

Earthquake Recovery Legislation learning from experience

The Canterbury earthquake sequence sparked a series of constitutional seismic shifts whose after-effects look set to continue long after Christchurch's regeneration is complete.¹ At the heart of the Canterbury earthquake legislation² was a Henry VIII clause that gave the executive the power to modify almost all primary legislation for a broad range of purposes related to recovery. The Henry VIII clause was supported by privative clauses shielding government decisions from judicial review.

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While the Henry VIII clause caused some concern, the executive's use of it was both proportionate and restrained (Kerkin, 2017, p.164). It is, therefore, unsurprising that the executive turned to it in responding to the Hurunui/Kaikōura earthquakes.

The Hurunui/Kaikōura Earthquakes Recovery Act 2016 (the Kaikōura Act) contains a Henry VIII clause modelled on the Canterbury legislation, with some important differences. The Kaikōura Act strengthens, and imposes some new, safeguards on the Henry VIII clause. But it struggles with the same constitutional challenges as the Canterbury legislation. Further development is desirable in this constitutional evolution.³

What's the issue with Henry VIII clauses?

Henry VIII clauses empower the executive to modify acts of Parliament using delegated legislation (law made by the executive using powers delegated by Parliament). This transfer of power from the legislature to the executive has traditionally been treated with suspicion as possibly constitutionally inappropriate (McGee, 2017, p.465). As a general rule, only Parliament should amend law that it has made.

This general rule separates Parliament's and the executive's functions and, by so

doing, supports the rule of law (Waldron, 2012). It reflects Parliament's authority to make the law, which comes from its sovereignty and from its constituent members, who are the people's elected representatives (Geddis and Fenton, 2008). Parliament should make law, particularly where it affects human rights, property interests, access to justice or expenditure of public money (Legislation Advisory Committee, 2014, ch.13.1).

Yet there can be a place for Henry VIII clauses in the modern legislative toolkit. New Zealand's recent legislative history suggests they have found a place in the context of disaster recovery.

Why use a Henry VIII clause for disaster recovery?

The Canterbury legislation's Henry VIII clause was intended to put the legal authority for recovery activities beyond doubt.⁴ There were both pragmatic and principled reasons for doing so. Pragmatically, recovery would have been slowed if people hesitated to act for fear of breaching the law or delayed acting until they had obtained legal advice or an indemnity. The principled reasons related to questions of fairness and legitimacy. It would have been unfair to hold people liable for contravening laws made in 'peacetime' that could not be complied with, or no longer quite made sense, in the post-earthquake context (Nick Smith in Hansard, 2010). It was more consistent with the rule of law to ensure that the law made sense and could be complied with.

Ideally the method of changing the law would uphold the law's legitimacy. Legitimacy is a core tenet of a constitutional framework, and is necessary for public acceptance of, and compliance with, the law. Public confidence in the legitimacy of lawmaking enhances acceptance of the law and shores up legitimacy of the underpinning constitutional settings.

The Canterbury legislation's Henry VIII clause caused some consternation, partly due to its breadth and partly because there were few constraints on the use of that power. On paper the clause ran lawmaking, implementation and coercive action into Waldron's single gestalt (Waldron, 2013) centred on the executive.

In practice, the executive's lawmaking power was exercised with restraint. The Regulations Review Committee's scrutiny did not identify any significant unresolved concerns (Regulations Review Committee, 2010, 2011). Only once was the validity of an order made under the Henry VIII clause called into question, due to an irregularity in the Canterbury Earthquake Recovery Review Panel's make-up. Even here, the Regulations Review Committee did not conclude that the order was invalid, although it suggested validating legislation just in case (Regulations Review Committee, 2015).

It has a narrower application than the Canterbury clause

The Canterbury clause (s71) allowed all but six core constitutional statutes⁵ to be amended by order in council. It was first enacted in the 2010 act.

The 2010 act was passed just 10 days after the initial earthquake. Officials invited Canterbury local authorities 'to compile a "wish list" of the legislative changes that they may require to promote a more efficient recovery' (Gall, 2012, p.234). This line of questioning invited a focus on matters of bureaucratic inconvenience rather than a methodical

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While the Henry VIII clause did raise some constitutional concerns, it also resonated with the New Zealand constitutional value of pragmatism (Kerkin, 2017, p.284). There is a paradox at the heart of the parliamentary lawmaking process. In an unwritten constitution, procedure is important, and often *is* the protection: 'without good process, good law is much more difficult to achieve' (McLeay, Geiringer and Higbee, 2012, p.14). In the right circumstances these procedural protections can undermine public confidence if they are too cumbersome, too slow, or a disproportionate investment for the matter at hand. Here, they may weaken trust and confidence in the lawmaking procedure, the executive and Parliament (Kerkin, 2017, pp. 272, 283-5). In the right circumstances and with the right safeguards, a Henry VIII clause might carry more legitimacy in the eyes of the public than more traditional ways of legislating.

