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Reigning in Hell: Legislation in an Emergency

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Abstract:

The maintenance of Parliament's sovereignty over its legislative functions is vital to the exercise of delegating legislative power by Parliament to the executive. Parliamentary bodies such as the Regulations Review Committee of the New Zealand House of Representatives are central to upholding control.

An emergency turns this dynamic upside down. Chaos and loss of control are inherent to the nature of a catastrophe. It follows that the primacy of the executive and cession by Parliament become the practical starting points for the making of emergency legislation.

Given this reversal, emergency legislation requires unique consideration in view of constitutional principles.

This paper reviews the Regulations Review Committee's responses to emergency primary and secondary legislation, including that made for COVID-19, the Canterbury earthquakes, and other natural disasters.

In particular, the paper considers the policy and drafting practice employed in response, and the constitutional view and *post hoc* scrutiny, in light of the nature of different types of emergencies in recent New Zealand history. These experiences inform analysis of what can be done better in the future.

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Introduction

The separation of powers is, to some degree, more a fantasy[2] of purity than a hard reality. Some combination of powers is necessary; not merely for convenience,[3] but to generate the spark to get things running. In New Zealand and Westminster overall, the main dyad is of the legislature and executive.[4] It is only the judiciary that truly sits by itself.[5] Of course, the risk in the unified rule of legislature and executive is for our democratic system to be, even more intensely, an "elective dictatorship".[6]

This paper sets out how an emergency both reveals and intensifies this dyad. It explores emergency legislation through the lens of the tension within the dyad, considering the varied aspects of accountability that may apply: democratic, constitutional, and educative,[7] especially assessing how the Regulations Review Committee (RRC) acts as an accountability mechanism.

There are different views on the dynamic between legislature and executive in the process of delegation of lawmaking. The ideas of cession and subordination are often used. However,

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[2] I use the term "fantasy" here in the Žižekian sense (he tends to use the term "fiction" or "symbolic fiction", but I prefer this other word) – this is not something false or sophistical, but an ideal from which a symbolic structure (that idea is adapted from Lacan, of whom Žižek is not a strict reader) flows: "The symbolic dimension is […] the invisible order that structures our experience of reality, the complex network of rules and meanings which makes us see what we see the way we see it (and what we don't see the way we don't see it). The Real, however, is not simply external reality; it is rather, as Lacan put it, "impossible": something which can neither be directly experienced not symbolized – like a traumatic encounter of extreme violence which destabilises our entire universe of meaning. As such, the Real can only be discerned in its traces, effects or aftershocks". Slavoj Žižek *Event: a philosophical journey through a concept* (New York, Melville House, 2014) at 119-120. Further, to explain the Lacanian tripartite framework of ideas in Žižek's interpretation: "For Lacan, the reality of human beings is constituted by three intertangled levels: the Symbolic, the Imaginary, and the Real. This triad can be nicely illustrated by the game of chess. The rules one has to follow in order to play it are its symbolic dimension: from the purely formal symbolic standpoint, 'knight' is defined only by the moves this figure can make. This level is clearly different from the imaginary one, namely the way in which different pieces are shaped and characterized by their names (king, queen, knight), and it is easy to envision a game with the same rules, but with a different imaginary, in which this figure would be called 'messenger' or 'runner' or whatever. Finally, real is the entire complex set of contingent circumstances that affect the course of the game: the intelligence of the players, the unpredictable intrusions that may disconcert one player or directly cut the game short." Slavoj Žižek *How to Read Lacan* (London, Granta, 2006) at 8-9. Put roughly, in the context of lawmaking as a game, for our purposes, "symbolic" is the rules of the game (the law, the structure of prohibitions), "imaginary" is the fictitious schema of the game (the lore), as it is understood and accessed (the fantasy is an aspect of this, as an illusion that structures this world), and "real" is the meta game, as the issues of the material world. Hence, the trauma of the real (for our purposes) is the breaking, or breaking through, of the meta, which, reflexively disrupts the symbolic and the imaginary. The fantasy of separation I am talking about is both part of the law and the lore, i.e. it functions on the level of both the symbolic and the imaginary. It is rooted in the lore, the imaginary, and also, governs the framework of the law. In that way, it operates in the same manner as Lacan's original conception of the imaginary and the symbolic – the symbolic is a way of mediating the imaginary and the real is that which cannot be mediated. An emergency is "real" because it cannot be mediated or captured properly in the lawmaking world, according to the existing symbolic conventions.

[3] *Committee on Ministers' Powers Report* (Cm 4060,1939) [Donoughmore Report] at 4.

[4] This is different in other jurisdictions – for example, in the United States, there is a dyadic relationship between the executive and the courts.

[5] However, the judiciary also is a means by which Parliament (and/or/with the rule of law) flexes on the executive – this idea is covered further below.

[6] Lord Hailsham *Elective Dictatorship* (London, British Broadcasting Corporation, 1976).

[7] Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (July 2007) 13(4) ELJ 447.

most views on empowerment are predicated on a zero-sum premise – the idea that in empowering the executive, the legislature loses something or somehow reduces its own capacity. This is a presupposition that is overripe for questioning. The alternative view is simply that, in *empowering* the executive, Parliament is calling in the executive to take part in a communal legislative role rather than somehow sacrificing or giving away some finite or rivalrous resource.

Taking this idea further, as well as the concept of the executive and legislature as a dyad, we may say that an emergency, as a "violent event",[8] is a type of "truth event" or incursion of the "real"[9] that also imposes, or exposes, the interlinked nature of the legislature and the executive. On the level of the legislative text,[10] too, this truth event is replicated in the Henry VIII power, in which matters of substance/policy have been broken down and become a matter of mere form in the sparse and shell-like legislative framework of the emergency empowering provision.

Of course, mundanely and outside of the emergency, it is the executive government that proposes policy, writes government bills, and has the confidence of the legislature. In that pragmatic light, the legislature and executive are, to some degree, the same, even in everyday life. The separation is merely academic or theoretical. However, that theory still has power as it is manifested through the text of legislation.

Regardless of what the view is regarding the severable identities of the three powers, accountability, control, and balance are still especially important in an emergency, so that this "violent event" does not bloom and bleed beyond the material. These accountabilities are primarily set in mindful and intentional legislation. As protector of the supremacy of the law, it is Parliament that sets the course. Of course, the RRC, an aspect of Parliamentary sovereignty itself, assists with the process, both pre- and post-legislatively. The committee is able to tap into that source of both control and empowerment. The RRC's functions can be framed as further extension or manifestation of the controls and empowerments set down in the text of the legislation. In an emergency, Parliamentary sovereignty may become an especially academic concept, due to the explicit ascendency of the executive,[11] but that is still something manifested through the text, the focal point of the RRC.

This view is especially relevant to regulation in emergency situations. In a catastrophe, regulations no longer occupy a mere "tedious corner of the constitutional edifice".[12] Instead, the tenor of their status as the "legislation of everyday life" [13] is expanded, as they become more potent and intrusive.

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[8] The concept of the "event" is originally from Badiou. Badiou's idea is quite complex in a way that is not relevant here. I am using a Žižekian version of the "truth event" or "violent event" for the purposes of this paper; that is, an occurrence that breaks or dispels the overarching fantasy and the symbolic order constructed thereunder. See generally Slavoj Žižek *Event: a philosophical journey through a concept* (Brooklyn, New York, Melville House, 2014).

[9] See footnote 1.

[10] In this paper, all references to "the text" are about the legislation.

[11] This is one way of looking at it – an alternative to the sharing idea. This ascendancy / cession idea is more conventional. The design of Henry VIII provisions has always been somewhat predicated on this idea.

[12] J D Hayhurst & P. Wallington, "The Parliamentary Scrutiny of Delegated Legislation" in Michael Zander (ed), *The Law Making Process* (London, Butterworths, 2020), at 95, cited in Ruth Fox and Joel Blackwell *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, London, 2014) at 25.

[13] *The Devil is in the Detail*, above n 12, at 24.

In his 2007 paper, Bovens explores the concept of accountability in the European governance context. But, given the dyad or union of legislature and executive that is revealed or caused in an emergency (i.e. the breaking of the meta and the concomitant dispelling of the fantasy of separation), where does accountability lie?

