

EMERGENCY POWERS OF THE NEW ZEALAND GOVERNMENT

Sources, Limitations, and the Canterbury Earthquake

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Note on referencing

This dissertation conforms to the New Zealand Law Style Guide. Full references for online materials may be found in the bibliography. Enactments are reproduced in the appendix where indicated.

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Introduction

Sudden, unforeseen events that threaten the lives and property of New Zealanders on a large scale require an immediate and decisive short-term government response. The normal powers of members of national or local government, or of constables of the New Zealand Police or other emergency responders, may not be sufficient to adequately respond to the emergency. Emergency powers will therefore often be required after such events.

Emergency powers are generally defined by enactment in advance of their use becoming necessary. In New Zealand emergency powers legislation has tended towards certainty and predefinition, and away from the grant of general powers of regulation to the executive government. This dissertation describes in Chapter One those powers contained in legislation, where use is only contemplated for a short period of time (a “state of emergency” such as an earthquake or flood), as opposed to specific powers where use is contemplated over a longer period in response to a developing problem, such as a regulatory response to epidemic or biosecurity emergencies.

These exceptional powers, while undoubtedly necessary, come with exceptional risks. The activation of emergency powers regimes involves a temporary but significant transfer of power to the executive branch of government. In Chapter Two, the legislative and judicial limitations on the exercise of emergency powers is discussed, with reference to the approach taken during historical emergencies.

Chapter Three concerns the ability of the executive government to respond to an emergency with measures not covered by any emergency powers regime, or where the use of such a regime is made impossible by difficult circumstances. The residue of power contained in the royal prerogative, and the ability to take measures to preserve the state in truly dire circumstances, is discussed here in a New Zealand context.

New Zealand's unique constitutional culture and continuing divergence from the United Kingdom's constitutional structure merits an examination of the conceptual limits on emergency legislative powers in modern day New Zealand; this is also discussed in Chapter Three.

Chapter Four is a case study of the response to the 2010 Canterbury earthquake. This response involved the application of existing emergency powers, as well as an emergency legislative response enacted as the Canterbury Earthquake Response and Recovery Act 2010. The measures taken by the legislature and executive, as well as by immediate responders, provide excellent examples of application of the powers and principles discussed in the preceding chapters.

I

An emergency may necessitate the granting of special powers to police constables and other responders in order to deal with that emergency in the most effective possible manner. These powers are additional to the ordinary powers of police, and may be both permissive exceptions to legal norms favouring the maintenance of private property and personal privacy, and restrictive limitations on democratic freedoms exercised in the public sphere.

The general common law function of a constable is to preserve the Queen's peace; this includes a duty to protect life and property.¹ Constables have a power to request assistance in times of emergency with or without emergency powers being in force, but the freedoms and property of a person may be interfered with by constables only as far as specific legal powers, or consent to do so, will permit. Consent may pose a problem, particularly where, in response to an emergency, police seek to deal with private property or to infringe the rights of a particularly sensitive person.

The necessity for emergency powers, then, lies partially in the greater need for haste during an emergency situation, and otherwise in the need for clearly delineated powers and sanctions to compel compliance with police requests (emergency powers are often accompanied by emergency offences).

¹ *Laws of New Zealand Police* (online ed) at [44]. The Court of Appeal has endorsed this position: *Minto v Police* [1987] 1 NZLR 374, at 378 per Cooke P

Historical enactments

The last century of emergency powers legislation in New Zealand shows several pleasing trends. Vague purposes and general powers have given way to closely defined purposes and limited powers. A concentration of powers in the executive government, reflective of the authoritarian attitude to public power in New Zealand,² has been whittled down to a declaratory power and little more. While once weak, legislative oversight has become a dominant form of limitation on the exercise of emergency powers and prevention of their abuse, as discussed in Chapter Two. A description of New Zealand's former emergency powers enactments is necessary to make this contrast clear.

In wartime, New Zealand's House of Representatives has been quick to grant exceptional powers to the executive, which the executive has been slow to relinquish once that war has ceased.

During World War I a general power of regulation to provide for the public safety and the defence of New Zealand³ was enacted as the War Regulations Act 1914. This power continued for almost six years, well beyond the date of armistice, and was finally replaced by the War Regulations Continuance Act 1920. That enactment removed the power to regulate anew, but preserved a great number of regulations made in the preceding years in a schedule to the Act. These included some perfectly benign provisions concerning passports and firearms, but also preserved were regulations referring to seditious crimes and strikes, government takeover of wharves, and a prohibition on any person over 15 years of age leaving the country, subject to

² M Palmer, "Open the Doors and Where are the People?" (conference paper presented at "We the People(s): Engagement and Participation in Government" in Wellington, 11-12 February 2010), at 15

³ War Regulations Act 1914, ss 2-3

few exceptions.⁴ Many of these regulations were shortly repealed, but some remained in force until the War Regulations Continuance Act was itself repealed in 1947.⁵

The response to World War II was no different: the Emergency Regulations Act 1939 allowed a similar general power of regulation. This enactment was repealed by the Emergency Regulations Continuance Act 1947, which itself preserved a range of regulations wider even than that preserved by the earlier Continuance Act. These preserved regulations covered subjects so broad as defence, strikes and public servants,⁶ but most were repealed or subsumed into other enactments over the following decade. The Act itself remained in force until 1964,⁷ some 25 years after the outbreak of war. Some post-1945 regulations and a number of wartime regulations were plainly for the purpose of economic stabilisation, and clearly not for the purposes of the Emergency Regulations Act;⁸ this was later recognised by the creation of a regulatory power over production in the Economic Stabilisation Act 1948.

General powers of regulation to secure the national interest in wartime were undoubtedly necessary, at least during the fearful home-front years of World War II. The tendency of such powers and regulations to persist into peacetime is an indictment of past governments' authoritarian traits. This trend, however, is of little consequence when compared to the long life of New Zealand's most concerning and oppressive piece of emergency legislation, the Public Safety Conservation Act 1932 ("PSCA"), which remained in force for over 50 years.

The PSCA closely mirrored an earlier Imperial enactment, the Emergency Powers Act 1920 (UK). This English enactment was concerned only with the acts of any group of

⁴ War Regulations Continuance Act 1920, Schedule 2

⁵ Emergency Regulations Continuance Act 1947, s 7

⁶ Emergency Regulations Continuance Act 1947, Schedule 2

⁷ By s 54(1) of the Reserve Bank of New Zealand Act 1964.

⁸ For example, the Pickled Sheep and Lamb Pelt Emergency Regulations 1947.

persons calculated to interfere with the necessities of human life,⁹ and allowed for the Sovereign to declare a state of emergency and propagate emergency regulations for the duration of the emergency. A natural reading of this enactment today would tend to indicate that it was intended to apply to war-like acts or domestic terrorism; however, it was generally only utilised where industrial unrest threatened some consumer service.¹⁰

The PSCA had a much broader ambit than the Emergency Powers Act. The power of the Governor-General to declare a state of emergency included any other circumstances, including natural disasters, which could pose a danger to public safety or to public order.¹¹ A state of emergency persisted for a month before it lapsed or required renewal.¹² The power for making emergency regulations was exceptionally broad: apparently any regulation relating to the goals of the enactment would be permissible.¹³

This power proved more than merely a potential danger: it was invoked several times by the government of the day during the 1951 waterfront dispute.¹⁴ Besides abuse of the power by one-party government, the PSCA also contained a provision permitting local constables to pre-empt an Order in Council during a developing emergency and before the government had an opportunity to respond.¹⁵ The offence for obstructing or interfering with a local constable was as if an Order in Council authorising police action had been already passed.¹⁶

⁹ Emergency Powers Act 1920, s 1(1) (UK)

¹⁰ See, for example, the Emergency Powers Regulations 1926 (UK), which related to a miners' strike.

¹¹ Public Safety Conservation Act 1932, s 2(1)

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

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

¹⁴ See, for example, the Waterfront Strike Emergency Regulations 1951 (Reg. 1951/24)

¹⁵ Public Safety Conservation Act 1932, s 4(1)

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

In spite of the PSCA, which was finally repealed in 1987,¹⁷ states of emergency closely defined by legislation became the preferred method of response to crises. The powers to declare such emergencies were found in the Civil Defence Act 1962, and later in the Civil Defence Act 1983. These Acts differentiated between “national emergencies” (arising from warlike acts)¹⁸ and “major disasters”¹⁹ (called “civil defence emergencies” in the 1983 Act),²⁰ the result of natural events or industrial accidents. This dichotomy was of no particular consequence in either Act, except that the method for declaration was vested in the Governor-General by Proclamation in the former case,²¹ and in the Minister of Civil Defence by declaration in the latter.²² The distinction between national emergencies and civil defence emergencies was accordingly abandoned in the most recent civil defence enactment, the Civil Defence Emergency Management Act 2002 (“CDEMA”).

Defined states of emergency are contained in other enactments passed in the interim: the International Terrorism Emergency Powers Act 1987 (“ITEPA”), and the Defence Act 1990. In each case where a state of emergency can be declared, a set of powers under each act are made available to various persons.

Civil Defence Emergency Management Act 2002

Before the emergency powers in the CDEMA may be utilised, a situation must pass the three-stage test of “emergency” defined at s 4 (see Appendix). That situation must (a) arise as the result of “any happening, whether natural or otherwise”, including any natural or biological disaster, failure of a crucial utility or a warlike act; (b) threaten the safety of the public or property; and (c) cannot be dealt with by the ordinary

¹⁷ Public Safety Conservation Act Repeal Act 1987, s 2

¹⁸ Civil Defence Act 1962, s 2; Civil Defence Act 1983, s 2

¹⁹ Civil Defence Act 1962, s 2

²⁰ Civil Defence Act 1983, s 2

²¹ Civil Defence Act 1983, s 46(1)

²² Civil Defence Act 1983, s 50(1)

response of emergency services. The Act can be invoked in response to a warlike act, despite its silence as to powers of the New Zealand Defence Force. The definition of “emergency” also provides that “infestation, plague [and] epidemic” will qualify, despite the existence of regulatory powers to deal with such emergencies (Part 7 of the Biosecurity Act 1993, and the Epidemic Preparedness Act 2006, respectively). Inclusion of warlike acts in this definition is likely intended to permit the Director of Civil Defence to exercise powers to provide for matters of public welfare,²³ which are equally at issue in wartime as they are following a natural disaster. Specific biosecurity or epidemic emergencies, while making available to the executive powers to alter legislation by Order in Council,²⁴ may also require special powers for emergency responders; the CDEMA provides a predefined set of powers that can be quickly activated to allow persons to deal with all types of emergency as quickly as possible, without the need for further regulations or legislation.

If an emergency has occurred or may occur in an area, a nominated member of an area Civil Defence Emergency Management Group²⁵ may declare a state of local emergency,²⁶ as may the mayor of a territorial authority or the mayor’s deputy.²⁷ If it appears that the emergency is of such a scale that the necessary response is likely to be beyond the capability of that Group, the Minister of Civil Defence may declare a state of national emergency.²⁸

Special powers of constables and Controllers of Civil Defence Emergency Management Groups, contained in ss 86-92 CDEMA, are invoked whenever a state of emergency is in force, as are a set of special offences relating to noncompliance with

²³ Civil Defence Emergency Management Act 2002, s 9(a)

²⁴ Biosecurity Act 1993, s 150; Epidemic Preparedness Act 2006, ss 11, 12, 14, 15

²⁵ Civil Defence Emergency Management Act 2002, s 25(1)

²⁶ Civil Defence Emergency Management Act 2002, s 68(1) (see Appendix)

²⁷ Civil Defence Emergency Management Act 2002, s 25(5)

²⁸ Civil Defence Emergency Management Act 2002, s 66(1) (see Appendix)

the exercise of these powers, contained in ss 98-102. “State of emergency” includes both national and local states of emergency.²⁹ There has been no state of national emergency declared under the CDEMA, but a number of local states of emergency have been declared, mostly in response to flooding.³⁰

Adopting the New Zealand Law Commission’s classification of emergency powers,³¹ the CDEMA provides for the direction of persons, control of movement, requisitioning of land and other property, removal or destruction of property, and other powers in relation to property such as the power of entry. Specifically, emergency powers are available to constables and Controllers and are quite extensive:³²

- a) Evacuation of private premises and public places may be compelled under s 86 where necessary for the preservation of human life; failure to comply with such a request is an offence under s 99(1).
- b) Where believed to be reasonably necessary for saving life, injury prevention or rescue, or carrying out any urgent measure for the relief of suffering or distress, constables and Controllers may enter private premises under s 87, using force if necessary.
- c) Roads and public places may be closed to the public in order to prevent or limit the extent of the emergency under s 88; failure to comply with such restrictions is an offence under s 100.
- d) Any vehicle impeding emergency management may be removed from any place under s 89 in order to prevent or limit the extent of the emergency.
- e) Any type of personal or real property may be requisitioned if necessary for the preservation of human life under s 90(2), and the owner or controller of

²⁹ Civil Defence Emergency Management Act 2002, s 4

³⁰ “Emergency Declarations: 1967 – present” Ministry of Civil Defence and Emergency Management <www.civildefence.govt.nz>

³¹ Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at 3.106

³² See Appendix for the relevant sections in full.

- that property can be directed to assist in the use of that property under s 90(6); it is an offence to fail to comply with either section under s 101(1).
- f) Directions may be given to cease any activity that may substantially contribute to the emergency under s 91(a); it is an offence to fail to comply with such directions under s 102.
 - g) Any property, animal or other thing may be inspected, seized, sampled, disinfected or destroyed in order to prevent or limit the extent of the emergency under s 92.

