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RECOVERING FROM A WORST-CASE SCENARIO: SHOULD NEW ZEALAND IMPLEMENT A DISASTER RECOVERY ACT?

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TABLE OF CONTENTS

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ANDRE KNOPS*

ABSTRACT

In response to the February 2011 earthquake, Parliament enacted the Canterbury Earthquake Recovery Act. This emergency legislation provided the executive with extreme powers that extended well beyond the initial emergency response and into the recovery phase. Although New Zealand has the Civil Defence Emergency Management Act 2002, it was unable to cope with the scale and intensity of the Canterbury earthquake sequence. Considering the well-known geological risk facing the Wellington region, this paper will consider whether a standalone "Disaster Recovery Act" should be established to separate an emergency and its response from the recovery phase.

Currently, Government policy is to respond reactively to a disaster rather than proactively. In a major event, this typically involves the executive being given the ability to make rules, regulations and policy without the delay or oversight of normal legislative process. In the first part of this paper, I will canvas what a "Disaster Recovery Act" could prescribe and why there is a need to separate recovery from emergency. Secondly, I will consider the shortfalls in the current civil defence recovery framework which necessitates this kind of heavy governmental response after a disaster. In the final section, I will examine how a Recovery Act could increase community resilience and how an Act could result in better outcomes.

I Introduction

The wide array of hazards New Zealand faces has transformed New Zealand's civil defence structures from rest homes for former military men to a professional responsive organisation.[1] Reducing risks, enhancing resilience, and responding to an emergency have all been well planned, rehearsed and practically applied over decades. Recovery, however, has been left behind.

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1 Robert Kipp "From Cold War to Canterbury: The New Zealand Experience in Emergency Management" (PhD thesis, University of Canterbury, 2016) at 93.

The Civil Defence Emergency Management Act 2002 (CDEMA) defines recovery as: "The co-ordinated efforts and processes used to bring about the immediate, medium-term, and long-term holistic regeneration and enhancement of a community following an emergency."[2]

Haas, Kates and Bowden identified that there is a sequential model of disaster recovery that stretches from the emergency period through to the end of long term reconstruction.[3] This model illustrates how there are multiple phases to recovery,[4] with differing needs and actions required.[5] These phases range from taking stock and evaluating the changed landscape through to the commemoration and betterment of the community beyond what existed prior. Evolving targets and goals and long operational periods means that there is a constant risk that, without the appropriate level of engagement and leadership, the recovery could be needlessly delayed or fail. All communities go through this cycle despite the recovery needs and issues of every community being different.[6] The key factor is time. Some incidents may only need to spend a short time within a phase whereas others may spend a month or more working within one of the four phases.

New Zealand's approach to civil defence is structured around the "4Rs". They are reduction, readiness, response and recovery. The disaster cycle has been studied for decades with the four-phase approach the latest iteration, first identified by Carr in the 1930s.[7] Considerable amounts of time are focussed on reduction and readiness. This often takes the form of identifying and ordering the remediation of earthquake-prone buildings,[8] marking tsunami and flood evacuation routes,[9] and regularly testing emergency signals such as tsunami sirens.[10] While these kinds of preparations may serve the community well in responding to a local emergency, it often is not enough for an authority to recover from a larger event.

[2] Civil Defence Emergency Management Act 2002, s 4.
[3] Eugene Haas, Robert Kates and Martyn Bowden *Reconstruction Following Disaster* (2nd ed, MIT Press, Cambridge Massachusetts, 1977) at 1–4.
[4] Defined as the emergency, restoration, reconstruction 1 and reconstruction 2 phases.
[5] Haas, Kates and Bowden, above n 3, at 4.
[6] In Haas, Kates and Bowden, above n 3, the Anchorage, Managua and San Francisco earthquake recovery experiences were surveyed, as well as the Rapid City floods.
[7] David Neal "Reconsidering the Phases of Disaster" (1997) 15 International Journal of Mass Emergencies and Disasters 239 at 241.
[8] Building Act 2004, Pt 2 subpt 6 and 6A.
[9] For example, the blue line project in Wellington indicates safe places for the public to evacuate to in the event of strong earthquake that could generate a tsunami.
[10] For example, in Christchurch the sirens are tested on the Sunday at the commencement and conclusion of daylight savings.

Historically, New Zealand has been reactive in enacting the necessary legislation and regulations to enable communities to recover and thrive. Reactive legislation, like the Canterbury Earthquake Recovery Act 2011, is drafted during or immediately after the emergency response when deliberations are clouded by the desire for efficiency and speed. The result is wide ranging legislation that grants extraordinary emergency powers and sidesteps normal legislative and administrative processes.

In a society that operates under the rule of law and its associated administrative processes, it should not be possible to cast this aside merely because of an earthquake or the desire to cut "red tape". Recovery periods are long, deliberative and administrative processes. The inclusion of recovery in civil defence legislation which focuses on speed, restoration and efficiency establishes an unwelcome public expectation that recovery should follow a similar pattern.

This paper will predominantly examine the Canterbury earthquake experience and how it has exposed deficiencies in planning for a worst-case scenario. With the known risks associated with the faults around Wellington, the Hikurangi Subduction Zone, the Alpine Fault and the volcanism in the North Island; there are a multitude of possible worst-case scenarios which could trigger a lengthy recovery similar to that of Canterbury. This paper will examine the nature of recovery, its place within the civil defence framework and whether recovery should be separated into a standalone Act. This will be split into three parts. Firstly, why recovery should be separated from emergency management. Secondly, whether deficiencies in the status quo warrant a "Recovery Act", before finally considering what a possible Disaster Recovery Act may achieve.

