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WHO'S IN CHARGE?
EXAMINING THE LEGITIMACY OF THE ALLOCATION OF AUTHORITY FOLLOWING TWO EMERGENCIES

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Contents

Abstract

In this paper I critique and compare the legitimacy of the different types of authority granted following the Canterbury earthquakes and the Covid-19 pandemic. In an emergency it is common for the executive to be granted extensive powers to facilitate a quick and effective emergency response. The traditional approach in New Zealand is the "Minister Method", where such authority is granted to ministers. This occurred following both Canterbury earthquakes, where the urgently-enacted response legislation gave ministers broad law-making powers. In contrast, the Government adopted the "Public Official Method" in the initial response to the Covid-19 pandemic. The Director-General of Health, an unelected official, was enabled to make orders to implement lockdown and Alert Level 3. Theoretically the Minister Method is legitimate because ministers are democratically accountable for the exercise of their authority. However, the presence of privative clauses restricting the availability of judicial review in the earthquake response legislation diminished accountability in practice. The Public Official Method is legitimate because the Director-General's exercise of authority is based on his medical and health expertise. It may be less democratically legitimate than the Minister Method because officials are not democratically accountable, but the Director-General's participation in media conferences and willingness to take responsibility for his decisions helped to mitigate this potential deficiency. Each Method has different strengths and weaknesses in legitimacy, but the subsequent shifting of authority from the Director-General to the Minister of Health demonstrates that the Minister Method remains the preferred response to emergencies for New Zealand governments.

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I Introduction

New Zealand has had its share of emergencies in recent years. From the Canterbury earthquakes to the ongoing Covid-19 pandemic, governments have had to act quickly to respond to the damage and risks facing our communities. To facilitate this response, it is common for the executive to be granted extensive discretionary powers.[1] The typical approach in New Zealand is for such authority to be allocated to government ministers. This approach, which I call the "Minister Method", applied following both Canterbury earthquakes of 2010 and 2011. However, the initial response to Covid-19 saw authority instead granted to a senior public servant, the Director-General of Health (Director-General) Dr Ashley Bloomfield. I term this the "Public Official Method".

When Covid-19 reached New Zealand and community transmission became apparent, the Government unveiled its Alert Level framework and the entire country entered lockdown (Alert Level 4) for five weeks.[2] The lockdown was effected by orders made under the Health Act 1956, which enables a medical officer of health to isolate and quarantine people and close premises to prevent the spread of an infectious disease.[3] Bloomfield acted as the medical officer of health for the entire country to make the orders governing the first lockdown and the slightly more relaxed Alert Level 3. Several weeks later, the COVID-19 Public Health Response Act 2020 (CPHRA) was passed, which instead empowered the Minister of Health to make a wide range of orders to prevent the spread of Covid-19.[4]

The making of the initial orders by the Director-General raises interesting public law questions about how an unelected official can wield such power over citizens and whether his authority to do so is legitimate in a democratic society. In this paper, I examine and compare the legitimacy of the different types of authority granted following the Canterbury

[1] John Hopkins "The First Victim – Administrative Law and Natural Disasters" [2016] NZ L Rev 189 at 193.
[2] New Zealand Government "New Zealand moves to COVID-19 Alert Level 3, then Level 4 in 48 hours" (press release, 23 March 2020).
[3] Section 70.
[4] Section 11.

earthquakes and the Covid-19 outbreak. The purpose of this paper is not to conclude which approach is better, but to interrogate the sources of legitimacy for both the Minister Method and the Public Official Method and to analyse where they might experience deficiencies in legitimacy. As will be shown, they both related to their own unique contexts and each Method demonstrates a number of strengths and weaknesses. This paper's focus is on the initial response to Covid-19, which relied on the Health Act and consequent empowerment of Bloomfield. I discuss the enactment of the CPHRA and what this means for legitimacy at a high level; however, it is the Public Official Method used during the initial response that is of specific interest to this paper.

I begin in Part II by setting out the emergency responses that I will later be examining. After explaining the Government's response to Covid-19 and the Public Official Method, I detail the Government's response to both the 2010 and 2011 Canterbury earthquakes. Following each earthquake, legislation was passed to enable the Governor-General to make Orders in Council, on the recommendation of the relevant minister, to amend or suspend provisions in other legislation to enable an efficient earthquake recovery.[5] This extensive law-making power delegated to ministers is the key feature of the Minister Method.

In Part III, I set out the necessary theoretical background for a discussion of legitimate authority in an emergency response. First, I explain the impact that emergencies can have on law-making. Emergencies will typically justify the temporary suspension of normal law-making processes to enable an efficient and effective response, but it remains important that this response is consistent with fundamental constitutional principles and the rule of law.[6] Second, I introduce and define legitimacy as a concept. Laws are legitimate when their imposition, meaning the way in which they are imposed rather than the substance of the laws themselves, is acceptable, justifiable or desirable.[7] Therefore, in

[5] The Canterbury Earthquake Response and Recovery Act 2010, s 6; and the Canterbury Earthquake Recovery Act 2011, s 71.

[6] Regulations Review Committee *Inquiry into Parliament's legislative response to future national emergencies* (New Zealand Parliament, December 2016) at 12.

[7] Philip Pettit "Legitimacy and Justice in Republican Perspective" (2012) 65 Current Legal Problems 59 at 60.

the context of this paper, if the allocation of authority under the Minister Method and/or the Public Official Method is legitimate, people will accept they are bound by the orders, rules or laws made within them.

In Parts IV and V, I begin my exploration of the possible sources of legitimacy for the Minister Method and the Public Official Method. I draw heavily upon regulatory and administrative theory from the United States, which sets out several models of legitimacy that can be adapted to the New Zealand emergency law context. First, in Part IV, I consider the legislative model and the accountability model, which can both be applied to the Minister Method. In particular, the accountability model explains that the Minister Method is democratically legitimate because ministers are accountable to Parliament and to the public in exercising their authority. In Part V, I consider the expertise model, which can be applied to the Public Official Method. According to this model, the Director-General's authority is legitimate because he is a medical professional whose decisions are based on neutral fact and evidence, not politics.

Having determined the key sources of legitimacy for both approaches, in Part VI I undertake a more in-depth evaluation and comparison of the strength of their legitimacy. In particular, while the Minister Method might theoretically have a stronger claim to democratic legitimacy due to the accountability of ministers, in practice the Canterbury legislation significantly restricted the courts' ability to review the use of the ministers' powers. This break in accountability, alongside the extensive powers granted to ministers, is a worrying combination that arguably weakens the democratic legitimacy of the Minister Method. The Public Official Method's main weakness is that an official is traditionally not accountable to the public for their exercise of power in the same way an elected representative is.[8] However, we will see that this is mitigated by practical steps taken to instil accountability in the process, such as the Director-General fronting regular media conferences. Despite these steps, there remains an uneasy tension between the placement of such significant authority in an appointed official and democratic legitimacy. The

[8] Richard Mulgan "Public Sector Reforms in New Zealand: Issues of Public Accountability" (2008) 32 PAQ 1 at 19–20.

subsequent enactment of the CPHRA as soon as was practicable, which instead placed authority with the Minister of Health, demonstrates that the Government's preferred approach remains something akin to the Minister Method.

II Pandemics and Earthquakes: Emergencies and Their Responses

In this Part, I introduce the emergency events and government responses that are the focus of this paper and which form the basis for the Minister Method and the Public Official Method. First, I set out the response to Covid-19, which initially depended on the Director-General's use of his powers under the Health Act before authority moved to the Minister of Health under the CPHRA. Then I set out the responses to both the 2010 and 2011 Canterbury earthquakes, which saw the placement of broad law-making powers in ministers.

A Covid-19 Pandemic

Covid-19 is an infectious disease affecting the respiratory system, which was discovered in Wuhan in December 2019.[9] The World Health Organization (WHO) declared the disease a pandemic on 11 March 2020.[10]

In late February 2020, New Zealand had its first case of Covid-19 and the situation escalated quickly.[11] The Government announced its Alert Level framework for combating Covid-19 on 21 March.[12] Two days later, following the first instance of community transmission of the virus, the country moved to Alert Level 3, and then to Alert Level 4 on 25 March.[13] This was a state of lockdown and all people were required to stay home and only leave to access or provide essential services. Five weeks later, New Zealand reverted

[9] World Health Organization "Coronavirus" <www.who.int>.

[10] World Health Organization "Rolling updates on coronavirus disease (Covid-19)" <www.who.int>.

[11] Ministry of Health "Single case of COVID-19 confirmed in New Zealand" (press release, 28 February 2020).

[12] New Zealand Government "Alert system overview" Unite against Covid-19 < https://covid19.govt.nz/>.

[13] New Zealand Government, above n 2.

to Alert Level 3, which allowed some increased personal movement and business operation.[14] On 14 May, New Zealand began its staggered move to Alert Level 2,[15] and then on 8 June, to Alert Level 1, which represented a return to near normal life.[16] New cases of community transmission have since caused different parts of the country to move up and down Alert Levels.[17] At the time of writing, the entire country is at Alert Level 1, but the situation remains fluid.[18]

1 Orders under the Health Act 1956

The ability to effect the lockdown and Alert Level 3 came from a special power within the Health Act. Under s 70(1) a medical officer of health for a health district can make various orders for the purpose of preventing the outbreak or spread of an infectious disease. They can do so when a state of national emergency has been declared, when an epidemic notice is in force, or when authorised to do so by the Minister of Health. Prime Minister Jacinda Ardern issued an epidemic notice on 23 March 2020, giving the Government access to a range of special powers.[19] On 25 March, the Minister of Civil Defence declared the second state of national emergency in New Zealand's history,[20] enabling the Director of Civil Defence Emergency Management to coordinate the national response.[21]

With these mechanisms in place and with the authority of the Minister of Health, the Director-General, acting as medical officer of health for all districts in New Zealand, made

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[14] New Zealand Government "PM announces date for move to Alert Level 3" (press release, 20 April 2020).
[15] Jacinda Ardern, Prime Minister of New Zealand "Level 2 announcement" (Speech to media, Wellington, 11 May 2020).
[16] Jacinda Ardern, Prime Minister of New Zealand "New Zealand moves to Alert Level 1" (Speech to media, Wellington, 8 June 2020).
[17] For announcements on the recent Alert Level changes (as at time of writing), see New Zealand Government "PM comments on Auckland COVID-19 case" (press release, 11 August 2020); and New Zealand Government "PM statement on Cabinet COVID-19 Alert Level review" (press release, 14 September 2020).
[18] For current Alert Level settings, see New Zealand Government "Current Alert Level" Unite Against Covid-19 <https://covid19.govt.nz/>.
[19] "Epidemic Preparedness (COVID-19) Notice 2020" (24 March 2020) *New Zealand Gazette* No 2020-go1368.
[20] "Declaration of State of National Emergency by Minister of Civil Defence" (26 March 2020) *New Zealand Gazette* No 2020-go1435.
[21] Civil Defence Emergency Management Act 2002, s 9.

a series of orders under the Health Act. On 25 March, he made an order under s 70(1)(m) to close all premises in all districts in New Zealand and to prohibit congregation of people in all public or private outdoor spaces, with a few limited exceptions related to essential services.[22] He made a second order on 3 April to strengthen the lockdown by requiring all people to isolate or quarantine by remaining at their residence except for essential personal movement.[23] This gave legal force to the requirement that people stay at home in their "bubbles". The Director-General issued another order on 24 April to provide the framework for Alert Level 3.[24] He made a few other orders but in general the above orders governed Alert Levels 3 and 4 in March, April and May 2020.

