



Inquiry into Parliament's legislative response to future national emergencies

Report of the Regulations Review
Committee

Fifty-first Parliament
Hon David Cunliffe, Chairperson
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Inquiry into Parliament's legislative response to future national emergencies

Summary of recommendations

The Regulations Review Committee makes the following recommendations to the Government:

Theme One: executive powers to override enactments should extend only as far as is necessary to deal with the emergency itself, and should only be exercised for that purpose

- 1 Emergency legislation should be bespoke for each national emergency and confer powers only as necessary to each situation. Generic national emergency legislation should not be passed in advance (page 19).
- 2 As much time as possible in the circumstances should be allowed for select committee consideration of emergency legislation (page 19).
- 3 Existing select committees should consider emergency legislation (page 20).
- 4 Emergency legislation should take the form of primary legislation wherever reasonably possible, rather than relying on broad powers to make delegated legislation (page 20).

Theme Two: emergency legislation should incorporate safeguards

- 5 Powers to override enactments by Order in Council should provide a positive list of the specific enactments that can be overridden (page 21).
- 6 Orders in Council should be subject to scrutiny before and after they are made (page 22).
- 7 The right to seek judicial review of Orders in Council made under emergency legislation should be preserved and upheld (page 22).
- 8 Legislation for national emergencies should have regard to international norms and benchmarks (page 23).
- 9 Bespoke emergency powers should be in force only for as long as is reasonably necessary, and should have built-in sunset provisions (page 24).

Theme Three: any legislative response to a national emergency should be designed to ensure that recovery from the emergency begins on day one

- 10 Legislation must reflect the principle that recovery from a national emergency starts on day one (page 24).
- 11 The responsible Minister should formally report, annually, to the House on the exercise of powers under the emergency legislation and on progress with the recovery effort (page 25).

1 Introduction

This inquiry was referred to the Regulations Review Committee by the House in July 2014. It aims to establish constitutional principles for the arrangement and delegation of recovery powers in the case of a national emergency.

Legislation enacted following the Canterbury earthquakes had raised questions about the constitutional implications of provisions to make delegated legislation for such purposes, and the institutional arrangements needed for the long-term recovery from a national emergency. These questions are relevant today, as the House considers emergency legislation in response to the Hurunui/Kaikōura earthquakes of November 2016.¹

The inquiry had the following terms of reference. It was to:

- consider the overarching principles governing the delegation of Parliament's law-making powers in the context of recovery from a national emergency
- propose appropriate enhancements to the framework for both primary and delegated legislation to confer the powers necessary for recovery after the lifting of a state of national emergency
- consider and recommend to the House and other appropriate bodies which constitutional and other enactments (or provisions in enactments) should expressly not be modified by delegated legislation, and make recommendations accordingly
- establish guiding principles for the expiry of recovery legislation, and of modifications to enactments under associated delegated legislation
- examine the legitimacy of actions taken under recovery legislation once the authority to act under the legislation has expired
- determine the extent and nature of the parliamentary scrutiny that would be appropriate in passing a recovery bill
- propose appropriate safeguards and checks and balances on the use of powers delegated to the executive
- consider the role of the House in scrutinising delegated legislation made under a recovery Act.
- consider the extent of the role of the judiciary in examining recovery legislation, and whether any limits on it might be appropriate
- examine alternative models for recovery legislation used in other jurisdictions
- consider lessons learned from the implementation of recovery legislation after the Canterbury earthquakes.

2 The events that led to this inquiry

The September 2010 Canterbury earthquake

A magnitude 7.1 earthquake struck Canterbury on 4 September 2010 at 4:35am. No lives were lost, but there was significant property damage.

At 9:33am a state of emergency was declared for Christchurch City under section 68 of the Civil Defence Emergency Management Act 2002 (the 2002 Act). Soon afterwards, a state of emergency was declared for the other two affected local authority districts. The declaration relating to Christchurch city expired on 6 September 2010, but was extended by three further declarations through to 16 September 2010.²

Maintaining a state of emergency lacks the regulatory precision necessary to address the ongoing need for response and recovery.³ A declaration under the 2002 Act has a short life, and the use of its powers for emergency management is intended to be *in extremis* and necessarily short term.⁴

The Canterbury Earthquake Response and Recovery Act 2010

Accordingly, on 8 September 2010, the Attorney-General directed that a bill be drafted to allow legislative dispensations available during a state of emergency under the 2002 Act to continue to be available after the state of emergency was lifted, to help expedite a quicker and fuller recovery.⁵

That bill became the Canterbury Earthquake Response and Recovery Act 2010 (the 2010 Act). It was taken through all stages by leave of the House on 14 September 2010.⁶ It was not considered by a select committee and no public submissions were called for. The 2010 Act came into force the following day, 15 September 2010.

The 2010 Act provided that the Governor-General may make Orders in Council which “may grant an exemption from, or modify, or extend any provision of any enactment”.⁷ Such Orders in Council could be retrospective back to the date of the earthquake.⁸

Several safeguards existed:

- although the Order in Council powers were general in their application, a number of Acts were excluded (a “negative list”) ⁹
- such orders could be made only if reasonably necessary or expedient for the purpose of the Act¹⁰
- the Regulations (Disallowance) Act 1989 applied to the Orders in Council,¹¹ so the Regulations Review Committee examined all orders made¹²
- the Act was temporary; neither it, nor any Orders in Council made under it, would apply after 1 April 2012
- the Orders in Council could be scrutinised by the High Court on judicial review. Restrictions on judicial review related only to the recommendation to make an Order in Council, not the order itself.¹³

Notwithstanding these safeguards, the 2010 Act was criticised¹⁴ as being contrary to well-established constitutional conventions that provisions with retrospective effect should not be enacted, and the executive should not be given the power to override Acts of Parliament.¹⁵ Restrictions on judicial review of Orders in Council were also criticised.

In *An open letter to New Zealand's people and their Parliament*, 27 legal scholars argued that, in passing the 2010 Act, Parliament had “abandon[ed] established constitutional values and principles in order to remove any inconvenient legal roadblock...a dangerous and misguided step.” The open letter described the 2010 Act as “an extraordinarily broad transfer of law-making power away from Parliament and to the executive branch, with minimal constraints on how that power may be used.”¹⁶

Thirty orders were made under the 2010 Act. They extended deadlines in, modified the application of, or created exemptions to, provisions in 19 Acts.¹⁷

The Regulations Review Committee received no complaints about any of the orders made under the 2010 Act.

Interim report of the Regulations Review Committee (December 2010)

In an interim report presented to the House in December 2010, the Regulations Review Committee outlined its scrutiny procedures for seven of the first Orders in Council made under the 2010 Act.¹⁸ The report covered its request for information from the Parliamentary Counsel Office (PCO) about the explanatory notes to the orders as well as its examination of regulations relating to the earthquake, but not made under the 2010 Act.

The committee tested with instructing agencies and the PCO the justification for the orders and whether they were consistent with the purpose of the 2010 Act.¹⁹ The PCO was requested to provide extended explanatory notes for the orders.²⁰ The committee concluded that all the orders were within the scope of the empowering provision and did not recommend that the House disallow any of them.²¹

The then committee chair, Charles Chauvel MP, noted in the House that the Orders in Council made under the 2010 Act were:

...moderate... There has not been an attempt, to date, to overreach the powers that the Minister has had conferred on him by this Parliament. I will put that on record happily and freely.²²

The February 2011 Canterbury earthquake

A much more devastating 6.3 magnitude earthquake struck Canterbury on 22 February 2011. In it, 185 people lost their lives and there was extensive damage to personal and public property.

A state of national emergency was declared under the 2002 Act the following day. This was extended, week by week, for two months. That period allowed time for development of policy to implement a long term recovery programme, and for drafting a bill to implement that programme.²³ At the same time, the 2010 Act continued to apply, as the February 2011 earthquake was technically an aftershock from the September 2010 earthquake.

The 2011 Act

Although the February earthquake was more severe in its effects than that of 2010, the legislative response was slower and more considered. Preliminary drafting instructions reached PCO on 7 March 2011. The resulting Canterbury Earthquake Recovery Bill was

read for the first time on 12 April 2011, and referred to the Local Government and Environment Committee. The committee heard submissions in Wellington later that same day, and in Christchurch and Wellington on 13 April 2011.²⁴ Special instructions that accompanied the bill's referral meant that the committee was not empowered to recommend amendments, only to hear the submissions and report.²⁵

Several criticisms have been made about the select committee process:²⁶

- there was a lack of opportunity for formal public input (the bill was not available until 4pm on the day before submissions began to be heard)
- submitters were selected, and there was no general call for public comment
- those who wished to make a submission had less than 24 hours to prepare and present it
- neither the Law Commission nor the Legislation Advisory Committee was consulted during the development of the bill.

The Government took the Canterbury Earthquake Recovery Bill through all of its remaining stages under urgency on 14 April 2011.²⁷ Forty clauses were amended in the Committee of the whole House by a Supplementary Order Paper.²⁸ The Canterbury Earthquake Recovery Act 2011 (the 2011 Act) came into force on 19 April 2011.²⁹

The 2011 Act included provisions setting out the powers, duties and functions of the Canterbury Earthquake Recovery Authority (CERA) and the Minister for Canterbury Earthquake Recovery. It also required community input into certain ministerial decisions, provided for the development and implementation of various planning instruments, and created powers for information gathering, entry, surveys, building works, directions, compliance orders, and the acquisition and disposal of real property. The 2011 Act, unlike the 2010 Act, provided for compensation to be paid in relation to demolition of property and compulsory acquisition of land under the Act.³⁰

The power to make Orders in Council under the 2011 Act was constrained by a less specific and more recovery-focused purpose provision.³¹

The 2011 Act was less heavily criticised than its 2010 predecessor. Additional safeguards were also provided under the 2011 Act. They included the following:

- the Minister was required to review its operation and effectiveness annually, and recommend any amendments³²
- the Minister was required to have regard to the recommendations of the Canterbury Earthquake Recovery Review Panel when recommending an Order in Council (in practice, this requirement was met by the executive submitting a finalised draft of the proposed order to the Review Panel for its consideration before submitting that order to the Executive Council)³³
- community and cross-party forums provided a way to share information between local and central agencies³⁴
- the Orders in Council made under the 2011 Act were generally in the form of lifting burdens rather than imposing them.³⁵

Oversight by the Regulations Review Committee

The Regulations (Disallowance) Act 1989 (and subsequently the Legislation Act 2012) applied to the Orders in Council, so the Regulations Review Committee examined all orders made.

Regulations Review Committee's Interim Report (October 2011)

The committee's interim report of October 2011 set out its further scrutiny of two orders referred to in its December 2010 interim report, and its scrutiny of other orders made since then. The committee did not need to seek additional information about many of the orders. Where it had concerns, they were usually resolved through correspondence with departments. However, the committee noted:³⁶

Despite this, we consider it very important to monitor the operation of orders in force and any new orders that may be made, because the Regulations Review Committee's scrutiny is the only way in which Parliament can exercise any oversight of the powers conferred on the Government to make these orders. Because of this, and as the Canterbury Earthquake Recovery Act will have effect until 2016, we strongly encourage the Regulations Review Committee of the 50th Parliament to continue to investigate the orders made under the Act, and report to Parliament as they see fit on their scrutiny.

Regulations Review Committee's activity in 2012

In 2012, the Regulations Review Committee asked the Inland Revenue Department to clarify the effect of the Canterbury Earthquake (Tax Administration Act) Order (No 2) 2011 (SR 2011/375) made under the 2011 Act. The Committee considered the clarification satisfactory and did not take any further action.³⁷

The committee also expressed concerns about another order, in that the Canterbury Earthquake Recovery Review Panel's recommendations on the draft Order in Council had not been presented to the House as soon as practicable after receiving the recommendations.³⁸ The committee received an assurance from Land Information New Zealand and the CERA that the delay in presenting the panel's recommendations to the House was an oversight, and the process had been reviewed to ensure it would not happen again.

Regulations Review Committee's activity in 2013

In 2013, the committee sought information from relevant government departments or ministries about four orders made under the 2011 Act.³⁹

It received two complaints about the Canterbury Earthquake (Building Act) Order 2011. This order modified the Building Act 2004 to give three Canterbury area councils the authority to issue an extended section 124 notice, or "red card", under the Building Act, where there was a risk of injury or death from the collapse of nearby land. The committee considered that none of the Standing Orders' grounds raised by the complainants was made out.⁴⁰ It noted that the order had expired and its replacement did not empower the issuing of extended section 124 notices. The committee expressed its concern, however, that section 124 notices were still in force and recommended to the Government that, as a matter of urgency, it issue explicit guidelines to the relevant local authorities relating to the removal of the extended section 124 notices that had been issued under the Canterbury Earthquake (Building Act) Order 2011.

Consideration in the 51st Parliament

The current Regulations Review Committee was established at the start of the 51st Parliament in October 2014. In the following year we examined the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (LI 2014/228) and noted two matters of interest: the retrospective effect of clause 6(5) and limitations on rights of appeal from a decision of the hearings panel. A matter of greater significance concerned whether the Canterbury Earthquake Recovery Review Panel was properly constituted under section 72 of the 2011 Act when it had recommended that the order be made.

