

INQUIRY INTO PARLIAMENT'S LEGISLATIVE RESPONSE TO FUTURE NATIONAL EMERGENCIES

Regulations Review Committee

1 August 2015



Introduction

1. The Human Rights Commission (“Commission”) welcomes the opportunity to make a submission on the Regulations Review Committee’s Inquiry into Parliament’s legislative response to future national emergencies (“Inquiry”).
2. The Commission considers that future disaster recovery legislation should be guided by, and founded in, a human rights approach. A human rights based approach requires compliance with international standards and emphasises non-discrimination, participation, empowerment, and accountability.
3. In order to achieve this the Commission recommends that the following principles apply to any future recovery legislation:
 - a) as far as practicable, norms to be applied during an emergency are formulated when no emergency exists;
 - b) affected people can participate in the development of legislation;
 - c) the legislation states [with precision] the circumstances in which [and the purposes for which] the emergency powers can be exercised;
 - d) the legislation expressly provides for mechanisms for effective community participation in decision making;
 - e) the legislation is consistent the Guiding Principles of the Sendai Framework for Disaster Risk Reduction 2015 – 2030, the IASC Operational Guidelines on Human Rights and Natural Disasters and the Pinheiro Principles (which relate to loss of housing and shelter);
 - f) the legislation includes a positive obligation to protect human rights, particularly the rights to life, housing, health home and property and to participation. Where any temporary limits are placed on the realisation of

- these rights they must be justified within a human rights framework. Namely they must be for a particular purpose and no more restrictive than is required to achieve that purpose;
- g) the legislation provides for an assessment of vulnerability to ensure that any response appropriately addresses the needs of all sectors of the community; and
- h) powers created by the legislation are:
- restricted to those circumstances where the exercise of such powers is necessary in a particular situation;
 - no more restrictive on the rights and freedoms of New Zealanders as is required to achieve the purpose of the powers;
 - in force for the shortest time necessary in the circumstances;
 - subject to the New Zealand Bill of Rights Act 1990 (“BORA”), the Human Rights Act 1993, and consistent with New Zealand’s international human rights legal obligations;
 - subject to periodic oversight by Parliament and other horizontal accountability mechanisms; and
 - subject to accessible operational level grievance mechanisms as well as judicial review mechanisms.

A human rights approach to recovery

4. Relief and recovery activities should be provided on a non-discriminatory basis. This means avoiding both deliberate or direct discrimination as well as indirect or unintentional discrimination – that is, policies or practices that have an unintended, negative impact on a particular group.
5. The participation of those affected in decision making is synonymous with a rights based approach and is required by both the IASC Operational Guidelines on Human Rights and Natural Disasters and the Pinheiro Principles (which relate to loss of housing and shelter).¹

¹ Committee on Economic Social and Cultural Rights, *Principles on Housing and Property Restoration for Refugees and Displaced Persons* (UN Doc. E/CN.4/Sub.2/2005/17). Article 14, in particular provides: *States and other involved international and national actors should, in particular, ensure that women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children are adequately represented and included in restitution decision-making processes, and have the appropriate means and information to participate effectively.*

6. In the interests of efficiency, decision making is often centralised after a disaster. However, this can result in those most affected being unable to have input into decisions about how they will be treated and what their needs are. Being excluded from decision making can increase the sense of disempowerment that often follows a disaster and undermine recovery efforts.
7. Closely linked to empowerment is the principle of accountability – including transparent decision making. For authorities to be genuinely accountable interventions should be monitored to ensure they are delivered fairly and equitably and deliver what affected communities want and need.
8. The IASC guidelines emphasise the importance of adopting a human rights based approach to the response to natural disasters.²

Often, negative impacts on the human rights concerns after a natural disaster do not arise from purposeful policies but are the result of inadequate planning and disaster preparedness, inappropriate policies and measures to respond to the disasters, or simple neglect.

...

These challenges could be mitigated or avoided altogether if the relevant human rights guarantees were taken into account by national and international actors, in all phases of the disaster response: preparedness, relief and recovery.

9. The guiding principles of the Sendai Framework for Disaster Risk Reduction 2015-2030³ reflect the human rights approach. They state that the implementation of the

² Inter-Agency Standing Committee, *Human Rights and Natural Disasters. Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, January 2011 at 2.

³ The Sendai Framework is the successor instrument to the Hyogo Framework for Action (HFA) 2005-2015: Building the Resilience of Nations and Communities to Disasters. The HFA was conceived to give further impetus to the global work under the International Framework for Action for the International Decade for Natural Disaster Reduction of 1989, and the Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and its Plan of Action, adopted in 1994 and the International Strategy for Disaster Reduction of 1999 : http://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf page 4
The foreword of the Sendai Framework notes that the framework “was adopted at the Third UN World Conference in Sendai, Japan, on March 18, 2015. It is the outcome of stakeholder consultations initiated in March 2012 and

Framework will be guided by the following principles, while taking into account national circumstances, and consistent with domestic laws as well as international obligation and commitments:⁴

...

(c) *Managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development;*

(d) *Disaster risk reduction requires an all-of-society engagement and partnership. It also requires empowerment and inclusive, accessible and non discriminatory participation, paying special attention to people disproportionately affected by disasters, especially the poorest. A gender, age, disability and cultural perspective should be integrated in all policies and practices, and women and youth leadership should be promoted. In this context, special attention should be paid to the improvement of organized voluntary work of citizens;*

(e) *Disaster risk reduction and management depends on coordination mechanisms within and across sectors and with relevant stakeholders at all levels, and it requires the full engagement of all State institutions of an executive and legislative nature at national and local levels and a clear articulation of responsibilities across public and private stakeholders, including business and academia, to ensure mutual outreach, partnership, complementarity in roles and accountability and follow-up;*

(f) *While the enabling, guiding and coordinating role of national and federal State Governments remain essential, it is necessary to empower local authorities and local communities to reduce disaster risk, including through resources, incentives and decision-making responsibilities, as appropriate;*

(g) *Disaster risk reduction requires a multi-hazard approach and inclusive risk-informed decision-making based on the open exchange and dissemination of*

inter-governmental negotiations from July 2014 to March 2015, supported by the United Nations Office for Disaster Risk Reduction at the request of the UN General Assembly.