With the exception of the requisitioning power in s 90, any person acting under the authority of a constable or a Controller may exercise all of the emergency powers of Controllers or constables listed above. It can be safely assumed that all members of a Civil Defence Emergency Management Group will be acting under the authority of their Group Controller, but the generic term Controller also includes the National Controller.³³ This may be a person to whom certain powers have been delegated under s 10, but if no delegation is made the Director of Civil Defence will be the National Controller.³⁴

“Constable” is not defined by the CDEMA, but is defined in the Policing Act 2008 as an employee of the New Zealand Police who has taken the prescribed oath³⁵ to hold the office of constable.³⁶ Unsworn employees of the Police are therefore not constables, and would require the authorisation of a constable to exercise any emergency power. Members of the general public also require authorisation from a constable or Controller to exercise such powers, and it is sensible that this should occur in suitable situations. Groups such as Red Cross and LandSAR are not formally

³³ Civil Defence Emergency Management Act 2002, s 4

³⁴ Civil Defence Emergency Management Act 2002, s 10(4)

³⁵ Policing Act 2008, s 22(1)

³⁶ Policing Act 2008, s 4

recognised by the CDEMA but can provide an essential specialised response; it is conceivable that the exercise of emergency powers by such groups may be necessary.

Section 84(2) grants a broad power of direction to the Minister of Civil Defence, whenever a state of emergency has been declared or an emergency is imminent, and it is expedient to exercise the power.³⁷ This power permits the Minister to direct any person to perform or to cease performance of any function, duty or power conferred on that person under the Act.³⁸ This provision can potentially act as a power of micromanagement over all responders to an emergency.

Most of the emergency powers listed above require that exercise of the power be “necessary”. However, it need only be “expedient” to exercise the Minister’s power of direction. Expediency is a lesser standard than necessity.³⁹ A necessity is an indispensable requirement. An expedient act is “advantageous” or “fit, proper; suitable to the circumstances of the case.”⁴⁰ The threshold for exercise of the power of direction is therefore less than that of the power itself, and this presents a problem: to what standard must the Minister be satisfied before directing the exercise of a power?

It is clear from the wording of s 84(1)(b) that the standard for exercising the power of direction must be separated from the standard for exercising the directed power. The “expedient” standard applies to the power to direct, while the “necessary” standard applies to the powers themselves. The Minister must put himself in the shoes of the person directed to exercise the power and decide whether exercise of that power is essential, required or indispensable in the circumstances; he must also determine that to direct exercise of that power would be advantageous or suitable.

³⁷ Civil Defence Emergency Management Act 2002, s 84(1) (see Appendix)

³⁸ Civil Defence Emergency Management Act 2002, s 84(2) (see Appendix)

³⁹ *R v Leitch* [1998] 1 NZLR 420, at 429; *R v Peterson* CA368/99, 22 February 2000, at [26]

⁴⁰ Oxford Shorter English Dictionary (6th ed.), at 898

International Terrorism (Emergency Powers) Act 1987

Given the catch-all nature of the CDEMA's definition of "emergency", the ITEPA may be little more than a historical anomaly. Enacted in 1987 shortly before the repeal of the PSCA, the ITEPA is a heavily restrictive response to the recently realised threat of international terrorism embodied in the sinking of the Rainbow Warrior, and the reaction of the Lange government against broad, poorly defined executive powers such as that contained in the PSCA.⁴¹ It applies only to those situations able to meet the narrow definition of "international terrorist emergency".⁴²

To be an international terrorist emergency, a situation must involve a person threatening or causing death or injury to people, or damage to any real or personal property, natural features of national importance, or animals, in order to coerce, deter or intimidate a government of New Zealand or elsewhere, or any other group of persons, for the purpose of furthering a political aim outside of New Zealand. Upon being informed of a possible international terrorist emergency by the Commissioner of Police,⁴³ the Prime Minister with at least two other Ministers may authorise the exercise of certain emergency powers where the Ministers reasonably conclude that an emergency is occurring which may be an international terrorist emergency, and that emergency powers are necessary to permit the New Zealand Police to deal with the emergency.⁴⁴

The emergency powers activated by such an authorisation are by and large the same as those contained in the CDEMA. Every power contained in s 10(2) ITEPA has a close equivalent: subs (a) is an evacuation power equivalent to s 86 CDEMA; subss (b) and

⁴¹ P Roth "Emergency Powers Legislation After the Repeal of the Public Safety Conservation Act" (1988) 6 Otago LR 682, at 697

⁴² International Terrorism (Emergency Powers) Act 1987, s 2(1)

⁴³ International Terrorism (Emergency Powers) Act 1987, s 5

⁴⁴ International Terrorism (Emergency Powers) Act 1987, s 6(2)

(d) together constitute the power of removal of vehicles similar to s 89 CDEMA; subs (c) and (g) permit exclusion from public places as in s 88 CDEMA; subs (e) provides a similar power of destruction as that contained in s 92 CDEMA, while subs (f) allows for requisitioning as in s 90(2) CDEMA. There is an additional power with no CDEMA equivalent: s 10(3) permits unwarranted wiretapping where a constable reasonably believes that doing so will facilitate the preservation of life threatened by the emergency.⁴⁵ Private communications remain inadmissible as evidence where they relate to an offence not related to the emergency.⁴⁶

The wording used to express these powers is distinct from that of the CDEMA: the prior mental state in the CDEMA generally is that exercise of a power be “necessary” for some specific purpose (the preservation of human life, for example).⁴⁷ Section 10(2) ITEPA requires only that the Police officer exercises the powers contained therein for the purpose of dealing with the emergency or for preserving life or property threatened by the emergency. This seems deliberate, given the otherwise high degree of similarity to the civil defence emergency powers existing at the time, which required necessity for a particular purpose.⁴⁸ Furthermore, some of the powers contained in subsections of s 10(2) contain an additional requirement that some aspect of the exercise of the power be necessary for a particular purpose.⁴⁹

Exercise of a statutory power must always be reasonable, whatever the particular wording of legislation, but this standard falls short of reasonable necessity. Either a lower standard of review is intended, given the importance of purpose and necessary haste of action, or the legislature framed the powers poorly. Either way, the distinction is likely to be theoretical rather than practical.

⁴⁵ International Terrorism (Emergency Powers) Act 1987, s 10(4)

⁴⁶ International Terrorism (Emergency Powers) Act 1987, s 20

⁴⁷ Civil Defence (Emergency Management) Act 2002, s 90(1) (see Appendix)

⁴⁸ See for examples Civil Defence Act 1983, ss 60, 61, 64

⁴⁹ International Terrorism (Emergency Powers) Act 1987, ss 10(2)(b), 10(2)(d)

There is no power of direction resting in the executive equivalent to s 84 CDEMA. However, the Prime Minister enjoys a long-term power of suppression under s 14, to prevent publication of the identities of persons responding to the emergency, and of the lawful measures used in response to an emergency, where the Prime Minister has a reasonable belief that publication would respectively endanger the safety of the responding persons, or prejudice the measures used in response to the emergency.

Use of the Armed Forces

Section 9 of the Defence Act 1990 both permits and limits the use of the New Zealand Defence Force's Armed Forces in providing assistance to the civil power during an emergency.⁵⁰ By s 9(1) the Armed Forces may be used to perform any public service or to assist the civil power during an emergency generally. However, during an emergency constituting a threatened or actual violent attack on persons or property,⁵¹ which cannot be dealt with without the assistance of the Armed Forces,⁵² the Armed Forces may not assist the civil power unless authority is granted by the Prime Minister.⁵³

An international terrorist emergency is an emergency of this kind. Section 12 ITEPA permits members of the Armed Forces to exercise emergency powers under that Act where assistance has been requested by the Police.⁵⁴ Clearly, in light of s 9 of the Defence Act, it is not sufficient warrant for assistance to simply be requested by a member of the Police where an international terrorist emergency is in progress. The Prime Minister must authorise such assistance under s 9(4). So too where a state of emergency is declared under the CDEMA as the result of an "actual or imminent

⁵⁰ Defence Act 1990, s 9(1)(b)

⁵¹ Defence Act 1990, s 9(4)(a)

⁵² Defence Act 1990, s 9(4)(b)

⁵³ Defence Act 1990, s 9(3)

⁵⁴ International Terrorism (Emergency Powers) Act 1987, s 12(1)

attack or warlike act” that causes or may cause loss of life or injury to persons or property,⁵⁵ the Prime Minister’s authorisation is required.

No other emergency situation is limited in such a way. Formally, then, as Commander-in-Chief of New Zealand,⁵⁶ the Governor-General has the ultimate discretion as to deployment of the Armed Forces to assist the civil power during all other types of emergency.⁵⁷ In reality, however, the Minister of Defence is able to exercise the power to deploy the Armed Forces,⁵⁸ and may do so through the Chief of Defence Force.⁵⁹ While the Director of Civil Defence has the power to co-ordinate the use of New Zealand Defence Force resources in response to an emergency,⁶⁰ the chain of command provided for in the Defence Act clearly requires such resources to be formally made available by either the Minister of Defence or the Chief of Defence Force.

It would seem that an authorisation under s 9(4) of the Defence Act was required to permit the use of Defence Force NZLAVs in assisting Napier police officers to retrieve the body of Constable Len Snee on 8 May 2009. The shooter Jan Molenaar had caused the death of a person and serious injury to others, and was certainly threatening further injuries, as specified in s 9(4). However, the Prime Minister did not make the required authorisation. The involvement of the Armed Forces was mentioned to the House in the Prime Minister’s dedication to Constable Snee,⁶¹ but the House was not

⁵⁵ Civil Defence Emergency Management Act 2002, s 4 (see Appendix)

⁵⁶ Defence Act 1990, ss 5-6

⁵⁷ Defence Act 1990, s 5(e)

⁵⁸ Defence Act 1990, s 7

⁵⁹ Defence Act 1990, s 8

⁶⁰ Civil Defence Emergency Management Act 2002, s 9(2)(a)

⁶¹ (12 May 2009) 654 NZPD 3051

formally notified as required.⁶² The use of the Defence Force in this situation has been described to me as “a public service, pursuant to section 9(1)(a) of the Defence Act.”⁶³

The lack of a required authorisation here contravenes the express requirement for specific consideration in situations of this nature contained in s 9(4). The existence of a statutory standard applying in particular situations is a strong indicator that such a standard should be applied in every such situation. It is dishonest to characterise this use of the Defence Force as a “public service” not requiring authorisation. The Defence Act requires an official authorisation to be made for the purpose of oversight by the House of Representatives, and should not be circumvented unless tremendous urgency is required.

On the other hand, the use of the Armed Forces following the 2010 Canterbury earthquake did not require executive authorisation. The nature of that emergency was quite different to that of the “Napier siege”, focusing on public safety in the Christchurch central business district and affected suburbs, rather than response to a dangerous armed individual. There the use of the Armed Forces could quite sensibly be characterised as a public service.

Conclusion

Progressive legislative developments have seen that New Zealand emergency responders presently enjoy a set of certain and predefined powers under a range of enactments. Most of these powers have a unique purpose for which they may be exercised. The use of the Armed Forces to respond to emergencies is also subject to controls in certain situations, but these controls are not always strictly adhered to.

⁶² Defence Act 1990, s 9(7)

⁶³ Letter from Hon Dr Wayne Mapp to Matthew McKillop regarding authorisation during the “Napier siege” (20 September 2010)

While now better defined than by previous enactments, no set of emergency powers can be made immune from abuse, whether purposeful or inadvertent. The following chapter concerns the legislative and judicial limitations on these powers, in order to curb the potential impact on the rights and interests of affected individuals.

II

Limitations on statutory emergency powers of the executive government may be classified as either legislative or judicial. Legislative limitations allow the House of Representatives to control executive action, while judicial limitations allow the courts to impose boundaries on broad powers.

A legislative check

The major limitation on emergency powers contemplated by the Civil Defence Emergency Management Act, the International Terrorism (Emergency Powers) Act and the Defence Act is that of legislative censure. Each of these enactments requires that the person declaring an emergency or authorising the use of emergency powers inform the House of Representatives where such a declaration or authorisation has been made.¹ Such a limitation even existed in the executive power-friendly Public Safety Conservation Act: any regulation made after a proclamation of a state of emergency was required to be laid before Parliament and confirmed within fourteen days by both the House of Representatives and the Legislative Council.² New Zealand emergency powers legislation past and present evinces a clear endorsement of legislative supremacy even during an emergency of grave importance, but gives the executive sufficient latitude to act immediately – emergencies, after all, are not confined to sitting days.

¹ Civil Defence Emergency Management Act 2002, s 66(2) (see Appendix); International Terrorism (Emergency Powers) Act 1987, s 7(1); Defence Act 1990, s 9(7)

² Public Safety Conservation Act 1932, s 3(3)

Of the three current emergency powers enactments this paper focuses on, the CDEMA provides the strongest legislative check on executive power. If a state of national emergency is declared under the CDEMA, and Parliament is prorogued,³ the Governor-General must by Proclamation appoint a sitting day occurring within seven days of the declaration of a state of emergency, and Parliament must meet on that appointed day.⁴ If Parliament is not prorogued but the House of Representatives is adjourned for longer than seven days,⁵ the Speaker of the House must by Gazette give notice of a sitting day occurring within seven days of the declaration of a state of emergency, and the House must sit on that appointed day.⁶

While prorogation is not a feature of modern New Zealand parliamentary practice, it remains possible and has in fact occurred in Canada twice within the current parliamentary term.⁷ The prorogation of Parliament to exercise emergency powers unfettered by legislative oversight is not inconceivable then, even under contemporary Commonwealth governments.

If emergency powers are authorised under the ITEPA, the House of Representatives must be notified of that authorisation,⁸ but there is no requirement that the House sit, or that Parliament meet if it has been prorogued, and there is no provision obliging the Governor-General to proclaim a sitting day for Parliament. Notification of the House is also required where the Armed Forces have been deployed to assist the civil power in an emergency,⁹ but only in those emergencies where the express authorisation of the Prime Minister is required; there is again no requirement that the

³ Civil Defence Emergency Management Act 2002, s 67(1) (see Appendix)

⁴ Civil Defence Emergency Management Act 2002, s 67(3) (see Appendix)

⁵ Civil Defence Emergency Management Act 2002, s 67(2) (see Appendix)

⁶ Civil Defence Emergency Management Act 2002, s 67(4) (see Appendix)

⁷ A Heard “The Governor General’s Decision to Prorogue Parliament: A Chronology and Assessment” (2009) 18 Const F 1; M Dobbin “Harper’s hitlist: Thirteen months, two prorogations of Parliament” (2010) Rabble.ca <www.rabble.ca>

⁸ International Terrorism (Emergency Powers) Act 1987, s 7(1)

⁹ Defence Act 1990, s 9(7)

House consider the legality of the authorisation. Best practice would encourage the Speaker or Governor-General to exercise powers equivalent to those in s 67 CDEMA wherever authorisations have been given under the ITEPA or the Defence Act, to ensure that even a prorogued Parliament would meet to consider the situation. Use of ITEPA emergency powers and the domestic deployment of the Armed Forces involve the same potential to endanger individual liberties as a declaration of a state of emergency under the CDEMA.

