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# CIVIC DEFENCE: DEFINING ROLES AND PREPARING OUR DEMOCRACY FOR THE NEXT EMERGENCY

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# CIVIC DEFENCE: DEFINING ROLES AND PREPARING OUR DEMOCRACY FOR THE NEXT EMERGENCY

DANIELLE VAN DALEN\*

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## *The paper in summary...*

The COVID-19 pandemic saw New Zealand enter its second nationwide state of emergency in March 2020. This gave the Government access to levels of power not seen in New Zealand since the 1950s, perhaps ever.

These emergency powers bring significant risk to democratic practices, and therefore to democratic values and freedoms. History and international experience have shown that there is great risk that this kind of government control extends beyond what is appropriate without strong democratic practices and protections.

New Zealand's response to the COVID-19 pandemic has, at the time of writing, been relatively successful. We are fortunate that our leaders are not attempting to hold on to these extreme powers and there is no evidence to suggest we are on our way to becoming an autocracy. However, the pandemic response has also highlighted the weaknesses in our system, and how much we rely on different sectors of society to play their roles to safeguard against potential abuses of power. This paper is an attempt to pull together and specifically name the responsibilities each of these sectors during emergencies to safeguard the democratic freedoms we often take for granted. Namely:

- **The executive** must minimise restrictions to the fundamental freedoms of New Zealanders, balance a sufficiently speedy response to the crisis with the need for carefully considered legislation, and increase the priority for governmental transparency and accountability,
- **The legislature** must continue to scrutinise, challenge, and hold the executive to account for their decisions,
- **The judiciary** must interpret and apply the law—for both the general public and the government,
- **The fourth estate** must ask questions, challenge mistakes and explanations, and provide analysis and explanations for the general public, and
- **The civil society** must take an active interest in its trust of government, and participate in the parliamentary process where possible and appropriate.

While these role definitions are nothing new, in a state of emergency it is especially crucial that each sector knows the significance of their role and act accordingly to protect the necessary conditions for the functioning and freedoms of a democratic society. This requires being explicit about what is implicit (especially in an emergency), and reminding ourselves of what each of these roles require of us so that responsibilities are not abused or forgotten.

Therefore, we finish the paper with recommended reforms to ensure the long-term survival of democratic values and practices in New Zealand by protecting and strengthening the roles of the different sectors of society following the COVID-19 pandemic state of emergency. **These recommendations include:**

- *A Royal Commission of Inquiry should be appointed to begin an investigation into the actions taken by the Executive in responding to COVID-19.*
- *Parliament should pass legislation to ensure that the Official Information Act cannot be suspended or overridden during a state of emergency.*
- *The standing orders of the House should formally protect the essential position of the leader of the opposition in a state of emergency.*
- *At every stage of the political process, particularly in a state of emergency, civil society should be actively engaged and participating where appropriate.*

While emergencies are usually unexpected, they will inevitably come, and it is essential that we are well-prepared to respond, and that strong protections are in place for the risks that emergency powers pose to democracy. We hope that the recommendations in this paper inspire all New Zealanders to attend well to their key roles and responsibilities, because now is the time to prepare for the future.

## 1. INTRODUCTION

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“With great power comes great responsibility.”<sup>1</sup> When any government faces the task of responding to an emergency like COVID-19, they would do well to heed Ben Parker’s advice. The access to (great) emergency power when a state of emergency is declared comes with a great responsibility not to misuse or abuse that power, and to plan well to return our national affairs to normal when the threat is passed.

Modern democracies like New Zealand require all sectors of society—whether that be the Government, the House of Representatives (the House), the Courts, news media, or ordinary New Zealanders—to take an active role in maintaining that democracy and protecting the freedoms enjoyed by its citizens. For example, the government rules the nation through law making, the House scrutinises and passes laws, the Courts interpret and apply the laws, the news media inform the general public, and ordinary New Zealanders complete the circle by giving Government the power to govern via voting.

In a state of emergency, the balance of power amongst these different sectors shifts—largely in favour of the government—granting government sufficient power to appropriately respond to the crisis. This increases the risk of abuse of powers and, as a result the importance of each group attending well to their own role is amplified. In these moments, the functioning and integrity of our democracy, which plays a central role in maintaining core human rights and freedoms, loses many of the normal protections it has outside a state of emergency. In fact, while the immediate crisis and quest for survival necessarily dominates our focus for a time, it is essential that the long-term thriving of our society is not neglected.

The response of the New Zealand Government to the COVID-19 crisis, and especially the Level 4 lockdown, has highlighted constitutional shortcomings in our ability to do this well. Now that we can begin to look to the long term, it is time to review the Government’s response (especially the use of emergency powers), assess the strengths and weaknesses, identify important lessons, and consider possible reform. First, however, I will outline a few key aspects of the political response to the COVID-19 pandemic in New Zealand, before discussing why this is an issue that we should care about.

## 2. WHAT HAPPENED?

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The effects of the COVID-19 pandemic have frequently been called unprecedented, impacting the lives of New Zealanders and the functioning of our society in ways that we would not have imagined at the beginning of 2020. On 25 March 2020, this became especially clear when Prime Minister Jacinda Ardern, announced New Zealand’s second nationwide state of emergency.<sup>2</sup> This state of national emergency was extended six times before it was replaced by a National Transition Period on 13 May 2020.<sup>3</sup>

After the state of emergency was declared the Prime Minister and Cabinet had access to emergency powers through the Health Act 1956, the Civil Defence Emergency Management Act 2002, and the Epidemic Preparedness Act 2006.<sup>4</sup> As a result, the medical officer of health and police were granted permission to “declare any land, building, or thing to be insanitary, and prohibit its use for any specified purpose,” require people “to submit themselves for medical testing,” and “require persons, places, buildings, ships, vehicles, aircraft, animals or things to be isolated, quarantined, or disinfected,” among other things.<sup>5</sup>

