

Report No 22

**FINAL REPORT
ON EMERGENCIES**

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FINAL REPORT ON EMERGENCIES

December 1991

Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand society.

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Report/Law Commission Wellington 1991

ISSN 00113-2334

This Report may be cited as: NZLC R22

Also published as Parliamentary Paper E 31P

SUMMARY OF CONTENTS

Page

Letter of transmittal

Acknowledgement

I Introduction, summary of conclusions and recommendations

Part I

II The nature of emergencies

III Existing emergency legislation

IV Sources of power in an emergency

V Powers: standards and safeguards

Part II

VI War and other armed conflicts

VII Serious civil disturbances

VIII Public welfare emergencies

IX Civil defence

X Economic emergencies

Appendices

Index

CONTENTS

	Para
Letter of transmittal	
Acknowledgement	
II INTRODUCTION, SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS	
Introduction	1.1
Summary of conclusions	
What is an emergency? (Chapter II)	1.11
Sources of power in an emergency (Chapter IV)	1.22
Powers: standards and safeguards (Chapter V)	1.30
War and other armed conflicts (Chapter VI)	1.46
Serious civil disturbances (Chapter VII)	1.63
Public welfare emergencies (Chapter VIII)	1.84
Civil defence (Chapter IX)	1.101
Economic emergencies (Chapter X)	1.111
Principal recommendations	1.115
General principles	
Legislative and related action	
Matters requiring attention	
Matters to be further considered by the Law Commission	
PART I	
II THE NATURE OF EMERGENCIES	
What is an emergency?	2.2

"Public emergencies"	2.6
National emergencies in New Zealand	2.10
An emergency trigger?	2.13
Emergency and disaster	2.17
The phases of an emergency	2.25
The response phase	2.30
Executive powers in emergencies	2.32
Characteristics of emergencies	2.35
Scale	2.37
Urgency	2.38
Temporary nature	2.42
The inadequacy of normal measures	2.43
Safeguards	2.45
Involvement of central government	2.46
III EXISTING EMERGENCY LEGISLATION	
Powers in the response phase	3.1
War and other armed conflicts	3.3
Defence Act 1990	3.4
National emergencies under the Civil Defence Act 1983	3.6
United Nations Act 1946	3.7
Geneva Conventions	3.10
International obligations in time of emergency	3.13
Serious civil disturbances	3.16
International terrorism	3.19
Terrorism in New Zealand	3.28

Emergency provisions	3.37
Public welfare emergencies	3.46
Appendix A	3.47
Animals Act 1967	3.49
Agriculture (Emergency Powers) Act 1934	3.60
Resource Management Act 1991	3.65
Health Act 1956	3.68
Fire Service Act 1975	3.70
Civil Aviation Act 1990	3.75
Civil defence	3.84
Civil Defence Act 1983	3.86
Economic emergencies	3.98
Economic Stabilisation Act 1948	3.100
Current response powers	3.104
Classification of powers	3.106
IV SOURCES OF POWER IN AN EMERGENCY	
Emergency legislation	4.2
General or sectoral legislation	4.3
The sectoral approach	4.8
Conclusion	4.11
Emergency legislation in advance	4.12
The passage of legislation in an emergency	4.22
Passage of legislation under urgency	4.28
No legislative authority	4.33
Prerogative	4.37
State necessity	4.42
Common law necessity	4.44
Martial law	4.45

Emergency action without authority	4.49
Need for safeguards	4.51
Executive action in an emergency	4.54
Recommendations	4.55
V POWERS: STANDARDS AND SAFEGUARDS	
Introduction	5.1
The control of public power	5.4
The New Zealand Bill of Rights	5.6
The International Covenant on Civil and Political Rights	5.13
When should it be possible to invoke emergency powers?	5.18
The existence of an emergency situation and the need for extraordinary powers	5.19
Time limits	5.33
Geographic limits	5.39
Who should have the power to declare a state of emergency or to invoke emergency powers?	5.41
What procedure should be followed in declaring a state of emergency or invoking emergency powers?	5.48
Consultation	5.50
Informing the public	5.57
Informing the House of Representatives	5.62
What extraordinary powers should be conferred for use in the emergency?	5.64
The need for the power	5.67
The conferral of specific powers	5.69

The inclusion of powers in the statute itself	5.74
The justification for delegating law-making powers	5.78
Protected rights	5.91
What controls should there be on the exercise of emergency powers?	5.94
Review by the House of Representatives	5.95
Review by the courts	5.105
Review by other agencies	5.124
International processes	5.126
What remedies, including compensation, should be available to those affected by the exercise of emergency powers?	5.135
Compensation	5.137
Loss or damage to property	5.140
Limits on liability and remedies	5.156
Recommendation	5.169

PART II

VI WAR AND OTHER ARMED CONFLICTS

Government responsibility for safety and security	6.1
Terminology	6.4
Statutory powers to deal with emergencies	6.8
Potential war emergency situations	6.11
Low and medium -level contingencies	6.12
War, high-level armed conflict or armed attack	6.16
Threat of nuclear war	6.19
A nuclear event	6.28
Armed insurrection or civil war	6.29
World War II emergency powers	6.43
Existing legislation	6.50

National emergencies under the Civil Defence Act 1983	6.51
A War Emergencies Act	6.57
The circumstances justifying the declaration of a war emergency	6.60
Powers	6.72
Safeguards	6.76
Preparation and timing	6.77
Recommendations	6.81
VII SERIOUS CIVIL DISTURBANCES	
Introduction	7.1
Concern about terrorism	7.9
The nature of terrorism	7.13
Defining terrorism	7.16
The purpose of defining terrorism	7.20
Consideration of police powers	7.30
Preventive or investigative (pre-emptive) powers	
Intelligence	7.31
Ability to pre-empt offences	7.37
Power to detain	7.38
Power to search	7.45
Prevention of Terrorism (Temporary Provisions) Act	7.50
Conclusion	7.55
Combative or operational (response) powers	
Introduction	7.59
Duties of the police	7.62

Statutory powers	7.63
Common law powers	7.66
Flexibility versus uncertainty	7.71
The International Terrorism (Emergency Powers) Act 1987	7.74
Powers under the International Terrorism (Emergency Powers) Act 1987	7.94
Section 10 powers	7.95
Recommendation	7.139
Control of the media	7.140
Recommendation	7.162
Summary of recommendations	7.163
VIII PUBLIC WELFARE EMERGENCIES	
Introduction	8.1
Animal disease and plant disease	8.6
National Agriculture Security Service	8.11
Levels of response power	8.19
"Normal" and "emergency" response powers	8.24
Management plans	8.27
Powers in a Biosecurity Act	8.32
General safeguards in a Biosecurity Act	8.38
States of emergency	8.39
Agriculture (Emergency Powers) Act 1934	8.48
Pollution and hazardous substances	8.49
Resource Management Act 1991	8.56
Hazards Control Commission	8.62
Resource Management Act 1991 and emergencies	8.64
Emergency response	8.66
The role of Civil Defence	8.75

	Oil pollution	8.79
	Issues for consideration	8.82
IX	CIVIL DEFENCE	
	Civil Defence Act 1983	9.1
	A note on terminology	9.5
	National emergencies	9.6
	Recommendation	9.9
	Scope of Civil Defence responsibilities	9.10
	Third element - need for civil defence measures	9.11
	First element - listing of disaster events	9.13
	Recommendations	9.21
	Second element - consequences of disaster events	9.22
	Recommendation	9.34
	Use of emergency regulations	9.35
	Recommendations	9.38
	Monitoring by House of Representatives	9.39
	Recommendations	9.43
	Review by the courts	9.44
	Recommendations	9.46
	Civil defence responsibilities of State-owned enterprises and private enterprises	9.47
	Public functions of non-government enterprises	9.56
	SOE responsibilities	9.59
	Legislative authority	9.62
	Recommendation	9.67

	Compensation	9.68
	Recommendation	9.70
	Disaster recovery	9.71
	Recommendation	9.79
	Concluding recommendation	9.80
X	ECONOMIC EMERGENCIES	
	The nature of economic emergencies	10.1
	What is an economic emergency?	10.4
	The need for economic emergency powers	10.6
	The collapse of a bank	10.8
	A foreign exchange crisis	10.9
	Breakdown in essential services or industries	10.10
	Conclusion	10.11

Appendices

Index

16 December 1991

Dear Minister

I am pleased to submit to you Report No 22 of the Law Commission, *Final Report on Emergencies*.

The *First Report on Emergencies: Use of the armed forces* (NZLC R12 1990) was largely implemented by the Defence Act 1990.

This Report addresses the balance of emergency powers. As its extent indicates, it covers a wide range of matters. The Commission recommends that when emergency powers are required they should be conferred in sectoral legislation, that is, legislation tailored to the needs of the particular kind of emergency. It also proposes principles which should govern the drafting of such sectoral statutes.

In accordance with that approach the Report recommends the enactment of two statutes: a War Emergencies Act and a new Civil Defence Act replacing the Act of 1983. It also recommends the repeal of the International Terrorism (Emergency Powers) Act 1987 when new general legislation relating to police powers is enacted. It identifies particular matters which should be further considered by other agencies and by the Commission.

The very wide ranging nature of the inquiry has been such that we did not call for submissions although we have consulted widely within the public sector. No doubt there will be an opportunity for public discussion of the proposals, for instance, in the course of the consideration of legislation arising from the Report or other legislation relating to the principles stated in it. The related work of the Commission on criminal procedure and police powers, the Crown, and legislation also involves wide consultation.

Yours sincerely

K J Keith

President

Hon D A M Graham MP

Minister of Justice

Parliament House

WELLINGTON

ACKNOWLEDGEMENT

In completing the Final Report, Dr C C Aikman again acted as a consultant to the Law Commission as he did on the preparation of the *First Report on Emergencies: Use of the armed forces*. We thank him for the scholarship of his research, the sensitivity of his policy advice and his persistence in the long task of putting the Report into its final form.

Introduction, Summary of Conclusions and Recommendations

INTRODUCTION

1.1 The Law Commission has been asked to consider and report on the following questions:

(1) What executive powers are needed and justified to deal effectively with a national emergency in New Zealand, in a manner consistent with our basic constitutional system and traditions;

(2) What rights and freedoms ought not to be derogated from in any national emergency;

(3) What procedures are most appropriate for bringing emergency powers into effect;

(4) What safeguards are needed to confine the exercise of emergency powers to a national emergency;

(5) What limits and controls should be placed on the exercise of emergency powers, and what remedies should there be for the abuse of these powers;

(6) What changes are needed in the existing law to achieve these objects.

1.2 The Law Commission in its First Report on Emergencies: Use of the armed forces (NZLC R12 1990) concluded that there should not be a "national emergencies" statute that would apply in a wide range of emergency situations. Instead, the Commission adopted a sectoral approach under which

emergency powers and legislation conferring those powers would be tailored to the needs of particular emergency situations (see also Chapter IV of this Report).

1.3 In accordance with that sectoral approach the First Report then dealt with those issues falling within the terms of reference which arose during the preparation and passage of the Defence Act 1990. The Act substantially implemented the recommendations in that First Report. The recommendations concerned the powers that should be available

- to requisition property, call up members of the territorial and reserve forces, or extend the term of service of members of the regular forces in the event of an actual or imminent emergency involving the deployment beyond New Zealand of any part of the armed forces,

and the procedures that should be followed in authorising the armed forces

- to perform public services,
- to provide assistance to the police in the event of an emergency involving the possibility of death or serious injury to any person or the destruction of or serious damage to property, if the emergency cannot be dealt with by the police without the assistance of members of the armed forces, and
- to provide essential services withheld during an industrial dispute.

1.4 The First Report also concluded that, apart from the last-mentioned power, there should be no general legislation granting emergency powers for use in connection with an industrial dispute.

1.5 This Final Report completes the Law Commission's examination of the powers which should be available to deal with emergency situations. The decision to adopt a sectoral approach has meant that the Commission has been committed to reviewing, in light of our terms of reference, the executive powers available to deal with emergency situations that might arise over the whole area of State

responsibility. A detailed review of all of these powers and the preparation of a set of proposals in respect of all of them have clearly not been possible.

1.6 The range of powers is far too wide and extraordinary powers for use in an emergency are often best elaborated when normal powers are being reviewed. The Law Commission has, however, set out the issues that should be taken into account in the conferment of extraordinary powers. Besides a number of specific recommendations for amendments, the Commission is proposing new legislation in two sectors - war emergencies and civil defence - and the repeal of legislation relating to international terrorism in favour of reliance on general police powers.

1.7 As a consequence this Report contains four categories of recommendations:

- **general principles including the standards that should be observed and the safeguards that should be included in the legislative grant of executive powers to deal with emergency situations;**
- **specific proposals for legislative and related action;**
- **issues that call for the attention of the Government and its advisers;**
- **issues that the Law Commission will take up in the course of existing projects.**

The recommendations are listed at the end of this chapter (para 1.115).

1.8 The Law Commission in preparing this Report has not followed its usual practice of issuing discussion papers and seeking extensive public comment. It has, however, sought assistance, generously given, from a wide range of public authorities. The reasons for that course of action were (1) the great difficulty of consulting over the very diverse range of areas in which emergency powers are exercised, and (2) the character of the conclusions and recommendations falling within the first, third and fourth categories just listed. Those conclusions and recommendations will be further refined and tested as particular legislative proposals are developed. In respect of the specific proposals for legislative action in the second category, we recommend that there be a full opportunity for public input through the parliamentary process and in other appropriate ways.

1.9 The Law Commission has appreciated the contribution that has been made from all those from whom it has sought assistance. This has been particularly the case with Ministries, departments and other agencies involved in sectors on which we have concentrated: the Ministry of Defence; the Police; the Department of Justice; the Ministry for the Environment; the Parliamentary Commissioner for the Environment; the Ministry of Agriculture and Fisheries; the Department of Scientific and Industrial Research; the National Radiation Laboratory; the Ministry of Civil Defence; the Ministry of External Relations and Trade; the Reserve Bank; and Treasury. We have also been helped by Mr D G McGee, the Clerk of the House of Representatives, and Mr J W Rowe. This is not to say that all those who have assisted us agree with our conclusions and recommendations.

1.10 The present chapter contains a summary of conclusions and a list of principal recommendations. The remainder of the Report has been divided into two parts. Part I (Chapters II to V) includes conclusions and recommendations of general relevance to emergencies. Part II (Chapters VI to X) discusses and presents conclusions and recommendations on five specific categories of emergency.

PART I

- Chapter II - "The Nature of Emergencies" - considers the nature of emergencies, their distinguishing characteristics and the circumstances in which unusual or extraordinary powers will be required.
- Chapter III - "Existing Emergency Legislation" - summarises relevant legislation and international treaty obligations. Appendix A is a "Table of Emergency Powers".
- Chapter IV - "Sources of Power in an Emergency" - restates the case for a sectoral approach to emergency legislation, emphasises the importance of preparing and passing emergency legislation in advance of an emergency, and considers the prerogative, necessity and martial law as other sources of authority for emergency action. Appendix B - "Exercise of Executive and Legislative Power in an Emergency" - examines problems that might arise in an emergency in relation to the exercise of the powers of the Governor-General and the Governor-General in Council and the calling together of the House of Representatives.
- Chapter V - "Powers: Standards and Safeguards" - examines the standards or principles that should be followed in the enactment of emergency legislation, with particular emphasis on the circumstances and the procedures in which emergency powers may be invoked, the nature and extent of those powers, and controls over their exercise. There is also a discussion of the safeguards that are available, independent of provisions in the legislation itself. Appendix C summarises court decisions in cases in which emergency action has been challenged.

PART II

- Chapter VI - "War and Other Armed Conflicts" - makes the case for the enactment of a War Emergencies Act that would enable the making of emergency regulations in the event of an actual or imminent war, other armed conflict (including armed insurrection or civil war), nuclear or biological incident. The chapter also considers the responsibility of Civil Defence for the protection of the civilian population in those events. A draft War Emergencies Act appears in Appendix D.
- Chapter VII - "Serious Civil Disturbances" - considers the need for special powers to deal with serious civil disturbances. It proposes that the International Terrorism (Emergency Powers) Act 1987 be repealed. Appendix E sets out the guidelines agreed by the police and the media on the media coverage of terrorist incidents.
- Chapter VIII - "Public Welfare Emergencies" - sets out, by way of example, the way in which the standards and safeguards in Chapter V might be applied in the draft Biosecurity Bill being prepared by the Ministry of Agriculture and Fisheries. It also discusses emergencies arising from pollution and the escape of hazardous substances.
- Chapter IX - "Civil Defence" - examines particular aspects of the Civil Defence Act 1983, in particular the scope of civil defence responsibilities. There are proposals for the amendment of the 1983 Act and the conclusion is that those amendments should be embodied in a new Act to replace the 1983 Act. Appendix F - "A Background to Civil Defence in New Zealand" - traces the history of civil defence legislation in New Zealand and comments on the use of the term "civil defence".
- Chapter X - "Economic Emergencies" - distinguishes economic emergencies from the economic consequences of other categories of emergency and discusses the need for further powers to deal with economic emergencies.

SUMMARY OF CONCLUSIONS

WHAT IS AN EMERGENCY? (Chapter II)

1.11 Our brief is to consider the executive powers that are needed and justified to deal effectively with a national emergency in New Zealand. Although our conclusion that it is inappropriate to enact a general "National Emergencies Act" makes a precise definition of "national emergency" unnecessary, we must still identify the types of emergency which fall within the scope of our review.

1.12 The word "emergency" may be used in many ways. In one sense, a house fire or a road accident is an emergency. These emergencies can be distinguished from events which involve a serious threat to public safety or welfare, or the destruction of or serious damage to property, such as a severe earthquake or an outbreak of foot and mouth disease.

1.13 These serious emergencies are likely to make great demands on the resources of the community. In the first instance, services such as the fire brigade, the police and the medical and agricultural services will respond to the emergency. But it will often be necessary to call upon other community services. There should be provision for ensuring a co-ordinated response from territorial authorities and regional councils; Civil Defence; government departments; State-owned enterprises and the private sector; the armed forces; and voluntary organisations like the Red Cross and Salvation Army.

1.14 The response to an emergency may lead to a realignment of organisations within the community. It may also require the exercise of extraordinary powers by organisations or individuals involving constraints on normal activities and other infringements of private rights or freedoms in the interests of the wider community.

1.15 While emergencies that affect the security, safety or welfare of New Zealand or the New Zealand public as a whole can be readily identified as "national emergencies", events which are limited in terms of their immediate impact may also be emergencies of national concern. National resources may need to be deployed in order to respond to a regional or territorial emergency, or there may be implications arising out of a localised event which call for the involvement of central government.

1.16 The use of the description "disaster" can convey more clearly than does "emergency" the serious nature of the event involved and the two terms are often interchangeable.

The phases of an emergency

1.17 An emergency can pass through various phases - the emergency continuum. The mitigation phase involves an attempt to prevent an emergency from arising or to reduce its effects if it does occur. Plans should be made for dealing with an emergency - the preparedness phase. The measures taken to deal with the immediate effects of the emergency itself are the response phase. And steps will have to be taken to address the problems arising from the emergency. This is the recovery phase.

1.18 The Law Commission is primarily concerned with the response phase of emergencies, because it is in this phase that extraordinary executive powers may be required. However, provision for response will often be part of a comprehensive approach to emergency planning involving also mitigation, preparedness and recovery. Legislation containing extraordinary response powers is likely to include normal powers which can be exercised in the course of the response as well as provisions that relate to other emergency phases.

Executive powers in an emergency

1.19 In a spectrum of public powers, extraordinary powers needed to respond to an emergency will be towards one end of the spectrum. It may, however, be difficult to determine at what point in the spectrum the powers required to deal with any emergency situation cease to be "extraordinary" and become "normal". The answer is likely to depend on the context in which the power is to be exercised. In some circumstances a particular power will be regarded as "extraordinary", in others as "normal". In cases where extraordinary response powers can be called upon, the ability to exercise powers which are normally available may be vital to an effective emergency response.

Characteristics of emergencies

1.20 Emergencies which justify the availability of extraordinary powers will have distinguishing characteristics. The Law Commission has identified the following:

- **Scale:** The emergency will pose a serious danger to the safety or welfare of the New Zealand public or a serious threat to the security of New Zealand as a whole, it will have a widespread impact or potential impact, and it will require substantial resources to counter the danger effectively.
- **Urgency:** Generally the emergency threat will be an immediate one, although an event which is imminent or likely to occur may justify the taking of emergency measures. A common perception, clearly accurate in the case of an emergency such as a serious earthquake, is that emergencies occur suddenly and are unexpected. But an emergency situation, such as a drought, may develop gradually over a period of time.
- **Temporary character:** Generally the emergency will be temporary, although a drought or a lengthy war both illustrate that this is not invariably the case.
- **Inadequacy of normal measures:** The emergency will be a situation that cannot be dealt with without recourse to extraordinary measures.

Involvement of central government

1.21 In this country many emergencies with the above characteristics will make calls on resources that are at the command of central government. Further, given the central government's primary responsibility for the security, safety and welfare of its citizens, it will have the ultimate responsibility for responding to an emergency situation. Indeed, in New Zealand, although an immediate response will often be at the territorial or regional level, the central government is likely to be involved with all phases of the emergency cycle - mitigation, preparedness and recovery as well as response.

SOURCES OF POWER IN AN EMERGENCY (Chapter IV)

General or sectoral legislation?

1.22 The Law Commission confirms and develops the sectoral approach to emergency legislation in this Report (see para 1.2). This conclusion has involved the rejection of a single general statute dealing with a wide range of emergencies and support for a series of separate statutes, each concerned with a particular emergency situation.

1.23 The primary difficulty with a general statute dealing with the full range of emergencies is that it would not be possible to include controls to prevent the possibility of a government invoking drastic powers by executive fiat in a situation where they could not be justified. Further, those powers would necessarily include a broad emergency regulation-making power. The Law Commission considers that such a power should be available in only selected categories of emergency.

1.24 The advantages of sectoral emergency legislation are as follows:

- The particular emergency situation can be defined with relative precision, thereby reducing the possibility that the powers conferred will be invoked in a different situation where their use is inappropriate.
- In general the powers to deal with a particular situation can be set out in the statute itself and confined to those appropriate to the emergency concerned. A broad emergency regulation-making power can be avoided except in three special cases where the government may need wide-ranging powers - war emergencies, civil defence emergencies and emergencies arising in the agriculture industry.

- Appropriate controls and safeguards can be included in the statute.
- The inclusion of powers and controls in the statute itself means that the provisions are subjected to parliamentary scrutiny.

Legislation in advance

1.25 The Law Commission considers that emergency legislation should be enacted in advance of an emergency situation arising. This view is supported by New Zealand and overseas experience and by overseas commentators.

1.26 A practical concern is that an emergency situation will often call for an immediate response. Legislation hurriedly enacted in such a time of crisis is likely to include wider powers than are necessary and to omit desirable safeguards. Consequently it will be open to abuse. Legislation enacted without pressure of time and in the absence of a crisis is more likely to be carefully considered.

1.27 Nevertheless there may be situations where it is appropriate to pass emergency legislation particular to an emergency:

- A decision may be taken during a continuing emergency to enact case specific legislation instead of relying on more general sectoral legislation under which the emergency has been declared.
- The relevant sectoral enactment may need to be amended to include an additional response power thought to be necessary.
- The government may wish to obtain parliamentary sanction for the exercise of a particular power.
- An emergency may arise in an area that is not the subject of sectoral legislation.

Why is legislation necessary?

1.28 The decision to favour sectoral emergency legislation over a general emergencies statute rests on the preliminary conclusion that statutory authority is usually the appropriate basis for emergency action requiring the exercise of extraordinary powers. In the absence of this authority, there are a number of non-statutory sources of authority:

- the prerogative;
- State necessity;

- common law necessity;
- martial law;
- action without lawful authority followed by an Act of indemnity.

1.29 The Law Commission concludes that these sources of authority should not in general be relied upon as alternative bases for emergency action:

- The first four possible sources of authority are vague and ill-defined.
- Exercises of power under these sources of authority are not in general subject to safeguards against abuse.
- It is objectionable in principle to take actions which are or may be unlawful in the expectation that Parliament will enact retrospective indemnifying legislation.

POWERS: STANDARDS AND SAFEGUARDS (Chapter V)

1.30 Without controls on emergency powers there is much potential for their abuse. A decision to confer emergency powers therefore requires, as does any grant of public power, a consideration of the following matters:

- the circumstances in which the emergency powers may be invoked;
- the person or body which may invoke the powers;
- the procedure to be followed when invoking powers;
- the substantive scope of the powers;
- the controls on the exercise of the powers;
- the remedies, including compensation, which are to be available to those affected by the exercise of the powers.

A balance must be struck between the needs of the State to have the powers required to handle an emergency and the rights of those who may be affected by the exercise of those powers. Further, as the International Covenant on Civil and Political Rights makes clear, some basic rights must be respected in all situations. The Bill of Rights Act 1990 affirms New Zealand's commitment to the International Covenant.

The circumstances in which emergency powers may be invoked

1.31 Two essential preconditions for a grant of emergency powers are the existence of an emergency situation and the need to deal with that situation by the exercise of extraordinary powers. This statutory statement of circumstances will generally require a belief on the part of a specified office-holder, based on certain information, that a particular state of affairs exists and that extraordinary powers are necessary to deal with it. Given this common structure, the following principles are applicable:

- **The belief that the state of affairs exists should be based on reasonable grounds.**
- **A belief that a particular state of affairs exists should not in itself justify the declaration of a state of emergency. There should also be a belief, again on reasonable grounds, that the circumstances require the invocation of emergency powers.**
- **The state of affairs should be one which threatens important values and interests.**
- **In the interests of precision, the state of affairs should be described in concrete rather than speculative terms.**

The existence of a state of emergency should be limited in time and, where appropriate, by place.

Who may invoke the powers?

1.32 The general principle is that the greater the emergency (and usually the correlative powers), the higher the level at which the decision to invoke emergency powers should be made. Generally these decisions will be taken by Ministers or officials for whose actions Ministers are responsible. But sometimes emergency powers may be conferred on statutory officers who are independent of political control but answerable to the courts. The decision which enables emergency powers to be exercised will usually be taken by officers who are senior to those who actually exercise the powers.

1.33 The power to extend the period of a state of emergency will usually be vested in the original decision-maker. In some instances Parliament may review the original declaration or any extension of it and, occasionally, may itself have the exclusive power to extend the initial period.

What procedures should be followed?

1.34 Some of the procedures to be followed in invoking emergency powers are a necessary corollary of the choice of the person or body who has to decide whether the state of affairs calling for the declaration of an emergency exists. For example, the Governor-General will be advised by the Executive Council.

1.35 Where special knowledge or expertise is required in order to make an informed decision there should be provision for appropriate advice to be given to the decision-maker. As a general principle, decision-makers should be required to consult those whose interests or responsibilities are affected before taking action.

1.36 Once an emergency has been declared, sufficient publicity should be given to the declaration to ensure that those who are or may be affected are aware of the existence of a state of emergency. This publicity is necessary to ensure that the emergency measures taken are effective and also that there is appropriate accountability for the decision to invoke emergency powers.

What should the powers be? How should they be limited?

1.37 As the situations constituting an emergency will vary, so also will the response powers which should be available. Again, general principles can be stated:

- The powers conferred should be limited to those needed to deal effectively with the emergency.
- The scope and drafting of an emergency power should be governed by
 - the nature of the public interest threatened by the emergency,
 - the need for the power in the particular circumstances,
 - the importance of the right, interest or value being abrogated or prejudiced by the exercise of the power, and
 - the extent of that abrogation or prejudice.
- In general powers should be conferred by statute rather than by delegated legislation.

- If an emergency regulation-making power is thought necessary it should
 - be expressed in the standard objective formula, specifying the purposes for which regulations may be made,
 - include a requirement that the regulations be necessary for those purposes,
 - expressly exclude matters more appropriately dealt with by Parliament in primary legislation,
 - prevent regulations being made which outlast the emergency, and
 - where appropriate, require that emergency regulations be made only after prior consultation with those affected.

- Emergency legislation should not impinge on rights and freedoms which ought to remain protected and should conform with New Zealand's international obligations.

How are safeguards to be provided?

1.38 Some safeguards can be provided by the procedures which must be followed in declaring an emergency and exercising emergency powers. Once a declaration has been made, controls may be exercised through Parliament, the courts and other national and international processes.