The overarching purpose framing Bovens' structures of accountability is the legitimacy of, and confidence in, government.[14] The other purpose is public catharsis – "public account giving can help to bring a tragic period to an end".[15] These ideas are generally relevant to control and balance, not just accountability. As being about the public, as well, the purposes are about *maintenance* of separation.[16]

Hence, the importance of accountability is split into three general categories: the democratic perspective of the will of the people, the constitutional perspective of the prevention of abuse of power, and the learning perspective of enhancing government effectiveness.[17]

The democratic perspective is maintenance of the "democratic chain of delegation".[18] It is about Parliamentary control and oversight, as being the conduit of the will of the people. As we are dealing with Parliamentary institutions here, the democratic perspective is something of a moot point. Any engagement by select committees, including the RRC, and the prescription of powers in primary legislation, is, by nature, democratic.

The constitutional perspective is the active maintenance of the equilibrium of power through the functions of checks and balances themselves – the effectiveness of sanctions and the strength of inquisitiveness.

The learning perspective is about improving the efficacy of institutions by refining policies and procedures in an educative manner.

These different accountability purposes are also generally relevant to the concept of control, as being a broader idea than accountability. Accountability, according to Bovens, is a subset of control.[19]

The concomitant and obverse of control is empowerment itself.[20] In the dynamic between legislature and executive, the mechanisms of control and balance are often the same as those of empowerment. This is shown both on the level of the text, through empowering provisions and other delegated powers written out in the primary legislation, and on the level of the legislative machinery of process – the procedural checks and balances throughout lawmaking and subsequent scrutiny.[21] Of course, the text and the legislative machinery coalesce, as one can stipulate the other.

This paper extrapolates Bovens' accountability categories (democratic, constitutional, and educative) and applies them more broadly to empowerment and control in four different sets of emergency legislation in New Zealand history – war, earthquakes, the pandemic, and cyclones.[22] This wide range of types of emergency illustrates the rationale behind the need for bespoke emergency legislation.

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[14] Bovens, above n 7, at 464.
[15] Bovens, above n 7, at 464.
[16] In other words, delusion is the solution.
[17] Bovens, above n 7, at 463.
[18] Bovens, above n 7, at 465.
[19] Bovens, above n 7, at 453-454.
[20] That is, within a context of the need for positive empowerment of the executive by Parliament.
[21] Select committees and other forms of scrutiny.
[22] These correspond to, of course, fire, earth, air, and water.

In assessing emergency legislation made since 2016, this paper also considers the recommendations made by the RRC in its 2016 *Inquiry into Parliament's legislative response to future national emergencies* (the 2016 Inquiry),[23] in light of Bovens' categories. The paper also sets out various case studies as examples of RRC scrutiny of emergency legislation.

The 2016 Recommendations

These recommendations for both text and the machinery of process sit under two general themes. They focus on the recovery stage rather than the immediate aftermath. The general policy of the recommendations is to "uphold the need to facilitate recovery from the emergency while minimising intrusion on protected rights and freedoms"; therefore:[24]

1) executive powers to override enactments should extend only as far as is necessary to deal with the emergency itself and should only be exercised for that purpose (demure executive);
2) emergency legislation should include safeguards (mindful legislation).

Of course, these rules merge, especially where the text is concerned. The 2016 Inquiry made the following specific recommendations for both content in text and the machinery of process; I have grouped them according to the Bovens perspectives on accountability.[25] Some recommendations are relevant to multiple perspectives.

The *first recommendation* is for emergency legislation to be bespoke rather than generic. In a similar vein, the *fourth and fifth recommendations* are that primary legislation is to be used wherever possible and that any Henry VIII power should be restricted to amending specified Acts. The *ninth recommendation* is that bespoke emergency powers should be in force only as long as is reasonably necessary and should have built-in sunset provisions.

These recommendations are all relevant to both the democratic and constitutional perspectives. Maintaining the specificity of delegated powers rather than having catch-all general provisions applicable to a range of situations helps to uphold balance between powers, as well as Parliamentary oversight. It is to avoid "unacceptably broad" resulting powers, due to the varied nature of different national emergencies.

The *second, third and sixth recommendations* are that as much time as possible in the circumstances should be allowed for the select committee consideration of emergency legislation, that this should be done by existing select committees, and that delegated legislation should be scrutinised before and after it is made. These factors are relevant to the second and third perspectives. The democratic perspective is also relevant, as select committees are the conduit through which Parliament exercises its legislative functions; they also incorporate direct public engagement through the submissions process. Then, the constitutional as well as educative, as select committees are a means of Parliamentary self-

[23] Regulations Review Committee "Inquiry into Parliament's legislative response to future national emergencies" [2016] AJHR I.16B.
[24] At 18. There is a third major theme in the 2016 Inquiry: that any legislative response to a national emergency should be designed to ensure the recovery from the emergency begins on day one. This sits outside the focus of this paper. It is more of a policy and context-specific recommendation about operational matters. In some emergency situations, for example war and very significant events, there will be a "new normal" approach, and endurance rather than recovery will be the priority.
[25] Some of the recommendations are more policy-focused; these are not canvassed in detail here. They are recommendations 8 (that legislation should have regard to international norms and benchmarks) and 10 (that recovery from a national emergency starts on day one).

scrutiny and also a check on legislation through bills that are proposed, in practice, by the executive branch.

The *seventh recommendation* is for the preservation of judicial review rights regarding regulations. This is primarily the constitutional perspective, about maintaining balances between the separation of powers. The function of the courts is as the constitutional conscience, which also, of course, is to uphold the democratic and educative purposes through enforcing the will of Parliament as manifested through its Acts. The judiciary also educatively hold both the executive and Parliament to account through its function of statutory interpretation and upholding, in general, the rule of law. Where the text of the law has deficits, amendment will be necessary.

Likewise, the *eleventh recommendation* is a formal reporting function for the relevant Minister to report to the House on the exercise of powers under the emergency legislation and on progress with the recovery effort.

Accountability under the RRC – jurisdiction

These recommendations sit alongside the matrix of accountability structures already in place under the RRC. These engage all aspects of the Bovens accountability rubric.

The RRC functions that can apply to emergency legislation include:

- the conduct of *post-hoc* Briefings and Inquiries under its reporting to the House function,[26] which includes a requirement for a government response to the committee's recommendations within 60 days of the presentation of the report to the House.[27]
- the regular scrutiny of:
    a. Regulation-making powers in bills[28] and Acts;[29]
    b. Secondary legislation after it is made.[30]
- the complaints jurisdiction.[31]
- the referral of draft secondary legislation by Ministers.[32]

Under the Standing Orders 2023, the RRC determines itself whether or not instruments and decisions are of significant legislative effect and are therefore secondary legislation.[33] Further, emergency Acts can include specific requirements involving the RRC review of draft legislation, in addition to ministers' ability to refer draft legislation to the RRC and that committee's general scrutiny and reporting purview under the Standing Orders.

Much of the emergency *primary* legislation set out in this paper was not scrutinised by the RRC or subject select committee at bill stage, or after it was made. That is due to bills being under urgency, sometimes being introduced and passed into law on the same day.

In contrast, there has been heavy scrutiny of emergency *secondary* legislation by the RRC. This has been both pre-legislative and post-legislative. Some of the RRC pre-legislative

[26] Standing Orders 2023, 326(4).
[27] Standing Orders 2023, 256(1).
[28] Standing Orders 2023, 326(3).
[29] Standing Orders 2023, 326(4).
[30] Standing Orders 2023, 326(1) and (4).
[31] Standing Orders 2023, 328.
[32] Standing Orders 2023, 326(2).
[33] Standing Orders 2023, 3 (definition of "secondary legislation").

scrutiny has been explicitly necessitated by empowering provisions as a statutory pre-requisite; some was done under the Standing Orders on voluntary referral by ministers.

