

Managing Emergency Management: A Look at New Zealand's Legislative Approaches^o

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Knowledge is the thing that makes you smile in the face of disaster.¹

I—Introduction

Recent experience with fires and floods in Australia and earthquakes in New Zealand has renewed governmental interest in legislative approaches to managing emergency management. This paper looks at the approaches taken in New Zealand. Part II surveys the development of emergency management legislation in New Zealand before the Canterbury earthquakes. Part III canvasses the legislation that arose out of the Canterbury earthquakes. Part IV presents the lessons that parliamentary counsel and others have learned in producing this legislation. Part V concludes that legislation designed to assist those managing emergency management is among the most challenging to draft, as it needs to be cogent yet instructive, flexible yet principled, and, in the case of post-event legislation, produced *in extremis*.

II—Development of Emergency Management Legislation before 4 September 2010

This Part traces the development of general emergency management legislation² in New Zealand and gives an overview of emergency management legislation in force before 4 September 2010.

A *Needs Must*³

It may be contended that the Bill gives exceptionally wide powers to the authorities. But what are we to do? It is necessary that the Government should have power if it is to see that peace and good order is maintained.⁴

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¹ Avery Brooks, actor, jazz musician, opera singer, and college professor (http://en.wikipedia.org/wiki/Avery_Brooks) quoted on the homepage of the Internet site for Queensland's Emergency Services Report at <http://esr.net.au/previous.html>. In the late 1800s, Louis Pasteur, the French scientist who developed pasteurization, put this idea more succinctly, saying that "fortune favours the prepared mind" (<http://www.cybernation.com/quotationcenter/quoteshow.php?id=11216>), which is often shortened to "fortune favours the prepared" (see e.g., <http://www.strategydriven.com/2009/08/31/leadership-inspirations-fortune-favors-the-prepared/>).

² Legislation concerned with war emergencies is not covered in this paper (e.g., the War Regulations Act 1914 and the Emergency Regulations Act 1939), but see Law Commission *First Report on Emergencies: Use of the armed forces* (NZLC R12 1990) and the Defence Act 1990.

³ Short form of the saying "Needs must when the devil drives".

⁴ (20 April 1932) 232 NZPD 238 Hon Mr Garland, commenting on the Public Safety Conservation Bill.

In February 1931, Hawke's Bay (on the eastern coast of New Zealand's North Island) was hit by a magnitude 7.8 earthquake lasting two and a half minutes. The coastline shifted as land rose up by over two metres in places. In the towns of Napier and Hastings, many buildings collapsed while others were gutted by fire. More than 250 lives were lost.

The Hawke's Bay earthquake affected New Zealand legislation in two ways. First, it resulted in three event-specific Acts addressing the legal and financial issues arising from the earthquake. The Hawke's Bay Earthquake Act 1931 was enacted on 28 April 1931. It established the Hawke's Bay Adjustment Court for the purpose of issuing declaratory orders in respect of rights or liabilities brought into question as a result of the Hawke's Bay earthquake and making orders for relief from obligations or encumbrances. The Act also provided for earthquake sufferers and local authorities to receive financial assistance, and created a number of regulation-making powers, including a power to make regulations "rendered necessary by the earthquake".⁵ Regulations made in reliance on this power could be retrospective to the date of the earthquake and could override "anything to the contrary in any other Act, Order in Council, or regulations, or in any Proclamation, rules, or by-laws".⁶ The Hawke's Bay Earthquake Relief Funds Act 1931 was enacted on 9 November 1931. Its Long Title stated that it was "[a]n Act to make Provision for the Administration and Control of Funds raised wholly or partly by Private Subscription for the Benefit of Persons injuriously affected by the Hawke's Bay Earthquake." The Land Transfer (Hawke's Bay) Act 1931 was also enacted on 9 November 1931. It provided legislative authority for reconstituting destroyed land titles.

Secondly, the Hawke's Bay earthquake highlighted the need for some form of general emergency legislation and prompted the development of the Public Safety Conservation Bill.⁷ The Bill was introduced in 1932, but by that time New Zealand was facing a crisis of a very different kind: civil unrest precipitated by economic hardship, unemployment, and "Communist parties".⁸ As the Bill passed through all stages in one day, the previous week's riots in Auckland dominated debate in the House of Representatives (the House).⁹

The Public Safety Conservation Act 1932 (the 1932 Act) was an Act to provide for "the protection of the community in cases of emergency".¹⁰ Section 2(1) of the Act authorised the Governor-General to issue a proclamation of emergency in two situations. One of the triggering situations was actual or threatened action by one or more persons that was of a nature and scale sufficient to interfere with essential services¹¹ or deprive all or a substantial part of the community of the essentials of life. The second situation was the existence of any circumstances likely to imperil public safety or public order. A proclamation of emergency could be in force no longer than one month, but the 1932 Act allowed for overlapping or consecutive proclamations to be made.¹²

⁵ Hawke's Bay Earthquake Act 1931, s 66, heading.

⁶ Hawke's Bay Earthquake Act 1931, s 66(3).

⁷ (20 April 1932) 232 NZPD 235–238.

⁸ (20 April 1932) 232 NZPD 236 Hon Colonel Smith.

⁹ John A Lee, a Labour member, was in Auckland at the time of the Queen Street riot. He later described the event as follows (Michael King *The Penguin History of New Zealand* (Penguin, 2003) at 348):

Queen Street was looted from end to end. Law and order were down and out. Men were being marshalled from the navy to patrol the streets. The looters, being ordinary decent citizens moved to desperation by distress, exploded in violence and then just as suddenly disappeared, not anxious to be seen in the street of anarchy, although they would gather in Karangahape Road for a repeat the next night ... If [they] had not been democratically minded they would have had the government out that week.

¹⁰ Public Safety Conservation Act 1932, Long Title.

¹¹ "[T]he supply and distribution of food, water, fuel, or light [or] the means of locomotion": Public Safety Conservation Act 1932, s 2(1).

¹² Public Safety Conservation Act 1932, s 2(2).

While a proclamation of emergency was in force, the Governor-General could make any regulations considered necessary for the conservation of public safety and order or to secure the essentials of life to the community,¹³ including regulations to override any Act.¹⁴ Regulations were subject to parliamentary oversight¹⁵ and could not remain in force in the absence of a current proclamation of emergency.¹⁶ The 1932 Act also enabled the senior officer of a local Police force to exercise emergency powers, in advance of a proclamation of emergency, in the event of a public emergency that arose suddenly and required immediate action.¹⁷ This was described by Michael King in his *Penguin History of New Zealand* as a draconian power for the police to detain people.¹⁸

The first proclamation of emergency under the 1932 Act was issued on 1 September 1939, at the outbreak of World War II. More than 30 wartime regulations were made in reliance on that proclamation.¹⁹ The regulation-making power was only used once more, in the context of an industrial dispute in 1951.²⁰ The 1932 Act was repealed in 1987.²¹

The 1932 Act is an example of a general emergency statute:²² it could have been used in any situation threatening public safety. The emergency regulation-making powers in the 1932 Act also illustrate a needs must approach: desperate times call for desperate measures.

B Devolution

1—Local Authorities' Emergency Powers Act 1953

The move away from a centralised approach to emergency management began with the Local Authorities' Emergency Powers Act 1953 (the 1953 Act). The 1953 Act empowered a local authority to perform, and to make arrangements for performing, certain functions in its district in the event of an emergency, which the 1953 Act defined as follows:²³

“Emergency” means an emergency arising from earthquake, fire, flood, or other natural phenomenon, or from action in time of war by enemy powers or enemy sympathizers, which causes or is likely to cause in New Zealand large scale loss of or injury or damage to life, health, or property.

Natural disasters and war emergencies were covered; economic emergencies and civil unrest, already catered for by the 1932 Act, were not.²⁴

¹³ Public Safety Conservation Act 1932, s 3(1).

¹⁴ Public Safety Conservation Act 1932, s 3(7).

¹⁵ Regulations were required to be laid before Parliament as soon as possible after being made and expired 14 days after that unless continued by resolution of the House of Representatives: Public Safety Conservation Act 1932, s 3(3).

¹⁶ Public Safety Conservation Act 1932, s 3(5).

¹⁷ Public Safety Conservation Act 1932, s 4(1).

¹⁸ Michael King *The Penguin History of New Zealand* (Penguin, 2002) at 349.

¹⁹ Further wartime regulations were made under the Emergency Regulations Act 1939, which was enacted on 14 September 1939.

²⁰ The 1951 waterfront dispute: see <http://www.teara.govt.nz/en/strikes-and-labour-disputes/7> (Te Ara Encyclopedia of New Zealand).

²¹ Public Safety Conservation Act Repeal Act 1987.

²² Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at 3.38.

²³ Local Authorities' Emergency Powers Act 1953, s 2.

²⁴ (15 October 1953) 300 NZPD 1855 Hon Mr Bodkin:

[The Local Authorities' Emergency Powers Bill] no way interferes with the Public Safety Conservation Act, because that measure's main objective is to prevent civil disorders and to ensure the preservation of law and order. The machinery contemplated here deals with a disaster such as we experienced in Napier and in Hastings, following an earthquake.

The 1953 Act set out response-focused functions and powers: rescuing endangered persons, clearing streets and disposing of dangerous structures, providing first aid, relief, and welfare, supplying information and advice to the public, and conserving and distributing food and other essential materials.²⁵ No declaration of emergency was required to trigger the 1953 Act's operation. The functions could be carried out by the local authority's chairman (if the local authority was not able) or deputy chairman or appointed person (if the chairman was not able), or by any other person at the Minister's direction.²⁶ The 1953 Act also provided for a local authority to borrow money, without the consent of ratepayers, to meet the costs of carrying out its emergency functions.

Although the 1953 Act enabled, but did not require, a local authority to prepare for an emergency, debate during the Bill's passage highlighted the need for local authorities to be prepared: "[W]ithout becoming hysterical or unduly jittery we should take reasonable and sober precautions."²⁷ The needs must approach to emergency legislation was again apparent.²⁸

It is admitted that the powers conferred by the measure are wide. They have to be. However, I think we can safely leave them to the commonsense and responsibility of local authorities.

2—Civil Defence Act 1962

The Civil Defence Act 1962 (the 1962 Act) repealed and replaced the 1953 Act.²⁹ The term "civil defence" was not acceptable to all. During the passage of the Civil Defence Bill, Mr May (the Member for Onslow) suggested that many people would assume that civil defence had something to do with a military organisation.³⁰ Hon F L A Götz (the Minister for Internal Affairs) responded as follows:³¹

The member for Onslow raised the question of confusion in the public mind over this term "civil defence". I do not think that any country likes the term "civil defence", but a substitute has not been found in England or elsewhere. Nobody has been able to find a better term, and we are therefore using it.

The 1962 Act established administrative structures for coordinating civil defence at the national, regional, and local levels. It also required a newly established Director of Civil Defence (at the national level) and local authorities (at the local level) to plan for civil defence rather than simply reacting to emergencies as they arose. Speaking on the motion to introduce the Civil Defence Bill to the House, Hon F L A Götz noted that the powers in the 1932 Act could not be exercised until after an emergency, saying that "[a]fter a disaster has occurred is too late to introduce emergency measures."³²

The 1962 Act, as first enacted, defined civil defence as follows:³³

"Civil defence" means the planning, organisation, coordination, and implementation of measures, other than measures amounting to actual combat or preparation therefor, that are necessary or desirable in respect of the safety of the public, and are designed to guard against, prevent, reduce, or overcome the effects or possible effects of a national emergency or a major disaster.

²⁵ Local Authorities' Emergency Powers Act 1953, s 3(1).

²⁶ Local Authorities' Emergency Powers Act 1953, ss 4 and 6.

²⁷ (21 October 1953) 300 NZPD 1925 Hon Mr Mason.

²⁸ (21 October 1953) 300 NZPD 1931 Hon Mr Bodkin.

²⁹ This occurred in the context of a growing concern about the hydrogen bomb: Law Commission *Final Report on Emergencies* (NZLC R22, 1991) Appendix F at F12–F18.

³⁰ (7 November 1962) 332 NZPD 2505 Mr May.

³¹ (7 November 1962) 332 NZPD 2510 Hon F L A Götz.