While the CDEMA provides the strongest power for summoning Parliament at the earliest opportunity, it does not specify any action that need be taken in relation to the state of emergency. There exists no power for the House to override a declaration of a state of emergency: the House must merely “sit”.¹⁰ A declaration will lapse after seven days unless extended by the Minister of Civil Defence,¹¹ or the person empowered to declare a local state of emergency;¹² the power to extend a state of emergency is unlimited, but each extension will lapse after seven days. Similarly, no power exists in the Defence Act permitting the House to resolve to end an authorisation to exercise emergency powers.

A far better prescription of legislative procedure occurs in the ITEPA. A notice authorising the exercise of emergency powers will lapse on the seventh day after the notice is given.¹³ The power to extend that authorisation rests primarily in the House of Representatives, providing that Parliament is not prorogued.¹⁴ The House may by resolution extend the authority to a maximum total duration of fourteen days.¹⁵ More

¹⁰ Civil Defence Emergency Management Act 2002, s 67(3)(b); s 67(4)(b) (see Appendix)

¹¹ Civil Defence Emergency Management Act 2002, s 71(1)

¹² Civil Defence Emergency Management Act 2002, s 71(2)

¹³ International Terrorism (Emergency Powers) Act 1987, s 6(4)(d)

¹⁴ International Terrorism (Emergency Powers) Act 1987, s 7(3)

¹⁵ International Terrorism (Emergency Powers) Act 1987, s 7(4)

importantly, however, the House may also *revoke* the authority at any time, by resolution.¹⁶

One-party government is no longer the norm in New Zealand: no political party has won a majority in an election under proportional representation. At the time the ITEPA was passed, this revocation provision was a window-dressing of sorts, by a Government conscious of executive excess but unlikely to limit a determined executive drawing on a reliable parliamentary majority. Revocation provisions such as that in s 8 ITEPA, or ratification provisions as existed in s 3(3) PSCA, are today likely to provide a much more reliable limitation on executive action than could previously have been expected, even in light of the tendency for legislatures to “abdicate responsibility in times of emergency”,¹⁷ whereby opposition parties prefer to leave emergency management up to those members of the executive best informed and equipped. Where an invocation of emergency powers is of questionable legitimacy, revocation provisions are appropriate. Some provision for legislative approval (or disapproval) of executive action by resolution could and should form the basis of the effective limitation of emergency powers in all the relevant enactments, but only the ITEPA provides for this process – and does so incompletely, as no power to summon a prorogued or dissolved Parliament or adjourned House is expressed.

Despite the shortcomings of each legislative check, and even if adequate provision for legislative consideration were in place across all emergency power legislation, it is highly unlikely that the Governor-General or Speaker of the House could be compelled to exercise their powers to convene the legislature. Fogarty J in *Queen v Speaker* suggests that some situations may be so grave that an order of the court is

¹⁶ International Terrorism (Emergency Powers) Act 1987, s 8

¹⁷ O Gross and F Ní Aoláin *Law in Times of Crisis: Emergency Powers in Theory and Practice* (1st ed., Cambridge University Press, Cambridge, 2006) at 64. This generalisation may not be well founded: see D Bonner *Emergency Powers in Peacetime* (1st ed., Sweet and Maxwell, London, 1985) at 39-40

necessary,¹⁸ but that in all but the most exceptional circumstances comity between the courts and the legislature requires judicial restraint.¹⁹

Limitation by review

In the absence of any comprehensive system of legislative censure, and due to the possibility of abuse both by the executive branch and empowered constables, Controllers or members of the military, the limits of emergency powers are for the courts to determine. Changes to both the style of emergency powers legislation, and the culture of judicial review, make limits on emergency powers based on historical judgments uncertain at best. By charting the changing nature of emergency powers legislation and judicial review, I aim here to give general indications of the approach likely to be taken.

In the past, reviews of emergency powers have been overwhelmingly deferential to government in both New Zealand and the United Kingdom. It is difficult to use such cases to predict the attitudes of courts today. Emergency powers legislation historically permitted executive action of a broad scope in the form of regulations made in reaction to an emergency; today's emergency powers are formulated prior to the event and do not tend to grant the executive *carte blanche* to act as it sees fit.

The case of *McEldowney v Forde*²⁰ is an excellent and comparatively recent example of how trends in emergency powers legislation have changed. That case concerned a regulation made under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, which permitted the Minister of Home Affairs for Northern Ireland to make regulations “for the preservation of the peace and maintenance of order”²¹ – an

¹⁸ *Queen v Speaker of the House of Representatives* [2004] NZAR 585, at [31]

¹⁹ *Ibid*, at [28]

²⁰ *McEldowney v Forde* [1971] AC 632

²¹ Civil Authorities (Special Powers) Act (Northern Ireland) 1922, s 1(3)(a) (UK)

exceptionally permissive provision. The Minister used this power to ban “republican clubs” of all kinds,²² and “any like organisation howsoever described.”²³ *McEldowney* was a member of the Slaughtneil Republican Club, but there was no evidence that the Club was a threat to the peace or order in Northern Ireland or had engaged in any “seditious...pursuits”.²⁴ The House of Lords decided in a split 3-2 decision that the regulation made was *not* so vague as to be beyond the powers of the Minister. This case demonstrates a broad regulatory power and a general attitude of deference, both of which may now be considered outmoded.

With the repeal of the Public Safety Conservation Act 1932, there no longer exists any general power of regulation for emergencies in New Zealand of the kind litigated in *McEldowney*, although the Canterbury Earthquake Response and Recovery Act 2010 comes close in its vagueness of purpose. Generally, however, emergency powers are defined by enactment, and activated by a decision of the relevant Minister of the Crown or local official. General executive discretions to regulate in pursuit of vague goals, such as those described by the House of Lords in *Attorney-General for Canada v Hallet & Carey Ltd*²⁵ and *Ross-Clunis v Papadopoulos*,²⁶ now constitute at best a power to direct the exercise of lesser, previously-defined powers at a Minister’s discretion.²⁷ Each emergency powers enactment binds the Crown.²⁸

Apart from the style of the emergency powers available, the shift in Commonwealth courts’ attitudes towards executive power over the last century of emergency powers

²² *McEldowney v Forde*, above n 20, at 647 per Lord Guest

²³ *Ibid*, at 652

²⁴ *Ibid*, at 647

²⁵ *Attorney-General for Canada v Hallet & Carey Ltd* [1952] AC 427

²⁶ *Ross-Clunis v Papadopoulos and Ors* [1958] 1 WLR 546

²⁷ Civil Defence Emergency Management Act 2002, s 84 (see Appendix)

²⁸ Civil Defence Emergency Management Act 2002, s 5; International Terrorism (Emergency Powers) Act 1987, s 3; Defence Act 1990, s 3

litigation has been immense. In *Rex v Halliday*,²⁹ a clear majority of the House of Lords concluded that the Parliament's generalised grant of emergency regulatory power to the executive by the Defence of the Realm Consolidation Act 1914 (UK) was sufficient to permit the detention of naturalised British citizens for the duration of the war. This regulation was found to be within the power of the Sovereign in Council to "issue regulations for securing the public safety and the defence of the realm",³⁰ though imprisonment without trial for an undetermined period is not specifically contemplated by the Act.

Furthermore, some statements by the Lords in *Halliday* aim to exclude the possibility of judicial review altogether. Lord Finlay describes how, in times of emergency, Parliament may grant great powers to the executive and "may do so feeling certain that such powers will be reasonably exercised."³¹ Parliament's temporal restriction of emergency powers to the duration of the war in progress was thought to be "a sufficient safeguard" by another Law Lord.³²

Such a contention finds support in a later local case. *Stevenson v Reid*³³ concerned an offence innocently committed against the Censorship and Publicity Emergency Regulations 1939.³⁴ With a degree of deference not seen even in *Halliday*, the Supreme Court Judge stated quite plainly that, the executive having followed the prescribed statutory process, "it would be quite impossible to challenge the validity of the regulations".³⁵ The concentration of regulatory power in the executive was considered a necessary evil of wartime; as for the courts, "we must submit to it."³⁶ This near-

²⁹ *Rex v Halliday* [1917] AC 260

³⁰ Defence of the Realm Consolidation Act 1914 (UK), s 1(1)

³¹ *Rex v Halliday*, above n 29, at 268-9

³² *Ibid*, at 271 per Lord Dunedin

³³ *Stevenson v Reid* [1942] NZLR 1

³⁴ Reg. 1939/121

³⁵ *Stevenson v Reid*, above n 33, at 3

³⁶ *Ibid*

absolute power of the executive was maintained even after that war was over, during New Zealand's most notorious industrial dispute. In *Hewett v Fielder*³⁷ the power of the Governor-General in Council under the PSCA to declare states of emergency and to make emergency regulations was considered by the Court to be limited only by improper purpose.³⁸ The power of the Governor-General to take such actions "as he thinks necessary" was unable to be bound;³⁹ provided the exercise of the power related to one of the very broad purposes of the PSCA, and was taken in good faith, it would be good. Similar reasoning, limiting review to the fides of the decision-maker, found favour with the House of Lords around the same time.⁴⁰

It is important to note at this stage the difference between exercise of a power by an individual outside of Cabinet and within Cabinet. Because the exceptional powers of those responding to an emergency directly are no longer created on an ad hoc basis by regulation, but are outlined in advance by legislation, each exercise of those powers does not necessarily reflect an urgent and overwhelming public interest priority of the executive; the powers are merely permitted acts should a state of emergency be declared, and all the contemplated responders are likely to be trained accordingly. Additionally, the CDEMA powers have in substance persisted in some form since the Civil Defence Act 1962; over this time these powers have gained a distinctly non-political flavour. So, while the decisions of Ministers to declare states of emergency and direct the use of emergency powers may well be political and policy-driven in nature, the decisions of constables or Civil Defence Controllers to exercise such powers is likely to lack such a dimension. This distinction potentially allows for greater review of the discretions permitted to emergency responders than could be made of the discretions government Ministers.

³⁷ *Hewett v Fielder* [1951] NZLR 755

³⁸ *Ibid*, at 760

³⁹ *Ibid*

⁴⁰ *Liversidge v Anderson* [1942] AC 206, at 261 per Lord Wright

The national interest, the public interest, matters of national security: all indicate the necessity for a quantum of deference to the executive branch, through the unwillingness of courts to interfere with matters of policy.⁴¹ Use of the word “emergency” may be sufficient to scare off particularly conservative judges, but it should always be considered that a hands-off approach in such situations may abdicate a court’s role as the “ultimate arbiter...of the necessary qualities of a democracy.”⁴² Sometimes emergency powers will be exercised in a fashion entirely beyond the capacity of the court to question: exercise of statutory powers equating to the ancient prerogative of defence of the realm,⁴³ for example, are unlikely to be reviewable where there is a clear foreign threat being addressed. Generally, however, the shift from reactionary emergency regulation to certain emergency legislation, where powers and purposes for their exercise are elaborated long before the fact, indicates a greater place for judicial review in determining the bounds of those powers. Past abdications of review jurisdiction during times of total war⁴⁴ are no longer relevant except in emergencies where the life of the nation is truly at risk.

In the recent case of *A v Secretary of State for the Home Department*,⁴⁵ the House of Lords shows an intriguing split approach to executive deference. Measures taken in the wake of the jihadist terrorist attacks of September 2001 affected rights protected in the United Kingdom by the Human Rights Act 1998. In *A* the House of Lords rejected any detailed investigation into whether the executive government was justified in determining whether a public emergency existed so to permit derogation from the European Convention on Human Rights,⁴⁶ despite the reservations of one of the

⁴¹ *Wellington City Council v Woolworths (New Zealand) Ltd (No 2)* [1996] 2 NZLR 537, at 546 per Richardson J

⁴² J Jowell “Judicial Deference, Servility, Civility or Institutional Capacity?” [2003] PL 592, at 599

⁴³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 418 per Lord Roskill

⁴⁴ Bonner, above n 17, at 59

⁴⁵ *A and Ors v Secretary of State for the Home Department* [2005] 2 AC 68

⁴⁶ *Ibid*, see for example [29] per Lord Bingham, [116] per Lord Hope

majority Lords.⁴⁷ At the same time, however, a majority also was more than willing to assess the proportionality of the response to the danger posed, and to find that the measures taken (involving the indefinite detention of foreign nationals) were inconsistent with the detainees' human rights.⁴⁸

New Zealand's human rights law, while similar to that of the United Kingdom, is not flavoured by European rights jurisprudence, but some parallel can be drawn here nonetheless. Decisions of the executive to declare states of emergency are unlikely to be seriously called into question by a court, but the response to that emergency, through powers available to constables, Civil Defence staff and Ministers of the Crown, is readily assessable for regular grounds of review, and for consistency with the rights of the individuals affected.

Illegality review

An error in comprehension of the law may make the exercise of an emergency power illegal. Unless some exemption can be found in the common law, every emergency power must be justified by an empowering statute.

Powers must be exercised for the purpose for which they are enacted, and not for some improper purpose. The purpose of the emergency powers contained in the CDEMA is to "provide...for response and recovery in the event of an emergency".⁴⁹ Each emergency power is also associated with a particular purpose: this may be to "prevent or limit the extent of the emergency",⁵⁰ to preserve or save human life,⁵¹ or to facilitate "any urgent measure for the relief of suffering or distress".⁵² The exercise of particular

⁴⁷ Ibid, at [154] per Lord Scott

⁴⁸ Ibid, see for example [44] per Lord Bingham, [81] per Lord Nicholls.

