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**CONSTITUTIONAL RED TAPE: ASSESSING
NEW ZEALAND'S LEGISLATIVE RESPONSE
TO THE KAIKŌURA EARTHQUAKE**

LAWS 522: Public Law: State, Power and Accountability

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Contents

I	Introduction	4
II	Setting the scene: disaster, legislation and back-lash	5
III	Establishing a framework: the 2016 Act and administrative law theory	9
IV	Exploring justifications: speed, efficiency, flexibility and the emergency continuum	11
V	The constitutional consistency of the Kaikōura legislation	17
	<i>A Henry VIII provision</i>	<i>18</i>
	<i>B Privative clause</i>	<i>22</i>
	<i>C Prescriptive process</i>	<i>28</i>
	<i>D Sun-set provisions</i>	<i>34</i>
	<i>E Henry VIII provisions re-visited</i>	<i>36</i>
VI	Conclusion	38
VII	Appendix: Relevant Provisions of the Emergency Legislation	41
VIII	Bibliography	46

Abstract

This paper examines Parliament's recent legislative response to the 2016 Hurunui/Kaikōura earthquake. More specifically, it focuses on the delegated legislation making power granted to the executive in the Hurunui/Kaikōura Earthquakes Recovery Act 2016. It assesses the 2016 legislation against the background of the Canterbury earthquake legislation and the criticism that such legislation engendered. This paper addresses three key questions. Firstly, can the criticism directed at the Canterbury legislation be transferred to the Kaikōura legislation. In other words, is the Kaikōura legislation still constitutionally repugnant, and if so, to what degree. Secondly, is such constitutional repugnance able to be justified by the unique and disastrous circumstances. Finally, it asks what more can be done to bring the legislation more into line with fundamental principles, and enable it to be justified. This paper concludes the following. Firstly, the Kaikōura legislation proves to be a significant step forward, but there are aspects that are at odds with fundamental principles. Secondly, such inconsistencies cannot be justified. Finally, this paper makes suggestions for possible reform that still appreciates the Government's concern.

Key words

Emergency legislation, Hurunui/Kaikōura Earthquakes Recovery Act 2016, earthquake response, earthquake recovery, Kaikōura earthquake, Henry VIII provisions.

I Introduction

In recent years, New Zealand has been struck by three devastating earthquakes, the impact of which are still being felt. Each earthquake caused major damage, predominately in the South Island, but also reaching as far north as Wellington. Following each of these earthquakes, Parliament had to act quickly to provide assistance and relief for the earthquake-affected areas. Anything less than expediency and robustness would engender accusations of political negligence. Parliament therefore enacted bespoke primary legislation following each earthquake. The legislation became more complex with each earthquake. Three separate pieces of legislation were passed after the most recent Hurunui/Kaikōura earthquake in 2016, each addressing differing and complex facets of the impacts of the earthquake.

The emergency legislation passed in response to all three earthquakes has been the subject of much controversy. It called into question established control and accountability mechanisms, and how far the Government was willing to depart from these fundamental constitutional principles in times of emergency. The constitutional implications of the Canterbury earthquake legislation, being enacted approximately seven years ago, have already been the subject of much academic debate. My paper will thus focus predominately on the most recent legislation; in particular the Hurunui/Kaikōura Earthquakes Recovery Act 2016. The preceding Canterbury legislation will provide a basis, on which to compare the implications of the Kaikōura legislation, and to assess whether the improvements made to the recent legislation were sufficient. My paper will focus on a very specific aspect of the emergency legislation; the delegated legislation making power granted to the Governor-General. I ultimately conclude that the 2016 legislation was an important step-forward in developing constitutionally consistent emergency legislation. However, there is still room for improvement in order to justify a departure from constitutional principles.

The structure of my paper is as follows. Part II provides the backdrop, on which the discussion of the Kaikōura legislation takes place. The earthquakes, legislation and the subsequent criticisms are briefly canvassed. From here, Part III outlines the framework for the assessment that will take place. I identify four key aspects of the delegated legislation making power that will be the subject of scrutiny. Namely Henry VIII provisions, privative (or ouster) clauses, the process, and sun-set provisions. Part III also identifies divergent theories of administrative law which will be utilized to pick apart the differing control mechanisms included in, and excluded from the Acts. Before the full-scale analysis takes place however, Part IV asks; in what circumstances might a legislative response that

departs from constitutional principles be justified? I will address the disastrous state of the earthquake-affected areas and the oft-repeated argument that such a disastrous context provides a ‘no-questions asked’ justification. I also address the concept of the ‘emergency continuum,’ and argue that the temporal proximity of the earthquake is of the utmost relevance to what powers are defensible. I argue that response to, and recovery from an emergency are distinct phases. Only during the former can such extraordinary powers be justified. In light of said justification, Part V forms the substantive analysis of the Kaikōura legislation. It seeks to address the constitutional consistency of the Kaikōura legislation, relying on the Canterbury legislation as a form of comparison. Each mechanism is explored in regard to its constitutional and practical implications, whether it can be justified, and how it could be changed to improve emergency legislation.

The conclusions of my paper are extremely important. New Zealand is bound to be struck by further disaster, whether it be another earthquake, flooding, or another form of disaster. Fundamental administrative law principles must not be a victim in times of emergency. Instead, it is imperative that Parliament, in times of relative calm, can determine how to best respond when emergency strikes, and is willing to respond reflexively to previous legislation.

II Setting the scene: disaster, legislation and back-lash

On the 4th of September 2010, a magnitude 7.1 earthquake hit Christchurch, marking the beginning of a devastating set of earthquakes. The initial shock was followed by more than 2,000 aftershocks, which kept the city in a constant state of anxiety and disrupted the immediate earthquake response.¹ Approximately five months later, when Christchurch had barely begun the recovery process, a 6.3 “aftershock” struck Canterbury. The second earthquake was significantly shallower than the first, and located closer to Christchurch City.² It proved considerably more disastrous. Five years on, when Parliament had begun to reflect on its previous response to said emergencies, another major disaster struck New Zealand. A magnitude 7.8 earthquake hit near Kaikōura on the 14th of November 2016.³

¹ Charles Feltham *Canterbury Earthquake: facts and figures* (Parliamentary Library Research Paper 2010/07, November 2010) at 2.

² Eileen McSaveney “Historic earthquakes – The 2011 Christchurch earthquake and other recent earthquakes” (14 October 2014) Te Ara – The Encyclopaedia of New Zealand <www.teara.govt.nz>.

³ GeoNet “Magnitude 7.8, Mon Nov 14 2016 12:02 AM” (2016) GeoNet <<http://www.geonet.org.nz/earthquake/2016p858000>>.

Bespoke primary legislation was enacted under urgency in response to each earthquake to enable recovery once the states of emergency were lifted.⁴ The three Acts of consequence to this paper are the Canterbury Earthquake Response and Recovery Act 2010 (2010 Act), the Canterbury Earthquake Recovery Act 2011 (2011 Act), and the Hurunui/Kaikōura Earthquakes Recovery Act 2016 (2016 Act). These Acts each contained the delegated legislation making power enacted in relation to each earthquake. The 2016 Act will be the focus of this discussion with the 2010 and 2011 Acts being discussed to provide a comparison.

The 2010 Act was the first, and shortest of the Acts addressed in this discussion. It had a double function; it conferred a delegated legislation making power to the Governor-General and provided for the establishment of the Canterbury Earthquake Recovery Commission (Recovery Commission). The 2011 Act repealed and replaced the 2010 Act, and covered significantly more than its predecessor. It provided for – among other things – delegated legislation making power, the establishment of the Canterbury Earthquake Recovery Authority (CERA), Recovery strategies, information gathering, compliance orders and the acquiring or disposing of property.⁵ The 2011 Act was subsequently repealed and replaced by the Greater Christchurch Regeneration Act 2016, which shifted focus from recovery to regeneration.⁶

The legislative response to the Kaikōura earthquake was more extensive than the 2010 and 2011 earthquakes. Perhaps the harsh criticism directed at Parliament following the preceding legislation engendered a more considered and comprehensive approach. Additionally, having had similar disasters before the Kaikōura earthquake meant Parliament had more experience. The Canterbury legislation could be used as a blue-print of sorts. Three bespoke pieces of legislation were enacted to respond to the Kaikōura

⁴ Immediately following each earthquake, a state of emergency was declared under the Civil Defence Emergency Management Act 2001. During a state of emergency, a specific set of executive powers are invoked under the Civil Defence Emergency Management Act. Emergency powers are extensive and cover the direction of persons, the control of movement, requisitioning of land and other property, removal or destruction of property, and other powers such as powers of entry. Declaring a state of emergency is a short-term solution. Maintaining such a state is both ineffective in responding to the specific emergency at issue and inconsistent with the intention that those powers are reserved for extreme circumstances. See Civil Defence Emergency Management Act 2001 and Ministry of Civil Defence and Emergency Management “Declared States of Emergency” (2017) Civil Defence <www.civildefence.govt.nz>.

⁵ See generally *Quake Outcasts v The Minister for Canterbury Earthquake Recovery* [2015] NZSC 27 [2016] 1 NZLR 1 for a discussion regarding the lawfulness of the Canterbury Earthquake Recovery Authority’s offer to purchase land.

⁶ Greater Christchurch Regeneration Act 2016, ss 3 and 146(1).

earthquake: the Hurunui/Kaikōura Earthquakes Recovery (Emergency Relief) Act 2016,⁷ the Civil Defence Emergency Management Amendment Act 2016,⁸ and the Hurunui/Kaikōura Earthquakes Recovery Act 2016 (2016 Act). The 2016 Act contains similar provisions to the Canterbury legislation. Akin to the 2010 Act, the 2016 Act was a short piece of legislation that centered on delegated legislation making powers and the establishment of the Hurunui/Kaikōura Earthquakes Recovery Review Panel (Kaikōura Recovery Review Panel).

There has been extensive literature in both New Zealand and internationally regarding the constitutional implications of the Canterbury earthquake legislation.⁹ The purpose of this paper is thus to ask; can the criticisms of the preceding Acts be justifiably translated to the 2016 Act? I will draw on the existing literature and the 2010 and 2011 Acts to provide comparison to the 2016 Act. In doing so, a unique lens through which to re-visit the 2010 and 2011 Act will also be provided.

The legislative response to all three earthquakes raised important constitutional issues, with each piece of legislation impacting fundamental public law principles. As a total of five primary statutes were enacted as emergency legislation, to address all the constitutional issues engaged would be far too expansive a task; and outside the scope of this paper. Instead, I will focus on the delegated legislation making power granted to the Governor-

⁷ This Act modifies the Resource Management Act 1991 to allow for the rehabilitation of the Kaikōura harbour including authorising activities such as dredging and excavation.

⁸ This Act amends the Civil Defence Emergency Management Act 2002. It brings the commencement date of the provisions forward, enabling the powers to be used in relation to the Hurunui/Kaikōura earthquake. It also allows owners to obtain assessment of their structures, by way of transitional provision.