1.39 Parliamentary procedures already enable controls to be exercised over the enactment of legislation conferring emergency powers and the monitoring of emergency action, including the making of emergency regulations. It will also be appropriate in the case of some grants of emergency power to make specific provisions for parliamentary control in the emergency legislation itself. In these cases, consideration should be given to the need for provisions which would ensure that the House of Representatives meets to consider emergency action and would require the government to provide parliamentary time for the consideration of that action. (See safeguards in the proposed War Emergencies Act, para 1.62)

1.40 The possibility of judicial review affords an essential protection. Provisions purporting to prevent the questioning of the legality of a declaration of an emergency should not be enacted. Existing provisions to this effect should be repealed when opportunity offers.

Compensation and limits on liability

1.41 Individuals may suffer loss as the result of an emergency. This loss may stem from the effects of the emergency itself, from the lawful exercise of powers available to deal with the emergency, or from unlawful acts during the emergency. While loss involving personal injury by accident will be compensated under the Accident Compensation Act 1982 (there may also be relevant rights under war pensions or social security legislation), there is a need to consider remedies for the infringement of property rights.

1.42 In general, the risk of disaster attaches to the owner or proprietor of property whose responsibility it is to take appropriate action, by insurance or otherwise, to mitigate prospective loss. The Earthquake and War Damage Act 1944 provides for compulsory insurance to cover war damage and damage resulting from earthquake and other natural disasters. In some instances the government, recognising a wider community responsibility, may decide to make payments from public funds to meet part of the losses resulting from the emergency itself. (This was done in the case of Cyclone Bola.)

1.43 On the other hand, property loss caused by the lawful or unlawful actions of State officials taken to protect the interests of the wider public should in general be borne by the State. Compensation may have to be limited where the damage is so great that the State is unable to meet losses in full.

1.44 Legislation providing for compensation should also provide independent procedures for resolving disputes about entitlement and its extent.

1.45 There are a great number of provisions limiting or denying the liability of bodies and individuals exercising public power conferred by legislation. This issue will be fully examined in the Law Commission's work on the Crown. However, one aspect should be addressed in the present context. There can be no justification for preventing all recourse to the courts in respect of actions claimed to be unlawful. Although it may be desirable to protect those acting in an emergency from individual suit, the possibility of action against the Crown or other responsible body should in principle be preserved.

WAR AND OTHER ARMED CONFLICTS (Chapter VI)

1.46 The Defence Act 1990 implemented the recommendations in the First Report on additional powers that might be required in the event of a low or medium-level contingency involving the deployment beyond New Zealand of members of the armed forces (see para 1.3). There has since been a shift in defence policy (The Defence of New Zealand 1991: A Policy Paper (GP Print, 1991)). The Law Commission is of the view that the powers now available should enable New Zealand to maintain the strategy of "Self-Reliance in Partnership" projected in the Policy Paper.

1.47 The First Report identified war emergencies as a distinct emergency sector to be dealt with in the present Report. The relevant emergency situations are

- war or high-level armed conflict, conventional or nuclear, in which New Zealand is directly involved, whether or not there is a threat of invasion,
- the threat or outbreak of major nuclear or biological war in which New Zealand is not directly involved or a major nuclear or biological event which presents a threat to New Zealand, and
- armed insurrection or civil war within New Zealand.

War, armed hostilities or armed attack

1.48 While the likelihood of New Zealand becoming involved in full-scale armed conflict in the foreseeable future may be thought slight, the Law Commission is obliged to address this possibility and consider what executive powers would be needed and justified in the event.

1.49 War or high-level armed conflict involving a serious threat to the sovereignty, security or territorial integrity of New Zealand would call for both the mobilisation of national resources for the actual conduct of hostilities and the taking of measures for the protection of the civilian population. The executive would require a wide authority to take emergency action - an authority which should have a statutory basis. Although the prerogative can be used to declare war or to commit the armed forces to hostilities, it would be inappropriate and impracticable to conduct a modern war under the authority of the prerogative alone.

Nuclear war or accident

1.50 A nuclear event, whether arising from a nuclear war or a nuclear accident, could have a similarly drastic impact on New Zealand. The possibility of such an event cannot be discounted despite the ending of the Cold War. While New Zealand is unlikely to suffer the direct effects or, indeed, the indirect physical effects of a nuclear event, its social and economic impact on New Zealand could be devastating.

1.51 A breakdown of international trade would undermine the existing business, employment and financial system. Social and economic disruption could result in increasing disorder and lawlessness. As with war, the consequent threat to the life of the community would call for the grant of wide authority to the executive.

Armed insurrection or civil war

1.52 The prospect of civil war in New Zealand is even more remote than invasion or involvement in full-scale armed conflict overseas. Nevertheless it is a possibility which must be addressed. Again, given the grave threat which civil war or armed insurrection would pose to the sovereignty and security of New Zealand, wide executive powers would be needed to respond to the situation.

1.53 An understandable concern is that a government might be tempted to invoke these extensive powers in a situation where their exercise is not justified. However, civil war is an extreme situation which is to be distinguished from those situations falling within s 9(4) of the Defence Act 1990 in which the armed forces can be called upon to provide aid to the civil power (para 1.3). A principal safeguard against the possibility of war emergency powers being abused is a careful definition of the circumstances in which the declaration of a war emergency would be justified. It should not then be possible to use wide war emergency powers to deal with a situation falling short of armed conflict.

Protection of the civilian population

1.54 The Civil Defence Act 1983 contains provisions under which a state of national emergency can be declared enabling civil defence measures to be taken to protect the civilian population in the event of an attack on New Zealand or a warlike act directed against New Zealand. The Law Commission takes the view that a state of emergency in these circumstances should be declared under war emergencies legislation. It is, however, recognised that the civil defence organisation will continue to be involved in providing that protection and should take an active part in the preparatory phase (para 1.102).

A War Emergencies Act

1.55 The Law Commission's conclusion is that there should be a War Emergencies Act under which emergency powers would be available in respect of the stated contingencies. A draft War Emergencies Act is set out in Appendix D.

Definition of war emergency

1.56 The situations with which the proposed War Emergencies Act is concerned are war or other armed conflict (including armed insurrection or civil war) and nuclear or biological incidents.

1.57 To justify the declaration of a war emergency there must be reasonable grounds for believing that such a situation exists or is imminent and that the situation seriously endangers the lives, health or safety of New Zealand citizens, or seriously threatens the ability of a government in New Zealand to preserve the sovereignty, security or territorial integrity of New Zealand.

1.58 The situation must also be of such proportions or nature that it cannot be dealt with effectively except by authorising the Governor-General in Council to make war emergency regulations under the Act.

Powers

1.59 In light of the situations which are contemplated by the proposed War Emergencies Act, the powers which are to be available to the Government in the event of a war emergency need to be comprehensive. Accordingly, the Governor-General in Council is given the power to make such regulations as are believed, on reasonable grounds, to be necessary or expedient for dealing with the emergency.

1.60 It is possible, however, to exclude from the ambit of this power those matters which may be more appropriately left to Parliament. The Law Commission is not making firm recommendations with regard to these matters but, as an indication of what they might include, the draft War Emergencies Act provides that no war emergency regulations shall

- authorise conscription,
- override s 37 of the Defence Act 1990 (which stipulates the minimum age at which minors can be sent on active service overseas),
- override the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987,
or
- provide for the detention, imprisonment or internment of any New Zealand citizen by reason of that citizen's national origin.

Safeguards

1.61 War emergency regulations can with some exceptions override all other statutes and regulations. It is therefore essential that the power to make such regulations is accompanied by adequate safeguards.

1.62 The proposed War Emergencies Act contains extensive safeguards against the possible abuse of powers conferred by the Act:

- Immediate notice of the declaration of a war emergency is to be given to the public and to the House of Representatives, or, if the House is not then sitting, it is to be given as soon as practicable.
- A declaration of a war emergency may remain in force for a maximum initial period of three months.
- A declaration of a war emergency will cease to be in force if not confirmed by the House.

- A declaration of a war emergency may be continued in force for further periods of not longer than six months if the continuation is confirmed by the House (the number of renewals is not limited).
- The House may revoke the declaration of a war emergency at any time. A motion that a declaration of a war emergency be revoked takes effect without a vote if parliamentary time is not made available for its consideration within three days of the date on which notices of the motion are given by at least 10 members of Parliament.
- No emergency regulations are to be made which derogate from New Zealand's obligations
 - under the Geneva Conventions and Protocols, or
 - under specified articles of the International Covenant on Civil and Political Rights.
- Emergency regulations cease to be in force as soon as a declaration of emergency ceases to be in force.
- All emergency regulations are to be laid before the House within two sitting days of being made and may be amended or revoked by the House at any time.
- A motion that emergency regulations be amended or revoked takes effect without a vote if parliamentary time is not made available for its consideration within three sitting days of the date on which notices of the motion are given by at least 10 members of Parliament.
- There are procedures for bringing forward a meeting of Parliament or a sitting of the House.
- Any person whose property is

- requisitioned under any war emergency regulation, or
- lost, damaged or destroyed as a result of anything done or purported to be done under any war emergency regulation,

is to receive just compensation subject to any regulations made under the Act limiting the extent of compensation or controlling the disposition of claims.

- Individuals exercising or purporting to exercise powers during a war emergency are protected from suit, but this protection does not prevent the bringing of a claim against the Crown.

SERIOUS CIVIL DISTURBANCES (Chapter VII)

1.63 The primary question under this head is whether the powers of the police at common law and under statute are extensive enough to deal effectively with all situations which may arise. Are there emergencies where the normal powers of the police will be insufficient?

1.64 The passage of the International Terrorism (Emergency Powers) Act 1987 suggests that international terrorism is regarded as an emergency which does require the availability of special powers. The Law Commission questions whether international terrorism should be singled out in this way. In the context of the powers which should be available to the police no sensible distinction can be made between international terrorism and internal terrorism and indeed other acts of violence with a different motivation.

1.65 This absence of distinctive characteristics raises the question whether there are other situations where the normal powers of the police are inadequate, or conversely whether the normal powers of the police are adequate to deal with an international terrorist emergency.

1.66 In addressing this question, police powers are considered under two headings:

- preventive or investigative (pre-emptive) powers;
- combative or operational (response) powers.

Preventive or investigative (pre-emptive) powers

1.67 In the case of terrorism, as in the case of other serious acts of violence, the police face the difficulties both of obtaining information in advance of the projected terrorist act and of taking action against the would-be offender before the act has taken place. The fact that terrorism is usually a premeditated act planned and prepared by an organised group of persons increases both the opportunity for and the desirability of pre-emptive action.

1.68 In the United Kingdom the police, in the face of an ongoing campaign of terrorism, were in 1974 given expanded powers of arrest and detention and search and seizure. The police still have these powers. They are not emergency powers in the sense that they are available only to deal with an urgent situation of a temporary character. They are powers that the United Kingdom police are thought to require on a day to day basis.

1.69 There has been no suggestion that circumstances in New Zealand call for the conferment on the police of extended preventive or investigative powers specifically designed to enable them to deal with terrorist threats, and, in the Law Commission's view, such a step would not be justified.

1.70 This conclusion does not exclude the review, to be undertaken in the Law Commission's criminal procedure reference, of the powers of search and seizure and arrest and detention at present available to the police in the ordinary course of their duties.

Combative or operational (response) powers

1.71 The International Terrorism (Emergency Powers) Act 1987 contains specific response powers that are available if three Ministers of the Crown authorise their exercise on the basis that they believe on reasonable grounds that:

- **there is an emergency;**
- **it may be an international terrorist emergency; and**
- **the exercise of emergency powers is or may be necessary to deal with the emergency.**

The approach taken by the Act can be questioned on the grounds that a domestic terrorist incident is not covered and that in situations involving terrorist violence the police may have to act in advance of the authority being given.

1.72 In addition, an examination of the powers in the Act shows that some of the powers it confers are already available to the police under common law or statute. Others may, to a greater or lesser extent, be within the scope of police powers at common law.

1.73 The Law Commission has concluded that, with the exception of the media control provisions which require separate attention, the powers contained in the International Terrorism (Emergency Powers) Act 1987, to the extent that they are not already available, should be made available on a wider basis if they are to be available at all. In respect of the powers which the police may require to respond to a situation involving a threat to life or property, an international terrorist incident cannot be distinguished from any similar act of violence, whatever its motivation.

1.74 It follows that it may be misleading to regard the powers concerned as emergency powers and that there is a need for a general examination of the powers of the police to act in all situations involving a threat to life or property. This examination must take account of the police concern that their powers in these situations should be clearly defined. These are issues that move beyond the scope of the Law Commission's reference on emergencies. They will, however, be considered in the context of a review of law enforcement powers currently being undertaken by the Commission as part of its criminal procedure reference.

Control of the media

1.75 Media coverage of terrorist events can compromise the efforts of the authorities to resolve those events and may also prejudice future responses to terrorist action. While there is general acceptance that there should be some restraint on media coverage of terrorist incidents, the question is whether this restraint should be voluntary or imposed by legislation.

1.76 Between 1984 and 1987 the issue was solely governed by voluntary guidelines which had been formulated, and agreed upon, by police and media representatives. These guidelines, while recognising the operational perspective of the police, upheld the principle of editorial responsibility.

1.77 The International Terrorism (Emergency Powers) Act 1987 contains provisions which enable the Prime Minister, in a situation where the exercise of emergency powers under the Act has been authorised, to prohibit or restrict the publication of certain information which would be likely to endanger the safety of any person or prejudice measures designed to deal with international terrorist emergencies.

1.78 A number of reasons can be advanced for and against the retention of the media provisions in the Act. These arguments are set out in full in paras 7.155-7.161 and can be summarised as follows.

1.79 The case for the retention of the media provisions is based on the view that, in the face of increasing competition amongst the media, and the substantial rewards associated with reports of terrorist events, the guidelines are unlikely to be observed. One breach is likely to lead to their breakdown. Also, the voluntary guidelines do not apply to foreign media and their journalists - but this is also true of statutory provisions when the publication takes place outside New Zealand.

1.80 The case for a return to reliance on guidelines is based on respect for freedom of expression as well as pragmatic considerations. The flexibility arising from a continuing liaison between government, police and media is more likely to be effective in practice than executive prohibitions. Other countries which face a greater terrorist threat than New Zealand have not introduced comparable powers to control the media.

1.81 There are, too, the practical problems that arise from the provisions of the Act. It applies only to international terrorist incidents and not to domestic terrorism. There will be a delay between the beginning of the terrorist incident and the application of the media restraints. Not only must three Ministers of the Crown invoke the provisions of the Act, but the Prime Minister must then invoke the media powers. Also, questions have been raised in the United Nations Human Rights Committee as to the compatibility of the media provisions with those of the International Covenant on Civil and Political Rights.

1.82 The Law Commission considers that the media provisions are likely to prove ineffective in practice, and that the encroachment on the right to freedom of expression that is involved is not justified. The Commission therefore recommends the repeal of the media control provisions of the International Terrorism (Emergency Powers) Act 1987.

1.83 Having regard to this conclusion, and the examination of the other powers contained in the International Terrorism (Emergency Powers) Act 1987, the Law Commission recommends that the Act be repealed. Since police operational powers will be examined in a general context, it is recommended that the repeal be made at the same time as action is taken on the Law Commission's recommendations in the law enforcement powers segment of its criminal procedure reference.

PUBLIC WELFARE EMERGENCIES (Chapter VIII)

1.84 The State concerns itself with a wide range of economic and social activities which call for the exercise of public power, sometimes in emergency situations. These situations can conveniently be classified as public welfare emergencies. The legislation involved is likely to contain not only normal powers and possibly extraordinary powers that would be used to respond to an emergency, but also provisions relating to other phases of the emergency cycle - mitigation (prevention), preparedness and perhaps recovery.

1.85 Given this integrated approach, it is in the public welfare area that the difficulty of distinguishing between "normal" and "extraordinary" response powers is most acute.

1.86 The Law Commission has not attempted a comprehensive examination of emergency powers in "public welfare" legislation. (These powers are surveyed, along with other emergency powers, in Appendix A.) It has, however, considered two emergency sectors:

- There is an examination of the proposals of the Ministry of Agriculture and Fisheries (MAF) for a Biosecurity Act in the light of the standards and safeguards developed in this Report. The proposals are particularly significant because of the profound consequences that an outbreak of disease or the incursion of a pest might have for New Zealand's agriculturally based economy.
- There are comments on the present position with regard to emergencies resulting from the escape of hazardous substances and pollution.

Biosecurity Act

1.87 The proposed Biosecurity Act would replace the provisions of the Animals Act 1967 and other MAF legislation. It would have as its goal the protection of New Zealand's agriculture industry. The Act would be concerned with all phases of the emergency cycle (as well as with animal and plant health problems which do not raise emergency issues), with a particular emphasis on mitigation.

1.88 The provisions of the Animals Act 1967 and the proposals for a Biosecurity Act highlight the fact that there are sectors in which powers that would normally be regarded as extraordinary may be exercised by statutory officers in the normal course of their duties. Thus agriculture inspectors have far-reaching powers. In these circumstances, having regard to the substance of the powers, a principal concern is to ensure that they are accompanied by adequate safeguards. Many of the standards and safeguards elaborated in Chapter V are as applicable to response powers normally available to statutory officers as they are to emergency response powers. The application of those standards and safeguards to a Biosecurity Act is therefore discussed.

1.89 Since a Biosecurity Act would contain a range of powers to control diseases and pests it would also raise the issue of confining the response powers actually used to those appropriate in the particular emergency. MAF proposes to prepare and implement management plans for the prevention or control of outbreaks of particular diseases or incursions of particular pests. These plans would be drawn up in consultation with parties in the public and private sectors who were interested in the control of the particular disease or pest. In the view of the Law Commission, the management plan should identify the statutory powers that it might be necessary to exercise in each context.

1.90 MAF is proposing that a Biosecurity Act should contain two general powers. A general regulation-making power is envisaged and the Law Commission is concerned that powers of this kind should not be used to pass regulations conferring additional powers of an emergency character. Similarly MAF is proposing that the Act should authorise the making of rules, not only to provide for administrative detail but also to allow the Minister to deal with exceptional situations. In this latter case the rules would prevail over the relevant Act or regulation. The Law Commission's view is that this proposal cannot be justified in principle. The Commission is therefore recommending that any emergency that could not be dealt with under the provisions of a Biosecurity Act or regulations under that Act should be met by a proclamation of a state of emergency and the making of any necessary emergency regulations. In this case, too, relevant safeguards are proposed.

1.91 Finally, the possibility of judicial review should not be excluded. MAF is proposing that the Biosecurity Act should include a provision precluding injunctive relief from the application of response powers given by the Act. This proposal is in conflict with the general principle stated in para 1.40. In practice, the courts are extremely unlikely to prejudice a necessary emergency response by granting an injunction.

Escape of hazardous substances and pollution

1.92 The use of hazardous substances and the polluting effects of activities necessarily associated with today's urban and industrialised society give rise to a number of problems. Few of these problems could be classified as "emergencies" but emergencies can and do arise. Although the management of pollution and hazardous substances appropriately concentrates on prevention and mitigation, steps must be taken to prepare for emergencies and to ensure that adequate response powers are available.

1.93 One of the aims of the Resource Management Act 1991 is to rationalise and co-ordinate pollution and hazardous substances management. The passage of this Act was accompanied by the repeal of the existing "pollution" statutes (with the exception of the Marine Pollution Act 1974). The Resource Management Act envisages that a Hazards Control Commission, "to assist in the control of hazardous substances and new organisms", will be established at a future date. Legislation establishing a Hazards Control Commission would repeal some statutes which currently deal with hazardous substances management.

1.94 The reforms and reform initiatives to date are intended to provide a co-ordinated approach to pollution and hazardous substances management (the mitigation phase of the emergency cycle). They do not directly address similar problems of co-ordination which arise in respect of the preparedness and response phases.

1.95 This issue can be expected to arise in the formulation of the Hazards Control Commission legislation. Also consideration must be given to what is to happen to response powers contained in the hazardous substances legislation that is to be replaced. Existing powers will need to be examined in order to determine whether they are adequate or excessive.

1.96 A further issue arises as to the role Civil Defence should play in pollution and hazardous substances emergencies. A "serious fire, leakage or spillage of any dangerous gas or substance, or other happening" is included within the ambit of civil defence responsibilities (Civil Defence Act 1983 s 2).

1.97 Many pollution and hazardous substances incidents will not be serious enough to justify the taking of civil defence measures. Nevertheless, in a major emergency, civil defence powers and resources, including the ability to call on emergency regulations, may be vital to an effective response. Also, civil defence participation could ensure that proven systems of inter-agency co-operation were in place.

1.98 Civil defence involvement raises a question that needs to be addressed. Should emergency response planning be undertaken separately from pollution and hazardous substance management, given that the primary emphasis in relation to industrial disasters is and must be on mitigation? One approach would be to ensure that there is effective liaison between the hazardous substances sub-group of the National Civil Defence Committee's Scientific Advisory Committee and the Hazards Control Commission.

1.99 The Law Commission is not in a position to make firm proposals on the issues which arise with respect to response procedures and powers in relation to pollution and the escape of hazardous substances. The intention to repeal the existing statutes does, however, point to the need and provide an opportunity for careful consideration, not only of the powers that will be available to respond to both pollution and hazardous substances emergencies, but, equally important, of a rationalisation and co-ordination of preparedness procedures.

Conclusion

1.100 Our discussion of the proposed Biosecurity Act and of hazardous substances and pollution illustrates that it is particularly in the public welfare area that emergency response powers must be seen in the context of the emergency continuum. Control of agricultural diseases and pests and of hazardous substances and pollution necessarily involves an integrated approach in which emphasis is placed on mitigation, but which also includes preparedness for and response to emergency situations.

CIVIL DEFENCE (Chapter IX)

1.101 The Civil Defence Act 1983 confers powers that can be used to respond to natural and industrial disasters and similar emergencies - the types of emergency arising most frequently in New Zealand. Specific Law Commission proposals with regard to Civil Defence and to the provisions of the Act would involve significant amendments to the Act. The Commission is therefore recommending that the Act be reviewed and replaced by a new Act.

Scope of Civil Defence

1.102 The Law Commission is proposing that a War Emergencies Act should in future provide the authority for measures taken to protect the civilian population in time of war or comparable emergency (para 1.54). However, Civil Defence will continue to have responsibilities in this area. Appropriate provisions in a Civil Defence Act must continue to ensure that Civil Defence procedures encompass planning for a war emergency and that government departments, regional and territorial authorities and other "organisations" are committed to the planning process.

1.103 A civil defence emergency can arise only where the situation is one which cannot be dealt with by the police, fire service or another task-specific service. In other words the civil defence personnel and services

become available for a second tier response. The question arises as to the circumstances in which this response might be needed.

1.104 Natural and industrial disasters are covered by the present Civil Defence Act 1983. The Law Commission is proposing that Civil Defence should also have specific second tier responsibilities in respect of major accidents and disease in human beings, animals or plants.

1.105 The Civil Defence administration has taken the view that it is concerned only with the safety of members of the public and not with the protection of property. There are, however, instances where there is severe damage to property, without any direct danger to the public, in which there may be a need for civil defence resources, including the use of civil defence powers. Also, in many situations, widespread property damage, and consequential environmental impact, will compromise the public safety and welfare. For these reasons the Law Commission recommends that the definition of "Civil defence emergency" as it appears in the Civil Defence Act 1983 should be amended to include disaster events which cause or threaten to cause damage to property.

Other amendments

1.106 The Law Commission recommends the following amendments and additions to provisions in the Civil Defence Act 1983:

- The provisions in the Act relating to action by the Executive Council in a "national emergency" should be applied to the making of emergency regulations.
- There should be a provision designed to ensure that the government gives parliamentary time to a notice of motion for the revocation or amendment of an emergency regulation.
- Consideration should be given to the possibility of including a provision under which a specified number of members of Parliament can require the government to call the House of Representatives together to consider a civil defence emergency.
- As the Act stands, the power to declare a civil defence emergency can be exercised where it appears to the authority concerned that there is a civil defence emergency. The Law Commission's view is that the exercise of this power should be available only if the

relevant authority has reasonable cause to believe that a civil defence emergency has occurred or is likely to occur.

- The privative clauses attached to each provision authorising the declaration of a state of civil defence emergency should be repealed.
- The provisions concerning the right to compensation should be reviewed in light of the principles set out in Chapter V.

Civil Defence responsibilities of non-government enterprises

1.107 The need to involve a wide range of organisations in the planning of the response to a civil defence emergency is recognised in the provisions of the Civil Defence Act 1983. The Act places obligations on "[e]very department, organisation, local authority, regional council and territorial authority" to plan to continue its essential functions during a civil defence emergency, to undertake civil defence measures and to make adequate provision for rescue, first aid and relief of distress in premises under its control.

1.108 The question arises as to the responsibility of State-owned enterprises and private enterprises (some of which, as "departments", previously had those obligations) to plan for and respond to civil defence emergencies. As some of these agencies manage major resources or perform essential public functions, it is important that they assume civil defence responsibilities.

1.109 Ideally, decisions about the contributions of non-government enterprises to civil defence planning and response should be reached in agreement between Civil Defence and the enterprises concerned. However, it may not be possible to reach agreements which ensure that adequate civil defence measures are taken in an emergency or, importantly, that the enterprises concerned play a full role in civil defence planning. The Law Commission's view is that appropriate legislative steps should be taken to require non-government enterprises with civil defence responsibilities to make their services available in the planning for and the response to civil defence emergencies.

Disaster Recovery Co-ordinator

1.110 The procedure for the appointment of a Disaster Recovery Co-ordinator and the Co-ordinator's relationship with the Department of the Prime Minister and Cabinet needs to be clarified.

ECONOMIC EMERGENCIES (CHAPTER X)

1.111 A distinction is to be drawn between emergencies with a purely economic genesis and the economic consequences of other categories of emergency. The powers necessary to deal with the latter should be found in the sectoral legislation relating to the particular emergency.

1.112 The Law Commission does not examine "pure" economic emergencies in a substantive way in this Report. Our consideration of this area has revealed the elusive character of economic crises. It is difficult to pin-point the stage at which familiar economic phenomena reach crisis proportions. In many instances the best way to deal with an economic crisis is to proceed as if no crisis exists, "confidence" often being critical. Economic emergencies are therefore less open to analysis than other more concrete emergency situations.

1.113 The Treasury and the Reserve Bank took the view in discussions that there is no need for further powers to deal with economic emergencies, however they might be defined. A case can also be made for the view that, if special powers are needed, they are better provided by specific legislation than by conferring emergency powers under sectoral legislation of general application.

1.114 One exception may be the power to impose exchange control in the event of a foreign exchange crisis. The possible need for such a power was recognised. It is not one that can be conferred when the need arises by hastily enacted legislation. However, the Reserve Bank was of the view that such a power should not be included in the Reserve Bank Act 1989 on the basis that it would be inconsistent with the philosophy behind that Act.

1.115 The Law Commission notes that in several countries, which permit floating exchange rates for their currencies, the government has the power to fix the exchange rate or intervene in matters relating to foreign exchange. The Law Commission is making no recommendation on this point, but raises it so that the Government can further consult its economic advisers.

PRINCIPAL RECOMMENDATIONS

GENERAL PRINCIPLES

- A sectoral approach to emergency legislation should be followed: relevant empowering provisions should be included in separate statutes, each concerned with the area in which a particular emergency situation may arise (para 4.11).

- Emergency legislation should be in force in advance of an emergency occurring (paras 4.12-4.21).
- Legislation is the appropriate basis for emergency action and other sources of authority, such as the prerogative, should not be relied upon (para 4.53).
- Emergency legislation should be drafted in accordance with the standards and safeguards set out in Chapter V.