⁴⁹ Civil Defence Emergency Management Act 2002, s 3(c) (see Appendix)

⁵⁰ Civil Defence Emergency Management Act 2002, ss 88, 89, 91, 92 (see Appendix)

⁵¹ Civil Defence Emergency Management Act 2002, ss 86, 87, 90 (see Appendix)

⁵² Civil Defence Emergency Management Act 2002, s 87 (see Appendix)

powers by constables and Group Controllers must be in line with the particular purpose mandated by each empowering section; powers to declare emergency and direct exercise of a power must be exercised in accordance with the purposes of the CDEMA in s 3. There is a clear differentiation in the purposes applying to each emergency power; this indicates that emergency measures must be taken for specific purposes, rather than merely the broad overarching purposes of the Act.

The ITEPA provides that its emergency powers may be exercised for the purpose of dealing with an international terrorist emergency, or to preserve life or property threatened by that emergency.⁵³ This is a more general purpose than that provided for by the CDEMA, and reflects the different style of emergency the ITEPA is designed to respond to. A general purpose allowing the exercise of powers to deal with the emergency reflects the fact that every emergency under the ITEPA will necessarily involve a law enforcement response.

The purposes of the Defence Act are the most general of all. Amongst many other purposes, s 5 provides that the Governor-General may have the Armed Forces perform any public service⁵⁴ or assist the civil power in a time of emergency.⁵⁵ The generality of purpose provided for in the Defence Act makes review for improper purpose near impossible, but review for bad faith is not excluded.

Section 7 CDEMA allows persons exercising functions related to the implementation of civil defence emergency management plans to “be cautious in managing risks”. This section, I think, acts as an indication to courts that the exercise of emergency powers need not occur only where there is an immediate danger to one of the particular purposes of each power. A precautionary approach is permitted to allow potential dangers to be dealt with before they become an immediate threat to life or property.

⁵³ International Terrorism (Emergency Powers) Act 1987, s 10(2)

⁵⁴ Defence Act 1990, s 5(f)

⁵⁵ Defence Act 1990, s 5(e)

For example the exclusion of persons and vehicles from the central business district of Christchurch following the September 2010 earthquake was not immediately necessary for the preservation of human life, as required by s 86 CDEMA. Rather, the possibility of further earthquakes causing fragile buildings to collapse was the justification for the continued exclusion from the area. Exercise of the power was therefore a permissible precautionary anticipation of future dangers.

Irrationality review

It is widely recognised that New Zealand has departed from an exclusive test of *Wednesbury*⁵⁶ unreasonableness over the last fifteen or twenty years.⁵⁷ In those cases where an increased level of scrutiny has been applied, the human rights of individuals have almost invariably been at issue⁵⁸ – particularly those of immigrants (as in *Wolf*⁵⁹) and prisoners (as in *Wright*⁶⁰). The potentially oppressive powers of emergency responders raise similar concerns. These are not the only situations where the standard of review will vary: courts have discussed a “less tolerant eye”⁶¹ to error where a decision is one that affects a small number of persons, as opposed to decisions of more general application and with polycentric considerations. This has particularly been the case where persons within a limited geographical area are directly affected by a decision.⁶² Decisions taken under emergency powers legislation may range from those of the most general application to those impacting on a small number of individuals only, but will often apply to small geographical areas only.

⁵⁶ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

⁵⁷ D Knight “A Murky Methodology: Standards of Review in Administrative Law” (2008) 6 NZJIPL 117; M Taggart “Proportionality, Deference, *Wednesbury*” [2008] NZ L Rev 423, at 433-435

⁵⁸ Knight, *ibid* at 133

⁵⁹ *Wolf v Minister of Immigration* [2006] NZAR 414, at [48]

⁶⁰ *Wright v Attorney-General* [2008] NZAR 66, at [75]-[78]

⁶¹ *Pring v Wanganui District Council* [1999] NZRMA 523, at (7)

⁶² *Pring v Wanganui District Council*, *ibid*; *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601, at 606

A lowered standard of reasonableness may also be indicated by certain provisions in the CDEMA. The offences for failure to comply with an evacuation direction, and for failure to comply with a requisitioning request, each include as a defence those situations where the person exercising the power did not have a reasonable belief that doing so was necessary,⁶³ the standard of proof for which could not logically exceed the balance of probabilities. Of course, a public law standard of reasonableness is very different from a criminal law standard of proof as to reasonableness, but the inclusion of reasonableness defences is a strong indicator that the reasonableness of exercising a power should be kept in mind by a person with such a power, which in turn suggests that a close assessment for reasonableness may be made by a reviewing court.

Despite these indications that a stringent standard of irrationality review may exist, there remain serious countervailing considerations. While the exercise of emergency powers requires an unprecedented interference with individual liberties and property rights, an emergency will generally be a situation of great danger and urgency requiring an immediate and decisive response in order to preserve life or to limit the extent of the emergency. It is unrealistic and unreasonable to expect emergency responders to carefully assess the merits of every decision provided there is good faith.

The necessity of urgency has been regarded as a relevant factor in determining whether or not a decision is irrational in New Zealand,⁶⁴ but never in such an immediate situation as emergency response; it is clear though that urgency can be easily justified as a relevant factor. As such, and in light of the factors outlined above, a hard look for irrationality is likely to be available only where the decision in question applies to a small number of people or a small geographical area, involves conflict with human rights, and was not made under extreme urgency.

⁶³ Civil Defence Emergency Management Act 2002, ss 99(2), 101(2) (see Appendix)

⁶⁴ *Gore Borough Council v Southland District Health Board* HC Invercargill CP95/89, 11 October 1989 at 24

Consistency with the New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (NZBORA) requires that the rights and freedoms affirmed therein may be subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁶⁵ Where an interpretation consistent with those rights is possible, that interpretation should be preferred,⁶⁶ but no statute is impliedly repealed through inconsistency with those rights.⁶⁷ It generally invites a higher level of scrutiny than traditional judicial review through the use of a proportionality test.⁶⁸

The necessity to derogate from fundamental rights is recognised by the International Covenant on Civil and Political Rights (ICCPR), on which the NZBORA is based to an extent.⁶⁹ Article 4(1) provides that a public emergency that “threatens the life of the nation” may require limitation of rights to the extent necessary to deal with that emergency. Certain ICCPR rights, however, may not be limited to any extent in an emergency: these include the right to life,⁷⁰ freedom from torture and other cruel or degrading punishments,⁷¹ freedom from slavery and servitude,⁷² freedom from retrospective penalties,⁷³ and the right to freedom of thought and religion.⁷⁴

No emergency power provision contained in the CDEMA (or the equivalent powers contained in s 10(2) ITEPA) is inherently inconsistent with the NZBORA in the same

⁶⁵ New Zealand Bill of Rights Act 1990, s 5

⁶⁶ New Zealand Bill of Rights Act 1990, s 6

⁶⁷ New Zealand Bill of Rights Act 1990, s 4

⁶⁸ The “Oakes” test, from *R v Oakes* [1986] 1 SCR 103, endorsed in New Zealand by *Hansen v R* [2007] 3 NZLR 1, at [123] per Tipping J

⁶⁹ New Zealand Bill of Rights Act 1990, Long Title

⁷⁰ International Covenant on Civil and Political Rights, art 6

⁷¹ International Covenant on Civil and Political Rights, art 7

⁷² International Covenant on Civil and Political Rights, art 8

⁷³ International Covenant on Civil and Political Rights, art 15

⁷⁴ International Covenant on Civil and Political Rights, art 18

way as s 6(6) of the Misuse of Drugs Act was found to be by the majority in *Hansen*.⁷⁵ Some emergency powers are prima facie inconsistent with rights affirmed by the NZBORA: for example, ss 86 and 88 CDEMA, and ss 10(2)(a) and 10(2)(c) ITEPA (powers to evacuate private premises and public places, and to close roads and public places), are limitations on the right to freedom of movement.⁷⁶ However, on every occasion these powers serve sufficiently important purposes – such as the preservation of life or limiting the extent of the emergency – so that they constitute justified limitations on those rights. While the powers themselves are therefore not inconsistent with the NZBORA, individual exercises of these powers still have the potential to be disproportionate.

The provisions of the Defence Act are also consistent with the NZBORA. Members of the Armed Forces may only be granted the powers of the civil authorities under s 9 of that Act. There may however be scope for more egregious breaches of the NZBORA at the point of application by members of the Armed Forces who may not have been trained to understand the requirements of that enactment.

Section 21 NZBORA protects against unreasonable search or seizure of the person, property or correspondence. This provision informs the reading of emergency powers that deal with property without warrant. To requisition property under the CDEMA, a Controller or constable must believe that doing so is necessary for the preservation of human life.⁷⁷ Section 10(2)(f) of the ITEPA grants a requisitioning power where the Police are dealing with the emergency at hand or preserving life or property threatened by that emergency. Neither section requires that the belief in necessity (in the case of s 90 CDEMA) or the action (in s 10(2)(f) ITEPA) be a *reasonable* belief or action. By reading these provisions in conjunction with s 21 NZBORA, it is possible to

⁷⁵ *Hansen v R* [2007] 3 NZLR 1

⁷⁶ New Zealand Bill of Rights Act 1990, s 18(1)

⁷⁷ Civil Defence Emergency Management Act 2002, s 90(1) (see Appendix)

read into the powers a requirement for reasonableness from statute, rather than from inherent common law powers of review. This advantages a party seeking damages⁷⁸ for a poorly exercised power, given the lack of a financial remedy for judicial review.

It has been argued that a person has a lower expectation of privacy under s 21 NZBORA where the authority in question exercises “regulatory” powers, rather than powers related to the commission of a “true crime”.⁷⁹ Neither term is a particularly helpful description of the powers concerned here. Nonetheless, the power to requisition property should be treated more as a “true crime” than a regulation. It does not relate to the enforcement of a regulatory system such as vehicle licensing or health and safety regimes; also, the offence of failure to comply with a requisitioning direction⁸⁰ is a summary offence⁸¹ most likely to be prosecuted by Police, given the lack of institutional capacity for Civil Defence Emergency Management Groups to prosecute minor breaches of emergency powers on a local level. There is no reason, then, to import a lower expectation of NZBORA compliance due to the nature of the offence prosecuted.

The CDEMA explicitly responds to the NZBORA requirement for reasonableness. Section 101(2) contains a defence to proceedings for failure to comply with a requisitioning request where the defendant can prove on the balance of probabilities that the requisitioning person did not have a reasonable belief that in all the circumstances the requisitioning request was necessary for the preservation for human life. The ITEPA power of requisition is also subject to a summary offence for failure to

⁷⁸ As permitted by the Court of Appeal in *Simpson v Attorney-General (Baigent’s case)* [1994] 3 NZLR 667

⁷⁹ A Butler “Regulatory Offences and the Bill of Rights” in G Huscroft & P Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) 347, at 358

⁸⁰ Civil Defence Emergency Management Act 2002, s 101(1) (see Appendix)

⁸¹ Civil Defence Emergency Management Act 2002, s 104 (see Appendix)

comply,⁸² but there is no requirement for reasonableness in pursuing the permitted purposes contained in s 10(2). Section 21 NZBORA requires that a court recognise that reasonableness of belief is necessary to exercise the power under s 10(2)(f) ITEPA.

The ITEPA power of censorship⁸³ is prima facie inconsistent with the right to freedom of expression contained in s 14 NZBORA. This power has been variously described as ineffective,⁸⁴ uncertain and unworkable.⁸⁵ The Law Commission has gone so far as to claim that the continuation of a broadcasting prohibition after an international terrorist emergency has ended is unjustifiable under both the NZBORA and article 19 of the ICCPR.⁸⁶ This criticism may be overstated – after all, a threat to those persons responding to an international terrorist emergency will not necessarily dissipate within the fourteen day maximum period of that emergency. Such a limitation on the NZBORA right could not continue to be justified after the primary perpetrators of the international terrorist emergency are apprehended, unless there is a persistent active threat against any emergency responders.

Conclusion

Legislative limitations have become a prevalent first line of defence against the spectre of abuse of executive power during emergencies. While these legislative checks could be more comprehensive, their true failings are in their lack of utility by complacent legislatures with political motives. Despite prior attitudes of deference, then, it may become important to rely upon the judiciary to maintain the interests of affected individuals. While some areas of executive power remain off limits to a reviewing

⁸² International Terrorism (Emergency Powers) Act, s 21

⁸³ International Terrorism (Emergency Powers) Act, s 14

⁸⁴ Law Commission *Final Report on Emergencies* (NZLC R22, 1991) 7.162

⁸⁵ KJ Patterson “The spectre of censorship under the International Terrorism (Emergency Powers) Act 1987” (1988) 18 VUWLR 259

⁸⁶ Law Commission, above n 84

court, judicial attitudes have shifted sufficiently so that most exercises of emergency power are likely to be reviewable to some extent.

III

Non-statutory emergency measures and conceptual limitations on the New Zealand government's emergency powers are subjects far broader than can be fully discussed in one chapter. Rather than attempt the impossible, I will instead focus on three related aspects of the problems with exceptional measures in New Zealand. The first concerns the available powers under common law doctrines when no enactment provides an adequate emergency response. The second and third concern the conceptual limitations on Parliament's ability to legislate or the executive's ability to otherwise respond to an emergency, in a New Zealand context.

The end of civil government: prerogative and state necessity

“One cannot expect statute law to cover every eventuality of government.”¹ Unless government is to be rendered powerless to respond to exceptional crises, there must be some source of legal justification so to permit the necessary response. The doctrines constituting this justification are *prerogative* and *state necessity*. Both of these concepts were ably addressed in the recent Fijian Court of Appeal decision of *Qarase v Bainimarama*,² in which the Court considered the legality of the Fijian President's actions in dismissing his ministry contrary to the terms of the Fijian Constitution.