Some emergency empowering provisions that contain other statutory pre-requisites, such as the panel review of draft regulations, provide a set of pre- and post-legislative mechanisms, in light of the overall process. The pre-legislative intention is for the quality of the draft legislation to be improved by expert input and oversight. This results in two forms of accountability: both active engagement by independent experts in the lawmaking process, in supplying educative feedback to the minister, as well as accountability to the House by presenting a report on that expert engagement.[34]

Post-legislatively, there is another set of accountability mechanisms provided by the RRC in revising the pre-legislative checks, such as the use of an independent review panel, and providing the House with a "second set of eyes" after the initial reporting requirement. The addition of post-legislative checks adds to the fullness of RRC oversight.

Of course, as well as the scrutiny of orders as they are made, there is the general inquiry function of the RRC. The 2016 Inquiry was conducted on the bidding of the House, but the RRC frequently initiates inquiries and briefings of its own volition under its general role of reporting to the House on matters relating to regulations.

These inquiries are wide in scope. In terms of subject-matter for scrutiny, policy is "seen to belong to primary legislation which is more appropriately dealt with in the House or by other subject committees".[35] Therefore, as a matter of convention, the RRC usually does not consider policy when discharging its duty. It is a "technical scrutiny committee".[36] However, the line between the two different categories of thought: on one hand, the design and structure of the text and powers therein; and the other, policy (in other words, form and substance) is unstable and not bright. In determining its jurisdictional edge, the RRC will inevitably trespass into considering matters of policy, as do we all when determining categories of thought. Also, this boundary is not so clearly marked when considering emergency legislation. One of the reasons why Henry VIII powers have previously been viewed as so offensive (the very name denotes obscenity)[37] is that they allow the executive to make policy decisions without the public scrutiny and accountability that would otherwise occur through the Parliamentary process.

As the examples below will show, the RRC does recourse to considering the policy intent underlying emergency powers. Of course, that policy is usually relatively clear cut, as it goes

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[34] Note that it is not clear whether the reporting to the House on the panel input would need to occur prior to the making of the regulation.

[35] Jonathan Hunt "The Regulations Review Committee" [1999] NZLJ 402-408 at 402. This is reflected in Standing Orders 2023, SO 185(1)(b), where the Regulations Review Committee is established alongside other more technical committees such as the Petitions Committee and the Privileges Committee, rather than subject select committees (for example, the Justice Committee and the Health Committee).

[36] Regulations Review Committee *Briefing to Investigate Confirmable Instruments* (6 March 2020) at 98. See also Office of the Clerk of the House of Representatives *Making a Complaint to the Regulations Review Committee* (14 December 2014) at 9.

[37] The name of this type of clause comes from a 1539 Statute of Proclamations, by which the king might legislate by proclamation rather than through Acts of Parliament. See P A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed., Wellington, Brookers, 2014) at [26.3.1]. Joseph remarks that, by the time of the start of Henry VIII's reign, the power of the king was "no longer transcendent". The RRC's view of Henry VIII powers has softened over the years; compare Regulations Review Committee "Investigation into the Road User Charges (Transitional Matters) Regulations 2012 (13 November 2012)" at 3, with Regulations Review Committee "Activities of the Regulations Review Committee in 2019" (12 May 2020) [2017-2020] 2 AJHR I.16B at 14.

directly to the extreme nature of the emergency and the correlative need for a forceful legislative response.

The next part of this paper assesses different types of emergency legislation, some historic, some recent, and some current. The examples of crises dealt with are war, earthquakes, the COVID-19 pandemic, and Cyclone Gabrielle. The paper presents the evolution of different legislative approaches over the decades, starting at the beginning with wartime legislation and then moving to the middle of recent history with the Canterbury earthquakes which were the genesis of the 2016 Inquiry. The paper uses the 2016 Inquiry rubric, which was refined in a further Inquiry during the COVID-19 era, as a means of analysing more recent legislative approaches to different types of emergency, informed by Bovens' accountability concepts. It also looks at some specific case study examples of how the RRC has conducted scrutiny and considers how these may inform the refinement and expansion of the RRC's sphere of influence.

The paper concludes by suggesting how the RRC might further enjoy its constitutional role by exercising its full range of motion regarding publicity, longevity, and other matters.

Emergency Legislation

War

Significant emergency legislation was made in response to the World Wars. It is useful to compare that legislative approach with more recent examples, first to illustrate part of the genesis of the evolution of emergency legislation, and second, to examine the context of the early attitudes towards emergency power mechanisms such as Henry VIII provisions.

That well-known United Kingdom review of delegated legislation, the Devil is in the Detail,[38] starts off with noting the upsurge in delegated legislation under the Defence of the Realm Act 1914, as a response to the war outbreak.

New Zealand had the more demurely named War Regulations Act 1914,[39] introduced and passed on 23 October 2014, which conferred on the executive a generous and general power to legislate. For example, section 3 of that Act provided for the Governor in Council to make "such regulations as he thinks necessary for the prohibition of any acts which in his opinion are injurious to the public safety […]".

These powers persisted for almost six years. Many of the regulations made thereunder survived under the War Regulations Continuance Act 1920. Other, similar, powers were created during and after World War II, in the Emergency Regulations Act 1939 and Public Safety Conservation Act 1932 (PSCA).[40] Therefore, the shift in the legislative balance triggered by World War I, from Parliament to executive, from primary to secondary, was maintained. This occurred on two levels – a general perpetuation of the use of delegated legislation under multiple Acts, and the continuance of these extraordinary emergency powers themselves (the PSCA was not repealed until 1987 and, controversially, was used

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[38] *The Devil is in the Detail*, above n 12, at 41.

[39] This is an excellent and comprehensive WWI regulations resource: Index of wartime laws and regulations, 1914-21, URL: https://nzhistory.govt.nz/war/index-wartime-laws-and-regulations-1914-21, (Manatū Taonga — Ministry for Culture and Heritage), updated 28 May 2024.

[40] Section 3 of this Act, headed "Emergency Regulations", contained a power for Orders in Council to be made, on Proclamation of Emergency, that the Governor-General considered "necessary for the prohibition of ay acts which in his opinion would be injurious to the public safety, and also to make all such other regulations as in his opinion are required for the conservation of public safety and order and for securing the essentials of life to the community."

during the 1951 waterfront strike dispute).[41] Hence, war became a conduit for executive power being "given indefinite force under peacetime conditions".[42]

Informed by this genesis, a sharply prohibitive attitude towards executive legislative powers, and in particular to Henry VIII powers, emerged overseas.[43] If it had not been for the exigencies of war and the corresponding brutal legislative retort, it is unsure whether this reaction would have been so violent. The gist of things was that Henry VIII powers were unmitigatedly bad and should be avoided at all costs.[44] This attitude was mirrored in the antipodes until recent years.

A major point of comparison between this legislation and the more recent natural disaster emergency legislation dealt with in this paper is that wartime content is very much about active rather than responsive lawmaking. Responsive lawmaking being the alleviation or alteration of an existing regulatory scheme; active being implementing a fresh regulatory scheme. Active lawmaking was done, of course, through extraordinary executive powers by increasing the legislative and policy preponderance on the secondary legislation side. The responsive lawmaking experience has been similar, but it has been focused on powers to amend and adjust existing rule frameworks through Henry VIII powers to amend other Acts.

Perhaps due to the responsive nature of Henry VIII powers in an increasingly intricate regulatory world, or a more complex Parliament,[45] strong executive powers to legislate have been looked on more charitably of late.[46] The focus is now on robust oversight by Parliament and the courts, rather than absolute prohibition. Henry VIII powers are commonly seen in bills referred to the RRC. They are rarely objected to merely because they are Henry VIII powers. Instead, the RRC takes a pragmatic and context-specific approach. Its analysis of emergency Henry VIII powers has been no different.

Canterbury Earthquakes

Skipping forward in time, a series of earthquakes struck Canterbury in 2010 and 2011, amidst a dearth of emergency recovery legislation. The first response to the initial earthquake on 4 September 2010 was under generic emergency legislation, the Civil Defence and Emergency Management Act 2002 (CDEMA), which is designed for use on a short-term basis under state of emergency declarations. Under section 68 of the CDEMA a state of emergency was declared and then extended several times through to 16 September 2010.