⁹ See: John Hopkins “The First Victim – Administrative Law and Natural Disasters” [2016] NZ L Rev 189; Laurie A Johnson and Ljubica Mamula-Seadon “Transforming Governance: How National Policies and Organisations for Managing Disaster Recovery Evolved Following the 4 September 2010 and 22 February 2011 Canterbury Earthquakes” (2014) 30(1) Earthquake Spectra 577; Jonathan Orpin and Daniel Pannett “Constitutional Aftershocks” (2010) New Zealand Law Journal 386; Matthew J McKillop “Emergency Powers of the New Zealand Government: Sources, Limitations and the Canterbury Earthquake” (Otago University Honours Dissertation, October 2010); Mark Gobbi, Briar Gordon, and Fiona Lincoln, “Managing Emergency Management: A Look at New Zealand’s Legislative Approaches” (Australasian Drafting Conference, Adelaide Drafting Forum, 2011); Tim Macindoe MP “New Zealand’s legislative response to the Canterbury earthquakes” (paper presented to the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011); Andrew Geddis “An open letter to New Zealand’s people and their Parliament” (28 September 2010) Pundit <<http://pundit.co.nz/content/an-open-letter-to-new-zealands-people-and-their-parliament>>; Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015).

General, in the 2010, 2011 and 2016 Acts. Each of the Acts contain broadly similar delegated legislation making powers. Power is granted to the Governor-General to make Orders in Council (Orders) on the recommendation of the relevant Minister. Such Orders have the ability to override primary legislation, if related to the earthquakes. More specifically I will focus on how this power, and its statutory design and implementation, affect the control of executive power.

Before an assessment can commence however, the significant back-lash against the Canterbury legislation must be considered. It must be noted that criticism was not unanimous. Many staunchly believed the legislation was both necessary and the right thing to do in the circumstances. Such opposing perspectives will be addressed in Part IV, which canvasses potential justifications. The focus of this part however is on the criticism.

Most of the criticism of the Acts centered on the truncated legislative process, the broad powers delegated to the Executive (in the form of delegated legislation making power), and the lack of appropriate safeguards. The Legislation Advisory Committee stated that the power granted to the Governor-General lacked safeguards, and thought expediency could be used to justify an abuse of process.¹⁰ In an open letter to New Zealand's people and its Parliament, academics and scholars expressed deep concerns that in enacting the legislation Parliament was "abandoning established constitutional values and principles in order to remove any inconvenient legal roadblock."¹¹ The legislation was also deemed to "[send] the message that our constitutional principles...are not important in an emergency,"¹² and create "dangerous constitutional innovations."¹³

In 2014, the Regulations Review Committee was tasked with inquiring into Parliament's legislative response to future national emergencies.¹⁴ The purpose of the Regulations Review Committee's inquiry was to:¹⁵

establish the most appropriate legislative model for enabling and facilitating response to, and recovery from, national emergencies once a state of emergency has been lifted, while maintaining consistency with essential constitutional principles, the rule of law, and good legislative practice

¹⁰ See Legislation Advisory Committee *Canterbury Earthquake Recovery Bill* (12 April 2011).

¹¹ Geddis, above n 9.

¹² Orpin and Pannett, above n 9, at 388.

¹³ Hopkins, above n 9, at 206.

¹⁴ Regulations Review Committee *Inquiry into Parliament's legislative response to future national emergencies* (December 2016) at 10.

¹⁵ At 12.

The Standing Orders Committee of the 50th Parliament determined that such an inquiry was necessary, as the Canterbury earthquake legislation raised “significant issues in terms of parliamentary oversight and constitutional matters.”¹⁶ Additionally, it articulated the need to have such matters settled before another emergency occurred¹⁷ (a somewhat macabrely ironic point as the Kaikōura earthquake occurred merely a month before the Regulations Review Committee report was published).¹⁸ The Regulations Review Committee in its report deemed the Canterbury earthquake legislation to depart from constitutional principles, and asserted that changes needed to be made in order for Parliament’s legislative response to future national emergencies to adhere to the rule of law. Having framed the nature of the criticisms of the preceding Acts, this paper seeks to address whether the same (or at least similar) can be said of the Kaikōura legislation.

III Establishing a framework: the 2016 Act and administrative law theory

In assessing the Kaikōura legislation and whether it too “abandon[s] established constitutional values and principles,”¹⁹ four key mechanisms of the delegated legislation making power will be discussed on; Henry VIII provisions, privative clauses, the prescriptive process, and sun-set clauses. The latter three will be discussed to put the powers conferred by the Henry VIII provision in context, and to assess how they re-shape its application. I will discuss each mechanism, its constitutional implications and the effect it has on the control of executive power. The Canterbury legislation will provide a foundation from which to compare the more recent Kaikōura legislation.

A multi-faceted approach will be taken, utilizing differing theories of administrative law as tools to unpick certain mechanisms contained in, or excluded from the legislation. Understandings of what constitutes control are not stagnant, and have changed alongside paradigmatic shifts in administrative law theory.²⁰ On one hand, control of state power has

¹⁶ Regulations Review Committee, above n 14, at 10.

¹⁷ Regulations Review Committee, above n 14, at 10.

¹⁸ The report was published in December 2016.

¹⁹ Geddis, above n 9.

²⁰ Theories originating from the era of the minimal state have developed through to the 20th century and the expansion of the welfare state. When administrative law emerged as an academic subject, the ideology was predominately positivist. Positivism and subsequently formalism cover jurisprudence that sees law as a system of rules and reasoning that is logical and stands alone. Positivists view the purpose of administrative law to be controlling state power through a distinct set of legal principles. Such an understanding can be traced back to an inherent distrust of the state. When the welfare state expanded, and governmental functions proliferated, diverging understandings of administrative law began to develop. Both realism and functionalism emerged which, in contrast to positivism, emphasize the importance of social context and policy. The purpose of administrative law was not understood as simply controlling state power. See Carol

been understood as the supreme purpose of administrative law, which is incorporated under the ‘red light’ perspective, or:²¹

The view of...administrative law as an instrument for the control of power and for the protection of individual liberty, the emphasis being on the courts rather than the government...the state [is also] often regarded as intrusive.

The “ordinary courts”²² are perceived to be the principal tool for controlling the executive, as the judiciary has been given the function of assessing the legality of state action, subjecting it to the rule of law, and protecting individual rights.²³

On the other hand, the state has been understood as “the instigator of movement.”²⁴ Instead of a minimalist, merely regulatory state, the state’s role can be understood as engineering social change, providing extensive social services and improving society.²⁵ Under this perspective – the ‘green light’ perspective – effective controls are seen to be proactive, political controls, rather than retrospective legal and specifically judicial control. Additionally, discretionary powers are not seen as inherently unwarranted. Discretionary authority is accepted as vital to the running of a modern government. The focus is therefore not on control through complete removal of discretionary powers, but by controlling the “scope and application” of said powers.²⁶

In reality, legislative design includes a combination of legal and non-legal; prospective and retrospective; and judicial and non-judicial control mechanisms. Such is the case for the emergency legislation at issue. The view adopted in this discussion is therefore one that appreciates the need for both mechanisms endorsed by the differing theories of administrative law (an ‘amber light’ view). The amber light perspective appreciates the necessity of the discretionary exercise of public power, in order to better society.²⁷

Harlow “Law and public administration: convergence and symbiosis” (2005) 71(2) *International Review of Administrative Sciences* 279 at 279; Carol Harlow and Richard Rawlings *Law and Administration* (2nd ed, Butterworths, London, 1997) at 30; Paul Craig *Administrative Law* (7th ed, Sweet & Maxwell, London, 2012) at 11.

²¹ Harlow and Rawlings, above n 20, at 67.

²² Albert V Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan, 1959) at 187.

²³ Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009) at 25.

²⁴ Rodney Barker *Political Ideas in Modern Britain* (2nd ed, Methuen, London, 1997) at 14.

²⁵ Barker, above n 24, at 18.

²⁶ Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers Ltd, Wellington, 2007) at 161.

²⁷ Mark Partington, “The Reform of Public Law in Britain: Theoretical Problems and Practical Considerations” in McAuslan and McEldowney (eds), *Law, Legitimacy and the Constitution* (Sweet & Maxwell, London, 1985) at 191.

However, controlling such power only by political and prospective means is insufficient.²⁸ The amber light perspective instead insists that these forms of control must be complemented by traditional, legal and retrospective control mechanisms.²⁹

Acknowledging the distinct theories continues to be useful however, as they draw out different understandings of administrative law, and question its very purpose.³⁰ It is valuable in the context of this paper as it allows a deeper understanding of the control mechanisms in the legislation, and does not overlook differing understandings of what may constitute control in certain circumstances.

In light of such considerations, I argue that the Kaikōura legislation is an improvement on the Canterbury legislation, but still leaves more to be desired. The four mechanisms reveal that the Kaikōura legislation is not completely constitutionally compliant. The reach of the Henry VIII provision is still undesirably wide, enabling an excess of primary legislation to be amended. The scope of this provision is not sufficiently narrowed by the other mechanisms. The privative clause, although redundant in practice, is constitutionally abhorrent as it symbolically removes judicial review, in one view the most fundamental control mechanism available. The process is more robust than that included in the Canterbury legislation. There are, however certain loopholes that undermine its effectiveness, meaning it is lacking under both theories of administrative law. Finally, the sun-set provisions allow the legislation to be utilized for longer than necessary. I will return to a thorough analysis of each mechanism, and how they ultimately impact the power granted under the Henry VIII provision. First however, it is important to address whether such departures can be justified.

IV Exploring justifications: speed, efficiency, flexibility and the emergency continuum

When carrying out a thorough assessment of the legislation, it is important to consider whether constitutionally inconsistent mechanisms can be justified by the emergency context. Part IV seeks to do just that. It would be unhelpful and unrealistic to assess the legislation in a vacuum, without due regard to the unique circumstances of earthquake response and recovery. As stated in an open letter to New Zealand's people and its

²⁸ Partington, above n 27, at 193.

²⁹ Partington, above n 27, at 193.

³⁰ J Beatson, Mark Elliot and Martin Matthews *Beatson, Matthews & Elliot's Administrative Law: Text and materials* (4th ed, Oxford University Press, Oxford, 2011) at 5-6.

Parliament, “All levels of government have an obligation to help the people of Canterbury rebuild their homes, business and lives as quickly as possible.”³¹

This section will begin by canvassing the disastrous context of the earthquakes, before addressing how many people, including the Government used such a context to justify constitutionally inconsistent legislation. Speed, efficiency and flexibility are identified as the key requirements of a response, and thus prove to be the go-to justifications. Part IV then identifies the emergency continuum and argues that speed efficiency and flexibility can only justify extraordinary powers in the response phase of an emergency.