II Separating Recovery from Emergency

This section will canvass the need to separate the recovery phase from emergency management legislation. Recovery and emergency are two different activities that require different powers, timelines and responses. Currently, it is common for decision making during the recovery phase to be fast tracked for political expediency rather than actual need.[11] What can result is the confusion of physical reconstruction with the overall recovery of the city and

[11] John Hopkins "The First Victim – Administrative Law and Natural Disasters" [2016] NZLRev 189 at 206.

the focus on outputs rather than outcomes.[12] To achieve a more holistic recovery that includes community engagement and empowerment and keeps recovery localised and not over politicised, legislative powers must be provided for in greater detail than current statutes provide. Failure to do so can result in an experience similar to the top down management style of the Canterbury Earthquake Recovery Authority (CERA), where recovery management was centralised and controlled. The policy direction and development for the majority of the recovery process was carried out by a small group of staff at the authority which was then communicated to others. This resulted in undesirable outcomes for the community.

A Avoiding Over Politicisation of Recovery

Any event of the scale of the Canterbury earthquakes in 2011 will naturally become political. The multitude of people and magnitude of the resources involved means all levels of government will be invested in the recovery. In Christchurch, the recovery governance arrangement quickly became adversarial as the structuring of CERA as a government department lead to Ministerial oversight and control. This made the Government responsible for whatever resulted from the rebuild. If the rebuild is a success, the incumbent government can claim responsibility and any political accolades. However, if the recovery fails then they are solely to blame.[13] As a result the Government sought to avoid failure and did this through control rather than collaboration.[14] It is important to ensure that national-level politicians are limited to continuing their pre-disaster functions as a Minister, rather than establishing new roles and powers for themselves through an authority like CERA. The current structure of the CDEMA is designed to facilitate community leadership in the recovery rather than centralisation[15] and this has been recognised as best practice internationally.[16]

The governance arrangements of a recovery will have substantial impact on the form and function that the recovery takes. While politicians will have a stake in the outcome of recovery decision making, it is imperative that the governance structure and framework is one that

[12] Laurie Johnson and Robert Olshansky *After Great Disasters: How Six Countries Managed Community Recovery* (Lincoln Institute of Land Policy, Cambridge (Mass), 2016) at 5, 26; and Laurie Johnson "Reflections on recovery: The Canterbury earthquakes within the context of other major disasters" (paper presented to Canterbury Earthquakes Symposium, University of Canterbury, Christchurch, 30 November 2018).

[13] Barnaby Bennet "The Politicisation of CERA and the planning of new Christchurch" (6 May 2014) Freerange Press <www.projectfreerange.com>.

[14] Bennet, above n 13.

[15] Brenda Phillips *Disaster Recovery* (Auerbach Publications, Boca Raton, 2009) at 402.

[16] At 63.

involves meaningful community engagement and leadership. With a Recovery Act this could be best settled by legislating for the structure and framework that any recovery agency would work under. This would allow key stakeholders to be identified ahead of time and ensure that as the transition phase gives way to the recovery phase, there would be little doubt regarding how the recovery will be managed and where jurisdiction for recovery activities exists.

The Canterbury Earthquake Recovery Act (CER Act) is an example of how not having pre-existing recovery governance and administration organised can lead to unnecessary politicisation. The Act was based on the Queensland Reconstruction Authority Act 2011, which was enacted following major flooding.[17] Overall, there were many similarities between the two Acts.[18] As the recovery progressed the operation and interpretation of the Acts began to diverge. In particular, the two Acts fostered different relationships between central and local government which resulted in very different outcomes. When the Christchurch City Council did not endorse the proposed Land Use Recovery Plan, which changed land zoning to allow more housebuilding, the Minister threatened to utilise his powers to enact the plan regardless.[19] This shows how politicisation of the recovery can force a policy decision despite the powers within the Act not being utilised.

Although recovery laws are overseen and implemented by a legislature, the decision to adopt the CER Act by Parliament with its extraordinary powers and with few constitutional or otherwise special safeguards is alarming.[20] Putting such unbridled authority for such an extended period of time in the hands of a few key decision-makers may assist authorities to expedite decision making and action, but the cost to democracy and the constitution can be extreme. As shown in part two of this essay, the *Independent Fisheries* decision illustrates why there is a need for legislative controls to preserve administrative rules and processes during the recovery phase.[21]

[17] Gerry Brownlee "New authority will deliver for Canterbury" (press release, 29 March 2011).
[18] Elizabeth Toomey "Canterbury Earthquake Recovery Act 2011: Land and Resource Management Issues" in *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) 227 at 269. In particular, the local consultation process and structure of the decision-making process were replicated from the Queensland Act: Brownlee, above n 17.
[19] Gerry Brownlee "Disappointment over Land Use Recovery Plan hold up" (press release, 22 November 2013).
[20] Sascha Mueller "Turning Emergency Powers Inside Out: Are Extraordinary Powers Creeping into Ordinary Legislation?" (2016) 18 Flinders Law Journal 295 at 317.
[21] *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810.

By removing recovery from the legislation that regulates emergency response, the government and community can treat it as a separate event that has its own rules and administrative processes. The community's perception of the timelines involved in a recovery and its administrative processes can be easily warped by the rapid action of the emergency phase that preceded it. Politicians can use this to their advantage. As Hopkins found, "the false dichotomy of red tape vs action" can lead to imperfect outcomes made under administratively questionable powers.[22] Furthermore, the inherent mass politicisation of a recovery can amplify feelings of disenfranchisement between the populace and the government. Under the status quo, when a recovery body is established, community attachment to decision making can be removed. This may switch the benchmarks of the recovery's success towards the speed of reconstruction of tangible and physical things rather than a more rounded assessment of community well-being.[23] Politically, this is beneficial to the government as voters can watch the progress of construction from the sod turning through to ribbon cutting. The Christchurch recovery carried a narrative of steady progress and projection despite significant issues with insurance, administration, repairs to homes and businesses and legal compliance.[24] Listening to the politicians, it would seem like the recovery was an unrivalled success while listening to residents may result in a less cheerful response.