The introduction of the four Alert Levels was central to the Government’s response to COVID-19. Alert Level 1 focused on the borders and containing the disease within New Zealand, Alert Level 2 reduced physical interaction due to increased risk of community transition, Alert Level 3 further reduced interaction and asked New Zealanders to remain at home for anything other than “essential movement,” and Alert Level 4, or lockdown, completely restricted personal movement including the closure of schools and businesses.<sup>6</sup> New Zealand spent a month in lockdown, two and a half weeks at Level 3, and a further three and a half weeks at Level 2, before returning to some semblance of normality at Level 1 on Monday 8 May 2020.<sup>7</sup> As the nation moved through the Alert Levels questions began to arise over the legality of the lockdown, the necessity of remaining in each of the Alert Levels for the time periods determined by the Government, and how best to ensure the long term survival of New Zealand—particularly through the seemingly inevitable economic crisis.<sup>8</sup>

The Epidemic Response Select Committee was established on 25 March 2020 to mitigate the suspension of Parliament in Level 4, and “consider and report to the House on matters relating to the Government’s management of the COVID-19 epidemic.”<sup>9</sup> The Committee was chaired by then Leader of the Opposition Simon Bridges. The majority of its members were from Opposition parties, who met regularly each week, in meetings that were available for the general public to watch online.<sup>10</sup>

In the final days of Alert Level 3 the COVID-19 Public Health Response Bill was passed through Parliament to establish “standalone legislation that provides a different legal framework for responding to COVID-19 over the next 2 years or until COVID-19 is sooner brought under control.”<sup>11</sup> At the Bill’s first reading in Parliament the Attorney-General David Parker stated that the legislation was “bespoke” and better able to enforce the “restrictions that have been placed on New Zealanders extraordinary freedoms and liberties” in the lower Alert Levels than the Health Act would be able to do.<sup>12</sup>

This access to emergency powers was necessary for managing and responding to the crisis well. Its use, however, is unusual. According to Andrew Geddis, a law professor at the University of Otago, “the last time the Government has held such power over New Zealand was in 1951 during the Waterfront dispute.”<sup>13</sup> In fact, together with Claudia Geiringer, a law professor at Victoria University of Wellington, Geddis notes that the Level 3 and 4 “lockdowns impose[d] the most extensive restrictions on New Zealanders’ lives seen for at least 70 years; perhaps ever.”<sup>14</sup>

### 3. WHY SHOULD WE CARE?

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While increasing the power available to a government, emergency powers also increase the risk that a government might abuse that power, and in so doing inappropriately extend its control over the nation. For example, the increase in power might go beyond what is strictly necessary for responding to the crisis. When this occurs the result is a significant risk to the proper functioning of democracy as well as to the freedoms enjoyed by the citizens of that democracy.

There are numerous examples throughout history of governments abusing emergency powers in a time of crisis. As Eliot Bulmer of the International Institute for Democracy and Electoral Assistance has said:<sup>15</sup>

*[M]any governments have used emergency powers inappropriately—needlessly prolonging or renewing states of emergency, and using emergency powers not to restore democratic normality but to bypass normal channels of democratic accountability, harass dissidents, rig elections, restrict the press, and ultimately set aside a nominally democratic constitution and impose a dictatorial regime.*

Already Hungarian Prime Minister Viktor Orbán has used the introduction of emergency powers in the battle against COVID-19 to further justify his autocratic tendencies and decree to indefinitely rule Hungary.<sup>16</sup> This has granted him the unlimited authority to “suspend parliament and all future elections,” as well as to imprison people for “violating a quarantine” and “spreading false information.”<sup>17</sup>

Even countries considered to be bastions of democracy, the United Kingdom and United States of America, have pushed aside limitations to emergency powers once they have been enacted. For example, their respective governments were granted emergency powers in the wake of 9/11 through the Prevention of Terrorism Act 2005 (UK) and the Patriot Act 2001 (USA).<sup>18</sup> The sunset clauses included in these Acts, however, were significantly extended so that “many of the most controversial provisions of [the Patriot Act] are still in force today, despite the fact they were originally due to expire on December 31 2005.”<sup>19</sup> The sunset clause of the Prevention of Terrorism Act was also extended the following year.<sup>20</sup> As a caveat to this point, it is worth noting that in some cases, this extension to sunset clauses is necessary for the extended period of emergency.

Whether sunset clauses are extended or not, however, research suggests that an increase in the range and types of powers granted to governments during a state of emergency are not always revoked or retracted when the emergency has passed, and “almost invariably lead to strengthening of the executive branch at the expense of the other two branches [of the legislature and the judiciary].”<sup>21</sup> Or, as Senior Law Lecturer at the University of Birmingham Alan Greene puts it, “emergency powers have a worrying tendency of becoming permanent.”<sup>22</sup>

With the additional risks that these powers bring, it is essential that there are checks and balances in place to mitigate this risk. In fact, while additional emergency powers might be necessary for responding to a crisis, Geddis and Geiringer note that “no matter how ‘necessary’ these [emergency powers] may be, we should expect such restrictions to have a clear, certain basis in law and be imposed through a transparent and accountable process.”<sup>23</sup> That is, any use of emergency powers should:

- Have a secure and certain legal basis,
- Ensure there is clarity in the legal basis so that there is minimal uncertainty and ambiguity,
- Be limited to only those things which are necessary for protecting public safety and health,
- Be transparent, and
- Be subject to careful and rigorous independent scrutiny by parliament and the public.

This is especially important for the long term integrity and health of our democracy—even if our current leaders have the best intentions, precedent can be set for future leaders who might not be so careful or have such noble intent. Our constitution must be robust enough to protect us in the future as well as the present.

There is no evidence to suggest that New Zealand is on its way to becoming an autocracy. The use of emergency powers in New Zealand in response to the COVID-19 pandemic, however, have shown that there are weaknesses in both the current legislation that facilitates the use of emergency powers, and the broader culture of constitutional checks and balances that should protect us from any abuse of power. Abuse of power can be intentional or unintentional and we must protect against both. In the interests of efficiently responding to the crisis at hand—in this case responding to the economic and public health of the nation—the importance of constitutional checks and balances limiting emergency power can be forgotten, missed, or ignored.