The state of Christchurch and Kaikōura following the earthquakes was disastrous and saddening. The 2011 earthquake was fatal, with 185 lives lost, and thousands of people injured.³² Both the 2010 and 2011 earthquakes caused extensive property damage, with several large buildings completely collapsing.³³ After the 2011 earthquake the Central Business District was cordoned off, in some places until June 2013.³⁴ Several thousand homes were left uninhabitable, and water and sewage supplies were severely disrupted.³⁵ There was also substantial economic cost incurred as a result of each earthquake. The cost of the 2010 earthquake was estimated by the Treasury at \$5billion.³⁶ The 2011 earthquake was significantly costlier. The first estimation was \$16 billion, increasing to an estimated \$60 billion on revision.³⁷

The 2016 earthquake also proved fatal, with two people killed and approximately twenty people injured.³⁸ The earthquake caused severe damage to property and infrastructure, both in the Hurunui region, and further north in Wellington. In the South Island, many major roads were closed, including parts of State Highway one and State Highway seven.³⁹ State Highway one, north of Kaikōura to Blenheim/Picton is not expected to be fully open until

³¹ Geddis, above n 9.

³² Regulations Review Committee, above n 14, at 6.

³³ Hopkins, above n 9, at 190.

³⁴ Ministry for Culture and Heritage “Christchurch earthquake kills 185” (12 April 2017) New Zealand History <<https://nzhistory.govt.nz/page/christchurch-earthquake-kills-185>>.

³⁵ Ministry for Culture and Heritage, above n 34.

³⁶ Johnson and Mamula-Seadon, above n 9, at 582.

³⁷ Hopkins, above n 9, at 204.

³⁸ Radio NZ “The aftermath of the 7.8 earthquake so far” (18 November 2016) Radio New Zealand <<http://www.radionz.co.nz/news/national/318002/the-aftermath-of-the-7-point-8-earthquake-so-far>>.

³⁹ Stuff “Alternative route Between Christchurch and Picton established” (14 November 2016) Stuff <<http://www.stuff.co.nz/national/nz-earthquake/86434823/roads-closed-across-top-of-the-south-following-quake>>.

late 2017.⁴⁰ The impact was also strongly felt in Wellington, where multiple buildings were demolished and hundreds of workers were displaced.⁴¹ Again, New Zealand's economy took a hit. As recovery is still in progress, a concrete figure is not available. In its 2016 report however, The Treasury predicted the immediate costs (excluding further recovery and rebuild) to be between \$2 billion and \$3 billion.⁴²

Thus, it must be asked, does this extreme emergency context justify such a major departure from fundamental constitutional principles? Many believe it does. Hopkins notes that deviation from administrative principles in times of emergency is not only widely accepted in Western legal tradition, but often expected.⁴³ The Standing Committee on Justice and Community Safety in the Australian Capital Territory Legislative Assembly expressed the view that while the powers granted in the legislation were sweeping, the “natural disaster of terrible proportions” clearly justified their inclusion.⁴⁴

Of most consequence, Parliament heavily relied on the emergency context, and the uncertainty it brings, to justify their actions. It is important to note that the Regulations Review Committee's report on Parliament's legislative response to future national emergencies was published after the Kaikōura earthquake legislation had been enacted. Accordingly, while the timing was coincidental, the Government did not actually consider the Committee's recommendations before passing the 2016 Act. That being said the Government did address the 2016 Act alongside the Canterbury earthquake legislation in its response to the report. The Government's response to the Regulations Review Committee's report was brief and dismissive. The Government agreed with the recommendations in principle, but continued to assert the importance of flexibility in times of emergency. For example, the Regulations Review Committee recommended that all emergency legislation should take the form of primary legislation. In response, the Government stated, “The Government considers that emergency legislation should take whatever form that is most suitable in the circumstances.”⁴⁵ There was no indication that

⁴⁰ New Zealand Transport Agency “Kaikōura Earthquake Response” (7 April 2017) NZTA <<https://www.nzta.govt.nz/projects/Kaikōura-earthquake-response>>.

⁴¹ New Zealand Herald “Nearly 3 months on, Wellington still feeling effects of Kaikōura earthquake” (10 February 2017) New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11797820>.

⁴² The Treasury *Half Year Economic and Fiscal Update* (December, 2016) at 6.

⁴³ Hopkins, above n 9, at 195.

⁴⁴ Stephen Argument *Henry VIII Clauses Fact Sheet* (Legislative Assembly for the ACT, November 2011) at 11.

⁴⁵ *Government Response to Report of Regulations Review Committee on Inquiry into Parliament's legislative response to future national emergencies* (Presented to the House of Representatives in Accordance with Standing Order 252, J.1, 8 March 2017) at 3.

Parliament's future legislative response would be significantly, if at all affected by the report.

The political discourse after the 2010 earthquake cemented this approach. Take for example the second reading of the 2010 bill. The Hon Gerry Brownlee stated, "the bill will be the House's expression of a strong desire to remove bureaucracy that could slow down the very necessary work we now have to do."⁴⁶ The Hon Phil Goff, leader of the opposition at the time expressed similar sentiments; "we understand that this situation is not one of business as usual, and that we need to make an efficient and swift response."⁴⁷ Such discourse is understandable, given the political risk the Government faced. To fail to provide assistance and relief to Canterbury – regardless of the constitutional implications – would be a failure in the eyes of much of the voting public. Whether this approach was correct and defensible however, is an entirely different matter.

Three specific characteristics of the ideal legislative response were heavily relied upon by Government. They appear frequently throughout the legislation and subsequent Government publications. They are *speed*, *efficiency* (or *appropriateness*) and *flexibility*. Apt examples are found throughout the Government's response to the Regulations Review Committee's report. A selection follows. When addressing the report in its entirety:⁴⁸

The Government generally agrees with the recommendations contained in the Committee's Report but notes the ability to respond *flexibly* and *appropriately* to each national emergency must be retained.

In response to the recommendation that emergency legislation should take the form of primary legislation, the Government stated:⁴⁹

[T]he Order in Council mechanism allows for the *immediate* exercise of powers to resolve recovery problems while also providing the *flexibility* to deal with unforeseen issues later on. Further full parliamentary consideration of a large number of amendments may *slow down the effective response* to a national emergency.

As a final example, the Government justified limiting judicial review because:⁵⁰

⁴⁶(14 September 2010) 666 NZPD 13899.

⁴⁷ (14 September 2010) 666 NZPD 13899.

⁴⁸ At 2 (emphasis added).

⁴⁹ At 3 (emphasis added).

⁵⁰ At 4 (emphasis added).

Orders in Council provide a *fast* and *flexible* mechanism that allows the Government to react *quickly* to a range of issues after a national emergency. There is potential for the delivery of *essential* recovery activity to be *unduly delayed* by litigation.

In and of themselves, speed, efficiency and flexibility are not inherently objectionable. In fact, in the context of an emergency on the scale of these earthquakes, they are desirable legislative features. However, tension is created when achieving these features comes at the cost of fundamental administrative principles. In defusing the tension, or judging whether the need for speed, efficiency and flexibility justify a departure from fundamental principles, it is important to note that the need for each of these features differs the more time passes.⁵¹

A The emergency continuum

The speed, efficiency and flexibility required of emergency legislation will differ according to the temporal proximity to the earthquake. The powers required – and justifiable – in the immediate aftermath of the earthquake will be vastly different from those required a few months, and again a few years on. This point can be demonstrated by a process termed the ‘emergency continuum.’⁵² The emergency continuum describes the various stages of any disaster or emergency. Four distinct phases are identified: mitigation,⁵³ preparedness,⁵⁴ response, and recovery (sometimes referred to as reconstruction).⁵⁵ The Canterbury and Kaikōura legislation are naturally concerned with the response and recovery phases, those being the phases which occur after an emergency has transpired. The response phase entails measures taken to deal with the *direct aftermath* of the emergency, such as evacuation, emergency shelter, search and rescue, and damage assessment and control.⁵⁶ Recovery, on the other hand involves addressing the issues, often *ongoing*, that the emergency created. Such a phase is a more long-term phase, and covers measures such as liability assessment, community planning, and reconstruction.⁵⁷

⁵¹ See: Hopkins, above n 9.

⁵² Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at [1.17].

⁵³ Mitigation is defined by the United Nations Disaster Relief Co-Ordinator as the phase before an emergency in which the actual or probable effects of an extreme hazard on man and his environment are reduced. The Law Commission identifies activities which fall into the mitigation phase as things such as insurance, building codes, education and land-use planning. See Law Commission, above n 52, at [1.17] – [2.30].

⁵⁴ The preparedness phase is also a pre-emergency phase. However, during the preparedness phase, more specific actions are taken to prepare for a disaster, as opposed to reducing potential impacts. Activities within the preparedness phase include: warning systems, stockpiling and disaster planning. See Law Commission, above n 52, at [1.17] – [2.30].

⁵⁵ Law Commission, above n 52, at [1.17].

⁵⁶ Law Commission, above n 52, at [2.28].

⁵⁷ Law Commission, above n 52, at [2.28].

Hopkins has also articulated the necessity of such a distinction, although in different terms. He states that the terms ‘emergency’ and ‘disaster’ are distinct and should be treated as such in the legislation and popular discourse.⁵⁸ For the purposes of this paper, I will refer to the emergency continuum, as opposed to the emergency/disaster dichotomy for a couple of reasons. Firstly, the terms emergency and disaster are used interchangeably throughout the literature, and ‘disaster’ is used instead of emergency in comparative jurisdictions.⁵⁹ To attribute distinct meanings would cause confusion. Secondly, Hopkin’s conception of an emergency aligns with the response phase of the continuum, and his conception of disaster aligns with the recovery phase of the continuum. Accordingly, each phrasing is asserting the same idea; that the different stages of an emergency need to be recognised.

The purpose of ascertaining the different phases of an emergency is to shed light on what powers may be justified in each. The Law Commission assert that it is only during the response phase “that the need to deal urgently with the impact of the emergency may call for the use of extraordinary executive powers.”⁶⁰ Thus, while the concerns of the Government are valid, they are only valid in relation to dealing with the *immediate aftermath* of the earthquake. Extraordinary powers should thus not be used in the recovery phase. Hopkins reiterates this notion. In his submission to the Regulations Review Committee regarding the report in emergency legislation, he argues that “recovery is in fact nothing more than a form of development policy...it remains a series of long term policy choices – not an emergency response.”⁶¹ Accordingly, any policy aimed at the recovery of an earthquake affected area should be subject to regular scrutiny and proper principles of law making.

An example of an Order clearly directed as recovery as opposed to response lies in the Canterbury Earthquake (Christchurch Replacement District Plan) Order (“District Plan Order”) enacted under the 2011 legislation in July 2014. The Order modifies the Resource Management Act 1991 to provide a more expedient process for reviewing the existing Christchurch district plan and preparing its replacement. Undoubtedly, the Order was enacted to facilitate recovery, as it involves city planning three and a half years after the earthquake. The effects of the decisions made regarding the recovery of the city, such as those made under the Christchurch Replacement District Plan Order will be felt for many

⁵⁸ See: W John Hopkins “Submission to the Regulations Review Committee on the Inquiry into Parliament’s legislative response to future national emergencies 2016” and Hopkins, above n 9.

⁵⁹ Law Commission, above n 52, at [2.17] and [2.19].

⁶⁰ Law Commission, above n 52, at [2.30].