While some critics have questioned whether the Director-General did in fact have the legal power to make these orders under s 70(1)(m) and (f),[25] a recent judicial review upheld each of his orders,[26] although it was found that aspects of some statements made by the Prime Minister were unlawful.[27] Further discussion on the legality of the orders is a lengthy study in itself and beyond the scope of this paper.

2 The COVID-19 Public Health Response Act 2020

While the Health Act orders provided the basis for the initial lockdown and Alert Level 3, the CPHRA was rushed through Parliament in time to govern Alert Level 2 and any future Alert Levels. The CPHRA was specifically designed to combat Covid-19 and enable a more proportionate and nuanced response across all Alert Levels.[28] It will be repealed unless continued every 90 days by motion of the House.[29]

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[22] Section 70(1)(m) Health Act Order 25 March 2020.

[23] Section 70(1)(f) Health Act Order 3 April 2020.

[24] Health Act (Covid-19 Alert Level 3) Order 2020.

[25] Andrew Geddis and Claudia Geiringer "Is New Zealand's COVID-19 lockdown lawful?" (27 April 2020) UK Constitutional Law Association <https://ukconstitutionallaw.org>.

[26] Borrowdale v Director General of Health [2020] NZHC 2090 at [139].

[27] At [225].

[28] New Zealand Government "Law setting up legal framework for Covid-19 Alert Level 2 passes" (press release, 13 May 2020); and All of Government Law Reform Team *Final report to the FEC on its Inquiry into the COVID-19 Public Health Response Act 2020* (New Zealand Parliament, 27 July 2020) at [5] and [6].

[29] Section 3.

Under s 11, the Minister of Health can make a wider range of orders to prevent or limit the outbreak or spread of Covid-19 than could be made by the Director-General under the Health Act. Such an order can only be made while an epidemic notice, a state of emergency or transition period is in force, or if the Prime Minister authorises it.[30] Section 9 requires that, before he makes a s 11 order, the Minister of Health must have had regard to advice from a number of ministers, including the Prime Minister, and the Director-General. The Director-General is also able to make orders under s 11, but only in limited circumstances.[31]

The Minister of Health issued the COVID-19 Public Health Response (Alert Level 2) Order 2020 in accordance with ss 9 and 11 of the CPHRA to take effect from 14 May. The order outlined and formalised the restrictions for Alert Level 2 and was revoked when New Zealand entered Alert Level 1.[32] The Minister of Health has made, and continues to make, other orders as the government refines its response and as Alert Levels change.[33]

B The Canterbury Earthquakes

Turning now to the second emergency event, or series of events, that are the focus of this paper: the Canterbury earthquakes. I first outline the Government's response to the 2010 earthquake and then the 2011 earthquake, and highlight where the responses differ.

1 September 2010 earthquake

On 4 September 2010 a 7.1 magnitude earthquake hit the Canterbury region.[34] It caused extensive damage to property and infrastructure, but fortunately no one died.

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[30] Section 8.

[31] Section 10.

[32] COVID-19 Public Health Response (Alert Level 2) Order Revocation Order 2020.

[33] For a complete list of orders made under both the CPHRA and the Health Act, see New Zealand Government "Legislation and key documents" Unite Against Covid-19 <https://covid19.govt.nz/>.

[34] Ministry of Culture and Heritage "September 2010 Canterbury (Darfield) earthquake: Timeline: 4-16 September 2010" New Zealand History <https://nzhistory.govt.nz/>.

Later that morning, mayors of affected districts declared local states of emergency,[35] and two days later Gerry Brownlee was appointed Minister for Canterbury Earthquake Recovery (Minister for Earthquake Recovery).[36] Recognising that a state of emergency is a rather blunt tool for ongoing emergency response and recovery,[37] a Bill was drafted to enable the recovery process to continue effectively by extending the Government's emergency management powers.[38]

Parliament enacted the Canterbury Earthquake Response and Recovery Act 2010 (2010 Act) within one day, without it being considered by a select committee. It was intended to enable provisions in other statutes to be relaxed or suspended to allow efficient earthquake response and to minimise further damage.[39] It enabled the Governor-General to make Orders in Council on the recommendation of the relevant minister, which "may grant an exemption from, or modify, or extend any provision of any enactment".[40] Provisions such as this, which enable delegated legislation to amend primary legislation, are known as Henry VIII clauses; commentators criticise them for allowing ministers to relatively freely rewrite legislation.[41] The 2010 Act included a "negative list" of Acts in respect of which orders could not be made, such as the New Zealand Bill of Rights Act 1990.[42] Section 9 also established the Canterbury Earthquake Recovery Commission (CERC), which was to provide advice on proposed Orders in Council and to the Government regarding recovery priorities.[43] Further, the 2010 Act contained a "privative clause", a mechanism which

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[35] "Declaration of State of Local Emergency" (9 December 2010) 170 *New Zealand Gazette* 4193; "Declaration of State of Local Emergency" (9 December 2010) 170 *New Zealand Gazette* 4196; and "Declaration of State of Local Emergency" (16 September 2010) 120 *New Zealand Gazette* 3225.

[36] Parliamentary Library *Canterbury earthquake timeline: Government's and Parliament's response* (Parliamentary Library Research Paper 2010/05, 9 November 2010) at 2.

[37] Regulations Review Committee, above n 6, at 5.

[38] Hopkins, above n 1, at 203.

[39] Section 3.

[40] Section 6(4).

[41] See Andrew Geddis "An open letter to New Zealand's people and their Parliament" (28 September 2010) Pundit <www.pundit.co.nz/>; and Dean Knight "Canterbury Earthquake Response and Recovery Bill: Constitutionally Outrageous" (14 September 2010) LAWS179 Elephants and the Law <www.laws179.co.nz/>.

[42] Section 6(6).

[43] Section 10.

restricts or precludes judicial review.[44] Section 6(3) stated that the Minister's recommendation could not be "challenged, reviewed, quashed or called into question in any court".

2 February 2011 earthquake

While Canterbury was recovering, a devastating aftershock came on 22 February 2011.[45] This badly damaged Christchurch CBD and 185 people were killed. For the first time in New Zealand a state of national emergency was declared.[46]

Fairly quickly, the Government decided that CERC had not worked as well as intended and established a new entity to lead the recovery process.[47] The Canterbury Earthquake Recovery Authority (CERA) replaced CERC on 29 March 2011 to collaborate, engage and support the wider recovery community.[48]

On 19 April the Canterbury Earthquake Recovery Act 2011 (2011 Act) repealed and replaced the 2010 Act, in recognition that it was no longer fit for purpose.[49] Parliament enacted the 2011 Act following a slightly longer process than for the 2010 Act: it passed under urgency but went through a short select committee process. The 2011 Act enabled the Minister for Earthquake Recovery and CERA to facilitate and direct Canterbury's communities to recover from the earthquakes and focused on enhanced community involvement.[50] It gave the Minister for Earthquake Recovery broad powers, including the

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[44] Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009) at 26.

[45] Ministry of Culture and Heritage "February 2011 Christchurch earthquake" New Zealand History <https://nzhistory.govt.nz/>.

[46] "Declaration by Minister of State of National Emergency" (3 March 2011) 23 *New Zealand Gazette* 616.

[47] Department of the Prime Minister and Cabinet *Whole of Government Report: Lessons From the Canterbury Earthquake Sequence* (Greater Christchurch Group, July 2017) at 7.

[48] At 7.

[49] At 8.

[50] Section 3.

ability to override Resource Management Act 1991 (RMA) processes and local government decisions and to compulsorily acquire land.[51]

The 2011 Act carried over the Henry VIII provisions from the 2010 Act.[52] However, in response to criticisms of the 2010 Act, it provided that a four-person Canterbury Earthquake Recovery Review Panel (Review Panel) would review draft Orders in Council before the relevant minister recommended them to the Governor-General,[53] and that the Minister for Earthquake Recovery must publicly notify these recommendations.[54] The privative clause was also carried over to the 2011 Act.[55] While each Act has its differences, both share the key characteristic of granting extensive powers to ministers to facilitate the earthquake response.

III The Effect of Emergencies on Law-Making and Legitimacy

Having outlined the government responses to Covid-19 and the Canterbury earthquakes, shortly I will begin analysing why each of these emergency responses, and the Methods they represent, is legitimate. However, I must first introduce the concept of legitimacy, particularly in the context of emergencies. In this Part I provide this foundational information to form the basis for my later analysis. I begin by explaining how emergency events necessitate changes to typical law-making processes. Then, I define legitimacy and discuss its continued importance in light of these changes.

