

Pūrongo Rangahau | Study Paper 23

The Legal Framework for Emergencies in Aotearoa New Zealand

Professor Janet McLean KC



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

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Foreword

In April 2021, Te Aka Matua o te Ture | Law Commission engaged Professor Janet McLean KC to write a study paper concerning Aotearoa New Zealand's legal and institutional framework for pandemics and other threats. At the time, the COVID-19 pandemic had been with us for over a year. We had witnessed its unprecedented impacts across society, especially those arising from the various measures adopted to prevent and mitigate the risks of infection spreading. These measures in turn have prompted people to question whether our legal institutions are adequate for crisis situations.

Just over 30 years ago, the Commission published its *Final Report on Emergencies* (NZLC R22, 1991). The Report addressed the sources of powers in an emergency and the balance of powers and freedoms in an emergency, both generally and in relation to particular kinds of emergencies. Notably, the Report does not address pandemics, although it briefly mentions epidemics and makes recommendations relating to biological incidents in the context of a war.

Given the COVID-19 pandemic, the changing nature of threats that may require an emergency response and changes to the legal landscape in Aotearoa New Zealand more generally, it was timely for the Commission to reconsider the country's legal readiness for future emergencies. We are immensely grateful that Professor McLean agreed to take on this task for us and thank her for the scholarship of her research and the wisdom of her advice.



Amokura Kawharu

Tumu Whakarae | President

Author's preface

This paper was written primarily from my home in Auckland (sometimes under conditions of lockdown) while the COVID-19 pandemic unfolded, new variants of the virus evolved, a huge amount of legislation was generated and legislation began to be challenged in the courts.

The legal issues changed drastically over that time. This paper draws on my expertise as a public lawyer and does not necessarily represent the views of the Commission. Thanks to Selwyn Fraser and Nathan Pinder for research assistance.

All errors are my own. The law is as stated at 14 July 2022.

Professor Janet McLean KC

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Executive summary

STRUCTURE OF THE STUDY PAPER

1. This Study Paper is in three parts. Part One identifies changes to Aotearoa New Zealand's background constitutional norms since Te Aka Matua o te Ture | Law Commission (Commission)'s 1991 *Final Report on Emergencies*. Modern emergency legislation will be read against background norms to be found in:
 - (a) tikanga Māori;
 - (b) te Tiriti o Waitangi | Treaty of Waitangi;
 - (c) international and domestic rights protection frameworks; and
 - (d) privacy law;and against a general expectation that limitations on protected rights and freedoms must be prescribed by law.
2. Part Two endorses the general principles that should apply to emergency legislation identified by the Regulations Review Committee and elaborates upon them further. It suggests that Aotearoa New Zealand has very much relied on bespoke emergency legislation enacted to deal with emergencies as they have arisen. It should now consolidate some of that experience by embedding selected provisions for emergencies in standing rules, protected by legal thresholds and triggering provisions.
3. Part Three contains a detailed analysis of the existing standing legal regime for emergencies, usually but not always triggered by a declaration of emergency. It looks across various types of emergencies, considers the legal tests that unlock emergency powers and for how long and discusses the rules for elections disrupted by emergencies. Its particular focus is on lessons from the ongoing pandemic.

PRINCIPAL RECOMMENDATIONS

Part One

4. Māori should have greater input into emergency legislation, emergency preparation and the recovery phase of emergencies.
5. In those rare cases in which the New Zealand Government is forced by circumstances to act without participation from Māori authorities, especially in the acute response phase, the duty of active protection of Māori should weigh more heavily than usual on government.

6. Standing committees of Māori advisors for emergencies should be established.
7. Ongoing work needs to be undertaken, with the involvement of the Privacy Commissioner, into alternatives to lockdowns and quarantines that use phone surveillance as a measure of both disease surveillance and enforcement. The current legislative test in the Privacy Act 2020 weighs privacy against the public interest, but in a pandemic, privacy rights may have to be weighed against other rights and freedoms.

Part Two

Emergency regulations and orders

8. For reasons of constitutional principle, primary legislation enacted by Parliament usually prevails over secondary legislation made by the executive government.
9. Orders made under delegated power conferred on the executive in emergency legislation should have the status of secondary legislation and be subject to the same minimum checks and balances as secondary legislation more generally (such as publication requirements and the availability of regulatory disallowance procedures).
10. Additional measures for control and supervision of such orders should be calibrated according to:
 - (a) how much negative impact the orders are likely to have on the daily life and businesses of the population as a whole (including the extent to which they are likely to restrict protected rights and liberties);
 - (b) how much negative impact the orders are likely to have on particular sectors of the population;
 - (c) how much negative impact the orders are likely to have on Māori;
 - (d) how much public input has been possible in the making of the primary legislation under which the orders have been made;
 - (e) how much parliamentary input has been possible into the primary legislation and draft orders;
 - (f) the likely duration of the emergency; and
 - (g) whether the orders modify statutes passed by Parliament.
11. In circumstances in which there is great public impact and low public and parliamentary input, additional opportunities for scrutiny of orders should be considered, such as:
 - (a) a requirement to publish a justification of why an order is necessary, its effect on protected rights and te Tiriti o Waitangi and the advice on which the Minister relied within 7 days of its making;
 - (b) a requirement that the House affirm the order within a stated period;
 - (c) scrutiny by a standing body of experts;
 - (d) scrutiny by a body of community representatives;
 - (e) scrutiny by a standing body of Māori representatives; and
 - (f) strict time limits on the duration of the order.

Regulations that modify statutes

12. Earlier modifications to statutes by regulations required in response to past earthquakes and during the COVID-19 pandemic should be considered for inclusion in standing rules to be triggered by a declaration of emergency or epidemic notice.
13. Where necessary, bespoke legislation should include a non-exhaustive positive list of statutes that can be modified by regulation. The list should be able to be added to “if necessary” together with a requirement of reasons.
14. Ideally, modifications to statutes by regulation should only be authorised in rare cases in which they are “likely to be necessary” (rather than “necessary or desirable” or “expedient”). At the very least, the statute should spell out the purposes for which modifications can be made. Modifications of legislative requirements that have as their object to ensure that individuals are able to obey the law when they would otherwise have no option but to be in breach of the law because of emergency measures support the rule of law. Other reasons for the modification of statutes by regulations, for example, for the purposes of administrative convenience or redeployment of personnel, should require much more by way of justification and supervision.

Part Three

Suggested changes to the standing regime for emergencies

15. It would be both possible and desirable to enact more emergency rules in primary legislation, with full public input, subject to well-calibrated protections and legal tests to ensure they are triggered by a genuine emergency and that they become dormant again once the emergency has passed. It is likely that the need for bespoke legislation will never completely go away, but we ought not to be as reliant on it as we have been.
16. The standing regime for emergencies should be designed to be time-limited so that emergency powers cease when a state of emergency (and its transition period) ends. In certain cases, it may be necessary to confer powers on officials to act immediately for a short period in advance of a formal state of emergency being declared.

Relationship between the Civil Defence Emergency Management Act 2002 (CDEM Act) and other emergency powers

17. The relationship between the CDEM Act and the declaration of emergency processes it sets out and the emergency powers in separate statutes is varied and complicated and could benefit from further consideration and greater consistency or justification. Are the sector-specific declaration of emergency regimes intended to be used for ordinary or intermediate emergencies or are they intended to unlock powers in advance of serious emergencies being declared under the CDEM Act or both?

Powers in a pandemic

18. The exercise of the more-routine public health powers relating to specified individuals and places should continue to be triggered by the Minister of Health on the advice of local medical officers of health. Consideration should also be given to whether it may be appropriate to confer further powers directly on medical officers of health to act immediately and for a limited time in relation to identified threats to public health including for a limited period in advance of powers being formally triggered.

19. There should be a separate regime for powers to regulate health emergencies that affect whole populations (whether local or national).
20. The exercise of powers in relation to the whole population or parts of the population should be triggered by the issue of an epidemic notice either by the Prime Minister acting in consultation with the Minister of Health on public health advice or the Governor-General in Council acting on public health advice.
21. Powers over the whole or parts of the population should still continue to be able to be triggered by the Minister for Emergency Management under the CDEM Act in order to activate its notification requirements and time-limits.
22. There should be a reference in the Health Act 1956 and Epidemic Preparedness Act 2006 (and not just the CDEM Act) to the need to take a precautionary approach.
23. The Health Act s 117 confers broad powers to make regulations with little by way of protection in terms of their purpose and without any requirement of a triggering event. The s 117 powers significantly overlap with the powers to make orders under s 70 (for example, the powers to restrict public gatherings and to isolate persons). It would be helpful to identify in the Health Act when ordinary regulation-making powers are contemplated and for which purposes – or alternatively to align the two regimes as much as possible.
24. Powers to make orders over parts or the whole of the population under the Health Act should be conferred on the officials who hold political responsibility for their exercise rather than public servants. National orders should be made by the Prime Minister or Governor-General in Council having regard to public health advice (indicating that a range of other advice will be relevant but without specifying exactly which Ministers have to be involved). Geographically bounded orders (which could include lockdowns of major cities) should be made by the politically responsible Minister of Health on public health advice.
25. Powers to regulate essential services and supply chains in a pandemic should be conferred on the Minister responsible for commerce having regard to public health advice.
26. The COVID-19 Public Health Response Act 2020 improves on the Health Act in the way in which the powers are expressed and the purposes for which health orders can be made. However, some particular matters identified by the Finance and Expenditure Committee Inquiry into the operation of the COVID-19 Public Health Response Act 2020 need further consideration. These include the incorporation of te Tiriti o Waitangi and principles of tikanga Māori, ensuring that contact tracing rules comply with privacy principles and the authorisation of other officials to enforce orders made under the Health Act. Added to the list should be the potential effect of pandemic orders on religious freedom. Other control devices should be considered (as mentioned above) including:
 - (a) a requirement to publish a justification of why an order is necessary, its effect on protected rights and te Tiriti o Waitangi and the advice on which the Minister relied within 7 days of its making;
 - (b) a requirement that the House affirm an order within a stated period;
 - (c) scrutiny by a standing body of experts;
 - (d) scrutiny by a body of community representatives; and
 - (e) scrutiny by a standing body of Māori representatives.

27. The operation of the Epidemic Preparedness Act should be assessed to determine its effectiveness and whether more provisions should be embedded in advance to be activated by the issue of an epidemic notice. The triggering test for issuing an epidemic notice is currently quite onerous. It refers to the directly disrupting effects of the disease itself and not to the indirect effects of measures taken by the government to mitigate the spread or outbreak of a disease. This should be clarified by reference to both direct and indirect effects.
28. The enlistment of other officials for the enforcement of orders under the COVID-19 Public Health Response Act suggests that the enforcement provisions of the Health Act are not necessarily appropriate or sufficiently specialised for the long-term response required in relation to a pandemic emergency. The powers of WorkSafe inspectors, Aviation Security officers and Customs officers could be augmented in their parent legislation to be triggered by the issue of an epidemic notice.
29. The legislature should consider whether s 9 of the Defence Act 1990 should be amended to authorise assistance by the defence forces when an epidemic notice has been given. Ideally, ministerial approval ought to be required, and limitations on the use of such enforcement powers against the civilian population ought to be included. The Defence Forces should be acting in support of civilian enforcement officers (such as Police or Customs officers) if at all possible.

Parliament and elections

30. Section 18(1) of the Constitution Act 1986 allows the Governor-General to designate where Parliament should meet and, in s 18 (1A), to change the “place” it meets “if that place is unsafe or uninhabitable”. The provision could be clarified to add “mode of meeting” to make clearer that technical alternatives are also possible. Once Parliament has been convened, the House itself can decide where and how to conduct its business.
 31. Further consideration needs to be given to the conduct of elections disrupted by an emergency. Current legislation places an undue burden on the Chief Electoral Officer to make what may be very difficult decisions in very difficult circumstances when an election is disrupted by an emergency. Further consideration should be given to whether the Chief Electoral Officer should be enabled and, in certain circumstances, required to consult the Clerk of the Executive Council and the Chief Government Statistician.
 32. If an emergency occurs or threatens after Parliament has been dissolved or expired and the electoral writs issued, there should be consideration of whether there should be a power to reconvene the old Parliament to seek a political solution to the disrupted election.
 33. The Cabinet Manual caretaker conventions should address when the caretaker conventions begin in the event that an election is partially or wholly disrupted by an emergency.
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Introduction

He moana kē ta matawhānui, he moana kē ta matawhāiti

Proper preparation is needed in order to secure the future for the people

1. On 9 April 2021, Te Aka Matua o te Ture | Law Commission (Commission) commissioned me to write a study paper concerning Aotearoa New Zealand's legal and institutional framework for pandemics and other threats. Building on the Commission's *Final Report on Emergencies* (NZLC R22, 1991), I was asked to undertake a preliminary evaluation of how well Aotearoa New Zealand's laws and legal institutions anticipated the challenges presented by COVID-19 and to identify any questions that ought to be considered to ensure readiness for future emergencies. I was asked to focus on the standing legislative regime designed for threats posed by pandemics and to consider the appropriate distribution of powers including the exercise of executive power as opposed to legislative power in an emergency situation, the holding of elections and the exercise of kāwanatanga by the Crown in light of te Tiriti o Waitangi | Treaty of Waitangi obligations.
2. This Study Paper is in three parts. Part One surveys the Commission's earlier work in relation to emergencies in Aotearoa New Zealand, describes some of the constitutional background norms that have been recognised or have evolved since that earlier study, such as te Tiriti o Waitangi and the New Zealand Bill of Rights Act 1990, and suggests some of the ways those norms are likely to be tested in an emergency. Part Two discusses more-specific principles and practices that should inform the ways in which emergency legislation is drafted. It draws on the legal responses to a number of Aotearoa New Zealand's recent disaster events – notably earthquakes – that have established legislative practices and principles to be observed in sector-specific emergency legislation. It suggests that Aotearoa New Zealand has very much relied on bespoke emergency legislation enacted to deal with emergencies as they have arisen. It could now consolidate some of that experience in standing rules that can be unlocked once a triggering event occurs. Part Three contains a more detailed analysis of the existing standing legal regime for emergencies, usually but not always triggered by a declaration of emergency. It looks across various types of emergencies, considers the legal tests that unlock emergency powers and for how long and discusses the rules for elections disrupted by emergencies. Its particular focus is on lessons from the ongoing pandemic and potential reforms to the Health Act 1956 provisions designed to control outbreaks of diseases.
3. When COVID-19 reached Aotearoa New Zealand's shores, officials had to make the best of the existing legal regime for epidemics and to find ways to make it work. This study is not seeking to allocate praise or blame for the government's handling of the current crisis.

Instead, it speaks to the future, drawing on general principles and on what we have learned not only in relation to the latest pandemic but also from other emergencies such as the Christchurch and Kaikōura earthquakes. Its focus is on ensuring that governments in the future have sufficient powers to do what is necessary to protect their citizens in an emergency and on the proper legal and political controls on such powers. In the relative calm of this distance from the initial outbreak of COVID-19 and with the legal experience of it fresh in our minds, we have an opportunity to identify general frameworks, principles and processes with which to frame future responses. The “golden hour” for such legislative reform is while the pandemic is still fresh in our minds and while we have a realistic view of what legal powers may be necessary in order to respond to a major threat to the life of the nation.

4. Louise Delany’s valuable book *Covid and the Law in Aotearoa New Zealand*, which was published halfway through this project, relieves me of the task of outlining in detail Aotearoa New Zealand’s legal response to COVID-19 (though at times I have included examples of orders made in the response to COVID-19).¹ As part of her analysis, Delany includes a helpful chronological account of the labyrinthine statutes, orders and directives that have been used to give effect to the government’s measures in response to COVID-19.² Part Three of this Study Paper refers to matters of legal detail, but it is not intended to be a complete account of all the instruments used or even of all of the legal issues that have arisen in relation to the COVID-19 pandemic in particular. For example, there have been numerous legal challenges surrounding vaccine availability, safety and the imposition of vaccine mandates. A future pandemic is likely to raise different issues depending on the disease type, how easily it is transmitted, which sections of the public are most at risk, its virulence, whether there is an effective vaccine and how much population take-up of a vaccine is required for vaccine effectiveness.³
5. Emergency preparedness and mitigation involves numerous elements of which the legal framework is only one. Public institutions need to be coordinated and resilient. This is especially the case when policy institutions such as the Ministry of Health have been established separately from institutions engaged in delivering services. Interconnectedness with the wider world and between diverse communities and sites of authority within Aotearoa New Zealand will be critical to ensure that communication is clear, information feeds back into the system and there is trust in government and its institutions.⁴ As the experience of COVID-19 has shown, there is a need to develop capacity, risk analysis and resilience in advance of unforeseen perils. Low intensive care capacity limited the government’s choices of how to respond and resulted in longer and stricter lockdowns. Developing and maintaining social cohesion will be critical. In a pandemic, in particular, we are only as secure as the most vulnerable of our communities. Relationships between government agencies and Māori institutions and community groups that look after people’s welfare cannot be forged during a state of emergency. Such relationships need to be strong and well established. Electronic alternatives to face-to-face contact may need to be

1 Louise Delany *Covid and the Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021).

2 My thanks to Dr Delany for her generosity in sharing early drafts and her insights with me.

3 See *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012; *GF v Minister of COVID-19 Response* [2021] NZHC 2526; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 and *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.

4 See *Sendai Framework for Disaster Risk Reduction 2015-2030* GA Res 69/283 (2015).

further trialled and developed, as may information gathering and systems for the protection of personal information. The Public Service Act 2020 provides a framework for continuous evaluation of long-term challenges and threats to Aotearoa New Zealand, which will be an important part of planning,⁵ as does the Civil Defence Emergency Management Act 2002, which is currently under review.

6. It is tempting to place too much emphasis on what is “natural” and “inevitable” about emergencies. However, it is often the *consequences* of an emergency event that is the disaster. How an emergency is experienced by people is often very much the product of human agency. The *extent* of the flooding of New Orleans in Hurricane Katrina had a human cause. We are able to design buildings to protect lives in an earthquake. The degree to which individual rights have to be limited to protect public health may depend in part on hospital capacity, the general health status of the population and the speed at which borders can be closed. Intensive care capacity and other health provision capacity should be planned with future contingencies in mind. Future events are inevitable, but their effects and our responses to them are not. That is especially true at a time when we are faced with the pervasive threat of climate change. How well we plan will have a direct effect on the liberties we will be able to enjoy in the future as well as on our social and economic wellbeing.
7. Given the size of these broader challenges, some may regard the clarification of the *legal* framework as a relatively unimportant or even peripheral part of preparing for a future emergency and pandemic response. After all, some may argue that the *effectiveness* and *justification* for Aotearoa New Zealand’s initial COVID-19 response in March 2020 were more important than its legality. As time went on, however, the importance of the legal regime became increasingly more apparent to everyone. A good legal framework ensures that appropriate officials have apposite powers and provides opportunities for governments to justify their actions. It establishes processes, promotes certainty and disciplines power and decision making. It provides rules and standards to which officials can be held – in times of crisis as well as ordinary times. Such standards are important in guiding officials’ behaviour when levels of public trust are highest and the temptation to overreach is strong. They are even more important when public trust inevitably starts to wane or the measures adopted seem not to be working or are taking a long time to work. The response phase in a pandemic, in particular, can sometimes be very long. Both officials and citizens can become fatigued, and confidence and trust in government will inevitably fluctuate. In both the initial emergency phase and in the longer response and recovery phases, legal standards need to be accessible and, to the extent possible in an emergency, predictable in their application. Getting the legal framework correct is essential for the legitimacy of government. It evidences a political community’s deepest commitments to the value of respect for persons. A bad legal framework can contribute to a disaster.
8. Lawyers have long worried that the use by governments of extra-legal or extraordinary powers in a genuine emergency for good reasons may give licence to future governments to dispense with ordinary law and legal processes in situations in which the emergency has been manufactured or exaggerated. Clear and effective frameworks that confer powers and create expectations of accountability during emergencies ensure that emergencies do not take place in the absence of legal authorisation and constraint.

⁵ Te Aka Matua o te Ture | Law Commission *Final Report on Emergencies* (NZLC R22, 1991).

9. Observers of emergencies have identified the following phases in any emergency: mitigation, preparedness, response and recovery. In a liberal democracy, the expectation is that extraordinary measures and the suspension of ordinary processes should be limited as much as possible to the acute part of the response phase and that recovery should commence as early as possible. The experience of the COVID-19 pandemic may cause us to rethink these discrete phases given that the response and recovery phases may proceed in tandem for many years and the threat to health may fluctuate. The general proposition still holds good that the use of extraordinary powers should be as time-limited as possible and the resumption of ordinary political and legal processes should commence as early as is prudent (subject to ongoing mitigation measures).
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PART ONE

Aotearoa New Zealand's evolving constitutional framework

EARLIER LAW COMMISSION WORK ON EMERGENCIES

- 1.1 Te Aka Matua o te Ture | Law Commission (Commission)'s 1991 *Final Report on Emergencies* (1991 Report) was an important contribution to the identification of the legislative principles and practices that should govern emergencies in Aotearoa New Zealand.¹ The 1991 Report was informed by the ways in which successive New Zealand governments had used the broad emergency powers conferred in the Economic Stabilisation Act 1948 and the Public Safety Conservation Act 1932 to extend their executive powers.² Both of these statutes left the question of when emergency powers were justified to the Prime Minister's individual judgement and conferred extensive powers on the Prime Minister with little by way of safeguards. These Acts remained part of the law of New Zealand until their repeal in 1987.
- 1.2 The 1991 Report referred to the various stages of the so-called emergency continuum.³ The *mitigation* phase involves attempts to prevent an emergency from arising or to reduce its effects if it does occur. The *preparedness* phase refers to planning for an emergency. The measures taken to deal with the immediate effects of the emergency itself are the *response* phase. And steps will have to be taken to address the problems arising from the emergency in the *recovery* phase. The Commission was primarily concerned with the *response* or acute phase of emergencies because it is during this phase in which extraordinary powers tend to be most required. These phases are rarely as discrete as the continuum describes. It is widely accepted that the response and recovery phases tend to occur in tandem. In a pandemic, in particular, mitigation measures may need to be in place throughout.
- 1.3 Many of the recommendations made in the 1991 Report have since been adopted as best legislative practice. Following its recommendations, the practice has for the most part

1 Te Aka Matua o te Ture | Law Commission *Final Report on Emergencies* (NZLC R22, 1991).

2 See for example *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA); *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA); and *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA).