LEGISLATIVE AND RELATED ACTION

- A War Emergencies Act should be enacted. Under this Act the Governor-General in Council would be able to make regulations to deal with an emergency resulting from war or high-level armed conflict, a nuclear incident or a biological incident. This regulation-making power would be subject to limitations and the Act would contain safeguards against its possible abuse (paras 6.57-6.76, 6.81).
- The International Terrorism (Emergency Powers) Act 1987 should be repealed. Media coverage of terrorist incidents should, as previously, be governed by voluntary guidelines. The repeal of the Act should be co-ordinated with legislative action on any recommendations the Law Commission is to make on law enforcement powers that would be available in non-emergency (as well as emergency) situations (para 7.163).
- The Civil Defence Act 1983 should be reviewed and replaced by a new Act embodying recommendations made in this Report on the scope of civil defence responsibilities and other issues (para 9.80).
- The Constitution Act 1986 should be amended to make it clear that, if Parliament has met at a particular place in response to a summons, it can be adjourned, if necessary by the Speaker at the request of the Prime Minister, to another place as well as another time, without the need to prorogue Parliament (para 4.56, Appendix B para B22).
- Clause XII of the Letters Patent Constituting the Office of Governor-General should be amended to include High Court Judges, in order of seniority, amongst the persons who may be called upon as Administrator of the Government to perform the functions of the office of Governor-General (para 4.56, Appendix B para B22).

- The Standing Orders of the House of Representatives should be amended so that the Speaker may change the day to which the House is adjourned if satisfied that it is in the public interest to do so (para 4.56, Appendix B para B22).

MATTERS REQUIRING ATTENTION

- The proposed Biosecurity Bill and other legislation conferring emergency powers should be drafted in accordance with the standards and safeguards developed by the Law Commission in this Report (Chapter V and paras 8.6-8.47).
- Attention must be paid to the responsibility and authority for planning for, and responding to, hazardous substances emergencies and pollution incidents, particularly at the regional and territorial levels. Consideration also needs to be given to the role of Civil Defence in respect of those emergencies and incidents (paras 8.49-8.83).
- Consideration needs to be given to the future of the response powers in existing hazardous substances legislation if that legislation is repealed as a result of the establishment of the Hazards Control Commission (paras 8.62-8.74).
- The procedure for the appointment of a Disaster Recovery Co-ordinator and the Co-ordinator's channel of responsibility should be clarified (para 9.79).
- The Government should consult its advisers about the need for a power to impose exchange control in the event of a foreign exchange crisis (para 10.12).

MATTERS TO BE FURTHER CONSIDERED BY THE LAW COMMISSION

- The powers which the police may require to deal with a situation involving a threat to life or property need to be considered in a wider context than that of international terrorism. These powers will be considered in a review of law enforcement powers which the Law Commission is currently undertaking as part of its criminal procedure reference (paras 1.35-1.38).
- Provisions limiting or denying the liability of bodies and individuals exercising public power conferred by legislation will be the subject of detailed examination in the Law Commission's work on the Crown.

Part I

The Nature of Emergencies

Existing Emergency Legislation

Sources of Power in an Emergency

Powers : Standards and Safeguards

II

The Nature of Emergencies

2.1 The Law Commission's conclusion in its First Report, that there should not be a comprehensive statute to deal with "national emergencies" (para 1.2), has relieved the Commission of the need to attempt to define a "national emergency". But the parameters of the inquiry have to be set in keeping with the thrust of the terms of reference. This can be done, first, by discussing the nature of emergencies and identifying their characteristics.

WHAT IS AN EMERGENCY?

2.2 The word "emergency" has a number of connotations. Many types of emergency or accident are everyday occurrences. The Emergency Service numbers given in the opening pages of the telephone directory facilitate ready access to the services provided by ambulance, hospital, police, fire brigade, local authorities, the National Poisons and Hazardous Chemicals Information Centre and personal emergency services such as the Samaritans Service. Each of the agencies involved has skilled personnel who handle emergencies and accidents as a normal part of their daily activities. If legal powers are required in responding to any of these "everyday" emergencies, they will be found in statute, regulation or bylaw, or the common law.

2.3 These everyday emergencies are to be distinguished from events which involve, or might involve, serious and sometimes widespread risk of injury or harm to members of the public, or the destruction of, or serious damage to, property. There can be a severe earthquake, a major fire, a large scale riot, a suspected outbreak of an exotic disease, the escape of a hazardous substance, or a rail catastrophe. In the first place, what have been described as the "task-specific" organisations - such as the fire service, medical services, the police or agricultural officers - will be called upon. But others may become involved: regional and district governments; Civil Defence; government departments, State-owned enterprises and the private sector; and the armed forces. Also, voluntary organisations such as the Red Cross and Salvation Army will be providing their services.

2.4 Enrico L. Quarantelli, a leading United States authority on disaster research, has made the point that there is a difference in kind between an accident or minor emergency and an emergency in which demands are made on the wider resources of the community. He describes the latter situation as a "disaster" which

involves not just more, but something which is qualitatively different. This has to be considered when planning for disasters, training for disasters, operating under disastrous conditions, and evaluating group or organizational activity during such crises. An accident cannot be perceived as a little disaster, nor can a disaster be viewed as a big accident! ...

Even a relatively moderate size disaster will force dozens of unfamiliar local and extra-local organizations to work together on unfamiliar or new tasks that are a part of the community response network. (Quarantelli, Organizational Behaviour in Disasters and Implications for Disaster Planning (Disaster Research Centre, Ohio State University) 5, 6)

2.5 The response to a disaster will not only involve the realignment of organisations within the community. It will often require the grant of unusual or extraordinary powers to agencies or individuals. The exercise of these powers will involve restrictions on normal activities and other infringements of private rights and freedoms in the interests of the wider community. Freedom of movement may be restricted by the cordoning off of an emergency area or by an evacuation order, citizens may be required to assist, animals and private property may be destroyed, and property may be requisitioned.

"PUBLIC EMERGENCIES"

2.6 The frequency with which States making up the international community have established a "state of emergency", "public emergency", "national emergency", "state of siege" or "state of exception" has led to an extensive international literature. This literature accepts that there will be situations which call for the establishment of emergency regimes. It is focused on establishing international standards governing the criteria and procedures by which a state of emergency is to be established and the extent to which a government may justify derogation from internationally accepted human rights.

2Error! Bookmark not defined..7 **Error! Bookmark not defined.** Important points of reference are the international conventions concerned with the protection of human rights, particularly the International Covenant on Civil and Political Rights to which New Zealand is a party (NZTS 1978 No 19; AJHR 1979 A69; AJHR 1984-85 A

6) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953; Cmnd 8969).

2.8 The International Covenant recognises that States Parties can derogate from certain of the rights set out in the Covenant

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ... (Article 4)

2.9 Comparable language in Article 15 of the European Convention - "In time of war or other public emergency threatening the life of the nation" - has been considered by both the European Commission of Human Rights and the European Court of Human Rights. They have decided that if a public emergency is to justify derogation from rights in the Convention then:

- there must be an actual or imminent emergency;
- its effects must involve the whole nation;
- the continuance of the organised life of the community must be threatened;
- the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are inadequate. (The Greek Case (1969) 12 Yearbook of the European Convention on Human Rights, 72, para 153)

NATIONAL EMERGENCIES IN NEW ZEALAND

2.10 There are emergencies which can readily be identified as "public" or "national" emergencies. They would affect the security, safety or welfare of New Zealand or the New Zealand public as a whole: an armed attack on New Zealand; involvement in war or armed conflict requiring the deployment overseas of the New Zealand armed forces; a nuclear war or catastrophe; armed insurrection; an event, such as a major strike or a natural disaster, that deprives the New Zealand community of essential utilities or services; or an economic emergency such as a foreign exchange crisis.

2.11 There is a definition of "National emergency" in the Civil Defence Act 1983:

an emergency due to an actual or imminent attack on New Zealand by an enemy, or to any actual or imminent warlike act whether directed against New Zealand or not, whereby loss of life or injury or distress to persons or danger to the safety of the public is caused or threatened to be caused in New Zealand, or in any part of New Zealand. (s 2)

This definition is, however, of limited application, being concerned with the circumstances in which the Civil Defence Act can be invoked to protect the civil population in the event of armed hostilities (see Appendix F paras F13-F14). The definition does not include measures directed towards the conduct of those hostilities. Nor does it cover other events listed in para 2.10 as being readily identifiable national emergencies.

2.12 A local emergency, which does not itself pose a national threat, may have political or other implications that call for the involvement of the central government, for instance, a terrorist outrage. And other situations of regional or territorial origin may become emergencies of national concern because they are serious enough to require the diversion of national resources. This is recognised in the "Central Government Functions" listed under "Government Response" in the Ministry of Civil Defence's National Civil Defence Plan (Part 1, 2-3). Although a state of regional civil defence emergency was declared in the case of Cyclone Bola, central government was heavily involved.

AN EMERGENCY TRIGGER?

2.13 The International Law Association, drawing on the provisions of the international human rights conventions, the work of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, and a report of the International Commission of Jurists, has formulated the "Minimum Standards of Human Rights Norms in a State of Exception" (International Law Association, Report of the Sixty-First Conference held at Paris (London, 1985) 56-97). The Minimum Standards recognise that in order to justify the establishment of a public emergency there has to be a procedure for declaring a state of emergency that

- is clearly laid down and provides for a formal proclamation or notification, and
- involves the political organs of the State, ie, the legislature and the executive.

2.14 These two requirements relate to a "public emergency threatening the life of the nation". The sectoral approach adopted in this Report accepts that there is a range of situations of an emergency character,

many of which would not "threaten the life of the nation" but in which executive powers involving extraordinary constraints or interference with rights and freedoms may be justified.

2.15 There are in New Zealand sectoral emergencies which conform to the first of the Minimum Standards' requirements. That is, there is a formal step or "trigger" establishing a state of emergency. This step carries with it authorisation for the exercise of extraordinary powers. In some situations there will be a Proclamation or declaration of a state of emergency. A state of national emergency under the Civil Defence Act 1983 is established by a Proclamation by the Governor-General in Council. States of national, regional or local civil defence emergency involve a formal declaration at the national, regional or territorial level as the case may be (ss 46, 50-52). There are other sectoral emergencies in which there is no "trigger" establishing a state of emergency. No formalities are laid down for the Minister of Health to authorise a Medical Officer to exercise extensive powers to prevent an outbreak or spread of any infectious disease (Health Act 1956 s 70). See also the Fire Service Act 1975 s 28(3) (paras 3.70-3.74).

2.16 As to the second requirement - the involvement of the political organs of the State - a Proclamation or declaration of a state of emergency in New Zealand is an executive act, whether made at the political or the official level. There are a limited number of cases in which the executive act is subject to control or monitoring by the House of Representatives (see Civil Defence Act 1983 ss 49, 50(2), 79(7A); Defence Act 1990 s 9; and paras 5.95-5.104).

EMERGENCY AND DISASTER

2.17 The words "disaster" and "emergency" are frequently interchanged. This can be illustrated by an amendment made to the Civil Defence Act 1962 in 1968. The words "civil defence emergency" replaced the words "major disaster" wherever they appeared in the 1962 Act. Since the actual content of the definitions remained the same, there were no changes in the circumstances in which powers under the Act might be invoked (see Appendix F para F19). The Government explained the change on the ground that the term "emergency" was less emotive than "disaster" and might, for psychological reasons, make it easier for local authorities to make a declaration when it was called for. The Minister of Civil Defence, the Hon D C Seath, expressed the view that the new term "gives a more readily understandable meaning to the circumstances in which the civil defence organisation may be called into operation" (Rawlinson, "Organisation for Disaster: The Development of Civil Defence in New Zealand: 1959-1970" MA thesis, University of Canterbury, 1971, 123, 138; 357 NZPD 2062, 3 October 1968).

2.18 On the other hand, the description "disaster" can convey more precisely than does "emergency" the serious nature of the event involved. And it is significant that the New Zealand National Civil Defence Plan begins by stating that the Plan "is to set out the functions, responsibilities, priorities and procedures where a disaster is of sufficient magnitude that civil defence measures are needed." (Introduction, 1) The description "disaster" is used frequently in the Plan and in other publications of the Ministry of Civil Defence.

2.19 Although "emergency" is now in general use in New Zealand domestic law, "disaster" has a wide currency at the international level and in other national jurisdictions. There is a United Nations Disaster Relief Co-ordinator and, in the words of a publication issued by the Co-ordinator's office:

"Disaster" ... means not only the commonly perceived effects of sudden natural events: earthquakes, tropical storms, floods, volcanic eruptions, and so on, but also the effects of drought, crop failure as a result of blight or infestation, and other events which are slow to develop. "Disaster" is a term also used to describe the accidental damaging or destructive effects of man's normal activities. These include, but are not limited to, radiation accidents, oil spills, atmospheric contamination, and transport accidents. Finally, the deliberate acts of man - war, civil strife, and riot - will bring about conditions in which relief has to be provided to innocent sufferers and which will later call for rehabilitative and reconstruction measures. (Office of the United Nations Disaster Relief Co-ordinator, Disaster Prevention and Mitigation: A Compendium of Current Knowledge: Volume 11: Preparedness Aspects (New York, 1984) 1)

2.20 The United Nations General Assembly resolution of 11 December 1987 (A/RES/42/169) dealt with a much narrower range of disasters. It established the International Decade of Natural Disaster Reduction 1990-2000, being concerned only with "natural disasters, such as earthquakes, windstorms (cyclones, hurricanes, tornadoes, typhoons), tsunamis, floods, landslides, volcanic eruptions, wildfires and other calamities of natural origin".

2.21 The First Protocol Additional to the Geneva Conventions uses the term disaster in its definition of "civil defence":

"civil defence" means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. (Article 61, Fifth Schedule Geneva Conventions Act 1958)

"Disaster" here is regarded as including calamities not caused by hostilities, such as a tidal wave (natural disaster) or a cloud of gas escaping from a chemical factory (disaster caused by human error) (International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Martinus Nijhoff Publishers, Geneva, 1987) 717-721; and see Appendix F para F30).

2.22 Various classifications of disaster have been attempted. A New Zealand authority, Professor A J W Taylor, has distinguished natural, industrial and human disasters:

- natural disasters caused by profound disruption of the physical environment - earthquakes, cyclones, drought, endemic disease;
- industrial disasters arising from a serious disruption of the eco-system from the products, by-products, and waste from the manufacturing system - dam failures, chemical pollution, oil spills, radiation accidents; and
- human disasters arising from errors of judgment, deliberation, incompetence, negligence, and perversity whether personal, national, political, racial, sectarian or social - ecological irresponsibility, hijackings, sports crowd violence, terrorism, warfare (Disasters and Disaster Stress (AMS Press, New York, 1989) 9-15).

2.23 A distinction frequently made is between natural and "man-made" or human disasters. Industrial disasters are included in the latter category. However, there is often an interface between natural hazards and vulnerability arising from human intervention. This is exemplified by the impact of earthquakes on badly designed buildings, or the effect of storms on changes that have been made to the landscape. See the discussion of this issue in the *Report of the Commission of Inquiry Into the Abbotsford Landslip Disaster* AJHR 1980 H 7.

2.24 It follows that "emergency" and "disaster" are often interchangeable and in some sections of this Report it will be convenient to refer to "disasters" rather than to "emergencies". In the main, the distinction will be made between natural and industrial disasters.

THE PHASES OF AN EMERGENCY

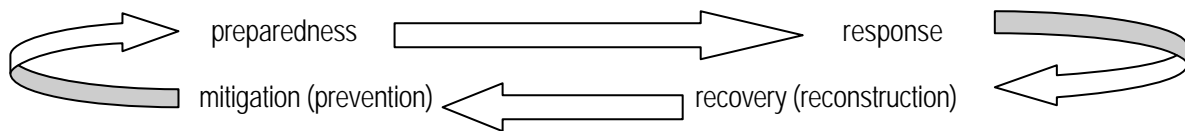
2.25 An emergency can pass through various phases. Thus steps may be taken to see that the emergency does not arise or that its effects are reduced: the mitigation phase. Plans may be made for dealing with an emergency should it arise: the preparedness phase. There will be a need to combat the immediate impact of the emergency: the response phase. And there is likely to be a need for further measures of assistance once the immediate danger is over: the recovery phase.

2.26 The United Nations Disaster Relief Co-ordinator distinguishes prevention - the measures designed to prevent natural phenomena from causing or resulting in disaster or other related emergency situations - from mitigation. Mitigation then comprises the measures spanning

the broad spectrum of disaster prevention and preparedness. Mitigation means reducing the actual or probable effects of an extreme hazard on man and his environment. Thus an emergency plan if properly executed can have a mitigating effect on a disaster just as the proper observance of building and land use regulations designed to avert disaster. Mitigation is, in effect, prevention to a degree. (Office of the United Nations Disaster Relief Co-ordinator, *Disaster Prevention and Mitigation: A*

In places in this Report we make a similar distinction, but generally we use mitigation to include prevention.

.27 Some writers list the mitigation or prevention phase after the recovery phase, as involving the steps required to prevent a repetition of an emergency. In practice, the different phases merge into one another. There is what can be described as "an emergency continuum". This can be conceptualised:



2.28 The following list of activities, illustrative of each phase of an emergency, is provided by Thomas E Drabek of the University of Denver. His activities are those "that may occur within each of the components of the overall disaster life cycle" (Professional Emergency Manager (University of Colorado, 1987) 24-26).

Mitigation	Hazard-vulnerability analysis
	Land-use planning
	Insurance
	Building codes
	Structural mitigations
	Public education (prevention and adoption of mitigative adjustments)
	Regulation of hazardous substances (transportation, storage, and disposal)

Preparedness	Disaster planning
	Warning systems
	Stockpiling food and medical supplies
	Training
	Public education (self-help)
Response	Evacuation
	Protective actions
	Mobilisation of emergency personnel and resources
	Search and rescue
	Emergency shelter
	Mass feeding
	Medical care
	Security within impact area
	Damage assessment and control
Recovery	Temporary housing
	Clean-up, repair and reconstruction
	Redevelopment loans
	Legal assistance and liability assessment
	Victim counselling
	Community planning

2.29 The frequency of events that fall within the category of "natural disaster" has meant that lists of illustrative activities apply more particularly to that category of emergency. Other lists might be prepared for other categories of emergency: war, civil disturbance, an industrial disaster, or the outbreak of an infectious human or animal disease. In each case the steps that are taken in respect of a particular phase will depend on an appreciation of the severity and frequency of the risk involved.

THE RESPONSE PHASE

2.30 The Law Commission is primarily concerned with the response phase of emergencies. It is during this phase that the need to deal urgently with the impact of the emergency may call for the use of extraordinary executive powers. If there is a possibility of the powers being required, it is important that there is in place a mechanism which makes them readily available in most if not all foreseeable circumstances, but includes safeguards against their abuse.

2.31 As in its First Report, the Law Commission is recommending in this Report a sectoral approach to the grant of emergency response powers, that is, the powers should be tailored to the needs of the particular emergency. In many cases this approach will mean that the response phase of an emergency will be an integral part of a co-ordinated approach to that emergency sector which takes account of all four phases of the emergency continuum - mitigation, preparedness, response and recovery. It follows that the extraordinary powers required in the response phase are likely to be included in an enactment along with other powers that may be required in the response phase and provisions that relate to other emergency phases. This is the case, for instance, with the provisions of the Animals Act 1967 and the Health Act 1956 (paras 3.49-3.59, 3.68-3.69).

EXECUTIVE POWERS IN EMERGENCIES

2.32 The assumption in the first two questions in the Law Commission's terms of reference for the present project (para 1.1) is that a response to a national emergency may call for the exercise of executive powers that involve some extraordinary constraint on or interference with the rights and freedoms of organisations or individuals. In the same way, the tailoring of response powers to the needs of a sectoral emergency will mean that these powers may constrain or interfere with rights and freedoms. But the question can arise as to whether the constraint or interference is, in the context of that sector, to be regarded as extraordinary. That is, are the powers involved extraordinary? The answer is that the circumstances will determine whether this is the case. It is easy enough to identify some powers that will be regarded as extraordinary whatever the circumstances - such as the conscription or detention of persons. But what of the power of a person in charge of a fire brigade to pull down a building to prevent the spread of a fire (Fire Services Act 1975 s28); or of an agriculture inspector to kill an animal suspected of being diseased (Animals Act 1967 s 34)? These are powers that involve interference with rights and freedoms, powers which the statutory officers concerned can exercise in the normal course of their duties but which in other circumstances would be regarded as extraordinary.

2.33 On this analysis it is apparent that there is a spectrum of executive powers. Where there is a grant of extraordinary powers to deal with an emergency, those powers are towards one end of the spectrum. The

difficulty is to determine at what point in the spectrum the powers required to deal with any particular emergency cease to be "extraordinary" and become "normal". In practice, the answer is likely to differ according to the emergency sector that is involved.

2.34 The point also needs to be made that, even where extraordinary response powers can be called upon, those powers will need to be exercised along with normal powers if there is to be an effective emergency response. As an English commentator has said:

The powers applicable on an everyday basis represent the context in which the special powers (the emergency powers) operate. It is often the inadequacy of those ordinary powers to deal with the threat that provides a justification for resort to special powers. (Bonner, Emergency Powers in Peacetime (Sweet and Maxwell, London, 1985) 7)

CHARACTERISTICS OF EMERGENCIES

2.35 Emergencies which in Quarantelli's words are "qualitatively different" (para 2.4) will have distinguishing characteristics. The presence of these characteristics, or some of them, in a particular situation may justify the availability of extraordinary powers to respond to that situation. A touchstone as to what some of these characteristics might be is provided by the definition of "national emergency" used by the Canadians in their Emergencies Act 1988:

a "national emergency" is an urgent and critical situation of a temporary nature that

- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
- (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada. (s 3)

2.36 The provisions of the Canadian Act should be understood in the light of the division of powers between the federal and provincial governments. In general, emergencies which are confined in scope to the territorial limits of a province fall under the exclusive jurisdiction of the province. The Act establishes four different emergency sectors - public welfare, public order, international and war - and the definition of "national emergency" is used to identify the circumstances in which each of these sectors, with its own distinct definition, becomes the responsibility of the federal government. Thus the above definition of "national emergency" does not on its own set out the circumstances in which there may be a grant of executive power. Nevertheless, the definition does suggest that an emergency justifying the availability of extraordinary powers may be characterised by its scale, urgency, temporary nature and the inadequacy of normal powers.

SCALE

2.37 An emergency is typically a grave situation that involves or may involve

- serious danger to the lives, health or safety of members of the New Zealand public,
- a serious threat to the security or territorial integrity of New Zealand, or
- destruction of or serious damage to property.

It will generally call for the commitment of extensive resources to combat the danger involved. This is reflected in a typical definition of a disaster - one that conforms to Quarantelli's analysis - as a damaging event that exceeds the capacity of locally mobilised resources to deal with it.

URGENCY

2.38 The immediacy and reality of the injury or damage associated with a particular situation is obviously an important element if extraordinary measures are to be justified. Nevertheless, a belief that an event is imminent or likely to occur, or that an attempt will be made to cause a particular event, may justify the taking of emergency measures. In other cases, mere suspicion will be recognised as a basis for taking emergency action - for instance, where the existence of a particular disease or pest is suspected.

2.39 An emergency may not occur suddenly. Lord Atkin has said in the House of Lords that "emergency" can be used to describe a state of things which is not the result of a sudden occurrence:

A condition of things causing a reasonable apprehension of the near approach of danger would I think, constitute an emergency. The gradual approach of a hostile invader might well at some time or other constitute an emergency. (Larchbank v British Petrol [1943] AC 299, 304 (HL))

.40 Professor Taylor has pointed out that the events giving rise to a disaster may range in duration from a few seconds (an earthquake) to a substantial period of time (a drought). He questions whether disasters, to be so called, have to be unexpected, sudden, widespread and utterly devastating:

It is conceivable that situations are no less catastrophic if they are predictable, insidious, restricted, debilitating, and less limited in their scale of destruction. Such for example would be the argument for regarding drought, endemic disease, famine, poverty, and unemployment as disasters. (Disaster and Disaster Stress, 10)

2.41 The element of urgency is, however, a factor that calls for the instant availability of response powers in legislation that is in place. If the emergency arises over a period there will have been an opportunity to pass specific legislation containing appropriate response powers with relevant safeguards. Similarly, where the emergency continues for some time, emergency response powers can be replaced by legislation adapted to the needs of the particular situation (see paras 4.22-4.24).

TEMPORARY NATURE

2.42 The Canadian definition of "national emergency" speaks of "an urgent and critical situation of a temporary nature" (emphasis added). Often a feature of an emergency will be its temporary character and usually a time limit is placed on the availability of response powers. But in practice an emergency may not be short-lived, particularly in a situation where the response and recovery phases merge into each other. Some of the emergency legislation introduced by New Zealand during World War II extended well into the post-war reconstruction period. On the other hand, an emergency is not expected to continue indefinitely.

THE INADEQUACY OF NORMAL MEASURES

2.43 An important element in the Canadian definition is the requirement that the situation "cannot be effectively dealt with under any other law of Canada." As has been mentioned, the Canadian legislation is directed to the assumption of powers by the federal authorities in matters normally dealt with by the provinces. This is an illustration of the broader proposition that inability to deal with a situation by the normal means is an important characteristic of an emergency.

2.44 There are examples in the New Zealand statute book of situations where extraordinary powers are conferred, or the category of persons entitled to exercise ordinary powers is widened, on the explicit ground that the normal range of powers is inadequate in the circumstances or that the situation exceeds the capacity of those initially responsible for responding to the emergency.

- A civil defence emergency can be declared only where a situation cannot be dealt with by the police, fire or other services without the adoption of civil defence measures (Civil Defence Act 1983 s 2; and see paras 9.11-9.12).
- The armed forces may be authorised to assist the police to maintain law and order only where "the emergency cannot be dealt with by the Police without the assistance of members of the Armed Forces" (Defence Act 1990 s 9(4)).

SAFEGUARDS

2.45 The exercise of extraordinary powers is likely to involve restrictions on normal activities and other infringements of private rights and freedoms. It follows that legislation conferring extraordinary powers should conform to recognised standards and principles and include appropriate safeguards. These are discussed in Chapter V. Legislative Change: Guidelines on Process and Content (Department of Justice, Wellington, August 1987), the Report by the Legislation Advisory Committee which was endorsed by Cabinet, discusses the safeguards of which account should be taken when drafting legislation conferring public powers. The Committee recognises that safeguards must be looked at in the context of the particular powers that are being conferred. This principle must apply whether or not those powers are to be regarded as extraordinary in the context of a particular emergency situation.

INVOLVEMENT OF CENTRAL GOVERNMENT

2.46 In New Zealand it is the central government that has the primary responsibility for the security, safety and welfare of its citizens, and therefore for their protection against the threat of a major emergency or disaster. This is to be contrasted with the position in federal states such as Canada, the United States and Australia where constitutional responsibilities for emergencies will be shared. The federal government may have primary responsibilities in areas such as defence, but only residual responsibilities in other areas such as natural disaster response and the maintenance of public order.

2.47 A corollary to this primary responsibility of central government in New Zealand is its overall concern with each phase of the emergency continuum. Policy guidelines must be established and these may need to be supported by appropriate national legislation. Thus prevention and mitigation can involve legislation and regulatory measures, for instance in the areas of land use, urban planning and building regulations. Preparedness plans will include the conferment of emergency powers that can be called upon in the response phase, and provision for the recovery phase, involving relief, rehabilitation and reconstruction. The Government will determine, with the support of legislation, the level of government - central, regional or territorial - at which responsibility will lie for activities within each emergency phase, and whether responsibilities are to be allocated to other agencies - such as the Earthquake and War Damage Commission. The legislation will also confer on the relevant authorities the powers required to carry out their responsibilities.

2.48 In emergencies of any significance calls will be made on resources that are at the command of central government. The Law Commission's First Report illustrated the extent to which the armed forces have a role to play in the provision of emergency services. The technological and other resources of government ministries and departments are freely available, while the Civil Defence Act 1983 s 8 charges the Director of Civil Defence with the co-ordination and direction of national resources - provided by departments, organisations, local authorities, and other persons - for civil defence purposes (see also ss 43-45).

2.49 The central government's primary responsibility for the security, safety and welfare of its citizens means that whatever delegation of specific responsibility for emergencies or disasters may take place, the ultimate responsibility is that of central government. As was said in the Ministry for the Environment's People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform in referring to difficulties that individual communities might face in dealing with natural hazards:

Central government is likely to remain involved as the insurer of last resort to communities. ((Ministry for the Environment, Wellington, December 1988) 48)

III

Existing Emergency Legislation

POWERS IN THE RESPONSE PHASE

3.1 This chapter is concerned with existing New Zealand legislation containing provisions for emergency response. First, existing legislation and treaty obligations relating to the five categories of emergency dealt with in Part II will be examined. The categories are:

- **War and other armed conflicts**
- **Serious civil disturbances**
- **Public welfare emergencies**
- **Civil defence**
- **Economic emergencies.**

Second, the chapter will introduce Appendix A which contains a summary of emergency response powers in New Zealand legislation. The chapter concludes with a classification of the types of powers involved.