³² (7 November 1962) 332 NZPD 2504 Hon F L A Götz.

³³ Civil Defence Act 1962, s 2.

It distinguished between national emergencies (arising from acts of warfare) and major disasters. The definition of major disaster did not allow for emergency measures to be taken in response to a threat of large-scale damage to property, as was the case under the 1953 Act:³⁴

“Major disaster” means any fire, explosion, earthquake, eruption, seismic sea wave, flood, storm, tornado, or other happening, not attributable to an attack by an enemy or to any warlike act, that causes or threatens to cause large scale loss of life or injury or distress to persons or in any way endangers the safety of the public in New Zealand or in any part of New Zealand.

The term “major disaster” was replaced by “civil defence emergency” (with no change in meaning) by a 1968 amendment, on the basis that the word “emergency” was less emotive than “disaster” and easier to understand.³⁵

The 1962 Act included a regulation-making power that authorised the Governor-General to make regulations for the purpose of “securing the public safety and generally safeguarding the interests of the public during any state of national emergency or civil defence emergency”.³⁶ The regulation-making power was drafted considerably more narrowly than that in the 1932 Act and did not authorise regulations that were inconsistent with Acts. Specific purposes for which regulations could be made included prescribing requirements for warning devices and insignia for civil defence personnel.

3—Civil Defence Act 1983

The Civil Defence Act 1983 (the 1983 Act) was described in the House as “essentially an update” to the 1962 Act.³⁷ It maintained the distinction between national (war) emergencies and civil defence emergencies, but added some further examples of the events that might require civil defence measures. One such addition—“leakage or spillage of any dangerous gas or substance”³⁸—was a direct response to concerns about the application of the Act in nuclear accidents.³⁹ The definition of civil defence also included, in addition to the planning, organisation, coordination, and implementation of emergency-management measures, a new element of training for those purposes.⁴⁰ As with previous Acts, scale was also important. The definition of civil defence emergency in the 1983 Act required the situation to be something not able to be dealt with by emergency services in the absence of civil defence measures.⁴¹

A significant change from the 1962 Act was the addition of a very broad emergency regulation-making power. The 1983 Act enabled regulations to be made that, in the words of Mr Woollaston (an Opposition member), “may confer unstated powers on unspecified individuals to carry out unspecified functions or duties that will override any Act on the statute book”⁴² and were “much broader than almost any other regulation-making power on the statute book.”⁴³ Mr Woollaston also commented on the provision barring judicial

³⁴ Civil Defence Act 1962, s 2.

³⁵ Civil Defence Amendment Act 1968, s 2; (3 October 1968) 357 NZPD 2062.

³⁶ Civil Defence Act 1962, s 55(1).

³⁷ (28 July 1983) 451 NZPD 874 Mr Terris.

³⁸ Civil Defence Act 1983, s 2.

³⁹ (28 July 1983) 451 NZPD 873 Mr Thompson.

⁴⁰ Civil Defence Act 1983, s 2.

⁴¹ Civil Defence Act 1983, s 2.

⁴² (23 November 1983) 455 NZPD 4197 Mr Woollaston.

⁴³ (23 November 1983) 455 NZPD 4196 Mr Woollaston.

review of a decision to declare a state of emergency, saying:⁴⁴

[Clause 45(6)] indicates that if a state of national emergency is declared by the Prime Minister acting on his own—which may happen—it is not possible for anybody to inquire why that state of emergency should have been declared.

The House should contemplate that, because the powers given under this part of the Bill are very broad, and are akin to a proclamation under the Public Safety Conservation Act—and we know how Draconian those powers are.

However, Mr Woollaston's concerns were given short shrift by Mr Thompson (a Government member).⁴⁵

[Mr Woollaston] said that Opposition members generally agree with the Bill, but that has not spared us their rather tedious recitation of minor grumbles, which we find rather tiresome.

4—Civil Defence Emergency Management Act 2002

The Civil Defence Emergency Management Act 2002 (the 2002 Act) repealed and replaced the 1983 Act. Hon Judith Tizard, moving the first reading of the Civil Defence Emergency Management Bill on behalf of the Minister of Civil Defence, Hon George Hawkins, described the Bill as “encompass[ing] risk-management principles based on a balanced focus across the four Rs—that is, reduction, readiness, response, and recovery” and “provid[ing] a framework for coordination in planning across local government, central government, important utilities, and the emergency services.”⁴⁶

At the Committee of the whole House stage, John Carter moved an amendment to rename the Bill the Civil Defence Management Bill. His concern was that the word “emergency” sent all the wrong signals: “This bill is actually about risk reduction, and civil defence should be all about reducing risk, and then—obviously—managing an emergency when we have one.”⁴⁷ Jim Peters, speaking in support of the motion, said:⁴⁸

The word “emergency” has a futuristic look to it, far beyond this time, and therefore, for the ordinary person on the street, it is of no great consequence. This bill is meant to enhance local knowledge and local capacity. That is implicit in the words “civil defence”. It is civil, it is common, and it is community.

Hon Ken Shirley was also in favour of John Carter's proposed amendment, but suggested that the title could be made even shorter.⁴⁹

But why not just call it the “Civil Defence Bill”? Perhaps our forebears in this Parliament were more sensible. Today we always seem to want to add words. We call this the Civil Defence Emergency Management Bill, and we feel good and full of puffery, with all these extra words. But really, let us get down to the nuts and bolts of it: it is the “Civil Defence Bill”.

The Minister's response was that “emergency management” was an established term that was internationally recognised—as well as one “used by our near-neighbours, Australia”.⁵⁰ The proposed amendment was voted down.

⁴⁴ (23 November 1983) 455 NZPD 4196 Mr Woollaston.

⁴⁵ (23 November 1983) 455 NZPD 4197 Mr Thompson.

⁴⁶ (12 December 2000) 589 NZPD 7324 Hon Judith Tizard.

⁴⁷ (8 October 2002) 603 NZPD 995 John Carter.

⁴⁸ (8 October 2002) 603 NZPD 1009 Jim Peters.

⁴⁹ (8 October 2002) 603 NZPD 1006–1007 Hon Ken Shirley.

⁵⁰ (8 October 2002) 603 NZPD 1008 Hon George Hawkins.

The 2002 Act (which is still in force) defines an emergency as follows:

emergency means a situation that—

- (a) is the result of any happening, whether natural or otherwise, including, without limitation, any explosion, earthquake, eruption, tsunami, land movement, flood, storm, tornado, cyclone, serious fire, leakage or spillage of any dangerous gas or substance, technological failure, infestation, plague, epidemic, failure of or disruption to an emergency service or a lifeline utility, or actual or imminent attack or warlike act; and
- (b) causes or may cause loss of life or injury or illness or distress or in any way endangers the safety of the public or property in New Zealand or any part of New Zealand; and
- (c) cannot be dealt with by emergency services, or otherwise requires a significant and co-ordinated response under this Act.

This definition is wider than its 1983 Act equivalent in that it includes additional examples of causative events (technological failure, infestation, plague, epidemic, or failure of or disruption to an emergency service or a lifeline utility) and the additional trigger of endangerment of the safety of property. The distinction in the 1962 and 1983 Acts between war emergencies and other emergencies was not carried forward into the 2002 Act.

The 2002 Act puts a much stronger emphasis on planning and preparedness than its predecessors. It requires the Minister of Civil Defence to prepare and maintain a national Civil Defence Emergency Management (CDEM) Strategy⁵¹ and a national CDEM Plan.⁵² At the local level, each regional authority is required to unite with the territorial authorities within its region to establish a CDEM Group⁵³ and each CDEM Group must establish, prepare, and approve a CDEM group plan.⁵⁴

Each CDEM Group must appoint at least one person who can, if an emergency occurs or may occur, declare a state of local emergency for the region covered by the CDEM group.⁵⁵ If an emergency appears to the Minister of Civil Defence to be beyond the resources of the CDEM Group to manage, the Minister may declare a state of national emergency.⁵⁶ A state of emergency, unless it is extended, expires on the seventh day after the day on which it is declared.⁵⁷

Part 5 of the Act sets out a range of civil defence emergency management powers. Many of these are drafted to include appropriate safeguards. For example, the power to require a person to provide information comes with a right of appeal;⁵⁸ the power to break into or enter onto premises is exercisable only if a state of emergency is in force and only if the person exercising the power believes on reasonable grounds that their action is necessary to save life, prevent injury, rescue and remove injured or endangered persons, or enable the relief of suffering or distress.⁵⁹ CDEM Groups have a range of response-focused powers exercisable in a state of local emergency.⁶⁰ The Minister has a power of direction: if a state of emergency is in force, and if the Minister considers it necessary, the Minister can require the Director of CDEM, a CDEM Group, or any person to perform or exercise their statutory functions, duties, and powers, or to cease to do so.⁶¹

⁵¹ Civil Defence Emergency Management Act 2002, s 31.

⁵² Civil Defence Emergency Management Act 2002, ss 39, 44, and 45

⁵³ Civil Defence Emergency Management Act 2002, s 12

⁵⁴ Civil Defence Emergency Management Act 2002, s 48

⁵⁵ Civil Defence Emergency Management Act 2002, ss 25(1), 68(1).

⁵⁶ Civil Defence Emergency Management Act 2002, s 66(1).

⁵⁷ Civil Defence Emergency Management Act 2002, ss 70, 71.

⁵⁸ Civil Defence Emergency Management Act 2002, ss 76, 77.

⁵⁹ Civil Defence Emergency Management Act 2002, s 87.

⁶⁰ Civil Defence Emergency Management Act 2002, s 85.

⁶¹ Civil Defence Emergency Management Act 2002, s 84.

The 2002 Act includes a regulation-making power,⁶² but it does not authorise regulations that override other enactments.

C A Sectoral Approach?

In the late 1980s, the New Zealand Law Commission was asked to report on the law that should govern the action to be taken in a national emergency.⁶³ One of the Commission's key recommendations was against taking a generic approach to emergency legislation. The Commission said:⁶⁴

The primary difficulty with a general statute dealing with the full range of emergencies is that it would not be possible to include controls to prevent the possibility of a government invoking drastic powers by executive fiat in a situation where they could not be justified. Further, those powers would necessarily include a broad emergency regulation-making power. The Law Commission considers that such a power should be only available in selected categories of emergency.

The Commission recommended that New Zealand continue to take a "sectoral approach", using tailored legislation for different emergency situations. Under this approach, each type of emergency can be carefully defined and matched with appropriate powers and safeguards. In particular, broad regulation-making powers can be reserved for the types of emergency that justify them, which the Commission considered to be war emergencies, civil defence emergencies, and emergencies arising in the agriculture industry.⁶⁵

The Epidemic Preparedness Act 2006 is a good example of the sectoral approach. It applies in the event of a declaration that the effects of an outbreak of a stated quarantinable disease are likely to significantly disrupt, or continue to significantly disrupt, essential governmental and business activity.⁶⁶ The Act authorises the making of Orders in Council that allow both immediate and prospective modifications of statutory requirements and restrictions.⁶⁷ The orders must be necessary to enable the effective management of an epidemic or to enable compliance with statutory requirements and restrictions during an epidemic. The orders are subject to disallowance by Parliament.⁶⁸

Tailored emergency powers are available under a number of other Acts. For example, the following Acts grant emergency powers in the event of a particular type of emergency:

- Biosecurity Act 1993 (in the event of a biosecurity emergency)⁶⁹
- Corrections Act 2004 (in the event of an epidemic or the outbreak or spread of an infectious disease)⁷⁰
- Hazardous Substances and New Organisms Act 1996 (in the event of a hazardous substance or new organisms emergency)⁷¹

⁶² Civil Defence Emergency Management Act 2002, s 115.

⁶³ The Law Commission was asked to consider the following questions: (1) What executive powers are needed and justified to deal effectively with a national emergency in New Zealand, in a manner consistent with our basic constitutional system and traditions; (2) What rights and freedoms ought not to be derogated from in any national emergency; (3) What procedures are most appropriate for bringing emergency powers into effect; (4) What safeguards are needed to confine the exercise of emergency powers to a national emergency; (5) What limits and controls should be placed on the exercise of emergency powers, and what remedies should there be for the abuse of these powers; (6) What changes are needed in the existing law to achieve these objects. Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at 1.1.