3 Te Aka Matua o te Ture | Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at 1.17 and 1.18.

been to avoid the conferral of broad powers to deal with a range of emergencies in a single Act, preferring instead a sectoral approach tailoring the powers required for different kinds of emergencies in discrete legislation. The decision to trigger the most extensive national emergency powers is no longer left to the subjective assessment of the Prime Minister alone. Declarations of emergency are now subject to detailed rules about how they are triggered and by whom and are subject to the oversight of the House of Representatives.⁴ In each case, bespoke legislation enacted to deal with particular emergencies such as in response to the Canterbury and Kaikōura earthquakes and the COVID-19 pandemic has been set to expire within a stated timeframe.⁵

- 1.4 The 1991 Report identified enduring questions that remain as relevant today as they were in 1991:
- (a) What executive powers are needed and justified to deal effectively with a national emergency in Aotearoa New Zealand and in a manner consistent with our basic constitutional system and traditions?
 - (b) What rights and freedoms ought to be derogated from in any national emergency?
 - (c) What procedures are most appropriate for bringing emergency powers into effect?
 - (d) What safeguards are needed to confine the exercise of emergency powers to a national emergency?
 - (e) What limits and controls should be placed on the exercise of emergency powers, and what remedies should there be for the abuse of these powers?
 - (f) What changes are needed in the existing law to achieve these objects?
- 1.5 Even the wisest among us, however, are limited by our imaginations and experiences, which is something we all need to keep uppermost in our minds when designing and recommending legal frameworks for emergencies (including in this study itself). Despite its excellent and enduring qualities, the 1991 Report said very little about human diseases. It contained only four paragraphs specifically devoted to the issue of epidemics and the related powers under the Health Act 1956. The experiences of the earlier SARs threat and of COVID-19 over the last 3 years suggest that pandemic-type events have certain distinctive features that need to be considered in the design of any legal regime. Moreover, a number of Aotearoa New Zealand's background constitutional and legal norms and expectations have developed and changed since 1991 and are likely to continue to do so.

CHANGES SINCE 1991: THE DEVELOPMENT AND RECOGNITION OF LEGAL AND CONSTITUTIONAL NORMS

- 1.6 I turn now to discuss in more detail some of the important legal norms that have been recognised or developed since 1991 and should inform any standing legislative regime to govern pandemics and other emergencies – conscious that these will continue to develop over time. I begin each section with the constitutional expectations that operate in

4 Civil Defence Emergency Management Act 2002, s 67. There are still gaps that need to be addressed as discussed in Part Three. Most emergencies are local and are subject to different requirements.

5 See generally the Hurunui/Kaikōura Earthquakes Recovery Act 2016; Canterbury Earthquake Recovery Act 2011; Canterbury Earthquake Response and Recovery Act 2010 and COVID-19 Public Health Response Act 2020.

ordinary times before turning to the question of whether or how much they should be derogated from in an emergency.

Tikanga Māori

- 1.7 Tikanga Māori is constitutionally significant to Aotearoa New Zealand's legal norms in four mutually reinforcing respects:⁶
- (a) First, as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa New Zealand.⁷
 - (b) Second, in terms of Treaty rights and obligations that pertain to tikanga.
 - (c) Third, where tikanga values comprise a source of the New Zealand common law⁸ or have been integrated into state law by statutory reference.⁹
 - (d) Fourth, to give effect to Aotearoa New Zealand's international obligations in relation to Māori as indigenous people, including under Te Whakapuakitanga o te Rūnanga Whakakotahi i ngā Iwi o te Ao mō ngā Tika o ngā Iwi Taketake | United Nations Declaration on the Rights of Indigenous Peoples.¹⁰
- 1.8 Consistency of state law with tikanga (or Māori customary law) is to be aimed for, if possible. Equally, there may be aspects of tikanga that state law cannot reach. Tikanga may operate in cooperation with state law, which we witnessed in New Zealand Police

6 Te Aka Matua o te Ture | Law Commission is currently undertaking a study of tikanga Māori as a system of ethics and law.

7 Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David V Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 331 and 334; and Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Taumauri | Waikato L Rev* 1 at 2–5. See also *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, particularly the reasons given by William Young and Ellen France JJ at [166]–[169], Glazebrook J at [237], Williams J at [297] and Winkelmann CJ at [332].

8 As recognised by te Kōti Mana Nui | Supreme Court in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [9] and [169]. In *Ellis v R* [2020] NZSC 89, submissions were sought on the application of tikanga on the question of whether the Court has jurisdiction to hear an appeal against conviction after the death of the appellant. The Court issued its judgment allowing the appeal to proceed, but reasons for that decision are to be provided with the judgment on the substantive appeal: at [5]. See also *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291 at [43]–[47] and [58].

9 Statutes referencing tikanga include the Oranga Tamariki Act 1989 (see s 2 definitions of “tikanga Māori” and “mana tamaiti (tamariki)”; Resource Management Act 1991; and Taumata Arowai—the Water Services Regulator Act 2020. See also Christian N Whata “Evolution of legal issues facing Māori” (paper presented to Māori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013).

10 Aotearoa New Zealand affirmed Te Whakapuakitanga o te Rūnanga Whakakotahi i ngā Iwi o te Ao mō ngā Tika o ngā Iwi Taketake | United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007) (UNDRIP) in 2010. UNDRIP recognises the importance of protecting the collective rights of indigenous peoples and addresses the rights to self-determination, preservation of culture and institutions, participation in decision making and consultation, and rights to lands and resources. As a declaration rather than a convention, UNDRIP does not have legally binding force attached to it in international law. However, UNDRIP is widely viewed as not creating new rights but rather elaborating on internationally recognised human rights as they apply to indigenous peoples and individuals, thus in this way having a binding effect: see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 34–35 and 38–44; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 42 and 233–234; and Claire Charters “The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case for Cautious Optimism” in *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS — Special Report* (Centre for International Governance Innovation, 2020) 43 at 48–50.

and iwi-operated road blocks during the pandemic.¹¹ Alternatively, it may be adopted as part of state law, as we saw in the adoption of rāhui after the Whakaari/White Island eruption. Where there is agreement about tikanga or kawa (for certain iwi, foundational principles are referred to as kawa) among Māori, a tikanga- or kawa-consistent reading of state law should be applied to Māori where possible and for recognised purposes.¹² Tikanga existing alongside and untouched by state law may itself be adjusted to accommodate emergencies (for example, adaptation of marae protocol to protect kaumātua and kuia from COVID-19). Given that emergencies tend to threaten people's safety and wellbeing, state law and tikanga will inevitably both have a role to play.

- 1.9 An emergency, and perhaps especially an emergency sparked by a pandemic, raises in an acute way the issue of how authority is ordinarily distributed in any political system and of how much the need for swift and decisive action may require ordinary decision-making procedures to be set aside for a time. Where the survival of the people is at stake, power may need to be concentrated in a few hands for a time. This is true in both tikanga and state law. Sir Eddie Durie writes that, in times of peace, more-powerful rangatira acted in concert with those of lesser influence, but during or shortly after a war, the authority of a single rangatira could be absolute. In war, personal authority became more important than consensus.¹³ Particular rangatira would sometimes lead the people on special projects, while other rangatira would lead more generally. Those who teach and advise leaders because of their special expertise, knowledge or skills (experts or tohunga) become especially important in an emergency in both systems too. According to tikanga, the quality of the leadership of rangatira will be judged after the fact by the people.
- 1.10 Te Puea was a prominent Māori leader who, during the 1913 smallpox epidemic, established almost single-handedly a makeshift shelter at Te Paina so that infected people could be isolated but without being removed from their home community. She was one of the first Māori leaders to accept and adopt Western medical treatment and practices for Pākehā diseases (about which many of her people were suspicious and afraid). At the same time, she ensured nursing and other medical assistance was provided by Māori as much as was possible.¹⁴ Tainui leadership carried on that tradition in King Tūheitia's endorsement of the COVID-19 vaccine.
- 1.11 Emergencies raise questions in both tikanga and state legal systems about how much ordinary political participation should be reduced and in what circumstances. In specific instances defined by tikanga, ordinary expectations, even of consultation between the Crown and iwi, may yield to measures for the preservation of the people. Dr Carwyn Jones has given uncontradicted evidence of tikanga expectations in a pandemic (in the

11 Many have argued that road blocks were an exercise in te tino rangatiratanga. I have described these as cooperative arrangements given that both state law and tikanga were being used to preserve health and life and both Māori and state institutions were involved.

12 *Te Pou Matakana Ltd v Attorney-General* (No 2) [2021] NZHC 3319, [2022] 2 NZLR 178 in relation to Māori health data sharing with Whānau Ora in a pandemic.

13 Edward Durie "Custom Law" (unpublished discussion paper for the Waitangi Tribunal, 1994) at 39. Published online after use in: *Te Aka Matua o te Ture | Law Commission Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

14 Michael King *Te Puea* (Hodder and Stoughton, Auckland) at 72.

context of the requirements on the Crown to share Māori individual data with Whānau Ora health providers) to this effect:¹⁵

Iwi by iwi consultation may be appropriate, and indeed necessary, to be consistent with tikanga and Te Tiriti in ordinary circumstances, but these are not ordinary circumstances ... The primary objectives of tino rangatiratanga are to ensure that the community survives as a people, with both individuals and the collective thriving ... it is not consistent with te tino rangatiratanga to frustrate those objectives.

- 1.12 Not all of the values and practices of tikanga will be able to be perfectly fulfilled when survival is at stake.
- 1.13 The question of how much the two legal systems of Aotearoa New Zealand should operate in their separate streams or be woven together in state law in practice may be more pressing in an emergency than in ordinary times. How the two legal systems interrelate may also depend on how acute the threat is and the type of emergency. Powers over and controls on international borders and security intelligence in response to a pandemic or terrorism threat need to be the subject of a single set of uniform rules (though that in itself does not preclude participation by Māori).¹⁶ Responses to natural disasters may be able to be more pluralistic.
- 1.14 In the response and recovery phase of an emergency, it is likely that tikanga and state law will have separate and coordinating roles to play. In the recent pandemic, we have witnessed the important role of tikanga in the protection of Māori. Cultural memory of the suffering of Māori communities in response to the 1918 influenza epidemic helped inform the protective measures that were initially put in place by Māori in exercise of te tino rangatiratanga. Iwi were able and willing to exercise authority at a local level. Indeed, during the initial phase of the COVID-19 outbreak, regulatory measures taken by mana whenua were sometimes more stringent than those adopted by state government. In order to protect vulnerable kuia and kaumātua, some iwi and hapū organised rāhui. Certain iwi and hapū worked together with New Zealand Police to enforce road blocks and other restrictions on movement within their rohe.¹⁷ Marae rapidly adapted their practices, for example, by modifying the use of the hongi and the ways in which tangihanga were conducted, and while marae, which are important centres for response in other kinds of emergencies, could not operate in the usual ways to give physical shelter and assistance, those who had received settlements with the Crown were able rapidly to adapt to support whānau with food, laptops and other assistance in the early days of lockdown. Marae later proved to be an important site for information dissemination and leadership in the roll-out of the vaccine.

Te Tiriti o Waitangi

- 1.15 Understandings about te Tiriti o Waitangi and of Crown-Māori relationships have changed and developed since the 1991 Report. In particular, there is a greater willingness to accept that kāwanatanga assigned to the Crown under te Tiriti o Waitangi is not absolute or unfettered. It is qualified by the guarantee to Māori of tino rangatiratanga and Māori control over taonga, or their own affairs, in a way that aligns with Māori customs and

¹⁵ *Te Pou Matakana Ltd v Attorney-General* (No 2) [2021] NZHC 3319, [2022] 2 NZLR 178 at [108]. See also the evidence of Lady Tureiti Haromi Moxon at [110].

¹⁶ Sub-national participation in international law processes is evolving.

¹⁷ Claire Charters “The Relevance of Te Tiriti o Waitangi in the COVID-19 Era” (2020) 9 MAI Journal 17.

values. Māori expect to participate in decisions affecting their interests. There is an obligation on the Crown that, in its exercise of qualified *kāwanatanga*, it will seek to understand and be informed about the nature of the Māori rights and interests engaged and to actively protect those interests. The exercise of *kāwanatanga* does not free government from its obligation to respect *te tino rangatiratanga*.

- 1.16 Te Tiriti o Waitangi sets out a framework for the distribution of political authority in Aotearoa New Zealand. State organs exercise *kāwanatanga* while *rangatiratanga* continues to vest in Māori authorities. How these two different sources of authority and law interact is sometimes a difficult and unresolved question. The Commission has suggested that responsible *kāwanatanga* requires state authorities to facilitate the exercise of *te tino rangatiratanga* by Māori where appropriate.¹⁸ *Kāwanatanga* imposes an obligation on state organs to attempt to understand the extent of Māori rights and interests, to consult Māori about those rights and interests and to consider how they should best be represented in state law or otherwise.
- 1.17 Because they are often used to justify *reduced* public participation more generally, emergencies draw particular attention to the degree to which Māori interests and *te tino rangatiratanga* are *ordinarily* recognised by the state legal system and its decision-making procedures. It is likely to be difficult to establish new relationships and decision-making procedures *during* an emergency. As the Waitangi Tribunal's Haumarū Report has shown,¹⁹ many of the ad hoc measures to involve Māori advisory groups in the COVID-19 pandemic have not been effective in ensuring Māori interests are reflected in government policies. This raises larger questions about the fundamental constitutional relationships between Māori and state authorities and how they operate in ordinary times, which go well beyond this Study Paper. It would clearly be an advance to establish standing Māori committees to plan and advise on emergencies.

The preparation phase of an emergency

- 1.18 In order for the state to be properly informed about Māori rights and interests, Māori need to be fully involved and explicitly engaged in the planning for emergencies. Much more could be done to establish better relationships and coordination between state institutions and Māori sources of authority. The current Civil Defence Emergency Management Act 2002 (CDEM Act), for example, does not mention Māori authorities at all. The associated National Civil Defence Emergency Management Plan 2015 currently only mentions Māori interests in relation to the “welfare cluster” for which Te Puni Kōkiri is given the role of facilitating and coordinating culturally relevant support for Māori and of creating links with *marae* for advice, shelter and *manaakitanga*.
- 1.19 The government is currently undertaking an extensive review of the CDEM Act. Proactively released documents have signalled the Minister for Emergency Management's desire for greater recognition, understanding and integration of *iwi*/Māori perspectives and *tikanga* in emergency management as well as to support the role of

¹⁸ Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021) at 2.33.

¹⁹ Waitangi Tribunal *Haumarū: The COVID-19 Priority Report – Pre-publication Version* (Wai 2575, 2021).

marae, which look after people in an emergency.²⁰ Increased opportunities for meaningful input by Māori into both primary and secondary emergency legislation are recommended in Parts Two and Three.

- 1.20 One important aspect of preparation and active protection in the pandemic context was the Waitangi Tribunal's finding that the Crown had an obligation to share information with Māori authorities so that they could exercise their tino rangatiratanga in treating and protecting their people.
- 1.21 An aspect of the response to pandemic-type emergencies (and perhaps other forms of emergency) is the availability of readily accessible data to identify groups who may be particularly vulnerable in order to enable Māori health providers to assist their people. The Waitangi Tribunal found that, in relation to the current pandemic, the absence of data identifying tāngata whaikaha (Māori with lived experience of disability) was in breach of the Treaty principles of active protection and equity.²¹ There were similar difficulties in rapidly identifying those whose co-morbidities placed them at the greatest risk as a result of a COVID-19 infection in relation to the rest of the population.
- 1.22 The general point is that the proper exercise of kāwanatanga should enable Māori authorities to assist their people. It is worth noting that people with disabilities will not always be at the greatest risk in a pandemic. The 1918 "Spanish" influenza, for example, was most lethal for the young and fit and targeted those in their 20s and 30s. Polio epidemics have targeted children. The ability to identify those most at risk is likely to be very important in ensuring that the public health response is effective and equitable. Exactly who comprises the most-vulnerable groups will depend on the nature of the disease and the availability of vaccines or other protection measures.
- 1.23 The more that is known about the characteristics of those likely to be most at risk, the greater the government's obligation will be to allocate resources to protect people with such characteristics. In cases in which Māori are disproportionately in the most vulnerable group or are at risk at a younger age than the general population, duties of active protection will arise under te Tiriti. Significant correlations between age, race, gender and sexual orientation with worse disease outcomes can legally justify the adoption of special measures in relation to vulnerable groups more generally. Article 3 of te Tiriti and s 19 of the New Zealand Bill of Rights Act 1990 pull in the same direction to prohibit direct and indirect forms of discrimination and promote equity in the whole population.

The acute response phases of an emergency

- 1.24 It is particularly during the most acute response phases of an emergency that ordinary processes of participation and dialogue may have to be temporarily suspended and power may have to be concentrated in the hands of a few. The duration and degree to which suspension is justified will depend on the level of the threat to wellbeing and the nature and geographical extent of the emergency. We have seen that, in a pandemic in particular, a country may go in and out of an acute emergency phase, and the assessment

20 Cabinet Paper "Proposed Government response to the Technical Advisory Group's report *Better Responses to Natural Disaster and Other Emergencies*" (30 August 2018) at [52] and [84]; Cabinet Paper "Emergency Management System Reform" GOV-21-SUB-0043 (15 March 2022); Cabinet Minute "Emergency Management System Reform" GOV-21-MIN-0043 (15 March 2022).

21 Waitangi Tribunal *Haumarū: The COVID-19 Priority Report – Pre-publication Version* (Wai 2575, 2021) at 59.

of risk may be temporarily assigned to a few acting on expert advice. This is also likely to be the case in the event of a terrorist threat. It is also the case that some of that expert advice should take the form of advice about Māori interests where those are distinct from those of the rest of the population.

- 1.25 The assessments of the pandemic threat in relation to COVID-19 and decisions to close the borders and lock down the country were initially taken by a very small group and under extreme time pressure. Documents proactively released by the government show that, at the onset of the pandemic threat, access to the top table was limited to a very small number indeed.²² Not all members of Cabinet were included in the decision making. Cabinet authorised the formation of a small ad hoc committee to respond to COVID-19 and assembled a group of seven Ministers.²³ Decisions had to be made in a very short timeframe. The Director-General of Health gave affidavit evidence to the High Court in *Borrowdale v Director-General of Health* on this point: “What we thought could be done in two weeks or two days had to happen now: it was literally now or never.”²⁴ Given the urgency of the decision making in the initial stages of a pandemic, it is hard to see how, under current constitutional arrangements, more-extensive dialogue with national Māori authorities²⁵ (or, indeed, with the wider Cabinet or Parliament) could have been accommodated without potentially catastrophic delay. Nor is it easy to envisage how Māori decision-making bodies could have been given access to expert advice within such a tight timeframe. The Waitangi Tribunal records there was “some tolerance among Māori” for the initial rapid move to Alert Level 4 when it was unclear what kind of disease was threatened.²⁶
- 1.26 The genuinely “acute” response phases of even a pandemic type of emergency are, however, likely to be few and relatively short. There will be limited situations where the Crown must move quite so urgently. It is hard to judge in advance what may be practically possible by way of consultation with Māori. In those rare cases in which state government is forced by circumstances to act without participation from Māori authorities, the duty of active protection of Māori should weigh more heavily on the state authorities than usual. It is likely that, in such situations, Māori interests will coincide with those of the rest of the population.

The recovery phase

- 1.27 As is the case in the preparation and acute phases of an emergency, kāwanatanga obliges the Crown to explore with Māori authorities what Māori interests are and how they can best be represented in the response stage of an emergency. This includes exploring the coordination between state law and tikanga.
- 1.28 The Waitangi Tribunal has recommended that, to ensure fulfilment of tino rangatiratanga and active protection, representative Māori should be able to speak *directly to Cabinet* and contribute to the co-design of an emergency response, including in the longer

22 Michael Webster “Government decision making during a crisis: The New Zealand experience during the Covid-19 pandemic” (2021) 17 Policy Quarterly 11 at 11–14.

23 One issue is that such Ministers were not necessarily those in whom statute vested powers to act.

24 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [147].

25 Authorities include the Iwi Chairs Forum, New Zealand Māori Council, National Urban Māori Authority, Federation of Māori Authorities and Māori Women's Welfare League.

26 Waitangi Tribunal *Haumarū: The COVID-19 Priority Report – Pre-publication Version* (Wai 2575, 2021) at 47.

response phase of a pandemic.²⁷ It finds that, while there were multiple sources of advice on the rights and interests of Māori generated by Māori advisory bodies and in the ordinary civil service policy streams, this advice was not formally incorporated in the Cabinet documents.

- 1.29 Once again, there are large constitutional questions about the different forms that government under te Tiriti o Waitangi may take, which are beyond the scope of this Study Paper. Relationships established between the Crown and Māori during ordinary times are more likely to work well in an emergency.

The executive government and its relationship to Parliament

- 1.30 Within the bounds of kāwanatanga, it has long been understood that it is *Parliament* that represents the electorate and not the *executive government*.²⁸ Parliamentary processes, debate and scrutiny lend democratic legitimacy to the legality of *primary* legislation – or legislation made by Parliament – and tend to improve its content. This is reflected in the fact that primary legislation usually prevails over secondary legislation and general policy made by the executive. The adoption of mixed-member proportional representation in 1991 has further enhanced the role of Parliament in its supervision of the executive as well as increasing the representativeness of the House of Representatives itself.
- 1.31 In Aotearoa New Zealand, the executive or Cabinet is part of Parliament and, by definition, enjoys the support of the House of Representatives in order to govern. Despite the necessary dominance of the executive over legislative and financial matters, the ordinary processes of legislation making provide opportunities for members to initiate legislation and hear from the public directly and for the House of Representatives as a whole to contribute to legislation. For the most part, legislation is drafted by Parliamentary Counsel, who are public servants with a wide knowledge of law and legal principle. Special legislative procedures require the Attorney-General to draw attention to any proposed legislation that potentially breaches rights protected by the New Zealand Bill of Rights Act upon the introduction of a Bill.²⁹
- 1.32 Ideally, primary legislation sets out general rules and processes (as opposed to focusing on decisions that affect particular people), is prospective in its operation (as opposed to validating unlawful actions or penalising lawful actions that have happened in the past), gives people a degree of certainty, is accessible, knowable in advance and consistent and is able to be obeyed. For the most part, this is also the case in practice. The very operation of Parliament's processes and the principles that inform them tend to have the effect of limiting power. Scrutiny contributes to good law.
- 1.33 Even in ordinary times, primary legislation is sometimes passed under urgency so as to avoid the delays and scrutiny associated with select committee processes. The uses and misuses of urgency are controversial and have been much discussed.³⁰ In ordinary times too, Parliament routinely delegates power to the executive to make more-detailed rules – particularly when the rules are of a technical nature, change frequently or are too

27 Waitangi Tribunal Haumarū: *The COVID-19 Priority Report – Pre-publication Version* (Wai 2575, 2021) [at 113.

28 Mark Walters *AV Dicey and the Common Law Constitutional Tradition* (Cambridge University Press, Cambridge, 2021).

29 New Zealand Bill of Rights Act 1990, s 7.

30 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011).

detailed for parliamentary consideration. There are a variety of checks on the use of such powers. The Regulations Review Committee of the House, which is chaired by a member of the Opposition, has an important scrutiny function, and the Legislation Act 2019 contains a procedure by which regulations made by the executive can be invalidated by the House as a whole.³¹ This is an important check on executive authority. The Opposition also plays an important supervisory role over executive action – primarily through asking questions of Ministers during Question Time. Parliamentary sanctions follow if Ministers are found to have misled the House in their answers.

