



1.8.2015

Submission to the Parliament on the inquiry into legislative response for future national emergencies

Introduction

1. This submission, focusing on legislative response for future national emergencies has been prepared by the Wellington Community Justice Project.
2. The Wellington Community Justice Project (WCJP) (www.wellingtoncjp.org) is a student-led organisation at Victoria University of Wellington. The project, formed in 2010, has twin aims: to improve access to justice and legal services in the community; and to provide law students with an opportunity to gain practical experience. It pursues these goals by establishing community-based volunteer projects and working with other organisations that have similar goals.
3. The research for this submission was carried out by students David Cheng (LLB/ Bcom), Chong Hui (Joshua) Tan (LLB) and Vivian Tan (LLB) as part of volunteer work for the project.

Inquiry into Parliament's Legislative Response to Future National Emergencies

I Introduction

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

A national state of emergency occurs when a disaster or any other event is or is likely to be of a severity that it is beyond the recourses of the local Civil Defence group. Declaring a national state of emergency allows public authorities to requisition, and have access to resources not limited to land and building necessary for the preservation of human life.¹

II Background

The starting point of this submission is the looking at Parliament's response to the 2010 Canterbury Earthquake and the 2011 major aftershock.

Ten days after the 2010 earthquake, Parliament enacted the Canterbury Earthquake Response and Recovery Act which was to expire on 1 April 2012. After the second earthquake in 2012, the Canterbury Earthquake Recovery Act (CERA) was enacted.²

Both acts granted powers to the Governor-General to make Orders in Council on the recommendation of the Minister for Earthquake and Recovery.³ The power to make these recommendations cannot be challenged, reviewed, quashed or called into question by judicial reviews.⁴

III Delegated Legislations

Most laws enacted each year are delegated legislations in the form of Orders in Council, proclamations, regulations, rules, notices, warrants and bylaws.⁵ Apart from technical scrutiny from the Regulations Review Committee (RRC), there are no general procedures for the making of delegated legislation that ensure that it is subjected to public debate and scrutiny before it is made.⁶

¹ NZ Herald Staff "Christchurch Quake: What is a National State of Emergency?" (23 February 2011) New Zealand Herald <www.nzherald.co.nz>.

² Kenneth Palmer "Canterbury Earthquake Recovery Act 2011 – a legislative opportunity?" (2011) 9 BRMB 52.

³ Canterbury Earthquake Recovery Act 2011; Canterbury Response and Recovery Act 2010.

⁴ Canterbury Response and Recovery Act 2010, s 6(3).

⁵ David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005) at 396.

⁶ David McGee, above n 5, at 397.

In general, delegated legislation should not contain:⁷

- i. Significant question of policy, including new policy or fundamental changes to existing policy
- ii. Rules that have a significant impact on individual rights and liberties
- iii. Provisions creating offences that impose significant criminal penalties
- iv. Amendments to Acts of Parliament; and
- v. Powers of search and seizure

Constitutional principles such as the separation of powers, democracy and responsible government, parliamentary supremacy and the rule of law also govern delegated law-making.⁸

IV Enhancing Delegated Legislations Framework

Emergency situations resulting from natural disasters or the outbreak of diseases can call for rapid legislative response to govern people and property. However, some government policies require a great deal of analysis, consultation and refinement before they are ready to be the subject of legislation.⁹

Decisions regarding national emergencies are usually too significant to delegate without controls as they reflect institutional roles and are focused by key constraints.¹⁰ The role of the RRC is to apply key basic constitutional principles to Orders, for example the commencement of an Act, any fees and changes relating to an Act and where regulations override Acts, to see if these principles are adhered to when the order is being made. However, it is possible to devise a universal approach to delegating law-making power and widen the scope of the RRC's responsibility.

In Germany, constitutional law requires the Legislature to define the "content, purpose and scope" of legislative powers which are about to get delegated to the Executive. If the scope is deemed too significant, it will normally be dealt with by the Legislature instead. It is proposed that New Zealand do the same. Parliament can on one hand approve legislative schemes and monitor the operation and use of those scheme on the other. They should also be able to repeal, amend or replace these schemes.¹¹

This framework will allow important matters like the removal of historical buildings to be decided by the elected Parliament¹² and ease the Courts' contentious position in dealing with

⁷ George Tanner "Delegated Legislation: Different Types, Validity, Some Current Issues" (paper presented to New Zealand Law Society Delegated Legislation Conference, May 2002) 3 at 5.

⁸ Ross Carter and others *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at 24–26.

⁹ Ross Carter and others, above n 8, at 18.

¹⁰ Ross Carter and others, above n 8.

¹¹ Ross Carter and others, above n 8, at 63.

