The Institute for Governance and Policy Studies, School of Government at Victoria University of Wellington

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FOCUS ON COVID-19

Governance in a pandemic

The Institute for Governance and Policy Studies, School of Government at Victoria University of Wellington

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Editorial Note

Globally, from COVID-19 to climate change to disputed election results, 2020 was a year of extremes. Similar turbulence seems likely in 2021.

I was reminded of this while driving from Dunedin to Oamaru on 2 January. The trip proved hazardous. The rain-soaked roads of North Otago were barely passable, and indeed State Highway 1 was closed to traffic shortly after we traversed the severely flooded Kakanui River. Subsequently, several dozen road closures occurred in Otago due to slips and flooding.

Only a year earlier, in early December 2019 (when my wife and I were in Dunedin for a graduation ceremony), the flooded Rangitata River brought north-south traffic in Canterbury to a standstill for days, disrupting normal business activity throughout the South Island, stranding tourists and causing extensive damage to physical infrastructure. The flooding was prompted by intense and protracted rainfall in the river's headwaters, with almost a metre falling in parts of the catchment during the first nine days of December.

Severe weather events are not new, but are becoming more frequent, as well as more damaging. There is robust evidence that human-induced climate change is the key factor. Inevitably, as the planet continues to warm, the situation will worsen.

Globally, the implications for human civilization will be profound. Major impacts will include ever-increasing damage to human settlements, greater food insecurity, large-scale migration flows, increased civil unrest and political instability, and starker economic and social inequalities. For Aotearoa New Zealand the many risks have been carefully analysed in the National Climate Change Risk Assessment published in August 2020; this document makes for grim but essential reading.

Locally, two policy responses are vital. First, we need a vigorous, consistent and evidence-informed focus on improving our adaptive capacity and enhancing our societal resilience. Among other things this will require major changes to spatial planning and resource management, new fit-for-purpose governance arrangements, tougher restrictions to further development on vulnerable coasts and flood plains, more rigorous building codes, and a comprehensive, long-term strategy for infrastructure investment.

Second, the country must contribute energetically to the global goal of zero net emissions of greenhouse gases (GHGs) by 2050. Thus far, our track record has been lamentable, with both gross and net GHG emissions rising for much of the past three decades.

Recently, the Climate Change Commission published its proposed emissions budgets for 2022-2035, and related policy advice on how to achieve the required emissions reductions. Its draft report lays bare the gravity, urgency, and magnitude of the task.

Reducing transport emissions both quickly and sustainably is critical. Currently, land transport emissions (i.e. from light and heavy vehicles) constitute around 40 per cent of the nation's carbon-dioxide emissions and about 20 per cent of total GHG emissions. Achieving zero net emissions will require significant modal shifts, above all a much greater reliance on public transport, cycling and walking. Large investments in high-quality mass transit and cycleways are imperative. In this regard, the recent upsurge in e-bike usage is encouraging.

Rapid decarbonization of the nation's vehicle fleet will also be essential. In short, the age of internal combustion engines (ICEs) must end, and swiftly. Given current technologies, decarbonization will mean a heavy reliance on battery electric vehicles (BEVs). Embracing hybrid vehicles, whether plug-in or otherwise, while helpful, will be insufficient. Other competitive zero-emission transport technologies may well emerge, but are not a short-term option.

Are such dramatic transitions possible? Thankfully, yes: cars replaced horses in the early 20th century within several decades. Realistically, BEVs can supplant ICE vehicles over a similar timeframe.

Norway provides a viable model. Like Aotearoa New Zealand, it relies mostly on renewable energy sources for electricity, which makes BEVs a sensible low-emissions option. It also has a similar population size and density.

Norway commenced a concerted shift to BEVs in 2015, underpinned by multiple government incentives. The transition has been swift. By June 2020 the country had more than 300,000 BEVs, around 10 per cent of all light vehicles. In November 2020, almost 80 per cent of new vehicle sales were plug-in electrics: BEVs captured 55 per cent of the market, while plug-in hybrids captured 24 per cent. The share of traditional ICE vehicles was just 10.5 per cent, down from 27 per cent a year earlier.

Four main policy initiatives galvanized this transition. First, buying BEVs (but not plug-in hybrids) was made price competitive with ICE vehicles by exempting the former from purchase taxes and value-added taxes. Second, BEVs were exempted from the annual road tax, public parking fees and toll payments; they were also permitted to use bus lanes. Third, a comprehensive network of public charging stations was established. Currently, Norway boasts almost 14,000 charging points, more than 20 times New Zealand's total. Finally, purchasing new ICE vehicles will become illegal from 2025.

Collectively, these policies have shifted public attitudes and behaviours. Purchasing BEVs is now the societal norm. Like smoking, driving ICE vehicles may soon be regarded as anti-social.

Aotearoa New Zealand is capable of a similar transition, but it will take political courage and significant policy reforms.

At the same time, we must not simply replace four million ICE vehicles with BEVs. As noted, modal shifts are also essential. Many city roads are already severely congested. Equally, BEVs have some negative environmental impacts. Accordingly, genuine sustainability and climate justice will require a multi-pronged approach. This must include embracing a circular economy, thereby consuming fewer natural resources and minimizing waste.

Jonathan Boston, Editor
Disclosure statement: I drive a BEV.

David Skegg

This article is an edited version of the
Sir Frank Holmes Memorial Lecture
delivered by Sir David Skegg at
Victoria University of Wellington
on 12 November 2020.

The Covid-19 Pandemic lessons for our future

It is a pleasure and a privilege to be giving this lecture. A pleasure, because I have always had affection and respect for this university, ever since I was billeted here as a student in the University of Otago debating team. And it is a privilege to be giving the Sir Frank Holmes Memorial Lecture.

Frank Holmes was the president of the Otago University Students' Association in 1947. Speaking from experience, I must admit that vice-chancellors don't always see their student presidents as destined to become notable scholars or leaders in public life. Yet the list of OUSA presidents contains many distinguished names, including that pioneer of anthropology and Māori health improvement, Sir Peter Buck (Te Rangi Hīroa). There are also three current members of Parliament, including the deputy prime minister and a new member of the Cabinet, Ayesha Verrall.

Frank Holmes, during a long career as an economist here at Victoria, was not only a respected university leader, but also someone who helped to chart New Zealand's social and economic future. He served on an astonishing range of public advisory bodies and corporate boards. And he was one of the founders of the Institute of Policy Studies at this university.

Returning to the University of Otago to receive an honorary degree, 50 years after his student presidency, Sir Frank said that he had been told how one of his academic colleagues saw him:

> At the end of a conversation about my propensity to move in and out of the university and to take on advisory assignments for governments and others while I was employed there, he said: 'He's not really an academic, is he?'

Fortunately, universities have a broader view of their mission today.

As we face the challenge of rebuilding our future in the midst of the Covid-19 pandemic, it is a great pity that we cannot draw on the vision and wisdom of Frank Holmes. I will say a few words about likely effects of this pandemic on our national life, but I cannot pretend to be an economist or a social scientist and so will focus largely on the health of the people.

That is my first disclaimer. The second disclaimer is that everything I say must be seen as provisional. We are learning more about Covid-19 every day, and the global

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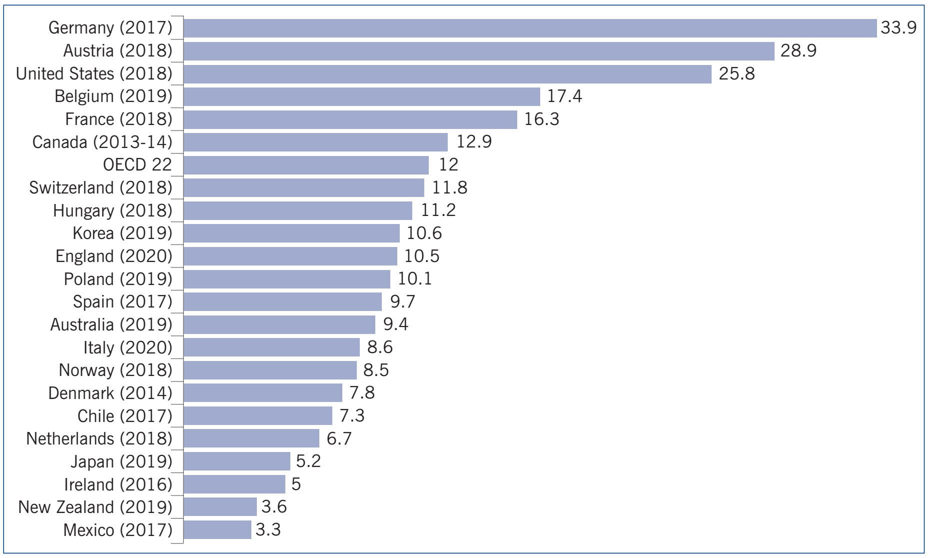
David Skegg, an epidemiologist and public health physician, is an emeritus professor at the University of Otago. He was previously the vice-chancellor of the university. As well as advising the World Health Organization for more than three decades, he has chaired many government bodies, including the Health Research Council and the Public Health Commission. He was also the president of the Royal Society Te Apārangi. In 2020 he served as a special adviser to Parliament's Epidemic Response Committee, and he was called as a witness by the equivalent select committee of the UK House of Commons.

Figure 1: Capacity of intensive care beds (per 100,000 population) in selected OECD countries



Source: OECD (2020)

pandemic is still rampant, so things might change here as early as tomorrow.

The emergence of Covid-19

On 6 November 2019, the prime minister unveiled a national memorial to 9,000 New Zealanders who died in the 1918 influenza pandemic. I doubt if she envisaged that a new pandemic was about to be unleashed on the world. Perhaps we should not have been surprised, as scientists had been warning for years that viral pandemics were becoming increasingly likely. Some countries had recently dealt with epidemics of infectious diseases new to humans, such as SARS and MERS. Moreover, New Zealand has been part of the ongoing HIV/AIDS pandemic, which the World Health Organization (WHO) estimates has killed about 33 million people so far.

It was in late December that reports emerged about a mysterious new disease in Wuhan, China. There has been justified condemnation of attempts by the Wuhan authorities to suppress this unwelcome news, but less acknowledgement of the remarkable progress made by Chinese doctors and scientists. A coronavirus was identified as the cause of the illness by 8 January 2020, and the genome sequence of this virus was made public only four days later. The disease spread quickly to all provinces of mainland China, but the country then mounted what has been described as 'perhaps the most ambitious, agile and aggressive disease containment effort in history' (WHO, 2020, p.16). Meanwhile, Chinese doctors published, in international journals, crucial observations on the clinical features and range of outcomes of the illness.

The WHO was notified about the outbreak at an early stage, and it worked closely with the Chinese authorities. It arranged for a joint mission of experts from eight countries to spend nine days in China from 16 February. Their incisive report is a landmark document that informed control efforts in all countries, including New Zealand (WHO, 2020).

The WHO has been criticised, especially by American politicians, for being complimentary about the Chinese response to the outbreak. Yet it was a major achievement to persuade the communist authorities to host a fact-finding mission of experts from other countries, even if restrictions were placed on the scope of their enquiries. Imagine if this epidemic had started in the United States, as may well have been the case with the 1918 influenza pandemic – even though it is often mistakenly called the 'Spanish flu' (Crosby, 1993). How would President Trump have reacted if the WHO had proposed that a posse of scientists from other countries should come and try to get to the bottom of things?

What is remarkable is that health authorities in many Western nations were so slow to recognise the gravity of the threat, despite repeated warnings from the Chinese and from the WHO. The editor of *The Lancet* has described this as 'the greatest science policy failure for a generation' (Horton, 2020, p.41). Delayed and inadequate action has led to hundreds of thousands of deaths in Europe and the United States. Sadly there will be many more, and perhaps an even greater number of people afflicted by chronic effects of infection that are still being clarified – the so-called 'Long Covid'.

Meanwhile, a number of Asian countries were being far more successful in controlling the virus. They had learned much from the SARS epidemic in 2003, but Western countries were reluctant to follow their advice. The fact that the United States and Britain, which have led the world in medical and public health sciences, failed so miserably in responding to a known pandemic threat has been a supreme irony of this pandemic. David King, a former chief science adviser to the UK government, blamed 'arrogance' and 'hubris' (Kirkpatrick, Apuzzo and Gebre, 2020).

Early responses in New Zealand

Hubris was not an option in this country, because health professionals knew only too well that we were ill-prepared. The country has no public health commission or centre for disease control, and the Ministry of Health did not even employ epidemiologists. A Global Health Security Index, published a few months before the pandemic, ranked New Zealand as 35th in the world for pandemic preparedness (Cameron, Nuzzo and Bell, 2019).

Spending on public health services in New Zealand shrank markedly between 2010 and 2018 (Crampton, Matheson and Cotter, 2020). The public health units in our district health boards (DHBs) have been underfunded for years, so they had only a limited capacity for contact tracing. But the DHBs had a more compelling concern. They knew they lacked the surge capacity to cope with an influx of critically ill patients, as seen in countries that were only a few weeks ahead of us in the pandemic. Our hospitals have often been dangerously stretched, even by routine winter outbreaks of influenza. Among 22 OECD countries, the provision of intensive care beds (per capita) in New Zealand has been less than one-third of the average (OECD, 2020). New Zealand is in 21st place, followed only by Mexico (Figure 1).

On 5 March 2020, after New Zealand's third case of Covid-19 had been confirmed, the prime minister gave an assurance which indicated that she had been badly misinformed. She said that New Zealand's 'world-class' health system was geared up to deal with the outbreak: 'Our public health system is designed for [an outbreak] like this … I have every faith in our system' (Walls, 2020). Only three weeks later, the government was forced to impose one of the strictest lockdowns in the world.

A change of strategy

A senior government minister, Chris Hipkins, later acknowledged that the Cabinet was still expecting New Zealand's hospitals to be 'completely overrun' by coronavirus cases when the country moved into the highest level of lockdown (Wiltshire, 2020). But this hastily adopted measure actually provided the opportunity for a change of strategy.

New Zealand, like many countries, had an influenza pandemic plan, and the prime minister received advice that led her to assure Parliament on 11 March that it was 'designed for exactly these situations' (Ardern, 2020). Yet it became more and more evident that Covid-19 is very different from seasonal influenza, and not just because it is many times more fatal. Philip Hill and James Ussher, from the University of Otago, were among those who noted that people who get infected with this coronavirus take more days before becoming infectious to others than people who develop influenza (Hill and Ussher, 2020). This explained why some Asian countries were successful in controlling Covid-19, at least partly through testing, together with rapid tracing and isolation of contacts before they could infect other people.

With influenza pandemic plans, contact tracing and isolation are abandoned once community transmission is established. In contrast, the properties of this coronavirus make elimination of Covid-19 a realistic proposition. Epidemiologists define 'elimination' as the reduction of case transmission to zero or to a predetermined very low level (Porta, 2014). A distinction is made from 'eradication', which normally means the worldwide extermination of an infection. Two professors at the Wellington campus of the University of Otago, Michael Baker and Nick Wilson, became strong advocates for an elimination strategy.

In many countries, including the United Kingdom, the initial strategy for dealing with Covid-19 could be described as 'mitigation'. One of the aims of this approach was to achieve 'herd immunity', a state in which an infection stops spreading through a population because a sufficient proportion of people have become immune to that infection. Although many public health officials and politicians are now denying that this was ever their aim, the historical record is clear. It was soon realised that, even if herd immunity were attainable in the absence of vaccination – which now seems highly unlikely – health services would be utterly overwhelmed and the huge number of deaths would be unacceptable. So most countries switched to a policy of 'suppression', aiming to 'flatten the epidemic curve' and protect health services from collapsing. Meanwhile, a number of Asian countries, including China, had elimination as their goal.

> As Minister Hipkins acknowledged, the New Zealand government had not adopted a goal of elimination when the lockdown was imposed.

As Minister Hipkins acknowledged, the New Zealand government had not adopted a goal of elimination when the lockdown was imposed. At the first meeting of Parliament's Epidemic Response Committee, in the following week, the then minister of health (David Clark) gave a lengthy presentation about the government's strategy (Clark, 2020). He did not once mention elimination. Instead, he alluded to suppression, wanting to 'bend the curve', 'avoid a single large surge of cases', or 'spread the cases over several smaller waves'. On the day after that meeting, however, the government announced that it would adopt an elimination strategy.

That was a crucial decision, and I salute the prime minister and her Cabinet for having the courage to adopt that goal and to commit to it publicly. They could see that the best health response would also be best for society and for the economy. Why was the decision courageous? Because we all knew that failure was entirely possible. In so many other countries, politicians were afraid of failing and they adopted less ambitious goals. Every night, on our television screens, we can see the terrible consequences of allowing this virus to get out of control.

Reasons for success

I do not need to recount the ups and downs of the following weeks and months. There were delays in expanding criteria for testing, problems in scaling up contact tracing, and repeated failures in border controls. Many of us have been critical of particular matters, but the overall result has been brilliant.

As an example, let us compare New Zealand with Scotland, which also has just over five million people. New Zealand has had a total of 25 deaths during the pandemic. Scotland had 64 deaths yesterday (11 November 2020), and has had more than 4,500 deaths so far. A great many more Scots have experienced serious illness, which has become chronic in some cases. Moreover, the social and economic life of places like Scotland will continue to be stymied for many months.

What were the key factors that enabled New Zealand to achieve elimination?

- First, it must be acknowledged that we enjoyed some natural advantages, as an island nation with a relatively low population density. On the other hand, a number of other countries with similar advantages have done poorly.
- Restricting entry through our borders from an early stage limited the influx of people carrying the virus.
- Our lack of preparedness and shortage of intensive care facilities prompted an

early lockdown. Paradoxically, this turned out to be a fortunate circumstance.
- The lockdown was unusually rigorous, although also brief compared with those in a great many other countries.
- There was excellent communication – not only from political leaders and health officials fronting media conferences, but also from the civil servants responsible for communications and public engagement.
- The government listened to scientific advice about weaknesses in the response to the pandemic. Willingness to change tack in the light of experience or new evidence was essential.
- The news media played a constructive and vital role. They kept people informed about what was happening, both in New Zealand and overseas. Inquiring reporters uncovered information that was helpful to many groups, including epidemiologists.
- There was wonderful support from most people in the community, and that was enhanced by excellent political leadership.
- Finally, while it would be ridiculous to attribute all our success to good luck, we were fortunate on a number of occasions when there were new incursions of the virus into the community.

At a meeting of the Epidemic Response Committee in April, I said that if we were successful, eliminating Covid-19 would be one of New Zealand's greatest achievements (Skegg, 2020). I still believe that to be the case. We owe a debt of gratitude to politicians from more than one party, to public servants in the Ministry of Health (ably led by Ashley Bloomfield) and in several other ministries, and to hard-working staff in public health units and laboratories around the country. Finally, the commitment of the New Zealand public was fundamental.

Dorothy Porter wrote:

> An epidemic is a sudden disastrous event in the same way as a hurricane, an earthquake or a flood. Such events reveal many facets of the societies with which they collide. The stress they cause tests social stability and cohesion. (Porter, 1999, p.79)

New Zealand does face substantial costs, both social and economic, as a result of the lockdowns and continuing border restrictions.

I think we can feel proud that New Zealand passed this test.

While we live in a relatively caring and cohesive society, New Zealanders unfortunately have a bent towards complacency. It is almost certain that the virus will keep finding its way through our borders – we have had eight incursions detected in three months – so future outbreaks should be expected. Can such outbreaks be stamped out quickly, by testing and contact tracing, without the need for further lockdowns? I would feel more confident if people were practising sensible physical distancing, wearing masks on public transport, getting tested promptly when they have symptoms, and consistently using a contact tracing app (preferably with a Bluetooth function).

Bending the bars of our gilded cage

New Zealanders at present enjoy freedoms and security that are becoming distant memories in many countries. Our children are in school; public gatherings are unrestricted; people can enjoy sport, restaurants and internal travel; and the health system is not disrupted by an unrelenting burden of coronavirus cases. In many countries, disruptions to health care may cause even more deaths than the virus itself.

New Zealand does face substantial costs, both social and economic, as a result of the lockdowns and continuing border restrictions. Those costs fall unevenly on different people. Some of us are hardly affected, while others have lost their entire livelihood.

It is important to recognise that many of the burdens are due to the global pandemic, rather than to decisions by the government. For example, while international tourism in New Zealand was halted by our border restrictions, international passenger traffic worldwide was down by 92% in July compared with the previous year (Skapinker, 2020).

Analyses by the International Monetary Fund suggest that full economic recovery depends on keeping the virus under control (Grigoli and Sandri, 2020). In places where Covid-19 is spreading, voluntary social distancing has been found to have severe detrimental effects on a country's economy. A report from the international consultants McKinsey & Company concludes that governments with a 'near-zero-virus strategy' can achieve a much better economic outcome than countries attempting a 'balancing act' (Charumilind et al., 2020).

Nevertheless, we all want to progress towards normality as soon as possible. So how might we start to bend the bars of our gilded cage?

- As I have already mentioned, it now seems unlikely that herd immunity could be achieved without vaccination, even in countries where the pandemic is raging. In such populations, the proportion of people carrying antibodies is still far below the level that modelling indicates would be required. Moreover, there is uncertainty about how long immunity conferred by natural infection will last.
- It is possible that the virus will gradually evolve over time to become less dangerous to humans. So far there is no evidence that is occurring.
- In future there may be reliable ways of screening people who wish to travel between countries, to ensure they pose no risk of infecting others. A huge amount of work is being done to develop suitable tests, but further progress is required.

- If there were an effective and safe way of treating Covid-19, many of the current restrictions could be lifted. While there have been some advances in supporting people with severe Covid-19, such as with steroid therapy, specific antiviral agents are still needed.
- At present, vaccination offers the best hope of a route to a ‘new normal’. The speed at which numerous vaccines are being developed around the world is unprecedented. Early results from clinical trials of the first candidates are encouraging. Many questions will need to be answered. How effective is a vaccine, especially in the groups (such as the elderly) who are most likely to suffer severe effects from Covid-19? How long will the immunity last? Will the vaccine merely protect an individual recipient from becoming ill, or will it prevent transmission of the virus to other people? How safe will it be, in the short and long term? And what proportion of people in each country will accept it?

I am hopeful that one or more of the vaccines approaching the final stages of evaluation will provide New Zealand with the opportunity to relax border controls and engage more freely with the rest of the world. The optimal strategy for achieving this will depend not only on properties of the vaccines, but also on the availability and uptake of vaccination in New Zealand and many other countries.

A different future

Many misfortunes – the AIDS pandemic, hijacking of planes, the destruction of the Twin Towers in New York – have led to permanent changes in the way people live. Covid-19 will be no different. It will be with us for many years, because vaccination programmes cannot be expected to achieve global eradication. Even as the threat diminishes, some things will never be the same again.

Already one can speculate about developments during 2020 that are likely to become permanent. Working from home will be more common than in the past. This should limit the growth of city traffic and save office accommodation, but there will be a loss of collegiality – not least in universities. Air travel for work will diminish, as more meetings are held by Zoom or similar means. At least these developments will be beneficial in regard to climate change. It is also expected that more work will be automated, with displacement of many jobs.

I hope that our leaders will now be more focused on building the resilience of our society and economy. The Covid-19 pandemic should have brought home to people that we are interdependent; our safety relied on everyone pulling together. People in occupations that have not been accorded high status, such as carers or supermarket assistants and delivery drivers, played an essential role. Society will be more resilient if there is less inequality and a fairer distribution of wealth.

> While our success in controlling Covid-19 has prevented the carnage seen in other countries, job losses and other economic shocks will affect some groups more than others.

Epidemics usually have a disproportionate effect on groups in society that are already disadvantaged. In New Zealand, Māori and Pasifika people are particularly vulnerable. While our success in controlling Covid-19 has prevented the carnage seen in other countries, job losses and other economic shocks will affect some groups more than others.

The pandemic has exposed the lack of resilience of our economy. Excessive dependence on mass tourism and international students made us particularly vulnerable to restrictions on international travel. It seems unlikely that cheap international travel will return to its previous frenetic state in the foreseeable future. Covid-19 has been a more potent force than the environmental movement for *flygskam*, or flight shame. Diversifying an economy is easier said than done, but I hope there will now be radical thinking about how this can be achieved. We have also been reminded how important it is to maintain some manufacturing capacity within the country, when supply lines can be disrupted by an international emergency.

The threat of further pandemics

Some people talk about Covid-19 as a ‘once in 100 years event’. That is highly improbable. In recent decades, emerging infectious diseases have been reported with increasing frequency, with many originating from an animal source (Jones et al., 2008). Advances in biotechnology have also raised the possibility that novel agents may be created in the laboratory and released as biological weapons. The scale and speed of international travel have made it more likely that new infectious agents will spread rapidly around the globe. A new pandemic could occur within the next year or two, and it might carry a much higher risk of death than Covid-19. It has been suggested that the whole future of our species, or at least our civilisation, could be put at risk.

The threat of new pandemics underlines the importance of global cooperation in detecting and controlling emerging diseases. The role of international agencies, including a strengthened WHO, has never been more crucial. The last thing we need is the chauvinistic nationalism that has been evident in some quarters. In addition, New Zealand, like every other country, needs to make its own preparations, so that we can respond quickly and effectively.

I hope there will be a full public inquiry, in due course, to examine New Zealand’s response to the Covid-19 pandemic. That will expose our lack of preparedness, in regard to both clinical facilities (such as intensive care beds) and public health capability. A resilient health system requires the capacity to cope with surges in demand. Unfortunately, both National- and Labour-led governments have been failing to invest adequately in health services as the population grows and ages, and as advances in medical technology make modern care more expensive.

The prime minister herself, during the lockdown, remarked that politicians had not been aware of the importance of public health, and of the work done every day by public health professionals in DHBs and other agencies. Public health can be defined as 'the science and art of preventing disease, prolonging life and promoting health through organised efforts of society' (Committee of Inquiry, 1988, p.1). People will be shocked if a New Zealand inquiry reveals the critical shortage of public health expertise in the Ministry of Health. The Covid-19 pandemic has highlighted the vulnerability of our public health function – something already made obvious by recent outbreaks of Campylobacter infection and measles, which were a disgrace for a developed nation.

The Covid-19 pandemic has highlighted the vulnerability of our public health function – something already made obvious by recent outbreaks of Campylobacter infection and measles, which were a disgrace for a developed nation.

Rebuilding our public health capacity

Infectious diseases are far from being the only challenges we face. Indeed, there are other pandemics that will claim more lives. For example, we are still in the grip of a tobacco disease pandemic. The WHO estimates that tobacco kills more than eight million people every year, with about 1.2 million of those deaths being in non-smokers exposed to second-hand smoke.

Here in New Zealand, we are especially affected by what can be described as an obesity pandemic (Swinburn et al., 2011; Skegg, 2019). More than one-third of New Zealand children and two-thirds of adults are now either overweight or obese. Obesity has already overtaken smoking as a cause of health loss in this country. The problem disproportionately affects Māori and Pasifika people, as well as those living in deprived areas. According to a report on children living in 41 OECD and European Union countries, the proportion of New Zealand children and adolescents who are overweight or obese is higher than in all the other countries except the United States (UNICEF Innocenti, 2020). Our failure to protect young people from this problem means that far too many of them will grow up to suffer chronic diseases, such as type 2 diabetes and heart disease. Obesity can also lead to social rejection and victimisation, which adversely affect mental health and quality of life.

As the preventive side of health care, public health needs to confront the whole range of threats to our health and well-being. In a book published last year, I tried to dissect reasons for the weakness of our public health function, and to recommend possible solutions (Skegg, 2019). In June 2020, the government released a review of our health system, from an appointed panel chaired by Heather Simpson (Health and Disability System Review, 2020). Their report was largely completed before the coronavirus pandemic hit New Zealand. There are many sensible recommendations, but I hope those relating to public health will be reconsidered in the light of our experiences this year.

The chapter on 'Population health' calls for 'a determined and ambitious shift towards prevention and promotion of health and wellbeing with strengthened national capacity and capability'. The report contends that this 'cannot be achieved by carving population health off to the side'. These are fine words, but I have concerns about some of the mechanisms proposed.

The report recommends that the Ministry of Health should have a strengthened leadership role, while the existing Health Promotion Agency would be disbanded. The crucial function of monitoring and analysing the state of the public health (often called 'public health intelligence') would be spread across several organisations: the ministry, a new body to be called Health NZ, and a new Māori Health Authority. The funding for population health work in the regions would be devolved to the DHBs, rather than being subject to separate contracts with ring-fenced funding, as at present. There is little emphasis in the report on the important functions of public health policy and advocacy, but the panel recommends that a Public Health Advisory Committee should be re-established.

Several of these recommendations closely resemble approaches that have been tried in the past, without success. For example, the devolution of funding for public health to DHBs recalls the arrangements (and the rhetoric) for area health boards in the late 1980s. Most of those area health boards manifestly failed public health, with resources being siphoned off into treatment services (National Interim Provider Board, 1992). That was one of several reasons why a Public Health Commission was established (Skegg, 2019).

There are a range of matters that need to be considered in designing a more effective system for public health in New Zealand (Crampton, Matheson and Cotter, 2020). Here I want to focus on just one aspect: the need for independent and authoritative advice to the government and to the community about public health challenges. While the Ministry of Health is the key agency, it is politically accountable and cannot speak publicly and frankly on politically sensitive matters. Throughout my career I have learned that most issues in public health have the potential to become politically sensitive, often without warning. Elsewhere I have argued that the ministry needs to be complemented by a separate agency, such as a Crown entity or an officer of Parliament akin to the parliamentary commissioner for the environment (Skegg, 2019, pp.99–119). The call from the Health and Disability System Review for reinstatement of a Public Health Advisory Committee is to 'provide independent advice to the Minister and a public voice on important population health issues'.

Public Health Advisory Committee

It may be salutary to consider previous experience with such a committee, which existed under statute from 2000 to 2016. The New Zealand Public Health and Disability Act 2000 required the National Health Committee to establish a Public Health Advisory Committee. This was to provide independent advice to the minister, as well as to the National Health Committee, on public health issues, including factors underlying the health of people and communities, the promotion of public health and the monitoring of public health. The advice given by the Public Health Advisory Committee was to be formulated after consultation with organisations and individuals, and it had to be made publicly available by the minister.

Despite sterling efforts by individuals, this committee was never able to make much impact. Like the National Health Committee, it was serviced by the Ministry of Health and tended to work on projects that were chosen by the government. In 2013, after the committee had not even met for at least a couple of years, the MP Kevin Hague alleged that it had been 'unlawfully disbanded'. The minister of health, Tony Ryall, denied this, but conceded that it 'had not been very active' (Skegg, 2019, p.92).

Since recounting that episode in my book, I decided to find out what happened next. There was uncertainty about the membership of the committee, and the minister himself was unable to name the members within the time frame set for responding to a written parliamentary question. In the following year, the annual report of the National Health Committee included a cryptic statement, that 'three of the Committee's membership constitute the Public Health Advisory Committee'. These members were not identified, but were in fact a surgeon, a businesswoman and a retired lawyer from Wanaka.

I wrote to the Ministry of Health and asked for details of the activities of this committee between 2008 and 2016. The ministry refused to provide even the dates of any meetings between 2008 and 2013, on the grounds that the volume of collation required was 'such that the Ministry's ability to carry out its day-to-day work would be impaired'. Presumably this was the period when the minister had said that the committee 'had not been very active'.

The ministry was able to provide the dates of 17 meetings between March 2014 and March 2016. Agenda papers were found for a further two meetings in 2014, but it was 'unconfirmed if these meetings were held', and no minutes could be found. In fact the minutes of six of the other 17 meetings of this statutory committee could not be provided, as 'the information requested does not exist, or despite reasonable efforts to locate it, cannot be found'. This surely calls into question the adequacy of record-keeping in our public service.

Even more surprising was the duration of the meetings of the Public Health Advisory Committee. The first meeting in 2014 lasted 19 minutes, but the subsequent meetings had a median length of five or six minutes (Table 1).

Table 1: Duration of meetings of the Public Health Advisory Committee, 2014–16

Date of Meeting	Duration
25 March 2014	19 minutes
30 September 2014	2 minutes
16 December 2014	7 minutes
4 March 2015	6 minutes
31 March 2015	5 minutes
6 May 2015	5 minutes
28 July 2015	10 minutes
3 November 2015	2 minutes
8 December 2015	5 minutes
2 February 2016	30 minutes
4 March 2016	10 minutes

These meetings were held at hotels in Wellington or Auckland, at the Royal Auckland Golf Club, or at Eden Park. Given that some of them lasted only two minutes, it is hardly surprising that their business was largely confined to administrative matters, such as an interests register, risk register, gifts register, attendance register, hospitality register, and the minutes of the previous meeting. At the majority of meetings, however, the committee was asked to note formally that 'the executive' (i.e. the Ministry of Health) had not identified any matters that required the consideration of the Public Health Advisory Committee.

During years when New Zealand was facing major public health challenges, the government and the community received no relevant advice from this committee. I find it chilling that the Ministry of Health carefully engineered what can only be described as a charade, designed to subvert the purpose of an Act of Parliament.

In view of this experience, I hope it will be understood why I am sceptical about the recommendation from the Health and Disability System Review. I was pleased to see that the Labour Party manifesto, released in September, provides for the establishment of a Public Health Agency. The objectives and arrangements for this body are yet to be clarified. It should be at arm's length from the government of the day, and equipped to provide independent advice on how best to monitor, improve and protect the health of New Zealanders.

Conclusion

As individuals we know that health is a precious commodity, and we cannot fulfil all of our potential without it. The Covid-19 pandemic has taught many nations a painful lesson, that the same is true of society. In dealing with this virus, our government was one of the first to acknowledge that the best health response would also be the best economic response. That can also be true in the absence of a pandemic virus. Improving the health of the people is one of the keys to a successful society.