- 1.34 Finally, the ability of citizens to change a government and the members of Parliament at election time is perhaps the most important safeguard on the exercise of *kāwanatanga*. I discuss elections in Part Three.

Parliament in an Emergency

- 1.35 The risk in an emergency is that power becomes more centralised in the executive branch of government, Parliament's role is marginalised and the ordinary processes of political debate and accountability are diminished. The opportunities for opposition parties to scrutinise publicly the activities of the executive may also be reduced. The use of delegated powers to make rules by the executive branch of government is likely to become more frequent and to be used in novel and potentially far-reaching ways. In some instances, there will be a temptation to use regulations when primary legislation would be more appropriate.³² Some of these changes in process and scrutiny may be inevitable given the rapid responses required and as new information emerges during both the initial or acute phase of an emergency and during the extended period of a pandemic response, but there is always the concern that exceptional practices will continue beyond when they are necessary and become normalised. The principle still stands that it is Parliament, not the executive, that holds the greater power within a *kāwanatanga* framework. Wherever possible, Parliament, not the executive, should be engaged in creating the legislative infrastructure that operates in an emergency. Every effort should be made to ensure Parliament retains its scrutiny and supervisory functions.
- 1.36 Statute requires Parliament to meet within 7 days of a declaration of a state of emergency, which ensures that, more often than not, there is some political oversight at the outset of an emergency.³³ If Parliament has already been dissolved, triggering the processes for an election, it must meet 7 days after the date for the return of the writ.³⁴
- 1.37 In the immediate response to COVID-19, the House adjusted its own rules to empower the Business Committee to meet and make determinations by electronic means, allow remote participation and remove the 25 per cent limit on proxy votes that may be cast by a party during a party vote. The rules also empowered the Speaker to approve special arrangements for select committees to meet and conduct business.

31 Legislation Act 2019, sub-pt 2.

32 See for example *Four Aviation Security Service Employees v Attorney-General* [2021] NZHC 3012 at [129], where Cooke J expressed surprise that vaccination mandates were not addressed in primary legislation. The COVID-19 Response (Vaccinations) Legislation Act 2021 was subsequently enacted in November 2021.

33 Civil Defence Emergency Management Act 2002, s 67.

34 Section 67(3)(a)(ii).

- 1.38 Depending on the kind of emergency at issue, the inability of the House to meet physically may be able to be circumvented by the use of technology. Section 18(1) of the Constitution Act 1986 allows the Governor-General to designate where Parliament should meet and to change the “place” it meets “if that place is unsafe or uninhabitable”.³⁵ That provision presumably confers sufficient power to allow the Governor-General to designate a particular “mode” of meeting via the internet. The provision could be amended to add “mode of meeting” to make it clearer that technical alternatives are also envisaged. Once Parliament has been convened, the House itself can decide where and how to conduct its business.

Continued scrutiny function while the House is suspended or adjourned

- 1.39 There may still be circumstances in which Parliament is adjourned or suspended for a time – perhaps because of casualties or death or simply because Ministers are too busy managing the emergency to take part in the usual business of the House. A constitutional innovation was tried while Parliament was suspended in relation to the COVID-19 pandemic. To enable parliamentary scrutiny to be sustained at least to some degree during the lockdown, the House voted to establish a cross-party Epidemic Response Committee chaired by the Leader of the Opposition to consider and report to the House on matters relating to the Government’s management of the COVID-19 epidemic.³⁶
- 1.40 In the performance of the Committee’s functions it summonsed the Solicitor-General, the Police Commissioner and the Director-General of Health to provide information relating to the legal basis of the initial lockdown. The Director-General and Commissioner of Police informed the Committee of the existence, timing and sources of the relevant legal advice but were not prepared to disclose its substance. The established view is that legal advice belongs to the recipient of it. The Attorney-General objected to disclosure of that advice and refused to waive legal professional privilege. The House agreed to disestablish the Epidemic Response Committee on 26 May 2020.
- 1.41 The experience of the Epidemic Response Committee raises questions about whether and when it may be appropriate for officials directly to be able to advise members of the House about the substance of legal advice in an emergency.³⁷ This was a case in which advice evidently existed. Redacted advice was also made available. A confidential briefing from the Solicitor-General was offered to the chair of the Committee (as is possible under the House’s rules), but the offer was declined. Potentially, the Committee could have held the officials in contempt for failing to obey the summons in an attempt to force the Attorney-General’s hand to waive privilege. Meanwhile, the government proactively released a great deal of other material relating to the measures taken, including a review of the government response.
- 1.42 The Cabinet Manual currently sets out very limited circumstances under which opposition parties have access to government advisors (with the consent of the Prime Minister).³⁸

35 Section 18(1A).

36 25 March 2020.

37 Graeme Edgeler and Andrew Geddis “The powerless(ness) of New Zealand’s House of Representatives to summons the Crown’s legal advice” (2020) 31 PLR 229; and Jelena Gligorijević “Government Accountability for the Lawfulness of Lockdown: New Zealand Parliamentary Scrutiny and Privileged Legal Advice” (11 May 2020) UK Constitutional Law Blog <ukconstitutionallaw.org>.

38 Cabinet Office *Cabinet Manual 2017* at [6.67].

Further consideration should be given to whether the House should have greater access to advice, especially in the event of an existential threat to the life of the nation.

- 1.43 Other solutions to the problem of executive scrutiny that have been mooted include providing for Parliament to continue to meet throughout the emergency in some form at least. The debates in the House in relation to the Epidemic Preparedness Act 2006 had suggested that, in certain circumstances, it might be desirable to convene a wartime cabinet drawn from both the government and the opposition (now opposition parties) to manage a pandemic so that different perspectives could be taken into account – though the overall effect of that proposal is likely to reduce scrutiny.³⁹ Matters such as these should be left to political resolution rather than be governed by legislation set out in advance.⁴⁰ A willingness to consider such practices demonstrates an important constitutional commitment to parliamentary government.

Legislation in an emergency

- 1.44 Given the need for a rapid response and the fact that we cannot anticipate everything in advance, it will often be necessary for government to govern in part by secondary legislation rather than to act under the authority of primary legislation during an emergency. That, in itself, is not necessarily a cause for concern, but the use of delegated rule-making power needs to be subject to ordinary controls and be properly authorised by statute. When circumstances are changing rapidly, there may often also be a temptation to overuse discretionary powers to decide matters on a case-by-case basis. The risk of too much discretion is that it does not allow people to plan their actions, often renders rules inaccessible (especially in conditions of emergency) and may be exercised or appear to be exercised in arbitrary or discriminatory ways. Getting the balance of rules as opposed to discretion right is an important and difficult task that requires thought and deliberation. In the COVID-19 pandemic, for example, a list of “essential” services that could remain open in “Alert Level 4”⁴¹ was created but without general criteria set out in advance for establishing what *kinds* of businesses or activities were considered “essential”. This made it very difficult for people with businesses to plan. What is “essential”, however, is likely to change depending on the virulence of a disease and how it is transmitted – both of which may change as new information and variants emerge. With the benefit of hindsight, we are now in a better position to anticipate the kinds of rules that may be needed to control a respiratory virus similar to COVID-19. Even then, such rules may not be appropriate in relation to a range of other diseases.
- 1.45 The Commission’s 1991 Report assumed that government would use regulation-making powers during an emergency. For various reasons, the regulation-making powers conferred by s 117 of the Health Act were not used in the initial response to the COVID-19 pandemic. Instead, the initial response was effected by orders made by the Director-General of Health, who is a medical officer of health, under s 70 of the Health Act. Such orders did not at the time have the status of statutory instruments. The Director-General’s powers to make orders were initially used to make general rules for the entire population as well as to direct particular persons or businesses to do certain things. A subsequent

39 (5 December 2006) 636 NZPD 6900 (Epidemic Preparedness Bill – Second Reading, Shane Ardern).

40 At the time of the outbreak of the 2020 pandemic, there was already a three-party government.

41 This was the most severe of the initial lockdown categories, before the introduction of a new “traffic light system”.

amendment to s 70 of the Health Act⁴² has significantly improved the legal framework. Orders made by a medical officer of health applying to the general population (as opposed to orders applying to one or more named persons) now have the status of secondary legislation and are subject to publication requirements and parliamentary scrutiny under regulatory disallowance procedures.⁴³ There is still room for improvement, as will be discussed in Part Three.

- 1.46 The temptation to pass laws under urgency is likely to be even greater than usual in an emergency.⁴⁴ The Aotearoa New Zealand practice of recent years has been to pass specific bespoke legislation under urgency to deal with a particular disaster event. From that experience, there are a number of lessons to be learned that this report hopes to capture. One set of lessons goes to the adequacy of the standing legal framework for different kinds of emergencies, discussed in Part Three. The other lessons take the form of principles of legislative best practice for all emergency legislation, discussed in Part Two.

A rights framework for emergencies

- 1.47 Aotearoa New Zealand has a more individual rights-conscious culture than existed in 1991, in part as a result of the experience of the operation of the New Zealand Bill of Rights Act. Even when the objective is as important as the preservation of public health, New Zealanders have a greater expectation than formerly that their rights will be protected and that erosions of their rights should be prescribed, limited and justified. Where large discretionary powers are conferred in legislation, there is an expectation that they should not be used to limit rights more than is necessary to achieve their purpose (an expectation that arises from s 5 of the New Zealand Bill of Rights Act). Public expectations about data and health information privacy have also grown with the enactment of the Privacy Act 1993 and its successor, the Privacy Act 2020.

Limits on rights to be prescribed by law

- 1.48 Section 1 of the Bill of Rights 1688 and s 5 of the New Zealand Bill of Rights Act each require that limits on rights and freedoms should be prescribed by law. Alongside these statutes, the common law principle of legality operates as an interpretative presumption that common law rights will not be presumed to have been restricted unless the statute is irresistibly clear in its authorisation of such limits. This presumption can be satisfied either by express terms or by necessary implication.⁴⁵ Together, the statutes and

42 28 October 2021.

43 Legislation Act 2019, pt 3.

44 When Parliament was able to meet immediately after the initial lockdown, it passed 14 explicitly COVID-19-related Bills and considered 51 Bills under urgency, nine of which bypassed the select committee stage. Three of the COVID-19-related Bills were passed under a special process by leave of the House without invoking urgency. The most significant of the enactments was the COVID-19 Public Health Response Act 2020, which was passed without prior select committee scrutiny. In a novel process, after its passage, the Act was sent to the Finance and Expenditure Committee on the government's motion and a short time was allowed for review. See for a full discussion Gabor Hellyer "Assessing Parliament's Response to the Covid-19 Pandemic" (2021) 17 Policy Quarterly 20 at 21–22.

45 Some argue the presumption limits "unreasonable" restrictions: see Hanna Wilberg "Interpreting pandemic powers: qualifications to the principle of legality" (2020) 31 PLR 384; *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

common law doctrine require Parliament to be clear when enacting legislation that restricts protected rights.

- 1.49 It follows that there is now a decreased tolerance for the common law doctrine of necessity than there was in 1991. The Commission's 1991 Report recognised that the doctrine of necessity may be available to a government seeking a legal basis for the exercise of powers necessary for the common good in the absence of authorising legislation. In the current era, the doctrine of necessity is increasingly viewed as an argument of the very last resort, and indeed, many public lawyers doubt its very existence. It is notable that the Solicitor-General did not invoke it as a possible legal basis for the existence of powers to enforce the admonition to self-isolate in the first 9 days of the initial lockdown in March 2020.⁴⁶ This is evidence of a strong presumption within government that legal powers used to affect and limit people's rights should have a basis in legislation.⁴⁷ The questionable legal basis of the doctrine of necessity makes it all the more important to ensure that the standing legal frameworks are sufficiently power conferring and with appropriate controls.

Overlapping rights frameworks

- 1.50 The valuing of persons is or should be at the heart of the legal system of Aotearoa New Zealand. Aotearoa New Zealand's ordinary constitutional norms include rights frameworks that are recognised in both international and domestic law. Aotearoa New Zealand is committed to numerous international human rights instruments including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Declaration on the Rights of Indigenous Peoples, the World Health Organization International Health Regulations and the Convention on the Rights of Persons with Disabilities. Domestic law reflects such frameworks in te Tiriti o Waitangi (especially Article 3, which guarantees to Māori the rights afforded other citizens without discrimination), the New Zealand Bill of Rights Act and the Human Rights Act 1993, the Privacy Act 2020 and various other legislative instruments that give effect to the state's obligations to its citizens.
- 1.51 The New Zealand Government has committed itself under the ICESCR to take all necessary steps to the maximum of its available resources to ensure progressively the prevention, treatment and control of epidemic diseases,⁴⁸ safe and healthy working conditions⁴⁹ and conditions that would allow everyone access to medical treatment in the event of sickness.⁵⁰ Numerous legal sources impose obligations on the government to take positive action to protect its citizens and, if necessary, to protect its citizens from each other.

46 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864.

47 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864. The High Court's finding that, in the first 9 days of the initial lockdown, certain of the government's restrictions on rights protected by the New Zealand Bill of Rights Act were reasonable but not prescribed by law was not the subject of a cross-appeal by the Crown in *Borrowdale v Director-General of Health* [2021] NZCA 520.

48 International Covenant on Economic, Social and Cultural Rights GA Res 2200A (adopted 16 December 1966, entered into force 3 January 1976), art 12.2(c).

49 International Covenant on Economic, Social and Cultural Rights GA Res 2200A (adopted 16 December 1966, entered into force 3 January 1976), art 7(b).

50 International Covenant on Economic, Social and Cultural Rights GA Res 2200A (adopted 16 December 1966, entered into force 3 January 1976), art 12.2(d).

- 1.52 Other international and domestic instruments are calculated to place limits on state powers and actions where these would unreasonably intrude upon rights. The instances in which enumerated rights are guaranteed in absolute terms are rare in ordinary times and are allowed to be more limited during an emergency. The guarantee of the manifestation of freedom of thought, conscience and religion in Article 18 (3) of the ICCPR is, for example, subject to “limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”. In addition, the ICCPR explicitly allows states to place limits on certain (but not all) rights in an emergency in Article 3:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

- 1.53 The test is whether the emergency “threatens the life of the nation”. To put that in perspective, the 2005 UK terrorist bombings of the London Underground, buses and Glasgow Airport were not considered by the UK House of Lords to meet that threshold.⁵¹ The ICCPR requires the official proclamation of an emergency (a declaration of emergency) and formal notification of the treaty bodies before any such derogations can be made. Some rights, however, cannot be derogated from, even in an emergency. Those rights protect against the arbitrary deprivation of life (Article 6), torture or inhumane treatment (Article 7), slavery or servitude (Article 8), imprisonment for breach of contractual obligations (Article 11), the imposition of retrospective criminal penalties (Article 15), recognition before the law (Article 16) and freedom of thought, conscience and religion (Article 18).

- 1.54 The New Zealand Bill of Rights Act is intended to give effect to the ICCPR in domestic law. On its face, s 5 appears to adopt the approach that *all* rights may be subjected to reasonable limits. It enumerates protected rights and makes them subject to a requirement that the government justify any limitation on the rights in these terms:

[T]he rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- 1.55 In practice, however, Aotearoa New Zealand’s appellate judges have recognised that a number of rights can never be subject to s 5 limits and not only those that are non-derogable according to international human rights instruments (for example, rights against arbitrary detention and unfair trial).⁵²
- 1.56 The New Zealand Bill of Rights Act framework incorporates a statutory interpretation presumption in ss 5 and 6 that individual rights should not be limited unjustifiably unless legislation clearly overrides them and operates to require the state to be able to justify restrictions on protected rights (including when public officials exercise wide powers and discretions). Only then should individual rights have to yield to the rights of others. There

⁵¹ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [91] per Lord Hoffmann.

⁵² *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 (inhumane treatment); *R v Poumako* [2000] 2 NZLR 695 (CA); *R v Pora* [2001] 2 NZLR 37 (CA) (retrospective penalty) but compare *Glazebrook J in D v Police* [2021] NZSC 2 who considers that the imposition of retrospective penalties may be justified under s 5.

are opportunities for members of Parliament to debate the justification for limiting rights prior to the enactment of primary legislation and (since 2022) to revisit those judgements if a court subsequently finds that legislation wanting.⁵³ The New Zealand Bill of Rights Act, as it has been interpreted by the courts, requires that restrictions on rights should only be for an important objective and be reasonable.

- 1.57 What the rights instruments require is that limitations on rights need to be for good reason, to be reasonable and justified. Sometimes, the texts and the judges use the language of proportionality to describe that calculation. Good reasons supplied by Aotearoa New Zealand's various international commitments include to ensure public health, to ensure the health of others and to control epidemic diseases. That will depend on evidence of justification that the government is able to produce in the specific case.
- 1.58 Especially in the early stages of a pandemic or at the point at which a new strain of a virus emerges, the evidential basis of the justification may contain a large number of unknowns, be based on prediction, mathematical modelling and worst-case scenarios and take account of the sometimes limited ability of the state to enforce widespread restrictions. When the science is uncertain and/or still emerging, another principle is likely to be engaged in both the rights calculus and general decision making. This is the "precautionary principle", which is a notion borrowed from ecology. When the precautionary principle is activated, decisions go beyond a simple cost-benefit analysis or probability calculus. The precautionary principle gives special weight in decision making to the potentially *catastrophic* consequences of a particular course of action or failure to embark on a particular course of action.⁵⁴
- 1.59 The New Zealand Bill of Rights Act allows that individual rights may sometimes have to be limited for the wellbeing or survival of the collective. The idea that we, as individuals, have obligations to the group as a whole is something on which regulatory frameworks for pandemics rely. In order to work, they assume a necessary underlying degree of social cohesion. They also require skilled leadership to persuade others of the right course of action.⁵⁵
- 1.60 The concept of an individual's obligations to the collective is even more clear in tikanga. In te ao Māori, the concept of tapu refers to a state of ritual restriction (which includes illness). If individuals breach tapu and or undermine the mana of others, there are grounds for corrective action. "Together, mana and tapu [prescribe] the space within which the individual [can] operate, as long as he or she [does] not interfere unnecessarily with others, and continue[s] to uphold his or her obligations to the group as a corporate body".⁵⁶ Public health medicine specialist Professor Papaarangi Reid has said in relation

53 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.

54 Discussed by Gwyn J in *Orewa Community Church v Minister for COVID-19 Response* [2022] NZHC 2026 [108]–[115]. See also, by analogy, *New Health NZ v South Taranaki District Council* [2018] NZSC 59; *R v Sharpe* [2001] 1 SCR 45 (Canada), *Scottish Whiskey Association v Lord Advocate* [2017] UKSC 76, which recognise that it may sometimes be appropriate for policy makers to take protective measures in the absence of overwhelming scientific proof.

55 Māmari Stephens "Fires Still Burning? Māori Jurisprudence and Human Rights Protection in Aotearoa New Zealand" in M Bedggood, K Gledhill and I McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 99 at 116. Māmari Stephens regards this as one of the key tasks of rangatira.

56 Māmari Stephens "Fires Still Burning? Māori Jurisprudence and Human Rights Protection in Aotearoa New Zealand" in M Bedggood, K Gledhill and I McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 99, at 110–111.

to the COVID-19 pandemic that “part of te tino rangatiratanga is collective responsibility – it is not a breach of te tino rangatiratanga to choose to be vaccinated but an exercise of it”.⁵⁷

- 1.61 It is tempting to think of the regulatory controls that we might anticipate being required in response to a pandemic in particular as straightforward restrictions of individual rights and freedoms. It would be a mistake, however, to view the issue *always* as a simple clash between individual rights and the collective good. Health is also considered to be a human right. Some restrictions will allow people to protect themselves and their families as they wish to without the risk of breaching employment or other contracts or the general law. They may allow people to do what they already want to do.
- 1.62 More problematically and coercively, in order to protect the collective, some individuals may have to be forced to forego some of their individual liberties. These restrictions, calculated in order to protect individuals from themselves and from others, will fall harder on some individuals than others. These include individuals who assess risk differently, those who are more willing to take risks for themselves while simultaneously posing risks for others, those whose livelihoods are at stake and those who may be separated from loved ones. Some possible restrictions that impact on people’s access to elective surgery and other medical procedures will pose particularly difficult calculations for decision makers about the balance of health risk.
- 1.63 Some of the most vulnerable members of society – including those with serious disabilities, with drug dependency, who are homeless, who fear violence in their homes or who are detained by the state against their will – are likely to be disproportionately affected.
- 1.64 Many restrictions such as the mandatory wearing of masks, vaccine mandates, use of tracer apps and sharing of health information may be calculated to avoid more-draconian limitations on freedoms. Such restrictions also ought to be carefully deliberated, proportionate and justified.
- 1.65 Taken together, Aotearoa New Zealand’s existing rights frameworks have the flexibility to recognise these subtleties and are mutually supportive. The Court of Appeal’s suggestion in *Borrowdale* that the New Zealand Bill of Rights Act is domestically enforceable while the ICESCR is not, is only superficially true.⁵⁸ The commitment that Aotearoa New Zealand has made to the prevention of the spread of epidemic diseases and to safe and healthy working conditions under the ICESCR, for example, can support and justify the proportionate limitation of certain civil rights, with appropriate evidence.

How are rights enforced?

- 1.66 There are various ways to ensure that limitations on protected rights are justified. The Attorney-General has a duty to draw attention to a Bill that unreasonably limits rights, upon its introduction to the House, so that the members are aware of what is at stake.⁵⁹ Despite this, if the Bill is subsequently passed without change, it is still valid law enforceable by the courts. The courts are able to declare that a statute is inconsistent

⁵⁷ Email from Professor Papaarangi Reid to author (18 May 2022).

⁵⁸ *Borrowdale v Director-General of Health* [2021] NZCA 520 at [118].

⁵⁹ New Zealand Bill of Rights Act 1990, s 7.

with the New Zealand Bill of Rights Act, and there is now a procedure by which the inconsistency can be brought to the renewed attention of the House.