## 4. HOW SHOULD WE RESPOND?

The risks inherent to the use of emergency power make it essential that we answer the question of how we might best respond. Citizenship carries both rights and responsibilities, and therefore every person who values

democracy has a responsibility to protect democratic processes and institutions in the face of multiple threats. So we must ask:

- What are the appropriate roles for the three branches of government (the executive, legislature, and judiciary) as well as the fourth estate and civil society in the context of a national emergency like the COVID-19 pandemic?
- What are the lessons we can learn from this experience?
- What reforms might assist in better protecting democratic values and practices for the future?

Each of the following sections considers these questions by discussing a particular sector’s designated role, outlines a few descriptive (rather than normative) examples of how that sector has responded to the COVID-19 state of emergency thus far, and finishes with a list of recommendations that would help each sector to strengthen and prepare our constitution for future emergencies.

### 4.1. The role of the executive

As described by the Ministry of Justice, “the executive consists of ministers (both inside and outside Cabinet) and government departments [including the public service]. The role of the executive is to decide policy, propose laws (which must be approved by the legislature) and administer the law.”<sup>24</sup> In a state of emergency, these responsibilities are increased and the executive must declare, or propose a state of emergency and, as David McGee’s well-known guide to the rules and procedures of parliament explains, they step in “immediately to respond to an emergency, over and above a local or regional response.”<sup>25</sup> In order to respond well and effectively the executive can draw on additional emergency powers available to them through legislation like the Civil Defence Emergency Management Act 2002, utilising “a temporary concentration of power [...] at the expense of the legislature.”<sup>26</sup> This is because:<sup>27</sup>

*Emergency situations may require concentrated and decisive action, for which the executive is better suited than the legislature. Many constitutions therefore enable the executive, during an emergency, to take actions—including issuing orders having the force of law—which might otherwise be the legislature’s responsibility.*

As a result of this additional power and responsibility, there is an increased risk of abuse of emergency power by the executive. Therefore, the executive should minimise restrictions to the fundamental freedoms of New Zealanders, balance a sufficiently speedy response to the crisis with the need for carefully considered legislation, and increase the priority for government transparency and accountability.

#### *4.1.1. Restricting fundamental freedoms*

The additional powers of the executive during a state of emergency allow for the restriction and suspension of important human rights and freedoms—such as freedom of movement and freedom of assembly—that would otherwise not be tolerated. While governments must have the legal powers and capacity to respond appropriately and effectively to any emergency, any restriction or suspension of fundamental freedoms should only be temporary. As the Legislation Design

##### *Box 1: Restricting fundamental freedoms in the COVID-19 pandemic*

- Freedom of movement, association and assembly were curtailed as a result of quarantining or isolation, which in turn restricted the freedom for religious groups to congregate and worship.<sup>29</sup> Government lawyers provided advice to the Acting-Attorney General Andrew Little on whether the restriction of these rights in the COVID-19 Public Health Response Bill was consistent with the New Zealand Bill of Rights Act 1990.<sup>30</sup> Government lawyers also provided advice to the Attorney General David Parker on all other bills passed in relation to the COVID-19 response.<sup>31</sup> When a state of emergency is declared, however, similar Bill of Rights consistency statements are not required or published.
- Privacy rights have also been discussed in Singapore, the United Kingdom, and Australia, with concerns raised about the introduction of contact tracing apps on phones.<sup>32</sup>

and Advisory Committee notes, “It is often said that Parliament can legislate to do anything. Yet this does not mean that it should, particularly where human rights or fundamental constitutional principles are affected.”<sup>28</sup> In a state of emergency we must be careful to ensure these rights and freedoms are not forgotten or passed over in favour of short term successes.

#### *4.1.2. Avoiding rushed legislation and unintended consequences*

By their very nature, emergencies require prompt responses. That is, “when the public safety is seriously threatened, there may be a need for quick and decisive action that cannot, perhaps, wait for the deliberate pace of ordinary constitutional rule.”<sup>33</sup> Legislation is at its best, however, when it is carefully considered and has been through the procedures that were designed to ensure multiple voices and sectors can consider the impact of the legislation’s operation. In fact, in their ten principles of good law making, Claudia Geiringer, Polly Higbee, and Elizabeth McLeay from Victoria University of Wellington name “sufficient time and opportunity for the adequate scrutiny of bills” as their second principle.<sup>34</sup> They go on to say that government intentions should be “made public so that all the relevant issues and implications of bills can be considered carefully,” and that “Bills should proceed at a measured pace through the legislature and there should be opportunity for submissions through committee consideration of bills.”<sup>35</sup>

In an emergency then, the executive and its advisors are put in a difficult position—trying to make prompt and effective use of existing emergency powers and discerning whether new emergency powers are required, all while adhering to due process to avoid mistakes. Sascha Mueller, Senior Law Lecturer at the University of Canterbury, has recognised that emergency legislation “is passed rapidly and in response to some crisis or another, without proper consideration as to how it affects the constitutional order as a whole and whether it does so appropriately.”<sup>36</sup> Therefore, she goes on to suggest that “for every bit of power that is shifted to a state actor, appropriate safeguards need to minimise the scope for misuse of those powers.”<sup>37</sup> While it is difficult to allow time to properly consider emergency legislation, it is important to find that balance.

As a result, some constitutions expressly prevent any constitutional change during a state of emergency. Elliot Bulmer of the Institute for Democracy and Electoral Assistance explains that a central reason for this prohibition is that it can lead to “hasty decisions [...] that address current fears and concerns but neglect longer-term interests in ways that may ultimately be harmful for democracy.”<sup>38</sup> In fact, if constitutional change does take place in a state of emergency, Bulmer recognises that it increases the risk of misuse of power. That is, constitutional change can result in changes to regulations of a state of emergency, which could also include extensions to a state of emergency, “or otherwise open the way to misuse of power.”<sup>39</sup> Therefore, while New Zealand does not have an entrenched justiciable constitution, the importance of carefully considered policy changes, even with the lure of rushed legislation that attempts to quickly manage a crisis, must be remembered and even increase in importance during a state of emergency.