3.2 Treaty provisions may be relevant in two ways. They may provide a recognition by the international community that emergencies can justify the existence and exercise of extraordinary powers, and they may place limits on State power and protect important rights.

WAR AND OTHER ARMED CONFLICTS

3.3 The Law Commission's First Report identified two emergency sectors as falling under this heading: war emergencies, and low and medium-level contingencies. Although a discussion of war emergencies was left for this Report, the First Report concluded:

- Any legislative action required in contemplation of a war emergency would not involve amendments to the Defence Act 1971 or inclusion in a new Defence Act (paras 45-46).
- The low and medium-level contingencies that were the focus of New Zealand's defence policy (Defence of New Zealand: Review of Defence Policy 1987 AJHR 1986-87 G 4A) were unlikely to call for the exercise of wide emergency powers. There were, nevertheless, a number of specific powers that might be required in those contingencies that should be included in the Defence Bill then before the House of Representatives. (These powers now appear in the Defence Act 1990 - see paras 1.3, 3.5 and 6.14.)

DEFENCE ACT 1990

3.4 The Defence Act 1990 provides for the establishment, control and activities of the New Zealand Defence Force which embodies the armed forces of New Zealand. Traditionally the Crown has the prerogative power exercisable on the advice of the government of the day to deploy the armed forces as it thinks fit, whether in time of war or peace, but Parliamentary authority must be obtained for the raising and maintaining of a standing army in peacetime (First Report, paras 83-102). This latter principle is reflected in the provisions of s 5 of the 1990 Act. The government is therefore authorised to raise and maintain armed forces for named purposes:

- (a) The defence of New Zealand, and of any area for the defence of which New Zealand is responsible under any Act:
- (b) The protection of the interests of New Zealand, whether in New Zealand or elsewhere:
- (c) The contribution of forces under collective security treaties, agreements, or arrangements:
- (d) The contribution of forces to, or for any of the purposes of, the United Nations, or in association with other organisations or States and in accordance with the principles of the Charter of the United Nations:
- (e) The provision of assistance to the civil power either in New Zealand or elsewhere in time of emergency:
- (f) The provision of any public service.

3.5 The corresponding provision in the Defence Act 1971 was complemented by provisions setting out the liability for and duration of service of members of the regular, territorial and reserve forces "[i]n time of war or other like emergency". These provisions reappear in the Defence Act 1990 accompanied by further provisions setting out the liability for service of those forces "[i]n the event of an actual or imminent emergency involving the deployment of members of the Armed Forces outside New Zealand" (ss 38-40; see also s 10 (power to requisition), ss 41-43 and paras 3.41-3.44). As to the adequacy of these provisions in the event of the deployment of the armed forces under the strategy of "Self-Reliance in Partnership" developed in The Defence of New Zealand 1991: A Policy Paper (GP Print, 1991), see paras 6.12-6.15.

NATIONAL EMERGENCIES UNDER THE CIVIL DEFENCE ACT 1983

3.6 The Civil Defence Act 1983 authorises the declaration of a state of national emergency (ss 46-49). The relevant provisions can be invoked if measures are necessary to protect the civil population against injury in the event of armed hostilities or some warlike act. In enacting these provisions in the Civil Defence Act 1983 Parliament had particularly in mind the hazards to the civilian population that might result from the outbreak of a nuclear war. On the other hand, they do not authorise the taking of measures directed towards the actual conduct of hostilities (paras 2.11, 6.51-6.56, 9.6-9.9 and Appendix F).

UNITED NATIONS ACT 1946

3.7 New Zealand has taken an active interest in international measures aimed at preventing the outbreak of war or armed hostilities. This interest is reflected in s 5(c) and (d) of the Defence Act 1990 (see para 3.4); in New Zealand participation in United Nations peacekeeping operations such as the UN-Iran-Iraq Military Observer Group and the UN Transition Group in Namibia; and in the New Zealand response to Security Council resolutions arising out of the Iraqi invasion of Kuwait.

3.8 As one of its peacekeeping procedures, the United Nations Security Council can call upon members of the United Nations to apply measures not involving the use of armed force:

These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.
(Article 41, UN Charter)

The United Nations Act 1946 gives a New Zealand government the authority to impose sanctions in response to a Security Council resolution under Article 41. The Governor-General in Council may "make all such regulations as appear to him to be necessary or expedient for enabling those measures to be effectively applied." Regulations are to be laid before Parliament "as soon as may be after they are made." (s 2)

3.9 The United Nations Act 1946 was invoked following the United Nations decision to impose sanctions on Iraq following Iraq's invasion of Kuwait. The United Nations Sanctions (Iraq and Kuwait) Regulations 1990 (SR 1990/198) prohibited imports and exports from or to Iraq or Kuwait. As an interim measure, pending the passage of a Security Council resolution, the New Zealand Government made the Customs Import Prohibition (Iraq and Kuwait) Order 1990 under s 48 of the Customs Act 1966 which gives the Governor-General in Council a wide power to prohibit imports (SR 1990/190; see also SR 1990/199). Prohibition of exports to Iraq and Kuwait might also have been effected under the Export Prohibition Regulations 1953 (SR 1953/179) made under s 70 of the

Customs Act 1966 and requiring the permission in writing of the Minister of Customs for the exportation of goods (reg 2).

GENEVA CONVENTIONS

3.10 The four Geneva Conventions of 1949, along with the two Additional Protocols of 1977, impose important limits on the conduct of States and other parties who are engaged in war and armed conflict including "armed conflict not of an international character". These humanitarian rules recognise that armed conflict involves lawful acts of combat which kill and destroy. At the same time they place limits on those acts by moderating some actions on the battlefield and especially by protecting those not immediately involved in the combat. The rules are to be enforced by internal military discipline, by penal sanctions imposed by States Parties for "grave breaches" and through international machinery. New Zealand measures to give effect to these obligations include the Geneva Conventions Act 1958 as amended in 1987 (the texts of the Conventions and Protocols are scheduled to this legislation; see paras 6.5, 6.41-6.42 and Appendix F paras F30-F32).

3.11 In addition to the Geneva Conventions, there is a body of treaties and related customary international law which places limits on the use, testing, manufacture and deployment of certain weapons. New Zealand is a party to the following:

- Protocol for the prohibition of the use in War of asphyxiating, poisonous or other Gases, and of bacteriological methods of Warfare, 17 June 1925, Geneva UKTS 24 (1930);
- Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, London/Washington/Moscow (NZTS 1963 No 20; AJHR 1963 A 28);
- Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, London/Moscow/Washington (NZTS 1969 No 7; AJHR 1969 A 16);
- Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil thereof, 11 February 1971, London/Moscow/Washington (NZTS 1971 No 8; AJHR 1972 A 12);
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons, and their Destruction, 10 April 1972, London/Moscow/Washington (NZTS 1972 No 14; AJHR 1975 A 31 (1972));

- **South Pacific Nuclear Free Zone Treaty, 6 August 1985, Rarotonga (NZTS 1986 No 7; AJHR 1986-87 A 45).**

The texts of each of the instruments, other than the Gas Protocol of 1925, are reproduced in a schedule to the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987.

3.12 There are other international obligations and procedures of general application, such as those under the International Covenant on Civil and Political Rights (paras 2.7-2.8), which are concerned with the protection of fundamental human rights and can have a bearing on the conduct of States involved in armed conflict. Relevant aspects of these obligations are considered in Chapter V (paras 5.13-5.16, 5.127-5.135).

INTERNATIONAL OBLIGATIONS IN TIME OF EMERGENCY

3.13 International law recognises that general legal obligations may be relaxed in times of great emergency, including armed conflict. For instance, a State might be able to plead a fundamental change of circumstances, self-defence, force majeure or necessity, or the need to take otherwise unlawful action as a reprisal.

3.14 Two conventions which make specific provision for emergencies are the International Covenant and the Forced Labour Convention (28 June 1930, Geneva, ILO 29 (39 UNTS 55)). The International Covenant allows derogation from certain of its provisions "[in] time of public emergency which threatens the life of the nation" (Article 4, see para 5.14). Under the Forced Labour Convention forced labour does not include any work exacted in cases of emergency (Article 2(d)). On the other hand, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UK Misc 12 (1985), implemented in New Zealand by the Crimes of Torture Act 1989) states:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification of torture. (Article 2(2))

3.15 The Conventions listed in para 3.11, with the exception of the 1925 Gas Protocol, deal with the emergency issue by providing a right of withdrawal. Although each convention states its prohibitions in absolute terms, a party may withdraw if it decides that extraordinary events, related to the subject matter of the convention, have jeopardised its supreme interests. Many parties to the 1925 Gas Protocol have entered a reservation to the effect that they will not be bound in respect of an enemy who does not respect the convention. New Zealand withdrew its reservation in January 1989.

SERIOUS CIVIL DISTURBANCES

3.16 There is a wide range of situations in which the police may be called upon to act in carrying out their duties to prevent crime, keep the peace, and protect life and property. Thus they may be concerned with an isolated incident of disorderly behaviour, a hostage or other situation calling for the involvement of an armed offenders' squad, a gang confrontation, widespread public disorder, or actions threatening the security of the State such as treason, sabotage or terrorism.

3.17 The Summary Offences Act 1981 and the Crimes Act 1961 provide for offences of varying seriousness for which those involved in these situations can be prosecuted: disorderly behaviour, disorderly assembly, unlawful assembly, riot, assault, murder, sabotage and offences coming under the head of criminal damage, such as arson and wrecking. These provisions are amplified by others dealing with conspiracy, aiding and abetting, and attempt. There are also offences under other legislation, such as the Explosives Act 1957 and the Arms Act 1983, which may be relevant (and see paras 3.24-3.26).

3.18 Of particular relevance in the emergency context are the powers that are available to the police to deal with situations with which they are confronted. The police are able to exercise a variety of powers which are available at common law and under statute. Police powers are examined in some detail in Chapter VII (paras 7.38-7.49, 7.66-7.73, 7.94-7.139), but there are a number of statutory provisions to which attention can be drawn at this stage. In the main, these provisions are concerned with the threat posed by terrorist activity.

INTERNATIONAL TERRORISM

3.19 An increase in the incidence of terrorism has provoked a number of initiatives at both the international and national levels aimed at countering this development.

3.20 United Nations initiatives have met with limited success. In particular, there has been difficulty in arriving at a generally accepted definition of terrorism (see para 7.16). Acts which are for some unacceptable acts of terrorism are for others justifiable acts taken in the cause of self-determination or national liberation. As a corollary, there has been debate whether elimination of the causes of terrorism should precede measures to restrain terrorism. The measures concluded have either been regional conventions (in Europe and the Americas) or conventions focused on particular offences.

3.21 States which have not been able to agree on a definition of terrorism have been able to agree that specific categories of criminal acts constitute unacceptable behaviour. As a result, a number of the forms in which terrorist activity is manifested - hijacking, offences in relation to aircraft, attacks on diplomats and hostage-taking - have been given the status of international offences by their inclusion in a series of conventions.

3.22 The relevant conventions to which New Zealand is a party are:

- Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, Tokyo (NZTS 1974 No 6; AJHR 1975 A 42);
- Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, The Hague (NZTS 1974 No 1; AJHR 1975 A 14 (1974));
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, Montreal (NZTS 1974 No 5; AJHR 1975 A 41);
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, New York (1035 UNTS 167);
- International Convention Against the Taking of Hostages, 17 December 1979, New York (UKTS 81 (1983)).

3.23 The first three conventions are implemented in New Zealand by the Aviation Crimes Act 1972, and the latter two by the Crimes (Internationally Protected Persons and Hostages) Act 1980. New Zealand has also signed but not ratified the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, with Final Act, Rome, 10 March 1988.

3.24 The conventions are based on the principle "prosecute or extradite"; that is, the country in which an offender is detained must either accept the onus of trying that offender or extradite the offender. The Aviation Crimes Act 1972 and the Crimes (Internationally Protected Persons and Hostages) Act 1980 contain provisions relating to jurisdiction and extradition which give effect to that principle. Under these provisions:

- New crimes in respect of acts of violence whether committed inside or outside New Zealand are created: hijacking, other offences relating to aircraft, and hostage-taking. (A New Zealand citizen, present in New Zealand, who has taken a New Zealand citizen hostage in New Zealand, cannot be convicted of the crime of hostage-taking.)
- Acts which would be crimes if committed in New Zealand are crimes at New Zealand law if committed on board an aircraft in flight outside New Zealand in connection with the crime of hijacking.
- Certain acts which would be crimes if committed in New Zealand are crimes at New Zealand law, whether committed in or outside New Zealand, if directed against an internationally protected person or the person's premises or vehicle. Threats to commit such acts are also crimes. ("Internationally protected persons" include heads of State,

heads of government, and representatives of States and intergovernmental organisations who are entitled to diplomatic protection.)

- In respect of the new crimes created and the crimes against internationally protected persons:
 - The crimes are extraditable offences under the Extradition Act 1965 and are deemed to be included in extradition treaties between New Zealand and countries which are also parties to the relevant conventions.
 - For the purpose of the surrender of a person under either the Extradition Act 1965 or the Fugitive Offenders Act 1881 (UK) (which is still part of New Zealand law although it has been repealed and replaced in the United Kingdom) the proscribed act is deemed to have been committed within the jurisdiction of the country seeking surrender, even if it was committed outside the territory of that country, if
 - (i.) the act is one for which the person whose surrender is being sought could be tried and punished in the country seeking surrender; and
 - (ii.) the country is a party to the applicable convention.

3.25 The Aviation Crimes Act 1972 also contains provisions allowing for the search of aircraft passengers, their baggage and cargo (ss 12, 13). Further, aircraft commanders are authorised to take reasonable measures, including restraint of the person, to protect the safety of their aircraft or persons or property on board, or to maintain good order and discipline on board the aircraft (s 15). They may search any person or baggage on board the aircraft if they have reasonable grounds to suspect that a crime against the Act has been, is being or is likely to be committed (s 17).

3.26 The Crimes (Internationally Protected Persons and Hostages) Act 1980 contains provisions, based on humanitarian considerations, by which a person otherwise subject to surrender under the Act may not be surrendered if certain conditions exist. For example, accused persons are not to be surrendered if it appears that surrender is sought for the purpose of punishing them on account of their race, ethnic origin, religion, nationality, or political opinions (s 12).

3.27 Difficulties can arise under the conventions in cases where an offender is seeking asylum, for instance, on the basis that the offender's actions form part of an act of self-determination. This had led some States to decide not to sign the conventions. There are no mechanisms under the conventions for sanctioning States which do not fulfil their obligations.

TERRORISM IN NEW ZEALAND

3.28 Two further statutes contain provisions that are specifically aimed at countering terrorism in New Zealand: the Immigration Act 1987 and the New Zealand Security Intelligence Service Act 1969.

Immigration Act 1987

3.29 The Immigration Act 1987 contains a number of provisions which can be used to avert the possibility of terrorist acts by foreign terrorists in New Zealand. Persons who are not New Zealand citizens require a permit to enter New Zealand. With limited exceptions, a decision on the grant of a permit is discretionary and unappealable (ss 8, 9). (Citizens of the Commonwealth of Australia are exempt from the permit requirement: Immigration Regulations 1987 (SR 1987/301).) Under s 7(1) an entry permit is not to be granted (nor shall an exemption apply) to

- persons who the Minister of Immigration has reason to believe have been involved or are likely to become involved in an act of terrorism in New Zealand; or
- persons who have been involved in acts of terrorism outside New Zealand if, in the opinion of the Minister, their presence in New Zealand constitutes a threat to public safety.

3.30 The Immigration Act 1987 provides no statutory rules or guidelines for the detention or questioning of arrivals. In the majority of cases entry would be denied only to a suspected terrorist whose intention to enter the country had been brought to the attention of the police and the immigration authorities by intelligence before arrival. On arrival, the suspected terrorist would be denied a permit and would then be interrogated. Then the decision to deny a permit would be affirmed or reversed. If a permit is refused, passengers can be detained until arrangements are made for their departure (s 128).

3.31 An Immigration Amendment Act has recently come into force. Among the changes it contains are procedures for the detention of persons about whom a decision to grant a permit cannot be made immediately because their status under s 7(1) of the Act cannot be immediately ascertained. (Section 128 was amended and new ss 128A, 128B were inserted.)

3.32 Section 128B applies if:

- (a) An immigration officer or any member of the Police has reason to suspect that the person may be a person to whom section 7(1) of this Act applies; or

- (b) The person has no appropriate documentation for immigration purposes, or any such documentation held by the person appears to be false,-

and a decision as to whether or not to grant that person a permit has not been made because the person's status under section 7(1) of this Act cannot be immediately ascertained.

3.33 Members of the police have the power to detain and place in custody a person to whom s 128B applies, while that person's status in terms of s 7(1) is being investigated. If

- a determination is made that s 7(1) applies to the person, or
- the person requests removal from New Zealand

then the person can be retained in custody according to the provisions of s 128 of the Act until departure from New Zealand is arranged.

3.34 The Immigration Act 1987 contains elaborate provisions relating to the "Deportation of Persons Threatening National Security, and Suspected Terrorists" (Part III). Under s 72 the Governor-General may, by Order in Council, order the deportation of any person (not being a New Zealand citizen) if the Minister of Immigration certifies that the continued presence of that person in New Zealand constitutes a threat to national security. Under s 73 the Minister may order the deportation of any person where the Minister has reason to believe that person has been involved or is likely to become involved in an act of terrorism in New Zealand. This provision also applies to persons who have been involved in acts of terrorism outside New Zealand if, in the opinion of the Minister, their presence in New Zealand constitutes a threat to public safety.

3.35 The police can arrest any person who they believe on reasonable grounds falls within s 73. That person can be detained pending the Minister's decision on whether a deportation order should be made, but must be brought before a District Court Judge as soon as possible. In no case is the arrested person to be detained for more than 48 hours unless the Judge issues a warrant of commitment (ss 75, 79).

New Zealand Security Intelligence Service Act 1969

3.36 Under s 4A of the New Zealand Security Intelligence Service Act 1969, the Minister in charge of the Service may issue a warrant authorising the interception or seizure of communications if satisfied that this is necessary for detecting activities prejudicial to security, or for gathering foreign information essential to security. Security includes the protection of New Zealand from acts of espionage, sabotage, terrorism and subversion.

However, it is not the function of the service to enforce measures of security - that is the responsibility of the police (see further paras 7.31-7.36).

EMERGENCY PROVISIONS

3.37 Until 1987, the possibility that the police might have insufficient powers or insufficient resources to deal effectively with an outbreak of public disorder or a terrorist attack could have been met by the provisions of the Public Safety Conservation Act 1932.

3.38 That Act authorised the making of a Proclamation of Emergency in circumstances in which the "public safety or public order is or is likely to be imperilled". (The Act could also be invoked in other circumstances. It provides an example of a general emergency statute.) A Proclamation of Emergency carried with it a wide regulation-making authority that could be used both to supplement police resources by calling on other services, in particular the armed forces, and to provide the police with additional powers to deal with the emergency.

3.39 The Act contained a further provision that, in a public emergency where the other provisions of the Act could not be put into effect immediately due to the suddenness of the occurrence or some other cause, the senior police officer in the locality could (until such time as an emergency was proclaimed) take action to preserve life, protect property and maintain order (s 4).

3.40 The repeal in 1987 of the Public Safety Conservation Act 1932 was accompanied by

- amendments to the Defence Act 1971 (now incorporated in the Defence Act 1990 s 9(4) and (8)) aimed at ensuring that the armed forces can be called upon to assist the police if necessary in a situation where a criminal act poses a serious threat to life or property, and
- the enactment of the International Terrorism (Emergency Powers) Act 1987 under which Ministers of the Crown can authorise the exercise by the police of certain powers in the event of an international terrorist emergency.

Defence Act 1990

3.41 The government can raise and maintain armed forces to assist the civil power in time of emergency and to provide "any public service" (Defence Act 1990 s 5(e) and (f); see para 3.4). But the Crown's prerogative power to deploy the armed forces for these purposes is governed by s 9 of the Defence Act 1990. The section imposes limitations on the use of the armed forces to provide a public service in connection with an industrial dispute (s 9(2), (7) and (8)). Section 9(4) sets out the circumstances in which the Prime Minister can authorise the deployment of the armed forces to assist the police in the maintenance of law and order (see para 7.5).

3.42 Section 9(5) recognises the primary responsibility of the civil power for the maintenance of law and order by stating that the armed forces are to "act at the request of the member of the Police who is in charge of the operations". The armed forces may exercise powers that are available to members of the police (s 9(6)), but the police are given no additional powers to deal with the emergency and must rely on those that are generally available

to them. Compare the position under the International Terrorism (Emergency Powers) Act 1987 s 12 where armed forces assisting the police may exercise emergency powers under the Act at the request of a member of the police.

3.43 Where the armed forces have been authorised to provide a public service in connection with an industrial dispute or to assist the police under s 9, the House of Representatives is to be informed. The authority lapses after 14 days unless it is extended by resolution of the House. If Parliament has been dissolved or has expired the Governor-General in Council can extend the authority.

3.44 The use of the armed forces to assist the police in the maintenance of law and order is to be distinguished from situations where the armed forces merely provide logistic and administrative support to the police. In the latter instance the armed forces are providing a public service (see s 9(1) and First Report, paras 143-150).

International Terrorism (Emergency Powers) Act 1987

3.45 The repeal of the Public Safety Conservation Act 1932 and the passage of the International Terrorism (Emergency Powers) Act 1987 means that an international terrorist emergency under the Act is now the only public order situation in which there is provision in an emergency to supplement the normal statutory and common law powers of the police with further powers. Under the Act, a meeting of three Ministers of the Crown can, in the event of an international terrorist emergency, authorise the exercise by the police of the emergency powers set out in the Act. (The definition of an "International terrorist emergency" is set out in para 7.6. For a detailed examination of provisions of the International Terrorism (Emergency Powers) Act 1987 see paras 7.74-7.163.)

PUBLIC WELFARE EMERGENCIES

3.46 The State involves itself in a wide range of economic and social activities which call for the exercise of public power, sometimes in emergencies. These situations, which can conveniently be classified under the omnibus heading of "public welfare emergencies", are reflected in the table of emergency powers appearing in Appendix A. Most sectors of State responsibility are represented, including agriculture and fisheries, civil aviation, commerce, conservation, customs, education, energy, the fire service, health, local government, the postal service, public works, shipping, and social welfare. Although Appendix A is a table of emergency response powers, many of the statutes cited contain provisions dealing with other phases of the emergency continuum: mitigation, preparedness and perhaps recovery.

APPENDIX A

3.47 In preparing the table in Appendix A the Law Commission faced the issue to which attention has been drawn in Chapter II. There is a spectrum of public powers. In any particular sectoral area it may be difficult to determine the point at which a power ceases to be "normal" and becomes "extraordinary". It may or may not be helpful that a power is described in legislation as an "emergency" power. In many cases it has been a matter of judgment whether a power should be included in the table. In making this judgment the Commission has had regard to the extent to which a power would become available for use in response to situations that have the emergency characteristics discussed in Chapter II. The tendency has been to err on the side of inclusion.

3.48 This Report cannot attempt to examine critically each of the emergency sectors that can be said to fall under the head of "public welfare emergencies". Sectoral legislation relating to agriculture, health and the fire service does, however, illustrate the difficulties that arise in classifying emergency powers. The Resource Management Act 1991 establishes a new regime for the management of pollution and hazardous substances. And the Civil Aviation Act 1990 contains provisions relating to the making of ordinary rules and emergency rules that may be thought to provide a precedent for the inclusion of similar provisions in other sectoral legislation.

ANIMALS ACT 1967

3.49 The Animals Act 1967, the Plants Act 1970, the Apiaries Act 1969, the Agriculture Pests Destruction Act 1967 and the Noxious Plants Act 1978, which fall within the responsibilities of Ministry of Agriculture and Fisheries, are each listed in Appendix A as containing emergency response provisions. A more detailed examination of the provisions of the Animals Act 1967 is called for because they raise questions, some of which are common to all five MAF statutes, as to the nature of emergency powers.

Importation

3.50 Part II of the Animals Act 1967 contains prohibitions and controls over the importation of animals, animal products, organisms, etc, aimed at the prevention of the introduction of diseases into New Zealand. The controls include a requirement that no person arriving in New Zealand by ship or aircraft is to leave the ship, nor is any animal, baggage, etc, to be removed without the permission of an Inspector (ss 4 -22).

Control of animal diseases

3.51 Control of animal diseases under the Animals Act 1967 (and regulations made under the Act) can be effected at five levels by

- **general powers given to Inspectors,**
- **a declaration of an infected place by an Inspector,**
- **a declaration of an infected area by a Chief Veterinary Officer**

- a declaration of a stock control area by the Director-General of Agriculture and Fisheries, and
- a Proclamation of a state of animal disease emergency by the Governor-General

The powers given in the Act are complemented by provisions in the Stock Diseases Regulations 1937 (Reprint) (SR 1967/174) and the Foot and Mouth Disease Control Regulations 1966 (SR 1966/133). These regulations were originally made under the Stock Act 1908 and they remain in force under the wide regulation-making power in s 25 of the Animals Act 1967.

3.52 Inspectors have a general power to enter and inspect any conveyance, land or premises for the purpose of inspecting any animal, animal product, fittings, fodder, etc. The Inspectors may direct

- the owner of any animal, animal product, fitting, fodder, etc, to take measures such as placing in quarantine, disinfecting, treating and cleaning;
- the owner of "any diseased or infected animal or animals, or any animal or animals suspected of being diseased or infected" to take measures as to their treatment and "such other measures" in relation to the animal or animals or any animal product, fitting, fodder, etc, as "in the opinion of the Inspector are necessary to eradicate or check the spread of the disease" (s 6).

3.53 For the purposes of their control animal diseases are divided into two categories listed separately in the first and second schedules to the Animals Act 1967 (s 24). First Schedule diseases are rapidly spreading, economically damaging, exotic diseases. Other exotic diseases of less economic concern (such as anthrax, rabies and headwater) are in the second schedule together with a few endemic diseases. The full range of the controls referred to above is only to be used in the case of first schedule diseases.

3.54 Declarations that an area of land is an infected place, an infected area or a stock control area enable controls to be exercised on the movement of stock, and in some cases the movement of persons, in or out of the area concerned (s 29; Stock Diseases Regulations 1937 reg 3; and see paras 8.20-8.22).

3.55 Also, the status of an area will determine the powers that an Inspector or a Chief Veterinary Officer may exercise. Under the Stock Diseases Regulations 1937 an Inspector is given powers in respect of the destruction of stock, poultry, farm produce, dwellings and chattels and of the movement of stock (reg 2). Under the

Foot and Mouth Disease Control Regulations 1966 a number of prohibitions and restraints come into operation on the declaration of an infected place. In the main these are concerned with the movement of animals, persons, produce, or chattels in and out of the infected place, the wearing of protective clothing, and the cleansing and disinfection of clothing, land, fixtures or chattels. An Inspector may in most instances provide by permit or licence for dispensations from the prohibitions and requirements (reg 6). An Inspector may cause an animal to be slaughtered when a veterinary surgeon agrees that the animal is affected or could be affected with foot and mouth disease (reg 9); and may require land, fixtures and chattels suspected of contamination to be cleaned and disinfected (reg 10).

3.56 The Chief Veterinary Officer, having declared an infected area, may impose controls on the movement of animals, animal products, fodder, etc, in respect of that area, establish road blocks, and empower police or traffic officers to stop and search vehicles (s 29). The Foot and Mouth Disease Control Regulations 1966 confer other powers on a "Chief Inspector" and impose additional prohibitions and requirements that operate in respect of an infected area (regs 12-16).

3.57 The fourth level of control (para 3.51) involves the Proclamation of a state of animal disease emergency in the whole or part of New Zealand:

If at any time it appears to the Governor-General that an outbreak of any [First Schedule disease] has occurred or is likely to occur

A Proclamation is not to be in force for more than six months, but another may be issued (s 30).

3.58 **Error! Bookmark not defined. Error! Bookmark not defined.** While a state of animal disease emergency is in force the Minister, or any person authorised by the Minister in writing, may

- require any registered veterinary surgeon or any "fit male person" over the age of 18, living or working in the vicinity, to provide assistance;
- requisition any equipment, land or premises, ship or aircraft (s 30).