- 1.67 By contrast, secondary legislation made by the executive may be invalidated if it unreasonably breaches rights by the regulations disallowance procedure in the House of Representatives and by judicial review.⁶⁰
- 1.68 Judicial review can also be used to challenge the use of a broad discretion or power in a manner that unreasonably breaches rights.⁶¹

Privacy protections

- 1.69 Obligations on governments to protect privacy are also recognised in international instruments to which Aotearoa New Zealand is bound.⁶² Privacy principles and data protection rules have evolved since 1991 to protect the collection and use of personal information and to restrict information sharing, including between government agencies. In stating these principles, the Privacy Act 2020, its predecessor the Privacy Act 1993 and the associated Health Information Privacy Code 1994 allow exceptions for public health. The general principle (information privacy principle 2) that personal information ought only to be collected from the individual concerned can be breached to “prevent or lessen a serious threat to the life or health of the individual concerned or any other individual”.⁶³ The general principle (information privacy principle 10) that public sector agencies should only use information for the purpose for which it was collected can be breached if it is “necessary to prevent or lessen serious threats to public health and safety”.⁶⁴ Additionally, the Privacy Commissioner has the power to authorise the collection, use, storage or disclosure of personal information otherwise in breach of certain of the information privacy principles if the public interest outweighs the privacy interests at stake.⁶⁵
- 1.70 These provisions were relied on for the sharing by the Ministry of Health of COVID-19-related information with Police and emergency services for the benefit of first responders and also with agencies involved in managed isolation and quarantine facilities.⁶⁶
- 1.71 Additionally, the Civil Defence National Emergencies (Information Sharing) Code 2013 allows information sharing not otherwise permissible while a state of emergency is in force.⁶⁷

60 Legislation Act 2019, s 19. See for a judicial review example *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832.

61 See for example *GF v Minister of COVID-19 Response* [2021] NZHC 2526.

62 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entry into force 23 March 1976), art 17.

63 Privacy Act 2020, s 22. See the discussion of this test in *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942, [2022] 2 NZLR 248 at [36] per Gwyn J.

64 Privacy Act 2020, s 22.

65 Privacy Act 2020, s 30.

66 See the discussion in Louise Delany *Covid and the Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021) at 213.

67 Louise Delany *Covid and the Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021) at 216.

Contract tracing and privacy

- 1.72 The Privacy Commissioner endorsed the NZ COVID Tracer app on the basis that it met “privacy by design” principles and passed a privacy impact assessment.⁶⁸ There remain, however, questions about whether the legislative and technological framework worked as well as it could have and is sufficiently ready for the next pandemic threat. There are additional issues, for example, about whether there is sufficient technical capacity for information sharing between primary health providers and officials involved in a vaccine roll-out in order to identify and notify patients for inoculation in order of health priority.
- 1.73 There does not seem to be provision for the expedited authorisation of exemptions to the health information codes or privacy principles in a situation of public health emergency. That may well be the correct approach. It would be desirable, however, for ongoing work to be undertaken, with the involvement of the Privacy Commissioner, into alternatives to lockdowns and quarantines that use phone surveillance as a measure of both disease surveillance and enforcement as has been used with some success in Taiwan.⁶⁹ The current legislative test in s 30 of the Privacy Act 2020 weighs privacy against the public interest. In a pandemic, however, privacy rights may have to be weighed against other freedoms. In other words, we may need to consider whether to forego privacy (with protections) in order to maintain other liberties. More-intrusive tracing rules may be the lesser of several evils. As O'Connor et al. have noted, “individuals are quite willing to share vast amounts of personal data with global corporations (who use it for profit) for access to convenient services, without a second thought”.⁷⁰
- 1.74 In this part, I have sought to identify underlying constitutional principles that have evolved since the Commission’s 1991 Report. Together, they constitute background norms that inform the interpretation of primary and secondary legislation designed to regulate emergencies. I turn now to consider emergency legislation in more detail.

68 Office of the Privacy Commissioner “Guidance on mandatory record keeping for supporting COVID-19 contact tracing” (1 September 2021) <www.privacy.org.nz>.

69 Helen O'Connor, W John Hopkins and David Johnston “For the greater good? Data and disasters in a post-COVID world” (2021) 51(sup1) *Journal of the Royal Society of New Zealand* at S214.

70 Helen O'Connor, W John Hopkins and David Johnston “For the greater good? Data and disasters in a post-COVID world” (2021) 51(sup1) *Journal of the Royal Society of New Zealand* at S226.

PART TWO

Principles governing emergency legislation

INTRODUCTION

- 2.1 In this part, I draw together some of the valuable work undertaken by parliamentary select committees cataloguing the general principles that should govern emergency legislation. In particular, I draw on the Regulations Review Committee (RRC)'s 2016 *Inquiry into Parliament's legislative response to future national emergencies* (2016 Report)¹ and its 2020 *Briefing to review secondary legislation made in response to COVID-19* (2020 Report).² I evaluate how well the principles have been upheld in recent legislation and suggest additional practices to control emergency powers that could be considered.
- 2.2 I begin, however, with a general comment. The Aotearoa New Zealand practice over the past 12 years has been to use the standing rules to deal with the immediate response to an emergency as it arises and to follow up with time-limited bespoke legislation designed for the specific event shortly thereafter.
- 2.3 The current balance between standing rules and bespoke legislation appears to have been accepted uncritically by politicians in Aotearoa New Zealand in recent years. There has been an understandable reluctance to confer broad powers in advance of an actual emergency. The downside is that specific bespoke legislation, passed after an emergency has arisen, invariably receives little by way of public input or indeed the input of officials who have dealt with past emergency events. It is dangerous to assume that Parliament will necessarily be able to meet (whether in person or electronically) to enact bespoke legislation in response to every kind of emergency.³ It would be both possible and desirable to enact more emergency rules in primary legislation, with full public input, subject to well-calibrated protections and legal tests to ensure they are triggered by a

1 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016). The report can be accessed [here](#).

2 *Briefing to review secondary legislation made in response to COVID-19: Final report of the Regulations Review Committee* (August 2020). The report can be accessed [here](#). The Regulations Review Committee plays an important parliamentary role in scrutinising the powers conferred in primary legislation on the executive to make secondary legislation and the regulations that are made under such provisions.

3 During the Global Financial Crisis, for example, the Public Finance Act 1989 was used to grant an urgent deposit guarantee because bespoke legislation was not able to be introduced when Parliament was not sitting. This led to ongoing difficulties.

genuine emergency and that they become dormant again once the emergency has passed. It is likely that bespoke legislation will likely still be needed, but given Aotearoa New Zealand's recent experience of COVID-19 and a succession of earthquakes, now may be a particularly appropriate time to add to the standing rules provisions likely to be necessary and desirable in advance of the next emergency

TIME-LIMITED EMERGENCY LEGISLATION

- 2.4 The RRC has endorsed the high-level principle that “emergency powers should be in force no longer than is reasonably necessary to manage the consequences of the emergency”, giving two historical examples that demonstrate the risk of emergency laws becoming normalised.⁴ It recommended that, in general:

... 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.⁵

- 2.5 It is not immediately clear what the RRC envisaged by this recommendation or whether such a review is necessary. I am not aware of any such review ever taking place. The consistent application of the Declaration of Emergency framework currently set out in the Civil Defence Emergency Management Act 2002 and of other time-limited emergency powers overseen by Parliament should achieve the same goal.

- 2.6 It is, perhaps, an unarticulated premise of the RRC that standing law conferring emergency powers is more dangerous than bespoke law. The idea behind bespoke legislation is that it removes the necessity for, and avoids the risks attached to, the enactment of excessively broad powers that *remain* on the statute book. The RRC's 2016 Report recommended that:

Bespoke emergency powers should be in force only for as long as is reasonably necessary, and should have built-in sunset provisions.⁶

- 2.7 This recommendation *has* been followed in practice. Specific legislation enacted for particular emergencies has in recent years been time-limited, requiring intermittent renewal by the House and set to expire after a given period of time.
- 2.8 Time-limited states of emergency would, however, achieve a similar effect. Not all of the current legislative frameworks ensure such an end point, and this may help to explain the current preference for temporary bespoke legislation. The standing regime for emergencies should be designed to be time-limited so that emergency powers cease when a state of emergency (and its transition period) ends (discussed further in Part Three).

4 Regulation-making powers under the Public Safety Conservation Act 1932, passed during the Depression, were used 7 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 Acts were not repealed until 1987.

5 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 24.

6 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 24.

CONSIDERATION OF EMERGENCY LEGISLATION

- 2.9 The parliamentary record on the level of deliberation about and public input into emergency legislation has been much more uneven. The Epidemic Preparedness Act 2006 was given much more thorough consideration than any recent bespoke emergency legislation and was passed unanimously. Bespoke emergency legislation, by contrast, has without exception been passed under urgency and with limited input from the general public.
- 2.10 The RRC's 2016 Report criticised the passing of bespoke emergency legislation under urgency. It recommended the following:
- (a) As much time as possible in the circumstances should be allowed for select committee consideration of emergency legislation.⁷
 - (b) Existing select committees should consider emergency legislation.⁸
 - (c) Emergency legislation should take the form of primary legislation wherever reasonably possible, rather than relying on broad powers to make delegated legislation.⁹
- 2.11 No Parliament has fully followed that advice. The Canterbury Earthquake Response and Recovery Act 2010 passed all of its stages in a single day and was not considered by a select committee at all. The Canterbury Earthquake Recovery Act 2011 was referred to a select committee, but that committee was not able to recommend amendments. Selected submitters were given 24 hours to prepare and present submissions, and there was no general call for public input. The public was effectively only given a day to make submissions on the Hurunui/Kaikōura Earthquakes Recovery Act 2016. The COVID-19 Public Health Response Act 2020 was also passed under urgency despite time between the first national lockdown and its subsequent enactment. In an unusual compromise, it was subject to limited submissions on an exposure draft, but full select committee consideration was only given *after* it had been enacted. It was not considered by the Health Committee or the Epidemic Response Committee (which had by then been dissolved) but rather by the Finance and Expenditure Committee, and even then, its recommendations were not intended to result in changes to the legislation.
- 2.12 Given that attitudes to the use of parliamentary urgency processes are unlikely to change in the foreseeable future, consideration should be given to augmenting standing rules containing *dormant* emergency powers for specific kinds of emergencies (to be triggered by a declaration of emergency or additional triggering event such as an epidemic notice). Standing rules are much more likely to be enacted following full parliamentary consideration and public input in advance of emergencies, whereas bespoke legislation typically confers broad powers on the executive without public input. Present arrangements and practices have had the effect of precluding much by way of public

7 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 19.

8 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 20.

9 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 20.

input, let alone input by the Crown’s Treaty partner, at both the immediate response and recovery stages.

- 2.13 Enabling Māori to participate fully in planning for emergencies, in coordinating state and iwi bodies for their respective roles in emergencies and in considering the potential for broad coercive powers to be applied in ways that are consistent with tikanga (for example, legislative encroachments on activities on the marae) is obviously constitutionally important.
- 2.14 Present settings also have the effect that there is no opportunity for valuable input from experienced officials and citizens about which powers have proved necessary in the past and of the priorities of people on the ground in different types of emergency.
- 2.15 Of course, it will not be possible to legislate for everything in advance of an emergency. Bespoke legislation is still likely to be needed. When bespoke legislation is considered necessary, as much as possible should be included in primary legislation, properly considered, including where possible the controversial provisions that most significantly impact on people’s lives. During the COVID-19 pandemic, for example, Cooke J recommended that the adoption of vaccine mandates for domestic use was a proper matter for primary rather than secondary legislation.¹⁰ Given that the desirability of a vaccine mandate is so contingent on the nature of a particular disease and the availability of an effective and safe vaccine, this is the kind of matter that needs to be addressed, if at all, in bespoke legislation.

POWERS TO MAKE ORDERS IN EMERGENCY LEGISLATION

- 2.16 Orders made under delegated power conferred on the executive in emergency legislation should have the status of secondary legislation and as a minimum should be subject to the same requirements and scrutiny as secondary legislation more generally (such as publication requirements and the availability of regulatory disallowance procedures).¹¹ At times, such orders may have to take effect before publication. Secondary legislation should, without exception, be subject to challenge by judicial review.
- 2.17 The RRC’s 2020 Report recommended that:

the Government should make greater use of Standing Order 318(2) to refer draft secondary legislation to the Regulations Review Committee for consideration.¹²
- 2.18 The operation of referrals under its own rules is usually for the House to decide. The Hurunui/Kaikōura earthquakes legislation went further to *require* the Minister to engage with the RRC on the content of draft orders.¹³ That provision, however, has not yet become the norm in emergency legislation. The COVID-19 Public Health Response Act, for example, does not provide for COVID-19 orders to be scrutinised before they are

¹⁰ *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012 at [129] per Cooke J.

¹¹ Legislation Act 2019, pt 3.

¹² *Briefing to review secondary legislation made in response to COVID-19: Final report of the Regulations Review Committee* (August 2020) at 2.

¹³ Hurunui/Kaikōura Earthquakes Recovery Act 2016, s 8(1)(c)(i).

made. The Minister has made no use of the provision in the Standing Orders¹⁴ to refer draft COVID-19 orders to the RRC either.

2.19 The RRC's 2020 Report sought to reassure Ministers that:

We understand that some instruments were made under tight timeframes. However, we can consider instruments promptly and provide feedback that may assist departments to avoid later problems.¹⁵

2.20 Given that there will often be genuine urgency in promulgating regulations in an emergency, consideration has been given to other ways to improve the quality of orders. The RRC's 2020 Report recommended that all departments with responsibility for secondary legislation should involve experts in legislative drafting when writing secondary legislation. This recommendation is likely to bring real improvements given that Parliamentary Counsel have deep knowledge about the general law and the constitutional principles underpinning legislation.

2.21 Most important and controlling are the statutory statements of the principles that govern the making of regulations and set out the purposes for which regulations are made. Some principles such as those contained in international standards, te Tiriti o Waitangi, aspects of tikanga and the New Zealand Bill of Rights Act 1990 operate as a matter of law whether or not they are expressly referred to in the primary legislation. Even so, it may sometimes be helpful to restate these in the statute itself to remind decision makers of the factors they need to take into account.

2.22 Precautionary principles and *general* principles of proportionality (as opposed to the proportionality test incorporated in s 5 of the New Zealand Bill of Rights Act) may need to be stated expressly in order to be taken into account. Their applicability may depend on the type of emergency or threat. If a general proportionality test is included, it should state clearly which matters are to be weighed.

2.23 There are additional ways to focus decision makers' minds on general principles. In the Part Three, I recommend that Aotearoa New Zealand should consider whether to adopt and adapt the requirement enacted in the Victorian Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 that government publish a justification of why an order is necessary, its effect on protected rights (in Aotearoa New Zealand, rights protected under the New Zealand Bill of Rights Act) and to disclose the advice on which the Minister relied within 7 days of its making. In the Aotearoa New Zealand context, such a device could also be used to ensure that obligations under te Tiriti were ascertained and considered. This would go beyond what has previously been provided for in Aotearoa New Zealand bespoke emergency legislation. Though the Hurunui/Kaikōura Earthquakes Recovery Act required a contemporaneous statement of reasons to be given by the Ministers when recommending certain orders to be made, the content of the reasons required was much more open ended.

2.24 I also recommend that Aotearoa New Zealand should consider whether to establish standing expert committees to advise on the content of orders in relation to pandemics and other emergency events. New Zealand legislation has already provided for

14 Standing Orders of the House of Representatives 2020, SO 326. Previously SO 318(2) in the 2017 Standing Orders.

15 *Briefing to review secondary legislation made in response to COVID-19: Final report of the Regulations Review Committee* (August 2020) at 3.

committees external to the House to review orders made under the earthquake response legislation of the past 12 years. How best to ensure greater input by the general public will depend on the emergency (whether it is local or national and so on).

- 2.25 The COVID-19 Public Health Response Act enhances the ability of the House of Representatives to scrutinise secondary legislation beyond the standard disallowance procedures. It provides that certain kinds of orders (made by the Director-General of Health) automatically expire after a month¹⁶ and requires that an order made by the Minister expires after a designated period of time *unless* the House of Representatives positively affirms the order.¹⁷
- 2.26 There is also a practice of requiring the relevant Minister periodically to report to the House about the use of exceptional powers and the general response to an emergency.
- 2.27 These levels of protection go beyond what is ordinarily expected or necessary in relation to Orders in Council made by the executive. The necessity for these additional levels of supervision and transparency needs to be calibrated according to factors that include:
- (a) how much negative impact the orders are likely to have on the daily life and businesses of the population as a whole (including the extent to which they are likely to restrict protected rights and liberties);
 - (b) how much negative impact the orders are likely to have on particular sectors of the population;
 - (c) how much negative impact the orders are likely to have on Māori;
 - (d) how much public input has been possible into the making of the primary legislation under which the orders have been made;
 - (e) how much parliamentary input has been possible into the making of the primary legislation under which the orders have been made and into the draft orders;
 - (f) the likely duration of the emergency; and
 - (g) whether the orders modify statutes passed by Parliament (see the discussion that follows).

ORDERS MODIFYING STATUTES

- 2.28 It has become a common practice in Aotearoa New Zealand to confer exceptional powers in emergency legislation allowing statutes made by Parliament to be modified by regulations made by the executive (sometimes called Henry VIII clauses).¹⁸ Such exceptional powers, which invert the usual assumption that statutes prevail over regulations, are also conferred in the Epidemic Preparedness Act, discussed below. They are exceptional and need to be subject to exceptional parliamentary and other oversight beyond that ordinarily available for secondary legislation.
- 2.29 The RRC's 2016 Report recommended that powers in regulations to amend statutes should be used sparingly and that the statutes that are subject to modification should be

¹⁶ COVID-19 Public Health Response Act 2020, s 14(4).

¹⁷ COVID-19 Public Health Response Act 2020, s16.

¹⁸ See generally, Sarah Kerkin "Earthquake Recovery Legislation: learning from experience" (2018) 14 Policy Quarterly 53.

positively listed in the statute. That is, it recommended that emergency legislation should specifically mention which Acts (and even which secondary legislation) it *can* modify by order.¹⁹ The RRC said it could not predict which enactments should be on the list as that will depend on the nature of the emergency.

- 2.30 The RRC did not go as far as to set out positive lists for different kinds of emergencies but rather suggested a best practice process, namely that the list 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.²⁰

- 2.31 While the suggestion is admirable, it again depends on there being select committee consideration.

- 2.32 The much criticised Canterbury Earthquake Response and Recovery Act 2010 and Canterbury Earthquake Recovery Act s 71(3) both contained non-exhaustive lists of statutes that could be modified. Many of the named statutes were never actually modified (as the RRC's 2016 Report records). The more recent Hurunui/Kaikōura Earthquakes Recovery Act contained an indicative list of statutes that could be modified or exempted and enabled the Minister to recommend further statutes to be added by Order in Council "if necessary and desirable for the purposes of the Act".²¹ The Minister was required to give contemporaneous reasons for the recommendation.

- 2.33 Consideration should be given to whether it would be appropriate to embed in standing rules (to be triggered by a declaration of emergency or epidemic notice) any of the modifications to statutes by regulations found to be necessary in response to past earthquakes and during the COVID-19 pandemic.

- 2.34 Where necessary, bespoke legislation should include a non-exhaustive positive list of statutes that can be modified by regulation that could be added to "if necessary" together with a statement of reasons modelled on s 18 of the Hurunui/Kaikōura Earthquakes Recovery Act. A major earthquake occurring in Wellington, for example, may be more likely to disrupt normal government operations requiring more statutes to be modified.

- 2.35 Ideally, modifications should only be able to be made to statutes by regulation if they are "likely to be necessary" (rather than if "necessary or desirable"²² or "necessary and expedient"²³). In any event, the statute should spell out the purposes for which modifications can be made and (if the reference to "desirability" is retained) give an indication of the kinds of reasons that would render them "desirable". Modifications of legislative requirements that have as their object to ensure that individuals are able to obey the law when they would otherwise have no option but to be in breach because of an emergency actually support the rule of law. Other reasons for the modification of statutes by regulations, for example, for the purposes of administrative convenience or

19 The RRC also helpfully reported on which statutes had actually been modified in response to the Canterbury earthquakes in 2010 and 2011.

20 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 21.

21 Hurunui/Kaikōura Earthquakes Recovery Act 2016, s 18.

22 Hurunui/Kaikōura Earthquakes Recovery Act 2016, s 8.

23 Canterbury Earthquake Recovery Act 2011, s 71.

redeployment of personnel, should require much more by way of justification and supervision. Such modifications will be especially difficult to justify if Parliament is still able fully to meet.

- 2.36 An alternative formulation in current legislation typically gives power to the executive to modify a requirement or restriction in primary legislation by substituting “a discretionary power for the requirement or restriction”.²⁴ The risk is that the law ceases to be general, specified individuals rather than classes of people are held to different standards and there is a failure to provide equal protection of the law. It may sometimes be better to allow the option of modifying the law by replacing it temporarily with a new set of criteria either by statutory amendment or, if necessary, with the requirement that the new criteria be positively affirmed by the House of Representatives.
- 2.37 Modifications of *government* duties to provide services to, respond to or make decisions about its citizens (because of a need to prioritise resources) may sometimes be problematic. Assessments need to be made of the potential to create real hardship for individuals.
- 2.38 In addition to the positive lists of statutes that are able to be modified, the Canterbury earthquake legislation listed five constitutional statutes that could *not* be modified by order. The Judicature Amendment Act 1972 and the Judicial Review Procedure Act 2016 are now typically added to that list.
- 2.39 The standard list of exclusions from modification by order has now been expanded to include the following:

Section 11 Hurunui/Kaikōura Earthquakes Recovery Act 2016

- (1) Despite anything else in this Act, an order must not—
- (a) grant an exemption from or modify a requirement to—
 - (i) release a person from custody or detention; or
 - (ii) have any person’s detention reviewed by a court, Judge, or Registrar; or
 - (b) grant an exemption from or modify a restriction on keeping a person in custody or detention; or
 - (c) grant an exemption from or modify a requirement or restriction imposed by the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1972, the Judicial Review Procedure Act 2016, the New Zealand Bill of Rights Act 1990, or the Parliamentary Privilege Act 2014; or
 - (d) contain any provision that has the effect of amending a provision of this Act.
- 2.40 The practice of listing the Act containing the amending power itself in the list of statutes that cannot be modified (s 11(1)(d)) has been uneven.
- 2.41 Again, such a list is at least likely to provide a starting point, though undoubtedly there are further statutes that may broadly be considered to be fundamental.²⁵ Even so, certain

²⁴ Epidemic Preparedness Act 2006, s 11(3)(b)(ii).

²⁵ Christchurch City Council’s submission to the 2020 RRC inquiry suggested 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 these constitutional statutes may sometimes need to be modified in an emergency (for example, see the discussion in Part Three about elections disrupted by emergencies that may require amendments to the Constitution Act 1986). That makes it all the more necessary to get the settings right in advance and to maintain a certain degree of flexibility.