Almost 150 years ago, the Royal Sanitary Commission (1871) in Britain reached a similar conclusion:

> The constant relation between the health and vigour of the people and the welfare and commercial prosperity of the State requires no argument. Franklin's aphorism, 'public health is public wealth', is undeniable (cited in Committee of Inquiry, 1988, p.i).

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Michael Webster

Government decision making during a crisis

the New Zealand experience during the Covid-19 pandemic

Abstract

A key component of New Zealand's response to the Covid-19 pandemic was how the government was organised and supported to make decisions in relation to the health, economic, social, foreign policy, legal and other policy issues it faced. The New Zealand system of central government decision making, as set out in the *Cabinet Manual* and operated by the Cabinet Office, was continually adapted to ensure that the Prime Minister and Ministers, and the officials working to them, were provided with a system that facilitated both rapid and considered decision making and promulgation of those decisions.

Keywords Covid-19, Cabinet, Prime Minister, Ministers, executive, decision making

Michael Webster is the Secretary of the Cabinet. He has previously held a range of senior roles in central and local government.

On Saturday, 1 February 2020 something out of the ordinary – at least by New Zealand government standards – happened. The Cabinet, the central decision-making body of executive government, met late at night by teleconference. At the meeting, Cabinet received an update on the novel coronavirus outbreak, including proposed enhanced border measures. Cabinet also authorised a group of Ministers to have power to act to take decisions on New Zealand's response to the outbreak and border measures. On the following Sunday, 2 February, Ministers with power to act agreed to a series of border measures. Those border measures were kept under review throughout February and into March by the group of Ministers, and Cabinet, with amendments agreed to from time to time.

At its meeting on Monday, 2 March 2020, Cabinet noted that an Ad Hoc Cabinet Committee on the Covid-19 Response (CVD) would be established. It was clear that the response to Covid-19 would continue to dominate New Zealand's system of central government decision making for some time to come.

New Zealand's system of central government decision making

One of the greatest strengths of New Zealand's democracy is its system of Cabinet government. It's a system that ensures that decisions are taken by informed Ministers working together to achieve collective goals. An understanding of how that system is structured and operates is key to understanding how the New Zealand government considered advice and made decisions in response to the Covid-19 pandemic.

The *Cabinet Manual* has, for many years now, been the authoritative guide to New Zealand's system of central government decision making. It sets out Cabinet's practices and procedures. Its content reflects the stable and underlying traditions and conventions of democratic government in New Zealand. The principles in the *Manual* represent all that is best about our system of executive government: robust decision-making processes, respect for the law, integrity, effectiveness and efficiency, openness and accountability.

There is a long-standing recognition in New Zealand that good process is a worthy goal in its own right – contributing to good policy, respect for the institutions of government and, in the end, good outcomes for the people of New Zealand.

Chapter 5 of the *Cabinet Manual* is concerned with Cabinet decision making. The key principles and guidance set out in this chapter that inform a consideration of the government response to the Covid-19 pandemic are:

- [Cabinet] is a collective forum for Ministers to decide significant government issues and to keep colleagues informed of matters of public interest and controversy.
- Cabinet is central to New Zealand's system of government. It is established by convention, not law. The legal powers of the Executive are exercised by those with statutory authority to act (for example, the Governor-General, the Governor-General in Council, or individual Ministers). In practice, however, all significant decisions or actions taken by the Executive are first discussed and collectively agreed by Cabinet.
- Cabinet determines and regulates its own procedures. Final decisions on Cabinet procedures rest with the Prime Minister, as the chair of Cabinet.
- Cabinet committees provide the forum for detailed consideration and discussion of issues before their reference to Cabinet, with officials available to assist Ministers if the committee wishes.
- Occasionally, Cabinet or the Prime Minister will authorise a Cabinet committee or specified Ministers (a group of Ministers) to have 'power to act' (that is, power to take a final decision) on a clearly defined item. Where a committee or specified Ministers take a decision under power to act, the decision can be acted on immediately.
- Papers are submitted to Cabinet committees and Cabinet to enable Ministers to make collective decisions based on sound information and analysis. Good papers reflect robust policy development and consultation processes, are informed by evidence and insights from diverse perspectives, and are analytically sound. They are succinct yet sufficiently comprehensive to provide Ministers with all the information they need to reach an informed decision.
- In cases of particular urgency or confidentiality, or to update Cabinet on a current issue, or to test preliminary support for a proposal, a Minister may wish to raise an oral item at a Cabinet or Cabinet committee meeting.
- The Cabinet Office supports meetings of Cabinet (in the Cabinet Room) and Cabinet committees (in the separate Cabinet committee meeting room).
- Issues are often debated vigorously in the confidential setting of Cabinet meetings, although consensus is usually reached and votes are rarely taken.
- The Cabinet Office publishes on CabNet [a secure electronic system for managing Cabinet material], and where required distributes in hard copy, minutes of Cabinet and Cabinet committee decisions as soon as possible after each meeting, recording the decisions in a form that allows the necessary action to be taken. (Cabinet Office, 2017)

> The Ad Hoc Cabinet Committee on the Covid-19 Response met four times in March ... sometimes in person and sometimes by teleconference, to receive updates and discuss a range of matters, including border measures.

Government decision making during the pandemic: a timeline

The impact of the Covid-19 pandemic on the decision-making processes of executive government in New Zealand is perhaps best seen by setting out, in a chronological fashion, the various steps and events that happened following that first teleconference Cabinet meeting in early February 2020.

The Ad Hoc Cabinet Committee on the Covid-19 Response met four times in March (4, 11, 12 and 18 March), sometimes in person and sometimes by teleconference, to receive updates and discuss a range of matters, including border measures.

On 19 March, Cabinet authorised a group of Ministers to have power to act in relation to the government response to Covid-19, comprising the Prime Minister, Deputy Prime Minister, Hon Kelvin Davis, Hon Grant Robertson, Hon Chris Hipkins, Hon

Carmel Sepuloni, Hon Dr David Clark and Hon James Shaw. This group, known as the Covid-19 Ministerial Group (CMG), replaced the CVD, and reinforced decision-making flexibility to respond to the urgency of the matters facing Ministers, supported by their public service advisors. Formally, its role was to coordinate and direct the government response to the Covid-19 outbreak.

The Covid-19 Ministerial Group was not a Cabinet committee. Given the group's critical role, the Cabinet Office, rather than departmental officials, provided the secretariat support to this group: receiving papers, generating its agendas, running its meetings and preparing minutes of its decisions.

At its 19 March 2020 meeting, Cabinet also agreed to close New Zealand's borders to everyone except New Zealand citizens and permanent residents (with some exceptions).

The following day, the CMG agreed to the alert level framework and agreed to move New Zealand to alert level 2 as soon as practicable.

On Monday, 23 March, Cabinet took place under physical distancing procedures. Only ten Ministers attended in person, with the rest of Cabinet joining the meeting through teleconference. It was to be the last face-to-face meeting of Cabinet until the move back to alert level 3 in late April.

At that meeting Cabinet:

- agreed to raise the alert level, beginning with a rise to alert level 3 on Monday, 23 March;
- agreed in principle to move to alert level 4 at the earliest practicable opportunity and no later than within 48 hours, for an initial four-week period (it was subsequently extended to Monday, 27 April); and
- agreed that declaring a state of emergency under the Civil Defence Emergency Management Act 2002 was the preferred approach to allow the measures in level 4.

The CMG met again on Wednesday, 25 March 2020, and: a) confirmed the decision to move to alert level 4 at 11.59pm on Wednesday 25 March 2020 for an initial four week period; and b) noted that the Minister of Civil Defence would declare a state of national emergency on 25 March 2020.

The sheer volume of items considered by the government that were directly related to the Covid-19 pandemic, and the response and recovery, was, by any stretch of the imagination, significant.

The CMG, Cabinet or the Cabinet Business Committee (CBC), with some variations, met nearly every day, including weekends, during alert level 4. The weekly cycle looked something like: Cabinet on Monday; CMG on Tuesday; CBC on Wednesday; and CMG on Thursday, Friday and also in the weekend.

A 'battle rhythm' for meetings soon emerged. Officials worked closely with the Prime Minister, Ministers and the Prime Minister's Office in scheduling and preparing papers for decision making. Those papers would be received electronically by members of the Cabinet Office team on duty (working both from home and in the Beehive) by around 4.00pm the day before a meeting. An agenda would be prepared, and the papers distributed to Ministers and the officials who supported them. The meetings themselves normally took place by videoconference the following day. After the meetings, the minutes would be prepared and distributed, and a handover to the next Cabinet Office team would take place, as they in turn waited for the next set of papers for the following day's meeting to be provided for distribution. It was, as all those involved would acknowledge, a relentless yet mostly smoothly functioning process.

The sheer volume of items considered by the government that were directly related to the Covid-19 pandemic, and the response and recovery, was, by any stretch of the imagination, significant. By mid-June 2020, when New Zealand went back to alert level 1, the total had reached over 250. This number includes oral items as well as papers. Some of these items were considered more than once. For example, a matter might have been considered at Cabinet one week, and then an updated paper on the same matter submitted for Cabinet the following week.

During this time, a number of Orders in Council needed to be made by the Governor-General, on the advice of Ministers. In normal times, once Cabinet has approved an Order for signature, the Governor-General signs it at a meeting of the Executive Council, held in the Executive Council Meeting Room in the Beehive, with the necessary Ministers present. The lockdown meant that this standard procedure had to be adapted. Meetings of the Executive Council were held by videoconference, at the conclusion of Cabinet, CBC or CMG meetings, with the Prime Minister presiding. Once approved, the Orders and associated advice sheets were scanned and sent to the Governor-General. They were then printed out, signed by Her Excellency, and then gazetted.

On 28 April 2020 New Zealand moved back to alert level 3. At this point, the normal cycle of Cabinet and Cabinet committee meetings resumed, with some Ministers attending in person and some attending over videoconference in order to meet public health requirements.

On 14 May 2020 New Zealand moved down to alert level 2. Meetings now took place again in the Cabinet Room. A second tier of tables was set up around the main table, allowing the full Cabinet to be present but with the appropriate distancing in place. The Cabinet Room was used for all Cabinet and Cabinet committee meetings until the move to alert level 1.

On 8 June 2020 Cabinet met to consider moving New Zealand to alert level 1. That was agreed with effect from 11.59pm that night.

Supporting Ministers to work remotely

In the normal course of events, papers for Cabinet and Cabinet committees are submitted through the Cabinet Office's

CabNet system. Once those papers have been processed by the Cabinet Office, and an agenda prepared, the Cabinet Office copies and distributes hard copies to those Ministers who want them in that format. Under the higher alert levels, the Cabinet Office was unable to distribute hard copies of papers. Happily, the Cabinet Office also has an application called CabDocs, which is linked to CabNet and enables Ministers to read their Cabinet material electronically on a laptop or tablet device.

Use of audiovisual technology

Of course, during an alert level 4 lockdown you cannot hold face-to-face, or round the table, Cabinet or ministerial meetings. Early on, Ministers met by teleconference. The limitations with teleconferencing when seeking to run, take part in and support the critical decision-making meetings in those early days led to a move to running the meetings using videoconferencing.

Many of those involved in the Covid-19 response and recovery decision-making process were already familiar with videoconferencing tools. However, as with anything new and involving IT, the move to online meetings did involve, for some participants, sorting IT system compatibility issues, upskilling in this sort of meeting technology, and rapidly acquiring the skills and behaviours necessary to ensure an effective discussion and decision-making experience. The subsequent move, under the lower alert levels, to part remote/part in-room meetings necessitated the urgent equipping of the rather traditional Cabinet Room in the Beehive with the necessary technology in terms of screens, microphones and speakers. This experience has prompted ongoing work on ensuring that Ministers and officials have access to up-to-date audiovisual equipment in the Beehive.

Proactive release of papers and minutes

For a number of years now, governments have made it clear that Cabinet material (Cabinet and Cabinet committee papers and minutes) on significant policy decisions should generally be released proactively once decisions have been taken, most often by publication online. That expectation was promulgated in more detail in October 2018 in Cabinet Office Circular CO(18)4: Proactive Release of Cabinet Material: Updated Requirements. Adherence to the expectations set out in that circular proved challenging during the lockdown. However, with the move to alert level 3, officials and responsible Ministers were once again able to commence the proactive release of Cabinet material. Releases took place on 8 May, 12 May, 26 June, 31 July and 9 October (https://covid19.govt.nz/updates-and-resources/legislation-and-key-documents/proactive-release/#released-documents-by-category).

> The longstanding principles of best practice decision making, as set out in the *Cabinet Manual*, were effectively combined with modern technology, the adaptation of systems and processes, and a dash of Kiwi pragmatism, to deliver a decision-making approach that supported Ministers to respond to one of the most significant crises New Zealand has ever faced.

Conclusion

In a Bagehot column in the *Economist* on 2 May 2020, the author discussed the challenges of governing in a Covid-19 world, and noted: 'The cabinet, cumbersome at the best of times, is ill-designed for crisis' (Bagehot, 2020). New Zealand's experience has been different; our system of executive decision making has proven flexible enough to allow an agile and swift response to a crisis. Ministers were, at incredibly short notice, regularly provided with information, analysis and advice and, in a collective setting, after robust discussion in a virtual environment, made decisions that were accurately and clearly recorded, and quickly promulgated. The longstanding principles of best practice decision making, as set out in the *Cabinet Manual*, were effectively combined with modern technology, the adaptation of systems and processes, and a dash of Kiwi pragmatism, to deliver a decision-making approach that supported Ministers to respond to one of the most significant crises New Zealand has ever faced. There is now an opportunity to reflect on that experience, to ensure that:

- the back-office technology that supports executive decision making is as effective as it needs to be, in all sorts of different situations; and
- the systems, processes and structures for decision making by Ministers, and the formal processes of making Orders in Council by the Governor-General, continue to be both flexible and robust enough to work effectively in any future crises.

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Hannah Cameron

The New Zealand Public Service Response to Covid-19

Abstract

The New Zealand public service faced an unprecedented challenge in 2020. The focus of this article is on what the Covid-19 experience can tell us about the strengths of the public service, and whether the course that we have set for the future, enshrined through the Public Service Act 2020, is the right one. The established directions of public service change helped the Covid response: functional leadership made a definite contribution; dispersed leadership roles proved their worth; the deepening experience of inter-agency collaboration over the past decade cannot be proved to have contributed, but it seems reasonable to conclude that it did. Public servants proved willing to behave as participants in a single service rather than employees of a single agency, living up to the more complete view of human motivation reflected in the Public Service Act. The article concludes with some observations on the importance of interoperability for the future public service, and on the implications the strong Māori response to Covid-19 may have for the public service of the future.

Keywords public service reform, Covid response, spirit of service, trust, integrity, collaboration

Hannah Cameron has been a public servant for 20 years, working for the UK and New Zealand governments. She has been the Deputy Commissioner, Strategy and Policy in Te Kawa Mataaho Public Service Commission since 2018, where she led the work on the Public Service Act 2020.

The New Zealand public service faced an unprecedented challenge in 2020. Delivering New Zealand's response to the Covid-19 pandemic has been multi-faceted and complex, and is ongoing. There is no part of the public service that has not been affected.

While Covid-19 dominated the nation's thoughts, another event quietly occurred in 2020 that has significance for the public service: the passage of the first major rewrite of the legislation underpinning the service for 30 years. The Public Service Act 2020 marks a milestone in the evolution of the New Zealand public service. It reconfirms and codifies the purpose and principles of the service and provides new tools to enable it to continue to improve results.

This brief article does not attempt to do justice to the whole public service Covid-19 effort in either breadth or detail. Rather, the focus here is on what the experience can tell us about the strengths of the public service, and whether the course that we have set for the future, enshrined through the Public Service Act 2020, remains relevant and appropriate.

The current direction for public service change will be familiar to most readers of *Policy Quarterly*:

- an emphasis on the public service as a single, linked system with a common culture;
- maintaining the ethical foundations of the system based on the spirit of service;
- building and supporting the relationships of the Crown with Māori;
- a focus on outcomes and on cross-agency working to achieve results;
- leadership of the public service as a single system, and dispersed cross-system leadership roles for aspects of its work;
- flexibility in organisational arrangements and facilitation of workforce mobility across the system.

The emphasis on a single system, aligned and yet agile, collaborating to deliver outcomes, represents a gradual shift away from the highly devolved, and therefore somewhat siloed, approach that emerged from the New Public Management approach of the late 1980s. A further compelling rationale for making this shift is the changing world that we live in, one where communication is constant, rapid and diffuse, and where citizens have different expectations regarding the level and type of engagement they can have with decision makers. Increasingly, the public service is working in a dynamic environment where demands shift, sometimes very rapidly, and where ways of working need to change and adapt.

In terms of this agility challenge, an unprecedented and sudden external shock like Covid-19 is almost the ultimate challenge: major and serious, and broad in the sense of its breadth of impact – health, economic, social wellbeing. Moreover, the crisis was not ‘out there’, and in this respect was quite different from other crises the public service has had to respond to in the past. Previous economic shocks, like the global financial crisis or the earlier Asian financial crisis, whatever their broad social and economic impact, did not directly impact on the ability of the public service to deliver. Natural disasters, like cyclone Bola or the Canterbury earthquakes, have localised impacts on public service delivery. Covid-19 affected every part of the entire New Zealand public service’s ability to operate and continue both normal and Covid-19-related activity. It was not only a crisis ‘out there’, but was very much ‘in here’.

> The extraordinary Covid-19 experience for the community meant that there was significant public recognition of the efforts made by public servants.

The emergency phase of the Covid-19 experience in New Zealand presented multiple challenges for the public service. How did it perform and what does this tell us about the strengths of the system, and the direction in which we need to evolve into the future?

The spirit of service

The obvious and outstanding feature highlighted in the response was the strength of the underlying spirit of service among public servants. Departments consistently reported staff in important or vital roles working in difficult circumstances, experiencing extreme pressure to deliver in short time frames despite upheaval to location, work hours and technology, and with concurrent disruption in their family and home life. They shared stories of staff going above and beyond despite these barriers.

Historically, the spirit of service has tended to be assumed rather than actively cultivated. To some extent it is part and parcel of New Zealand’s culture: characteristic of a society with strong social cohesion, a collectivist ethic, and an emphasis on fairness and responsibility in public discourse (Scott and Merton, forthcoming). In recent years, there has been stronger recognition of the need to more actively foster and celebrate the spirit of service, starting at the highest levels of senior management (Scott and Macaulay, 2020). This was mentioned in the purpose of the State Sector Act 1988, but not backed with any specific obligation until the Public Service Act was passed. The role of senior public service leaders is to nurture, preserve and maintain the spirit of service. The Covid-19 experience shows how this can be achieved into the future, by empowering staff and removing barriers that impede their ability to serve New Zealanders.

The extraordinary Covid-19 experience for the community meant that there was significant public recognition of the efforts made by public servants. This is part of another key feature of the response: trust.

Public trust

The second outstanding feature of the public service response to Covid-19 was the extent to which it both depended on, and contributed to, the high level of trust in government. New Zealanders trusted their public officials and agencies to tell the truth. So, when they received clear information about the evidence underlying the policies of the public health response, they bought into the solution.

Trust in government helped achieve results for New Zealand through the high level of voluntary compliance with level 3 and 4 restrictions. The link between trust and voluntary compliance is well-established across a range of policy areas (Scott and Merton, forthcoming; Murphy, 2004; Grimes, 2006). This allowed the public service response to be built on voluntary compliance with very little enforcement, let alone prosecution, needed. Resentment against government-imposed ‘restrictions’ never gained much traction, and the public service was able to assume a positive character as a helper and enabler of the society’s wellbeing, rather than the negative cast that it sometimes acquired elsewhere.

Survey results indicate that trust levels hit a record high during the pandemic, but New Zealand has historically consistent high levels of public trust. This doesn’t happen by accident. The currency of trust has two sides to its coin, integrity and delivery. New Zealanders need to trust that the public service will deliver to their needs, and that this will be done in a way that reflects their expectations. This is consistent with international research – for example, with the OECD trust framework, which refers to 'competences' (responsiveness and reliability) and 'values' (integrity, openness and fairness) (OECD, 2017, Box 4.4, p.142).

In New Zealand's Covid-19 response we saw expert, professional voices being heard and believed by the public. Ministerial communications during the crisis phase were backed by high-profile expert public service communications, most notably from the director-general of health and senior officials of the Covid-19 All-of-Government Response Group located in the Department of the Prime Minister and Cabinet. In this context, we saw tangible recognition of the value of those same principles that were codified in the Public Service Act: public servants are appointed on merit, have a legal duty to be politically neutral, are expected to provide free and frank advice to elected officials and are mandated as stewards of the public service.

The challenge in this is always to be worthy of continued trust; to act in a way that adds to the fund of trust 'capital' in the system, rather than burning through it. Communications from public service leaders, backed by a range of information and advice from departments, were successful. The overwhelming impression was one of professionalism in style, competence in content, and timeliness in securing and providing information. Of course, there were instances where information was incomplete or contained errors, and where communications were inconsistent from various sources. Both the public and ministers seemed to accept these as inevitable shortcomings, understandable in the circumstances.

The New Zealand public service operates from a strong basis in integrity, for which we have a well-documented and deserved international reputation. Integrity concerns were not a feature of the Covid response. Historically, integrity has been another taken-for-granted aspect of our public service. It is now becoming an area of greater focus as we appreciate how significant a role it has played in enabling a successful pandemic response, and the huge opportunity cost of a loss of confidence in the integrity of the public service. It underlines the need for continued investment in this area.

> Public service delivery was challenged as never before in that Covid-19 posed a threat not only to the provision of services, but to the very ability of public service agencies to continue operating.

Shifting to new ways of working

Public service delivery was challenged as never before in that Covid-19 posed a threat not only to the provision of services, but to the very ability of public service agencies to continue operating. For most agencies, Covid-19 meant providing employees with the means to work from home if services were to be maintained at anything like normal levels.

Working from home presented a range of issues. Equipment often could not be transferred home from the workplace. There were issues with IT connectivity. People's homes are generally not set up for ergonomic working. Managing teams remotely presented its own challenges, as did the need to prioritise when not all normal work could continue. And, as noted above, there were concerns for employee welfare and wellbeing, given isolation and other factors. However, the scale of the achievement should not be underestimated. At one point, 4,000 Inland Revenue staff were working from home. All Ministry of Education staff were at home by 17 April.

In facing these challenges, agencies found that it didn't make sense to work alone. The legacy of the highly devolved approach to the delivery of services meant that different agencies faced different challenges around the shift to digital and remote working. At the same time, the changes that have been made over the last decade to align systems and develop ways of sharing expertise across the system through the creation of functional leadership roles were critical to supporting agencies to adjust.

The government chief digital officer – Paul James, Department of Internal Affairs – had a key system role during Covid-19, supporting government agencies to maintain critical digital services and continue to deliver for New Zealanders during the response. The government chief digital officer also partnered with other government departments and vendors to ensure that available digital resources were directed to the areas of greatest need across government.

The Digital Public Service branch in the Department of Internal Affairs also helped the progression and delivery of digital services for New Zealanders during the Covid-19 response. This included:

- working closely with government agencies to support them in implementing remote working;
- supporting key agencies providing critical services around health, education, welfare, and law and order;
- rapidly scaling up the infrastructure to support the government's main Unite against Covid-19 website, using cloud services (Common Web Platform and Amazon Web Services) to ensure that it remained up and running even under heavy demand;
- contributing to the National Crisis Management Centre's response and delivering subsequent joint Health/Government Digital Services reports back on technology options to improve contact tracing, manage self-isolation, and monitor population movements and disease spread.

Some very complex and difficult pieces of work were delivered by agencies during the Covid-19 lockdown. The delivery of the wage subsidy is probably the outstanding example. Within ten days of announcement, almost 200,000 applications covering

460,000 jobs had been paid out at a time when the Ministry of Social Development was already under pressure from increasing numbers seeking hardship, benefit and employment assistance. And some elements of business-as-usual activity faced great difficulties: two public service payroll runs were completed by public servants working from home.

Moving forward, there is now even greater recognition of the value of interoperable technology and platforms. In tackling a challenge like Covid-19, leveraging the power of the whole system outweighed the previous focus on agency-specific needs.

System-wide flexibility

Innovation and improvisation to enable the public service response to Covid-19 were evident not only at the level of the individual department, but across agencies and also on a system-wide basis. A public service history of working to improve collaborative capacity paired with public servants' intrinsic motivation to innovate, despite the difficult conditions, was evident (Scott and Boyd, 2020).

The response was not managed through the usual agency-specific mechanisms but co-ordinated through the specifically created Covid-19 All-of-Government Reponse Group, and led by officials selected for their expertise and seconded from a range of departments.

Departments assisted each other, including by transferring workload (especially in the case of call centres), sharing expert capability where possible, and redeploying staff. There were significant redeployments among large operational departments; staff with policy and strategy skills were moved into 'front-line' departments; executive assistants were processing wage subsidy applications; and in at least one case public servants were deployed to an emergency service outside government. Guidelines for the system set in place common ways of working and basic rules for secondments and deployment that fast-tracked agreements and smoothed working arrangements. The Office of the Auditor-General stepped in to support agencies to use appropriations more flexibly under the Public Finance Act, to reduce the need for elaborate arrangements of transferring funding when staff were deployed to different short-term functions.

> Innovation and improvisation to enable the public service response to Covid-19 were evident not only at the level of the individual department, but across agencies and also on a system-wide basis.

At a cross-agency level, new forms of collaboration were needed and put in place. The Ministry of Health, New Zealand Police, New Zealand Defence Force and the Ministry of Foreign Affairs and Trade worked to establish the Whangaparāoa Reception Centre as a dedicated quarantine facility – a first for New Zealand – with design and implementation occurring between 31 January and 5 February. The obvious priority for this initiative was the protection of the wider community from the virus. These agencies also placed an equal focus on the welcome being provided to those arriving back in New Zealand, with staff being told to treat every returnee as though they were their own auntie – another example of a uniquely New Zealand response at work, and consistent with the values enshrined in the Public Service Act.

Over a period of 18 days, Inland Revenue and the Treasury designed and implemented the loan scheme for small business owners that helped over 92,000 small business owners manage through the Covid-19 crisis. For this project, policy design, legislation, system and contract development and software development all had to be done concurrently.

As we move beyond the initial emergency response, and ensure that we have the best systems and processes to succeed in a world defined by Covid-19 for the next 12–18 months (at least), the Public Service Act has also enabled the public service to build on collaborative efforts. Since early 2020, border agencies have worked closely together to manage the novel challenges of a closed border with managed isolation and quarantine requirements. In January 2021, these working arrangements were enshrined in an interdepartmental executive board under the new Act. This enables these arrangements to be sustained over time, enables shared 'neutral' resources to support collaborative efforts, and provides a platform for shared border infrastructure in the future.

Not only did the central government 'outgrow the silos', but the relationship with local government was strengthened. As Mike Reid wrote in the August 2020 issue of *Policy Quarterly*, 'institutional arrangements [were] quickly put in place that enabled a joined-up response from both local and central government' (Reid, *Policy Quarterly*, 16 (3), p.42). The August lockdown in Auckland also demonstrated the ability of agencies to mobilise community support. The Ministry for Pacific Peoples worked in partnership with Pacific community groups and key stakeholders to find out where support and assistance was needed, and to help individuals and families get access to information in multiple Pacific languages on testing stations, foodbanks and financial assistance.

When public servants are asked about the success of these collaborations, they often refer to the strength of a clear and common goal as a key enabler. When facing immediate challenges of the type thrown up by Covid-19, these goals are obvious and less likely to be crowded out by the myriad of other competing priorities. A key question moving forward is, therefore, how the public service can more routinely identify shared goals and configure actions and delivery around these outcomes for New Zealanders.

The Covid-19 response and public service change

While the Covid-19 pandemic is far from over, it appears that the New Zealand public service passed a test of agility – the greatest it has ever faced in peacetime – which created a deserved public impression of a highly competent public service dealing well with an unprecedented challenge.

The established directions of public service change helped: functional leadership made a definite contribution; dispersed leadership roles proved their worth; the deepening experience of inter-agency collaboration over the past decade cannot be proved to have contributed, but it seems reasonable to conclude that it did. Public servants proved willing to behave as participants in a single service rather than employees of a single agency, living up to the more complete view of human motivation reflected in the Public Service Act 2020 (Scott, 2019). And all of this was made possible by a foundation of trust in government, created by an historical reputation for intergrity and delivery. Overall, the experience demonstates the ongoing relevance of the new Public Service Act and the direction of public service change.

The Covid-19 experience provides some important lessons. Most obviously, there is the need for priority and emphasis on 'interoperability'. It is likely that future innovation, with or without the stimulus of a major external shock, will depend on equipment, systems and skills that are transferable across the system, and therefore not specific to a particular agency or subset of agencies. While progress has been made in the sharing of experitise, such as through the government chief digital officer, this approach is often straining at the seams. Many public servants gained different experience and skills through redeployment, but enabling flexible secondments across agencies is more challenging once normal rules and modes of operating return. There is significant potential to move further along the spectrum towards shared infrastructure, common standards and procedures without placing the flexibility of individual agency service delivery under threat.

For the public service as a whole there will be important lessons to be learned from the Māori response to Covid-19. As noted earlier, one of the elements of the reform agenda is the public service's role in building the relationships between the Crown and Māori. And one of the visible features, both to public servants and for commentators more generally, was the strength of Māori channels in delivering services. 'Māori channels were shown during the lockdown to have reached those who may have been unreachable by other parties, and commonly to have had a pre-existing level of trust that enabled higher-quality engagement and more effective outcomes' (McMeeking and Savage, 2020, p.37). Māori networks effectively disseminated information and mobilised to distribute items including food and digital devices. The implications of this for the public service are potentially far-reaching: in terms of effective delivery of services to New Zealanders, meaningful collaboration with Māori, and assisting the Crown to fulfil its responsibilities as a Treaty partner.

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Gabor Hellyer

Assessing Parliament's Response to the Covid-19 Pandemic

Abstract

Parliament had to discharge its constitutional role in unprecedented conditions following the onset of the Covid-19 pandemic. How did it fare? This article assesses Parliament's response to the pandemic across its core constitutional functions of legislating, scrutinising, financing, representing and providing a government. It argues that Parliament's response was remarkably effective and resulted in meaningful permanent changes to the legislature's operation. Nonetheless, the response also highlighted opportunities for further institutional strengthening regarding Parliament's role in a national emergency.

Keywords Parliament, legislature, Epidemic Response Committee, scrutiny, accountability, legislation, national emergency, pandemic response

Gabor Hellyer is a Principal Clerk of Committee in Select Committee Services in the Office of the Clerk of the House of Representatives. Currently he clerks the Justice Committee, Privileges Committee, and Standing Orders Committee.

Effective parliaments are fundamental to good quality democratic governance. Following the onset of the Covid-19 pandemic in early 2020, and during the first months in particular, Parliament had to discharge its constitutional functions in unprecedented circumstances. How did one of our oldest institutions, which is often considered slow to change and somewhat arcane, fare in adapting to the disruptions that left no part of society untouched?

This article examines the nature and quality of Parliament's response to the pandemic across its key functions of making and scrutinising legislation, scrutinising the executive, authorising and examining public expenditure, representing the people, and providing a government. It argues that Parliament's response was remarkably effective, driven by a culture of adaptability within established norms that has been purposively developed over recent decades. It touches briefly on the lasting legacy of Parliament's pandemic response, and identifies several opportunities for improving parliamentary effectiveness.

Focusing on constitutional functions

To examine how Parliament performed, it is useful to focus on the institution's constitutional functions: legislating, scrutinising, financing, representing and providing a government. These roles are set out in McGee's *Parliamentary Practice in New Zealand*, except for financing. Financing is a composite of the legislating and scrutinising functions, separated here to highlight Parliament's constitutional role in public finance. Together, they describe the contribution Parliament is expected to make to democratic governance.[1] They are described in more detail at the beginning of their respective sections below.

Our task is to examine the discharge of these functions through the lens of a major crisis. Naturally, success in a crisis will look different from success during normal times. At the same time, it is useful to keep in mind the extant standard to which each function has been performed. While variation should be expected, the development of substantively new expressions of key functions is a high expectation to place on a well-established institution responding to a crisis. Lastly, we should not expect Parliament to perform roles it is not designed to perform. Parliament's roles do not include, for example, being part of the operational response to an emergency. Rather, its role is to check the operational response through its scrutiny function, thereby making the response more effective. Before assessing the functions outlined above, it is helpful to outline a timeline of key events (see table above).

Timeline of key parliamentary events relating to Covid-19 in 2020

12 February	First mention of Covid-19 in Parliament – minister of health delivers a ministerial statement on the response to the virus.
3 March	Minister of health delivers a ministerial statement on the first case in New Zealand (confirmed on 28 February) and the nascent response.
17 and 18 March	Business Committee's first and second meetings to discuss Parliament's response to the pandemic, including proposal for a special epidemic committee.
19 March	Temporary rule changes, agreed in principle at Business Committee, are approved by the House.[2] The speaker issues rules allowing remote participation of members in select committee meetings.
24 March	Third meeting of Business Committee on Parliament's response, including agreement to set up Epidemic Response Committee.
25 March	Parliament recalled from planned one-week adjournment and passes urgent Covid-19 legislation and establishes the Epidemic Response Committee, then adjourns for four weeks ahead of alert level 4 lockdown.
31 March	First meeting of Epidemic Response Committee during lockdown.
28 April	The House sits for first time since 25 March – prime minister delivers a statement on move to alert level 3 and ongoing state of national emergency, and question time is held.
26 May	Epidemic Response Committee disestablished after 24 meetings, with opposition from the opposition.
16 June	First sitting of the House under alert level 1.
4 August	Permanent changes to standing orders (Parliament's rules) adopted by the House as part of regular triennial review, some with genesis in pandemic response.
6 August	Parliament holds 'adjournment debate', expecting to dissolve on 12 August.
18 August	Parliament sits again following a delay to dissolution caused by Covid-19 outbreak in Auckland and a subsequent delay to the date of the general election.
2 September	Parliament meets for the last time before dissolution.
6 September	Parliament is dissolved.