### *Box 2: Rushed legislation in the COVID-19 pandemic*

During New Zealand’s lockdown the Government accidentally introduced and passed the wrong piece of legislation, which “accidentally [brought] into law a multi-billion dollar loan scheme.”<sup>40</sup>

#### *4.1.3. Transparency and accountability*

In her 2016 report to the House of Representatives, former Auditor-General Lyn Provost stated that:<sup>41</sup>

*Accountability is an important element of good government. It is about the relationship between the State and its citizens, and the extent to which the State is answerable for its actions. The concept of accountability refers to the legal and reporting framework, organisational structure, strategy, procedures, and actions to help ensure that any organisations that use public money and make decisions that affect people’s lives can be held responsible for their actions.*

Or, as Claudia Geiringer, Polly Higbee, and Elizabeth McLeay explain, “transparency is a democratic value in its own right. MPs and citizens alike depend on the

legislative process being conducted in an open and accessible way.”<sup>42</sup>

On a day-to-day basis, the government and its advisors provide accountability and transparency for their actions through a series of reporting requirements and questions. When the country is in a state of emergency the executive have an increased ability to make swift decisions that will impact the lives and functioning of New Zealanders, and therefore, the importance of these reporting requirements, for both the Cabinet and public servants, is greater than at any other time. That is, maintaining and prioritising accountability measures and processes reduces the potential for any concerns from the public about the decision-making process and management of the crisis, and reassures the public that the government is not abusing its power and is worthy of their trust.

Proper accountability and transparency also requires public servants and government ministers to maintain their appropriate roles and relationships. As the administrative arm of the executive, public servants “are expected to offer ministers free, frank, and fearless advice.”<sup>43</sup> Ministers can then make policy decisions based on that advice. Public servants, however, should not be expected to “express personal views on [government policies], or respond publicly to criticism of them.”<sup>44</sup> Rather, it is the role of the Minister to “stand up in the House and account to the public for the success or failure of their policies.”<sup>45</sup> Thus, in a state of emergency, it is essential for ministers to listen to the advice of the public service, utilise that advice in its decision making, and ultimately take responsibility for the decisions that have been made.

### *Box 3: Transparency and accountability restrictions in the COVID-19 pandemic*

- The Regulatory Impact Statement (RIS) from Treasury that accompanies Government decisions and analyse “the impacts of any changes, including an estimate of how much they’re likely to cost,” were temporarily suspended at the beginning of New Zealand’s lockdown.<sup>46</sup>
- As reported by *The Newsroom*, Government officials suggested the Official Information Act, described as a “prime means of accountability” by the Chief Ombudsman, also be suspended during lockdown.<sup>47</sup>
- On the afternoon of Friday 8 May 2020, and again on Friday 26 June, the government pre-emptively released the first of a large number of documents related to its decisions and response to COVID-19 (later termed the “Friday Data Dump”)—an approach unlikely to receive sufficient scrutiny.<sup>48</sup>
- During the lockdown period, then Minister of Health, David Clark, was rebuked for breaching lockdown rules. At the time Clark maintained his position due to the Prime Minister’s recognition that a Minister of Health is crucial in responding to a global pandemic, and the Director-General of Health fronted many of the press conferences that should have been fronted by the Minister to allow proper scrutiny from the legislature and news media.<sup>49</sup> The Minister later resigned from his position following criticisms of passing responsibility for border testing failures to the Director-General.<sup>50</sup>

## 4.2. The role of the legislature

The legislature, or House of Representatives has an important role to play in scrutinising, challenging, and holding the executive to account for their decisions.<sup>51</sup> This includes opposition parties and the backbencher members of parliament who are within the governing parties but are not members of the executive.

This responsibility remains when a state of emergency is declared and the executive manages the response to that emergency. As David McGee explains, “The House maintains its central role in holding the executive to account for the exercise of any emergency powers and its response to the emergencies generally.”<sup>54</sup>

### *4.2.1. Holding the executive accountable*

As the OECD explains; “the overarching purpose of parliamentary oversight is to hold government to account. While governments are directly accountable to voters at elections, in between elections it is the duty of parliamentarians to hold ministers and their departments to account on the public’s behalf.”<sup>52</sup> As a result, the legislature must “[highlight] issues of concern and ensur[e] that government is able to justify its actions to the public, or where that policy is deficient, forc[e] a change.”<sup>53</sup>

#### *Box 4: Government accountability in the COVID-19 pandemic*

- As former Chairperson Simon Bridges explained, the Epidemic Response Select Committee existed “with an opposition majority to scrutinise the government’s response,” and provided a key accountability measure for Government’s decisions while Parliament was suspended.<sup>55</sup>
- The suspension of Parliament removed one of the House’s methods of scrutinising and holding accountable the decisions of the Executive. Even with the establishment of the Epidemic Response Committee and the accountability it provided, the appropriateness of the suspension of Parliament has been questioned, suggesting that the business of the House should have been deemed an “essential service.”<sup>56</sup>
- The Government was criticised for the speed at which it shifted the COVID-19 response back to Alert Level 2, and in particular for the limited time allowed for proper scrutiny of the COVID-19 Public Health Response Bill. Chief Human Rights Commissioner Paul Hunt stated:<sup>57</sup>

*For weeks the Government has known that we would be moving to Alert Level 2. It has not allowed enough time for careful public democratic consideration of this Level 2 legislation. There has been no input from ordinary New Zealanders which is deeply regrettable.*

Moreover, Amnesty International New Zealand executive director Meg de Ronde said “there should have been better consultation and public scrutiny on the significant bill.”<sup>58</sup>

- At the beginning of lockdown, former Opposition Leader Simon Bridges was heavily criticised for his decision to drive to Wellington and lead the Epidemic Response Select Committee from Parliament rather than his home in Tauranga. His defence for this action was that as “leader of the opposition, I’ve got constitutional duties, I’m running a committee in extreme circumstances where there is no Parliament. I have to do that in the best way possible and it seems to me that does mean doing it in Parliament where I have the resources, where I can do it in a professional way, and I’m available to media.”<sup>59</sup>

### 4.3. The role of the judiciary

As described by the Ministry of Justice, the “role of the judiciary [which consists of all judges] is to interpret and apply the law.”<sup>60</sup> This includes ensuring not only that the general public are acting appropriately in response to the law, but also that the Government are acting in accordance with the law—especially in regards to their use of emergency powers.