We noted that the panel's convenor and legal member, Sir John Hansen, had recused himself because of a proposal that he become chairperson of the hearings panel. Some members of our committee considered that the order was invalid, while other members considered that the panel remained properly constituted notwithstanding Sir John's recusal (as he remained one of its members).⁴¹ In any event, the order was validated by the Greater Christchurch Regeneration Act 2016 (the 2016 Act).⁴²

Repeal of 2011 Act by the Greater Christchurch Regeneration Act 2016

The 2011 Act was repealed on 16 April 2016 by the 2016 Act.⁴³ The 2016 Act also revoked 33 of the Orders in Council made under the 2011 Act or the 2010 Act (and continued under the 2011 Act).⁴⁴ Nine Orders in Council were continued, amended and validated by the 2016 Act.⁴⁵

The 2016 Act recognises the shift in focus from recovering from the Canterbury earthquakes to regeneration.⁴⁶ It does not continue the power to make further Orders in Council granting exemptions from, modifying, or extending the provisions of any enactment. It continues the Minister's power to suspend, amend or revoke a Resource Management Act document, council plan, or other planning documents.⁴⁷ However, the Minister's powers to suspend or cancel resource consent and other entitlements protected under the Resource Management Act 1991 are not continued under the 2016 Act.⁴⁸

Lessons learned from the 2010 and 2011 Acts

We considered a paper by three Parliamentary Counsel—Mark Gobbi, Dr Briar Gordon, and Fiona Lincoln—who suggest that a lesson learned from the adverse reactions to the powers delegated under the 2010 Act was that primary legislation should be used as far as could reasonably be predicted for the purposes of addressing emergency measures.⁴⁹

They refer to the value of:

- taking a measured approach to the development of a remedial legislative response with adequate pre-introduction consultation
- avoiding as far as possible a truncated parliamentary process
- ensuring appropriate mechanisms exist for coordinating the agencies involved in both the response and recovery efforts
- ensuring that people and communities are heard (as well as protected from further injurious effects)
- making balanced provision for local participation (rather than imposing a “top down” model)

- providing for transparent planning processes, including community and stakeholder involvement
- enabling collaborative stake-holder opportunities with overarching planning requirements
- ensuring that the powers to make delegated legislation are adequate for the purpose, while also placing appropriate limits on the power handed to the executive, such as by including in the primary legislation such powers as can clearly be anticipated as necessary
- providing as necessary for the protection of executive action to discourage unworthy challenges to the legitimate purposes of the primary legislation
- permitting judicial supervision of the exercise of executive powers.⁵⁰

Gobbi, Gordon, and Lincoln also noted that some criticisms of the order-making powers were repeated, including that they lacked safeguards and were open to abuse through the test of expediency (orders could “make any provision that is reasonably necessary or expedient for all or any of the purposes stated in section 3(a) to (g)”)⁵¹.

We agree that valuable lessons were learnt from the process of enactment and application of the 2010 and 2011 Acts. We do, however, take a slightly different view on the penultimate point in relation to discouraging unworthy challenges to executive action. We believe that whether a challenge is “unworthy” will often be in the eye of the beholder. As we set out later, we consider that one of the important safeguards against misuse of broad powers to make Orders in Council is unfettered access to the courts to seek review of the lawfulness of an order.

The genesis of the present inquiry

In 2011, the Standing Orders Committee of the 49th Parliament recommended that there be an inquiry into Parliament’s legislative response to a national emergency, particularly in terms of how it enables ongoing response and recovery.⁵² It recommended allowing a reasonable period to enable the progress of recovery from the Canterbury earthquakes before this work was undertaken.

In 2014, the Standing Orders Committee of the 50th Parliament determined that the time had come for such an inquiry. It noted that the legislation passed in the aftermath of the Canterbury earthquakes had raised some significant issues in terms of parliamentary oversight and constitutional matters. It considered that such high-level considerations should be settled before they need to be reflected in legislation in the wake of the next national emergency.

On 30 July 2014, the House instructed the Regulations Review Committee to inquire into Parliament’s legislative response to future national emergencies, and to make a report to the House. In moving the instruction, the Leader of the House, Hon Gerry Brownlee, noted that:

...it would be good—and Parliament agrees it would be good—to set out constitutional principles for the arrangement and delegation of recovery powers for the House’s ready reference on the next occasion, should this country be unfortunate enough to require the passing of special disaster-recovery legislation.

...I think it is best that the way in which the Act is tested is through having the Regulations Review Committee formally look at the way in which that Act is being used. ... I think it is important that we establish a way that gives some surety, particularly to the courts, that Parliament is constantly reaffirming what it intended when it passed legislation.⁵³

3 The inquiry: the process and issues considered

On 17 December 2014, we issued a statement detailing the terms of reference of our inquiry (see Chapter 1 above), and explaining that its role was not to deal with substantive issues arising from the Canterbury earthquake, but that the review may be informed by recent experiences, including Canterbury, in considering the use of executive power and delegated legislation.⁵⁴

We described the purpose of the inquiry as being:⁵⁵

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

In undertaking this work, we have been aware that several other related initiatives are either underway or have been undertaken. These include the review by the Ministry of Business, Innovation and Employment of building emergency management under the Building Act 2004; the Department of the Prime Minister and Cabinet's Earthquake Recovery Learning and Legacy Programme; and the Ministry for the Environment's work on the development of a National Policy Statement for the management of natural hazards under the Resource Management Act. We are not seeking to replicate these initiatives, but to focus on the specific mandate of the Regulations Review Committee: that is, to examine the use of delegated legislation and its relation to empowering statutes, as relevant to our terms of reference.

Submissions that we received

On 7 May 2015, we made an interim report that included a catalogue of existing emergency powers on the statute book. This was intended to help inform submissions from interested parties. When we made this report, we set a deadline of 1 August 2015 for submissions to be sent to us. We received 32 written submissions and heard oral evidence from 17 submitters at hearings in Wellington and Christchurch.⁵⁶ Some of the recurring themes in the submissions were:

- the desirability of having the legislation necessary for recovery from a national emergency prepared, as much as is possible, in advance
- the difficulty of preparing generic legislation to comprehensively cover the wide range of potential emergencies and that it may be preferable to adopt a sectoral approach where emergency legislation is tailored to the needs of particular emergencies, as recommended by the Law Commission in its 1991 *Final Report on Emergencies*
- concerns about the use of Orders in Council to override primary legislation

- the need to ensure that there is robust scrutiny and other safeguards on the enactment and application of legislation following a national emergency, including through the courts
- the need to ensure that vulnerable members of the community are adequately protected
- that legislation should be consistent with international benchmarks such as:
 - the Guiding Principles of the Sendai Framework for Disaster Risk Reduction 2015–2030
 - the United Nations Inter-Agency Standing Committee (IASC) Operational Guidelines on Human Rights and Natural Disasters
 - the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles)
 - the rights affirmed in the New Zealand Bill of Rights Act 1990
- that emergency legislation should only be in force for as long as is absolutely necessary before resumption of normal law occurs
- that emergency legislation should recognise that recovery starts from day one of the emergency
- that emergency legislation should balance local community involvement with “top-down” central government measures.

The Law Commission’s report on emergencies

We also noted and spent time considering an important piece of work in this area by the Law Commission. In 1991, the Law Commission published its Final Report on Emergencies.⁵⁷ This was concerned primarily with the response phase of emergencies, whereas our inquiry is focused on legislation for the recovery phase. Nevertheless, several aspects of the Law Commission’s work are well worth noting in the context of the current inquiry, and we have consulted it extensively.

First, the Law Commission recommended a sectoral approach to the grant of emergency response powers. That is, powers should be tailored to the needs of the particular emergency. It considered there should not be a general “national emergencies” statute containing a broad emergency regulation-making power.⁵⁸

Second, the Law Commission acknowledged the need for there to be provisions empowering the making of delegated legislation that would override primary legislation, in two kinds of emergency situations where it may not be feasible to confer the necessary powers, or all of them, in the governing statute:⁵⁹

- The first such situation is to deal with the possibility that events take an unexpected turn.
- The second situation is where it is not possible to know in advance the form the emergency may take. The measures required to deal with it may extend across the whole economy. War is cited by the Law Commission as the prime example where “the conferral of powers by emergency regulations will then be the first recourse, not the last, and the power to make those regulations will be a general one”. Indeed, the Law Commission’s draft War Emergencies Act includes such a provision.⁶⁰

However, the Law Commission considered that a far-reaching empowering provision of this kind would need to be made subject to specific limits:

In the case of the draft War Emergencies Act these limits prohibit the making of regulations inconsistent with certain other Acts or interfering with the liberty of the person in certain ways...And, even where the regulation-making power remains wide, the regulations must still be capable of being related to the general purpose of the statute.⁶¹

Reviewing the current legislative framework for emergencies

The Civil Defence Emergency Management Act (the 2002 Act) sets out the primary legislative framework for managing recovery from emergencies. It promotes a “Four R’s approach”—reduction, readiness, response, and recovery, in addressing emergency management.⁶² A summary of the current legislative framework for managing recovery from emergencies is set out in diagrammatic form as Appendix E to this report.

The 2002 Act was thought to have significant shortcomings relating to managing recovery from emergencies.⁶³ The Ministry of Civil Defence and Emergency Management (MCDEM) has been engaged in reviewing the legislative framework for recovery from emergencies. MCDEM’s review entails two stages.

Stage One is focused on small- to moderate-scale emergencies (which are the most frequent experienced in New Zealand, for example weather-related emergencies such as the 2004 North Island storm, the 2005 Matata floods, the 2006 Canterbury snowstorm, and the 2007 Northland storms), and enhancing the recovery provisions in the 2002 Act.

Stage Two is focused on large-scale emergencies, such as the February 2011 earthquake, and what legislation might be needed for recovery.

Stage One of MCDEM’s review has resulted in the Civil Defence Emergency Management Amendment Act 2016.⁶⁴ The 2016 Amendment Act aims to strengthen the legislative framework for recovery by introducing provisions that:

- provide for a mandate for roles and responsibilities that apply for the duration of the recovery from an emergency
- strengthen recovery planning
- ensure a seamless transition from the response to an emergency to the initial recovery period, by ensuring appropriate and effective statutory powers are available
- create a permanent legislative authority to allow for Crown funding of response and recovery costs.

In relation to Stage Two of MCDEM’s review, it should be noted that the Civil Defence Emergency Management Amendment Act 2016 does not distinguish between emergencies of small to moderate scale, and national emergencies (apart from in the explanatory note to the bill). Accordingly, the recovery-focused provisions in the Act will, in practice, be able to be used in national emergencies, or large-scale local emergencies until any bespoke legislation is enacted.⁶⁵ The Act lacks any powers to make Orders in Council, such as those in the 2011 and 2010 Acts. An important question is whether such Order in Council-making powers should be included in future legislation for recovery from national emergencies.

This question is expected to arise again soon after this Report is finalised, when Parliament considers the Hurunui/Kaikōura Earthquakes Recovery Bill 2016 on 1 December 2016. The Government has announced this Bill will establish a process that enables plans and bylaws to be amended by Order in Council.

Assessment of the 2010 Act

The view of the Legislation Advisory Committee

We noted the view of the Legislation Advisory Committee. This body was critical of the Order in Council-making powers, which it described as lacking safeguards and being open to abuse through the test of “expediency”. The committee observed that orders could “make any provision that is reasonably necessary or expedient for all or any of the purposes stated in section 3(a) to (g)”.⁶⁶

The open letter to New Zealand's people and their Parliament

We have referred above to *An open letter to New Zealand's people and their Parliament*, in which a group of 27 legal scholars from New Zealand and overseas outlined deep concerns over the constitutional implications of the 2010 Act. In particular, the writers noted that:⁶⁷

- individual government Ministers, through Orders in Council, may change virtually every part of New Zealand's statute book in order to achieve very broadly defined ends, thereby effectively handing to the executive branch Parliament's power to make law
- the legislation forbids courts from examining the reasons a Minister has for thinking an Order in Council is needed, as well as the process followed in reaching that decision
- Orders in Council are deemed to have full legislative force, such that they prevail over any inconsistent parliamentary enactment
- persons acting under the authority of an Order in Council have protection from legal liability, with no right to compensation should their actions cause harm to another person.

The writers of the open letter expressed the view that the 2010 Act stood as a “dangerous precedent for future ‘emergency’ situations” because, inevitably, there would be calls for a similar legislative response to future events. The 2011 Act contained similar Order in Council-making powers, so these concerns remained pertinent.

Previous reports of the Regulations Review Committee

The Regulations Review Committee has previously expressed concerns about regulation-making powers that authorise regulations overriding primary legislation. In 2014, the then committee issued a report on transitional override powers—powers authorising the making of regulations that can amend or override primary legislation during a specified transitional period.⁶⁸

The report noted that a transitional override power is a type of Henry VIII provision,⁶⁹ because it authorises delegated legislation to amend, suspend, or override primary legislation. The committee endorsed the view of the United Kingdom's Donoughmore Committee that Henry VIII provisions should be avoided unless “demonstrably essential”.⁷⁰ This reflects the constitutional principle that primary legislation should rarely if

ever be overridden, suspended, or amended by delegated legislation, and certainly not without clear and express authority to do so. As former Regulations Review Committee members have stated:⁷¹

The practical significance of Henry VIII clauses lies in the loss of the public scrutiny and accountability for policy decisions that would usually occur when primary legislation is made by Parliament. In other words, matters of policy can be determined by the executive without the effective scrutiny of Parliament.

In its previous reports, the committee has stated that a Henry VIII empowering provision should be contained in an Act only in exceptional circumstances, should never be used routinely in reforming legislation, and ought to be subject to appropriate controls and safeguards.⁷² It has also stated previously that Henry VIII clauses should be drafted in the most specific and limited terms possible, and has also advocated the adoption of a formal consultation process before regulations that override primary legislation are made. In addition, the committee has recommended that sunset provisions should apply to the regulations made pursuant to a Henry VIII clause, as well as to its empowering provision.