⁴ Sendai Framework for Disaster Risk Reduction 2015 – 2030 at 10:
http://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf

disaggregated data, including by sex, age and disability, as well as on easily accessible, up-to-date, comprehensible, science-based, non-sensitive risk information, complemented by traditional knowledge;

...

(k) In the post-disaster recovery, rehabilitation and reconstruction phase, it is critical to prevent the creation of and to reduce disaster risk by “Building Back Better” and increasing public education and awareness of disaster risk;

Recovery from the Canterbury earthquakes: a case study

10. The Canterbury earthquakes provide a useful case study against which to consider the implementation and effectiveness of New Zealand’s disaster management and recovery framework.

The Civil Defence Emergency Management Act 2002

11. The Civil Defence Emergency Management Act 2002 (“CDEM Act”)⁵ governs New Zealand’s disaster response and recovery framework. The Ministry of Civil Defence and Emergency Management (“CDEM”) is responsible for emergency management at a national level. On the declaration of an emergency the Director of CDEM is granted a number of powers under section 9 of the CDEM Act including: evacuation and entry of premises, closing roads, giving directions, carrying out inspections and undertaking works to make roads and structures safe. However, when the emergency period ends, these powers cease to apply and routine procedural arrangements are reverted to.
12. One obvious gap in the CDEM Act framework is where emergency response occurs before the declaration of an emergency. Where this occurs those responding to the events of a natural disaster have no greater powers and no immunities. Professor Toomey has suggested that an amendment to the CDEM Act be made “to allow retrospective validation of, and appropriate immunity for, acts done in good faith in

⁵ Civil Defence Emergency Management Act 2002,
<http://www.legislation.govt.nz/act/public/2002/0033/latest/DLM149789.html>

response to the emergency prior to the declaration.⁶ The Commission agrees with this recommendation.

Canterbury Earthquake recovery legislation

13. After the September 2010 earthquake a state of local emergency was declared enabling the suspending of normal and essential services as required. Local CDEM groups implemented response activities. Nevertheless, the Government considered that it needed to intervene to ensure that it had adequate ongoing statutory powers to assist with the response to the earthquake.⁷ Accordingly, Hon. Gerry Brownlee was appointed as the Minister responsible for the Earthquake Recovery and the Prime Minister announced a designated Cabinet Committee to coordinate the Government's response.⁸
14. The day before the local state of emergency was due to expire, the Government introduced the *Canterbury Earthquake Response and Recovery Bill* ("Bill") to respond and recover from the earthquake. The Bill established the Canterbury Earthquake Recovery Commission ("CERC") to advise Ministers and to act as a liaison between central and local government in managing the recovery. Remarkably it also enabled the Executive to amend almost any legislation by Order in Council – a process which enables quick changes to be made without the approval of Parliament, and no real avenue for public engagement and consultation.

15. The main purposes of the Bill were to:⁹
 - (a) facilitate the response to the Canterbury earthquake;
 - (b) provide adequate statutory power to assist with the response to the Canterbury earthquake;
 - (c) enable the relaxation or suspension of provisions in enactments that

⁶ Jeremy Finn and Elizabeth Toomey, *Legal Response to Natural Disasters*, Thomson Reuters (2015) at 338.

⁷ Cabinet (2011b) *Cabinet Paper 2: Proposed powers – Annex 2 – Regulatory Impact Statement*, <http://cera.govt.nz/sites/default/files/common/cabinet-paper-2-proposed-powers-annex-2-regulatory-impact-statement-march-2011.pdf>

⁸ <http://www.parliament.nz/en-nz/parl-support/research-papers/00PLSocRP10051/canterbury-earthquake-timeline-government%20%99s-and-parliament%20%99s>

⁹ Canterbury Earthquake Response and Recovery Act 2010, s 3.

- (i) *may divert resources away from the effort to–*
 - (a) *efficiently respond to the damage caused by the Canterbury earthquake;*
 - (b) *minimise further damage; or*
 - (ii) *may not be reasonably capable of being complied with, or complied with fully owing to the circumstances resulting from the Canterbury quake;*
- (d) *facilitate the gathering of information about any structure or any infrastructure affected by the Canterbury earthquake that is relevant to understanding how to minimise the damage caused by further earthquakes; and*
 - (e) *provide protection from liability for certain acts or omissions.*

16. The Bill was passed within the day without recourse to normal Parliamentary oversight processes. Despite the Bill gaining multi-party consensus, significant concerns were raised by Members of Parliament, legal academics, and commentators about the extent of the powers in the Bill. Six main concerns were raised, namely:

- it provided the executive with almost unlimited powers;
- there were inadequate checks and balances on the use of these powers;
- the extreme powers were not proportional to the magnitude of the disaster;
- elements of the Act were contrary to long-standing constitutional and democratic principles;
- the Act set a dangerous constitutional precedent; and
- the Act was procedurally unsound.

17. A state of local emergency was again declared following the February 2011 earthquake. However, given the scale of damage and loss of life New Zealand's first ever national emergency was declared on 23 February, enabling the suspension of

ordinary work and essential services and for national resource to be marshalled to perform emergency functions and tasks.