#### *4.3.1. Interpreting the law*

When a state of emergency has been announced and the power available to the executive has increased, the courts have a unique position of power over the executive. In fact, Professor of law Frank Remington has explained that “[c]ourts have historically and no doubt will continue to assume responsibility for ensuring that governmental power is not abused to the detriment of the individual rights of citizens.”<sup>61</sup> The courts can test the legality of

the executive’s response to the state of emergency, and if necessary hold the executive accountable “if it acts outside the authority granted it by parliament.”<sup>62</sup> This generally involves a legal testing of the declaration, or in some cases the extension, of the state of emergency, as well as the exercise of emergency powers. While this judicial review grants the ability to test for any short-term abuse of emergency powers, the true purpose of this role is to maintain the long-term health of the constitution.

### Box 5: Interpreting the law in the COVID-19 pandemic

- Part way through New Zealand’s lockdown period, the legality of that lockdown was put into question. Law professors Andrew Geddis and Claudia Geiringer, for example, raised questions on “the legal status of Level 4 Lockdown rules.”<sup>63</sup> These are:<sup>64</sup>
  1. “Whether Cabinet has overstepped the mark in purporting to direct the country into lockdown,”
  2. Whether the notices issued during the lockdown go beyond the legal authority of the Director-General of Health, and
  3. Whether the notices issued during the lockdown were consistent with the Bill of Rights Act 1990.
- Nathan Batts, Senior Associate at Haigh Lyon, also argued that “restrictions on activity, along with the power to lock New Zealand into isolation and quarantine, may not be backed by legislative authority.”<sup>65</sup> The Prime Minister’s ruling and management of emergency powers in response to COVID-19 quickly reached the courts through two initial lawsuits (*A v Ardern* and *B v Ardern*) claiming that lockdown resulted in the illegal detention of the two accusers.<sup>66</sup> Justice Mary Peters ruled in favour of the Prime Minister, however, she did note that the second case raised two issues. First, “whether the terms of the order resulted in detention within the meaning of the law”, and second “whether [Director-General of Health Ashley] Bloomfield, Jacinda Ardern, and Director of Civil Defence Emergency Management Sarah Stuart-Black could establish the legality of ‘detention’.”<sup>67</sup>
- Former parliamentary law drafter, Andrew Borrowdale, filed judicial proceedings challenging the lawfulness of the lockdown orders issued under the Health Act as well as other aspects of the Government’s response to COVID-19.<sup>68</sup> Mr Borrowdale claims that the orders issued under the Health Act 1956 went beyond the scope provided for by that legislation and were therefore unlawful. These proceedings are to be heard by the High Court in Wellington at the end of July.<sup>69</sup>

#### 4.3.2. Apply the law

The courts also apply the law. Having interpreted the law, it ensures that the law is enforced, and that those who fail to act in accordance with the law receive the appropriate penalty. In a state of emergency this requires the courts to determine whether the executive have overstepped the lawful power available to them in their response to the emergency. This is because: “Judges decide on specific issues rather than abstract rules, [... and therefore, they are] better able to evaluate the necessity of the situation and the corresponding actions of the executive.”<sup>70</sup>

Similar to the role public servants play as essential contributors to the role of the executive, enforcement officers (generally police officers) are essential contributors to the role of the judiciary and are also responsible for administering the law. As Professor Frank Remington has explained:<sup>71</sup>

*To a major extent, responsibility for deciding what laws are to be enforced under what circumstances must be left to the police. The judge gets the case only after there has been an arrest and prosecution. He can exercise some influence by indicating what he deems to be instances of overzealous enforcement, but he is in no position to review instances in which no enforcement takes place at all.*

As a result, it is essential that laws are clearly understood so that enforcement officers can enact these as intended and appropriate in the circumstances.

### *Box 6: Applying the law in the COVID-19 pandemic*

Daily press conferences with the Prime Minister and a range of public servants (including the Director General of Health and Police Commissioner) or the Minister of Finance were regularly utilised to explain the new powers available to the Executive and New Zealand police throughout the COVID-19 lockdown.<sup>72</sup> At times, however, this resulted in a lack of clarity as to what was required of the New Zealand public and what the police would and would not enforce.<sup>73</sup> For example, while it was explained that New Zealanders were allowed to leave their homes for walks and exercise in the local area during Alert Level 4, in practice this led to inconsistency and questions about the distances people were allowed to travel.<sup>74</sup>

## 4.4. The role of the fourth estate

Thomas Carlyle points to Edmund Burke in discussing the role of the fourth estate. He writes, “Burke said there were Three Estates in Parliament; but in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.”<sup>75</sup> While Burke could not imagine the changes that technology has brought since those words were first written, this fourth estate of the news media continues to play an essential role in sustaining democracy. They are an important source of information, providing analysis, explanation, and scrutiny of the executive’s decisions, the activities of parliament, and commentary on society more broadly.