Legislating: speed, delegation and ex post scrutiny

Although Parliament is not the only body that makes law in New Zealand, it is the most important. Acts of Parliament set binding rules and frameworks in the form of statutory law, under which the executive can be delegated law-making powers and which the judicial branch can subsequently interpret. Emergencies often test existing rules and frameworks with novel and unexpected scenarios, and Covid-19 has been no different. So how effectively did Parliament perform its legislative role? On what criteria can this be assessed?

The legislature has a tricky balance to strike in an emergency. On the one hand, it needs to be responsive and not unduly hinder the timeliness of response. On the other hand, it needs to ensure that good process and practice are not altogether dispensed with in addressing the exigencies of the day. It must also avoid its outputs departing markedly from the usual standards of quality. For example, fundamental rights must not be unjustifiably curtailed in the haste of crisis, and the laws made should be coherent. Finally, the legislature should at some point turn its mind to post-emergency thinking, reflecting on its law-making experiences and tidying up where necessary. And this is to say nothing of its extant, pre-emergency legislative programme.

First, some statistics. Between 25 March and 6 September 2020, a total of 58 bills were passed by the House. Of these, 14 were explicitly Covid-19-related. The House considered 51 bills under urgency, including nine that bypassed the select committee stage. Urgency accounted for 41.3% of the 253 hours of sitting time over this period. By comparison, urgency accounted for only 10.9% of the total sitting hours for the whole of the 52nd Parliament – up from 7.5% in the 51st Parliament, but still far below the average of 20.5% between 1996 and 2011. Urgency in 2020 accounted for 62% of all urgency during the 52nd Parliament.[3]

The New Zealand Parliament has been known for its capacity to pass laws quickly. Indeed, this was evident in the response to Covid-19. Not all of this fast law making relied on urgency, however. The House can also set aside usual process 'by leave of the House' – that is, lack of a dissenting voice among the members present in the debating chamber. In practice, this is often agreed in advance at the Business Committee.[4] The House granted such leave on 25 March and

30 April to pass three Covid-19 bills through all legislative stages. Similarly, in response to a different crisis, the House passed the Canterbury Earthquake Response and Recovery Act 2010 through all stages by leave on 14 September 2010.

So, Parliament legislated promptly, and was not an undue barrier to addressing needs to change the law. However, this did not entail adaptation, and was to be expected. Of more interest is that some significant legislation was passed incredibly quickly and without select committee scrutiny – most notably, the Covid-19 Public Health Response Act 2020. The legislation was referred to a select committee for review after its passage, which was a welcome response to public criticism (see, for example, Geddis, 2020a). But the time allowed for scrutiny was relatively short, and the referral relied on the initiative of the government moving a motion in the House. It was sent to the Finance and Expenditure Committee, on which the majority of members were from parties in government, although its subject matter would arguably have sat better with the Epidemic Response Committee. Even so, the referral shows the force of parliamentary norms. Norms are an important if intangible component of institutions, and the ex post referral should be seen in this light. Notably, however, none of the other bills that bypassed select committee were referred for ex post scrutiny.

Parliament also passed the wrong version of a bill under urgency. Members were debating a draft of the bill circulated in advance, but a different version was delivered to the debating chamber in error. The bill in the chamber is always the authoritative version of what the House is debating. More than anything, this episode underscores the risks of legislating at breakneck speed. The error sprang from idiosyncratic arrangements between the Parliamentary Counsel Office, which drafts and prints most bills, and Inland Revenue, the only department that drafts its own bills (see Justice Committee, 2020a, pp.5–6). The fact that the error was not picked up during the parliamentary process was a direct consequence of truncating normal procedures. The government said the practical effect was simply that its planned small business loan scheme was legislated for sooner than intended (Coughlan, 2020), but it was an instructive experience nonetheless.

> ... although the law making was at times speedy and made more sparing use of the rear-view mirror than it might have, the resulting legislation did not raise widespread concern

More important is the quality of the law that was made. Although some concerns were raised in the public sphere – particularly concerning the Covid-19 Public Health Response Act – there was no general opprobrium over the legislative response's inconsistency with fundamental constitutional principles (Knight, 2020). This contrasts with the response to the 2010 Canterbury earthquake, which led 27 experts in constitutional law to pen an open letter to 'New Zealand's people and their Parliament' expressing 'deep concern' over the legislative response (Geddis et al., 2010). So, although the law making was at times speedy and made more sparing use of the rear-view mirror than it might have, the resulting legislation did not raise widespread concern.

The concerns in the 2010 open letter all related to the extent and nature of the delegation of law-making power from Parliament to the executive. This is a key aspect of legislative quality, particularly in an emergency when there is a heightened need to respond to new and rapidly evolving operational challenges.

In fact, Parliament excelled in the realm of delegated legislation during the response to Covid-19. More specifically, the Regulations Review Committee performed particularly well.

The Regulations Review Committee is, by convention, chaired by an opposition member. It is tasked with advising other select committees on Parliament's delegation of law-making power to the executive, and overseeing the executive's use of its delegated powers. It discharged this crucial and often unseen scrutiny meticulously. Between 15 April and 5 August 2020, the committee examined prospective delegation powers in 11 bills and scrutinised 110 instruments made by the executive in response to Covid-19 (Regulations Review Committee, 2020). It is worth noting that a large amount of legislative power sat with the executive branch already, flowing from existing delegations on the statute book. This included both emergency-specific powers, such as those in the Epidemic Preparedness Act 2006, and regular regulation-making powers. As evidenced by the Regulations Review Committee's scrutiny, the government used these powers extensively.

While the Regulations Review Committee's work made few headlines, it made a real and significant contribution. It did so at times by working constructively with departments, ministers and other committees on areas for improvement. In many cases, regulations were amended in response to its scrutiny, and the committee reported that the quality of regulations increased significantly over time (ibid., p.3). At other times, the committee simply satisfied itself – and by extension the wider system and the public – that public power was being properly exercised.

In its fifth and final report on its Covid-19 review work,[5] the Regulations Review Committee assessed Parliament's legislative response against the principles articulated by a previous iteration of the committee in a 2016 report on the response to the Canterbury earthquakes. It found that the principles deduced through that inquiry – doctrines of minimalism and safeguards, and an immediate focus on recovery – had been largely and satisfactorily observed in responding to Covid-19 (ibid., pp.12–13).

Overall, Parliament performed its legislative role successfully during the pandemic. However, the following improvements could be considered.

First, legislation passed quickly during an emergency – whether under urgency moved by the government or by leave of the House – should be subject to mandatory post-legislative scrutiny by a select committee, to ensure its immediate fitness for purpose and provide a guaranteed opportunity for public input. Doing so should not rely on the initiative of the government of the day. Rather, it should be specified in Parliament's rules. This would properly recognise Parliament's responsibility to ensure the quality of the laws it passes, even during an emergency. Such rules could include an expedited parliamentary process for legislative amendments recommended by the committee during such a review.

Second, the Regulations Review Committee scrutinises delegated legislation from a technical perspective only, focusing on whether the executive is using its delegated powers as Parliament intended and in line with constitutional principles concerning delegated legislation.[6] Parliament should consider creating a structured process for assessing the policy content of delegated legislation made in response to an emergency. It is proper to delegate extensive legislative power during an emergency, but Parliament should also scrutinise whether the decisions made by the executive are justified. To a certain extent this is what the Epidemic Response Committee was tasked with doing, but it was essentially ad hoc, and the committee tended to focus on politically salient topics. A more structured process involving all subject select committees would increase the extent of legislative scrutiny, provide guaranteed avenues for opposition parties to probe the government's response, and increase the focus on less publicly prominent issues.

Scrutinising: the role and effectiveness of the Epidemic Response Committee

Scrutiny lies at the heart of almost all parliamentary activity. It is the fundamental mode by which Parliament contributes to the quality of governance. As described by Boston, Bagnall and Barry,

> Scrutiny is the process of probing, considering and expressing views about the government's policy, expenditure and performance. The overall objectives are to promote better governance, maintain public confidence in the country's administration and ultimately secure the legitimacy of democratic institutions. (Boston, Bagnall and Barry, 2019, p.63)

The less theatrical, more informal setting of the virtual committee room proved better suited to probing governmental decisions on complex topics.

This is more important than ever during an emergency. Yet many of the usual ways of conducting scrutiny are ill-suited to the pace of emergency governance. Parliamentary scrutiny is an interlinked system of reporting requirements, procedural triggers, information gathering and political debate. Its operation generally spans months rather than days. So how did Parliament fare in discharging this constitutional function during the pandemic?

Parliament's most significant adaptation to Covid-19 was the creation of the Epidemic Response Committee. Established ahead of the move to alert level 4 and the consequent four-week adjournment of the House, it was designed to conduct the scrutiny that would usually occur in the House. It was a resounding, if not uncomplicated, success. More than any other change, it demonstrated Parliament's ability to quickly adapt its workings to new realities, and capitalise afterwards on the experience gained.

The Epidemic Response Committee was established on a government motion in the House on 25 March 2020. This followed advice from the clerk of the House to the Business Committee and discussion over several meetings, and eventual agreement, of that committee. Members from parties not in government constituted a majority on the Epidemic Response Committee, and it was chaired by the leader of the opposition. It was also given the rare power to summons documents and persons. The combination of these features alone mark it out as a significant moment in Parliament's history.

The committee met remotely by videoconference three days a week, the same number of days the House sits in a sitting week. Remote committee meetings were another major Covid-19 innovation, applicable to all select committees. Initially, the Epidemic Response Committee heard from ministers and senior public servants, before focusing more on hearings with business and community leaders. It received independent expert advice from a prominent epidemiologist, and considered two Covid-19 bills. Its meetings were broadcast on free-to-air Parliament TV – another first for select committees – and streamed through a number of web platforms, attracting an unprecedented public viewership. The technical solutions to enable these features were devised and implemented at incredible speed in challenging circumstances by the agencies supporting Parliament.

The committee's style of scrutiny was notably different from question time. Hearings with ministers were significantly longer, more conversational, and judged to be genuinely informative. The less theatrical, more informal setting of the virtual committee room proved better suited to probing governmental decisions on complex topics. Credit is due for both the opposition's questioning and the government's engagement with the committee. As expressed by members during the debate on the committee's establishment, there was a genuine sense that it was there to 'work in the best interests of all New Zealanders' (Brownlee, 2020).

A more stringent assessment of the committee's contribution might require demonstrating its impact on policy. Such impact is a dimension of good scrutiny (Boston, Bagnall and Barry, 2019, p.74), but is difficult to assess on such a compact timeline. Also, focusing too narrowly on policy impact would miss the more indirect contributions that scrutiny makes. Simply knowing that decisions must run the gauntlet of parliamentary scrutiny helps instil discipline. And the public can take confidence from seeing scrutiny conducted, even if the direct effect on decision making is at times opaque.

Indeed, the committee had a significant impact on public engagement. It is near-impossible to know how many tuned in to its meetings, due to the plethora of ways the public could watch (including many platforms not controlled by parliamentary agencies). The Epidemic Response Committee racked up over 3 million views on Parliament's Facebook and Vimeo channels, but it is estimated that this only accounts for 10–20% of all viewership. Research by Colmar Brunton showed that one quarter of all New Zealanders had watched or listened to Parliament's select committees since the beginning of lockdown – a six-fold increase on earlier numbers (Colmar Brunton, 2020). Moreover, the reach of the committee was much higher than direct viewership, as its proceedings frequently appeared in the news media during lockdown. In short, Parliament successfully made itself relevant at a time when public attention was captivated by the pandemic and the operational response to it.

This impact is significant. As Boston, Bagnall and Barry note, 'Ensuring public confidence in the governance of the country is one of the main aims of the scrutiny process' (Boston, Bagnall and Barry, p.69). This is particularly true when the government is exercising significant powers, and asking the public to comply with unprecedented restrictions. Parliament, through the Epidemic Response Committee, performed particularly strongly on this count.

The committee was not without contentious moments. Ministers were instructed not to accept invitations from the committee following the resumption of sittings of the House (Small, 2020). Its positive contributions were eventually overshadowed somewhat by a politically fractious battle over its summonsing of legally privileged advice to the government (see Geddis, 2020b; Edgeler and Geddis, 2020). And, ultimately, it was disestablished on a government motion that both opposition parties opposed (Woodhouse, 2020).

> ... Parliament should seriously consider creating permanent rules governing the creation and termination of a committee to scrutinise the government during extraordinary times.

Yet the committee's brief tenure had a lasting and significant impact. In the 2020 review of Parliament's rules, the Standing Orders Committee strongly encouraged ministers to appear before select committees more often on legislation and the results of spending. In recommending this change, the Standing Orders Committee said the Epidemic Response Committee's 'model of more conversational scrutiny was widely seen as successful and there would be great merit' in more of it (Standing Orders Committee, 2020). Given that ministers generally attend select committee only once a year for hearings on the Budget, this could lead to a significant – and some might say overdue – rebalancing between the executive and the legislature.

The Epidemic Response Committee was a highly effective adaptation of Parliament's scrutiny function. However, the truth is that its existence was dependent on the will of the government – as evidenced by its disestablishment and attendant political disagreement. This is perhaps unsurprising in a parliamentary system, where the government must command a majority in the House. Having said this, we must also acknowledge the real and tangible respect for parliamentary norms evinced by its creation (see, for example, Hipkins, 2020).

Nonetheless, Parliament should seriously consider creating permanent rules governing the creation and termination of a committee to scrutinise the government during extraordinary times. They could hinge, for example, on whether certain statutory emergency powers have been invoked by the government. Such a committee should have an opposition majority. Without such rules, the legislature's institutional response to future emergencies would continue to depend on governing parties' view of Parliament's role. Well-designed institutions ensure the operation of their basic functions independent of the nature of the individuals who inhabit them.

Financing: authorisation granted, examinations pending

The government cannot levy taxes or spend public money without express authorisation from Parliament. Parliament is thus engaged in a continual cycle of scrutinising spending plans, approving the financing of the government, and examining the past performance and current operations of entities funded with public money.

On 25 March 2020 the House passed the Imprest Supply (Third for 2019/20) Bill.[7] This authorised the government to spend up to $52 billion on top of the $129.5 billion authorised in Budget 2019 and the second imprest supply bill – an eye-wateringly large figure. Budget 2020, introduced on 14 May, authorised just over $130 billion in spending, which was later topped up with the largest-ever imprest supply of $56.6 billion (Controller and Auditor-General, 2020). These figures represent the maximum spending authorised, and actual spending in 2019/20 is likely to be significantly lower.[8] But they reflect the magnitude of the economic shock to New Zealand generated by the pandemic, and the level of uncertainty over how expensive the response will be.

The authorisation of spending is relatively permissive in New Zealand's unicameral Parliament. The real action is often in the backward-looking scrutiny, examining what has been achieved with the money spent by the government. In this regard, the 2019/20 annual review process – taking place in the first half of 2021 – will be a key test for Parliament's scrutiny of Covid-19-related spending.

In the meantime, much of the scrutiny is occurring in the 'institutional' layer (Boston, Bagnall and Barry, 2019, pp.64–5), often overlooked in the MP-centric idea of Parliament. The controller and auditor-general, as an officer of Parliament, discharges invaluable scrutiny of the government's spending. As public watchdog, the auditor-general's office has provided regular updates on the government's Covid-19 spending, undertaken a review of the management of personal protective equipment, and announced that it is reviewing the management of the wage subsidy scheme.[9]Through this work, the auditor-general has and will continue to be a core part of the legislative branch's response to Covid-19.

Lastly, Parliament adopted a technical rule change to facilitate its work on financial scrutiny that ended up having a transformative effect beyond financial bills: the removal of the four-call limit. Previously, the standing orders limited the number of speeches MPs could make during a particular part of the legislative process called 'the committee stage',[10] and capped their length at five minutes. The debate on annual reviews of public entities, during which MPs can question ministers, is technically the committee stage of a bill. As a result, members had grown used to making a small number of five-minute speeches.

The annual review debate took place under alert level 3 in 2020. This entailed a reduction in the number of members in the debating chamber. As described by the minister of finance when moving the motion to remove the four-call limit, there was a desire to ensure that the reduction in members present did not lead to a reduction of scrutiny. The focus on interactive debate and dialogue between ministers and opposition members generated by the Epidemic Response Committee provided further impetus for change: the limit's removal would facilitate members speaking more frequently, but for a shorter time. The hope was that this would lead to more questioning and better scrutiny, and less obligatory speech-making.

> The most essential feature of our system of government is that representatives are elected to represent the views of the people.

The change had a substantial impact. Following a much-improved annual review debate, the approach was continued for the remainder of the Parliament for other bills. In recommending the permanent removal of the limit in the triennial review of Parliament's rules, the Standing Orders Committee said the committee stage had been 'transformed very suddenly, and is much more satisfactory and enlightening' (Standing Orders Committee, 2020, p.40). Members paid tribute to the change in the House, including the prime minister when speaking on the election of the speaker on the first day of the 53rd Parliament (Ardern, 2020).

The limit's removal had been discussed previously, but had never quite arrived. It took adaptation to a pandemic to open the doors of possibility, leading to a permanent improvement to the legislative process.

Representing: articulating in public, assisting in private

Much like scrutiny, representing is fundamental to much of what happens at Parliament. The most essential feature of our system of government is that representatives are elected to represent the views of the people. While some rituals of representation are more salient than others, MPs are constantly representing the views of their electors. Additionally, select committees provide opportunities for direct public involvement in Parliament's proceedings.

Assessing representation is a complex and at times subjective task. For the purposes of this article, a handful of observations can be made on the discharge of this function during the pandemic response.

First, the Epidemic Response Committee provided a remarkable platform for the visible representation of different views, as well as for direct participation by organisations representing various sectors of society. However, the committee was criticised over a lack of Māori voices (Hurihanganui, 2020).

Second, many select committees continued to meet remotely during alert levels 4 and 3, hearing evidence from the public via videoconference on various issues. The Justice Committee, for example, heard over 20 hours of evidence from 86 submitters on proposed changes to restore the right to vote to certain prisoners. This was not without controversy, with opposition members and some members of the public objecting to non-Covid-19 legislation being progressed during the lockdown (Justice Committee, 2020b). However, it illustrates that the public continued to be represented even while they and their representatives were largely confined to their homes.

Lastly, MPs worked tirelessly in their electorates to assist their constituents remotely. A huge swell of enquiries followed the move to alert level 4, and MPs and their staff had to respond in challenging circumstances. MPs' constituent work is often largely unseen, but it was near-invisible when conducted remotely.

Providing a government: a question of confidence

Our system requires that the government maintain the confidence of the House. This function receives little attention in the New Zealand context, because our Parliament is remarkably successful at providing governments. One point is worth mentioning, however.

Much was made by some commentators of the fact that the House was adjourned for the four weeks of alert level 4, casting it as an unprecedented disarming of Parliament. Several points should be weighed in considering this view.

First, the four-week adjournment included an already planned two-week adjournment for the school holidays. The additional two weeks does not seem extreme, particularly when compared to the four–five months for which Parliament frequently stood adjourned as recently as the mid-1980s.

Second, scrutiny was provided by the Epidemic Response Committee. As described above, this was arguably superior to the scrutiny that would have been conducted in the House. It would be incorrect to suggest that the executive was unchecked during this time. Given the general predominance the government enjoys over the House's agenda in our parliamentary system, the Epidemic Response Committee increased the opposition's agenda-setting power considerably.

Third, it is true that during this period the House was unable to express no confidence in the government. Had one of the governing parties sought to bring down the government through the withdrawal of confidence, the country would have faced a major constitutional crisis during a once-in-one-hundred-years public health crisis. Speculation over how the fall of the government during lockdown would have played out would be just that, speculation.

On balance, the supposed constitutional risk posed by adjourning Parliament for four weeks does not appear to warrant the hyperbole it attracted from some commentators.

Factors influencing success

Taken together, the changes adopted by Parliament demonstrate a significant capacity for innovation within established norms. Why was Parliament able to respond so successfully?

First, the Business Committee has emerged over the past decade as an invaluable cross-party forum for discussing and agreeing on how Parliament will operate. Every parliamentary party is entitled to representation and the committee makes decisions based on 'near unanimity' – objections from one smaller party may not be enough to stop a decision, but the speaker, in chairing the committee, must ensure its decisions do not unduly oppress the interests of smaller parties. All of this is specified in Parliament's rules (standing orders 77 and 78, House of Representatives, 2020, p.22). The committee has significant powers to arrange the business of the House, and has also emerged as a forum for discussing temporary rule changes that require a motion in the House.

> The Business Committee and the Standing Orders Committee are, in their current incarnations, creatures of the MMP era.

Similarly, there is a strong convention of consensus-based decision making for permanent changes to Parliament's rules through the Standing Orders Committee's triennial review of standing orders. Many of the changes trialled during the pandemic response were made permanent in the 2020 review. Few overseas parliaments have a comparable tradition.

More important, perhaps, than the existence of these mechanisms and their institutional design is the culture of mutual trust and respect fostered through their practical operation over time. Trust can only be built through repeated interactions. Just as trust was shown to be a defining feature of New Zealand's overall pandemic response (Standing Orders Committee, 2020, p.4), so too was it a key component of Parliament's response.

The Business Committee and the Standing Orders Committee are, in their current incarnations, creatures of the MMP era. Without the adaptation to multi-party parliaments engendered by MMP, the winner-takes-all culture generated by first-past-the-post may well have weighed against the enhancement of Parliament's effectiveness.

Conclusion

The response to the Covid-19 pandemic during 2020 will leave a lasting legacy for New Zealand's parliamentary system of government, through select committees meeting virtually, more frequent scrutiny of ministers, better legislative processes, and, hopefully, more public engagement with Parliament. The Standing Orders Committee acknowledged this legacy in its 2020 report:

> While the Covid-19 pandemic has considerably curtailed the available time and focus for the review of Standing Orders this year, it has resulted in many adaptations and innovations at Parliament, as it has across the community. … The pandemic has strengthened the case for democratic institutions to continuously improve and become more effective, responsive, and accountable. Parliaments and Governments must attentively foster their legitimacy in the eyes of the public, so these institutions can appropriately contribute to a national response in times of crisis. (ibid., pp.4–5)

The pandemic response also highlighted two contrasting but complementary truths. On the one hand, cross-party consensus on adaptations and permanent changes revealed a striking political consensus over the role and value of Parliament. The force of parliamentary norms should not be underestimated. As overseas experiences with democratic deconsolidation demonstrate, norms and their maintenance are just as important as the written rules.

On the other hand, some of the best aspects of the response relied on the government of the day taking the initiative to enable them. Parliament, through the Business Committee, came up with its own response to the pandemic. But the government still had to move the motions to give effect to key aspects of the response.

We should take this opportunity to build on the successes of the response and further strengthen the institution of Parliament. After all, effective parliaments are fundamental to good quality democratic governance. A strong and active Parliament is in all New Zealanders' interests.

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1 Parliament and the House of Representatives are distinct entities, with the latter a component part of the former, together with the sovereign or her representative, the governor-general. However, reflecting lay usage, the term Parliament is used to refer to both here.

2 Not all procedural changes are described in this article. For example, certain previously paper-based requirements were altered to facilitate digital processes. For a further account of the changes made by Parliament, see Wilson, (2021).

3 Statistics for 52nd Parliament calculated using data from the Office of the Clerk. Other statistics drawn from Clerk of the House of Representatives, 2016.

4 For more information on the Business Committee, see section titled 'Factors influencing success'.

5 It is important to note that the Regulations Review Committee continues to scrutinise and report on delegated legislation made in response to Covid-19. The 'fifth and final' descriptor refers to the series of reports released between May and August 2020.

6 Two such principles that the committee raised concerns about were unclear drafting and inappropriate sub-delegation of delegated powers.

7 Imprest supply refers to interim legal authority to spend more than previously authorised. The first imprest supply of the financial year provides authority to spend in the period between the start of the financial year and the passing of the Budget in August/September. The second imprest supply is usually passed at the same time as the Budget, providing an update on the amounts estimated in May. A third imprest supply is uncommon, and addresses unforeseen circumstances ahead of the passage of the next financial year's Budget.

8. Since writing, the Government's audited financial statements have been released. Total expenditure for 2019.20 was $138.9 billion.

9 For more information, see Controller and Auditor-General, 2020.

10 Not to be confused with the select committee stage, the committee stage involves the House turning itself into a 'committee of the whole House', with a different presiding officer (a chairperson rather than the speaker) and set of procedures, to debate amendments on the details of legislation. This takes place after the second reading debate and before the third reading debate. See Harris and Wilson (eds), 2017, pp.425–6.

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Suzanne Manning and Mathew Walton

Public Trust in Science and Research

responsibility and ethics

Abstract

Innovation in science and research technology often raises questions of acceptability, ethics and governance processes. This article explores research assessment and ethics frameworks based on values, responsibility, relationships, trust and distributed power, which could give guidance to decision making around research and development investments in scientific institutes. Governance using a responsibility lens alongside risk mitigation, based on explicit ethical and moral values, allows critical evaluation of research programmes which seek to address inequities in society. Funding for formal research assessment structures that bring diverse perspectives together within institutions would facilitate ongoing dialogue with Māori and local communities and strengthen decision making. The example of the current and future development of waste water-based epidemiology technologies is used to show how a responsible research approach could be applied.

Keywords social licence, governance, democracy, new technology, responsible research, te Tiriti o Waitangi

Suzanne Manning is a social scientist at the Institute of Environmental Science and Research (ESR) within the Social Systems Team, with a science, education, policy and history background.
Mat Walton is a science leader at the Institute of Environmental Science and Research (ESR) within the Social Systems Team, specialising in application of systems and complexity thinking to social science, policy and evaluation.

Ethics and governance of emerging technologies

Innovation in science and research technology often raises questions of acceptability, ethics and governance processes. Examples include biotechnologies (Cook et al., 2004), joined-up data sets such as the Integrated Data Infrastructure (Kukutai and Cormack, 2019), and population health surveillance tools such as those developed for Covid-19 contact tracing (Dare, 2020). Acceptability of new technology, related to perspectives of potential benefits and harms, can become a political issue, as was seen in the 2000s when the Labour-led government established the Royal Commission on Genetic Modification. Less overtly political responses may act through public agencies, such as the National Ethics Advisory Committee,[1] or working groups such as the Data Ethics Advisory Group convened by the government chief data steward.[2] The work of these bodies ranges from widespread engagement with communities through to consultation with small reference groups, each type of response carrying implicit claims of legitimate expertise and appropriate control of decision making (Fischer, 2009).

Within Aotearoa New Zealand there is currently a lot of interest in ethical research processes. For example, in recent years the Royal Society Te Apārangi has been working on guidelines for supporting good research practice, including public engagement guidelines, an updated code of professional standards and ethics, and a research charter (Royal Society Te Apārangi, 2016, 2018, 2019). These provide broad frameworks for thinking about what processes a responsible research organisation should consider, and reflect international developments in this space (International Science Council, n.d.). Another example is the Health Research Council's Māori health advancement guidelines, where the first domain for consideration is the relationships between the research team and Māori, so that the research can be aligned with what is meaningful for Māori. In this article we consider existing frameworks that may guide 'responsible' research practices, specifically for the purpose of guiding investment decisions in new and emerging technology and disciplines.

The concept of a 'social licence to operate' is a common way of thinking about ethics and engagement with communities (Edwards and Trafford, 2016). It originated in the context of extractive industries such as mining and forestry, and is now widely applied in Aotearoa New Zealand in a variety of contexts, including data sovereignty, primary industries and developing scientific technologies (Data Futures Partnership, 2017; Jenkins, 2018; Ministry for Primary Industries, Quigley and Baines, 2014). There are numerous critiques of social licence as a concept when addressing future uncertainties associated with emerging technology development, or working with te Tiriti o Waitangi-based partnerships (Jenkins, 2018; Moffat et al., 2016; Owen and Kemp, 2012; Ruckstuhl, Thompson-Fawcett and Rae, 2014; Te Mana Raraunga, 2017). While social licence is likely to have merit with specific proposals (for example, developing a tissue biobank), we sought to identify frameworks that would support decisions regarding emerging areas. By emerging we refer to either developing technologies or developing issues that may benefit from different applications of existing science capability.

> [Responsible research and innovation] has been defined as a process rather than an outcome, something an organisation *does* rather than *gains*.

In exploring responsible research, this article first considers the concept of responsible research and innovation (RRI), which has been prominent in European research policy and funding for the past two decades. The Māori research ethics framework *Te Ara Tika* is then considered. The third framework comes from the International Association for Public Participation and related literature that emphasises 'upstream' community engagement. All three frameworks are based on the idea that ethical engagement with communities is most effective when it is started early and develops into an ongoing relationship, and that research agendas should be shaped by such engagement. The frameworks are then applied to waste water-based epidemiology, as an example of an emerging scientific technology. The final section suggests policy implications for a responsible approach to scientific research and development in Aotearoa New Zealand.

Responsible research and innovation (RRI)

The concept of responsible research and innovation focuses on the responsibility that research institutions have towards society. Current research investment decisions are often based on benefits and costs (of development, but also of mitigating risks), capability, demand and potential future revenue. An RRI approach adds a critical assessment that is based on values and responsibility, along with addressing inequities in society. RRI involves ongoing dialogue and responsive processes, and considers what could and should be done for the benefit of society, not just what should *not* be done. The concept arose in Europe in the late 1990s as a result of public rejection of biotechnologies, such as genetic modification of food and stem cell research; new concerns arose about the development of nanotechnology in the early 2000s (Pidgeon and Rogers-Hayden, 2007). RRI as a concept became widely utilised after the European Commission's *Horizon 2020* research and innovation strategy for 2014–2020 explicitly included it as a funding requirement (European Commission, 2019), similar to the way Vision Mātauranga has been integrated into the science funding system in Aotearoa New Zealand (Rauika Māngai, 2020). The concept of responsible research, over and above a duty to practise ethical behaviour, is supported by the International Science Council and the Royal Society Te Apārangi (International Science Council, n.d.; Royal Society Te Apārangi, 2018).

An influential definition of RRI is: 'Responsible innovation means taking care of the future through collective stewardship of science and innovation in the present' (Stilgoe, Owen and Macnaghten, 2013, p.1570). Stilgoe et al. suggest that RRI has four dimensions. *Anticipation* means that the research institution should make considered judgements about potential impacts of new technologies and research, and act to maximise benefits and minimise risks, as well as reduce inequities. *Reflexivity* requires the institution to build in a transparent system for reflecting on its own values and potential different framings of the research. *Inclusion* of a diversity of voices in decision making is needed for public legitimacy. Finally, *responsiveness* involves both the capacity and willingness to change the direction of the research in response to the outcomes of anticipation, reflexivity and inclusion.

RRI has been defined as a process rather than an outcome, something an organisation *does* rather than *gains*. Importantly, RRI includes the idea of questioning the societal desirability of the proposed research or development, and not assuming that innovation processes and the resultant products are going to be wanted by society simply because they are available. René von Schomberg from the European Commission suggested that there should be agreement on what counts as 'responsible' research and for this he turned to the democratically agreed values in the Treaty on European Union (von Schomberg, 2013). Applying RRI to Aotearoa New Zealand requires (re) defining values for this context.

Te Ara Tika

Te Ara Tika – 'the right path' – is a framework for human research ethics based on Māori cultural values. A collaboration in 2005 between the National Ethics Advisory Committee, the Health Research Council and Ngā Pae o te Māramatanga – Māori Centre of Research Excellence produced *Te Ara Tika* (Hudson et al., 2010; Hudson et al., 2016). These Māori human research ethics guidelines are based on the principles of whakapapa, tika, manaakitanga and mana, defined in *Te Ara Tika* as connected with relationships, research design, cultural and social responsibility, and justice and equity respectively.

Whakapapa is the central principle, and in this context refers to the quality and processes of research relationships. Whakapapa relationships can be concerned with the subject matter of the research – for example, in genomic research involving DNA which is linked back to ancestors – or to digital data collected from the research, or to relationships between people involved in conducting or participating in the research. *Te Ara Tika* describes three levels of relationships between researchers and iwi and hapū, where the minimum standard is 'consultation', good practice is 'engagement', and best practice is empowering Māori to take a 'kaitiaki' (guardian/advocate, briefly defined) role. This continuum moves from inviting critique of the research through to partnership with Māori on issues that involve Māori communities. In the context of the public service, similar recommendations for best practice engagement with Māori have been produced by Te Arawhiti, the Office for Māori–Crown Relations (2018).

> ... common themes can be discerned for guiding an ethical and responsible approach within the context of innovation in science and technology in Aotearoa New Zealand.

Related to the ethical guidelines outlined in *Te Ara Tika* is the concept of Māori data sovereignty. Te Mana Raraunga, the Māori Data Sovereignty Network, advocates for Māori data to be subject to Māori governance (Te Mana Raraunga, 2017). Māori data sovereignty implies co-governance of data, according to the principles of te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples. According to *Te Ara Tika*, therefore, a responsible approach to scientific research and development in Aotearoa New Zealand requires a focus on relationships and co-governance with Māori. This is in addition to engagement with the broader community, where the quality of relationships also has importance.

Upstream community engagement

Community engagement is an important part of ensuring that public good research is ethical, perceived to be beneficial and therefore welcomed. The timing and extent of engagement is critical to its effectiveness. This was shown clearly with the resistance to biotechnologies in Europe in the 1990s, when engagement with the community only occurred after there had been significant investment and development of the science. The political fallout from this influenced the development of the RRI concept (Pidgeon and Rogers-Hayden, 2007). The approach of engaging with communities after technology development, rather than at an earlier stage, is linked with a deficit view of community concerns. The deficit view suggests that communities object to technology mainly because of a lack of understanding, and that this can be overcome with careful communication of the technology's benefits. Such a view glosses over the idea that the community might have different perspectives on what constitutes 'benefits'; nor does it involve reciprocal dialogue, where the community views are listened to and acted upon (Becker et al., 2017).