Feedback received by the committee

Apart from the initial criticism of the Order in Council powers at the time of the enactment of the 2010 Act, criticism of the powers, and of their exercise, was relatively muted. There were no successful judicial review challenges to any of the orders made under either the 2010 or 2011 Act,⁷³ and only a single complaint to the committee.⁷⁴

One submitter to our inquiry, the Christchurch City Council, analysed the orders made under the 2011 Act and found that there had been no need to amend eight of the 23 Acts specified as being able to be modified by Order in Council.⁷⁵ In the circumstances, as the Council's analysis shows, the indicative list in section 71(3) of the 2011 Act was reasonably accurate. Fourteen of the 23 Acts listed were modified by Order in Council and a further seven Acts, not separately identified in the 2011 Act, were modified.⁷⁶

The New Zealand Parliament's use of Henry VIII powers in the 2010 and 2011 Acts has received endorsement from Australia. The Standing Committee on Justice and Community Safety in the ACT Legislative Assembly observed that:⁷⁷

While [the powers in section 71 of the 2011 Act] are, indeed, sweeping, the Committee notes that the fact that they relate to a natural disaster of terrible proportions brings this use of "Henry VIII" clauses clearly within the exceptional circumstances/emergency justification that has previously been given for the use of such clauses.

The provisions in the 2010 and 2011 Acts empowering the making of delegated legislation overriding primary legislation were not unique. The Epidemic Preparedness Act 2006 provides for various powers to make Orders in Council, modifying statutory requirements and restrictions, to facilitate the management of diseases.⁷⁸ Similarly, section 79 of the 1983 predecessor to the 2002 Civil Defence Emergency Management Act provided for the making of Orders in Council during a state of emergency, or civil defence emergency, that could override any Act, regulation, or bylaw, other than the Civil Defence Act itself. (This power was not replicated in the 2002 Act.)

Nonetheless, as we have detailed above, the use of Orders in Council to override Acts of Parliament was strongly criticised following the enactment of the 2010 Act. As part of our inquiry, we considered these criticisms in some detail.

Our conclusion

We consider that the criticisms expressed in the *Open letter to New Zealand's people and their Parliament* about the inclusion of powers to make Orders in Council overriding Acts were well-made. They served to remind everyone involved in the process of legislating for the recovery from the Canterbury earthquakes that overriding primary legislation with delegated legislation was contrary to constitutional norms and carried risk of abuse. The safeguards and checks put in place helped ensure that the powers were not abused, but were used moderately and consistently with the purpose for which they were granted.

Nevertheless, the regulation-making power was broader than was necessary, and we believe it is useful to consider some further checks and safeguards that could be incorporated if it becomes necessary to consider using similar powers in a future national emergency.

4 Our findings and recommendations

Major themes

Our recommendations are made against the background of three major themes, all of which uphold the need to facilitate recovery from the emergency while minimising intrusion on protected rights and freedoms.

The first theme is that executive powers to override enactments should extend only as far as is necessary to deal with the emergency itself, and should only be exercised for that purpose. The drafting of such powers should enshrine the principle that any override should be tightly focussed and be the minimum necessary to achieve its purpose.

We consider that the 2011 Act had a reasonable legislative form, and the safeguards in that Act provide a useful starting point.⁷⁹ But the powers to override enactments in the 2011 Act were broader than they needed to be. We consider that an analysis of the enactments that were overridden should inform the scope of any override power that may be included in future legislation to deal with a national emergency. A proper (although inevitably truncated) legislative process is required, with select committee scrutiny that includes public submissions and the ability to recommend changes to the legislation before it is enacted.

The second theme is that emergency legislation should include safeguards:

- using primary legislation wherever possible rather than broad powers to make delegated legislation
- including sunset provisions for emergency powers and requiring renewal of such powers every three years at the most
- retaining an external panel led by a retired High Court Judge to review Orders in Council before they are made to ensure they are authorised and to suggest any amendments
- preserving rights to seek judicial review of the exercise of emergency powers, including of Orders in Council, while ensuring meritless challenges do not frustrate the ability to get the job of recovery underway.

The third theme is that any legislative response to a national emergency should be designed to ensure that recovery from the emergency begins on day one. Pre-planning (operational not legislative) must set this up in advance. We agree with submitters, such as the New Zealand Law Society, who emphasised that preparation for national emergencies is largely a practical and operational matter, involving aspects such as:

- ensuring a workable chain of command⁸⁰
- training of emergency responders and the relationship between different emergency responder agencies
- provision of emergency relief to those affected
- availability of suitable provisions and equipment

- transparent planning processes involving community members and other stakeholders, both initially and on an ongoing basis
- bottom-up participation by communities, and consultation with them wherever reasonably possible
- advance planning for interagency and central–local government coordination
- recognition that local leadership may be impaired by the disaster.

We make the following recommendations arising from these themes.

Recommendation

1 Emergency legislation should be bespoke for each national emergency and confer powers only as necessary to each situation. Generic national emergency legislation should not be passed in advance.

Some submitters argued in favour of the preparation and enactment of legislation in anticipation of a national emergency. This argument is instinctively attractive, because planning and preparing for response and recovery from emergencies always seems desirable.⁸¹ However, we consider that the Civil Defence Emergency Management Act 2002 will generally allow for an appropriate level of response to most emergencies, especially with the 2016 amendments. The Government can also promote special legislation for particular emergencies if needed, as occurred in 2010 and 2011 and as is currently occurring in relation to the Hurunui/Kaikōura earthquakes. Such legislation can be passed promptly following an emergency, allowing time (albeit truncated) for policy development and public consultation via select committees.

Overall, therefore, we agree with the Law Commission's 1991 recommendation that there should not be a general "national emergencies" statute containing broad emergency regulation-making powers. The multitude of different types of emergencies that are possible means that the resulting powers under such legislation would inevitably have to be unacceptably broad.

Experience with the Canterbury earthquakes legislation, in particular the 2011 Act, has shown that our legislative agencies and institutions are capable of enacting quickly bespoke legislation for recovery from a national emergency. The key is to ensure such legislation adequately balances the need for extraordinary powers to get the job of recovery done, without overly compromising rights and freedoms and proper process.

In addition, we support continuation of the sectoral approach to the enactment of legislation conferring emergency powers, under which legislation can be tailored to the needs of a particular emergency. We note that the Law Commission supports this also.⁸² A good example is the Epidemic Preparedness Act 2006.

Recommendation

2 As much time as possible in the circumstances should be allowed for select committee consideration of emergency legislation.

Submitters indicated to us that they considered the two-day limited submission period for the Canterbury Earthquake Recovery Bill inadequate. We agree that affected people should be able to participate in the development of legislation and that adequate time for select committee consideration should be allowed. We also consider that, wherever possible, the select committee charged with reviewing emergency legislation should be able to recommend changes for consideration in the Committee of the whole House. We recognise, however, that in the circumstances of a national emergency, a more truncated submission process is likely to be necessary.

Recommendation

3 Existing select committees should consider emergency legislation.

The 2011 Act required the Minister to arrange for a cross-party parliamentary forum to be held from time to time for the purpose of providing the Minister with information or advice about the operation of the Act. Some submitters thought the cross-party forum was a good idea, but wanted to take the idea further. They wanted recovery legislation to provide for the automatic establishment of a specially constituted select committee. This committee would be involved in scrutinising legislation, hearing submissions, and inquiring into, and reviewing, the overall progress of the recovery.

We do not consider that future legislation for recovery from a national emergency needs to provide for the establishment of a dedicated select committee for these purposes. Existing select committees are capable of carrying out the scrutiny work that is needed.

We consider it is advisable that cross-party consultation in the preparation and development of a bill is very helpful, given the truncated timeframes for consideration by the House, and therefore we recommend this practice should be continued.

Recommendation

4 Emergency legislation should take the form of primary legislation wherever reasonably possible, rather than relying on broad powers to make delegated legislation.

This recommendation arises from our second major theme, discussed above. We acknowledge that one of the main reasons for including broad power to make Orders in Council overriding enactments in the 2010 and 2011 Acts was the need for flexibility to facilitate recovery from the earthquakes. It was not possible to anticipate, when those Acts were passed, what powers might need to be enhanced or what duties abrogated or modified.

However, there needs to be a proper balance. One of the reasons that the 2010 Act, in particular, was criticised was because the balance appeared to weigh too heavily in favour of the use of delegated legislation. Reflecting on those criticisms, and best practice advocated by agencies such as the Legislation Design and Advisory Committee,⁸³ we agree that primary legislation should be used as far as can reasonably be predicted for the purposes of addressing emergency measures.

One of the consequences of promoting the use of primary legislation is that it will require those preparing the emergency legislation to take more time to consider carefully the

underlying policy, including what additional powers are needed to deal with the emergency. We think this is a good thing. The experience of the 2011 Act (compared to the 2010 Act) was that taking a little longer to prepare the legislative response (while in the meantime relying on existing powers in the Civil Defence Emergency Management Act 2002), resulted in a better legislative product overall.

Recommendation

5 Powers to override enactments by Order in Council should provide a “positive list” of the specific enactments that can be overridden.

The 2010 and 2011 Acts permitted the making of an Order in Council that “may grant an exemption from, or modify, or extend any provision of any enactment”. Five Acts were excluded from the Order in Council override power under the 2010 Act, namely the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, and the New Zealand Bill of Rights Act 1990 (effectively a “negative list”).⁸⁴ In the 2011 Act, the Parliamentary Privilege Act 2014 was added to the list of Acts that could not be overridden.⁸⁵

In its submission to our inquiry, the Christchurch City Council submitted that a further 35 Acts should be excluded from Order in Council amendment because of their fundamentally constitutional nature in protecting the rights and freedoms, and transparent governance, of which New Zealand is justly proud.

We do not favour the suggested approach of adding to the list of Acts that cannot be amended. Instead, we recommend that any future national emergencies legislation with power to make Orders in Council overriding other Acts should set out an exclusive “positive list” of enactments (including subordinate legislation) that *can* be overridden by Order in Council.

We are unable to say in advance which enactments should be on that list. It will depend on the nature of the particular emergency, and when it occurs. Rather than attempt to prepare a list in advance, we think a better approach would be for the list of enactments that can be overridden to be developed under the supervision of the Attorney-General, with select committee consideration, informed by submissions, during the preparation of bespoke legislation following a national emergency.

We consider that the guiding principle should be that the list of Acts that could be overridden should be no broader than necessary in each circumstance. We consider that there should be substantive justification for the inclusion of each Act listed.

We also agree with the approach taken in the 2010 and 2011 Acts of expressly requiring a clear link between the Order in Council and the purposes of the emergency legislation.⁸⁶

In our view it is difficult to imagine any circumstances in which the Order in Council-making power would need to be used to override the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993. It follows that any Orders in Council would need to be consistent with those Acts, and could be judicially reviewed if they were not (see also Recommendation 7 below).

The enactments that can be overridden should be informed by an assessment of which of the Acts were modified by Order in Council under the 2010 and 2011 Acts. We have

analysed which Acts were overridden by Orders in Council made under the 2010 and 2011 Acts and note that at least 40 Acts⁸⁷ were modified by Order in Council, of which around 25 were listed in neither the 2010 or the 2011 Acts. Moreover, 10 of the Acts listed in the 2010 and/or 2011 Acts, as examples of Acts that could be modified, were not amended.⁸⁸

The 2010 and 2011 Acts also provided that an Order in Council made under section 71 could not:

- grant an exemption from or modify a requirement to
 - release a person from custody or detention or
 - have any person's detention reviewed by a court, Judge, or Registrar
- grant an exemption from or modify a restriction on keeping a person in custody or detention.⁸⁹

We agree that these restrictions should be maintained.

Recommendation

6 Orders in Council should be subject to scrutiny before and after they are made.

The 2011 Act provided for an external Review Panel, headed by a retired High Court Judge, to review draft Orders in Council and make “recommendations” to the Minister before the Minister recommended they be made.⁹⁰ While in practice the Review Panel made few recommendations for change to Orders in Council under the 2011 Act, the Panel’s presence was an important safeguard that helped ensure that the Order in Council power was exercised responsibly and lawfully. We recommend that such a practice be included in future emergency legislation including powers to make Orders in Council overriding Acts.

Likewise, the scrutiny of Orders in Council, in particular by this committee, is another important safeguard, which should be preserved in emergency legislation. The Regulations Review Committee examines all regulations,⁹¹ which includes Orders in Council made under emergency legislation, and decides whether they ought to be drawn to the special attention of the House.⁹² Orders in Council are disallowable instruments by default,⁹³ and subject to the disallowance procedures in the Legislation Act 2012.⁹⁴ These safeguards applied to Orders in Council made under the 2011 Act.⁹⁵

Recommendation

7 The right to seek judicial review of Orders in Council made under emergency legislation should be preserved and upheld.