B Community Engagement and Empowerment

Recovery decisions after a major event will shape the look and feel of an impacted area for decades. Speedy decisions are not automatically good decisions. Utilising legislative powers granted by rushed emergency legislation to knock down some "old dungers" shows action but does not necessarily show forethought.[25] Removing an earthquake-damaged building creates a level of finality to the land it sits on. With the building removed, there can be no discussion on whether it would be better for the community to restore and repair their links to the past. Additionally, the block by block demolition of the Christchurch city centre created vast barren lots that provided a boon for the car parking industry, but no real

[22] Hopkins, above n 11, at 206.
[23] For example, in Christchurch the media often focused on measuring the progress of the recovery around "anchor projects" that included a new library, convention centre and stadium.
[24] Greg Simons "Projecting failure as success: Residents' perspectives of the Christchurch earthquakes recovery" (2016) 2 Cogent Social Sciences 1 at 6–8.
[25] "Editorial: The price of heritage" *The Press* (online ed, Christchurch, 28 September 2011) <www.stuff.co.nz>.

motivation for the plans for recovery to move from paper to practice. In Christchurch, the loss of building capacity created a snowball effect, whereby some businesses could not resume their normal operations and so faced greater economic turbulence, which caused uncertainty in deciding to relocate or rebuild.[26]

Resilient and strong communities are fostered by the knowledge that a community is empowered to make its own decisions and be represented in matters of interest to it.[27] Communities that have a more active hand in their rebuild will foster a greater level of resilience and support for the recovery.[28] If a community is supportive and more involved in a recovery then they would be more likely to accept the longer timeframes that a properly administered recovery may entail compared to the employment of emergency legislation. Without the support and trust of the community, the recovery may fail.[29]

A Disaster Recovery Act could fix the imbalance by establishing the levels of community engagement and consultation required during the recovery. This imbalance may be solved by delivering recovery through local government, which can ensure local participation and administration. The recovery can start immediately by avoiding the need for setting up agencies like CERA and Ōtākaro and granting the necessary powers to local decision makers and local authority officials. This avoids central government interference, protects administrative processes and keeps recovery leadership local and focused which has been a target of the CDEMA[30] and is accepted as general best practice.[31]

C Keeping Recovery Local

A benefit of greater involvement of local authorities is the institutional knowledge they hold. When CERA was established, it was mainly staffed by secondments from other central

[26] The New Zealand recovery capacity experience is somewhat unique as the high rates of insurance meant that many buildings were demolished, not due to them becoming unsafe in the earthquake, but because of insurance settlements.

[27] *Focus on Recovery A Holistic Framework for Recovery in New Zealand* (Ministry of Civil Defence & Emergency Management, Wellington, 2005) at 7.

[28] A Winstanley, M Hepi and D Wood "Resilience? Contested meanings and experiences in post-disaster Christchurch, New Zealand" (2015) 10 Kotuitui: New Zealand Journal of Social Sciences 126 at 131.

[29] Phillips, above n 15, at 402.

[30] At 401.

[31] For example: Johnson, above n 12; Hamish Dobbie "Speed of Recovery" (Canterbury Earthquake Symposium, University of Canterbury, 30 November 2018); Haas, Kates and Bowden, above n 3, at 278–281; and Clancy Phillipsborn "The Disaster Recovery Process" in *Holistic Disaster Recovery* (Public Entity Risk Institute, Fairfax (Virg), 2005) at ch 2.

government departments and ministries. Many of these people were likely experienced in their field but may not have held local knowledge about Christchurch.[32] This is particularly concerning, given it is the council plans and strategies that were overruled and amended by the Minister. After the disestablishment of the recovery authority, the council is left to administer whatever is left. Rather than a gradual withdrawal of central government intervention as local recovery capacity developed, the nature of CERA as a department meant that all activities ceased upon withdrawal. To continue the recovery, either more central government intervention was required or the local authorities and agencies had to effectively start from the beginning.

To avoid a CERA-like model in future, clear established powers, procedures and plans are required so there is no confusion towards who holds what authority and how they will be executed. Under a recovery specific Act, plans like the Land Use Recovery Plan (LURP) can be mandated specifically under legislation,[33] or require local authorities to plan for a post disaster LURP.[34] The debates over which land could be called upon for rezoning to assist in recovery can be held now rather than after the event where politicians are likely to fall into the false dichotomy of action versus red tape. Methodologies and frameworks for creating pre-event recovery planning for land use have already been established.[35] What is needed is a greater effort to engage in these matters now to ensure collaboration with the community. If the community does not feel engaged and adequately consulted, then their faith and trust give way to suspicion and opposition.[36] Collaboration and empowering approaches are the best for redevelopment and regeneration,[37] and these take time.[38]

[32] As an example, the foreign firm that won the tender for the Margaret Mahy Playground was oblivious to the pre-existing Elsie Locke Memorial located on the site

[33] Similar to how the Christchurch City Council was statutorily required to create a central business district recovery plan under s 17 of the Canterbury Earthquake Recovery Act 2011.

[34] This recognises the fact that until the disaster actually hits there is no way of knowing specifically what land is affected or what needs to be done to facilitate the recovery.

[35] Julie Becker and others "Preplanning for Recovery" in *Community Disaster Recovery and Resiliency: Exploring Global Opportunities and Challenges* (Auerbach Publications, Boca Raton, 2011) 525 at 537.

[36] Simons, above n 24, at 8; and Johnson, above n 12.

[37] Becker and others, above n 35, at 532.

[38] Johnson, above n 12.

D Defined Roles and Duties

A Recovery Act could directly define the roles of the government and their associated plans. For example, plans already exist that express how local and central government and lifeline utilities would act following a major Wellington Earthquake and where decision-making authority rests.[39] Extending this into recovery would not be difficult. A Recovery Act would have to be flexible to accommodate the many different scenarios that could result from a major event, but this can be grounded in core principles that are desired regardless of the triggering event. The vulnerability of the status quo is the level of funding, central government support and prescription for when it becomes time to engage the recovery plan.

Through a more detailed approach, the recovery plan could automatically engage without fear of seeking financial approval, sign off, or other interference from central government. Coupled with the added time in the switch from response phase to recovery through transition periods,[40] overbearing urgently implemented legislation can be avoided. This ensures that emergency situations are not exploited to grant the executive emergency powers to overrule normal administrative processes and recovery can be kept local.