A A Brief Introduction to Emergency Powers

In the wake of emergencies, the Government needs access to special powers to respond to people's immediate needs and to mitigate danger. These powers are common in modern

[51] Sections 27, 48, 49 and 54.
[52] Section 71.
[53] Section 73(2).
[54] Section 73(6).
[55] Section 74(2).

democracies and tend to set aside normal legislative and executive processes in favour of placing regulation-making powers with the executive.[56]

In an emergency, specific laws can be temporarily suspended, or certain norms and standards derogated from, in a process called de-juridification.[57] On a practical level, this de-juridification removes or relaxes hurdles that might prevent or inhibit the Government's ability to effectively and urgently assist the affected population.[58] The temporary derogation from these constitutional norms is theoretically justified because the ordinary law-making processes and other response mechanisms of the state cannot cope with the extraordinary pressures and time-sensitivity of an emergency.[59] Rather than being viewed as unconstitutional, the limited suspension of ordinary safeguards is deemed necessary to protect the constitutional system and the state itself.[60]

The availability of these powers and the granting of additional authority to the executive dates back to Roman times, where a dictator would be granted absolute power during an emergency.[61] Such absolute power is repugnant to the modern democratic state and is no longer the accepted method of dealing with crises.[62] While an emergency justifies the relaxation of normal procedures, the rule of law and other fundamental constitutional principles must still be adhered to.[63] In particular, sound administrative practices and principles arguably become more important to control executive arbitrariness.[64] For this reason, limits are placed on emergency powers. Typically, Parliament will maintain control

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[56] Holly Mclean and Ben Huf *Emergency Powers, Public Health and COVID-19* (Department of Parliamentary Services, Parliament of Victoria, Research Paper No 2, August 2020) at 4.

[57] Antonios Kouroutakis and Sofia Ranchordas "Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies" (2016) 25 Minnesota Journal of International Law 29 at 31.

[58] Sascha Mueller "Turning Emergency Powers inside out: Are Extraordinary Powers Creeping into Ordinary Legislation" (2016) 18 Flinders Law Journal 295 at 298.

[59] Mueller, above n 58, at 295; and David Bonner *Emergency Powers in Peacetime* (Sweet & Maxwell, London, 1985) at 7.

[60] Mueller, above n 58, at 298.

[61] At 295.

[62] Bonner, above n 59, at 1.

[63] Regulations Review Committee, above n 6, at 12.

[64] Hopkins, above n 1, at 210.

of the executive and grant it tailored powers to respond to the specific emergency in a proportionate manner.[65] Additionally, it is a key characteristic of emergency law that the executive's special powers are temporary and only apply with effect during the recognised emergency.[66]

B What is Legitimacy and Why is it Important?

I have attempted to explain why it is crucial that certain key safeguards remain in place to control the use of the executive's powers in times of emergency. If granted uncontrolled and exorbitant power during such crises, it is unlikely the executive's exercise of this power would be viewed as legitimate. In this section, I use Pettit's conception of legitimacy to explain what legitimacy means and why it continues to be important in emergency situations. I rely on Pettit's work simply because he provides a useful definition and overview of legitimacy and helpfully distinguishes it from other related concepts, such as justice.

Pettit defines legitimacy as referring to the vertical relationship between the state and citizens and the nature of the imposition of law, rather than the content of the laws themselves.[67] Laws are legitimate when their imposition, meaning the way in which they are imposed, is acceptable, justifiable or desirable.[68] Whether the laws themselves are substantively acceptable, justifiable or desirable is distinguished as a question of justice.[69] Pettit's distinction between legitimacy and justice means that unjust laws may be imposed in a legitimate way, or conversely that just laws may be imposed in an illegitimate way.[70] In Pettit's view, if a system is legitimate then, while citizens can oppose unjust laws, they must do so in a way that allows the system to survive.[71] Legitimacy relates not only to the

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[65] Mueller, above n 58, at 296
[66] Bonner, above n 59, at 7.
[67] Pettit, above n 7, at 60.
[68] At 60.
[69] At 60.
[70] At 60.
[71] At 62.

state's system or regime as a whole, but also to individual laws and institutions within the regime.[72] For example, a government might be viewed as legitimate while some of the laws it imposes could be viewed as individually illegitimate.

Legitimacy is therefore important because it gives citizens a reason to accept a regime, regardless of whether they agree with the content of the laws.[73] If a law is imposed legitimately, but citizens believe the law is unjust, they will campaign for the Government to change the law; however, in the meantime they will accept that the law applies (even if they disobey it).[74] Following this logic, the allocation and exercise of authority following an emergency must be legitimate in order for it to be accepted by the populace. Emergencies are high-stakes events, which can "threaten safety, property or the integrity of the state" and require immediate and decisive action.[75] If people view the Government's emergency powers as illegitimate, they may reject the exercise of those powers, undermining the Government's crisis response. It is therefore crucial that, as with ordinary laws, the laws governing the provision of emergency powers are legitimate.

Pettit views democracy as a prerequisite for legitimacy,[76] and indeed the authors of the literature I have drawn on thus far consider emergency powers to be typically justified on the basis of democratic legitimacy.[77] Pettit promotes a version of legitimacy that is grounded in the idea of freedom as non-domination by the state.[78] State coercion and interference, necessary and unavoidable as part of living in a modern society, are legitimate as long as the citizens enjoy a suitable level of control over the coercion or interference.[79] Suitable control requires that citizens can exercise both influence and direction: they must be able to make a designed difference to the process.[80] Although it may be up for debate,

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[72] At 64.
[73] At 65.
[74] At 63.
[75] Mclean and Huf, above n 56, at 4.
[76] Pettit, above n 7, at 61.
[77] See Mclean and Huf, above n 56, at 4; and Mueller, above n 58, at 296.
[78] Pettit, above n 7, at 74.
[79] At 74.
[80] At 78.

broadly speaking this notion of legitimacy is conceivably consistent with the law-making processes of a representative democracy such as New Zealand's.

Pettit provides much more detail on this topic; however, this paper will largely be looking at the sources of legitimacy for certain types of authority, not applying Pettit's framework specifically. The above overview provides useful context for explaining what legitimacy means and why it is important for the acceptance of laws and regimes at a high level, but as the following sections will demonstrate, I do not restrict my analysis to Pettit's concept of legitimacy alone. For the purposes of this paper, further theory must also be relied on to understand how legitimacy is upheld in emergencies in New Zealand.

1 The search for legitimacy in New Zealand emergencies

In many other jurisdictions, particularly in some European nations, there exists specific provisions in the constitution where, once triggered, detailed emergency rules apply and the usual protections around law-making processes are lifted.[81] New Zealand does not have such constitutional provisions and therefore faces a unique question of how and why our government's inevitable use of extraordinary powers and the lifting of typical law-making processes during an emergency is legitimate.

To answer this question and to analyse the legitimacy of authority granted during emergencies in New Zealand, I rely heavily on American regulatory and administrative theory. The Constitution of the United States vests executive power in the President,[82] but it does not make specific provision for the wider executive branch. As a result, an extensive body of regulatory and administrative theory has developed in an attempt to legitimise the plethora of quasi-executive bodies within the American governmental framework. These bodies enjoy often broad and coercive powers, and the theory helps to explain why their

[81] Anna Khakee *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe* (Geneva Centre for the Democratic Control of Armed Forces, Policy Paper No 30, 2009) at 8 and 11–15; and Kim Lane Scheppele "Law in a Time of Emergency: States of Exception and the Temptations of 9/11" (2004) 6 University of Pennsylvania Journal of Constitutional Law 1001 at 1079.

[82] Article II.

enjoyment of such powers is legitimate, despite not being provided for in the Constitution.[83] Similarly, in a New Zealand context, during emergencies we have seen unprecedented and extraordinary powers given to both ministers and public officials, which is not provided for in any constitution. The American regulatory and administrative theory models, particularly the legislative, accountability and expertise models, can be adapted to the New Zealand context to help explain why this unusual allocation of authority is nevertheless legitimate.

With Pettit's concept of legitimacy as a useful starting point, I will thus be considering these American regulatory and administrative theory models and analysing how they help explain why the two types of authority within the Canterbury earthquakes and Covid-19 responses are legitimate. Though the models originate in American literature, I am flexible in their application and adapt them where possible to suit the New Zealand emergency responses and their respective uses of the Minister Method and Public Official Method. In the following two Parts, I assess which models are applicable to the Minister Method and Public Official Method and the extent to which they can provide a source of legitimacy for each Method. This will prepare for the in-depth analysis in Part VI, where I more substantively critique each Method and analyse their various strengths and potential deficiencies in legitimacy.

IV Sources of Legitimacy for the Minister Method

The Canterbury earthquakes saw the allocation of significant law-making powers in the hands of government ministers. Following the 2011 earthquake in particular, the Minister for Earthquake Recovery, Gerry Brownlee, was given broad powers to direct the earthquake response. In this Part I will examine the possible sources of legitimacy for this Minister Method. First, I set out two relevant regulatory and administrative models of

[83] Richard Stewart "The Reformation of American Administrative Law" (1975) 88 Harv L Rev 1667 at 1672.

legitimacy, the legislative model and the accountability model, before adapting them to fit the Canterbury context in the final section.

A The Legislative Model

The legislative model, sometimes labelled the "transmission belt theory", is the traditional model used to explain and justify the legitimacy of administrative actions.[84] This model stipulates that the legitimacy of a decision or process is determined by the degree to which it "carr[ies] forward legislative prescription".[85] The legislative model attempts to be consistent with democratic theory. Because citizens vote to elect the legislature, which in turn controls the executive and its administrators, if the administrative agencies follow the legislature's policies then their actions are legitimate.[86] Accordingly, the more specific the legislature's policies, the more legitimate the administrator's actions.[87] If the legislative prescription is broad and provides for discretion, then the claim to legitimacy is weakened.[88] Discretion is considered undesirable as it allows the possibility for the uncontrolled will of unelected and unaccountable officials to threaten individuals' autonomy and freedoms.[89]

1 The impracticalities of the legislative model

The traditional legislative model of legitimacy has several obvious weaknesses and has been labelled as unsatisfactory.[90] It ignores the reality of public administration, where the legislature frequently and intentionally allocates discretionary powers to administrative bodies.[91] This then raises the question of how detailed the legislative prescription must be for the agency's actions to count as legitimate.[92] Even where the allocation of discretion

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[84] Stewart, above n 83, at 1669.
[85] Jerry Mashaw *Due Process in the Administrative State* (Yale University Press, New Haven, 1986) at 16.
[86] At 16.
[87] Timothy Jones "Administrative Law, Regulation, and Legitimacy" (1989) 16 Journal of Law and Society 410 at 412.
[88] At 412.
[89] Stewart, above n 83, at 1676.
[90] Mashaw, above n 85, at 16.
[91] At 16–17.
[92] Jones, above n 87, at 412.

is limited and the statutory mandate is as specific as possible, administrative decisions always require the exercise of some judgment on both technical issues and the allocation of priorities.[93] It is rare for the legislature to provide for the exact scenario facing the administrator, more often providing for general conditions.[94] Further, in practice, there is no guarantee that more specific laws would lead to better policy delivery.[95] A certain amount of discretion to deal with inevitably general statutory provisions is part of the reality of administration. If the legislative model would reject this necessary discretion as illegitimate then it is an unrealistic and idealistic approach incompatible with most modern democracies where "legislators tend to be pragmatists rather than idealists".[96]

While the traditional legislative model based on the transmission belt theory may be outdated, there remain definite limits on the exercise of agencies' discretion.[97] Agencies' choices are restrained by legal requirements and political input from the legislature.[98] Even if there is more than one course of action available to an agency, generally the available options will be those considered desirable by the legislature. This suggests a modernised version of the legislative model, more cognisant of the necessity for discretion, may still be applicable to a certain extent.