In addition, the Minister may take such measures "as in the opinion of the Minister are necessary and desirable for the purpose of eradicating the disease or preventing or limiting the spread of the disease" (s 31). Although there is no provision specifically authorising the making of emergency regulations, regulations may be made in respect of an area in which an animal disease emergency is in force

- requiring the disinfection of persons, clothing, vehicles and any chattels which pass out of or through the area, and
- prescribing measures to be taken to prevent, eradicate or limit the spread by the disease (s 25(w) and (x)).

3.59 **Error! Bookmark not defined. Error! Bookmark not defined.**

There are provisions for the

payment of compensation (ss 30(5), 42-45).

AGRICULTURE (EMERGENCY POWERS) ACT 1934

3.60 The Agriculture (Emergency Powers) Act 1934 authorises the making of regulations for giving effect to the recommendations made by a Commission of Inquiry into the conditions of the dairy industry in New Zealand

and generally for the purpose of securing the effective conduct of any of the industries in respect of which the [Minister of Agriculture and Fisheries] has for the time being any statutory or other functions ... (s 27(1))

3.61 In addition, specific authority is given for the making of regulations relating to the licensing of dairy factories and the marketing of dairy produce. See for instance the Dairy Board (Local Marketing) Regulations 1987 (SR 1987/131) and the Dairy Factory Supply Regulations 1989 (SR 1989/387).

3.62 Regulations are not to be invalid because they deal with any matter provided for by any other Act or because of repugnancy to any Act (s 27(3)).

3.63 Regulations expire

- if they are not laid before the House of Representatives within 16 sitting days, or
- at the close of the session of Parliament during which they are laid if they have not been validated and confirmed by Act (s 27(6)).

3.64 Although the regulation-making power in the Agriculture (Emergency Powers) Act 1934 appears to be widely framed, the circumstances in which that power was originally granted suggests that it is not to be regarded as a reliable authority for the making of regulations, particularly in emergency situations, over the range of the responsibilities of the Ministry of Agriculture and Fisheries.

RESOURCE MANAGEMENT ACT 1991

3.65 The Resource Management Act 1991 recognises situations in which a person or authority, who is responsible for a work, natural and physical resource or area, or project and who is of the opinion that that work, resource, area, or project is affected by or likely to be affected by

- an adverse effect on the environment which requires immediate preventive measures,
- an adverse effect on the environment which requires immediate remedial measures, or
- any sudden emergency causing or likely to cause loss of life, injury, or serious damage to property,

may take action "to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency." In such a situation the restrictions which the Act places on the use of land, coastal marine areas, the beds of lakes and rivers and water, and on the discharge of contaminants into the environment do not apply. (ss 9, 12, 13, 14, 15, 330(1))

3.66 A local authority or the Minister of Conservation, who has financial responsibility for a public work or jurisdiction in respect of a resource or area, may enter any place, in any of the circumstances set out above, "to take such action as is immediately necessary and sufficient to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency." (s 330(2)) Section 331 enables the local authority or the Minister to seek reimbursement or compensation.

3.67 No person is to be prosecuted for taking action under the above provisions. Also, action "necessary for the purposes of saving or protecting life or health, or preventing serious damage to property or avoiding an actual or likely adverse effect on the environment" may be available as a defence in respect of a prosecution for failure to observe restrictions imposed by the Act. (ss 18, 338, 341)

HEALTH ACT 1956

3.68 The Health Act 1956 gives the Medical Officer of Health an extensive range of powers which can be used to prevent "the outbreak or spread of any infectious disease" if so authorised by the Minister of Health or if a state of national or regional civil defence emergency has been declared under the Civil Defence Act 1983. (A state of local civil defence emergency is not included.) In these circumstances a Medical Officer of Health may cause insanitary buildings and other things to be destroyed; require persons to submit themselves for medical examination; restrict the movement of persons, animals or things; close theatres, places of public amusement, bars, churches, etc; forbid congregations of people; and prohibit the attendance of children under 16 at schools, theatres, etc (s 70).

3.69 If there is an actual outbreak of an infectious disease the Medical Officer of Health (again with the authority of the Minister or during a state of national or regional civil defence emergency) may requisition land, buildings and vehicles, and drugs and articles deemed necessary for the treatment of patients (s 71). There is also a wide regulation-making power under which the Governor-General in Council may make such regulations "as may in his opinion be necessary or expedient for giving full effect" to the provisions of the Act (s 117).

FIRE SERVICE ACT 1975

3.70 **Error! Bookmark not defined.** A fire brigade is obliged to act to extinguish and prevent the spread of fire. It may decide to act to

- stabilise or render safe a hazardous substance, or
- intervene in any other emergency where it is considered that the brigade can render assistance.

In each case the brigade is commissioned "to save lives and property in danger." (Fire Service Act 1975 ss 28(2), 28(3), 28(3A); see also s 28A)

3.71 In any such emergency extensive powers are available to the person in charge of the fire brigade. These include the power to enter or break into any land, building or structure; to remove any flammable or dangerous material from a building; to cause any building or structure to be pulled down; to cause any motorway, street or thoroughfare to be closed for traffic; to remove persons interfering with operations or in danger; and to require the provision of information (s 28(4); and see ss 28A and 29).

3.72 In the event of an emergency not involving fire the above powers are not to be exercised by the person in charge of the fire brigade without the authorisation of the person in charge of operations at the scene of the emergency, unless the former is of the opinion that lives or property are in imminent danger (s 28(5)).

3.73 In a hazardous substance emergency the person in charge of the fire brigade also has the powers of an Inspector of Dangerous Goods under the Dangerous Goods Act 1974 and an officer under the Toxic Substances Act 1979 until the arrival of an Inspector or officer as the case may be (s 28(3B)).

3.74 Action taken under s 28(4) is protected by a privative clause:

The fact that any person performs any function or duty or exercises any power under subsection (4) of this section shall be conclusive evidence of his authority to do so, and no person shall be concerned to enquire whether the occasion requiring or authorising him to do so has arisen or has ceased. (s 28(6))

CIVIL AVIATION ACT 1990

3.75 The provisions of the Civil Aviation Act 1990 are directed towards

- the promotion of safety in New Zealand's civil aviation system, and
- the implementation of New Zealand's obligations under international aviation agreements.

3.76 The Minister of Transport may make rules, described as "ordinary rules", while the Director of Civil Aviation Safety is authorised to make "emergency rules" (ss 28-37; see paras 5.86-5.88). There is emphasis on the need for consultation and publication. Ordinary rules may be made for the purposes set out in the Act, including safety and security. Emergency rules may be made where they are

necessary to alleviate or minimise any risk of the death of or a serious injury to any person, or of damage to any property. (s 31(1))

The Director is not to make emergency rules "unless it is impracticable in the circumstances of the particular case for the Minister to make ordinary rules to effectively alleviate or minimise the risk concerned." (s 31(2))

3.77 Consultation: The Minister must give public notice of intention to make an ordinary rule, give all interested persons a reasonable time to make submissions, and consult widely within the aviation industry. Before making an emergency rule the Director is required to carry out such consultations as are considered appropriate. Each ordinary or emergency rule must state the extent of the consultation.

3.78 Publication: Rules are to be notified in the Gazette and provision is to be made for their sale to and inspection by the public. Where it is inappropriate to follow this procedure - in the case of ordinary rules for reasons of security and in the case of emergency rules for reasons of safety and security - notification is to be given to such persons as are considered necessary or appropriate in the circumstances.

3.79 Ordinary and emergency rules are deemed to be regulations for the purposes of the Regulations (Disallowance) Act 1989, but not for the purposes of the Acts and Regulations Publication Act 1989. This means that the rules can be disallowed by the House of Representatives under the provisions of the former Act, but there is no requirement that the rules be published in the series of statutory regulations.

3.80 Although the Minister may not delegate the power to make ordinary rules, an ordinary rule may delegate discretions to the Secretary for Transport or any other person.

3.81 An emergency rule may be in force for a period not exceeding 90 days, but it may be renewed once only for a further period not exceeding 90 days (s 35).

3.82 The Director may, in specified circumstances, exempt any person, aircraft, etc, from a requirement in an ordinary rule (s 37).

3.83 Rules, whether ordinary or emergency, are not to be inconsistent with International Civil Aviation Organisation Safety and Security Standards (to the extent adopted by New Zealand) or with New Zealand's international obligations relating to aviation safety and security (s 33). The considerations to which the Minister or the Director are to have regard in making any rule are set out. Although emergency rules prevail over ordinary rules (s 35(6)), both ordinary and emergency rules remain subject to other Acts and regulations. Ordinary rules can prevail over the bylaws of a local authority (s 28(8)).

CIVIL DEFENCE

3.84 In New Zealand, as elsewhere, the majority of emergencies or disasters will continue to arise from natural or industrial hazards and accidents of various kinds. A major responsibility for the preparedness and response phases of the more serious of these situations falls on the Ministry of Civil Defence (referred to as "Civil Defence").

3.85 It is important to recall the distinction between a minor emergency or accident and a disaster. A "Civil defence emergency" is defined in the Civil Defence Act 1983 as "a situation ... that causes or may cause loss of life or injury or distress or in any way endangers or may endanger the safety of the public and cannot be dealt with by the Police, the New Zealand Fire Service, or otherwise without the adoption of civil defence measures" (s 2, emphasis added). In other words, Civil Defence is the second tier of emergency response. In the first tier are the normal services provided by the police and the fire service, and, in addition, by medical, local body and departmental services and voluntary organisations.

CIVIL DEFENCE ACT 1983

3.86 The account in Appendix F of the civil defence legislation which culminated in the Civil Defence Act 1983 provides a background to a consideration of the 1983 statute. In particular it explains the significance of the provisions relating to national emergencies discussed elsewhere in this Report (paras 3.6, 6.51-6.56).

3.87 The Director of Civil Defence advises and assists central government and regional and territorial authorities in planning and operational matters, and is the principal executive for central government in the direction and co-ordination of civil defence (ss 7-9).

.88 The National Civil Defence Committee, consisting in the main of the chief executives of interested departments (Telecom, NZ Rail and Works and Development also provide representatives) is responsible for the preparation of national civil defence plans. A plan is to specify the measures to be undertaken and the functions to be exercised by "Departments, organisations, local authorities, regional councils, and territorial authorities" in preparation for a response to national and civil defence emergencies. A plan is also to specify the functions that voluntary bodies may undertake. (See ss 19-22 and the National Civil Defence Plan.)

3.89 New Zealand is divided into four civil defence zones with operational facilities and staff located in Auckland, Palmerston North, Wellington and Christchurch. A Civil Defence Commissioner for each zone is responsible to the Director for civil defence measures for the regions falling within the zone (ss 10-14).

Responsibilities of civil defence authorities

3.90 Regional and territorial authorities are responsible, individually or jointly by arrangement, for planning civil defence measures and for responding to emergencies. These responsibilities include:

- **maintenance of civil defence organisations;**
- **production of civil defence plans;**
- **appointment of regional and local controllers of Civil Defence; and**
- **co-ordination and training of personnel and mobilisation of resources (ss 23-42).**

3.91 Under the Civil Defence Act 1983 there are four kinds of states of emergency:

- **local civil defence emergency - declared by the Chairperson of the territorial authority affected or by the local controller (s 52);**
- **regional civil defence emergency - declared by the Chairperson of the regional council concerned or by the Regional Controller if the emergency is likely to be one beyond the resources of the affected territorial authority or authorities (s 51);**
- **national civil defence emergency - declared by the Minister of Civil Defence if the emergency is likely to be beyond the resources of the affected regional council or councils (s 50); and**
- **national emergency - declared by Proclamation of the Governor-General on the recommendation of the Executive Council (s 46).**

The House of Representatives is to be informed of the declaration of national and national civil defence emergencies (ss 49(1) and 50(2)).

Powers of civil defence authorities

.92 Regional councils and territorial authorities are responsible for civil defence measures if states of national or civil defence emergency are in force in their region or district. In taking these measures those authorities may:

- (a) Carry out or require to be carried out works, clearing of roads and other public places, and the removal and disposal of dangerous structures and materials:
- (b) Provide for the rescue of endangered persons and their removal to areas of safety:
- (c) Set up first-aid posts, and provide for first aid to casualties and their movement to hospital or areas of safety:
- (d) Provide for the relief of distress including emergency food, clothing, and shelter:
- (e) Provide for the conservation and supply of food, fuel, and other essential supplies:
- (f) Prohibit or regulate land, air, and water traffic within the region or district to give effect to civil defence measures:
- (g) Undertake emergency measures for the disposal of the dead where it is satisfied that such measures are urgently necessary in the interests of public health:
- (h) Disseminate information and advice to the public:
- (i) Provide equipment, accommodation, and facilities for the exercise of any of the powers conferred by this subsection. (s 58(5))

3.93 If the responsible territorial authority is unable for any reason to carry out immediate effective civil defence measures in a district the senior police officer may exercise such of the above powers as are thought necessary in the circumstances (s 58(6)).

3.94 Further powers can be exercised by a Civil Defence Commissioner, a Regional or Local Controller or a constable in specified circumstances:

- **evacuation of premises and places;**
- **entry on premises;**

- closing of roads and public places;
- removal of obstructing vehicles; and
- requisition of land, buildings, vehicles, medical supplies, food, etc (ss 60-65).

Use of armed forces

3.95 The armed forces may be deployed to assist in civil defence measures under the provision of the Defence Act 1990 which authorises the use of the armed forces "to perform any public service" (Defence Act 1990 ss 5(f) and 9(1); see para 3.4 and First Report, paras 79, 80).

Emergency regulations

3.96 The powers in the Civil Defence Act 1983 itself are supplemented by a wide grant of authority to make emergency regulations. There is a general grant under which the Governor-General in Council may

make regulations for such matters as are necessary or expedient for the purpose of securing the public safety and generally safeguarding the interests of the public during any state of national emergency or civil defence emergency. (s 79(1); and see para 5.81)

The regulations may confer on departments or other authorities, police or traffic officers, or a person holding any office under the Act, certain functions, duties or powers. These relate to evacuation, control of transport, health measures, regulation of entry into specified areas, and the provision of essential supplies and services.

3.97 Regulations made under s 79

- prevail over provisions in any other Act, regulation or bylaw other than the Civil Defence Act 1983 itself (compare para 5.80),
- are in force only while a state of emergency is in force and, in the case of a local or regional civil defence emergency, only in respect of the area to which it relates,
- must be laid before the House of Representatives within seven sitting days of the day on which they were made, and
- may be revoked or amended by resolution of the House.

ECONOMIC EMERGENCIES

3.98 A distinction is to be drawn between emergencies which have an economic genesis and the economic consequences of other categories of emergency, such as the economic consequences of natural disasters. This is a distinction that may be difficult to draw in some cases, particularly when dealing with the supply

and distribution of scarce resources. If powers are required for a response to the economic consequences of an emergency they are usually to be found in the sectoral legislation relating to the category of emergency involved.

3.99 The following economic conditions might be regarded as economic emergencies, that is, emergencies which have an economic genesis, and call for special measures: rapidly accelerating inflation; a major breakdown in the functioning of essential domestic industries, markets or services; an international assault on the value of the currency; a sudden shortage of essential imported commodities resulting from a foreign embargo or the breakdown of orderly world trade; a company collapse with wide-ranging ramifications for the national economy; and a banking crisis, arising for instance from defaults in payments by major bank debtors (compare working paper prepared by Emergency Preparedness Canada, Bill C-77: An Act to Provide for Safety and Security in Emergencies: Working Paper 26).

ECONOMIC STABILISATION ACT 1948

3.100 During World War II wide regulatory measures were taken under the Emergency Regulations Act 1939 to mobilise the economy in support of the war effort. Many of these measures were maintained after the war under the authority of that Act and its amendments.

3.101 The Economic Stabilisation Act 1948, which authorised the making of regulations to promote the "economic stability of New Zealand", was enacted in response to pressure to curtail these wartime measures. Nevertheless, the Act carried forward regulations such as the Economic Stabilisation Emergency Regulations 1942 (SR 1942/335) which established the Economic Stabilisation Commission and controls on rent, remuneration and prices.

3.102 Exercise of a government's wide-ranging authority under the Economic Stabilisation Act 1948 to control the economy did not depend on the Proclamation of a state of emergency. There was always a requirement that the regulations be laid before Parliament within a stipulated time, but it was not until the Economic Stabilisation Amendment Act 1982 that provision was made under which the House of Representatives could disallow regulations by resolution within 28 sitting days of their being laid before the Parliament (s 13A). This safeguard was appropriate in view of another provision in the 1982 amendment under which stabilisation regulations were to prevail over other Acts in matters relating to rates of remuneration and conditions of employment (s 11A).

3.103 Over 370 regulations were made under the Economic Stabilisation Act 1948 during its 40-year lifespan, most by successive governments in the 1970s and early 1980s. It was used in 1979 and 1980 to respond to the world oil crisis, and it was the major instrument of the price and wage freezes of 1982 to 1984.

CURRENT RESPONSE POWERS

3.104 Since 1984 there has been a change in economic policy from extensive government intervention in the economy to non-intervention and a market-led approach to economic reform. Parliament has accordingly removed executive power to intervene in the economy by

- repealing the National Development Act 1979 in 1986 and the Economic Stabilisation Act 1948 in 1987,
- transferring to the Reserve Bank of New Zealand responsibility for formulating and implementing monetary policy directed at the lowering of inflation and narrowing the powers of the executive to control foreign exchange movements (Reserve Bank of New Zealand Act 1989 ss 8, 16-18), and
- progressively relaxing controls on imports by amendments to regulations under the Import Control Act 1988.

3.105 There are, however, a number of statutes that would enable a government to take specific action in an emergency that might be classified as economic:

- Although there are no longer powers to impose exchange controls, the Reserve Bank can influence the foreign exchange market by dealing in it, either of its own motion or under direction from the Minister; and the Minister, authorised by the Governor-General by Order in Council within the preceding 30 days, can fix the rates at which the bank deals (Reserve Bank of New Zealand Act 1989 ss 16-18). Under normal circumstances this would, in effect, fix the exchange rate. Under the Act the suspension of foreign exchange business is a decision for the Governor of the Reserve Bank (s 22).
- Under the Reserve Bank of New Zealand Act 1989 ss 117 and 118 the Governor-General in Council may place a registered bank under statutory management. The grounds on which this action can be taken include: the bank is insolvent or likely to become insolvent; the circumstances of the bank prejudice the soundness of the financial system. Statutory management is also available on rather broader grounds for corporations at risk (Corporations (Investigation and Management) Act 1989).
- Under the General Agreement on Tariffs and Trade Act 1948 advantage can be taken of the general exceptions provided under Article XX of the Agreement (First Schedule to the Act).
- The Public Finance Act 1989 allows the Minister of Finance to approve expenditure of public money in the event of an emergency that affects the public health or safety of New

Zealand, or of a state of national or civil defence emergency under the Civil Defence Act 1983, whether or not money has been appropriated for the purpose (s 13).

- There are two statutes authorising the making of regulations relating to the acquisition, distribution, supply, storage, or use of petroleum products in New Zealand:
 - The International Energy Agreement Act 1976 enables New Zealand to carry out its obligations under the Agreement on an International Energy Program 1974 (attached as a schedule to the Act). A Proclamation of a petroleum emergency by the Governor-General, approved in the Executive Council, must precede the making of emergency regulations under the Act (ss 3-5).
 - The Petroleum Demand Restraint Act 1981 enables restraints to be imposed by regulation on the demand for petroleum products or arrangements to be made for their equitable distribution (ss 4-6).
- If the assets of the Earthquake and War Damage Commission are insufficient to meet lawful claims, they are to be met out of public money without further appropriation (Earthquake and War Damage Act 1944 s 13).
- The Agriculture (Emergency Powers) Act 1934 authorises the making of regulations "generally for the purpose of securing the effective conduct of any of the industries in respect of which the Minister of Agriculture and Fisheries has for the time being any statutory or other functions" (s 27; see paras 3.60-3.64).
- Controls on imports and exports can be effected under the Customs Act 1966, and on imports under the Import Control Act 1988 (see also para 3.9 and the Export Prohibition Regulations 1953 (SR 1953/179)).
- The Patents Act 1953 s 58 authorises the use of patents by the Crown during any "period of emergency" declared by Order in Council. The section applies to a range of emergency situations.

CLASSIFICATION OF POWERS

3.106 A consideration of the legislation cited in this chapter and of other legislation listed in Appendix A suggests that the extraordinary powers that may be used in situations having characteristics of an emergency can be classified under 10 headings:

- *Direction of persons* - authorisation or direction of persons to perform essential services.
- *Control of movement* - regulation of or prohibition on the movement of persons, including compulsory evacuation, and the movement of traffic and vehicles.
- *Requisition of land, buildings, vehicles and equipment*
- *Removal or destruction of buildings, vehicles, vegetation and animals.*
- *Other powers in relation to property* - controls on movement of animals, the provision of accommodation, and the possession and use of items other than those in the above categories; powers of entry.
- *Provision of essential utilities and services* - control, restoration and maintenance of essential utilities and services, including distribution of food, fuel and other essential supplies and the provision of medical services; rescue.
- *Spending or raising public money without prior approval* - the expenditure of unappropriated money, or the raising of loans without the usual consents.
- *Control of information.*
- *Alteration of legal rights and obligations* - while most emergency powers have this effect, there are specific provisions relating to legal processes, including recognition of defences to actions that would otherwise be offences, moratoria on legal proceedings, and approval of actions contrary to approved plans.
- *General, non-specific powers* - for example, provisions that authorise any action that is necessary in the circumstances.

IV

Sources of Power in an Emergency

4.1 In Chapter III and Appendix A existing legislation has been examined to ascertain what powers are presently available for response to emergencies. There may also be other situations in which a government will need to have at hand legislation conferring extraordinary powers to deal with an emergency. This chapter discusses the approach that should be adopted to the enactment of emergency legislation and the circumstances in which it should be passed. It also considers whether there might be resort to non-statutory powers in an emergency.

EMERGENCY LEGISLATION

4.2 In New Zealand the government of the day, so long as it retains its majority in the House of Representatives, can expect to obtain from Parliament any legislation it pleases if it is prepared to accept the political consequences of its actions. This means that, if the executive asks the House of Representatives for legislation conferring on it wide powers with which to deal with an emergency or prospective emergency, there is every likelihood that that legislation will be passed. This can be either in advance of an emergency, or when an emergency is imminent or has actually occurred. (Note, however, that under the Electoral Act 1956 s 189 and the Constitution Act 1986 s 17 a 75 per cent majority of the members of the House or a majority at a referendum is required to extend the term of Parliament.)

GENERAL OR SECTORAL LEGISLATION

4.3 A decision that emergency legislation should be passed in New Zealand - in addition to or in replacement of legislation already in place - involves a choice between

- a general emergencies Act containing powers that will enable a response to be made to a wide range of emergencies, and
- sectoral emergency legislation that is tailored to particular kinds of emergency with powers that are appropriate to each situation.

4.4 The Law Commission's First Report pointed to the difficulty of framing general legislation that would on the one hand confer sufficient powers to deal with a wide range of "national emergency" situations and, on the other, include controls and safeguards that would prevent a government from invoking drastic powers by executive fiat in situations where they were neither justified nor appropriate (First Report, paras 32-46).

4.5 There is first of all the difficulty of formulating a definition of a "national emergency" that might form the basis of an acceptable "national emergencies" statute. Language that is wide enough to cover every conceivable national emergency will be wide enough to enable misuse of the powers in non-emergency situations. Second, it is not possible to anticipate, nor practicable to set out in a statute, the actual powers that will be required over the full range of possible emergencies. Therefore, it would be necessary to include in a general emergency statute a wide power to make emergency regulations. This is illustrated by the Public Safety Conservation Act 1932 and the Economic Stabilisation Act 1948 (both now repealed) which did not themselves set out emergency powers. These powers were to be assumed by regulation, in the one case once a state of emergency had been declared, in the other without any such preliminary "trigger". The Civil Defence Act 1983 differs in that it sets out specific powers in the Act itself, although these are supplemented with a wide regulation-making authority. The powers and the authority are available once a state of national or civil defence emergency has been declared. (This authority, like the corresponding provision in the former Civil Defence Act 1962, has not been used in the context of a civil defence emergency; compare Civil Defence Emergency Regulations 1978 (SR 1978/231).)

4.6 There is a discussion in Chapter V of the basic standards and safeguards that should attach to the enactment of emergency legislation. In the case of a general emergency statute these might include procedures for the control of emergency action by the House of Representatives, and provisions protecting individual rights and facilitating intervention by the courts. There could also be a provision, like that in the Canadian Emergencies Act 1988, by which emergency measures under the statute could not be taken where the emergency could be effectively dealt with under any other law of New Zealand (paras 2.35, 2.43-2.44). Even with these safeguards, the possibility would remain that a government, supported by a secure majority in the House of Representatives, could take advantage of a general grant of power by instigating a state of emergency and assuming wide emergency powers (First Report, para 34).

4.7 There will nevertheless be particular emergency situations, which threaten the life of the nation and can be defined with reasonable precision, in which Parliament will be justified in providing the executive with wide discretionary powers. War or armed attack, a nuclear event affecting on New Zealand, a serious natural disaster or an outbreak of foot and mouth disease are generally accepted as falling within this category. These are situations in which sectoral legislation will be appropriate and they will be discussed later in Part II of this Report (Chapters VI, VIII and IX).

THE SECTORAL APPROACH

4.8 The First Report developed a sectoral approach to emergency legislation. It accepted the principle that emergency legislation should be tailored to the needs of particular kinds of emergency. Reference was made to statements made by the Rt Hon David Lange (as Prime Minister) and the Rt Hon Geoffrey Palmer (as Deputy Prime Minister) at the time of the repeal of the Public Safety Conservation Act 1932 and the enactment of the International Terrorism (Emergency Powers) Act 1987. Those statements were to the effect that, where there is a need for additional powers to deal with a particular situation, those powers should be included in specific legislation which meets that specific need. The First Report also cited international support for this approach (First Report, paras 35-38).

4.9 The examination of New Zealand legislation in Chapter III and the list of emergency provisions in Appendix A shows that, although some reliance has in the past been placed on the wide regulation-making powers conferred in the Public Safety Conservation Act 1932 and the Economic Stabilisation Act 1948, New Zealand has adopted a sectoral approach to legislation dealing with emergencies. The majority of the emergency response powers appearing in Appendix A are set out in the statutes themselves, along with provision for the normal everyday activities of a Ministry or department. Only in isolated cases are these powers supported by an authority to make regulations or emergency regulations. The activities concerned can be expected to include responsibility for mitigation, preparedness and, perhaps, the recovery phases, as well as the response phase, of emergencies. In practice this can mean that it is difficult to differentiate extraordinary powers intended for use in response to an emergency from those required to carry out normal activities.

4.10 The ability inherent in the sectoral approach to tailor emergency powers to the needs of a particular emergency and to include those powers in the statute as distinct from regulations is itself a safeguard against abuse. That approach also facilitates the inclusion of other safeguards and constraints, discussed in Chapter V, that are related to the nature of the particular emergency.

CONCLUSION

4.11 The Law Commission affirms the position it took in its First Report - that there should be a sectoral approach to the passage of legislation conferring powers to respond to emergencies. A general national emergency statute should not be enacted.

EMERGENCY LEGISLATION IN ADVANCE

4.12 Emergencies are likely to call for immediate and drastic action. It follows that legislation authorising an appropriate response should be in place in advance of the emergency itself. This factor, and the likelihood that the emergency response will involve interference with established rights, points to the desirability of preparing emergency legislation at leisure rather than under the pressure of an actual or imminent emergency. The choice will be between legislation carefully prepared in advance, conforming to the principles and safeguards discussed in Chapter V, and hastily drafted legislation conferring wider powers than are necessary and omitting appropriate protections against abuse. Moreover, New Zealand and overseas experience suggests that emergency legislation passed in haste is likely to remain on the statute book long after its immediate purpose has been served.

4.13 Canadian experience illustrates both the dangers of hasty emergency legislation and the advantages of taking time to pass that legislation in advance. There, the hastily drafted and draconian War Measures Act, passed in 1914 at the outbreak of World War I, continued in force after that war and became the source of emergency powers during World War II. The Act was used in October 1970 to authorise the use by the police of wide powers of search, seizure and detention in combating a Quebec separatist group. This use brought to a head pressure for its repeal.

