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**Expediting Democratic, Civil and Political Rights: Covid-19
and an Improved Model of Expedited Law-Making.**

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Abstract

Research and scholarship on the use of expedited law-making processes, such as urgency, is limited. That which does exist focuses on the dangers of using expedited law-making when there is not a genuine need to do so. Do these dangers vanish when expedited law-making is used legitimately? Expedited law-making even where used legitimately, for example to respond to Covid-19, can cause harm to civil, democratic and political rights. These harms can be evidenced by the passing of the Covid-19 Public Health Response Act 2020. Such harms were not isolated. An analysis of bills passed from the start of the pandemic to the time of writing shows that these harms were widespread. Once the existence of these harms has been established, their nature and extent is analysed against 10 principles of good law-making. These harms, however, need not be accepted as inevitable. A new model of law-making consisting of seven practices to be implemented across the life span of a bill mitigates harms to civil, democratic and political rights without undermining the urgency of expedited law-making. Ultimately, law-making in times of crisis should be efficient, but such law-making must not be governed by fear, panic or haste. Instead, law-making in times of crisis must be governed by the rule of law, democratic ideals and principles of good law-making.

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I Introduction

In 2020 New Zealand, much like the rest of the world, was subject to severe public health measures to combat the threat to life and health posed by Covid-19. Citizens rushed to bring laptops home from work, visit loved ones and stock up on essential items. Simultaneously New Zealand's lawmakers were urgently passing legislation to ensure that unprecedented public health restrictions had proper legal grounding.¹ The use of expedited law-making, even where legitimate, undermines fundamental and constitutional rights of citizens. Specifically, the rights of citizens to have their views represented in Parliament, to contribute to law-making, to debate law-making in a transparent manner and for any infringement on their rights to be given careful consideration and due process.² Any infringement on such rights warrants an evaluation of how they can be protected. Even more worrying, an infringement of such rights may erode the consent upon which representative democracy is built.³ This may, in turn, decay the legitimacy of Parliament. An absence of such legitimacy may lead to civil dissonance or disobedience and in the most severe cases a constitutional crisis, anarchy or insurrection.⁴

To demonstrate how these harms manifest in New Zealand's democracy, this paper provides an account of their presence in the passage of the Covid-19 Public Health Act (Covid-19 Act). Then, a quantitative analysis of all bills passed from the start of the pandemic (March 2020) to the time of writing (September 2021) illustrates that these harms were widespread and not an isolated incident.⁵

Once the presence of these harms has been established, their nature and extent is evaluated against 10 principles of good law-making. Those principles are; open debate, scrutiny, citizen participation, transparency, quality legislation, fundamental rights, stable procedural rules, fostering respect, the right to govern and the quick enactment of legislation in actual emergencies.⁶ Although this paper focuses on Parliament, which has authority to pass legislation, much of this evaluation necessarily focuses on procedures within the House as these are central to the law-making process.

¹ (25 March 2020) 745 NZPD.

² Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry?* (1st ed, Victoria University Press, Wellington, 2011) at 16 – 19.

³ John Locke *Two Treatises on Government: A Translation into Modern English* (Industrial Systems Research, Manchester, 2013) at 243.

⁴ At 243 – 250.

⁵ Data is collated from 25 March 2020, the date that a state of emergency was declared, and epidemic notice was in force to 10 September 2021, the end of the last sitting block before the conclusion of writing this paper.

⁶ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 16.

Specifically, representative democracy is premised on the majority being governed by a few with their consent.⁷ Elected representatives make laws on behalf of citizens. They must therefore articulate arguments for and against bills on their behalf.⁸ If citizens do not feel represented, for example, if arguments for and against bills in their place are not being made, due to limits on debate, as was the case with most expedited laws made in response to Covid-19, that consent may be eroded and in turn, the legitimacy of Parliament decayed.

Central to the consent upon which Parliament is premised is that citizens can participate in the legislative process, both directly and indirectly.⁹ In a representative democracy such participation is generally through elections, however, there are many other mechanisms such as engagement with elected officials, petitions and select committee submissions, these, however, were not present for expedited law-making during Covid-19.¹⁰

It is an established principle that legislation should not jeopardise fundamental constitutional rights and principles.¹¹ Citizens' fundamental rights such as freedom of movement and association were heavily restricted during the pandemic.¹² In addition, “the more that legislation affects individual and group rights, the more important it is that it is accorded due process and is carefully considered.”¹³ However, even where expedited law-making is used legitimately it removes mechanisms that allow for careful consideration this can leave citizen feeling like their rights have been unduly infringed.¹⁴

These harms, however, need not be accepted as an inevitable consequence of expedited law-making. Based on the demonstration and assessment of harms to democratic, civil and political rights an improved model of expedited law-making consisting of seven practices that should be adopted by Parliament is advanced. These practices include an early indication of a policy position. An early indication can give time and transparency to build social licence and legitimacy in the face of removing nearly all democratic input. Once this early policy indication has been given and a draft bill is being produced the minister responsible can give a ministerial statement. Once the bill is drafted, academics and special

⁷ *Laws of New Zealand Parliament* (online ed) at [58].

⁸ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 2 – 3.

⁹ Henry Steiner “Political Participation as a Human Right” (1988) 1 *Human Rights Yearbook* 77.

¹⁰ David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 409 – 411 and 600.

¹¹ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 18.

¹² Alexander Gillespie “Five ways New Zealanders' lives and liberties will be heavily controlled, even after lockdown eases” *The Conversation* (online ed, New Zealand, 16 April 2020).

¹³ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 18.

¹⁴ At 14.

interest groups can comment on it. When the bill is introduced to the House democratic input can be facilitated through electronic means by directly connecting citizens to elected representatives. After the bill is passed it should be subject to post-enactment review. At all stages of the process including the period after the bill has become law all official information should be proactively released. Finally, “the full evaluation of the response to Covid-19 must include ongoing concerns for the ways in which that response navigates relationships under te Tiriti.”¹⁵

Law-making in times of crisis should be efficient, but such law-making must not be governed by the fear, panic or haste produced by the urgency of responding to emergencies. Instead, law-making in times of crisis must be governed by the rule of law, democratic ideals and principles of good law-making.

II Covid-19 Public Health Act: A demonstration of the harms from expedited law-making

Research and scholarship on the use of expedited law-making, such as urgency, is limited. That which does exist focuses on the dangers of using expedited law-making when there is not a genuine need to do so. Do these dangers vanish when expedited law-making is used in a legitimate way? The Covid-19 Act demonstrates that such harms and dangers are still present even where expedited law-making is used legitimately. On 28 February 2020 the first case of Covid-19 was reported in New Zealand, creating a sense of nervousness about what the novel virus meant for the country.¹⁶ Less than a month later, relying on old powers in s 70 of the Health Act 1956, the Director-General of Health made several orders that closed New Zealand's borders to all people except citizens and permanent residents.¹⁷ It was the first time in history that the government had closed the countries' borders.¹⁸ This unprecedented measure served as a precursor for the restrictions that were to come. Beyond New Zealand's safely closed border over 40,000 people were falling ill and over 2,000

¹⁵ Janet McLean, Arie Rosen, Nicole Roughan & Jesse Wall “Legality in times of emergency: assessing NZ’s response to COVID-19” (2021) 51 *Journal of the Royal Society of New Zealand* 197, at 208.

¹⁶ Ministry of Health “Single case of COVID-19 confirmed in New Zealand” (press release, 28 February 2020).

¹⁷ Cabinet Minute of Decision “Stronger COVID-19 Border Measures” (19 March 2020) CAB-20-MIN-0122.

¹⁸ Gill Bonnet “Covid19 coronavirus – New Zealand’s historic border closure six months on” *New Zealand Herald* (online ed, New Zealand, 19 September 2020).

people losing their lives to the virus each day.¹⁹ By late March, once again relying on s 70 powers in the Health Act the government placed those in the country into lockdown under alert level 4 restrictions.²⁰ At alert level 4, citizens are required to stay at home, except for accessing essential services.²¹ At alert level 3, citizens were still required to stay at home except for accessing permitted businesses or services. At alert level 3, permitted businesses includes non-essential businesses and services such as trade people if all interaction was “contactless”.²² At alert level 2, schools could re-open alongside cafes, restaurants and businesses but with public health measures such as physical distancing, mask wearing and occupancy limits.²³ At alert level 1, there are few restrictions on the general community except, for example, the requirement of face-coverings in certain settings.²⁴

The virus posed a great risk. Specifically, to peoples right not to be deprived of life. At its peak, the crisis saw nearly 20,000 deaths per day globally.²⁵ If medical systems were to become overrun due to the uncontrolled spread of the virus people's right to receive medical treatment and right to health and wellbeing would be violated.²⁶ There was no doubt that significant restrictions on democratic and civil liberties by requiring people to stay at home, limit social interactions and give up many other comforts of day-to-day life, were necessary. But there is also no doubt that such restrictions were a severe infringement on citizens' rights.²⁷ The restrictions imposed limits on freedom of expression, for example, gathering for church and religious expression was banned.²⁸ Rights to work and leisure were also restricted.²⁹ A few essential workers could work with strict conditions.³⁰

¹⁹ “Situation by Region, Country, Territory & Area” WHO Coronavirus (Covid-19) Dashboard < covid19.who.int >.

²⁰ Rt Hon Jacinda Ardern “Covid-19 Alert Level increased” (press release, 23 March 2020); Section 70(1)(m) Health Act Order (25 March 2020); Section 70(1)(f) notice to all persons in New Zealand (3 April 2020); and Rt Hon Jacinda Ardern “PM Daily COVID-19 Press Conference” (press release, 27 March 2021).

²¹ Unite Against Covid-19 “What we need to do at Alert Level 4” < covid19.govt.nz >; and Rt Hon Jacinda Ardern “PM Address – Covid-19 update” (press release, 21 March 2020) at [11].

²² Unite Against Covid-19 “What we need to do at Alert Level 3” < covid19.govt.nz >; and Rt Hon Jacinda Ardern, above n 21, at [11].

²³ Unite Against Covid-19 “What we need to do at Alert Level 2” < covid19.govt.nz >; and Rt Hon Jacinda Ardern, above n 21, at [11].

²⁴ Unite Against Covid-19 “What we need to do at Alert Level 1” < covid19.govt.nz >; and Rt Hon Jacinda Ardern, above n 21, at [11].

²⁵ World Health Organisation, above n 19.

²⁶ Universal Declaration of Human Rights GA Res 217A (1948), art 25.

²⁷ Alexander Gillespie, above n 12.

²⁸ New Zealand Bill of Rights Act 1990; Section 70(1)(m) Health Act Order (25 March 2020); and Section 70(1)(f) notice to all persons in New Zealand (3 April 2020).

²⁹ Universal Declaration of Human Rights, above n 26, art 23 and 24.

³⁰ Section 70(1)(m) Health Act Order (25 March 2020); Section 70(1)(f) notice to all persons in New Zealand (3 April 2020); and COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021, s 18.

However, the vast majority of people had to work remotely if possible or cease work.³¹ Later in the pandemic mandatory testing and vaccination for some workers also limited rights such as that to refuse medical treatment.³²

New Zealand saw a high rate of compliance.³³ Parallel legislative interventions such as a wage subsidy assisted in achieving such high compliance.³⁴ The high level of compliance meant New Zealand was soon free of Covid-19.³⁵ By May 2020 the state of emergency and epidemic notice ceased to be in force. Restrictions were set to ease with the country moving to alert level 2 of the government's extra-legal alert level framework.³⁶ There was ongoing debate about the legality of s 70 orders to impose nationwide restrictions that gave effect to alert level 3 and 4.³⁷

In response, the government sought to pass the Covid-19 Act to give legal grounding to the national alert level framework going forward. The Act gave the government sweeping powers to use secondary legislation to impose restrictions on various rights and liberties as discussed above.³⁸ It also conferred wide powers to the police and other bodies to enforce such restrictions.³⁹ The Act was intended to give legal grounding to all national and regional restrictions going forward.⁴⁰

The government had known for several weeks that it intended for restrictions to ease.⁴¹ The government had also known about the ongoing debate about the suitability of the legal

³¹ Statistics New Zealand “Four in 10 employed New Zealanders work from home during lockdown” (7 September 2020) StatsNZ <stats.govt.nz>.

³² New Zealand Bill of Rights Act 1990, s 11.

³³ Dean Knight “New Zealand: Legal Response to COVID-19” in Jeff King and Dr Octávio Ferraz (eds) *Oxford Compendium of National Legal Responses to COVID-19* (Oxford Constitutional Law, Published online) at [121].

³⁴ (17 March 2020) 745 NZPD at 17011; and Hon Grant Robertson “New wage subsidy, leave scheme protects jobs and businesses” (press release, 17 August 2020).

³⁵ Ministry of Health “No active cases of COVID-19” (press release, 8 June 2020); and Rt Hon Jacinda Ardern “New Zealand moves to Alert Level 1” (press release, 8 June 2020).

³⁶ Rt Hon Jacinda Ardern “Post-cabinet press conference” (press release, 11 May 2020); and Cabinet Social Wellbeing Committee Minute of Decision “Report back on the case for new powers for the Alert Level Framework” (29 April 2020) SWC-20-MIN-0022.