In Simons' research into residents' perspectives of recovery, it was apparent that the CERA-style response to recovery left respondents very discontented.[41] Residents expressed dissatisfaction and distrust in the government and agencies facilitating the recovery.[42] Interestingly, the positive points highlighted by respondents showed praise for the initial emergency response.[43] One interpretation of this could be that the high standards set by the emergency response led residents to expect a similar level of action, speed and efficiency in the recovery. When asked who they trusted during the rebuild process, the vast majority of respondents indicated community and neighbourhood groups. This is consistent with the favourability of locally led recovery efforts.[44] Government agencies and the individuals charged with leading the recovery scored poorly.[45] This suggests that the trust of the

[39] *Wellington Earthquake National Initial Response Plan* (SP02/17 Ministry of Civil Defence & Emergency Management, 2017).
[40] Civil Defence Emergency Management Act 2002, pts 5A and 5B.
[41] Simons, above n 24, at 11–14.
[42] At 12.
[43] At 13.
[44] Dobbie, above n 31; and Phillips, above n 15, at 401–404.
[45] Simons, above n 24, at 15.

community involved can be lost when the government uses emergency powers to satisfy their desires for efficiency and curtailing administrative processes.

E Section Conclusion

"Freeing the recovery effort from the inconvenient shackles of constitutional procedures" is the description Mueller provides for the Canterbury Earthquake Recovery Act.[46] The employment of such tools of efficiency can ostracise the community who is supposed to be in partnership with the recovery agencies. Without community support and engagement, disenfranchisement flourishes.

The execution of powers and delivery of recovery are founded upon the decision-making process. Prior to the disaster, this would have taken the form of standard administrative processes involving consultation and planning that ensured that the rights of individuals affected by the execution of executive power are heard. In the aftermath of a disaster, execution of power consistent with the rule of law is necessary to ensure that society recovers in the form the local community wants. The conflicts that arise through the status quo can be traced back to the divisions that arise when a recovery agency exercises emergency powers to force through a vision that the community may not support. Part of the emergency power mandate granted to central government may be a hidden strategy to claw back developmental decision making from local authorities.[47] Local devolution of powers must be accompanied by an understanding that recovery processes take time and may not necessarily take the form that the central government would like. Unlike an emergency response, which has a certain start point and a clear end point, recovery processes continue without a set end point. Recovery legislation may attempt to set a time limit on recovery through sunset clauses but this is artificial. Recovery continues until its activities eventually are subsumed by business as usual and become the new status quo.[48]

[46] Mueller, above n 20, at 314.
[47] Morten Gjerde "Building Back Better: Learning from the Christchurch Rebuild" (Elsevier, paper presented to Urban Transitions Conference, Shanghai, September 2016) 530 at 538.
[48] At 538.

III – The Status Quo

A Civil Defence Emergency Management Act

The Civil Defence Emergency Management Act 2002 (CDEMA) is the primary emergency management and recovery statute in New Zealand and is administered by the Ministry for Civil Defence and Emergency Management. The Ministry supports and assists the planning and training of local Civil Defence Emergency Management Groups. These groups are responsible for responding to an emergency within their region.[49] In most cases, this will be localised natural events like storms and flooding that do not warrant a wider national response. If a national emergency is declared,[50] the Director of Civil Defence and the National Controller assume command.[51]

Upon the declaration of an emergency, the CDEMA grants extreme powers to those responding to an emergency situation. These powers include the power to enter, and if necessary, break into private property,[52] the power to order the evacuation of homes and businesses,[53] the ability to requisition goods and services,[54] the power to close any public road or public place,[55] and the power to carry out any inspection, seizure or destruction of any property or animal.[56] The emergency powers are granted in order to contain the situation, save lives, protect property and facilitate the CDEMA's purpose of response and recovery.[57]

If it were not for the risk to life, health and property, these powers would be considered in violation of normal administrative practices or unconstitutional.[58] The use of emergency powers is legally justified under the formal theory of the rule of law through New Zealand's weak constitutional framework. The rule of law, under natural law theory, is the legal norms that operate as a principle of morality and discipline which avoid the execution of arbitrary

[49] Civil Defence Emergency Management Act 2002, s 17(1)(d).
[50] Section 66(1).
[51] Sections 8–11.
[52] Section 87.
[53] Section 86.
[54] Section 90.
[55] Section 88.
[56] Section 92.
[57] Section 3(c).
[58] Hopkins, above n 11, at 193.

power.[59] Formalistic legal theory describes the law as a form of procedure and avoids moral arguments or institutional values.[60] The issue with this concept is that perverse outcomes can be achieved.[61] It is argued that the rule of law, which underpins modern liberal democracies, on some occasions has to be cast aside by legislative and executive branches of government out of necessity but: "Necessity has no law."[62] The government will attempt to do what they can out of necessity for the maintenance of public order, health and safety in times of emergency.

B Legislating for Recovery

During the Canterbury earthquakes, there were provisions for recovery within the CDEMA. The Minister had the ability to appoint a recovery coordinator for a term of 28 days and direct the powers available to them.[63] Instead, the Government settled on a different path and enacted a new law to manage recovery. Parliament enacted the Canterbury Earthquake Response and Recovery Act 2010 and then the Canterbury Earthquake Recovery Act 2011. Both statutes granted the executive vast powers in order to "facilitate the response to the Canterbury earthquake"[64] and "enable a focused, timely, and expedited recovery".[65] The statute was so powerful that Mueller questioned whether the legislation ousted the sovereignty of Parliament.[66]

The Canterbury Earthquake Recovery Authority was established in early 2011 as the Crown agency that would lead the recovery. CERA utilised the CER Act to override local plans, council decisions and normal processes. The Government, in many aspects, took away any notion of there being a local responsibility for the recovery and instead made it a concern of the central government.[67] This was partly because New Zealand had not experienced a disaster as expensive and extensive since Hawkes Bay in 1931 and, also, for political reasons.