The prerogative power permits the Sovereign to act where no positive law governing a situation otherwise exists, by utilising the “residue of discretionary...authority”, as

¹ *Qarase v Bainimarama* [2008] FJHC 241, at [104]

² *Qarase v Bainimarama* [2009] FJCA 9

Dicey put it.³ Locke described the prerogative as a power to act “for the public good, without the prescription of law, and sometimes even against it.”⁴ This is not a good description of prerogative as it is understood today; on Dicey’s formulation, prerogative powers exist within the law and not outside of it, and the Sovereign may not act against the law. Locke’s explanation is closer to the doctrine of state necessity as set out in *Mitchell v Director of Public Prosecutions*,⁵ a case arising out of a breakdown of the civil authority in Grenada and the attempts of the Governor-General to restore that authority.⁶

The crux of the Fijian Court of Appeal decision in *Qarase* was the existence of specific constitutional provisions providing for the appointment and dismissal of the Prime Minister, and for permitting the President to exercise emergency powers. The Court concluded that the prerogative does not persist where express provision is made for the method of exercise of those powers.⁷ This judgment conforms to the often approved⁸ Diceyan description of the prerogative described above: it comprises the power that *remains* with the Crown.

So a prerogative remains if it is not excluded by a positive statement of the law by Parliament – but what constitutes the prerogative in the first place? The content of the prerogative “is not easy to discover”,⁹ but has been thought to include a prerogative to maintain the peace¹⁰ or to respond to circumstances “preliminary to an emergency.”¹¹

³ AV Dicey *Introduction to the study of the law of the constitution* (6th ed., Macmillan, London, 1902) at 368

⁴ J Locke *Two treatises of government* (London, 1698) at 292

⁵ *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35

⁶ P St J Smart “Revolutions, Constitutions and the Commonwealth: Grenada” (1986) 35 Int’l & Comp LQ 950, at 952

⁷ *Qarase*, above n 2, at [128]

⁸ For example, see *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, at 99

⁹ *Ibid*

¹⁰ *Regina v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] 1 QB 26, at 55 per Purchas LJ

¹¹ *Ibid*, at 59 per Nourse LJ

These circumstances, however, are unknown until they arise, as are all the powers necessary to deal with them. Nevertheless, regardless of the difficulty inherent to a prediction of the necessary legislative emergency powers, the Law Commission has strongly recommended against reliance on the prerogative in times of emergency.¹² Powers should be defined by legislation in advance to the greatest degree possible.

Situations requiring extralegal measures of state necessity are even less likely than those requiring an exercise of prerogative power. A contemporary Fijian decision¹³ has endorsed the definition of state necessity contained in *Mitchell*,¹⁴ which found its genesis in Pakistan's earlier constitutional crises and the maxims *salus populi suprema lex* and *salus reipublicae est suprema lex*.¹⁵ This definition of state necessity requires that an otherwise illegal act be the only available response to protect or preserve the state, which minimally infringes upon the general law and does not impair the rights of citizens unnecessarily.¹⁶

State necessity was informally recognised in New Zealand long before any adoption of the theory by modern Commonwealth case law. In 1913, then Solicitor-General John Salmond advised the Prime Minister that extraordinary measures to deal with an industrial dispute may be justified by necessity "although otherwise illegal".¹⁷ The Crown, in defending warrantless monitoring of the mailbox of an anti-Catholic propagandist during World War I, also argued that the measure was one of necessity.¹⁸ The Law Commission appears to agree that such a doctrine would be available in New

¹² Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at para 4.53

¹³ *Republic of Fiji Islands v Prasad* [2001] FJCA 2

¹⁴ *Mitchell v Director of Public Prosecutions*, above n 5

¹⁵ L Wolf-Philips "Constitutional Legitimacy: A Study of the Doctrine of Necessity" (1979) 1 Third World Q 97, at 103

¹⁶ *Mitchell v Director of Public Prosecutions*, above n 5, at 88

¹⁷ A Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) at 162

¹⁸ *Ibid*, at 177

Zealand in the event that the prescribed legal rules or processes could not be followed, but is careful to limit the available situations to those where the state is imperilled.¹⁹

Conceptions of sovereignty and constitution

The New Zealand Parliament has the same sovereign power as the United Kingdom Parliament,²⁰ and New Zealand Courts have often confirmed the supremacy of their Parliament as law-maker. Matthew Palmer has described New Zealand's adherence to this constitutional norm as "perhaps the purest...of any democracy in the world."²¹ A commonly-cited and modern example of this is the case of *Berkett v Tauranga District Court*.²² Recognising that a hierarchy must necessarily spring from some source, the Court there stated that each New Zealand Court will follow the doctrine of *stare decisis* and that all Courts will "recognise and act upon the Acts of their Parliament."²³ To the unimaginative, such a statement ends the question of what style of powers are available. If law is simply that which a court will do, then if an authorising enactment of Parliament exists, a power indisputably exists also. This approach reflects the positive aspect of Dicey's definition of sovereignty, and it necessarily implies the negative aspect (that there is no other person or body that can make laws supreme to those of Parliament).²⁴ There is still a question of particular limitations on existing powers under this strict approach to Parliamentary sovereignty. Such powers are only as wide as Parliament permits; they are limited by statutory wording and the interpretive directions of Parliament and the common law. Otherwise, however, the

¹⁹ Law Commission, above n 12, at para 4.42

²⁰ J Goldworthy *The Sovereignty of Parliament – History and Philosophy* (Oxford University Press, Oxford, 2001) at 1

²¹ M Palmer, "Open the Doors and Where are the People?" (conference paper presented at "We the People(s): Engagement and Participation in Government" in Wellington, 11-12 February 2010), at 16

²² *Berkett v Tauranga District Court* [1992] 3 NZLR 206

²³ *Ibid*, at 211

²⁴ Dicey, above n 3, at 38

Courts' recognition of Parliament as sovereign would seem to put an end to the question of legality, even where the measures taken are of the most repugnant variety.

Competing conceptions of popular sovereignty – that the Sovereign is “formed entirely of the individuals who compose it”²⁵ in union – have not gained much traction in New Zealand. Australia's Constitution and other steps away from the imperial power have forced change in attitudes to sovereignty there; Mason CJ has for example claimed that “ultimate sovereignty [resides] in the Australian people.”²⁶ No formal document akin to the Australian Constitution, approved by the people as the basis of a political and legal system, exists in New Zealand. The argument has been made that, in the case of proposed constitutional changes, the United Kingdom Parliament is constrained by its electors only to act in accordance with their will, and that this has not just developed in modern times but was apparent in the 19th and early 20th centuries as democratic and constitutional reform took hold.²⁷ A parallel may be drawn with the evident unwillingness of New Zealand's legislature to make alterations to the electoral system without the consent of the majority of voters in a referendum, but this trend alone is surely not of sufficient gravity to remove the primacy of the principle of parliamentary sovereignty. Without doubt, New Zealand's Parliament has the power in law to (for example) repeal the NZBORA or to change the parliamentary term, subject to certain self-imposed limitations.²⁸

It has been recognised in dicta of the House of Lords that British parliamentary sovereignty is not what it once was in light of the European Convention on Human Rights. Lord Steyn has suggested that a “new legal order” exists in light of the Human Rights Act 1998, and that it may now be impossible for a Parliament to attempt to

²⁵ JJ Rousseau *The Social Contract* (34th ed., Penguin, London, 1968) at 63

²⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, at 138

²⁷ R Weill “We the British People” [2004] PL 380

²⁸ Electoral Act 1993, s 268

abolish judicial review;²⁹ similar sentiments in relation to fundamental rights have been expressed by Baroness Hale.³⁰ Lord Hope indicated in the same case that absurd enactments unrecognised by the “populace at large” make parliamentary sovereignty “an empty principle”.³¹ These dicta, from the House of Lords case of *Jackson*, are vague and call into question differing aspects of the Constitution; they cannot be relied upon to prove any general rule. What they do demonstrate is the changing attitude of the highest English court to the concept of parliamentary sovereignty, but in a constitutional setting increasingly divergent to that existing in New Zealand. In particular, European human rights jurisprudence has created a widening constitutional gulf.

A similar sentiment was evident in the approach of Sir Robin Cooke at a much earlier time. In *Taylor v New Zealand Poultry Board*,³² Cooke J famously claimed in dictum that, while it was within the lawful powers of Parliament to compel a response to certain questions of officials, doing so by torture would be illegal; “[s]ome common law rights presumably lie so deep that even Parliament could not override them.”³³ This line of thought has largely travelled the same way as Cooke himself – to the House of Lords – and is not widely discussed in New Zealand courts except as precedent for the privilege against self-incrimination.³⁴

The present discussion is very relevant to the limitation of emergency powers. It is in times of emergency, or in the wake of emergencies, that New Zealand’s normally cautious and respectful legislature is most likely to take steps that infringe upon core

²⁹ *R (Jackson) v Attorney-General* [2006] 1 AC 262, at [102]

³⁰ *Jackson*, *ibid*, at [159]

³¹ *Jackson*, *ibid*, at [120]

³² *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394

³³ *Ibid*, at 399

³⁴ See for example *R v Sew Hoy* (1991) 1 HRNZ 424, at 430; *Department of Labour v Matches Construction Ltd* [2001] DCR 587, at [15]

constitutional norms such as the rule of law³⁵ and representative democracy,³⁶ or that limit rights affirmed by NZBORA. A tension is evident between an effective governmental response and the limitation of civil and political rights. It is unlikely, save for the most offensive, retrograde or unthinkable legislation, that New Zealand courts would respond in the way the Lords in *Jackson* suggested, given our unusual collective devotion to the concept of parliamentary sovereignty. Instead, New Zealand's constitutional structure lends itself instead to dialogue between the judiciary and legislature as the best method for determining the limits of state power in areas where human rights are affected.

Dialogue as a limitation of emergency measures

Dialogue theory has different applications between jurisdictions, but its core principle is that of collaborative problem-solving of human rights issues by the judiciary and the legislature, the latter retaining legal supremacy. In Canada, situations where a court has rejected the legislature's attempt to balance the public interest and individual rights to which the legislature responds may be considered to involve dialogue.³⁷ Sceptics deny that dialogue truly occurs in Canada – that in reality, the Court is the definitive constitutional interpreter³⁸ – but others describe mechanisms such as the “notwithstanding” clause³⁹ and the justified limitations clause⁴⁰ as providing for

³⁵ New Zealand Law Society “Law Society comments on Canterbury Earthquake Act” (press release, 29 September 2010)

³⁶ Constitutional norms discussed by Palmer, above n 21, at 15-16

³⁷ PW Hogg and AA Bushell “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75, at 79-81

³⁸ G Huscroft “Rationalizing Judicial Power: The Mischief of Dialogue Theory” in JB Kelly & CP Manfredi (eds) *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (UBC Press, Vancouver, 2009) at 64

³⁹ Canadian Charter of Rights and Freedoms, s 33; discussed in S Gardbaum “Reassessing the new Commonwealth model of constitutionalism” (2010) 8 Int J Constitutional Law 167, at 182

⁴⁰ Canadian Charter of Rights and Freedoms, s 1; discussed in K Roach “Dialogue or defiance: Legislative reversals of Supreme Court decisions in Canada and the United States” (2006) 4 Int J Constitutional Law 347, at 349

genuine collaboration. The United Kingdom approach involves a weaker form of judicial review, as no power to strike down legislation exists under the Human Rights Act 1998, but still includes a strong form of dialogue: declarations of incompatibility with European Convention rights may be issued,⁴¹ and while these do not force Parliament to amend the offending legislation, the common practice is to do so.⁴²

Judicial review of legislation in New Zealand is weak in comparison to jurisdictions such as Canada and the United States. Section 4 of the NZBORA strongly excludes any ability to hold other enactments to be impliedly repealed for inconsistency with affirmed rights; there is also no explicit power to issue a declaration of incompatibility with an affirmed right, equivalent to the power existing in s 4(2) of the Human Rights Act 1998 (UK). Since the passage of the NZBORA, New Zealand courts have gone no further than finding legislation inconsistent with a right without further comment.⁴³ A power to issue a formal declaration of inconsistency has been mooted by the Court of Appeal⁴⁴ but never acted upon; in light of the current New Zealand precedent discussing the availability of such declarations, it is doubtful that a declaration could be made in any but “the rarest of circumstances.”⁴⁵

While the formality of a declaration of incompatibility is not utilised in New Zealand, dialogue between the branches of government still occurs on matters of individual and group rights.⁴⁶ However, constitutional dialogue where legislation has seriously restricted a core individual right is threatened by this weak model. Without the need for a formal response in the legislature, and with findings of inconsistency receiving

⁴¹ Human Rights Act 1998 (UK), s 4(2)

⁴² “Responding to human rights judgments: Government Response to the Joint Committee on Human Rights’ Fifteenth Report of Session 2009-10” Ministry of Justice (UK) <www.justice.gov.uk> at 42

⁴³ As in *Hansen v R* [2007] 3 NZLR 1

⁴⁴ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, [20]

⁴⁵ C Geiringer “On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act” (2009) 40 VUWLR 613, at 640

⁴⁶ Palmer, above n 21, at 12-13

much less press coverage than formal declarations,⁴⁷ there is little public pressure to force a legislative reaction. McGrath J describes an indication (not a declaration) of incompatibility as the Court's "constitutional responsibility" and expects a reconsideration of the inconsistent legislation to occur as a result,⁴⁸ but such weak dialogue is not sufficient where very serious derogations from core rights have occurred.