⁶¹ Hopkins “Submission to the Regulations Review Committee”, above n 58, at 3.

years to come. Such decisions will shape the way the city is planned and developed. Hastily made decisions may result in poorly planned cities. They should thus be the result of careful consideration, and Parliamentary and public input and scrutiny. In line with the emergency continuum the District Plan Order should not have been made under wide delegated legislation making powers.

The emergency legislation of Queensland Australia provides further effective insights. Not only is the emergency continuum (and importantly the response/recovery dichotomy) recognised, it is specifically legislated for. The 2016 Queensland State Disaster Management Plan (in accordance with the Disaster Management Act 2003), specifies that there are four differing stages (including both response and recovery) and outlines which functions can be enacted in each. It stipulates that certain criteria must be fulfilled before the transition can be made from the response phase, to the next stage of recovery.⁶² The purpose of this paper is assessment of New Zealand's bespoke legislation. I therefore do not suggest that the Queensland Disaster Management Plan is adopted. Instead, the dichotomy between response and recovery can be transferred to the New Zealand context, and its legislative regime should recognise different powers are required for different stages.

To bring it back to the Government's justifications, the need for *speed, effectiveness* and *flexibility* is only so urgent to justify extraordinary powers in the *response* as opposed to *recovery* phase. As will be discussed, the powers granted in the legislation at issue very much stray into the territory of granting extensive executive power in relation to the recovery phase, and are thus not justified.

V The constitutional consistency of the Kaikōura legislation

In Part V I assess the legislation and the impact it has on the control of executive power. I will focus specifically on the Henry VIII provisions, privative clauses, prescriptive process and sun-set provisions. The latter three mechanisms will be discussed in relation to how they re-shape the control granted by the Henry VIII provision. Throughout the discussion of each mechanism, whether or not its effect can be justified is also addressed. Ultimately, I conclude that while each mechanism proves to be an improvement on the Canterbury legislation, the excess power given to the executive, in the form of the Henry VIII provision remains too wide, and cannot be justified.

⁶² Queensland Government *Queensland State Disaster Management Plan* September 2016 at 37.

Part V also suggests possible reforms for each mechanism. The Government put much emphasis on the need for a fast, efficient and flexible response. Such considerations should not be easily disposed of. This section will thus discuss alternative forms the legislation may take, consistent with constitutional principles, but still appreciating the Government's concerns. Possible reform will be suggested on the basis of Parliament continuing to use the general approach taken with the previous three major earthquakes. Namely bespoke primary legislation conferring a delegated legislation making power. While significant amendments could be made to the Civil Defence Emergency Management Act 2002, such that emergency powers are enacted under that Act, a discussion of the constitutional implications, and form of such powers fall outside the scope of this paper. It has also been suggested that compensation mechanisms should be built into future Acts, providing for those impacted by decisions made under the legislation. An assessment of the merits of such a suggestion while of relevance to this discussion, also fall outside the scope of this paper. Instead, focus is on improvements to the mechanisms recently adopted by Parliament.

By way of a recap, each Act contains a provision granting delegated legislation making power to the Governor-General. The Governor-General is granted the power to make Orders, on the recommendation of the relevant Minister, that have the ability to override primary legislation. It is important that Act is considered holistically, as adequate safeguards may ensure a sweeping power is not constitutionally repugnant. Accordingly, the following discussion explores all aspects of the power, and how they impact the power granted by the primary mechanism; the Henry VIII provision.

A Henry VIII provision

At the heart of this paper (and the legislation) lies the delegated legislation making power granted to the Executive. Each provision granting this power amounts to a Henry VIII provision. 'Henry VIII provision' is a "derogatory slogan"⁶³ for a provision contained in a statute that allows primary legislation to be amended or repealed by delegated, or subordinate legislation.⁶⁴ Specifically, in all three Acts the Governor-General is granted the power to make any Order which "may grant an exemption from, or modify or extend" primary legislation.⁶⁵ Not only is this a Henry VIII provision, it is one with extremely wide-

⁶³ Ross Carter, Jason McHerron, and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at 79.

⁶⁴ Dean R Knight and Edward Clark *Regulations Review Committee Digest* (6th ed, New Zealand Centre for Public Law, Wellington, 2016) at 17.

⁶⁵ Section 6(4) of the 2010 Act; section 71(2) of the 2011 Act.

reaching implications, the reasons for which will be subsequently discussed. It is important to note however, that the implications of the Henry VIII provisions are subject to the other three mechanisms.

The derogatory nature of the name reflects the general disdain for Henry VIII provisions. They have been described by the New Zealand Court of Appeal as “in principle, undesirable.”⁶⁶ Additionally, the Cabinet Manual 2017 practically forbids them, stating that delegated legislation “should not, in general...purport to amend primary legislation.”⁶⁷ Such a notion has been explored in depth for centuries.⁶⁸ Henry VIII provisions are undesirable for a multitude of reasons, varying depending on the extent to which a regulation may amend a piece of primary legislation. They confer vast amounts of generally unchecked power to the Executive. The Minister may recommend the amendment of a piece of primary legislation, without an extensive pre-legislative scrutiny phase.⁶⁹ The proposed regulations are not required to go through a select committee, committee of the whole house, nor a New Zealand Bill of Rights Act 1990 vet.

Prospective controls are evidently removed. Accordingly, if the view of administrative law as the instigator of movement is adopted, Henry VIII provisions are repugnant. Additionally, reviewing amendments to primary legislation falls outside the jurisdiction of the courts. Retrospective judicial control is therefore also removed. Regardless of the perspective of administrative law adopted, generally speaking, Henry VIII provisions are incompatible with effective administrative law. It is worth keeping in mind however that effective safeguards (the definition of which differs according to administrative law theory) may influence the constitutional repugnance of a Henry VIII provision.

While generally deplorable, it has been suggested that certain circumstances may render Henry VIII provisions acceptable. In the United Kingdom, the Regulations Review Committee stated that Henry VIII provisions were not appropriate for general legislative purposes, and instead were only acceptable when used to cover uncontroversial and unforeseen legislative inadequacies or inconsistencies.⁷⁰ However, the United Kingdom Legislation Advisory Committee suggested that such provisions could also be used in

⁶⁶ *Accident Compensation Corporation v Donaldson* [2009] NZCA167 at [26].

⁶⁷ Cabinet Office *Cabinet Manual 2017* at [7.82].

⁶⁸ See generally: Richard Gordon “Why Henry VIII Clauses should be Consigned to the Dustbin of History” (Public Law Project, Conference Papers, November 2015); Lord Rippon “Henry VIII Clauses” (1989) 10 *Stat L Rev* 205; Dennis Morris “Henry VIII Clauses: Their birth, a late 20th century renaissance and a possible 21st century Metamorphosis” (The Loophole, March 2007) 14.

⁶⁹ Cabinet Office, above n 67, at [7.82].

⁷⁰ Joseph, above n 26, at 504.

“exceptional circumstances.”⁷¹ The ‘exceptional circumstances’ justification is also evident in New Zealand, with the unique circumstances of the emergencies frequently repeated as a ‘no questions asked’ form of justification. Many staunchly argue that the inclusion of a wide Henry VIII provision is permissible, given the need for fast, flexible and effective recovery from the earthquakes. Some illumination on this perspective can be provided by the benefits of Henry VIII provisions and delegated legislation. They can relieve time, technical and practical pressures on Parliament.⁷² They are also able to provide consequential amendments arising from unforeseen implementation issues.⁷³ Many examples of the benefits of delegated legislation – in direct relation to emergency legislation – can be found in the specific Orders enacted after the earthquakes. Take for example, the Canterbury Earthquake (Social Security Act) Order 2011. The Order enabled the speedy enactment of a provision exempting those living in certain areas from having to re-apply for the unemployment benefit. The purpose of the Order is desirable and engaging a full Parliamentary process appears unnecessary given the circumstances.

Of course, it must be acknowledged that the circumstances surrounding the sizable earthquakes were exceptional, and did require government action quite distinct from day to day tasks. However, in order to assess whether the specific Henry VIII provisions can be justified, their form and implications must first be ascertained.

In both the 2010 and the 2011 Acts, an Order was permitted to modify *any* Act. Both statutes contained a non-exhaustive list of legislation that may be amended.⁷⁴ The scope of the Henry VIII provision was therefore huge.⁷⁵ Further, including the non-exhaustive list proved to be redundant in practice. For example, under the 2010 Act, 16 Acts were amended by Order, seven of which were not listed.⁷⁶ In response, the Regulations Review Committee specifically recommended that “powers to override enactments by Order in Council should provide a positive list of the specific enactments that can be overridden.”⁷⁷ Consistently with this recommendation, the 2016 Act’s Henry VIII provision took a

⁷¹ United Kingdom Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2001 ed, with 2003 supplement) at [10.1.2].

⁷² Sean Brennan “Henry VIII Clauses: Their Place in Modern New Zealand” (Victoria University of Wellington Honours Dissertation, 2016) at 6.

⁷³ Brennan, above n 72, at 6.

⁷⁴ Section 6(4).

⁷⁵ There were however certain Acts that were forbidden from being amended. Five statutes were included in s 6(6)(c) of the 2010 Act: The Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, and the New Zealand Bill of Rights Act 1990. The Parliamentary Privilege Act 2014 was added to the exempted list by amendment to the 2011 Act in 2014. In the 2016 Act the list further added the Judicial Review Procedure Act 2016.

⁷⁶ Regulations Review Committee, above n 14, at 33.

⁷⁷ At 3.

different form. Instead of a non-exhaustive list, it contained a positive list of legislation which can be modified.⁷⁸ The positive list is a further control on executive power, and narrows the scope of the Henry VIII provision; a desirable step forward. However, on closer inspection, it may be little more than paying lip-service to the recommendation. First, the positive list contained in Schedule 2 is wide. It contains 38 Acts including the Land Transfer Act 1952, the Inland Revenue Acts and the Social Security Act 1964. Schedule 2 also includes phrases which further widen the scope. For example, *any* Act may be modified, to the extent that it relates to financial statements and obligations.⁷⁹ Secondly, s 18 allows the Governor-General to make an Order specifying Acts for the purpose of Schedule 2. In other words, an Order can be made to allow more Acts to be amended. An Order specifying additional Acts is subject to the same processes, and judicial review requirements as all Orders made under the Act.⁸⁰ Such a section may render the additional safeguard practically redundant, subject to the prescriptive process.

In terms of justification for having such a broad Henry VIII provision, the government has provided little, besides the ‘exceptional circumstances’ line of reasoning outlined above. In fact, the Hon Gerry Brownlee, then Minister of Earthquake Recovery stated, “the Government doesn’t need to justify the law.”⁸¹ In its response to the Regulations Review Committee’s report, the Government merely stated what its approach was, and that it considered it appropriate to include a mechanism allowing additional Acts to be added.