One of the provisions attracting the most criticism in the 2010 and 2011 Acts was the provision that the Minister's recommendation to the Governor-General to make an Order in Council may not be challenged, reviewed, quashed, or called into question in any court.⁹⁶ A companion provision, that “So far as it is authorised by this Act, an order has the force of law as if it were enacted as a provision of this Act”, was criticised as ineffectual by one expert.⁹⁷ By contrast, the Legislation Advisory Committee submitted that this latter

provision “may well have the effect of precluding challenge to the validity of regulations by way of judicial review”.⁹⁸

From a constitutional point of view, neither of these provisions is desirable. Under New Zealand’s democracy, the courts uphold the principle that no one, not even the executive, may usurp Parliament’s powers of legislation.⁹⁹ Accordingly, judicial scrutiny of subordinate legislation upholds the rule of law and the sovereignty of Parliament.¹⁰⁰

We think that part of the *quid pro quo* for Parliament conferring such broad powers to the executive to make Orders in Council overriding primary legislation in emergencies is that citizens should be able to ask the Court to review the lawfulness of such Orders in Council. In turn, the Court should not be impeded by attempts to exclude its jurisdiction to conduct this exercise. There were no successful challenges to any of the Orders in Council made under the 2010 or 2011 Acts. As the Law Commission recognised in its 1991 Report, in practice, the courts are extremely unlikely to prejudice a necessary emergency response by granting an injunction.¹⁰¹

Recommendation

8 Legislation for national emergencies should have regard to international norms and benchmarks.

We recommend that legislation for recovery from national emergencies should be consistent with international norms and benchmarks, including:

- the Sendai Framework for Disaster Risk Reduction 2015-2030,¹⁰² which emphasises that:

...the recovery, rehabilitation and reconstruction phase, which needs to be prepared ahead of a disaster, is a critical opportunity to “Build Back Better”, including through integrating disaster risk reduction into development measures, making nations and communities resilient to disasters.
- the IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (2011), General Principle I.3 of which provides:¹⁰³

Affected persons should be informed and consulted on measures taken on their behalf and given the opportunity to take charge of their own affairs to the maximum extent and as early as possible. They should be able to participate in the planning and implementation of the various stages of the disaster response. Targeted measures should be taken to include those who are traditionally marginalized from participation in decision-making.
- the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles), Principle 2 of which provides:¹⁰⁴

All...displaced persons have the right to have restored to them any housing, land or property of which they were arbitrarily or unlawfully deprived.

Many of the international norms and benchmarks reflected in the above documents are of fairly general application, but they provide useful guidance to inform the preparation of bespoke national emergency legislation.

Recommendation

9 Bespoke emergency powers should be in force only for as long as is reasonably necessary, and should have built-in sunset provisions.

In principle, emergency powers should be in force no longer than is reasonably necessary to manage the consequences of the emergency. That is especially true in relation to broad powers conferred on the executive, such as powers to amend primary legislation by Order in Council.

The history of the use of emergency powers in New Zealand demonstrates the need to ensure emergency powers do not stay in force longer than is necessary to deal with the consequences of the emergency. Regulation-making powers under the Public Safety Conservation Act 1932, passed during the Depression, were used seven years later at the outbreak of war, and 19 years later for suppressing industrial action. Regulation-making powers under the Economic Stabilisation Act 1948 were used 34 years later to institute a national wage and price freeze. The 2011 Act contained a sunset clause for its expiry, and the revocation of Orders in Council made under it, five years after the date of its commencement.¹⁰⁵

We consider as a general principle that there should be renewal of the parliamentary mandate for extraordinary emergency powers at least every three years, in line with the length of the parliamentary term.

Recommendation

10 Legislation must reflect the principle that recovery from a national emergency starts on day one.

We see this recommendation as having a strong operational (as well as legislative) dimension. The best way to ensure the fastest recovery is to prepare in advance for practical matters arising from foreseeable emergencies of the kind New Zealand has recently experienced—for example, to ensure in advance that there is adequate post-emergency resilience of lifeline networks such as power, water, sewerage, phone, and internet.¹⁰⁶

Inevitably, a national emergency will require heavy involvement by central government in the response and recovery phases. The capacity of local leadership can often be impaired as a result of a national emergency. Nonetheless, involvement of central government will need to be appropriately balanced with that of local government and local communities.

A strong theme in submissions to our inquiry was that a “top-down” approach to response and recovery risks alienating and excluding local government and communities, and hindering them from being able to press ahead with the recovery of their communities at the earliest possible stage. The Greater Christchurch Regeneration Act 2016 was seen by some submitters as striking the right balance, but several years too late. The Civil Defence Emergency Management Amendment Act 2016 also enhances the focus on recovery in the 2002 Act.

Accordingly, we recommend that those involved in the preparation of legislation for response and recovery from national emergencies are mindful to ensure that such legislation:

- facilitates the return to normality of laws and institutions as soon as reasonably possible by ensuring that recovery becomes a primary goal from day one of the emergency
- enables community input into decision-making, the exercise of powers, and the regeneration of communities
- adequately recognises local leadership, and existing processes and tools in recovery from, and regeneration following, a national emergency, while recognising that local capacity may be impaired as a result of such a national emergency.

Recommendation

11 The responsible Minister should formally report, annually, to the House on the exercise of powers under the emergency legislation and on progress with the recovery effort.

The 2011 Act required the Minister for Canterbury Earthquake Recovery to carry out annual reviews of the operation and effectiveness of the 2011 Act, make any recommendations for amendments to the Act, and report to the House of Representatives as soon as possible after the review has been completed.¹⁰⁷ The Minister was also required to make quarterly reports to the House on the operation of the Act, including the powers exercised by, or on behalf of, the Chief Executive of CERA.¹⁰⁸

The Christchurch City Council submitted that it was important to include reporting requirements relating to the recovery effort as well, something that was lacking in the 2011 Act. We agree that future recovery legislation should include a requirement that the Minister report annually to the House on progress with the recovery effort, as well as reporting on the exercise of powers under the legislation.

The New Zealand Law Society submitted that there should be greater community input in the operation of emergency legislation and reviews of powers exercised under it, together with access to an ombudsman or statutory complaints officer who can receive and determine complaints from members of affected communities.¹⁰⁹ We agree these suggestions may have merit and should be considered in the event that new emergency legislation is being considered.

As a matter of good practice, we consider it would be desirable that all MPs from affected areas be briefed regularly by the responsible Minister, particularly during the early stages of the emergency.

5 Conclusion and next steps

For the reasons set out in detail above, we do not recommend passing general legislation in advance for national emergencies. While superficially attractive, the wide range of different types of potential national emergencies we face in New Zealand means that unduly broad powers would need to be conferred to cover all possible eventualities. Rather, we prefer bespoke legislation with appropriate safeguards that can be tailored to the needs of the particular emergency concerned.

New Zealand's recent experience in dealing with the consequences of major earthquakes has demonstrated that our public agencies, executive Government, and House of Representatives together have the capabilities to produce appropriate and timely legislation to respond to national emergencies as they arise. There needs to be public involvement in the development of such legislation, as well as scrutiny by the House and other agencies, both during the legislation's passage and in its implementation. With these things in place, an appropriate balance can be struck between facilitating the necessary emergency response and the subsequent recovery, without placing undue limits on rights and freedoms.

We invite the Government to formally consider and respond to our report and recommendations, and to table its response for debate in the House as soon as practicable.

We note that the proximity of the 14 November 2016 Hurunui/Kaikōura earthquakes, and the introduction of subsequent emergency legislation, may provide a preliminary opportunity for debate on the principles and recommendations contained in this Report. Such debate should complement, but not replace, Parliament's scrutiny of the Government's formal response to the recommendations we have made in this Report.

Appendix A

Committee procedure

This inquiry was referred to the Regulations Review Committee on 30 July 2014. The committee met between 30 October 2014 and 1 December 2016 to consider the inquiry. We called for public submissions with a closing date of 1 August 2015. We received 32 submissions from the organisations and individuals listed in Appendix B and heard oral evidence from 17 submitters. We heard evidence in Wellington and Christchurch.

We were assisted by advice from our legal counsel, Jason McHerron, barrister.

Committee members

Hon David Cunliffe (Chairperson)

Andrew Bayly

Chris Bishop

Hon Chester Borrows

Hon David Parker

Appendix B

List of submitters

Andrew Sheldon
Blue
Bryce Jensen
Canterbury Earthquake Recovery Authority
Caritas Aotearoa New Zealand
Centre for Advanced Engineering
Christchurch City Council
Cliff Mason
D S Whitfield
Deaf Aotearoa
Dr Ljubica Mamula-Seadon
Dr W John Hopkins
Earthquake Commission
Equal Justice Project
Greg
Harry Bradshaw
Insurance Council of New Zealand
McGuinness Institute
Ministry of Civil Defence and Emergency Management
National Council of Women of New Zealand
New Zealand Council of Christian Social Services
New Zealand Human Rights Commission
New Zealand Law Society
NGO Disaster Relief Forum
Office of the Privacy Commissioner
Parliamentary Counsel Office
Professor Jeremy Finn, Professor Elizabeth Toomey, Mr Robert Kipp
Robert Philip Barlin
Sigjaws Charitable Trust
The Salvation Army
WeCan
Wellington Community Justice Project

Appendix C

Provisions in 2010 and 2011 Acts for making Orders in Council

Canterbury Earthquake Response and Recovery Act 2010

- 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\(6\)](#).

Canterbury Earthquake Recovery Act 2011

71 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 that is reasonably necessary or expedient for all or any of the purposes stated in [section 3\(a\) to \(g\)](#).
- (2) An Order in Council made under subsection (1) may grant exemptions from, modify, or extend any provisions of any enactment for all or any of the purposes stated in [section 3\(a\) to \(g\)](#).
- (3) The enactments that may be the subject of an Order in Council that does anything referred to in subsection (2) include (without limitation) the following:
 - (a) the [Building Act 2004](#);
 - (b) the [Cadastral Survey Act 2002](#)
 - (c) the [Civil Defence Emergency Management Act 2002](#);
 - (d) the [Commerce Act 1986](#);

- (e) the [Earthquake Commission Act 1993](#);
 - (f) the [Health Act 1956](#);
 - (g) the [Health and Disability Services \(Safety\) Act 2001](#)
 - (h) the [Heritage New Zealand Pouhere Taonga Act 2014](#);
 - (i) the [Land Transport Act 1998](#);
 - (j) the [Land Transport Management Act 2003](#);
 - (k) the [Local Government Act 1974](#);
 - (l) the [Local Government Act 2002](#);
 - (m) the [Local Government Official Information and Meetings Act 1987](#);
 - (n) the [Local Government \(Rating\) Act 2002](#);
 - (o) the [Public Works Act 1981](#);
 - (p) the [Rating Valuations Act 1998](#);
 - (q) the [Reserves Act 1977](#);
 - (r) the [Resource Management Act 1991](#)
 - (s) the [Road User Charges Act 2012](#);
 - (t) the [Social Security Act 1964](#);
 - (u) the [Soil Conservation and Rivers Control Act 1941](#);
 - (v) the [Transport Act 1962](#);
 - (w) the [Waste Minimisation Act 2008](#).
- (4) An exemption from, modification of, or extension of a provision may be—
- (a) absolute or subject to conditions; and
 - (b) made by—
 - (i) stating alternative means of complying with the provision; or
 - (ii) substituting a discretionary power for the provision.
- (5) To avoid doubt, an exemption from, modification of, or extension of a provision may be for the purposes of enabling the relaxation or suspension of provisions in enactments that—
- (a) may divert resources away from the effort to—
 - (i) efficiently respond to the damage caused by the Canterbury earthquakes;
 - (ii) minimise further damage; or
 - (b) may not be reasonably capable of being complied with, or complied with fully, owing to the circumstances resulting from the Canterbury earthquakes.
- (6) Despite subsections (2) to (5), an Order in Council made under this section may not—
- (a) grant an exemption from or modify a requirement to—
 - (i) release a person from custody or detention; or
 - (ii) have any person's detention reviewed by a court, Judge, or Registrar; or
 - (b) grant an exemption from or modify a restriction on keeping a person in custody or detention; or
 - (c) grant an exemption from or modify a requirement or restriction imposed by the [Bill of Rights 1688](#), the [Constitution Act 1986](#), the [Electoral Act 1993](#), the [Judicature Amendment Act 1972](#), the [New Zealand Bill of Rights Act 1990](#), or the [Parliamentary Privilege Act 2014](#); or

(d) contain any provision having the effect of amending this section or [section 3, 6, 72 to 76, or 93](#).

(7) Subsections (2) to (5) do not limit subsection (1).

74 Procedure for recommending Order in Council

(1) In making a recommendation under [section 71](#), the relevant Minister must—

- (a) take into account the purposes of this Act; and
- (b) have regard to the recommendations of the Canterbury Earthquake Recovery Review Panel.

(2) The recommendation of the relevant Minister may not be challenged, reviewed, quashed, or called into question in any court.

75 Further provisions about Orders in Council

(1) This section applies to Orders in Council made under [section 71](#).

(2) An order may not be held invalid just because—

- (a) it is, or authorises any act or omission that is, inconsistent with any other Act; or
- (b) it confers any discretion on, or allows any matter to be determined or approved by, any person.

(3) An order may be expressed to come into force on a day that is before, on, or after the date on which it is made, but not earlier than 4 September 2010; and the order comes into force or, as the case may be, is deemed to have come into force accordingly.

(4) An order may be retrospective only to the extent provided for in subsection (3).

(5) So far as it is authorised by this Act, an order has the force of law as if it were enacted as a provision of this Act.

76 Application of Legislation Act 2012

(1) Despite [section 75\(5\)](#), an Order in Council made under [section 71](#) is a disallowable instrument for the purposes of the [Legislation Act 2012](#).

(2) An Order in Council made under [section 71](#) is also a legislative instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under [section 41](#) of that Act.