¹² *Hampton v Canterbury Earthquake Recover Authority* HC Christchurch CIV 2011-409-001368, 20 July 2011.

judicial review matters – Courts are usually reluctant to go against the wide powers conferred to the Executive by the Legislature due to the issue of parliamentary supremacy.

V Protecting Constitutional Bodies and Other Enactments

The most troubling aspect of both the Canterbury Earthquake Response and Recovery Act and the Canterbury Earthquake Recovery Act is that they have empowered the Executive to modify the Acts of Parliament by Orders.¹³ By 2012, more than 40 orders were made.¹⁴

Although there are safeguards, Parliament should continue to be careful to the extent of which it should delegate its law-making powers. Parliament needs to consider and give due recognition to the perennial dangers that exist when the Executive is given power to exercise legislative authority.¹⁵

Although Parliamentary scrutiny of regulations have provided important opportunities for public scrutiny and challenge, this can be said to be limited due to constraints of the scope of the RRC and the extensive powers delegated to the Executive. Theoretically, the RRC plays an important role in examining regulations to see if any should be drawn to the special attention of the House under Standing Order 382.¹⁶ Practically, RRC only examine a limited amount of regulations.

The Courts can also judicially review delegated legislation. As the “only ultimate” test for whether a subordinate legislation is authorised, Courts assess whether these legislations are within the scope of the relevant empowering provision. Common law however, is subjected to parliamentary supremacy. Moreover, they are only concerned with whether the regulations are within the powers conferred by Parliament.¹⁷

For example, empowering provisions such as s 39(2) Canterbury Earthquake Recovery Act 2011 expressly conferred power to confer discretions. The Courts can only rule on whether or not law-makers have failed to use the power given to them.

The Canterbury Earthquake Response Act can modify a number of legislations not limited to the Reserves Act 1977, Resource Management Act 1991, Social Security Act 1964.¹⁸ However, these wide powers need to be duly restrained. Constitutional legislations should also continue to be left untouched.

¹³ Jonathan Orpin “Constitutional Aftershocks” [2010] NZLJ 386.

¹⁴ Ross Carter and others, above n 8, at 38.

¹⁵ Ross Carter and others, above n 8, at 21.

¹⁶ Mai Chen “Practical Problems with Practitioners with Regulations” (paper presented to New Zealand Law Society Delegated Legislation Conference, May 2002) 57 at 67.

¹⁷ George Tanner, above n 7, at 28.

¹⁸ Section 6, Canterbury Earthquake Response Act 2011.

VI Suggested Guiding Principles

Despite the many dangers of conferring too much power to the Executive, the 2011 CERA review concluded that recourse has been taken to its special powers progressively with evident circumspection by statutory decision makers, under the active oversight of the Review Panel and with the knowledge of the Cross-Party Parliamentary Forum.¹⁹

The CERA will expire in 2016. The National Civil Defence Emergency Management Plan Order 2015 appears to deal with the residual responsibilities of this act.²⁰ This order incorporates important lessons learnt from the Canterbury earthquakes in 2010 and 2011, and will generally be revised every 5 years.²¹

Many improvements have been made, including the clarification of the role of lead agencies and setting out new arrangements for business continuity planning and emergency response planning for local authorities.²²

Reducing the possibility of abuse of ministerial discretion would be the best thing to do. Therefore, New Zealand should mandate the expiry of recovery legislations after 5 years or subject it to the discretion of parliamentarians which should be passed with a 75% majority. An independent panel like the CERA Review Committee should be set up to constantly assess and suggest modifications to the recovery legislation.

VII Examination of the Legitimacy of Actions Taken under Recovery Legislation Once Authority to Act has Expired

The issue is whether a “third source” of public power legitimises the actions taken under recovery legislation once authority to act has expired.

The third source of power is the government’s residual freedom to make decisions that are not prohibited. It is clear that individuals may do anything that the law does not permit, but it is not clear whether governments have the same power.²³

The Supreme Court in the *Quake Outcasts* decision recognised the third source of public power, but determined that it was limited by statutory and common law restraints.²⁴

¹⁹ Simon Murdoch “Annual Review of the Canterbury Earthquake Recovery Act 2011”.

²⁰ National Civil Defence Emergency Management Plan Order 2015.

²¹ NZME “How New Zealand Will Cope in an Emergency?” (5 June 2015) New Zealand Herald <www.nzherald.co.nz>.

²² Schedule 1, National Civil Defence Emergency Management Plan Order 2015.

²³ Julia Caldwell “Quake Outcasts v Minister for Canterbury Earthquake Recovery [2015] NZSC 27” (13 May 2015) MinterEllisonRuddWatts <www.minterellison.co.nz>.