In light of the emergency continuum, there does not appear to be much justification available for including such wide-reaching clauses. The power granted appears to stretch far beyond simply earthquake response. However, it is important that the Act is not atomized. The broad powers of the Henry VIII provisions cannot be assessed in isolation. The impact that these provisions will have on control, including whether they can be justified, will depend on the purpose for which they can be made and the safeguards that are included, or relevantly, excluded from the Act. As Macindoe asserts “even where Henry VIII powers are justified, they should be subject to strict controls.”⁸² Accordingly, before the practical and constitutional implications of said Henry VIII provisions can be judged, the other mechanisms must be assessed. The existence and form of these mechanisms reshape the power granted by the Henry VIII clause. Accordingly, I will return to Henry VIII

⁷⁸ Section 7(1).

⁷⁹ Schedule 2(39).

⁸⁰ Section 18.

⁸¹ Radio New Zealand “Quake Recovery Law ‘Misguided’” (28 September 2010) Radio New Zealand <<http://www.radionz.co.nz/news/canterbury-earthquake/57956/quake-recovery-law-'misguided'>>.

⁸² Tim Macindoe MP “New Zealand’s legislative response to the Canterbury earthquakes” (paper presented to the Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011) at 6.

provisions after the other mechanisms have been sufficiently analyzed and their implications on the delegated legislation making power assessed.

B Privative clause

A mechanism furthering the unfettered control of the executive is the inclusion of privative clauses in all three Acts. Akin to Henry VIII provisions, ‘privative clauses’ or ‘ouster clauses’ are simple legislative mechanisms that come with extensive public law issues. A privative clause is a provision in an Act that either restricts or excludes judicial review.⁸³ Within the umbrella term, there are ‘full’ privative clauses, and ‘partial’ privative clauses. A full privative clause completely removes judicial review, in all circumstances. A partial privative clause on the other hand, restricts judicial review. For example, a partial privative clause may impose temporal or grounds-based restrictions on reviewability or reserve judicial review only for when all other remedies have been exhausted.⁸⁴

Privative clauses are of particular abhorrence to those who view control as the sole purpose of administrative law. As previously discussed, this view places the utmost importance on external legal and judicial control on executive power. Thus, a provision which removes judicial review is repugnant to fundamental principles of control. By way of example, legal academics in an open letter to New Zealand’s people and its Parliament, expressed such a perspective of administrative law in relation to the Canterbury earthquake legislation stating, “Only formal, legal means of accountability, ultimately enforceable through the courts, are constitutionally acceptable.”⁸⁵

Those adopting a differing view of administrative law, on the other hand, would be less outraged at the existence of a privative clause, so long as the Act in question contained more intense prospective control mechanisms.⁸⁶ Therefore, both perspectives need to be taken into account in assessing whether the ouster clauses in these Acts are permissible and justified.

It is clear that all three Acts include a privative clause. The 2010 and 2011 Acts contained identical provisions which stipulated, “the recommendation of the relevant Minister may not be challenged, reviewed, quashed, or called into question in any court.”⁸⁷ Despite the

⁸³ Harlow and Rawlings, above n 23, at 26.

⁸⁴ Hanna Wilberg “Administrative Law” [2013] NZ L Rev 715 at 739-740.

⁸⁵ Geddis, above n 9.

⁸⁶ Beatson, Elliot and Matthews, above n 30, at 5.

⁸⁷ 74(2) (2011 Act), and 6(3) (2010 Act).

harsh criticisms of the Canterbury legislation in this respect, the Kaikōura legislation still contained a practically identical privative clause. Parliament made the clause even more unequivocal by adding that the decisions of the Minister (as well as their recommendations) are explicitly unreviewable. While the provisions' privative nature is undeniable, it is less obvious whether they amount to a full or partial privative clause, and what their practical effect will be. Per the wording of the section, the recommendation (and decisions) of a Minister are explicitly unreviewable. For example, if a Minister recommends an order, improperly undertaking the statutorily required process (as will be later discussed), then the decision is unamenable to review. Excluding judicial review in this way is contrary to fundamental constitutional principles. The Regulations Review Committee recommended that all judicial review should be preserved.⁸⁸ Moreover, the Law Commission, in its 1991 report stated that to remove legal accountability in this way “appears in principle to be the wrong approach”, and should not be legislated for.⁸⁹

The provisions do not, however, go so far as removing reviewability of the Orders themselves. To determine the reviewability of Orders, the Act must be read as a whole, taking into consideration other provisions that may amount to privative clauses, whether full or partial.

The Kaikōura legislation has a robust scope of reviewability, at least when compared with the Canterbury legislation. A comparison follows. The Parliamentary Counsel Office, in a retrospective report, asserted that the 2010 Act did not exclude judicial review of an Order itself.⁹⁰ Therefore, if an Order is made that is outside the purpose of the 2010 Act, it may still be held to be *ultra vires*.⁹¹ However, it could be argued that when read in conjunction, certain provisions of the Act may constitute a full privative clause. Section 7(1) established that every Order had “the force of law as if it were enacted as a provision of this Act.” The effect of this provision is not clarified. Primary legislation is not amenable to review, thus if a regulation were deemed to have the force of law as a provision in a piece of primary legislation, it too would appear to be excluded from judicial review. Further, section 7(5) stipulated that an Order may not be held to be invalid because it authorizes an act or omission at odds with any other primary legislation, or because it confers discretion on any

⁸⁸ At 3.

⁸⁹ At [5.114].

⁹⁰ Gobbi, Gordon, and Lincoln, above n 9, at 16.

⁹¹ At 16.

person. The 2011 Act contained almost identical provisions to the 2010 Act regarding reviewability of orders, and thus too appears to constitute a full privative clause.⁹²

Interpreting the provisions contained in the 2010 and 2011 Act as amounting to a full privative clause would be untenable in the current judicial review climate.⁹³ Early precedent established that statutory incorporation of regulations (as in s 7(1) of the 2010 Act, and s 74(2) of the 2011 Act) does not extend to invalid, or ultra vires regulations. *Hackett v Lander and Solicitor-General* recognized that judicial review was not excluded from a regulation with the force of law of primary legislation when it “plainly appeared that the regulations could have nothing to do with the objects for which they were authorized to be made.”⁹⁴ Accordingly, ss 7(1) and 74(2) must be read such that only valid, or *intra vires* regulations could be deemed to have the “force of law as if it were enacted as a provision.”⁹⁵ Such an interpretation was clarified by the 2011 Act, which stipulated an Order held the force of law as if enacted as a provision, *only as far as it is authorized by the Act*.⁹⁶

Further, in the “post *Ammimisc*-era”⁹⁷ courts will not uphold such full privative clauses, in order to preserve judicial review.⁹⁸ *Bulk Gas Users Group v Attorney-General* reaffirmed the settled approach in New Zealand, that the judiciary will inevitably apply statutory interpretation against a privative clause.⁹⁹ Such an approach was even explicitly acknowledged by Government. The Hon Gerry Brownlee, in the Committee of the Whole House, noted the established judicial attitude towards full privative clauses.¹⁰⁰ He also stated that “totally outrageous” Orders would not be excluded from judicial review.¹⁰¹ Accordingly, the privative clauses contained in the Canterbury legislation are likely to have no practical effect, as the judiciary will not uphold them. Despite its practical redundancy, the inclusion of a privative clause by Parliament, continues to be constitutionally repugnant.

⁹² Section 75(5) is nearly identical to s 7(1) of the 2010 Act, however states that Order only have the force of law as if enacted as a provision of the Act *so far as they are authorised by the Act*. Section 75(2) is akin to s 7(5) of the 2010 Act, stating that an Order may not be held invalid because it is inconsistent with any other Act, or confers any discretion.

⁹³ Matthew J McKillop “Emergency Powers of the New Zealand Government: Sources, Limitations and the Canterbury Earthquake” (Otago University Honours Dissertation, October 2010) at 53.

⁹⁴ *Hackett v Lander and Solicitor-General* [1917] NZLR 947 at 950 (SC).

⁹⁵ See *Sheahon v Room* [1917] 497 (SC).

⁹⁶ Section 75(5).

⁹⁷ Joseph, above n 26, at 1031.

⁹⁸ See Joseph, above n 26, at 1031, and Craig, above n 20, at 892.

⁹⁹ *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

¹⁰⁰ Orpin and Pannett, above n 9, at 388.

¹⁰¹ Orpin and Pannett, above n 9, at 388.

The judicial reviewability of Orders under the Kaikōura legislation is better preserved. The Government, in its response to the Regulations Review Committee's recommendation to remove said privative clauses, stated that the ouster clause relating to the Ministers decision must be kept, in order to ensure litigation does not unduly delay recovery.¹⁰² Despite the Government's dismissive response, the 2016 Act's privative clause seem less robust. Again, the recommendation of the Minister is fully excluded from judicial review. However, when the Act is read as a whole, there appears to be no intention to completely remove the mechanism of judicial review, although limits are clear. Akin to the Canterbury legislation, Orders may not be held invalid because they are inconsistent with any Act or confer discretion.¹⁰³ However, this statute does not include a provision granting an Order the force of law as if it were enacted as part of the primary legislation. Further, the statute stipulates that "...nothing in this Act prevents a court from determining whether an order is authorized by this Act."¹⁰⁴ Accordingly, the provisions in the 2016 Act only amount to a partial privative clause.

Relatively recent New Zealand cases reveal that partial privative clauses, as opposed to full privative clauses may be upheld where circumstances are appropriate.¹⁰⁵ The aforementioned judicial approach, to interpret statutes such that full privative clauses have no effect, is not as strong in regard to partial privative clauses.¹⁰⁶ In other words, a court is more likely to uphold a partial privative clause than a full privative clause. For example, in the 2011 employment law case of *Parker v Silver Fern Farms Ltd*, the Court of Appeal upheld the partial privative clause contained in s193 of the Employment Relations Act 2000. The clause restricted judicial review to the limited ground of "lack of jurisdiction."¹⁰⁷ This partial privative clause has often been upheld by the Courts.

It has also been noted that courts have upheld partial privative clauses only where alternative remedies existed that firstly, did not leave anyone without a challenge, and secondly included access to the courts.¹⁰⁸ Such was the case in *Ramsay v Wellington District Court*, whereby alternative statutory remedies were prioritized.¹⁰⁹ Linked to this, Courts may uphold such alternative remedies if there is a valid policy reason for the partial

¹⁰² At 4.

¹⁰³ Section 16.

¹⁰⁴ Section 8(5).

¹⁰⁵ Wilberg, above n 84, at 739.

¹⁰⁶ Wilberg, above n 84, at 739.

¹⁰⁷ Section 193.

¹⁰⁸ Wilberg, above n 84, at 740.