An international framework for guiding community engagement is the Spectrum of Public Participation, highlighting increasing impact on decision making as public participation moves through a continuum of inform–consult–involve–collaborate–empower (International Association for Public Participation, 2018). There are clear alignments here with *Te Ara Tika*, which proposes a continuum of Māori engagement moving through consult–engage–kaitiaki (Hudson et al., 2010), the Health Research Council emphasis on developing ongoing, mutually beneficial relationships between researchers and Māori (Health Research Council, 2019), and the Royal Society Te Apārangi's public engagement guidelines based on a principle of an engaged and informed society (Royal Society Te Apārangi, 2016). Community engagement at the beginning of the continuum (inform) represents 'downstream' community engagement, and the other end (empower) is 'upstream' community engagement. Upstream engagement is useful in the context of developing potentially controversial technologies, as an emphasis on authentic and reciprocal dialogue enables public voices to be heard at a stage where they can influence the research agenda (Becker et al., 2017).

Connecting themes

These three frameworks are from different countries and different research fields and target different levels of influence. Yet common themes can be discerned for guiding an ethical and responsible approach within the context of innovation in science and technology in Aotearoa New Zealand. First, the frameworks are based on explicit normative values, whether coming from a cultural world view or from democratically derived agreement. Then there is a broad view of research ethics which encompasses not only risk management, but a responsibility to work in the interests of the community. These three approaches are based on the establishment of trusting relationships and involve sharing of power and influence on decision making. Finally, these conversations are extended beyond the research institute to the wider public, encouraging deliberative processes for setting the agenda for publicly funded research.

Values

Both RRI and *Te Ara Tika* are explicit that research ethics should be underpinned by a set of values. Values can provide direction as to what is important when evaluating research programmes and making investment decisions. There are many values that can be chosen, some complementary and others conflicting. The question of 'which values' is important. For RRI in a European context, von Schomberg (2013) recommended basing decisions on the values of the Treaty on European Union. In our local context, other values can be called upon. The fundamental purpose of *Te Ara Tika*, for example, is to provide an ethical framework based on generalised Māori cultural values. Arguably, in Aotearoa New Zealand high-level guiding values are contained in te Tiriti o Waitangi and the New Zealand bill of rights. These highlight values of equality, freedom, recognition of the rights of indigenous peoples, protection from discrimination, and fair treatment by the government and others. These values already underpin ethical approaches in use, such as the national ethical standards which integrate the principles of *Te Ara Tika* and bioethics (National Ethics Advisory Committee, 2019). The bioethics principle of justice is similarly underpinned by equality, fair treatment and protection from discrimination, and the principle of respect for people (autonomy, informed consent) can be seen to rest on the values of freedom and human rights. For an organisation to implement a responsible research approach, it must first be explicit about the values that are used as criteria for decision making. Such an explicit statement of values will be important for developing relationships with diverse publics, which underpin an RRI process.

If societal values such as equity and the principles of te Tiriti o Waitangi underpin research decision making, then publicly funded scientific development should not only provide positive public benefits, but should also reduce existing inequities.

Responsibility versus risk

Mitigating risks is a major focus of current ethical approaches. Risk management necessarily starts from a deficit viewpoint, identifying those things that should be avoided. This is essential in a robust assessment of research programmes and making investment decisions; however, a 'responsible' approach would take the assessment further. If societal values such as equity and the principles of te Tiriti o Waitangi underpin research decision making, then publicly funded scientific development should not only provide positive public benefits, but should also reduce existing inequities. This positive framing exists in *Te Ara Tika*, where good research is that which focuses on Māori goals and aspirations, as defined by Māori themselves. Similarly, upstream community engagement enables the research agenda to be set in consultation with the community to reflect their goals and aspirations. With limited resources for research, institutions have a responsibility to ensure that research programmes address the issues of most importance for the community, defined in partnership with the community. This requires actively seeking the voice of those groups who are most affected by inequities, in some cases moving beyond groups who are already organised and resourced for engagement. Taking responsibility means proactive outreach and establishing meaningful relationships (Hepi et al., 2016; Royal Society Te Apārangi, 2016).

Relationships and trust

A common theme in these frameworks or approaches is that trust is the basis for all positive community engagement. Trust is built up over time, in the context of an ongoing relationship where there is fairness, transparency, communication and reciprocity (Becker et al., 2017; Dare, Schirmer and Vanclay, 2014; Hepi et al., 2007). Importantly, the community needs to have trust in the intentions of the research institution, which again relates to being explicit about the underpinning values of the organisation. Community trust in an institution implies a reciprocal responsibility from the organisation to act in alignment with that trust. In developing relationships to support research organisation decisions, there must be explicit consideration of how these external perspectives interact with layers of governance in an organisation.

The three approaches discussed consider community engagement and research ethics as relationship-based processes. Trusting relationships are the *mechanism* for positive community input into research agendas, not a by-product. The bioethical framework commonly used in health research gives guidelines for conditions that should be met for research to be considered ethical. This checklist is necessary but not sufficient for research to be considered responsible. *Te Ara Tika*, for example, stresses the need for ethics approval to be evaluated against the demonstrated research relationships. Such trusting relationships require time to establish, active effort to maintain, and funding to allow these things to happen.

Distributed power

A common thread that connects RRI, *Te Ara Tika* and upstream community engagement is that best practice is seen as a genuine partnership with the community, where power is distributed among the partners. RRI argues for inclusivity and responsiveness, *Te Ara Tika* understands that the ideal is for Māori to be empowered as kaitiaki in a full expression of te Tiriti o Waitangi partnership, and the furthest point on the spectrum of public participation places final decision making in the hands of the public. A responsible research approach insists that hearing the views and concerns of the community is only the first step in the relationship process, and that the next step is a responsiveness and willingness to allow those views to shape the research (Hepi et al., 2007).

Distributed power is relevant not only for the research process but also for research data. This is of particular concern for developing scientific technologies, which increasingly can store digital data for use with future applications. Gaining consent for these new purposes is usually logistically difficult or impossible, and therefore the governors of the data asset have an important ethical role. A responsible research approach suggests that the research institution should pay as much attention to ethical procedures and decision making with data as with the original research. For data related to Māori, an RRI approach based on the principles of te Tiriti o Waitangi and the value of recognising indigenous rights and data sovereignty would imply that a formal co-governance structure is necessary to meet the institution's public responsibilities.

When science funding is predominantly focused on projects, there is little incentive to establish and maintain structures which enable relationships to be built and community engagement to be normalised.

Waste water-based epidemiology

This article arose from a study of the ethics and public acceptance of waste water-based epidemiology as an emerging science and set of technologies. This is a field which has been developing rapidly since the mid-2000s and involves taking samples of waste water entering a treatment plant and chemically analysing them for biomarkers. A biomarker is a substance that has been excreted by a human body, as opposed to a substance that enters the waste water from the environment (or, say, the laundry). To date, waste water-based epidemiology has been used primarily for providing quantified estimates of illicit drugs consumed in a given area. These estimates show a population-level picture of drug use in a non-invasive way, not reliant on the self-reporting of traditional drug-use surveys. Other uses are being investigated, such as detecting the Covid-19 virus for surveillance purposes (Institute of Environmental Science and Research, 2020), and examining consumption of nicotine and caffeine or exposure to environmental pollutants (for reviews, see Choi et al., 2018; Farkas et al., 2020).

To identify different perspectives on waste water-based epidemiology, interviews have been conducted with stakeholders involved in it in some way, or with ethics or data usage. Detailed findings are being written for publications elsewhere. For the purposes of this article, the findings demonstrate how boundaries of acceptability for stakeholders were intimately connected to the motivations of research, intended purposes and potential beneficiaries. For example, public health uses of waste water-based epidemiology were seen as less problematic than law enforcement purposes. Also, when data is shared to support community decision making and action, it was viewed as less problematic than 'taking' local data for central government decision making without community voice.

Given that perceptions of acceptability were tied up with motivations, purposes and beneficiaries, as waste water-based epidemiology technology and applications develop we can expect the boundaries of acceptability to shift, and that there will be diversity of perspectives on either side of these boundaries. It would be difficult to develop a new research project to assess each generation of the technology and associated uses. Instead, in line with principles underpinning *Te Ara Tika*, upstream community engagement and RRI, ongoing relationships with diverse stakeholders would allow for regular testing of perspectives of new technology and applications. Indeed, in our research on waste water-based epidemiology, stakeholders expected that a 'responsible' research organisation would have such relationships and mechanisms for engagement in place. This expectation is also stated in the Royal Society Te Apārangi research charter, where it states that researchers should 'endeavour to identify and engage with stakeholders and/or affected communities' and research organisations should 'establish and maintain good governance and management practices to support and encourage responsible research practice' (Royal Society Te Apārangi, 2018, p.1).

Secondary uses and data governance concerns are also illustrated through the example of waste water-based epidemiology. Communities may find that waste water-based epidemiology data, gathered for other purposes, could be useful for their own benefit. Aggregated data on illicit drugs, for example, is routinely published online; however, some community health, addiction and rehabilitation services may be able to use the more detailed data for delivering health services. Governance decisions around this release of data may include considering who has rights to such data, and the need to support the community services to interpret and use the scientific data in order that it can be used in a responsible fashion.

Implications for funding policy

A responsible research approach is based on creating long-lasting, trusting relationships. Multiple research projects have investigated how to create such relationships (Becker et al., 2017; Dare et al., 2014; Ministry for Primary Industries, Quigley and Baines, 2014; Pidgeon and Rogers-Hayden, 2007). To achieve this takes time, as relationships are built through shared experiences, open and transparent communication, and consistent delivery on promises. It requires a genuine commitment to reciprocity, to listening and responding. Those people who can bridge the gaps between different world views and communities are invaluable, and such capacity within research organisations should be nurtured.

Developing relationships requires guaranteed resourcing beyond the lifespan of any one research project. When science funding is predominantly focused on projects, there is little incentive to establish and maintain structures which enable relationships to be built and community engagement to be normalised. When government agencies purchase scientific services they are, in effect, leveraging the relationships that the research organisation and communities already have. To support responsible research processes, and relationships that underpin these processes, scientific service contracts should acknowledge the shared power and the influences on how science is conducted, managed and communicated. The costs of shared governance structures, community engagement and te Tiriti o Waitangi partnerships need to be considered in funding models for contracting scientific research, testing and advice. For government agencies purchasing research, they may need to consider responsible research processes research organisations have in place when evaluating providers.

Conclusion

Making investment decisions in emerging science and technology in the context of publicly funded research can be usefully guided by approaches and frameworks that emphasise proactive responsibility and move beyond risk mitigation. Aspects of the European responsible research and innovation approach, the ethical framework outlined in *Te Ara Tika,* and upstream community engagement could contribute to a unique approach to responsible research in Aotearoa New Zealand. Public research institutions taking a responsible research approach would need to be explicit about the underlying values that guide decision making and should incorporate values from te Tiriti o Waitangi and the bill of rights (Royal Society Te Apārangi, 2016, 2018, 2019). Research resources should be focused on issues identified by communities as being important for them, through the development of long-lasting, authentic, reciprocal and trusting relationships with communities, iwi and hapū. Formal institutional research governance structures are one way this might be achieved, where space is created to engage a diversity of views and assess the research in a holistic way. This process would be separate from standard ethical procedures, which are focused more specifically on projects. The responsible research approach will require support through science funding, resourcing of developing and maintaining long-lasting relationships.

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1 https://neac.health.govt.nz/.

2 https://data.govt.nz/about/government-chief-data-steward-gcds/data-ethics-advisory-group.

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Nicholas Huntington

Evaluation, Science and Pragmatism

practitioner stances towards evidence-based policy

Abstract

In Aotearoa New Zealand, as elsewhere, the evidence-based policy movement has been one of the most visible recent influences on how policies are described, discussed and debated. It is now commonly taken for granted that good policy work involves using evidence, and that it is important to increase the influence of data and research uptake during policy development. Promoting evidence-based policy has even been used as the raison d'être for the founding of a political party. However, the voices and perspectives of practitioners themselves are often missing from conversations about evidence's role in policy work. Drawing on my doctoral research, this article presents three stances that frame how policy workers approach evidence in their practice.

Keywords evidence-based policy, policy work, policy practitioners, interpretive analysis

Nicholas Huntington is a policy and research consultant, and a doctoral student in the School of Government, Victoria University of Wellington Te Herenga Waka.

Aotearoa New Zealand has enthusiastically adopted the language of evidence-based policy. Promoting knowledge transfer between research and policy communities, increasing interest in using 'big data' to guide policy decisions, and orienting public research funding towards applied policy goals are all international trends that have been seen here (Head and Di Francesco, 2019; Lofgren and Cavagnoli, 2015). Prominent reports such as those from the prime minister's chief science advisor have set out cases and strategies for government agencies to enhance their use of evidence. Formal initiatives, such as the establishment of departmental science advisors and the Policy Project, have worked to increase evidence use within the public sector.

And yet, what this means for the day-to-day practice of officials is largely missing from discussions, both here and internationally. Promoting evidence-based policy is simply taken to mean making 'evidence' more prominent, without exploring what that means for practitioners. In this vein, literature tends to focus on structural barriers and solutions, and treat 'evidence-based' as a characteristic of systems and outputs rather than – as in other fields and disciplines – considering it as a mode of professional practice.

This article is based on my doctoral research into practitioner engagement with evidence in policy, and starts from the point that neglecting the attitudes and perspectives of practitioners will lead to only a partial picture of how evidence is embodied within the policy world. The first part illustrates some complexities of evidence-based policy, discussing its emergence, appeal and critiques. The second part then presents stances toward evidence-based policy adopted by policy practitioners, as identified through semi-structured interviews with officials.

Tauri (2009) points out that the evidence-based policy movement has a Eurocentric tendency, often privileging forms of knowledge without acknowledging their cultural basis.

The evidence-based policy movement

Evidence-based policy is not a specific policy technique. Instead, it is a movement or agenda which broadly advocates for improving linkages between policy work and high-quality information sources: for 'putting the best available evidence from research at the heart of policy development and implementation' (Davies, 2000, p.366). In this sense, it is the latest example of a long tradition, which includes the post-war policy sciences model, the 'science of society' social reformers of the Victorian era, the Polizeiwissenschaft of 16th- and 17th-century cameralism, and even the very emergence of the modern (Western) state. In its contemporary guise, though, evidence-based policy is part of a broader 'evidentiary turn' in many fields, disciplines and professions, that originated with and was inspired by evidence-based medicine.

While advocating for more data and research use has been a recurrent theme within the policy world, the modern movement specifically referred to as evidence-based policy is generally agreed to have emerged in the United Kingdom in the 1990s (Parkhurst, 2017; Sayer, 2020). Specifically, the 1997 election of Tony Blair's 'New' Labour marked the point at which evidence became a distinctive part of government language. The party's manifesto explicitly linked use of evidence with a reformist agenda; the 1999 *Modernising Government* white paper and subsequent publications established its philosophy as 'what matters is what works' (Nutley and Webb, 2000); and in 2000 ministers promised that social science research would no longer be 'irrelevant' to policy – provided that such research accorded with the government's preferences (Hodginkson, 2000).

However, what was initially characterised by Solesbury as 'a peculiarly British affair' (Solesbury, 2001, p.6) quickly became part of global policy orthodoxy. Several reasons have been proposed for this rapid spread, including technical developments, better data and – somewhat paradoxically – growing distrust of expert advice (Powell, 2011; Solesbury, 2001). The movement was also commonly linked to arguments that the public sector must be more productive, competitive and accountable. Given that many evidence-based policy advocates associated using evidence with making services and officials more efficient, some have connected its expansion to the growing influence within government of market-oriented and private sector-influenced approaches and philosophies such as New Public Management (Boaz et al., 2019; Head, 2008; Newman, 2017).

Three broad perspectives characterise explanations of evidence-based policy's appeal: professionalisation, politics and power. Professionalisation positions it as part of the public sector maturing: a recognition of the advantages using research and data brings to policy development and a desire to reduce the perceived influence of special interests and similar factors in the policy process. Politics emphasises the rhetorical value of claims to evidence for politicians and pressure groups, both in claiming legitimacy for their agenda and in attacking those of their opponents.

The power perspective explains evidence-based policy's appeal through a critical social lens. Labelling a policy as evidence-based or claiming it lacks evidence can be used to mask or sidestep its social, political or cultural dimensions (Parkhurst, 2017). Shifting the grounds of debate from the desirability of the policy to the strength of the evidence can also lead to policy processes becoming focused on technical arguments about specific details, assumptions or methodologies. This can marginalise the influence of people without sufficient social and cultural capital to participate in such arguments. Similarly, power can be exercised through defining acceptable and sufficient evidence standards. For example, Sharman and Perkins (2017) highlight how opponents of climate change measures have used claims around evidence quality to prevent policy action.

A contested phenomenon

As Biesta notes, 'it is difficult to imagine an argument against engagement with evidence' (Biesta, 2010, p.492). And yet the evidence-based policy movement has occasioned a possibly surprising level of internal and external debate over even such details as its name (e.g., 'evidence-based' versus 'evidence-informed'). Importantly, those engaging critically with the evidentiary turn do not reject the principle that research and information should inform policy work. Instead, they are best thought of as critiquing the features of evidence-based policy as a (relatively) coherent movement, highlighting the complexity of evidence use and challenging the types or strength of claims often associated with it (Huntington, Wolf and Bryson, 2019).

One of the most contentious aspects of evidence-based policy is the privileging of certain types of information, methodologies or analysis. A key debate in the field concerns what is often referred to as the 'medical model': establishing evidence hierarchies, usually topped by the results of randomised control trials, to govern what evidence is suitable for policy processes.[1] The evidence-based policy movement has become more inclusive over time, acknowledging that epistemological complexity and methodological pluralism are relevant considerations in policy work, recognising that what constitutes high-quality evidence can vary from case to case, and replacing linear hierarchies with identifying what research is appropriate in particular policy contexts (Nutley, Davies and Hughes, 2019). However, more traditional or hardline approaches continue to command significant sway. For example, Oliver and Pearce (2017) claim that few still argue for the primacy of randomised control trials, yet these were recently lauded as 'rapidly becoming the new normal' in public policy (What Works Network, 2018, p.4). This suggests that, ironically, the more nuanced approach to 'what counts' as valid evidence in evidence-based policy scholarship may not be informing how evidence-based policy is understood in practice.

This issue is particularly salient in Aotearoa New Zealand given both the position of mātauranga Māori (knowledge generated through indigenous forms and methods: see Broughton and McBreen, 2015), and the enshrinement of tino rangatiratanga within article two of te Tiriti o Waitangi. Tauri (2009) points out that the evidence-based policy movement has a Eurocentric tendency, often privileging forms of knowledge without acknowledging their cultural basis. This marginalises both indigenous epistemology and the types of community-focused and emancipatory research required to address the needs of Māori. Similarly, the implication of tino rangatiratanga that Māori should have authority in determining 'what works' for Māori sits uncomfortably with traditional evidence-based policy's assumption that policy responses can be determined by universalisable evidence that can be applied by anyone. Both these points raise the question of who should be responsible for determining the role of evidence in developing policy to meet Māori needs, and who is the authoritative voice in establishing appropriate forms and standards for using it.

> The evaluative stance frames evidence as a valuable input for developing policy, but emphasises that decisions and advice should stem from context-specific assessments made on the basis of professional expertise.

Exploring practitioner stances towards evidence-based policy

In my doctoral research I have focused on how policy workers – the government staff who develop policy and advice – engage with the concept of evidence-based policy. In most fields, evidence-based approaches are treated as forms of professional practice. Evidence-based medicine, for example, does not occur when a doctor simply follows the 'research cookbook', but rather when a clinician combines their expertise, patient circumstances and preferences, and insights from evidence to reach a clinical decision (Haynes, 2002).

In policy, however, there has been a surprising lack of scholarship on practitioner experiences and perspectives (Oliver, Lorenc and Innvaer, 2014). Discussions either address overarching theoretical issues or focus on systems and structures that influence research uptake, meaning that we have little understanding of how officials interpret being told to operate in an evidence-based way. This also means that we may be missing important nuances in how practitioners view the position of evidence within the policy world. For example, many participants in my research were superficially dismissive of the terminology of evidence-based policy, but revealed a strong commitment to the value of evidence when actually discussing their practice.

For my PhD I conducted in-depth, semi-structured interviews with 18 senior officials from three agencies involved in aspects of skills policy. Transcribed interviews were coded and analysed to identify the interpretive repertoires used to engage with the concept of evidence-based policy (see Huntington, Wolf and Bryson, 2019). Participants were drawn from three broad groups: advisors and analysts developing strategic policy; managers overseeing teams of such officials; and officials focused on developing and generating evidence within agencies (and who worked closely with analysts and advisors, sometimes under shared management structures). Participants were not presented with a specific definition of what the term 'evidence' referred to; such definitions were intended to emerge from the interviews.

This uncovered three key repertoires of practice (what working as a policy official means), three key repertoires of context (influences on the policy environment), and five key repertoires of evidence. Discussion of these repertoires is beyond the scope of this article; instead I present here a set of 'stances'. These represent natural recurring clusters of repertoires across practice, context and evidence, providing a coherent framework that integrates how participants constructed the work they did, the context for that work, and how evidence fitted into that world view. While some participants used a given stance more commonly than another, each stance was present at some point during almost every interview. This fits with discursive psychology's position that people's understanding of phenomena is not fixed, but rather at different points they adopt different frameworks to serve different purposes (Jorgensen and Philips, 2002).

The evaluative stance

The evaluative stance frames evidence as a valuable input for developing policy, but emphasises that decisions and advice should stem from context-specific assessments made on the basis of professional expertise. The complexity of policy work means that practitioner judgement – involving a combination of analytic, experiential, relational and cultural capabilities – must take primacy: 'it's an adaptive world rather than a technical solution world' (Mark[2]). Evidence is framed as a supplement that can provide a starting point for practitioners' work, or an external reference point that supports reflection on ideas or arguments: 'the data or the research can't give you the answers, but it can definitely point you in a good direction or show some dangers or flaws you might not have thought of' (James).

The scientific stance frames evidence-based policy as a way to remove distortions, biases and inertia in the policy process, in order to reveal correct (or 'most' correct) conclusions.

The evaluative stance is associated with expansive views of what constitutes policy-valid forms of evidence. Participants adopting it referred not only to official data or research, but also the results of consultation, co-design processes and expert opinion (especially reflections on prior experience) as important sources of knowledge, with multiple forms needed to develop good policy. Importantly, this was not framed in terms of approximating a single policy truth through triangulation, but rather as about uncovering different ways of understanding policy contexts: 'one type of evidence will only give you one part of the picture, and to be honest when you look at multiple sources there are usually multiple pictures there too' (Lisa). However, using such information was often positioned as not being formally evidence-based; these sources were referred to as vital but outside the 'academic' or 'scientific' standards of evidence-based policy. Given this, a recurring concern was that the language of evidence narrowed the acceptable basis for policy advice and devalued key sources of information required for good policy conclusions.

The evaluative stance is also linked to a belief that many policy stakeholders, particularly key leaders and decision makers, did not fully appreciate the inevitable nuances and limitations of evidence. A common example of this was the 'magic number' metaphor: quantitative findings – such as returns on investment or estimates of automation-based job loss – taking on a life of their own and being used out of context or without appropriate caveats. In Michelle's words:

> Well, at the moment there's kind of a vogue for 'give us the one number'; you know, the sort of social investment stuff. People always like numbers; they tend to believe numbers, even if the way that you got to the number was total twaddle. I guess people that understand numbers tend to be much more dubious about the final result.

Dialogue, diversity and debate were also important themes. For example, when comparing experiences at two agencies, Rebecca described the organisation with a stronger evidence-based approach as being characterised by argument rather than consensus and by 'better conversations' between contrasting perspectives. Evidence-based work was couched in terms not of identifying truth or adopting the 'right' approach but of extensive discussion and 'a whole bunch of variety'. Similarly, she later referred positively to staff at one agency as having 'ding-dong arguments … about the best way to do stuff … at [previous employer] the people tended to sit at their desks and write papers to each other, rather than having conversations'. Deploying evidence through passionate and active debate was more likely to create good policy outcomes than supposedly dispassionate analysis.

The scientific stance

The scientific stance frames evidence-based policy as a way to remove distortions, biases and inertia in the policy process, in order to reveal correct (or 'most' correct) conclusions. Where the evaluative stance frames 'good' policy outcomes as determined by the professional expertise of the official, in the scientific stance it is the evidence itself that defines desirable actions and decisions. The role of the official is to ensure that policy decisions and settings reflect as far as possible the authoritative messages that can be derived from the body of available evidence.

This stance is associated most strongly with repertoires that position policy work as a technical, problem-solving activity. Reflecting Mayer, van Daalen and Bots' (2004) rational style of policy analysis, practice is seen as a primarily intellectual exercise involving the application of rigorous, disciplined thinking to identify 'right' and 'wrong' answers. In this light, evidence is seen as allowing an analyst to avoid distortions caused by personal bias, influence from vested interests and the like. Peer-reviewed research produced through standardised processes was framed as the most valuable form of evidence, especially 'academic' quantitative findings. This stance also often involved reference to system data as a vehicle for understanding and improving performance, reflecting a view that 'information is … one of the strongest agents of change in the system' (William).

A strong current in this stance was barriers and problems involved in deploying evidence. This often related to internal skills and resources, such as agencies not recruiting for or cultivating technical analytic capabilities among their policy staff. Another key aspect, though, was how external stakeholders reacted to using evidence. For example, Peter referred extensively to the problems involved in producing evidence that contradicts influential stakeholders' views, especially given the constraints on officials' ability to respond to criticism:

> I think there is very much a suspicion of government, and a suspicion of any evidence that comes out of government, and a belief that it's used to attack the sector. [There's] an intrinsic belief that what the sector is doing is right, and that anybody who casts doubt on that is a pariah, and doesn't understand, and is trying to destroy it and all those kinds of things – which is not the case at all. And so I have spent a lot of my time kind of absorbing hate from various places.

This stance does not represent a technocratic caricature or naïve trust in data. Participants adopting it still recognised that there are unavoidable influences and limits on what can be practically implemented, and that information is often imperfect. But these were acknowledged with a tone of regret; an 'ideal' policy outcome is one that embodies what the evidence said, and having to take other factors into account is disappointing. As Mark stated when describing a major project: 'In the end it was really a very policy driven process which I guess was inevitable. But in a perfect world, in my perfect world, it wouldn't have worked anywhere like that.'

The pragmatic stance

The pragmatic stance focuses on the functional purpose of policy work: specifically that, on a day-to-day basis, practitioners are being asked to develop policies that need to be implemented. This focus on the end point of policy work distinguishes the pragmatic stance from the previous two, in that it is concerned with evidence not as the basis for policy per se but rather on how evidence practically supports an official to present their advice and conclusions. It also often represented a descriptive rather than normative position: participants adopted it to explain how evidence *is* used, rather than how it *should* be used.

The pragmatic stance focuses on the functional purpose of policy work: specifically that, on a day-to-day basis, practitioners are being asked to develop policies that need to be implemented.

Accordingly, the pragmatic stance is closely linked to repertoires of policy context, especially those that emphasise ministers and senior management as core influences on policy development. The preferences and capabilities of these figures were usually presented as driving how evidence gets used or the weight given to particular forms. This does not mean compromising on evidence quality or ignoring the results of evidence, but rather recognising that the persuasiveness or relevance of particular evidence types depends on the particular policy context or stakeholders. For example, many participants contrasted the fields of skills policy and health policy, noting that the different issues and 'players' involved meant that different forms of evidence were relevant to generating solutions.

Even more so than the evaluative stance, this stance stressed the partial nature of most evidence, and that the value of a given piece of data or research depended on how it could be used. Evidence that met rigorous formal quality standards might be of little practical value given a sector's pace of change or country-specific details of Aotearoa New Zealand. Conversely, flaws or questionable assumptions might have to be overlooked in the greater interests of the policy agenda. A recurrent metaphor was 'trading off' the practical requirements of policy development against the types of evidence available, while James referred to this relationship as:

> a kind of dance between politics and evidence. Realistically you have to say well, this is our space and these are the things we can and can't change. This is what we want to achieve. We're going to build on what we know from our data and our research nationally but also overseas international experience in this area that can be drawn from, and then our advice has to actually be useful for someone.

In some cases this stance incorporated a cynical edge, and it was when adopting the pragmatic orientation that participants were most negative or sceptical about evidence use in policy processes. For example, at one point Rebecca framed evidence-based policy as a way for officials to legitimise or delegitimatise their work:

> Basically, everyone in Wellington thinks they're doing evidence-based policy unless they disagree with what it is they're doing. [Laughs] … No one wants to think that there aren't good reasons for their positions, and people obviously think that what they're arguing for is the best thing to do, so they say that it's supported by evidence.

This draws attention to the use of evidence for not just external but also internal justification: 'this work is evidence-based because "good" work is evidence-based and I do good work', or, conversely, 'I am being asked to do "bad" work and if it was evidence-based it would be good, so it must not be evidence-based'. The pragmatic stance does not, though, simply involve rejecting the notion of meaningful evidence use in policy or criticising agencies; it is still a frame by which practitioners engage with evidence in the policy process. It portrays evidence in essentially utilitarian terms: its value lies not in any inherent qualities, but rather in how a policy official can use it within a specific situation.

Conclusion

This article began from the position that, as it is the practitioner who ultimately determines how evidence gets used in policy work, understanding evidence-based policy requires a practitioner-focused perspective. This means taking what Noordegraaf (2010) terms a 'second order' approach, one which focuses on examining practitioners as agents who work as individuals, but within structures that shape and constrain acceptable behaviours and approaches. My research has embodied this approach by exploring how officials interpret their own practice, the broader policy environment, and the role of evidence within it.

Practitioner viewpoints are not only of interest in their own right, but also have practical implications. For example, criticism of evidence-based policy as a distinct phenomenon (as opposed to the general idea of using information) was associated particularly strongly with the evaluative and pragmatic stances. Common critiques made by interviewees included that the movement was based on narrow conceptions of what constituted evidence, that it devalued debate and experience, and that advocates did not appreciate the realities of day-to-day policy work. At particularly cynical points it was seen simply as a slogan or window-dressing for agencies; what Pollitt and Hupe (2011) might term one of the policy world's 'magic concepts'. This suggests that the way the concept of evidence-based policy is described may resonate well with those who tend towards the scientific stance, but alienate other portions of our policy workforce.

The three stances identified above – and the repertoires that sit behind them – illustrate the range of ways policy practitioners position not just evidence, but the distinct framing that is evidence-based policy. Within these stances are embodied different positions on understanding the contribution of evidence, definitions of value and practical influences. Exploring such issues, including articulating how evidence use relates to professional judgement and argument, or is defined through context, would seem a fruitful next step in advancing our dialogue on not just getting *more* evidence use in Aotearoa New Zealand's public sector, but understanding what *effective* use means and how it can be achieved.

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[1] Examples of hierarchies include the Maryland Scale of Scientific Methods and GRADE (grading of recommendations assessment, development and evaluation). Further examples and discussion of issues associated with them can be found in Nutley, Powell and Davies, 2013, Nutley, Davies and Hughes, 2019 and Parkhurst, 2017.

[2] Unless otherwise indicated, quotes in this section are taken from interviewees. The names used for attribution are randomised pseudonyms.

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David Bromell and David Shanks

CENSORED!

Developing a framework for making sound decisions fast

Abstract

Public sector leadership often demands fast thinking and rapid response. Our decisions are more likely to be sound, however, when they are informed by 'slow thinking' when we are not in crisis mode. The art of 'thinking, fast and slow' (Kahneman, 2011) is illustrated by decisions of the Office of Film and Literature Classification (the Classification Office) in the days following the Christchurch mosque shootings on 15 March 2019. This article engages with political philosophy to support the Classification Office in applying its decision framework and encourages public sector investment in 'slow thinking', so that public administration can be both responsive and anticipatory, pragmatic and principled.

Keywords freedom of expression, censorship, Christchurch mosque shootings, liberty-limiting principles, public good

David Bromell worked as a policy advisor in central government from 2003 to 2013, and in local government in Canterbury from 2013 to 2020. A senior associate of the Institute for Governance and Policy Studies, he is currently a research fellow at the Center for Advanced Internet Studies (CAIS) in Bochum, NRW, Germany. His work on this article has been financially supported by the CAIS fellowship. **David Shanks** is New Zealand's Chief Censor, who leads the Classification Office, an independent Crown entity with responsibility for regulation of a wide variety of media both traditional and digital. He is a barrister and solicitor with executive experience spanning senior governmental and private sector tech industry roles.

The Christchurch mosque shootings

On 15 March 2019, a white nationalist terrorist attacked worshippers at two mosques in Christchurch during Jumu'ah (Friday prayer). Brenton Tarrant, an Australian citizen, was arrested and charged with 51 murders, 40 attempted murders and engaging in a terrorist attack. He was sentenced on 27 August 2020 in the High Court at Christchurch to life imprisonment without parole after changing his plea to guilty.

Minutes before the attacks, Tarrant sent a 74-page manifesto titled 'The Great Replacement' to various email accounts, websites and media outlets. Links were shared on platforms such as Twitter and 8chan.[1] The manifesto referenced Norwegian terrorist Anders Breivik and others as inspiration for his attacks. The Christchurch shootings and the gunman's manifesto have in turn been cited as inspiration for planned and actual racial attacks in the United States, Germany and Norway.

Tarrant livestreamed the first 17 minutes of the attack at Masjid Al Noor on Facebook Live. The original livestream was viewed some 4,000 times before Facebook took it down. Copies of the livestream were reposted on other websites and social media and file-sharing platforms, including LiveLeak, YouTube, Twitter, Reddit, 4chan and 8chan. It was uploaded repeatedly to Facebook and subsequently removed 1.5 million times in the first 24 hours.[2] Between 15 March and 30 September 2019, Facebook reported taking down 4.5 million pieces of content related to the Christchurch mosque shootings (Rosen, 2019b).