18. On 14 April 2011 the *Canterbury Earthquake Recovery Act 2011* (“CER Act”)¹⁰ was passed under urgency. Although a select committee process was followed, it was severely truncated – with the select committee review of the Bill being condensed to less than 24 hours.
19. The CER Act was enacted to ensure a focused, timely and expedited recovery. It provides the Chief Executive of the Canterbury Earthquake Recovery Authority (“CERA”) and the Minister for Canterbury Earthquake Recovery with additional power. Notably it contains a ‘Henry VIII’ clause, allowing the Governor-General (on advice from the Minister) to modify or grant an exemption from existing legislation through an Order in Council (“OIC”).¹¹ The CER Act precludes any judicial challenge or review of a ministerial recommendation.¹² Anyone who acts under the authority of an OIC is also immune from legal liability,¹³ and any right to compensation for acts taken under the CER Act is expressly removed.¹⁴
20. Section 38 of the CER Act enables CERA to carry out or commission works that include erection, reconstruction, placement, alteration, extension, demolition, removal and disposal of all or any part of buildings and structures.¹⁵ Such works may be undertaken with or without the consent of the owner or occupier.¹⁶ The CER Act also gives the Minister and CERA extensive powers with respect to the acquisition of property. Section 53(1) states:

The chief executive may, in the name of the Crown, purchase or otherwise acquire, hold, exchange, mortgage, lease, and dispose of land and personal property.

21. Under section 54 of the CER Act, the Minister may acquire land compulsorily. There are detailed protections for the provision of adequate information. However, there is

¹⁰ The CER Act expires on 18 April 2016.

¹¹ CER Act s. 71.

¹² CER Act s. 6(3).

¹³ CER Act s. 19.

¹⁴ CER Act s. 20.

¹⁵ CER Act ss 38(1) and (2).

¹⁶ CER Act s 38(5). Note: the Government is not liable to compensate the owner or any tenant or other occupier when a “dangerous building” is demolished. However, compensation is required when a “non dangerous building” is demolished in order to demolish a “dangerous building” or for any other reason.

no right to objection to a notice of intention to take land. Furthermore the Governor-General may in certain circumstances declare land to be taken.¹⁷ If land is compulsorily acquired compensation, determined as at the date of acquisition, is available under the CER Act¹⁸ and the government succeeds to all rights, entitlements that the owner may have included against any insurer.

22. On 30 April 2011, the national state of emergency was lifted and management of the recovery effort moved to CERA. The CER Act expires on 18 April 2016.

Noble aims – involving the community in recovery

23. The Explanatory Note to the CER Bill stated:¹⁹

The Bill is founded on the need for community participation in decision-making processes while balancing this against the need for a timely and coordinated recovery process...

... Planning for the recovery of the greater Christchurch region will occur through the development of a Long-Term Recovery Strategy... Underneath the Recovery Strategy will sit a series of more detailed Recovery Plans that will set out the detail of what needs to be done and how it will be implemented. Recovery Plans will be able to cover – any social, economic, cultural, or environmental matter...

... It is expected that processes for community consultation will be an integral component of the development of such plans...

24. In mid 2011 community workshops were held²⁰ seeking input on the development of the Recovery Strategy. The draft Recovery Strategy was also publicly notified²¹ and made available for comment and consultation from 10 September 2011 to 31 October

¹⁷ CER Act ss 55 and 56.

¹⁸ CER Act s 61.

¹⁹ Canterbury Earthquake Recovery Bill 286-1, at page 1.

²⁰ Canterbury Earthquake Recovery Authority, *Community Workshops Report* (July 2011).

²¹ CER Act, s 13(1).

2011. Following this consultation the final Strategy was approved by the Canterbury Earthquake (Recovery Strategy Approval) Order 2012.²²

25. To help achieve the goals of the Recovery Strategy the CER Act envisages the development of recovery plans. The Minister may direct responsible entities to develop a recovery plan for all or part of greater Christchurch for his approval.²³ Recovery plans must be publicly notified and members of the public must have the opportunity to comment. However, it is at the Minister's discretion as to how the plan is developed, notified and consulted on.²⁴
26. The Minister directed that a Land Use Recovery Plan be developed to provide "direction for residential and business land use development to support recovery and rebuilding."²⁵ The final Land Use Recovery Plan was Gazetted on 6 December 2013.²⁶ In addition a Recovery Plan for the Central Business District was completed in December 2011. CEARA, Environment Canterbury and Te Runanga o Ngai Tahu were given the opportunity to provide input into the plan.²⁷ Public hearings were also held.

The use of extra ordinary powers under the Canterbury Earthquake Recovery Act in practice

27. Despite the important provisions in the CER Act requiring community engagement and transparent decision-making processes, decisions that significantly impact on the rights of Cantabrians have been made and implemented outside that framework.
28. The Canterbury earthquake recovery has highlighted the fragility of some human rights protections.²⁸ People affected by the earthquakes are limited in their opportunities to participate in problem identification, solution design and decision-making in issues which affect their lives. Difficulties are faced in the provision of full and timely information relevant to decision-making, and clear timeframes and transparency from decision-making authorities.

²² The Order in Council was notified in the *New Zealand Gazette*: "Canterbury Earthquake (Recovery Strategy Approval) Order 2012" (31 May 2012) 61 *New Zealand Gazette* 1721 at 1745.

²³ CER Act, s 16(1).

²⁴ CER Act, s 21(4)(b), s 20 (2)-(3), s 19(1) and s 22(1)-(2).

²⁵ Environment Canterbury Regional Council Land Use Recovery Plan (6 December 2013) at 6.

²⁶ Ibid.

²⁷ CER Act, s 17(2).