³⁷ See eg Andrew Geddis and Claudia Geiringer “Is New Zealand’s COVID-19 lockdown lawful?” UK Constitutional Law Association (27 April 2020); Dean R Knight and Geoff McLay “Is New Zealand’s COVID-19 lockdown lawful? - an alternative view” UK Constitutional Law Association (11 May 2020); and Cabinet Social Wellbeing Committee Minute of Decision “Report back on the case for new powers for the Alert Level Framework” (29 April 2020) SWC-20-MIN-0022.

³⁸ Section 11.

³⁹ Sections 18 – 27.

⁴⁰ Section 4.

⁴¹ Rt Hon Jacinda Ardern “Level 2 Announcement” (press release, 11 May 2020).

powers previously relied on for imposing Covid-19 restrictions.⁴² Despite this, the government did not give any indication of their intent to create bespoke legislation.⁴³ It was not until the Bill was introduced to the House on 12 May 2020 that the opposition, media or citizens knew of its contents.

The Bill passed through an expedited process coming into force the next day.⁴⁴ No formal mechanisms were in place for citizens to express their views. As a result, some felt it was “rushed through” to intentionally limit scrutiny of the sweeping powers.⁴⁵ This caused “a wave of sound and fury”.⁴⁶ That fury manifested in petitions and protests which breached restrictions and put lives at risk.⁴⁷ Such a response demonstrates the frustration of citizens who were deprived of usual democratic mechanisms for expressing their views on the law. Certain provisions and their potential use raised particular concern. For example, warrantless entry to marae caused a “firestorm”.⁴⁸ That concern was the subject of numerous news articles and acknowledged by members in the House.⁴⁹ Limited debate in the House and very few opportunities for engagement with the minister responsible for the Bill meant these concerns could not be dispelled. Regardless, the Bill was passed and has provided the legal basis for ongoing restrictions including both regional and nationwide lockdowns to protect against an outbreak of the delta variant.⁵⁰ The Act was the first bill passed in response to Covid-19 that did not have the support of all parties in Parliament.⁵¹

⁴² Hon David Parker “New Zealand’s Covid-19 response - legal underpinnings and legal privilege” (press release, 8 May 2020).

⁴³ Collette Devlin “Coronavirus: New COVID-19 law gives police power to conduct warrantless searches amid civil liberty concerns” *Stuff* (Auckland, 14 May 2020); and “Level 2 enforcement law passed too quickly: Human Rights Commissioner” *Radio New Zealand National* (online ed, Wellington, 16 May 2020).

⁴⁴ (12 May 2020) 745 NZPD; and (13 May 2020) 745 NZPD.

⁴⁵ Inquiry into the operation of the COVID-19 Public Health Response Act 2020 Report of the Finance and Expenditure Committee (July 2020) at 4.

⁴⁶ Claudia Geiringer “The COVID-19 Public Health Response Act 2020” (2020) NZLJ at 159.

⁴⁷ “Timeline: The year of Covid-19 in New Zealand” *Radio New Zealand National* (online ed, New Zealand, 24 March 2020); and Linda Dalglish “Petition to the New Zealand Parliament: We do not want the COVID-19 Public Health Response Act 2020” (2 June 2020).

⁴⁸ Claudia Geiringer, above n 46, at 159.

⁴⁹ (12 May 2020) 745 NZPD; (13 May 2020) 745 NZPD; Collette Devlin “Coronavirus: New COVID-19 law gives police power to conduct warrantless searches amid civil liberty concerns” *Stuff* (online ed, Auckland, 14 May 2020); Andrew Geddis “The level two law is necessary- and full of flaws” *The Spinoff* (online ed, New Zealand, 14 May 2020); “Law professor scrutinises Public Health Bill” *Radio New Zealand National* (online ed, Wellington, 13 May 2020); and Collette Devlin “Government tweaks COVID-19 level 2 law after marae controversy” *Stuff* (online ed, New Zealand, 13 May 2020).

⁵⁰ See eg Covid-19 Public Health Response (Alert Level 3 and 2) Order 2020; COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021; Ministry of Health “COVID-19: Current cases” (Last updated 17 August 2021) <health.govt.nz>; and Ministry of Health “COVID-19: News and media updates” (13 October 2020) <health.govt.nz>.

⁵¹ Amelia Wade “Covid19 coronavirus: Controversial bill passed to enforce alert level 2 powers” *New Zealand Herald* (online ed, Auckland, 13 May 2020).

Over a year later, discontent about the way the Bill passed remains and has been the subject of academic commentary, media scrutiny and even citizen petitions.⁵² The Act demonstrates the harms to the rule of law, democratic ideals and principles of good law-making posed even by the legitimate use of expedited law-making in response to emergencies.

III Widespread use of expedited law-making: Widespread harm

The way the Covid-19 Act was passed and the concerns raised in response was not an isolated incident. Secondary legislation was used to implement most public health measures, however, central features of the government's response, such as new welfare supports, were implemented through the creation of new primary legislation.⁵³

Data from the start of the pandemic, 25 March 2020 (when a state of emergency and a pandemic notice were first issued) until 10 September 2021 (the most recent sitting block at the time of writing), shows that nearly all bills related to Covid-19 went through an expedited process.⁵⁴ This was so even where there were no restrictions in place.⁵⁵ A lack of restrictions indicates there was no outbreak or active public health threat in the community that required an urgent response.⁵⁶ The data also shows that these bills passed through a highly expedited process. These bills often skipped the select committee a core

⁵² Gayleen Putt “Petition to the New Zealand Parliament: It's time to repeal the Covid-19 Public Health Response Act 2020” (1 June 2021); Claudia Geiringer, above n 46; and Mark Quinlivan “COVID-19 law 'much better' than first lockdown, Government has 'raft of power' – expert” *Newshub* (online ed, New Zealand, 13 August 2020).

⁵³ See eg Covid-19 Response (Taxation and Social Assistance Urgent Measures) Bill; Covid-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; Immigration (Covid-19 Response) Amendment Bill; and Covid-19 Recovery (Fast-track Consenting) Bill.

⁵⁴ See appendix for a table outlining the type of expedition seen at each stage of each bill.

Note: The statistics below do not include government finance bills such as budget or imprest and supply bills where these were used among other things to confirm/supply funding for COVID related initiatives. This is because these are general government administration bills that would have occurred despite the emergency and the spending confirmed through these bills had their policy decision implemented through separate legislation, for example, the Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill.

Data was collected by recording every bill that received Royal Assent during this period. Hansard for each stage of the bill was then read and it was recorded whether an urgency motion was accorded for that stage of the legislative process, whether leave of the House was successfully sought to expedite that stage of the legislative process or whether a determination of the business committee expedited that stage of the legislative process. A bill is classed as a Covid-19 related bill if its primary function was related to the Covid-19 response, for example, related to public health measures, managed isolation and quarantine, economic recovery or vaccination to name a few.

⁵⁵ See eg Medicines Amendment Bill; and COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill.

⁵⁶ Unite Against Covid-19 “About the Alert System” <covid19.govt.nz>.

scrutiny and democratic mechanism.⁵⁷ Additionally, these bills frequently had no debate at multiple readings of the bill and sometimes skipped or had a highly abridged Committee of the whole House.⁵⁸ Some bills came into force the same day or within a few days of introduction, this indicates a high degree of haste.⁵⁹ Finally, bills passed at the start of the crisis were done through leave of the House, indicating consent across the House for the process. However, bills passed later instead relied on urgency with opposition members voting against the bill, often on procedural grounds, demonstrating a lack of support for the expedited process.⁶⁰

Parliamentary proceedings were disrupted from 26 March – 28 April. Accordingly, no bills were passed in this period.⁶¹ On 28 April, when New Zealand moved to alert level 3 Parliament resumed but with social distancing, reduced numbers and proxy voting.⁶² Parliament was again disrupted from 17 August 2021 – 23 August 2021 as a nationwide lockdown was in force, it also sat under level 3 protocols from 24 August 2021 – 7 September 2021. By this stage of the pandemic most necessary laws were in place and several outbreaks had been dealt with, no state of emergency was declared reflecting the different nature of these restrictions. For the period 25 March 2020 – 13 May 2020 when a state of emergency was in force only seven bills were passed.⁶³ Two of these were routine bills, the Imprest Supply Bill and an Appropriation Confirmation and Validation Bill (for 2018/2019).⁶⁴ The other five were related to Covid-19.⁶⁵ All of the five Covid-19 bills had all stages expedited, skipping the select committee and Committee of the Whole House and came into force the same day they were introduced.⁶⁶

⁵⁷ See appendix.

⁵⁸ See appendix.

⁵⁹ See appendix.

⁶⁰ See appendix.

⁶¹ (25 March 2020) 745 NZPD at 17322.

⁶² Dean Knight, above n 33, at [48].

⁶³ COVID-19 Public Health Response Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill; Immigration (COVID-19 Response) Amendment Bill; and COVID-19 Response (Further Management Measures) Legislation Bill.

⁶⁴ Imprest Supply (Third for 2019/20) Bill; and Appropriation (2018/19 Confirmation and Validation) Bill.

⁶⁵ COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; and COVID-19 Public Health Response Bill and the COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill.

⁶⁶ COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; COVID-19 Public Health Response Bill; and the COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill.

As noted, these bills were expedited using leave of the House, which means with permission of the House.⁶⁷ Where that permission is ascertained procedural rules laid down by the standing orders may be set aside.⁶⁸ Leave of the House is an alternative to using a formal motion such as urgency.⁶⁹ In emergencies, where many other scrutiny and accountability mechanisms are surpassed, using leave of the House to demonstrate consensus for expedited law-making may be a preference. However, the diminishment of scrutiny, democratic input and other principles of good law-making is the same regardless of which tool is used to expedite the process.⁷⁰

From 25 March 2020 – 10 September 2021, 82 bills passed through Parliament.⁷¹ 17 of these were related to Covid-19.⁷² Of these bills, 13 had the first reading expedited, 12 skipped the select committee stage, 13 had the second reading expedited, 12 had the Committee of the whole House expedited and 12 had all stages expedited.⁷³ The majority of these were expedited relying on urgency. Consensus for expedited law-making was hard to gain once the country was out of the height of the crisis. Urgency can be accorded by a government motion and does not require consensus. Urgency assists a piece of legislation to pass through the legislative process in an expedited manner by; extending sitting hours of the House,⁷⁴ prioritising the matter that has been accorded urgency,⁷⁵ bypassing usual restrictions on how fast a bill can progress from one stage of the legislative process to the next⁷⁶ and finally, bypassing the select committee process.⁷⁷

This data shows that expedited law-making was heavily relied on during Covid-19. Therefore, the harms that occur when expedited law-making is used are also widely present.

⁶⁷ Standing Orders of the House of Representatives 2020, SO 3(1); and David McGee, above n 10.

⁶⁸ David McGee, above n 10.

⁶⁹ At 15.

⁷⁰ At 15.

⁷¹ See appendix.

⁷² See appendix.

⁷³ See appendix.

⁷⁴ Standing Orders of the House of Representatives 2020, SO 58 (1).

⁷⁵ Standing Orders of the House of Representatives 2020, SO 59(1).

⁷⁶ Standing Orders of the House of Representatives 2020, SO 293(1)(a).

⁷⁷ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 25; and Standing Orders of the House of Representatives 2020, SO 296(1).

Table 1:

	From 25 March 2020 until 13 May 2020 when a state of emergency and pandemic notice was in force and New Zealand was in a nationwide lockdown.	From 25 March 2020, when a state of emergency was declared, and a pandemic notice was issued, and New Zealand was in a nationwide lockdown until 10 September 2021 (the most recent sitting block before the conclusion of writing).
Total number of bills passed	7	83
Number of bills related to Covid-19	5	17
Number of general bills	2	54
Number of Covid-19 bills that had first reading expedited	5 total all through leave of the House	13 total 10 under urgency 3 through leave of the House
Number of Covid-19 bills that skipped select committee	5 total all through leave of the House	12 total 9 under urgency 3 through leave of the House
Number of Covid-19 bills that had second reading expedited	5 total all through leave of the House	13 total 10 under urgency 3 through leave of the House
Number of Covid-19 bills that had the Committee of the Whole House expedited	5 total all through leave of the House	12 total 9 under urgency 3 through leave of the House
Number of Covid-19 bills that had third reading expedited	5 total all through leave of the House	12 total 9 under urgency 3 through leave of the House
Number of Covid-19 bills that had all stages expedited	5 total all through leave of the House	12 total 9 had all stages under urgency 3 had all stages expedited through leave of the House

IV Analysing harms to democracy from expedited law-making against principles of good law-making

A Introduction

The preceding analysis has established that harms to democratic, civil, and political rights, in general terms, are manifesting in New Zealand's democracy. Geiringer et al provide a bespoke framework developed for assessing harms caused by expedited law-making.⁷⁸ The framework consists of 10 principles of good law-making.⁷⁹ The principles are; open debate, scrutiny, citizen participation, transparency, quality legislation, fundamental rights, stable procedural rules, fostering respect, the right to govern and the quick enactment of legislation in actual emergencies.⁸⁰ These principles can be applied to expedited law-making during Covid-19 to further evaluate the nature and extent of the harms caused. An evaluation of such harms lays the foundation for the succeeding section in which practices that should be adopted to address derogation from these principles of good law-making are advanced.