¹⁰⁹ *Ramsay v Wellington District Court* [2006] NZAR 136 (CA).

privative clause, which we know is a strong argument in relation to devastating earthquakes.¹¹⁰

I would argue however, that the Kaikōura legislation would be treated differently than the above cases. The above cases relate to specific legislation, designed for a very different purpose than the emergency legislation. In the employment law context, alternative remedies are available and there is a general policy to keep employment law disputes away from the courts.¹¹¹ The 2016 Act contemplates no such effective alternative remedies, and confers the kinds of powers that do not warrant being kept away from the courts. Further, the design of the partial ouster is different than that in *Parker* and *Ramsay* as it is a wider restriction on judicial review. Additionally, when enforcing partial privative clauses, the judiciary considers specific alternative remedies, and other ways to access the courts.¹¹² No such alternatives exist in the 2016 Act. It is therefore unlikely, in light of the previous discussion and the nature of the Kaikōura legislation, that the courts would treat the privative clause any differently from the Canterbury legislation. Such a conclusion sheds light on the powers granted by the Henry VIII provision. It is not so unfettered so as to be completely exempt from review. However, privative clauses transform the Henry VIII provision into one with at least symbolically wide power.

It is important to note, that all three pieces of legislation ensured that the Orders remained either disallowable, or legislative instruments, as governed by the Legislation Act 2012.¹¹³ Accordingly, they must be presented to the House of Representatives, which has the power to disallow the instrument by resolution.¹¹⁴ Such a power proves to be a further retrospective control. Preserving the power is important, but cannot be a complete alternative to judicial review.

There are changes that could be made to remedy the constitutional implications of the privative clauses. As the improvements are to the 2016 Act, I will proceed on the basis that the provision stating Orders are to be treated as primary legislation has already been removed.

¹¹⁰ Wilberg, above n 84, at 740.

¹¹¹ Wilberg, above n 84, at 745.

¹¹² Wilberg, above n 84, at 740.

¹¹³ Although in 2010 and 2011 disallowable instruments were governed by the Regulations (Disallowance) Act 1989.

¹¹⁴ Part 3, Subpart 1.

The most effective improvement would be to completely remove any privative clauses. Provisions excluding the Ministers decisions and recommendations from review should not be reenacted in future emergency legislation. Such an improvement is consistent with the Regulations Review Committee's recommendations, the Law Commissions report, and most importantly fundamental constitutional principles. Additionally, as the Hon Gerry Brownlee himself conceded, such privative clauses are likely to have little impact. Including them merely sends a practically redundant signal to the judiciary which is at odds with the rule of law.

An alternative, albeit less desirable approach would be to include a partial privative clause in relation to the Ministers decision, in the form of a time limit to judicial review. The Government justified the statutory removal of judicial review of a Minister's decision on the basis of avoiding lengthy litigation disrupting earthquake recovery. Accordingly, putting a time limit on judicial review would ensure that a remedy could be sought, but at such a time so as not to disrupt earthquake recovery. Again, the emergency continuum provides a framework. Such a temporal privative clause would need to be worded to ensure that judicial review continued to be possible during earthquake *recovery*, just perhaps not the *response* to the earthquake. As previously established the speed and efficiency required in the recovery of an earthquake is not enough to justify any departure from constitutional principle (such as a privative clause). Practically speaking, as recovery is an ongoing and long-term process, judicial review would not prove to be as much of a hindrance as in the response phase.

A further alternative would be to build effective alternative remedies to judicial review into the Act; the design out which fall outside the scope of this paper. Alternative remedies would see the impact of privative clauses on retrospective control mechanisms lessened, as other retrospective controls would be available. However, this would be an undesirable option from a red light perspective, as it would not impact the existence privative clause itself. Further, it may mean the judiciary are more inclined to uphold a partial privative clause. As demonstrated by the preceding discussion, the existence of effective alternative remedies means a judge is more likely to uphold any partial privative clause.¹¹⁵ Green light theorists would discount any opposition to such alternatives, maintaining that judicial review is not the only form of control available. Even if alternative remedies were to be included in future Acts, the privative clause should still be removed. Regardless of the effectiveness of other control mechanisms, ousting judicial review is at odds with fundamental constitutional principles.

¹¹⁵ Ramsay, above n 109.

C Prescriptive process

While the powers conferred by the Acts were undoubtedly broad, safeguards were not entirely excluded. One such safeguard is the prescriptive process. Each Act statutorily requires the Minister to undertake a certain process before he or she can make a recommendation. How effective this process is in reigning in the power in question, is the question to be answered by this subpart.

The process required of the Minister is often overlooked. Criticisms of the Canterbury earthquake legislation tended to focus primarily on the broad Henry VIII provision and the lack of judicial review. Such a focus reflects the red light perspective that retrospective judicial control is the only form of control that matters. However, as noted throughout, a different perspective exists. The green light theory reminds us that the prescriptive controls on the Minister before making recommendations are equally (or in their view, often more) important than retrospective controls. It is important to bear in mind both perspectives, as they are both valuable, and in reality, work together. For example, judicial review would have seriously diminished effectiveness if there was no process against which to hold the Minister to account. In light of the differing theories, an analysis of the implications for control in these Acts would be incomplete without a discussion on the process the Minister must take before making a recommendation.

The first, and most oft discussed requirement on the Minister, is to ensure that an Order is necessary for the purposes of the Act. Each of the purposes in all three Acts is unsatisfactorily wide. The 2010 Act's purpose encompassed broad notions such as "providing adequate statutory power", "facilitating the gathering of information" and "provid[ing] protection from liability."¹¹⁶ Such notions are in relation to the response to the Canterbury earthquake, which as previous discussion illustrates, is desirable. The inclusion of provisions enabling minimization of further damage does however seem to extend the purpose to both response and recovery (which is, after-all the Act's namesake). The purpose of the 2011 Act, as noted by the Parliamentary Counsel Office, is even less specific than the 2010 Act.¹¹⁷ For example, Orders can be made "to facilitate, coordinate, and direct the planning, rebuilding, and recovery of the affected communities, or to restore the social, economic, cultural and environmental well-being of the affected region."¹¹⁸ Again, both response and recovery are covered by the purpose.

¹¹⁶ Section 3 (See Appendix A).

¹¹⁷ Section 3 (See Appendix A).

¹¹⁸ Gobbi, Gordon, and Lincoln, above n 9, at 19.

Under the 2016 Act, rather than requiring the Orders to be “reasonably necessary or expedient” for the purpose of the Act (per 2010 and 2011 Acts), the Order must be “necessary or desirable.”¹¹⁹ Again, the purpose is construed extremely broadly. The purpose is to “assist the earthquake-affected area and its councils and communities to respond to and recover from the impacts of [the earthquakes].”¹²⁰ Section 3 then goes on to provide the particulars of response and recovery. The particulars are extremely wide reaching and include to:¹²¹

- (a) provide for economic recovery; and
- (b) provide for the planning, rebuilding, and recovery of affected communities and persons, including—
 - (i) the repair and rebuilding of land, infrastructure, and other property of affected communities or of any affected persons; and
 - (ii) safety enhancements to, and improvements to the resilience of, that land, infrastructure, or other property; and
 - (iii) facilitating co-ordinated efforts and processes for short-term, medium-term, and long-term recovery; and
 - (iv) facilitating the restoration and improvement of the economic, social, and cultural well-being, and the resilience, of affected communities or of any affected persons; and
 - (v) facilitating the restoration of the environment.

The inclusion of such broad purposes ensures the alarming reach of the Henry VIII provisions is not narrowed. Firstly, as mentioned above, one of the judicial review mechanisms maintained in relation to the Orders, is that an Order may be deemed ultra vires. In other words, if it is outside the purpose of the Act it may be held to be invalid. Such an occurrence is very unlikely to take place when the purpose is so broad, as almost any Order could be held to be for the purpose of the Act.

Secondly, all three pieces of legislation include and somewhat conflate the phases of response and recovery in the purpose section. In fact, providing for the “restoration and improvement of economic, social, and cultural well-being” per s 3(b)(iv) of the 2016 Act is almost identical to the definition of disaster recovery in the Queensland State Disaster Management Plan.¹²² It is then even further widened to include additional stages such as

¹¹⁹ Section 8(1)(a)(i).

¹²⁰ Section 3.

¹²¹ Section 3.

¹²² At 37.

medium-term and long-term recovery and includes restoration of the environment. Powers are thus able to be used to respond to and recover from the earthquake. Recovery is a long-term planning process which should be subject to ordinary legislative process, and not the result of ad-hoc Orders. Accordingly, Orders for the purpose of recovery should be excluded and the purpose should only relate to the response phase.

The Hurunui/Kaikōura Earthquakes Recovery (Unreinforced Masonry Buildings) Order 2017, (“Masonry Buildings Order”) is an apt example of an Order that fits within the purpose stipulated in the 2016 Act, but cannot be justified to have been made through delegated legislation. Simply put, the Masonry Buildings Order grants power to territorial authorities, to issue notices under the Building Act 2004 to an owner of an unreinforced public facing masonry building. Upon issue of a notice, a building owner must carry out reinforcement work within 12 months. It is clear the Order fits under the purpose of the 2016 Act, specifically s 3(2)(ii). However, the urgency required to give building owners 12 months to strengthen their buildings, does not justify departure from constitutional principles. Instead, earthquake strengthening is part of city development, which should not be the subject of hasty decision making, and instead considered by Parliament. It is not an emergency situation requiring the fast and flexible response of Parliament. The implications of amendments to the Building Act 2004 further demonstrate that it should go through appropriate Parliamentary and public scrutiny, especially as it is un-related to the immediate response. The amendments will have significant impacts on many members of the public. Requiring specific works to be done within 12 months is costly, in both a time and financial sense. Those affected, as well as experts should have opportunity to have their opinion on the matter heard.

Aside from requiring an Order to be for the purpose of the Act, the 2010 Act provides little else in the way of prospective controls on the Minister’s decision making. In making a recommendation, the Minister must take into account the purpose of the Act, consult the Recovery Commission (if practicable), and have regard to the recommendations of the Recovery Commission (if any).¹²³ However, ‘must take into account’, imposes no legal obligations on the Minister to incorporate recommendations. Additionally, the qualifiers ‘if practicable’ and ‘if any’ means the Recovery Commission could effectively be ignored at the Ministers discretion. Accordingly, it stipulates no legal obligation. However, it is important not to overlook its role as a political form of control or accountability,¹²⁴ a form of mechanism endorsed by the green light of administrative law.

¹²³ Section 6(2).

¹²⁴ See Mark Bovens “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 13

A significant difference between the 2010 and 2011 Acts was the establishment of the Canterbury Earthquake Recovery Review Panel (Review Panel), per ss 72 and 73 of the 2011 Act. The Review Panel must contain 4 persons with relevant expertise or skills, as appointed by the Minister, one of whom must have legal expertise.¹²⁵ The function of the Review Panel is to provide advice to the Minister. Importantly, the Review Panel must also review all draft Orders, and they must give the Minister their recommendations within three working days of receiving the draft.¹²⁶ The recommendations must also be made public, and be presented to the House of Representatives.¹²⁷ As stated above, however, the Minister must only *have regard* to the recommendations, representing a political, as opposed to legal form of control.