Specifically, the Canterbury Earthquake Recovery Act 2011 “occupies the field”, and thus made the Minister for Canterbury Earthquake Recovery’s decision unlawful.²⁵

The government’s decisions after the authority to act has expired are only legitimate if statute and common law principles do not limit its authority to exercise its third source of public power, in the absence of public power derived from statute or the prerogative.²⁶ It is recommended that the government does not act beyond this scope.

VIII Appropriate Extent and Nature of Parliamentary Scrutiny Appropriate for Passing a Recovery Bill

Urgency exists to allow the House of Representatives to respond quickly to circumstances without some of the processes necessary under normal circumstances.²⁷

The Canterbury Earthquake Recovery Bill was passed under urgency and was given royal assent on 18 April 2011. The Bill did go through the select committee process, but issues were raised as to whether the short period of time allowed for that process was sufficient.

It is necessary for the government’s actions to be expediently approved in order to respond effectively to the circumstances. However, it is recommended that the government should also be accountable to ensure that the government does not extend its powers beyond what is necessary in the circumstances.

IX Proposed Safeguards, Checks and Balances on the Use of Powers Delegated to the Executive

The development of Parliament’s practice of delegating its powers in the form of “tertiary” legislation has not been sufficiently honed.

Tertiary legislation, as John Burrows uses it, refers to the product of lawmaking power that is delegated by Parliament, typically to the Executive, which are not regulations.²⁸ As such, it is beyond some of the controls on regulations, such as the Regulations Review Committee, the Regulations (Disallowance) Act 1989 and the Regulations Publication Act 1989, as well as the disallowance of Parliament.²⁹

The current controls on tertiary legislation include (if required by the empowering Acts) consultation with affected interests, approval by the relevant Minister, the designation of “deemed regulation” status – making it subject to the Regulations (Disallowance) Act 1989,

²⁴ Julia Caldwell, above n 23.

²⁵ *Quake Outcasts v The Minister for Canterbury Earthquake Recovery* [2015] NZSC 27 at [91].

²⁶ Julia Caldwell, above n 23.

²⁷ “Urgency in the House” New Zealand Parliament (11 April 2011) <www.parliament.nz>.

²⁸ John Burrows “Legislation: Primary, Secondary and Tertiary” (2011) 42 VUWLR 65.

²⁹ John Burrows, above n 28.

as well as the jurisdiction of the Regulations Review Committee, and some forms of publication.³⁰

Though some modern empowering Acts have included these controls, they are not universal.

Legislations akin to the Regulations (Disallowance) Act 1989 should be passed and a body similar the Regulations Review Committee should be created to specifically ensure the proper use and hard restrictions of the use of delegating tertiary legislative power, to prevent tertiary lawmakers from acting beyond what is necessary.

X Role of the House in Scrutinising Delegated Legislation Made under a Recovery Act

It is up to the House of Representatives to scrutinise delegated legislation made under a recovery Act, to ensure that the government does not act beyond what is necessary, and if the government does, to hold it accountable.

It is necessary for the government to respond expediently to national emergencies by passing delegated legislation. It is not the role of the House to hinder the government's necessary actions in time sensitive situations. This necessarily must allow a greater exercise of public power (though still restrained) in necessary situations.

The House should review the government's actions to determine whether they were necessary in the situation, and if so, whether it went beyond its powers after the initial emergency situation.

Furthermore, other actions such as an inquiry or a body similar to the Regulations Review Committee can, and should be used to hold the government accountable.

XI Consider extent of Judiciary's role in examining recovery legislation, whether any limits on it might be appropriate

A Introduction

Recovery legislation, such as Canterbury Earthquake Recovery Act 2011 (the Act), aims to rebuild Christchurch in a timely and expeditious manner.³¹ More generally, it is in the public interest to maintain governmental day-to-day business in the midst of unexpected contingencies or casualties.

³⁰ John Burrows, above n 28.

³¹ Canterbury Earthquake Recovery Act 2011, s 2.

This part of the submission argues that the normal principles in judicial review³² are sufficient enough to inform the boundary of the judiciary's role in examining recovery legislation. This is because the ministerial discretion, which is pivotal in exercising the power conferred by recovery legislation, can be held accountable to judicial scrutiny.

However, the Courts should not have the power to strike down the Order in Council, unless it is *ultra vires* the parent Act. This will prevent the Courts from violating the principle of separation of power between the judiciary and the legislature.

B The Extent of Judiciary Role in Examining Recovery Legislation

The judiciary should play an extensive role in examining recovery legislation. The background and reasons are as follows.