B A precursor: Te Tiriti o Waitangi/Treaty of Waitangi

While Geiringer et al's framework takes account of constitutional principles and rights under principle six, this is interpreted narrowly focusing on the Bill of Rights and rule of law.⁸¹ The framework does not explicitly provide for te Tiriti o Waitangi/Treaty of Waitangi (te Tiriti), the founding document of New Zealand or its relevance to law-making. Whether law-making infringes or upholds obligations under te Tiriti should explicitly be considered as a principle of good law-making. This is because te Tiriti gives the state authority to govern.⁸² If that authority “is not exercised in accordance with te Tiriti—it is constitutionally illegal and illegitimate.”⁸³ To reflect this, compliance with te Tiriti obligations is assessed as a precursor to the framework, as a foundational entry point for good law-making.

⁷⁸ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2.

⁷⁹ At 15 – 16.

⁸⁰ At 16.

⁸¹ At 18.

⁸² Ani Makire “Tikanga as the first law of New Zealand” (2007) 10 Yearbook of New Zealand Jurisprudence 24.

⁸³ Claire Charters “The relevance of Te Tiriti O Waitangi in the COVID-19 pandemic” 9 MAI New Zealand Journal of Indigenous Scholarship 17 at 18.

Under te Tiriti the state has the right to govern while Māori retain tino rangatiratanga.⁸⁴ Māori exercised tino rangatiratanga in response to the pandemic in various ways such as, to restrict access to communities, provide flu vaccination and personal protective equipment.⁸⁵ In some instances, those exercising Crown authority and those exercising Māori authority worked together. For example, Police and iwi in some locations collaborated to enforce restrictions through vehicle checkpoints.⁸⁶ This was not without challenge. Many questioned the legitimacy and purpose of iwi led checkpoints despite legal experts agreeing they were both lawful and justified.⁸⁷

It is noted by Māori academics that te Tiriti obligations could have been better recognised. Specifically, co-governance and an equitable approach could have given effect to the special interest of Māori.⁸⁸ For example, the Covid-19 Recovery (Fast-track Consenting) Act 2020 passed under urgency expedites Resource Management Act requirements in an attempt to stimulate economic recovery. It is well recognised that in te ao Māori the cultural significance of rivers, mountains and other geographical features is stronger than in te ao Pākehā.⁸⁹ Such taonga are also protected under te Tiriti.⁹⁰ The impact of such legislation on Māori is distinguishable. Therefore, co-governance and equity are needed.⁹¹ It is generally accepted that this was not present and therefore the urgent law-making process did not uphold treaty obligations in regard to protecting taonga.⁹² The same can be said about the Covid-19 Act. The controversial nature of warrantless marae entry has already been discussed.⁹³ Māori academics note that although some Māori were approached to comment on an exposure draft of the bill they “were given only hours to comment, and some important contributions were rejected or ignored.”⁹⁴ In light of this, “greater and more influential Māori involvement in the development of the Covid-19 Act” was needed.⁹⁵ Other scholars have noted that such failures not only breach constitutional obligations but

⁸⁴ Waitangi Tribunal *The report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 22.

⁸⁵ Claire Charters, above n 83, at 19.

⁸⁶ At 19.

⁸⁷ Kerensa Johnston “Whos land is it anyway?” *E-tangata* (New Zealand, online ed, 19 April 2020); Dr Rawiri Taonui “Checkpoints- a Pākehā or Māori problem?” *Waatea News* (New Zealand, online ed, 24 April 2020); and Max Harris “Community checkpoints are an important and lawful part of NZ’s Covid response” University of Auckland Blog (28 May 2020) <auckland.ac.nz>.

⁸⁸ Claire Charters, above n 83, at 18.

⁸⁹ Waitangi Tribunal *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 3.2.1 and 3.2.3.

⁹⁰ At 3.1.

⁹¹ Claire Charters, above n 83, at 18.

⁹² At 19.

⁹³ See eg (12 May 2020) 745 NZPD at 17678.

⁹⁴ Claire Charters, above n 83, at 18.

⁹⁵ At 18.

provide practical anomalies, failing to achieve the purpose of the law.⁹⁶ Specifically, the law failed to “recognise the role of Māori authorities located in communities that the state is unable or at least poorly equipped to serve on its own.”⁹⁷

C Analysis against the 10 principles of good law-making

1 Informed and open debate

The first principle of the framework is that the legislature should allow time and opportunity for informed and open policy deliberation.⁹⁸ The Privy Council has said, “political debate is at the core of representative democracy.”⁹⁹ Elected representatives make laws on behalf of citizens so must articulate arguments for and against bills in their place and provide reasons for their actions.¹⁰⁰ Debate outside the House is also important. Experts can provide a view and understanding of the law not readily accessible to the public, this can produce informed media commentary.¹⁰¹ Such commentary, in turn, influences the public debate.¹⁰² The public then engage with members, and it enriches debate within the House.¹⁰³ For most of the laws passed during the Covid-19 crisis, there was less than a day for informed and open debate.¹⁰⁴

During the height of the crisis (March 2020 – May 2020) it was common to have one member of each party, usually, the relevant spokesperson, to speak briefly at the third reading of a bill.¹⁰⁵ For more substantial bills such as the Covid-19 Public Health Bill, there was more debate on the first, second and third reading from across the floor.¹⁰⁶ This allowed for even greater articulation of arguments for and against the Bill.¹⁰⁷ But, by and large, debate was significantly diminished. This demonstrates the impact of expedited law-

⁹⁶ Rhys Jones “Why equity for Māori must be prioritised during the COVID-19 response” *The Spinoff* (online ed, New Zealand, 15 March 2020); and Elana Curtis “An open letter to the government from a Māori public health specialist” *E-tangata* (online ed, New Zealand, 5 April 2020).

⁹⁷ Janet McLean, Arie Rosen, Nicole Roughtan and Jesse Wall, above n 15, at 209; and Kerensa Johnston, above n 87.

⁹⁸ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 16.

⁹⁹ *Lange v Atkinson* [1999] UKPC 46 at [6]; and *Lange v Atkinson* [2000] 1 NZLR 257 at 260.

¹⁰⁰ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 15.

¹⁰¹ At 16

¹⁰² At 16.

¹⁰³ At 16.

¹⁰⁴ (25 March 2020) 745 NZPD; 12 May 745 NZPD; and (13 May 2020) 745 NZPD.

¹⁰⁵ (25 March 2020) 745 NZPD at 17286 – 17307; (12 May 2020) 745 NZPD at 17609 – 17655; and (12 May 2020, continued on Wednesday 13 May 2020) 745 NZPD at 17659 – 17697.

¹⁰⁶ (12 May 2020) 745 NZPD at 17609 – 17655; and (12 May 2020, continued on Wednesday 13 May 2020) 745 NZPD at 17659 – 17697.

¹⁰⁷ (12 May 2020) 745 NZPD at 17609 – 17655; and (12 May 2020, continued on Wednesday 13 May 2020) 745 NZPD at 17659 – 17697.

making on citizen's rights to be represented in Parliament and have arguments for and against bills be made in their place.

Outside of the House, academics frequently commented on the government's Covid-19 response.¹⁰⁸ For example, early in the pandemic academics initiated and contributed to debate about the legality of the lockdown and the suitability of the Health Act for imposing nationwide public health measures.¹⁰⁹ This debate contributed to the government's desire to create bespoke legislation in the form of the Covid-19 Act.¹¹⁰ In the 24 hours following the passing of the Covid-19 Act, there were several pieces of academic commentary published in the media.¹¹¹ Some academics were given a very limited opportunity (overnight from 11 May before the Bill was introduced on the 12 May) to debate and provide feedback on an exposure draft of the Bill.¹¹² This resulted in some changes, the most significant being the introduction of a sunset clause.¹¹³ Given the reactive nature of such contributions, they are best described not as debate that helps shape the policy response but as accountability functions. In this regard, expedited law-making prevented the debate on bills from being informed by experts, which increases scrutiny. Expedition also removed the opportunity to increase social license by having clear explanations of contentious matters, flaws, benefits and protections in the law.

The media played a significant role in consolidating and facilitating the debates and views of different communities, members and experts. Press freedom was not restricted and journalists were classed as essential workers even under the most severe restrictions.¹¹⁴ Daily media updates of the number of cases and their locality are given, even over a year after the pandemic began.¹¹⁵ In the height of the emergency daily media briefings were given by the Prime Minister and Director-General of Health. Where appropriate, other

¹⁰⁸ Heather Du Plessi-Allan "Legal powers around lockdown rules may not stand up in court" *Newstalk ZB* (New Zealand, 7 April 2020); "Law professor scrutinises Public Health Bill" *Radio New Zealand National* (online ed, Wellington, 13 May 2020); and "Public law expert talks about inquiry into COVID patients' details" *Radio New Zealand National* (online ed, Wellington, 30 July 2020).

¹⁰⁹ Andrew Geddis and Claudia Geiringer, above n 37; and Dean R Knight and Geoff McLay; above n 37.

¹¹⁰ Hon David Parker, above n 42.

¹¹¹ Collette Devlin "Coronavirus: New COVID-19 law gives police power to conduct warrantless searches amid civil liberty concerns" *Stuff* (online ed, Auckland, 14 May 2020); "Level 2 enforcement law passed too quickly: Human Rights Commissioner" *Radio New Zealand National* (online ed, Wellington, 16 May 2020); Alexander Gillespie "Are New Zealand's new COVID-19 laws and powers really a step towards a police state?" *The Conversation* (online ed, New Zealand, 19 May 2020); Andrew Geddis "The level two law is necessary- and full of flaws" *The Spinoff* (online ed, New Zealand, 14 May 2020); and "Law professor scrutinises Public Health Bill" *Radio New Zealand National* (online ed, Wellington, 13 May 2020).

¹¹² (13 May 2020) 745 NZPD at 17743 and 17752.

¹¹³ At 17752.

¹¹⁴ Health Act (COVID-19 Alert Level 3) Order 2020 (24 April 2020); and Dean Knight, above n 33, at [67].

¹¹⁵ Ministry of Health "COVID-19: News and media updates" (13 October 2020) <health.govt.nz>.

senior public servants, other ministers or officials participated to provide updates on specific matters. Although this meant the media had access to information, there was limited opportunity and time to debate such information. Throughout 2020, the Conversation, a platform where academics write short form pieces designed for consumption by the general public, published an average of nearly eight Covid-19 related articles a week.¹¹⁶ The majority of these were posted in March – May during the height of the pandemic.¹¹⁷ The national media outlet, Radio New Zealand National posted on average just over 200 Covid-19 articles per month during 2021.¹¹⁸ While this debate can inform the public and prompt citizens to engage in democratic processes if there are no pathways to do so the debate is of no utility. Similarly, if it prompts citizens to contact members but they are then unable to speak on the bill in the House, the debate within the media and electorate is of little benefit.

With information technology and social media, open and informed policy deliberation can occur faster and involve members directly.¹¹⁹ These methods were used effectively by the electorate to participate in open and informed policy debate. One opposition member noted during the third reading of the Covid-19 Public Health Bill:¹²⁰

Judging by the deluge of emails that I have received—text messages, phone calls to my electorate office, posts on social media, and so on—I believe that the Government has badly misjudged public sentiment.

Other members noted that they had received messages and emails from constituents, and this informed their contributions to the law-making process. For example, Hon Tim Macindoe noted his support to ease restrictions on funerals tangihanga, weddings and other religious services “because I have been inundated in the last 24 hours by messages of concern by people throughout New Zealand”.¹²¹ Additionally, Hon Marama Davidson supported amendments to the inclusion of marae because “there has been public outrage” she also wanted to put that outrage “on record” and noted public influence on the changes occurring.¹²² The debate within the House that facilitated this democratic involvement and gave debate within the electorate some utility was largely due to the decision not to expedite

¹¹⁶ “Edition: New Zealand” The Conversation <theconversation.com/nz>.

¹¹⁷ “Edition: New Zealand” The Conversation <theconversation.com/nz>.

¹¹⁸ “COVID-19 coverage” *Radio New Zealand National* (onlined ed, New Zealand).

¹¹⁹ Andy Williamson “The Effect of Digital Media on MPs Communication with Constituents” (2009) 62 *Parliamentary Affairs*; and David McGee, above n 10, at 396.

¹²⁰ (12 May 2020) 745 NZPD at 17699.

¹²¹ At 17679.

¹²² At 17678.

the Committee of the whole House stage and temporary changes to allow more calls at that stage. Such decisions are not guaranteed and this debate in the House could easily be expedited in different circumstances.

Ultimately, there was a lot of debate that demonstrates interest from civil society, however, there was not enough time or opportunity for that debate to flourish. Some ad hoc mechanisms such as increased calls at the Committee of the whole House stage supported debate. Overall, these mechanisms were weak which is reflected in the limited social licence and influence on the law resulting from informed and open debate.

2 Time and opportunity for scrutiny

The second principle is that the legislative process should allow sufficient time and opportunity for the adequate scrutiny of bills.¹²³ It is a core function of the House to scrutinise the government. To realise that scrutiny opposition members need to be given the opportunity to ask questions, examine bills and listen to experts and citizens.¹²⁴ Scrutiny is further supported by select committees and an orderly progression of bills.¹²⁵ Scrutiny is essential to democratic rights as it can draw attention to and advocate for change of any proposed legislation that may adversely affect citizens. It can also identify and amend flaws improving the quality of legislation. Finally, scrutiny provides an opportunity to debate and dispel concerns and gain social consent.

During the Covid-19 pandemic, there was very limited opportunity for opposition members to ask questions or examine bills.¹²⁶ Generally, one representative of each party was able to speak briefly.¹²⁷ However, greater scrutiny was afforded for more substantial bills such as the Covid-19 Public Health Bill. The benefit of this was acknowledged by the Minister of Justice:¹²⁸

It has been a very instructive debate through all the stages of the House in the last day or so. I thank all members, and particularly the members of the Opposition who were right to vigorously scrutinise and contest and challenge the legislation the way that they did.