It is not known how many New Zealanders viewed the horrific footage of the killings, but initially social media algorithms 'recommended' the livestream to users as trending content. Many members of the public, including children, viewed it while not fully comprehending what they were seeing.

The need to balance speed of response with principled, clear consideration is critical when dealing with digital harm events. Social media dynamics can propagate harmful material with incredible speed, creating pressure for immediate responses. On the other hand, responses that have not been thought through well can have wide-ranging, unintended consequences, significantly impacting on human rights, including freedom of expression.

Enter the chief censor

On 18 March 2019, three days after the mosque attacks, the Classification Office issued a decision (Classification Office, 2019a) classifying the Christchurch mosque attack livestream as objectionable. On 23 March 2019 the Classification Office issued a further decision (Classification Office, 2019b), classifying the 'Great Replacement' manifesto as objectionable.

In effect, this banned the possession or distribution of both the livestream and the manifesto.[3] Distributing objectionable material can result in a maximum of 14 years imprisonment. A number of people have been charged and convicted in New Zealand for possession and/or distribution of the livestream video and/or the manifesto, with sentences ranging from discharge without conviction to home detention, to terms of imprisonment of around two years for the most serious cases.

Section 14 of the New Zealand Bill of Rights Act states that everyone has 'the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form'.

Classifying the livestream video and manifesto as objectionable presented challenges, given how quickly and widely the harmful material was propagating online, and the need for access to information for legitimate reporting on a national tragedy. The Classification Office was well placed to respond, however, for two reasons. First, it had previously considered and issued decisions on a range of similar material: for example, computer video files showing execution, beheading and dismemberment by militants acting for the Islamic State (ISIL/Daesh) (Classification Office, 2018). Second, the Classification Office has a framework for decision making that it consistently applies to classification decisions. This enabled rapid decision making to confirm and justify its instinctual, system 1 'fast thinking' (Kahneman, 2011).

Classification Office framework

The Classification Office's notices of decision routinely follow a framework for decision making that we summarise here as:

- the presumption of liberty;
- the meaning of 'objectionable';
- publications that are 'deemed to be objectionable';
- matters to be given particular weight; and
- additional matters to be considered.

This framework is shaped and informed by the New Zealand Bill of Rights Act 1990, the Film, Videos and Publications Classification Act 1993 (FVPC Act) and Court of Appeal findings on classifications made under the FVPC Act.

The presumption of liberty

Section 14 of the New Zealand Bill of Rights Act states that everyone has 'the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form'. Section 5 states that this freedom is subject 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The New Zealand Bill of Rights Act, section 6, states that 'wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning'.

The presumption is, therefore, freedom of expression. Any limitation of this freedom by the state should be reasonable, lawful and demonstrably justifiable.[4]

The meaning of 'objectionable'

Section 3(1) of the FVPC Act states that a publication is objectionable if it 'describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good'. The Classification Office also takes into account the Court of Appeal's interpretation of 'matters such as sex, horror, crime, cruelty, or violence' in section 3(1), as set out in *Living Word Distributors v Human Rights Action Group (Wellington)*:

> The words 'matters such as' in context are both expanding and limiting. They expand the qualifying content beyond a bare focus on one of the five categories specified. But the expression 'such as' is narrower than 'includes', which was the

> term used in defining 'indecent' in the repealed Indecent Publications Act 1963. Given the similarity of the content description in the successive statutes, 'such as' was a deliberate departure from the unrestricting 'includes'.
>
> The words used in s3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words 'sex, horror, crime, cruelty or violence', as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude.
>
> That, in our view, is the scope of the subject matter gateway. (*Living Word Distributors v Human Rights Action Group (Wellington)*, 2000, paras 27–9)

In classifying a publication, the main question is, therefore, whether it deals with any section 3(1) matters in such a manner that the availability of the publication is likely to be injurious to the public good and 'deemed to be objectionable'.

Publications 'deemed to be objectionable'

Under section 3(2) of the FVPC Act, a publication is deemed to be objectionable if it promotes or supports, or tends to promote or support, certain activities listed in that sub-section.

In *Moonen v Film and Literature Board of Review*, the Court of Appeal stated that the words 'promotes or supports' must be given 'such available meaning as impinges as little as possible on the freedom of expression' in order to be consistent with the New Zealand Bill of Rights Act (*Moonen v Film and Literature Board of Review*, 2000, para 27):

> Description and depiction … of a prohibited activity do not of themselves necessarily amount to promotion of or support for that activity. There must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity (para 29).

Mere depiction or description of any of the section 3(2) matters will generally not be enough to justify a classification as objectionable. When used in conjunction with an activity, the Classification Office defines 'promote' to mean the advancement or encouragement of that activity, and 'support' to mean the upholding and strengthening of something so that it is more likely to endure. A publication must, therefore, advance, encourage, uphold or strengthen, rather than merely depict, describe or deal with one of the matters listed in section 3(2) for it to be deemed to be objectionable under that provision.

Given the presumption of liberty, six principles singly or in combination may justify government intervention that restricts freedom or coerces people to do something they would not freely choose to do …

Matters to be given particular weight

Where a publication is not 'deemed' to be objectionable under the FVPC Act, section 3(3) of the Act specifies matters the Classification Office must particularly consider in determining whether a publication is objectionable. For example, the Classification Office considered section 3(3)(d) and section 3(3)(e) to be relevant to its classification of the 'Great Replacement' manifesto as objectionable:[5]

> s3(3)(d) The extent and degree to which, and the manner in which, the publication promotes or encourages criminal acts or acts of terrorism.
>
> s3(3)(e) The extent and degree to which, and the manner in which, the publication represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristics of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993. (Classification Office, 2019b)

Other matters to be considered

Section 3(4) of the FVPC Act specifies six further matters the Classification Office shall consider for material like the 'Great Replacement' manifesto, all of which are referenced in the classification decision (ibid.):

> (a) the dominant effect of the publication as a whole;
> (b) the impact of the medium in which the publication is presented;
> (c) the character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters;
> (d) the persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available;
> (e) the purpose for which the publication is intended to be used;
> (f) any other relevant circumstances relating to the intended or likely use of the publication.

Developing the decision framework

Restricting freedom of expression by classifying a publication as 'objectionable' is not a decision to be made lightly, even when there is an immediate and significant risk of digital harm. To support the Classification Office in applying its decision framework, we have looked to political philosophy to clarify two requirements of the legal framework established by the New Zealand Bill of Rights Act and the FVPC Act. First, what liberty-limiting principles, singly or in combination, may lend weight to reasonable, lawful and demonstrably justifiable limits on freedom of expression (New Zealand Bill of Rights Act, s5)? Second, what might reasonably be meant by 'public', 'the public good' and 'injurious to the public good' (FVPC Act, s3(1))?

Liberty-limiting principles

Given the presumption of liberty, six principles singly or in combination may justify government intervention that restricts freedom or coerces people to do something they would not freely choose to do (Bromell, 2019, pp.76–84; Feinberg, 1973, 1980). Principles 1–4 broadly seek to prevent harm. Principle 5 seeks to prevent harm and/or promote welfare. Principle 6 seeks to promote welfare.

Because the critical question for the Classification Office is whether the availability of a publication is 'likely to be injurious to the public good' (FVPC Act, s3(1)), the harm principle is especially relevant, along with principles 2–5 that extend the harm principle in various ways.

The harm principle

The harm principle holds that *restricting freedom may be justifiable if (and only if) the intervention prevents harm to specified others (private harm) or unspecified others (public harm).*

The *private harm principle* may justify a state enacting laws: for example, that prohibit and punish burglary, assault, child sexual abuse, rape, manslaughter and homicide.

The *public harm principle* may justify restricting a person's freedom to prevent public harms, which are of two main sorts:

- behaviours that risk significant harm to unspecified others: for example, driving while under the influence of drugs and/or alcohol, discharging a weapon in a public place, or selling a product known to be unsafe; and
- behaviours that risk significant harm to public institutions and practices: for example, tax evasion, welfare benefit fraud, refusing to perform jury service, counterfeiting currency, or smuggling.

State coercion may be justifiable in terms of the public harm principle because, even though a single instance of harm or risk of harm may do little actual damage, government regulation and enforcement prevent these practices becoming general.

Private harm is dealt with under the criminal and civil law. Classification decisions primarily concern public harm. The question is whether the availability of a publication risks significant harm to unspecified others. We elaborate on this below, in the section on the public good.

In an age of digitally enabled terrorism and violent extremism, governments need to be mindful of the risk of individuals and groups inciting, threatening or resorting to violence in response to offence ...

The legal moralism principle

The legal moralism principle is an extension of the public harm principle (Feinberg, 1973, p.37): *restricting freedom may be justifiable if (and only if) the intervention prevents behaviours that conflict with a society's collective moral judgements, even when those behaviours do not directly result in physical or psychological harm to (specified) others* (Himma, n.d.).

In super-diverse societies, reaching settled political agreement on immoral acts that ought to be regulated by the state even when those behaviours do not directly result in physical or psychological harm to (specified) others is difficult at best. Yet Feinberg suggests there may still be grounds for a 'pure version' of legal moralism, reflecting that 'the world as a whole would be a better place without morally ugly, even "harmlessly immoral," conduct, and that our actual universe is intrinsically worse for having such conduct in it' (Feinberg, 1973, p.40). Potential examples legislated in the FVPC Act include 'sexual conduct with or upon the body of a dead person', or 'bestiality' (ss2, 3).

The offence principle

The offence principle holds that *restricting freedom may be justifiable if (and only if) the intervention prevents offence to some specified or unspecified others.*

The FVPC Act adopts a harm approach to determining what is and is not objectionable. 'Objectionable', rather than 'offensive', appears to be deliberately preferred as the key operational term in the FVPC Act. By contrast, the likelihood that material may cause offence is a key consideration in broadcasting standards (Broadcasting Standards Authority, 2018, 2020). This may reflect a concern to ground the significant powers and sanctions contained in the FVPC Act in a more objective way than is offered by the concept of offence, which can be highly subjective. The Classification Office typically does not factor in offence as an element 'injurious to the public good' that might lead to a publication being banned.

This is an area that requires ongoing thinking and development, however, because offence and harm increasingly intersect in the area of 'hate speech', which is currently regulated under human rights legislation in New Zealand.[6] In an age of digitally enabled terrorism and violent extremism, governments need to be mindful of the risk of individuals and groups inciting, threatening or resorting to violence in response to offence, particularly where the offence is felt in areas of core values. This has played out repeatedly in acts of terrorism, including the beheading of French teacher Samuel Paty on 16 October 2020 (Mallet and Murphy, 2020).

The precautionary principle

The precautionary principle is a more recent extension of the harm principle: *restricting freedom may be justifiable if (and only if) the intervention prevents private and public harm now and/or in the future.*

The precautionary principle extends the harm principle by inviting us to assess the risk of harm over time, particularly the sorts of harm that may prove serious and irreversible. For example, a government impact assessment of a UK age verification legislative proposal designed to block children accessing online pornography sites noted that:

> There is evidence of harm but the exact nature and long-term effects are uncertain. It is also uncertain whether effects are causal or correlational. The Government is of the view that there is sufficient expert opinion that pornographic content can lead to harm to people under 18, whether or not this relationship is causal or correlational. (Department for Culture, Media and Sport, 2018, p.5)[7]

The paternalism principle

The paternalism principle holds that *restricting freedom may be justifiable if (and only if) the intervention prevents harm or ensures a benefit to specified or unspecified others*. The principle provides a potential justification for preventing people from doing something that will harm them, or for obliging them to do something 'for their own good'.[8]

Dworkin (1983) sets out four conditions for the paternalism principle to justify the state restricting freedom in order to prevent harm to those whose freedom is restricted:

- the state must show that the behaviour governed by the proposed restriction involves the sorts of far-reaching, potentially dangerous and irreversible harm that a rational person would want to avoid;
- on the calculations of a fully rational person, the potential risk of harm outweighs the benefits of the relevant behaviour to the individual or individuals whose liberty is interfered with;
- the restriction preserves a wider range of freedoms for the individual in question; and
- the proposed restriction is the least restrictive alternative for protecting against the harm.

The welfare principle

The welfare principle holds that *restricting freedom may be justifiable if (and only if) the intervention secures a benefit to some unspecified others*. For example, local authorities bill property owners for rates (property taxes), which in part fund the construction and operation of public facilities such as museums, libraries, swimming pools and sports arenas, even if we do not use these facilities personally.

The six liberty-limiting principles help clarify when state intervention that restricts freedom may be justifiable to prevent harm ('injury'). They are best thought of as 'specifications of the *kinds* of reasons that are always relevant or acceptable in support of proposed coercion, even though in a given case they may not be conclusive' (Feinberg, 1973, pp.33-34, emphasis in original). Because the principles are not mutually exclusive, the case for intervention may be stronger where an argument credibly applies two or more principles in combination. They provide a catalogue of reasons to help assess whether the availability of a publication is likely to be 'injurious to the public good' (FVPC Act, s3(1)) and therefore whether restricting freedom of expression in any particular case may be lawful, reasonable and demonstrably justifiable (New Zealand Bill of Rights Act, s5).

... a liberal democracy requires us to live together, with all our differences, under the rule of law and without recourse to domination, humiliation, cruelty and violence ...

The harm principle, the legal moralism principle, the offence principle and the precautionary principle lend weight to the classification of the Christchurch mosque shooter's livestream and manifesto as objectionable. They add force to the argument that these were reasonable, lawful and demonstrably justifiable restrictions of free expression, in order to prevent actual and potential harm to specified and unspecified others, now and in the future, whether through the perpetrator's own acts, incitement to others to act similarly, or provocation of retaliatory acts.

Injury to the public good

What, though, are we to understand by 'public' and 'the public good' in a super-diverse, digitally connected society?

The public (or common) good is typically used in the context of an appeal to individuals or interest groups to prioritise those elements in their own good (their 'interests') that they share indiscriminately with others over those elements that benefit or concern only them (Barry, 1965, pp.203–4). There are two terms to clarify here: the noun 'good', and the adjective 'public' that qualifies it.

First, what do we mean by 'the good'? Clearly, we do not all share the same conception of 'the good'. People want and value different things. Given different and conflicting conceptions of 'the good', the tradition of political liberalism has generally agreed that the state has no business telling its citizens what we should think, feel, believe or value. But while the individual's freedom of thought, conscience and expression is paramount, our human connections, communities and collective identities also matter to us, and this plays out in both private and public space as we seek to promote our interests and ideas.[9]

At best, we achieve a 'civil give-and-take' (Etzioni, 2015, p.6) that works out our disagreements and negotiates priorities and trade-offs through an exchange of public reasons. Iris Young wrote about this as a politics of difference without exclusion; but equally a politics without community, a politics of unassimilated otherness, a togetherness of strangers, 'differentiated solidarity' (Young, 1990, p.237, 2000, p.221). More recently, Chantal Mouffe has advocated a politics of agonism without antagonism (Mouffe, 2005, 2013). It means 'we should try to avoid fights over the public space that force into it more than it can contain without the destruction of civility' (Nagel, 2002, p.20).

At the very least, a liberal democracy requires us to live together, with all our differences, under the rule of law and without recourse to domination, humiliation, cruelty and violence (Bromell, 2019, ch.7). This reinforces the Classification Office's primary objective of minimising risk of harm, rather than preventing offence, promoting 'right thinking' or otherwise preferring any particular conception of the good.

The adjective 'public' that qualifies 'the good' is also critical. Something is 'public' if it directly or indirectly concerns, or could potentially concern, any member or members of a community indiscriminately (Barry, 1962, pp.195–6; Bromell, 2017, p.59). We unpack this in four steps.

First, 'the public' does not necessarily mean everyone whatsoever in an absolute, aggregate sense. It means everyone in the sense of 'anyone at all'. A facility is 'public' not because every member of a community uses it, but because it is open in principle to anyone indiscriminately. We use 'public' in this sense when we talk about going to a 'public meeting', using 'public transport', or the 'publication' (as opposed to the private printing) of a leaflet or book. By contrast, a private facility or event is not open to anyone indiscriminately.

Second, a 'public' is constituted within history, in a specific context at a particular point in time (Barry, 1965, p.192; Etzioni, 2015, p.24). When a bus drivers' strike inconveniences 'the public', we do not mean the strike has inconvenienced absolutely everyone whatsoever in a community. Disruption of public transport services inconveniences the 'travelling public', including students, commuters (and their employers) and people with no access to private transport.[10] So we have to do with multiple publics (and counter-publics), rather than some imagined singular collectivity ('the public').

Third, among 'diverse publics of a multiple public sphere' (Asen, 2000, p.425), something is 'public' if it is 'open to witness':

Given the presumption of liberty, all acts of censorship need to go through processes of justification, even when events demand rapid decision making.

> The public is the space in which witnessing can take place. Conversely, one is a private being – a solely personal actor – when one's actions cannot be witnessed by others. The private sphere is the domain in which one can only be witnessed by intimate observers. (Coleman and Ross, 2010, p.5)[11]

Fourth, we can distinguish public from private in terms of the direct and indirect consequences of actions. This is critical when assessing whether government intervention is justifiable to prevent or respond to something that is, or is deemed to be, injurious to the public good. Barry (1965, pp.191–2), following Bentham, distinguished private, reflective, semi-public and public offences (or injuries):

- a private injury damages one or more identifiable individuals;
- a reflective injury damages one's own self;
- a semi-public injury affects a portion of the community (a 'public') and, depending on the duration and severity of the offence, may justify government action;
- a public injury produces some actual or potential danger either to all members of a state, or to an indefinite number of non-assignable individuals (anyone at all) in a specific context who may be affected by the consequences of an action.

Distinguishing public from private in this way can usefully inform classification decisions, which characteristically concern harm that is open to witness and likely to cause public or semi-public injury, rather than private or reflective injury, by promoting or supporting prohibited activity.

Digitisation introduces additional layers of complexity to traditional concepts of 'public' and 'private' space. The ever-present risk of private digital recordings being copied to public digital spaces (that is, becoming 'open to witness') is an ongoing challenge for the Classification Office. The precautionary principle (discussed above) sheds some light on this, but striking a balance between freedom of expression and prevention of harm is no light or easy matter.

Clarifying the meaning of 'public', 'the public good' and 'injury to the public good' in this way lends weight to the classification of the Christchurch mosque shooter's livestream and manifesto as objectionable, because the livestream portrayed acts of cruelty and violence resulting in *actual* semi-public and public injury, and because the manifesto encourages and promotes *potential* acts of cruelty and violence that could also result in semi-public and public injury.

Thinking fast *and* slow

In reflecting on the decision framework used by the Classification Office, we have considered liberty-limiting principles that singly or in combination may lend weight to reasonable, lawful and demonstrably justifiable limits on freedom of expression; and we have reflected on 'the good' and distinguished public and private in ways that clarify what might reasonably be meant by 'the public good' and 'injurious to the public good'.

We have taken time to think about this, because instinctual, system 1 'fast thinking' can lead us astray. Given the presumption of liberty, all acts of censorship need to go through processes of justification, even when events demand rapid decision making. And insight gained from responding in a balanced way to digital harms will increasingly be needed as the impact of new technologies expands to touch nearly every aspect of our lives.

We cannot make sound, durable decisions fast in public administration if we do not also invest time and resource in system 2 'slow thinking' that is effortful, reflective, deliberative and reasoned:

> Whatever else it produces, an organization is a factory that manufactures judgments and decisions. Every factory must have ways to ensure the quality of its products in the initial design, in fabrication, and in final inspections. The corresponding stages in the production of decisions are the framing of the problem that is to be solved, the collection of relevant information leading to a decision, and reflection and review. (Kahneman, 2011, p.418)

Making space and time for 'slow thinking' in public administration requires ongoing investment in public sector capability building, including:

- developing explicit and transparent analytical and decision-making frameworks, informed by doing political philosophy in ways that bring moral clarity to the choices we confront as citizens and as public officials (Howard, 2018, p.20; Bromell, 2016; Sandel, 2009, p.19);
- contributing to public discussion, to inform open debate of issues, options, challenges and opportunities;
- supporting anticipatory governance (Boston, 2016) – scanning the horizon and planning and preparing ahead, not 'management by crisis' or merely reacting to one event after another; and
- cultivating in public servants the virtue of prudence – the exercise of practical wisdom acquired through critical reflection on experience (Bromell, 2019, pp.168–9).

Thinking fast and slow can help us exercise public leadership that is both responsive and anticipatory, both pragmatic and principled.

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1 8chan is a platform for user-created message boards. It has been linked to the alt-right, white supremacism, multiple mass shootings and child pornography. 8chan went offline in August 2019 when internet service providers denied it access to the clearnet (publicly accessible internet) following the shootings in El Paso and Dayton. It was relaunched as 8kun in November 2019 through a Russian hosting provider.

2 1.2 million copies of the livestream video were blocked at upload; 300,000 versions of the footage were successfully uploaded and had to be removed by moderators (Rosen, 2019a; RNZ, 2019).

3 New Zealand legislation does allow for the chief censor to grant exemptions to individuals including researchers, academics, specialists and media, so that necessary research, analysis and reportage can be undertaken. A significant number of exemptions have been granted for this purpose.

4 A decision may be *justifiable* without necessarily being justified. Whether or not a decision is justified may only become clear through a review and appeal process and/or the settled agreement of the public over time. The FVPC Act provides for review of classification decisions (part 4) and appeals to the High Court (part 5).

5 In classifying the livestream video, the Classification Office did 'deem' the content to be objectionable, as it tended to promote or support the infliction of extreme violence (FVPC Act, s3(2)(f)).

6 Two weeks after the Christchurch mosque attacks, Minister of Justice Andrew Little initiated a review of New Zealand's hate speech legislation. In June 2020 the minister said Labour was still in talks with its support parties and that legislation was not likely to go to Cabinet until after the general election (Devlin, 2020).

7 As it turned out, the UK government withdrew the age verification proposal in October 2019 because of criticisms from privacy rights advocates and those who thought the age verification checks could too easily be bypassed by virtual private networks (UK Parliament, 2019).

8 Gerald Dworkin explains that paternalism is 'the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced' (Dworkin, 1983, p.20).

9 Bromell argues for 'three-cornered thinking' about the individual, the community and the state, rather than either/or thinking about liberalism and communitarianism, neutrality and perfectionism (Bromell, 2019, ch.7).

10 A critical point for public policy is that a person who never uses public transport, goes to concerts or requires public health services might nevertheless consider what arrangements or services they would prefer if they were a member of the relevant public within a given context at a particular point in time (Reeve, 2018; Bromell, 2017, p.60).

11 Thomas Nagel laments a decline of respect for the boundaries between the private and the public, concealment (or at least reticence and privacy) and exposure: 'The liberal idea, in society and culture as in politics, is that no more should be subjected to the demands of public response than is necessary for the requirements of collective life' (Nagel, 2002, p.13).

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Ben Dudley Tombs, Janet Stephenson,
Ben France-Hudson and Elisabeth Ellis

‘Property Purgatory’

A worst-case scenario objectively and evidentially based, must, by definition, be a reasonable possibility – albeit the worst one.

(Justice Williams, *Weir v Kapiti Coast District Council*, 2013)

Abstract

Climate change will place increasing numbers of homeowners in ‘property purgatory’, a state of financial insecurity arising from the foreseeability of eventual damage and uncertainty about means to recover their losses. The impacts of climate change-induced sea level rise and storm events are now certain, and exposed properties will likely incur insurance, mortgage and value loss. These effects could occur prior to physical damage, and existing inequities will be magnified. Current legal and institutional arrangements offer no clear pathway for those affected to recover funds in order to relocate themselves. We position property purgatory as an immediate practical challenge for those affected seeking to recover their losses, and as a legal question regarding undefined responsibilities of central and local government.

Keywords property purgatory, sea level rise, adaptation, insurance, foreseeability, loss

Benjamin Dudley Tombs is a PhD student at the University of Otago. His research looks at legal and policy implications of foreseeable loss due to climate change. **Janet Stephenson** is a social scientist at the Centre for Sustainability, University of Otago. Her research focuses on societal transitions towards a sustainable future, with a particular focus on energy and climate change. **Ben France-Hudson** is a senior lecturer in the Faculty of Law at the University of Otago. His research focuses on the law and theory of private property, with a particular focus on natural resources and land law. **Elisabeth Ellis** is a professor of philosophy and politics at the University of Otago. She writes about how we can make environmental decisions that will promote human flourishing now and in the future, and is co-editor of the journal *Political Theory*.

Research by NIWA (the National Institute of Water and Atmospheric Research) suggests that 50,000 residential properties in New Zealand are currently at risk from hazards arising from sea level rise and increased riverine flooding driven by climate change (NIWA, 2019, p.8). The same research states that a mean sea level rise of 0.3 metres from current levels could bring the number of exposed properties to 70,000, a rise that could occur by 2050 (ibid., pp.9, 30). This trajectory will continue beyond 2050, with challenging implications for property owners. This is a novel circumstance for which New Zealand’s legal and institutional arrangements are not well prepared.

Climate change-related hazards are already occurring in locations such as the Kāpiti Coast, Hawke’s Bay and Greymouth (Parliamentary Commissioner for the

Environment, 2015). As global mean temperatures continue to rise, the impacts of coastal and river flooding will increase and result in further damage and loss to property (Hayward, 2017; Meduna, 2015; Rouse et al., 2017). The increasing exposure of property to damage that we can now map and predict is likely to place many owners in circumstances of uninsurability against climate-related hazards (Storey et al., 2015). This combination of circumstances creates a novel situation for property owners, whereby losses are foreseeable but solutions are obscure and undefined. Under current policies, legislation and practice, it is not clear whether or how owners can recover their economic or material losses from climate change-related damage, or alternatively how they might fund relocation away from danger zones (Fleming et al., 2019; Hino, Field and Mach, 2017; Lovett, 2017). This novel and undefined circumstance is what we are calling 'property purgatory'.

The purpose of this article is to describe and qualify the problem. First we outline its key characteristics. We then discuss the implications of this problem becoming increasingly prevalent and unavoidable. We consider how property purgatory sits at the boundary of existing legal doctrine and poses a novel legal question regarding loss recovery. Lastly, we link property purgatory with broader themes of wealth, responsibility and fairness.

Property purgatory

A real-life example illustrates the problem of property purgatory. Ms R lives in a coastal residential area. Her insurance was withdrawn in 2017 after her low-lying house was subjected to several instances of flooding and inundation as a result of extreme weather events. Her house eventually became uninhabitable. The outcome was that she had to live in a vehicle while continuing to pay the mortgage on an unusable and uninsurable house. This meant she could not sell (unless at a considerable loss, and assuming she could find a buyer); nor could she borrow money to make improvements to her property. No blame could be attributed to her, as she had purchased the property well before there had been indications of climate change exposure. She had no clear avenues by which to recover her loss; nor to practically remedy her situation. Short of acute and immediate danger to human health, the responsibilities of central and local government remain undefined in this situation, despite the extensive descriptive literature (Iorns and Watts, 2019). As this case shows, climate change-related losses like Ms R's are exacerbated by undermined responsibility and the anxieties felt by those hoping to recover their losses.

> ... the four stages of property purgatory: loss of insurance, loss of mortgage, loss of financial means to relocate, and, at some point, physical damage and thus loss of means to enjoy the property as a dwelling.

In its Roman Catholic doctrinal meaning, a person in purgatory waits with uncertainty for deliverance, by something or someone out of that person's control, to an outcome either good or bad (2 Corinthians 5:10). Purgatory implies a state of suffering, or at least an anxious waiting for judgement (Revelation 20:12). For those in Ms R's situation, this is an apt description. They will likely be unable to afford to protect their property from future damage, will have constraints on the ability to build protective structures, and will be unable to sell and move on without considerable loss (if they can sell at all) (*Gisborne v Falkner*, 1994). They will be in property purgatory: living in uncertainty, emotionally strained, for an indeterminate period, suspended between terrible and good outcomes (Storey et al., 2015). It is a condition lacking agency, with little capacity to initiate deliverance because the parameters of recourse and responsibility are unclear.

Ms R's situation clearly illustrates an unnerving ambiguity in loss recovery. Her 'loss' includes the original function of her house as a dwelling place and the monetary and non-monetary values associated with this, but she is not barred from the property. She is barred from the usual means by which she should expect to enjoy her property as a dwelling and as an asset to fund other investment or her relocation.

Property purgatory comprises sequential stages of tangible loss. The first stage is the withdrawal of insurance, denying the owner a conventional method to recover loss of means. The second stage of loss is the impact such uninsurability has on a mortgage and the property value more generally; there will be instances of mortgagees divesting their mortgages on uninsured property (Iorns, 2018; Storey et al., 2015). These two stages compound into the third stage of loss, involving diminished capacity to sell the property to move on (should the person wish to) because of the loss in value. The three stages are all possible without any actual physical loss caused by some degree of damage to the property from climate-induced hazards. Unlike the previous three, this fourth stage of loss, from damage, can happen at any juncture in the timeline, and can worsen the purgatory if the owner has diminished ability to fund repairs.

In this way, the diminution of property value can and may often occur simply as a result of the foreseeability of damage becoming known (*Smaill* v *Buller District Council*, 1997). Territorial authorities, through the requirement that they identify and communicate natural hazards to the public (discussed later), may unwittingly trigger a movement into the first stage of purgatory.

These, then, are the four stages of property purgatory: loss of insurance, loss of mortgage,[1] loss of financial means to relocate, and, at some point, physical damage and thus loss of means to enjoy the property as a dwelling. If some form of recovery is sought, it will be at some point in these stages of loss that characterise property purgatory. Across all four stages, property value as a negotiating position will significantly diminish. Unless the owner has other assets, they will have limited practical or legal recourse by which to rectify the situation or recover their loss. This raises the question of how to develop principled legal doctrine that accounts for this new characteristic of quantifiable and foreseeable loss.

The scope of property purgatory

In this article, property purgatory is considered in the context of the foreseeable damage associated with sea level rise, together with increasing frequency and severity of storm and flooding events (Oliver-Smith, 2016). Climate change-driven coastal hazards include coastal erosion, rising groundwater, increasingly high tides, flooding, ponding, and landward movement of mean sea level (Horton et al., 2020; Meduna, 2015). The concept is equally applicable to other hazards driven by climate change, but we do not pursue them in this article.

The scope of 'property', for the purposes of this article, comprises existing owner-occupied homes. We consider the implications of foreseeable damage to residential assets from impacts arising from climate change hazards, as described above. We touch on the implications for other classes of property (e.g. greenfield, rental, commercial, rural) in the article's conclusion.

Beyond 'risk': foreseeable damage and loss

Risk is the likelihood of 'x' consequence for an asset over time (Grace, Kilvington and France-Hudson, 2019; Saunders and Kilvington, 2016). However, in exposed locations, climate change impacts such as coastal erosion and increasingly high tides are beyond 'risk' in this sense, as their likelihood is certain. There may be uncertainty regarding precise timeframes and severity of impact (Horton et al., 2020), but damage will certainly eventuate and thus is foreseeable.

Foreseeable damage arises from a combination of incremental change and more extreme events. Slow-onset damage from sea level rise, for example, compounds property exposure to extreme weather events (Hino, Field and Mach, 2017; Lawrence et al., 2015). Over time, the number of properties exposed to these impacts will increase, along with the severity of the impacts (Boston and Lawrence, 2017; Storey et al., 2015). Modelling of exposure and the capacity to predict and map the damage is being undertaken with increasing accuracy (NIWA, 2019; Parliamentary Commissioner for the Environment, 2015). This predictability of damage takes it beyond 'risk' into new legal territory.

> … for many people the withdrawal of private insurance is likely to catalyse these cascading impacts and economic losses long before significant physical damage from climate change.

In New Zealand, the parliamentary commissioner for the environment report *Preparing New Zealand for Rising Seas* uses Dunedin as an example (Parliamentary Commissioner for the Environment, 2015). The significant flooding experienced by South Dunedin in June 2015, which left a lasting physical and emotional legacy, is an example of a one in 100 years event (McNeilly and Daly, 2015; Parliamentary Commissioner for the Environment, 2015). This 'once in 100 years' scale of damage is projected to occur every two years by 2065. In other words, by that time, every year will bring a 50% chance of what we currently consider to be severe damage. By 2100 this increases to a 100% likelihood (i.e., every tide bringing potential damage at this scale) (Parliamentary Commissioner For the Environment, 2015). The certain outcome, unless prior action is taken, will be economic and material losses.

Insurance retreat

This shift in the likelihood from 'risk of damage' to 'foreseeable damage' will drive insurance retreat from exposed properties. Insurers are likely to respond initially by raising insurance premiums. This may make living costs, such as mortgage repayments, more unaffordable, especially for those on lower incomes. Once insurers consider a property's likelihood of damage is no longer a risk but a certainty, they will no longer insure. This may affect the owner's ability to obtain, or retain, mortgages, which (almost always) contain a covenant requiring the mortgagor insure the property from risk (Property Law Act 2007, s95 and schedule 2, part 1, cl 2(1)). The loss of insurance may lead to an owner being in default under their mortgage. This may bring the threat of the mortgagee exercising its power of sale (and enforcing the mortgagor's personal covenant to pay when the mortgage is not repaid in full following mortgagee sale). The financial implications for households are sobering (Hayward, 2017).

In Ms R's situation, her house suffered physical damage from flooding but it was the withdrawal of her insurance as a reaction to the (correct) expectation of foreseeable damage that constituted her initial loss. She therefore not only was unable to recover from flood damage via insurance, but further suffered a diminution of property value due to uninsurability stemming from the increasing likelihood of further damage. The insurance loss (reflecting the certainty of future damage) first plunges people into property purgatory; unaffordable physical damage, as the Ms R example shows, keeps them there. The result is a ratchet effect, with means to recovery diminishing as the person moves through the stages of property purgatory.