[59] Philip Joseph *Constitutional and Administrative Law* (4th ed, Brookers, Wellington, 2014) at 153 and 156.
[60] At 156.
[61] For example: "A political detainee's right to habeas corpus would be worthless if the law purposefully authorised arbitrary detention." Joseph, above n 59, at 156.
[62] David Dyzenhaus *The* Constitution *of Law* (Cambridge University Press, New York, 2006) at 4.
[63] Civil Defence Emergency Management Act 2002, ss 29–30, as at 1 October 2008.
[64] Canterbury Earthquake Recovery Response and Recovery Act 2010, s 3(a).
[65] Canterbury Earthquake Recovery Act 2011, s 3(d).
[66] Mueller, above n 20, at 314.
[67] Amendments to the CDEMA in 2016 now mean that recovery is specifically designated and provided for within the Act and imposes a duty on all local authorities to plan and prepare for it.

The Canterbury earthquakes are considered to be one of the most expensive disasters in history,[68] and the preceding action to replace the councillors of Environment Canterbury with commissioners led the government to suspect that local leaders were not capable of managing such an unprecedented event.[69]

"The Christchurch earthquake narrative has revolved around the false dichotomy of action vs red tape."[70] Utilising these powers, executive efficiency was portrayed as making the decisions necessary to allow residents to move forward as quickly as possible with their lives.[71] Both of these portrayals resonate well as an electioneering soundbite but do not show great concern for community collaboration or better rebuilding. This resulted in a centrally defined narrative of recovery, influenced not necessarily by what would be best for the future of the city but based on what was considered possible by central government.

A requirement for a strategic plan for recovery was introduced as part of the 2016 amendments to the CDEMA.[72] The new rules meant that each CDEM group has to formulate a strategy for responding to the recovery needs of their communities. While on the surface this appears to enable greater recovery, there is still the threat of recovery legislation being employed after an event to quicken the process. This would render the recovery plans as merely guidelines for consideration by the government of the day. In a future worst-case scenario, we are therefore likely to see such legislation employed again by the government. The desire for speed to respond to such a large event will likely result in a Bill being put to the legislature which contains powers similar to CERA so that it has the ability to respond to whatever scenario arises during the recovery. With a Recovery Act there is no need to urgently draft and enact a new event specific recovery statute, as the Act would contain the powers, roles and responsibilities necessary to facilitate a recovery within the realms of normal administrative processes.

Under the transition powers established in the CDEMA, there are some emergency powers available to authorities to facilitate the start of the recovery phase.[73] This lasts for as

[68] Estimates place the total cost at around $40 billion. In comparison, the 2011 Japanese tsunami is estimated to have cost $300 billion.
[69] Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.
[70] Hopkins, above n 11, at 206.
[71] Department of Prime Minister and Cabinet *Whole of Government Report: Lessons from the Canterbury earthquake sequence* (July 2017) at 5 and 7–9.
[72] Civil Defence Emergency Management Act 2002, s 49(2)(ca).
[73] Civil Defence Emergency Management Act 2002, pts 5A and 5B.

long as the transition period is in place but cannot last forever. The need is for some nuanced power to be available to facilitate recovery without automatically resorting to some heavy-handed emergency power. The best time to work out what powers, principles and values will underscore a region's recovery is before the event, so there is proactive legislation that can be consulted and debated on widely without the urgent demand for immediate action.

Reactive legislation allows the government to set the tone of the recovery. Through the passage of wide-ranging legislation, the government can ensure "essential" matters and roadblocks are quickly dealt to. In Kaikoura, the Hurunui/Kaikoura Earthquakes Recovery Bill deemed permitting dredging the sea floor under the regional plan essential because the restoration of harbour access would allow the restoration of tourist activities.[74] The recovery legislation meant that normal administrative processes under the Resource Management Act were cast aside in the name of efficiency and essential needs. The problem with this is that following a major event there will always be something that could be considered essential that could be accelerated with the help of legislation and executive intervention. This creates a scenario where extraordinary legislation gradually creeps into ordinary processes.[75]

C Overriding the Law in the Name of Recovery

The Minister for Earthquake Recovery used their authority many times to facilitate the rebuild in Canterbury. Orders in Council covered many different Acts.[76] The most controversial use of these powers was for matters relating to the Resource Management Act 1991. In one example, the Minister used their authority to streamline and limit the consent for the Burwood Resource Recovery Park. The consent was made non-notifiable and only selected groups and individuals had the right to provide comment on the proposal. There was no right to appeal the decision to grant the consent.[77] The result of this was distressed neighbours of the recovery park as the operations continued and were expanded while the community had few abilities to complain.[78]

[74] Gerry Brownlee "Emergency legislation for earthquake response" (press release, 29 November 2016).
[75] Mueller, above n 20, at 317.
[76] Some related to Education Act requirements towards school locations, opening hours and licensing requirements while others dealt with social security and tax concerns relating to record keeping.
[77] Canterbury Earthquake (Resource Management Act—Burwood Resource Recovery Park) Order 2011 (SR 2011/254), cl 9(5)(a).
[78] See Rachel Young "Burwood dump plan angers" Stuff (22 September 2012) <stuff.co.nz>; and Anna Turner "Burwood meeting fails to satisfy residents" Stuff (16 October 2012) <www.stuff.co.nz>.

In another example, Resource Management processes were overridden to allow reclamation of land at Lyttelton Port.[79] Although made in the name of recovering the local economy and disposing of earthquake rubble, there was concern within the community that there were ulterior commercial motives and that they were not properly consulted.[80] Even if the consultation leads to the same outcome, it is worth conducting in order to adhere to the administrative processes that underlie the rule of law. Furthermore, communities can be empowered into feeling like they have control of the regeneration of their area and faith in the recovery process.

D Planning Overrides

Planning decisions for housing subdivisions in Kaiapoi were also overruled in the name of recovery. In one case, the Minister used the Act to approve changes to the Waimakariri District Plan to permit 550 sections to be constructed at the Silverstream development.[81] In another, related, decision, the Minister overruled the noise contours put in place to preserve the flightpaths over Kaiapoi to deliver more than 1,000 homes.[82] This is one of many examples of the status quo providing the Minister with the power to overrule plans in the name of efficiency which framed the recovery as a political rather than a policy based process.