### *4.4.1. Provision of information, analysis, explanation, and scrutiny*

The news media are key to proper scrutiny and analysis of the government’s decisions. They can ask questions that others might have missed, challenge mistakes and explanations, and then analyse and explain for the general public what it all means. Moreover, they can highlight any issues that might have been missed by someone not immersed in the political landscape. Often this work is assisted and supplemented by academics and experts who can comment and navigate the details of what is happening. This provides an essential balance of power between politicians and the general public because it makes broader democratic participation possible, sometimes described as “a democratic mission to inform, represent and involve citizens.”<sup>76</sup>

This role of the fourth estate also increases in importance in a state of emergency. That is, the news media ask questions of the executive’s decisions and decision making process, provide analysis on what that might mean for New Zealand, and highlight any issues that may arise from the actions taken by the government. In so doing, the general public are best able to remain well-informed of the decisions that are being made on their behalf and can determine whether they agree and if they believe the likely limitations to their freedoms are justified.

To provide sufficient analysis and explanation, however, news media must include a range of viewpoints, highlighting both the strengths and the weaknesses of the governments approach. Without a variety of views civil society is significantly limited in carrying out its own role. As Geoff Kemp, lecturer in political studies at Auckland University has said, “Deliberation as the considered judgement of pros and cons also ultimately takes place within the minds of the public, a process similarly enhanced by the provision of diverse viewpoints, credible information, and imaginative experience.”<sup>77</sup>

### *Box 7: News media analysis, explanation, and scrutiny in the COVID-19 pandemic*

- Steve Elers, Senior Lecturer in the School of Communication, Journalism, and Marketing at Massey University, raised concerns that the media were not sufficiently challenging the Government or holding them to account during the lockdown period. He said, “Media seem far too chummy with the Prime Minister instead of fulfilling their role as a watchdog for society.”<sup>78</sup>
- The news media frequently consulted academics and experts throughout the lockdown period to explain the health and scientific realities of the virus, the potential economic impacts, as well as the legal implications of the Government’s response.<sup>79</sup>
- Expert and academic opinions were characterised as “unhelpful” and “contrarian” when they questioned the Government’s response to COVID-19, rather than dispassionately reported as potential policy alternatives.<sup>80</sup>
- In comparison to the daily press conferences which allowed media to directly ask questions about the decisions that had been made, the Prime Minister’s use of Facebook Live to discuss her responses to COVID-19 sidestepped the ability of news media to directly scrutinise and challenge those remarks as they were being made.<sup>81</sup>
- In a positive example, the Prime Minister opted to maintain her Tuesday morning media interviews throughout lockdown, providing space for the media to question and challenge her decisions and actions, even though she had no legal obligation to do so.

## 4.5. The role of civil society

The term democracy is derived from the Greek words *demos* and *kratos*, meaning “power to the people.”<sup>82</sup> For democracy to work as intended, or as Sascha Mueller puts it, “for political constitutionalism to effectively control excessive government powers, it requires conscientious legislators and a well-informed constituency.”<sup>83</sup> The full participation of all sectors of society is required. Civil society or members of the public, therefore, have an essential role to play in protecting democracy from any threat that emergency powers might pose by taking an active role in its trust of government, and then participating in the parliamentary process.

### 4.5.1. Trust in government

Participating fully in the democratic process as a member of the general public or civil society requires trust in government and its parliamentary processes.<sup>84</sup> Research from the Institute for Governance and Policy Studies (IGPS) found that “trust in the government to do what is right for New Zealand has risen between 2016 and 2018 and 2019 to a level equal to trust in neighbours [the group New Zealanders placed the most trust in].”<sup>85</sup> While it’s fascinating to see that New Zealanders generally

place such high levels of trust in government and its decision making process, it’s important that healthy levels of distrust and questioning are also maintained to ensure that high levels of trust do not become blind faith. This requires public engagement, an awareness of the decisions and approaches taken by the government, and consideration of the strengths and weaknesses of those decisions before deciding whether or not to agree with them. In a state of emergency, when ministers are asked to make a lot of decisions very quickly, this is especially important.

### *Box 8: Trust in the Government during the COVID-19 pandemic*

- Early polling on the response of New Zealanders to the actions and decisions of the Government found that “public support for the official New Zealand response to the COVID-19 outbreak remains high, and well ahead of the world’s richest countries.” In fact, 88 percent of respondents “trust the government to make the right decisions on COVID-19,” in comparison to 59 percent among G7 countries.<sup>86</sup>
- After returning to Alert Level 1, demographically weighted polls by Stickybeak for *The Spinoff* found overall support for the government response fell to below 75% for the first time.<sup>87</sup> As editor Toby Manhire suggests, however, “the Labour-led Government can draw relief from a result showing three in four New Zealanders continue to back the response.”<sup>88</sup>

### *4.5.2. Participation*

Engagement in the political process, even in seemingly simple acts like voting, are central to sustaining a democracy. In fact, political scientists are often quick to despair at any downward trends in voter turnout.<sup>89</sup> This is because “a high level of public involvement in democracy gives legitimacy to government policy and the level of voter turnout can impact the content of policy.”<sup>90</sup> As political scientist Bronwyn Hayward states, “public participation often produces better decisions.”<sup>91</sup> This is largely because, “local communities can contribute valuable local knowledge or new perspectives.”<sup>92</sup> While we would not suggest that public participation requires civil society to write legislation, actions like making a submission to a parliamentary select committee, and voting at general, local, and by-elections are key to democratic participation.

Of course, when in a state of emergency many of these traditional pathways for civic participation may be limited or even unavailable. Thus, while the importance of proper engagement increases when so much is at stake, the focus of this engagement will likely shift to the local community. For example, it might include conversations with friends and family about the impact of the executive’s response, ensuring the survival of local community organisations and institutions, and in some cases even making public comments on behalf of the local community when impacted by the executive’s response.

### *Box 9: Public participation in the COVID-19 pandemic*

When the re-opening of schools was announced for some students, prominent headmasters and teachers’ unions publicly decried the decision, aware of the leadership that they held and the impact their opinion would have.<sup>93</sup>

## **5. WHAT REFORMS SHOULD BE MADE?**

Emergencies are a significant test for the constitution and its ability to protect against the risks posed to a democracy. During the COVID-19 pandemic precedent was set that will assist future governments responding to crises, however, weaknesses in the New Zealand constitution also arose in the failure of sufficient checks and balances to the Government’s access to emergency powers. This is not to say that a written constitution would be preferable—as the pandemic has shown, a written constitution is unable to anticipate the specific requirements of a crisis or the response required. And yet, this experience has shown that while these weaknesses did not result in disaster for this emergency, next time we might not be so lucky. A different government had the potential for real damage.