The Court of Appeal decision in *Independent Fisheries Ltd v Minister for Canterbury Earthquake* may suggest that s 27 of Canterbury Earthquake Recovery Act 2011 could deprive general access to the Court.³³ This is because the minister will access to the Environmental Court when a Resource Management Act document is suspended under s 27. It is unknown if such capacity will be extended to other areas of ministerial discretion.³⁴

Furthermore, s 71 of the Act allows the Governor-General, acting on the ministerial advice, to pass Orders in Council. This effectively allow delegated legislation to evade further Parliamentary scrutiny. Delegated legislation of this kind are known as the Henry VIII Clause.³⁵

It is plausible to think that recovery legislation in general will consist of Acts that resemble a Henry VIII Clause. It allows the minister or the government at large to efficiently deal with unexpected national emergencies. It also ensures that the daily business of the country will not be suspended due to unfortunate events of such kind. Speed and finality becomes the priority.

A Henry VIII clause is necessary if used to deal with the unexpected contingencies for the reasons specified above.³⁶ Natural disasters such as earthquakes will fall under this category. However, access to Court is a fundamental building block of New Zealand society, if not the cornerstone of a civilisation. A Henry VIII clause embodied in the recovery legislation could entirely eliminate one's access to the Courts. In other words, judiciary should play a pivotal role in examining recovery legislation as access to court is the fundamental precepts of the society.

³² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

³³ *Independent Fisheries Ltd v Minister for Canterbury Earthquake* [2012] NZCA 601; [2013] 2 NZLR 57 at [143].

³⁴ Above n 33, at [145]

³⁵ Philip Joseph "Environment Canterbury Legislation" [2010] NZLJ 193 at 195.

³⁶ Above n 35, at 195.

It follows that the accountability of the ministerial discretion conferred by Recovery legislation will be in question. It could potentially be left unchecked by the democratically elected Parliament. In other words, it opens the gateway for power abuse.

Situations as such will call for the intervention by the Courts. Courts have jurisdiction to judicially review ministerial exercise of power. The Courts can review the recovery legislations in light of the judicial review principle so that the ministerial power can be kept in check. Moreover, it ensures that whoever is applying the power conferred by the recovery legislation will be held accountable to the general public and the judiciary.

Nonetheless, the judiciary should not have extensive power in examining recovery legislation.

Such reviews of the legislation is necessarily reactive. The Courts can only act if people go to the Courts with a case; judges can then decide the case in light of its facts. It follows then that the Court's review will slow down the implementation of the power conferred by the recovery legislation. This is contrary to the purpose of recovery legislation to deal with the unexpected contingencies in a timely and expeditious fashion. It is simply inefficient. In other words, it will not be in the public's interest to give the Court such extensive power in examining the recovery legislation.

If Parliament had intended that the Courts should not play any role in certain ministerial decision, Courts should not be given the power to examine recovery legislations. For example, ss 68 – 70 of the Canterbury Earthquake Recovery Act 2011 excluded general appeal to the Court, subject to some limited exceptions.³⁷

C Discussion

The Court must always be constantly vigilant so that they do not overstep the boundary of the separation of power between the judiciary and the executive. It is possible for timely and expeditious manner envisaged by the recovery legislation to co-exist with the Court's close scrutiny. Given that the Court is always acting in its reactive capacity, it is therefore desirable to maintain this characteristic. Recovery legislation should first be reviewed by an independent panel chaired by lawyers. If any disputes arise from there, the Court will then gain its legitimacy to step in.

D Conclusion

For the reasons outlined above, it is more desirable for the judiciary to play an extensive role.

³⁷ Canterbury Earthquake Recovery Act 2011, s 68 – s 70.

XII Examine alternative models for recovery legislation used in other jurisdictions

This question will be dealt with in brief. The Queensland Reconstruction Authority Act 2011 in Australia established Queensland Reconstruction Board.³⁸ It sets out its function and most notably, it has a sunset date (though it can be extended indefinitely when the Parliament deemed it is necessary).³⁹

In relation to New Zealand, the Queensland Reconstruction Authority Act 2011 is more comprehensive. The Parliament in Queensland is not silent on the confines of the authority's power. Moreover, part 5 of the Act gives a detailed instruction on how the authority should proceed in deciding to grant notice for projects.⁴⁰

The Queensland Act allowed the authority to act consistently with the provision. It also in turn, significantly reduces the opportunity for abuse of power by the minister.

XIII Consider lessons learned from implementation of recovery legislation after Canterbury earthquakes

Community engagement is of paramount importance. The whole recovery process ultimately concerns the community. This means that the implementation of any recovery legislation should include community participation. For example, a panel can be established for that purpose.

Finally, a clear hierarchy of power structure must be clearly outlined. The Courts must also be prepared to expeditiously deal with myriad of cases that arise from the earthquake.

³⁸ Queensland Reconstruction Authority Act 2011 (Qld).

³⁹ Sunset date refers to the date when the Act will expire.

⁴⁰ Queensland Reconstruction Authority Act, above n 38.