⁶⁴ Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at 1.23.

⁶⁵ Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at 1.24.

⁶⁶ Epidemic Preparedness Act 2006, s 5(1).

⁶⁷ Epidemic Preparedness Act 2006, ss 11–15.

⁶⁸ See Epidemic Preparedness Act 2006, ss 16, 21, and 22 (immediate modification orders) and Regulations Disallowance Act 1989 (prospective modification orders).

⁶⁹ Biosecurity Act 1993, Part 7.

⁷⁰ Corrections Act 2004, ss 179A–179E.

- Health Act 1956 (in the event of a drinking water emergency).⁷²

Another approach is to grant a narrowly focused power that is exercisable in any emergency. For example, the Public Finance Act 1989 enables the Minister to approve emergency expenditure without appropriation.⁷³ The Defence Act 1990 applies more generally. It provides that the Armed Forces may be used in New Zealand or elsewhere to “provide assistance to the civil power in time of emergency.”⁷⁴ The Defence Act 1990 does not specify what constitutes a time of emergency.

The International Terrorism (Emergency Powers) Act 1987 appears, from its title, to be an Act consistent with the sectoral approach. However, the Law Commission recommended, in its 1991 report, that this Act be repealed because most of the powers conferred by the Act were already, or should be made, available to the Police under common law or statute.⁷⁵ The Commission may have taken this view because the Act’s definition of international terrorist emergency is very wide: it includes “a situation in which any person is threatening, causing, or attempting to cause ... the death of, or serious injury or serious harm to, any person or persons”.⁷⁶ The International Terrorism (Emergency Powers) Act 1987 is still in force.

D Observations

Four broad themes are apparent.

First, broad emergency regulation-making powers are becoming less acceptable. They featured in the 1932 Act and the 1983 Act, but not in the 1953 Act or the 1962 Act, and do not feature in the current 2002 Act. The Law Commission recommended in 1991 that New Zealand continue to take a sectoral approach to emergency management legislation and reserve emergency regulation-making powers for the situations in which they are justified: war emergencies, civil defence emergencies (arguably a very broad category), and emergencies arising in the agriculture industry.

Secondly, definitions that trigger emergency legislation have three common elements: cause, effect, and scale.⁷⁷ Each has evolved over time as follows:

- 1 The cause element has grown from “circumstances” in the 1932 Act to a long, non-exclusive list of events in the 2002 Act. The 1953, 1962, and 1983 Acts distinguish between war emergencies and general emergencies: the 2002 Act does not.
- 2 The effect element has changed form, but public safety has remained a common theme. The 1932 Act required interference with essential services or the essentials of life, or the imperilment of public safety or public order. The 1953 Act required loss of or injury or damage to life, health, or property. The 1962 and 1983 Acts required, and the 2002 Act requires, loss of life or injury or distress to persons or a

⁷¹ Hazardous Substances and New Organisms Act 1996, ss 136 and 137.

⁷² Health Act 1956, ss 69ZZA–69ZZF.

⁷³ Public Finance Act 1989, s 25(2).

⁷⁴ Defence Act 1990, s 9(1)(b). See also Law Commission *First Report on Emergencies: Use of the armed forces* (NZLC R12, 1990).

⁷⁵ Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at 7.135–7.139.

⁷⁶ International Terrorism (Emergency Powers) Act 1987, s 2(1).

⁷⁷ The Law Commission considered that a definition of civil defence emergency could be expected to have three elements, describing these as: a list of possible disaster events; the disastrous consequences of any such event; and a necessity for civil defence measures to be adopted: Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at 9.10–9.34.

threat to the safety of the public. The 2002 Act can also be triggered by a situation threatening the safety of property.

- 3 The scale element is now expressed in terms of resource implications rather than size. The 1932 Act required, for one of its trigger situations, that “all or a substantial part of the community” be at risk. The 1953 and 1962 Acts required the effects to be “large scale”. However, the 1983 and the 2002 Act both require something of a scale beyond what emergency services can manage in the absence of civil defence measures.

Thirdly, the focus has shifted. The 1932 and 1953 Acts were response-focused, while later Acts gave increasing prominence to the importance of preparation and planning. In addition, the locus of responsibility has spread. Under the 1932 Act, emergency management was the responsibility of central government (although the senior officer of a local Police force also had powers in the event of a localised public emergency). Since then, local authorities have gained increasing control of, and responsibility for, emergency management in their regions.

Finally, emergency management powers generally have an expiry date: they can be exercised only while a state of emergency is in force.

III—Development of Emergency Management Legislation after 4 September 2010

This Part discusses the origins and implications of the legislation that arose out of the earthquakes that struck the Canterbury region of New Zealand on 4 September 2010,⁷⁸ 22 February 2011,⁷⁹ and 13 June 2011.⁸⁰ In doing so, it highlights the challenges that this legislation presented for the Parliamentary Counsel Office (the PCO).

⁷⁸ The earthquake struck at 4:35 am and measured 7.1. Its epicentre was 40 kilometres west of Christchurch; its hypocentre was at a depth of 10 kilometres. The earthquake caused no loss of life, but seriously injured two people and knocked out power to half of the central business district, most of northern Christchurch, and all of rural Canterbury. It caused widespread damage, particularly to roads and buried sewage and water pipes. The estimated cost of the earthquake to insurers is NZ\$4 billion to NZ\$5 billion.

⁷⁹ The earthquake struck at 12:51 pm and measured 6.3. Its epicentre was 10 kilometres south-east of Christchurch; its hypocentre was at a depth of 5 kilometres. One hundred eighty-one lives were lost (more than 100 in one building), 220 were treated for major trauma, and between 1,500 and 2,000 were treated for minor injuries. The earthquake caused extensive infrastructure damage (including severe damage to 80% of the water and sewerage system) and property damage (particularly in the central business district), liquefaction throughout the Canterbury region, and power cuts to 80% of Christchurch. Some 1,000 buildings (out of 4,000) in downtown Christchurch and some 10,000 homes in and around Christchurch (out of 100,000 that were damaged) are slated for demolition. The estimated cost to insurers is NZ\$15 billion to NZ\$16 billion.

⁸⁰ Two earthquakes struck close together. The first occurred at 1:00 pm and measured 5.7. Its epicentre was at Taylor’s Mistake, which is at the south-eastern extremity of Christchurch; its hypocentre was at depth of 9 kilometres. The second occurred at 2:20 pm and measured 6.3. Its epicentre was 10 kilometres east of Christchurch; its hypocentre was at a depth of 6 kilometres. The earthquakes caused no loss of life, but did cause widespread property damage, especially to properties weakened by the previous earthquakes, and liquefaction, cut power to 54,000 homes, and injured at least 46 people. The estimated cost to insurers is as yet unknown.

A Legislative Response to 4 September 2010 Earthquake

This section sets out the legislative response to the magnitude 7.1 earthquake that struck the Canterbury region on Saturday 4 September 2010 at 4:35 am. It sets out the process that led to the enactment of the Canterbury Earthquake Response and Recovery Act 2010 (the 2010 Act),⁸¹ outlines the reaction to the 2010 Act, and discusses the orders made under the 2010 Act.

1—Enacting the Canterbury Earthquake Response and Recovery Act 2010

The process of enacting the 2010 Act was unusual. The circumstances giving rise to the 2010 Act truncated the process, particularly its policy development and public participation phases.

(a) Monday 6 September 2010

On the morning of Monday 6 September 2010, the Deputy Chief Parliamentary Counsel (the DCPC), as an anticipatory measure, assembled a team to draft any urgent primary legislation that the Government might require. The DCPC asked the team members to clear their schedules through the week, including the weekend, and to expect drafting instructions to arrive soon.

(b) Tuesday 7 September 2010 through Thursday 9 September 2010

Ahead of the arrival of formal drafting instructions, the PCO began to take a series of anticipatory steps. After completing the tasks associated with creating a new bill file, the PCO set up the Canterbury Earthquake Response and Recovery Bill (the Bill). The PCO adopted a two-part structure to minimise the time that the House would need to enact the Bill, adapted the generally required standard provisions, and then looked for and found several precedents,⁸² which the PCO eventually used to further develop the Bill.⁸³

The Attorney-General's formal direction to the Chief Parliamentary Counsel (the CPC) guided the search for precedents. On Wednesday 8 September 2010, the Attorney-General directed the PCO to draft a Bill that would make the legislative dispensations generally available during a state of emergency⁸⁴ available after the state of emergency is lifted to help expedite a quicker and fuller recovery. The lessons from Hurricane Katrina and the Gulf oil spill may have encouraged the inclination of local and central government representatives to bring the state of emergency to an end as quickly as possible.⁸⁵

⁸¹ For a copy of the Act, see http://www.legislation.govt.nz/act/public/2010/0114/31.0/DLM3233004.html?search=ts_act_canterbury+earthquake_noresel&p=1&sr=1.

⁸² The Hawke's Bay Earthquake Act 1931, the United Nations Act 1946, and the Epidemic Preparedness Act 2006 provided guidance in determining the Bill's scope and shaping its empowering and parliamentary review provisions.

⁸³ The still extant Hawke's Bay Earthquake Act 1931 provided guidance in determining the Bill's scope and shaping its empowering provisions. The Epidemic Preparedness Act 2006 informed the approach taken regarding Parliament's review of any orders made under the Bill.

⁸⁴ As declared under the Civil Defence Emergency Management Act 2002.

⁸⁵ This also explains why the resulting legislation, which was initially called the Canterbury Earthquake Recovery Bill, is called the Canterbury Earthquake Response and Recovery Act 2010.

(c) *Friday 10 September 2010*

The initial set of formal drafting instructions arrived on Friday 10 September 2010.⁸⁶ They posed several challenges. Lack of time was the most pervasive and pressing challenge. The instructions arrived on Friday morning along with confirmation that Cabinet expected to see an introduction-ready version of the Bill early on Monday morning. This gave the PCO just three days to produce the Bill, but without the advantages of a fully crewed office for two of those days because of the weekend. The CPC compensated for this by performing the required quality assurance tasks over the weekend, including critiquing and proofing of various drafts of the Bill.

The absence of formal Cabinet authorisation intensified the time constraint challenge. Private sector lawyers acting for the local authorities affected by the earthquake had formulated the instructions that came to the PCO. As a consequence, the instructions were not accompanied by the usual suite of Cabinet papers and Cabinet approvals that counsel typically use to vet and flesh out instructions. More importantly, as no central government agency or minister had primary responsibility for the instructions, the PCO did not have immediate access to the central government expertise that it usually draws on to clarify instructions and to inform the development of the Bill.⁸⁷ To resolve this situation, the PCO asked Department of the Prime Minister and Cabinet (the DPMC) to specify a lead agency. This responsibility initially fell to the Ministry for the Environment (MfE),⁸⁸ which organised the central government resources that informed the work of the PCO throughout the weekend.⁸⁹

The instructions, which proposed a two-pronged approach with retrospective effect, also presented challenges. One prong required drafting a series of amendments that modified, or exempted compliance with, the provisions of a set of specified Acts.⁹⁰ The other prong required drafting empowering provisions that would allow the use of orders to modify, or exempt persons from compliance with, the provisions of another set of specified Acts.⁹¹ The proposal ran counter to the well-established conventions of not enacting provisions that have retrospective effect or not giving the Executive the power to override Acts of Parliament.

⁸⁶ The date stamp on this set of instructions is “9/09/2010 9:40 pm”.

⁸⁷ While no one agency had primary responsibility for the instructions, most of the central agencies were very interested in playing a role in the Government’s response to the earthquake. The email traffic from chief executives, and the management tiers that report directly to them, to the PCO was extremely heavy. To relieve counsel working on the Bill of the burden of sifting through these emails, the CPC took up the role of filtering them.

⁸⁸ This decision may have been made on the basis of the composition of the instructions, a sizable portion of which concerned provisions found in the Resource Management Act 1991, which is administered by MfE.

⁸⁹ This responsibility shifted to the Ministry of Economic Development (MED) when Cabinet approved the Bill for introduction. The shift occurred because the Prime Minister designated the Minister of Economic Development, a Member of Parliament from the region affected by the earthquake, as the Minister for Canterbury Earthquake Recovery. MED took the lead in developing the process used to make orders under the Act.