Exposed homeowners are in a situation of double peril from insurance retreat. First, for many people the withdrawal of private insurance is likely to catalyse these cascading impacts and economic losses long before significant physical damage from climate change. Second, property owners' usual loss recovery mechanism is through their insurance, whose very withdrawal has placed them in this position. Those affected will have to seek relief from somewhere else. They could choose to stay where they are and do nothing, or may not have the resources to seek relief, but ultimately their property will suffer the predicted physical damage and become unliveable. If there are no routes to resolve this lack of access to means, the implications are for a ghettoisation of foreseeably impacted locations, which will particularly affect the less wealthy who have no alternative place to live.

The role of local authorities

To whom will people turn? Their first thought is likely to be their local authorities – possibly their regional council, but more likely their territorial local authority (city or district council) (Local Government Act 2002, ss5(1), 21, 39). Regional and territorial authorities have differing responsibilities to mitigate the impacts of hazards such as land instability, flooding and earthquakes (Grace, Kilvington and France-Hudson, 2019; James, Gerard and Iorns, 2019; Palmer, 2012). These duties stem from their roles under statutes such as (inter alia) the Resource Management Act 1991 (RMA), the Public Works Act 1981, the Local Government Act and the Building Act 2004 (Cox, 2007; Palmer, 2012; Todd et al. 2016). We focus on territorial local authorities, because they will likely be the first point of contact for many homeowners confronting property purgatory.

Territorial local authorities are expected to manage risk speculatively; this is very clear in the statutory language that confers and details their powers and duties. They are required to understand and anticipate to a reasonable degree the level of hazard risk ahead of permitting potential subdivisions, land uses and new structures (RMA, s31(1)(b)(i)). Their duties also include administering building safety standards and civil defence emergency management (Building Act 2004; Local Government Act, s48J(1)(a)).

> Currently, therefore, and for the immediate future at least, New Zealand does not have a publicly funded instrument to assist property owners with climate change losses and damage

Territorial local authorities thus have tools to avoid future risky development, and indeed may have an obligation to do so where it is supported by expert information (RMA, s35(5)(j)). Some have already included hazard lines on planning maps to indicate areas at risk from climate change impacts. Rules for the hazard areas may, for example, prevent new subdivision, require minimum floor levels, or even prevent new structures altogether. Territorial local authorities also issue land information memoranda (LIMs) to advise potential purchasers of risks, and issue building certificates to confirm compliance of new buildings with required standards.

However, these mechanisms do not apply to hazards faced by existing buildings. These have existing use rights under the RMA (s10). Unless a building is unsafe, or residents are at immediate risk of harm, councils do not appear to have any responsibility for assisting owners in property purgatory (Building Act 2004, s129(1)(a)).

Indeed, territorial local authorities may unintentionally cast property owners into the first stages of property purgatory due to the requirement that they make the public aware of the exposure of property to future damage. These actions, while falling squarely within their mandate, will ultimately have a ripple effect on the insurability or at least property values of those in the affected areas (*Weir v Kapiti Coast District Council*, 2015; *Smaill v Buller District Council*, 1998). Territorial local authorities have reason to be cautious in this space while the specifics of their responsibilities regarding climate change-related damage remain undefined although potentially within the scope of their more general responsibilities under the Local Government Act (s10(1)(b)).

The role of the state

Given the absence of any clear role for territorial local authorities with respect to losses faced by owners in property purgatory, does the state have a role? New Zealand has a well-established mechanism for loss recovery from some natural hazards, but this does not appear to apply to foreseeable damage from climate change.

Public insurance for earthquakes first began in 1944. The current form of the Crown entity the Earthquake Commission (EQC) was established in 1993 'to administer the insurance against natural disaster damage provided under this Act' (Earthquake Commission Act 1993, s5(1)(a)). EQC is a public institution that provides relief to those affected by damage caused by 'earthquake, natural landslip, volcanic eruption, hydrothermal activity, or tsunami; or natural disaster fire'. It also includes flood damage, but only to residential land, not residential buildings (s2(1)).

Its applicability to those suffering loss from property purgatory seems unlikely, especially as it clearly would not apply to the first three stages of property purgatory, nor to stage-four damage to dwellings from storm or flood. Furthermore, the Earthquake Commission Act permits EQC to limit its own liability in relation to flood damage (schedule 3, s5). Notably, it limits liability where the damage and loss is likely to be recurring (schedule 3, s4(2)). Considering the scale of projections of damage to property associated with coastal climate change hazards, and in light of the statutory provisions guarding against potential indefinite liability, it is likely that loss recovery for any stage of property purgatory would be completely out of scope.

The role of EQC arguably reflects a national consensus regarding collectivisation of the risk from natural hazards. The Accident Compensation Corporation (ACC) similarly collectivises risk in the form of 'fair compensation for loss from injury' (Accident Compensation Act 2001, s3(d)). Climate change damage (both present and future) to property clearly falls outside a claim of 'personal injury' (s3).

Currently, therefore, and for the immediate future at least, New Zealand does not have a publicly funded instrument to assist property owners with climate change losses and damage (Boston and Lawrence, 2017; Kosolapova, 2011, p.189; Toomey, 2007). However, it is probable that the 'no fault' models of EQC and ACC, which collectivise risk and allocate funding on a no-fault basis, will inform the debate on future state-level responses to property purgatory. Boston and Lawrence argue the merits of public mechanisms that would fund compensation for climate change-related damage, and even managed retreat from highly exposed areas (Boston and Lawrence, 2017, p.24). Notably, they move the policy discussion beyond 'whether' public funding should be provided to 'how much, to whom, and on what conditions' (Boston, 2019a).

In sum, those in property purgatory who seek to recover their losses currently have nowhere to turn. The only possibility under current institutional and legal arrangements is a worsening outcome, as neither insurers, local authorities nor the state have the mandate to assist. New Zealand will have increasing numbers of property owners with no defined avenue for loss recovery (or help of any kind), and with property that is declining in liveability and value.

Recovery by legal mechanisms

The novel premise of exposure to foreseeable damage rather than solely risk affects our reading of state and territorial authorities' obligations in natural hazard management. It is possible that statutory language around risk, as it is currently written, does not suit the novelty or character of the problems posed by climate change (Grace, Kilvington and France-Hudson, 2019).

People in property purgatory are stuck, and currently there are no mechanisms to assist them to move on and even partially recover their losses.

While territorial authorities may affect property values by making public the severity of foreseeable damage to properties, they should not be blamed as the cause of property purgatory. As exposure predictions become more certain due to improving data, territorial authorities have a duty to act on that information; not to do so could be a recoverable cause of action (*Smaill v Buller District Council*, 1997; *North Shore City Council v Body Corporate 188529 And Ors CA*, 2010 (*Sunset Terraces*)). The undeveloped question is the existence of and/or extent of any duty towards owners in property purgatory, specifically regarding the 'proximity' (in the legal tort sense) of a territorial authority to property owners experiencing one or more of the stages of loss (Todd et al., 2016, 59.5.2.01). There is a possibility that New Zealand's legal landscape may reveal no such duty in statute or the common law. That said, such an assertion hardly waives the merit of enquiry. The nature of property purgatory means that the non-existence of a duty has just as many implications as the existence of one; possibly even more so, as establishing the non-existence of a duty could be the final nail in the coffin for those seeking to recover their losses through formal means, as it lessens avenues to recovery by anything other than ad hoc measures. In this way, rather perversely, the dismissal of a novel duty at the outset does not bury the issue of property purgatory, but embalms it.

There will be no closure or progress with this issue without robust legal analysis. Parallels have been drawn with rulings determining public bodies' duty to take care for foreseeable earthquake risk (Iorns, James and Stoverwatts, 2020). The *Smaill v Buller District Council* case concerning a diminution of property value on the basis of local authority knowledge of earthquake exposure could be useful in considering how the action of local authorities' responses could result in claims of compensation for economic damage. That case is relevant because it recognises the implications of loss despite the absence of physical damage.

Issues relevant to property purgatory, including moral hazard and possible funding of relocation from the danger zone, are raised by the Quake Outcasts case. The ruling (which challenged the Crown's offers to buy back some land following the 2010–11 Canterbury earthquakes) extended a full price buyout offer to uninsured owners in the 'red zone', contrary to the earthquake recovery minister's plan (*Quake Outcasts v Minister for Canterbury Earthquake Recovery*, 2015). Despite providing for the uninsured claimants by ruling that the plan constituted an 'area approach', the wider implications are largely unresolved and it was made very clear that this in no way set a precedent for future cases. Similar questions are being raised in the context of damage due to sea level rise, but one-off, case-specific legal decisions will become increasingly unjustifiable as the number of cases increases (Tombs and France-Hudson, 2018).

Loss recovery, wealth and fairness

At a broader level, property purgatory raises deeper questions about equity and fairness. Over 52% of New Zealand's wealth is from property investment (Rashbrooke, 2015; Russel and Baucher, 2017). Foreseeable damage to property will eventually affect this key financial pillar of the country. Those who are less wealthy (especially those whose sole asset is a mortgaged dwelling) will be disproportionately affected by property purgatory, and this will exacerbate existing wealth inequalities. The less wealthy are also less able to mount legal challenges that might help legally define unanswered questions about loss recovery in this context.

Given the potential scale of climate change impacts, it is inevitable that some will argue for default to individual liability rather than a collective risk approach which will involve cost sharing through rates or taxes. Those arguing for strict individual liability with no option to recover losses would emphasise how people in exposed property have made a bad investment, property purgatory being just a consequence of their poor judgement. Though somewhat lacking in compassion, this is an understandable reaction (Neill and Neill, 2012). People are cautious with public money and want to see huge public projects thoroughly justified on a practical, fiscal and principled basis. Topics such as the extent of individual responsibility, whether to distinguish between informed owners and those who bought their property prior to the hazard exposure being public knowledge, and how to navigate potential moral hazard must be no small part of the discussion. Approaches will differ in how the exposure and consequences should be shifted to other groups, either socio-economic or generational (Boston, 2019b; Ellis, 2018). A conversation about responsibility is necessary and inevitable (Boston and Lawrence, 2017; Fleming et al., 2019; Storey et al., 2015) and must incorporate consideration of fairness, equity and responsibility (Posner and Weisbach, 2010; Sovacool, Linnér and Goodsite, 2015).

Although this article has mainly focused on homeowners, the issue of property purgatory will also affect marae, community facilities, commercial property, rural property, reserves and other categories of property. The moral and financial arguments for shared responsibility will likely be stronger for some types of property than for others. For example, public infrastructure will have inherently different factors to consider as opposed to residential or commercial property. Communities will also be affected more generally as residential relocations and environmental damage start to have an impact on New Zealanders' strong attachments to land, place and community (Stephenson et al., 2018).

The foreseeable damage from climate change also raises an important issue too large to be covered in this article, regarding how local authority and Crown liabilities and responsibilities interact with obligations set out in the Treaty of Waitangi (Productivity Commission, 2019, pp.78–9; Local Government Act, ss14, 81(1)(a); RMA, s58M(a)). This will no doubt (and rightly so) extend to the ambit of local authorities in administering and operationalising climate change adaptation (Iorns, 2020; Todd et al., 2016).

Conclusion

This article has identified and described a troubling novel phenomenon: property purgatory. It arises from the fact that climate change hazards are shifting from 'risks' to 'foreseeable damage'. Once damage is foreseeable, insurance loss is very likely – the first stage of property purgatory. This may in many cases lead to the second stage of property purgatory, loss of mortgage. The third stage is loss of property value and thus the financial means to relocate. The fourth stage, involving physical damage from the hazard, may occur at any time during this process or subsequently. People in property purgatory are stuck, and currently there are no mechanisms to assist them to move on and even partially recover their losses.

There are property owners who have, or will have, a significant barrier to their ability to relocate away from an unacceptable housing situation. At a legal theory level, this raises questions about whether public bodies do or should have responsibilities for those facing foreseeable damage to their property. Until an approach to combat property purgatory is found, the atmosphere of uncertainty will immobilise those unfortunate enough to be caught in it, and existing inequities will be magnified.

Undeniably, the costliest option is to do nothing. Inaction under the circumstances posed by climate change will lead to people becoming entrenched in increasingly impoverished circumstances, and suffering the consequences in all aspects of their lives. Much work is required to identify and examine existing tools in law and policy that could address the stages of loss characterising property purgatory in order to prevent the worst-case scenario.

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[1] We realise not all properties have mortgages and this stage will not apply to everyone moving through the phases of property purgatory. Additionally, it still is not clear how banks will respond to these circumstances.

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Jeroen van der Heijden

Regulatory Stewardship

the challenge of joining a virtue and a mechanism

Abstract

Since 2013, New Zealand's regulatory agencies have had a statutory obligation to carry out regulatory stewardship. They have been expected to adopt a whole-of-system, life cycle view of regulation, and to take a proactive and collaborative approach to the monitoring and care of the regulatory system(s) for which they have responsibilities. In 2021, after eight years, regulatory agencies have not managed to operationalise their shared regulatory stewardship obligations in a coherent and consistent manner. This article explores the challenges they face in operationalising regulatory stewardship, and provides some conceptual clarity that may aid these agencies in collaborating to develop and adopt the whole-of-system, life cycle view of regulation that is envisaged.

Keywords regulatory stewardship, regulatory governance, regulatory reform, regulation of regulation

Jeroen van der Heijden holds the Chair in Regulatory Practice in the School of Government at Victoria University of Wellington, and is an honorary professor in the School of Regulation and Global Governance (RegNet) at the Australian National University.

For a long time, governments around the world have developed principles and guiding philosophies for the regulation of regulation. Their ambition is to ensure that regulatory agencies across government comply with a set of coherent and consistent criteria when proposing, developing, implementing, reviewing and terminating regulation and regulatory interventions. By way of illustration:

- The United States has a long history in this regard. In the mid-1940s it introduced the Administrative Procedure Act, which, when introduced, was touted as a 'bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated' (quoted in Rosenbloom and O'Leary, 1997, p.45). The Administrative Procedure Act requires regulatory agencies, among others, to keep the public informed of how they are organised, and their procedures and rules; to provide for public participation in the rule-making process; and to establish and follow uniform (whole-of-government) standards for making and implementing rules.

- On the other side of the Atlantic, the European Commission launched its Better Regulation Agenda in the early 2000s. Akin to the Administrative Procedure Act, the Better Regulation Agenda is a set of requirements and expectations for regulatory agencies at the EU level. The purpose is to ensure that regulation is developed and implemented openly and transparently, builds on the best available evidence, is backed by stakeholders, and respects the principles of subsidiarity and proportionality.
- Down under, we have seen similar developments since the early 1990s. Initially, both Australia and New Zealand set off on a trajectory of regulatory reform guided by the principles and underlying philosophy of deregulation and the reduction of red tape and compliance costs. While Australia is still very much following this philosophy in its deregulation agenda, the focus in New Zealand has shifted to regulatory stewardship.

The Administrative Procedure Act, the Better Regulation Agenda, and various deregulation initiatives now have a long enough history for us to see their merit (or the lack thereof) in regulatory practice. Perhaps more importantly, these initiatives have, over time, achieved some conceptual clarity. Regulatory stewardship is a relatively novel invention, and many questions remain about what it will ultimately achieve. Perhaps more problematically, there is a lack of conceptual clarity about what regulatory stewardship is, what it could be, and possibly what it should be.

To help to create greater conceptual clarity, this article explores the nature of regulatory stewardship in New Zealand. This includes examining the idea of 'stewardship' and considering what it could mean as a principle and guiding philosophy for the regulation of regulation.

Regulatory stewardship in New Zealand

The regulatory reforms since the late 1980s leading up to the introduction of regulatory stewardship in New Zealand have been well documented elsewhere (Gill and Intal, 2016). Regulatory stewardship was formally introduced in New Zealand in 2013 when it became a statutory obligation for government departments. Over time, expectations for regulatory stewardship have been developed by the New Zealand Treasury, with the latest guidance dating from April 2017. The Treasury defines regulatory stewardship as:

> a responsibility of government regulatory agencies. It involves them adopting a whole-of-system, lifecycle view of regulation, and taking a proactive, collaborative approach, to the monitoring and care of the regulatory system(s) within which they have policy or operational responsibilities. (Treasury, n.d.)

Stewardship responsibilities require regulators to keep track of the performance of their regulatory systems (through the 'monitoring, review and reporting on existing regulatory systems'), to seek to keep their regulatory systems fit for purpose (through 'robust analysis and implementation support for changes to regulatory systems'), and to ensure proper implementation of their regulatory systems ('good regulatory practice'). These responsibilities and expectations are, to some extent, laid down by the Treasury. It is relevant here to note that regulatory agencies are expected to do all this actively without requiring their minister's explicit direction or permission (Treasury, 2017).

However, despite this guidance having been provided by the Treasury, it is my experience that regulatory agencies in New Zealand have been struggling to operationalise their regulatory stewardship roles. In my role as professor of regulatory practice at Victoria University of Wellington I have worked closely with regulatory agencies, and it has become evident to me that the struggle of regulatory agencies to operationalise their stewardship obligations and role has at least four overlapping origins.

First, the overall regulatory stewardship obligation is akin to performance-based regulation. It stipulates the intent or outcome to be achieved but leaves a large amount of (discretionary) space for regulatory agencies to fill in their stewardship role. The intent or outcome is that regulatory systems are 'an asset for New Zealanders, not a liability' (ibid., p.2). Regulatory stewardship, then, 'simply means having a proactive duty of care of a [regulatory system that] belongs to, or exists for the benefit of, others' (Ayto, 2014, p.27). But, as is so often the case with performance-based regulation, the targets of the regulation (in this case, regulatory agencies) often want to know what minimum requirement they must meet in order to comply (May, 2011). This holds even more strongly when the outcome that is to be achieved is broad and somewhat opaque, as is the case with regulatory stewardship. Arguably, the Treasury had in mind that it would slowly explore with (some) regulatory agencies what regulatory stewardship could look like in practice. In my opinion, however, such an experimental approach is difficult to reconcile with the obligatory nature of regulatory stewardship. Experimental governance may work in exploring the performance or operationalisation of future-but-not-yet-mandatory requirements, but it seems less logical as an approach to rolling out a blanket obligation (Sabel and Zeitlin, 2012).

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Second, the term 'regulatory system' causes confusion within regulatory agencies. At the outset, the Treasury provides a broad but bounded definition. A regulatory system is 'a set of formal and informal rules, norms and sanctions, given effect through the actions and practices of designated actors, that work together to shape people's behaviour or interactions in pursuit of a broad goal or outcome' (Treasury, 2017, p.1). Things get confusing for regulatory agencies, however, when the Treasury adds that a regulatory system is part of a broader (legal) system and interacts with other regulatory systems, and that multiple regulatory agencies usually have responsibilities within a given regulatory system. Analytically, this very broad conceptualisation of 'regulatory system' is laudable. Practically, however, regulatory agencies wonder about the level at which they must define their regulatory system or systems (for example, the transport system in general, the road transport system, the vehicle roadworthiness system, the vehicle roadworthiness inspector certification system, and so on). Logically, they ask if they are responsible for a whole-of-system approach to regulation which calls for collaboration across regulatory agencies. And logically, too, they ask who is ultimately accountable for regulatory stewardship in a shared regulatory system (for a more extensive discussion, see, for example, Winson, 2017).

Third, the government expects regulatory agencies to work collaboratively on their stewardship responsibilities (Treasury, 2017). However, little progress has been made as regards such collaboration. Within-system engagement between agencies remains the biggest implementation challenge to date.[1] Arguably, it is not possible to achieve the whole-of-system perspective envisaged by the Treasury unless multiple agencies work together. Arguably, also, the Treasury envisages an individual regulatory agency as just *a* steward of a regulatory system (or systems), and never *the* steward of that system (or systems). Whether the lack of collaboration between regulatory agencies is the result of lack of clarity about their regulatory stewardship obligations or a lack of resourcing and commitment at agency level is beyond the scope of this article. It would, however, be a missed opportunity for agencies not to work together more closely in developing their regulatory stewardship strategies. The public at large will be better served by a generic (coherent and consistent), rather than an agency-by-agency, operationalisation of regulatory stewardship.

Fourth, conceptual confusion results in questions about what stewardship is, what it could be and what it should be. In workshops with regulatory agencies, I often argue that, in my opinion, we are witnessing a situation where the 'right' answer was given before the 'right' question was asked. I then immediately provide a quotation attributed to J. Robert Oppenheimer (the inventor of the atomic bomb): 'Genius sees the answer before the question.' With this, I mean to say that the broader idea of regulatory stewardship fits perfectly well within the international developments discussed at the start of this article. These all introduce some coherent or holistic form of (whole-of-government) regulation of regulation, as well as a guiding philosophy for regulatory reform. The term 'stewardship' indicates that the New Zealand government has high ambition in this respect – and that is where I think the genius comes in. However, I fear that the lack of conceptual clarity may make us miss the full potential of the idea.

In sum, the notion of regulatory stewardship has high normative appeal. It is an idea that many agree with in principle. Unfortunately, the notion is conceptually ambiguous. It is challenging for regulatory agencies to comply with the performance-based stewardship obligation, and the experimental approach of exploring the idea of regulatory stewardship seems difficult to reconcile with it being a statutory obligation. The system(s) terminology only further amplifies the challenge of operationalising the stewardship obligations of regulatory agencies. At the same time, regulatory agencies may have been too insular in developing their own regulatory stewardship strategies, and may perhaps not have allocated enough resources to them.

While acknowledging that all four overlapping challenges need to be tackled, I will focus here on only one aspect: namely, the conceptual clarity of the idea of stewardship in regulatory stewardship. In doing so, I am looking at regulatory stewardship not as a 'unique' idea, but as something that is illustrative of a broader trend of the development of coherent and consistent criteria for proposing, developing, implementing, reviewing and terminating regulation and regulatory interventions that we are witnessing around the world.

> There is then a risk that the concept is given too much weight and reality – as if stewardship exists 'out there' as a single, independent entity.

Unpacking the idea of 'stewardship' in regulatory stewardship

Stewardship is one of those abstract concepts that we all tend to define slightly differently. There is no fixed understanding of what exactly is meant by stewardship in the academic, policy and practitioner literature (Albers Mohrman, O'Toole and Lawler, 2015; Moon et al., 2017). Perhaps we would do better to talk about stewardship (and abstract concepts in the same class, such as accountability, equity, transparency and wellbeing) in the plural. Yet it is customary to discuss stewardship (and these other abstract concepts in the same class) in the singular. There is then a risk that the concept is given too much weight and reality – as if stewardship exists 'out there' as a single, independent entity. The price typically paid by abstract concepts for such reification is that we humans then (want to) subject them to bounded and unambiguous definitions. However, at the end of the day this is a *forced* concretisation and requires a clarity that does not exist in reality.

Honouring the duties owed by organisations to their staff and stakeholders is expected to nurture and strengthen their long-term commitment, which itself contributes to the long-term success of the organisation

With that caution in mind, it is safe to say that stewardship broadly implies 'the careful management of something that belongs to others' and leaving something 'in better condition for use by future generations' (Albers Mohrman, O'Toole and Lawler, 2015, p.3). In a similar vein, it is generally accepted that a steward 'does not necessarily own the entity that is being taken responsibility for' and does not 'necessarily have the right of control over the resources being taken responsibility for' (Moon et al., 2017, p.10). This understanding of stewardship resonates with how the term is generally used in a wide range of settings:

- It is central to many spiritual and religious epistemologies and ethics, appearing, for example, in the idea of a shepherd-like figure looking after a flock-like community in Abrahamic religions, or values such as kindness and discernment that are seen as essential to Buddhism (Cossin and Boon Hwee, 2016).
- It also resonates with the epistemologies and ethics of indigenous societies and First Peoples that we find around the world, such as in the Māori notion of kaitiakitanga, the Māori obligation to safeguard and care for the environment for future generations, which to some extent also includes a duty to care for people (Kawharu, 2010).
- It also resonates well with (Western) political and moral philosophy since the Enlightenment (Scruton, 2013). For example, the idea of the 'social contract' (that we all sacrifice some of our individual freedom to a ruling institution to look after and ensure our civil freedom) or Kant's 'categorical imperative' (the golden rule of not doing unto others what you do not want others to do to you) can be considered forms of stewardship.

While these broad understandings indicate that the notion of stewardship relates to a bounded set of values and expectations, the bounded set still needs to be translated to a regulatory context. To aid this translation, the following analysis first explores how the idea of stewardship is operationalised in the broader organisation, management and governance literature. It then considers how the idea is operationalised in the narrower regulatory literature.

Stewardship in organisation, management and governance literature

The idea of stewardship frequently recurs in organisation, management and governance literature. For example, 'stewardship theory' is a theory devised to explain and conceptualise organisational behaviour, and applies to public and private organisations. Contrary to many other organisational theories, it holds that leaders of organisations are willing to act in the best interests of their organisations, and are motivated by a need and desire to perform excellently and with honour (Keay, 2017). To nurture stewardship behaviour, the theory recommends that these leaders are provided with rewards that give them intrinsic satisfaction, such as a chance to grow and achieve self-actualisation, rather than with ever-larger financial gains (Davis, Schoorman and Donaldson, 1997).

In a similar vein, 'ethical stewardship' is a theory devised to explain and conceptualise the relationship between organisations and their staff, and organisations and their stakeholders, who include direct beneficiaries and parties that are indirectly affected by the organisation (Caldwell, Hayes, and Long, 2010). Central to the theory is the need for organisations to create trust by engaging staff and stakeholders in important decisions that involve them, and sharing critical information that may affect them. Honouring the duties owed by organisations to their staff and stakeholders is expected to nurture and strengthen their long-term commitment, which itself contributes to the long-term success of the organisation (Caldwell et al., 2011).

Both these theories focus on the activity[2] side of stewardship. Other theories, however, focus on the structural side of stewardship. This includes institutional and process aspects. For example, theories of 'corporate stewardship' hold that the type of virtuous organisational practices and values discussed above should be thoroughly institutionalised in the organisational culture, rather than being dependent on the personality of individual leaders (O'Toole, 2015). Such institutionalisation may be achieved through training future organisational leaders, and having in place well-articulated organisational values and clear and transparent internal accountability processes.

In the slipstream of theories that focus on the structural aspects of stewardship, there is an ever-expanding codification of stewardship expectations and an ever-expanding set of frameworks for embedding stewardship in organisational structures. For example, the UK Stewardship Code 2020 is a voluntary code for asset owners and managers and the service providers that support them. It sets out expectations about how these individuals should manage and oversee the capital entrusted to them by their beneficiaries and clients, as well as 'apply and explain' principles that will help them to put the idea of stewardship into practice and to explain to stakeholders how they do this. Likewise, initiatives such as the Forest Stewardship Council and the Marine Stewardship Council effectively provide organisations with a set of guidelines for putting the idea of stewardship into practice and being held accountable for following these guidelines.

Stewardship in the regulatory literature

Leaving the broader organisation, management and governance literature behind and zooming in on the regulatory literature, it quickly becomes apparent that the concept of 'regulatory stewardship' has not yet made inroads.[3] Yes, there is some 'regulatory stewardship' terminology in this literature, but this is more likely to be the result of simple statistics and chance than the purposeful development of a 'regulatory stewardship theory'. In the thousands of publications published each year, it is bound to happen that every now and then a (regulatory) scholar links the terms 'regulatory' and 'stewardship'. Nevertheless, it is worth having a look at the various parts of the regulatory literature that engage with the broader notion of stewardship as defined earlier.

Regulatory scholars have, for a long time, been interested in whether and how regulation (in a narrow and broad sense) is an appropriate way for governments and others to ensure the wellbeing of people and their environments (Levi-Faur, 2012), or whether regulation is a way to operationalise 'the careful management of something that belongs to others'. These scholars have also been interested for a long time in how regulatory interventions, regulatory regimes and regulatory systems can best be updated and be made and kept fit for purpose, resilient, anticipatory and future-proof (Drahos, 2017), or how regulatory reform can 'leave it in better condition for use by future generations'. In sum, regulatory scholarship makes an analytical distinction between stewardship *through* regulation (and regulatory systems) and stewardship *of* regulation (and regulatory systems).

> Rounding up, after unpacking the bounded set of values and expectations associated with the idea of stewardship, we can now safely conclude that it is hard to define exactly what regulatory stewardship is, let alone what it takes to be a regulatory steward.

This distinction between stewardship *through* regulation and stewardship *of* regulation may help to bring some further analytical clarity in our thinking about regulatory stewardship. Questions related to stewardship *through* regulation are largely normative. They are about the type of regulator a regulatory agency wants to be. After all, a regulatory agency can interpret its role in an authoritative, paternalistic manner and claim that it knows best how to look after the interests of current and future people and organisations, but it can just as well interpret its role in a collaborative, service manner and help people and organisations to take responsibility for their own wellbeing. Here I should note that in New Zealand the statutory regulatory stewardship obligation is only about stewardship *of* regulation. I will therefore not engage further with stewardship *through* regulation.

Questions related to the stewardship *of* regulation are more practical. For example, what type of monitoring and review of regulation gives us sufficient insight into its performance? How often and when does regulation need to be updated, and when are sunset clauses necessary? To what extent and how are targets of regulation and other stakeholders involved in regulatory development and implementation? What expertise and skills are required for regulatory staff across the regulatory sector, and how can these be provided?

Building a bridge between a virtue and a mechanism

In sum, the simple term stewardship encapsulates a wide variety of meanings and expectations. First, the idea of stewardship is both a virtue and a mechanism. As a virtue, it touches on values such as looking after the interests of others, taking care of what is given in trust, serving others, and looking after the interests of future generations. As a mechanism, it touches on practical issues such as being accountable for one's actions, being honest about one's behaviour, not taking unnecessary risks with what is given in trust, and keeping in mind short-term and long-term outcomes.

Second, the idea of stewardship is about both activity and structure. As activity, it touches on the motivations of human and organisational behaviour. It raises questions, for example, about how we nurture organisational leaders, staff and stakeholders to see the prosperity of their organisations and the environments they serve and influence as more important than their personal interests. As structure, it touches on the processes and institutions that we have in place to put stewardship into practice. This resonates very much with the idea of stewardship as a mechanism that includes accountability processes, transparency requirements, risk reduction strategies and periodic reviews.[4]

Third, the idea of stewardship is both outward-looking and inward-looking. As outward-looking, it very clearly touches on

Figure 1 : Some elements of regulatory stewardship as a mechanism

		Stewardship focus	
		Inward-looking	Outward-looking
Stewardship approach	Activity	• Engage staff in essential decisions that involve them; share critical information with staff and share it on time. • Give staff rewards that aid a long-term view of their career path (ideally within the organisation), and leadership rewards that trigger intrinsic satisfaction. • Nurture staff skills and competencies ('good regulatory practice') and train future organisational leaders. • Cultivate a sense of personal responsibility for the long-term wellbeing of the regulatory agency and its contribution to society.	• Engage stakeholders (including other regulatory agencies) in essential decisions that involve them. • Share critical information with stakeholders (including other regulatory agencies) and share it on time. • Be receptive to the diversity of public concerns about the development, implementation, review and termination of regulation. • Increase stakeholder skills, competencies and capacities to comply with regulation.
	Structure	• Have in place clear and transparent internal accountability processes to cultivate a culture of rigorous self-criticism. • Have in place well-articulated organisational values (including an operationalisation of how the agency is a steward of its regulatory system/s). • Have in place a system/s monitoring and evaluation plan; have in place a system/s issues and response log; and create knowledge from past performance and disseminate this within the agency. • Periodically carry out gap analyses/risk assessments.	• Have in place clear and transparent external accountability processes to ensure fundamental procedural fairness, accessibility and responsiveness. • Have in place 'apply and explain' principles about the development, implementation, review and termination of regulation. • Have in place genuine and transparent stakeholder participation processes. • Have in place agreements with other agencies to collaborate on stewardship work.

the central understanding that stewardship is about holding something in trust for another, whether this is a current other or a future other. As inward-looking, it touches on the responsibility and obligations of collectives and organisations (including regulatory agencies) to serve the wellbeing of those that make up these collectives and organisations (such as the staff of regulatory agencies).

Rounding up, after unpacking the bounded set of values and expectations associated with the idea of stewardship, we can now safely conclude that it is hard to define exactly what regulatory stewardship is, let alone what it takes to be a regulatory steward. Still, it goes without saying that to achieve stewardship as a virtue, some stewardship mechanisms need to be in place. The literature discussed and the analytical distinctions made provide some starting points for thinking about the necessary elements of regulatory stewardship as a mechanism, as illustrated in Figure 1.

It should be noted that Figure 1 is by no means an exhaustive overview of all elements that are required for regulatory stewardship. Its main aim is to bring some analytical clarity to the broader literature on stewardship.

Conclusion: regulatory stewardship in New Zealand as ideal and reality

> Stewardship is service to something larger than ourselves, and that 'something larger' needs to be known before people can commit. (Block, 2013, p.79)

Peter Block, quoted here, has put much thought into what stewardship means as a guiding principle for individuals and organisations. This quotation strikes me, mainly because it drives home a simple message: you cannot expect others to be stewards if you are not clear about what it means to be a steward. At the same time, there is no point in telling others how to be stewards from a position of authority; stewardship is about serving rather than ruling. If we take stewardship seriously as a guiding philosophy for the regulation of regulation, we can only expect others to become stewards if we are stewards to them. In abstract terms, there is a duality in regulatory stewardship as an obligation of regulatory agencies. In practical terms, the New Zealand Treasury cannot expect regulatory agencies themselves to solve the puzzle of how to live up to their regulatory stewardship obligations, and yet regulatory agencies cannot (and should not) expect the Treasury to tell them how to fulfil their regulatory stewardship obligations. What it means to be a regulatory steward will have to be discovered and decided in collaboration.