¹²³ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 16.

¹²⁴ At 16.

¹²⁵ At 16.

¹²⁶ Elena Grigilo “Parliamentary oversight under the COVID-19 emergency: striving against executive dominance” 8 *The Theory and Practice of Legislation* 49 at 49.

¹²⁷ (25 March 2020) 745 NZPD at 17286 – 17307.

¹²⁸ (12 May 2020) 745 NZPD at 17697.

Of the 17 laws related to Covid-19, 12 skipped the select committee stage, a key scrutiny mechanism.¹²⁹ Other mechanisms were put in place in attempts to reinstate this scrutiny to some extent. The Epidemic Response Committee and during the second outbreak special virtual Covid select committees allowed for discussion of legislative settings, scrutiny of government action and the ability to listen to experts.¹³⁰

The need to have increased dialogue with ministers and facilitate more “conversational scrutiny”¹³¹ was recognised by all parties. In response, all parties agreed to suspend limits on calls during the committee stage so that there could be increased questioning of the minister responsible for a bill.¹³²

Scrutiny mechanisms were significantly abrogated. For most bills, there was no select committee and highly expedited debate. This was increased for controversial bills but often at the Committee of the whole House stage, so its benefits were limited. This stage is after most public debate has been had, just before the law comes into effect and where there is limited ability to amend the law in response to scrutiny. The dereliction of scrutiny has significant consequences, for example passing the wrong law, which will be discussed in greater detail under principle five.¹³³

3 *Citizen participation*

The third principle is that citizens should be able to participate in the legislative process, both directly and indirectly. Political participation is also central to international human rights norms.¹³⁴ Representative democracy is premised on the consent of the majority to be

¹²⁹ Medicines Amendment Bill; COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill; COVID-19 Public Health Response Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill (No 2); COVID-19 Public Health Response Amendment Bill; Social Security (COVID-19 Income Relief Payment to be Income) Amendment Bill; Remuneration Authority (COVID-19 Measures) Amendment Bill; COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill; COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; and COVID-19 Public Health Response Bill; and David McGee, above n 10 at 280 – 354.

¹³⁰ Dean Knight, above n 33, at [43]; Gabor Hellyer “Assessing Parliament’s Response to the COVID-19 Pandemic” 17 *Policy Quarterly* 20 at 21; and (25 March 2020) 745 *NZPD* at 17316.

¹³¹ David Wilson “How the New Zealand Parliament responded” in *Parliaments and the Pandemic* (Study of Parliament Group, published online, 2021) 187 at 191 – 193.

¹³² At 191.

¹³³ Thomas Coughlan “Parliament passes the wrong law in an afternoon of urgent law-making” *Stuff* (online ed, New Zealand, 1 May 2020); and David Wilson, above n 131, at 191.

¹³⁴ Henry Steiner, above n 9.

governed by a few.¹³⁵ The ability of elected officials to represent citizens requires them to be aware of their views and concerns through citizen participation. Citizen participation can be divided into two categories; indirect participation through political parties that represent diverse views or direct participation for minority groups who are not fairly represented by elected parties.¹³⁶

Citizen participation, in all forms, was sweepingly curtailed by expedited law-making in the Covid-19 crisis.¹³⁷ For early bills, there was no chance for citizen participation, given the height of the crisis and the urgency required this was not heavily criticised. Following the height of the crisis in mid-May when Parliament was able to resume but a state of emergency was still in force the government was heavily criticised for its lack of citizen participation.¹³⁸ Beyond this, once the state of emergency ceased a further 17 Covid-19 related bills were passed through an expedited legislative process with no formal mechanisms for citizen participation.¹³⁹

Citizens could participate by directly contacting their local member, however, expedited debate in the House meant the influence of individual members was limited.

Limited public participation was facilitated through the Finance and Expenditure Committee's inquiry into the operation of the Covid-19 Act.¹⁴⁰ The committee received 1,342 written submissions.¹⁴¹ This inquiry was, however, retrospective and while the law was passing citizens felt like they had no voice. The lack of citizen participation diminished

¹³⁵ John Locke, above n 3.

¹³⁶ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 17.

¹³⁷ Elena Grigilo "Parliamentary oversight under the COVID-19 emergency: striving against executive dominance" 8 *The Theory and Practice of Legislation* 49; and Dean Knight, above n 33, at [21].

¹³⁸ Collette Devlin, above n 111.

¹³⁹ COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; COVID-19 Public Health Response Bill; Medicines Amendment Bill; COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; Immigration (COVID-19 Response) Amendment Bill; Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill; COVID-19 Public Health Response Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill (No 2); COVID-19 Public Health Response Amendment Bill; COVID-19 Recovery (Fast-track Consenting) Bill; Social Security (COVID-19 Income Relief Payment to be Income) Amendment Bill; Remuneration Authority (COVID-19 Measures) Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill; Immigration (COVID-19 Response) Amendment Bill; and COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill

¹⁴⁰ COVID-19 Public Health Response Bill (select committee report – inquiry of the Finance and Expenditure committee).

¹⁴¹ Dean R Knight "Lockdown Bubbles through Lawyers of Law, Discretion and Nudges- New Zealand" (7 April 2020) *Verfassungsblog* at 4.

social licence. The lack of citizen participation and the harms this creates were exacerbated by the law containing powers to significantly infringe civil rights.

The benefits of citizen participation can be seen clearly in the positive changes made to the Covid-19 Act in response to recommendations of legal academics and special interest groups.¹⁴² The government adopted several features such as a sunset clause and post-enactment review.¹⁴³ However, only a select few were afforded this opportunity and those that were had such little time that they could not engage with their communities diminishing the value of their input.¹⁴⁴

Citizen initiated participation was seen through citizens commenting on social media posts, contacting members and creating petitions.¹⁴⁵ Members noted the number of phone calls, emails and social media interactions they had and echoed those views in the House.¹⁴⁶ As a result, some changes were made to reflect citizens' concerns.¹⁴⁷ So, by allowing members to speak on bills, especially a greater number of members the House supports the views of citizens, expressed in this way, being brought into the House and its law-making however this was very limited.

Although democratic input is very hard to facilitate while responding to emergencies it is essential to the rule of law, representative democracy and upholding civil and political rights. In order to represent the views of citizens elected representatives need to be aware of what those views are. Where citizen participation is not facilitated and citizens do not feel represented, the consent upon which representative democracy is premised begins to erode. As well as eroding the consent upon which the legitimacy of Parliament is based a lack of democratic input can undermine the social license of a particular law resulting in protest or a lack of compliance, as seen in response to some of the bills passed during the Covid-19 crisis.¹⁴⁸ The realisation of these harms demonstrates that citizen participation was not sufficient.

¹⁴² (12 May 2020) 745 NZPD at 17697.

¹⁴³ Zane Small "COVID-19 law allowing warrantless police searches faces 'post-enactment review' *Newshub* (online ed, Auckland, 15 May 2020); and (12 May 2020) 745 NZPD at 17697.

¹⁴⁴ (12 May 2020) 745 NZPD at 17697.

¹⁴⁵ At 17699.

¹⁴⁶ At 17688.

¹⁴⁷ Collette Devlin "Government tweaks COVID-19 level 2 law after marae controversy" *Stuff* (online ed, New Zealand, 13 May 2020).

¹⁴⁸ Melanie Earley "Coronavirus: More than a thousand turn out for anti-lockdown rally in Auckland" *Stuff* (online ed, New Zealand, 12 September 2020).

4 Transparency

The fourth principle is that Parliament ought to operate in a transparent manner.¹⁴⁹ Transparency is primarily supported by bills passing through the House at a measured pace, the opportunity for submissions and media reporting.¹⁵⁰

At the most basic level, all pieces of legislation produced in response to Covid-19 are collated and publicly available through the government's Covid-19 website.¹⁵¹ Additionally, the Hansard and any other relevant materials are easily accessible on the New Zealand Parliament website.¹⁵²

In New Zealand, proactive release has become commonplace, especially regarding executive decision making.¹⁵³ Since the start of 2019 Cabinet papers have been proactively released no later than 30 business days after they were lodged.¹⁵⁴ This gives New Zealand “a degree of transparency most other countries would never contemplate.”¹⁵⁵ However, the government's approach to proactive release has not been without criticism. As the country emerged from the height of the crisis, the government was criticized by journalists for the time and scale of releases when it released a large number of documents on a Friday evening without any indication. Journalists argued that this approach hinders the transparency afforded by proactive release in several ways. First, because it was not foreshadowed “many media organisations had to scramble staff to dive into the pile of documents.”¹⁵⁶ The time of the release, a Friday evening, was when media audiences were low and gave journalists very little time to engage with ministers via their offices before the weekend.¹⁵⁷ The Prime Minister acknowledged the criticism and agreed to release documents in the morning and with notice.¹⁵⁸

¹⁴⁹ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 17.

¹⁵⁰ At 17 – 18.

¹⁵¹ Unite Against COVID-19 “Legislation and key documents” < covid19.govt.nz >.

¹⁵² New Zealand Parliament “Read Hansard Reports” < www.Parliament.nz >; and New Zealand Parliament “Bills and Laws” < www.Parliament.nz >.

¹⁵³ Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at [12.17] – [12.43].

¹⁵⁴ Cabinet Office Circular “Proactive Release of Cabinet Material: Updated Requirements” (23 October 2019) CO(18)4 at [2].

¹⁵⁵ Thomas Coughlan “Explainer: Why the Government's coronavirus document dump matters” *Stuff* (online ed, New Zealand, 11 May 2020).

¹⁵⁶ Thomas Coughlan, above n 155; and Jason Walls and Derek Cheng “Live- Government dumps thousands of pages of official Covid papers” *New Zealand Herald* (online ed, New Zealand, 8 May 2020).

¹⁵⁷ Thomas Coughlan, above n 155.

¹⁵⁸ Thomas Coughlan, above n 155.

The government's proactive release of all Covid-19 related documents temporarily ended with the last release on 1 April 2021 and then "returned to pre-covid processes for proactive releases".¹⁵⁹ Meaning, that individuals need to make Official Information Act requests to individual departments.¹⁶⁰ This reduces transparency by creating delays, putting the onus on citizens or media to request documents and limiting the information that may be released as a result of a culture of minimum compliance.¹⁶¹ Despite New Zealand being out of the height of the crisis at this time the government still subsequently passed urgent legislation in relation to vaccine approval and border measures for which transparency is still required.¹⁶² Proactive release was reinstated through the government's Covid-19 website during a second nationwide outbreak in August 2021. It is not clear if once alert level 3 and 4 restrictions ease proactive release will end or continue.

Although transparency was present throughout the pandemic, it could have been improved to ensure the benefits were maintained and not undermined by expedited law-making.

5 *High quality legislation*

The fifth principle is that Parliament ought to strive to produce high quality legislation.¹⁶³ As Geiringer et al outline:¹⁶⁴

The quality of legislation can be detrimentally affected by: (a) inadequate and abbreviated pre-introduction scrutiny; (b) insufficient time for members to give bills adequate consideration; or (c) insufficient time for the public, including expert submitters, to provide advice, feedback and new ideas.

These features, specifically, insufficient time for consideration by members and for public input have been explained in reference to earlier principles and will not be revisited in any detail here, but their relevance is noted. More relevant here is mapping the impact of such deficiencies in reducing the quality of legislation.

¹⁵⁹ Unite Against COVID-19 "Legislation and key documents – proactive release" < covid19.govt.nz >.

¹⁶⁰ Unite Against COVID-19 "Legislation and key documents – proactive release" < covid19.govt.nz >.

¹⁶¹ Philip Joseph *Joseph on Constitutional and Administrative Law* (4th ed, Thomson Reuters, New Zealand, 2014).

¹⁶² COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; and Medicines Amendment Bill.

¹⁶³ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 18.

¹⁶⁴ At 18.

On 30 April 2020 the Covid-19 Response (Taxation and Other Regulatory Urgent Measures) Bill passed under urgency.¹⁶⁵ The Bill that was passed differed from the Bill circulated to all parties prior to the debate.¹⁶⁶ It included the establishment of a small business loan scheme.¹⁶⁷ Only one member noted the difference in the bills during debate at its third reading.¹⁶⁸ The mistake appears to have been a miscommunication between law drafters and printers.¹⁶⁹ Despite its cause, the mistake gathered attention in the media. Specifically, it was noted that such an instance undermined trust and confidence in the House's scrutiny mechanisms.¹⁷⁰ If citizens do not feel like the House is providing appropriate scrutiny, the utility and authority of such scrutiny mechanisms may be called into question, and citizens may seek to rely more on other measures such as protest. More significantly if such scrutiny mechanisms fail to the extent that citizens do not feel that Parliament is passing good laws, they may begin to revoke the consent upon which representative democracy is based.

Finally, in late 2020, the government passed under urgency, the Covid-19 Public Health Response Amendment Bill. This allowed the Minister to make an order in council to charge fees for Managed Isolation and Quarantine at the border.¹⁷¹ In May 2021 the government realised that there was an error in the order promulgated and it had illegally charged Australian citizens.¹⁷² Rather than accepting their mistake and dismissing the small financial loss, the government instead under urgency passed retrospective legislation to validate the charges.¹⁷³ This breaches a fundamental principle of the rule of law, that law should not be retrospective.¹⁷⁴ The purpose of the law is to regulate human behaviour through clear rules. "To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose".¹⁷⁵ Citizens cannot regulate their behaviour to avoid the negative consequences of breaching the law. Retrospective law-making then is unjust, ineffective and can undermine the legitimacy of law, prevent compliance or be of little utility.