Appendix D**Acts amended/not amended by Orders in Council under 2010 and 2011 Acts**

List of Acts amended by Order in Council	2010 Act/ 2011 Act	Listed in section 6(4) of 2010 Act?	Listed in section 71(3) of 2011 Act?
Accident Compensation Act 2001	2010	x	x
Building Act 2004	2010/2011	✓	✓
Cadastral Survey Act 2002	2010	✓	✓
Civil Defence Emergency Management Act 2002	2010	x	✓
Earthquake Commission Act 1993	2011	✓	✓
Education Act 1989	2010/2011	x	x
Energy Companies Act 1992	2011	x	x
Financial Advisers Act 2008	2011	x	x
Financial Service Providers (Registration and Dispute Resolution) Act 2008	2010	x	x
Historic Places Act 1993	2011	✓	x
Inland Revenue Acts ¹¹⁰	2010	x	x
Land Transport Management Amendment Act 2008	2011	x	x
Land Transport Act 1998	2010/2011	✓	✓
Local Government Act 2002	2010/2011	✓	✓

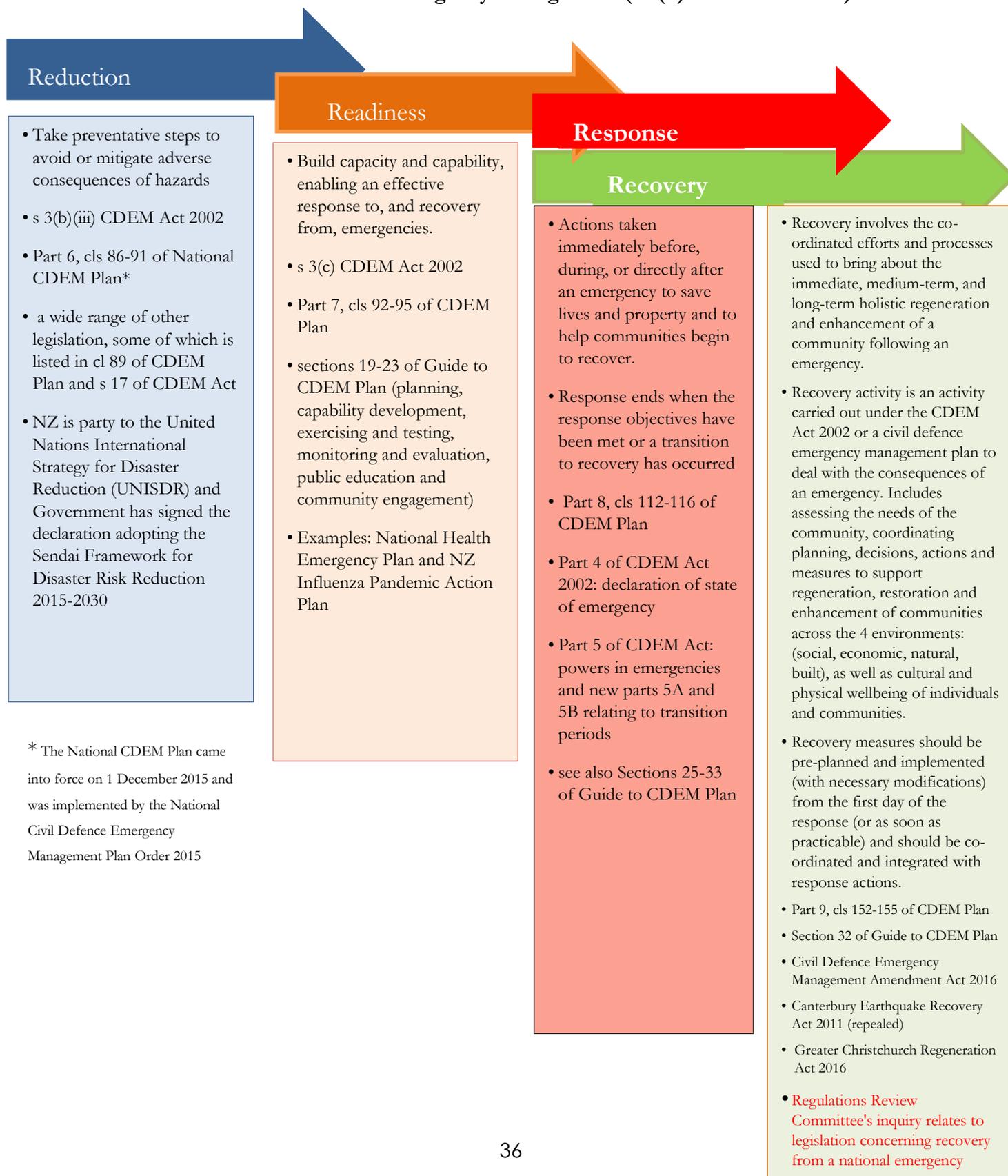
Local Government Official Information and Meetings Act 1987	2010	✓	✓
Local Government (Rating) Act 2002	2011	✓	✓
Public Transport Management Act 2008	2011	x	x
Rating Valuations Act 1998	2011	✓	✓
Reserves Act 1977	2010/2011	✓	✓
Resource Management Act 1991	2010/2011	✓	✓
Road User Charges Act 1977	2010/2011	✓	✓
Social Security Act 1964	2010/2011	✓	✓
Tax Administration Act 1994	2010/2011	x	x
Transport Services Licensing Act 1989	2011	x	x
Transport (Vehicle and Driver Registration and Licensing) Act 1986	2010/2011	x	x

Acts listed in section 6(4) of 2010 Act or section 71(3) of 2011 Act that were not amended by Order in Council	Listed in s6(4) of 2010 Act?	Listed in s71(3) of 2011 Act?
Commerce Act 1986	✓	✓
Health Act 1956	✓	✓
Health and Disability Services (Safety) Act 2001	✓	✓
Heritage New Zealand Pouhere Taonga Act 2014	x	✓
Land Transport Management Act 2003	✓	✓
Local Government Act 1974	✓	✓
Public Works Act 1981	✓	✓
Soil Conservation and Rivers Control Act 1941	✓	✓
Transport Act 1962	✓	✓
Waste Minimisation Act 2008	✓	✓

Appendix E

Continuum of current legislative response to emergencies:

The four R's of civil defence emergency management (s 3(d) CDEM Act 2002)



Appendix F

Definitions of terms

Existing legislation defines relevant terms.

Emergency

Emergency is defined in the 2002 Act as follows:

emergency means a situation that—

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

State of National Emergency

A **state of national emergency** is defined in the 2002 Act as a state of national emergency declared under s 66 of that Act, which provides:¹¹¹

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.

Recovery Activities

The Civil Defence Emergency Management Amendment Act 2016 introduces a new definition of **recovery** and will replace the definition of **recovery activities**, as follows:

recovery means the co-ordinated efforts and processes used to bring about the immediate, medium-term, and long-term holistic regeneration and enhancement of a community following an emergency

recovery activity means an activity carried out under this Act or any civil defence emergency management plan to deal with the consequences of an emergency, including, without limitation,—

- (a) the assessment and ongoing monitoring of the needs of a community affected by the emergency; and
- (b) the co-ordination and integration of planning, decisions, actions, and resources; and
- (c) measures to support—
 - (i) the regeneration, restoration, and enhancement of communities across the 4 environments (built, natural, social, and economic); and
 - (ii) the cultural and physical well-being of individuals and their communities; and
 - (iii) government and non-government organisations and entities working together; and
- (d) measures to enable community participation in recovery planning; and
- (e) new measures—
 - (i) to reduce risks from hazards; and
 - (ii) to build resilience

Appendix G

Orders in Council made under 2010 and 2011 Acts

Based on a list provided to the inquiry by CERA

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Orders in Council under the Canterbury Earthquake Recovery Act 2011 (in descending chronological order)</i>				
<i>Canterbury Earthquake (Christchurch Replacement District Plan) Order 2015 (LI 2015/55) and No 2 (LI 2015/235) and No 3 (LI 2015/239)</i>	1 September 2014 (retroactive)	Resource Management Act 1991	Various amendments to LI 2014/228	Will be revoked on the close of 30 June 2021 (continued and amended by Greater Christchurch Regeneration Act 2016)
<i>Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (LI 2014/228)</i>	8 July 2014	Resource Management Act 1991	Provides a streamlined process for the review of the existing Christchurch district plans (the Christchurch City Plan and the Banks Peninsula District Plan) and for the preparation of a comprehensive replacement district plan for the Christchurch district.	Will be revoked on the close of 30 June 2021 (continued and amended by Greater Christchurch Regeneration Act 2016)
<i>Canterbury Earthquake (Education Legislation) Order 2014 (LI 2014/74)</i>	2 April 2014	Education Act 1989	Amended education legislation under the Canterbury Earthquake Recovery Act 2011. It replaced the <i>Canterbury Earthquake (Education Legislation) Order 2013</i> which expired on 1 April 2014.	Revoked 2 April 2015

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Social Security Act) Order (No 2) 2010 Amendment Order 2014</i> (LI 2014/108)	1 April 2014	Social Security Act 1964	Provides that the amended definition of “premises” for the purposes of the Accommodation Supplement be continued until 19 April 2016 to allow people to continue to receive financial assistance where necessary.	Revoked 19 April 2016
<i>Canterbury Earthquake (Canterbury DHB Land Exchange) Order 2014</i> (LI 2014/107)	31 March 2014	Reserves Act 1977	Enables the transfer of land between the Canterbury District Health Board and the Christchurch City Council to provide space for the redevelopment of Christchurch hospital.	Revoked 19 April 2016
<i>Canterbury Earthquake (Rating Valuations Act – Christchurch City Council) Order 2013</i> (SR 2013/396)	27 September 2013	Rating Valuations Act 1998	Modifies the rating valuation system for Christchurch City. Enables the Christchurch City Council to conduct a revaluation before 31 March 2014 and then operate and maintain the district valuation roll until the next valuation.	Revoked 19 April 2016
<i>Canterbury Earthquake (Building Act) Order 2013</i> (SR 2013/390)	17 September 2013	Building Act 2004	Extends part of the <i>Canterbury Earthquake (Building Act) Order 2011</i> to enable the existing dangerous building notices issued under the 2011 Order to continue in force.	Revoked on the close of 18 April 2016
<i>Canterbury Earthquake (Local Government Act 2002- Retaining Walls) Order 2013</i> (SR 2013/33)	4 April 2013	Local Government Act 2002	Extends the powers of the Christchurch City Council to access private land for the purposes of constructing and rebuilding Council-owned retaining walls on or under private land.	Will be revoked on the close of 30 June 2021 (continued and amended by Greater Christchurch Regeneration Act 2016)

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Education Legislation) Order 2013</i> (SR 2013/44)	2 April 2013	Education Act 1989	Amended education legislation under the Canterbury Earthquake Recovery Act 2011. It replaced the <i>Canterbury Earthquake (Education Legislation) Order 2012</i> which expired on 1 April 2013.	Revoked 2 April 2014
<i>Canterbury Earthquake (Local Government Act 2002 – Christchurch City 3-Year Plan) Order 2013</i> (SR 2013/39) <i>Canterbury Earthquake (Local Government Act 2002) Order (No 2) 2011 Amendment Order 2013</i> (SR 2013/40)	22 March 2013	Local Government Act 2002	The Order exempted the Christchurch City Council from the obligation to have a long-term plan under the Local Government Act 2002 while the order was in force. Before the end of June 2015, the council had to adopt a long term plan for 2015/25. The council was to prepare and adopt a plan (the Christchurch City 3-Year Plan) covering the period 1 July 2013 to 30 June 2016. The plan remained in force until the close of 30 June 2015.	Expired on the close of 1 July 2015
<i>Canterbury Earthquake (Rating Valuations Act - Waimakariri District Council) Amendment Order 2012</i> (SR 2012/323)	30 November 2012	Rating Valuations Act 1998	Deferred the general revaluation to maintain the ratings valuation system's operability, integrity and transparency, and facilitated a smooth return to the standard rating valuation system.	Expired on the close of 31 March 2015
<i>Canterbury Earthquake (Rating) Order 2012</i> (SR 2012/147)	1 July 2012	Local Government (Rating) Act 2002	Modifies the rating powers of the Christchurch City Council to enable rates to be assessed following building, demolition or subdivision during the course of the year, rather than only at the start of the next financial year as at present.	Will be revoked on 1 July 2018 (continued by Greater Christchurch Regeneration Act 2016)

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Education Legislation) Order 2012</i> (SR 2012/34)	2 April 2012	Education Act 1989	Amended education legislation under the Canterbury Earthquake Recovery Act 2011 and replaced the <i>Canterbury Earthquake (Education Act) Order 2011</i> which expired on 1 April 2012.	Revoked 2 April 2013
<i>Canterbury Earthquake (Inland Revenue Acts) Amendment Order 2012</i> (SR 2012/35)	1 April 2012	Inland Revenue Acts (see footnote 1)	Allowed the Commissioner of Inland Revenue to extend a time limit specified in tax legislation if a person was unable to comply with an original time limit because of the Canterbury earthquakes.	Expired on the close of 1 October 2012
<i>Canterbury Earthquake (Social Security Act) Order (No 2) 2010 Amendment Order 2012</i> (SR 2012/42)	30 March 2012	Social Security Act 1964	Extended the principal Order, <i>Canterbury Earthquake (Social Security Act) Order (No 2) 2010</i> that was due to expire on 31 March 2012.	Expired on 1 April 2014
<i>Canterbury Earthquake (Local Government Act 2002) Order (No 2) 2011</i> (SR 2011/402)	28 November 2011	Local Government Act 2002	Provided the Selwyn and Waimakariri District Councils and the Christchurch City Council with a workable long- term planning solution for local government in Christchurch that supported earthquake recovery.	Expired on the close of 1 July 2015
<i>Canterbury Earthquake (Reserves Legislation) Order (No 2) 2011</i> (SR 2011/368)	7 November 2011	Reserves Act 1977	Repeals and replaces the <i>Canterbury Earthquake (Reserves Legislation) Order 2011</i> to extend the timeframe for powers provided to the Selwyn and Waimakariri District Councils and Christchurch City Council to permit reserves to be used for earthquake response and recovery efforts.	Will be revoked on the close of 30 June 2021 (continued by Greater Christchurch Regeneration Act 2016)
<i>Canterbury Earthquake (Tax Administration Act) Order (No 2) 2011</i> (SR 2011/375)	1 November 2011	Tax Administration Act 1994	Replaced the <i>Canterbury Earthquake (Tax Administration Act) Order 2011</i> which expired on the 31 October 2011.	Expired on the close of 31 October 2012