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[41] Waterfront Strike Emergency Regulations 1951.
[42] Philip A. Joseph "Delegated Legislation in New Zealand" (1997) 18(2) SLR 85.
[43] Donoughmore Report, above n 3, at 13.
[44] For one of the angriest examples, see Lord Hewart *The New Despotism* (London, Benn, 1929) at 21: "this course [of world domination] will prove tolerably simple if he [the ardent bureaucrat] can: (a) get legislation passed in skeleton form; (b) fill up the gaps with his own rules, orders, and regulations; (c) make it difficult or impossible for Parliament to check the said rules, orders, and regulations; (d) secure for them the force of statute; (e) make his own decision final; (f) arrange that the fact of his decision shall be conclusive proof of its legality; (g) take power to modify the provisions of statutes; and (h) prevent and avoid any sort of appeal to a Court of Law".
[45] For example, *de rigueur* select committee commentaries (narrative reports) on bills were not introduced until 1995. Prior to that, committee staff prepared "report-back notes", which were provided to chairpersons and members for use in a debate that arose when the chairperson presented the committee's report in the House: see David McGee *Parliamentary Practice in New Zealand* (2nd ed, GP Publications, Wellington, 1994), at 266.
[46] Regulations Review Committee *Activities of the Regulations Review Committee in 2019* (12 May 2020) [2017-2020] 2 AJHR I.16B at 14.

Part of the basis for the bespoke legislation recommendation in the 2016 Inquiry was that the Canterbury experience showed that Government was able to obtain the passage of legislation quickly and specifically in response.[47] However, the first legislative response to the Canterbury earthquakes was not without problems.

This, the Canterbury Earthquake Response and Recovery Act 2010 (the CERRA10), was introduced on 14 September 2010 and taken, by leave, through all stages in the House on the same day without scrutiny by select committee.

The CERRA10 included an extraordinarily powerful and retrospective[48] Henry VIII provision for delegated legislation to grant an exemption from, modify, or extend any provision of any enactment, if "reasonably necessary or expedient for the purpose of the Act".[49] This provision was originally conceived of as a negative resolution procedure, but was finally enacted as a Henry VIII regulation-making power, party due to the fact that the RRC would scrutinise these regulations.[50]

Other extraordinary elements included that the recommendation of the relevant Minister, which triggered the use of the Henry VIII power, "may not be challenged, reviewed, quashed, or called into question in any court" (section 6(3)), that the ensuing delegated legislation had the same force as if it were part of the CERRA10 itself (section 7(2)) and that it may not be held to be invalid because it is, or authorises any act or omission that is repugnant to or inconsistent with any other Act, or confers any discretion on, or allows any matter to be determined or approved by, any person (section 7(5)). Further, the purposive section stated, not without some redundancy, that the aims of the Act (to which end the Henry VIII power was employed) included "provid[ing] adequate statutory power to assist with the [earthquake] response" and "enabl[ing] the relaxation or suspension of provisions in enactments that divert resources away from [the earthquake effort]". Thirty orders were made under CERRA10, amending 19 Acts.[51]

Critics of this Henry VIII power stated that, despite the responsible use and constructive rationale of the provision, it was not sufficient to trust to the worthy intentions of the executive. To them, the CERRA10 indicated that "our constitutional values are not important in an emergency".[52]

On 22 February 2011 a second, more severe, earthquake struck Christchurch, killing 185 people. A 2 month state of national emergency under the CDEMA followed, as did a second tranche of bespoke legislation. The Bill for the new Canterbury Earthquake Recovery Act 2011 (the CERA11) was passed under urgency and through an expedited select committee process, without full public submissions.[53]

The CERA11 contained a similar Henry VIII power to the CERRA10, albeit less specific. There were, again, vociferous adverse comments, including that the CERA11 was a pure

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[47] At 19.
[48] Back to the date of the initial earthquake.
[49] Sections 6(4) and 7(2). Some exceptions applied to the Henry VIII clause, including the New Zealand Bill of Rights Act 1990.
[50] Cabinet Paper "Canterbury Earthquake Response and Recovery Bill" (13 September 2010) at [10]; (14 September 2010) 666 NZPD 13899,
[51] 2016 Inquiry at 6.
[52] Jonathan Orpin and Daniel Pannet "Constitutional Aftershocks" (2010) NZLJ 386 at 388; see also Austin Forbes QC "The rule of law and New Zealand lawyers" (2011) NZLJ 42; "Ad hoc legislation" (2010) NZLJ 397. Also see sources cited at footnote 14, 2016 Inquiry.
[53] 2016 Inquiry at 7. See criticism in the House at (12 April 2011) 671 NZPD 18129.

"command and control" approach and that it contained powers of a calibre similar to those used in wartime.[54]

Nevertheless, there were some additional safeguards, including an annual review by the Minister and the use of a Review Panel for draft Orders in Council.

The 2016 Inquiry noted the above issues, but also commented on the safeguards included in the CERRA10 and CERA11. Some of these were:[55]

- the exclusion of certain constitutionally important Acts from amendment by the Henry VIII power;
- the purposive restriction: that orders could be made only if reasonably necessary or expedient for the purpose of the Act;
- the RRC could scrutinise all secondary legislation made under the Henry VIII power;
- there was a sunset clause applicable to the primary and secondary legislation;
- judicial review rights still applied to the Orders in Council themselves.

The 2016 Inquiry concluded that the Henry VIII powers were "broader than was necessary", and considered that, in future, further checks and balances should be considered for incorporation.[56] The 2016 Recommendations came out of this analysis.

Further recommendations emerging from specific critiques of the Henry VIII powers in CERRA10 and CERA11 were for a more rigorous select committee process for bills, the prioritisation of use of context-specific primary legislation, and the inclusion of lists of legislation to be amended when using Henry VIII powers.

Somewhat portentously, the 2016 Inquiry commented that the Epidemic Preparedness Act 2006 contained similar Henry VIII powers regarding the management of diseases, recommending the "sectoral approach" in that Act for specific legislation tailored for certain types of emergency.[57]

The COVID-19 era comprises the second set of legislation covered in this paper, after consideration of a case study on the RRC's dealings with a Canterbury earthquake regulation.

Case study – Review Panel and CERA11

The CERA11 contained one of the first sets of prospective panel review mechanisms for the making of emergency regulations.[58] These were often used for subsequent emergency legislation for COVID and Cyclone Gabrielle.

Sections 73(6) and (7) required the Minister for Canterbury Earthquake Recovery to publicly notify the Review Panel's recommendations on draft secondary legislation, and, as soon as practicable after receiving the recommendations, to present a copy to the House of those recommendations. Section 72 set out the requirements for the Review Panel itself. The Review Panel had to include at least one member with legal expertise.

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[54] Kenneth Palmer "Canterbury Earthquake Recovery Act 2011 – a legislative opportunity?" 9 (2011) BRMB 55; (12 April 2011) 671 NZPD 17898. Also see Megan Gall *A Seismic Shift: Public Participation in the Legislative Response to the Canterbury Earthquakes* (2005) 18 Cant L Rev 232 at 240.
[55] 2016 Inquiry at 5.
[56] 2016 Inquiry at 17.
[57] At 16 and 19.
[58] Section 74(1)(b).

The RRC became concerned that, when considering the Canterbury Earthquake District Plan Order 2014 made under section 71 of the CERA11, a panel member with legal expertise had recused themselves.[59] The requirement under section 72 was for one of the four panel members to be a former or retired Judge of the High Court or a lawyer. The RRC considered that this recusal may have entailed that the order had not been made in accordance with section 73. The RRC corresponded with the Ministry for the Environment (Ministry) and held a hearing with the ministry and the Canterbury Earthquake Recovery Authority (CERA).

The Ministry and CERA stated that there was no legal requirement for all members, or a percentage of the panel members, to be in attendance for the panel to be properly constituted, and that the CERA11 provided for panel reviews to "be conducted in any manner the convener thinks appropriate".[60]

The RRC considered the issue under Standing Order 327(2)(a): whether the order was in accordance with the general objects and intentions of the principal Act. It commented on the "extraordinary" Henry VIII powers held by the executive under the Act and the removal of judicial oversight, stating that the panel performed an "important constitutional safeguard" in this context.[61]

In addition to these "control" type concerns, the RRC considered the importance of the *freedom* of the executive in emergency circumstances, as granted under the Act. In particular, it commented on the important policy behind the order in question and recommended that Parliament pass validating legislation urgently, in order to avoid legal challenges. This is an example of the RRC going beyond its usual non-policy rubric when considering emergency legislation.