This paper recommends a series of reforms to strengthen our democratic practices and better protect our democratic values for the next emergency. In particular we recommend that, following the example of the Christchurch earthquakes and terror attack, a royal

commission of inquiry be appointed as an important method for learning from the experience of the COVID-19 pandemic and resulting state of emergency. More broadly, these recommendations are a collection of what, in most cases, should be business as usual for different sectors to remind us of the responsibilities each democratic citizen holds in responding to an emergency.

## 5.1. Recommendations to assist the executive in protecting democratic values and practices

**Recommendation 1:** *The Executive should increase the transparency of their response to COVID-19 and bring forward the reinstatement of Regulatory Impact Statements, and revise the approach of the “Friday data dump” so that it can better ensure public accountability and accessibility to the Government’s decision-making process.*

Regulatory Impact Statements (RIS) are an important element of Government accountability. While the March 2020 decision to suspend these was temporary (with the intention of reinstating the RIS on 31 August 2020) the return to Alert Level 1 on 8 June 2020 suggests that this should have been brought forward and that the Government should reinstate the RIS immediately.<sup>94</sup>

Moreover, while the “Friday Data Dump” was described by the Government as “proactively released information,” this would be better achieved in smaller, more frequent amounts earlier in the week, with embargoed copies available to the news media so that they are best able to properly hold the Government accountable for the decisions that have been made under emergency power.<sup>95</sup>

**Recommendation 2:** *When restricting the freedoms of New Zealanders in response to an emergency the executive should increase the transparency of the decision-making process by providing, and making publicly available, legal advice on the consistency with the Bill of Rights Act.*

While the Attorney General already receives advice on the consistency of bills being considered by Government with the Bill of Rights Act 1990, this process is not mandated when a state of emergency is declared unless that declaration is the result of a new bill. Such advice is especially important for determining whether restrictions

of the freedoms of New Zealanders are legitimate, and therefore should be provided by the Chief Legal Counsel to the Attorney General every time a state of emergency is declared.

**Recommendation 3:** *Parliament should pass legislation to ensure that the Official Information Act cannot be suspended or over-ridden during a state of emergency.*

The Official Information Act is key to the transparency of New Zealand’s Government. It grants the New Zealand public the opportunity to request and receive official information “in the making and administration of laws and policies.”<sup>96</sup> As stated in the Act’s purpose, it exists “to promote the accountability of Ministers of the Crown and officials.”<sup>97</sup> During a state of emergency, when the need for this accountability is heightened, it is essential that these are not pushed aside—even if this comes from a desire to remove unnecessary administrative tasks when time-poor officials are focused on responding to a crisis well. Therefore, legislation is required to ensure this is not forgotten or ignored in future emergencies.

**Recommendation 4:** *Elected representatives should front media when announcing and answering for policy decisions.*

There is an important distinction between politicians and public servants in a democratic society. Public servants provide advice—advice that is importantly apolitical in nature—while politicians make decisions based on that advice and are then accountable for those choices at elections. While senior officials have an important role in implementing and explaining policy decisions, politicians should take ownership of those decisions and front the media to announce them so that they can be appropriately scrutinised. The Director-General of Health and some other senior officials, however, are statutory officers and when using their independent statutory powers it is important for them to also be answerable to parliament and the news media.

**Recommendation 5:** *The Auditor-General’s work to assess the effectiveness of the accountability measures in the public service should continue and be prioritised.*

In 2016 the Auditor-General noted that “as far as we know, no policy agency has ever assessed whether the individual arrangements add up to a system that is comprehensive and effective for the people it services. Based on this work and our own experience of trying to find a source of help for people who contact my office, this would be a worthwhile exercise.”<sup>98</sup> Recognising the increased importance of these accountability measures when in a state of emergency, we echo the exhortation of the Auditor-General and acknowledge the ongoing work of their office to improve accountability measures in the public service.<sup>99</sup> While there is currently no suggestion that this will stop, the COVID-19 pandemic and resulting state of national emergency has highlighted the importance of both prioritising and continuing this work to assess and improve accountability measures in the public service.

**Recommendation 6:** *The executive should ensure that all emergency legislation includes a sunset clause, and parliament (or the House) should ensure that these clauses are adhered to.*

When a sunset clause is included in legislation, it sets a date and time for when that piece of legislation will expire. In the case of emergency powers, these are important tools for ensuring those powers expire when they are no longer necessary. This requires the executive to hand back the additional power they have been granted under the emergency legislation and return to their traditional roles and responsibilities. To protect against abuse and misuse of that power then, it is important that sunset clauses are included in all emergency legislation. As outlined above, however, sunset clauses have a history of being extended beyond what was initially imagined and therefore the legislature should act in their role as a check against unnecessary extensions. This could include requiring a supermajority vote in parliament to bypass sunset clauses and extend emergency powers.

**Recommendation 7:** *The executive should make sure there is a shared understanding of policies among the different branches of government to ensure that there is a consistency in official information provided to the public.*

In a state of emergency, when information is changing quickly and relied upon by the general public, it is essential that official information has terms and definitions that are clearly and consistently understood throughout New Zealand. This is particularly important when it regards actions that have become prosecutorial offences.

## 5.2. Recommendations to assist the legislature in protecting democratic values and practices

**Recommendation 8:** *The standing orders of the House should include a plan for parliament to continue to sit in a state of national emergency so that we can avoid the suspension of parliament in future.*

As we have discussed, a sitting parliament is a key method for the legislature to hold the executive to account. While there is a “formal contingency plan” that includes relocation in the case of “a catastrophic event in Wellington,” the COVID-19 pandemic and resulting suspension of Parliament has shown this is insufficient.<sup>100</sup> Further plans which allow the House to sit even in the event of a nationwide lockdown are necessary. This may require harnessing technology and negotiating security concerns so that the House can sit virtually.