The Kaikōura clause has evolved from experience in Canterbury

The Kaikōura clause takes a more deliberate approach to constitutional safeguards, so that executive restraint is not completely left to chance.

assessment of business needs. It resulted in an unfocused and abstract response (ibid.) that was unlikely to have instilled confidence that the local authorities knew precisely which legal barriers they faced. In light of that, the executive considered the only practical way forward was to enact a generic Henry VIII clause (Gall, 2012; Gerry Brownlee in Hansard, 2010).

By 2011 agencies had a clearer idea of what activities would be needed, and the kinds of legal constraints in play. Parliament heard submissions suggesting that other core constitutional statutes be removed from the Henry VIII clause's ambit as a signal about constitutional no-go areas. On a practical note, Orion Energy Ltd (the electricity supplier to much of Christchurch) suggested adding statutes to the list of those expressly subject to the clause to improve certainty and limit the need to rely on ministerial discretion (Local Government and Environment Committee, 2011, pp.101-2). The government of the day rejected these submissions and the 2010 Henry VIII clause was carried through unchanged into the 2011 act.

By contrast, the Kaikōura clause (Kaikōura Act, s7) permits only those

statutes listed in Schedule 2 to be modified. Schedule 2 statutes mostly relate to land and buildings, conservation, environment and marine legislation, civil defence and earthquakes, revenue, local government, transport and food safety.

The act preserves flexibility for the executive. Schedule 2 can itself be expanded by order in council. The minister⁶ may seek to extend Schedule 2 if satisfied that it is necessary or desirable for the purposes of the act, and the order would not breach specified exclusions from the regime. The minister must give a draft of the order and the minister's reasons to each leader of the

examples to the House of where the lawmaking power was to be used were at the 'necessary' end of the spectrum, such as allowing heavier than allowable loads to be taken to landfills and streamlining processes for dealing with dangerous buildings (Gerry Brownlee in Hansard, 2010).

The use of 'expedient' was particularly troubling for some. For instance, the Legislation Advisory Committee submitted that:

the words 'or expedient' just shouldn't be there. It should be limited to things

likely to accept a decision, even if they disagree with it, if they understand why the decision maker has made it. Second, transparency is a precursor to accountability: a transparent decision-making power gives people the means to hold decision makers to account.

The Canterbury legislation did not contain any requirements to give reasons for using the Henry VIII clause. The Canterbury Earthquake Recovery Review Panel (the Canterbury Panel), which advised the minister on draft orders, tended not to give reasons for its decisions. By giving reasons the Canterbury Panel could have created a body of decision-making jurisprudence, which would have helped departments learn from the experiences of others and informed the public about the acceptable tolerances within which the Henry VIII clause could be used (Kerkin, 2017, p.164).

Section 88 of the 2011 act required the minister to report quarterly to Parliament on his use of powers under the act. As enacted, section 88 did not require reasons to be given or details to be specified, and the minister's section 88 reports did not give any (Kerkin, 2017, pp.187-8; Minister for Canterbury Earthquake Recovery, 2011).

By contrast, the Kaikōura Act includes reasons requirements. The minister must give reasons for recommending an order in council under section 7, including why the order is appropriate (s10). The Hurunui/Kaikōura Earthquakes Recovery Review Panel (the Kaikōura Panel), which reviews draft orders in council made under section 7, must give reasons for its recommendations (s14(6)). Finally, any proposals to amend Schedule 2 must also be accompanied by reasons (s20).

These reasons requirements mean that the minister and the Kaikōura Panel will have to justify their decisions. Committing those reasons to paper means thought will be given to their defensibility. In this way, reasons requirements provide political accountability that will be felt immediately. While not formal legal accountability, the introduction of reasons requirements in the Kaikōura Act is a safeguard that can systematically encourage reasonable and restrained use of the Henry VIII clause.

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political parties represented in Parliament. The order can be made only if there is unanimous or near unanimous support for the order from those leaders. This approach seeks Parliament's imprimatur in a less formal way than more traditional procedures such as affirmative resolution, while achieving a substantially similar result. Any order extending Schedule 2 can be revoked if not approved by the House (s19).

No 'expedient' amendments

Parliament's Regulations Review Committee has traditionally taken the view that Henry VIII clauses should be avoided unless demonstrably essential, and has recommended they be used only in exceptional circumstances (McGee, 2017, p.465).