The RRC was split on the panel issue; some members considered that the statutory requirements had been satisfied; others, that they were vitiated, and the regulation was invalid. The arguments for invalidity were primarily that the requirement for a legally trained member of the panel in section 72(1) was intended "to bring a legal perspective to the panel's decisions" in light of the broad Henry VIII override power.[62] Further, the RRC commented on the lack of engagement and communication between the Ministry and CERA, stating that this had "the effect of undermining" the committee.[63]

The order was subsequently validated by primary legislation.[64]

Therefore, the RRC will consider underlying policy when assessing emergency legislation. This very policy in considered in this example is one of, primarily, empowering the executive. However, looking at the generic praxis of the RRC considering policy: this is a tremulous exercise in an emergency, as it is very important that the public view of the committee's veil of political neutrality is maintained, in order to make the balance and control that constitutes

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[59] Regulations Review Committee "Investigation into the Canterbury Earthquake District Plan Order 2014" [2015] AJHR I16A. For further scrutiny of orders made under CERRA10 and CERA11, see: Regulations Review Committee "Activities of the Regulations Review Committee in 2012" [2014] AJHR I.16E at 12; Regulations Review Committee *"*Orders in Council made under the Canterbury Earthquake Response and Recovery Act 2010 and the Canterbury Earthquake Recovery Act 2011 Interim report of the Regulations Review Committee" [2011] AJHR I.16N.
[60] At 4.
[61] At 5.
[62] At 6.
[63] At 7.
[64] Greater Christchurch Regeneration Act 2016, section 112.

the separation of powers make sense. Luckily, most emergency response policy is bipartisan.

COVID-19

The RRC's next general inquiry into emergency legislation was in June 2023: the *Inquiry into COVID-19 Secondary Legislation*.[65] The Inquiry looked at, inter alia, how well that legislation followed the principles set out in the 2016 Inquiry.

The COVID-19 pandemic needs no introduction. Of course, the response risked spreading the "germ of arbitrary administration".[66] In New Zealand, this initially was under the pre-existing Epidemic Preparedness Act 2006 (EPA) and the Health Act 1956 (HA).[67]

The EPA involved significant Henry VIII powers allowing for the "prospective modification of statutory requirements and restrictions" to "facilitate management of serious outbreak of disease",[68] as well as providing for the Prime Minister's power to issue an epidemic notice activating powers in the infectious diseases regime in the HA.[69] These epidemic notices were issued throughout the lifecycle of the pandemic; the first Infectious and Notifiable Diseases Order 2020, making COVID-19 a notifiable disease under the HA, came into force on 30 January 2020.[70]

Correlative orders under section 70 of the HA were made by the Director-General of Health all the way through the pandemic, even after specific COVID-19 primary legislation had been passed. The powers are significant, including the ability to prohibit the use of any land or building, require persons to submit themselves for medical examination, and require isolation or quarantine.

As the High Court commented in a case involving a challenge to COVID-19 legislation, "the democratic nature of our constitution means that there comes a point when Parliament ought to pass bespoke legislation to ensure that critical policy decisions are made by ordinary Cabinet decision-making".[71]

The COVID-19 Public Health Response Act 2020 (the 2020 Act) was the main specific primary legislation, introduced on 12 May 2020 and passed within two days, without public consultation or a select committee stage.

Under section 11 of the 2020 Act, the Minister of Health had national regulation-making powers and the Director-General of Health was able to make orders in respect of single territorial authority districts.[72] Later, vaccine mandates provisions were introduced through amendments under the COVID-19 Response (Vaccinations) Legislation Act 2021 (the Vaccinations Act).[73]

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[65] Regulations Review Committee "Inquiry into COVID-19 Secondary Legislation" AJHR I.16C [2023 Inquiry].
[66] C.T. Carr, *Delegated legislation*, (London, Cambridge University Press, 1921).
[67] A list of primary and secondary legislation for the COVID-19 response is available on the Ministry of Health website at: https://www.health.govt.nz/strategies-initiatives/programmes-and-initiatives/covid-19/legislation-and-orders.
[68] Sections 10 and 11.
[69] Section 5.
[70] 2023 Inquiry at 41.
[71] *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [102]. See 2023 Inquiry at 7.
[72] At 8.
[73] Section 11AB. 2023 Inquiry at 9.

The RRC scrutinised both 2020 Act orders and section 11 HA orders on a regular basis soon after each order was made. The COVID-19 legislation, unlike other more recent emergency legislation for natural disasters, did not have a statutory requirement for the submission of draft regulations to the RRC. Further, due to the expediting of the 2020 Act and Vaccinations Act, which were passed without public submission or subject select committee review, the RRC did not scrutinise the regulation-making powers at the Bill stage. This lack of scrutiny was one of the reasons behind the 2023 Inquiry.[74]

In addition to commenting on the state of RRC involvement, the 2023 Inquiry made the following conclusions regarding the 2016 Recommendations. I have set them out with reference to Bovens' democratic, constitutional, and educative perspectives:[75]

- On the democratic and constitutional grounds, regarding restrictions in the text as a conduit of Parliamentary empowerment and controls, the RRC commented that:
    - Specific legislation was used, which was appropriately limited with a strong set of safeguards.
    - The legislation applied only to the current COVID-19 outbreak and required regular resolutions of the House to prevent its repeal (this safeguard was eventually removed).
    - Primary legislation ought to be used for emergency measures, so that policy and additional powers can be carefully considered. The Protection Framework System, which included the traffic light system and rules relating to the vaccine mandates, ought to have been in primary legislation.
    - The legislative scheme did not accord with the 2016 Recommendation that Henry VIII powers should only be empowered to amend specified legislation in a 'positive list' rather than *all* primary legislation with some listed exceptions.
    - There were explicit safeguards included in the 2020 Act, including:
        - clear criteria for when orders may have been made
        - an automatic revocation provision that applied unless orders were approved by the House (section 16)
        - *Gazette* notification, publication, and presentation requirements[76]
        - review of orders by the Minister or Director-General.
    - Regarding the use of sunset provisions built into the primary legislation, despite that the COVID-19 pandemic did not have a "definitive end date": the 2023 Inquiry acknowledged that sunset provisions may not be suitable in certain types of emergency (I note an example might be wartime). The RRC stated that one purpose of sunset provisions was Parliamentary scrutiny. I observe that would be akin to a legislative refresh button.
- Primarily on the constitutional ground, also invoking the democratic and educative grounds, the right to seek judicial review of orders was maintained. Unlike the CERA11, there were no requirements for the executive to formally report to the House on the exercise of powers under the emergency legislation and progress with recovery.

[74] 2023 Inquiry at 5.
[75] 2023 Inquiry at 31-35.
[76] Under section 14, section 11 orders had to be published and notified at least 48 hours before coming into force.

- On the democratic, constitutional, and educative grounds, regarding the oversight role of select committees:
    - The government needed to push through some of the legislation quickly because of the nature of the crisis. This limited public participation and refinement of the legislation at select committee.
    - The RRC endorsed the referral of the 2020 Act to subject select committee for post-enactment review in 2020.
    - One of the amendment Acts (the COVID-19 Public Health Response (Extension of Act and Reduction of Powers Amendment Act 2022) was passed through all stages in a single day.
    - A dedicated committee did not need to be established for review of the COVID-19 legislation.
    - There was no other form of post-enactment review, public engagement, or necessary revision implemented in the legislation, or conducted by select committees, save that conducted by the RRC.
    - The 2020 Act did not provide for the scrutiny of draft orders. This should have been provided for in the legislation or done under SO326(2).

The metrics and consideration of the COVID-19 scheme by the 2023 Inquiry were largely the same as the 2016 Inquiry. However, the 2023 Inquiry did have a more in-depth focus on the details of scrutiny actually employed by the RRC in reviewing COVID-19 secondary legislation. The particulars of the analysis that occurred in the COVID-19 era are beyond the scope of this paper, insofar as they extend beyond the subject of the nature of the RRC's role and purview. However, one case study on a complaint is included to illustrate the nuances of the RRC's boundaries in considering policy matters and the distinction between legislative and administrative power.