It is also notable that the Court of Appeal has rejected applications made simply to determine NZBORA consistency without involving an interpretive question central to a party's case: courts are not "empowered to conduct what are effectively commissions of inquiry into acts of the legislature and executive to see whether they measure up to the requirements of the Bill of Rights and the [ICCPR]." ⁴⁹

The issue of a declaration of incompatibility would require a court to ignore a range of self-imposed limitations on their use.⁵⁰ So what legislative steps taken in an emergency might be sufficient to encourage a court to issue a declaration of incompatibility on request, to properly constrain the exercise of legislative power by democratic dialogue? The natural starting point seems to be legislation affecting non-derogable ICCPR rights. As explained in Chapter Two, certain ICCPR rights to which the NZBORA gives effect may not be limited by any circumstances under the Covenant, including the right to life⁵¹ and freedom from torture or cruel, inhuman or degrading treatment or punishment,⁵² as well as freedom of belief⁵³ and freedom from retrospective penalties.⁵⁴ In ratifying the ICCPR, New Zealand's government has

⁴⁷ Geiringer, above n 45, at 642

⁴⁸ *Hansen*, above n 43, at [259] per McGrath J

⁴⁹ *R v Exley* [2007] NZCA 393, at [20]

⁵⁰ Geiringer, above n 45

⁵¹ International Covenant on Civil and Political Rights, art 6

⁵² International Covenant on Civil and Political Rights, art 7

⁵³ International Covenant on Civil and Political Rights, art 18

⁵⁴ International Covenant on Civil and Political Rights, art 15

acceded to the idea that these rights are absolutely inalienable. The non-derogable freedom from torture provided by article 3 of the European Convention on Human Rights has been described by the European Court of Human Rights as “one of the fundamental values of a democratic society”; presumably this extends to all non-derogable human rights “[e]ven in the most difficult of circumstances”.⁵⁵ In the interests of avoiding “window-dressing”,⁵⁶ New Zealand courts should accept applications for declarations of incompatibility where these rights are threatened, even if interpretation of the offending statute is not the central issue in the case.

This approach accords with that taken by Thomas J in *R v Poumako*.⁵⁷ In that case the right affected was freedom from the imposition of heavier retrospective penalties, under s 25(g) NZBORA. This right is also non-derogable under article 15(1) ICCPR. In a minority judgment, Thomas J argued that the importance of the right affected necessitated the issuing of a declaration of incompatibility. The majority made no finding on the consistency of the relevant provision.⁵⁸

Extreme derogations of other rights also deserve a suitable response. The right to liberty⁵⁹ is derogable in times of emergency under the ICCPR, but some derogations of this right may be so obviously irrational or discriminatory, and such an affront to the right, that they merit a declaration of incompatibility. The facts of the English case of *A*,⁶⁰ however, are unfortunately within the tolerance one would expect from a New Zealand court, given the conservative constitutionalism described above. On the date of judgment in *A*, some foreign national detainees under the Anti-terrorism, Crime

⁵⁵ *Aksoy v Turkey* (1996) 23 EHRR 553, at [62]

⁵⁶ *Tavita v Minister of Immigration* [1994] 2 NZLR 257, at 266

⁵⁷ *R v Poumako* [2000] 2 NZLR 695, at [75] per Thomas J

⁵⁸ *Ibid*, at [42] per Gault J

⁵⁹ New Zealand Bill of Rights Act 1990, s 22; International Covenant on Civil and Political Rights, art 9

⁶⁰ *A and Ors v Secretary of State for the Home Department* [2005] 2 AC 68

and Security Act 2001 had been held for three years without charge;⁶¹ the provision under which they were held was disproportionate and discriminatory according to both the House of Lords⁶² and the European Court of Human Rights.⁶³ While similar measures taken legislatively in New Zealand would certainly be inconsistent with the NZBORA, I doubt that a court would issue a declaration of incompatibility.

Conclusion

The ability of the New Zealand government to respond to an emergency remains vast, despite years of incremental steps away from the concept of parliamentary sovereignty and towards inalienable natural law rights, both in New Zealand and throughout the Commonwealth. The response may consist of the utilisation of existing legislation, emergency legislation, use of the royal prerogative or, in extreme situations, action by necessity to preserve the state. There is little prospect of any limitation on parliamentary sovereignty arising in the New Zealand courts, but there is scope for greater dialogue between the judiciary and the legislature on rights issues by making use of declarations of incompatibility.

⁶¹ Ibid, at [2] per Lord Bingham

⁶² Ibid, at [73] per Lord Bingham

⁶³ *A v United Kingdom* (2009) 49 EHRR 29, at [190]

IV

The response to the large earthquake which occurred on September 4 2010 near Christchurch provides an excellent case study for how the powers I have discussed are implemented, and how they might feasibly be limited. A state of local emergency was declared on September 4 within each of the three affected districts (Selwyn District, Waikamariri District and Christchurch City) and persisted until September 16.¹

*This power or that?*²

A variety of Civil Defence Emergency Management Act 2002 emergency powers were invoked by local constables and Civil Defence officials over the following days. A cordon was put in place around the Christchurch central business district from September 4 until September 10.³ A cordon was also in place in Kaiapoi's main shopping area.⁴ At night, these managed cordons with some permitted entry became absolute cordons with twelve-hour curfews. At least one person has been successfully prosecuted for breach of s 88 CDEMA;⁵ the offence for breaching a restriction on access to a public place arises under s 100.

Section 88 may be used to regulate access to a public place "in order to prevent or limit the extent of the emergency." Section 100 creates an offence of intentionally

¹ NZPA "Canterbury states of emergency lifted" *Otago Daily Times* (16 September 2010) <www.odt.co.nz>

² All powers and offences discussed in this section are set out in full in the Appendix.

³ M Cornell "Quake: Christchurch cordon lifted" *Stuff* (10 September 2010) <www.stuff.co.nz>

⁴ G Brown "Kaiapoi cordon breakers caught" *The Press* (16 September 2010) <www.press.co.nz>

⁵ I Steward "Burglar breached curfew" *The Press* (Christchurch, 10 September 2010) at A6

failing to comply with a s 88 restriction. No particular justifications for the Christchurch cordon and curfew were given in media releases of the Christchurch City Council (who declared the emergency) or New Zealand Police (who enforced the cordon), but we can infer that the preservation of life and the prevention of looting were the main concerns.

Although the definition of emergency incorporates danger or harm to persons or property,⁶ imposing a cordon or curfew for those purposes under s 88 sits uneasily with the other emergency powers in Part 5 CDEMA; those powers able to be exercised to preserve human life state that purpose explicitly.⁷ In addition to s 88, ss 89 and 92, respectively providing for the removal of vehicles from an area or to inspect and destroy property, may only be exercised to prevent or limit the extent of an emergency. These other powers appear to be aimed at preventing the spread of a disaster outside of a particular geographical area; s 92, for example, provides for property, animals or any other things to be seized, sampled, disinfected or destroyed in order to prevent or limit the extent of an emergency.

Alternatively, a cordon may also be created under the s 86 power, which permits the evacuation and exclusion of persons and vehicles from public places where “necessary for the preservation of human life”; a curfew is merely a cordon with a temporal component. Section 99(1) creates an offence of intentionally failing to comply with a s 86 direction. Section 99(2) makes the cordon/curfew power subject to a requirement of reasonable necessity to preserve life. If, for example, an authority had attempted to impose a curfew over the entirety of Christchurch city, such an exercise of the power would be exceptionally difficult to justify. The available evidence did not support the idea that many places in Christchurch were particularly dangerous besides the central

⁶ Civil Defence Emergency Management Act 2002, s 4

⁷ Civil Defence Emergency Management Act 2002, ss 86, 87, 90 (see Appendix)

business district. Evacuation from particularly affected neighbourhoods, however, such as Bexley,⁸ was easily justifiable.

Exercise of one of these powers to exclude persons from a certain area may be challenged if a prosecution is incorrectly brought. While the reported Christchurch case involved a lenient sentence of community work, the maximum penalty is considerable (up to three months imprisonment and/or a \$5000 fine).⁹ The availability of a defence differs depending on which section a person is alleged to have breached. Breach of s 86 can be defended where the Controller or constable who ordered the evacuation or exclusion did not have reasonable grounds to believe it necessary for the preservation of human life,¹⁰ whereas there is no statutory defence to a charge laid under s 100. Collateral challenge to the justification for a cordon is, then, a real possibility.

It is not necessary to carefully consider whether or not s 86 or 88 applies when responding to an emergency, as there is no requirement to proclaim or inform the public in any official way why an area is not accessible; turning people away is sufficient. However, at the point of application in criminal proceedings, a correct justification for the action taken is essential.

The power to requisition property¹¹ also requires a constable or Controller to believe that such requisitioning was reasonably necessary to preserve human life. If not, any person who fails to comply with a requisitioning request will have a defence.¹² This power was exercised during the Christchurch emergency: while describing the advantages of a state of local emergency after the earthquake, the mayor of

⁸ “Christchurch earthquake, *Day 3 updates*” *The New Zealand Herald* (Auckland, 6 September 2010), <www.nzherald.co.nz>

⁹ Civil Defence Emergency Management Act 2002, s 104(a) (see Appendix)

¹⁰ Civil Defence Emergency Management Act 2002, s 99(2) (see Appendix)

¹¹ Civil Defence Emergency Management Act 2002, s 90 (see Appendix)

¹² Civil Defence Emergency Management Act 2002, s 101(2) (see Appendix)

Christchurch told a national radio programme that bedding had been requisitioned from an unnamed hotel.¹³ Refusals to comply with such requests, followed by prosecutions, are conceivable: the economic loss to a business may be severe if property essential to their operation is requisitioned. Compensation is available under the CDEMA for the use of the property and any damage to that property,¹⁴ but damages for pure economic loss are only available where the “good done” as the result of a requisitioning is disproportionately less than the loss suffered.¹⁵ Given that requisitioning is permitted only for the purpose of preserving human life, this standard seems near-impossible to meet.

Canterbury Earthquake Response and Recovery Act 2010

A government bill, enacted as the Canterbury Earthquake Response and Recovery Act 2010 (CERRA), was introduced, read, passed and assented to under extreme urgency on 14 September 2010. The bill received unanimous support from within Parliament, subject to the immediate reservations of the Green Party primarily;¹⁶ concerns were also expressed individually by ACT¹⁷ and Labour¹⁸ Members. These reservations were not misplaced: CERRA provides a regulatory power to the executive of the sort not seen since the Public Safety Conservation Act was repealed. Indeed, within a fortnight a group of prominent legal academics issued an open letter detailing concerns about the breadth of the power granted, calling CERRA a “dangerous precedent”.¹⁹ This danger arises from a poorly framed general power to regulate, with weak legislative

¹³ Interview with Bob Parker, Christchurch Mayor (Geoff Robinson, Morning Report, Radio New Zealand National, 7 September 2010) audio provided at <www.radionz.co.nz>

¹⁴ Civil Defence Emergency Management Act 2002, s 107

¹⁵ Civil Defence Emergency Management Act 2002, s 109(2)

¹⁶ Green Party of Aotearoa New Zealand “Improvements put forward for Quake Bill” (press release, 14 September 2010)

¹⁷ (14 September 2010) 666 NZPD 13910-13911

¹⁸ (14 September 2010) 666 NZPD 13928-13929

¹⁹ Joint media statement “Legal Scholars: Deep Canterbury Quake Law Concerns” (press release, 28 September 2010)

oversight and limitations on the review of that power by courts. The overall effect is a large power shift towards the executive branch of government, and away from the legislature and judiciary.

CERRA permits the making of Orders in Council, on the recommendation of various Ministers of the Crown, to “grant an exemption from, or modify, or extend any provision of any enactment”,²⁰ with the exception of five constitutional enactments (the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, and NZBORA).²¹ An Order in Council under CERRA has the force of law as if it were a provision of the primary Act.²² Judicial review of such Orders is limited to an extent, as discussed below. The enactment, and all Orders in Council made under it, will expire on 1 April 2012, at the latest.²³

CERRA is similar in structure to the Epidemic Preparedness Act 2006, although the power to regulate is far wider and accordingly more dangerous.²⁴ The powers of general regulation in the Epidemic Preparedness Act concern only modification of “any requirement or restriction imposed” by an enactment,²⁵ and give non-exhaustive suggestions as to the proper exercise of that power, such as giving alternative means of complying with the requirement or restriction or substituting a discretionary power for the requirement or restriction.²⁶ The CERRA power is more vague: an Order in Council “may grant an exemption from, or modify, or extend any provision of any enactment”.²⁷ This description of the CERRA power is actually non-exhaustive: it does

²⁰ Canterbury Earthquake Response and Recovery Act 2010, s 6(4) (see Appendix)

²¹ Canterbury Earthquake Response and Recovery Act 2010, s 6(6)(c) (see Appendix)

²² Canterbury Earthquake Response and Recovery Act 2010, s 7 (see Appendix)

²³ Canterbury Earthquake Response and Recovery Act 2010, s 17 (see Appendix)

²⁴ A Geddis “Canterbury’s earthquake is worse than an infestation of zombies...” (2010) Pundit <www.pundit.co.nz>

²⁵ Epidemic Preparedness Act, ss 12(1), 15(1)

²⁶ Epidemic Preparedness Act, ss 12(5)(b), 15(5)(b); the same non-exhaustive suggestions are included in the Canterbury Earthquake Response and Recovery Act 2010, s 6(5) (see Appendix)

²⁷ Canterbury Earthquake Response and Recovery Act 2010, s 6(4) (see Appendix)

not limit²⁸ the general power contained in s 6(1), which states that an Order in Council may include “any provision reasonably necessary or expedient for the purpose of [CERRA].”

There is some legislative oversight of Orders in Council made under CERRA, as s 8 provides that the Regulations (Disallowance) Act 1989 procedure applies. This requires a regulation to be tabled in the House of Representatives within 16 sitting days of being made,²⁹ and allows the House to disallow a regulation by resolution.³⁰ Of concern, however, is the ability of an Order in Council to provide that the procedure does not apply, as s 8 CERRA is not protected from alteration by an Order in Council.³¹ While this is likely little more than an oversight, it speaks to the potential danger of the regulatory power. There is also no requirement that a prorogued Parliament be recalled if an Order is made.

Powers contained in the Act were widely misreported. This is fairly understandable, as the Act was poorly drafted and hastily enacted, and involves complex matters of judicial review and constitutional law. In fact, some aspects of CERRA are so confused that it is impossible to confidently determine their intention.