The numerous weaknesses of the legislative model and its arguable incompatibility with modern democracies suggest it may be insufficient on its own to legitimise the allocation of authority within the Minister Method. Even if the legislative model can be modernised, its fundamental assumption that the legitimacy of authority depends on its connection to legislative prescription persists. It may retain some utility, however, if used to complement other stronger models of legitimacy and I will attempt to apply it to the Minister Method

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[93] Mashaw, above n 85, at 18.
[94] Jones, above n 87, at 412.
[95] At 412.
[96] At 412.
[97] Sidney Shapiro "Law, Expertise and Rulemaking Legitimacy: Revisiting the Reformation" (2019) 49 Environmental Law 661 at 676.
[98] At 677.

as adopted in the Canterbury earthquakes response. Before doing so I introduce the accountability model, which holds greater potential.

B The Accountability Model

The accountability model may be an answer to the deficiencies of the legislative model. Under this model, administrative actions are legitimate if the administrative process incorporates legal and political accountability and control mechanisms.[99] Such accountability mechanisms can serve to legitimise broad legislative mandates that would be unacceptable under the legislative model.[100] The accountability model is a reaction to the perceived risk that empowered and uncontrolled administrators would use their discretion arbitrarily and unpredictably.[101] Accountability mechanisms such as judicial review should therefore be used to monitor and curtail agencies' discretion, which in turn promotes legitimacy.[102]

The most significant challenge of the accountability model is the tension between accountability and independence. As accountability mechanisms are strengthened, the possible choices of action available to agencies are narrowed.[103] While this could be desirable, many regulatory and administrative bodies were created with the intention they would be free from partisan influence.[104] In fact, often one reason the legitimacy of their decisions is accepted by the public is because they are made independently of party politics.[105]

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[99] Jones, above n 87, at 415; and James Freedman *Crisis and Legitimacy: The Administrative Process and American Government* (Cambridge University Press, Cambridge, 1978) at 11.

[100] Jones, above n 87, at 415.

[101] Marshall Breger "The Quest for Legitimacy in American Administrative Law" (2007) 40 Israel Law Review 72 at 87.

[102] At 87.

[103] Jones, above n 87, at 416.

[104] At 416.

[105] At 416

1 The accountability model as a prerequisite for democratic legitimacy

Stepping away from the confines of regulatory and administrative theory, accountability can be seen more generally as a prerequisite of democratic legitimacy. Public accountability is a fundamental public law principle and a "cornerstone of our system of government".[106] In a democratic society, a government's power derives from and belongs to the people.[107] For this reason, a government is accountable for the exercise of the power entrusted to it.[108] Accountability is crucial to upholding the public's trust and confidence in its government and public service.[109]

Accountability as a concept has buzzword-like qualities. While definitions vary, everyone agrees it is a "good thing" and should be pursued as a feature of good governance in a liberal democracy.[110] Some definitions are broad; for example, Behn defines accountability simply as punishment.[111] Many other scholars perceive accountability as a social relationship between two entities.[112] For example, Bovens defines accountability as:[113]

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

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[106] Controller and Auditor-General *Public accountability: A matter of trust and confidence* (September 2019) at 3.

[107] *Nationwide NPWS Pty Ltd v Wills* (1992) 108 ALR 681 (HCA) at 723.

[108] Paul Finn "Public trust and public accountability" (1994) 3 GLR 224 at 228.

[109] Controller and Auditor-General, above n 106, at [1.1].

[110] Christopher Pollitt *The Essential Public Manager* (Open University Press, England, 2003) at 89.

[111] Robert Behn *Rethinking Democratic Accountability* (Brookings Institution Press, Washington DC, 2001) at 3.

[112] See Barbara Romzek and Melvin Dubnick "Accountability" in Jay Shafritz (ed) *International Encyclopaedia of Public Policy and Administration* (West View Press, Boulder, 1998) 6 at 6; and Guy Peters "Accountability in public administration" in Mark Bovens, Robert Goodin and Thomas Schillemans (eds) *The Oxford Handbook of Public Accountability* (Oxford University Press, United States, 2014) 215 at 218.

[113] Mark Bovens *Analysing and Assessing Public Accountability. A Conceptual Framework* (CONNEX and NewGOV, European Governance Papers No C-06-01, 2006) at 9.

Bovens opines such account-giving must operate ex post, after the relevant conduct has occurred.[114] To be considered "public" accountability, the account-giving must be open to the public and must concern matters in the public domain, such as decisions of government departments and the use of taxpayers' money.[115] In this paper, the only relevant type of accountability is public, so I refer for the sake of simplicity to "accountability". Each of these references should be considered synonymous with public accountability.

Democratic societies need accountability mechanisms to function: "at its core, a democratic polity depends on its ability to keep a check on authority."[116] In a representative democracy, such as New Zealand, citizens are the primary principals who have transferred their sovereignty to Parliament.[117] Parliament has transferred law-drafting and enforcement powers to the Government, which in turn has transferred much of its operational responsibilities to public officials.[118] Each principal in the chain relies on accountability arrangements to monitor the performance of their respective agent, with citizens having the final say by being able to vote governments in or out.[119]

While Pettit does not speak specifically about accountability, the above account is consistent with his concept of legitimacy. He emphasises the importance of citizens having control over their government, but specifically that this control needs to be meaningful; citizens must exercise both influence and direction.[120] For people to be able to influence their government's actions, there must be accountability mechanisms that allow them to know what their government is doing and to enable sanctions if it is not moving in the desired direction. Accountability is necessary for meaningful control, as without it, a government could do whatever it wanted without fear of repercussions. Therefore, if citizen control is necessary for democratic legitimacy, then so is accountability.

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[114] At 13.

[115] At 11–12.

[116] Zoltan Majdik and William Keith "Expertise as Argument: Authority, Democracy, and Problem-Solving" (2011) 25 Argumentation 371 at 371.

[117] Bovens, above n 113, at 25.

[118] At 25.

[119] At 27.

[120] Pettit, above n 7, at 79.

The accountability model holds promise as a useful tool for legitimising the allocation of authority in the Minister Method. While the traditional accountability model developed out of American regulatory and administrative theory, the connection between accountability and democratic legitimacy means it is highly relevant in a New Zealand context. Further, while a perceived weakness of the accountability model is its potential incompatibility with independence, this is not an issue where the Minister Method is concerned. Ministers are elected representatives and by their very nature as politicians are partisan.

C An Adapted Model for Canterbury

The two models of legitimacy discussed above each provide different potential bases for the legitimacy of authority. Although I consider the accountability model to be stronger and more suited to the Minister Method, the legislative model may still be relevant. In this section I apply both models and discuss the extent to which they provide a source of legitimacy for the allocation of authority under the Minister Method seen in the Canterbury earthquake response.

1 An adapted legislative model?

One challenge in applying the legislative model to the Minister Method is that it becomes obvious that the model was designed to apply to administrative and regulatory agencies. These agencies generally operate at arm's length from the Government and, in the case of regulatory agencies, were intended to regulate a particular industry, such as broadcasting.[121] In contrast, ministers are elected by the public and form part of the very core of government. While acknowledging this difficulty, the legislative model may still be useful.

As mentioned in Part II, both the 2010 Act and the 2011 Act contained a Henry VIII clause, which empowered the relevant minister to amend primary legislation. The 2011 Act also gave the Minister for Earthquake Recovery additional recovery powers. Law-making is

[121] Jones, above n 87, at 416.

traditionally the prerogative of Parliament in New Zealand,[122] so the allocation of such broad law-making powers to ministers is a significant transfer of authority. However, provision for this authority was made in two pieces of legislation enacted by Parliament (admittedly through a truncated parliamentary process). Under the legislative model then, the extraordinary powers able to be exercised by ministers were democratically legitimate because Parliament had given those powers, and the ministers were simply acting within their mandate.

The biggest weakness of applying this model to the Minister Method is the enormous degree of discretion afforded to ministers. Ministers could "grant an exemption from, or modify, or extend any provision of any enactment".[123] This phrasing gives ministers broad powers to amend a number of Acts and, as we have seen, the legislative model is uncomfortable with vague directions and the conferral of discretion. Such broad discretion is arguably incompatible even with a modernised version of the legislative model, as ministers have almost complete freedom of action rather than choosing between different options Parliament has prescribed for them. In this case the link between Parliament's prescription and the ministers' powers might appear tenuous.

While it is generally convincing that powers allocated to ministers are, in part, legitimate because they have been given them by a democratically elected Parliament, this does not satisfactorily legitimise the allocation of such broad and extraordinary powers.

2 Does the accountability model provide a solution?

Turning now to the accountability model. In a Westminster system such as New Zealand's, the Government is responsible to the House of Representatives.[124] Further, as elected representatives, ministers are not only accountable to the public indirectly through

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[122] New Zealand Parliament "Parliament Brief: What is Parliament?" (21 March 2014) <www.parliament.nz/en/>.

[123] Canterbury Earthquake Response and Recovery Act 2010, s 6(4); the 2011 Act has almost identical wording under s 71(2).

[124] New Zealand Parliament "Parliament Brief: Government Accountability to the House" (21 March 2014) <www.parliament.nz/en/>.

Parliament, but also directly through the ballot box. The nature of ministerial office therefore incorporates accountability mechanisms which legitimise ministers' authority. Ministers must face their own Cabinet, front the media and face Parliament during question time. They must provide information and explanations and, if the public is unhappy with their actions, risk losing office.

Generally speaking, the accountability model therefore applies well to the Minister Method. Indeed, because ministers are elected, they are certainly more accountable than the agencies considered in regulatory theory. However, this accountability logic could be used to legitimise practically any powers granted to ministers. It is necessary to also consider what specific accountability mechanisms were provided for in the Canterbury earthquakes response and evaluate what this means for legitimacy. I will discuss this further as part of my analysis in Part VI.