²⁸ For more information see: <https://www.hrc.co.nz/files/2114/2427/8929/HRC-Earthquake-Report-2013-final-for-web.pdf>

29. Limitations on meaningful participation and the uncertainty faced by many Cantabrians are factors contributing towards deteriorating standards of mental health and wellbeing. Since the earthquakes Canterbury has seen an increase of 67 per cent in child and youth mental health services, an 80 per cent increase in rural adult cases, and 102 per cent increase in emergency psychiatric ED assessments.²⁹ These increases are largely as a result of secondary stressors such as insurance, land issues, changes to schooling and problems with rebuilding and repairing homes. The CERA Wellbeing Survey provides some analysis of the increase in secondary stressors, as does the All Right? Research.³⁰

30. In the absence of robust scrutiny and other checks and balances on the exercise of the extra ordinary powers enabled by the CER Act extensive, litigation has ensued – increasing delay in recovery and severely affecting the mental and physical health and wellbeing of affected people. These matters have most visibly played out in relation to property rights. The two fundamental Court actions are *Canterbury Regional Council v Independent Fisheries Ltd*³¹ and *Quake Outcasts v The Minister for Canterbury Earthquake Recovery*.³² Both these cases tested core provisions in the CER Act and the scope and extent of the Minister's – and the Chief Executive of CERA's powers. As Professor Toomey puts it:³³

The underlying themes of public law – improper purpose and unlawful interference with court proceedings (Independent Fisheries) and the Government's residual freedom and its duty to act consistently [Quake Outcasts] – and human rights law – right of access to the courts (Independent Fisheries) and citizens' rights and liberties [Quake Outcasts] – provide a glimpse of the complexities that arise when an emergency-driven statute is passed.

31. Another issue that has emerged is the differences in the CER Act 2011 and the Public Works Act 1981 with respect to land acquisition, compensation and appeals.

²⁹ See: <http://www.stuff.co.nz/the-press/opinion/70550119/financial-review-of-canterbury-district-health-board-unbelievable>

³⁰ http://www.allright.org.nz/media/uploads/AllRightResearchSummary_2_2.pdf and <http://cera.govt.nz/sites/default/files/common/cera-wellbeing-survey-september-2014-report.pdf>

³¹ *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601,

³² *Quake Outcasts v The Minister for Canterbury Earthquake Recovery* [2015] NZSC 27.

³³ Supra note 6 at 347.

Specific decisions relating to property rights

(a) *The residential red zone*

32. Following the 22 February 2011 earthquake, Cabinet delegated power to act to eight Ministers to make Cabinet decisions on matters relating to Canterbury earthquake land damage and remediation issues. After the 13 June 2011 earthquake, that group developed a detailed strategy for identifying “zones” of land and for the Crown to offer to purchase properties in the worst affected areas. These worst affected areas were zoned red.
33. Where an insured property was zoned red the Government has offered to purchase those properties. CERA originally offered two alternatives:
 - (a) sell the entire property to the Government for the price of the last rating valuation (option 1); or
 - (b) sell the land to the Government for the value ascribed to the land in the last rating valuation and deal with the insurer of the property in respect of the value of the building (option 2).
34. Owners of properties which were uninsured or consisted of vacant land were offered only half the 2007 rateable value of the land, and nothing for any improvements, including homes. Owners of commercial properties were offered half the 2007 rateable value of the land and half of the rateable value for any improvements (if the improvements had been insured).
35. The decision to red zone properties has had the effect of undermining the market value of those properties. As a result, owners of property within the red zone, particularly those who were uninsured or owned vacant land, find themselves at a considerable disadvantage economically, with severe social impacts, and under pressure to sell to the Crown on the Crown’s terms.
36. The creation of zones with the express purpose of specifying areas where entire communities were intended to be relocated from their homes obviously engages a

range of human rights. Most obvious are the rights to housing and home discussed above: residents were faced with either leaving their homes or remaining in what were to be effectively abandoned communities, with degenerating services and infrastructure.

37. A Government policy of relocation impacts on security of tenure and the right to enjoy one's home in peace,³⁴ and raises issues about the adequacy of proposed alternatives.³⁵ A policy which also leaves people behind in abandoned communities raises issues with the adequacy of the housing conditions that remain.

38. The CER Act provides legislative objectives and protections which broadly reflect New Zealand's international human rights obligations, and also provides a platform for the domestic 'enforcement' of those rights through judicial review and the presumptions of statutory interpretation. By contrast, the Executive process adopted to zone properties post-earthquakes, appears to offer none of those constraints or protections.³⁶ One of the key differences between the two processes is the provision in the CER Act for community participation and engagement with those directly affected by the decisions (albeit subject to justified necessary restrictions where urgency is required). In addition to its significance in the context of the rights to home and housing, community participation in the conduct of public affairs is recognised as a right in itself in art 25 of the ICCPR. As confirmed in General Comment 25,³⁷ the right of participation in the "conduct of public affairs" is a broad concept, and participation may include popular assemblies and bodies created to represent citizens in consultation with government. The importance of this right provides a further indication that where Parliament has established provision for such participation, it should not be readily inferred that executive processes which effectively bypass those provisions can also be employed.

³⁴ See for example *R v North & East Devon District Health Authority ex p Coughlan* [2001] QB 213, [2000] 3 All ER 850 at [90] – [93] (right engaged in decision to relocate patients from long term care facility); *Chapman v United Kingdom* (2001) 33 EHRR 399 at [68] – [78] (right engaged in decision to refuse planning consent to allow continued occupation of a caravan on the property).

³⁵ This issue is relevant both to the ICESCR rights to adequate housing, but also to the assessment of the interference with one's home under ICCPR: see for example *Connors v United Kingdom*, (2004) 16 BHRC 639 at [102], *Howard v United Kingdom*, Application no.10825/84, European Court of Human Rights, 18 October 1985, at page 205.

³⁶ The Crown position appears to be that the decisions are not even subject to judicial review: submissions [5.4] and [5.8].

³⁷ United Nations Human Rights Committee (1996) General Comment No. 25: *The right to participate in public affairs, voting rights and the right of equal access to public service* (Art. 25) at [5] and [6].