¹⁶⁵ (30 April 2020) 745 NZPD at 17429.

¹⁶⁶ David Wilson, above n 131, at 191.

¹⁶⁷ At 191.

¹⁶⁸ At 191.

¹⁶⁹ At 191.

¹⁷⁰ Thomas Coughlan, above n 155; and David Wilson, above n 131, at 191.

¹⁷¹ COVID-19 Public Health Response Amendment Act, s 33A.

¹⁷² (20 May 2020) 752 NZPD.

¹⁷³ COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine charges) Amendment Bill.

¹⁷⁴ Lon Fuller *The Morality of Law: Revised Edition* (Yale University Press, London, 1963).

¹⁷⁵ At 53.

Expedited law-making significantly reduced the quality of legislation. The legislation produced breached fundamental principles of law-making, was the wrong bill or contained flaws that had to be addressed subsequently. This reflects a lack of scrutiny mechanisms. Low-quality legislation is not only ineffective but also reduces trust in Parliament and its processes. Breaching fundamental principles of law-making such as retrospectivity exacerbates the erosion of such trust. A lack of trust in Parliament may lead to social dissonance, social disruption and in the most severe cases a constitutional crisis, anarchy, or insurrection.¹⁷⁶

6 Fundamental constitutional rights and principles

The sixth principle is that legislation should not jeopardise fundamental constitutional rights and principles.¹⁷⁷ “The more that legislation affects individual and group rights, the more important it is that it is accorded due process and is carefully considered.”¹⁷⁸ The Covid-19 crisis curtailed citizen's rights and freedoms more significantly than any other crisis in recent memory. Accordingly, it is even more important that due process is carefully considered. However, expedited law-making circumvents due process and eludes careful consideration.

Certain pieces of urgent legislation such as the Covid-19 Act caused “widespread concern.”¹⁷⁹ At the heart of this concern was the lack of social acceptance of the law. Social acceptance could have been gained through explaining how it operates, dispelling common concerns, and highlighting accountability and safeguard mechanisms. However, due to the expedited law-making process, such explanations were not provided.¹⁸⁰ The more legislation infringes on rights and freedoms the more important it is that due process is followed.¹⁸¹ The process of expedited law-making during Covid-19 did not take account of the need to provide as many opportunities for careful consideration as possible in light of heightened civil liberty concerns. Paul Hunt, New Zealand’s Chief Human Rights Commissioner said:¹⁸²

¹⁷⁶ John Locke, above n 3, at 243 – 250.

¹⁷⁷ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 18.

¹⁷⁸ At 18.

¹⁷⁹ Collette Devlin, above n 111.

¹⁸⁰ Collette Devlin, above n 111.

¹⁸¹ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 18.

¹⁸² Collette Devlin, above n 111.

For weeks the Government has known that we would be moving to alert level 2. It has not allowed enough time for careful public democratic consideration of this level 2 legislation. There has been no input from ordinary New Zealanders which is deeply regrettable.

Ultimately, a lot of the legislation passed in response to Covid-19 infringed on citizens' fundamental rights. Although technically following due process, no additional consideration was given to take account of the fact that most due process functions and mechanisms for careful consideration had been removed by expedition. This led to a significant deficit in social licence. An absence of social licence can lead to a lack of compliance or even explicit resistance to laws.¹⁸³ Although not widespread or well-established small instances of resistance were seen in the form of petitions, protests, and breaches of public health measures.¹⁸⁴

7 *Stable procedural rules*

The seventh principle is that Parliament should follow stable procedural rules.¹⁸⁵ This principle reflects Fuller's rule of law framework which purports that law must remain consistent.¹⁸⁶ Following stable procedural rules is conducive to a stable policy environment and greater scrutiny.¹⁸⁷ Stable procedure may not be possible especially in health emergencies where knowledge of the illness and appropriate responses are evolving. For example, during the Covid-19 pandemic there was a need to adopt altered procedural rules such as adjusted sitting hours, social distancing, and proxy voting.¹⁸⁸ However, procedural rules should be as stable as possible.

Parliament did not take a consistent approach to its use of expedited law-making during the Covid-19 pandemic. Such inconsistencies can be highlighted by looking to the use of post-enactment review and the Epidemic Response Committee as part of the expedited law-making process. Only the Covid-19 Act was referred for post-enactment review and received feedback from academics and special interest groups such as the Māori pandemic group.¹⁸⁹ The Epidemic Response Committee was only in place for the height of the pandemic.¹⁹⁰ So, although the laws passed before the lockdown were subsequently

¹⁸³ Jonathan Jackson et al. "Why do people comply with the law? Legitimacy and the Influence of Legal Institutions" (2012) 52 *The British Journal of Criminology* 1051.

¹⁸⁴ Melanie Earley, above n 148.

¹⁸⁵ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 19.

¹⁸⁶ Lon Fuller, above n 174, at 79 – 81.

¹⁸⁷ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 19.

¹⁸⁸ David Wilson, above n 131, at 190.

¹⁸⁹ (12 May 2020, continued on Wednesday 13 May 2020) 745 NZPD at 17610.

¹⁹⁰ Dean Knight, above n 33, at [43].

discussed in this committee others were not. During a later outbreak, a different approach was adopted with virtual Covid-19 hearings of already established select committees.¹⁹¹

Overall, Parliament did not follow stable procedural rules. Many responses to try and reinstate transparency, and scrutiny were ad hoc. Although these responses were somewhat valuable in doing so their ad hoc nature meant the full benefit of such mechanisms was not realised.

8 *Foster respect*

The eighth principle is that Parliament should foster, not erode, respect for itself as an institution.¹⁹² Respect for Parliament is an underlying component of its legitimacy. The fact that correct procedures have been followed builds respect for laws.¹⁹³

Parliament did not deviate from correct procedures, although these procedures were dramatically altered or nullified due to the adoption of expedited law-making.¹⁹⁴ However, “urgency comes at a cost”.¹⁹⁵ Following the correct procedures is not always enough to foster trust and respect when so many of Parliaments' usual procedures are altered or nullified.

In some instances of urgent law-making the government failed to “gain social acceptance of the law and explain how it operates.”¹⁹⁶ As a result, citizens to felt like their rights were being unduly inhibited and reduced trust in the Parliamentary process.¹⁹⁷ For example, the inclusion of “marae” alongside dwelling house in the Covid-19 Public Health Bill, was deeply misjudge and cause “public outrage”.¹⁹⁸ This is far from fostering respect for itself as an institution.

As was noted before, Parliament passing the wrong bill, having to amend flaws in several bills and breaching fundamental principles of law undermined confidence and trust in Parliament.

¹⁹¹ New Zealand Parliament “Covid-19 Response select committees” (24 August 2021) <www.parliament.nz>.

¹⁹² Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 19.

¹⁹³ At 19.

¹⁹⁴ At 19.

¹⁹⁵ At 1.

¹⁹⁶ Collette Devlin, above n 111.

¹⁹⁷ Alexander Gillespie “Are New Zealand’s new COVID-19 laws and powers really a step towards a police state?” *The Conversation* (New Zealand, 19 May 2020).

¹⁹⁸ (12 May 2020, continued on Wednesday 13 May 2020) 745 NZPD at 17678.

Derogation from principles of good law-making previously discussed all serve to erode respect for Parliament. Lack of social licence through citizen involvement and lack of scrutiny reducing the quality of law are particularly harmful in this regard. If citizens do not respect Parliament, they may not consent to it governing on their behalf, the absence of consent could undermine the legitimacy of Parliament and representative democracy.

9 *The right to govern*

The ninth principle is that the government has a right to govern, so long as it commands a majority in the House.¹⁹⁹ During the height of the crisis, the coalition government consisting of the Labour Party, New Zealand First and the Green Party and following the election in late 2020 the Labour Party alone commanded a majority and was able to govern.²⁰⁰

10 *Quick enactment in emergencies*

The final principle is that Parliament should be able to enact legislation quickly in emergencies.²⁰¹ All government bills related to Covid-19 brought to the House were passed,²⁰² 13 of them came into force within 1–2 days of being introduced.²⁰³ As has been outlined, proxy voting, adoption of electronic process and other changes to standing orders

¹⁹⁹ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 19.

²⁰⁰ Dean Knight, above n 33, at [59] – [62].

²⁰¹ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 19.

²⁰² COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; COVID-19 Public Health Response Bill; Medicines Amendment Bill; COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; Immigration (COVID-19 Response) Amendment Bill; Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill; COVID-19 Public Health Response Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill (No 2); COVID-19 Public Health Response Amendment Bill; COVID-19 Recovery (Fast-track Consenting) Bill; Social Security (COVID-19 Income Relief Payment to be Income) Amendment Bill; Remuneration Authority (COVID-19 Measures) Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill; Immigration (COVID-19 Response) Amendment Bill; and COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill.

²⁰³ Medicines Amendment Bill; COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill; COVID-19 Public Health Response Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill (No 2); COVID-19 Public Health Response Amendment Bill; Social Security (COVID-19 Income Relief Payment to be Income) Amendment Bill; Remuneration Authority (COVID-19 Measures) Amendment Bill; COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill; COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; and COVID-19 Public Health Response Bill.

and the law-making process were able to occur.²⁰⁴ Notably, during the early stages of the crisis, all parties supported bills and acknowledged the need for Parliament to quickly enact legislation in emergencies.²⁰⁵ Opposition parties noted the role of the House in providing scrutiny and accountability without being a hindrance.²⁰⁶

D Summary

An assessment of expedited law-making against Geiringer et al's framework has shown derogation from most of the 10 principles to a varying extent. Although some ad hoc mechanisms were adopted that went some way to reinstate these principles, their full value was not realised due to their ad hoc and restrained nature. The derogation from these principles can have profound consequences such as eroding the consent upon which representative democracy is built and in turn decaying the legitimacy of Parliament.

V A new model of expedited law-making: 7 practices to uphold principles of good law-making

Law-making in times of crisis must be efficient but expediting the law-making process can undermine principles of good law-making and democratic, civil, and political rights. This has been demonstrated through the passing of the Covid-19 Act. A quantitative analysis of all legislation passed from 25 March 2020 – 10 September 2021 showed that such harms were not isolated. The nature and extent of these harms has been analysed against 10 principles of good law-making.

Urgent law-making must not be governed by the fear, panic or haste produced by the urgency of responding to a crisis. Instead, law-making in times of crisis must be governed by the rule of law, democratic ideals and principles of good law-making. That can be achieved through a new model of law-making that embraces these characteristics. Specifically, this paper advances seven practices that should be adopted by Parliament to mitigate the aforementioned harms and to uphold principles of good law-making.

The seven practices are presented according to their place in the life cycle of a bill rather than in direct response to each principle. This approach demonstrates what the new model

²⁰⁴ David Wilson, above n 131, at 190; and Dean Knight, above n 33, at [48].

²⁰⁵ See eg (25 March 2020) 745 NZPD at 17300 – 17306.

²⁰⁶ At 17308.

A The model in action – a positive counterfactual

It is mid-2020. After nearly two months of a nationwide lockdown, that significantly curtailed the rights and freedoms of citizens, New Zealand is being hailed as the first country to successfully eliminate Covid-19.²⁰⁷ Doing so has protected citizens from the despair of death and disease seen in other nations.²⁰⁸ Due to this success, the government is seeking to ease restrictions.²⁰⁹ It has realised that the s 70 Health Act orders previously relied on as the legal basis for public health restrictions are not fit for purpose going forward.²¹⁰ The powers are largely designed for implementing only a handful of restrictions on individuals or households in an active state of emergency.²¹¹ The powers are not as well suited to the nationwide, often pre-emptive, less restrictive measures that were now needed. Realising this, the government announces their intent to create a new piece of legislation based on the alert level framework. It also shares the key features of that legislation, such as, who has the power to promulgate an order, the potential substance of orders and who can enforce orders.

Legal academics and medical experts have time to consider the policy response and provide comments to the media debating flaws or benefits and providing explanations to the public. The public feels informed and has time to consider media articles and contact their local member if they have concerns. The media also have time to engage with ministers, officials, and their offices about the policy position through various interactions such as daily press briefings. Similarly, opposition members have the chance to question the minister responsible when the minister delivers a ministerial statement to the House. Members can raise issues of concern that the electorate has broached with them directly or that they have seen dominate the media narrative. Throughout this process, the minister can dispel common concerns or panic. During this period citizens can provide their views directly through submissions to the select committee that will review the legislation ex post. Citizens have a formal way to participate. Their concerns about their rights being infringed are ameliorated by due process being followed and that a select committee process will occur, albeit after the passing of the legislation.

²⁰⁷ Michael Baker, Amanda Kvalsvig, Ayesha Verrall “New Zealand’s Covid-19 elimination strategy” (2020) 213 *The Medical Journal of Australia* 1; Charlotte Graham-McLay “Can’t quite believe it’: New Zealand tiptoes towards elimination of coronavirus” *The Guardian* (online ed, United Kingdom, 4 June 2020); and Sophie Cousins “New Zealand eliminates COVID-19” 395 *The Lancet* 1474.

²⁰⁸ World Health Organisation, above n 19.