Overall, both the legislative and accountability models shed a certain amount of light on the sources of legitimacy for the Minister Method employed in the Canterbury earthquakes response. I find accountability to be a significantly more convincing source of legitimacy because accountability is a fundamental feature of the ministerial office. While the legislative model may be insufficient on its own, it complements the accountability model by reinforcing the allocation of authority as legitimate. Combining both models leads to the conclusion that the allocation of authority within the Minister Method is democratically legitimate because Parliament authorised it and ministers are accountable to the public for the exercise of their authority.

V Sources of Legitimacy for the Public Official Method

The Government's initial response to Covid-19 saw authority placed in Dr Ashley Bloomfield, the Director-General of Health, who used special powers available to him under the Health Act. The Director-General of Health is the Chief Executive of the Ministry

of Health,[125] with responsibilities under the Public Service Act 2020, and is an appointed official.[126] The allocation of authority to such an official is exemplary of the Public Official Method, and in this Part I continue to draw on American regulatory and administrative theory to examine the possible sources of legitimacy for this approach.

A Can the Traditional Legislative Model Apply?

While writing in the context of American regulatory theory, Breyer notes a familiar and relevant argument associated with the empowerment of public officials: it is undemocratic and illegitimate to entrust important decisions to unelected bureaucrats.[127] Bureaucrats are not representatives of the people and yet, in the case of Bloomfield, can wield extraordinary powers to constrain people's autonomy and freedom.

The legislative model, or at least an adapted version of it, could feasibly explain why this allocation of authority is nevertheless legitimate. The Health Act was enacted by Parliament and its powers have been available to medical officers of health for several decades. As a medical officer of health, and with the appropriate authorisations as outlined in Part II, Bloomfield was simply carrying forward legislative prescription when he made the series of orders under the Health Act.

Putting aside the question of whether his orders were within the scope of what was contemplated by Parliament, the obvious weakness in applying the legislative model is that the Health Act appears to intentionally grant medical officers of health significant freedom and discretion when making these orders. For instance, the powers available under s 70 enable the medical officer of health to destroy insanitary things and infected animals and to require people and places to be quarantined or disinfected "as he thinks fit".[128] As we have seen, the legislative model might consider such broad conferral of discretion

[125] New Zealand Public Health and Disability Act 2000, s 6.

[126] Section 52 and sch 7(3); Previously ss 32 and 35 of the State Sector Act 1988.

[127] Stephen Breyer "Two Models of Regulatory Reform" (1983) 34 SCL Rev 629 at 629.

[128] Sections 70(1)(c), 70(1)(d) and 70(1)(f).

illegitimate. Perhaps this discretion can be legitimised on accountability grounds, that the Director-General is responsible to the Minister of Health.[129] However, while both the legislative and accountability models of legitimacy could possibly be stretched to legitimise the Public Official Method adopted in the Covid-19 response, I suggest a more fitting source of legitimacy is grounded in the Director-General's expertise as a medical professional.

B In Experts We Trust?

The expertise model of legitimacy gained popularity in American regulatory and administrative theory during the New Deal reforms of the 1930s. These reforms saw the creation of agencies with broad powers and discretion who used their expert judgement to respond to problems.[130] This expertise was regarded as their greatest strength.[131] According to this model, administrative decisions are legitimate because the agencies' experts would provide the best possible evidence-based solution grounded in scientific or professional methodology.[132]

The expertise model recognises it is impossible to have all regulatory rules and decisions prescribed by legislation.[133] Discretion is not only inevitable in a bureaucracy, but also desirable.[134] There must be room to adapt to changing circumstances and specific problems as they arise and the people best qualified to undertake this are experts within the bureaucracy.[135] Special agencies are created to deal with specific issues, and they are far more qualified to deal with complex subject matter and/or scientific decisions than a generalist legislature or judiciary.[136]

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[129] Public Service Act, s 52(1).

[130] Breger, above n 101, at 78.

[131] Freedman, above n 99, at 44.

[132] Mashaw, above n 85, at 19.

[133] Robert Kagan *Regulatory Justice: Implementing a Wage-Price Freeze* (Russell Sage Foundation, New York, 1978) at 13.

[134] Gerald Frug "The Ideology of Bureaucracy in American Law" (1984) 97 Harv L Rev 1276 at 1283.

[135] Kagan, above n 133, at 13.

[136] Mashaw, above n 85, at 19.

This reverence for expert judgment is not just relevant to the New Deal. Science, and particularly medicine, grew in status following World War II where the importance of advanced theoretical science became enormously clear.[137] Now even more, we depend on specialist and technical expertise to assess the ever-present risks of modern society, evaluate their likelihood and gravity, and establish how best to respond.[138]

1 Weaknesses of the expertise model

The expertise model fell in popularity in the United States following the New Deal. Freedman identified a growing scepticism among the public that expertise was sufficient to ensure good decision-making.[139] He noted this scepticism was rooted in the American public's distrust of experts and borderline anti-intellectualism.[140] Importantly, these comments were made in a different era and about a country with a very different socio-political landscape to New Zealand's. Still, it demonstrates the importance of public trust in experts for their judgements to carry legitimacy.

One of the most difficult challenges for the expertise model is its potentially tenuous connection with democratic legitimacy in particular. Rahman explains that, while agency decisions based on neutral expert analysis may go some way towards enhancing legitimacy, deference to these experts is at odds with democratic accountability,[141] which as we have seen is a prerequisite for democratic legitimacy. These unelected experts are insulated from politics and public participation.[142] They are not accountable to the people, so why should they be making important decisions on their behalf? Their authority to do so could well be perceived as democratically illegitimate.

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[137] Stephen P Turner *Liberal democracy 3.0: Civil society in an age of experts* (Sage Publications, Thousand Oaks, 2003) at 12.

[138] Majdik and Keith, above n 116, at 372.

[139] Freedman, above n 99, at 47.

[140] At 48.

[141] K Sabeel Rahman "Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes" (2011) 48 Harv J on Legis 555 at 570.

[142] At 570.

Alternatively, it could be argued that a focus on expertise does actually improve democracy. This is because independent experts "pursue the public good rather than partisan advantage",[143] and do so on the basis of neutral fact. A difficulty with this argument is that even the objectivity of expertise itself may be doubted, as "expert knowledge masquerades as neutral fact".[144] What is accepted as fact is influenced by contemporary norms and assumptions. Now-outdated "facts" were informed by patriarchy and racism and eventually current thinking will be exposed as a product of today's prejudices.[145]

A reliance on rational and objective decision-making also ignores the reality that almost all decisions require some sort of value judgement.[146] Even if broad values and goals are set democratically, experts will always be required to make judgements on how to implement policy and pursue the "common good".[147] However, Kagan notes a modern version of the expertise model would admit that, while there are political and evaluative judgements to all decisions, it is not the experts' job to identify the public interest; it is the factual elements that are properly their responsibility.[148]

Another issue is that some policy problems may be too complex to be adequately resolved by technical experts, especially if they do need to consider the "public interest".[149] Related to this, Mashaw discusses how reliance on expertise can imply a degree of "tunnel vision", as important considerations such as local and affected interests may be ignored.[150] Yet, if experts take account of a wider range of matters, especially those outside their area of expertise, their judgement may begin to look political rather than rational.[151] This is

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[143] Jerry Mashaw *Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports Democratic Government* (Cambridge University Press, Cambridge, 2018) at 166.
[144] Turner, above n 137, at 31.
[145] At 31.
[146] K Sabeel Rahman "Conceptualizing the Economic Role of the State: Laissez-Faire, Technocracy, and the Democratic Alternative" (2011) 43 Polity 264 at 270.
[147] At 270.
[148] Kagan, above n 133, at 14.
[149] At 50.
[150] Mashaw, above n 85, at 21.
[151] At 22.

important because expertise as a ground of legitimacy traditionally only works because the judgement of experts is not based on personal or political factors.[152]

While there are potential weaknesses associated with the expertise model, generally I accept that expertise may be a viable source of legitimacy for authority in situations where scientific and/or evidence-based decision-making is paramount. We must also remember that the Covid-19 pandemic is a unique event, and the Government's role in responding to it is quite different from the typical activities of the regulatory and administrative agencies that are the focus of the American literature. Accordingly, in the following section I assess the extent to which the expertise model, or an adapted version of it, applies to the unique allocation of authority within the Public Official Method seen in the initial Covid-19 response.

2 Applying the expertise model to the Director-General of Health

The expertise model can explain much of the Government's initial response to Covid-19 and why it was legitimate to place Bloomfield in charge. Bloomfield is a medical professional who specialises in public health medicine.[153] He has a history of senior leadership within the Ministry of Health and before his appointment as Director-General he was Chief Executive of Hutt Valley District Health Board.[154] He is not simply an experienced public servant or policy adviser, he is a medical practitioner with subject matter expertise. Further, the special powers available to him under the Health Act are available to all medical officers of health. Medical officers of health are required to be "medical practitioner[s] suitably qualified and experienced in public health medicine".[155] The Health Act therefore intends for the delegation of powers to medical and health experts when responding to infectious diseases,[156] such as Covid-19. Accordingly, the Government relied on Bloomfield for its public health response to Covid-19, as he made all the orders under the Health Act to put in place the initial lockdown and Alert Level 3

[152] Frug, above n 134, at 1321.

[153] Ministry of Health "Executive Leadership Team" <www.health.govt.nz/>.

[154] Ministry of Health, above n 153.

[155] Health Act 1956, s 7A(2).

[156] Section 70.

restrictions. Under the expertise model then, the authority placed in Bloomfield is legitimate because he has the expertise to make the best decisions regarding New Zealand's response to Covid-19 according to scientific and medical evidence.

It is worth noting that the role of Director-General of Health is not required to be filled by a medical professional. The previous office-holder, Chai Chuah, was not medically qualified and therefore could not have acted as a medical officer of health to make orders under the Health Act. While he had 25 years experience within the health sector, he held a commerce degree and was qualified as a chartered accountant.[157] It is fortunate the current Director-General had the appropriate qualifications to be a medical officer of health, otherwise the Government would have been required to follow an alternative approach and could not have relied so heavily on his expertise.