- 2.42 The 2020 Report of the Finance and Expenditure Committee on the COVID-19 Public Health Response Act contains little by way of discussion of the powers to modify primary legislation by order. It does, however, comment that the COVID-19 Public Health Response Act:

... unlike the legislation responding to the Christchurch earthquakes ... did not provide powers to override other enactments.²⁶

- 2.43 While strictly that is the case, the actual situation is a little more complicated. The COVID-19 Public Health Response Act does not contain a negative list similar to those used in earlier bespoke legislation exempting named statutes from modification by order. There is less need for it to do so given that the Epidemic Preparedness Act already performs some of this work. Significantly, however, s 13(1) of the COVID-19 Public Health Response Act provides that a COVID-19 order cannot be held invalid simply because:

- (a) it is, or authorises any act or omission that is, inconsistent with the Health Act 1956 or any other enactment relevant to the subject matter of the order; or
- (b) it confers any discretion on, or allows any matter to be determined, approved, or exempted by any person.

- 2.44 Whatever the intention may have been, in certain circumstances, section 13(1) appears to achieve a similar effect to that of a Henry VIII clause. As discussed in Part Three, it effectively allowed the deployment of New Zealand Defence Force personnel by an order made by the Director-General of Health and thus circumvented the controlling criteria in the Defence Act 1990.

- 2.45 While COVID-19 orders apply even if contradicted by primary legislation (under s 13(1)), the COVID-19 Public Health Response Act does not otherwise elevate orders to the status of primary legislation. Section 13(3) is emphatic:

To avoid doubt, nothing in this Act prevents the filing, hearing, or determination of any legal proceedings in respect of the making or terms of any *COVID-19 order*.

- 2.46 This, at least, allows a degree of judicial oversight of these questions.

CONTROLS ON IMPLEMENTATION

- 2.47 The RRC reports also identify the need for *ongoing*, robust scrutiny around the *implementation* of emergency laws. The RRC's 2016 Report recommends that:

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.²⁷

²⁶ *Finance and Expenditure Committee Inquiry into the operation of the COVID-19 Public Health Response Act 2020* (July 2020) at 12.

²⁷ *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 25.

- 2.48 The RRC’s 2016 Report picks up on a couple of provisions in the Canterbury Earthquake Recovery Act, which contain reporting obligations to the House. Section 88 stipulated:

88 Quarterly report on operation of this Act

- (1) The Minister must prepare and present to the House of Representatives quarterly reports on the operation of this Act.
- (2) Each report must include a description of powers exercised by or on behalf of the Minister or the chief executive under this Act during the period reported on.

- 2.49 In addition, the Minister for Canterbury Earthquake Recovery was also obliged to carry out a more comprehensive annual review under s 92.

- 2.50 Much will depend on the level of detail of those reports. The report on the uses of extraordinary powers could include, for example, data by which to ascertain whether warrantless searches have more frequently been used against certain discrete sectors of the population.

- 2.51 Such measures, however, tend to be fairly blunt and after the fact. They render more pressing the need for continuing judicial supervision. Notoriously, the Canterbury Earthquake Response and Recovery Act s 6(3) effectively disbarred one significant avenue for judicial review. It read:

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

Of equal concern was s 7(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.

- 2.52 The effect of this provision was to preclude the judicial review of these Orders in Council, since primary legislation cannot be reviewed by the courts. The RRC’s 2016 Report and 2020 Report both recommend that judicial review should continue in an emergency.

- 2.53 Access to judicial review is unlikely to be sufficient in the event of a major emergency. The Law Society submission to the 2016 RRC, endorsed by the 2020 RRC, recommended 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.

INTERNATIONAL NORMS AND BENCHMARKS

- 2.54 The RRC’s 2016 Report recommended that:

Legislation for national emergencies should have regard to international norms and benchmarks.²⁸

- 2.55 The 2016 Report specifically mentions a few international norms, such as the Sendai Framework for Disaster Risk Reduction 2015-2030, the IASC Operational Guidelines on

²⁸ *Inquiry into Parliament’s legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 23.

the Protection of Persons in Situations of Natural Disasters (2011) and the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles). The World Health Organization International Health Regulations and international human rights frameworks should also be included in that list.²⁹

RECOVERY FROM THE EMERGENCY BEGINS ON DAY ONE

2.56 Another recommendation in the RRC's 2016 Report is that:

any legislative response to a national emergency should be designed to ensure that recovery from the emergency begins on day one.³⁰

2.57 As the RRC notes, this principle is largely operational, yet it still includes a legislative component. Specifically, legislation should ensure it:

- (a) 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;
- (b) enables community input into decision making, the exercise of powers and the regeneration of communities; and
- (c) 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.

2.58 That cannot be achieved by a single provision. The restoration of normal procedures, liberties and politics, and ordinary life needs to be kept in focus as the ultimate goal.

2.59 The RRC's 2016 Report was concerned with how legislation should address the transition out of a state of emergency and back into normality. It endorses the Four Rs: Reduction, Readiness, Response, Recovery.³¹ This language of "emergency then recovery" does not easily map onto epidemics like COVID-19, and alternative frameworks (initially the four-level system and then the traffic light system) were created. More thought needs to go into appropriate high-level frameworks. Further consideration also needs to be given to those who have the greatest health vulnerabilities as "normal life" resumes for the rest of the population after the major surges of a pandemic.

REVIEWING PREVIOUS EXPERIENCE


2.60 Much of the RRC's 2020 Report is concerned with reviewing or summarising previous reviews of various COVID-19 orders (including a very comprehensive summary of COVID-19 secondary legislation in Appendix B.) The RRC recommends that:

29 See further the discussion in Louise Delany *Covid and the Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021) at [13.2], which summarises various points of intersection between the COVID-19 response and international law.

30 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 3.

31 *Inquiry into Parliament's legislative response to future national emergencies: Report of the Regulations Review Committee* (December 2016) at 36. The framework is described in detail.

the Government should facilitate an all-of-government examination of COVID-19 secondary legislation (and powers to make that legislation) to seek ways of improving the quality of secondary legislation in future emergencies.³²

- 2.61 Because of COVID-19 fatigue, there will be understandable resistance to revisiting which measures have worked well and not so well once the acute threat of the pandemic is over. There will never be a better time to do so. This may well be the “golden hour” to consider what powers should be conferred in general legislation to be unlocked in an emergency.
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32 *Briefing to review secondary legislation made in response to COVID-19: Final report of the Regulations Review Committee* (August 2020) at 2.

PART THREE

Understanding and improving the current legislative framework for emergencies

- 3.1 In this part, the existing standing regime for pandemics and other kinds of emergencies is considered in more detail. I make specific recommendations for change and identify other matters for possible reform that require further consideration.
- 3.2 The recent Aotearoa New Zealand practice has been to confer powers on Ministers and civil servants in specific legislation (for example, the Health Act 1956, Biosecurity Act 1993 and Radiation Safety Act 2016) to deal with particular kinds of emergencies rather than to confer very broad powers in a generic emergency statute. Other aspects of the current legislative regime could be improved by better linking the emergency powers in specific statutes with more standardised procedures for unlocking and controlling such powers and ensuring that the powers become dormant again when the emergency has passed. Additionally or alternatively, powers to deal with different kinds and scales of emergencies could be better graduated.
- 3.3 As currently designed, sector-specific powers are almost always able to be triggered by the standardised procedures for declarations of emergency set up under the Civil Defence Emergency Management Act 2002 (CDEM Act). The CDEM Act subjects emergency powers to political oversight and defined time limits, but sector-specific statutes often allow emergency powers to be unlocked in additional ways. This has the effect of subjecting different emergency powers to different levels of political oversight and other protections and of sometimes obscuring exactly when the emergency powers are activated and become dormant again.
- 3.4 The current preference for enacting bespoke legislation to deal with emergencies after they have emerged is perhaps an indictment of the usefulness of the existing standing rules or evidence of a concern about their possible misuse or both. More needs to be done in standing legislation for the reason that it will not always be possible to enact bespoke legislation in time or with appropriate public input.

CIVIL DEFENCE EMERGENCY MANAGEMENT ACT 2002

- 3.5 The closest we have to a generic emergency statute in New Zealand is the CDEM Act. It empowers the responsible Minister to make a declaration of national emergency and certain identified officials to make declarations of local emergency following the fulfilment of a series of legal tests. Such declarations in turn activate special powers both in the CDEM Act itself and in a range of other enactments. It provides for *parliamentary* oversight and *procedures* to ensure that declarations of emergency are time-limited.

WHAT IS AN “EMERGENCY” UNDER THE CDEM ACT?

- 3.6 An “emergency” is defined broadly and non-exhaustively in s 4 of the CDEM Act to mean 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 coordinated response under this Act.
- 3.7 Whatever the kind of emergency, the focus of the definition is that the emergency must be (a) endangering the safety of people or property to such an extent that it (b) goes beyond the capacities of ordinary emergency services to respond.

State of emergency

- 3.8 A “state of emergency” is defined in s 4 to mean either a state of national emergency or a state of local emergency. The CDEM Act trigger may unlock three options:
- (a) A state of national emergency declared under s 66.
 - (b) A state of local emergency declared under s 68.
 - (c) A transition period (whether out of a national or local emergency).

National emergency

- 3.9 A state of national emergency can be declared under the CDEM Act by the responsible Minister (currently the Minister for Emergency Management). Section 66 reads:

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.

3.10 The threshold test has two key components:

- (a) First, it must appear that an emergency has occurred or may occur. “May occur” incorporates the precautionary approach enacted in s 7, which mandates “caution in managing risks even if there is scientific and technical uncertainty” about the extent of those risks.
- (b) Second, the emergency must have exceeded or be likely to exceed the capacities of the relevant local Civil Defence Emergency Management Groups (CDEM Groups). These CDEM Groups are comprised of selected members of several regional councils and territorial authorities working together.

3.11 According to s 67, once a declaration of national emergency has been made, Parliament must meet within the next 7 days. This is an important democratic protection to ensure the provisions are not overused and to facilitate public scrutiny when they are used. That democratic protection cannot operate if the Parliament has been dissolved and the process has been started for a general election. In that case, the new Parliament must be notified after the return of the electoral writs.

Local emergency

3.12 Declarations of local emergency can be made under s 68. They are made, in the first instance, by an appointed member of the relevant CDEM Group.¹ Subsection (1) provides:

A person appointed for the purpose under section 25 may declare that a state of local emergency exists in the area for which the person is appointed if at any time it appears to the person that an emergency has occurred or may occur within the area.

3.13 The core test remains the same: it must appear that an emergency has occurred or may occur.

3.14 Declarations of emergency of either kind can be extended every 7 days by processes set out in s 67.

Transition period

3.15 As a result of a 2018 amendment to the CDEM Act, certain powers (for example, to request information or enter into, evaluate or close premises and roads) can now be activated during a so-called “transition” or recovery phase. The Minister is able to trigger special powers if necessary in the public interest *and* when “necessary or desirable to ensure a timely and effective recovery” (s 94A) either after the expiration or termination of a state of emergency or in circumstances when the initial event did not trigger a state of emergency at all. There are procedural protections against the misuse of these powers

¹ Civil Defence Emergency Management Act 2002, s 25. Section 69 provides that the Minister may only declare a state of local emergency if “it appears to the Minister that an emergency has occurred or may occur in the area of any [CDEM] Group and a state of emergency has been declared under section 68.”

(provisions for the notification of the House of Representatives similar to those that apply to declarations of emergency and requirements to report individual exercises of special powers). Even so, the usual expectation is that special emergency powers should be activated only for as long as is strictly necessary and that the reversion to normal powers should be as swift as possible.

- 3.16 Given that it is not always possible to determine whether an emergency exists by way of a bright-line test, it is sensible for the legal regime to accommodate a transition to an emergency and back to ordinary powers. It is notable, however, that, with the exception of the COVID-19 Public Health Response Act 2020,² there are no references to the transition phase in other statutes that rely on declarations of emergency under the CDEM Act. Whether special powers are available in a transition phase and exactly which powers are available are questions that need to be addressed in the different sector-specific statutes dealing with different kinds of emergencies.

RELATIONSHIP OF CDEM ACT WITH OTHER STATUTES

- 3.17 The relationship between the CDEM Act and the declaration of emergency processes it sets out and emergency powers in separate statutes is varied and complicated and needs further consideration. I discuss only a selection of emergency powers in this section. In the main, the powers in sector-specific statutes are activated for a time-limited period. The periods for which they can be exercised without political oversight vary, as do the thresholds for their use. A clearer sense of how the CDEM Act declaration provisions interact with the separate declaration of emergency regimes in sector-specific legislation would be helpful. Are the sector-specific declaration of emergency regimes intended to be used for ordinary or intermediate emergencies or are they intended to unlock powers in advance of serious emergencies being declared under the CDEM Act or both?
- 3.18 The existence of a declaration of an emergency under the CDEM Act straightforwardly triggers a discretion in the Commissioner of Inland Revenue to exempt or mitigate tax reporting and other liabilities under the Tax Administration Act 1994 s 91AAS and accordingly determines when the discretion is available to be exercised. By contrast, a declaration of emergency under the CDEM Act is only one of three ways to trigger emergency powers under s 70 of the Health Act. Two of these triggers are time-limited but one is not (discussed in more detail below in relation to enforcement powers).
- 3.19 Similarly, while a declaration of emergency under the CDEM Act may trigger special powers, including an expedited procedure for the importation and release of hazardous substances “necessary to deal with an emergency” under the Hazardous Substances and New Organisms Act 1996 (HSNO Act), there are a range of other triggers for such a procedure set out in s 46 of the HSNO Act that do not necessarily meet the CDEM Act declaration of emergency threshold (such as an ordinary fire emergency). In addition, the responsible Minister is also able to declare a special emergency under s 49B for which the legal test is minimal, there is no requirement to have regard to specialist advice and the duration of the special emergency is left entirely to his or her discretion without any reference to the House of Representatives.

2 COVID-19 Public Health Response Act 2020, ss 8, 38 and 39.

- 3.20 The HSNO Act s 136 allows for special emergency powers to be available to identified officials if certain tests are met even *in advance* of a declaration of emergency under the CDEM Act but appropriately only for a very limited 48-hour period. The intention seems to be to enable individual officials to act immediately for a short period upon the identification of a threat. The special powers can continue once a declaration of emergency is made under the CDEM Act or under certain other statutes (including the Radiation Safety Act) but otherwise are appropriately time-limited.
- 3.21 The Radiation Safety Act s 54(1)(b) sets out an alternative set of rules again for the declaration of a radiation emergency. In this case, the rules allow the Director for Radiation Safety or an officer on site (s 55) to make a declaration of radiation safety but only if others have so far failed to act or in advance of others acting including to declare a state of emergency under the CDEM Act. The declaration is time-limited (though the 10-day renewable time limit is much longer than under the HSNO Act or the CDEM Act) and is overridden by a declaration under the CDEM Act.
- 3.22 This is a complicated patchwork of provisions that should be standardised where that is possible and appropriate.
- 3.23 Other statutes grant powers to declare emergencies completely independently of the CDEM Act regime, and their relationship with it is unclear. One of these instances is the power to declare an emergency under the Biosecurity Act s 144. Such a declaration of emergency does not require Ministers to act on expert advice. It also triggers very broad powers indeed in s 145:

Emergency powers

- (1) The Minister may, in the area or areas in which a declaration of biosecurity emergency is in force by notice, take such measures, and do all such acts and things and give all such directions, and require all such acts to be done or not to be done, as the Minister believes on reasonable grounds to be necessary or desirable for the purpose of eradicating or managing the organism in respect of which the emergency has been declared.
- 3.24 This power is, however, time-limited, and the House of Representatives is required to be notified.³
- 3.25 The International Terrorism (Emergency Powers) Act 1987 sets out separate processes in ss 6 and 7 for the authorisation of the exercise of emergency powers in a terrorist emergency on the advice of the Commissioner of Police together with requirements to notify Parliament and time limits.
- 3.26 The International Energy Agreement Act 1976 sets out a different procedure again for the proclamation of a petroleum emergency. The obligation on New Zealand Ministers to make such a declaration and to take domestic measures derives from the International Energy Agreement. In practice, it is the advice of the Secretariat and decisions of the Commission under the International Energy Agreement that triggers the proclamation and the use of measures by the signatory states. According to the New Zealand statute, such a proclamation triggers the making of regulations restricting the distribution, supply and use of petroleum. There is no requirement for direct notification of Parliament but rather the proclamation itself is treated as if it were secondary legislation. There is nothing in the

3 Biosecurity Act 1993, s 146.

International Energy Agreement itself that would prevent the notification of the proclamation to Parliament, and that would be a desirable amendment to the Act.

CDEM ACT FITNESS FOR PURPOSE?

- 3.27 The CDEM Act purports to apply to a broad range of emergencies. It provides an important framework for emergency planning and creates institutions and mechanisms for the coordination of a range of essential public service functions that are likely to be necessary in response to a wide range of (though not necessarily all) emergencies (for example, the supply of food, removal of bodies, life support and information dissemination.) Its main provisions appear to have been designed with small or medium “territorial” emergencies caused by earthquakes, flooding, tsunamis and fire primarily in mind. The institutions it creates are not so well designed for other kinds of emergencies, like technological failures, and do not adequately enable iwi input. The CDEM Act is currently being reviewed, and new legislation is expected. This will provide an opportunity to better align the various regimes.
- 3.28 The relationship between the CDEM Act and other statutes that trigger emergency powers needs to be part of that review to ensure as much consistency as possible, that the exercise of emergency powers in other sector-specific legislation is also subject to supervision by the House and is necessarily time-limited and that the length of the time limits are appropriate to the kind of emergency being regulated.
- 3.29 A table illustrating a selection of the current rules for when an emergency can be triggered and for what purposes emergency powers can be exercised is included in Appendix One.

PANDEMIC EMERGENCIES

- 3.30 Te Aka Matua o te Ture | Law Commission (Commission)’s 1991 *Final Report on Emergencies* only mentioned the Health Act at paragraphs 3.68 to 3.69 and then only referred to the potentially sweeping regulation-making powers in s 117. There is a broad consensus that the Health Act provisions for pandemics need to be updated in light of recent experience. Given the ongoing COVID-19 pandemic, I devote considerably more attention to pandemic-type emergencies in this Study Paper.
- 3.31 The principal legal instruments for the regulation of pandemic emergencies comprise the World Health Organization International Health Regulations 2005 to which Aotearoa New Zealand is bound, the Health Act, the Epidemic Preparedness Act 2006 and the more generic CDEM Act. In the current pandemic, a range of bespoke legislation was also required to be enacted. This included the COVID-19 Public Health Response Act and the Immigration (COVID-19 Response) Amendment Act 2020.

World Health Organization International Health Regulations 2005

- 3.32 The World Health Organization International Health Regulations, which are binding on Aotearoa New Zealand, are a crucial part of the regulatory framework for international health emergencies. They require states to fulfil core capacity measures for the regulation of borders and for the regulation, monitoring and prevention of the international transmission of diseases by persons, cargo and carriage in preparation for an international health emergency.

- 3.33 The World Health Organization is a key source of technical and scientific advice and information for domestic governments in an international health emergency. In particular, the regulations mandate information sharing between states about diseases that may present an international risk. The World Health Organization plays a critical role in collecting, verifying and sharing information about the risks of the international transmission of disease and in providing scientific expertise.⁴ The Director-General of the World Health Organization has the power to determine whether an event constitutes a public health emergency of international concern according to prescribed criteria and procedures.⁵
- 3.34 Notably, the World Health Organization International Health Regulations also prohibit charging *citizens* who have been travelling (as opposed to those seeking temporary or permanent residence) for isolation or quarantine requirements (Article 40) or for vaccines and set out other rules to be applied to travellers (including vaccine certificates).

Triggering the Health Act

- 3.35 The decision framework that unlocks the dormant emergency powers in s 70 of the Health Act is to be found in the beginning part of that provision:
- ... the medical officer of health may from time to time, if authorised to do so by the Minister or if a state of emergency has been declared under the Civil Defence Emergency Management Act 2002 or while an epidemic notice is in force
- 3.36 While all three triggering conditions had been fulfilled in unlocking the s 70 powers in March 2020, they are available as alternatives. There can be (a) authorisation by the Minister of Health, (b) an epidemic notice under s 5 of the Epidemic Preparedness Act (made by the Prime Minister) or (c) a declaration of a state of emergency under the CDEM Act (made by the Minister for Emergency Management). Of the three alternatives, only the first – authorisation by the Minister of Health – is a stand-alone provision in the Health Act. Should these unlocking powers be alternative or cumulative? Are the appropriate actors involved?
- 3.37 The usual assumption is that the executive part of government will too readily avail itself of emergency powers, which may lead to the conclusion that the triggering events should be cumulative rather than alternative. This would have the advantage of preventing the overuse of such powers and ensure that the time limits that apply under the CDEM Act or Epidemic Preparedness Act would determine the period over which the extraordinary powers would be activated. Realistically, it is unlikely that *national* powers of potentially the most draconian kind would ever be triggered without the knowledge and approval of the Prime Minister.
- 3.38 On the other hand, there may be an advantage to having alternative triggering powers. The international experience of the current pandemic demonstrates that many governments fatally delayed their response until the disease had taken hold in their communities. Having several alternative sites of power to trigger emergency measures over local or national populations may help to mitigate the temptation to delay. Michael Lewis's *The Premonition* describes the preparations for and response to COVID-19 in the United States of America. Lewis portrays rather graphically how brave public health

4 World Health Organisation International Health Regulations 2005, arts 7 and 10.

5 World Health Organisation International Health Regulations 2005, art 12.

officials and politicians sometimes have to be in acting against significant epidemic threats.⁶ It is a potentially career-ending event if a politician or public servant “overreacts” and the threat does not come to anything. Equally, if officials act early and effectively to successfully mitigate the threat, they may not be given any or sufficient credit for averting the danger to public health and their actions too may be characterised as an overreaction. Because politicians are subject to significant economic and social incentives not to act early or at all in a pandemic situation, it may be appropriate that the decision to activate public health powers be distributed across several political officials rather than cumulative.

- 3.39 The availability of separate ways to trigger s 70, as currently written, is also explained by the fact that it applies to local health emergencies, including those relating to contaminated water supply or food as well as to national health emergencies. It may, of course, be unnecessary to involve the Prime Minister and the Minister for Emergency Management in a local *Salmonella* outbreak or small-scale disruption to water supply. I suggest that the exercise of the powers relating to specified individuals and places should continue to be triggered by the Minister of Health on the advice of local medical officers of health. There should be a separate regime for health emergencies that affect whole populations (whether local or national). Consideration should also be given to whether it would be appropriate to confer certain powers directly on medical officers of health to act immediately in relation to identified threats to public health. Other emergency statutes authorise officials to act immediately for a limited period in advance of powers being formally triggered.
- 3.40 I recommend that the more exceptional powers that affect whole populations or significant parts of populations should be triggered by the issue of an epidemic notice by the Prime Minister acting in consultation with the Minister of Health and on public health advice and a declaration of a state of emergency under the CDEM Act (in order to activate its notification and time-limited provisions). Specifying which Ministers must be consulted is not particularly controlling given that s 7 of the Constitution Act 1986 allows members of the Executive Council to act on each other’s behalf. The public health advice is therefore critical. Given that, in many cases, decisions will have to be taken in circumstances of scientific uncertainty, and there should be a reference in the Health Act and Epidemic Preparedness Act (and not just the CDEM Act) to the need to take a precautionary approach.