39. In a majority decision, *Quake Outcasts v Minister for Earthquake Recovery*,³⁸ the Supreme Court ruled that the Cabinet Committee's zoning decision was illegal. The Court considered that the CER Act 2011 "covered the field" and therefore the procedures under that Act should have been used for any earthquake recovery measures, including land zoning decisions.
40. The Supreme Court and the Crown have both acknowledged the stress the people affected by the red zone decisions have been put under. There have been significant consequences to the health and wellbeing of red zone residents as a result of the Crown's decision to act as it did and CERAs decision not to utilise the powers it should have used under the CER Act for making relevant decisions and undertaking associated activities.

(b) *Section 124 notices*

41. Section 124 of the Building Act provides for a territorial authority to require work to be carried out on an earthquake-prone building by issuing a notice requiring the building owner to "reduce or remove the danger". It also enables the territorial authority to prevent people from accessing a building while the danger remains.
42. In the wake of the earthquakes the definition of dangerous buildings for the purpose of section 124 was extended by Order in Council "to ensure people are protected from earthquake related hazards".³⁹ The applicable definition of "dangerous", as amended by the Order, includes the position where:⁴⁰

...there is a risk that adjacent, adjoining, or nearby buildings or land could collapse (including collapse by way of rockfall, landslip, cliff collapse, or subsidence) or otherwise cause injury or death to any person in the building.
43. In using the OIC to amend the Building Act, there was a keenness to deal with the problem, but not sufficient flexibility to deal with unforeseen consequences. The Canterbury City Council ("CCC") issued notices to properties that were deemed to be

³⁸ *Quake Outcasts v Minister for Earthquake Recovery* [2015] NZSC 27.

³⁹ Canterbury Earthquake (Building Act) Order 2011 and 2013.

⁴⁰ Canterbury Earthquake (Building Act) Order 2011, cl 7.

dangerous due in many cases to the risk of rockfalls in the Port Hills (i.e. a risk to their property due to a hazard originating from /associated with another property).

44. Owners of properties affected by these notices can lack any practical ability to address the risk arising from the adjacent land and because the hazard is in the nature of a *future risk of damage* rather than actual damage they can also lack recourse to insurance coverage. These notices can remain in place for many years until hazards are removed and/or the risk of damage to property or life decreases to a deemed acceptable level. Practically, this has meant that many homeowners remain in a state of limbo – insurance assessments are unable to be completed, repairs progressed or pay-outs made to enable them to purchase a new property. In many cases, we understand that homeowners are willing to mitigate the risk and/or assume it in order to be able to go home.⁴¹

45. The effect of the s124 notices has proved profound. People are effectively estopped from the use of their property in exactly the same way as they would be if it was seized from them.

Towards some guiding principles

Preparation of Legislation

*As far as practicable, norms to be applied during an emergency shall be formulated when no emergency exists.*⁴²

46. The Law Commission noted back in 1991 that:⁴³

Emergencies are likely to call for immediate and drastic action. It follows that legislation authorising an appropriate response should be in place in advance of the emergency itself. This factor and the likelihood that the emergency response will involve interference with established rights, points to the desirability of preparing

⁴¹ For further discussion see: *Kraal v Earthquake Commission* [2015] NZCA 13: <http://myold.lawsociety.org.nz/in-practice/the-changing-law/case-commentary/kraal-v-earthquake-commission/Kraal-2015-NZCA-13.pdf>

⁴² International Law Association, *Report of the Sixty-First Conference Held at Paris* (London, 1985)

⁴³ Law Commission, *Final Report on Emergencies* Wellington (1991) at 4.12

emergency legislation at leisure rather than under the pressure of an actual or imminent emergency.”

The principle remains apt today. As outlined above the rushed processes adopted in relation to the CER Act have proved problematic in principle and in practice.

Affected people should be able to participate in the development of legislation

47. Effective community engagement involving all the relevant stakeholders generates better decisions and is the key to robust legislation. The ability to participate in the political process – including in the development of legislation – is a fundamental right in liberal democracies such as New Zealand and has long been seen as integral to stable and responsive governance. Political participation is also central to international human rights norms.⁴⁴
48. Select committees are regarded as an important check and balance on the Executive, particularly in a Parliament that lacks an upper house or revising chamber, as is the case in New Zealand. Examination of bills for consideration after the first reading – except for those to which urgency is accorded – is a primary function of select committees. Public participation in providing feedback on the content of legislation through the select committee process is a positive feature of the New Zealand legislative process. It provides an avenue for affected people to participate and to raise any concerns about the impact of a Bill on the realisation of their rights.

Scope of legislation

The governing legislation will state [with precision] the circumstances in which [and the purposes for which]...the emergency powers can be exercised⁴⁵

49. Depending on the circumstances, recovery legislation may enable the exercise of extraordinary powers which have the potential to impact on the rights and freedoms of New Zealanders. The Law Commission has stated:⁴⁶

⁴⁴ Steiner, H *Political Participation as a Human Right* (1988) Human Rights Yearbook, Vol.1

⁴⁵ Supra note 43.

⁴⁶ Ibid at 5.23.

The drafting of the statutory statement of what constitutes the emergency situation...will have an important bearing on the potential impact on individual rights of the exercise of the powers involved. The more general the circumstances in which the powers are available, the more far-reaching the impact. A basic reason for the Law Commission's sectoral approach is the need to define the occasion for the exercise of emergency powers with as much precision as possible. The definition of that occasion should focus on the protection of important values and interests.

Limits on scope of powers

- a) *The empowering statute should provide that emergency measures are to be in force for a limited period.⁴⁷*
- b) *The powers available in each category of emergency should be those required to deal effectively with emergencies of that category and should be limited to these powers. The powers should be conferred in clear terms.*
- c) *The powers exercised in a particular emergency should be limited to those needed to deal effectively with that emergency.⁴⁸*

50. While rights can be restricted in some circumstances, human rights law clearly prescribes the parameters within which this can occur. As a general principle, permissible limitations and restrictions must constitute an exception to the rule and must be kept to the minimum necessary to pursue the legitimate aim of safeguarding other human rights. Necessary means that any proposed restriction is pursuant to a legitimate aim, proportionate to that aim and no more restrictive than is required for the achievement of the desired purpose. This same test is codified in section 5 of the New Zealand Bill of Rights Act 1990.