However, it was not Bloomfield and Bloomfield alone who dictated the Covid-19 response. Cabinet decided the nature and extent of the restrictions and when they would be lifted, based on Bloomfield's expert advice. For example, Cabinet was responsible for deciding whether and when to drop from Alert Level 4 to Alert Level 3.[158] While the advice of the Director-General was a key consideration, social, economic and fiscal factors were also relevant.[159] This demonstrates that, while Bloomfield executed the decisions made by Cabinet and occupied an expert advisory role, he did not have the final say. The final value judgements and policy choices were considered properly the realm of ministers. This suggests that the Public Official Method adopted in the Covid-19 response exhibits an adapted and more measured version of the expertise model, which dilutes the power given to an unelected expert and increases ministerial control. This more measured approach arguably makes the allocation of authority within the Public Official Method more democratically legitimate. Admittedly though, in the above example, Cabinet did follow

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[157] Public Service Commission "Director-General of Health Appointed" (26 March 2015) <www.publicservice.govt.nz/>.

[158] Cabinet Office "Review of COVID-19 Alert Level 4" (20 April 2020) CAB-20-MIN-0176 at [9].

[159] Cabinet Office "Review of COVID-19 Alert Level 4" (20 April 2020) CAB-20-SUB-0176 at [23]–[53].

the approach recommended by the Director-General,[160] demonstrating it placed significant reliance on his expert advice.

Overall, the expertise model applies well to the Public Official Method employed during the initial Covid-19 response. It demonstrates that the Director-General's medical and health expertise legitimised his authority to issue lockdown and Alert Level 3 orders. In Part VI I critique where such an approach experiences strengths and deficiencies of legitimacy, but first I must determine the source of legitimacy for the subsequent placement of authority in the Minister of Health.

C A Subsequent Shift in Authority to the Minister of Health

The discussion so far on the Covid-19 response only tells part of the story. The CPHRA shifted authority for making orders governing the Alert Levels from the Director-General to the Minister of Health. This was a return to the more traditional allocation of emergency powers seen in the Minister Method. I argue this approach was similarly intended to enhance democratic legitimacy through an adapted legislative and accountability model, although expertise remains a partial source of legitimacy.

Parliament prescribed the nature and extent of the Minister of Health's powers, which reflects the legislative model. However, the explanatory note to the COVID-19 Public Health Response Bill demonstrates that accountability was key.[161] It states that making the Minister of Health the decision-maker (and Director-General the advice-giver) is better aligned with legislative conventions. Further, it specifies that the expansive scope and effects of the decisions to be made necessitate ministerial accountability. It also emphasises, though, that the Bill would maintain the centrality of "public health expertise" to decision-making. Indeed, this is reflected in the CPHRA's requirement that the Minister must have had regard to the Director-General's advice before making an order.[162]

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[160] At [11].

[161] COVID-19 Public Health Response Bill 2020 (246-1).

[162] Section 9(1)(a).

Since the CPHRA was enacted, subsequent orders made under it demonstrate that the Minister of Health still relies heavily on the Director-General's advice. For example, the country moved to Alert Level 1 sooner than had initially been recommended by the Director-General due to promising evidence that the elimination strategy was working.[163] Importantly, before Cabinet agreed to do so, the Director-General advised that his earlier recommendation should be revisited and recommended that New Zealand was "on track" to move to Alert Level 1 at the earlier date of 8 June.[164] This demonstrates the Government's continued commitment to following the Director-General's advice as it develops.

The Government likely considered that placing the Minister of Health in charge was crucial for legitimacy. The Minister of Health is elected and accountable for the use of his powers under the CPHRA. Appropriately, his decisions remain based on the advice of the Director-General because Covid-19 remains a significant threat to public health and the latest scientific and medical evidence must be relied on. However, the wide powers that may be used to significantly restrict people's autonomy now belong to an elected representative. It is this combination of democratic accountability and evidence-based decision-making (expertise) that gives this allocation of authority legitimacy.

It is worth remembering that in limited circumstances the Director-General may still make orders under s 11 of the CPHRA. The prerequisites are that: the order only applies within a single territorial authority district;[165] and the Director-General considers that the order is urgently needed to contain or prevent the spread of Covid-19 and that his making of the orders is the most appropriate response.[166] This suggests that expertise remains a source of legitimacy in situations where there is high time-sensitivity. Shifting authority back to the Director-General in such situations is likely legitimate according to the expertise model

[163] Cabinet Office "Review of COVID-19 Alert Level 2 Controls" (25 May 2020) CAB-20-SUB-0240 at [3].
[164] Cabinet Office "Review of COVID-19 Alert Level 2" (8 June 2020) CAB-20-SUB-0270 at [32].
[165] Section 10(a).
[166] Section 10(b).

because if an order is "urgently needed" to contain Covid-19, the health of the community may be at immediate risk and the Director-General's public health and medical experience becomes of the utmost importance. However, the Minister of Health must make the orders if they apply within more than one territorial authority district,[167] suggesting that accountability is once again the basis of legitimacy where the order is to have wide application. The wider the scale and potential consequences of the order, the more important it is that the person making the order is held to account for the exercise of their authority, even if at the expense of a prompt response time.

Overall, as is typical of the Minister Method, accountability is the main source of legitimacy for the allocation of authority under the CPHRA. This is quite different to the initial Covid-19 response, where expertise is the key source of legitimacy for its employment of the Public Official Method.

VI Does the Theory Hold Up? An Evaluation and Comparison of the Two Methods

I have limited my examination so far to a high-level discussion of the sources of legitimacy that could feasibly have supported the different emergency responses. In this section I delve deeper into the Governments' approaches to compare their respective strengths and deficiencies in legitimacy. First, I critique the Minister Method seen following the Canterbury earthquakes, which in practice may have contained insufficient accountability mechanisms to temper the extensive powers granted to ministers. Then I critique the Public Official Method adopted in the response to Covid-19, which arguably exhibits a lack of

[167] Section 10(a).

democratic legitimacy, although this may be mitigated by its use of informal accountability mechanisms.

A Evaluating the Minister Method

The key strength of the Minister Method adopted following the Canterbury earthquakes is that it is theoretically more democratic than an approach based on expertise. In a representative democracy such as New Zealand, it is easy to assume this makes it more legitimate. An approach based solely on expertise, or which went as far as government by experts as in a technocracy, would be unacceptable. However, there are certain issues with the Minister Method which suggest there may be some deficiencies in legitimacy.

1 The Earthquake Tsar and the broad powers granted to the executive

The first issue with the Canterbury earthquakes response is the extent of the powers granted to the executive. The Henry VIII clauses in both the 2010 Act and the 2011 Act were subject to intense criticism. Hopkins explained it reflected a mindset that administrative process and constitutional rules were "roadblocks" requiring removal.[168] Orpin and Pannett labelled the "expansive scope of the powers" in the 2010 Act part of "a worrying approach to an emergency of national significance".[169] They explain how Henry VIII clauses are an exception to the fundamental principle that only Parliament can make and suspend laws.[170] Henry VIII clauses should be used very rarely as they pose significant dangers, including: a lack of scrutiny of proposed laws by the House and select committee; a lack of public consultation; and increased uncertainty and confusion for citizens because changes to law by way of Orders in Council are generally less accessible.[171] In an open letter to New Zealanders and Parliament, 27 constitutional law academics expressed similar concerns, calling such an abandonment of constitutional values a "dangerous and

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[168] Hopkins, above n 1, at 204.

[169] Jonathan Orpin and Daniel Pannett "Constitutional Aftershocks" (2010) 10 New Zealand Law Journal 386 at 386.

[170] At 386.

[171] At 387.

misguided step".[172] Notably, even the Regulations Review Committee (RRC) later agreed that the Henry VIII provision in the 2011 Act was broader than it needed to be.[173]

Yet, interestingly, the RRC considered the 2011 Act to be more restrained than the 2010 Act, as it had a more recovery-focused purpose provision and incorporated additional safeguards.[174] For example, as mentioned in Part II, there was the oversight of the Review Panel,[175] and additionally the Minister for Earthquake Recovery was required to conduct a yearly review of the operation and effectiveness of the 2011 Act.[176] However, as Hopkins pointed out, the new powers granted to the Minister in the 2011 Act were largely ignored.[177] These included the Minister being empowered to override RMA processes, and local government decisions, plans and policies.[178] These are enormous powers and the arguably excessive authority given to Brownlee led to him being labelled "King Gerry" and the "Earthquake Tsar" in the media.[179] A minister colloquially referred to as a dictator does not bode well for the democratic legitimacy of his powers and, according to the legislative model, the excessive discretion allowed him might be sufficient for his authority to be considered illegitimate.

Further, as Mueller notes, New Zealand's constitutional arrangements already incorporate an extremely weak separation of powers, with a powerful executive that dominates Parliament.[180] Granting further extreme powers to the executive is therefore particularly dangerous and, even if the authority granted to Brownlee was legitimate under the accountability model, there must come a point where the extent of the powers allocated to

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[172] Geddis, above n 41.

[173] Regulations Review Committee, above n 6, at 18.

[174] At 7.

[175] Section 73.

[176] Section 92.

[177] Hopkins, above n 1, at 205.

[178] Sections 27, 48 and 49.

[179] See John Hartevelt and Giles Brown "Cera bill under fire in House" (13 April 2011) Stuff <www.stuff.co.nz/>; Lianne Dalziel "City recovery threatened by muddied process" (press release, 8 February 2012); and Johnny Moore "The Christchurch rebuild king is dead. Long live the king" (27 October 2017) Stuff <www.stuff.co.nz/>.

[180] Mueller, above n 58, at 307–308.

a single minister undermines this legitimacy. It sits uneasily with notions of democracy and in a non-emergency situation would no doubt have been considered illegitimate.

Another controversial aspect of the Canterbury earthquakes response was the recovery and rebuild process, where a lack of public participation may have also partially undermined democratic legitimacy. This argument borrows from another administrative theory model of legitimacy: the due process model. According to this model, administrative processes are legitimate if their decision-making procedures are fair and provide for the participation and consultation of affected interests.[181] This ties in with the accountability model, as such participation mechanisms are said to make the administrator more directly accountable to these affected interests.[182] Further, Jones notes that in a democracy the participation of affected interests is "an important value in itself".[183] Usefully, in the context of the Canterbury earthquakes, Hopkins also discussed the importance of community involvement. He explained that in the recovery phase of an emergency, as compared with the immediate response, egalitarian decision-making and community involvement leads to more democratically legitimate solutions.[184]

Hayward writes that after the 2010 earthquake, one of the first Government actions was to exclude affected and local interests from decision-making in the interests of urgency.[185] Central government played a significant role in the recovery process, to the detriment of the involvement of local people and councils. For example, in 2011 Christchurch City Council's "Share An Idea" campaign saw local people contribute 106,000 ideas for rebuilding the city.[186] The Council was supposed to lead the development of the recovery plan, but central government intervened as it decided that a more specific implementation plan was needed.[187] CERA became the delivery entity, and the Government later

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[181] Jones, above n 87, at 419.