Triggering the COVID-19 Public Health Response Act 2020

- 3.41 The Health Act is improved upon in the COVID-19 Public Health Response Act in that it deals with pandemics separately from more-routine public health measures. For completeness, we compare and contrast the triggering provisions of these standing provisions with the bespoke and time-limited mechanisms in the COVID-19 Public Health Response Act.
- 3.42 The trigger mechanism in the COVID-19 Public Health Response Act is contained in s 8, which reads:

Prerequisites for all COVID-19 orders

6 Michael Lewis *The Premonition: A Pandemic Story* (Penguin Books Limited, 2021). See also the treatment of the responsible medical officer in the Isle of Man: Helen Pidd “Isle of Man medical director faced ‘disgraceful’ bullying, tribunal finds” *The Guardian* (online ed, London, 17 May 2022).

A COVID-19 order may be made under this Act only—

- (a) while an epidemic notice under [section 5](#) of the Epidemic Preparedness Act 2006 is in force for COVID-19; or
- (b) while a state of emergency or transition period in respect of COVID-19 under the [Civil Defence Emergency Management Act 2002](#) is in force; or
- (c) if the Prime Minister, by notice in the **Gazette**, after being satisfied that there is a risk of an outbreak or the spread of COVID-19, has authorised the use of COVID-19 orders (either generally or specifically) and the authorisation is in force.

3.43 The trigger mechanism is similar to that contained in the Health Act but with these differences. The COVID-19 Public Health Response Act powers can be unlocked during a transition period under the CDEM Act as well as during a state of emergency in recognition of the fluctuating nature of pandemics. The triggering authority is given to the Prime Minister and Minister for Emergency Management rather than the Minister of Health. A threshold test is added: the Prime Minister must be “satisfied that there is a risk of an outbreak or the spread of COVID-19”. This threshold is a precautionary one focused on the risk of outbreak, not the actual presence of COVID-19 or its effects.

The status of regulations under s 117 and orders under s 70

Section 117 regulation-making powers

3.44 The powers under s 70 remain dormant until triggered, but there are no similar protections in relation to the extensive powers to make orders conferred in s 117.

3.45 Section 117 of the Health Act confers extensive powers on the executive branch of government (technically, the Governor-General in Council) to make regulations (or secondary legislation). The section empowers the promulgation orders for the purposes of:

- (a) the improvement, promotion, and protection of public health;
- (b) the inspection, cleansing, purifying, disinfection, fumigation, and isolation of ships, aircraft, houses, buildings, yards, conveyances, drains, sewers, and things;
- (c) the destruction of insanitary things;
- (d) the vaccination of persons for the prevention of quarantinable diseases and other diseases, and the adoption of any other measures for the prevention and mitigation of disease;
- (da) the management of persons with, or suspected of having, infectious diseases, including persons subject to an urgent public health order or a court order under Part 3A, and their contacts;
- (e) the provision of medical aid, transport, accommodation, and curative treatment for the sick;
- (f) the transportation and disposal of the dead;
- (g) the isolation, disinfection, and treatment of persons suffering from any infectious disease;
- (h) the isolation or medical observation and surveillance of persons suspected to be suffering from any infectious disease, of persons in charge of or in attendance on persons suffering from any infectious disease, and of other persons who may have been exposed to the infection of any infectious disease:

- (ha) the identification of, and communication with, contacts of persons with, or suspected of having, infectious diseases:
- (i) the prevention of the spread of any infectious disease by persons who are contacts or carriers within the meaning of this Act, and the keeping of such persons under medical surveillance, and the restriction of the movements and the preventive treatment of such persons:
- (j) with respect to any infectious disease, prescribing the period which shall be deemed to be the period of incubation of that disease for the purposes of this Act:
- (k) the clinical, chemical, bacteriological, and other examinations and investigations necessary to determine whether any person is suffering from disease or is a carrier of any infectious disease, and whether any person who has been suffering from any infectious disease has ceased to be likely to convey infection:
- (l) the closing of schools or the regulation or restriction of school attendance to prevent or restrict the spread of any infectious disease:
- (m) prescribing the duties of parents or guardians of children who are suffering from, or have recently suffered from or been exposed to the infection of, any infectious disease, and the duties of persons in charge of schools in respect of any such children:
- (n) prescribing the accommodation to be provided in connection with boarding schools, orphanages, or other like institutions for the reception of persons in attendance thereat or resident therein who may be suffering from any infectious disease or who may be contacts within the meaning of this Act:
- (o) the regulation or restriction of the attendance of the public, or of any section of the public, at any place of public recreation or amusement or concourse, or the closing of any such places for admission to the public:
- (p) the regulation, restriction, or prohibition of the convening, holding, or attending of any public gatherings:
- (q) the regulation or restriction of traffic and the movements of persons within or from any area in which an infectious disease is prevalent:
- (r) prescribing the form and content of the notifications with respect to disease by medical practitioners and other persons, and prescribing the fees payable to medical practitioners, veterinary surgeons, or persons in charge of laboratories in respect of such notifications:
- (ra) prescribing identifying information for the purpose of section 74(3C)(b).

3.46 The provision also empowers the creation of penalties for breaching the rules.

3.47 Consideration needs to be given to whether the more extensive of those powers conferred in s 117 should be so readily available. It would be better to condition the exercise of certain powers such as to regulate public gatherings in (o) and (p) on the presence of a significant risk to health. If it is contemplated that religious or cultural gatherings are able to be regulated by s 117, that ought to be spelled out and subject to

conditions. The mixed public and private nature of the marae needs to be specially considered and the creation of such rules subject to appropriate Māori input.⁷

- 3.48 The s 117 powers are written very broadly, with little by way of protection in terms of their purpose and without any requirement of a triggering event. On the other hand, and unlike the powers originally conferred under s 70 of the Health Act, once made, the regulations are subject to the normal political and legal oversights and controls on regulations such as requirements of publication, scrutiny by the Regulations Review Committee, the possibility of disallowance on the motion of the House of Representatives (Legislation Act 2019 Part 5 Subpart 2) and challenge by way of judicial review in the courts.
- 3.49 As is well known, s 117 was not used as the source of the powers to make general rules for the whole population in the early days of the latest pandemic. The rules were not made by the Governor-General in Council as required by s 117 but rather by the Director-General of Health, who was a medical officer of health by virtue of being a qualified medical practitioner, and under powers conferred under s 70 of the Health Act. While there are significant areas of overlap between the powers to make orders in s 70 and the powers to make regulations in s 117 (for example, the powers to restrict public gatherings and to isolate persons), s 117 does not go so far as to empower the making of rules requiring people to stay at home in their “bubbles”, limiting private gatherings or mandating the general closure of all but essential services. For these purposes, the Director-General relied on s 70(1)(f) and (m).⁸ It would be helpful to identify in the Health Act when ordinary regulation-making powers are contemplated and for which purposes rather than emergency orders or alternatively to align the two regimes as far as possible.

Status of orders under s 70

- 3.50 There are several legal concerns relating to orders made under s 70. The version of s 70 in force during March 2020, and as was subsequently interpreted by the High Court and Court of Appeal in *Borrowdale v Director-General of Health*, was found to empower the Director-General to make orders both in relation to specific individuals and for the general population at large (either nationally or locally).⁹ Yet, with the exception of s 70(1)(m) (requiring public notifications relating to the closure of businesses), the section did not require the publication of such orders. Neither did such orders have the status of *secondary legislation for disallowance purposes*.
- 3.51 To some extent, this has now been remedied by the new s 70(1C) of the Health Act (enacted on 28 October 2021), which confers the status of secondary legislation¹⁰ on orders made under s 70(1), unless the order only applies to one or more named persons. The amendment allows the order to come into force when it is made, even if it is not yet published. As amended, the section requires the publication of all general orders, subjects

7 Khylee Quince “Māori concepts and privacy” in Rosemary Tobin and Stephen Penk (eds) *Privacy law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) 29 at 43. Marae are, for example, exempted from warrantless searches under s 109(2) of the Biosecurity Act 1993.

8 Health Act 1956, s 22(1). Every person who holds the office of Director-General of Health shall, if that person is a medical practitioner suitably experienced and qualified in public health medicine, have all the functions of a medical officer of health, and may exercise those functions in any part of New Zealand.

9 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864. *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356.

10 For the consequences of which, see the Legislation Act 2019.

such orders to potential parliamentary scrutiny and involves Parliamentary Counsel in their drafting – all amendments that greatly improve the existing law.

Who should make orders?

- 3.52 As presently written, once triggered, s 70 confers powers on medical officers of health to make orders. The reference to medical officers of health includes the Director-General of Health when he or she is also a medical practitioner. There is nothing in the Health Act to otherwise require the Director-General of Health to be an expert in public health or to be a qualified medical practitioner. Given the range of skills needed for the role of Director-General, it is not desirable to prescribe the qualifications of the Director-General in the legislation. The question remains of whether the Director-General of Health, a public servant, should be empowered to make such wide-ranging orders.
- 3.53 The COVID-19 Public Health Response Act again improves on the current standing rules. Consideration should be given to whether this general scheme or something like it should replace the current provisions in s 70 of the Health Act in terms of *who* should decide which matters. Section 9 of the 2020 Act, for example, confers the power to make orders on the Minister of Health, having regard to public health advice as well as other factors, and after consultation with named Ministers. The resulting orders are treated as secondary legislation.¹¹ The COVID-19 Public Health Response Act also confers powers on the Director-General (s 10) to make more-local geographically bounded orders (after considering the rights implications under the New Zealand Bill of Rights Act 1990), which also have the status of secondary legislation.
- 3.54 This could be further improved. The governing principle should be that the person vested with the power to make orders should correspond with the person or body that ultimately decides and holds political responsibility. National orders should be made by the Prime Minister or Governor-General in Council (if s 117 powers are used) having regard to public health advice (indicating that a range of other advice will be relevant but without specifying exactly which Ministers have to be involved, which is likely to vary depending on the circumstances). Longer-term geographically bounded orders (which could include lockdowns of major cities) should not be conferred on a public servant but rather should be made by the politically responsible Minister of Health on public health advice. To be clear, orders in relation to specific persons, places or things should continue to be made by medical officers of health or the Director-General. Consideration should be given to whether medical officers of health or the Director-General could make more-general orders for populations or parts of populations for very limited periods of time.
- 3.55 Given the multifarious factors involved in deciding which businesses should close (including limiting disruptions to the food supply chain, ensuring fairness between competitors and so on), it should not be the Director-General of Health or Minister of Health who makes *general* rules in relation to business closures, even if such powers were found to have been lawfully delegated to the Ministry of Business, Innovation and Employment by the Court of Appeal in *Borrowdale*.¹² Powers to regulate essential services and supply chains should be conferred on the Minister responsible for commerce

¹¹ The provision in s 9 requires the advice of the Director-General, but as noted, the Director-General may not be an expert in public health.

¹² *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356..

having regard to public health advice. Wherever possible, essential services should be identified by general rules, but once again, that will depend on what is known at the time about how a disease is transmitted.

- 3.56 The Finance and Expenditure Committee Inquiry into the operation of the COVID-19 Public Health Response Act 2020 suggested that the Minister for Māori Development should be included among those consulted before certain orders were made. As already stated, it is not significantly controlling to set out in statute which Ministers must be consulted because of s 7 of the Constitution Act. Orders with national implication should as much as possible be made collectively. The process of statutory amendment to the provisions of the Health Act will be an important opportunity to engage with Māori about the best way for Māori to have appropriate input in decision making when time is of the essence. The new Māori Health Authority, Te Aka Whai Ora is likely to have an important role in establishing *regular* avenues for Māori health advice, including in emergencies.
- 3.57 There are other ways to ensure proper consultation and wider input into orders during a pandemic emergency that should also be considered. The recent Victorian Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 is suggestive of some other possible innovations. It does not prescribe exactly who the Minister must consult when making orders but it does provide in s 165CE for a *statutory* standing Independent Pandemic Management Advisory Committee that brings together a range of expertise including expertise in:
- (a) public health;
 - (b) infectious diseases;
 - (c) primary care;
 - (d) emergency care;
 - (e) critical care;
 - (f) law;
 - (g) human rights;
 - (h) the interests and needs of traditional owners and Aboriginal Victorians; and
 - (i) the interests and needs of vulnerable communities.
- 3.58 The Victorian legislation also requires the government to publish a justification of why the order was necessary, its effect on protected rights (in New Zealand rights protected under the New Zealand Bill of Rights Act) and to disclose the advice on which the Minister relied within 7 days of the making of the order. In the Aotearoa New Zealand context, such a measure could be adapted to ensure iwi input and that obligations under te Tiriti are also ascertained and complied with.
- 3.59 All of the orders, which are in the nature of general rules (rather than relating to specific persons), should have the status of secondary legislation and should be subject to the regular supervision of the Regulations Review Committee of the House of Representatives and regulatory disallowance procedures.

Are the powers in s 70 properly framed?

- 3.60 Pandemics are likely to vary enormously in terms of how infectious a disease is, how potentially fatal, how it is transmitted, whether and for how long infected individuals

remain asymptomatic and which populations are likely to be most at risk. Current epidemiological predictions suggest that respiratory diseases are likely to continue to be a threat, but we should not forget other diseases borne by, and illnesses caused by, water, food, animals, insects, tissue and blood or radiation sickness. Law reform efforts should begin by considering the different kinds of health hazards and the tools required to address them.

- 3.61 The usual approach to interpreting powers that potentially limit fundamental rights, principles or other constitutional expectations such as obligations under te Tiriti o Waitangi is to require that they should be conferred as specifically as possible. Such expectations do not fit easily with emergency powers to deal with pandemic emergencies, which need to be broadly framed. The way in which an emergency statute describes the purpose, principles to be addressed and necessary justification for the use of such powers can provide a check on the exercise of broad powers at the point at which they are implemented.
- 3.62 Once again, the COVID-19 Public Health Response Act is an improvement in relation to how the powers are actually stated and the purposes for which health orders can be made. However, some particular matters identified by the Finance and Expenditure Committee Inquiry into the operation of the COVID-19 Public Health Response Act 2020 need further consideration. These include the incorporation of te Tiriti o Waitangi and principles of tikanga Māori, ensuring that contact tracing rules comply with privacy principles and the authorisation of other officials to enforce orders made under the Health Act. Additional issues have been publicly raised such as the potential effect of pandemic regulation on religious freedom.
- 3.63 A general Tiriti clause alone is unlikely to provide much protection for Māori, but requiring an order to be justified in relation to te Tiriti 7 days after it is made (discussed above) may certainly help to focus people's minds. Pre-planning will also be key. There needs to be further consideration of rules about the regulation of gatherings at marae (discussed above). Privacy principles in relation to contact tracing need to be further considered with the assistance of the Privacy Commissioner (see discussion in Part One). I address enforcement powers below.
- 3.64 By way of reference and to create a historical record for the future, Appendix Two sets out the orders made under the Health Act in the early days of the pandemic and before the enactment of the COVID-19 Public Health Response Act.

Epidemic Preparedness Act 2006

- 3.65 A second part of the domestic standing legal regime for epidemics is the inaptly named Epidemic Preparedness Act. It was passed by a unanimous House of Representatives after consideration over 6 months as part of the preparation for a possible influenza epidemic after the SARS scare. The powers are triggered by the making of an epidemic notice by the Prime Minister, which is time-limited and subject to renewal procedures.
- 3.66 The Epidemic Preparedness Act does three main things. It activates an epidemic notice, which in turn brings into force certain emergency provisions intended to deal with an outbreak of disease embedded in various statutes. These include the Electoral Act 1993 ss 195–195B, the Corrections Act 2004 ss 179C and 179E, the Health Act s 70 (discussed above) and provisions of the Criminal Procedure Act 2011, the Immigration Act 2009, the Parole Act 2002, the Sentencing Act 2002 and the Social Security Act 2018. It separately

empowers the making of orders both immediately and prospectively for modification of legislation administered by the Ministry of Health for the effective *management* of an outbreak (ss 11 and 14) and the making of orders to enable compliance with restrictions and requirements during an epidemic (ss 12 and 15). It also empowers judges to adjust the conduct of trials and rules of court (ss 24 and 25).

3.67 The gateway provision to the Epidemic Preparedness Act's powers is s 5(1). It provides:¹³

With the agreement of the Minister of Health, the Prime Minister may, by notice in the Gazette, declare that he or she is satisfied that the effects of an outbreak of a stated quarantinable disease (within the meaning of the Health Act 1956) are likely to disrupt or continue to disrupt essential governmental and business activity in New Zealand (or stated parts of New Zealand) significantly.

3.68 The epidemic notice is time-limited, and the Prime Minister is required promptly to revoke the epidemic notice if he or she is no longer satisfied these conditions are met (s 9(2)).

3.69 For this threshold to be met:

- (a) there must already have been an outbreak of the relevant disease (although that outbreak may have occurred outside of Aotearoa New Zealand);
- (b) there must be agreement of both the Minister of Health and the Prime Minister; and
- (c) the Prime Minister must not give the notice except on, and after considering, the written recommendation of the Director-General of Health.

3.70 The focus is on the effects of that outbreak. This can be either an assessment of actual extant effects or a risk analysis of "likely" effects.

3.71 As with a state of emergency, Parliament is required to meet within 7 days of an epidemic notice having been issued to ensure that there is a degree of democratic oversight.

3.72 On its face, the triggering test for issuing an epidemic notice is quite onerous. It refers to the directly disrupting effects of the disease itself and not to the indirect effects of measures taken by the government itself to mitigate the spread or outbreak of a disease. This should be clarified by reference to both direct and indirect effects.

3.73 The powers to change primary legislation (enacted by Parliament) by regulation (made by the executive) invert the usual constitutional hierarchy and hence are narrowly drawn. The Epidemic Preparedness Act is written deliberately restrictively. It empowers the executive to "modify any requirement or restriction imposed by any enactment" by stating "alternative means of complying with the requirement or restriction or substituting a discretionary power for the requirement or restriction". It does not allow new criteria to be set. It is primarily concerned about enabling interactions between people with government agencies that have or will be affected by a "quarantinable disease".

3.74 It subjects the modifications made to statutes by executive order to strict statutory tests, internal departmental review and oversight by the House of Representatives through the regulatory disallowance procedure. Certain statutes having a constitutional character are protected from modification, namely the Bill of Rights 1688, the Constitution Act, the Electoral Act, the Judicial Review Procedure Act 2016, the New Zealand Bill of Rights Act, the Parliamentary Privilege Act 2014 and the Epidemic Preparedness Act itself. A

¹³ The outbreak can be occurring in Aotearoa New Zealand or overseas: Epidemic Preparedness Act 2006, s 5(2).

modification order cannot be used to modify a requirement or restriction relating to an individual's detention or release from custody.

- 3.75 For the most part, the ways in which the modification orders were used in the COVID-19 pandemic were relatively benign and reinforced the rule of law by clarifying legislative requirements and enabling people to comply with the law when it would otherwise be impracticable or impossible lawfully to do so.¹⁴ The primary uses of the Epidemic Preparedness Act can be justified on the basis that they made it possible for individuals and officials to obey laws that would otherwise have conflicted or been uncertain and ensured that people were not punished for disobeying laws that they could not lawfully obey.
- 3.76 Section 15 immediate modification orders, for example, have been used to do three things in the COVID-19 pandemic: to widen the social security safety net by granting subsidies to businesses that had been forced to close; to relax procedural rules requiring people to meet in person; and to extend timeframes that were otherwise difficult to be met during a pandemic. A snapshot of what the initial orders were used to do appears in Appendix Three.

Commentary

- 3.77 With one exception, all of the listed s 15 immediate modification orders could be described as standard. That is, they are likely applicable to any pandemic and not just COVID-19. Indeed, many would be applicable to a raft of other kinds of emergencies as well.¹⁵
- 3.78 The orders fall into three categories:
- (a) **Relaxing social security requirements** – order 1 is all about widening the safety net during a pandemic by relaxing a procedural requirement.
 - (b) **Extending timeframes** – orders 3, 5 and 8 essentially extend timeframes that became impractical to comply with during a pandemic.
 - (c) **Relaxing procedural requirements** – orders 2, 3, 4, 6 and 7 relax procedural requirements that are rendered impractical when people are unable to easily meet in person.
- 3.79 What is striking is how similar this raft of orders under s 15 is to the provisions activated by the s 8 orders. In other words, all of them could, and perhaps should, be embedded into legislation in advance of an emergency, requiring only a s 8 notice for them to be activated. Many of the modification orders made under s 15 are likely to be uncontroversial and should be considered for embedding as dormant provisions in the statutes they modify (to be triggered by an epidemic notice). That would also have the advantage of the requirement for a s 7 report under the New Zealand Bill of Rights Act justifying any possible restrictions on rights upon their introduction to the House.
- 3.80 There remains a question of whether the Epidemic Preparedness Act was as useful as it could have been. The Epidemic Preparedness Act only empowers the modification of any requirement or restriction imposed by any enactment by stating “alternative means of

¹⁴ The Epidemic Preparedness Act 2006, s 25 preserves common law defences such as impossibility or necessity.

¹⁵ The one exception is the final order, which modifies the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in a very specific way.

complying with the requirement or restriction or substituting a discretionary power for the requirement or restriction”.¹⁶ It does not allow new criteria to be set. Further legislation had to be enacted, for example, for private entities in the COVID-19 Response (Requirements For Entities—Modifications and Exemptions) Act 2020 and for immigration purposes (discussed next). Some of the provisions in the COVID-19 Response (Management Measures) Legislation Act 2021 were of a similar kind in that they extended statutory deadlines and allowed specified activities to be carried out remotely. There is an opportunity to consolidate this experience and to do more to provide for future pandemics (and other emergencies) in advance in primary legislation.