One immediate report claimed that the Act permitted the suspension of provisions in 22 enactments.³² This is correct, but misrepresents the true scope of the power. Section 6(4) lists 22 enactments that may be altered by Order in Council, but this section does not limit the power to those certain enactments – in fact, it permits alterations to be made to any enactment. The only enactments that may not be altered are those contained in s 6(6)(c). This list of 22 enactments was quickly deviated from: within

²⁸ Canterbury Earthquake Response and Recovery Act 2010, s 6(7) (see Appendix)

²⁹ Regulations (Disallowance) Act 1989, s 4

³⁰ Regulations (Disallowance) Act 1989, s 5(1)

³¹ Canterbury Earthquake Response and Recovery Act 2010, s 6(6)(d) (see Appendix)

³² P Wilson “Parliament rushes through quake law” *Stuff* (New Zealand, 14 September 2010) <www.stuff.co.nz>

two days, an Order in Council had been made altering the CDEMA,³³ which is not included in s 6(4).

A later report more accurately represented the scope of the Act in this respect, but retained some confusion over the reviewability of Orders in Council, claiming that they could not “be challenged, reviewed, quashed, or called into question in any court”.³⁴ This inaccurately represents the judicial review provisions contained in the Act. That article directly quotes s 6(3), which states that “[t]he recommendation of the relevant Minister” to make an Order in Council may not be called into question by a court. An Order in Council is an order of the Governor-General given in consultation with the Executive Council, and does not merely consist of a Minister’s recommendation, although this is a precondition to the exercise of the power.³⁵

While a Minister’s recommendation is *prima facie* unreviewable, the reviewability of an Order in Council made under CERRA is a more contentious matter. Provisions of the Act may be read to exclude judicial review absolutely, to allow judicial review as usual, or to restrict review to questions of legality based on an alleged improper purpose.

Section 7(1) states that an Order in Council has the force of law “as if it were enacted as a provision of this Act.” Such a section might be read to exclude judicial review as to legality altogether – as an instruction to the High Court to treat regulations as if they were statutory provisions. Section 7(5)(a) prevents the Court holding an Order in Council invalid for being repugnant to or inconsistent with any other Act, while s 6(3) also provides that a Minister’s recommendation is not open to challenge. Read

³³ Canterbury Earthquake (Civil Defence Emergency Management Act) Order 2010

³⁴ “*Editorial*: Far-reaching powers hide worrying risks” *The New Zealand Herald* (Auckland, 16 September 2010) <www.nzherald.co.nz>

³⁵ Canterbury Earthquake Response and Recovery Act 2010, s 6(1) (see Appendix)

together, these provisions may be construed as a strong message to the Court that Orders in Council are intended to be immune from judicial interference absolutely.

This attitude to executive power may have prevailed within the judiciary during the second World War,³⁶ but administrative law has become a behemoth in the intervening years and courts have frequently shown their willingness to circumvent such restrictions. Nor is the situation addressed by CERRA so urgent as during wartime. Following *Anisminic*,³⁷ broad ouster clauses have been poorly received by New Zealand courts. Unlike the PSCA and enactments relating to wartime, CERRA is not an emergency powers enactment, and as such should be interpreted in a manner that gives effect to its urgent purposes while preserving the rule of law to the greatest extent possible.

An alternative and more palatable approach is to construe s 7(5) as clearly contemplating challenges to the validity of an Order in Council, acting as a *partial* ouster clause to prevent the review of certain matters. In combination with s 6(3) then, a reviewing court is ousted from considering whether or not the Minister's recommendation is a valid one, and from considering the repugnancy of an Order to existing enactments. Section 7(1) should accordingly be read as meaning that *valid* Orders in Council have the force of law, whereas *invalid* Orders remain reviewable. This is the approach Philip Joseph takes, in claiming that such "crude" privative clauses "could not survive the post-*Anisminic* era."³⁸

An implied requirement of validity would normally allow a reviewing court to consider all matters, but here it seems that broad jurisdiction is partially ousted. While CERRA does not state explicitly that a reviewing jurisdiction is limited to the

³⁶ *Stevenson v Reid* [1942] NZLR 1, at 3

³⁷ *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147

³⁸ PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed., Thomson Brookers, Wellington, 2007), at 1031

traditional understanding of that term, unlike the examples Joseph describes,³⁹ the practical effect and intention of CERRA provisions is the similar: to leave review open on some grounds and not on others.

There is no scope for review for breach of natural justice, as the purpose of CERRA is to facilitate a speedy response to the Canterbury earthquake; where a “streamlining of procedures” by the Executive Council is intended, no implied requirements of natural justice may be imported.⁴⁰ Review for irrationality is available, but is practically limited to the face of the Order, not the decision of the relevant Minister. Legality review would likely focus on the improper purpose of an Order, but such a standard might be difficult to meet as the purposes of CERRA are stated very broadly; one purpose is simply to “facilitate the response to the Canterbury earthquake”.⁴¹ The bar on inquiring into the Minister’s state of mind⁴² may cause this head of review to effectively resemble an irrationality standard.

Is Bill of Rights consistency a ground of review?

It is clear that CERRA narrows the ordinary scope of judicial review significantly; of greater interest is whether or not review for NZBORA consistency is excluded. Section 7(5) excludes review for repugnancy with another enactment, but this provision is subject to s 6(6).⁴³ NZBORA is protected by that provision from any “exemption from [it] or a modification of a requirement or restriction imposed” by an Order in Council made under CERRA.

The meaning of this phrase is contestable. It is clear that an Order in Council may not alter an enactment protected by s 6(6)(c); this includes NZBORA. It is also clear that

³⁹ Joseph, *ibid*, at 862-3

⁴⁰ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, at 177 per Cooke J

⁴¹ Canterbury Earthquake Response and Recovery Act 2010, s 3(a) (see Appendix)

⁴² Canterbury Earthquake Response and Recovery Act 2010, s 6(3) (see Appendix)

⁴³ Canterbury Earthquake Response and Recovery Act 2010, s 7(6) (see Appendix)

an exemption from a protected enactment contained in an unprotected enactment, such as would impliedly repeal part of that protected enactment, is also impermissible. For example, then, an Order in Council inserting a new section into the Summary Offences Act stating that the right to freedom of peaceful assembly⁴⁴ is temporarily suspended would breach s 6(6)(3) CERRA by providing an express exemption from NZBORA.

What of a differently worded provision – one that does not seek to extinguish the right to freedom of peaceful assembly, but which is plainly inconsistent with that right? For example, an Order in Council may make the following modification to s 5A(1) of the Summary Offences Act 1981:

5A Disorderly assembly

- (1) A disorderly assembly is an assembly of 3 or more persons who, in any public place, assemble in such a manner, or so conduct themselves when assembled, as to cause a person in the immediate vicinity of the assembly to fear on reasonable grounds that the persons so assembled—
 - (a) Will use violence against persons or property; or
 - (b) Will commit an offence against section 3 of this Act; or
 - (c) Will disrupt or interfere with or otherwise hinder efforts of a constable or territorial authority or any other person to respond to the Canterbury earthquake]—
in that vicinity.
- (2) [**Canterbury earthquake** has the same meaning as defined in s 4(1) of the Canterbury Earthquake Response and Recovery Act 2010.]

Such a modification is rationally connected to the CERRA purpose of facilitating recovery from the Canterbury earthquake. Putting aside the obvious problem of uncertainty in application,⁴⁵ and keeping in mind the restriction on review for repugnancy with any other enactment described above, does this hypothetical Order in Council constitute an “exemption” from NZBORA or a “modification of a requirement or restriction imposed” by NZBORA? It certainly does not amend the

⁴⁴ New Zealand Bill of Rights Act 1990, s 16

⁴⁵ *Kruze v Johnson* [1988] 2 QB 91, at 108

primary enactment, as it does not expressly refer to the right or to the Act. The Order in Council is, however, plainly inconsistent with the right.

The Ministry of Justice advice to the Attorney-General⁴⁶ on NZBORA consistency appears to have been given on an earlier version of the Bill, and so is of limited help. While the advice says that limitations on NZBORA provisions could only be made by a primary enactment,⁴⁷ it refers only to the “relaxing or suspending” of statutory requirements,⁴⁸ and refers to an expedited regulatory review process that was not present in the introduced or enacted Bill.⁴⁹

Claudia Geiringer’s comments on CERRA⁵⁰ are much more helpful. While I do not agree that an implied requirement of validity necessarily permits all of the normal grounds of review (having argued in favour of a partial ouster of review jurisdiction above), the requirement in s 6 NZBORA that enactments should be given a meaning consistent with the Bill of Rights where possible informs a reading of s 6(6)(c) CERRA to allow review for unjustifiable limitations on the affirmed rights. In order to conform with the right to apply for judicial review,⁵¹ then, s 6(6)(c) CERRA can be read without strain to include indirect inconsistencies with NZBORA rights.

This approach to rights protection allows a court to constrain un contemplated Orders in Council, even where they are rationally connected to CERRA purposes. When confronted with a much more general power to regulate and a more urgent need for executive power in *Halliday*,⁵² Lord Shaw of Dunfermline issued the lone dissenting

⁴⁶ J Orr “Legal advice. Consistency with the New Zealand Bill of Rights Act 1990: Canterbury Earthquake Response and Recovery Bill” (Ministry of Justice, 2010)

⁴⁷ Orr, *ibid*, at [6]

⁴⁸ Orr, *ibid*, at [4]

⁴⁹ Orr, *ibid*, at [6]

⁵⁰ C Geiringer “Comment of 16 September 2010” on D Knight “Canterbury Earthquake Response and Recovery Bill: some examples” (2010) LAWS179 Elephants and the Law <www.laws179.co.nz>

⁵¹ New Zealand Bill of Rights Act 1990, s 27(2)

⁵² *Rex v Halliday*, [1917] AC 260

judgment⁵³ of the House of Lords against an emergency regulation permitting the internment of persons of hostile origins or associations. Lord Shaw characterised the power granted to the Sovereign under the Defence of the Realm Consolidation Act 1914 as one to “judge what is for the [purposes of the Act], and to act accordingly.”⁵⁴ All the enactments of Parliament concerning fundamental constitutional tenets such as notions of liberty and due process were set to one side, subject to regulation; “on the other side stands this super-eminent power of the Government of the day.”⁵⁵ This is similar to the situation under CERRA, with the exception of the enactments protected by s 6(6)(c).

In this environment, Lord Shaw decided that the power provided by Parliament was not expressed with sufficient specificity to permit such severe derogations from the normal requirements of criminal process. This dissent was supported in legal publications from the period⁵⁶ – so despite his singular dissent, it cannot be said that Lord Shaw’s decision was an unusual outlier from an attitude of general deference. Although the power granted to the executive here is not so broad, it does remain dangerous; the difference between cases such as *Halliday*,⁵⁷ *McEldowney*⁵⁸ and *Stevenson*,⁵⁹ which all involved the exercise of executive power during times of war or great public danger, and the present situation in Canterbury, being one of consolidation and recovery following such a terrific event, is also of note. All of this considered, review for NZBORA consistency of CERRA Orders in Council appears more than feasible.

⁵³ Ibid, at 276-305

⁵⁴ Ibid, at 285

⁵⁵ Ibid

⁵⁶ “Notes: *Zadig’s case*” (1917) 33 LQ Rev 205, at 205-6; G. W. Wilton “The Right Hon Lord Shaw of Dunfermline” (1921) 3(3) J Comp Legis & Intl L (3rd series) vii, at viii

⁵⁷ *R v Halliday*, above n 52

⁵⁸ *McEldowney v Forde* [1971] AC 632

⁵⁹ *Stevenson v Reid*, above n 36

Conclusion

The legislative response to the Canterbury earthquake is an embarrassingly retrograde enactment, creating the potential for the worst of executive excesses due to poor, generalised drafting, a partial ouster of judicial review jurisdiction, and a complacent House of Representatives. A better considered Act would have limited Orders to those enactments listed, and would allow more extensive legislative censure and judicial review so to better check the power. Judicial review is limited, but Bill of Rights consistency of Orders in Council remains a requirement.

It is not clear that predetermined executive powers fare much better in a disaster situation. While the response to the Canterbury earthquake was generally competent, the importance of good justifications for emergency responses under existing enactments is clear in light of prosecutions brought for breaches of the Christchurch cordons.

Conclusion

New Zealand's emergency powers law has in recent years largely been codified, with admirable certainty. Despite this, it remains sufficiently robust, through general drafting, statutory powers of direction and common law doctrines, to permit necessary steps to be taken in order to limit the extent of novel or unforeseen emergencies.

There remains a necessity for limitations on emergency power: such situations can show up the worst authoritarian tendencies in frontline responders and Ministers of the Crown alike, the latter being particularly evident in the drafting of CERRA. Legislative checks on executive power, while welcome, have proved insufficient; a strong judicial review jurisdiction in all but the most critical situations is essential if the rights and freedoms of New Zealanders are to be preserved. The NZBORA requires that this jurisdiction be assumed where possible, and generally indicates a more intrusive review than has historically been available. While strong-form or strike-out review is not available to New Zealand courts, and strong notions of parliamentary sovereignty prevent any substantial move towards organic notions of rights or sovereignty, the notion of constitutional dialogue can and should be utilised to rebuke legislative overreach.