²⁰⁹ Rt Hon Jacinda Ardern, above n 41.

²¹⁰ See eg Andrew Geddis and Claudia Geiringer, above n 37; Dean R Knight and Geoff McLay above n 37; and Hon David Parker, above n 42.

²¹¹ Andrew Geddis and Claudia Geiringer, above n 37.

Following this, special interest groups and academics provide comment on an exposure draft. Even if such groups are only given a short period, they have now had some time since the policy position was announced and plenty of information through media coverage, a ministerial statement and proactively released official information to inform their comments, providing richer scrutiny. Further, such groups may have now had the opportunity to engage with and collate the views of their communities. This consultation in miniature can increase democratic input and social licence among those groups who may not fairly be represented in Parliament.

By the time the bill reaches its introduction it has already been subject to scrutiny, debate, democratic input, increased social licence and quality assurance all with great transparency and without increasing to any significant degree the time it will take to pass the law. While the bill is in the House, citizens although not able to have their usual input through select committees are provided with a mechanism to directly present their views to members. This mechanism is through an online form on Parliament's website. Such a form may be similar to that which already exists for submitting to a select committee.²¹² Submissions through this form can then inform the member's contributions to the debate in the House. Even where that debate is highly expedited, “such mechanisms linking constituents directly with elected representatives not only enhances participation but also serves to bolster representative democracy.”²¹³

After the legislation is enacted it is subject to post-enactment review. Post-enactment review has already served a great purpose *ex ante* in providing a channel for citizens to submit their views and by reassuring them that they will have a mechanism for input. Post-enactment review can now assess whether the law has worked effectively and “promote acceptance of government authority and the citizens' confidence in the government's administration.”²¹⁴ Following this the public, media, academia, and the opposition are informed about how the law is used when documents continue to be proactively released. Proactive release provides ongoing accountability mechanisms and social licence.

²¹² New Zealand Parliament “How to make a submission” (27 November 2015) <www.parliament.nz>.

²¹³ Michael Neblo, Kevin Esterling *Politics with the People: Building a Directly Representative Democracy* (Cambridge University Press, Cambridge, 2018).

²¹⁴ Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 *European Law Journal* 447 at 464.

B Practice 1 – Early indication of policy position

In the new model of law-making, the protection of civil and democratic rights begins before a bill is introduced. The first practice to be adopted is an early indication of a general policy position. The indication can be given before a bill is drafted, it may be modelled on a disclosure statement, and could be delivered by a verbal briefing from key officials at a press conference. Throughout Covid-19 the general policy position was decided by Cabinet and then implemented through primary or secondary legislation.²¹⁵ So, Cabinet will have, in advance of legislation being drafted, identified a policy position. This requirement then is not an burden nor does it obstruct quick law-making. Further, this means that it upholds principles nine and 10, the right to govern and to quickly enact legislation in emergencies.

Publicly available disclosure statements support transparency by indicating the general policy intent of the bill and “the presence of certain significant powers or features in the bill that might be of particular Parliamentary or public interest and warrant an explanation”.²¹⁶ However, for legislation passed during Covid-19 disclosure statements were brief given the rapid speed at which legislation had to be implemented.²¹⁷ Additionally, disclosure statements are only made available when the bill is put on the order paper.²¹⁸ Where law-making is expedited, there is a short time between the bill being introduced and it receiving Royal Assent, in some cases a single day. Consequently, there is little time for public discussion and expert input based on the information contained in the disclosure statement.

Indicating a policy position early better informs Parliamentary and public scrutiny of legislation, upholding principle two.²¹⁹ This scrutiny promotes good practice for the development of legislation, for example, by assessing and identifying any infringements on rights, upholding principle six. It allows the media and the opposition to pick up on and debate possible contentions, as is contemplated by principle one. Citizens can then express their views on such contentions to members, realising principle three. Finally, when academics and special interest groups get the chance to comment on an exposure draft, they have had more time to identify core issues and suggested solutions. Collectively these all improve the quality of legislation, upholding principle five.

²¹⁵ Dean Knight, above n 33, at [28].

²¹⁶ COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill (disclosure statement).

²¹⁷ COVID-19 Response (Urgent Management Measures) Legislation Bill (disclosure statement); and COVID-19 Public Health Response Bill (disclosure statement).

²¹⁸ Parliamentary Counsel Office “Disclosure statements” <pc.o.govt.nz>.

²¹⁹ Treasury “Departmental Disclosure Statements” (20 June 2017) <treasury.govt.nz>.

It is well established that important decisions should be taken through Parliament in a democratic process and that delegated power reduces transparency and legitimacy.²²⁰ However, when important decisions go through Parliament but in a highly expedited manner, this does not provide transparency, democracy, and legitimacy that is expected. Transparency, democracy and legitimacy are principles four, three and eight respectively. An early indication of a general policy position can go some way to reinstate these features.

Sharing an early indication of a policy position can identify flaws in the law or elements that have strong public backlash. Given the bill is still being drafted the government can consider the legitimacy of these concerns and amend the legislation accordingly.²²¹ The benefit of an early indication can again be demonstrated by reference to the Covid-19 Act. There was no prior indication of the policy position and although there was strong public backlash regarding certain provisions these remained unchanged or only marginally amended.²²² This reinforces principle four, principle one and principle five as transparency allows for open debate that can improve the quality of legislation.

Citizen participation, principle three, is also bolstered as citizens are informed and have the opportunity to contact members, speak to the media or exercise other democratic rights to influence the law. Further, giving a pre-emptive indication of a policy position creates a sense of deliberative democracy where citizens have a role in engaging and influencing the law rather than being informed about it after the fact. This strongly increases legitimacy.

Legitimacy can be further bolstered by the public accountability that an early indication of a policy position can provide. “Public accountability ... provides voters with the information needed for judging the propriety and effectiveness of the conduct of the government.”²²³ Daily media briefings “saw the government interrogated deeply about all aspects of the pandemic and response.”²²⁴ If at these briefings an indication of the policy position was also given, this could be interrogated deeply.

²²⁰ *Borrowdale v Director-General of Health* CA520/2020, 25 June (Submission on behalf of New Zealand Law Society Te Kāhui Ture o Aotearoa as intervenor) at [23].

²²¹ Mark Bovens, above n 214, at 450.

²²² Collette Devlin “Government tweaks COVID-19 level 2 law after marae controversy” Stuff (online ed, New Zealand, 13 May 2020).

²²³ Mark Bovens, above n 214, at 463.

²²⁴ Dean Knight “New Zealand: Rendering Account During the COVID-19 Pandemic” *Verfassungsblog* (19 April 2021) at 3.

Those asked to comment on an exposure draft of the Covid-19 Act noted that they had very little time to do so.²²⁵ An early indication of a general policy position can allow experts and special interest groups to form opinions and identify key issues before they receive the exposure draft. Additional time allows them to provide more vigorous comments and scrutiny.

The benefits of an early announcement of a policy position for both democratic and political scrutiny can be seen in the Firearms Amendment Bill. 72 hours after the Christchurch terrorist attack Cabinet met and decided that it would ban military-style and semi-automatic assault rifles.²²⁶ At the time no bill had been drafted and a bill was not introduced until 10 days later.²²⁷ Leave of the House was given to pass the Bill under a highly expedited process although a week was allowed for select committee.²²⁸ As an example, the national broadcaster Radio New Zealand produced six articles capturing public opinion and debate on all sides of the issue in the 48 hours following the announcement.²²⁹ It produced several more that captured political debate.²³⁰

Providing an early indication of a policy position can go a long way in reinstating the democratic and political ideals undermined by expedited law-making.

C Practice 2 – Increased use of ministerial statements

Once this early policy indication has been given and a draft bill is being produced, the minister responsible can give a ministerial statement. During Covid-19, there was limited opportunity for usual debate, questions and scrutiny.²³¹ Additionally, Cabinet alone made many decisions, and a few ministers were responsible for most of the legislation being

²²⁵ (13 May 2020) 745 NZPD at 17750 – 17753.

²²⁶ Rt Hon Jacinda Ardern and Hon Stuart Nash “New Zealand bans military style semi-automatics and assault rifles” (press release, 21 March 2020).

²²⁷ (2 April 2020) 737 NZPD at 10118.

²²⁸ At 10107.

²²⁹ Lew Stoddart “Opinion: Gun law reform strikes a fair balance” *Radio New Zealand* (online ed, New Zealand, 22 March 2019); Brigitee Morten: Action is what NZ needed on gun control, and what PM Jacinda Ardern delivered” *Radio New Zealand* (online ed, New Zealand, 22 March 2019); “Wide support for government’s move to tighten gun laws” *Radio New Zealand* (online ed, New Zealand, 21 March 2019); Kevin Clements “Ban on military style semi-automatic weapons should be ‘applauded’” *Radio New Zealand* (online ed, New Zealand, 21 March 2019); “World reacts to military-style semi-automatic weapons ban in New Zealand” *Radio New Zealand* (online ed, New Zealand, 21 March 2019).

²³⁰ See eg “Politicians must stop inciting division after shootings – MP” *Radio New Zealand* (online ed, New Zealand, 20 March 2019); and “ACT leader David Seymour sounds warning on pace of gun law reform” *Radio New Zealand* (online ed, New Zealand, 21 March 2019).

²³¹ Elena Grigilo, above n 126, at 49.

bought to the House.²³² In this context, all parties recognised the need to have greater dialogue with ministers and facilitate more “conversational scrutiny” by engaging directly with ministers.²³³ Ministerial statements have previously informed the House about emergency responses.²³⁴ The leader of each party with six or more members is entitled to comment on the statement for up to five minutes, the House has previously agreed to extend this to smaller parties, which would be suitable in an emergency.²³⁵ The minister may then respond to each comment for up to two minutes.²³⁶ As a result, the engagement with the minister in charge of the bill is significantly increased, this reinstates some of the transparency and scrutiny that is removed by expedited law-making.

The ability of ministerial statements to increase engagement with ministers and reinstate civil and democratic rights in the face of expedited law-making has been duly explored. The next matter to explore is the most effective way to realise that value. There are several benefits of using ministerial statements rather than other procedural mechanisms.

First, ministerial statements occur just before question time. Question time is “undoubtedly the most high-profile aspect” of parliamentary proceedings and has high media viewership.²³⁷ Consequently, the scrutiny and information facilitated through ministerial statements is more likely to be reported in the media further increasing debate principle one, scrutiny principle two, public input principle three and transparency principle four. Additionally, there is public interest in scrutiny through House procedure when it is readily available across platforms. Research has shown that New Zealanders are six times more likely to have watched or listened to a select committee after lockdown than before.²³⁸

A further benefit of ministerial statements is that debate prompted by them is informed upholding principles one. Specifically, the minister can dispel common unease or panic concerning certain impacts of the law. Social acceptance of the law increases as a result and in turn so does respect for Parliament, principle eight. For example, if citizens are

²³² Dean Knight, above n 33, at [27] – [43].

²³³ David Wilson, above n 131, at 193.

²³⁴ See eg (22 February 2011) 670 NZPD at 16937; (23 February 2011) 670 NZPD at 16943; (8 March 2011) 670 NZPD at 16948 – 16951.

²³⁵ David McGee, above n 10, at 264.

²³⁶ David McGee, above n 10, at 264; and Standing Orders of the House of Representatives 2020, SO 364-367.

²³⁷ Phil Larkin “Ministerial Accountability to Parliament” in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU Press, Australia, 2012) at 99.

²³⁸ Kolmar Brunton and New Zealand Parliament “Research report on audience for select committees” (June 2020).

concerned about how certain provisions in a draft bill may be implemented, a minister can directly confirm that a certain situation will not occur under the bill or that the government does not intend for certain actions to occur under the bill.

The use of ministerial statements is preferable to the removal of the limit on calls used during the Covid-19 emergency for several reasons. First, due to its reactive nature some bills were passed before the change to standing orders was made meaning they were subject to less of this kind of scrutiny.²³⁹ Secondly, the removal of the limit on calls is only at the Committee of the Whole House stage of the law-making process, which can be expedited.²⁴⁰ Finally, the ad hoc and unique nature of this mechanism means it may not be implemented in future emergencies. In contrast, ministerial statements are a well-established practice and incorporated into convention and standing orders. The established nature of ministerial statements serves to uphold principle seven by providing more stable procedural rules. Significantly, the presentation of and response to ministerial statements occurs independently of the law-making process so is not impacted by expedition of the law-making process.²⁴¹

Ministerial statements increase scrutiny, transparency, inform debate and build social licence in a way that is preferable to other measures. Most importantly, ministerial statements strike a suitable balance between the need for Parliament to urgently pass legislation while upholding good law-making principles such as scrutiny, transparency, increased policy deliberation and public trust.

D Practice 3 – Exposure drafts of bills

Once the bill is drafted, it can be used as an exposure draft to receive comments from academics and special interest groups. The approval of the Attorney-General and as best practice the consent of Cabinet is required for the release of draft legislation.²⁴² Obtaining this consent is not arduous and the discretion to release is wide, meaning it is feasible in emergencies.²⁴³ As a result, principle 10, the ability to pass legislation quickly is not

²³⁹ David Wilson, above n 131, at 194; and (6 May 2020) 745 NZPD 17517 – 17534.

²⁴⁰ The business committee can decide that a Bill does not need to be considered in the Committee of the whole House ultimately skipping this stage, additionally, the third reading and the Committee of the Whole House can be taken together under urgency. David Wilson, above n 131, at 194; (6 May 2020) 745 NZPD17517 – 17534; Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, at 38; and Standing Orders of the House of Representatives 2020, SO 307.