Case study - Policy considerations, nuances, and changes

As stated above regarding the Canterbury earthquake legislation, the RRC has taken into account policy considerations when scrutinising emergency legislation, to the extent to which policy informs the analysis of legislative strictures on regulation-making powers. In 2021, the RRC received a complaint about the Covid-19 Public Health Response (Maritime Border) Order (No 2) 2020 (the MBO), which provided for seafarers in certain circumstances to be exempt from managed isolation and quarantine. The complaint was that the MBO and other legislation entailed unfair treatment of seafarers ordinarily residing in New Zealand. The RRC held that the complaint related to the administration of the COVID-19 scheme, as expressed in the policy of the order, not to the text of the legislation itself.

It demurred from considering policy matters relating to the administration of the COVID-19 response scheme, stating that "our authority is limited to examination of legislation itself, not its administration […]".[77]

This approach reinforces the non-policy and text-focused purview, as well as the concentration on legislative power and effect, rather than any administrative functions of the executive that flow through that legislative power. The example illustrates how the RRC determines its boundaries, upholds separation, and therefore supports good public

[77] Regulations Review Committee "Complaint about COVID-19 Public Health Response (Maritime Border) Order (No 2) 2020" (17 December 2021) at 4.

perception; this is despite that, in considering emergency response legislation, it tends to always keep in mind the policy framework and the needs of expediency.

Hurunui/Kaikōura

On 14 November 2016, a series of earthquakes struck the Culverden area of the South Island, causing considerable damage to property and infrastructure. The main piece of primary legislation made in response was the Hurunui/Kaikōura Earthquakes Recovery Act 2016 (the 2016 Act). Much of the Act was based on CERA11; however, it contained more stringent safeguards on its Henry VIII powers. This was partly due to its exposure to subject select committee processes.

Progress in the House was expedited; the Bill for the 2016 Act was introduced on 29 November 2016 and referred to the Local Government and Environment Select Committee (the subject select committee) on 1 December 2016. There were public submissions to select committee.

The 2016 Act contained a Henry VIII power for an Order in Council, on the recommendation of the relevant Minister, to override specified primary legislation (section 7). These orders could be retrospective back until the date of the first earthquake. The subject select committee commented that these orders were "to speed up standard processes, cut through impediments to recovery, and enable timely decision-making […] [they] allow more flexibility to deal with matters such as the provision of temporary housing and relief from tax-reporting deadlines".[78] That committee recommended a number of amendments to the Bill, relating to checks and balances for the Henry VIII power.

Although the Hurunui/Kaikōura earthquake incidents were occurring at the same time as the 2016 Inquiry, the 2016 Act was not assessed as part of that Inquiry. It is also not clear whether the 2016 Inquiry was taken into account in the drafting of the initial Bill for the 2016 Act. There is some minor reference to the 2016 Inquiry in the select committee report, but it does not appear to have been considered at length by that committee.[79] The rubric in the 2016 Inquiry is exactly on point, as it applies to the same type of natural disaster. Again, I apply Bovens' accountability framework here.

- On the democratic and constitutional grounds:
    - context-specific legislation was used, applying only to the Hurunui/Kaikōura earthquakes
    - there were sunset periods for the regulation-making power provisions and the secondary legislation, within a 1–2 year period
    - regular resolutions of the House were not required to prevent the repeal of the primary legislation, unlike the COVID-19 Act
    - the legislative scheme *did* accord with the 2016 Recommendations, in that there was a 'positive list' of legislation included in the primary legislation. This list could be added to by Order in Council (section 18). Specific Acts were completely excluded from the list.
    - There were requirements for the making of orders under the Henry VIII power for amending the content of the primary legislation itself (the primary Henry VIII power):

[78]Hurunui/Kaikōura Earthquakes Recovery Bill (214-1) (select committee report) at 2.
[79] At 6.

    - non-derogative guidelines for the use of the Henry VIII power, including criteria relating to the effect of the legislation being amended
    - a Panel review of draft orders
    - engagement requirements (albeit limited to those whom the Minister considered appropriate)
- The following safeguards applied to the making of the primary Henry VIII orders or amending the *list* of specified enactments to which the primary Henry VIII power applied:
    - automatic revocation applied unless orders were approved by the House (this did not apply to the primary Henry VIII power)
    - the triggering recommendation may only have been made if the order was necessary or desirable for the purposes of the Act, the order did not amend the rights-based and constitutional legislation set out in section 11, a draft of the order was presented to each leader of a political party represented in Parliament, and the Minister was satisfied that there was unanimous or near unanimous support from those leaders
    - a requirement for the Minister to publish an explanation of reasons for making the recommendation, together with the order

- Primarily on the constitutional ground, also invoking the democratic and educative grounds, the right to seek judicial review of Orders in Council, on the basis of whether an order was authorised by the Act, was maintained. However, there was a limitation on challenge to the recommendation and decisions of the Minister.
- On the democratic, constitutional, and educative grounds, regarding the oversight role of select committees:
    - Public participation and refinement of the legislation at subject select committee was limited due to tight timeframes; however, unlike the situation with other emergency legislation, there was scrutiny by a subject select committee. This was an existing committee, not one specially set up for the purpose.
    - There was a requirement (section 22) for the executive to formally report to the House on the exercise of powers under the emergency legislation and progress with recovery. This is similar to the CERA11; no such provision was included in the COVID-19 legislation – probably to reduce administrative burdens in a time of extreme crisis.
    - scrutiny of draft orders by the RRC, or, if the House was adjourned, by each leader of a political party represented in Parliament.

Some of the above checks and balances in the legislation, or nuances thereof, were included in subject select committee recommendations. Several recommendations regarding the Henry VIII powers were made, such as:

- the addition of a 3 day deadline for the RRC or party leaders to comment on a draft Order
- other matters, such as effects on the environment, for the Minister to consider when making the triggering recommendation

- the specific statement that nothing in the Act prevents a court from determining whether an Order is authorised by the Act
- removing the power for Orders in Council to add local authorities to the Bill's area of effect, as Parliament should have to legislate to expand the geographic scope.

One issue with the 2016 Act that stands out and was neither fully addressed at select committee nor in the RRC response to its previous iteration in the Canterbury legislation, is the provision restricting the jurisdiction of the courts. In light of Bovens' constitutional perspective of maintaining the balance of the separation of powers, this is a significant disturbance in the force. That is not just because the judiciary's checking function on executive power is *per se* undermined, but also because the consequence of this is a lapse in legislative efficaciousness of the primary legislation. The role of the judiciary serves as not only a restraint in and of itself, but as a means by which Parliament flexes on the executive.

The restrictions on the Henry VIII power mainly reside in the recommendation function. If these restrictions on ministerial action are not legally enforceable through the courts, that begs the question of whether they then, practically, have the force of law. When the jurisdiction of the courts is removed, they become mere guidelines. Parliament would need to legislate further to enforce these requirements.

Notwithstanding that reservation, from a process standpoint, the legislative experience of the 2016 Act illustrates the salutary effect of pre-legislative subject select committee scrutiny. That scrutiny would presumably only have been refined further if the RRC had been involved more actively, either in an advisory capacity or in direct collaboration with the subject select committee. Unfortunately, due to the timeframes involved, thorough RRC pre-legislative scrutiny did not occur.

The RRC reported on some of its analysis of draft orders in its 2018 Activity Report.[80] It also reported on its post-legislative scrutiny.[81]

SWERLA

During January and February 2023, the North and East coasts of the North Island were struck by Cyclone Gabrielle. In response, Parliament passed the Severe Weather Emergency Recovery Legislation Act 2023 (SWERLA), in tandem with the Severe Weather Emergency Legislation Act 2023. The latter Act did not contain regulation-making powers, but instead made direct amendments to regulations and other Acts.

For emergency legislation, SWERLA made relatively stately progress through the House. The Bill was introduced on 27 March 2023 and referred to the Governance and Administration Select Committee from 28 March to 5 April 2023. There were public submissions received in writing and by oral evidence over the 28 and 29 March. These submissions included concerns about the retrospective nature of the core Henry VIII power in the Bill, as well as the generality of the purpose section. The RRC provided advice to the subject select committee.