[182] At 419.

[183] At 420.

[184] Hopkins, above n 1, at 202.

[185] Bronwyn Hayward "Sustaining democracy in disaster: The seeds of recovery" (22 April 2016) Making Christchurch <https://makingchristchurch.com/@MakingChch>.

[186] Christchurch City Council "Share an Idea" < https://ccc.govt.nz/>.

[187] Department of Prime Minister and Cabinet, above n 47, at 7–8.

acknowledged that public perception was that it had taken over the local initiative.[188] It recognised this had led to community "disempowerment and disillusionment".[189] The significant powers given to the Minister for Earthquake Recovery and CERA could possibly have been tempered and made more legitimate, according to the due process model, if they had allowed for genuine public participation in their processes. The above example demonstrates how attempts to provide this participation were largely performative, potentially weakening the Minister Method's claim to democratic legitimacy.

Nevertheless, the RRC received no complaints about any of the Orders in Council made under the 2010 Act and just one complaint about an Order made under the 2011 Act.[190] It noted that Orders made under the 2011 Act typically lifted burdens rather than imposed them.[191] Further, the Department of Prime Minister and Cabinet considered the 2011 Act to improve on the 2010 Act and viewed the checks and balances on the powers to have been appropriate,[192] although as part of the Whole of Government Report these comments are not entirely surprising. Kerkin surveyed orders made between 2011 and 2014 and determined they were "carefully crafted, … proportionate and defensible".[193] Overall, this suggests the use of powers under the 2010 Act and 2011 Act may have been restrained, but the potential for abuse was high and the issues discussed above serve to weaken the democratic legitimacy of this approach.

2 Is ministerial accountability enough to justify these powers?

Turning now to the most significant basis for the Minister Method's legitimacy: accountability. As discussed, the main justification for giving a minister extraordinary powers in an emergency situation is that they are accountable for their use. To evaluate whether the extensive powers given to ministers in the Canterbury earthquakes response

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[188] At 8.

[189] At 8.

[190] Regulations Review Committee, above n 6, at 16.

[191] At 7.

[192] Department of Prime Minister and Cabinet, above n 47, at 8–9.

[193] Sarah Kerkin "Here there be dragons: Using systems thinking to explore constitutional issues" (Doctoral Thesis, Victoria University of Wellington, 2017) at 153.

remain democratically legitimate, it is therefore necessary to analyse the extent to which the ministers could be held accountable for their use.

Some of the biggest deficiencies in accountability present in both the 2010 Act and 2011 Act are the privative clauses. These are problematic because they limit the reviewability of the ministers' use of their powers under the Acts, theoretically giving them significantly more freedom. For example, the Legislation Advisory Committee pointed out that, because the relevant minister's recommendations were not reviewable by virtue of s 73(2) of the 2011 Act, the requirements that the relevant minister must take into account the 2011 Act's purposes and have regard to the recommendations of the Review Panel before recommending an Order in Council,[194] were essentially redundant.[195] The relevant minister could feasibly disregard them.[196]

Further, both the 2010 Act and 2011 Act contained a weak-form privative clause that provided that Orders in Council made under the Acts had the force of law as if enacted as a provision of the Acts.[197] George Tanner QC explained that this may purport to prevent the reviewability of the Orders themselves (not just the relevant minister's recommendation to make an Order).[198] This is because if the Orders are considered part of statute (made by Parliament), then due to parliamentary sovereignty, their validity could not be reviewed by the courts.[199] There is, however, some debate over whether either kind of privative clause is in fact effective, as some experts have suggested the courts would not uphold such provisions.[200]

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[194] Section 74(1).

[195] Local Government and Environment Committee *Hearing of evidence on the Canterbury Earthquake Recovery Bill: Report of the Local Government and Environment Committee* (New Zealand Parliament, 14 April 2011) at 45.

[196] Kerkin, above n 193, at 148.

[197] Canterbury Earthquake Response and Recovery Act 2010, s 7(1); and Canterbury Earthquake Recovery Act 2011, s 75(5).

[198] Local Government and Environment Committee, above n 195, at 33–34.

[199] At 33.

[200] See Local Government and Environment Committee, above n 195, at 104–105 per Philip Joseph; and Knight, above n 41.

In any case, any judicial review that remained possible under the legislation would be severely restricted by the broad purpose provisions.[201] In the 2010 Act the purpose was relatively broad but focused on earthquake response and the minimisation of damage.[202] The 2011 Act expanded on this and focused more on community involvement, including a reference to the restoration of the "social, economic, cultural and environmental well-being" of the affected communities.[203] Kerkin argues that, while this was a more appropriate understanding of recovery, it did not place adequate limits on the scope of the powers within the 2011 Act.[204] It meant that what would be considered beyond the powers of the Act in a judicial review context would be extremely limited,[205] as "almost all governmental action" could be seen as enabling the restoration of community wellbeing.[206] This further restricted the availability and utility of judicial review.

Rather than balancing the significant allocation of authority to the executive with strong accountability mechanisms, the 2010 Act and 2011 Act whittled down ways in which ministers might be held accountable. As discussed in Part IV, judicial review is a key accountability mechanism to protect against abuse of authority.[207] Ministers were given enormous power in the earthquake response and the RRC considered the quid pro quo of this should have been the ability for the courts to review the lawfulness of Orders in Council made using this power.[208] However, the Government responded that Orders in Council are a "fast and flexible mechanism" enabling prompt reaction to a national emergency.[209] The restrictions on the availability of judicial review were intended to avoid the undue delay caused by litigation.[210]

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[201] Kerkin, above n 193, at 150.

[202] Section 3.

[203] Section 3.

[204] Kerkin, above n 193, at 150.

[205] At 293.

[206] Local Government and Environment Committee, above n 195, at 78 per Dean Knight.

[207] Breger, above n 101, at 87.

[208] Regulations Review Committee, above n 6, at 23.

[209] New Zealand Government *Government Response to Report of Regulations Review Committee on Inquiry into Parliament's legislative response to future national emergencies* (8 March 2017) at 4.

[210] At 4.

Some other accountability mechanisms existed in the legislation, particularly in terms of reporting requirements in the 2011 Act. As mentioned in the previous section, s 92 mandated that the Minister for Earthquake Recovery annually review the 2011 Act's operation and effectiveness. Additionally, s 88 required the Minister to prepare and present to the House quarterly reports on the operation of the 2011 Act, including a description of the powers exercised under it. The requirement that the Review Panel's recommendations on draft Orders in Council be publicly notified and presented to the House added another layer of scrutiny.[211] However, because this occurs before the Order is made it is an ex ante measure, whereas Bovens' definition of accountability requires such mechanisms to operate after decisions or actions have been taken.[212] Further, both the Review Panel's recommendations and the reporting requirements could be perceived as transparency mechanisms rather than accountability mechanisms, as they do not provide for the imposition of consequences.[213] Despite this, because they would make it easier for Parliament to hold ministers to account, I accept that they serve to enhance accountability within the Minister Method as a whole.

Overall, the accountability mechanisms existing within the Canterbury earthquakes response are weak. They constitute the bare minimum and may be insufficient considering the extent of the powers granted to ministers. Consequently, there is a potential accountability deficit, which could serve to undermine the democratic legitimacy of the ministers' authority. Geddis notes that New Zealanders are generally comfortable with a strong government empowered to act quickly; however, the caveat to this is that it be restrained by accountability to the public.[214] While judicial review was potentially not available under the earthquake legislation, ministers did remain accountable to Parliament and to the public by virtue of their status as ministers. It is up for debate whether, in New Zealand, this sort of default accountability may be enough to legitimise the law-making powers within the Minister Method, but there is at least a good argument that it is sufficient.

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[211] Section 73.

[212] Bovens, above n 113**Error! Bookmark not defined.**, at 13.

[213] At 10–11.

[214] Andrew Geddis "Parliamentary government in New Zealand: Lines of continuity and moments of change" (2016) 14 ICON 99 at 100–101.

On balance, the Minister Method adopted in the Canterbury earthquakes response may still be democratically legitimate; however, the lack of effective and specific accountability mechanisms is a definite weak point in its claim to legitimacy.

B Evaluating the Public Official Method

Turning now to an evaluation of the legitimacy of the Public Official Method adopted in the Covid-19 response. A key reason an expert and unelected official's authority is legitimate is that the exercise of their authority is perceived as being based on evidence and fact, not politics.[215] Theoretically, the public should be reassured that the orders made by Bloomfield are not for partisan gain. This likely contributed to people's willingness to tolerate significant restrictions on their freedom for so long. Although many criticised the Government's Covid-19 response,[216] supporters generally trusted that it was the best solution based on public health and medical evidence,[217] enhancing the legitimacy of such an approach.

1 An undemocratic lack of accountability?

The main weakness of the Public Official Method, compared with placing a minister in charge, is the lack of accountability required of public officials and the consequent deficit in democratic legitimacy. By virtue of their office, ministers are always subject to accountability mechanisms. Even if these constitute the bare minimum, they nevertheless are the basis of democratic legitimacy. However, while a lack of accountability might be a weakness of the traditional expertise model, I argue that the version of the Public Official Method adopted in the Covid-19 response helped mitigate this through the use of informal accountability mechanisms.

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[215] Mashaw, above n 143, at 166.

[216] For example see Covid Plan B "Our Plan B: The way out" (12 April 2020) < www.covidplanb.co.nz/>.

[217] See generally David Brain "Exclusive: New poll shows rising support for government handling of Covid-19" (12 April 2020) The Spinoff <https://thespinoff.co.nz/>; Thomas Coughlan "Coronavirus: The Government's Covid-19 lockdown measures have overwhelming public support, according to a poll" (23 April 2020) Stuff <www.stuff.co.nz/>; and Virginia Fallon and Bridie Whitton "Coronavirus: Call for return to normal life puts tens of thousands at risk" (14 April 2020) Stuff <www.stuff.co.nz/>.