The problem with these decisions is that it suggests a policy of loose interpretation of recovery in order to substantiate changes in major planning decisions. In a case spawned by the flight path decision, it was found the Minister had used recovery as a shield to block challenges to a decision. In *Independent Fisheries*, the High Court found that the Minister had gone beyond their powers by inserting two new chapters into the regional policy statement. Chisholm J found that recovery was an incidental purpose that was used to justify the action, despite references to recovery being seldom mentioned.[83] As the legislation provided the Minister and CERA with wide ranging powers, it is unsurprising that they would choose to try to utilise them in the name of efficient recovery to achieve ulterior purposes. An issue with

[79] Gerry Brownlee and Nick Smith "Port Reclamation fast-tracked to assist recovery" (press release, 25 May 2011).
[80] Marc Greenhill and Alan Wood "Dumping 'ignores' concerns" Stuff (26 May 2011) <www.stuff.co.nz>.
[81] Gerry Brownlee "CERA powers unlock Kaiapoi development" (press release, 24 November 2011).
[82] Gerry Brownlee "Exemption will deliver over 1,000 more sections" (press release, 7 October 2011).
[83] *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery*, above n 22, at [83]–[105].

such case by case application of powers is that it fails to create an equal administrative process which leads to good decision making. It also can result in justice for some, whereby those that can afford challenging matters in court may receive redress, but community groups or individuals that are unable to afford the legal fees are left to accept whatever is forced upon them.

This hardly suggests all are equal before the law. It also suggests a recovery that, rather than being community inspired and led, focuses on satisfying those who have access to power. It seems that until the courts intervene and rule that a decision maker has overstepped, a decision maker has formally satisfied the requirements placed upon them and thus the decision made is legal and in compliance with the rule of law.

E Conclusion

The status quo to recovery in New Zealand is one of executive dominance. The response by central government to a major disaster is generally to allow the powers granted to officials in the emergency phase to continue on into the recovery and into the future. As Kipp identified, there is a sustained gap between principles and practice when it comes to administering civil defence.[84] Despite the many plans, strategy documents and response groups, the central government always manages to be intimately involved with the recovery from major events. This is partly due to the strong centralised system and corresponding weak local government in New Zealand. There are no constitutional protections for local authorities and all operate under the will of Parliament.[85] Parliament can simply legislate to change any aspect of the functions or responsibilities that are held by local authorities as they see fit. This was most recently done with a law that appointed commissioners and changed certain water-related functions at Environment Canterbury.[86] The Act and subsequent amendments and extensions cancelled elections and means that 2019 will be the first time in nine years that the Council is fully elected. With this lingering tension and threat of future Parliamentary intervention, the Christchurch City Council was fearful of being "Ecanned" during key phases of the recovery when there was conflict between the Council, CERA and the Minister.[87] During

[84] Kipp, above n 1, at 190.
[85] Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Melbourne, 2013) at 248.
[86] Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.
[87] Johnson, above n 12.

recovery, there is no time for there to be challenges towards jurisdiction or responsibility. It is important for all parties involved to cooperate and work together. The threat under the status quo of central government intervention or dominance in the recovery shows deficiencies that can be resolved through recovery specific legislation.

IV What a Disaster Recovery Act Could Do

Given the short length of this paper, we can only briefly cover the possible elements of a "Disaster Recovery Act". At the very least, standalone recovery legislation can prevent total central government control of recovery by empowering local authorities and communities to lead. The legislation can prescribe the plans and documents a community should author to control their recovery, and the administrative processes and timelines that need to be conducted. International best practice has shown that, fundamentally, recovery should follow and give effect to certain key principles.[88] They broadly can be classified as community engagement and empowerment, keeping recovery local and using existing networks, planning integrated solutions in partnership with government agencies and community groups, and taking advantage of the opportunity to build back better with inbuilt resilience to foster greater future capacity.[89]

A Structure

Primarily, recovery should remain the focus and role of the pre-existing structures. Imposing an entire new framework or department during the response, transition or early recovery stages not only creates the likelihood of rushed ill-considered legislation but also means that the pre-existing plans and relationships are lost. It is incumbent on the structure of the Act to allow the existing recovery managers and authorities to build the necessary capacity in terms of knowledge, planning, staffing and resilience prior to an event. Any intervention from central government can therefore be targeted to areas where it is needed.

The Act could prescribe the manner and form of any changes to executive branch operations, and to scale and be proportionate to the emergency that occurred. The essential element is to ensure that there is sufficient capacity in existing structures and frameworks to

[88] Johnson and Olshansky, above n 12, at 5.
[89] For example, see: *Canterbury Civil Defence Emergency Management Group Plan* (Emergency Management Canterbury, 2018) at 68; and *Recovery Plan* (Southland Civil Defence Emergency Management, 2014) at 9.

respond. If the capacity to respond to an event is proven then the government does not need to legislatively intervene.

B Recognising Unknown Variables

By acknowledging that the needs for a recovery are not certain until the event causing it occurs, the recovery legislation could recognise that the circumstances of each incident may require a different proportional scale of response instead. In Canada, the Emergencies Act provides for four different types of national emergencies that can be declared.[90] The different emergencies have different requirements to be activated and different processes for consultation with provincial governments.[91] A similar idea could be incorporated within recovery legislation to show when it is appropriate, and the level for which it is appropriate, for streamlined powers to be activated or for funding agreements to be triggered proportional to the event. In Wellington, recovery plans have already considered the possible need for there to be some form of scalable recovery arrangement. The report concluded that under existing structures and legislation there may be a deficit of power and ability for large scale recovery which may require some form of legislation or amendment to create a standalone regional recovery agency.[92]

Recovery legislation and regulation needs to be broad to ensure all possibilities are covered and administered. The best way to do this is by incorporating key recovery principles that provide the statutory basis for decision makers to give effect to. Recovery should not be viewed through one central plan or perspective like the CERA approach. Recovery needs to consider the different aims of different communities and projects that may be different to the leadership's idea of recovery.[93] Legislation can facilitate this through mandating consultation procedures or localised planning and intervention. The nature of democracy does result in there being some political component of the process and decision making. Instead of politicians leading the recovery effort, like under the Minister with CERA, politicians

[90] Emergencies Act 1988 (Canada).
[91] John Lindsay "The power to react: review and discussion of Canada's emergency measures legislation" (2014) 18 IJHR 159 at 166.
[92] *Wellington Region Draft Strategic Recovery Framework* (Wellington Region Emergency Management Office 2018) at [3.2.3] and [3.4.7.2].
[93] Hopkins, above n 11, at 201.

can have a part that facilitates the will of the community that they represent.[94] Adopting a plan that has been endorsed by the community is better than a Minster making a decision for them. Perhaps most importantly, Recovery Act legislation can avoid having sections of law that prevent decision making being reviewable by the courts.