The 2016 Act had a significantly more robust pre-enactment process than its predecessors. Such a development can likely be attributed to the experience gained through the drafting and enactment of the Canterbury legislation, and the reflection on how the previous process played out. First, the Minister must be satisfied that the order is necessary for the purposes of the Act,¹²⁸ no broader than reasonably necessary and does not breach s 11 of the 2016 Act.¹²⁹ A draft of the Order (including a draft of the Ministers reasoning) must be reviewed by the Kaikōura Recovery Review Panel and provided to the Committee of the House of Representatives responsible for review of disallowable instruments. The Minister must have regard to the Kaikōura Recovery Review Panel's recommendations, and the comments on the draft provided by the Committee. If the Order relates to the Resource Management Act 1991 additional factors must be considered.¹³⁰ This is a more extensive internal process than found in the previous Acts. However, it may not prove watertight. Again, the Minister must only have regard to recommendations on the draft Order, which does not import a legal obligation (but a political obligation) to adopt them. Additionally, s 8(3) stipulates that a subsequent draft is only subject to a repeat of the review process if the Minister is satisfied that they are different enough to justify it. Accordingly, an Order with new content has the potential to avoid this process at the Minister's discretion.

(4) ELJ 447, for a discussion on differing forms of accountability.

¹²⁵ Section 72(1).

¹²⁶ Section 73.

¹²⁷ Section 73(7).

¹²⁸ The purpose is widely defined akin to the 2010 and 2011 Acts. See section 3 (Appendix A).

¹²⁹ Section 11 provides safeguards such as ensuring an Order does not release a person from custody or amends section 11 of the Act. It also provides a list of Acts which cannot be amended, as discussed at 75 (See Appendix A).

¹³⁰ Section 8(e).

An ‘engagement process’ must also be complied with. A document containing an explanation of the proposal’s purpose, effect, and reasoning must be made available to appropriate persons and the general public.¹³¹ The Minister must invite written comments on the document.¹³² Such an engagement process is a desirable step. There are however mechanisms through which the impact of the process can be minimised or side-stepped entirely. The Minister must have regard to the comments.¹³³ As seen throughout the emergency legislation, such comments may not impact the Minister’s decision. Further, the engagement process is not applicable if it is “impractical in the circumstances” or “the urgency of the situation requires that the order be made as soon as practicable without that engagement.”¹³⁴ Given the inherent nature of emergencies, and the discourse surrounding them, it is likely that impracticality and urgency would be easily satisfied. Parliament relied on urgency and practicality to justify much of its response. In fact, I would argue that at its very core, emergency legislation uses urgency to justify avoiding important procedures. This is therefore another example of the potential to use expediency to justify an abuse of process. If the engagement process is side-stepped, the Minister must publish his or her reasons.¹³⁵ The publication requirement provides a form of political accountability and thus form of safeguard, lacking in the other Acts.

Despite certain loopholes, the process required of the Minister under the 2016 Act is significantly more robust than the Canterbury Acts. Take for example, the enactment of the Canterbury Earthquake (Historic Places Act) Order in 2010. Essentially it granted a general emergency authority the power (on application) to “destroy, damage, or modify all or part of any class of archaeological sites.”¹³⁶ In terms of the process, the only consultation required of the Minister under the 2010 Act was from the Recovery Commission, if practicable. The make-up of the Recovery Commission at the time, was three Mayors, and four government appointed experts (of which one was required to be an Environment Canterbury commissioner).¹³⁷ Notably, no public representatives were included. Accordingly, a major decision with significant implications was made, with no public scrutiny or input. Many people of Christchurch would have been invested in the area, yet a swift decision was made on the basis of very few people. Under the 2016 Act, a much more intense process would have had to be undertaken. More stakeholders would have had

¹³¹ Section 9(1).

¹³² Section 9(1)(b).

¹³³ Section 9(1)(d).

¹³⁴ Section 9(3).

¹³⁵ Section 9(4).

¹³⁶ Canterbury Earthquake (Historic Places Act) Order 2010.

¹³⁷ “Canterbury Earthquake Recovery Commission: Terms of Reference” (10 February 2011) 14 *New Zealand Gazette* 303 at 303.

to be consulted, namely, the Kaikōura Recovery Review Panel, the Committee of the Whole House, and importantly, the general public. If such an order was made under the 2016 Act, the public would have been given three days to give comments to the Minister about their views on the ability to effectively destroy archaeological sites. Such engagement is a significant step forward, provided of course, the Minister does not side-step the process in the name of expediency.

While the 2016 Act represents a significant step forward, the process which the Minister must undergo could be improved. The process renders the Henry VIII provision undesirably wide. I will suggest a couple of options that if adopted would ensure the legislation is more constitutionally sound, and able to be justified.

The first, and most significant point at which the powers can be narrowed is the purpose of the Acts. The 2016 Act contained an undesirably wide purpose. The purpose in future, should be definitively defined. It should also explicitly recognize the emergency continuum and stipulate Orders can only be made during the response phase. Not only should the purpose be distinctly defined, it should also be geographically limited. An outline, or general framework for a future purpose follows. It is important to note that the following purpose section only provides an example, and is in the form of an amendment to the 2016 Act. Any future emergency legislation would have to be tailored to the specific emergency, but should be as narrow as the following:

3 Purpose

The purpose of this Act is to assist the earthquake-affected area and its councils and communities to respond effectively to the immediate impacts of the Hurunui/Kaikōura earthquakes, and does not extend to the medium-term or long-term recovery of the earthquake affected area.

‘Earthquake affected area’ could then be more narrowly defined in the interpretation section as:

earthquake affected area means, to the extent that they are directly affected by the Hurunui/Kaikōura earthquakes, and require assistance to respond effectively to the immediate impacts of the Hurunui/Kaikōura earthquakes,—

- (a) the districts or regions of the councils; and
- (b) the parts of the coastal marine area (within the meaning of section 2(1) of the Resource Management Act 1991 (that are part of, or adjacent to, those districts and regions; and

- (c) the areas of other districts or regions that contain transport or other infrastructure.

Response and *recovery* should also be included in the interpretation section, in order to avoid confusion and conflation. Such clarification is necessary. In the New Zealand discourse, there appears to be little distinction between the words *response* and *recovery*. Accordingly, the relevant decision maker may not anticipate the use of the word *response* in the legislation to indicate a specific meaning. The combination of these amendments, in the context of the Kaikōura legislation would significantly reduce the scope of the Henry VIII provisions, while still enabling a fast, effective and flexible response where necessary and justified.

A further improvement to the process is to tighten loopholes created that enable a Minister to skip steps of the process. First, as previously asserted, the Minister does not have to undertake an engagement process if it is “impractical in the circumstances” or “the urgency of the situation requires that the order be made as soon as practicable without that engagement.”¹³⁸ It is important that such prospective controls cannot be side-stepped. Additionally, the Regulations Review Committee recommended that all Orders should be subject to scrutiny, both before and after they are made. I would therefore suggest that the section enabling the Minister to side-step the engagement process is removed.

I do not suggest any improvements to the provisions that require the Minister only to *have regard* to views or recommendations. The heart of the making of Orders is the discretion of the Minister. Such wording appreciates the nature of discretionary power. It would be impractical to force the Minister to incorporate every recommendation or view of the relevant panels. Moreover, it does provide a safeguard, in terms of political control and accountability; this is adequate.

D Sun-set provisions

There is also a further, overarching safeguard built into each piece of legislation that it is important not to overlook. Consistent with all recommendations, each statute contains sun-set provisions. Sun-set provisions are comparably minor safeguards, and thus require the smallest analysis. As previously noted, the 2016 Act’s sunset provisions are the most effective of the three.

¹³⁸ Section 9(3).

The sunset provisions required of the emergency legislation in question are two-pronged. Firstly, each Order made under each Act must have an expiry date. The 2010 Act requires an expiry date to be appointed in the Order, and be no later than 1 April 2012. The 2011 Act on the other hand, has a pre-specified sunset provision for Orders which stipulates they will cease to apply 5 years after the Act is commenced. Similar to the 2011 Act, the 2016 Act provides a concrete date (21 March 2018) at which Orders are revoked. Secondly, each Act must provide for when the Act itself and therefore the delegated legislation making power, will be revoked. The 2010 Act, as the first and most hastily enacted Act, contains a somewhat ineffective sunset provision. Section 21 states that the Act expires when the sections governing delegated legislation making power cease to apply.¹³⁹ The Act was however, repealed and replaced by the 2011 Act. The 2011 Act contained a more concrete sunset provision, presumably given the time and ability to reflect on the 2010 Act. Section 93 states the Act will expire 5 years after it commences.

Even though the sun-set provision in the 2011 Act is concrete, five years is excessively lengthy for Orders, and the power to make them to be in force. For example, the Canterbury Earthquake (Christchurch Replacement District Plan) Order, as touched upon earlier, was enacted in July 2014; three and a half years after the 2011 earthquake. To reiterate, the Order modifies the Resource Management Act 1991, to provide a more expedient process for reviewing the existing Christchurch district plans “and for the preparation of a comprehensive replacement district plan for the Christchurch district.”¹⁴⁰ Again, such a decision should be made through regular legislative processes. Having such a decision able to be made simply by Order three and a half years after the earthquake is unconstitutional. While a streamlined process may very well have been required, its temporal distance from the earthquake means such a decision was not so urgent as to justify departure from constitutional principles. The sun-set provisions contained in the Acts should thus reflect this.

The Kaikōura legislation’s sun-set provisions are a vast improvement to both the 2010 and 2011 Acts. The 2016 Act stipulates that Orders are revoked on the 21st of March 2018.¹⁴¹ The Act’s expiry date is also concrete, and the sections conferring delegated legislation making power are repealed on 1 April 2018. In a 2014 report on transitional regulations to override primary legislation, the Regulations Review Committee recommended that Henry VIII provisions and the regulations made under them should not remain active for longer

¹³⁹ Section 21.

¹⁴⁰ Anderson Lloyd “Accelerated Process for Christchurch Replacement District Plan” (11 July 2014) <<https://www.al.nz/accelerated-process-for-christchurch-replacement-district-plan/>>.

¹⁴¹ Section 15.

than three years. The 2010 and 2011 Acts clearly do not adhere to this. The 2016 Act's sunset provision however, ensures both the Orders and the delegated legislation making powers are revoked two years after enactment at the latest. This is a desirable step forward. However, in the Regulations Review Committee's report on Future National Emergencies, it was recommended that "bespoke emergency powers should be in force only for as long as is reasonably necessary and should have built-in sunset provisions."¹⁴² Read in conjunction with the previous report, the three-year requirement appears to be an abstract recommendation, based on the absolute longest time they should extend. Bearing in mind the emergency continuum, the need for extraordinary powers in relation to the Kaikōura earthquake is only during the response phase. Accordingly, the two years and four-month sunset provision can still be said to be undesirably long, as it is not 'reasonably necessary.' Again, such insufficient safeguards ensure the power granted under the Henry VIII provision is wide.

Only minor improvements would need to be made to the sunset provisions to make them more constitutionally consistent. It is desirable that a concrete date is specified, rather than allowing the Orders to specify their own date of revocation. The time frame as it stands is too extensive. As fast and flexible Orders are only required and justifiable in the response phase after the emergency, the Henry VIII provisions should reflect that. Accordingly, both the power to make Orders, and the Orders themselves should have lesser temporal application. The sunset provisions should be brought forward, such that the powers are only available in the response phase of the earthquake. The exact temporal requirement of response will differ according to the size and damage caused by the earthquake (or another emergency). I would suggest, however, that a basic starting point would be six months, given the definition of emergency response. As previously discussed, the emergency response phase entails only measures taken to deal with the direct or immediate aftermath of an emergency, such as emergency shelter and evacuation.