It logically follows that there is no one-size-fits-all approach to regulatory stewardship. At the same time, it is not the case that anything goes when we seek to operationalise it. In abstract terms stewardship is, at its core, a set of values that relate to caring for something that is given in trust, nurturing what is given in trust for the wellbeing of others, and returning what is given in trust in better shape for future generations. In practical terms, as a mechanism, stewardship can be thought of as a collection of elements that create a bridge between an 'inward-looking' and an 'outward-looking' stewardship focus, with an 'activity' and 'structure' approach to stewardship (see Figure 1). The challenge for the Treasury and regulatory agencies in New Zealand will be to come to a bounded set of these elements that is broad enough to allow regulatory agencies to tailor their own operationalisation of regulatory stewardship, but that at the same time is narrow enough to be meaningful as an overarching set of principles and guiding philosophies for the (whole-of-government) regulation of regulation.

To conclude, regulatory stewardship in New Zealand is an ideal and a reality. As an ideal, it fits well with international initiatives to put in place some uniform (whole-of-government) principles and guiding philosophies for the regulation of regulation. Yes, the idea of regulatory stewardship might be a little more ambitious than the content of the Administrative Procedure Act in the United States or the Better Regulation Agenda in Europe, but overall there are many overlaps between these initiatives. As a reality, regulatory agencies do not have to be overwhelmed by their regulatory stewardship obligations. All regulatory agencies are in the same boat, and many are struggling to get it right. A practical way forward is to embrace the struggle together and explore which of the elements of regulatory stewardship can be developed (and perhaps be owned) jointly. This could include shared approaches to regulatory impact assessment, shared processes for public participation, and shared training of agency staff and leaders.

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1 Personal correspondence with a Treasury representative.

2 Academics (myself among them) would probably feel more comfortable talking about 'agency' here as understood in the broader social sciences, but in this article that term may cause confusion with the term 'regulatory agency'.

3 For example, a search for the term 'regulatory stewardship' in all fields of the academic database Web of Science on 17 October 2020 resulted in a mere four publications in research areas that are normally associated with regulatory literature (policy sciences, social sciences and public administration). This is the academic equivalent of uncharted territory. Even a search using the terms 'regulat* AND steward*' resulted in a mere 39 publications in these research areas, the majority discussing initiatives such as the Forest and Marine Stewardship Councils.

4 Which goes well beyond the very narrow, and arguably new, New Public Management understanding that the Morrison government in Australia has of regulatory stewardship: 'The stewardship approach replicates best practice in business management by ensuring line accountabilities and performance expectations are clear and are attributed to driving improved outcomes' (https://ministers.pmc.gov.au/morton/2020/morrison-governments-deregulation-agenda).

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Sam Murray and Roger Loveless

DISABILITY the Living Standards Framework and Wellbeing in New Zealand

Abstract

Disabled people and their whānau have poorer outcomes across a wide range of wellbeing and living standards measures.[1] Yet disability analysis does not appear to be well integrated into government decision making on wellbeing. This article builds a framework for understanding disability in a wellbeing context by using the Treasury's Living Standards Framework and Sophie Mitra's human development model for disability and health.

One of the most important aspects of Mitra's model is the interaction between resources and structural factors. Structural factors, such as an inaccessible built environment, force disabled people to spend more resources to get the same outcomes as non-disabled people. Publicly funded disability support is essential to counteract these structural factors. We also need to improve the usability of the four capitals for disabled people and their whānau to reduce these structural barriers.

Keywords disability, wellbeing, living standards, inequality

Sam Murray is a senior policy analyst for CCS Disability Action and is based in Dunedin.
Roger Loveless is an advocate for disabled persons and a local advisory committee member for CCS Disability Action Bay of Plenty. He has a lived experience of disability.

Conceptual conservatism

Amartya Sen, whose capability approach is acknowledged as an influence on the Treasury's Living Standards Framework, addressed disability in his work (Hall, 2019; Treasury, 2019). Sen noted that, given the wide-ranging impacts of disability, addressing disability should be central to work on wellbeing and creating a fairer society. Yet he was amazed at how inactive and, in his words, 'smug' societies were about addressing the disadvantages caused by disability. He identified conceptual conservatism – a reluctance to change existing conceptual models to incorporate a modern understanding of disability – as playing a significant role in the lack of a serious response to issues of disability in matters of justice (Sen, 2010, p.291–3).

In New Zealand, some work has been done at the Treasury by Toni Wharehoka on incorporating disability into the Living Standards Framework;[2] to date, however, this has not been published. This stands in contrast to other areas, such as ethnicity, where papers have been published. In our view, Sen's criticism has some potency in a New Zealand context. In general, disability is still often on the periphery of wellbeing policy and tends to be regarded as a matter for the disability-specific parts of the government.

This is at odds with the evidence that disability affects a wide range of policy areas and is of central importance to equity and distributive justice. Disability is not a side topic; it is central to issues of justice in the same way gender, sexual orientation and ethnicity are. For example, households with disabled children are between 1.4 and 1.6 times more likely to be below three poverty thresholds, the 39.2%, 47% and 62.7% of median gross household income thresholds, than households that have only non-disabled children (Murray, 2018, p.70, 2019, pp.24–5).[3]

We agree with Sen that a key obstacle is a conceptual deficit in interfacing modern approaches to disability with wellbeing frameworks and models. This article attempts to address this deficit by drawing upon the Treasury's Living Standards Framework and Sophie Mitra's human development model for disability and health to build a framework for understanding disability in a wellbeing context (Mitra, 2018). Some of the key points to understand are:

- Disability is an interactional phenomenon where a disabled person's environment/context plays a key role in creating the disadvantage they experience.
- If the capitals identified in the Living Standards Framework – natural, physical/financial, social and human – are not able to be acquired and used by disabled people to an equal extent as by non-disabled people, this creates inequality and conversion costs for disabled people. Conversion costs reduce the ability of disabled people to convert resources into the outcomes they want.
- When we shift disability-related costs to individuals and their whānau and make assumptions about the resources disabled people have access to, we fuel other forms of inequality, such as ethnic and gender inequality.
- Increasing the ability of disabled people to acquire and use the four capitals, thereby lifting their living standards to levels enjoyed by others, has significant value. This needs to be factored into fiscal, economic and wellbeing analysis.

Understanding these points should be seen alongside the importance of engaging with disabled people, their whānau and their representative organisations. While engagement and co-design are vital, officials need to develop their expertise in understanding the importance of disability to decision making on wellbeing policy. Indeed, engagement is likely to be far more fruitful if officials understand the basic issues many disabled people face, the key models of disability, and how the models relate to general policy models, such as the Living Standards Framework. We need a substantial change in how we approach disability policy and assess disability-related spending in wellbeing terms.

The impact of barriers on the living standards of disabled people are wide and significant

The 2013 Disability Survey estimates that 24% of New Zealanders – 1,062,000 – are disabled people (Statistics New Zealand, 2014b). The potential impact of disability-related barriers is larger than just their impact on these individuals. While we do not yet have good New Zealand data on household composition and disability, we can look at data from the United Kingdom. In the latest UK's Family Resources Survey, 21% of individuals were disabled people, but 34% of individuals were disabled people or lived with at least one immediate family member who was a disabled person.[4] Even among children, the rate is high: 33% of all children were disabled children or lived with at least one immediate family member who was a disabled person (Department for Work and Pensions, 2020).

Disabled people face greater barriers to achieving their goals than non-disabled people, and often have lower living standards and are more likely to live in poverty as a result. This is particularly the case for disabled people aged 15–64. Compared to non-disabled people aged 15–64 they are:

- 2.5 times more likely to report not having enough income;
- twice as likely to report being discriminated against;
- 2.2 times more likely to rate their life satisfaction as 6 or below (on a scale where 10 is the highest possible); and
- 1.9 times more likely to rate the wellbeing of their family as 6 or below (on a scale where 10 is the highest possible) (Murray, 2019);
- 2.5 times more likely to be unemployed;
- 2.6 times more likely to have no qualifications (Statistics New Zealand, 2019).

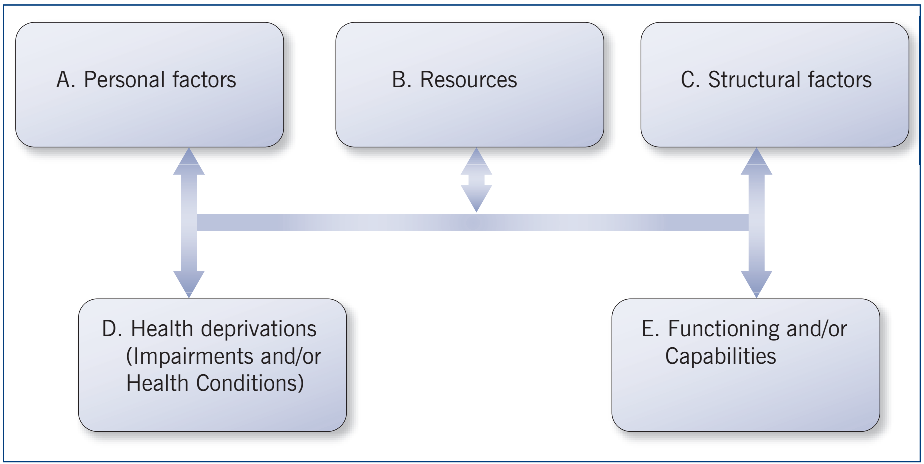
Disability-related inequality also interacts with other sources of disadvantage and inequity, such as gender and ethnicity. For example, Māori disabled people are more likely to earn under $30,000 a year than either Māori non-disabled people or disabled people in general (Statistics New Zealand, 2014a, 2015). Research commissioned by the Waitangi Tribunal has highlighted how disability policy, support and services have failed to meet the needs of Māori disabled people and their whānau (King, 2019; Allport and Kaiwai, 2019). In general, disability support appears to be inequitably distributed to non-European ethnicities (Bowden, Kokaua and Murray, 2020).

> Disability-related inequality also interacts with other sources of disadvantage and inequity, such as gender and ethnicity.

Models of disability

All analysis of disability and disability policy draws on models of disability (Mitra, 2018, p.10). The models can be formal models of disability, or informal models based on beliefs and norms drawn from the wider economic, political, social and cultural environment. Models articulate what factors cause disability to exist in society and explain the relationship

Figure 1: Mitra's human development model for disability and health



Source: Mitra, 2018

between these different factors.

Modern formal models of disability see disability as resulting from interactions between the disabled person and their context/environment. This is a dynamic process and the disabled person's context/environment plays a key role, or even the entire role, in generating the disadvantage, or disability, the person experiences (Barnes and Mercer, 2010, pp.14–97; Beatson, 2000, pp.13–56; Shakespeare, 2014, pp.9–110; Thomas, 2004; Hughes and Paterson, 1997; Office for Disability Issues, 2016). This is in contrast to some informal models of disability, such as the medical model of disability, where the disadvantage or disability is chiefly, or even solely, caused by the person's impairment and/or health condition (Wasserman et al., 2016).

For an example of a modern formal model of disability, the United Nations Convention on the Rights of Persons with Disabilities states:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. (UN General Assembly, 2007)

While a useful starting point, however, we need more detail to examine disability in wellbeing policy. One modern approach to disability based on Amartya Sen's capability work is Sophie Mitra's human development model for disability and health (Figure 1). Mitra's model has some features that may make it better suited than other models for interfacing with the Living Standards Framework. In particular, Mitra's model:

- shares some similar influences with the Living Standards Framework, particularly Sen's work on functionings and capabilities;
- separates resources from structural factors, which allows the examining of conversion costs; and
- recognises that relevant resources for the disabled person can be held at the whānau and community level, making the model possibly more applicable to different cultural contexts.

Mitra's model is a dynamic interactional model of disability. Disability is defined as a disadvantage in accessing opportunities or achieving outcomes desired by the person caused by various external factors interacting with a person's impairment and/or health condition, as well as their demographics and other personal characteristics (Mitra, 2018, pp.13–16). In this model, the external factors are divided into two parts:

- resources: the goods, services and information the person owns or can freely use through their whānau and/or community connections; and
- structural factors: the environments and contexts the person finds themselves in.

Economic, political, social and cultural forces shape the resources the person has access to and the environments the person finds themselves in. Together, the internal and external factors shape what opportunities are available to the person, as well as what they can achieve. The practical opportunities available to the person and what they choose to do are encapsulated in box E as functionings and capabilities.

Mitra's definition of wellbeing is the functionings and capabilities that are relevant to one's own life (ibid., pp.12–13). Wellbeing is the achievements and practical opportunities that a person chooses and values. This article uses this definition of wellbeing.

The need to include Māori approaches, concepts and language around disability

The existing models of disability have been criticised for being focused on Western concepts of disability and are not always appropriate for use in other cultural contexts, especially for indigenous peoples (Hickey and Wilson, 2017, p.85). Mitra's model does have one advantage here over similar models because it has a less individualistic understanding of resources. It actively recognises that disabled people often use resources held at the whānau or community level (Mitra, 2018, p.17).

That said, because it is a model designed overseas, Mitra's model does not incorporate an understanding of:

- the impact of colonisation on Māori disabled people and their whānau, particularly the impact of imposing Western concepts around disability and health on Māori (Allport and Kaiwai, 2019, pp.18–31);
- the importance of te Tiriti o Waitangi for disability policy and support (ibid., pp.74–5); and
- Māori approaches, concepts and language around disability (ibid., pp.17–18; King, 2009, pp.3–6).

We note that work has been done on incorporating an indigenous perspective into the Living Standards Framework (Te Puni Kōkiri and Treasury, 2019). We need to build on this and incorporate the developing evidence from the Waitangi Tribunal inquiry into Māori with lived experience of disability. We cannot address the current inequalities Māori disabled people and their whānau experience, nor meet our Treaty obligations, without bringing to light the historical injustices and incorporating Māori concepts and language around disability into the Living Standards Framework. In addition, many forms of disability support need to be redesigned to work for Māori disabled people and their whānau. This includes, as will be highlighted later, a need to rebalance private and public costs in disability support, an issue which often disproportionately affects Māori and Pacific peoples.

Conversion functions/costs

From a public policy or Living Standards Framework point of view, one of the most important aspects of Mitra's model is the interaction between resources and structural factors. If structural factors do not meet the needs of disabled people, they can reduce the effectiveness of resources for disabled people (or increase the amount of resources needed to achieve the same outcomes as for non-disabled people). For example, the effectiveness of a wheelchair (a resource) will be heavily dependent on the built environment being accessible through suitable footpaths, curb cuts, wide enough doorways, and step-free access inside and outside buildings. This interaction between resources and structural factors can be thought of as a conversion function or cost (Mitra, 2018, p.14).

Even if two people appear to have access to the same quantity of resources, their ability to convert these resources into their desired outcomes may sharply differ because of structural factors (ibid.). For example, a lack of accessible housing may limit where a disabled person can live, affecting their access to employment, education and other opportunities, as well as potentially their transport costs. If the supply of accessible housing is below demand, accessible housing will also be more expensive, meaning disabled people will require more resources to rent or buy a suitable house than a non-disabled person.

If they cannot afford the cost and/or trade-offs necessary to access the limited supply of accessible houses, disabled people may choose to make do with a house that does not meet their access needs. This, in turn, may increase conversion costs in other areas by increasing the amount of time or resources needed for various activities in, and out of, the home. For example, if the kitchen does not meet their access needs, they may need someone else to cook for them or rely more on takeaway and/or prepared meals.

Conversion costs play a substantial role in generating disability-related inequality. Wellbeing economist Wiebke Kuklys, using UK data, estimated that a disabled individual needed a 43% higher income to achieve the same consumption opportunity set, or income satisfaction, as an equivalent non-disabled individual. Accounting for conversion difficulties increased the percentage of families with disabled family members in poverty by between 1.4 and 3 times. This was despite the various forms of support available (Kuklys, 2004, pp.27–8).

The Living Standards Framework capitals and the human development model for disability and health

Central to the Living Standards Framework are the four capitals: natural, physical/financial, social and human (Burton, 2018, p.6). These capitals represent the assets that generate current and future wellbeing. Under Mitra's model, the four capitals will have multiple roles in the dynamic interaction process that causes disability.

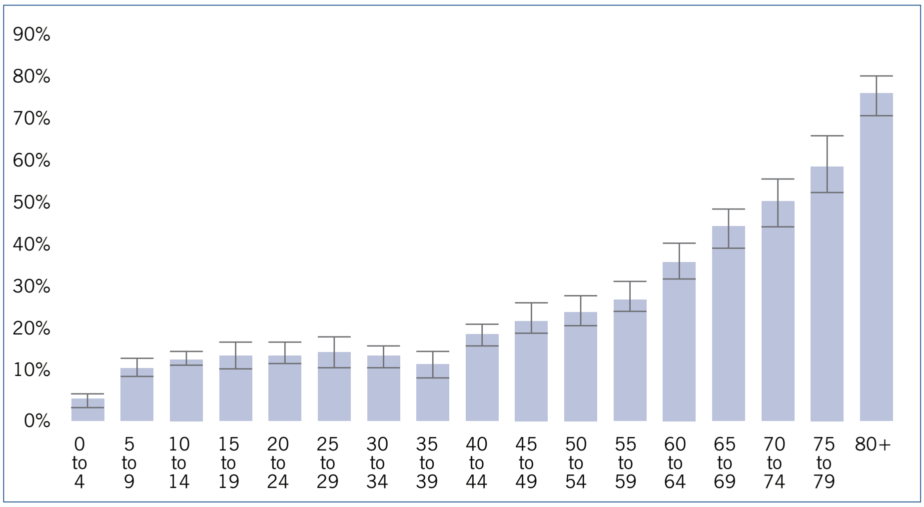
The capitals the disabled person owns or can freely use through their whānau and/or community connections have the role of resources. This could include a variety of goods and services, such as equipment, vehicles and housing. It could also include the human capital of others, such as paid support workers and unpaid carers. It can also include the disabled person's human and/or social capital. For example, the information and social connections a disabled person gains through a training/education process will be resources they can then use to convert to desired achievements.

The capitals the person does not own or can freely use through their whānau and/or community connections will determine the structural factors they face. Crucially, if disabled people cannot access, acquire and/or use the capitals to the same extent as non-disabled people, as is often the case, this will create conversion costs, or even prevent some opportunities entirely. As well as barriers created by inaccessible physical capital, the barriers here can be negative attitudes, prejudice and discrimination, including from key groups such as employers (Woodley and Dylan, 2012). There is some similarity here to the point made by Suzy Morrissey in her Treasury paper on human capital, that some groups face barriers, including structural disadvantage, to acquiring or using human capital (Morrissey, 2018, pp.3–4).

> Crucially, if disabled people cannot access, acquire and/or use the capitals to the same extent as non-disabled people, as is often the case, this will create conversion costs, or even prevent some opportunities entirely.

Taking these ideas a step further, the ability of disabled people to acquire and use various forms of capital can also be interdependent. There can be chains where multiple elements need to be fully usable before disabled people can effectively use the capitals together with their resources to get desired outcomes. This is often the case with transport infrastructure. Having accessible trains is no use without accessible stations. The effectiveness of accessible stations, in turn, depends on the accessibility of footpaths, connected transport networks and parking. In her model, Mitra includes larger systems under structural factors, such as markets and social services, which are made up of a variety of linked capitals (Mitra, 2018, p.13). In some cases, it may be more useful to think about the usability for disabled people of interconnected systems of capitals.

Figure 2: Disability rates in New Zealand 2013 by age (error bars at 95% confidence intervals)



Source: Statistics New Zealand, 2017

The impact of demographic factors

As mentioned, disability does not stand alone; it interacts with demographic trends and socio-economic inequalities. This is because disabled people are a heterogeneous population. It is vital to take this diversity into account when looking at wellbeing outcomes and living standards. Mitra's model incorporates demographic characteristics, such as gender, age and ethnicity, under personal factors, that in turn interact with the other parts of the model, including structural factors (ibid., p.17). Disabled people and their whānau may experience multiple structural disadvantages due to their impairment, gender, sexual orientation, ethnicity and age.

There can be considerable differences within the disabled population in terms of inequality. For example, disabled people over the age of 65 often tend to experience less inequality than disabled people under 65 (Dickson, 2020, pp.22–3, 27, 35, 37–41). As one example of this, disabled people under 65 are almost 2.5 times more likely to report not having enough income than non-disabled people under 65. By comparison, disabled people over 65 are only 1.5 times more likely to report not having enough income compared to non-disabled people over 65. If we compare both groups directly, disabled people under 65 are 2.6 times more likely to report not having enough income than disabled people over 65 (Murray, 2019, pp.10–11).

To understand the reason for this significant difference we need to consider that disability rates are very stable until about 60 years of age before increasing sharply (see the Figure 2).

A large percentage of disabled people under 65 would have acquired their impairment(s) early in their life. By comparison, disabled people over 65 are far more likely to have acquired their impairment(s) late in life. If we consider Mitra's model and the Living Standards Framework, this is likely to make a significant difference.

All disabled people by definition will experience structural factors/barriers that can increase conversion costs. Disabled people who acquire an impairment early in life will experience these conversion costs earlier and, crucially, during the life stages when many of us acquire and utilise our human and social capitals to accumulate resources. This is likely to lead to persistent inequality that gets worse over time.

The experience of disabled people over 65 who have had their impairment before the age of 65 is likely to be somewhat hidden in wellbeing data disaggregated by age. This group will probably have outcomes closer to younger disabled people than to disabled people over 65 who recently acquired their impairment. This is especially likely to be true for disabled people who have had an impairment since a young age or birth. Unfortunately, data is far more available on disability and age than on the age the person gained an impairment. This, of course, is a strong argument for more data that breaks down outcomes by the age the disabled person acquired their impairment.

The value of disability-related spending

Concerns around fiscal costs often dominate disability-related funding decisions (Power, 2014, pp.11–13). There is often an underappreciation of the valuable contributions disabled people currently make, and could make with the right support and/or changes. Yet there is clearly scope for disability-related spending to generate economic benefits and net fiscal benefits through increased productivity and economic growth, and/or by reducing government spending in other areas. For example, the New Zealand Institute of Economic Research found that improved access could boost employment, raise GDP, and lower spending on income support (New Zealand Institute of Economic Research, 2017).

While state support may not appear to generate a net fiscal benefit, it is nevertheless essential for individuals, families, whānau and wider society in terms of enabling equal opportunities, freedoms and rights. In this regard, New Zealand has ratified several United Nations conventions, including those relating to human, children's, women's and disabled people's rights. The ratification of these conventions means that everyone, regardless of circumstances, needs to have the opportunity to live a satisfying and fulfilling life. As the Treasury has noted, equity means focusing on more than just fiscal returns (Treasury, 2013, p.10).

Private and public costs

Officials have often failed to measure or have underestimated the private costs created for individuals, whānau and non-government entities when disability-related costs are not met through government spending. This includes not just financial costs, but also time costs. Disabled people report that one of the most significant barriers they face is a lack of time (Wilkinson-Meyersa et al., 2014, pp.1547–8). Similarly, the whānau of disabled people often report a lack of time, particularly groups such as one-parent households (Lee, 2019, pp.52, 55).

In Canada, England and the United States, reforms of disability-related support have been undermined by the fears of officials that a large number of disabled people will switch from unfunded support from family and friends to government-funded services (Power, 2014). Such fears about private costs becoming public costs could be seen here in New Zealand in the Crown's arguments during the court cases on paying family carers (Human Rights Review Tribunal, 2010), and can also be seen in advice on reforms of disability support, where officials have been concerned about, in their words, an over-correction to a more expensive, demand-driven system (Treasury, 2019, pp.1–2).

These fears may go some way to explaining why reforms of disability support are taking an inordinately long time to be trialled and implemented. Since the Social Services Committee found major issues with disability supports in 2008 there have been no fewer than four pilots, and it still unclear when a national roll-out will happen (Social Services Committee, 2008; Evalue Research, 2012; Anderson, Ferguson and Rowanne, 2014; Were, 2016; Lovelock, 2020).

Regardless of where the disability-related costs sit, the costs will have impacts on people's wellbeing, our wider society and the economy. Left unexamined, in all the above, is the impact on different groups from having to meet costs privately, or, to draw on Mitra's model, meet resource shortfalls and/or high conversion costs privately. Public costs are often only seen from the narrow perspective of a particular fiscal budget, such as the Ministry of Health's Disability Support Services, rather than from a whole-of-government and wellbeing perspective.

There is often an assumption that disabled people and their whānau have sufficient resources to meet private costs. For example, a key government support for the whānau of disabled people is carer support. Carer support provides a subsidy at less than the minimum wage for whānau to hire a support person so they can take a break (Ministry of Health, 2019). As a result, carers have to either top up the amount with their own money or find people willing to provide support for less than the minimum wage (Lee, 2019, pp.56–7). In 2016 research, 66% of carers reported using their financial resources to make up the difference between the carer support payment and the actual cost of respite. Some 22% of carers reported spending more than $1,500 a year on respite care (Milner, Mirfin-Veitch and Milner-Jones, 2016, p.41). This contributory model is hard to reconcile with the reality that an estimated 30% of disabled children live in one-parent households, or the high number of disabled people living in low-income households (Murray, 2018; Statistics New Zealand, 2014a; Lee, 2019, pp.56–7).

By keeping disability-related costs off government balance sheets, we have exacerbated the inequalities in our distribution of support. Māori and Pacific disabled peoples and their whānau are often the most affected. They are underrepresented among disabled children using disability support services (Bowden, Kokaua and Murray, 2020). In addition, between the March 2010 quarter and the March 2020 quarter, for people of working age, New Zealand Europeans received a median payment rate from the disability allowance that was between 1.4 and 1.6 higher than for Māori and between 2.1 and 2.4 higher than for Pacific peoples (Ministry of Social Development, 2020).

> A key cause of the inequality with the disability allowance may be the complex application process, which requires people to identify relevant costs, provide evidence of those costs, and then get input/sign-off from a health practitioner …

A key cause of the inequality with the disability allowance may be the complex application process, which requires people to identify relevant costs, provide evidence of those costs, and then get input/sign-off from a health practitioner (Murray, 2020; Robson, 2020). The last part may be especially problematic because the New Zealand Health Survey has found that Māori and Pacific peoples are more likely to face barriers to accessing primary health care (Ministry of Health, 2019).

There is a legitimate debate to be had around the balance of private and public costs. This debate needs to be evidence-informed and driven by principles of social justice and the diverse experience of disabled people and their whānau. We have to be careful not to generate or perpetuate ethnic, gender and/or age-related inequality through attempts to keep public costs down. We also need to understand the impacts of private costs on the wellbeing of disabled people and their whānau. Currently, we are not at all confident this is the case.

Conclusion

We cannot have a just society in which everyone has an equal opportunity to pursue their idea of wellbeing without tackling the causes of disability-related inequality. All modern models of disability highlight the role of external factors in generating the inequality disabled people experience. Sophie Mitra's model divides external factors into resources the person can freely access and structural factors. The level of resources disabled people need to live a good life will depend heavily on structural factors. This in turn depends on how usable the capitals in the Living Standards Framework are for disabled people and their whānau. Improving the usability of the four capitals for disabled people should, therefore, be a high priority.

We need to understand how disability-related inequality interacts with other forms of inequality. We often do not account for the diversity within the disability community and make assumptions about the resources disabled people and their whānau have. As a result, we often end up fuelling inequalities through the design of disability-related support, particularly through complicated application processes and contributory models of support. This can particularly disadvantage Māori and Pacific disabled peoples, as well as one-parent households. There is a pressing need to re-examine the balance between private and public costs in disability support.

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1 This article uses the term disabled people in line with the New Zealand Disability Strategy 2016–2026. We also use the term Māori disabled people in line with the strategy, as it places Māori first. We fully acknowledge that there is considerable diversity in the language people use around disability and disabled people.

2 As noted in the acknowledgements, Toni Wharehoka produced a good paper on disability and the Living Standards Framework while completing a summer internship at the Treasury.

3 These thresholds are as close to the usual 40%, 50%, and 60% thresholds as one of the authors could get using the census income bands; for more see Murray, 2018.

4 In the Family Resources Survey, a family is defined as a single adult or a married or cohabiting couple and any dependent children.

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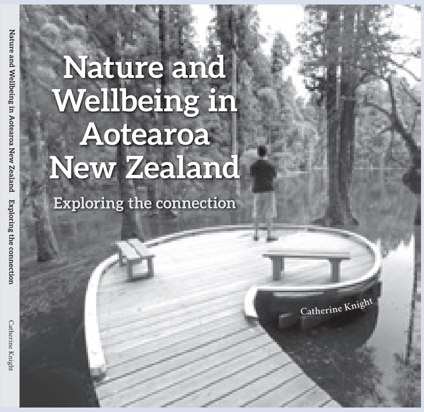

Paula King, Gabrielle Baker,
Bernadette Jones and Tristram Ingham

The Official Information Act

Māori with Lived Experience of Disability, and New Zealand Disability Data: a case study

Abstract

This article presents a case study of the use of the Official Information Act 1982 (OIA), for research commissioned by the Waitangi Tribunal in 2018 into disability-related issues for Māori. The responses of Crown organisations to OIA requests examined in this research highlight both issues with inconsistent application of the OIA, and limited access to information held and made available by Crown agencies for Māori with lived experience of disability.[1] The statutory time frame for responses to OIA requests was rarely met. Organisations also resisted providing information, while crucial information for ensuring equity for Māori with lived experience of disability was often not able to be released because it was not collected at all. The impact of these limitations is discussed, particularly pertaining to core government roles of performance monitoring and ensuring accountability.

In addition to querying who benefits from, and is privileged by, the OIA and its application, questions are raised around the necessary components of a legislation rewrite in order to deliver on a modern approach to official information that ensures equitable, high-performing and truly democratic public administration.

Keywords disability, Māori, Official Information Act, Waitangi Tribunal

Paula King (Te Rarawa, Ngāpuhi, Ngāti Whātua, Waikato-Tainui, Ngāti Maniapoto) is a public health medicine specialist and senior research fellow at the University of Otago, Wellington, specialising in tāngata whenua rights to health and well-being. **Gabrielle Baker** (Ngāpuhi) is a director at Baker Consulting Ltd, specialising in Māori health and health equity. **Bernadette Jones** (Ngā Wairiki, Ngāti Apa) is a senior research fellow at the University of Otago, specialising in Māori health and disability equity. **Tristram Ingham** (Ngāti Kahungunu, Ngāti Porou) is a clinical epidemiologist and senior research fellow at the University of Otago, Wellington, specialising in health equity and healthcare governance.

Background

The Official Information Act 1982 (OIA) aims to make official information accessible, applying a general principle that information held by the New Zealand government should be made available unless there is a legislated ground for withholding it or refusing the request (ss5, 6). The approach taken with the OIA is in contrast to its predecessor legislation, the Official Secrets Act 1951. This made it an offence to release official information without authority (s6). However, the general report of the Committee on Official Information published in 1980 found that various government departments tended to

> proceed on the assumption that there is in practice an implied authority to disclose a great deal. But the nature of the information which is seen to be covered by such an authority has depended heavily on departmental and ministerial attitudes. (Committee on Official Information, 1980, p.13)

Thus, the new Official Information Act was intended not only to make information more available, but to do so in a way that was both consistent across agencies and built trust and confidence in the operation of government (Committee on Official Information, 1980; New Zealand Law Commission, 2012; OIA, s4). Members of Parliament have since spoken in favour of the intent of the OIA, Labour's Adrian Rurawhe stating:

> [t]he Official Information Act is one of the few mechanisms of democratic accountability: it gives taxpayers and voters the confidence that decisions are made on their behalf, and that they are right and proper. (Rurawhe, 2016)

Concerns have been raised, however, about inconsistent application of the OIA by government agencies and by ministers. Research over a decade ago examining over 690 OIA requests, across a wide range of government agencies, found issues with the application of the OIA that 'seriously compromise[d] the OIA's ability to fulfil its constitutional role of promoting accountability, participation and good governance' (Price, 2005, p.50). In 2012 the New Zealand Law Commission made a range of recommendations on amendments to the OIA itself, as well as on guidance to agencies regarding application of OIA provisions, particularly around the withholding of information (New Zealand Law Commission 2012).

... 'the Tribunal's researcher encountered considerable difficulty in gaining full and timely access to official records through the centralised Official Information Act procedure orchestrated by Crown counsel'...

In 2019 the minister of justice sought input from a select group of experts, as well as public submissions, on whether to review the OIA. More recently, the minister has stated to the media the government's commitment to rewriting the OIA (Macdonald, 2020). Publicly available submissions, and excerpts reported on from the submissions, have highlighted a number of concerns regarding 'an apparently broken process, with … excessive delays and deletions, overuse of vague withholding grounds, political interference and an ombudsman appeal process made ineffective by sometimes years-long waits' (ibid.), and the need for consequences for organisations that apply the OIA poorly. For instance, one submission states:

> [t]here need to be real sanctions for delays caused by inefficient and overly complicated processes for dealing with information requests, and for deliberate delay and obstruction. There is far too much scope for organisations to delay responding to a request until the information is no longer useful. And there should be a time limit on the provision that allows an organisation to withhold information if it will 'soon be publicly available'. Soon should not mean 'in two years' time'. (Transparency International New Zealand, 2019, p.2)

Although there is regular informal commentary about issues with the application of the OIA (Macdonald, 2020), there is very little information in the available literature that focuses on the way the OIA is implemented currently across a range of Crown organisations to which its provisions apply. This article presents the findings from a case study of the use of the OIA within the context of research commissioned by the Waitangi Tribunal in 2018.

Waitangi Tribunal research using the OIA to collect information

The Waitangi Tribunal is a permanent commission of inquiry, set up under the Treaty of Waitangi Act 1975, with its primary purpose being to receive and report on claims of Crown breaches of the principles of the Treaty of Waitangi (Baker, Baxter and Crampton, 2019; Treaty of Waitangi Act 1975, s5). The inquiry into health services and outcomes (known as Wai 2575) is one of 11 kaupapa inquiries signalled by the Tribunal and includes over 200 claims, organised into stages. The first of these was primary healthcare, reported on by the Tribunal in July 2019 (Waitangi Tribunal, 2019).