Critical to this is defining the duties and responsibilities directly of each level of government. Current intervention by central government in major cases may, in some ways, lighten the load of the local council but it also may lead to disputes over jurisdiction and responsibility. If residents can expect aspects of the recovery to come from a specific place then they know where to direct their concerns and inquiries. If a local authority was able to plan prior to the event for their role in the recovery, launch into action the moment the recovery phase commences and follow through with their plans and promises, the community will be more engaged and feel like they can hold their local leaders more accountable.

C Funding

One of the arguments in favour of removing recovery duties from local authorities is that they do not have access to the finances needed to facilitate a recovery. While it is true that central government has more money, this does not necessarily mean that it is central government who should spend it. A transfer of funds and grants to the authorities recovering is all that is required. This is the more common approach in jurisdictions with more established constitutional boundaries like the United States.[95]

Local government funding sources are more restricted than those of the central government. Central government is able to raise funds by levying taxes on income, spending, corporations and specific products through duties, levies and tariffs as well as through other means like state-owned enterprises and sovereign wealth funds. For the local government sector, funding is primarily sourced through rates affixed to properties within the district and supplemented through council-owned holdings and grants from the government that follow a specific formula and satisfy a specific spending purpose. Borrowing limits control the

[94] This would demonstrate empowerment and collaboration rather than mere consultation as described in Becker and others, above n 35, at 532.

[95] For the United States see Phillips, above n 15, at ch 15. Another example is Australia with National Disaster Relief and Recovery Arrangements, whereby emergencies are matters for the states but once a threshold is reached then a cost sharing arrangement is automatically triggered providing Australian Government money direct to the state who then decide when and where to spend it.

amount of money that a local government can borrow and establishes a hard cap that limits operational expenditure.[96] Central government does not have to worry about a similar debt ceiling and is able to borrow as needed.[97]

A new law could ensure that the funding arrangements for a recovery are prepared well in advance. The plans for initial response to an earthquake in Wellington indicate substantial damage is likely. Deaths could exceed 1,000, the damage inflicted could cost tens of billions of dollars,[98] and vital connections like roads and water supplies could be cut for months.[99] With such high costs expected, it is imperative that funding agreements are arranged prior to the event or, at the very least, so that there is an agreed process or formula in place. This enables debate and consideration of responsibilities and sources of revenue, and, also means that, as the years progress, central government is not distracted by wider budgetary concerns.

D Revenue Gathering Options

In Christchurch, the recovery became a competitor in the annual battle for the Finance Minister's attention in the budget. Major projects were delayed in an attempt to deliver a much-promised budget surplus.[100] Consequently, residents lost trust in recovery leaders as deadlines and targets were missed. The lack of certainty then resulted in a lack of investor and business confidence which then added obstacles and delays to the recovery.

Possible solutions to this could be canvassed within a Disaster Recovery Act. Special levies, like those charged by the Earthquake Commission, could secure access to funds that are instantly available for recovery purposes. Expanding the EQC scheme to allow for greater regeneration integration is another option. Alternatively, funding could be ring-fenced within the central or local government budget annually to provide for any potential recovery needs. The key is that the funding would ensure that local authorities of all sizes, whether it be large and urban like Auckland or Wellington, or small and rural like Kaikoura, have the ability to access funds upon the Act being triggered rather than at the discretion of a Minister.

[96] "Why do councils borrow?" We. are. LGNZ. <www.lgnz.co.nz>.
[97] For example, the budget deficit in 2011 alone was more than $18 billion and the Finance Minister was not required by law to balance the books or otherwise account for the sudden expense.
[98] WJ Cousins *Earthquake damage and casualties due to large earthquakes impacting Wellington Region* (2013/41 GNS Science 2013) at 4.
[99] *Wellington Earthquake National Initial Response Plan*, above n 39, at 8–9.
[100] John McCrone "How much is the Government really spending to fix Christchurch?" *The Press* (Christchurch, 11 July 2015).

Another possibility rather than having a pre-emptive revenue gathering measure is to have a reactive one. The Act could prescribe a levy that kicks in upon the Act being activated. This method was used in Australia in the 2014–2015 Federal Budget. The temporary budget deficit levy was a two per cent tax applied to assist in paying down the federal budget deficit. Politically, a government would be brave to introduce such a tool in ordinary circumstances. However, a national emergency and recovery of the scale experienced by Canterbury in 2011 would not be considered ordinary. A specific rate could be prescribed within the Act, or the Act could grant the power to a Minister to declare the situation as meeting the threshold for the Act's activation and prescribing what the rate would be.

E Preplanning for Recovery

To be most effective at delivering a holistic outcome, a Recovery Act should have operative provisions that influence decision making pre-emergency. One practical example of recovery legislation potentially changing the post disaster recovery phase is by mainstreaming and mandating recovery considerations in decision making. This would adhere to the concept that recovery is part of a continuum rather than a set phase.[101] Similar to how government decisions must be assessed against the principles of the Treaty of Waitangi, a mandatory part of the decision-making process could be to note how the decision being made will assist in meeting the recovery principles. Overtime this would build in resilience and recovery capacity and prevent the need for central government intervention during the recovery phase.