**Recommendation 9:** *The standing orders of the House should require the opposition to continue during a state of emergency.*

While the legislature is distinct from the executive—particularly when a state of emergency is in place—the importance of that role increases when the executive possesses additional emergency powers. Therefore, the continued work of the House should be required by law (albeit, in some instances in a different format) during a state of emergency.

**Recommendation 10:** *The standing orders of the House should formally protect the essential position of leader of the opposition in a state of emergency.*

The leader of the opposition plays a key role in the House working as an effective safeguard on the additional power that a state of emergency grants to the executive. This responsibility then, should be formally elevated to ensure that it cannot be ignored or made difficult for the leader of the opposition to carry out. This could include: requiring the leader's "consent to any motion to approve or extend a state of emergency," inviting the leader "to receive confidential high-level briefings on the management of the emergency response in order to build informal cross-party support for intended courses of action," or even to formalise "an obligation to keep the leader of the opposition informed."<sup>101</sup> This might also include requiring the leader of the opposition to remain in Wellington (or wherever the executive is meeting) to ensure availability for participation and prompt responses to announcements from the government.

### 5.3. Recommendations to assist the judiciary in protecting democratic values and practices

**Recommendation 11:** *A Royal Commission of Inquiry should be appointed to begin an investigation into the actions taken by the Executive in responding to COVID-19.*

A Royal Commission of Inquiry is reserved for the most serious issues in New Zealand governance, investigating "matters of great importance and difficulty."<sup>102</sup> It is therefore an appropriate method for investigating the Government response to COVID-19, particularly following the precedent of inquiries into the Canterbury earthquakes and the Christchurch terror attacks.<sup>103</sup> This is an important opportunity to evaluate the Government's actions, because as Wellington Lawyer Linda Clark has said, "how well we learn from our present response matters a great deal."<sup>104</sup> As suggested by Otago University Academic Professor Nick Wilson and colleagues, this inquiry could consider the effectiveness and appropriateness of the Government's actions in responding to the pandemic, the social impacts on different communities around New Zealand, "the implications for how public health systems are organised and resourced," "the different health impacts" of the

pandemic, and "the long-term societal and economic impacts."<sup>105</sup>

### 5.4. Recommendations to assist the fourth estate in protecting democratic values and practices

**Recommendation 12:** *The government should ensure the news media has the necessary funding to secure the future of a diverse media landscape.*

An independent news media is key to sufficient scrutiny and analysis of the work and decisions of parliament. The survival of news media, however, is an essential prior concern, and with the heightened financial difficulties of 2020 this has become a significant concern for many. Therefore, the Government should encourage actions, accommodation for sustainable business models and funding that will allow for the survival of different outlets, while ensuring diversity and independence remain.

**Recommendation 13:** *Politicians should avoid the use of social media to announce, explain, or justify significant policy decisions, ensuring commensurate space for news media scrutiny of those announcements.*

Social media is a powerful tool for politicians to connect with the general public and discuss policy decisions in a much more intimate way. This is not inherently a bad thing, however, having any initial announcement made on social media obscures the ability of the news media to scrutinise and ask questions on behalf of the public, especially when policies are announced or discussed.

**Recommendation 14:** *The news media should ensure that a range of viewpoints are published and expressed in their outlets.*

To effectively participate in the decisions being made by the executive, it is essential that the general public hear from a range of viewpoints or opinions. For this to occur, however, we largely rely on the news media to publicise views and analysis from a variety of perspectives.

**Recommendation 15:** *The Prime Minister should maintain regular media appearances, like the Tuesday morning media interviews, especially throughout a state of emergency.*

Regular media interviews with the Prime Minister allow space to focus on a particular issue, ask difficult questions, and generally scrutinise the decisions that have been made. In turn, the Prime Minister is given the opportunity to answer those questions, share the reasons for a particular decision, correct something that may have been misinterpreted, and generally provide the rationale behind the decisions that have been made. This practice assists in providing the necessary information for public accountability.

## 5.5. Recommendations to assist civil society in protecting democratic values and practices

**Recommendation 16:** *At every stage of the political process, particularly in a state of emergency, civil society should be actively engaged and participating where appropriate.*

In a state of emergency the New Zealand public should take every opportunity to engage with and participate in the political process. Of course, during a state of emergency the ability to participate in the process is often restricted by the nature of the emergency. Participation, however, can simply include paying attention to the decisions and actions of the government, discussing this with friends and family, and getting in touch with their local MP.

Institutional authorities, such as unions, academics, religious leaders, medical practitioners, and legal professionals should also recognise their particular responsibility and use their own platforms to highlight concerns that might not otherwise be heard. And where possible and appropriate, the executive should ensure that opportunities for civil society to engage remain. For example, sufficient time should be provided for the general public to submit to a select committee. However, the New Zealand public should not simply rely on the executive to provide this space to participate in the democratic process and should take initiative to ask when they believe their voice needs to be heard.

## 6. CONCLUSION

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Emergencies will inevitably come, and while they may be unexpected it is essential that we are always as prepared as possible to respond well. Governments in particular, need the ability to respond to emergencies promptly and effectively so that public interest, and especially public health and safety, is protected. The emergency powers that assist in this, however, can also constrain some democratic processes and restrict certain human rights when in use. This, in turn, poses significant risks to the health of our democracy.

Following the COVID-19 pandemic, the response of the New Zealand Government highlighted the importance of checks and balances to emergency powers, accountability when managing the restriction of fundamental freedoms, and careful decision-making, even in the midst of a crisis. The government, however, are not the only group responsible for providing protection from the risks of an emergency on the long term flourishing of a democracy. The legislature, judiciary, fourth estate, and civil society also play key roles in mitigating the risks of emergency powers. We hope that the recommendations in this paper inspire all New Zealanders to better respond to these key roles and responsibilities, because now is the time to prepare for the future and attend to the “great responsibility” we have been given.

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