The second stage of the inquiry focuses on claims connected with disability, mental health, and alcohol, tobacco and substance abuse (Waitangi Tribunal, 2018a). In anticipation of this stage of the inquiry process, the Tribunal commissioned disability-focused research in late 2018. The purpose of the research was to examine how the contemporary health and disability system recognises and provides for the needs of Māori with lived experience of disability, and to what extent Crown acts or omissions have contributed to inequities in disability services and outcomes for

Māori with lived experience of disability (King, 2019).

Background to the Waitangi Tribunal research and use of the OIA

Kaupapa Māori researchers were commissioned by the Tribunal to examine the historical and contemporary issues relevant to Māori with lived experience of disability. This required access to both primary and secondary sources of information from a range of Crown organisations with roles relevant to Māori with lived experience of disability.

A precedent had been set for use of the OIA by earlier Tribunal research commissioned for the inquiry into Napier hospital and health services (Waitangi Tribunal, 2001). The OIA process was instigated by Crown organisations, with Crown Law running a centralised process to release information. However, in this case the process appears to have been unsatisfactory, with the Tribunal report noting that 'the Tribunal's researcher encountered considerable difficulty in gaining full and timely access to official records through the centralised Official Information Act procedure orchestrated by Crown counsel' (Waitangi Tribunal, 2001, p.20).

As the Tribunal's research had to be completed within five months (Waitangi Tribunal, 2018a, 2018b), and due to previous use of the OIA for Tribunal-commissioned health research, the researchers opted to use the OIA to access information. This was considered appropriate by the researchers given both the statutory time frame for OIA requests to be responded to of 20 working days, and assumptions that each of the relevant Crown organisations would have adequate processes in place for responding swiftly to OIA requests. It was also reasonably assumed by the researchers that some of the issues previously raised regarding a centralised Crown Law process around the release of information would be remedied by the researchers, not Crown Law, coordinating the requests, and within the broader context of stronger central agency guidance developed for Crown organisations in order to ensure swift and reasonable release of information (Kibblewhite and Boshier, 2018; Office of the Ombudsman, 2019).

The OIA request process

For the initial research, OIA requests were sent to 33 Crown organisations, including all 20 district health boards (DHBs), the Ministry of Health, the Accident Compensation Corporation, other health sector Crown entities (such as the Health Quality and Safety Commission), the Office for Disability Issues, the Ministry for Children, the Department of Corrections and Te Puni Kōkiri. All requests clearly indicated that the information was sought for the Tribunal-commissioned research project. In accordance with the New Zealand Disability Strategy, which uses the United Nations Convention on the Rights of Persons with Disabilities definition, disability was defined as 'long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder … full and effective participation in society on an equal basis with others' (Office for Disability Issues, 2016, p.20).

Findings on the use of the OIA

Initial resistance by Crown organisations to providing responses to requests

The OIA requests generally sought information on how Māori with lived experience of disability were involved in decision making, policy development, service design and delivery; provision of data for Māori with lived experience of disability; and how this data was used to monitor health and disability system performance. There was initial resistance from some Crown organisations to providing responses to the OIA requests. For instance, a professional services organisation for DHBs contacted the researchers stating that the majority of the questions were 'subjective' and because of this were outside the scope of the OIA. Questions considered 'subjective' included a request for a breakdown of DHB board membership by ethnicity (the two categories requested were Māori and non-Māori) and by disability (King, 2019). Further clarification was sought from this organisation on how a request for disaggregation of DHB board membership by ethnicity and disability could be considered 'subjective', but no further rationale or correspondence was provided to the researchers.

Delays in providing substantive responses to requests

Fewer than a third of Crown organisations provided responses within the statutory time frame of 20 working days to all aspects of the initial OIA requests made of them (ten organisations out of 33). A further four agencies responded to the initial request on time but did not provide complete answers. One other organisation did not acknowledge the request for 30 working days, and is yet to provide a final substantive response more than a year after the initial request was made. These findings align with those of Price (2005), who found that one out of every eight OIA responses exceeded the statutory time frame (without requests for extensions having been made).

Table 1: Time frames of Crown organisation responses to OIA requests

Time frame for response	Number of responses	Percentage of responses
Within 20 working days with complete answers	10	30.3%
Within 20 working days with incomplete answers	4	12.1%
Beyond 20 working days with an extension	15	45.5%
Beyond 20 working days without an extension	3	9.1%
Has yet to respond	1	3%

Table 1 sets out the time frames for the first request and response for all 33 Crown organisations. Note that for some organisations there were follow-up OIA requests, which are not covered in this table.

The OIA allows agencies to set extensions for 'a reasonable period of time having regard to the circumstances' (s15A(2)). The Office of the Ombudsman provides agencies with further guidance, emphasising that the concept of 'reasonable' will depend upon the circumstances of the particular case (Office of the Ombudsman, 2019). Three agencies replied to the OIA requests late, without seeking an extension. Fifteen Crown organisations set extensions ranging from a few days through to an additional 25 working days. Not enough information was provided by these agencies to determine if the extensions could be considered 'reasonable', but it is noted that in one example a Crown organisation sought an extension of 20 working days in order to answer a single question.

Incomplete responses were often provided

As previously noted, four agencies did respond to the initial OIA requests on time but did not provide complete answers. Incomplete answers were fairly common and included responses where information was withheld without sufficient rationale, responses were too general to address the requests adequately, wording of requests was repeated in responses without providing any additional information, or the rationale provided for withholding information seemed implausible (for instance, the information was already publicly available or had been released under a previous OIA request, when, in fact, this was not the case).

Variation across the 20 district health boards in approaches to the OIA

As set out in the New Zealand Public Health and Disability Act 2000, all 20 DHBs have the same roles and functions. This includes objectives to: 'promote effective care or support for those in need of personal health services or disability support services' within their districts; 'promote the inclusion and participation in society and independence of people with disabilities'; 'reduce, with a view to eliminating, health outcome disparities between various population groups'; and improve 'health outcomes for Māori and other population groups' (s22(1)). Although it was found wanting by the Tribunal (Waitangi Tribunal, 2019), the governing legislation of DHBs also provides mechanisms to give effect to the principles of the Treaty of Waitangi/te Tiriti o Waitangi regarding participation of Māori in decision making and service delivery. For this reason, it was anticipated that DHBs would hold information pertaining to issues relevant to Māori with lived experience of disability.

Table 2: Variation in DHB responses to OIA requests

OIA request	DHB responses
Ethnicity and disability information on DHB board members	Thirteen DHBs indicated they did not hold this information. The Ministry of Health subsequently provided this data on behalf of all DHBs, but was only able to identify whether DHB board members were Māori or non-Māori, not whether they had lived experience of disability.
Spending on Māori with lived experience of disability compared with non-Māori with lived experience of disability	Only eight DHBs were able to provide information on spending, with the rest providing partial information or stating that they did not hold this information.
Data disaggregated by: Māori, non-Māori, Māori with lived experience of disability, and non-Māori with lived experience of disability	Across all DHBs, variations of the following response were common: '[the] DHB does not collect patient data/information specific to a person's disability or impairment. There is therefore no basis for understanding how well we respond to those with impairment or disability' (King, 2019, p.159). Some DHBs sought clarification on the definition of disability before declining the request on the basis that they do not collect information on disability.

Although every DHB was sent the same set of OIA requests, there was variation in the responses as to what information they held, what information they released, and the reasons why they withheld information (Table 2). For instance, seven DHBs provided responses that were unclear or simply did not address the questions outlined in the OIA request. One DHB reiterated what its professional services organisation had previously stated, that a number of the questions in the request were 'outside the scope' of the OIA (King, 2019).

Complicated funding and accountability arrangements within the health and disability system make navigating OIA processes challenging

The specific arrangements between DHBs and the Ministry of Health and the range of functions carried out by each DHB can be complicated. Intentionally or not, this can make direct answers difficult to obtain, which has implications for citizens attempting to navigate the OIA process. For instance, one DHB referred to funding arrangements with the ministry as limiting the information that DHBs hold for Māori with lived experience of disability if they are under 65 years of age.

It can be argued that this rationale does not stand up to scrutiny, as there are a number of services that DHBs are responsible for providing to Māori with lived experience of disability. Although the Ministry of Health has funding responsibility for a limited range of disability support services for people under 65 (Ministry of Health, 2020), DHBs still have funding and statutory responsibilities for healthcare and disability support services for their entire population, including Māori with lived experience of disability (New Zealand Public Health and Disability Act 2000, s22). In this specific case, a complicated funding arrangement appears to have been used as a means of avoiding answering an OIA request.

DHBs have both a provider function relating to services delivered by the DHB and its staff – for example, in hospitals – and a funder function covering the purchasing of services delivered in the community (Gifford et al., 2020), and DHB responses to OIA requests were often unclear around which of these two functions was being referred to. For instance, one DHB responded to a question asking about workforce development within its district by providing an answer

Table 3: OIA requests refused under sections 18(e) and 18(f) of the legislation

Ground for refusing request	Subject of requests
Section 18(e) … that the document alleged to contain the information requested does not exist or, despite reasonable efforts to locate it, cannot be found.	Membership of ministerial committees disaggregated by ethnicity and disability Number of providers contracted to provide health or disability support services to Māori with lived experience of disability Proportion of Vote Health targeted for healthcare and disability supports for Māori with lived experience of disability
Section 18(f) … that the information requested cannot be made available without substantial collation or research.	Number of disabled Māori and disabled non-Māori in care and protection residences and youth justice residences Number of disabled Māori and disabled non-Māori in prisons who have been referred to disability support services Staff training in cultural competence/safety and disability responsiveness Number of mechanical restraint incidents disaggregated by ethnicity and disability

that pertained to a specific part of a hospital. Based on responses, it was difficult for the researchers to ascertain whether or not DHBs even considered issues around workforce development when purchasing services for communities within their district.

Not all Crown organisations appear to have well-implemented OIA processes

There were a number of administration issues with the OIA responses. For example, some Crown organisations did not calculate the 20-working-day time frame accurately. Although most organisations acknowledged the receipt of an OIA request, this was not universal, and in one case the original OIA request was not logged officially, causing delay in the overall response.

Understanding of the OIA also appears varied among Crown organisations. For instance, one organisation requested that the researchers keep the material provided in the OIA response confidential (despite it being released under the OIA without redactions and without there being any obvious personal information). These variations were substantially more common among Crown organisations outside central government. The Law Commission has previously noted difficulties in administering the OIA faced by 'smaller agencies who have not had frequent experience in applying the legislation' (New Zealand Law Commission, 2012, p.9).

There are serious gaps in official information for Māori with lived experience of disability

Across four central government agencies, a number of requests were refused because information did not exist or would require unreasonable efforts to locate or compile (see Table 3). The information covered by these requests related to data that would support service planning and funding decisions, as well as health and disability system monitoring. For example, information requested would support an understanding of the effectiveness of the Ministry for Children and the Department of Corrections in meeting the health and disability needs of people in their care. It is concerning such information either does not exist, or is not held in a way that means agencies can be accountable to Māori with lived experience of disability.

Discussion

The findings of the Waitangi Tribunal-commissioned research overall demonstrated the disconnect between the Crown's stated objectives and its actions (or inactions), which disproportionately, unfairly and unjustly impacted on Māori with lived experience of disability (King, 2019). The findings of this case study around use of the OIA to access information relevant to Māori with lived experience of disability further illuminates how Crown action (and inaction) unfairly and unjustly affects this group. The use of the OIA has also served to highlight the lack of data collection when it comes to Māori with lived experience of disability. This is not an issue with the legislation governing the release of government information, but it shows that legislation on information availability is not enough in and of itself to provide appropriate levels of democratic accountability and transparency to all population groups.

The well-documented inequities between Māori and non-Māori (Ministry of Health, 2015) and increasing information available on the inequities faced by Māori with lived experience of disability (King, 2019; Ministry of Health, 2019a) have highlighted government failures in meeting the health and disability needs of Māori. This is echoed by the chief ombudsman, who recently investigated the collection, use and reporting of information about the deaths of people with intellectual disabilities. There the ombudsman found that '[t]he Ministry [of Health]'s systems did not support the collection of complete, accurate or sufficient information, in the context of its fundamental responsibilities and obligations' (Office of the Ombudsman, 2020, p.8).

Additionally, the lack of information held by central government agencies raises questions about the ability of these agencies to give effect to their obligations under te Tiriti o Waitangi. In mid-2019 the Tribunal released its Wai 2575 report examining two primary healthcare claims. The Tribunal found that a number of principles of the Treaty had been breached by the Crown in its approach to primary healthcare and critiqued the Crown's adoption of principles of 'partnership', 'participation' and 'protection' (Waitangi Tribunal, 2019). The Tribunal articulated instead a broader set of five principles: the guarantee of tino rangatiratanga; the principle of equity; the principle of active protection; the principle of options; and the principle of partnership. All five of these principles require good quality ethnicity and disability data to support policy development, service design, funding, monitoring and evaluation. The guarantee of tino rangatiratanga goes further, emphasising that Māori should have access to high-quality information in order to monitor the performance of government systems.

The suggestion that collating data on mechanical restraints used on Māori and/

or Māori with lived experience of disability, or providing information about contracted providers of health or disability support services for Māori with lived experience of disability, would require 'unreasonable efforts' is of concern. This indicates that the test of what constitutes 'reasonable efforts' is unrelated to the seriousness of the issues, or the impact on Māori generally and Māori with lived experience of disability specifically. This is a variation on the findings of Price (2005), which highlighted an inadequate balance of public interest considerations. That study reported that three out of four OIA responses failed to explicitly balance public interest considerations in the decisions made to withhold information. With regard to what should be part of decisions on whether effort to collate information is reasonable, public interest should take into account government obligations under te Tiriti o Waitangi, human rights legislation (the Human Rights Act 1993, the New Zealand Bill of Rights Act 1990) and various international human rights instruments that have been ratified by New Zealand (United Nations, 1946, 1966a, 1966b, 1966c, 1979, 1989, 1990, 2006, 2007).

In the case of information relating to seclusion and restraint, there is heightened interest driven by human rights concerns at its overuse (Committee on the Rights of Persons with Disabilities, 2018) and evidence demonstrating inequities for Māori in the use of seclusion and segregation units (King, 2019; Ministry of Health, 2019b; Shalev, 2017). The United Nations Convention on the Rights of Persons with Disabilities (ratified by the government in 2008) also articulates a clear obligation on states to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the convention (United Nations, 2006, article 31). International human rights instruments ratified by government also state the right to the enjoyment of the highest attainable standard of health for Māori with lived experience of disability (United Nations, 1966c, article 12; 1989, article 24; 2006, article 25; 2007, article 24), a right which requires high-quality information in order to be given full effect.

> ... despite the OIA being nearly 40 years old, Crown organisations are not consistent in their approach to it; nor are they reliable when it comes to providing official information on time.

Responses to the OIA requests in this case study suggest that the government obligations under international human rights instruments are not being fully met by Crown organisations.

The lack of high-quality data available for Māori with lived experience of disability is likely to have practical implications for the day-to-day operations of Crown organisations. High-quality DHB-level data can support decision making and improvements in health and disability services, and elimination of inequities in terms of both DHB funding arms responsible for the allocation of the DHB's share of Vote Health resources, and the DHB provider arms that have responsibility for specific service areas (Gifford et al., 2020). This information is clearly incomplete when it comes to Māori with lived experience of disability, severely limiting the ability of DHBs to carry out their core functions.

In accordance with findings from commentators (Macdonald, 2020; New Zealand Law Commission, 2012; Price, 2005), this case study highlights that, where information does exist, the application of the OIA across government agencies requires knowledge and resources (including time) in order to navigate OIA requests and government responses. Within the context of information sought for a population group that already experiences multiple forms of structural oppression (King, 2019), such findings stress the considerable limitations of the OIA in providing a means of truly democratic accountability for all population groups within New Zealand. In some notable instances, Crown organisations contributed to some of the delay in OIA responses and created seemingly unnecessary difficulties for the researchers: for instance, describing OIA requests as 'subjective' and therefore not within the scope of the OIA (King, 2019). Given the gaps in disability information for Māori held by Crown organisations, such delays could potentially appear to be tactics to avoid further scrutiny. This is particularly concerning given the critical importance of this information and the ongoing failures of Crown organisations in meeting the needs of Māori with lived experience of disability (King, 2019; Ministry of Health, 2019a).

Conclusion

The findings of this case study indicate that, despite the OIA being nearly 40 years old, Crown organisations are not consistent in their approach to it; nor are they reliable when it comes to providing official information on time. Given alignment between issues identified in this case study and the findings of Price (2005), it appears that, for well over a decade, developments pertaining to the OIA, including improved guidance to agencies (Office of the Ombudsman, 2019), have been insufficient. Some of these issues could be the result of organisational immaturity (particularly outside central government); however, regardless of the reasons why, historical and current application of the OIA appears to be against the spirit of information availability and democratic accountability that the OIA was founded on.

The OIA has been purported to increase trust and confidence in government. This case study has indicated, however, that for some parts of the population, who already experience multiple forms of structural oppression, there is limited information on which to build this trust and confidence. The demonstrable reinforcement of existing power structures means that many of the benefits of the OIA are reserved for those who hold the most power and privilege within New Zealand society. The growing understanding of how Crown organisations must apply the principles of te Tiriti o Waitangi to their work, and the increased focus on human rights obligations since the introduction of the OIA, raise questions for the government about how to address the inadequacies of current legislation and urgently make the changes required to deliver on a modern approach to official information that ensures equitable, high-performing and truly democratic public administration.

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[1] The authors use the term ‘Māori with lived experience of disability’, acknowledging that there are a range of terms that may be used instead.

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Michael Legge and Ruth Fitzgerald

Does the Human Assisted Reproductive Technology Act 2004 need a review?

Abstract

The use of assisted reproductive technologies (ART) in New Zealand is governed by the Human Assisted Reproductive Technology Act 2004 (the HART Act), which provides for all procedures currently undertaken by fertility clinics and other centres involved with ART. Although the Act has provided good coverage for the use of ART over the last 16 years, it did not have a revision clause. Here, we explore whether the HART Act should be reviewed, and outline the important considerations that need to be taken into account to ensure that the legislation is up to date with current issues and technologies.

Keywords HART Act, review, cryopreservation, surrogacy, research, new technologies

The Human Assisted Reproductive Technology Act 2004 (HART Act) has a long history prior to being passed into law. Initially introduced into Parliament as a private member's bill by Dianne Yates in 1996, it went through many iterations before being passed as a government bill in 2004. The original concept of the bill was based on the Human Fertilisation and Embryology Act passed in the United Kingdom in 1990, which itself had a long gestation and was based on the Warnock Committee report to the UK Parliament in 1984. The Human Fertilisation and Embryology Act was reviewed in 2008 and some significant revisions were made, as well as additional supplementary legislation passed, to provide for new technologies. By the time the final version of the HART Act was passed into law, assisted reproductive technologies (ART) were established in New Zealand and the first baby conceived by in vitro fertilisation (IVF) in New Zealand was 20 years old. At the time it was passed the HART Act was certainly fit for purpose, having had the benefit of the UK legislation plus the experiences in the UK under that legislation. This experience was not referred to very often in the HART bill debates, but did influence the drafting of the bill (Legge, Fitzgerald and Frank, 2007; McLauchlan, MacCormick and Park, 2010).

While the HART Act has provided adequate legislative cover in New Zealand, there have been small changes, such as the revision of cryopreservation of gamete and embryo storage time (Human Assisted Reproductive Technology (Storage) Amendment Act 2010). In addition, many of the regulations have undergone subtle changes or revision by the Advisory Committee on Assisted Reproductive

Michael Legge is and honorary associate professor in the Department of Biochemistry, University of Otago, Dunedin. **Ruth Fitzgerald** is a professor in the Department of Anthropology, School of Social Sciences, University of Otago, Dunedin.

Technology (ACART), the advisory committee established under the legislation. Given that, with all modern medical technologies, there are changes in procedures and technologies, as well as in public perception of the use of technologies, the question that must be asked is whether it is time to review the HART Act, especially as there was no review requirement built in. While the everyday business end of the HART Act is to provide a safe regulatory environment for fertility clinics, ART, patients and children born as a result of IVF, how fit for purpose is the Act 16 years on, in the rapidly changing clinical and scientific world? There are many aspects of ART that have changed and were not considered in the lead up to the passing of the Act in 2004, due to either scientific and technology changes or changing societal outcomes and expectations.

While several considerations presented here could possibly be addressed by modifications to the relevant sections of the HART Act, two issues arise from a piecemeal approach. The first relates to issues of consequential impacts of changes in various parts of the HART Act, as well as, potentially, other Acts of Parliament. Second, as the Act is 16 years old, and while Parliament at the time may have been 'farsighted', a review of the Act, as has happened in the UK with the Human Fertilisation and Embryology Act, should be considered as good legislative practice. Here, we consider some of the aspects that should be considered in a review of the HART Act.

Rethinking aspects of the Hart Act

Cryopreservation of gametes, embryos and reproductive tissues

Currently, these procedures are subject to a ten-year time limit (HART Act, s10), with extensions over that limit being subject to approval by the Ethics Committee for Assisted Reproductive Technologies (ECART). Given that there have been no reports in either the international clinical or scientific literature of any unfavourable outcomes for children born from cryopreserved human gametes and embryos in over 30 years of cryopreservation, is it necessary to legislate a time frame for gamete and embryo storage, and to require ethical approval for any extensions? Should this section be removed from the HART Act for routine ART, and the matter left for a decision between the patient(s) and the fertility clinic?

> … no minister of health since 2004 has given permission for ACART to issue guidelines for research using 'viable' human embryos …

Associated with cryopreservation is the removal and storage of gametes or reproductive tissue from children. Under the current legislation it is an offence to remove gametes from a person under the age of 16 years, or to use those gametes (s12). This lacks clarity in relation to treatment for cancer or other potentially life-threatening diseases where treatment may affect the ability to conceive children later in life. Gametes from under-16-year-olds could be cryopreserved prior to any treatment for future use. A secondary consideration would be the issues relating to the storage and potential posthumous use of the gametes in the event of death. ACART currently has this issue under review as part of its wider work programme, but the public consultation process cannot lead to a law change.

Surrogacy

Surrogacy was still controversial in 2004, and although the HART Act allows surrogacy, payment (or 'valuable consideration' as it is framed in the Act (s13)) is illegal. This has led to significant confusion over whether payment of 'reasonable expenses' constitutes commercial surrogacy, and whether the surrogate should be 'compensated' for the pregnancy expenses and the inherent risks associated with the pregnancy. Section 14 of the HART Act allows payment to the 'provider' of the reproductive services (i.e. the clinic), and for legal advice to the woman intending to be the surrogate, but not to the surrogate during the pregnancy. Surrogacy is often the only option for couples wishing to have a child using their own gametes, and the confusion surrounding payments to the surrogate risks such couples opting for a private arrangement with a prospective surrogate, with no safeguards for either the surrogate, the intending parents or the future child. Clarity about the role of 'valuable consideration' is required.

In addition, the current law requires the surrogate to retain the child for ten days before handing the child over to the intending parents for adoption, as the surrogate is recognised as the child's birth mother. Should there be a process to transfer parentage of the child to the intending parents during the surrogate's pregnancy? An opportunity should be taken to review this aspect of the law (see further discussion below).

Mitochondrial transfer

The approval by the UK Parliament of mitochondrial transfer in oocytes and zygotes to prevent inherited mitochondrial disorders merits consideration in any review. As mitochondria are present in all cells, this does constitute a modification (albeit small: less than 1% of total DNA) of all cells, including those of the germ cell lines, and thus may currently be illegal under the HART Act. When considering the potential use of mitochondrial transfer it will be necessary to define 'nuclear DNA' as distinct from mitochondrial DNA. Additionally, should the transfer of mitochondria to oocytes unaffected by mitochondrial disorders, which may improve their success in a pregnancy, be allowed, a technique generally known as mitochondrial transfer therapy? This technique has been used overseas.

Research using human embryos

The HART Act is permissive as regards the use of human embryos in research (ss16, 19). However, no minister of health since 2004 has given permission for ACART to issue guidelines for research using 'viable' human embryos (Goodman et al., 2018). The guidelines currently being used by both ACART and ECART were issued in 2005 by the now defunct National Ethics Committee on Assisted Human Reproduction. However, the terms 'viable' and 'non-viable' embryos used in these guidelines cannot be found in their stated reference source, the guidelines produced by Australia's National Health and Medical Research Council (NHMRC) in 2004, or in any subsequent NHMRC documents. The Australian documents consistently, from 2004 onwards, used the term 'excess ART embryo(s)' (NHMRC, 2017). Until appropriate guidelines are issued by ACART, no research using viable human embryos is permissible.

While it is possible to conduct research using non-viable embryos, internationally the definition of 'non-viable' has been subject to considerable discussion (Choudhary et al., 2004; Poulin et al., 2014; Rosenwaks, 2017; Borman et al., 2020). The restriction of research using viable human embryos has limited New Zealand's contribution to international research to improve ART and to better understand embryo development in vitro and assessment of embryo viability. The inability to use viable embryos has also limited New Zealand scientists' ability to create human embryonic stem cells to improve understanding of developmental genes and the potential for regenerative medicine.

Research also raises the question as to whether gametes and embryos no longer required for treatment could be 'banked' for research following appropriate consent. International evidence indicates that embryo donation for research is the preferred option rather than disposal, and is considered as facilitating further knowledge in treating infertility (Samorinha et al., 2016). The law requires greater clarity in relation to the term 'human reproductive research', and this should be linked to appropriate regulations governing this part of the legislation. Here it is worth noting that an ACART report to the minister of health in 2007, following public consultation on embryo research, provided evidence of strong public support for human embryo research; however, no action was taken by the then minister or subsequent ministers on any of the recommendations made by ACART (ACART, 2007). The term 'hybrid embryos' in the HART Act (ss5, 9) is no longer appropriate and these should be more correctly indicated as 'admixed embryos', with a more detailed interpretation of the term. This would be consistent with international trends.

> ... any change to embryo culture conditions cannot be considered piecemeal and must be considered in the global context of rapidly changing technologies and legislation review.

Embryo culture beyond 14 days

The current legislation restricts the culture of human embryos beyond 14 days of development (s9(4)). While this was a recommendation of the UK Warnock Committee prior to the implementation of the Human Fertilisation and Embryology Act, the committee also considered up to 28 days; however, 14 days was embedded into the UK legislation as a compromise (Williams and Johnson, 2020), and subsequently the 14 days was incorporated into the New Zealand legislation. Notwithstanding the moral and ethical debates relating to culture, embryo culture up to 12–13 days of development has been achieved (Deglincerti et al., 2016; Shahbazi et al., 2016), primarily due to significant advances in embryo culture technologies. Embryo culture beyond 14 days is likely to provide valuable information in areas such as the cellular mechanisms for twinning, early pregnancy loss, birth defects, understanding the function of developmental genes and gene switching in the development of cancer. It could not be used for ectogenesis. While extended embryo culture technology is still technically difficult, culture technologies move at a very rapid pace; therefore, consideration should be provided for it in any revised legislation.

Furthermore, progress in the development of endometrial organoid cultures may provide significant opportunities for extended embryo culture to resolve issues relating to early implantation and other unresolved issues in early development (Bui et al., 2020). If embryo culture was extended, defined markers would be required for the embryo staging as with the current 14-day rule, i.e. the appearance of the primitive streak (HART Act, s9). Again, it is the authors' opinion that any change to embryo culture conditions cannot be considered piecemeal and must be considered in the global context of rapidly changing technologies and legislation review.

Emerging technologies

Gene editing

Gene editing has moved centre stage with the prospect of correcting genetic defects in pre-implantation embryos. While there is current uncertainty relating to the success of this technology for human embryos, there should be room in the legislation to accommodate the development and possible control of advanced technologies such as gene editing.

Whole genome sequencing

Whole genome sequencing is rapidly becoming accessible as a technology, and as the cost of undertaking the technique progressively declines, this technology is beginning to be used for human embryos (Wells et al., 2014; Weizman et al., 2019). There may well be a need to consider what, if any, limitations should be placed on the use of this technology for social rather than diagnostic purposes.

Trait prediction

Trait prediction from whole genome DNA sequencing data is rapidly becoming possible (Kayser, 2015; Lippert et al., 2017), with current predictive models testing for facial structure, voice, eye and skin colour, height and weight, but not yet in use for embryo DNA (although some American gene analysis companies are beginning to promote this type of analysis). With the decreasing cost of whole genome sequencing, it may become possible for early embryo biopsies to be used to predict (or select) embryos on the basis of phenotype-based genomic selection. This is not covered in the current legislation, where only 'social' sex determination of embryos is not permitted (s11).

Redefining gametes and embryos

While gamete and embryo are correctly defined in the HART Act (s5), gametes and embryos may now be created by other means, such as stem cell modification using induced pluripotent stem cells, and this would require a separate section in any revised legislation. In addition, gametes should now include immature gametogenetic cells, such as primary oocytes and spermatocytes, which have the potential to be matured into eggs and sperm.

Organoids

Organoids are small, self-organised three-dimensional tissues grown in culture that are derived from stem cells and can be programmed to replicate the function of a body organ or certain cell types. In the not too distant future the development of human tissue organoids will almost certainly have a role in clinical medicine – for example, pancreatic organoids for diabetes treatment – as well as in research investigating tissue formation, development of cancers and drug testing. While the current technology for using organoids is centred on the use of induced pluripotent stem (iPS) cells, there are distinct advantages in using embryonic stem cells with their early gene activation and induction. However, should organoids from either stem cell source develop into embryos or embryo-like features, should they be regarded as embryos, and how would they be regarded under the current legislation, as they will not be formed from gametes? Similarly, the development of testicular and ovarian organoids could result in sperm and eggs being created from non-reproductive tissues and may result in their use in infertility treatment, possibly as a source of hormones. A second question would be whether they can be programmed to produce functional gametes and the subsequent outcome of any children from this manipulation.

Cryopreservation in particular has made significant advances in both safety and successful pregnancies since 2004 ...

Other likely impacts of a review of the HART Act

While there are a number of clinical, scientific and technical issues for consideration in a review of the HART Act, there are also social and procedural aspects that should be considered.

Adoption Act 1955 and Status of Children Act 1969 (amended 1987, 2004)

These are outdated and not 'in step' with society in the context of defining 'parents'. Surrogacy, for example, did not form part of the 1950s reproductive culture. There need to be credible linkages with modern reproductive procedures and the significant changes in society, and revision of the Adoption Act 1955, particularly in relation to a distinction between payment for adoption and for surrogacy (s25), should be considered. The Status of Children Act 1969 initially identified the gamete donor as the legal parent, forming a genetic link to parenthood (s17). However, the 1987 amendment changed this to a social link instead of a genetic link, which at the time, with the uncertainty of the response to surrogacy, was considered a safer option (Van Zyl and Walker, 2015). Therefore both Acts require review whereby the intending parents become the legal parents at birth and requirement for adoption is removed. Similarly, the definition of 'family member' is very broad and requires ECART approval for gamete and embryo donations for individuals who are remotely related, for example through marriage.

Welfare of women

Although one of the principles of the HART Act is, 'the health and well-being of women must be protected in the use of these procedures' (s4c), the statement is broad and lacks clarity, especially for egg donors, women undertaking a surrogate pregnancy, and any potential issues arising from uterine transplants.

Defining 'procedures'

There is uncertainty relating to 'established procedures' and 'assisted reproductive procedures', which leads to degrees of confusion in assessing ACART guidelines for ECART to use when considering applications by the public for ART procedures outside the procedural guidelines. The creation of new 'established procedures' is a long and often convoluted process, with final ministerial approval of a recommendation sometimes taking years. This process needs to be streamlined to ensure that up-to-date procedures and technologies are delivered for patient care in a timely manner. In addition, under the current legislation there is no 'ownership' or 'right' of donors to donated gametes and embryos. This creates uncertainty for both the clinics and the recipients.

Conclusion

The HART Act 2004 has proved to be effective legislation, providing a 'fit for purpose' law for assisted reproductive technologies in New Zealand which was relevant at the time. However, since 2004 there have been significant scientific developments, as well as changes in society's perception and understanding of ART. The use of ART is not only providing fertility treatment for heterosexual couples, but also provides the opportunity for same sex couples to achieve parenthood. Within this broad use of ART there have been significant changes in both the technologies and alternative options for achieving a pregnancy – for example, surrogacy. Cryopreservation in particular has made significant advances in both safety and successful pregnancies since 2004, and the question now is whether it should be included in any legislation, given the absence of any complications internationally relating to its use. Research promotes new developments and improvement of existing ART technologies, and it is time that New Zealand scientists had the opportunity to contribute to this rapidly developing area by using donated excess embryos for IVF procedures.

Similarly, there should be discussion of the 14-day rule. It seems incongruous that both the use of pre-implantation embryos for research and in vitro embryo culture times are thus limited when the Abortion Act 2020 permits the termination of an in vivo foetus up to 20 weeks' gestation. The HART Act does not accommodate any of the new or rapidly developing technologies which could be used in the ART arena, some of which have significant social as well as scientific implications – for example, whole genome sequencing, gene editing and trait prediction.

Along with the significant scientific considerations, there are issues with existing parallel legislation, such as the Adoption Act 1955 and the Status of Children Act 1969, which need to be reconsidered to be made consistent with societal changes in the acceptance and use of ART. Similarly, there are many procedural matters relating to ACART and ECART that may make the decision-making processes more efficient and effective.

In summary, it is recognised that some of the changes proposed here will have moral and ethical issues associated with them that are beyond the scope of this article. However, we consider that it is essential that the current ART legislation is reviewed, and that the debate on social change and new or rapidly changing technologies forms a core of this review.

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