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Building Act) Order 2011 (SR 2011/311)</i>	17 September 2011	Building Act 2004	Assisted the Selwyn and Waimakariri District Council and the Christchurch City Council to deal with on-going earthquake response issues promptly and effectively and ensure that the people in Canterbury are adequately protected from public health and safety risks following the Canterbury earthquakes.	Expired on the close of 16 September 2013
<i>Canterbury Earthquake (Resource Management Act – Electricity Network Recovery) Order 2011 (SR 2011/308)</i> <i>Canterbury Earthquake (Reserves Act – Electricity Network Recovery) Order 2011 (SR 2011/308)</i>	9 September 2011	Resource Management Act 1991	Facilitates recovery by expediting the Resource Management Act 1991 and the Reserves Act 1977 processes for electricity network recovery works in Christchurch.	Revoked 19 April 2016
<i>Canterbury Earthquake (Earthquake Commission Act) Order 2012 (SR 2012/63)</i>	4 September 2011	Earthquake Commission Act 1993	Enables the Earthquake Commission to carry out the managed repair of residential land and property in greater Christchurch, particularly through the Project Management Office established by the Commission.	Will be revoked on the close of 30 June 2021 (continued by Greater Christchurch Regeneration Act 2016)
<i>Canterbury Earthquake (Resource Management Act - Burwood Resource Recovery Park) Order 2011 (SR 2011/254)</i>	22 July 2011	Resource Management Act 1991	Permits the storage, sorting and processing (including recycling) of earthquake waste at the Burwood Resource Recovery Park through a modified resource consent process.	Will be revoked on the close of 30 June 2021 (continued by Greater Christchurch Regeneration Act 2016)

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Historic Places Act) Order 2011 (SR 2011/231)</i>	1 July 2011	Historic Places Act 1993	Adds a streamlined New Zealand Historic Places Trust process for determining applications to modify sites of interest to Māori in a way that balances the need to support recovery and rebuilding of Canterbury with the need to protect sites of interest to Māori.	Will be revoked on the close of 30 June 2021 (continued and amended by Greater Christchurch Regeneration Act 2016)
<i>Canterbury Earthquake (Rating Valuations Act: Waimakariri District Council) Order 2011 (SR 2011/218)</i>	30 June 2011	Rating Valuations Act 1998	Modified or suspended the effect of certain provisions of the Rating Valuations Act 1998 in relation to the Waimakariri District Council so that the council had a practical basis for setting and assessing rates, at least for the 2011/12 financial year and possibly for longer depending on the speed of recovery work in greater Christchurch.	Expired on the close of 31 March 2015
<i>Canterbury Earthquake (Land Transport Rule: Operator Licensing) Order 2011 (SR 2011/153)</i>	27 June 2011	Land Transport Act 1998	Extended the deadline for greater Christchurch taxi operator compliance with installing in-vehicle security systems in recognition of financial disruption caused by the earthquakes.	Expired on the close of 2 May 2012
<i>Canterbury Earthquake (Transport Legislation-Canterbury Regional Transport Planning) Order 2011 (SR 2011/345)</i>	25 June 2011	Public Transport Management Act 2008 Land Transport Management Amendment Act 2008	Enabled the Canterbury Regional Council to meet extended deadlines for their statutory planning obligations.	Expired on the close of 31 December 2012

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Rating Valuations Act: Christchurch City Council) Order 2011 (SR 2011/216)</i>	30 June 2011	Rating Valuations Act 1998	Modified or suspended the effect of certain provisions of the Rating Valuations Act 1998 in relation to the Christchurch City Council so that the council had a practical basis for setting and assessing rates, at least for the 2011/12 financial year and possibly for longer depending on the speed of recovery work in greater Christchurch.	Revoked on 27 September 2013
<i>Canterbury Earthquake (Rating Valuations Act: Selwyn District Council) Order 2011 (SR 2011/217)</i>	30 June 2011	Rating Valuations Act 1998	Modified or suspended the effect of certain provisions of the Rating Valuations Act 1998 in relation to the Selwyn District Council so that the council has a practical basis for setting and assessing rates, at least for the 2011/12 financial year and possibly longer depending on the speed of recovery work in greater Christchurch.	Expired on 1 July 2012
<i>Canterbury Earthquake (Resource Management Act Port of Lyttelton Recovery) Order 2011 (SR 2011/148)</i>	26 May 2011	Resource Management Act 1991	Provides for up to 10ha of reclamation and port activities necessary for the recovery of the Port of Lyttelton to proceed without being unduly impeded by certain processes of the Resource Management Act 1991.	Revoked 18 April 2016
<i>Canterbury Earthquake (Energy Companies Act) Order 2011 (SR 2011/215)</i>	1 April 2011	Energy Companies Act 1992	Modified the application of the Energy Companies Act 1992 to Orion New Zealand so that it can benefit from extra time to prepare and update its statement of corporate intent and operations report, particularly in light of the changes to the electrical lines infrastructure since the earthquakes.	Expired on the close of 1 November 2012

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Financial Advisers Legislation) Order 2011</i> (SR 2011/74)	1 April 2011	Financial Advisers Act 2008 Financial Service Providers (Registration and Dispute Resolution) Act 2008	Provided that a Canterbury-based financial adviser was exempt from all the sections of the Financial Advisers Act 2008 and the disclosure regulations.	Expired on the close of 30 September 2011
<i>Canterbury Earthquake (Transport Legislation) Amendment Order 2011</i> (SR 2011/152)	26 March 2011 (retroactive)	Road User Charges Act 1977 Transport (Vehicle and Driver Registration and Licensing) Act 1986 Land Transport Act 1998	Provided a means to permit the operation of heavy vehicles from Australia or Canada as part of the recovery effort.	Expired on the close of 31 October 2011
<i>Canterbury Earthquake (Local Government Act 2002) Order 2011</i> (SR 2011/219)	1 March 2011	Local Government Act 2002	Relaxed or suspended specific Local Government Act provisions for the Christchurch City Council that may divert resources away from recovery, or may not be reasonably capable of being complied with due to circumstances resulting from the earthquakes	Expired on the close of 31 December 2012
<i>Orders in Council under the Canterbury Earthquake Response and Recovery Act 2010 (in descending chronological order)</i>				
<i>Canterbury Earthquake (Resource Management Act) Amendment Order (No 2) 2011</i> (SR 2011/47)	15 March 2011	Resource Management Act 1991	Amended a cross reference in the principle Order, <i>Canterbury Earthquake (Resource Management Act) Order 2011</i> to avoid ambiguity.	Revoked 19 April 2016

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Local Government Official Information and Meetings Act) Order 2011 (SR 2011/43)</i>	5 March 2011 (retroactive)	Local Government Official Information and Meetings Act 1987	Modified the time requirements for providing a Land Information Memorandum (LIM) where a request had been made for a LIM and it had not been provided by 5 March 2011. The Selwyn and Waimakariri District Councils and Christchurch City Council need only include information that is readily accessible. Any LIM issued under this Order must be viewed as only carrying limited information.	Expired on the close of 31 March 2012
<i>Canterbury Earthquake (Social Security Act) Order 2011 (SR 2011/40)</i>	1 March 2011 (retroactive)	Social Security Act 1964	Provided that those living in the districts of Ashburton, Christchurch, Hurunui, Selwyn or Waimakariri are exempt from the provisions which provide for the expiry of the unemployment benefit and require application for a further grant of that benefit.	Expired on the close of 30 November 2011
<i>Canterbury Earthquake (Tax Administration Act) Order 2011 (SR 2011/27)</i>	24 February 2011 (retroactive)	Tax Administration Act 1994	Created an exemption allowing the Commissioner of Inland Revenue to disclose information about a person to certain government agencies where it is necessary to enable the government agency to provide assistance as a result of the Canterbury earthquakes.	Expired on the close of 31 October 2011
<i>Canterbury Earthquake (Accident Compensation Act 2001) Order 2011 (SR 2011/37)</i>	22 February 2011 (retroactive)	Accident Compensation Act 2001	Provided for the Accident Compensation Corporation to pay the first week's compensation for loss of earnings to those who suffered injury as a direct result of the earthquake of 22 February 2011. The first week's compensation would usually be payable by the employer.	Expired on the close of 31 March 2012

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Reserves Legislation) Order 2011 (SR 2011/56)</i>	22 February 2011 (retroactive)	Reserves Act 1977	Enabled the Christchurch City Council, Selwyn District Council and Waimakariri District Council to exercise powers in relation to reserves for certain purposes that the councils would otherwise be prohibited from exercising without certain preconditions.	Revoked 10 November 2011
<i>Canterbury Earthquake (Resource Management Act) Amendment Order 2011 (SR 2011/35)</i>	22 February 2011 (retroactive)	Resource Management Act 1991	Extended time periods under the principal Order, <i>Canterbury Earthquake (Resource Management Act) Order 2011</i> .	Revoked 19 April 2016
<i>Canterbury Earthquake (Resource Management Act Permitted Activities Order 2011 (SR 2011/36)</i>	22 February 2011 (retroactive)	Resource Management Act 1991	Provides for temporary accommodation and temporary depots and storage facilities to be deemed permitted activities in greater Christchurch under the Resource Management Act 1991.	Will be revoked on the close of 30 June 2021 (continued and amended by Greater Christchurch Regeneration Act 2016)
<i>Canterbury Earthquake (Transport Legislation) Order 2011 (SR 2011/39)</i>	22 February 2011 (retroactive)	Land Transport Act 1998 Transport (Vehicle and Driver Registration and Licensing) Act 1986 Road User Charges Act 1977	Provided exceptions to overloading provisions in the Land Transport Act 1998 to specified heavy motor vehicles operating as part of the response to the Canterbury earthquake.	Expired on the close of 31 October 2011

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Education Act) Order 2011</i> (SR 2011/38)	22 February 2011 (retroactive)	Education Act 1989	Made changes to the Education Act 1989. Students enrolled in a school zone within the specified area at the time of the 22 February earthquake continue to be considered as living in the home zone of the school, even if they had moved. Special enrolment schemes could be set up within the specified area. The Minister could vary the meaning of “half-day” etc.	Expired on the close of 1 April 2012
<i>Canterbury Earthquake (Social Security Act) Order (No 2) 2010</i> (SR 2010/483)	24 December 2010	Social Security Act 1964	Relates to accommodation supplements, and extends them to people who would otherwise be eligible for the supplement, but who are unable to remain in their homes due to the Canterbury earthquakes. The Order extends the definition of “premises” to include this situation.	Will be revoked on the close of 30 June 2021 (continued and amended by Greater Christchurch Regeneration Act 2016)
<i>Canterbury Earthquake (Social Security Act) Order (No 3) 2010</i> (SR 2010/484)	24 December 2010	Social Security Act 1964	Modified the definition of cash assets to exclude money paid to any person by the Earthquake Commission or by any insurance company in respect of damage to property or costs of alternative accommodation in light of the Canterbury earthquakes.	Expired on the close of 31 March 2012
<i>Canterbury Earthquake (Building Act) Amendment Order 2010</i> (SR 2010/466)	23 December 2010	Building Act 2004	This Order amended the principal Order, <i>Canterbury Earthquake (Building Act) Order 2010</i> and revoked a number of modifications and extensions to Schedule 1 of the Building Act 2004.	Expired on the close of 16 September 2011
<i>Canterbury Earthquake (Cadastral Survey Act) Order 2010</i> (SR 2010/467)	16 December 2010	Cadastral Survey Act 2002	Authorised the Surveyor-General to make rules for the conduct of cadastral surveys for land affected by the Canterbury earthquakes.	Expired and revoked 31 December 2012

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Rating Valuations Act) Order 2010</i> (SR 2010/412)	16 December 2010	Rating Valuations Act 1998	Section 9(1) requires a territorial authority to revise its district valuation roll at intervals of not less than 3 years. This order extends the interval within which the Christchurch City Council is to comply with that provision to 1 December 2011.	Revoked 30 June 2011
<i>Canterbury Earthquake (Historic Places Act) Order 2010</i> (SR 2010/333) amended by (SR 2011/76)	23 September 2010	Historic Places Act 1993	Provided for emergency authority to destroy, damage, or modify the whole or part of an archaeological site in the territorial districts	Revoked on 1 July 2011 by SR 2011/231
<i>Canterbury Earthquake (Social Security Act) Order 2010</i> (SR 2010/331)	27 September 2010	Social Security Act 1964	Exemption from sections 99AA and 99AB of the Social Security Act 1964 in respect of people residing in specified areas. Those sections, which come into force on 27 September 2010, provide for the expiry of the unemployment benefit and require application for a re-grant of that benefit.	Expired on the close of 28 February 2010
<i>Canterbury Earthquake (Road User Charges Act) Order 2010</i> (SR 2010/427)	4 September 2010 (retroactive)	Road User Charges Act 1977	Exemptions from section 5(1)(b) of the Road User Charges Act 1977 (which concerns the operation of a vehicle in excess of its maximum gross weight.	Expired on the close of 30 November 2010
<i>Canterbury Earthquake (Local Government Official Information and Meetings Act) Order 2010</i> (SR 2010/350)	4 September 2010 (retroactive)	Local Government Official Information and Meetings Act 1987	Modified application of Local Government Official Information and Meetings Act 1987 in respect of s 44A (LIMs)	Expired on the close of 4 March 2011