Section 71 of the 2011 act allowed orders in council to 'make any provision that is reasonably necessary or expedient' for the act's purposes, which were themselves drawn quite widely. The term 'expedient' is not often used in delegating Parliament's power to legislate, and no explanation was given for it. The minister's

that are extraordinary and need to be done because they're absolutely necessary to give effect to the purpose of the Act, not things that are simply expedient to do. (Local Government and Environment Committee, 2011, p.31)

By contrast, the Kaikōura Act does not use 'expedient'. It allows orders to be made where 'necessary or desirable' for the purpose of the act. For practical purposes, the difference may be semantic, but the language of desirability seems more positive than that of expedience. However, the inclusion of 'desirable' means that the Kaikōura Act still strays from the ideal of 'demonstrably essential'.

Enhanced transparency and accountability through reasons

A requirement to give reasons aids the transparency of decision making under the act. Transparency promotes legitimacy in two ways. First, it promotes understanding of why certain decisions have been made. Understanding promotes acceptance: people are more

Enhanced legitimacy through engagement

Participation in decision-making procedures enhances legitimacy in several ways. It gives people an opportunity to influence and inform decision makers, and helps them to understand the decision. It can help decision makers to ensure they have the right information, are aware of all relevant perspectives, and can anticipate the decision's consequences.

The Canterbury legislation was influenced by an assumption that public and parliamentary participation is time-consuming and could impede a timely recovery. The purpose clause (s3) made that clear: the act was to enable a focused, timely and expedited recovery and enabled community participation only to the extent that it did not impede that.

By contrast, the Kaikōura Act strengthens engagement expectations. First, it strengthens parliamentary engagement by requiring the minister to engage with the Regulations Review Committee or, if the House is adjourned, with the leaders of parliamentary parties, on draft orders (s8(1)(c) and (d)). That early engagement should promote legitimacy and reduce the potential for disallowance.

Second, it broadens the perspectives brought into the order in council process through membership of the Kaikōura Panel. The panels established under the Canterbury and Kaikōura acts were intended to inject rigour into the process through their expertise and independent advice. The Canterbury Panel had four members with relevant expertise or appropriate skills, and the chair was to be a former or retired judge of the High Court or a lawyer (s72(1)). By contrast, the Kaikōura Panel may have up to six members, who must possess relevant skills in one or more of:

- law, public administration or local government;
- mātauranga Māori (Māori traditional knowledge) and tikanga Māori (Māori protocol and culture);
- environmental protection;
- the nature of the affected communities and the earthquake-affected area. (s12)

In appointing members, the minister must have regard to the views of Local

Government New Zealand and one or more organisations or representatives who have knowledge, skills or experience relating to mātauranga Māori and tikanga Māori in the earthquake-affected area.

Most significantly, the Kaikōura Act requires that in developing orders in council, the relevant portfolio ministers must identify people who ought to be consulted. There is a procedure – albeit highly truncated – for ministers to follow. If ministers consider engagement is impracticable, they must publish their reasons for not following the engagement procedure with the order (s9). Committing

made under the Canterbury legislation, due to careful use by the executive (Kerkin, 2017, p.133).

In debating the Kaikōura Act, then shadow attorney-general spokesperson David Parker noted that the powers in the Canterbury legislation 'were not abused, but the possibility of their abuse existed from the breadth of the legislation' (Hansard, 2016a, p.15467). Some submitters on the Kaikōura Act considered the purposes to be too broad (Geddis and Knight, 2016; Hopkins, 2016a).

There may not be an easy way around this problem. Both acts take a holistic view

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those reasons to paper should ensure ministers consider the defensibility of their preferred approach.

The ongoing constitutional challenges

While the Kaikōura Act has evolved from the Canterbury legislation, there are still some outstanding constitutional challenges.

A broad purpose

Purpose is relevant to disallowance (the process by which Parliament supervises and controls delegated legislation). Parliament may disallow delegated legislation that makes an 'unusual or unexpected' use of the lawmaking power (standing order 319). That ground for review will be undermined if the empowering act's purpose clause is all-encompassing: the wider the act's purpose, the less likely an instrument is to stray beyond it. Thus, disallowance may not be an effective remedy against executive overreach.

While some were uncomfortable with the breadth of the 2011 act's purposes, the government maintained that the purpose was clearly defined (Kerkin, 2017, pp.161-3). And the question did not arise in orders

of recovery, viewing it in terms of environmental, social, economic and cultural well-being (2011 act, s3; Kaikōura Act, s3). In the Kaikōura Act, the holistic approach to recovery tends to be compounded by the act's coverage of greater Wellington (which extends to the Wairarapa), where a state of emergency was never declared.

A broad purpose does not sit easily with the ideal of the use of Henry VIII clauses only where 'demonstrably essential'. This tension is likely to be felt in any future disaster recovery statute that uses a Henry VIII clause.