⁹⁰ This set consisted of the Resource Management Act 1991, the Building Act 2004, the Local Government Act 2002, and the Land Transport Act 1998.

⁹¹ This set consisted of the Building Act 2004, the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, the Historic Places Act 1993, the Land Transport Act 1998, the Land Transport Management Act 2003, the Local Government (Rating) Act 2002, the Local Government Act 1974, the Local Government Act 2002, the Local Government Official Information and Meetings Act 1987, the Rating Valuations Act 1998, the Resource Management Act 1991, and the Transport Act 1962.

Given uncertainty as to the comprehensiveness of the proposed amendments and uncertainty as to whether particular Acts should be included or excluded, MfE accepted the PCO's assessment that the proposed approach risked producing an incomplete legislative solution. Discussions between MfE and the lawyers acting for the local authorities affected by the earthquake confirmed this risk, as they identified a further range of issues that were likely to require attention once the recovery process was underway.⁹² Consequently, MfE reached the view that the Bill should simply allow the use of orders to modify, or exempt compliance with, the provisions of any enactment,⁹³ as this solution could be drafted quickly and then applied as required to address any foreseen or unforeseen difficulties that may arise.

The PCO modified the Bill with these considerations in mind and provided MfE with a draft for comment and consultation purposes on the afternoon of Friday 10 September 2010. In doing so, the PCO expressly restricted the application of the empowering provision by tying its use to the Bill's purpose clause, that is, to circumstances where the need to facilitate a response to the earthquake warranted it. The PCO also included a clause that provided for the expiry of the Bill's empowering provision (among others) and the simultaneous revocation of any orders made under it. In addition, the PCO added a provision that specified that an order could not be made to change key provisions of the Bill, including its empowering provisions.

(d) Saturday 11 September 2010 through Sunday 12 September 2010

Over the course of the weekend, the PCO revised the Bill in the light of comments received via MfE on various drafts. The PCO added a provision that specified several matters and Acts that may not be subject to an order made under the Bill's empowering provision.⁹⁴ The PCO also developed the Bill's protection from liability clause.⁹⁵ In addition, the PCO added clauses that clarified that the Bill did not create any right to compensation,⁹⁶ changed the disallowance procedure for orders made under the Bill,⁹⁷ and established a recovery commission to provide advice to Ministers in relation to the recovery effort.⁹⁸ The recovery commission clauses doubled the length of the Bill and, as they arrived late Saturday, they made more challenging the effort to provide Cabinet with an introduction-ready Bill by the date required. The PCO also picked up a request to add a provision that barred judicial review of a Minister's recommendation to make an order under the Bill's empowering provision. This suggestion arose out of the Crown Law Office's experience with cases in which plaintiffs have two chances to challenge the validity of an order: first by attacking the recommendation for the order and second by attacking the order itself.

⁹² In New Zealand, local authorities generally propose local Bills to address purely local concerns. As the proposed legislative solution required the amendment of, or empowered the amendment of, a number of public Acts, this approach could not be used.

⁹³ In New Zealand, the term "enactment" includes all legislation, be it an Act or a regulation. See Interpretation Act 1999, s 29.

⁹⁴ See Canterbury Earthquake Response and Recovery Act 2010, s 6(6).

⁹⁵ See Canterbury Earthquake Response and Recovery Act 2010, s 19.

⁹⁶ See Canterbury Earthquake Response and Recovery Act 2010, s 20.

⁹⁷ See Canterbury Earthquake Response and Recovery Act 2010, s 8.

⁹⁸ See Canterbury Earthquake Response and Recovery Act 2010, ss 9 to 16.

(e) *Monday 13 September 2010*

On the morning of Monday 13 September 2010, Cabinet approved the Bill for introduction to the House. In doing so, Cabinet directed the PCO to remove the clauses setting up a special disallowance procedure for orders made under the Bill's empowering provision. Cabinet decided that these orders should be subject to the same disallowance procedure as any other regulation.⁹⁹

(f) *Tuesday 14 September 2010*

On Tuesday 14 September 2010, the Government took the Bill through all its stages by leave of the House.¹⁰⁰ The Committee of the Whole House agreed to the Government's suggestion that the recovery commission be subject to the Official Information Act 1982. However, it did not agree to changes that the Green Party (five sets of amendments) and the Labour Party (two sets of amendments) suggested. Nevertheless, the Bill passed its third reading without a vote recorded against it.

During the passage of the Bill, the DPMC devised a special procedure for the making of orders under the Bill's empowering provision. It established the Ad Hoc Cabinet Committee on Canterbury Earthquake Recovery (ACE) to oversee and coordinate the Government's support of the recovery and reconstruction effort in response to the earthquake. ACE required proposed orders to be sent to the DPMC at least 48 hours before ACE's weekly meeting to give ACE an opportunity to discuss the proposed orders with the leaders of the opposition parties in the House. Once approved by ACE, the proposed orders followed the usual procedure to be made, that is, they were sent via Cabinet to the Executive Council for the Governor-General's signature.

During the passage of the Bill, the PCO developed a template for orders to be made under the Bill's empowering provisions. The template set out a number of standard features, including a particular entitling style, a modified pursuant to provision, an expiry clause, and a statement in the explanatory note as to the temporary nature of the order. More importantly, the template required a to-be-read-in-place-of approach to modifying or displacing other legislation, rather than a textual amendment approach. The purpose of this approach was to eliminate the need to draft further legislation repealing any textual changes brought in by an order once that order expires or is revoked.¹⁰¹ The approach also had the benefit of eliminating the need to generate a new consolidated online version of an Act each time the Executive made an order that affected the Act.

⁹⁹ For a description of the current disallowance process, see clauses 7.79 to 7.81 of the Cabinet Office Manual (<http://cabinetmanual.cabinetoffice.govt.nz/node/54#7.79>); SO 309 to 315 of the Standing Orders of the House of Representatives (2008) 95–98 (at http://www.parliament.nz/NR/rdonlyres/81D0893A-FFF2-47A3-9311-6358590BEB3D/100828/standingorders2008_5.pdf); Regulations (Disallowance) Act 1989, ss 4 to 10.

¹⁰⁰ Journals of the House (for the week beginning Tuesday 14 September 2010) at <http://www.parliament.nz/en-NZ/PB/Debates/Journals/8/e/1/00HOHJournals201009141-Journals-of-the-House-for-the-week-beginning.htm>.

¹⁰¹ The approach also eliminated the need to decide on the effect of section 17(1) of the Interpretation Act 1999, which provides that the repeal of an enactment does not affect the validity, invalidity, effect, or consequences of anything done or suffered, an existing right, interest, title, immunity, or duty, an existing status or capacity, *an amendment made by the enactment to another enactment*, or the previous operation of the enactment or anything done or suffered under it (emphasis added).

2—Reaction to Canterbury Earthquake Response and Recovery Act 2010

The 2010 Act, which consisted of 21 sections, came into force on 15 September 2010. Although enacted unanimously, the 2010 Act had a mixed reception.¹⁰² Those who focused on practical difficulties created by the earthquake viewed the 2010 Act in a favourable light. They saw the grant of legislative power to the Executive as exceptional but necessary to provide the flexibility and responsiveness to ensure a rapid recovery, one supported by rules adjusted expeditiously for post-quake circumstances rather than impeded by rules more suited to pre-quake circumstances. Those focused on fundamental principles raised several constitutional points.

First, the 2010 Act's empowering provision ran counter to the convention of not giving the Executive the power to override Acts of Parliament. Furthermore, the empowering provision was the most egregious type of overriding power as it allowed the Executive to rewrite all parliamentary enactments.

The empowering provision was contrary to the convention; however, the power that it granted was fettered. A set of fundamental Acts were expressly removed from its reach.¹⁰³ In addition, an order could be made only if reasonably necessary or expedient for the purpose of the 2010 Act.¹⁰⁴ The purpose of the 2010 Act was to enable the relaxation or suspension of enactments that divert resources away from the effort to respond to or minimise further damage caused by the earthquake or that may not be reasonably capable of being complied with owing to the circumstances resulting from the earthquake.¹⁰⁵ Orders unrelated to this purpose clause would be ultra vires. Furthermore, the 2010 Act was, and the orders made under it are, temporary; neither the 2010 Act nor its orders had application beyond the close of 1 April 2012.¹⁰⁶

Secondly, orders made under the 2010 Act could have retrospective effect. This ran counter to the convention against retrospective legislation.

¹⁰² See generally (14 September 2010) 666 NZPD 13899ff and 13934ff (setting out the first reading, second reading, Committee of the Whole, and third reading debates in respect of the Bill) at http://www.parliament.nz/en-NZ/PB/Debates/Debates/a/0/1/49HansD_20100914_00000689-Canterbury-Earthquake-Response-and-Recovery.htm and http://www.parliament.nz/en-NZ/PB/Debates/Debates/f/e/2/49HansD_20100914_00000901-Canterbury-Earthquake-Response-and-Recovery.htm; see also e.g., Factbox; Earthquake legislation (13 September 2010) at <http://tvnz.co.nz/national-news/factbox-earthquake-legislation-3775830>; Andrew Geddis, An open letter to New Zealand's people and their Parliament (28 September 2010) at <http://pundit.co.nz/content/an-open-letter-to-new-zealands-people-and-their-parliament> (signed by 27 legal scholars: 24 working in New Zealand law faculties, and 3 expatriate New Zealanders working in law faculties overseas (2 in the UK, and 1 in the US)); Gordon Campbell, On the draconian Christchurch earthquake legislation (15 September 2010) at <http://gordoncampbell.scoop.co.nz/2010/09/15/gordon-campbell-the-christchurch-earthquake-law/>; Dean Knight, Canterbury Earthquake Response and Recovery Bill: Constitutionally Outrageous (14 September 2010) at <http://www.laws179.co.nz/2010/09/canterbury-earthquake-response-and.html>; Law Society comments on Canterbury Earthquake Response and Recovery Act (undated) at http://www.lawsociety.org.nz/home/for_the_public/for_the_media/latest_news/news/september/law_society_comments_on_canterbury_earthquake_response_and_recovery_act; see also Nicholas Wood, After the 'quake: the legislative response (1 October 2010) 146 NZ Lawyer online at <http://www.nzlawyermagazine.co.nz/Archives/Issue146/146F6/tabid/2671/Default.aspx> (comparing the Canterbury Earthquake Response and Recovery Act 2010 with the Hawke's Bay Earthquake Act 1931).

¹⁰³ The relevant Acts are 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. See Canterbury Earthquake Response and Recovery Act 2010, s 6(6)(c).

¹⁰⁴ Canterbury Earthquake Response and Recovery Act 2010, s 6(1).

¹⁰⁵ Canterbury Earthquake Response and Recovery Act 2010, s 3.

¹⁰⁶ Canterbury Earthquake Response and Recovery Act 2010, ss 17 and 21

Orders made under the 2010 Act could reach back in time to 4 September 2010, the date of the earthquake. However, orders that did so would only run counter to the convention if the orders were to criminalise an action that was legal when the action was carried out. The 2010 Act did not expressly authorise the imposition of retroactive criminal penalties. This imposition was not implied by the 2010 Act's purpose clause, as it was concerned with providing relief from the burden of complying with legislation.¹⁰⁷

Thirdly, the 2010 Act prohibited judicial review of orders made under it.

The 2010 Act did bar judicial review of a Minister's recommendation to make an order under it.¹⁰⁸ However, it did not bar judicial review of an order once it is made. As noted above, if an order dealt with matters outside the purpose of the 2010 Act, it would be ultra vires.

3—Orders made under Canterbury Earthquake Response and Recovery Act 2010

The Executive made 30 orders under the 2010 Act,¹⁰⁹ which were drafted by a range of counsel in each of the PCO's three drafting teams. Of these, five amended existing orders, nine have expired or been revoked, and 21 remain in force. The 30 orders extended deadlines in, modified the application of, or created exemptions to, provisions found in the following 19 Acts:¹¹⁰

- Accident Compensation Act 2001
- Building Act 2004*
- Cadastral Survey Act 2002*
- Civil Defence Emergency Management Act 2002
- Education Act 1989
- Financial Advisors Act 2008¹¹¹
- Financial Service Providers (Registration and Dispute Resolution) Act 2008
- Historic Places Act 1993*
- Inland Revenue Acts¹¹²
- Land Transport Act 1998*
- Local Government Act 2002*
- Local Government Official Information and Meetings Act 1987*
- Rating Valuations Act 1998*
- Reserves Act 1977^{113*}
- Resource Management Act 1991*
- Road User Charges Act 1977^{114*}

¹⁰⁷ Canterbury Earthquake Response and Recovery Act 2010, s 3.