²⁴¹ Standing Orders of the House of Representatives 2020, SO 364 – 367.

²⁴² Cabinet Office *Cabinet Manual 2017* at [7.48].

²⁴³ At [7.48]; and Cabinet Office Circular “Attorney-General’s Protocol for Release of Draft Government Legislation outside the Crown” (16 April 2019) CO19/2 at [7] – [10].

undermined. In fact, this process was followed for the Covid-19 Act and improved the quality of the legislation, created legitimacy and facilitated citizen participation, thereby upholding principles, five, eight and three respectively.

Exposure drafts “can deliver significant value”.²⁴⁴ Specifically, ensuring that legislation achieves its policy purpose, test assumptions and check the quality of the legislation, which serve to bolster principles two and five. Further, exposure drafts can obtain stakeholder agreement.²⁴⁵ Obtaining stakeholder agreement upholds principles three and eight as it requires citizen participation and fosters respect for Parliament. Exposure drafts require agencies to provide explanations and create contextual material on the intent of the bill.²⁴⁶ This contextual material can be referenced by courts, practitioners and those enforcing the law.²⁴⁷ When law-making is expedited in an emergency there may be omissions or errors, contextual material can alleviate the impact of those by providing additional guidance.

The ability of Māori and a handful of academics to comment on an exposure draft of the Covid-19 Act was generally regarded as successful. Important changes and safeguards such as a sunset clause were introduced as a result and this contribution was acknowledged by lawmakers.²⁴⁸

Māori academics note that they were given only hours to comment, contributions were rejected, and that overall greater Māori involvement was needed.²⁴⁹ Commenting on an exposure draft of all bills may help to alleviate these concerns and create more of a co-governance structure by allowing Māori input into all acts. Further, an early indication of the general policy position will mean that those asked to comment have more time to develop and articulate their views and the views of their communities. Exposure drafts are a draft and should be malleable.²⁵⁰ It is not suitable for the government to present exposure drafts to special interest groups for comment if it is not going to recognise the validity of those comments, or if the bill is in reality, final.

²⁴⁴ Legislation and Design Advisory Committee “Legislation Guidelines” (2018) at 16.

²⁴⁵ Legislation and Design Advisory Committee “Legislation Guidelines- Supplementary materials Exposure draft bills” (2018) at 2.

²⁴⁶ At 3.

²⁴⁷ At 3.

²⁴⁸ (13 May 2020) 745 NZPD at 17750 – 17753.

²⁴⁹ Claire Charters, above n 83, at 2.

²⁵⁰ Legislation and Design Advisory Committee, above n 245, at 2.

The evidence of the positive contribution of exposure drafts has been shown through their use during Covid-19. The benefits of exposure bills can be further leveraged by adopting the new model of expedited law-making advance in this paper.

E Practice 4 – Formal electronic engagement between citizens and members

Once the bill is introduced to the House, procedures need to better support the direct engagement of citizens with elected representatives and their role in the democratic process, in essence, principle three. It is well established that “democracies are generally not prepared to sustain deliberation and participation in times of crisis.”²⁵¹ But the ability to participate in the legislative process is a fundamental right in liberal democracies.²⁵²

Recent scholarship has noted that large scale democratic innovations can function in health crises and other emergencies, however, they need to be put in place before such emergencies occur.²⁵³ It is crucial then that a new model of law-making that outlines suitable democratic innovations is adopted to future proof the protection of this fundamental right. In recognition of its fundamental nature, the discussion of all other elements of this new model of law-making and their utility refers to citizen participation in some regard.

By affording more opportunities for members to speak on bills Parliament can support in the views of citizens, expressed in this way, being brought into the House and thus the democratic process. So, through upholding principle one by allowing for open debate principle three is also realised as that debate allows citizens to participate in the legislative process. Most members speaking on the Covid-19 Public Health Response Bill referenced the views of citizens directly communicated to them, media discourse or comments and views received through the draft exposure process.²⁵⁴ For example, Tim McIndoe referenced an email from a citizen.²⁵⁵ Marama Davidson acknowledged and raised concerns of certain communities.²⁵⁶ Alfred Ngaro highlighted comments made by

²⁵¹ Lucy Parry, Hans Asenbaum and Selen Ercan “Democracy in Flux: a systemic view on the impact of COVID-19” 15 *Transforming Government: People, Process and Policy* 197 at 201.

²⁵² Human Rights Commission “Submission to the Finance and Expenditure Committee Inquiry into the COVID-19 Public Health Response Act 2020”; and Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington 2015).

²⁵³ Lucy Parry, Hans Asenbaum and Selen A Ercan, above n 251, at 201.

²⁵⁴ (13 May 2020) 745 NZPD at 17734 – 17753.

²⁵⁵ At 17734 – 17735.

²⁵⁶ At 17741 – 17742.

particular communities on the exposure draft especially discussing concerns of Māori.²⁵⁷ Kiri Tapu Allen similarly acknowledged concerns of Māori over marae.²⁵⁸ Erica Stanford referenced media commentary on the matter.²⁵⁹ Finally, Hon David Parker referenced comments of the Human Rights Commission and legal experts.²⁶⁰

Parliament can facilitate direct engagement between citizens and members through an online submission form. The communication of views directly to government representatives through online forms has also been suggested by other scholars.²⁶¹ “Such mechanisms linking constituents directly with elected representatives not only enhances participation but also serves to bolster representative democracy.”²⁶² An online form is greater at building social license than citizen initiated engagement with members, such as commenting on their social media posts, because it is a formal mechanism that therefore has more legitimacy.

The use of technology to allow for greater democratic input into law-making has been effective in a range of ways previously. For example, the New Zealand Parliament posts links to select committee pages on social media, by following these links citizens can make a submission online using a simple form.²⁶³ Additionally, the Green Party have previously crowdsourced questions via social media to ask in the House during question time, acknowledging the member of the public who asked the question.²⁶⁴ This method was used to increase public engagement and allow the public to see their views being expressly represented in Parliament.

Further, when the government announced that it planned to ban all automatic firearms and to tighten New Zealand's gun laws there were strongly held views that the public was eager to express to decision makers. At the time this policy position was announced no legislation had been drafted.²⁶⁵ The Office of the Clerk set up an email address to provide a mechanism

²⁵⁷ At 17742 – 17743.

²⁵⁸ At 17737 – 17738.

²⁵⁹ At 17745 – 17746.

²⁶⁰ At 17750 – 17753.

²⁶¹ Lucy Parry, Hans Asenbaum and Selen A Ercan, above n 251, at 202.

²⁶² Michael Neblo, Kevin Esterling, above n 213.

²⁶³ David McGee, above n 10, at 320 and 409.

²⁶⁴ (29 April 2015) 704 NZPD at 2989 – 2991; and Stacey Krirk “Want to hold the Government to account on climate change? Now's your chance” *Stuff* (online ed, New Zealand, 24 April 2015).

²⁶⁵ Rt Hon Jacinda Ardern “PM statement on Christchurch mosques terror attack – 18 March” (press release, 18 March 2019).

for citizens to submit their views until the select committee occurred.²⁶⁶ It was made clear that this was not a formal submission but that these would be passed on to the select committee in due course, who may consider them evidence or submissions. This allows greater democratic input and captures views and opinions when engagement is highest. It also creates social licence as citizens have an input mechanism while the bill is being passed rather than feeling as though their rights are being surreptitiously curtailed. Social licence means that citizens respect the law and the process Parliament used to create it, in essence, principle eight. The previous and successful use of such mechanisms endorses their viability and utility.

Although democratic input is hard to facilitate in actual emergencies it is an essential precondition for representative democracy and upholding the legitimacy of Parliament.²⁶⁷ The negative consequences of bypassing such mechanisms through expedited law-making are clear.²⁶⁸ Simple mechanisms such as an online submission form and pre-emptive receipt of submissions via email go a significant way in reinstating democratic input, ensuring that democracy is representative and maintaining the legitimacy of Parliament and its laws.

F Practice 5 – Post-enactment review

Once the bill has become law it should be subject to post-enactment review. The post-enactment review of substantial legislation has been described as “a novel but appropriate and swift way to address the democratic deficit of the urgent law-making process”.²⁶⁹ The Covid-19 Act was referred to the Finance and Expenditure Committee for post-enactment review.²⁷⁰ This was recommended by legal academics in their comments on the exposure draft.²⁷¹

New Zealand has a “plethora of ad hoc review mechanisms at varying levels” but does not have a great tendency to utilise them.²⁷² Key factors influencing the limited effectiveness

²⁶⁶ New Zealand Parliament “Public input on gun law changes proposed by the Government” (21 March 2019) <www.parliament.nz>.

²⁶⁷ John Locke, above n 3, at 243.

²⁶⁸ At 243.

²⁶⁹ Collette Devlin “Parliament sends controversial new COVID-19 Level 2 law to be reviewed at Select Committee” *Stuff* (online ed, New Zealand, 15 May 2020).

²⁷⁰ Zane Small, above n 143; and Inquiry into the operation of the COVID-19 Public Health Response Act 2020 Report of the Finance and Expenditure Committee (July 2020).

²⁷¹ (13 May 2020) 745 NZPD at 17750-17753; and Collette Devlin, above n 269.

²⁷² Derek Gill and Susy Frankel “Learning the Way Forward? The Role of Monitoring Evaluation and Review” in Susy Frankel and John Yeabsley (eds) *Framing the Commons: Cross-Cutting Issues in Regulation* (Victoria University Press, Wellington, 2014) at 2.2.2.

of post-enactment review are a lack of guidance and a lack of links between the pre and post-enactment process.²⁷³ Having post-enactment review and procedural details identified as part of the pre-enactment process addresses these issues by providing guidance and establishing a link between the pre-enactment process and the post-enactment review. However, if post-enactment review were not adopted as an established practice within a new model of law-making and only relied on as an ad hoc mechanism then these problems remain. Making post-enactment review the norm when enacting expedited legislation in an emergency prevents reliance on ad hoc measures that may not be used or used in a way that garners the full benefit of post-enactment review.

To some degree, post-enactment review by select committee has been adopted in the United Kingdom.²⁷⁴ This has generally been regarded as positive and has increased scrutiny, public input and the efficacy of law.²⁷⁵ Post-enactment review in that instance has been effective at evaluating whether the law is working as intended, improving it if not and importantly addressing any unintended consequences and accounting for how citizens respond.²⁷⁶ Taking account of how citizens have responded and particularly how this has undermined the efficacy of the law, for example, through a lack of compliance creates a pathway for citizen participation.²⁷⁷ It requires an understanding of how citizens have responded, which could be ascertained through public submissions. This kind of citizen engagement is exactly that foreseen by principle three.

Post-enactment review can also build legitimacy when the response of citizens is accounted for either in the review report or by informing amendments to the law. Bovens notes that where respect for governmental authority is dwindling the process of accountability allows those in power to explain and justify.²⁷⁸ Citizens and interest groups can pose questions and offer their opinions.²⁷⁹ This process can “promote acceptance of government authority and the citizens' confidence in the government's administration.”²⁸⁰ In other words, it can foster respect, principle eight.

²⁷³ Tayla Crawford “Post-legislative scrutiny in New Zealand: is a more formal mechanism necessary?” (LLB(Hons) Dissertation, Victoria University of Wellington, 2017) at 19 and 21 – 24.

²⁷⁴ Law Commission (UK) “Post-Legislative Scrutiny No 302” (2006) at [2.4].

²⁷⁵ At [2.4].

²⁷⁶ At [2.4].

²⁷⁷ Lydia Clapinska “Post-Legislative Scrutiny of Acts of Parliament” (2006) 32 Commonwealth Law Bulletin 191 at 198.

²⁷⁸ Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13 European Law Journal 447 at 450.

²⁷⁹ At 464.

²⁸⁰ At 464.

Another commonly acknowledged benefit of the scrutiny provided by post-enactment review is its encouragement of learning and improvement of the regulatory system.²⁸¹ Learning is one of Bovens' three measures of accountability.²⁸² In this context, accountability is a tool to keep governments “effective in delivering their promises.”²⁸³ In this sense, post-enactment review realises principle two by providing an opportunity for scrutiny.

Post-enactment review allows the opportunity to establish social licence and legitimacy through democratic input and scrutiny. Further, it allows for reconciliation of Parliamentary legitimacy where this has been harmed through expedited law-making.

G Practice 6 – Proactive release

All related official information should be proactively released, at all stages of the law-making process, including the period after the bill has become law. Proactive release has become commonplace in New Zealand.²⁸⁴ Proactive release can strengthen accountability, inform public understanding, facilitate informed participation and improve public trust and confidence.²⁸⁵ These characteristics are shared with principles two, one, three and eight respectively. Primarily, proactive release serves to realise principle four, transparency.

Proactive release reduces the burden on government agencies of responding to individual requests.²⁸⁶ When government actors are working to respond to the emergency itself this is more relevant. It is also relevant to citizens because the diversion of operational government resources to respond to the emergency, may create delays or omissions in responding to individual requests. Delays reduce transparency and scrutiny, particularly in emergencies when attention is given to the issues of the day.

Proactive release allows for a greater body of information to reach a greater number of people. When a request must be made, the response is often sent only to the individual who made the request. When requesting information, citizens must have a line of inquiry already identified to request associated information. In contrast, even if no line of inquiry has yet

²⁸¹ Derek Gill and Susy Frankel, above n 272, at 210-221.