4.14 Preparatory work with accompanying publicity over a period of years led to the introduction in the Canadian House of Commons in June 1987 of Bill C-77 Emergencies Act. Debate in the House and in the Senate, and in the committees of both Houses together with submissions from interested organisations, led to significant amendments. In the debates there was frequent acknowledgement of the advantages gained from the care being taken, at a time when there was no pressure from an emergency, to draft legislation defining powers appropriate for responses to four different categories of emergency. The Emergencies Act 1988 emerged as carefully honed legislation containing emergency powers related to particular emergencies but balanced by safeguards against abuse (see paras 2.35-2.36, and Emergency Planning Canada, Safety and Security in Emergencies: Background Papers: Studies in Various Aspects of Emergencies Legislation (Ottawa, November 1985)).

4the hasty passage of the Public Safety Conservation Act 1932 and the use to which it was subsequently put (First Report, paras 183-190).

4.16 The International Commission of Jurists, in drawing conclusions from a survey of the impact on human rights of states of emergency in a number of countries, has said:

Real emergencies do occur, and many governments resort to emergency powers in good faith. To the extent that this is so, it is essential that the proper occasions for invoking emergency powers and their maximum scope be fully debated and decided in advance of rather than during a crisis. (*States of Emergency: Their Impact on Human Rights* (Geneva, 1983) 432)

4.17 The International Law Association has made the same point in its statement of Minimum Standards (see para 2.13):

As far as practicable, norms to be applied during an emergency shall be formulated when no emergency exists. (Report of the Sixty-First Conference Held at Paris (London, 1985) 65)

4.18 Implementation of the sectoral approach makes it even more necessary to prepare legislation in advance. In most instances, sectoral provisions for an emergency response will be part of a comprehensive statute which includes provisions that are concerned with one or more of the other emergency phases - mitigation, preparedness and recovery. Since mitigation and preparedness, in particular, are ongoing responsibilities of the agencies involved, time should be taken to determine how these responsibilities should be carried out. This cannot be done under urgency. Moreover, if these responsibilities are to be carried out effectively, they must be set in place well in advance of the need to respond to an emergency.

4.19 The preparation in advance of a Bill conferring exceptional powers should enable the standard procedure for the passage of Bills into law to be followed. Under the New Zealand Bill of Rights Act 1990 the Attorney-General, on the introduction of a Bill, is required to bring to the attention of the House of Representatives any provision that appears to be inconsistent with the Bill of Rights (s 7). The first reading of the Bill is followed by a reference to a select committee where public submissions are heard. At this stage the Regulations Review Committee can consider any regulation-making power in the Bill and report on it to the select committee considering the Bill (Standing Order 388). In particular, the committees concerned can be expected to satisfy themselves that adequate controls are placed on any regulation-making power. The Bill is then read a second time, considered by the House in Committee, and read a third time - stages of the legislative process providing an opportunity for full debate.

4.20 Recent changes in the Standing Orders of the House of Representatives have provided increased opportunities for the critical examination of Bills. Concern has, however, been expressed that there are ways in which these processes can be avoided by a determined government under pressure of time. See Burrows, Joseph, "Parliamentary Law Making" [1990] NZLJ 306. Advantage should not be taken of these shortened procedures to enact provisions conferring emergency powers. It is important that these provisions are submitted to rigorous scrutiny.

4.21 An alternative to the passage of emergency legislation into law in advance of an emergency might be the preparation of draft legislation in advance and the opening of the draft for public discussion. The draft Bill could then be held for parliamentary action should an emergency with which it deals become imminent or actually occur. A difficulty with this approach could be that the nature of the emergency may make it impracticable to pass legislation. (See the further discussion in the context of our recommendation that there should be a War Emergencies Act (paras 6.77-6.81).)

THE PASSAGE OF LEGISLATION IN AN EMERGENCY

4.22 There may be situations calling for the passage of legislation particular to a specific emergency. These situations may - but do not necessarily - involve action by the House of Representatives under urgency (see paras 4.28-4.32).

- A decision is taken during a continuing emergency to enact case specific legislation instead of relying on more general sectoral legislation under which the emergency has been declared.
- The relevant sectoral enactment does not confer a particular response power thought to be necessary.
- The government wishes to obtain parliamentary sanction for the exercise of a particular power.
- The emergency arises in a sector for which no provision is made in sectoral legislation.

4.23 The legislative steps taken by New Zealand during World War II illustrate the first and third situations. On 1 September 1939 a Proclamation of Emergency was made under the Public Safety Conservation Act 1932 in anticipation of the outbreak of war on 3 September (SR 1939/120). Initially, emergency regulations were made pursuant to that Proclamation. The Emergency Regulations Act 1939 was passed on 14 September 1939 and became the authority for all wartime emergency regulations. The Emergency Regulations Act 1940 specifically authorised the introduction of conscription by providing that emergency regulations might be made "requiring persons to place themselves, their services, and their property at the disposal of His Majesty" (s 2(1)). (See paras 6.43-6.46. In World War I conscription for service overseas was introduced by statute: the Military Service Act 1916.)

4.24 There may be circumstances in which there will be a case for replacing sectoral emergency legislation with new legislation during the currency of an emergency, particularly where the emergency is likely to last for a substantial period. This might be done so that the new legislation can be more closely tailored to the needs of the particular situation. On the other hand, there is the danger that new legislation enacted while there is pressure from a concerned public will confer wider powers than are actually needed and omit appropriate safeguards (para 4.12). That is, the new legislation may not be prepared with the care and deliberation which went into the legislation it replaces.

4.25 The theme of this Report is that a government should not be able to draw on general, largely unfettered powers, given in a "national emergencies" statute, to handle any emergency that may arise, whether or not it is a situation requiring the exercise of extraordinary powers. However, it must be recognised that a possible consequence of the absence of general emergency legislation and of the adoption of the sectoral approach is that an emergency will arise that falls within the interstices of provisions in sectoral legislation. This may occur either because, through design or neglect, relevant sectoral legislation has not been passed, or because a particular type of emergency has not been anticipated.

4.26 If the War Emergencies Act proposed in Chapter VI was in place, and effect was to be given to other recommendations in this Report, such a situation would be unlikely. Nevertheless, the First Report recognised that a government might find it necessary to take ad hoc legislative action to deal with an emergency arising out of an industrial dispute (paras 228-236). Also, a qualification is made with regard to economic emergencies, on which see Chapter X.

4.27 It follows that there could be situations in which emergency legislation must be passed under urgency or in which there is either no time or no opportunity to pass legislation.

PASSAGE OF LEGISLATION UNDER URGENCY

4.28 In an emergency Parliament can pass legislation with little, or very little, delay. Under the present arrangements for the despatch of parliamentary business there are frequent and regular sittings of the House of Representatives, and legislation can be passed under urgency. This can mean that a Bill is passed "at the same sitting of the House" with the omission of the important select committee stage (Standing Orders 50 and 208(5)).

4.29 In these days of rapid communications the members of the House of Representatives can be brought together at very short notice unless difficulties are presented by the nature of an emergency. The holding of a meeting of the House to conduct business is facilitated by the fact that the quorum of the House is 15 members (out of a total of 97) inclusive of the Speaker or other member in the Chair (Standing Order 53).

4.30 If Parliament has been prorogued it can be summoned by the Governor-General who can, if need be, at the same time change the place of meeting (Constitution Act 1986 s 18).

4.31 There is, however, a procedural difficulty involved in bringing forward a meeting of the House of Representatives from the day to which the House has been adjourned. At present this can only be done by proroguing and re-summoning Parliament. The result is that there must be a formal re-opening of Parliament (Constitution Act 1986 s 18). It is proposed that the House should consider an amendment to its Standing Orders under which the Speaker of the House can, if satisfied that it is in the public interest, bring forward (or perhaps postpone) the day of meeting of an adjourned House (Appendix B paras B16-B19).

4.32 There can also be a difficulty where the House of Representatives is sitting or stands adjourned and it is desired to change the place of meeting of the House. This, too, can be effected only by proroguing Parliament and re-summoning it for a new venue. It is proposed that the position should be rectified by an amendment to s 18 of the Constitution Act 1986 (Appendix B paras B20-B22).

NO LEGISLATIVE AUTHORITY

4.33 The objections to the passage of emergency legislation under urgency have been stressed. Further, situations can be envisaged in which it may not be possible or practicable to pass legislation in an emergency.

- Parliament may not be able to meet to pass legislation either because it is dissolved or has expired or because the emergency event itself prevents the House of Representatives from meeting (as might be the case after a major Wellington earthquake).
- The suddenness of the emergency means that there is no time to pass legislation.

4.34 Emergency legislation can in some cases anticipate that an emergency may occur after Parliament has expired or been dissolved. Thus the provisions in the International Terrorism (Emergency Powers) Act 1987 s 7(3) and the Defence Act 1990 s 9(8) enable the Governor-General in Council to act instead of the House of Representatives during a dissolution of the House in extending an authority to exercise emergency powers.

4.35 There are a number of non-statutory sources of power that need to be considered in the present context. These are

- the prerogative
- State necessity
- common law necessity
- martial law.

In extreme cases the State might also act without lawful authority, and then promote an Act of Indemnity.

4.36 Two questions arise. Do these non-statutory sources of power provide a basis for emergency response? If so, what reliance should be placed on them as an alternative to the passage of legislation conferring emergency powers?

PREROGATIVE

4.37 The Governor-General as representative of the Queen in New Zealand has certain inherent powers to act in time of emergency without authorisation from Parliament. These powers flow from the royal prerogative consisting of the residue of absolute authority belonging to the Crown which has not been abrogated by legislation. Where action is taken in the name of the Governor-General, the Governor-General will be acting on the advice of Ministers. On occasion, the prerogative will be exercised by Ministers without a need for any formal act by the Governor-General.

4.38 The prerogative has an important role in the area of war-related emergencies. The powers to declare war or make peace, to regulate the disposition of armed forces, and, within limits, to requisition property needed for the defence of the realm, are prerogative powers. (See First Report, paras 62-63, 83-102.) In Burmah Oil Co Ltd v Lord Advocate [1965] AC 75, 100 (HL) Lord Reid said:

The reasons for leaving the waging of war to the King (or now the executive) is obvious. A schoolboy's knowledge of history is ample to disclose some of the disasters which have been due to parliamentary or other outside attempts at control. So the prerogative certainly covers doing all those things in an emergency which are necessary for the conduct of war.

However, Lord Reid recognised that it would be impracticable to conduct a modern war by use of the prerogative alone: "In fact no major war which has put this country in real peril has been waged in modern times without statutory powers of an emergency character." (101; compare paras 6.8-6.10)

4.39 Apart from the war prerogative powers, the ambit of the prerogative is unclear. A recent decision of the English Court of Appeal is based, in part, on the existence of a prerogative to keep the peace and to maintain law and order, this being a "sister prerogative" to the war prerogative (R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority [1989] QB 26, 58 (CA)). Purchas LJ (at 55) placed reliance on a statement by Viscount Radcliffe in the Burmah Oil case which was not necessary for the decision in the latter case:

There is no need to say that the imminence or outbreak of war was the only circumstance in which that prerogative could be invoked. Riot, pestilence and conflagration might well be other circumstances ... ([1965] AC 75, 115 (HL))

The Northumbria case has been criticised by commentators on the grounds that it draws on scant authority and creates uncertainty as to the scope of the prerogative. It does, however, suggest that that scope may not be foreclosed and that the situation might arise in which the prerogative could be invoked to deal with a peacetime emergency, should that emergency not be covered by existing legislation.

4.40 A series of Pakistan cases (reported in Jennings, Constitutional Problems in Pakistan (Cambridge University Press, London, 1957) 79-238) upheld the assumption by the Governor-General of powers to govern in a time of crisis. These cases have been used to support one view that the Australian courts, in the face of a national calamity, might be prepared to recognise an "extraordinary prerogative" by resort "to an over-arching, higher principle that the government of the country must continue to function effectively." (Lee, Emergency Powers (Law Book Company, Sydney, 1984) 65)

4.41 To uncertainty about the existence and scope of prerogative powers can be added uncertainty whether legislation that covers the same field as a prerogative power supersedes that power. Further, if legislation does supersede the prerogative power, does its subsequent repeal revive that power? Thus there can be debate as to the implications of both the enactment and repeal of the Public Safety Conservation Act 1932 and the Emergency Regulations Act 1939, both of which contained regulation-making powers capable of extending across the whole field of prerogative powers. One authority has suggested that, on the repeal of a statute that supersedes a prerogative, the prerogative revives where "it is a major governmental attribute or is otherwise consonant with contemporary conditions." (de Smith, Brazier, Constitutional and Administrative Law (6th ed Penguin Books, London, 1989) 133)

STATE NECESSITY

4.42 The Pakistan cases (para 4.40), in which ostensibly unconstitutional acts were upheld, can be seen as a recognition of a doctrine of State necessity, rather than as an exercise of prerogative power. There is support for a doctrine of State necessity in English, Commonwealth and United States constitutional jurisprudence. After the American Civil War the acts of the Confederate state legislatures and governments were held to be legally effective on the basis of the doctrine. The Court of Appeal in Cyprus has held that the doctrine would be used "to ensure the very existence of the State"; and there are Canadian decisions upholding the constitutional validity of legislation, otherwise invalid, on the basis that a legal vacuum would "undermine the principle of the rule of law" (de Smith, Brazier, 69-70; Hogg, "Necessity in a Constitutional Crisis" (1989) 15 Monash University Law Review 253 citing Attorney-General of Cyprus v Mustafa Ibrahim [1964] Cyprus LR 195 and Re Manitoba Language Rights [1985] 1 SCR 721, 748; Mitchell v DPP [1986] LRC (Const) 35 (Grenada CA)).

4.43 These precedents suggest that the courts in New Zealand might be asked to uphold the legality of an emergency response on the ground of State necessity where, as a result of the emergency, the prescribed legal requirements for that response could not be complied with.

COMMON LAW NECESSITY

4.44 Resort to the concept of State necessity is to be distinguished from situations in which the Crown relies on the common law defence of necessity. This defence is available to Crown and subject alike. The common law has recognised that otherwise unlawful actions may be excused or justified if taken in a situation of urgent necessity involving imminent peril to life or property. Applications of the defence include the destruction of a house to prevent the spread of fire and entry onto another's property in order to preserve life. However, the status and scope of the defence is uncertain. Further, as it is concerned with individual actions, it cannot provide a satisfactory legal basis for a comprehensive emergency response (see also para 7.111).

MARTIAL LAW

4.45 A step that civil authorities may take in an extreme situation arising from insurrection or invasion is the imposition of martial law. This involves the suspension of the ordinary law and the imposition of discretionary government, enforced through the armed forces.

4.46 The origins of martial law are obscure and the subject of controversy, but it has been seen as sharing the attributes of the prerogative, the common law defence of necessity and the doctrine of State necessity. Imposition of martial law is a political and not a legal act. If the courts are sitting they have the jurisdiction to determine whether a state of war or rebellion exists that calls for military intervention in the form of martial law. Once that is established the courts cannot inquire into the acts of government and the armed forces while the state of martial law continues.

4.47 The jurisdiction of the courts to inquire into acts of the government and the armed forces resumes on the termination of the state of martial law. It is usual to pass an Act of Indemnity retrospectively validating actions taken pursuant to the state of martial law and relieving those concerned from criminal and civil liability.

4.48 States of martial law were established in New Zealand on a number of occasions during the nineteenth century. Proclamations of martial law in 1845, 1846, 1847, 1860 and 1863 were in the main directed at combating Maori resistance.

EMERGENCY ACTION WITHOUT AUTHORITY

4.49 There may be emergency situations of such urgency and seriousness that a government will respond even though there is no evident authority for the steps it decides to take. In such cases the government can ask Parliament to ratify the action that has been taken by the passage of indemnifying legislation. A government may decide to do this even if there may be a sustainable case that the action has been taken on the authority of the prerogative or on the ground of State necessity.

4.50 In the nineteenth century the New Zealand legislature supported Proclamations of martial law with generously worded indemnity provisions. There was an Ordinance in 1847, and Acts were passed in 1860, 1865, 1866, 1867, 1868 and 1882. The Indemnity Act 1882 recited that "certain measures were adopted by the Government of New Zealand, and carried out under their authority, some of which measures may have been in excess of legal powers" with the object of preventing certain meetings of "aboriginal natives" and preserving the peace. The Act proceeded to indemnify persons who, acting under the authority of the Government, given before or after the event, had done anything for the preservation of the peace and good order or had detained or imprisoned persons concerned in or suspected of being concerned in the meetings or certain other acts. Those indemnified were "freed, acquitted, released, indemnified, and

discharged of, from, and against all actions, suits, complaints, informations, indictments, prosecutions, liabilities and proceedings whatsoever." (s 2)

NEED FOR SAFEGUARDS

4.51 It has been emphasised that there is a great deal of uncertainty as to the extent to which the prerogative, State necessity and common law necessity can be relied on as authority for an emergency response. There is a further basis for objection to their use - the absence of accompanying restraints. It is a central theme of this Report, elaborated in Chapter V, that emergency powers should be exercised in accordance with accepted standards and subject to safeguards. Where reliance is placed on the prerogative or on necessity or where martial law is declared, there are no controls over the circumstances in which the emergency powers can be invoked or who may invoke them. There are no established procedures and there is uncertainty as to the extent of the powers. Other recognised safeguards may not be available. There is no assurance that Parliament will be given an opportunity to control or monitor the exercise of the powers. In the past the courts have had only limited control over the exercise of the prerogative. Traditionally they have been able to decide whether it was available in a particular case, but not to review the way in which it has actually been exercised. As pointed out in paras 4.46-4.47 there has been a comparable position with regard to martial law.

4.52 The extent of the control exercised by the courts over the exercise of the prerogative may be changing. Just as the courts have in recent years been more willing to review the exercise of a statutory discretion, so they have shown a disposition to review the exercise of a prerogative power. See Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL); and R v Toohy; Ex Parte Northern Land Council (1981) 151 CLR 170, 217-224 (HC) per Mason J. Another development which may be relevant is the enactment of the New Zealand Bill of Rights Act 1990 (see paras 5.6-5.12). Is the effect of the Bill of Rights that the prerogative cannot be used in derogation of any of the rights protected in the Bill?

4.53 The above discussion leads to the conclusion that a government should not in general depend on non-statutory powers, in particular the prerogative or necessity, to respond to an emergency:

- The powers are vague and ill-defined and they may not be recognised by the courts.
- The effect of legislation on the availability of the prerogative is often uncertain.
- The powers are not in general subject to the safeguards against their abuse which should be included in legislation conferring emergency powers.
- It is unsatisfactory in principle to have retrospective indemnifying legislation especially when it is based on a recognition that State action has been either illegal or of doubtful legality.

EXECUTIVE ACTION IN AN EMERGENCY

4.54 In Appendix B (paras B2-B8, B22) there is a discussion of the situation where the Governor-General or members of the Executive Council are for some reason not available to act in an emergency. The first two recommendations in para 4.56 relate to such a situation.

Recommendations

4.55 The Law Commission recommends the following approach to the enactment of legislation containing emergency powers:

- There should not be a general "national emergencies" statute containing a broad emergency regulation-making power.
- There should be a sectoral approach to the enactment of legislation conferring emergency powers under which that legislation is tailored to the needs of a particular kind of emergency.
- In principle emergency legislation should be prepared in advance of an emergency in circumstances that provide full opportunity for public debate on the measures it contains.
- The Crown prerogative, State necessity, the common law defence of necessity, or government action followed by the passage of indemnifying legislation should not be regarded as an appropriate or effective basis for government action in an emergency.

4.56 In addition, the Law Commission makes the following recommendations as to specific action that should be taken (see Appendix B para B22):

- Clause XII of the Letters Patent Constituting the Office of Governor-General of New Zealand should be amended to include High Court Judges, in order of seniority, amongst the persons who may be called upon to perform, as Administrator of the Government, the functions of the office of Governor-General.

- When an emergency provision involves the intervention of the Governor-General in Council consideration should be given to the desirability of providing for the possibility that the Governor-General or members of the Executive Council may not be available to act.
- The House of Representatives should consider the desirability of making a Standing Order under which the Speaker of the House can, if satisfied that it is in the public interest, bring forward (or possibly postpone) the day to which the House has been adjourned.
- The Constitution Act 1986 should be amended to make it clear that, if Parliament has met at a particular place in response to a summons, it can be adjourned, if necessary by the Speaker at the request of the Prime Minister, to another place as well as another time, without the need to prorogue Parliament.

V

Powers : Standards and Safeguards

INTRODUCTION

5.1 The materials gathered in Chapters II, III and IV, Appendices A and B and the Select Bibliography (Appendix G) make it clear that the State will have extraordinary powers to deal with a wide range of emergency situations. Chapter IV states two general conclusions about the source of those powers: Parliament should confer the powers in sectoral legislation, and that legislation should be enacted with due deliberation before an emergency arises.

5.2 The sectoral legislation conferring emergency powers will usually contain provisions answering, in whole or in part, six questions:

- When may the emergency powers be invoked?
- Who may declare a state of emergency or invoke the emergency powers?
- What procedure must be followed in taking those steps?
- What extraordinary powers are conferred for use in the emergency?
- What controls are there on the exercise of the emergency powers?

- What remedies, including compensation, are available to those affected by the exercise of the emergency powers?

5.3 The form of the relevant provisions in a particular case will turn on the balance between the State's need to have at its disposal all the powers necessary to handle the emergency and the rights of those who may be affected by the exercise of those powers. As the Rt Hon David Lange said in 1987, speaking as Prime Minister on the introduction of the International Terrorism (Emergency Powers) Bill,

when those powers [to control the news media] are used it is critical that it be recognised that they are emergency powers; they are extraordinary powers. It is essential that they be contained as tightly as possible, and the need to make an effective response must not ignore the checks and balances that are necessary in the democratic society the Government is fundamentally seeking to protect by the introduction of the measures. (477 NZPD 6720, 3 February 1987)

THE CONTROL OF PUBLIC POWER

5.4 The need to strike a balance between public power and the controls on its exercise arises whenever any legislation which will confer power on public authorities is being considered for enactment. There is a long-established body of principle and legislative practice relating to the conferral of public powers generally, and covering the six questions set out in para 5.2. Some of that body of principle and practice was assembled in 1987 in the report of the Legislation Advisory Committee, Legislative Change: Guidelines on Process and Content (Department of Justice, Wellington, 1987). Since then Governments have directed that legislation is, in general, to conform with the principles and rules stated in that report. The Committee has recently confirmed that there needs to be an ongoing process of elaborating further guidelines and refining existing ones (Report of the Legislation Advisory Committee: 1 April 1988 to 31 December 1989 (Report No 5, Department of Justice, March 1990) 3). We have made the point already that the recognised principles and practices are as relevant to legislation conferring emergency powers as to that conferring other public powers (paras 2.32-2.34, 2.45). But the material collected in Legislative Change (para 95) recognises that in emergency situations the State's powers may be conferred in broader terms and be subject to fewer controls than in ordinary times.

5.5 This Report is not on the whole concerned with the exercise of regular public powers. We do, however, stress that those powers, actual or potential, should be closely examined by those who prepare and approve legislation, to see whether their conferral can be justified. If so, how should they be defined and controlled? We make this point because in some cases it may be difficult to draw the dividing line between normal powers and emergency powers, as illustrated by the proposals for new agriculture legislation (paras 8.10, 8.24-8.26).

THE NEW ZEALAND BILL OF RIGHTS

5.6 The New Zealand Bill of Rights Act 1990 affirms, protects and promotes human rights and fundamental freedoms in New Zealand. The rights affirmed include those to freedom of expression and of peaceful assembly, the right not to be arbitrarily detained and the right of access to the courts to test the exercise of public power. Those rights and freedoms are not unlimited.

5.7 First, some of those rights are expressly qualified in the Bill itself, as with the right to be secure against unreasonable search or seizure. Second, and more generally, s 5 of the Bill of Rights provides that "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." For instance, the right to freedom of expression is restricted by the law of defamation. With respect to emergency powers, the determination of what is reasonable is likely to recognise the need to take effective measures to deal with the emergency.

5.8 This is not the occasion for a lengthy analysis of the ways in which rights and freedoms contained in the Bill of Rights and the limits to which they are subject are, or might be, interpreted and applied. However, two general points may be made with regard to the roles of the courts and the legislature.

5.9 First, the courts cannot apply the Bill of Rights so as to render other legislative provisions invalid or inoperative (s 4). However, the Bill of Rights is to be taken into account in interpreting legislation. Where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights that meaning is to be preferred to any other meaning (s 6).

5.10 Further, the Bill of Rights applies to acts of the executive and judicial branches of government, as well as the legislative branch, and also to acts done by "any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law." (s 3) Therefore, the courts can be expected to consider whether the acts of State agents which are not authorised by primary or delegated legislation impinge on rights protected by the Bill of Rights. On the other hand, where emergency powers are defined in a sectoral statute or, on occasion, in regulations there will be little scope for a review of those powers on the basis that they are inconsistent with the Bill.

5.11 This leads to the second point which concerns the importance of the role played by the legislature in the conferral of powers. In his introduction to A Bill of Rights for New Zealand: A White Paper, the then Minister of Justice, the Rt Hon Geoffrey Palmer, said:

In practical terms the Bill of Rights is a most important set of messages to the machinery of government itself. It points to the fact that certain laws should not be passed, that certain actions should not be engaged in by Government. In that way a Bill of Rights provides a set of navigation lights for the whole process of Government to observe. (AJHR 1984-85 A 6, 6)

The significance of the Bill of Rights as a "set of navigation lights for the whole process of Government" may be seen as all the greater, given the comparatively limited role of the courts (para 5.9).

5.12 Those responsible for the preparation of emergency legislation must weigh its provisions against the rights and freedoms contained in the Bill of Rights. Section 7 requires the Attorney-General to bring to the attention of the House of Representatives any provision in any proposed legislation which appears to be inconsistent with any of these rights and freedoms. The weighing process should of course extend to the preparation of emergency regulations in those exceptional cases where Parliament has delegated its law-making power.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

5.13 The Bill of Rights expressly affirms New Zealand's commitment to the International Covenant on Civil and Political Rights 1966 a commitment arising from New Zealand's ratification on 28 December 1978 (NZTS 1978 No 19; AJHR 1979 A 69; AJHR 1984-85 A 6). The International Covenant sets standards for the protection of rights to which New Zealand law is expected to conform. There are, however, provisions under which the protection given to rights and freedoms may be qualified in time of emergency. Limitations are attached to certain of the rights and freedoms. In these cases action which impinges on a particular right or freedom may be justified if it is taken to protect interests such as national security, public order, public health or morals, or the rights and freedoms of others. Advantage might be taken of these limitations in time of emergency.

5.14 The International Covenant also has a general provision recognising that in a "public emergency" there may be departures from the standards it lays down (para 2.6). Article 4(1) provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties ... may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The State is to give notice of the derogation to the other States Parties, through the Secretary-General of the United Nations.

5.15 Paragraph (2) of Article 4 qualifies paragraph (1) by prohibiting derogations from the most basic rights set out in the International Covenant. Those rights include the prohibitions on the arbitrary taking of life and on torture and cruel treatment, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion.

5.16 Article 4 of the International Covenant will not authorise derogations from New Zealand's obligations under the International Covenant in most of the emergencies with which this report is concerned, since they do not threaten the life of the nation. But it will, or may be, relevant in emergencies arising from war or armed conflict. (Schedule 1 to the draft War Emergencies Act in Appendix D sets out the provisions of the International Covenant from which no derogation may be made by emergency regulations under that Act.) The principles reflected in Article 4 also apply by analogy in most emergency situations. They relate, for instance, to the need to define the circumstances justifying the exercise of emergency powers and to place limits on those powers which ought generally to be observed.

5.17 The remainder of this chapter sets out the principles on which sectoral emergency legislation should be based, considering in turn the six questions listed in para 5.2. Part II of this Report makes recommendations about the application of these principles in particular emergency sectors.

WHEN SHOULD IT BE POSSIBLE TO INVOKE EMERGENCY POWERS?

5.18 The governing legislation will state the circumstances in which a state of emergency can be declared or the emergency powers can be exercised, or both. These statements will of course vary according to the category of emergency but they are likely to contain common elements.