51. The Law Commission has stated:⁴⁹

A state of emergency or other regime permitting the exercise of extraordinary powers should not last longer than a period prescribed by the empowering statute. Any extension should be dependent on the continuation of the circumstances justifying the

⁴⁷ Supra note 43.

⁴⁸ Supra note 43 at 5.68.

⁴⁹ Supra note 43 at 5.38.

initial declaration of the state of emergency or other decision to invoke emergency powers...

52. The Commission agrees – the purposes of recovery legislation must be clearly defined and it must only remain in force for as long as is necessary to achieve the required purposes.

Content of Legislation

Mechanisms should be developed to enable affected communities to voice their concerns and opinions on the recovery and on decisions that affect them.⁵⁰

53. The legislative framework for recovery needs to ensure that affected people are involved in decision making that affects them:⁵¹

Though public engagement may appear to cause delays and generate high costs, international lessons suggest a number of benefits including political stability, community buy-in and support for new initiatives, the identification of workable solutions, and a generally positive recovery that promotes confidence in both the process and the likely end result. Such confidence is essential in terms of social and financial investment in the city and surrounds. Successful recovery therefore requires greater clarity around the development and implementation of a vision which, in turn, depends on good information flows (both up, down and across the system) and the translation of generalised aspirations into acceptable choice sets synthesised through mutual deliberation and informed exchange.

Positive obligation to protect rights in recovery

54. The very purpose of recovery legislation is to protect rights – to protect life and security in the short term and to facilitate social and economic redevelopment in the longer term. As the Sendai Framework for Disaster Risk Reduction 2015 – 2030 notes:⁵²

⁵⁰ Supra note 2.

⁵¹ Suzanne Vallance, *Resilient Futures: Supporting Recovery in Greater Christchurch* (Lincoln University, 18 April 2011).

⁵² Supra note 4.

Managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development.

55. The Law Commission noted:⁵³

Relevant sectoral legislation conferring emergency powers should not interfere with rights and freedoms which ought to remain protected or derogate from relevant international obligations by which New Zealand is bound.

56. Recovery legislation should include a positive obligation to protect human rights, particularly the rights to life, housing, health, home and property and to participation. This obligation must include at a minimum compliance with the BORA, the Human Rights Act 1993 and New Zealand's international obligations. Where any temporary limits are going to be placed on the realisation of these rights they must be justified within a human rights framework. Namely they must be for a particular purpose and no more restrictive than is required to achieve that purpose.

Protecting the most vulnerable

57. More often than not, the most vulnerable people in society are especially affected in times of disaster and in the aftermath. Without robust legal frameworks, guidelines or clear policies, in the chaos of a disaster the most vulnerable are often discriminated against, simply by being treated like everyone else. Recovery legislation should explicitly provide for an assessment of vulnerability to ensure that any response appropriately addresses the needs of all sectors of the community.

Safeguards

Emergency legislation should include provisions under which the House of Representatives can supervise and review the exercise of those powers⁵⁴

⁵³ Supra note 43.

⁵⁴ Supra note 43 at 5.104.

58. Recovery legislation invariably empowers the executive, Ministers or delegated officials to exercise powers which may either intentionally or unintentionally impact on the rights and freedoms of affected people. Although in some cases the exercise of such powers and limiting certain rights may be justified in others it may go beyond what is necessary for the purposes of recovery. The Commission agrees with the Law Commission⁵⁵ that the exercise of powers under recovery legislation should be subject to periodic oversight by the House of Representative. In addition the exercise of such powers should be expressly subject to the oversight of other horizontal accountability mechanisms such as the Human Rights Commission, the Auditor-General and the Office of the Ombudsman.

Affected people whose rights have been infringed must have access to an efficient and effective remedy

59. As noted above people affected by the Canterbury earthquakes have faced barriers in accessing review mechanisms where decisions have been made under the CER Act. Even where review has been available there has been a distinct lack of any effective remedy to enable them to move on with their lives with dignity and fully participate in the recovery. In other cases sole recourse to judicial review proceedings has proved costly and increased delays and uncertainty for affected people.

60. The rule of law requires that anyone who alleges that his or her rights have been violated has recourse to justice and the right to an effective remedy. This same principle cuts across international human rights law. For example, Article 2 of the ICCPR expressly requires the existence of effective remedies for breaches of Convention rights.

61. The Commission considers that recovery legislation should include provision for accessible complaints and review mechanisms. Such mechanisms should be provided with a framework to provide effective remedies to individuals where it is found that the exercise of powers under recovery legislation has unduly impacted on their rights.

⁵⁵ Ibid.

Conclusion

62. The Commission considers that much can be learnt from the Canterbury Earthquake recovery. Perhaps the biggest lesson is that affected people must be involved in decision making that affects them. Only by adopting such an approach can recovery efforts be successful in rebuilding vibrant and sustainable communities. Participation must be at the centre of any legislative recovery framework.
63. Recovery legislation must also be subject to robust checks and balances and oversight. The extra ordinary powers which such legislation creates must at a minimum be:
 - restricted to those circumstances where the exercise of such powers is necessary in a particular situation;
 - no more restrictive on the rights and freedoms of New Zealanders as is required to achieve the purpose of the powers;
 - in force for the shortest time necessary in the circumstances;
 - subject to the BORA, the Human Rights Act 1993, and consistent with New Zealand's international human rights obligations;
 - subject to periodic oversight by Parliament and other horizontal accountability mechanisms; and
 - subject to accessible operational level grievance mechanisms as well as judicial review mechanisms.