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Transport Legislation) Order 2010</i> SR 2010/319	4 September 2010 (retroactive)	Land Transport Act 1998	Exempted operators of heavy motor vehicles from certain provisions regarding heavy motor vehicles where those heavy motor vehicles are operated as part of a relevant authority's response to the Canterbury earthquake.	Expired on 30 November 2010
<i>Canterbury Earthquake (Resource Management Act) Order 2010</i> (SR 2010/318 amended by SR 2010/325)	4 September 2010 (retroactive)	Resource Management Act 1991	Extended time periods and relaxed duties, modified requirements, made exemptions and created additional defences under the RMA.	Revoked on 19 April 2016
<i>Canterbury Earthquake (Local Government Act 2002) Order 2010</i> (SR 2010/317)	4 September 2010 (retroactive)	Local Government Act 2002	Exempted the Canterbury Regional Council, Christchurch City Council, Selwyn District Council, and Waimakariri District Council from certain provisions of the Local Government Act.	Expired on the close of 31 December 2011
<i>Canterbury Earthquake (Civil Defence Emergency Management Act) Order (No 2) 2010</i> (SR 2010/482)	4 September 2010 (retroactive)	Civil Defence Emergency Management Act 2002	A person acting in accordance with a direction given or a request made under section 91 of the Civil Defence Emergency Management Act 2002 during a state of emergency declared as a result of the Canterbury earthquake may not be held liable for breaches of resource consents in relation to disposal of waste at the Kate Valley landfill in the Hurunui District.	Expired on 1 January 2011

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Civil Defence Emergency Management Act) Order 2010 (SR 2010/316)</i>	16 September 2010	Civil Defence Emergency Management Act 2002	While a state of local emergency was in force in respect of a specified district (Christchurch City, Selwyn District, or Waimakariri District), those provisions enabled civil defence emergency management powers to be exercised in respect of that district by persons who are, or who are acting under the authority of, a Controller or a constable (authorised persons).	Expired on the close of 29 November 2010
<i>Canterbury Earthquake (Building Act) Order 2010 (SR 2010/315)</i>	16 September 2010	Building Act 2004	Extended the definition of a “dangerous building” under the Building Act to include dangerous, earthquake-prone or unsanitary buildings. The territorial authority could also issue notice requiring work to be carried out on a building to reduce or remove danger or prevent the building from remaining in an unsanitary state, or issue a notice restricting entry to a building.	Expired on the close of 16 September 2011
<i>Canterbury Earthquake (Inland Revenue Acts) Order 2011 (SR 2011/80)</i>	4 September 2010	Inland Revenue Acts ¹¹²	Authorised the Commissioner of Inland Revenue to extend a time limit or a time period if the Commissioner considers that a person/group/class of persons is or has been unable to comply with that time limit as a result of the Canterbury earthquakes and the Commissioner considers it fair and equitable in the circumstances to extend it.	Expired on the close of 1 October 2012

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Local Government Act 2002) Order 2010</i> (SR 2010/317)	4 September 2010 (retroactive)	Local Government Act 2002	Made amendments relating to the preparation of the Christchurch City Council's Annual Report, Annual Plan and Council-controlled organisations' 2011/12 Statement of Intent. Some timelines were extended or requirements relaxed. The Council was required to prepare and adopt progress points at intervals of not more than 4 months.	Expired on the close of 31 December 2011
<i>Canterbury Earthquake (Resource Management Act) Order 2010</i> (SR 2010/318)	4 September 2010 (retroactive)	Resource Management Act 1991	Amends provisions of the Resource Management Act 1991, relaxing requirements on the Selwyn and Waimakariri District Councils, Christchurch City Council and Canterbury Regional Council so they can focus on earthquake recovery.	Revoked 18 April 2016
<i>Canterbury Earthquake (Resource Management Act) Amendment Order 2010</i> (SR 2010/325)	4 September 2010 (retroactive)	Resource Management Act 1991	Amended the principal Order, <i>Canterbury Earthquake (Resource Management Act) Order 2010</i> to provide that the extension of time period under clause 6 of that order and the power to extend a time period under clause 7 of that order are in addition to, and not in substitution for, the powers under sections 37 and 37A of the Resource Management Act 1991.	Revoked 19 April 2016

Order in Council	Commencement	Legislation amended	Effect	Expiry
<i>Canterbury Earthquake (Resource Management Act) Order 2011</i> (SR 2011/34)	4 September 2010 (retroactive)	Resource Management Act 1991	The Order streamlines the consent process for land remediation work following the Canterbury earthquakes. It applies to resource consent applications made to the Christchurch City Council, Selwyn District Council, Waimakariri District Council, Canterbury Regional Council and other specified bodies to undertake land remediation work or to change or cancel conditions of resource consents granted under the Order.	Revoked 18 April 2016

Appendix H

Endnotes

Chapter 2 The events that led to this inquiry

- ¹ Hurunui/Kaikōura Earthquakes Emergency Relief Bill and Civil Defence Emergency Management Amendment Act 2016 Amendment Act 2016. A third bill containing powers to override enactments by Order in Council, the Hurunui/ Kaikōura Earthquakes Recovery Bill, is expected to be introduced on 1 December 2016.
- ² New Zealand Gazette 2010 pp 3225-3226, 4193-4194, 4196-4197. See sections 68, 70, and 71 of the 2002 Act, which give a declaration of a state of emergency a default life of 7 days before a further declaration is required but impose no limit on the number of extensions that may be declared.
- ³ Mark Gobbi, Briar Gordon, and Fiona Lincoln, "Managing Emergency Management: A Look at New Zealand's Legislative Approaches", Australasian Drafting Conference, Adelaide Drafting Forum, 2011, at p 11. Section 2 of our report draws extensively from this paper, which was submitted to our inquiry by the Parliamentary Counsel Office. The authors are all parliamentary counsel, but the paper reflects their personal views, rather than those of the Parliamentary Counsel Office or New Zealand's Attorney-General. We are grateful to the authors for their work in compiling this important historical record.
- ⁴ Ibid.
- ⁵ Gobbi, Gordon, and Lincoln (above n. 3) at 11
- ⁶ Journals of the House (for the week beginning Tuesday 14 September 2010).
- ⁷ Section 6(4) of the 2010 Act – see Appendix C.
- ⁸ Section 7(2) of the 2010 Act.
- ⁹ See 2010 Act, section 6(6)(c): the Acts excluded were the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, and the New Zealand Bill of Rights Act 1990.
- ¹⁰ 2010 Act, section 6(1). The purpose provision was set out in section 3 of the 2010 Act. That meant, for example, that the 2010 Act is unlikely to have justified imposing retroactive criminal penalties. See *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 in which the Supreme Court held at [115] that (in relation to the Canterbury Earthquake Recovery Act 2011) the purposes of the Act were expressed comprehensively, indicating that the Act was intended to be the vehicle (and the only vehicle) for major earthquake recovery measures.
- ¹¹ Section 8 of the 2010 Act.
- ¹² Standing Orders of the House of Representatives, 2008, SO 309; Standing Orders of the House of Representatives, 2011, SO 314(1); Standing Orders of the House of Representatives, 2014 SO 318(1).
- ¹³ 2010 Act, section 6(3).

- ¹⁴ Andrew Geddis, An open letter to New Zealand's people and their Parliament (28 September 2010) at <http://pundit.co.nz/content/an-open-letter-to-new-zealands-people-and-their-parliament> (signed by 27 legal scholars: 24 working in New Zealand law faculties, and 3 expatriate New Zealanders working in law faculties overseas (2 in the UK, and 1 in the US)); Gordon Campbell, On the draconian Christchurch earthquake legislation (15 September 2010) at <http://gordoncampbell.scoop.co.nz/2010/09/15/gordon-campbell-the-christchurch-earthquake-law/>; Dean Knight, Canterbury Earthquake Response and Recovery Bill: Constitutionally Outrageous (14 September 2010) at <http://www.laws179.co.nz/2010/09/canterbury-earthquake-response-and.html>; Law Society comments on Canterbury Earthquake Response and Recovery Act, 29 September 2010, at <http://pacific.scoop.co.nz/2010/09/law-society-comments-on-canterbury-earthquake-act>
- ¹⁵ See Legislation Advisory Committee Guidelines: 2014 Edition, Chapter 13, Part 5; Gobbi, Gordon, and Lincoln (above n. 3) at 12.
- ¹⁶ Andrew Geddis, An open letter to New Zealand's people and their Parliament, above n.14.
- ¹⁷ Accident Compensation Act 2001, Building Act 2004, Cadastral Survey Act 2002, Civil Defence Emergency Management Act 2002, Education Act 1989, Financial Advisors Act 2008, Financial Service Providers (Registration and Dispute Resolution) Act 2008, Historic Places Act 1993, Inland Revenue Acts, Land Transport Act 1998, Local Government Act 2002, Local Government Official Information and Meetings Act 1987, Rating Valuations Act 1998, Reserves Act 1977, Resource Management Act 1991, Road User Charges Act 1977, Social Security Act 1964, Tax Administration Act 1994, Transport (Vehicle and Driver Registration and Licensing) Act 1986. See further Appendix D and Appendix G.
- ¹⁸ Interim report of the Regulations Review Committee, December 2010.
- ¹⁹ See Report of the Regulations Review Committee, Activities of the Regulations Review Committee in 2010, March 2011, pp 9-10, referring to Interim Report of the Regulations Review Committee, December 2010.
- ²⁰ Gobbi, Gordon, and Lincoln (above n. 3) at 17.
- ²¹ Gobbi, Gordon, and Lincoln (above n. 3) at 17 put this down to "RRC diligence, PCO vigilance, and Executive compliance".
- ²² Charles Chauvel MP, Committee Stage of the Canterbury Earthquake Recovery Bill (2011) 671 NZPD 18129 available at https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20110414_00000012/canterbury-earthquake-recovery-bill-second-reading-in See also Paper delivered by Tim Macindoe MP and the Hon Lianne Dalziel MP, entitled New Zealand's response to the Canterbury earthquakes, at the 2011 Scrutiny of Legislation Conference.
- ²³ Gobbi, Gordon, and Lincoln (above n. 3) at p 28.
- ²⁴ Report of the Local Government and Environment Committee, Hearing of evidence on the Canterbury Earthquake Recovery Bill at p 3.
- ²⁵ (12 April 2011) 671 NZPD 17898, available at https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansS_20110412_00000823/brownlee-gerry-canterbury-earthquake-recovery-bill.
- ²⁶ See, report of the Local Government and Environment Committee on the Canterbury Earthquake Recovery Bill; (12 April 2011) 671 NZPD 18129, available at https://www.parliament.nz/en/pb/sc/reports/document/49DBSCH_SCR5107_1/hearing-of-evidence-on-the-canterbury-earthquake-recovery ; and see Megan Gall, A Seismic Shift: Public Participation in the Legislative Response to the Canterbury Earthquakes [2010] 18 Cant. Law Rev. 232 at 241.
- ²⁷ Gobbi, Gordon, and Lincoln (above n. 3) at 18.

- ²⁸ Gobbi, Gordon, and Lincoln (above n. 3) at 28 – no policy change was effected. Drafting changes were made to clarify the intent and achieve a better alignment of the Bill with legal principles and practical reality.
- ²⁹ Eleven Members of the House voted against the 2011 Act: https://www.parliament.nz/en/pb/journals-of-the-house/weekly-journals/document/00HOHJournals201104121/journals-of-the-house-for-the-week-beginning-tuesday-12#_Toc292272582
- ³⁰ 2011 Act, sections 60-57.
- ³¹ 2011 Act, sections 3 and 71(1).
- ³² 2011 Act, section 92.
- ³³ 2011 Act, sections 72 and 73. The Panel was chaired by a retired High Court Judge, Sir John Hansen, was Canterbury based, and was familiar with local circumstances. The Panel reviewed the 36 orders made under the 2011 Act. It recommended an amendment be made to only one of them – the first order it reviewed. It recommended one other order be reviewed in two years with regular reports on progress. The Panel recommended the remaining 34 orders be made without change.
- ³⁴ 2011 Act sections 6, 7.
- ³⁵ Gobbi, Gordon, and Lincoln (above n. 3) at 20.
- ³⁶ Interim report on the Orders in Council made under the Canterbury Earthquake Response and Recovery Act 2010 and the Canterbury Earthquake Recovery Act 2011 (I.16N) (5 October 2011), p 25.
- ³⁷ Report of the Regulations Review Committee, Activities of the Regulations Review Committee in 2012, March 2014, pp 7-8.
- ³⁸ As required by sections 73(6) and (7) of the 2011 Act. Report of the Regulations Review Committee, Activities of the Regulations Review Committee in 2012, March 2014, p 12.
- ³⁹ Report of the Regulations Review Committee, Activities of the Regulations Review Committee in 2013, June 2014, p 45.
- ⁴⁰ Report of the Regulations Review Committee, Complaint regarding the Canterbury Earthquake (Building Act) Order 2011 (SR 2011/311), April 2014, p 13.
- ⁴¹ Report of the Regulations Review Committee, Investigation into the Canterbury Earthquake District Plan Order 2014, December 2015.
- ⁴² Greater Christchurch Regeneration Act 2016 (2016 Act), section 147(3)(a), which provides that an order continued by subsection (1) is declared to have been lawfully made and to be and always have been valid.
- ⁴³ 2016 Act, section 146(1).
- ⁴⁴ 2016 Act, section 146(2) and Schedule 6.
- ⁴⁵ 2016 Act, section 147(1) and Schedule 7.
- ⁴⁶ Greater Christchurch Regeneration Bill, explanatory note.
- ⁴⁷ 2016 Act, section 71; cf. 2011 Act, s 27.