Continued discomfort with inroads into parliamentary supremacy

There is a continuing unease with the use of Henry VIII clauses in relation to disaster recovery. In part that unease may come from the fact that not all recovery decisions are equally urgent. In the early days of recovery, urgent amendments may be needed to get people into safe, weathertight accommodation, to open access to the affected area, and to ensure that businesses do not fail due to disruption. But longer-lasting decisions about the rebuilt

environment may lack legitimacy if made without engagement with the affected communities. Disaster recovery 'is a slow and long-term process riven with choices that raise difficult questions. To put this simply, disaster recovery is about policy' (Hopkins, 2016b, p.201).

As a remedy, it has been proposed that all orders made under the Henry VIII clause should be subject to affirmative resolution by Parliament that would validate the measure (Geddis and Knight, 2016; Hansard, 2016b, p.15735). That approach would mean the orders would not come into force until affirmed by Parliament (McGee, 2017, p.474), which could significantly delay their commencement depending on when they were made and whether the House was sitting at the time. For some orders that might not matter; for others, it might be critical.

A more nuanced approach is probably needed. Ideally, the Henry VIII clause would be reserved for those situations where the parliamentary process is too slow and where waiting for that process risks undermining public confidence in the lawmaking process. The Kaikōura Act's engagement clause (s9) may provide ministers and officials with an informal rule of thumb: if the context warrants – and allows for – a full engagement process, consideration might be given to making amendments by primary legislation, not by order in council. At the same time, a full engagement process might largely mitigate the harm done by using the Henry VIII mechanism in terms of decision quality and legitimacy.

Privative clauses remain a constitutional irritant

The Canterbury legislation contained two privative clauses, which were viewed as inflammatory, and experts were divided

over whether they would be effective (Kerkin, 2017, p.160).

The privative clauses were carried over into the Kaikōura Act, and much the same concerns were raised again. While the act clarifies that there is a residual judicial review right, it is not as wide as some members would have liked. David Parker observed:

But I, personally, think we should not be at all limiting judicial review rights. The bill does limit judicial review rights around process decisions and other decisions that the Minister takes under the Act. I do not think that was necessary. There is already a very wide discretion for the Minister. The test of his decision making is a subjective one – it is not an objective one – which gives him great latitude, and I do not think we should be scared of the courts having a judicial review function. (Hansard, 2016b, p.15733)

Conclusion

Henry VIII clauses are likely to be a long-term feature of the disaster recovery landscape. Where legislative change is needed urgently, parliamentary processes can be too slow and inefficient. Reliance on Parliament would have opportunity costs, in terms of the time needed both for a bill's passage and for the other legislation it displaces on the order paper. It may, paradoxically, weaken public confidence that the executive and legislature can act decisively and pragmatically in the face of disaster. Although they present some constitutional challenges, Henry VIII clauses are a pragmatic approach to making precise amendments to statutes in post-disaster recovery contexts.

The Kaikōura Act shows how Henry VIII clauses can evolve to make use of in-

formal safeguards against disproportionate or arbitrary use. It seeks to ensure that ministers' decisions are informed by wider perspectives, and that a broader parliamentary consensus is reached where possible. This promotes good decision making by ensuring that ministers are aware of all relevant considerations before making a decision. It also seeks to find a better balance between the executive and legislative branches, to mitigate the centralisation of power in the executive created by the Henry VIII clause.

The new safeguards in the Kaikōura Act are a step in the right direction. They reduce the 'possibility of abuse', although the levers are more informal and incentive-based than some would like. Challenges remain to ensure that disaster recovery Henry VIII clauses have a clearly defined and proportionate scope and that their use is properly controlled and supervised by Parliament and the judiciary.

- 1 This article contains the author's personal views and does not represent government policy or the position of the Ministry of Justice.
- 2 Canterbury Earthquake Response and Recovery Act 2010, which was repealed and replaced by the Canterbury Earthquake Recovery Act 2011. The Henry VIII clause in the 2010 act was carried through without change.
- 3 That evolution is continuing apace, with the introduction to Parliament on 4 December 2017 of the Christ Church Cathedral Reinstatement Bill, which contains a Henry VIII clause to facilitate reinstatement of the cathedral. An addendum to this article considering the effect of this bill will be included in the next issue of *Policy Quarterly*.
- 4 This is implicit in the general policy statement on the Canterbury Earthquake Response and Recovery Bill 2010: www.legislation.govt.nz/bill/government/2010/0215/latest/DLM3233004.html.
- 5 The Bill of Rights 1688, Constitution Act 1986, Electoral Act 1993, Judicature Amendment Act 1972, New Zealand Bill of Rights Act 1990 and Parliamentary Privilege Act 2014.
- 6 In this article 'the minister' means the minister with delegated responsibility for earthquake recovery.

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