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APPENDIX 1: Human Rights and disaster recovery

1. The increasing frequency and magnitude of natural disasters worldwide has led to the development of international guidelines on human rights principles in the event of a natural disaster.⁵⁶ The importance of human rights in disaster management has most recently been articulated in the Sendai Framework for Disaster Risk Reduction 2015 - 2030:⁵⁷

Managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development.

2. The significance of human rights in the Government's response to the Canterbury earthquakes has been emphasised by the United Nations supervisory bodies to whom New Zealand reports under the various treaties to which it is a State party. For example, the United Nations Committee on Economic, Social and Cultural Rights ("CESCR") stated:⁵⁸

The Committee notes the challenges caused by the recent earthquakes on the enjoyment of Covenant rights by persons affected, especially their right to housing. (art. 11, 2(2))

The Committee recommends that the State party adopt a human rights approach to reconstruction efforts, ensuring thereby appropriate consideration to availability, affordability and adequacy of housing, including for temporary housing. In this regard, the Committee refers the State party to its general comment No. 4 (1991) on the right to adequate housing. ...

⁵⁶ See for example: Inter-Agency Standing Committee, *Operational Guidelines on Human Rights and Natural Disasters* (2006) (revised 2011); UN Representative to the Secretary General on the Human Rights of Internally Displaced Persons, *Draft Operational Guidelines of Human Rights Protections in Situations of Natural Disasters* (2006); Brookings-Bern Project on Internal Displacement, *Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protections in Situations of Natural Disasters* (2006).

⁵⁷ Supra note 4.

⁵⁸ Concluding observations from the Committee on Economic, Social and Cultural Rights in response to New Zealand's third period report considering New Zealand's obligations under ICESCR, E/C.12/NZL/CO/3, 18 May 2012 at [21].

3. The Government has acknowledged the human rights implications of its response to the earthquakes, and confirmed its commitment to respect and protect those rights. For example, the Government stated in the recent second Universal Periodic Review (“UPR”) to the United Nations Human Rights Council that “ensuring any human rights impacts of the Canterbury Earthquake are accounted for in the on-going decisions around the rebuild” was a “key priority” for New Zealand.⁵⁹
4. Similarly, the Minister of Justice stated in her closing remarks at the presentation of the UPR on 27 January 2014 that:⁶⁰

The more than 11,000 earthquakes presented challenges in restoring people’s dignity and fundamental rights as recognised under New Zealand’s human rights legislation and international obligations. The Canterbury Earthquake Recovery Authority was established in response to the earthquakes. The Government’s Recovery Strategy has provisions for economic, social, and cultural recovery as well as for the built and natural environment.

Substantive Rights engaged in disaster recovery

5. New Zealand is party to a range of international human rights instruments, including the International Covenant on Civil and Political Rights (“ICCPR”)⁶¹ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).⁶² New Zealand has undertaken obligations to implement and protect these rights domestically.⁶³
6. The rights affirmed in these covenants are inalienable in all circumstances and continue to apply in times of disaster, albeit in some cases subject to temporary

⁵⁹ New Zealand’s Universal Periodic Report: *National report submitted in accordance with paragraph 5 of the annex to the Human Rights Council resolution 16/21, New Zealand A/HRC/WG.6/18/NZL/1*, 8 November 2013 at [4]

⁶⁰ New Zealand’s 2nd Universal Periodic Review: Minister’s Closing Remarks 27 January 2014 at pages 3 – 4.

⁶¹ International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976). New Zealand ratified on 28 December 1978.

⁶² International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976). New Zealand ratified on 28 December 1978.

⁶³ Art 2 ICCPR, art 2 ICESCR.

derogations.⁶⁴ Even when faced with the challenges of a disaster, New Zealand has a positive obligation to ensure the continued realisation of all rights.

7. The two Covenants allow for very limited exceptions to compliance.⁶⁵ Article 4(1) of the ICCPR provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties ... 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.

8. Paragraph (2) of Article 4 qualifies the exemption by prohibiting derogations from the most basic rights – including the prohibition on the arbitrary taking of life and on torture and cruel treatment, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. Reflecting on the operation of Article 4 the Law Commission stated:⁶⁶

Article 4 of the International Covenant will not authorise derogations from New Zealand's obligations under the International Covenant in most of the emergencies with which this report is concerned, since they do not threaten the life of the nation.....

[However] the principles reflected in Article 4 apply by analogy in most emergency situations. They relate, for instance, to the need to define the circumstances justifying the exercise of emergency powers and to place limits on those powers which ought generally to be observed.

⁶⁴ ICCPR, for example, contemplates that during public emergency, there may be some derogation from the full rights in the Covenant but it clearly limits this to the degree strictly necessary and limits which rights may be derogated from.

⁶⁵ Art 4 ICCPR, art 4 ICESCR. Art 27 of the Vienna Convention on the Law of Treaties (concluded at Vienna on 23 May 1969) also confirms that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." New Zealand has not lodged any relevant reservations to the ICCPR or ICESCR in terms of art 21 of the Vienna Convention.

⁶⁶ Supra note 43 at 5.16

9. A wide range of human rights will obviously be engaged in the context of the response to a natural disaster.⁶⁷ However, the rights to life, housing, health, home and property and to participation are particularly relevant. It is therefore worth considering the scope of these particular rights in more detail.