THE EXISTENCE OF AN EMERGENCY SITUATION AND THE NEED FOR EXTRAORDINARY POWERS

5.19 There are two essential conditions for the declaration of a state of emergency or the use of emergency powers:

- **the existence of an emergency of the specified kind; and**
- **the need in the particular case to exercise extraordinary powers.**

The executive should have to make that double judgment. Even if it is widely recognised that there is indeed an emergency, the executive may be able to handle it by exercising powers that are normally available. The additional requirement - to determine that these ordinary powers are insufficient - conforms with the principle reflected in Article 4 of the International Covenant on Civil and Political Rights (para 5.14). Emergency powers should be invoked only to the extent strictly required by the exigencies of the situation.

5.20 The Civil Defence Act 1983 likewise makes this need for extraordinary powers a prerequisite for the declaration of civil defence emergencies. There must be an emergency situation which cannot be dealt with by the police, the fire service or otherwise, without the adoption of civil defence measures (s 2). A relevant provision of the Defence Act 1990 (s 9(4)) also requires this double judgment. So does the Canadian Emergencies Act 1988. An emergency under that Act must be one that cannot be effectively dealt with under any other law of Canada, and it must exceed the capacity of any provincial authority to deal with it (s 3, and see paras 2.35-2.36).

5.21 The statutory statement of the circumstances constituting the emergency situation and justifying the need for special powers will usually include up to three components:

- (1) a state of mind of the decision-maker,
- (2) arrived at on the basis of certain information,
- (3) that a certain state of affairs exists.

A purely hypothetical example is (1) a belief, (2) on reasonable grounds, (3) both that disease has broken out threatening the plant life of the nation and the public interest and that special powers are required to deal with this situation.

5.22 This basic type of statement represents a balance between two, possibly conflicting, aims: the need to confer a sufficiently broad discretion to deal effectively with an emergency and, at the same time, the need to prevent the unjustified overriding of individual rights. It is a balance that must be struck whenever a public power is conferred or exercised. In the emergency context, the need to strike the balance arises whether the power is that to declare a state of emergency or to exercise emergency powers, including the power to make emergency regulations. The choice of the words defining the circumstances in which the executive may exercise those discretionary powers may be critical in determining the extent of the control by courts and other agencies. The wider the circumstances, the narrower that control - and vice versa. We return to that later (paras 5.106-5.123).

The existence of a certain state of affairs

5.23 The drafting of the statutory statement of what constitutes the emergency situation (the third component referred to in para 5.21) will have an important bearing on the potential impact on individual rights of the exercise of the powers involved. The more general the circumstances in which the powers are available, the more far-reaching the impact. A basic reason for the Law Commission's sectoral approach is the need to define the occasion for the exercise of emergency powers with as much precision as possible. The definition of that occasion should focus on the protection of important values and interests (such as the preservation of life or prevention of serious injury or serious and widespread damage to property).

5.24 The judgment required in a particular case may, however, relate to matters of a relatively intangible character. On occasion it may involve a possible rather than an actual event (a "threat") or a scarcely definable object ("the public interest"). An instance of the latter is the authority given to the Governor-General in Council to prohibit the importation of goods into New Zealand "in the public interest" (Import Control Act 1988 s 3(1)). If it is necessary to include speculative terms, the ancillary words should be in terms of probability or likelihood rather than possibility (such as "likely to" rather than "may").

5.25 In some cases only the third component of the basic statement - the factual situation permitting the exercise of special powers - will be stated in the statute. Under the United Nations Act 1946 s 2 the Governor-General in Council may make regulations in response to a call from the Security Council to give effect to a Council decision to employ sanctions, not involving the use of armed force, under Article 41 of the United Nations Charter. The Defence of the Realm Act 1914 (UK - repealed) is another example of an emergency statute which included only the third component. The King in Council was empowered "during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm" (s 1). The concrete language of these two statutes does not avoid the need for a determination that the state of affairs so described has indeed arisen. That determination may itself involve an element of judgment, as in the case of the Import Control Act 1988 example in para 5.24.

The state of mind of the decision-maker

5.26 The first component of the statutory statement (para 5.21) will indicate the state of mind required of the person or body as to the existence of the state of affairs giving rise to the discretion. A number of formulas are used: "believes"; "is satisfied"; "is of the opinion that"; and "suspects". A general suspicion that a state of affairs exists should not usually be enough. There are, however, some situations involving vital interests - such as the possibility that there has been an outbreak of foot and mouth disease - which may justify an emergency response on the basis of suspicion, particularly if the response involves only preliminary, provisional steps.

The grounds for the decision-maker's state of mind

5.27 The second component of the statutory statement - the reasons for the decision-maker's view that the specified state of affairs exists - will usually take the form of a requirement that that state of mind is based "on reasonable grounds". This formula requires decision-makers to put their minds to the facts of the situation, to evaluate their significance, and to decide whether, on these grounds, it is reasonable to conclude that the situation does indeed meet the statutory standard. Its inclusion imposes a higher standard of decision-making and enhances the possibility of control by the courts of any abusive exercise of the power. (See paras 5.106-5.112 on the restraint observed by the courts in examining challenges to the exercise of emergency powers.)

5.28 There are persuasive precedents for the inclusion of the requirement that there should be reasonable grounds for concluding that a situation justifies the invocation of extraordinary powers. A recent New Zealand emergency enactment, the International Terrorism (Emergency Powers) Act 1987, authorises the exercise of emergency powers if the relevant Ministers "believe, on reasonable grounds" that the specified circumstances exist. The Canadian Emergencies Act 1988 also imposes the same standard. The Bill for that Act, as introduced, would have enabled a declaration of emergency to be made "when the Governor in Council is of the opinion" that an emergency exists and necessitates the taking of special temporary measures. (The powers to make emergency regulations were in similar form.) In the course of its passage through the House of Commons the Bill was amended so as to authorise declarations of emergency "[w]hen the Governor in Council believes, on reasonable grounds" that the emergency exists and the measures are needed (ss 6, 17, 28, 38). (Similarly, under the statute as enacted, the Governor in Council was empowered to make such orders or regulations relating to specified matters "as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency" (ss 8, 19, 30; and compare s 40).)

Subjective and objective formulas

5.29 The first component of the statutory statement described in para 5.21, based as it is on the state of mind of the decision-maker ("believes", "is satisfied", etc), is often described as a subjective formula if it is unaccompanied by the second component setting out the grounds on which the decision-maker is to make a decision. That is, the drafting appears to leave the decision whether the pertinent state of affairs exists (the third component) to the unfettered and uncontrolled discretion of the decision-maker. The wording can be used to suggest that the courts have a limited or even no role in determining whether there was any basis for the decision.

5.30 The statutory statement is referred to as an objective formula when

- the second component is present, or
- the third component is present on its own (para 5.25).

The purpose of the formula is to confine the executive power and enhance the prospect of judicial review. The standard regulation-making authority contained in a statute now in general contains only the third component. (See paras 5.81-5.82.)

5.31 We discuss in paras 5.106-5.112 and in Appendix C the attitude the courts have taken in interpreting emergency provisions. We show that in practice the power of the courts to review the exercise of broad emergency powers has rarely been invoked successfully. The courts have read those powers widely and, consequently, have exercised their power of review within narrow limits. Nevertheless, the objective formula requiring the finding as to the existence of the specified state of affairs to be based "on reasonable grounds" does call for a higher standard of decision-making and does constrain the scope of the power. The Law Commission proposes that this formula should therefore be in general use in all emergency sectors.

Principle

5.32 Provisions authorising the declaration of a state of emergency or the exercise of emergency powers should, as a general rule, require that the person making the declaration or giving the other authorisation believes on reasonable grounds both (1) that an emergency situation of the specified kind exists, and (2) that the extra powers available in or under the emergency legislation are necessary in order to deal effectively with that situation.

TIME LIMITS

5.33 The empowering statute should usually provide that a state of emergency or other emergency measures are to be in force only for a limited period. When emergency regulations have been made under the authority conferred by the declaration of a state of emergency, it seems clear, as a matter of law, that those regulations cease to be in force once the state of emergency is terminated. Provision to this effect is usually included in the relevant legislation.

5.34 One reason for a time limit relates to one of the usual, though not invariable, characteristics of an emergency - it arises suddenly, requires an urgent response, and is of brief duration. A second reason is the extraordinary character of the powers which are conferred. These powers should not continue to be available on an indefinite basis. This would undermine the distinction between extraordinary emergency powers and the powers which are normally available. New Zealand legislation generally conforms with this principle.

5.35 The initial period for which a state of emergency may remain in force should be based on a realistic assessment of the minimum period for which extraordinary powers are likely to be necessary to deal with the particular type of emergency. For example, a state of civil defence emergency expires at the commencement of the seventh day after it has been declared (Civil Defence Act 1983 s 54). We propose that a war emergency should remain in force for no longer than an initial period of three months (draft War Emergencies Act s 6, Appendix D).

5.36 If a particular emergency does in fact last longer than the initial period during which the emergency powers are available, then further action can be taken. The state of emergency can be continued in force or Parliament can enact special legislation. In that second case Parliament will have had the opportunity and time to consider the particular situation after its nature, and the powers required to deal with it, have become clearer.

5.37 Any extension of a state of emergency should be the subject of deliberate consideration and decision. (Compare Teh Cheng Poh v Public Prosecutor [1980] AC 458, 473-474 (PC) where it was said that a failure to bring a state of emergency to an end, when there are no longer grounds for considering it still necessary for the specified purpose, may be an abuse of discretion.) If an initial state of emergency is due to expire and it is apparent that the situation still constitutes an emergency, it may be justifiable to extend the state of emergency for rather longer than the initial period. We propose that a declaration of a war emergency may be continued in force for periods of up to six months, after the expiry of the initial period of up to three months (see draft War Emergencies Act s 8, Appendix D).

Principle

5.38 A state of emergency or other regime permitting the exercise of extraordinary powers should not last longer than a period prescribed by the empowering statute. Any extension should be dependent on the continuation of the circumstances justifying the initial declaration of the state of emergency or other decision to invoke emergency powers. In some cases, renewal for a period which is longer than the initial period may be warranted.

GEOGRAPHIC LIMITS

5.39 The other common limit on the permitted scope of emergency measures is geographic. The declaration of a state of emergency should apply only to that part of New Zealand which is affected by the emergency: see, for example, the Civil Defence Act 1983 ss 50(1), 51(4) and 52(1). Again this is a reflection of the basic principle that only those powers that are necessary to deal with the emergency situation should be conferred.

Principle

5.40 Where appropriate, legislation authorising the exercise of emergency powers should provide for the exercise of the powers only within specified geographic limits or indicate that such a limitation should be considered.

WHO SHOULD HAVE THE POWER TO DECLARE A STATE OF EMERGENCY OR TO INVOKE EMERGENCY POWERS?

5.41 The statutory statement of the circumstances constituting the emergency situation and justifying the need for extraordinary powers can be expected to name the authority or person in central, regional or territorial government who is to make the decision which establishes or "triggers" the state of

emergency. It is worth noting that the decision to declare a state of emergency or to allow the exercise of emergency powers will usually be taken by Ministers or officials who are senior to those who actually exercise those powers.

5.42 A decision to proclaim a state of emergency carrying with it extraordinary emergency powers will normally be made by the Governor-General in Council. This was the position under the now repealed Public Safety Conservation Act 1932. A Proclamation of a state of national emergency under the Civil Defence Act 1983 s 46 is to be made by the Governor-General in Council; as are Proclamations of states of emergency under the Animals Act 1967 s 30 and the Plants Act 1970 s 12. The provisions of the Civil Defence Act 1983 reflect the need to take account of the relative gravity or scope of a situation by providing that national civil defence emergencies and regional and local civil defence emergencies are triggered by the Minister of Civil Defence and by regional and territorial authorities respectively (paras 3.90-3.91).

5.43 A declaration of a state of emergency may carry with it an authority to make emergency regulations. In this case the Governor-General in Council is involved. Under the Civil Defence Act 1983 the authority to make emergency regulations may be invoked not only during a national civil defence emergency but also during a regional or local civil defence emergency.

5.44 Ideally, the response powers will be set out in the Act itself. Those conferred by the Civil Defence Act 1983 can be invoked at the national, regional or territorial level as the case may require. The Medical Officer of Health if authorised by the Minister of Health can exercise an extensive range of powers for the purpose of preventing the outbreak or spread of any infectious disease (Health Act 1956 s 70). The Fire Service Act 1975 gives the person for the time being in charge of a fire brigade the authority to respond to a fire (s 28; and see also paras 3.70-3.74).

5.45 The extension of a state of emergency raises special questions. Usually the power to do so will be vested in the person or body empowered to make the original decision, although the House of Representatives may have the power to review the decision. Occasionally it may be necessary for the House itself to take the initiative in deciding upon any extension of the initial period (Defence Act 1990 s 9).

5.46 These illustrations reflect the broad proposition that the greater the emergency (and the wider the correlative powers to deal with it), the higher the level of decision-making. The application of this proposition to particular categories of emergency will depend on the nature and circumstances of those situations including their urgency.

Principle

5.47 Decisions to establish a state of emergency and to invoke emergency powers should be made at the level of executive authority appropriate to the importance of the decision. Where the circumstances require that they be made at a relatively low level, appropriate supervision and reporting procedures should be in place.

WHAT PROCEDURE SHOULD BE FOLLOWED IN DECLARING A STATE OF EMERGENCY OR INVOKING EMERGENCY POWERS?

5.48 The formal procedures to be followed in declaring a state of emergency or invoking emergency powers are discussed in the course of addressing other questions we have posed. There may, however, be other procedures to be followed before the declaration is made, immediately following the declaration, or while it is in force. Included are procedures relating to the controls on the declaration of a state of emergency or the exercise of emergency powers.

5.49 Again, many of the relevant procedures are discussed elsewhere in this chapter. Thus controls are discussed in paras 5.94-5.134. In this section we consider procedural requirements that deserve particular treatment. The duty to consult may arise before a decision to declare an emergency or exercise an emergency power is taken; along with the need to warn, there will be a duty to inform the public of the action taken. In some situations there will be a duty to inform the House of Representatives.

CONSULTATION

5.50 Where emergency powers are vested in the Governor-General in Council or in a Minister, there is a plain recognition that it is the political executive which makes the decision to exercise the power. But in some cases the formal action by or on the advice of Ministers can be taken only in accordance with the recommendation of a professional, independent body. For instance, some of the powers of the Governor-General to deal with financial emergencies can be exercised only on the recommendation of the Reserve Bank (Reserve Bank of New Zealand Act 1989 ss 77, 117). In other cases, the political executive makes the decision but must first consult with those who are most closely affected. So, for example, the Fishing Industry Board must be consulted before regulations are made to deal with emergencies endangering fish or aquatic life (Fisheries Act 1983 s 11); and the responsible Minister may take certain emergency steps to restrain petroleum consumption only after holding appropriate consultations (Petroleum Demand Restraint Act 1981 s 7; International Energy Agreement Act 1976 s 4).

5.51 Statutes now more often require consultation before the powers they confer, especially to make regulations, are exercised. The Regulations Review Committee has recommended that attention be given to the inclusion of such a requirement and to the desirability of notice and consultation being used in practice (Report of the Regulations Review Committee 1986: Regulation-Making Powers in Legislation AJHR 1986-87 I 16A, paras 9.1-9.7).

5.52 An input by way of recommendation or consultation is likely to be appropriate whenever expertise or special knowledge is relevant to the decision to invoke emergency powers. Sometimes the views of those immediately affected will be critical to the judgment that the use of extraordinary emergency powers is required (para 5.19).

5.53 The Canadian Emergencies Act 1988 illustrates the importance of providing, where appropriate, for prior consultation. The federal government is, in general, to consult with the provincial governments which are affected, and in some cases cannot act unless the provincial government has indicated that the emergency exceeds the capacity or authority of the province to deal with it (ss 14, 25, 35, 44). In the case of international and war emergencies, the obligation of the federal authorities to consult with their provincial counterparts is understandably qualified. But it exists nevertheless.

5.54 Before emergency regulations are brought into force a Minister can ask the Regulations Review Committee of the House of Representatives to consider them in draft and to report to the Minister (Standing Order 388(3)(a)). Occasionally there may be an opportunity for that consideration even after the emergency has arisen. For example, the International Energy Agreement Act 1976, which enables the making of regulations while a Proclamation of a petroleum emergency is in force, requires the relevant Minister to undertake appropriate consultations with representatives of producers and suppliers of petroleum likely to be affected by the regulations (s 4(1) and (4)). During that period of consultation the Committee might be asked to examine a draft of the proposed regulations.

5.55 In other cases, the exigencies of the emergency may not permit a reference to the Regulations Review Committee immediately before the emergency regulations are made. Wherever possible, however, draft emergency regulations should be prepared in advance, as part of the preparedness phase, and held in abeyance until there is a need for them. That preparatory work could include reference of the draft regulations to the Committee for scrutiny and report.

Principles

5.56 The executive should take all appropriate opportunities, before a state of emergency is declared, emergency regulations made or other emergency powers invoked, to consult with those who have special expertise or knowledge or will be most closely affected. Consideration should be given to including provisions to this effect in the empowering statute.

· Where practicable, and especially if they have been prepared in draft form in advance of the emergency, emergency regulations should be referred to the Regulations Review Committee before they are made.

INFORMING THE PUBLIC

5.57 In some situations the giving of a warning to both the public and the emergency services that an emergency is about or likely to occur is both part of the mitigation phase and an essential element of an effective response. Thus civil defence procedures are geared to provide warnings of a natural event such as an oncoming storm.

5.58 In general, the authorities will not be able to deal with the emergency effectively unless adequate publicity is given to the existence and nature of the emergency, the scope of the emergency powers that may be exercised, and the steps that are being taken to deal with the emergency.

5.59 The International Covenant on Civil and Political Rights enunciates the principle that a state of emergency should be officially proclaimed (see para 2.13). New Zealand law conforms with this principle and indeed runs beyond it. The declaration of a state of emergency by the Governor-General in Council will take the form of a Proclamation which is required to be published in the Gazette. All regulations are published in the statutory regulations series (Acts and Regulations Publication Act 1989). That ensures that there is an official record, that public notice is given of the various actions, and that there is a formal basis for processes of accountability.

5.60 In terms of the practicalities of dealing with an emergency quite different steps are required. Widespread publicity through the news media, or the service of notices on those particularly affected, may be necessary to bring the relevant decisions to the knowledge of the public generally and of those members of the public who are particularly affected. Sometimes the need for this type of publicity will be specifically recognised by the relevant legislation. (See, for example, the Civil Defence Act 1983 ss 32(2)(f), 57(3), 58(5)(h), 80(c).)

Principle

5.61 Consideration should be given to including in emergency legislation express provisions requiring that adequate publicity is given to the existence and nature of the emergency, the scope of the emergency powers that may be exercised, and the steps that are being taken to deal with the emergency.

INFORMING THE HOUSE OF REPRESENTATIVES

5.62 If the decision to declare a state of emergency or to exercise an emergency power has particular significance, by reason of the nature of the emergency, the scope of the emergency powers or the political implications of their exercise, the publicity the decision is to receive should include a requirement that the person making the declaration notifies the House of Representatives. This is the case with a national emergency or a national civil defence emergency declared under the Civil Defence Act 1983 ss 49(1), 50(2) and would be with a war emergency declared under the proposed War Emergencies Act s 12(1), Appendix D. A number of procedures are available under which the House can review the declaration of a state of emergency and control the exercise of emergency powers. These are discussed in paras 5.95-5.104.

Principle

5.63 Legislation conferring emergency powers should require notice of emergency measures to be given to the House of Representatives, where this is appropriate, having regard both to the importance of the measures and the nature of the emergency.

WHAT EXTRAORDINARY POWERS SHOULD BE CONFERRED FOR USE IN THE EMERGENCY?

5.64 The answer to this question - like the answer to the first question about the circumstances in which it should be possible to invoke emergency powers - depends on the category of emergency. Chapter III has already described powers conferred by or under particular statutes relating to the five categories of emergency which we discuss in Part II. We will take up in Part II questions about the conferral of some specific powers in particular emergency situations. Chapter III also provides a list of the types of powers which are to be found in the table in Appendix A (para 3.106).

5.65 Once again this chapter makes some proposals of principle, taking up themes that are already familiar: the Commission's emphasis on sectoral rather than general emergency legislation (Chapter IV and para 5.1); the balance between the State's need for emergency powers and respect for individual rights (paras 5.3-5.16); and the requirement that the executive should not be able to call on extraordinary powers in a particular situation unless it is satisfied on reasonable grounds that it needs those powers in addition to those ordinarily available (paras 5.19-5.32).

5.66 We consider in turn

- the requirement that the powers available should be only those necessary to deal with the emergency,
- the conferral of specific powers,
- the inclusion of the powers in the statute itself rather than in delegated legislation,
- the circumstances when it may be justified, in an emergency, to delegate law-making powers to the executive, and
- the rights which cannot be abrogated even in time of emergency.

THE NEED FOR THE POWER

5.67 We have already proposed that there should be power to declare a state of emergency only if the particular situation calls for the exercise of emergency powers - taking account both of the category of emergency and the exigencies that are likely to arise (para 5.19). The same principle applies to the powers which are available, and are exercised, to deal with the particular situation. They, too, should be limited to those required in order to deal with that situation effectively. That proposition is illustrated by the International Covenant: if the powers have the potential to interfere with basic human rights, a derogation from those rights is permitted only "to the extent strictly required by the exigencies of the situation" (para 5.14). On the other hand, once a need for an extraordinary power is established the power should be conferred in clear enough terms to enable those exercising it to determine which actions are within and which are outside its scope (para 5.115).

Principles

- .68
- × The powers available in each category of emergency should be those required to deal effectively with emergencies of that category and should be limited to these powers. The powers should be conferred in clear terms.
 - × The powers exercised in a particular emergency should be limited to those needed to deal effectively with that emergency.

THE CONFERRAL OF SPECIFIC POWERS

5.69 Emergency powers are usually conferred by the relevant Act and sometimes by regulations made under it. Whether particular powers (for instance, to direct persons to take certain actions or perform certain services, or to requisition and control property) should be conferred is a matter mainly to be determined in the context of each particular enactment. But there are recurring issues.

5.70 Some of the emergency powers listed in para 3.106 involve greater restrictions on rights than others. In terms of their effect on individual liberty, compare the power to conscript a person into the armed forces for war service with the power temporarily to prevent an individual from entering an area infected with an animal disease. In terms of rights of property, powers to destroy property are of course more serious than powers to requisition it for a short period; but, if there is compensation for the loss suffered, their different impacts may be less significant. Powers which have a preliminary, short-term effect, such as powers of entry or arrest, may be contrasted with those which may have a long-term effect, such as powers of detention.

5.71 The varying characteristics of the rights and interests in issue, balanced against the gravity of the situation and the consequent needs of the State, should determine the scope of the powers that are granted. The nature of these rights and interests and the extent to which they are adversely affected should also govern the applicable procedures.

5.72 The Law Commission is preparing a manual on legislation under its responsibilities in respect of legislation. In this context we plan to consider in a more general way the issues that arise in stating the grounds for the exercise of public powers. The manual will be a source of standard provisions

which can be drawn upon in authorising the exercise of emergency powers, as well as regular powers. For the moment we set out some general principles.

Principles

5.73 The legislative statements of the scope of an emergency power and the grounds on which it may be exercised should, in general, be governed by

- the nature of the public interest threatened by the emergency,
- the need for the power (or its exercise) in the particular circumstances,
- the importance of the right, interest or value being abrogated or prejudiced by the exercise of the power, and
- the extent of that abrogation or prejudice.

THE INCLUSION OF POWERS IN THE STATUTE ITSELF

5.74 Legislative practice and official commentary have long recognised the existence of "emergencies" as a standard justification for the delegation of law-making powers to the executive. See, for example, Report of the Delegated Legislation Committee AJHR 1962 I 18, paras 4 and 6. In the case of the Public Safety Conservation Act 1932 the range of circumstances in which the Act could be invoked made it necessary to rely on emergency regulations in order to confer powers for use in a particular emergency. But the sectoral approach to the grant of emergency powers means that reliance on emergency regulations can be justified only in the most exceptional cases. (See First Report, Chapter II, and Chapter IV of this Report.)

5.75 Legislative practice shows that in the case of most public welfare and economic emergencies the necessary powers can be conferred by the Act alone (see Appendix A). There may be a danger that the statute will confer too extensive a power in order to cover situations which may occur in the distant future, these being beyond close prediction and precise definition. It is, however, an advantage of the sectoral approach that the powers which may be required in a particular area can be more easily envisaged. When provision for their conferral is included in a Bill for an Act dealing with a particular emergency sector, the rigours of the parliamentary process will be brought to bear (para 4.19).

5.76 War emergency, civil defence and agriculture legislation are the exceptional cases where a power to make emergency regulations can be justified - and even in the civil defence area the main powers

actually needed in practice are conferred by the Civil Defence Act 1983. The power to make emergency regulations contained in the Act has not been used; nor was the corresponding power in the Civil Defence Act 1962. To date civil defence emergencies have, it seems, been dealt with effectively by exercising only the statutory powers. (As to agriculture see Chapter VIII, especially paras 8.39-8.41.)

Principle

5.77 In all but the most exceptional circumstances the powers which are available in an emergency should be conferred by the relevant Act itself, so avoiding the need to confer a wide power to make emergency regulations under the authority of the Act.

THE JUSTIFICATION FOR DELEGATING LAW-MAKING POWERS

5.78 There are two kinds of emergency situations where it may not be feasible to confer the necessary powers, or all of them, in the governing statute. In the first kind, most of the measures which may need to be taken can be foreseen. The relevant powers can be conferred directly by the Act itself. But the possibility remains that events may take an unexpected turn. It may then be essential as a matter of urgency to provide for the exercise of other powers that are not required and should not be available in the usual case, but should nevertheless be capable of being called upon as a last resort. (See the authority to make emergency regulations in the Civil Defence Act 1983, paras 3.96-3.97; see also paras 8.39-8.41)

5.79 In the second kind of situation it is simply not possible to know in advance the form the emergency may take. The measures required to deal with it may extend across the whole economy. War is the prime example. The conferral of powers by emergency regulations will then be the first recourse, not the last, and the power to make those regulations will be a general one. It cannot be conferred in narrow, specific terms. In the extreme case the whole government of the country may have to be carried on under that authority.

5.80 The delegated law-making powers in the two kinds of emergency just described will generally include an express power to make regulations which can override other legislation (although not the empowering Act itself). The regulations may affect rights which the law ordinarily protects. On the other hand, this far-reaching authority may still be made subject to specific limits. In the case of the draft War Emergencies Act these limits prohibit the making of regulations inconsistent with certain other Acts or interfering with the liberty of the person in certain ways (s 5(5), Appendix D). And, even where the regulation-making power remains wide, the regulations must still be capable of being related to the general purpose of the statute.

5.81 Select committees of the House of Representatives have more than once emphasised the importance of ensuring that the precise limits of the law-making powers delegated by Parliament are set down as clearly as possible in the enabling Act, and that the jurisdiction of the courts to review delegated legislation and determine its validity is not excluded or reduced (Report of the Delegated Legislation Committee AJHR 1962 I 18, paras 11-15; Report of the Regulations Review Committee 1986: Regulation-Making Powers in Legislation AJHR I 16A, paras 5.2-5.3, 5.6; see also Legislation Advisory Committee, Legislative Change, para 92). There is now a well-established formula in terms which are objective and confined - not subjective or broad - for authorising the making of regulations.

5.82 So far as possible the delegation of authority to make emergency regulations should be in the standard, objective form. While the emphasis on confining the power to make regulations and conferring it in specific terms is not appropriate in the case of the most serious of emergencies, it is still possible to use objective language (see the discussion of the terms in which the power to declare a state of emergency should be conferred in paras 5.21-5.32). In contrast to the Civil Defence Act 1962, which had authorised the Governor-General in Council to make such regulations "as appear to him to be necessary or expedient" for the purposes specified, the Civil Defence Act 1983 omits the reference to the subjective opinion of the Governor-General and simply authorises the making of emergency regulations "for such matters as are necessary or expedient" for the purposes in question (s 79, see para 3.96). The change made to the Canadian emergencies legislation mentioned earlier (para 5.28) also supports the use of objective wording.

5.83 We shall see later that the use of objective empowering language (whether or not qualified by the requirement of a belief "on reasonable grounds" that it is necessary to exercise the relevant power) does not usually lead to a close, detailed scrutiny and second-guessing by the courts of executive action taken to meet an emergency (paras 5.106-112 and Appendix C).