¹⁰⁸ Canterbury Earthquake Response and Recovery Act 2010, s 6(3)

¹⁰⁹ For a list of these orders, see <http://www.pco.parliament.govt.nz/pco-news/>. These orders can also be found at www.legislation.govt.nz by searching for regulations using the term "canterbury earthquake".

¹¹⁰ The Acts marked with asterisks are included in the indicative list of 22 Acts set out in section 6(4) of the Canterbury Earthquake Response and Recovery Act 2010.

¹¹¹ The relevant order also applies to the Financial Advisers (Disclosure) Regulations 2010 and the Securities Markets (Investment Advisers and Brokers) Regulations 2007. See generally the Canterbury Earthquake (Financial Advisers Legislation) Order 2011.

¹¹² This group of Acts includes the Child Support Act 1991, the Estate and Gift Duties Act 1968, the Estate Duty Abolition Act 1993, the Estate Duty Repeal Act 1999, the Gaming Duties Act 1971, the Income Tax Act 1994, the Income Tax Act 2004, the Income Tax Act 2007, the KiwiSaver Act 2006, the Land Tax Abolition Act 1990, the Stamp and Cheque Duties Act 1971, the Stamp Duty Abolition Act 1999, the Student Loan Scheme Act 1992, the Tax Administration Act 1994, and the Taxation Review Authorities Act 1994.

¹¹³ The relevant order also applies to any other enactment under which a reserve is held or that applies to a reserve. See generally the Canterbury Earthquake (Reserves Legislation) Order 2011.

¹¹⁴ The relevant order also applies to the Accident Compensation (Motor Vehicle Account Levies) Regulations 2010, the Heavy Motor Vehicle Regulations 1974, and Land Transport Rule: Vehicle Dimensions and Mass 2002. See generally the Canterbury Earthquake (Transport Legislation) Order 2011.

Social Security Act 1964*
Tax Administration Act 1994
Transport (Vehicle and Driver Registration and Licensing) Act 1986.

The Acts in this list carry the inference that limiting the application the 2010 Act along subject matter lines might have been a useful approach, as it might have helped to defuse the criticism that the 2010 Act engendered. However, this inference is an accident of hindsight. Only 11 of these 19 Acts¹¹⁵ appear on the indicative list of 22 Acts set out in the 2010 Act.¹¹⁶ This result appears to confirm that making predictions of this kind in rushed and trying circumstances runs the risk of incompleteness, whether or not the limiting factor is a specified list of Acts or a specified list of subjects.

Given their potential effect on primary legislation, the Regulations Review Committee (the RRC)¹¹⁷ gave considerable attention to the first orders made under the 2010 Act. The RRC required the instructing agencies and, in a departure from the usual practice, the PCO to answer its probing questions, which were intended to test the justifications for the orders and to assess whether they were consistent with the purpose of the 2010 Act. After several exchanges with the RRC, the CPC agreed that the PCO would provide exceptionally fulsome explanatory notes to the orders, including a statement of the policy rationale underlying each particular order. This was a departure from the PCO's long-established practice of providing only a statement of an instrument's legal effect. Although the RRC has exposed orders made under the 2010 Act to a heightened level of scrutiny, it has not yet recommended that the House disallow one.

This result may be attributable to RRC diligence, PCO vigilance, and Executive compliance. Another reason for this result may be the benign nature of the orders themselves. With the exception of the orders dealing with the fate of heritage buildings damaged by the earthquake, the orders made under the 2010 Act have not generated debate or headlines, as they are generally in the form of lifting burdens rather than imposing them. For example, one order suspended the application of weight limits for heavy motor vehicles to expedite the clearance of earthquake debris.¹¹⁸ Another delayed the expiry date for unemployment benefits for people residing in the region hit by the earthquake.¹¹⁹ Yet another modified the requirements for filing land information memoranda in respect of properties in the region hit by the earthquake.¹²⁰

In the light of experience with making orders under the 2010 Act, the force of the concerns raised in respect of the 2010 Act appears to have diminished. None of the orders made under the 2010 Act support the hypothesis that the Executive is using the 2010 Act to bypass Parliament whenever it pleases. The orders have, however, affected the pre-existing balance of interests in the region hit by the earthquake. For example, those interested in preserving heritage buildings hit by the earthquake have experienced changes to the applicable rules and procedures for deciding the fate of these buildings.¹²¹

¹¹⁵ These Acts are marked with asterisks.

¹¹⁶ See Canterbury Earthquake Response and Recovery Act 2010, s 6(4).

¹¹⁷ The Regulations Review Committee is a committee of the House of Representatives. It is, by convention, chaired by a member of the Opposition. Its main task is to fulfil the obligations of the House of Representatives under the Regulations (Disallowance) Act 1989, which it does by vetting regulations for compliance with a host of standards, including compliance with their empowering provisions.

¹¹⁸ See Canterbury Earthquake (Transport Legislation) Order 2011.

¹¹⁹ See Canterbury Earthquake (Social Security Act) Order 2011.

¹²⁰ See Canterbury Earthquake (Local Government Official Information and Meetings Act) Order 2011.

¹²¹ See generally Canterbury Earthquake (Historic Places Act) Order 2010 as amended by the Canterbury Earthquake (Historic Places Act) Amendment Order 2011.

4—Orders made under other Acts

The Executive also issued nine orders under other Acts in response to the 4 September 2010 earthquake, one of which revoked and replaced one of these orders.¹²² One order was made under the Earthquake Commission Act 1993, one was made under the Tax Administration Act 1994, and seven were made under the Social Security Act 1964. Eight orders remain in force.

B Legislative Response to 22 February 2011 Earthquake

This section sets out the legislative response to the magnitude 6.3 earthquake that struck the Canterbury region on Tuesday 22 February 2011 at 12:51 pm. It provides a brief synopsis of the process that led to the enactment of the Canterbury Earthquake Recovery Act 2011 (the 2011 Act),¹²³ discusses the reaction to the 2011 Act, and looks at the orders made under the 2011 Act.

1—Process of enacting Canterbury Earthquake Recovery Bill

Although more devastating than the earthquake of 4 September 2010,¹²⁴ the earthquake of 22 February 2011 generated a more measured legislative response.¹²⁵ An extensive array of preliminary drafting instructions, based on a pre-22 February review of the 2010 Act, reached the PCO on 7 March 2011. The relevant Cabinet papers and authorisations began to flow through to the PCO from 16 March 2011. Allowing for two days of select committee hearings, the Government took the Canterbury Earthquake Recovery Bill through all of its stages under urgency on 12 April 2011 and 14 April. On the basis of submissions received by the select committee, the Government adjusted a number of its provisions at the Committee of the Whole of the House stage. The resulting 2011 Act, which consists of 93 sections and two schedules, repealed and replaced the 2010 Act. The 2011 Act came into force on 19 April 2011. The drafting work was carried out by a team that the DCPC had assembled soon after the earthquake.

This comparatively leisurely pace can be attributed to several factors. Given the horrific nature of the 22 February 2011 earthquake, local and central government representatives were less inclined to lift the state of emergency. This provided the Executive with a longer period in which to use the powers provided under the Civil Defence Emergency Management Act 2002. In addition, the existence of the 2010 Act, which arguably applied to the 22 February 2011 earthquake by virtue of defining the earthquake of 4 September 2010 as including any aftershocks, could be used to address difficulties that might arise once the state of emergency ended but before Parliament enacted any legislation specifically addressing the 22 February 2011 earthquake. Essentially, these factors removed the imperative to truncate the usual policy development and Cabinet approval processes.

Most of the sections in the 2011 Act are dedicated to setting out the duties, functions, and powers of the Canterbury Earthquake Recovery Authority (which replaced the recovery commission) and the Minister for Canterbury Earthquake Recovery. They also require community input into certain ministerial decisions, provide for the development and implementation of various planning instruments, and create powers in relation to information gathering, entry, surveys, building works, directions, compliance orders, and

¹²² For a list of these orders, see <http://www.pco.parliament.govt.nz/pco-news/>.

¹²³ For a copy of the Act, see http://www.legislation.govt.nz/act/public/2011/0012/latest/DLM3653522.html?search=ts_act_canterbury+earthquake_rese&p=1&sr=1.

¹²⁴ See above notes 78 and 79.

¹²⁵ See generally above note 102 and below note 129.

the acquisition and disposal of real property. None of these sections appear in the 2010 Act. In addition, the 2011 Act, unlike the 2010 Act, addresses the issue of compensation. Work undertaken to review the operation of the 2010 Act before the 22 February 2011 earthquake struck formed the basis for the instructions for these provisions.

The 2011 Act saves any order made under the 2010 Act by treating it as an order made under the 2011 Act.¹²⁶ The 2011 Act also re-enacts the empowering provision of the 2010 Act. However, the purpose provision in the 2011 Act is less specific than the purpose provision in the 2010 Act. For example, the Executive can make orders under the 2011 Act that provide adequate statutory power to enable a focused, timely, and expedited recovery, to ensure that the relevant local authorities respond to and recover from the earthquake, to facilitate, coordinate, and direct the planning, rebuilding, and recovery of affected communities, or to restore the social, economic, cultural, and environmental well-being of the affected region.¹²⁷

2—Reaction to Canterbury Earthquake Recovery Act 2011

Eleven Members of the House voted against the 2011 Act.¹²⁸ Nevertheless, the criticism of the 2011 Act¹²⁹ was muted in comparison to the criticism of the unanimously supported 2010 Act,¹³⁰ even though the 2011 Act is to expire in five years instead of one and a half years like the 2010 Act.

The muted response may be attributable to the far greater losses caused by the 22 February earthquake.¹³¹ The media focused its attention on the local, national, and international efforts to address the practical difficulties arising in the aftermath of the earthquake rather than on theoretical concerns regarding the 2011 Act's departures from generally followed lawmaking conventions. The heavily reported response of the Japanese to the terrible consequences of the magnitude 8.9 earthquake and the subsequent tsunami that struck Japan on 11 March 2011 served to intensify the focus on practical matters.

The muted response may also be attributable to differences between the 2010 Act the 2011 Act. Unlike the 2010 Act, the 2011 Act includes a provision that requires the Minister to review annually the operation and effectiveness of the 2011 Act.¹³² The Minister must present a report on each review to the House that must include any recommendations for amendments to the 2011 Act. Unlike the 2010 Act, the 2011 Act

¹²⁶ See Canterbury Earthquake Recovery Act 2011, s 89.

¹²⁷ See Canterbury Earthquake Recovery Act 2011, ss 3 and 71(1).

¹²⁸ See Journals of the House (for the week beginning Tuesday 12 April 2011) at <http://www.parliament.nz/en-NZ/PB/Debates/Journals/2/a/e/00HOHJournals201104121-Journals-of-the-House-for-the-week-beginning.htm>.

¹²⁹ See generally (12 April 2011) 671 NZPD 17898ff, 18129ff, and 18198ff (setting out the first reading, second reading, Committee of the Whole, and third reading debates in respect of the Bill) at http://www.parliament.nz/en-NZ/PB/Debates/Debates/e/b/7/49HansD_20110412_00000816-Canterbury-Earthquake-Recovery-Bill-First.htm and http://www.parliament.nz/en-NZ/PB/Debates/Debates/e/7/1/49HansD_20110414_00000012-Canterbury-Earthquake-Recovery-Bill-Second.htm and http://www.parliament.nz/en-NZ/PB/Debates/Debates/7/8/2/49HansD_20110414_00001172-Canterbury-Earthquake-Recovery-Bill-In-Committee.htm.

¹³⁰ See above note 102.

¹³¹ See above notes 78 and 79.