The traditional Westminster model of ministerial responsibility has relaxed significantly over several decades. According to convention, public servants are faceless and are not required to answer to the public.[218] They remain anonymous and stand behind their minister, who is held accountable in Parliament and to the public for departmental actions.[219] However, the New Public Management reforms of the 1980s and 1990s saw the creation of chief executives of government departments, who are responsible for the delivery of departmental outputs.[220] It has become more common for chief executives, who remain (senior) public servants, to front the media and publicly respond to concerns about the goings-on of their department.[221] Sometimes they will even take responsibility for major departmental mistakes and resign their position, although there can be confusion over whether the responsible minister or the chief executive is to blame.[222] For example, immediately following the 1995 Cave Creek disaster where a Department of Conservation (DOC) viewing platform collapsed, killing 14 people, the DOC Chief Executive took full departmental responsibility.[223] He resigned two years later, with a year remaining on his contract.[224] Many argued the Minister of Conservation should accept responsibility and he did resign from that portfolio a year after the tragedy (although remaining a part of Cabinet).[225]

Chief executives are therefore not the anonymous bureaucrat envisioned by traditional regulatory and administrative theory. In New Zealand's context, the true "faceless" public servants would be the average policy adviser or agency administrator. As the Chief Executive of Health, the Director-General would therefore expect to be held accountable for his actions to a certain extent. His job does not depend on voters' approval but a major error on his part could plausibly result in his resignation. Indeed, the Director-General has

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[218] Mulgan, above n 8, at 19.
[219] At 19.
[220] At 2.
[221] At 20.
[222] At 20.
[223] Robert Gregory "Political Responsibility For Bureaucratic Incompetence: Tragedy At Cave Creek" (1998) 76 Public Administration 519 at 523.
[224] At 523.
[225] At 523.

not shied away from accountability. He fronted media conferences alongside the Prime Minister or Minister of Health daily during the first lockdown and Alert Level 3.[226] This continues whenever the country is at heightened Alert Levels. These media conferences are an accountability mechanism,[227] as the pair respond to questions from journalists and are frequently required to justify their actions, although Bloomfield properly sticks to answering health-related questions rather than political ones.

The former Minister of Health, David Clark, has demonstrated his willingness to attribute blame to the Director-General. In June, two returning New Zealanders were granted permission to leave their managed isolation facility on compassionate grounds.[228] They were not tested for Covid-19 before being released and later tested positive after developing symptoms.[229] Clark told the media that Bloomfield had "accepted responsibility" for the breach and refused to accept the media's suggestions that he should take some responsibility as minister.[230] While this did not relate to the use of the Director-General's powers under the Health Act, it demonstrates that it is inaccurate to describe him as an unaccountable public servant. He is not only responsible to his minister but is publicly accountable to the media, both when asked questions about the exercise of his authority and when errors occur in the general Covid-19 response. However, the above incident caused public outrage, as people considered the Minister of Health to be shirking responsibility and throwing a public official "under the bus".[231] Indeed, it was Clark himself who ended up resigning shortly after this last of a series of blunders.[232]

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[226] See New Zealand Government "Latest updates" Unite against Covid-19 <https://covid19.govt.nz/>.

[227] Bovens, above n 113, at 10.

[228] Ministry of Health "Two new cases of COVID-19" (press release, 16 June 2020).

[229] Ministry of Health, above n 228.

[230] Stuff "David Clark throws Ashley Bloomfield under the bus, while Bloomfield looks on" (25 June 2020) <www.stuff.co.nz/>.

[231] NZ Herald "Health Minister David Clark throws Dr Ashley Bloomfield under the bus - as he stands right behind him" (25 June 2020) < www.nzherald.co.nz/>.

[232] David Clark, Minister of Health "Statement from the Minister of Health Dr David Clark" (Speech to media, Wellington, 2 July 2020).

This incident demonstrates that, while the Director-General may be held accountable, he is not accountable to the same extent as is a minister, nor do the public expect him to be. Because the public were not clamouring for more accountability from Bloomfield, it is possible the lack of institutional accountability arrangements did not affect public perception of the legitimacy of his authority. In any case, the imposition of informal accountability mechanisms, such as the regular media conferences, helped to elevate his accountability beyond that required of traditional public officials. While the Public Official Method is by its nature arguably less democratically legitimate than the Minister Method, these mechanisms helped to re-instil a degree of democratic legitimacy to the Public Official Method as adopted in the Covid-19 response.

2 The Health Act as a stepping stone to a more legitimate allocation of authority

Despite the mitigation of some of the weaknesses seen in a traditional approach based on expertise, the subsequent enactment of the CPHRA suggests that the preferred emergency response of governments is to empower accountable ministers. This signifies the Government's acceptance of the view that the Minister Method is more democratically legitimate than the Public Official Method. The initial reliance on the Health Act was the only option available to the Government because it needed time to prepare fit-for-purpose Covid-19 legislation.[233] The use of the Public Official Method may have retained a degree of democratic legitimacy due to the Director-General's seniority and ability to be held to account, but it was only ever intended to be a temporary fix until the comparatively more democratically legitimate allocation of authority under the CPHRA was established.

As demonstrated by the Canterbury legislation, the Minister Method is not free of potential deficiencies in legitimacy. The CPHRA similarly grants significant and wide-ranging powers to the executive. In making orders under s 11, the Minister of Health can require people to do or refrain from doing an extensive number of things, such as physically distance from others, stay in a specified place and undergo medical testing.[234] There are also significant powers of enforcement of these orders; for example, a police officer can

[233] All of Government Law Reform Team, above n 28, at [5].

[234] Sections 11(1)(a)(i), 11(1)(a)(iii) and 11(1)(a)(viii).

enter private homes without a warrant in certain limited circumstances.[235] The range of possible orders under s 11 is extremely broad and involves serious encroachments on people's freedoms. Similarly to the Canterbury legislation, we would expect such broad powers to be tempered by effective accountability mechanisms to enhance democratic legitimacy.

Fortunately, such accountability mechanisms are preserved in the CPHRA. Crucially, the CPHRA does not contain privative clauses, meaning that s 11 orders can be judicially reviewed. The availability of this key accountability mechanism means the Minister Method adopted in the CPHRA avoids the accountability deficit that conceivably existed within the Canterbury legislation. Accordingly, because accountability is necessary for democratic legitimacy, the CPHRA arguably exhibits a more democratically legitimate version of the Minister Method.

Other safeguards include a requirement for orders to be approved by the House within a certain period or they will be revoked.[236] Although not strictly an accountability mechanism, the increased parliamentary involvement constrains ministerial power, strengthening democratic legitimacy. Additionally, the continued reliance on the Director-General's advice to inform the Minister of Health's use of powers under s 11 may enhance the legitimacy of the Minister's authority from the perspective of the expertise model, as it could possibly be seen as less partisan.

My preliminary assessment of the legitimacy of the Minister Method adopted in the CPHRA suggests that it may have avoided some of the deficiencies of the Minister Method adopted in the Canterbury legislation. This is largely due to the preservation of judicial review as an accountability mechanism. The contexts in which these Minister Methods exist are materially different and a comprehensive comparison would be valuable once the passage of time illuminates the full implications of the CPHRA. Such a review is beyond the scope of this paper, which has primarily compared the Canterbury earthquakes response

[235] Section 20(3).
[236] Section 16.

to the initial Covid-19 response, but the continued use of the Minister Method by different governments shows it remains the preferred approach in an emergency.

VII Conclusion

There is no one recipe for how to respond to an emergency event. Each emergency is unique and poses different risks to the community that must be mitigated in different ways. The Canterbury earthquakes demonstrated that the preferred approach of New Zealand governments is generally to give extensive law-making powers to ministers to enable them to manage the crisis, without being slowed by regular law-making processes. However, the initial response to Covid-19 was quite different, and instead an appointed public official was able to use special powers under the Health Act to place significant restrictions on the lives of the entire population. This paper has attempted to explain why and to what extent each of these two different approaches is legitimate.

Borrowing from the legislative and accountability models of regulatory and administrative theory, the Minister Method is legitimate largely because ministers are elected representatives who are accountable to the public. They are held to account by Parliament and the media and will ultimately be accountable to voters at election time. Their actions are scrutinised, they must explain and justify their decisions and they suffer the consequences of any errors.

However, there are aspects of the Minister Method adopted in the Canterbury earthquakes response that give cause for concern. The extent of the authority granted to ministers was such that they could rewrite almost any law. Gerry Brownlee in particular had additional powers to override important RMA processes and decisions of local authorities. If such enormous power is to be democratically legitimate, accountability for the use of those powers becomes even more important. The key deficiency of the Minister Method, as employed in the Canterbury earthquakes legislation, is therefore the unavailability of judicial review, and consequent difficulty in holding ministers to account for recommendations and Orders in Council made under the legislation.

In comparison, the Public Official Method is legitimised by expertise. According to the expertise model, in the context of Covid-19 the Public Official Method is legitimate because the Director-General made decisions based on his medical experience and the latest scientific and health evidence. This sort of decision-making is of the utmost importance in the context of an emergency and should lead to the optimal response to Covid-19.

Typically, the key weakness of the Public Official Method is the lack of accountability of appointed officials and the consequent tension with democratic legitimacy. However, times have changed since the traditional ministerial responsibility convention required public servants to remain anonymous at all times. Today it is common for chief executives of departments to take responsibility for departmental errors and to respond to public concerns. Bloomfield is not able to do whatever he wants without consequence and hide behind the Minister of Health. While the orders he made under the Health Act were in force, he was required to regularly front the media and respond to questions about his handling of Covid-19. The employment of this kind of informal accountability mechanism brought a degree of democratic legitimacy back to the Public Official Method.

One thing that has become abundantly clear over the course of 2020 is that no country was prepared for a pandemic as destructive as Covid-19, including New Zealand. As a result, New Zealand had to make do with pre-existing legislation to govern its initial pandemic response. The CPHRA was enacted as soon as possible to provide a more fit-for-purpose framework and this piece of legislation once again followed the Minister Method by allocating authority to the Minister of Health. Both the Public Official Method and the Minister Method have strengths and weaknesses when it comes to their legitimacy. They gain legitimacy from different sources and may both be appropriate in different contexts. However, the Minister Method likely has a stronger claim to democratic legitimacy, despite the flaws seen in the Canterbury legislation, and is likely to continue to be the preferred approach to future emergencies in New Zealand.

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