The subject select committee commented that the purposive breadth of the Bill was "to encompass the scale of the emergency situation. In the early stages of recovery, not all

[80] Regulations Review Committee "Activities of the Regulations Review Committee in 2018" (20 March 2019).
[81] Regulations Review Committee "Activities of the Regulations Review Committee in 2017" [2017] AJHR I16D; Regulations Review Committee "Activities of the Regulations Review Committee in 2018" (20 March 2019).

needs are known. It is difficult to anticipate which legislation will need to be amended, and in what context. Therefore, we consider it appropriate to maintain a broad purpose". [82]

Notwithstanding this widely empowering posture, the subject select committee acknowledged the need for safeguards and restrictions on the Henry VIII powers. The SWERLA uses a legislative pattern very similar to that employed for Hurunui/Kaikōura,[83] with one Henry VIII power to amend primary legislation specified in a Schedule (section 7) and another Henry VIII power to add or subtract Acts from that Schedule (section 19). Both are retrospective.

The primary (section 7) Henry VIII power in SWERLA is mostly the same as the Hurunui/Kaikōura legislation, down to the section numbering, aside from:

- a detailed definition of the term "modify", describing what the Orders can do to the primary legislation
- an explicit statement that, when making the triggering recommendation, the Minister had to be satisfied that the order did not limit, or was a justified limit, on New Zealand Bill of Rights Act 1990 (NZBORA) rights and freedoms
- no restriction on the jurisdiction of the courts (this also applied to the power to add or subtract Acts from the Schedule)
- the ability for the Minister to extend the public engagement period
- a Ministerial review obligation.[84]

There were also some differences in the provisions relating to the composition of the Review Panel, including a specification that the panel may act by division and consist of a certain quorum when doing so. This change is consistent with the RRC input on the Panel composition issue that occurred regarding the Canterbury earthquake legislation. This is probably an example of RRC influence taking effect long after the fact; although this legislative design issue was not specifically addressed by amendment in the Canterbury legislation or in the Hurunui/Kaikōura legislation, it was addressed 8 years later in 2023.

The RRC also influenced the subject select committee review. Informed by RRC advice, the subject select committee proposed a number of amendments to the Henry VIII powers to ensure scrutiny of the operation of the legislation, including:[85]

- the ability for the Minister to extend the RRC consultation timeframe
- a stipulation that party leaders should only be consulted during an interregnum,[86] when the RRC "does not exist and cannot be consulted"

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[82] Severe Weather Emergency Recovery Legislation Bill (242-1) (select committee report) at 3-4.
[83] As the SWERLA legislation is very similar to the Hurunui/Kaikōura legislation, I am not including a separate summary of the provisions' checks and balances against the Bovens analysis here.
[84] This is rather vaguely phrased: "The relevant Minister must keep under review all orders for which they are responsible under section 7 […] in carrying out the review, [the Minister] must decide whether they continue to be satisfied in relation to the [purpose, extent, rights-based, constitutional and NZBORA requirements in section 8(1)(a)]." (section 12).
[85] Severe Weather Emergency Recovery Legislation Bill (242-1) (select committee report) at 4-6.
[86] Section 8(1)(c) states that the relevant Minister must not recommend the making of an order unless a draft of the order has been provided to the Committee of the House of Representatives that is responsible for the review of secondary legislation; or, if Parliament has been dissolved or has expired, each leader of a political party represented in the most recent Parliament (unless a leader cannot be contacted after reasonable efforts have been made). Under subsection (1)(d)(ii), the relevant Minister must have regard to the comments on the draft order (if any) that are provided by the Committee or a leader referred to in paragraph (c) and that are provided within 3 working days

- a narrowing of the scope for orders to amend primary legislation, from "dealing with a new subject matter" to "dealing with a new subject matter if that is reasonably necessary to achieve the purposes of an order".

Notably, the subject select committee also raised the possibility of statutory post-enactment review of the legislation by select committee, as done in section 37 of the Returning Offenders (Management and Information) Act 2015.[87] That Act included a requirement for a select committee, determined by the Clerk of the House, to review the Act 18 months after its commencement.

The subject select committee ultimately decided not to include such a requirement in the Bill itself but recommended that a select committee initiate a review of the Act immediately after enactment.

RRC involvement

As stated above, under section 8 of SWERLA, the draft Henry VIII orders must be put before the RRC, which is to provide comments within three working days. The Minister must have regard to the RRC's views prior to recommending the making of this secondary legislation. These comments are kept between the RRC and the Minister. This process is, of course, in addition to the RRC's post-legislative routine scrutiny of regulations.

The RRC's assessment of SWERLA regulations, both in draft and final form, is ongoing. In 2023, the RRC reviewed 14 draft orders, on topics ranging from rating valuations to the burning of waste.[88] These have not been reported on specifically to the House.

Several matters closely scrutinised by the RRC included the extension, in a Henry VIII order, of a statutory limitation period for bringing prosecutions,[89] the retrospectivity of that Henry VIII order as relating to offences committed before it came into force, and four other Henry VIII orders excluding the courts' jurisdiction without explicit authorisation.[90] The RRC opened a specific Briefing to look into these issues and reported to the House.[91]

The jurisdictional question was the most significant issue. The RRC stated that, while the empowering provision was very broad, it did not explicitly allow the jurisdiction of the courts to be removed. It considered that, in order to uphold the letter and spirit of Standing Order 327(2)(e), which reflected the separation of powers, allowing the judiciary to review the lawfulness of executive action,[92] the empowering provision ought to have included "explicit, unequivocal authorisation". [93] The reasons for this approach were twofold:[94]

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after the date on which the draft order is first provided under paragraph (c) (or within any longer time allowed by the relevant Minister).

[87] At 7.

[88] Regulations Review Committee "Activities of the Regulations Review Committee in 2023" [2024] AJHR I.16A at 30.

[89] Severe Weather Emergency Recovery (Resource Management—Time Extensions) Order 2023.

[90] Severe Weather Emergency Recovery (Waste Management) Order 2023; Severe Weather Emergency Recovery (KiwiRail Holdings Limited) Order 2023; Severe Weather Emergency Recovery (Waka Kotahi New Zealand Transport Agency) Order 2023; Severe Weather Emergency Recovery (Hawke's Bay Flood Protection Works) Order 2023.

[91] Regulations Review Committee *Briefing on retrospective change of limitation periods and the truncating of appeal rights in secondary legislation in response to an emergency event* (August 2024).

[92] Under this Standing Order, the committee may draw a regulation to the attention of the House on the ground that the regulation excludes the jurisdiction of the courts without explicit authorisation in the empowering provision.

[93] At 8.

[94] At 8.

- Excluding the courts' jurisdiction is a serious step which should be highlighted in the empowering legislation, to allow Parliament to debate such provisions.
- In the absence of an explicit authorisation, the validity of such provisions is likely to be contested. The courts may accept arguments that Parliament did not intend for a general truncation of appeal rights, as it was not explicitly stated in the legislation.

The RRC wrote to the Ministers in charge of the relevant legislation. The Ministers did not agree that Standing Order 327(2)(e) applied; *inter alia*, they commented that the Henry VIII orders were "consistent with [the Act's] purpose as they provid[ed] the Government with flexibility to facilitate, enable, and expedite recovery, [which] can include relaxing certain legislative requirements".[95]

The RRC concluded by maintaining its view that there was no explicit exclusion of jurisdiction. Any power to exclude was only implicit. The Henry VIII orders and empowering provision, therefore, fell short of the standard in the Standing Orders.

Ultimately, the RRC did not recommend any amendments to primary or secondary legislation. It did, however, note to the Government that it should:

- only make secondary legislation authorising the truncation of appeal rights in the future if the primary legislation explicitly authorises the exclusion of the jurisdiction of the courts, including for any future orders made under the SWERLA
- only use secondary legislation to exclude the jurisdiction of the courts in the rare circumstances that it is justified.