- ⁴⁸ 2016 Act, section 71; cf. 2011 Act, s 27(3).
- ⁴⁹ Gobbi, Gordon, and Lincoln (above n. 3) at 30.
- ⁵⁰ Gobbi, Gordon, and Lincoln (above n. 3) at 21-22.
- ⁵¹ Note LAC submission and comments by Charles Chauvel on expediency in the Committee of the Whole House stage.
- ⁵² Report of the Standing Orders Committee, "Review of Standing Orders 2011", September 2011, pp 61-62.
- ⁵³ (2014) NZPD 30 July 2014, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/50HansD_20140801_00000012/standing-orders-inquiry-into-parliament-s-legislative

Chapter 3 The inquiry process and the material that influenced our thinking

- ⁵⁴ Regulations Review Committee media statement, 17 December 2014, available at https://www.parliament.nz/en/pb/sc/business-before-committees/document/00DBSCH_INQ_56953_1/inquiry-into-parliaments-legislative-response-to-future
- ⁵⁵ Ibid.
- ⁵⁶ A list of submitters is at Appendix B. Each submission is available to be downloaded at www.parliament.nz.
- ⁵⁷ Law Commission, *Final Report on Emergencies*, NZLC R22, 1991.
- ⁵⁸ Law Commission, (above n. 57), at [4.55].
- ⁵⁹ Ibid, at [5.78]-[5.79].
- ⁶⁰ Ibid at Appendix D, p 372, clause 5.
- ⁶¹ Ibid at [5.80].
- ⁶² See, for example, 2002 Act, section 3(d). A diagrammatic representation of the continuum of current legislative responses to emergencies is attached as Appendix E.
- ⁶³ See Regulatory Impact Statement, Review of the legislative framework for recovery from emergencies, p 2
- ⁶⁴ Most of the Act was originally due to come into force on 15 May 2017, 180 days after it received Royal assent (15 November 2016). On 15 November, in the wake of the 7.8 magnitude Hurunui/Kaikōura earthquake that struck just after midnight the previous day, Hon Gerry Brownlee suggested in answer to an oral question: "I think, given the events of the last couple of days, there may be a need to look at bringing that commencement date further forward. It is my intention to have discussions with all parties in the House with a view to perhaps moving in that direction." See [https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20161115_20161115.These discussions culminated in the Civil Defence Emergency Management Amendment Act 2016 Amendment Act 2016, which has brought the Amendment Act's commencement date forward to 29 November 2016 at 9:59pm](https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20161115_20161115.These%20discussions%20culminated%20in%20the%20Civil%20Defence%20Emergency%20Management%20Amendment%20Act%202016%20which%20has%20brought%20the%20Amendment%20Act's%20commencement%20date%20forward%20to%2029%20November%202016%20at%209:59pm).

- ⁶⁵ See third reading speech of Hon Nicky Wagner, on behalf of the Acting Minister of Civil Defence, 8 November 2016: https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS_20161108_078450000/wagner-nicky
- ⁶⁶ Note LAC submission dated 12 April 2011 at [18]: https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/49SCLGE_EVI_00DBSCH_OTH_10601_1_A182144/legislation-advisory-committee and comments by Charles Chauvel on “expediency” in the Committee of the whole House stage, 12 April 2011: https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20110414_00000012/canterbury-earthquake-recovery-bill-second-reading-in.
- ⁶⁷ Professor Andrew Geddis and others, An open letter to New Zealand’s people and their Parliament, 28 September 2010, (above n.14).
- ⁶⁸ Report of the Regulations Review Committee, Regulation-making powers that authorise transitional regulations to override primary legislation, July 2014 (RRC July 2014 Report).
- ⁶⁹ So named after the Statute of Proclamations of 1539, which allowed King Henry VIII’s proclamations to have the same force as an Act of Parliament.
- ⁷⁰ RRC July 2014 Report, p 5, citing Report of the Committee on Ministers’ Powers 1932, Cmnd 4060 (The Donoughmore Report).
- ⁷¹ Tim Macindoe MP and the Hon Lianne Dalziel MP, New Zealand’s response to the Canterbury earthquakes. Paper delivered to 2011 Australia-New Zealand Scrutiny of Legislation Conference.
- ⁷² Report of the Regulations Review Committee, Inquiry into the Resource Management (Transitional) Regulations 1994 and the Principles that Should Apply to the Use of Empowering Provisions Allowing Regulations to Override Primary Legislation During a Transitional Period [1995] AJHR I16C at 16; Regulations Review Committee Investigation into the Road User Charges (Transitional Matters) Regulations 2012 (13 November 2012).
- ⁷³ In *Scott v Christchurch City Council* HC Christchurch CIV-2010-409-2401, 23 October 2010, the plaintiff sought an interim order pursuant to section 8 of the Judicature Amendment Act 1972 to halt the demolition of Manchester Courts, a Category 1 historic place. While it was not a challenge to an Order in Council itself, it was a challenge to the exercise of powers under section 129 of the Building Act 2004 to direct its owner to demolish the building. In dismissing the application for review, the Court considered that the 2010 Act and orders made under it, including the Canterbury Earthquake (Building Act) Order 2010, had the effect of truncating the decision-making process and neutralising any implicit consultation obligation under section 129. The speed with which the Court dealt with the proceeding is noteworthy. Mr Scott filed his proceeding on Friday 22 October 2010, the hearing occurred the next day, Saturday 23 October, and Chisholm J gave his written judgment and reasons the same day.
- ⁷⁴ Regulations Review Committee Complaint regarding the Canterbury Earthquake (Building Act) Order 2011 (24 April 2014).
- ⁷⁵ The eight Acts that were not amended were the Commerce Act 1986, the Health Act 1956, the Health and Disability Services (Safety) Act 2001, the Heritage New Zealand Pouhere Taonga Act 2014, the Local Government Act 1974, the Public Works Act 1981, the Soil Conservation and Rivers Control Act 1941, and the Waste Minimisation Act 2008.
- ⁷⁶ Our own analysis of the Orders in Council is broadly similar to that of the Council, but we identified additional unlisted Acts that were overridden by Order in Council – see Appendix D, Acts amended/not amended by Orders in Council under 2010 and 2011 Acts, and Appendix G, Orders in Council made under 2010 and 2011 Acts.

⁷⁷ Legislative Assembly for the ACT, Standing Committee on Justice and Community Safety, Henry VIII clauses fact sheet, prepared by Stephen Argument, November 2011 at 11, noting that similar considerations applied in relation to the Queensland Reconstruction Authority Bill 2011, the Queensland Government's legislative response to the disastrous floods in Queensland, in 2011.

Chapter 4 Our findings and recommendations

⁷⁸ Epidemic Preparedness Act 2006, sections 11-22.

⁷⁹ Including: community input; cross-party parliamentary involvement; purposes of the Act, and linking the exercise of powers to those purposes; time limits on exercise of powers; timeliness requirements; requirements to present information to the House of Representatives; offer back of land taken by Proclamation; appeal rights; Canterbury Earthquake Recovery Review Panel, with House of Representatives being informed and Minister required to take into account Panel's recommendations; application of Legislation Act 2012 (Orders in Council are disallowable instruments); quarterly reports to House of Representatives by Minister on operation of Act; annual reviews of operation and effectiveness of Act including recommendations for amendments must be presented to House of Representatives; expiry of Act after 5 years (and revocation of Orders in Council); provision of comprehensive explanatory notes to Orders in Council.

⁸⁰ See, for example, Acting Minister of Civil Defence Hon Gerry Brownlee's comments following confusion about tsunami warnings in the wake of the magnitude 7.8 Hurunui/Kaikōura earthquake on 14 November 2016: "We want to get through this current circumstance...there'll be all sorts of suggestions about changes, and some of those will ultimately be reflected in the law...." The whole command and control structure of [MCDEM] needs to be looked at." <http://www.stuff.co.nz/national/86441740/civil-defence-overhaul-inevitable-after-tsunami-warning-confusion-govt> and <http://www.stuff.co.nz/national/nz-earthquake/86657769/earthquake-gerry-brownlee-says-there-has-been-a-breakdown-in-quake-response>

⁸¹ As reflected in one of the purposes of the Civil Defence Emergency Management Act 2002, section 3(c).

⁸² Law Commission, *Final Report on Emergencies* (above n. 57) at [4.55].

⁸³ See LAC Guidelines (above n. 15) at [13.1].

⁸⁴ 2010 Act, section 6(6)(c).

⁸⁵ 2011 Act, section 71(6)(c).

⁸⁶ 2010 Act, section 6(1); 2011 Act, section 71(1). See also section 10(1) of the 2011 Act, which provided that "the Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act". In *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [118], the Supreme Court held that "...the Act is explicit that all of the powers in the Act must be used for the purposes of the Act and, even then, only when it is reasonably considered necessary for those purposes."

⁸⁷ It is difficult to be precise about the number of Acts that were overridden as some Orders in Council did not clearly specify which Acts were modified. For example, the Canterbury Earthquake (Reserves Legislation) Order (No 2) 2011 (SR 2011/368), cl 6, which dispenses from Councils' obligations to comply with the Reserves Act 1977, "or any other enactment under which the reserve is held or that applies to the reserve".

⁸⁸ A list of such Acts is included at Appendix D.

⁸⁹ 2011 Act, section 71(6)(a) and (b); 2010 Act, section 6(6)(a) and (b).

- ⁹⁰ 2011 Act, sections 72, 73.
- ⁹¹ Standing Orders of the House of Representatives of New Zealand, 2014, SOs 318(1), 3(1).
- ⁹² SO 319.
- ⁹³ Legislation Act 2012, section 38.
- ⁹⁴ Legislation Act 2012, sections 37-47.
- ⁹⁵ The 2011 Act, section 76, provided that Orders in Council made under s 71 of that Act were disallowable instruments and legislative instruments for the purposes of the Legislation Act 2012, which would have been the default position anyway, but for s 75(5) which provided that “So far as it is authorised by this Act, an order has the force of law as if it were enacted as a provision of this Act”. We do not consider s 75(5) was necessary and do not recommend an equivalent provision be included in future emergency legislation.
- ⁹⁶ 2011 Act, section 74(2); 2010 Act, section 6(3). See for example, Andrew Geddis, An open letter to New Zealand’s people and their Parliament (above n. 14); Submission of Professor Philip Joseph, Hearing of evidence on the Canterbury Earthquake Recovery Bill https://www.parliament.nz/en/pb/sc/reports/document/49DBSCH_SCR5107_1/hearing-of-evidence-on-the-canterbury-earthquake-recovery at p 104
- ⁹⁷ Submission of Professor Joseph (above n. 96) at p 105.
- ⁹⁸ Submission of Legislation Advisory Committee, https://www.parliament.nz/en/pb/sc/reports/document/49DBSCH_SCR5107_1/hearing-of-evidence-on-the-canterbury-earthquake-recovery at p 45.
- ⁹⁹ For a recent application of this principle, in the context of the United Kingdom’s proposed withdrawal from the EU, see *R v The Secretary of State for Exiting the European Union* [2016] EWHC 2768.
- ¹⁰⁰ Carter, McHerron and Malone, *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at p 228.
- ¹⁰¹ Law Commission, *Final Report on Emergencies*, (above n. 57) at [1.91] and see also [1.40], [1.106], [5.31], [5.81], [5.105]-[5.123], [5.158], [8.44]-[8.46], [9.44]-[9.46]. See also n. 73 above.
- ¹⁰² Available at <http://www.unisdr.org/we/coordinate/sendai-framework>.
- ¹⁰³ Available at <http://www.ifrc.org/docs/idrl/I922EN.pdf>
- ¹⁰⁴ Available at <http://2001-2009.state.gov/documents/organization/99774.pdf>.
- ¹⁰⁵ 2011 Act, section 93. The New Zealand Law Society, in its supplementary submission of 7 December 2015, submitted that emergency legislation should include, as an express purpose, the need to restore existing rights as soon as possible.
- ¹⁰⁶ See Checkpoint interview with Professor Brendon Bradley, University of Canterbury, 16 November 2016: <http://www.radionz.co.nz/national/programmes/checkpoint/audio/201824140/new-zealand-needs-to-better-prepare-for-qaues>.

Appendix F

- ¹⁰⁷ 2011 Act, section 92.

¹⁰⁸ 2011 Act, section 88.

¹⁰⁹ New Zealand Law Society supplementary submission, 7 December 2015.

¹¹⁰ Child Support Act 1991, Estate and Gift Duties Act 1968, Estate Duty Abolition Act 1993, Estate Duty Repeal Act 1999, Gaming Duties Act 1971, Goods and Services Tax Act 1985, Income Tax Act 1994, Income Tax Act 2004, Income Tax Act 2007, KiwiSaver Act 2006 Land Tax Abolition Act 1990 Stamp and Cheque Duties Act 1971, Stamp Duty Abolition Act 1999, Student Loan Scheme Act 1992, Student Loan Scheme Act 2011, Tax Administration Act 1994, Taxation Review Authorities Act 1994

¹¹¹ The Acting Minister of Civil Defence, Hon Gerry Brownlee, suggested in response to a Parliamentary Question on 15 December 2016 that the definitional question of what is a “large-scale emergency” may need to be reconsidered following the magnitude 7.8 earthquake that struck near Hanmer at 12.02am on 14 November 2016: https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS_20161115_054337000/10-civil-defence-disaster-preparedness-legislation

¹¹² Child Support Act 1991, Estate and Gift Duties Act 1968, Estate Duty Abolition Act 1993, Estate Duty Repeal Act 1999, Gaming Duties Act 1971, Goods and Services Tax Act 1985, Income Tax Act 1994, Income Tax Act 2004, Income Tax Act 2007, KiwiSaver Act 2006 Land Tax Abolition Act 1990 Stamp and Cheque Duties Act 1971, Stamp Duty Abolition Act 1999, Student Loan Scheme Act 1992, Student Loan Scheme Act 2011, Tax Administration Act 1994, Taxation Review Authorities Act 1994