¹³² See Canterbury Earthquake Recovery Act 2011, s 92. The inclusion of the prohibition against judicial review of the recommendation of the Minister to make an order under the 2010 Act generated most of the critical comment directed toward that Act owing, in part, to the misperception that it barred the review of orders made under that Act. See e.g., Dean Knight, Canterbury Earthquake Response and Recovery Bill: Constitutionally Outrageous (14 September 2010) at <http://www.laws179.co.nz/2010/09/canterbury-earthquake-response-and.html>.

also requires the Minister to have regard to the recommendations of the Canterbury Earthquake Recovery Review Panel when making a recommendation for an order.¹³³ Although the Minister's recommendation is still not subject to judicial review,¹³⁴ the courts are free to consider whether an order has complied with the 2011 Act's requirements. Orders that are made without reference to the Canterbury Earthquake Recovery Review Panel would be as vulnerable to challenge as orders that address matters beyond the purposes of the 2011 Act.

In addition, the benign nature of the orders made under the 2010 Act might be a factor. As noted above, the orders are generally in the form of lifting burdens rather than imposing them.¹³⁵

3—Orders made under Canterbury Earthquake Recovery Act 2011

The Executive has made 10 orders under the 2011 Act.¹³⁶ Of these, none has expired, one amended an order made under the 2010 Act,¹³⁷ and two replaced orders made under the 2010 Act.¹³⁸ The orders have temporarily altered the application of certain provisions in the following eight Acts:¹³⁹

- Energy Companies Act 1992
- Historic Places Act 1993*
- Local Government Act 2002*
- Land Transport Act 1998*
- Ratings Valuations Act 1998*
- Resource Management Act 1991*
- Road User Charges Act 1977*
- Transport (Vehicle and Driver Registration and Licensing) Act 1986.

The paucity of orders made under the 2011 Act may be attributable to two factors. First, a provision in the 2011 Act that extends the expiry date of six orders made under the 2010 Act.¹⁴⁰ Secondly, the 2011 Act treats orders made under the 2010 Act as if they were made under the 2011 Act.¹⁴¹

¹³³ In practice, the Executive meets this requirement with respect to a proposed order by submitting a finalised draft of the proposed order to the Canterbury Earthquake Recovery Review Panel for its consideration before submitting the proposed order to Executive Council via ACE and Cabinet.

¹³⁴ See Canterbury Earthquake Recovery Act 2011, s 74(2).

¹³⁵ See above text accompanying notes 118 to 120.

¹³⁶ For a list of these orders, see <http://www.pco.parliament.govt.nz/pco-news/>. These orders can also be found at www.legislation.govt.nz by searching for regulations using the term "canterbury earthquake".

¹³⁷ See Canterbury Earthquake (Transport Legislation) Amendment Order 2011, s 4.

¹³⁸ See Canterbury Earthquake (Historic Places Act) Order 2011 (revoking and replacing the Canterbury Earthquake (Historic Places Act) Order 2010); Canterbury Earthquake (Rating Valuations Act—Christchurch City Council) Order 2011 (revoking and replacing the Canterbury Earthquake (Rating Valuations Act) Order 2010).

¹³⁹ One of the orders made under the 2011 Act modifies the Land Transport Rule: Operator Licensing 2007. See Canterbury Earthquake (Land Transport Rule: Operator Licensing) Order 2011. The Acts marked with asterisks are included in the indicative list of 23 Acts set out in section 71(3) of the Canterbury Earthquake Recovery Act 2011.

¹⁴⁰ See Canterbury Earthquake Recovery Act 2011, s 90 and Schedule 2. The date 31 March 2012 is the day before the expiry date of the Canterbury Earthquake Response and Recovery Act 2010, which is 1 April 2012. The date 19 April 2016 is the expiry date of the Canterbury Earthquake Recovery Act 2011, which expires five years after 19 April 2011, which is the date it came into force.

¹⁴¹ See Canterbury Earthquake Recovery Act 2011, s 89.

4—Orders made under other Acts

The Executive also issued seven orders under other Acts and one notice under a regulation in response to the 22 February 2011 earthquake.¹⁴² One order was made under the Goods and Services Tax Act 1985, one under the KiwiSaver Act 2006, one under the Ombudsmen Act 1975, one under the State Sector Act 1988, and two under the Social Security Act 1964. The notice was made under regulation 23 of the Accident Compensation (Experience Rating) Regulations 2011, which were made under the Accident Compensation Act 2001. These orders and the notice are still in force.

C *Legislative response to 13 June 2011 earthquakes*

On Monday 13 June 2011, the Canterbury region experienced two earthquakes within 80 minutes of each other, measuring 5.7 and 6.3 on the Richter scale. These earthquakes caused liquefaction in various areas and the loss of a host of buildings weakened in the earthquakes of 4 September 2010 and 22 February 2011, especially heritage buildings located in Christchurch's central business district.¹⁴³ They also had the effect of speeding up the Government's timetable for making key decisions necessary to progress a number of its recovery programmes, particularly regarding whether damaged homes in certain areas should be repaired or condemned or the appropriate level of compensation (if any). The Government did not instruct the PCO to draft any additional special powers in respect of these earthquakes, as it appears to have sufficient authority under the 2011 Act.

IV Lessons Learned

This Part draws together some of the themes discussed in Parts II and III with a view to identifying any lessons that might be considered in any future emergency management legislation.

Part II sets out something of the ebb and flow of emergency management over the last 80 years, showing how the needs must approach gave way to a devolved responsibility and quasi-generic approach, but by implication leaving the challenge of emergency management, such as that presented by the Canterbury earthquakes, to event-specific legislation. In terms of the precedents considered in Part II, both the 2010 and 2011 Canterbury earthquake Acts were event-specific enactments calculated to deal with the long-term effects of the earthquakes by covering the gaps that would be left once the state of emergency declared was lifted and the associated powers were no longer available under the Civil Defence Emergency Management Act 2002 (the 2002 Act).

Part III lays out some of the differences between the development and enactment of the 2010 Act and the 2011 Act. These differences provide some evidence from which to infer certain lessons to be learned from the 2010 Act and the 2011 Act. In particular, the lessons point to the value of:

- taking a measured approach to the development of a remedial legislative response with adequate pre-introduction consultation
- avoiding as far as possible a truncated parliamentary process
- ensuring appropriate mechanisms for coordinating the agencies involved in both the response and recovery efforts

¹⁴² For a list of these orders, see <http://www.pco.parliament.govt.nz/pco-news/>.

¹⁴³ See above notes 78 to 80.

- ensuring that people and communities are heard (as well as protected from further injurious effects)
- making balanced provision for local participation (rather than imposing a “top down” model)
- providing for transparent planning processes, including community and stakeholder involvement
- enabling collaborative, stake-holder opportunities with overarching planning requirements
- ensuring that the powers to make delegated legislation are adequate for the purpose, while also placing appropriate limits on the power handed to the Executive, as by including in the primary legislation such powers as can clearly be anticipated as necessary
- providing as necessary for the protection of Executive action to discourage unworthy challenges to the legitimate purposes of the primary legislation
- permitting judicial supervision of the exercise of Executive powers.

The critical reaction to the 2010 Act and the 2011 Act (and to a third discussed below¹⁴⁴) may suggest that the greater the *gravitas* of the circumstances giving rise to an enactment, the more important it is to preserve the rule of law and observe the constitutional conventions.

A Context for first legislative response: Canterbury Earthquake Response and Recovery Act 2010

This section considers why legislation was brought forward barely ten days after the first earthquake and how this may have contributed to the issues arising from that rapid response, especially as to its adverse reception.

1—Was Parliament’s immediate action needed?

(a) State of local emergency and exercise of powers under 2002 Act

At 9.33 am on 4 September 2010, a state of local emergency was declared under section 68 of the 2002 Act for Christchurch City, and for the other two affected local authority districts shortly after. The declaration relating to Christchurch City expired on 6 September but was extended by three further declarations to 16 September.¹⁴⁵ The other affected districts made declarations for somewhat different periods than those applying in Christchurch City (one even to be reviewed on a daily basis).¹⁴⁶

The efficacy of the declarations under the 2002 Act depended on the effectiveness of the planning undertaken by the local Civil Defence Emergency Management (CDEM) Group, the declarations gave access to the reactive, proactive, coercive, and protective powers under the 2002 Act, mobilising the resources of the local CDEM Group (but not nationally). The powers enabled the CDEM Group to undertake works, clear public places, remove dangerous structures, regulate traffic, rescue people, and provide immediate relief. By engaging the powers under the 2002 Act, those actions could be taken without the chilling effect of potential liability for breaching the law. Although the

¹⁴⁴ See discussion on the Rugby World Cup 2011 (Empowering) Act 2010 at text accompanying notes 156 to 162.

¹⁴⁵ *New Zealand Gazette* 2010 pp 4193–4194. See ss 68, 70, and 71 of the 2002 Act, which give a default life of 7 days before a further declaration is required but impose no limit on the extensions that may be declared.

¹⁴⁶ Those districts were Selwyn and Waiamkariri districts. *New Zealand Gazette* 2010 pp 3225, 4196–4197.

2002 Act lacked mechanisms for targeting a particular situation, other emergency powers on the statute book addressed particular matters.¹⁴⁷

(b) *Why the speed to enact Canterbury Earthquake Response and Recovery Act 2010?*

The powers under the 2002 Act may have been seen as being too heavy-handed and driven from the top down to be publicly acceptable beyond a short initial response, and at the same time as lacking regulatory precision to address the ongoing need for response and recovery.

Another concern may have been that the 2002 Act gave no guidance on the appropriate balance between taking urgent action required for public safety and protecting the long-term interest in personal freedoms. For example, as earlier noted, a particular sensitivity in Christchurch was the significant damage to buildings regarded as jewels in the heritage of New Zealand. Members of the public reacted strongly against any peremptory demolition of that heritage other than within the regulatory requirements of the Historic Places Act 1993, despite the public hazard that many of those buildings presented.¹⁴⁸ Equally, there were strong expressions of the opposite opinion.

The extensive physical damage to land, infrastructure, and the built environment required a long-term arrangement for recovery. The powers under the 2002 Act were inappropriate for anything other than a short-term response. The prospect of legal challenge could not be ruled out if powers were used inconsistently with the requirements of the general law, and there could be no confidence that retroactive validation would be granted.¹⁴⁹ Given the short life of a declaration under the 2002 Act, it appears that the use of its powers for emergency management is intended to be *in extremis* and necessarily short-term.¹⁵⁰

And so it was that the 2010 Act came into force barely ten days after the magnitude 7.1 shock.

2—Criticism levelled at 2010 Act—were there lessons to be learned?

The rapid enactment of the 2010 Bill left the Government exposed to criticism in the House, though Members acknowledged that the Act was needed. In view of the extent of the destruction in Canterbury, Members were sensitive to raising objections to the empowering Act, so criticism was somewhat guarded.

More strident criticism was to come after the enactment of the 2010 Act. Some (principally academic) members of the legal profession alleged that, in a “dangerous and misguided” manner, the Government had abandoned “established constitutional values and principles in order to remove any inconvenient roadblocks”, and that the Act represented “an extraordinarily broad transfer of law-making power away from Parliament and to the executive branch, with minimal constraints on how that power may be used.”¹⁵¹

¹⁴⁷ On the substance and process of enactment of the 2002 Act, see text above accompanying notes 46 to 62; and for other emergency regulation-making powers, see the text accompanying notes 69 to 76.

¹⁴⁸ In *Scott v Christchurch City Council*, Chisholm J, HC Christchurch 23 October 2010 the applicant sought interim orders under the Judicature Amendment Act 1972 (judicial review) to halt the demolition of one such building.

¹⁴⁹ For example, in the Building Act 2004 and the Historic Places Act 1993 there are absolute prohibitions that are inconsistent with the exercise of certain powers under the state of emergency.

¹⁵⁰ See text above accompanying note 85 for a comparison with the handling of certain emergency situations arising in the USA. Other comparisons were made with lessons learned from those disasters in the course of the House debates on the 2011 Act on 12 April 2011; see references at note 129.

¹⁵¹ An Open Letter to New Zealand’s People and their Parliament: see reference at note 102.

The criticism gained significant publicity, though its credibility may have been compromised by its scant acknowledgement of either the extraordinary circumstances that had given rise to the Act or the procedural safeguards included in it.¹⁵²

(a) *Parliamentary process truncated*

The process by which the 2010 Bill became law in a single day was undoubtedly a significant reason for the discontent, but substantive matters were also challenged.¹⁵³ The Government acknowledged that Parliament may need to consider further legislation to flesh out the details needed to ensure recovery.