E Henry VIII provisions re-visited

I now return to a discussion of the implications of the Henry VIII provision, that appreciates its enactment in the context of the other mechanisms. Earlier I noted that the practical effect of this wide-reaching Henry VIII provision hinged on the process, privative clauses and sunset provisions. The previous analysis demonstrates that despite their inclusion, the safeguards do not sufficiently limit the Henry VIII provision. Returning to Henry VIII provisions is necessary because not only is there room for improvement to the other

¹⁴² At 3.

mechanisms themselves, the provisions that constitute Henry VIII provisions also demand revision.

Change can be made to the 2016 legislation to bring it into line with constitutional principles, while still bearing in mind Governments concern of a fast, efficient and flexible response. The Kaikōura legislation adopted the approach recommended by the Regulations Review Committee that a positive list of legislation that *can* be amended is included. Such an approach was a positive step forward and should be adopted in the future. However, due to the oft-expressed need to adapt to unforeseen situations, s 18 was also included in the 2016 Act. Section 18 allows the Minister to recommend other Acts to be amended.

Granting such a wide power to make delegated legislation for all possible occurrences is unnecessary. Instead, earthquake response and recovery should be treated as an ongoing process; a collaboration between the legislature and the executive. It should not be a matter of Parliament delegating as much power as possible to the executive, and then stepping aside. I thus propose a hybrid approach. The initial power granted should not be excessive. Accordingly, a positive list of Acts that can be amended should be retained. Loopholes around adding more legislation should be removed, and Schedule 2 tightened. As the Orders should be related only to the response to an emergency, a positive list of Acts should not prove to be a hindrance. Given the definition of earthquake response as previously outlined, it would be a relatively straightforward task ascertaining the kinds of legislation that may need to be amended in order to respond effectively to an emergency. Additionally, having experienced three major earthquakes, the type of Orders that are likely to be made in order to respond could be assessed, and Schedule 2 designed accordingly.

The positive list need not exist as the be all and end all. Despite careful predictions of what may arise, there is every possibility that an unforeseen circumstance may occur. In that situation – if Schedule 2 proves to lack in a certain area – the executive should have a mechanism through which they can bring this to the attention of Parliament, and Parliament, acting through their supremacy, can respond accordingly. Speed, efficiency and flexibility are still maintained as the Minister would retain the crucial decision-making power. However, the limits of such power, and how such power would implicate primary legislation would have been overseen by Parliament. Further, such an approach does not give excess power to the executive in a ‘just in case’ capacity; a capacity which asserted throughout is unconstitutional. Instead, it provides power where deemed immediately necessary, but enables what is deemed necessary to be revised, notably, by those with the constitutional authority to do so.

Combined with the previously suggested reforms, changing the approach of the Henry VIII provision would ensure a more constitutionally consistent delegation of power, necessary to deal with response to extreme emergency circumstances.

VI Conclusion

When assessing the form of the Hurunui/Kaikōura Earthquakes Recovery Act 2016, there is not cause for complete dismay. Since the uproar surrounding the constitutional repugnance of the preceding Canterbury legislation, Parliament has made some significant steps forward. While Governmental discourse was not entirely welcoming of criticism, it appears at least some of it has been taken on board. Provisions fundamentally privative in nature have been removed, a positive list of Acts which *can* be modified was included, sunset provisions are shorter and the process for recommending an Order is more robust. However, in concluding the Kaikōura legislation is an improvement on the Canterbury legislation, it is important not to overlook the persistent constitutional implications that linger in the Kaikōura legislation. As my paper has demonstrated, more still needs to be done to bring bespoke emergency legislation with delegated legislation making power into line with fundamental constitutional principles.

Through an analysis of the Henry VIII provision, and the effect three further mechanisms have on it, the key causes for concern have been identified. Firstly, the Henry VIII provision remains unnecessarily broad, with the ability to modify, exempt or extend a large number of primary statutes. The persistence of privative clauses in the recent legislation represent a constitutionally repugnant mechanism, at odds with all recommendations. Further, the process the Minister must take also has loopholes which may render such process less effective. Finally, sunset provisions ensure the powers are able to last longer than reasonably necessary.

Despite contrary discourse emanating from Parliament, while speed flexibility and efficiency can justify extraordinary powers, it is not an overarching, no questions asked form a justification. Instead, such factors will only be acute enough to justify such powers being used in the response phase of an earthquake's emergency cycle. Thus, the conclusion that the Kaikōura legislation still falls short of constitutional consistency holds up in the face of opposition. If, in future, Parliament were to justify the use of extraordinary powers through the emergency context, such powers would have to be drafted in such a way that

appreciate the emergency continuum. Extraordinary powers should only be granted in the response phase of an emergency.

The conclusions in this paper are extremely important. Future emergency legislation cannot make the same mistakes; sacrificing constitutional principles when emergency strikes. Instead, Parliament must respond reflexively to each emergency, taking into consideration lessons learned from previous emergency legislation. This paper provides a reflection on such mistakes, while offering suggestions as to how future emergency legislation may avoid such mistakes. Such improvements would bring the legislation into line with constitutional principles and ensure that they can be justified, while still attuned to the unique needs the context requires.

Word count

The text of this paper (excluding table of contents, abstract, footnotes, and bibliography) comprises exactly 12,672 words.

VII Appendix: Relevant Provisions of the Emergency Legislation

A Canterbury Earthquake Response and Recovery Act 2010

...

Part 1

Preliminary provisions

3 Purpose

The purpose of this Act is to—

- (a) facilitate the response to the Canterbury earthquake:
- (b) provide adequate statutory power to assist with the response to the Canterbury earthquake:
- (c) enable the relaxation or suspension of provisions in enactments that—
 - (i) may divert resources away from the effort to—
 - (A) efficiently respond to the damage caused by the Canterbury earthquake:
 - (B) minimise further damage; or
 - (ii) may not be reasonably capable of being complied with, or complied with fully, owing to the circumstances resulting from the Canterbury earthquake:
- (d) facilitate the gathering of information about any structure or any infrastructure affected by the Canterbury earthquake that is relevant to understanding how to minimise the damage caused by future earthquakes:
- (e) provide protection from liability for certain acts or omissions.

B Canterbury Earthquake Recovery Act 2011

...

Part 1

Preliminary provisions

3 Purposes

The purposes of this Act are—

- (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:

- (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:
- (c) to provide for the Minister and CERA to ensure that recovery:
- (d) to enable a focused, timely, and expedited recovery:
- (e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:
- (f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:
- (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:
- (h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):
- (i) to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010.

C Hurunui/Kaikōura Earthquakes Recovery Act 2016

...

Part 1

Preliminary provisions

3 Purpose

The purpose of this Act is to assist the earthquake-affected area and its councils and communities to respond to, and recover from, the impacts of the Hurunui/Kaikōura earthquakes and, in particular, to—

- (a) provide for economic recovery; and
- (b) provide for the planning, rebuilding, and recovery of affected communities and persons, including—
 - (i) the repair and rebuilding of land, infrastructure, and other property of affected communities or of any affected persons; and
 - (ii) safety enhancements to, and improvements to the resilience of, that land, infrastructure, or other property; and
 - (iii) facilitating co-ordinated efforts and processes for short-term, medium-term, and long-term recovery; and

- (iv) facilitating the restoration and improvement of the economic, social, and cultural well-being, and the resilience, of affected communities or of any affected persons; and
- (v) facilitating the restoration of the environment.

4 Interpretation

- (1) In this Act, unless the context otherwise requires, —

...

earthquake-affected area means, to the extent that they are affected (whether directly or indirectly) by the Hurunui/Kaikōura earthquakes, —

- (a) the districts or regions of the councils; and
- (b) the parts of the coastal marine area (within the meaning of section 2(1) of the Resource Management Act 1991) that are part of, or adjacent to, those districts and regions; and
- (c) the areas of other districts or regions that contain transport or other infrastructure

...

11 Further restrictions on orders

- (1) Despite anything else in this Act, an order must not—

- (a) grant an exemption from or modify a requirement to—
 - (i) release a person from custody or detention; or
 - (ii) have any person’s detention reviewed by a court, Judge, or Registrar; or
 - (b) grant an exemption from or modify a restriction on keeping a person in custody or detention; or
 - (c) grant an exemption from or modify a requirement or restriction imposed by the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, the Judicial Review Procedure Act 2016, the New Zealand Bill of Rights Act 1990, or the Parliamentary Privilege Act 2014; or
 - (d) contain any provision that has the effect of amending a provision of this Act.
- (2) Subsection (1)(d) does not limit section 18.

...

*Order others***18 Order in Council may specify additional Acts**

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, specify 1 or more Acts for the purposes of Schedule 2.
- (2) The Minister may make a recommendation for an Order in Council under subsection (1) only if—
 - (a) the Minister is satisfied that—
 - (i) the order is necessary or desirable for the purpose of this Act; and
 - (ii) the order does not breach section 11(1)(a) to (c); and
 - (b) a draft of the order has been provided to each leader of a political party represented in Parliament; and
 - (c) the Minister is satisfied that there is unanimous or near unanimous support for the order from those leaders.
- (3) The draft order provided under subsection (2)(b) must be accompanied by a draft of the Minister's reasons for a recommendation under subsection (2) (including why the draft order is appropriate).
- (4) An order under section 7 that relates to an Act specified by an Order in Council under subsection (1) may, in accordance with section 16(2) and (3), come into force before, on, or after the date on which the order under section 7 is made, but not earlier than 14 November 2016.
- (5) Where a draft of the Order in Council has been subject to the process under subsection (2)(b) or (c), that paragraph applies to a subsequent draft of the order only if the Minister considers that, given the differences between the drafts, it would be appropriate to repeat the process.
- (6) The recommendation and decisions of the Minister may not be challenged, reviewed, quashed, or called into question in any court.
- (7) Except as provided in subsection (6), nothing in this Act prevents a court from determining whether an Order in Council under subsection (1) is authorised by this Act.

19 Order to add Acts revoked if not approved by House

- (1) An Order in Council under section 18 is revoked (unless it is earlier revoked) on the expiry of the relevant period if no motion to approve the order is agreed to by the House of Representatives within that period.
- (2) The relevant period is the longer of the following:

- (a) the period of 10 sitting days of the House of Representatives after the date on which the Order in Council is made:
 - (b) the period of 28 days after the date on which notice that the Order in Council has been made is given in the Gazette.
- (3) An order under section 7 that relates to an Act specified by an Order in Council under section 18 that is revoked under subsection (1) is also revoked at the same time.

20 Reasons for order

If the Minister makes a recommendation under section 18, the Minister's reasons for making the recommendation (including why the Order in Council is appropriate) must be published together with the order.

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