Practical changes in everyday policy can change the vision of recovery. This can change perceptions of recovery from merely the next step after responding to a disaster to ensuring that the capacity exists to give time for normal administrative functions to facilitate a proper recovery effort. The current attitude of urgency and quick action can yield to proper deliberation and implementation of recovery plans and empowering communities.[102]

F Section Conclusion

Upon the expiry of the Greater Christchurch Regeneration Act 2016, which replaced the expired Canterbury Earthquake Recovery Act 2011, Canterbury will have been under 10 years

[101] Becker and others, above n 35, at 529.
[102] At 531.

of extraordinary powers. These powers were first authorised in the immediate aftermath of the destruction of 22 February 2011. Although some powers expired with CERA, others remain operative. The past eight years cannot be described as an emergency but Parliament has granted powers as if it were.[103] Recovery legislation can ensure that, even when the pressure exists to cut corners with administrative processes in the interests of agility and efficiency, the constitutional order and rule of law is preserved.

Recovery is a slow and gradual process. Provided that there is work ongoing, transparency in decision making and active communication, there is no need for central government to take the lead or overrule administrative processes. A Recovery Act can take the existing plans and procedures from the CDEMA and establish its own framework and strategy towards ensuring a local recovery. A recovery that consults with the community, rather than imposing a centralised document or utilising emergency powers for the sake of efficiency. Infrastructure resilience, clear definition of powers and responsibilities, funding arrangements and streamlined administrative processes are all measures in which a Recovery Act could prove better than the current status quo of reactive legislation. All levels of government can collaborate now to ensure that recovery is covered by the right laws, processes and regulations proportional to the incident that occurred rather than the current approach, which can generate legal complications like *Independent Fisheries* and deliver justice to those that can afford it rather than justice for all.

V Conclusion

Recovery phases are long, deliberative and arduous. The lens through which a recovery phase is viewed greatly impacts upon its structure and, therefore, the result that is delivered. Recovery is not merely the next phase after an emergency to reconstruct pre-existing societal and structural networks and buildings. Recovery is split into multiple stages which work towards establishing a new status quo of reinvigorated communities.[104] For this to be successful, there needs to be respect for the administrative day to day processes that lead to informed decision making and recovery policy. The challenge for politicians and decision makers is time. Take too long and the populace gets restless. Conversely, act too quickly and

[103] Mueller, above n 20, at 314.
[104] Haas, Kates and Bowden, above n 3, at 1–4.

the quality of decision making reduces. The pressure of time often comes from the citizens themselves. Building something new and better requires high levels of planning. This is not helped by there being "a plan for reconstruction, indelibly stamped in the perception of each resident – the plan of the pre disaster city" which encourages quick decision making that favours reconstruction rather than regeneration.[105]

With a dedicated Recovery Act, policy and procedure can be prescribed in a manner which respects the rule of law, which underlies the administrative process, and restricts the exercise of arbitrary power.[106] The introduction of CERA in Christchurch saw proper administrative processes overruled in the name of efficiency and speed. Recovery was treated as something to be dispensed with in order to allow residents and the economy to return back to normal. The issue with this style of recovery is there will never be a return to the pre-event "normal" and actions made in haste under emergency powers can result in lifelong problems and missed opportunities.

With the variety of potentially catastrophic hazards facing New Zealand, it is important for there to be an agreed recovery structure and framework in place. A Disaster Recovery Act is able to prescribe and enshrine protections for administrative processes that uphold the rule of law, prevent adversarial over politicisation of recovery processes, as well as guarantee levels of consultation and community engagement that empower residents and keep recovery local. Other benefits of a Recovery Act include the ability to establish jurisdictions, roles and responsibilities clearly, organise funding arrangements ahead of time and change policy making to factor recovery into everyday decision making.

Although this paper did not recommend the precise structure and approach an Act should take, it has highlighted the need for that discussion to take place now. The best time to agree upon the regulation, form and approach of a recovery is when there is no distraction of a disaster. Decisions over how a community will recover and what powers are needed to execute that vision need to be made after consultation and deliberation rather than passing an urgent statute that grants emergency powers that span many years into the recovery.

Research suggests the best approach to recovery is a local one.[107] A local approach allows for community collaboration and engagement with decision makers who know the

[105] At 268.
[106] Joseph, above n 59, at 154.
[107] Johnson and Olshansky, above n 12, at 62.

community and who residents are familiar with. This would likely be very different to the centralised approach taken under CERA which focused on outputs rather than outcomes. Letting the community have a say in their own development and having local authorities facilitating the wishes of a community will cause a better outcome in decision making, resident welfare and result in a more holistic recovery. Would this approach mean some decisions take longer than under the CERA approach? Yes. But the engagement and consultation on these proposals will result in quality decision making that can increase the speed of the recovery later on.[108]

Part of a new recovery approach will likely involve changing how recovery is financed. Through legislation, the manner of how recovery will be financed and the various agreements between central and local government can be agreed to ahead of time. Levies, tax increases, borrowing, ring fenced funding and EQC are all ways through which the recovery can be paid for. Separating means of funding can also assist in reducing the adversarial nature of a recovery and empower local leadership.

The employment of emergency powers caused residents to feel disenfranchised and isolated from the recovery efforts under the centralised approach of CERA. Further uses of such powers caused an adversarial politicisation of the recovery and only those that were able to afford litigation, like Independent Fisheries, and who were not limited by the CER Act had recourse through the courts to challenge the decisions being made, rather than equal justice for all.

This creates the need for a statute that proactively prescribes how a recovery is governed and administered. For the protection of rights, protection of processes, protection of good decision making and, ultimately, the protection of the rule of law, recovery needs to have its own statute. One which recognises the diverse powers and processes required between an emergency and recovery. The existence of a pre-existing structure and framework can set the tone for recovery and create an underlying expectation within the community of the timetables, decisions, stakeholders and consultation involved. Whether it is an earthquake, tsunami, volcano or some other event, it may be impossible to be truly prepared for the damage and destruction that will occur. But, through active preparation and law making we

[108] At 60.

can ensure a better, more holistic recovery than what current processes and legislation can provide.