APPENDIX

Excerpts from relevant enactments

Canterbury Earthquake Response and Recovery Act 2010

3 Purpose

The purpose of this Act is to—

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

6 Governor-General may make Orders in Council for purpose of Act

- (1) The Governor-General may from time to time, by Order in Council made on the recommendation of the relevant Minister, make any provision reasonably necessary or expedient for the purpose of this Act.
- (2) In making a recommendation under subsection (1), the relevant Minister must—
 - (a) take into account the purpose of this Act; and
 - (b) consult the recovery commission (if any) if practicable; and
 - (c) have regard to the recommendations of the recovery commission (if any).
- (3) The recommendation of the relevant Minister may not be challenged, reviewed, quashed, or called into question in any court.
- (4) An Order in Council made under subsection (1) may grant an exemption from, or modify, or extend any provision of any enactment, including (but not limited to)—
 - (a) the Building Act 2004;
 - (b) the Cadastral Survey Act 2002;
 - (c) the Commerce Act 1986;
 - (d) the Earthquake Commission Act 1993;

- (e) the Health Act 1956:
- (f) the Health and Disability Services (Safety) Act 2001:
- (g) the Historic Places Act 1993:
- (h) the Land Transport Act 1998:
- (i) the Land Transport Management Act 2003:
- (j) the Local Government Act 1974:
- (k) the Local Government Act 2002:
- (l) the Local Government Official Information and Meetings Act 1987:
- (m) the Local Government (Rating) Act 2002:
- (n) the Public Works Act 1981:
- (o) the Rating Valuations Act 1998:
- (p) the Reserves Act 1977:
- (q) the Resource Management Act 1991:
- (r) the Road User Charges Act 1977:
- (s) the Social Security Act 1964:
- (t) the Soil Conservation and Rivers Control Act 1941:
- (u) the Transport Act 1962:
- (v) the Waste Minimisation Act 2008.
- (5) An exemption from, or modification of, or extension of a provision—
 - (a) may be absolute or subject to conditions; and
 - (b) may be made—
 - (i) by stating alternative means of complying with the provision; or
 - (ii) by substituting a discretionary power for the provision.
- (6) Despite subsections (1) and (4), an Order in Council made under this section may not make or authorise—
 - (a) an exemption from or a modification of a requirement to—
 - (i) release a person from custody or detention; or
 - (ii) have any person's detention reviewed by a court, Judge, or Registrar; or
 - (b) an exemption from or a modification of a restriction on keeping a person in custody or detention; or
 - (c) an exemption from or a modification of a requirement or restriction imposed by the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, or the New Zealand Bill of Rights Act 1990; or
 - (d) an amendment to this section, or section 7, 17, or 21.
- (7) Subsections (4) and (5) do not limit subsection (1).

7 Further provisions about Orders in Council

- (1) While it remains in force, every Order in Council made under section 6 has the force of law as if it were enacted as a provision of this Act.
- (2) An Order in Council made under section 6 must provide that it comes into force on a date specified in the Order in Council and that date may be before or on or after the date on which it is made, but not earlier than 4 September 2010.

- (3) An Order in Council made under section 6 expires on a date appointed in the Order in Council, being a date not later than 1 April 2012, and different dates may be appointed for the expiry of different provisions.
- (4) An Order in Council made under section 6 may be retrospective only to the extent provided for in subsection (2).
- (5) No Order in Council made under section 6 may be held invalid because—
 - (a) it is, or authorises any act or omission that is, repugnant to or inconsistent with any other Act; or
 - (b) it confers any discretion on, or allows any matter to be determined or approved by, any person.
- (6) Subsection (5) is subject to section 6(6).

8 Regulations (Disallowance) Act 1989 applies

Despite section 7(1), the Regulations (Disallowance) Act 1989 applies to an Order in Council made under section 6.

17 When sections 6 to 16 cease to apply

Sections 6 to 16 cease to apply on the earlier of the following:

- (a) a date specified by the Governor-General by Order in Council made on the recommendation of the responsible Ministers; or
- (b) the close of 1 April 2012.

Civil Defence Emergency Management Act 2002

3 Purpose

The purpose of this Act, which repeals and replaces the Civil Defence Act 1983, is to—

- (a) improve and promote the sustainable management of hazards (as that term is defined in this Act) in a way that contributes to the social, economic, cultural, and environmental well-being and safety of the public and also to the protection of property; and
- (b) encourage and enable communities to achieve acceptable levels of risk (as that term is defined in this Act), including, without limitation,—
 - (i) identifying, assessing, and managing risks; and
 - (ii) consulting and communicating about risks; and
 - (iii) identifying and implementing cost-effective risk reduction; and
 - (iv) monitoring and reviewing the process; and
- (c) provide for planning and preparation for emergencies and for response and recovery in the event of an emergency; and
- (d) require local authorities to co-ordinate, through regional groups, planning, programmes, and activities related to civil defence emergency management across the areas of reduction, readiness, response, and recovery, and encourage co-operation and joint action within those regional groups; and

- (e) provide a basis for the integration of national and local civil defence emergency management planning and activity through the alignment of local planning with a national strategy and national plan; and
- (f) encourage the co-ordination of emergency management, planning, and activities related to civil defence emergency management across the wide range of agencies and organisations preventing or managing emergencies under this Act and the Acts listed in section 17(3).

4 Interpretation

In this Act, unless the context otherwise requires,—

emergency means a situation that—

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

7 Precautionary approach

All persons exercising functions in relation to the development and implementation of civil defence emergency management plans under this Act may be cautious in managing risks even if there is scientific and technical uncertainty about those risks.

66 Minister may declare state of national emergency

- (1) The Minister may declare that a state of national emergency exists over the whole of New Zealand or any areas or districts if at any time it appears to the Minister that—
 - (a) an emergency has occurred or may occur; and
 - (b) the emergency is, or is likely to be, of such extent, magnitude, or severity that the civil defence emergency management necessary or desirable in respect of it is, or is likely to be, beyond the resources of the Civil Defence Emergency Management Groups whose areas may be affected by the emergency.
- (2) The Minister must advise the House of Representatives as soon as practicable where a state of national emergency has been declared or extended.
- (3) If a declaration of a state of national emergency is made, any other state of emergency then in force in the area to which the state of national emergency applies ceases to have effect.

67 Parliament must meet if state of national emergency declared

- (1) Subsection (3) applies if—
 - (a) a declaration of a state of national emergency is made; and
 - (b) Parliament—

- (i) has been prorogued until a date more than 7 days after the date on which the declaration is made or the date on which Parliament is next to meet has not been determined; or
 - (ii) has been dissolved or has expired and no Proclamation has been made summoning Parliament to meet on a day not later than 7 days after the date on which the declaration is made.
- (2) Subsection (4) applies if—
 - (a) a declaration of a state of national emergency is made; and
 - (b) the House of Representatives is adjourned until a date more than 7 days after the date on which the declaration is made.
- (3) If this subsection applies,—
 - (a) a Proclamation must be made appointing a day for Parliament to meet, being—
 - (i) a day not later than 7 days after the date of the making of the declaration of a state of national emergency; or
 - (ii) if the declaration is made after the date on which Parliament has been dissolved or has expired and before the latest day appointed under the Electoral Act 1993 for the return of the writ for the election of members of Parliament, a day not later than 7 days after the latest day appointed for the return of the writ; and
 - (b) Parliament must meet and sit on the day appointed.
- (4) If this subsection applies,—
 - (a) the Speaker of the House of Representatives must, as soon as practicable, by notice in the *Gazette*, appoint a day and time for the House of Representatives to meet, being a day not later than 7 days after the date of the making of the declaration; and
 - (b) the House of Representatives must meet and sit at the time and on the day specified in the notice.

68 Declaration of state of local emergency

- (1) A person appointed for the purpose under section 25 may declare that a state of local emergency exists in the area for which the person is appointed if at any time it appears to the person that an emergency has occurred or may occur within the area.
- (2) A person who is authorised to declare a state of local emergency may declare that the state of local emergency exists in respect of the whole area of the Civil Defence Emergency Management Group concerned or 1 or more districts or wards within the area.
- (3) A state of local emergency may be declared in respect of an area that is not affected by an emergency if, in the opinion of any person authorised to declare a state of local emergency in respect of that area, the resources of that area are needed to assist any other area where a state of local emergency is in force.
- (4) The fact that a person purporting to be authorised by section 25 declares a state of local emergency is, in the absence of proof to the contrary, conclusive evidence that the person is a person authorised under that section to do so.

- (5) Nothing in this section authorises a person to declare a state of local emergency for any part of New Zealand while a state of national emergency is in force in respect of that part.

84 Minister's power of direction

- (1) This section applies if—
- (a) a state of emergency is in force, or the Minister considers that an imminent threat of an emergency exists; and
 - (b) the Minister considers that, having regard to all the circumstances, it is expedient to exercise the power in subsection (2).
- (2) If this section applies, the Minister may direct the Director or any Civil Defence Emergency Management Group or person—
- (a) to perform or exercise any of the functions, duties, or powers conferred on that person or Group under this Act; or
 - (b) to cease to perform or exercise any of the functions, duties, or powers conferred on that person or Group under this Act.
- (3) If, under this section, the Minister directs any Civil Defence Emergency Management Group or person to perform any function or duty or exercise any power, the Minister may direct that the function, duty, or power must be performed or exercised under the control and to the satisfaction of the Director.

86 Evacuation of premises and places

If a state of emergency is in force and, in the opinion of a Controller or any constable, the action authorised by this section is necessary for the preservation of human life, that person or a person authorised by him or her may require, within the area or district in which the emergency is in force,—

- (a) the evacuation of any premises or place, including any public place; or
- (b) the exclusion of persons or vehicles from any premises or place, including any public place.

87 Entry on premises

If a state of emergency is in force in any area, a Controller or a constable, or any person acting under the authority of a Controller or constable, may enter on, and if necessary break into, any premises or place within the area or district in respect of which the state of emergency is in force if he or she believes on reasonable grounds that the action is necessary for—

- (a) saving life, preventing injury, or rescuing and removing injured or endangered persons; or
- (b) permitting or facilitating the carrying out of any urgent measure for the relief of suffering or distress.

88 Closing roads and public places

If a state of emergency is in force, a Controller or a constable, or any person acting under the authority of a Controller or constable, or any person so authorised in a relevant civil defence emergency management plan, may, in order to prevent or limit the extent of the emergency,

totally or partially prohibit or restrict public access, with or without vehicles, to any road or public place within the area or district in respect of which the state of emergency is in force.

89 Removal of aircraft, vessels, vehicles, etc

If a state of emergency is in force, a Controller or a constable, or any other person acting under the authority of a Controller or constable, may, in order to prevent or limit the extent of the emergency,—

- (a) remove from any place within the area or district in respect of which the state of emergency is in force, any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle impeding civil defence emergency management; and
- (b) if reasonably necessary for that purpose, use force or break into the aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle.

90 Requisitioning powers

- (1) This section applies if a state of emergency is in force and, in the opinion of a Controller or a constable, the action authorised by this section is necessary for the preservation of human life.
- (2) The Controller or constable, or a person authorised by him or her, may direct the owner or person for the time being in control of any land, building, vehicle, animal, boat, apparatus, implement, earth-moving equipment, construction materials or equipment, furniture, bedding, food, medicines, medical supplies, or any other equipment, materials, or supplies, to immediately place that property (**requisitioned property**)—
 - (a) under his or her control and direction; or
 - (b) under the control and direction of a Controller or a constable, or person authorised by that Controller or constable, if that person has requested the person making the requisition to do so on his or her behalf.
- (3) A person exercising any power conferred on him or her by this section must give to the owner or person in charge of the requisitioned property a written statement specifying the property that is requisitioned and the person under whose control the property is to be placed.
- (4) If the owner or person for the time being in control of any property that may be requisitioned under this section cannot be immediately found, a Controller or a constable, or a person authorised by a Controller or constable, may assume immediately the control and direction of the requisitioned property.
- (5) If a person assumes the control and direction of requisitioned property under subsection (4), that person must ensure that, as soon as is reasonably practicable in the circumstances, a written statement specifying the property that has been requisitioned and the person under whose control it has been placed is given to the owner or person formerly in charge of the requisitioned property.
- (6) The owner or person in control of any property immediately before it is requisitioned under this section must provide the person exercising the power under this section with any assistance that the person may reasonably require for the effective and safe use of that property.

91 Power to give directions

While a state of emergency is in force, a Controller or a constable, or any person acting under the authority of a Controller or constable, may—

- (a) direct any person to stop any activity that may cause or substantially contribute to an emergency;
- (b) request any person, either verbally or in writing, to take any action to prevent or limit the extent of the emergency.

92 Power to carry out inspections, etc

While a state of emergency is in force, a Controller or a constable, or any person acting under the authority of a Controller or constable, may examine, mark, seize, sample, secure, disinfect, or destroy any property, animal, or any other thing in order to prevent or limit the extent of the emergency.

98 Obstruction

A person commits an offence who, during a state of emergency, threatens, assaults, or intentionally obstructs or hinders any person in that person's exercise or performance of a function, power, or duty under this Act.

99 Failure to comply with direction to evacuate premises or place

- (1) A person commits an offence who intentionally fails to comply with any direction given to the person under section 86.
- (2) It is a defence to any proceedings for an offence against this section if the court is satisfied that the Controller or constable did not have reasonable grounds for believing that in all the circumstances of the case the requirement was necessary for the preservation of human life.

100 Failure to comply with prohibition or restriction on access to road or public place

A person commits an offence who intentionally fails to comply with any prohibition or restriction imposed under section 88.

101 Offences in relation to requisitioning

- (1) A person commits an offence who—
 - (a) intentionally fails to comply with any direction given to him or her under section 90(2); or
 - (b) intentionally fails to provide assistance under section 90(6).
- (2) It is a defence in any proceedings for an offence against subsection (1)(a) if the court is satisfied that the Controller or the constable did not have reasonable grounds for believing that in all the circumstances of the case the direction requisitioning property was necessary for the preservation of human life.
- (3) It is a defence in any proceedings for an offence against subsection (1)(b) if the court is satisfied that the person had reasonable grounds for not providing assistance.

102 Failure to comply with direction

A person commits an offence who intentionally fails to comply with a direction given under section 91(a).

104 Penalty for offences

A person who commits an offence against this Act is liable on summary conviction,—

- (a) in the case of an individual, to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$5,000, or both:
- (b) in the case of a body corporate, to a fine not exceeding \$50,000.

Public Safety Conservation Act 1932**3 Emergency Regulations**

- (1) Where the Proclamation of Emergency has been made, and so long as the Proclamation is in force, it shall be lawful for the Governor-General, by Order in Council, to make all such regulations as he thinks necessary for the prohibition of any acts which in his opinion would be injurious to the public safety, and also to make all such other regulations as in his opinion are required for the conservation of public safety and order and for securing the essentials of life to the community.

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