Whether the criticism was proportionate to the problem is moot. The critics did not explain how Parliament could otherwise have delivered the means to secure the safety of the citizens of Canterbury or to allow agencies to go about the rescue, clean-up, and recovery with the timeliness that the situation demanded.

(b) *Broad delegated powers were needed*

Concern was expressed in the House that the 2010 Bill risked “the breathtaking possibility” of orders being made to modify any event and for any part of New Zealand. In reality, the powers could only be exercised in respect of the three affected districts and were available only to meet the express purpose of the Act. Moreover, the plethora of matters that emerged during the first few weeks of the clean-up illustrated the scope of the orders that would be required to permit the remedial action needed. They were practical matters the policy for which, even if foreseeable, could not have been delivered in primary legislation in time to meet the emergency. The open-ended list of section 6(4) proved to be an essential element in the practical application of the remedial intent of the 2010 Act, as the Chairperson of the Regulations Review Committee was to acknowledge in a later debate in the House.¹⁵⁴

(c) *Cautious exercise of executive power*

The critical response to the 2010 Act turned it into something of a cause célèbre. This may have helped to ensure that a cautionary approach was taken to the scope of the orders that were made, but the Executive, alive to the *gravitas* of the situation, continued to promulgate orders on a needs-must basis as circumstances necessitated.¹⁵⁵

¹⁵² See text above accompanying notes 103 to 108.

¹⁵³ Besides the caution to “make haste slowly”, matters raised in the three readings on 14 September included the potential for standards, particularly building standards, to be relaxed unwisely, concern that reconstruction of Christchurch could be pursued at the expense of constitutional integrity, the scope of the power to make orders to override primary legislation, and a challenge to providing for retrospectivity and ouster of the courts (s 6(3) of the 2010 Act): see House debate 14 September 2010 http://www.parliament.nz/en-Z/PB/Debates/Debates/c/6/2/49HansD_20100914_00000689-Canterbury-Earthquake-Response-and-Recovery.htm and http://www.parliament.nz/en-NZ/PB/Debates/Debates/c/4/9/49HansD_20100914_00000901-Canterbury-Earthquake-Response-and-Recovery.htm.

¹⁵⁴ On the scope of the orders made under the 2010 Bill, see text above accompanying notes 109 to 116. For the comments of the Chairperson of the Regulations Review Committee, see committee of whole House debate on 12 April 2011, accessible at http://www.parliament.nz/en-NZ/PB/Debates/Debates/f/0/5/49HansD_20110414_00001172-Canterbury-Earthquake-Recovery-Bill-In-Committee.htm.

¹⁵⁵ See text above accompanying notes 118 to 122.

3—A tale of two Bills

(a) *Rugby World Cup 2011 (Empowering) Bill: its scope*

Ironically, the 2010 Act drew far more criticism than did the Rugby World Cup 2011(Empowering) Bill (RWC Bill)¹⁵⁶ that was before a select committee at the time of the magnitude 7.1 earthquake on 22 September 2010. Not in any ordinary sense a civil defence emergency Bill, the RWC Bill was designed to better enable delivery of the additional services and infrastructure reasonably necessary for the proper conduct of the 2011 tournament. The principal imperative was to avoid breaching the hosting requirements imposed by the international rugby body.

The RWC Bill proposed a new independent Rugby World Cup Authority (the Authority) with the power to make determinations that would override, as “reasonably necessary for the proper conduct of the tournament”, all but a number of specified enactments perceived as essential to public health and safety.¹⁵⁷

Specific exceptions from the normal procedures included requiring fast-tracked applications and decisions, with omission of much of the usual public process. There were two further matters of particular contention. The RWC Bill proposed conferring on the Minister for the Rugby World Cup the power to recommend regulations that would deem activities to be permitted activities if a matter of urgency arose. It also included what was essentially a ministerial fiat by which that Minister may, subject to consultation with certain other Ministers, declare activities to be permitted if necessary to meet extraordinary circumstances in the critical period leading up to and during the tournament.¹⁵⁸ Although the Minister, in exercising these powers, must receive and consider advice from the Authority, the Minister is not obliged to follow any advice.

(b) *Critical response to elements of RWC Bill*

No submissions raising constitutional objections to the Bill were made to the select committee.¹⁵⁹ However, in the select committee and subsequently, the Opposition sought to have the ministerial fiat removed, particularly given the ability of the Minister to ignore the advice of the Authority. Once negotiations to exclude that power had failed, opposition to the passage of the Bill was intensified. The power was likened to the powers taken

¹⁵⁶ Introduced 10 June 2010; first reading and referred to Government Administration Committee 22 June, reported back to the House by the committee 27 September 2010, second reading 19 October, committee of the whole House 26, 27 October, reported from that committee 9 November, third reading 16 November, and Royal assent 22 November 2010.

¹⁵⁷ See purpose clause, s 3(1) of the RWC Act; and for the excluded legislation, see s 5, which provides for the exclusion of some enactments from all Parts of the RWC Act and for the exclusion of other enactments from specified Parts of the RWC Act. For example, the Biosecurity Act 1993 (and 6 other Acts) are protected against any relaxation under the RWC Act, but the requirements of the Building Act 2004 may be overridden by the Minister under the powers conferred by Part 4 of the RWC Act. The constitutional enactments exempted from both Canterbury earthquake Acts were not specified as being outside the scope of the RWC Act.

¹⁵⁸ See Part 4 of the Rugby World Cup 2011 (Empowering Act 2010 (the RWC Act).

¹⁵⁹ Submitters’ concerns focused on ensuring that the RWC Bill would serve the public interest in securing a successful tournament and meeting particular sectoral needs appropriately, while protecting public health and safety. It is tempting to speculate whether the low level of concern about the powers to be conferred by the Bill was indicative of the culture around rugby or of the pragmatic needs-must approach to an event such as the tournament, or whether the safeguards in place (such as the provision for delayed commencement of certain provisions and expiry and repeal of the Act after the tournament) were seen as adequate protection in the circumstances: submissions are accessible at http://www.parliament.nz/en-NZ/PB/SC/Documents/Evidence/?Custom=00DBHOH_BILL10004_1.

during the Muldoon administration of 30 years earlier when the law was suspended by fiat to deal with a financial emergency by a price and wage fixing mechanism.¹⁶⁰

For whatever reason, no direct comparison was drawn in the House between the powers proposed in the RWC Bill and those that had been conferred on the Executive by the 2010 Act only a short time earlier.¹⁶¹ However, after its enactment the RWC Act was adversely commented on, along with the 2010 (Canterbury earthquake) Act, by the President of the New Zealand Law Society, describing those two Acts (and a third enacted in 2010) as evidence of a “developing trend” of the Government to override the rule of law by handing “absolute power” to a Minister.¹⁶²

The Legislation Advisory Committee (LAC),¹⁶³ in a report prepared for it by the New Zealand Law Commission and submitted to the select committee, expressed concern that the open-ended approach to the enactments that could be overridden by the RWC Bill lacked clarity as to exactly what provisions were within the scope of the RWC Bill. However, it also acknowledged that the policy objective of the RWC Bill was to provide for a decision-making scheme that would apply to a wide range of processes that might not be able to be foreseen and that the alternative, of amending all possibly relevant statutes and district plans, would be a disproportionately cumbersome and complex task.¹⁶⁴ The LAC did not comment on the provision of a ministerial fiat, nor on the power of the Minister to override any advice of the Authority. Overall, it accepted that a trade-off had to be made between the need to give the public opportunity to be heard and the stated purpose of the Act to provide for expeditious decision-making for eventualities that could arise. The end justified the means, on a “needs must when the devil drives” basis.

(c) *Are there lessons to be learned from the RWC Bill?*

A number of procedural and substantive elements may have contributed to the RWC Bill receiving a relatively fair-weather passage. For example:

- the Bill had had a long period of policy development before its introduction to the House, with considerable cross-party and sectoral consultation
- the passage of the Bill through the House was not curtailed and the select committee travelled to all the main venue centres to hear public submissions

¹⁶⁰ Second reading debate, accessible at http://www.ourhouse.parliament.nz/en-NZ/PB/Debates/Debates/a/1/b/49HansD_20101019_00000936-Rugby-World-Cup-2011-Empowering-Bill-Second.htm. On the suspension of the law to deal with an election promise to remove compulsory national superannuation well before Parliament was called, see *Fitzgerald v Muldoon* [1976] 2 NZLR 615 and discussion in Philip Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edition Thomson Brookers 2007) pp 165-167.

¹⁶¹ Speaking in the third reading debate on the RWC Bill (19 October 2010), Hon Trevor Mallard expressed his disappointment that the New Zealand Law Society had not “been across this legislation” much earlier (no submission was made by the Society), while admitting that “as parliamentarians we mainly came to a point of view on the Canterbury legislation that, in retrospect, leaves us with some questions.”; accessible at http://www.parliament.nz/en-NZ/PB/Debates/Debates/a/0/1/49HansD_20101116_00000988-Rugby-World-Cup-2011-Empowering-Bill-Third.htm. The member’s reference to the Law Society may have been to an earlier radio interview: see text below accompanying note 158.

¹⁶² Interview on National Radio with the President of the New Zealand Law Society and the Attorney-General, 11 November 2010: accessible at <http://www.radionz.co.nz/national/programmes/ninetonoon/audio/2430827/law-society-criticises-government-lawmaking>. The third enactment discussed was the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

¹⁶³ The role of the LAC includes the provision of advice to departments on the development of legislative proposals, reporting to the Attorney-General on the public law aspects of legislative proposals referred to it by the Attorney-General, scrutinising and submitting on aspects of bills introduced into Parliament that affect, or raise issues of, public law, and scrutinising legislative proposals for their compliance with the LAC Guidelines: <http://www2.justice.govt.nz/lac/who/index.html>.

¹⁶⁴ The LAC submission is accessible at http://www.parliament.nz/NR/rdonlyres/F105B2C5-A7DF-444A-809F-A9B3BFAB362/160373/49SCGA_EVI_00DBHOH_BILL10004_1_A60610_LawCommissio.pdf.

- the constitution of the Authority prescribed by the RWC Bill was one that generated confidence
- the Bill provided for a transparent (though expedited) decision-making process by the Authority, with a clear basis for its decision-making
- though it limited appeal rights, the Bill did not interfere with the supervisory role of the court in judicial review proceedings
- the Bill prescribed a firm expiry date for the RWC Act and for the approvals granted under it (unless a narrow grandparenting provision could be accessed).

What lessons can be taken from this comparison? A number of possibilities are open:

- wide pre-introduction consultation may be an effective pre-emptive move
- the proper parliamentary process ought not lightly to be truncated
- judicial supervision ought not be excluded or unduly curtailed
- a clearly defined and robust decision-making process assists acceptance.

These features alone could hardly excuse the constitutional risks posed by the RWC Bill or explain the contrast between the reception of that Bill and the 2010 Canterbury earthquake Act, so perhaps the answer lies elsewhere. Could it be that:

- the general acceptance of the measures in the RWC Act was due to a pragmatic attitude to the management of a tournament that would occupy but six weeks in the nation's life?
- society is more willing to relax the strict observation of constitutional conventions for legislation of short duration and involving matters of a lesser *gravitas*?

B Second legislative response: Canterbury Earthquake Recovery Act 2011

This section extrapolates lessons learned during the previous 5 months from the legislative response following the 22 February aftershock, the Canterbury Earthquake Recovery Act 2011.

1—Lessons (already) learned: process matters

(a) Practical difficulties and public discontent

Although nature had not finished with the Shaky Isles, the law as it stood after the enactment of the 2010 Act was proving adequate to manage obstacles to dealing with the physical damage arising from those events. However, before the magnitude 6.3 quake hit on 22 February 2011, with its terrible toll on life and property, the Executive had begun to review the adequacy of the 2010 Act, alive to the practical difficulties arising from the dislocation, fear, and nervous exhaustion of the people of affected areas, and discontent with aspects of the delivery of the recovery programme. Lessons already learned were being applied through the development of significant new policy proposals, as can be inferred from the 2011 Act.