²⁸² Mark Bovens, above n 214, at 447.

²⁸³ At 464.

²⁸⁴ Public Service Commission “Proactive Release of Official Information” (Agency Guidance, December 2017).

²⁸⁵ Ombudsman “Proactive release – good practices for proactive release of official information” (Guide, December 2020).

²⁸⁶ At 3.

been established, proactive release allows information to be publicly available. Further, the information being widely accessible means that trends or obscurities can be identified across the information.

The government was previously applauded for its proactive release and transparency.²⁸⁷ Proactive release ended on 1 April 2021 and citizens again needed to make Official Information Act requests to individual departments.²⁸⁸ Despite New Zealand being out of the height of the crisis at this time the government still subsequently passed urgent legislation regarding vaccine approval and border measures for which transparency is still required.²⁸⁹ Proactive release was reinstated through the government's Covid-19 website during a second nationwide outbreak in August 2021.²⁹⁰ It is not clear if once level 3 and 4 restrictions ease proactive release will end or continue.

Given the trend towards proactive release, it is unusual for such documents to not carry on being proactively released, not doing so fails to realise the extensive benefits it provides. Proactive release should continue so long as decisions relating to the emergency as still being taken.

H Practice 7 – Upholding te Tiriti obligations

Finally, “the full evaluation of the response to Covid-19 must include ongoing concerns for the ways in which that response navigates relationships under te Tiriti.”²⁹¹

Māori scholars have advanced several aspirational approaches to uphold te Tiriti obligations. The first suggested approach is the inclusion of a direct reference to te Tiriti obligations in legislation.²⁹² Direct reference to te Tiriti can enable an equitable approach and prevent the unjust application of seemingly neutral laws.²⁹³ For example, if explicit consideration was given to treaty principles the warrantless entry powers granted in the Covid-19 Act would not be exercised without “the consent of the relevant tangata whenua

²⁸⁷ See eg Dean Knight, above n 33, [67] – [69].

²⁸⁸ Unite Against Covid-19 “Legislation and key documents – proactive release” < covid19.govt.nz >.

²⁸⁹ COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; and Medicines Amendment Bill.

²⁹⁰ Unite Against Covid-19, above n 288.

²⁹¹ Janet McLean, Arie Rosen, Nicole Roughan and Jesse Wall, above n 15, at 208.

²⁹² At 208 – 209.

²⁹³ Claire Charters, above n 83, at 3; and Elana Curtis, above n 96.

of the rohe where the marae sits”.²⁹⁴ This approach would avoid or curtail the outrage caused by such provisions and will foster respect for Parliament and uphold principle eight.

The second approach to uphold te Tiriti obligations is co-governance and earlier engagement with Māori.²⁹⁵ Co-governance would have to be ideated and established by Māori for Māori in partnership with the Crown. Such a relationship can allow for shared expertise and citizen participation, principle three. Further, it would allow for Māori to effectively fulfil a role in their communities which the state cannot, upholding principle five by producing high quality legislation that fulfils its purpose. Further, this would create an understanding of an equally shared authority to regulate and in turn uphold the constitutional rights in te Tiriti as is contemplated by principle six.²⁹⁶

It has been argued that the practices advanced in this paper, such as Māori input into exposure drafts of bills, go some way to uphold obligations under te Tiriti. Ultimately, the Crown exercising kawanatanga and Māori exercising tino rangatiratanga must work in partnership to uphold te Tiriti obligations.²⁹⁷

VI Conclusion

The passage of the Covid-19 Act created a “firestorm” and was met with the “sound of fury”.²⁹⁸ Such a response aptly captures the reaction of citizens to expedited law-making that even when used legitimately and necessarily, undermines fundamental and constitutional rights. Specifically, the rights of citizens to have their views represented in Parliament, to contribute to law-making, to debate law-making transparently and for any infringement on their rights to be given careful consideration and due process.²⁹⁹ Any infringement on such rights warrants an evaluation of how they can be protected. Even more worrying, infringing such rights may erode the consent upon which representative democracy is built.³⁰⁰ A lack of consent may, in turn, decay the legitimacy of Parliament. An absence of such legitimacy may lead to civil dissonance or disobedience and in the most severe cases a constitutional crisis, anarchy or insurrection.³⁰¹

²⁹⁴ Claire Charters, above n 83, at 19.

²⁹⁵ Claire Charters, above n 83, at 18; and Human Rights Commission, above n 252, at [63] – [64].

²⁹⁶ Claire Charters, above n 83, at 2.

²⁹⁷ Janet McLean, Arie Rosen, Nicole Roughan and Jesse Wall, above n 15.

²⁹⁸ Claudia Geiringer, above n 46.

²⁹⁹ Claudia Geiringer, Polly Higbee and Elizabeth McLeay, above n 2, 16 – 19.

³⁰⁰ John Locke, above n 3, at 243.

³⁰¹ At 243 – 250.

The outrage, petition and protest seen in response to the Covid-19 Act are a reminder of how tangible these threats are, even though they may at times seem distant. Quantitative analysis of other bills passed from 25 March 2020 – 10 September 2021 shows that nearly all bills related to Covid-19 went through a highly expedited process, even when there was no active outbreak. Such bills often skipped the select committee, had no debate on multiple readings and skipped or had a highly abridge Committee of the whole House.

In response to such harms manifesting in New Zealand's democracy this paper has advanced a model of law-making, focusing on seven specific practices, that mitigate such harms and ensures the realisation of principles of good law-making. Applying this to the passage of the Covid-19 Act provides an apt counter-factual of how expedited law-making can and should occur.

The seven practices that comprise that model of law-making are, an early indication of a policy position, ministerial statements, exposure drafts of bills, direct electronic engagement between citizens and members, post-enactment review, proactive release and maintenance of te Tiriti obligations through co-governance or reference to te Tiriti in legislation.

The risks to fundamental rights, democracy and state legitimacy are present whenever expedited law-making subverts principles of good law-making. Although the model of law-making advocated in this paper grounds its examples and justifications within the Covid-19 emergency, the harms posed by expedited law-making are present in all emergencies. It is essential then that in all emergencies a model of law-making that effectively mitigates such harms is also adopted.

Ultimately, law-making in times of crisis should be efficient, but such law-making must not be governed by the fear, panic or haste produced by the urgency of responding to a crisis. Instead, law-making in times of crisis must be governed by the rule of law, democratic ideals and principles of good law-making.

VII Appendix

Bills and their legislative process from 25 March 2020 – 10 September 2021

This table documents whether any stage the legislative process was expedited and documents the type of mechanism used to expedite that stage. The table includes all bills passed through the House from 25 March 2021 (the date that a state of emergency was declared and pandemic notice was first in force) until 10 September 2021 (the last sitting block before the conclusion of writing this paper).

The table does not include government finance bills such as budget or imprest and supply bills. This is because these as general government administration bills would have occurred despite the crisis and the spending confirmed through these bills had their policy decision implemented through separate urgent legislation, for example, the Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill. Additionally, such bills are nearly always expedited but under unique settings.

Data was collected by recording every bill that received Royal Assent during this named period. Hansard for each stage of the bill was read and it was recorded whether an urgency motion was accorded for that stage of the legislative process, whether leave of the house was successfully sought to expedite that stage of the legislative process or whether a determination of the business committee expedited that stage of the legislative process.

Key:

V – Expedited through leave

X – Expedited through urgency

/ – Expedited in accordance with determination of the Business Committee

* – State of emergency in force

– Covid-19 related Bill (A bill is classed as a Covid-19 related bill if its primary function was related to the Covid-19 response, for example, public health measures, managed isolation and quarantine, economic recovery or vaccination to name a few).

Bill- chronologically (by date given royal assent)	First reading expedited	Select Committee Skipped	Second reading expedited	Committee of the whole house expedited	Third reading expedited
Covid-19 Response (Taxation and Social Assistance Urgent Measures) Bill * #	V	V	V	V	V
Covid-19 Response (Urgent Management Measures) Legislation Bill * #	V	V	V	V	V
Covid-19 Response (Taxation and Other Regulatory Urgent Measures) Bill * #	V	V	V	V	V
Covid-19 Public Health Response Bill * #	X	X	X	X	X

Covid-19 Response (Further Management Measures) Legislation Bill * #				V	
Covid-19 Response (Requirements for Entities—Modifications and Exemptions) Bill * #	X	X	X	X	X
Immigration (Covid-19 Response) Amendment Bill * #			V	V	
Customs and Excise (Tobacco) Amendment Bill	X	X	X	X	X
Family Court (Supporting Families in Court) Legislation Bill	X		V	V	
Remuneration Authority (Covid-19 Measures) Amendment Bill #	X		V	V	
Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Bill					
Overseas Investment (Urgent Measures) Amendment Bill	X	X	X	X	X
Social Security (Covid-19 Income Relief Payment to be Income) Amendment Bill #	X	X	X	X	X
Climate Change Response (Emissions Trading Reform) Amendment Bill			X	V	
Arms Legislation Bill				X	
Electoral (Registration of Sentenced Prisoners) Amendment Bill			X	X	X
Greater Christchurch Regeneration Amendment Bill				V	V
Land Transport (Rail) Legislation Bill			X	X	X
Mental Health and Wellbeing Commission Bill				V	X
Privacy Bill				V	X
Public Finance (Wellbeing) Amendment Bill	X	X	X	X	X
Racing Industry Bill				V	V
Resource Management Amendment Bill	X	X	X	X	X
Electoral (Registration of Sentenced Prisoners) Amendment Bill (No 2)	X	X	X	X	X
Auckland Regional Amenities Funding Amendment Bill					

Covid-19 Recovery (Fast-track Consenting) Bill #	X	X	X	X	X
New Zealand Māori Arts and Crafts Institute Vesting Bill					
New Zealand Superannuation and Veteran's Pension Legislation Amendment Bill			X	X	
Education and Training Bill			X	X	X
Covid-19 Public Health Response Amendment Bill #	X	X	X	X	X
Covid-19 Response (Further Management Measures) Legislation Bill (No 2) #	X	X	X	X	X
Crimes (Definition of Female Genital Mutilation) Amendment Bill				V	
Dairy Industry Restructuring Amendment Bill (No 3)				V	
Equal Pay Amendment Bill			X		
Films, Videos, and Publications Classification (Commercial Video on-Demand) Amendment Bill			X		
Forests (Regulation of Log Traders and Forestry Advisers) Amendment Bill	X	X			
Infrastructure Funding and Financing Bill					
International Crimes and International Criminal Court Amendment Bill			X		
Land Transport (NZTA) Legislation Amendment Bill			X		
Public Finance Amendment Bill					(Only had 3 rd reading)
Public Service Bill					(Only had 3 rd reading)
Rates Rebate (Statutory Declarations) Amendment Bill			X	X	
Support Workers (Pay Equity) Settlements Amendment Bill					
Taumata Arowai—the Water Services Regulator Bill			X	X	
Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill			X		

Urban Development Bill			X		
Veterans' Support Amendment Bill (No 2)	X			V	
Fuel Industry Bill	X		X	X	X
New Zealand Public Health and Disability Amendment Bill				V	V
Residential Tenancies Amendment Bill			X	X	X
Smoke free Environments and Regulated Products (Vaping) Amendment Bill				V	V
Covid-19 Public Health Response Amendment Bill #	X	X	X	X	X
Drug and Substance Checking Legislation Bill	X	X	X	X	X
Taxation (Income Tax Rate and Other Amendments) Bill					
Taxation (Covid-19 Resurgence Support Payments and Other Matters) Bill	X	X	X	X	X
Food (Continuation of Dietary Supplements Regulations) Amendment Bill	X				
Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill	X		X	X	X
Climate Change Response (Auction Price) Amendment Bill	X		X	X	X
Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill	X	X	X	X	X
Child Support Amendment Bill					
Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2)					
Regulatory Systems (Transport) Amendment Bill				V	V
Taxation (Annual Rates for 2020-21, Feasibility Expenditure, and Remedial Matters) Bill	X				
Local Government (Rating of Whenua Māori) Amendment Bill				X	
Ngāti Hinerangi Claims Settlement Bill					

Financial Market Infrastructures Bill					
Immigration (Covid-19 Response) Amendment Bill #					
Holidays (Increasing Sick Leave) Amendment Bill	X			V	V
Overseas Investment Amendment Bill (No 3)	X				X
Covid-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill #	X	X	X	X	X
Medicines Amendment Bill #	X	X	X	X	X
Taxation (Budget 2021 and Remedial Measures) Bill	X	X	X	X	X
Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill					
Health (National Cervical Screening Programme) Amendment Bill					
Intelligence and Security (Review) Amendment Bill				/	
Social Security (Financial Assistance for Caregivers) Amendment Bill					
District Court (Protection of Judgment Debtors with Disabilities) Amendment Bill					
Annual Reporting and Audit Time Frames Extensions Legislation Bill	X	X	X	X	X
Education and Training (Grants—Budget Measures) Amendment Bill					
Gas (Information Disclosure and Penalties) Amendment Bill					
Fair Trading Amendment Bill					
Family Court (Supporting Children in Court) Legislation Bill					
Reserve Bank of New Zealand Bill					

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Privacy Bill.
Public Finance (Wellbeing) Amendment Bill.

Public Finance Amendment Bill.
 Public Service Bill.
 Racing Industry Bill.
 Rates Rebate (Statutory Declarations) Amendment Bill.
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