Migration and borders

- 3.81 At the onset of the COVID-19 pandemic, the borders were more or less closed to international travellers. This potentially detrimentally affected people already in Aotearoa New Zealand holding visas that were due to expire. Existing legislation did not permit visa decisions to be made on a group or class basis. The emergency provisions triggered by the epidemic notice were not as helpful as had been anticipated given the numbers of people potentially affected and the difficulty of processing visa extensions in an emergency. This necessitated the passing of the Immigration (COVID-19 Response) Amendment Act in March 2020, which conferred powers on the Minister to extend visas, vary visa conditions, confer visas without application and exempt people from various requirements on a class basis rather than an individual basis. It also stopped the processing of visa applications from individuals who were overseas. For the most part, the powers were used to benefit existing visa holders and the powers were time-limited (the amendment was originally set to expire in a year and since has been extended until March 2023) and subject to appropriate oversight by the House of Representatives. It would now be possible to embed them in standing legislation (subject to discussion about the appropriate triggering provisions).
- 3.82 Compulsory managed isolation and quarantine (MIQ) facilities for those New Zealanders (and certain non-citizens) seeking to return to Aotearoa New Zealand were a central part of the COVID-19 virus elimination strategy (which was subsequently abandoned upon widespread community transmission of the more contagious Omicron variant). Places in MIQ were in extremely high demand and for a period were regulated by an online system that operated as a kind of lottery and did not take account of how long people had been waiting to return home. There was a separate system for the emergency allocation of places but it was extremely limited and narrow. The system was successfully challenged as unreasonably restrictive of returning New Zealanders’ freedom of movement.¹⁷
- 3.83 In hindsight, regulators may have underestimated the demand for return, the demand for emergency allocation and the importance of investing time in rule making and criteria setting when rights are at stake.

¹⁶ For the invalidation of an immediate modification order on the basis that it did not modify either a requirement or restriction, see *Idea Services v Attorney-General* [2022] NZCA 470.

¹⁷ *Grounded Kiwis Group v Minister of Health* [2022] NZHC 832.

ENFORCEMENT POWERS IN A PANDEMIC AND MORE GENERALLY

3.84 Upon the outbreak of the recent pandemic, the key enforcement powers were generally understood to be found in s 71A of the Health Act and in s 91 of the CDEM Act.

3.85 Section 91 of the CDEM Act has sometimes been regarded as a residual, stand-alone or back-up provision for the regulation of conduct in an emergency. It provides:

Power to give directions

- (1) While a state of emergency is in force, a Controller or a constable, or any person acting under the authority of a Controller or constable, may—
 - (a) direct any person to stop any activity that may cause or substantially contribute to an emergency;
 - (b) request any person, either verbally or in writing, to take any action to prevent or limit the extent of the emergency.

3.86 Doubts have been cast on the appropriateness, breadth and usefulness of s 91 as a *general* enforcement mechanism during the recent epidemic in the absence of a specific order proscribing certain conduct. The High Court in *Borrowdale*, for example, thought it would be unlikely that the failure of an individual or group of individuals to self-isolate and stay at home would in itself constitute an activity “that may cause or substantially contribute to an emergency”.¹⁸ Nation J in *Maddigan v Police* was less immediately dismissive and viewed the provision as giving constables wide discretion to respond to an emergency in an “on the ground capacity”.¹⁹ The question of whether the constable had reason to think the defendant’s actions may have contributed to an emergency was not tested in that case because of a guilty plea. In any event, it would be preferable for constables and others to rely on the enforcement powers designed for the specific emergency rather than to rely on s 91 of the CDEM Act.

3.87 The special pandemic emergency powers conferred by the Health Act are set out in ss 70 and 71 (the latter referring to requisitioning powers). Section 71 A of the Health Act authorises constables to enforce these provisions in very broad terms:

Power of constables to assist medical officer of health in relation to infectious diseases

- (1) A constable may do anything reasonably necessary (including the use of force)—
 - (a) to help a medical officer of health or any person authorised by a medical officer of health in the exercise or performance of powers or functions under section 70 or 71; or
 - (b) to help a person to do a thing that a medical officer of health or any person authorised by a medical officer of health has caused or required to be done in the exercise or performance of powers or functions under section 70 or 71; or
 - (c) to prevent people from obstructing or hindering a medical officer of health or any person authorised by a medical officer of health in the exercise or performance of powers or functions under section 70 or 71; or

¹⁸ *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864. at [221].

¹⁹ *Maddigan v New Zealand Police* [2021] NZHC 1035 at [64].

- (d) to prevent people from obstructing or hindering a person doing a thing that a medical officer of health or any person authorised by a medical officer of health has caused or required to be done in the exercise or performance of powers or functions under section 70 or 71; or
 - (e) to compel, enforce, or ensure compliance with a requirement made by a medical officer of health or any person authorised by a medical officer of health in the exercise or performance of powers or functions under section 70 or 71; or
 - (f) to prevent, or reduce the extent or effect of, the doing of a thing that a medical officer of health or any person authorised by a medical officer of health has forbidden or prohibited in the exercise or performance of powers or functions under section 70 or 71.
- (2) A constable acting under subsection (1) may at any time do any or all of the following things:
- (a) enter into or on any land, building, aircraft, ship, or vehicle:
 - (b) inspect any land, building, aircraft, ship, or vehicle, and any thing in or on it:
 - (c) whether for the purposes of paragraph (a) or (b) (or both) or in the exercise of a power conferred by subsection (1),—
 - (i) stop a ship or vehicle, or a taxiing aircraft; or
 - (ii) prevent a stationary aircraft, ship, or vehicle from moving; or
 - (iii) prevent an aircraft or ship from departing.
- (3) Subsection (2) does not limit the generality of subsection (1).
- (4) A constable may do a thing authorised by subsection (1) or (2) whether or not a medical officer of health has asked him or her to do so.
- (5) Sections 128, 129, and 177 of the Search and Surveillance Act 2012, with any necessary modifications, apply to the powers conferred by subsection (2)(c).
- (6) A constable does not incur any personal liability by reason of anything done by him or her in good faith in the exercise or intended exercise of a power conferred by this section.

3.88 Obstructing a medical officer of health or person assisting a medical officer of health is an offence that can carry a term of imprisonment not exceeding 6 months, a fine not exceeding \$4,000 or both.

3.89 These powers are potentially very broad indeed. They include the ability to enter a range of places and things without a warrant, and they extend to the control of the borders and the interception of aircraft and other craft. They anticipate that an ordinary constable could stop a taxiing aircraft and negotiate the complex regulatory environments governing the international law of the sea, international carriers and international travellers.

3.90 Orders made under the COVID-19 Public Health Response Act had the effect of enlisting and extending the powers of other enforcement officials to assist constables. This was necessary in part because New Zealand Police resources were stretched. The Director-General used s 18 of the COVID-19 Public Health Response Act to authorise as enforcement officers WorkSafe inspectors, Aviation Security officers, Customs officers, members of the New Zealand defence forces and an unspecified group of COVID-19 Enforcement Officers (Maritime Border). In most of these cases, powers conferred by the

COVID-19 Public Health Response Act were used to augment powers under existing legislation.

- 3.91 The enlistment of other officials for the enforcement of orders under the COVID-19 Public Health Response Act tends to suggest that the enforcement provisions of the Health Act were not necessarily appropriate or sufficiently specialised for the long-lasting response required in relation to a pandemic emergency. Does the COVID-19 Public Health Response Act suggest a better model for enforcement powers in a pandemic emergency? Should the dormant standing provisions include specific authorisations of other enforcement powers and agents of enforcement?
- 3.92 In answering those questions, it is worth considering in some detail how the open-ended provisions of the COVID-19 Public Health Response Act were actually used.

The special case of the defence forces

- 3.93 Before we consider the different spheres in which these different enforcement officers were used, we need separately to consider the special case of the authorisation of the use of the defence forces to control managed isolation and quarantine facilities and to assist in other ways. According to New Zealand legislation and long-standing principle,²⁰ the deployment of military personnel domestically (including in emergencies) has been legally circumscribed under s 9 of the Defence Act 1990 and s 12 International Terrorism (Emergency Powers) Act. The legislative intention is that, where defence forces are deployed domestically, they act in aid of the Police and under Police command. The only circumstance under which legislation contemplates that the defence forces could have direct enforcement powers over the ordinary public is in the event of imminent emergencies where persons threaten death or serious injury to themselves or others, and even then, they can only be called to assist when New Zealand Police cannot perform the task and under Police direction.
- 3.94 It is highly questionable whether the very general powers in s 18 conferring power on the Director-General of Health to authorise enforcement officials should have by themselves been sufficient to override the provisions of the Defence Act (or potentially the International Terrorism (Emergency Powers) Act in an analogous case). Nor is it appropriate that an official in the Ministry of Health, as opposed to a Minister, ought to be able to mobilise the defence forces under this or any other provision. The orders to deploy the New Zealand Defence Force were only saved by s 13(1)(a) of the COVID-19 Public Health Response Act, which protected from invalidation any order authorising “any act or omission that is, inconsistent with the Health Act 1956 or *any other enactment relevant to the subject matter of the order*”. Deployment of the New Zealand Defence Force domestically is a serious act with constitutional implications.
- 3.95 The legislature should consider whether s 9 of the Defence Act should be amended to authorise assistance by the defence forces when an epidemic notice has been given. Ideally, ministerial approval ought to be required, and limitations on the use of such enforcement powers against the civilian population ought to be included. They should be acting in support of civilian enforcement officers (such as Police or Customs officers).

20 Te Aka Matua o te Ture | Law Commission *First Report on Emergencies* (NZLC R12, 1991) at [13] and [79].

Where existing enforcement officers were deployed under the COVID-19 Public Health Response Act

3.96 Different officials have been deployed to assist in enforcement:

- (a) at the air border;
- (b) at the maritime border;
- (c) at managed isolation and quarantine facilities;
- (d) with the business sector; and
- (e) with everyday citizens.

Air border

3.97 There were two authorisations relevant at the air border: the authorisation of Aviation Security officers and also of Customs officials. The earlier authorisation, given as far back as 13 July 2020, was given to Aviation Security officers on the following terms:

Date and period	Functions and powers	Given for what purpose
<p><u>Issued</u></p> <p>13 July 2020</p> <p><u>Applicable</u></p> <p>While the epidemic notice is in force</p>	<ul style="list-style-type: none"> • The power to give directions (s 21). • The power to direct persons to provide identifying information (s 23). 	<ul style="list-style-type: none"> • Maintaining the security of entry and exit points. • Answering questions and ensuring persons understand the isolation/quarantine rules for the particular facility. • Monitoring and, if necessary, directing the movement of persons as they enter and exit the building for permitted reasons. • Monitoring compliance with physical distancing rules.

3.98 In early 2021, Customs officials were additionally authorised to enforce powers relevant to this domain. Specifically, the Director-General authorised Customs officers²¹ to assist with pre-departure testing required under the COVID-19 Air Border Order.²² The authorisation can be summarised as follows:

²¹ As defined by s 5 of the Customs and Excise Act 2018. The persons must also be employed and engaged by the New Zealand Customs Service.

²² Specifically, the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 (Order) (or any order that modifies, replaces or corresponds to that Order).

Date and period	Functions and powers	Given for what purpose
<u>Issued</u> 20 January 2021 <u>Applicable</u> 15 January – 31 December 2021	<ul style="list-style-type: none"> The power to give directions (s 21). The power to direct persons to provide identifying information (s 23). The power to issue infringement notices (s 29). 	<ul style="list-style-type: none"> Checking compliance with pre-departure testing requirements at the air border in relation to people arriving in Aotearoa New Zealand. Issuing infringement notices to people who have not complied with pre-departure testing requirements.

3.99 The augmentation of the existing powers of Aviation Security officers and Customs officials triggered by an epidemic notice in order to control the borders is uncontroversial and should be included in standing rules.

Maritime border

3.100 The authorisations given at the maritime border are more complex. Three groups were authorised as enforcement officers:

- 27 August 2020 – Customs officers were authorised.
- 29 October 2020 – the Armed Forces were given authorisation.
- 2 November 2020 – the authorisation of Customs officers was limited to those who have undertaken a specific kind of training.
- 11 November 2020 – an unspecified group of enforcement officers was enlisted.

Authorisation of Customs officers

Date and period	Functions and powers	Given for what purpose
<u>Issued</u> 27 August 2020 <u>Applicable</u> 27 August 2020 – 31 May 2021 ²³	<ul style="list-style-type: none"> The power of entry (s 20). The power to give directions (s 21). The power to direct persons to provide 	Assisting in the implementation and enforcement of the Maritime Border Order ²⁴ by: <ul style="list-style-type: none"> maintaining the security of entry and exit points in relation to ports and ships that have arrived in New Zealand, as required;

²³ All the notices actually say, at the same time as specifying an end date, “unless earlier revoked in accordance with section 18(4) of the Act”.

²⁴ Specifically, the COVID-19 Public Health Response (Maritime Border) Order 2020 (Order) (or any order that modifies, replaces or corresponds to that order).

	identifying information (s 23).	<ul style="list-style-type: none"> • providing information and engaging with people to ensure they understand the isolation/quarantine rules in relation to the Order; • monitoring and, if necessary, directing the movement of persons at ports and on ships; and • monitoring compliance at ports and on ships in relation to people disembarking, physical distancing rules and rules in relation to wearing personal protection equipment.
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3.101 Again, augmenting the powers of existing and appropriately qualified Customs officers for the maintenance of the maritime border when an epidemic notice is in force appears to be fairly uncontroversial and helps fulfil Aotearoa New Zealand's international obligations. Such powers should be included in the standing legislation.

Authorisation of WorkSafe inspectors

3.102 The function of enforcing businesses' compliance with COVID-19 orders was given to WorkSafe inspectors. Their authorisation was as follows:

Date and period	Functions and powers	Given for what purpose
<u>Issued</u> 31 March 2021 <u>Applicable</u> 31 March 2021 – 31 December 2021	<ul style="list-style-type: none"> • The power of entry (s 20). • The power to give directions (s 21). • The power to direct persons to provide identifying information (s 23). • The power to direct businesses to close (s 24). • The power to issue infringement notices (s 29). 	They may carry out these functions and powers "in respect of work and workplaces for which WorkSafe New Zealand is the regulator under section 189 of the Health and Safety at Work Act 2015".

3.103 Again, such powers should be conferred in standing rules to be triggered by an epidemic notice.

Enforcing the compliance of ordinary New Zealand citizens

- 3.104 Apart from the problematic authorisation of members of the defence forces to monitor the compliance of ordinary New Zealand citizens and other travellers in MIQ, discussed above, there was no specific authorisation extending powers to officials other than constables to enforce orders against ordinary citizens. Limiting the enforcement of compliance of ordinary citizens to constables was appropriate, and that limitation should have been made explicit in the legislation.

ELECTIONS IN AN EMERGENCY

- 3.105 There was a real risk that the 2020 general election may not have been able to be safely held in all parts of Aotearoa New Zealand. Depending on whether there was time to put reliable alternative voting procedures in place, this could have affected the fidelity of the election result. If this had been the case, political solutions such as the establishment of an interim cross-party Cabinet based on the incomplete election result may have had to be contemplated until another election could safely be conducted. The current legislative settings are not as helpful as they could be in enabling political solutions to electoral disruption.
- 3.106 Under existing rules, the term of Parliament is strictly limited to 3 years.²⁵ There is no power to extend the term beyond 3 years even in an emergency. Indeed, a special majority of the House of Representatives or a majority of the voters at a referendum is required before the term of Parliament can be altered. That is not such a problem if the extent of the emergency is known while Parliament is still meeting and is able to operate. Parliament could, for example, decide to extend the term or negotiate an interim power-sharing arrangement in the meantime until an election can safely and reliably be held.
- 3.107 Once Parliament has been dissolved or has expired after the designated 3-year term, the options under existing law are much more restricted. The Governor-General *must* start the electoral processes in train. Electoral processes are triggered by the Governor-General issuing the writ for the general election up to 7 days after the dissolution or expiry of Parliament.²⁶ There is no power to “undissolve” or reconvene the old Parliament after it has expired.
- 3.108 The writ sets the date for the general election and by which the results of the election must be returned. The usual rule is that the writ must be returned within 60 days (Electoral Act s 139). This sets the clock running as Parliament is required to meet again 6 weeks after the day fixed for the return of the writ.²⁷ The next 3-year term begins on the date set for the return of the writ. There is a provision in s 6 of the Constitution Act to extend the ministerial warrant of those who lost or did not contest the election for a limited period and to appoint Ministers for an interim period when the electoral result is not yet clearly known.
- 3.109 However, it may be that, after Parliament has been dissolved, an emergency of some kind disrupts electioneering and voting in some or all parts of the country. The constitutional

25 Constitution Act 1986; Electoral Act 1993.

26 Electoral Act 1993, s 125.

27 Constitution Act 1986, s 19.

framework needs to ensure that there is always clearly someone who holds a warrant to govern, even, or especially, in the event of an emergency or natural disaster and that, as far as possible, electoral accountability continues.

- 3.110 Enacted in March 2020, the provisions of the Electoral Act that cater for the unforeseen or unavoidable disruption of polling appear in ss 195, 195A, 195B and 195D. Section 195 contains a non-exhaustive definition of “disruption”:

195 Meaning of unforeseen or unavoidable disruption

- (1) In sections 195A, 195B, and 195D, an *unforeseen or unavoidable disruption* means a disruption that is likely to—
 - (a) prevent voters voting at a polling place; or
 - (b) pose a risk to the proper conduct of an election.
- (2) An unforeseen or unavoidable disruption includes, but is not limited to, a disruption arising as a result of—
 - (a) a natural disaster;
 - (b) adverse weather conditions;
 - (c) a riot or disorder, or a threat of a riot or disorder;
 - (d) a terrorist act (as defined in section 5 of the Terrorism Suppression Act 2002);
 - (e) an epidemic notice given under section 5(1) of the Epidemic Preparedness Act 2006 being in force;
 - (f) a cyberattack on the Electoral Commission’s electronic operating systems.

- 3.111 The provisions go on to empower the Chief Electoral Officer, after consulting the Prime Minister, Leader of the Opposition and those knowledgeable about the likely scale and duration of the disruption, to adjourn polling (in the whole or part of the country) initially for 3 days and then for one or more subsequent periods of 7 days each. There is no statutory limit on the number of times voting can be adjourned nor any upper limit on the length of time for adjournment. This, in turn, delays the date for the return of the writ by the equivalent number of days. The Chief Electoral Officer is also given a discretion whether to disclose the results of the election in parts of the country for which polling has not been delayed.

- 3.112 As currently understood and set out in the Cabinet Manual 2017, different conventions apply in relation to how much governments have freedom to act in the 3 months preceding an election²⁸ and between the election and its results becoming known. Only after the election is held and before the result is known do the caretaker conventions currently apply.²⁹ Different expectations apply while waiting for the results of an election depending on whether *it is not* clear who will form the next government or *it is* clear who will form the next government but they have not yet taken office. In the former case, the caretaking government is expected to defer major decisions and, if they cannot be deferred, to consult with the opposition parties before taking decisions if it is possible and appropriate to do so. In the latter case, the caretaker government is expected to act on the advice of the incoming government on any matter of such constitutional, economic

28 Cabinet Office *Cabinet Manual 2017* at [6.9].

29 Cabinet Office *Cabinet Manual 2017* at [6.24].

or other significance that it cannot be delayed until the new government formally takes office – even if the outgoing government disagrees with the course of action proposed.

- 3.113 The Cabinet Manual needs to be revisited to more fully consider how the conventions should operate if an election is disrupted by an emergency and to clarify when the caretaking conventions begin. The current law gives the Chief Electoral Officer power significantly to extend the period before the caretaker period begins. If only a small or sparsely populated part of the country is disrupted, it may be relatively clear to the Chief Electoral Officer what the overall result is likely to be. In such a case, he or she is currently under no *obligation* to disclose the results in the completed polling, only a discretion to do so under s 195D(2). We could easily envisage a situation in which the incumbent government's approach to an emergency is decisively rejected by electors at the completed polling. In that case, it is likely to really matter whether the Chief Electoral Officer discloses the results and exactly when the caretaking convention begins.
- 3.114 The rules that provide for disrupted elections enacted as part of an amendment in March 2020 place an undue burden on the Chief Electoral Officer to make what may be very difficult decisions in very difficult circumstances. Further consideration should be given to whether the Chief Electoral Officer should be enabled and, in certain circumstances required to consult the Clerk of the Executive Council. The Clerk of the Executive Council is likely to be in a better position than the Chief Electoral Officer to judge matters such as whether the incumbent government is able to carry on, to assess how well the conventions are working or to help to manage the formation of a new government in the event that it is impossible to regard the electoral result as reliable and yet further delay is thought to be intolerable. The Chief Government Statistician may also need to be consulted if, for example, certain age groups or categories of person have been more likely to have been unable to participate in the poll. The conventions stated in the Cabinet Manual about the access of opposition parties to official advice, including during the electoral transitional period, may also need to be adjusted in an emergency.
- 3.115 Much is likely to depend on the cause of the disruption of polling and how widespread it is. There may be a considerable length of time before a proper and reliable election can be held in a particular electorate, but the rest of the country may have been able to vote safely and the likely overall result may be clear enough (though of course this is made difficult because of the significance of the party vote to the number of seats in an MMP system). In such a situation, the best course of action may sometimes be to go ahead with the poll in the area subject to disruption, even knowing that the result is likely to be unreliable, in the clear expectation that a by-election will be held when it is safe to do so. Such an expectation is hard to set down in statute and would have to be left to political judgements and commitments.
- 3.116 The rules need to be written in a way that enables such political solutions to be found. Another possible solution that should be considered is to enable the old Parliament, which has been dissolved or expired, to reconvene even after the writ has been issued. (The place and *mode* of meeting may have to be adjusted depending on the cause of the disruption.) Parliament could then *itself* consider whether it wanted to extend the term of government until it was safe to electioneer and to hold a reliable poll. In doing so, coalition arrangements might also be renegotiated, and caretaker arrangements could be adopted. This would be preferable to the Chief Electoral Officer effectively making the decision about the length of the parliamentary term. I am not suggesting that the executive have the power unilaterally to change electoral law or the term of Parliament

but rather that there could be provision for the old Parliament to meet to decide how *it* wants to address the disruption rather than officials. The decision to reconvene Parliament should be formally in the hands of the Governor-General but subject to advice channelled through the Prime Minister or, if necessary and appropriate, the Clerk of the Executive Council.

- 3.117 Another solution would be to have alternative voting procedures available electronically, but that is not necessarily an answer if an emergency involves the failure of electricity supply or technology, and it may also disadvantage certain sectors of the electorate – all factors that could also affect the fidelity of the election result. Provision in general legislation for the extension of local body elections in an emergency is also needed.³⁰

CONCLUDING REMARKS

- 3.118 There is never a good time to write emergency law. Ensuring that legal frameworks provide governments with sufficient powers to cope with future emergencies while at the same time including effective political and legal constraints on such powers is a difficult balance to achieve. This, however, may be the best possible time to review Aotearoa New Zealand's emergency legislation. We have an important opportunity to learn from experience. This may well be the golden hour in which to prepare the legal powers and constraints necessary for the next pandemic.