The right to life, liberty and security of person

Every human being has the right to life, liberty and security of the person: Art 3 Universal Declaration of Human Rights ("UDHR")

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life: Art 6(1) ICCPR

10. Although as general principle it is inappropriate to prioritise some rights over others, it is inherent in a disaster situation that the first priority will be on the protection of life and security.
11. The duty to protect the right to life and security may mean people have to be evacuated to safer areas. However, this should only occur when necessary and if it is the least intrusive option. The IASC Operational Guidelines on Human Rights and Natural Disasters ("IASC guidelines") emphasise that people should be absent from their homes for the minimum amount of time necessary – in other words only for as long as the danger or risk exists.⁶⁸

The right to adequate housing

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions: Art 11 ICESCR

12. The right to adequate housing includes the right to live somewhere in security, peace and dignity.⁶⁹ The CESCR has defined 7 standards that must be met in order for housing to be adequate, namely:⁷⁰

⁶⁷ Supra note 2 at 10 – 11.

⁶⁸ Ibid.

⁶⁹ United Nations Committee on Economic, Social and Cultural Rights (1991), General Comment No.4. *The right to adequate housing: Article 11(1) CESCR*

⁷⁰ Ibid.

- *Security of tenure* – Residents should be protected against forced eviction, harassment and other threats including predatory redevelopment and displacement;
- *Habitability* – Housing must provide residents with adequate space that protects them from cold, damp, heat, rain, wind, and other threats to health, structural hazards, and disease;
- *Accessibility* - Housing must be accessible to all, and disadvantaged and vulnerable groups – including the disabled – must be accorded full access to housing resources;
- *Affordability* - Housing costs should be at such a level so as not to compromise the attainment of other basic needs. For example, people should not have to choose between paying rent and buying food;
- *Availability of services, materials, facilities and infrastructure* - Housing must provide access to services essential for health, security, comfort and nutrition. This includes water and sanitation, power and other essential utilities;
- *Location* - Housing should not be built on polluted sites or in immediate proximity to pollution sources that threaten the right to health of residents. The physical safety of residents must likewise be guaranteed. Additionally housing must be in a location which allows access to employment, health-care services, schools, child care centres, and other social facilities; and
- *Cultural Adequacy* - Housing and housing policies must guarantee the expression of cultural identity and diversity, including the preservation of cultural landmarks and institutions. Redevelopment or modernisation programs must ensure that the cultural significance of housing and communities is not sacrificed.

Any retrogressive step in times of emergency must be clearly justified and must only be for as long as is necessary.

13. Widespread loss of property is a common result of natural disasters and property issues can become a serious obstacle to recovery. The IASC guidelines recommend:⁷¹

- assisting affected communities to return to their homes as soon as possible;

⁷¹ Supra note 2.

- devising community based strategies to maximise the opportunity for affected communities to be involved in decision making regarding the location, design and infrastructure of housing;
 - ensuring financial aid is available for repair and/or reconstruction without discrimination; and
 - ensuring people who were renting houses that were damaged have access to assistance.
14. It should also be noted that the ability to access reliable, up to date information so that people know when, or under what conditions, they can return home is fundamental.

Right to Home

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation: Art 17 ICCPR

15. The concept of *interference* is less than total negation. It includes any action that interferes with a person's enjoyment of their home – being the place where a person resides or carries out his or her usual occupation.⁷²
16. Only unlawful or arbitrary interference will contravene the right. Whether interference is arbitrary requires an assessment of whether it is reasonable, proportionate and consistent with the Covenant.⁷³ The provision of procedural safeguards and a fair process for affected individuals will be an important part of that assessment. In this regard, Article 2 of the ICCPR requires New Zealand to ensure that there is an effective remedy available through competent judicial, administrative or legislative authorities for any violation of this right.

Right to Property

⁷² United Nations Human Rights Committee (1988), General Comment No. 16: *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (Art. 17) at [5].

⁷³ See for example *Mohammed Sahid v. New Zealand*, CCPR/C/77/D/893/1999 (11 April 2003) at [4.13], and *Toonen v Australia* No.

488/92, U.N. Doc CCPR/C/50/D/488/1992 (1994) at [8.3]. The test is similar to that laid down in section 5 of New Zealand's Bill of Rights Act 1990.

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property: Art 17 UDHR

17. The right to property is not reflected in either of the ICCPR or ICESCR. However the *travaux préparatoires* records.⁷⁴

...no one questioned the right of the individual to own property...it was generally admitted that the right to own property was not absolute and there was wide agreement that the right...was subject to some degree of control by the State while certain safeguards against abuse must be provided...

Participation

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives: Art 25 ICCPR

18. The UN Human Rights Committee has considered the interpretation of participation in its General Comment 25. It concluded:⁷⁵

The conduct of public affairs is a broad concept which relates to the exercise of political power and in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.

19. The CESCR has likewise highlighted participation as a central principle when it comes to development issues.⁷⁶ In particular the Committee points to broad and inclusive participation as a requirement in decision making and/or planning in areas such as education, health housing and employment.

⁷⁴ Annotations on the text of the draft International Covenants on Human Rights, 1/7/95 UN Doc. A/2929 at [197], [202] and [206].

⁷⁵ General Comment No 25: The right to participate in public affairs, voting rights and the right to equal access to public service (Art 25): 12 -07 -1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25 (General Comments).

⁷⁶ Committee on Economic, Social and Cultural Rights - General Comments 1, 11, 12,13,14,15, 18 & 21.

20. The right of affected populations to be consulted and to participate in decisions made about them reflects the right to freedom of expression and to receive and impart information.⁷⁷
21. Community planners have long recognised that active participation by those affected is integral to successful resettlement and reconstruction after a disaster.⁷⁸ The IASC guidelines recommend that mechanisms are developed to enable affected communities to voice their concerns and opinions on the recovery and ensure that sufficient resources are provided for this.⁷⁹

⁷⁷ See Art 19 ICCPR.

⁷⁸ See, for example, Olansky, R. *How do Communities Recover from Disaster? A Review of Current Knowledge and an Agenda for Future Research*; Paper presented at Annual Conference of the Association of Collegiate Schools of Planning, Kansas City (2005).

⁷⁹ Supra note 2.