(b) Due process underpins rule of law

The rapidity with which the state of local emergency was lifted in September 2010 had required extreme speed of response from officials and from parliamentary counsel, leaving too little time adequately to assess the ramifications of the policy. The unusual procedure by which the 2010 Bill, with the leave of the House, was enacted may have been even more damaging for its acceptability than the speed of its introduction.

Constitutionalists took no comfort from the fact that the House had expressed its solidarity with Canterbury by enacting the 2010 Bill unanimously.

In contrast to the response in September 2010, a state of national emergency was declared on 23 February 2011 after the magnitude 6.3 earthquake, reflecting a better appreciation of the severity of the disaster and scope of the recovery exercise. That state was extended week by week, allowing for a more measured and consultative process for the development of policy and preparation of legislation. There was growing concern in Canterbury with the ongoing state of national emergency (also expressed in the House). Despite that concern, a two-month period was eventually required to allow the civil defence authorities to perform their critical work under the 2002 (civil emergency) Act, in light of the high death toll and the scale and nature of the physical damage. That period also allowed for more fully formulated policy for a long-term recovery programme than had been possible after the earlier earthquake, as well as for the more considered drafting of the Bill to implement that policy.¹⁶⁵

The 2011 Bill was taken through the House under urgency, and subject to criticism for that, but the criticism was partially deflected by a two-day period being allowed for the Local Government and Environment Committee to hear evidence (though it was not permitted to recommend amendments).¹⁶⁶ Some 40 clauses of the 2011 Bill were amended in the committee of the whole House by the Minister's Supplementary Order Paper, many in response to the submissions heard by the select committee. Although no policy change was effected, drafting changes were made to clarify the intent and achieve a better alignment of the Bill with legal principles and practical reality.

(c) Process for exercising delegated legislative power

The early Orders in Council made under the 2010 Canterbury earthquake Act had come under the criticism (after they were made) of the Regulations Review Committee, perhaps engendering an abundance of caution in the later orders.¹⁶⁷ Although the order-making power in the 2011 Act reflected that of the 2010 Act, the 2011 Bill introduced an important measure to meet the negative reaction by providing that draft orders be submitted to a statutory review panel, the Canterbury Earthquake Recovery Review Panel, to provide advice and exercise independent oversight of the Executive before orders are made.¹⁶⁸

¹⁶⁵ See text above accompanying notes 124 to 127.

¹⁶⁶ Evidence was heard from 14 submitters, including the LAC, the New Zealand Law Society, the Insurance Council of New Zealand, all the affected local authorities and some individual counsellors, the Canterbury District Health Board, a community association, Te Rūnanga o Ngāi Tahu, the Minister, and some individuals. Written submissions were received from a further nine organisations or individuals. The written evidence is available at http://www.parliament.nz/en-NZ/PB/SC/Documents/Evidence/?Custom=00DBSCH_OTH_10601_1.

¹⁶⁷ See text above accompanying notes 109 to 116. For the Report of the RRC on the orders made up to December 2010, see http://www.parliament.nz/NR/rdonlyres/1DC08524-BC02-4096-B5BA-7904179459BA/174917/DBSCH_SCR_4941_InterimreportontheOrdersinCouncilma.pdf.

¹⁶⁸ See ss 72 and 73 of the 2011 Act. The panel is judge-chaired, Canterbury-based, and its membership ensures that it is informed by familiarity with local circumstances.

2—Lessons (already) learned: matters of substance

(a) *Governance arrangements: top down vs bottom up*

Well before the magnitude 6.3 aftershock of 22 February 2011, work had begun to extend the scope and method of the existing response by putting in place better governance mechanisms, including greater liaison between central and local government and the other bodies with an interest. Experience since September 2010 had shown that more effective leadership and coordination was needed than could be achieved by the existing agencies,¹⁶⁹ and that an alternative to a rigid top-down model was needed.

To promote local involvement in the recovery, the 2011 Canterbury earthquake Bill incorporated a requirement for community (and cross-party) forums as a mechanism for sharing information between local and central agencies.¹⁷⁰ That feature was welcomed by most submitters who generally emphasised the importance of recognising the social impact and aftermath of the earthquakes.

A change was also made to the governance arrangements to carry the recovery forward. The Canterbury Earthquake Recovery Authority (CERA) was set up by Order in Council as a public service department. It is located in Canterbury and reports to the Minister for Canterbury Earthquake Recovery.¹⁷¹ The rationale for this change was that such a body would be better positioned to co-ordinate the recovery effort and, in recognition that the cost of recovery could run into several billion dollars, would better allow the Government to manage the fiscal situation.¹⁷² The main role of the Canterbury-based CERA is to develop and implement a recovery strategy as the overarching planning document with primary legal effect for the reconstruction, rebuilding, and recovery of the whole area of greater Christchurch, and recovery plans for implementation of the strategy.¹⁷³

Importantly, the 2011 Act protects the integrity of the strategy and plans made under it by providing for their priority over the existing planning and other relevant instruments regulating life in the affected parts of Canterbury. However, while there is a local focus through the requirement of an inclusive process involving public hearings, significant coercive powers are vested in the Minister (such as to suspend or revoke existing planning arrangements and resource consents) in the interests of meeting the overall needs of Canterbury and of the country as a whole.

Such measures may be seen as necessary to ensure that the appropriate momentum is maintained, though whether the 2011 Canterbury earthquake Act will, in the long run, achieve a reversal of the top-down model remains to be seen, though the Act provides the means for bringing a holistic and local perspective to bear on the recovery programme.

¹⁶⁹ In essence, these were the central government agencies in Wellington, the four local authorities in “greater Christchurch”, and the Canterbury Earthquake Recovery Commission set up under s 9 of the 2010 Act (but which had only an advisory role).

¹⁷⁰ See ss 6 and 7 of the 2011 Act.

¹⁷¹ State Sector (Canterbury Earthquake Recovery Authority) Order 2011.

¹⁷² ACE Min (11) 6/1 refers.

¹⁷³ See ss 11 to 28 of the 2011 Act.

(b) *Range of matters for which powers needed*

The implementation of the 2010 Act showed that a significant, and somewhat unpredictable, range of powers is needed to avoid diverting resources away from the recovery process. The 2011 Act continued the regulation-making power in the same terms as those in the 2010 Act, but also included a raft of general powers that would otherwise have been provided for as delegated powers.¹⁷⁴ By this means the 2011 Act reduced the scope of the delegated powers conferred, suggesting that a lesson learned from the adverse reactions to the powers delegated under the 2010 Act was that primary legislation should be used as far as could reasonably be predicted for the purposes of addressing emergency measures.¹⁷⁵

(c) *Privative provisions retained*

The criticism of the privative clause that had been included in the 2010 Act did not deter the Government from providing the same protection in the 2011 Act.¹⁷⁶ Despite the criticism, its continued inclusion may have been seen as less significant, given the limited application of the provision (on a proper reading of the clause) and in view of the fact that the orders themselves remained justiciable.¹⁷⁷

(d) *Did the 2011 Canterbury earthquake Act improve situation?*

A number of the lessons that the Bill incorporated were acknowledged in the House debates and by submitters as improving the situation:

- the inclusion of consultative and participatory measures
- the inclusion of some general powers in the Bill, including powers relating to compensation
- the availability of judicial review of delegated legislation (as if that had not been the case in the 2010 Act).

Some constitutional critics remained concerned that the top-down model, supported by a broad purpose clause, was still objectionable as giving unconstrained executive and coercive powers, and that the appeal rights were unduly narrow.¹⁷⁸ The critics regarded the order-making powers as unnecessary (without suggesting an alternative approach), or as leaving too much power with the Executive and not appropriately limited to matters truly extraordinary, as lacking adequate safeguards (despite the inclusion of the review panel as well as disallowance), and as open to abuse through the test of expediency.¹⁷⁹

¹⁷⁴ Section 71 of the 2011 Act. A suite of general powers provides for information to be required and disseminated, the power of entry, for surveys to be undertaken, and for demolition or reconstruction works (with notice provisions) to be undertaken: see ss 29 to 58 of the 2011 Act.

¹⁷⁵ That was the burden of the message conveyed by the President of the New Zealand Law Society: see note 162.

¹⁷⁶ Section 6(3) of the 2010 Act and s 74(2) of the Canterbury Earthquake Recovery Act 2011; see text above accompanying note 108 for an account of the misreading of the clause and its scope.

¹⁷⁷ Another form of privative clause was identified in what is now section 75(5) of the 2011 Act (the equivalent of section 7(1) of the 2010 Act). Characterised in the debate on the 2010 Bill as a “supremacy clause”, one law expert opined before the select committee considering the 2011 Bill that the provision was an effective privative clause and another, that it would have no legal effect. For a transcript of the evidence given by members of the LAC, see http://www.parliament.nz/NR/rdonlyres/E58F02C1-0878-4ED0-8088-ECAD38610FAD/193584/DBSCH_SCR_5161_Specialreportprovidingcorrectedtran.pdf; and for Professor Philip Joseph’s evidence to the select committee, see reference at note 166.

¹⁷⁸ See for example the submission of Dean Knight to the select committee, reference at note 166.

¹⁷⁹ See LAC submission, references at notes 166 and 177.

In sum, the nub of the criticism was directed against the aggregation of ministerial powers of direction, characterised as being more akin to reserve powers that should be used only in a case of necessity to give effect to the statutory recovery strategy.

3—Observations

The Government was not persuaded to alter the overall approach to recovery provided in the 2011 Bill, despite the continuing criticism. Nevertheless, the 2011 Act is the result of a number of lessons learned from the experience of the 2010 Act, revisited in the context of the second devastating impact. The 2011 Act, like the 2010 Act, is a pragmatic needs-must response.

Translated into drafting terms, the 2011 Act ventures into providing for longer-term institutional mechanisms required for recovery from the cumulative damage. A collaborative (or even consultative) stake-holder orientation had not been possible in the short time frame allowed for the introduction of the 2010 Canterbury earthquake Bill, but that is the approach provided for in the 2011 Act, in order to take the response into the future by enabling the rebuilding to take place in a collaborative spirit while also ensuring central government control over the fiscal implications of achieving recovery.

C More lessons to be learned: Royal Commission of Inquiry established

The destructive effect of the magnitude 6.3 earthquake raised serious questions about the extent of the loss of life and land and property damage. Answers were needed as to whether systemic failures in the design, construction, or maintenance of the buildings had brought about their collapse. Thus it was that, five days before the 2011 Act came into force, terms of reference were promulgated for the appointment of the Royal Commission of Inquiry into Building Failure caused by the Canterbury Earthquakes.¹⁸⁰

The Royal Commission is charged with seeking to establish an ascertainable underlying cause for the loss of life and damage to property. It is required to investigate legal and best-practice requirements and make recommendations relevant to, among other things, the adequacy of the current legal and best-practice requirements as a means of preventing or minimising building failure and managing the risks of such failure. This process is intended to provide robust evidence that will guide the recovery process in Canterbury and assist in developing, if needed, more wide ranging policy reform relevant to balancing the safety standards against analysis of the relevant risks.

Clearly, the last word has not yet been drafted on the topic of civil defence emergency management.

V Conclusions

Legislation enacted in New Zealand in anticipation of, or in response to, natural disasters shares an essential common feature. Both strike a balance between the desire for freedom and the desire for safety. To safeguard our citizenry, our governments could enact pre-event legislation that forbids further development in areas that are prone to natural disasters. Likewise, they could enact post-event legislation that encourages relocating rather than rebuilding. This would be a radical rebalancing of freedom and safety, one that would be at odds with the histories of our respective nations.

¹⁸⁰ *New Zealand Gazette*, 14 April 2011, pages 1201–1204. A final report is required by 11 April 2012.

As parliamentary counsel, we can be thankful that the daunting task of finding an acceptable balance is the work of our elected representatives. Our challenge is to see that the agreed balance finds unambiguous expression in the law. This task demands the very best of us, as it requires drafting legislation that is cogent yet instructive, and flexible yet principled. In the case of post-event legislation, it also requires working urgently in circumstances that are far less than ideal, especially in terms of established protocols, standards, and conventions, including the authorisation to draft, the clarity and completeness of instructions, and the time available to produce and scrutinise the legislation before its enactment.