30 The timing of local body elections was changed by the COVID-19 Response (Management Measures) Legislation Act 2021 allowing extensions of 6 weeks at a time.

Appendix One

The following table illustrates a selection of the current rules for when an emergency can be triggered and for what purposes emergency powers can be exercised.

Act	Decision maker	Threshold
Health Act 1956	Medical officer authorised by Minister of Health	No threshold. ¹
COVID-19 Public Health Response Act 2020	Prime Minister	Prime Minister must be satisfied that there is a risk of an outbreak or the spread of COVID-19.
Civil Defence Emergency Management Act 2002	Local emergency: designated member of CDEM Group National emergency: Minister for Emergency Management	Local emergency: any kind of emergency that endangers the safety of people or property to such an extent that it goes beyond the capacities of ordinary emergency services to respond. National emergency: additionally, the local CDEM Group does not have the capacity to respond.
Epidemic Preparedness Act 2006	Minister of Health and the Prime Minister	Prime Minister is satisfied the effects of the outbreak are likely to disrupt or continue to disrupt essential governmental and business activity.

¹ The s 70 power has to be exercised “for the purpose of preventing the outbreak or spread of any infectious disease”. There is a distinction, however, between a trigger that unlocks a power and a purpose governing the exercise of that power.

Appendix Two

The first swathe of orders made under the Health Act 1956, summarised below, all relate to the initial response to COVID-19 before the enactment of the COVID-19 Public Health Response Act 2020.

By way of context, Aotearoa New Zealand moved to Alert Level 3 on 23 March 2020, to Alert Level 4 on 25 March, to Alert Level 3 on 27 April and to Alert Level 2 on 13 May. That is the point at which the COVID-19 Public Health Response Act replaced the Health Act as the governing legislation for issuing orders of a general character.

Date and person	Effect
Issued 16 March By Minister Applies for 14 days¹	<ul style="list-style-type: none"> Section 70(1)(f) – all persons arriving in New Zealand (except from Category 2 countries) after 1am Monday 16 March are expected to be quarantined for 14 days. Section 70(1)(h) – such people to be medically examined and undergo such preventative treatment as may be required. Section 71A – constables to do anything reasonable necessary to assist in ensuring compliance with this instruction.
Issued 24 March By Director-General of Health Applies from end of 25 March until further notice	<ul style="list-style-type: none"> Section 70(1)(m) – all premises within New Zealand to be closed and people forbidden to congregate in outdoor places (whether public or private). Section 71A – constables to assist.
Issued 31 March By Medical Officer Applies while epidemic notice is in force	<ul style="list-style-type: none"> Section 70(1)(f) – all persons arriving in New Zealand (except for air crew who have used PPE) after 1am Monday 16 March are expected to be quarantined for 14 days. Section 70(1)(h) – such people to be medically examined and undergo such preventative treatment as may be required. Section 71A – constables to assist.

¹ 14-day period, unless revoked or modified earlier. May be renewed for further 14-day periods.

Date and person	Effect
<p>Issued 3 April</p> <p>By Director-General of Health</p> <p>Applies from 6pm 3 April until end of 22 April 2020</p>	<ul style="list-style-type: none"> Section 70(1)(f) – all persons within New Zealand to be isolated or quarantined with exceptions for “essential personal movement” as defined. Section 71A – constables to assist.
<p>Issued 9 April</p> <p>By Director-General of Health</p> <p>Applies from 9 April until end of 22 April</p>	<ul style="list-style-type: none"> Sections 70(1)(e), (ea) and (f) – all persons arriving in New Zealand by air (with a few exceptions) to report and submit themselves to medical testing at the airport on arrival and to be isolated or quarantined for 14 days (or up to 28 days if medical officer says). Section 71A – constables to assist.
<p>Issued 24 April</p> <p>By Director-General of Health</p> <p>Applies 21 April to end of 27 April</p>	<p>Section 70(1B) – amending the 24 March order to add an exemption: accessing premises for purpose of carrying out necessary work as defined.</p>
<p>Issued 21 April</p> <p>By Director-General of Health</p> <p>Applies until 11 May</p>	<p>Two amendments to 9 April order: one small change and also extending expiry from end of 22 April until end of 11 May.</p>
<p>Issued 21 April</p> <p>By Director-General of Health</p> <p>Applies end of 27 April</p>	<p>Two amendments to 3 April order:</p> <ul style="list-style-type: none"> Adding an exemption for doing necessary work on closed premises. Extending expiry from 22 April to end of 27 April.
<p>Issued 24 April</p> <p>By Director-General of Health</p>	<p>Health Act (COVID-19 Alert Level 3) Order 2020: found here. This order is made under ss 70(1)(f) and (m). This order appears to be the only one found on the New Zealand Legislation website.</p> <p>It is predecessor to the COVID-19 alert level orders discussed below: It contains:</p> <ul style="list-style-type: none"> the general isolation and quarantine requirement (cl 6); the permission for essential personal movement or recreation (cl 7); the closure of premises (cl 9), a table describing which infection control measures are relevant for which restricted premises (cl 10); and

Date and person	Effect
	<ul style="list-style-type: none"> the prohibition on congregating in outdoor places (cl 11).
<p>Issued 29 April</p> <p>By Director-General of Health</p> <p>Applies from 20 April</p>	<p>Amends the 24 April order. Makes changes or clarifications as to what is permitted as essential personal movement or recreation under the principal order.</p>
<p>Issued 8 May</p> <p>By Director-General of Health</p> <p>Applies 11 May until end of 22 June</p>	<p>Two amendments to 9 April order:</p> <ul style="list-style-type: none"> Expiry moved back from end of 22 April to 22 June 2021. Small change to definition of essential personal movement.
<p>Issued 8 May</p> <p>By Director-General of Health</p>	<p>Amends the 24 April order by adding two other kinds of businesses (licensing trusts and hardware and DIY stores) to the list of category B businesses.</p>
<p>Issued 11 May</p> <p>By Director-General of Health</p>	<p>Amends the 24 April order to enable necessary work to be undertaken in certain premises from 12 May 2020 (in anticipation of move to Alert Level 2 on 14 May) in order to prepare for premises opening.</p>

Appendix Three

A sample of orders made under the Epidemic Preparedness Act 2006 follows:

Epidemic management notices under s 8 activating dormant provisions

The three orders made under s 8 of the Epidemic Preparedness Act activating dormant provisions in other Acts that explicitly refer to the Epidemic Preparedness Act are summarised in this table:

No	Name	Date	Purpose
1	<u>Epidemic Preparedness (Epidemic Management—COVID-19) Notice 2020</u>	24 March 2020	Modification of: <ul style="list-style-type: none"> - Social Security Act 2018; and - Immigration Act 2009 (Agreement from the Minister for Social Development and the Minister of Immigration)
2	<u>Epidemic Preparedness (Epidemic Management—COVID-19—Parole Act 2002 and Sentencing Act 2002) Notice 2020</u>	30 March 2020	Modification of: <ul style="list-style-type: none"> - Parole Act 2002 (but only s 13A and 56A); and - Sentencing Act 2002 (Agreement from the Minister of Justice and the Minister of Corrections)
3	<u>Epidemic Preparedness (Epidemic Management—COVID-19) Notice (No. 2) 2020</u>	24 June 2020	Revoked all modifications of the Immigration Act except for s 341.

On 24 March 2020, the same day the epidemic notice under s 5 was made, various provisions in the Social Security Act were activated.

Section	Power	Comment
64	Allows the Ministry for Social Development to, with their Minister's approval, grant emergency benefits to people who would not otherwise be entitled to them.	These enhanced compliance, relieved distress and had a humanitarian purpose.
299	Allows the Ministry for Social Development to grant benefits even if the claims for them have not been inquired into.	
443	Empowers the Governor-General to make regulations that, in general terms, relax the usual rules that would detrimentally affect people in terms of their entitlements to benefits. ¹	

Modification of Immigration Act (Order 1)

On 24 March 2020, various provisions in the Immigration Act were activated. However, with the exception of s 341, all these provisions were subsequently made dormant again on 24 June 2020 (see Order 3) as a result of the Prime Minister's responsibility in s 10 of the Epidemic Preparedness Act to keep the situation under review. The relevant provisions are set out below:

Section	Power	Comment
78	Deems existing temporary entry class visas to be extended in certain circumstances relating to an epidemic.	Humanitarian and uncontroversial.
337	Allows a District Court judge to deal with matters on the basis of documents only where that Act would normally require a certain person to be brought before the judge.	For both these provisions, the goal seems to be expediency, but they raise potential due process concerns – right to a fair trial and to be present at trial (New Zealand Bill of Rights Act 1990 s 25(a) and (e)). Subject to a test of justified limitation.
338	Allows a District Court judge to consider a particular question at intervals of not more than 28 days where that Act would normally require a person to be brought before the judge for the consideration of the question at intervals of not more than a stated duration.	

¹ For instance, paying benefits to people otherwise disentitled because of stand-down periods or suspensions; reinstating cancelled benefits; paying benefits at a higher rate despite the lower rate otherwise being justified by, for instance, a reduction, deduction or penalty imposed on a spouse or partner; or refraining from exercising powers to cancel, suspend or vary benefits.

Section	Power	Comment
339	Provides that existing warrants of commitment have effect for 28 days. Such a warrant can be authorised for up to 28 days ordinarily (s 316) so, in other words, it allows this to be pushed up the statutory maximum regardless of what the judge actually ruled.	This engages the liberty right (New Zealand Bill of Rights Act s 22), but it is likely a justified limit given it does not go beyond the statutory maximum.
340	Allows an immigration officer and a released person to agree to vary a condition imposed under s 320 of that Act without express permission from the order or consent of a District Court judge.	These conditions concern matters such as where a person lives or where or when they report. The goal is clearly expediency and avoiding in-person court hearings. Unlikely to be controversial unless the genuineness of the consent of the released person is at issue.
341	Modifies the calculation of the consecutive period for which a person has been detained under one or more warrants of commitment. The calculation here is relevant to the higher threshold for continued detention that is required, under s 323, after 6 months of continuous detention under warrants of commitment. Significantly, under this activated provision, periods of detention during an epidemic management notice are not taken into account.	This seems problematic. It is one thing to continue detention for pragmatic health-based reasons during a pandemic, but why should that not be considered for the purposes of calculating the 6-month period under s 323?

Modification of Parole Act (Order 2)

On 30 March 2020, a few days after the epidemic notice under s 5 was made, various provisions in the Parole Act were activated:

Section	Power	Comment
13A	Enables things that would normally have to be done by the New Zealand Parole Board to be done: <ul style="list-style-type: none"> by the Parole Board on the basis of documents only, without the presence or submission of any person who would otherwise have the right to be present or make a submission; or by the chairperson or panel convenor, acting alone, either in the usual way or on the basis of documents only without the presence or 	The goal here seems to be expediency, but it raises potential due process concerns about the right to a fair trial and to be present at trial (New Zealand Bill of Rights Act s 25(a) and (e)). Subject to a test of justified limitation.

	submission of any person who would otherwise have the right to be present or make a submission.	
56A	Enables a probation officer to temporarily vary a release condition imposed by the Parole Board if the officer has applied to the Parole Board to vary the condition.	Unlikely to be too controversial. These conditions concern matters such as where a person lives or where or when they report. The goal is clearly to avoid in-person court hearings.

In addition, several other sections of the Act that also refer to the Epidemic Preparedness Act were *not* activated:

Section	Power	Comment
27B	Provides that, during a pandemic, the Parole Board can meet its requirements (in ss 21–27) to consider an offender for parole by considering the offender concerned “as soon after he or she should have been considered as is reasonably practicable in the circumstances”. Those circumstances centre around the resources available to the Parole Board.	The goal here seems to be expediency, but it raises potential due process concerns: right to a fair trial and to be tried without undue delay (New Zealand Bill of Rights Act s 25(a) and (b)). Subject to a test of justified limitation.
65A	Deals with recall applications – an application for an order that an offender be recalled to continue serving a sentence of imprisonment in a prison. Under s 65, the Parole Board is required to determine such applications within a certain time period. Section 65A provides that, during a pandemic, the Parole Board can consider a recall application “as soon after it should have been considered as is reasonably practicable in the circumstances”. Again, those circumstances centre around the resources available to the Parole Board.	Same comment as above, but this time any delay is likely to be in the favour of (or at least not prejudicial to) the paroled individual.
107GA	Deals with applications for an extended supervision order where there is a live public protection order application. Under s 107GAA, the former	Similar comments applicable here.

	<p>application cannot be heard until the latter application is resolved.</p> <p>Section 107GA adds that, during an epidemic, the court may adjourn the former application for up to 21 days without the offender's consent.</p>	
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Modification of Sentencing Act (Order 2)

On 30 March 2020, a few days after the epidemic notice under s 5 was made, various provisions in the Sentencing Act were activated. The sections, which all relate to community-based sentences or home detention, are as follows:

Section	Power	Comment
54A and L	Subsection A applies to supervision and subsection L to intensive supervision. Each allows a probation officer to temporarily vary any special conditions or vary or suspend any standard conditions if the officer or offender has applied for a court order to vary those conditions.	<p>These provisions do not raise any significant concerns. Basically, they are about temporarily devolving power to other decision makers to avoid unnecessary court hearings.</p> <p>In many cases, these sections are also favourable to the people they apply to (most obviously, ss 67A and 69A).</p>
67A	Allows the chief executive of the Department of Corrections to give probation officers greater powers to remit the hours of community work imposed on offenders. Normally, they can only remit up to 10 per cent without a subsequent court application.	
69A	Under s 69, a probation officer can apply to court to extend the period during which community work must be done, broadly on humanitarian grounds. Section 69A allows the chief executive, during a pandemic, to authorise probation officers to extend that period up to 12 months without recourse to court.	
69J	Allows a probation officer to temporarily: <ul style="list-style-type: none"> • vary the curfew period on a sentence of community detention if the officer or offender has applied for a court order to vary the curfew period; and • vary or suspend any conditions of a sentence of community detention. 	
80ZH	Allows a probation officer to temporarily:	

	<ul style="list-style-type: none"> • vary any special conditions of a sentence of home detention if the officer or offender has applied for a court order to vary those conditions; and • vary or suspend any standard conditions of a sentence of home detention. 	
80ZI	Allows a probation officer to temporarily vary any post-detention conditions of a sentence of home detention if the officer or offender has applied for a court order to vary those conditions.	

Section 15 immediate modification orders

I now summarise the nine immediate modification orders made pursuant to s 15 between 26 March and 24 August 2020. As a preliminary comment, it is interesting to note that:

- the government opted for immediate modification orders as opposed to prospective modification orders, which require s 8 activation;
- all the immediate modification orders were under s 15 rather than s 14, which means they were to do with enactments other than those related to health and they were made for the purpose of modifying restrictions deemed to be, or likely to become, impossible or impracticable to comply with; and
- with the exception of the final order concerning the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, all the orders were made before the COVID-19 Public Health Response Act was enacted on 13 May 2020.

I summarise the orders in the table below. The hyperlinked full names of the orders can be found in the footnotes.

No	Act modified (and relevant Minister)	Date	Provision modified
1	Social Security Act 2018 ² (Social Development)	26 March 2020	<u>Provision</u> <p>Section 96 deals with requirements for a person to receive temporary additional support. Subs (1)(c) provides one such requirement is to meet criteria made in regulations under s 428.</p> <p>Those criteria include completing a particular application form with certain required information.</p> <u>How modified</u>

2 Epidemic Preparedness (Social Security Act 2018—Temporary Additional Support) Immediate Modification Order 2020.

No	Act modified (and relevant Minister)	Date	Provision modified
			The requirement in subs (1)(c) is effectively waived. It has effect “as if an applicant to whom this clause applies meets the criteria and requirements” in reg 61.
2	Local Government Act 2002 ³ (Local Government)	9 April 2020	<p><u>Provision</u></p> <p>The requirement is in Schedule 7, which prohibits a person from acting as a member of a local authority until they have made an oral declaration at a meeting of the local authority and also a written declaration in a prescribed way. That includes needing one of a shortlist of people to witness the signing of the written declaration.</p> <p><u>How modified</u></p> <p>The order makes it unnecessary for the signing to be witnessed, recognising that most meetings would be held virtually rather than in person.</p>
3	Employment Relations Act 2000 ⁴ (Workplace Relations and Safety)	14 April 2020	<p><u>Provisions</u></p> <p>Basically, this Act specifies a range of timeframes and other procedural requirements governing collective bargaining under the Act.</p> <p><u>How modified</u></p> <p>The order relaxes a range of timeframes and:</p> <ul style="list-style-type: none"> • modifies the maximum timeframes by which an employer must notify their employees who are in work and covered by collective bargaining that bargaining has been initiated to exclude the duration of the epidemic notice; • modifies the maximum timeframes by which an employer must seek to consolidate collective bargaining (40 days) and for unions to respond to an attempted consolidation (30 days) to exclude the duration of the epidemic notice; and • in the case of collective agreements that would otherwise have expired but are still in force for 12 months after expiry, modify the 12-month period to exclude any period covered by the epidemic notice if the 12-month period would otherwise end while the epidemic notice is in force or up to 3 months after it expires or is revoked.

3 Epidemic Preparedness (Local Government Act 2002) Immediate Modification Order 2020.

4 Epidemic Preparedness (Employment Relations Act 2000—Collective Bargaining) Immediate Modification Order 2020.

No	Act modified (and relevant Minister)	Date	Provision modified
			<p>The order also allows the union to notify the other intended party or parties to a collective agreement of a new ratification procedure to ratify the collective agreement (for example, online balloting, videoconferencing or teleconferencing) if a union has committed at the outset of collective bargaining to a ratification procedure that is no longer practicable (for example, in-person ratification meetings).</p> <p>See decision invalidating order in <i>Idea Services v Attorney-General</i> [2022]NZCA 470.</p>
4	<p>Oaths and Declarations Act 1957⁵</p> <p>(Justice)</p>	16 April 2020	<p><u>Provision</u></p> <p>Addresses provisions dealing with requirements for valid oaths, affirmations or declarations. One such requirement is that they must be administered in the presence of the person swearing the oath or making the affirmation or declaration.</p> <p><u>How modified</u></p> <p>The modifications expressly allow an oath, an affirmation or a declaration to be administered or taken using an audiovisual or audio link. It also enables a declaration to be taken by any officer or employee of an entity who is authorised by the entity but only if an enactment authorises or requires the declaration to be provided to the entity.</p>
5	<p>Sale and Supply of Alcohol Act 2012⁶</p> <p>(Justice)</p>	16 April 2020	<p><u>Provision</u></p> <p>The relevant requirements are in s 103 (dealing with new alcohol licence applications) and s 129 (dealing with application for renewal). For both kinds of applications, the Police, a medical officer of health and an inspector are required to inquire into the applications. If the Police or medical officer of health have any matters in opposition to the application, they must file within 15 working days.</p> <p><u>How modified</u></p> <p>The modification order simply extends this to 30 working days on the basis that health and Police resources need to be focused on the pandemic.</p>

5 Epidemic Preparedness (Oaths and Declarations Act 1957) Immediate Modification Order 2020.

6 Epidemic Preparedness (Sale and Supply of Alcohol Act 2012—Licence Application Inquiries) Immediate Modification Order 2020.

No	Act modified (and relevant Minister)	Date	Provision modified
6	Wills Act 2007 ⁷ (Justice)	16 April 2020	<p><u>Provision</u></p> <p>Section 11 requires wills to be signed in person, with witnesses “in the will-maker’s presence”.</p> <p><u>How modified</u></p> <p>The modifications allow wills to be signed and witnessed using audiovisual links.</p>
7	Protection of Personal and Property Rights Act 1988 ⁸ (Justice)	23 April 2020	<p><u>Provision</u></p> <p>The relevant requirements are to do with creating an enduring power of attorney (EPA). The requirements previously specified that:</p> <ul style="list-style-type: none"> • signatories must sign a single physical document; and • witnessing to take place in the presence of the relevant part (donor or attorney). <p><u>How modified</u></p> <p>The modification ensures EPAs can be created when the signatories (the donor, the attorney and witnesses) are in different places:</p> <ul style="list-style-type: none"> • allowing the signatories to sign separate copies of the same document; • treating the full set of signed documents that are sent to a holder (which may include photographs or scans) as comprising the complete instrument creating the EPA; and • allowing signing and witnessing over audiovisual links.
8	Customs and Excise Act 2018 ⁹ (Customs)	4 May 2020	<p><u>Provision</u></p> <p>Clause 15(2) of Sch 8 provides that a Customs Appeal Authority may only accept an application for an extension of time to bring an appeal if it is made within a specified timeframe.</p> <p><u>How modified</u></p> <p>The order extends the timeframe such that the Authority may accept an application within 20 working days after the</p>

7 Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020.

8 Epidemic Preparedness (Protection of Personal and Property Rights Act 1988—Enduring Powers of Attorney) Immediate Modification Order 2020.

9 Epidemic Preparedness (Customs and Excise Act 2018—Appeals) Immediate Modification Order 2020.

No	Act modified (and relevant Minister)	Date	Provision modified
			Epidemic Preparedness (COVID-19) Notice expires or is revoked (as long as the Authority is satisfied the effects of COVID-19 were such that the applicant was unable to file within the statutory timeframe.
9	Te Awa Tupua (Whanganui River Claims Settlement) Act ¹⁰ (Māori Crown Relations: Te Arawhiti)	24 August 2020	<p><u>Provision</u></p> <p>Te Pou Tupua is the legal representative of Te Awa Tupua, which is the legal person comprising the Whanganui River recognised under the Act. The term of office of the existing appointees (who are the first appointees) to Te Pou Tupua ends on 3 September 2020. This is because they are appointed for 3 years under the Act. There is no provision in the Act that enables the present members of Te Pou Tupua to continue to act beyond 3 September 2020.</p> <p><u>How modified</u></p> <p>The effect of the modification is that those appointees are appointed for 3 years and 9 months instead of the usual 3 years. This is to facilitate Te Pou Tupua to continue to make decisions as the legal representative of Te Awa Tupua.</p> <p>The effects of COVID-19 meant that initial meetings were not held and the iwi and the Crown could not get their internal processes under way in March 2020. Hui were not possible during this period, and both the Crown and iwi were focused on more-immediate priorities so basically more time was needed for the statutory-prescribed nomination and joint appointment process for Te Pou Tupua, which the Explanatory Note says requires approximately 6 months to complete. A 9-month extension is considered reasonable and appropriate to allow for both the general election (which ensures that a government is formed and a Minister warranted) and a subsequent 6-month process for appointment. This extension is supported by all parties involved.</p>

10 Epidemic Preparedness (COVID-19—Te Awa Tupua (Whanganui River Claims Settlement) Act 2017—Term of Appointments to Te Pou Tupua) Immediate Modification Order 2020.



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