There are a few notable things about this exchange and scrutiny of the SWERLA scheme in general. First, Standing Order 327(2)(e) is interesting in that it sets the RRC as a gatekeeper and protector of the courts' jurisdiction. The role is therefore to uphold the integrity of the judicial branch of the three powers, not just maintaining the line between executive and legislature. Further, in effect, Standing Order 327(2)(e) reflects the general power of the RRC to comment on matters relating to regulations in *enacted* empowering provisions, not just determining the status of the regulations themselves in light of the thresholds in Standing Order 327(2). The analysis under Standing Order 327(2)(e), informed by the precise wording of that Standing Order,[96] inevitably involves some assessment of whether or not a power to restrict the courts is implicit or explicit. If it is not explicit, there may still be some authorisation, but it does not meet the standard of the Standing Order. Therefore, it is the empowering provision itself that is lacking, as well as the regulation being astray.

Conclusion

To conclude on the points made above regarding reforms and adjustments, I revert to Bovens' rationales for accountability – public confidence in government and catharsis.

The Lie[97] *(public confidence; upholding the separation)*

Engagement with the public links with the democratic and constitutional functions. It is especially important in an emergency, where separation has been vitiated. The RRC is a potent mechanism of all accountabilities (democratic, constitutional, and educative). In particular, the veil of neutrality[98] is a main source of the committee's power. It is vital to the

[95] At 9.
[96] "[…] [E]xcludes the jurisdiction of the courts without *explicit* authorisation in the empowering provision."
[97] I am not here trying to imply any deceptive intentions. The separation of powers is a "lie" in that it is an ideal. The "lie" and the "cake" in the next section are a reference to the Portal games.
[98] I say "veil of neutrality", as, of course, there will always be antagonism within select committees. The veil of neutrality, in one way, is presented as a synthesis of that antagonism. The other side of the

constitutional role of the committee and its identity being sourced in Parliament itself and not the government of the day.[99] Of course, in order to uphold the veil of neutrality, a great deal of finesse is required in treading the line between structure and policy (form and substance) when performing scrutiny.

On the same point of maintaining public perception of the separation of powers,[100] public exposure to, and participation in, the RRC would engage more deeply with all aspects of Bovens' criteria. This is about heightening awareness of what the RRC does and the potential for its use as a targeted forum (the House is too wide ranging). Subject select committees have extensive public engagement functions; the RRC is very different. Its only patently public engagement function is the complaints jurisdiction. There are also instances where the RRC actively chooses to seek public submissions on an Inquiry or Briefing; this is a relatively rare step. Perhaps more work could be done for public engagement with, and exposure to, the *post hoc* reports and conclusions of the RRC. This may be appropriate given the expansiveness of the RRC's scrutiny purview (it extends beyond regulations themselves into many matters contained in primary legislation, as it covers anything that relates to secondary legislation).

Both the Standing Orders Committee and the drafters of emergency legislation might consider whether there should be a requirement for the RRC to present reports on draft legislation, and whether there should be a public submissions process as part of that. I am aware that there have been steps taken to publicise material relating RRC collaborations with subject select committees (to the limited extent to which collaboration occurs – some further steps could be made in that direction).

The Cake (catharsis; enjoyment)

In furtherance of its important constitutional role, it is essential that the RRC has full enjoyment of its powers. This may extend to post-legislative scrutiny of primary legislation, collaboration with subject select committees, responsiveness, the actual perpetuity of the committee, and the disallowance powers.

Regarding post-legislative scrutiny of Acts, the case study in the SWERL analysis above is an example. The 2016 Inquiry and 2023 Inquiry are both similar, in that they also critique and make suggestions on primary legislation. The RRC, until the current (54th) Parliament, has been relatively coy regarding forays into the post-legislative scrutiny of Acts. Inquiries, sometimes referred by the House, have been the main conduit of this activity. In the current Parliament this has changed, and the RRC scrutinises empowering provisions and other matters relating to regulations in Acts passed under urgency, in the same way that it assesses Bills.

This broad function of the RRC is especially salutary regarding emergency legislation, which is often passed under urgency. There is also the potential for enhanced flexibility to

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coin is that the neutrality of the committee is shown as a determinate *absence of* political ideals, which refines the nature of the committee as being focused on the practical, formal, and material, but still implicitly invokes these ideas by their absence. From a public perception point of view, and also in light of the democratic and constitutional source of the committee's power, this is very important.

[99] Of course, the underlying presupposition here is of the separation of powers. Therefore, the empowerment of the committee, as sourced in Parliament, is somewhat circular.

[100] Of course, the random person on the Newtown bus probably is not aware of the separation of powers *per se*, but they would, hopefully, have some degree, and sense, of confidence in the stabilising forces in our democratic system that are set up to prevent dictatorship and oppression.

collaborate with subject select committees and re-engage on post-legislative scrutiny, which has not yet been fully explored by the RRC.

There is also the issue raised by the subject select committee about scrutiny during the interregnum, when, technically, the RRC does not exist. The compromise effected in the SWERLA and similar emergency legislation is for all party leaders to have the same role as the RRC.

As canvassed above, the pre-legislative scrutiny function of the RRC in assessing draft orders engages all aspects of the Bovens analysis: the democratic, constitutional, and educative functions. It is questionable whether the engagement of all party leaders fulfils an equal function. On the democratic front, especially under a mixed member proportional system, the fact that each party leader is given equal "say" is dubious;[101] from an educative standpoint, in terms of refining the quality of the draft legislation, party leaders will not have the advice, expertise, or strength of jurisprudence of the RRC. From a constitutional perspective, as well, the unique role of the RRC in maintaining the separation of powers and, in particular, protecting the domains of the judiciary and Parliament (even though the practice and involvement of the latter shift in an emergency) does not have an equal. This is because of the RRC's expertise and specific mandate as gatekeeper.

The argument that the RRC should not conduct scrutiny during an interregnum is a simple and technical one – when Parliament does not exist, the RRC does not exist. The old Parliament has gone and its mandate is stale. The underlying principle of this technical reality, however, also vitiates the party leader mechanism – as those party leaders were put into place in the previous Parliament in an election that has now been spent, so to speak, there seems to be no real democratic, constitutional, or educative basis for party leaders from the previous Parliament to have a say in curbing the executive.

Of course, the RRC could still exist if it were to remain from the previous Parliament as a transcendent entity; still emerging from that Parliament, neither part of the government, nor a creature of statute, still a child of Parliament, but one that has outgrown its parent. This suits the nature of the RRC as an aspect of Parliamentary sovereignty.

In my view, that option, although it may require some sideline Standing Orders tinkering, is a preferable check on emergency legislation to the party leaders compromise. This is quite important when it comes to emergency legislation. Parliaments may die but the House is eternal.[102]

In conclusion, the RRC doubtlessly possesses an aura of catharsis and confidence. It could, however, enjoy its powers further. It could act more flexibly in using its full range of motion under the Standing Orders and the constitutional rubric. There also may be an argument for greater flexibility in in terms of liaising with subject select committees, as well as rapid responsiveness to bills that are expedited or passed under urgency. Further, the RRC rarely lets itself reach the constitutional euphoria of disallowance, which could be said to be the full manifestation of the House's power to oversee its delegated legislative authority.[103] Perhaps some day it will learn to stop worrying and love the bomb.

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[101] In comparison with the RRC: the RRC's composition, as with other select committees, roughly reflects the party composition in the House. Having said that, it is not uncommon for minor parties to choose not to have members on the RRC.

[102] Thanks to Mr David Bagnall for this quote.

[103] Disallowance has only actually occurred once in relatively recent years, in 2013. Prior to that, previous RRCs initiated disallowance on six occasions. Two of these lapsed due to Parliament dissolving. Four failed on the vote. See Dean R Knight and Edward Clark *Regulations Review*

Committee Digest (7th ed., Wellington, VUW, 2020) at 21-22. Of course, the RRC being a horizon of prohibition at full strength will maximise the government's (surplus) enjoyment of its own powers, on a hedonistic level: the very renunciation, at the edges imposed by the horizon of prohibition, becomes its own source of satisfaction. Of course, in self-censoring and demurring from using disallowance, the RRC reflexively usurps this aspect of the government's enjoyment of its power. For these concepts, in general, see Slavoj Žižek *The Ticklish Subject: The Absent Centre of Political Ontology* (London, Verso, 2000,), particularly at 25.