5.84 It is important also that the power to make regulations in an emergency should be expressly conferred. A provision is sometimes included in statutes authorising the making of regulations concerning specifically stated matters, and "such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act or for its due administration." Such a provision should not be seen as sufficient authority for the making of regulations to deal with an emergency. A residual regulation-making power of the kind just referred to is to be read in the context of the specific matters listed and given a limited meaning accordingly. The practice of including a general power at the end of a list of specific powers has recently been examined by the Regulations Review Committee (Regulations Review Committee 1990: Inquiry into the Drafting of Empowering Provisions in Bills AJHR 1990 I 16).

5.85 We are proposing that emergency regulations should, if possible, be made only after prior consultation with those likely to be most closely affected (paras 5.51-5.56), that there might be special arrangements for their review by Parliament during the time that they are in force (paras 5.100-5.104) and that the legislation should recognise that the regulations cease to be in force once the emergency itself is over (para 5.33).

Rules made by Ministers and officials

5.86 The definition of "Regulations" in the Regulations (Disallowance) Act 1989 includes not only regulations and rules made by the Governor-General in Council, but also those made by a Minister of the Crown. In principle, emergency regulations should be authorised by Cabinet and therefore made by the Governor-General in Council rather than by an individual Minister. There may be particular situations in which it is appropriate to confer on a Minister or a senior official the authority to make emergency regulations

or rules. It is important, however, that any such regulations or rules should be subjected to the same scrutiny as regulations made by the Governor-General in Council. Under the Regulations (Disallowance) Act 1989 this is the position in respect of rules made by a Minister, but special provision should be made in the case of rules made by an official. As will be seen, there may be situations in which specific provision should be made for earlier consideration of the regulations or rules by the House than is possible under the Regulations (Disallowance) Act 1989 (para 5.102).

5.87 The Civil Aviation Act 1990 authorises the Minister of Transport to make ordinary rules, and the Director of Civil Aviation Safety to make such emergency rules "as may be necessary to alleviate or minimise any risk of the death of or a serious injury to any person, or of damage to any property." (s 31; see ss 28-37) The procedures involved in the making of these rules are summarised in Chapter III (paras 3.75-3.83). It is to be noted that both categories of rule are deemed to be regulations for the purposes of the Regulations (Disallowance) Act 1989, but not for the purposes of publication in the volumes of statutory regulations (Acts and Regulations Publication Act 1989).

5.88 In the special circumstances that pertain to the aviation industry, where it may be necessary to make immediate changes to technical provisions in order to ensure aviation safety, the conferment on an official of authority to make emergency rules may be justified. This is not a precedent that should be adopted readily in emergency sectors. In Chapter VIII there is a discussion of a Ministry of Agriculture and Fisheries proposal that its legislation should include provision for the making of rules that would facilitate policy changes that cannot be expedited quickly enough by way of amendments to the principal Act or regulations. The Law Commission regards such a proposal as objectionable in principle. We suggest that, if an emergency should arise calling for the implementation of policy decisions involving the overriding of statutes or regulations, law changes should be effected on the authority of a formal declaration of a state of emergency followed by the passage of emergency regulations (paras 8.39-8.41).

Sub-delegated legislation

5.89 As a general rule, the holder of a delegated law-making power - the Governor-General in Council in the case of regulations - cannot validly sub-delegate that power to another person or body without express statutory authority. In those few sectoral statutes conferring emergency powers which include a power to make emergency regulations there may be a case for adding an authority to sub-delegate that power. The Emergency Regulations Act 1939 contained such an authority, as does the draft War Emergencies Act s 5(2)(c) (Appendix D).

5.90 An authority to make sub-delegated legislation should include appropriate safeguards. Thus it will be desirable to set out the subjects with which that legislation can deal. There should be requirements for consultation and adequate publicity. The legislation should be tabled in the House of Representatives and brought within the scope of the procedure for amendment or disallowance available in respect of the emergency regulations themselves.

PROTECTED RIGHTS

5.91 The International Covenant for the Protection of Civil and Political Rights makes it clear that a basic core of human rights and fundamental freedoms must be respected even in a time of public emergency threatening the life of the nation. It also reminds States Parties that in such a time they must continue to respect their other international obligations. (See paras 5.13-5.16.) Relevant international

obligations (most of which will apply in wartime as in peacetime) are further elaborated in other international instruments, for instance, those on the prohibition of torture and on the protection of the victims of armed conflict (internal as well as international) (see paras 3.10-3.15). As will be seen there is some scope for international monitoring of the performance of the State's international obligations in time of emergency (see paras 5.126-5.134).

5.92 These requirements and procedures should be taken into account in drafting emergency powers, whether conferred by statute or by emergency regulation. As a reminder in that last-mentioned case, it may be appropriate expressly to exclude any power to make regulations which derogate from New Zealand's obligations under the International Covenant or other treaties which are particularly relevant (see, for example, the draft War Emergencies Act s 5(4), Appendix D). Even in the absence of any such express exclusion, the need will remain to have proper regard for human rights and for all of the international obligations by which New Zealand will continue to be bound even in an emergency.

Principle

5.93 Relevant sectoral legislation conferring emergency powers should not interfere with rights and freedoms which ought to remain protected or derogate from relevant international obligations by which the New Zealand Government is bound. Consideration should be given to including an express limitation to this effect in any power to make emergency regulations.

WHAT CONTROLS SHOULD THERE BE ON THE EXERCISE OF EMERGENCY POWERS?

5.94 In this section we examine in turn the controls on the exercise of emergency powers which may be asserted by the House of Representatives and its committees, by the courts, and by other national and international processes. Generally speaking, these controls will operate after the declaration of a state of emergency or the taking of measures to deal with the emergency. But the process is, in a sense, a circular one. The corrective action taken by Parliament, the courts and other national and international agencies in a particular case contributes to the body of principle which should be taken into account in conferring the emergency powers themselves. Parliament's role includes the enactment of the legislation conferring those powers. And, before that, the executive will have proposed the terms in which the powers should be conferred. Those terms may be decisive for the type of controls which subsequently become available and the way in which those controls are exercised.

REVIEW BY THE HOUSE OF REPRESENTATIVES

5.95 The controls over the exercise of emergency powers which might be exercised by the House of Representatives fall into two groups - those generally available to the House, and those established by statute in relation to particular emergency sectors.

General controls

5.96 The controls generally available to the House of Representatives can be relevant in two distinct situations:

- in the drafting of Bills which deal with a particular type of emergency situation; and
- in the review of states of emergency and the exercise of emergency powers.

The procedures through which the House can ensure that legislation containing emergency powers conforms to the principles set out in this Report and elsewhere are discussed in Chapter IV (paras 4.18-4.21).

5.97 Any aspect of an emergency may be made the subject of a special debate in the House of Representatives. This may take place on the initiative of the government as was the case with the debate on the decision to commit transport aircraft and a medical team in support of the multinational force in the Gulf War. Alternatively, the Speaker may allow a debate on a definite matter of urgent public importance on the motion of any member of the House (Standing Order 89). Members can also raise emergency issues in questions to Ministers, general debates and debates on the estimates.

5.98 The select committees of the House also have broad powers to examine the policy, administration and expenditure of the departments and associated government agencies within their terms of reference (Standing Order 322). These powers enable them to undertake an investigation into the ways in which relevant departments and agencies have handled emergencies - as indeed happened in the case of Cyclone Bola (Report of the Primary Production Committee on the Inquiry into Government Assistance to the East Coast Region in the Wake of Cyclone Bola AJHR 1988 I 12A). Also, the House can set up special committees when it decides that this is appropriate.

5.99 The Regulations Review Committee of the House of Representatives can be asked by a Minister to consider draft emergency regulations before they are made (para 5.54). Once the regulations are made they are subject, like other regulations, to Standing Orders setting out the functions of the Regulations Review Committee (Standing Orders 388-390) and to the regime of tabling, review and possible amendment or disallowance provided by the Regulations (Disallowance) Act 1989. The Committee can draw a regulation to the attention of the House on the grounds (amongst others) that it

- trespasses unduly on personal rights and liberties,
- appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made, or

- **unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal (Standing Order 389).**

Under the Regulations (Disallowance) Act 1989 ss 5-7 a member of the Regulations Review Committee may move to disallow any regulations. The motion takes effect without House endorsement if it is not otherwise disposed of within 21 sitting days.

Special parliamentary controls

5.100 Under the parliamentary system the responsibility for responding to an emergency, including the declaration of a state of emergency, is an executive responsibility falling on central or local government. Nevertheless, there will be emergencies in which there should be parliamentary involvement. We have already noted that in the case of more significant declarations of a state of emergency there may be a statutory requirement that the maker of the declaration is to inform the House of Representatives (para 5.62). A requirement that the House of Representatives be informed that a state of emergency has been declared may be supplemented by provisions authorising or requiring the House to take specific action in relation to the declaration of a state of emergency or to the exercise of emergency response powers. There may be procedural requirements ensuring that the House meets to consider the measures taken and that, once it meets, the government makes parliamentary time available to consider any action the House itself may need or wish to take. The requirements and procedures that might be used are discussed in Appendix B.

5.101 The nature and extent of the response powers that will be available, including their potential impact on individual rights, will determine which of these requirements and procedures will be appropriate in a particular emergency. The possibilities will range from those emergencies in which there will be no requirement to inform the House of Representatives to those in which the House retains extensive controls over the extraordinary powers it has conferred. (See draft War Emergencies Act Part 3, Appendix D; paras 8.38, 8.42-8.43, 9.39-9.43.)

5.102 It follows that emergency legislation might contain an appropriate selection of requirements or procedures relating to the supervisory powers of the House of Representatives (see Appendix B paras B23-B46). The legislation might require that

- **the House is given notice, within a specified time, of the declaration of a state of emergency;**

- a meeting of the House or of Parliament is brought forward if the House is adjourned or Parliament is prorogued or dissolved;
- a meeting of the House or of Parliament is brought forward if a specified number of members of Parliament so require;
- the House has the opportunity within a specified time to confirm the declaration of a state of emergency (or any extension of it) and to change the period of its operation;
- the House has the power to revoke the declaration of a state of emergency (or any extension of it);
- a notice of motion by a specified number of members of Parliament that a declaration of a state of emergency be revoked, if not taken up and considered within a specified time, is to be regarded as adopted (compare the provision discussed in Appendix B para B31);
- emergency regulations are tabled earlier than the sixteenth sitting day required by the Regulations (Disallowance) Act 1989;
- a notice of motion by a specified number of members of Parliament to amend or revoke emergency regulations, if not taken up and considered within a specified time (being a shorter time than the 21-day limit provided in the Regulations (Disallowance Act) 1989), is to be regarded as adopted (compare the provision discussed in Appendix B para B41);
- the relevant Minister or official is required to report on the exercise of emergency powers.

5.103 The Canadian Emergencies Act 1988 s 62 provides for the establishment of a Parliamentary Review Committee to support Parliament's supervisory and review functions. This does not appear to be necessary in New Zealand in view of the committee system of the House of Representatives, including the House's right to set up special committees (para 5.97).

Principle

5.104 Where it is appropriate, having regard to the nature of the emergency and the extent of the extraordinary powers that are being conferred, emergency legislation should include provisions under which the House of Representatives can supervise and review the exercise of those powers. The provisions should ensure that the House can in fact exercise its powers of supervision without undue delay.

REVIEW BY THE COURTS

5.105 The courts may rule on the validity of any exercise of public power put in question in litigation before them. This court scrutiny does not involve a re-examination of the merits of the particular administrative decision or action. Rather it is for the courts to say whether the State has acted within its legal powers, and, where there is a discretion, whether it has been exercised on proper grounds and after following a proper process. This power of judicial review is supported by the power to award suitable relief by way of application for judicial review, habeas corpus, injunction or declaration.

5.106 The ability of the courts to rule that the State has or has not acted within its powers depends on the scope of the power conferred: the greater the administrative discretion, the more limited the power of judicial review. This general proposition is supported, in relation to emergency powers, by decisions (some briefly summarised in Appendix C) over the years in a number of jurisdictions. These decisions show that in reviewing broad emergency powers the courts have rarely held that the Government has acted unlawfully.

5.107 In those and related cases, the courts have had regard to a number of factors:

- the wide scope of the powers conferred by the emergency statute;
- the relatively intangible and highly discretionary character of the matters to be decided (or at least some of them):
- Those who are responsible for the national security must be the sole judges of what the national security requires (The Zamora [1916] 2 AC 77, 107 (JC); although note that the challenge to the Crown's action succeeded in that case);
- the subjective character of the judgment that the power should be exercised (if the power is conferred in such terms);
- the confidential nature of the information on which some decisions to exercise power are based;
- the fact that the powers were conferred in a statute passed in a time of supreme national emergency or to deal with such an emergency;

- the fact that the exercise of the powers was subject to other controls (such as the existence of an advisory committee which provides an opportunity for the person who is affected by the exercise of an emergency power to make representations).

5.108 There are of course factors that can count in the opposite direction. Some of the elements just listed may not be present in the particular case. The court may give greater weight to the protection of the rights and liberties of the individual than to the relevant interest of the State. The court may respond to the famous statement made by Lord Atkin in his dissent in Liversidge v Anderson [1942] AC 206, 244 (HL):

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

Further, the court may be able to relate the argument for invalidation to the infringement of a particular established legal right (see Appendix C para C6).

5.109 The timing of the case may also be significant. Some of the cases in which regulations were struck down (see Appendix C para C6) were decided after the emergency had passed, when the matter was no longer one of sacrificing the liberty of the individual in favour of "national success in the war, or escape from national plunder or enslavement." (R v Halliday [1917] AC 260, 271 (HL)) Further, although some of the policy factors which limited review in the wartime cases are also relevant to peacetime emergencies, the fact that these emergencies pose a lesser threat may mean that the courts will be more willing to review the exercise of peacetime emergency powers. As well, the different attitude to the control of the exercise of administrative power adopted in recent years by the courts in cases not concerned with emergencies may lead them to examine the exercise of emergency powers more closely.

Margin of appreciation

5.110 One interesting parallel between the national and the international jurisprudence is the respect accorded in each context to the fact that a government which is faced with an emergency situation has the responsibility of deciding what response measures are required. This is the approach taken in international forums when considering whether a State taking emergency measures is complying with the standards laid down in human rights or other relevant treaties. In upholding those standards in the particular case there is a recognition that the government has a broad discretion, often referred to as "a margin of appreciation", to make its own judgment about the existence of the emergency and also for the need for, and extent of, the response.

5.111 In Ireland v United Kingdom, a case about the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (para 2.7), the European Court of Human Rights stated the principles as follows:

It falls in the first place to each Contracting State, with its responsibility for "the life of [the] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of

such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15 para 1 [of the European Convention] leaves those authorities a wide margin of appreciation. (18 January 1978, European Court of Human Rights Series A, No 25, para 207; (1978) 2 EHRR 25, para 207; 17 ILM 680, 707)

(In the relevant respects Article 15(1) is to the same effect as Article 4 of the International Covenant on Civil and Political Rights (para 5.14).) There appears to be only one declaration of emergency which an international body has held not to be justified - that of 1967 by the Government of the Greek Colonels which had seized power by a coup d'etat and suspended part of the constitution (The Greek Case (1969) 12 Yearbook of the European Convention on Human Rights; see para 2.9).

5.112 It seems therefore that the specific terms in which emergency powers are conferred are not very significant in governing the extent to which the courts will set aside actions taken in an emergency. The other matters listed in para 5.107 must be seen as weightier. The broad conclusion is that the courts will intervene only in the clearest of cases. This conclusion is relevant to the question of including in legislation provisions designed to protect actions taken in an emergency from judicial review to which we now turn.

Exclusion of judicial review

5.113 Two principal formulas used to protect emergency action from judicial review provide that:

- **decisions of the executive cannot be called into question in any court;**
- **individuals acting or purporting to act under emergency powers are not liable, or cannot be sued.**

5.114 To attempt to preclude legal redress in either of these ways appears in principle to be a wrong approach. The critical step is to confer the necessary powers in the first instance, in appropriately drafted terms. This may mean using sufficiently broad language to be sure of having the powers which are necessary to meet the danger. The legislation should not protect the possibly unlawful use of powers which have been conferred in inappropriately narrow terms. This does not mean that wide general powers should be conferred on a speculative basis. That would cut across the principles set out in paras 5.64-5.68.

5.115 It is always necessary in the preparation of the legislation to decide what powers are required in the particular case. But once that decision is made, the power should be conferred in clear terms. Those exercising the power should be able to determine what actions are within its scope and what would be outside it. When appropriate the provision should be express. So, if those exercising a power of entry are to be able to break in by force if necessary, the empowering provision should say that explicitly.

5.116 The formulas set out in para 5.113, though having the same broad purpose, produce different legal effects. The implications of the second formula are discussed in paras 5.156-5.165.

5.117 The principal example of the first formula in emergency statutes is to be found in the Civil Defence Act 1983. According to that Act, the fact of the declaration by an authorised person of an emergency

shall be conclusive evidence of [that person's] authority [to make the declaration], and no person shall be concerned to inquire whether the occasion requiring or authorising [that person] to do so has arisen or has ceased. (ss 46(6), 50(3), 51(7) and 52(6); see also ss 47(3) and 48(2))

5.118 The inclusion of privative provisions of this kind is incompatible with an approach to the drafting of sectoral emergency legislation that requires that the circumstances in which emergency powers can be invoked are carefully defined. The courts should be able to examine whether the circumstances in which the powers are invoked fall within the authority that has been given. In other words, privative clauses are inconsistent with the basic proposition that the courts should have the power to determine whether the State is acting lawfully (however widely the emergency power is stated) - a principle now given statutory recognition in s 27(2) of the New Zealand Bill of Rights. They are also contrary to the principles stated by the Legislation Advisory Committee and endorsed by Cabinet (Legislative Change, para 113).

5.119 In any event just as a "subjective" or "objective" wording of a power may have little or no effect on the extent of judicial review (para 5.112), so too the courts have often granted a remedy in the face of a "privative" clause. Thus a court may hold that the authority purporting to be exercised is not an authority "conferred" by the relevant enactment or that the "decision" taken is not a decision because it has been taken outside the authority of the statute. Accordingly the privative clause does not apply (see Bulk Gas Users Group v Attorney-General [1983] NZLR 129 (CA) and the cases cited there). There is, however, uncertainty about how far the courts can or should go in limiting the effectiveness of privative clauses. As Sir Robin Cooke, the President of the Court of Appeal, has said, the disuse of private clauses by legislative drafters would be a further advance in the struggle for simplicity (Taggart (ed), Judicial Review of Administrative Action in the 1980s (Oxford University Press in association with the Legal Research Foundation, Auckland, 1986) 8; see also 31-33, 70-75 and 157).

5.120 There is a tendency to make less use of privative clauses in recent legislation, with the exception of clauses placing limits on interim relief. Some recent statutes not concerned with emergency situations have included a bar on seeking interim relief against the exercise of powers (especially of search and investigation) relating to economic and financial matters. They do not, however, prevent the legality of the exercise being questioned after the event (see, for example, the Serious Fraud Office Act 1990 s21).

5.121 These provisions should not be seen as a precedent justifying their inclusion in sectoral emergency legislation. They are inconsistent with the principle that the courts should have the power to determine whether the State is acting lawfully and, if not, to provide appropriate remedies. There should be immediate access to the courts for these purposes. Then, if the State's actions are found to be unlawful, they can be halted immediately, instead of leaving the plaintiff to seek a remedy after the event. This is important because some losses arising from the State's unlawful acts may be a grave interference with the

rights of the individual. For example, the award of damages for wrongful imprisonment to a person who has unlawfully been deprived of personal liberty is a second-best remedy, in comparison with immediate release.

5.122 In practice, provisions excluding access to the courts for interim relief may not affect the outcome of judicial review. On the one hand, the courts are likely to exhibit considerable reluctance to grant interim relief which would disrupt an emergency response. On the other, this type of privative clause, too, may not prevent judicial review (see para 5.119; Hawkins v Sturt (unreported, High Court, Auckland, 27 July 1990, M1183/90, Thomas J, 12)). The Law Commission will be examining bars on interim relief in a wider context in its work on the Crown. The better answer, to repeat this point, is to confer the relevant power in appropriate terms in the first place.

Principles

5.123 Provisions purporting to prevent the questioning of the legality of a declaration of a state of emergency or the exercise of emergency powers should not be enacted. The first appropriate opportunity should be taken to repeal existing provisions to this effect.

A power should be conferred in clear terms so that those exercising it are able to determine what actions are within its scope and what would be outside it.

REVIEW BY OTHER AGENCIES

5.124 There are other public agencies which can monitor the grant and exercise of emergency powers. The Human Rights Commission has a particular statutory responsibility in respect of the compliance by legislative, administrative and other agencies with standards laid down in international instruments on human rights (Human Rights Commission Act 1977 s 6(1); see also the title to the Act). The Ombudsmen have authority to review acts of administration of public agencies, both central and local. This review can include measures taken in an emergency.

5.125 In 1963 and 1964 the Ombudsman questioned whether Civil Defence had taken appropriate steps to press for the preparation of national civil defence plans and local civil defence plans as required by the Civil Defence Act 1962. In 1965 the Ombudsman accepted that the matter was "well in hand". (Report of the Ombudsman for the year ended 31 March 1964 AJHR 1964 A 6, 89, 35-36; Report of the Ombudsman for the year ended 31 March 1965 AJHR 1965 A 6, 30)

INTERNATIONAL PROCESSES

United Nations machinery

5.126 In a limited number of cases, international institutions and procedures may be used to monitor emergency actions taken by a State. These include procedures within the United Nations framework through which abuses of fundamental human rights and freedoms occurring during an emergency can be aired.

5.127 The United Nations Commission on Human Rights, established under the United Nations Charter, was responsible for the initial drafting of the International Covenant on Civil and Political Rights (see paras 5.13-5.16). The Commission has since been given jurisdiction to make a thorough study when it receives a complaint of a "consistent pattern of gross and reliably attested violations of human rights". These complaints are in the first instance filtered through the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

5.128 The Sub-Commission submits annual reports setting out a list of the States that have proclaimed or terminated a state of emergency during the year. The Special Rapporteur responsible for the reports, Leandro Despouy, has repeatedly stressed the importance of compliance with Article 4 of the International Covenant. He has prepared a list of standard criteria and norms applicable in emergency situations (The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency E/CN.4/Sub.2/1989/30/Rev.2, 18 December 1990).

5.129 There have also been instances in which investigations into human rights violations have been authorised by the United Nations General Assembly, as in the case of resolutions concerned with South Africa.

5.130 The International Covenant itself establishes a number of procedures aimed at ensuring that States give effect to its provisions:

- States Parties undertake to submit reports to the Human Rights Committee of the United Nations (established by the International Covenant) on measures they have taken to give effect to the rights recognised by the International Covenant and on the progress made in the enjoyment of those rights (Article 40).
- A State Party may declare that it recognises the competence of the Human Rights Committee to receive and consider complaints from another State Party that the declaring State is not fulfilling its obligations under the International Covenant (Article 41). New Zealand has made such a declaration, qualified by the condition that the complainant State Party must have made a similar declaration at least 12 months before any complaint.
- Under the Optional Protocol to the International Covenant a State Party recognises the competence of the Human Rights Committee to receive and consider

complaints from individuals within the State's jurisdiction that their rights under the International Covenant have been violated. The complainant must first exhaust available domestic remedies. New Zealand ratified the Optional Protocol in 1989 (Ministry of External Relations and Trade press release 6 April 1989; for the text of the Optional Protocol see 999 UNTS 171).

5.131 New Zealand presented its first periodic report under Article 40 of the International Covenant to the United Nations Human Rights Committee in 1983 (Ministry of Foreign Affairs, Human Rights in New Zealand (Information Bulletin No 6, January 1984)) and its second in 1989 (Ministry of External Relations and Trade, Human Rights in New Zealand (Information Bulletin No 30, March 1990)). The tenor of the Committee's thinking on particular issues raised in the reports is to be gathered from the comments of members of the Committee. Thus in 1989 questions were asked and comments made on the provisions of the International Terrorism (Emergency Powers) Act 1987 (paras 7.87-7.93, 7.150-7.153).

5.132 Other United Nations Conventions that may be significant in an emergency context have been noted in Chapter III. One that has an established implementation procedure is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (para 3.14). New Zealand is obliged to submit regular reports to a "Committee against Torture", the membership of which is intended to overlap with that of the United Nations Human Rights Committee (Article 19). New Zealand has accepted provisions permitting State-against-State and individual complaints to the Committee against Torture. New Zealand has also recognised the right of the Committee to initiate inquiries where there are indications of the systematic practice of torture.

Other international obligations

5.133 The International Labour Organisation Conventions and the Geneva Conventions of 1949 and Additional Protocols of 1977 have associated implementation procedures that could become relevant in an emergency situation. The Geneva Conventions and Protocols are considered in Chapters III and VI (paras 3.10, 6.41-6.42; and see the ILO Constitution, Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference (International Labour Office, Geneva, 1989)).

5.134 The availability of the international mechanisms discussed in paras 5.126-5.133 helps to ensure that emergency legislation and actions taken under its authority conform with the relevant international principles and standards.

WHAT REMEDIES, INCLUDING COMPENSATION, SHOULD BE AVAILABLE TO THOSE AFFECTED BY THE EXERCISE OF EMERGENCY POWERS?

5.135 Individuals may suffer loss and the infringement of their rights in the course of an emergency. What should the relevant statutes say about compensation and other remedies in respect of those losses and infringements? Legislative and administrative practice reveals two competing approaches: there may be provision requiring or permitting the payment of compensation; or on the contrary claims for compensation or remedies, which would otherwise be available under the general law, may be prohibited or restricted.

5.136 This chapter makes general proposals based on an evaluation of those two approaches. The general proposals are, as appropriate, taken up in Part II in specific contexts.

COMPENSATION

5.137 Loss or damage may be caused by the emergency or disaster itself, by lawful action taken under emergency powers, or by unlawful action taken in purported exercise of emergency powers. To give examples:

- An earthquake might itself be the direct cause of the loss.
- Civil Defence might have requisitioned privately owned vehicles acting under its lawful powers.
- A police officer might have commandeered a privately owned vehicle unlawfully.

5.138 The Accident Compensation Act 1982 provides compensation for persons who suffer injury by accident and for their dependants in the case of death by accident. War pensions and social security legislation will sometimes provide relevant entitlements or benefits. These provisions apply whether the cause was the emergency itself or an action taken to deal with it and, with the exception of special arrangements for members of the armed forces, they are available whatever the category of emergency. It follows that sectoral emergency legislation need not, in general, address losses arising from personal injury and death.

5.139 The question will, however, arise whether provision should be made for compensation in respect of infringements of property rights arising as a result of an emergency.

LOSS OR DAMAGE TO PROPERTY

5.140 A distinction can be made between loss or damage to property caused by an emergency itself and that caused by actions taken to deal with the emergency. This distinction can be justified in principle. The risk of disaster in general attaches to the owner or proprietor of property whose responsibility it is to take appropriate action to mitigate prospective loss. On the other hand, the loss caused to a particular individual by the actions taken to protect the interests of the wider public from an emergency should in general be borne by the State. The community should assume responsibility for the particular loss which its agents inflict.

Loss caused by the emergency

5.141 Central and local governments concern themselves with disaster mitigation by laying down regulations and codes of practice regarding building standards, the use of land and the control of animal health. It is, however, unusual for statutory provisions to provide compensation for damage to property caused by the disaster. (A minor exception is s 77 of the Accident Compensation Act 1982 under which a person suffering personal injury by accident can recover compensation for clothing and similar personal property damaged in the accident.)

5.142 The taking out of insurance to cover property damage is normally the responsibility of the owner of the property. Nevertheless, legislation introduced in 1941 to provide for compulsory insurance to cover war damage (War Damage Act 1941) was extended to include damage resulting from earthquake, earthquake fire, storm, flood, volcanic eruption, hydrothermal activity and landslip (Earthquake and War Damage Act 1944, Earthquake and War Damage Regulations 1984 (SR 1984/71), and Earthquake and War Damage (Land Cover) Regulations 1984 (SR 1984/144)). The funds built up from property owners' premiums are to be supplemented by the State if those funds are inadequate to meet claims.

5.143 While the Law Commission has been preparing this report, the Earthquake and War Damage Act 1944 has been under review. Accordingly, we have not considered the operation of the Act in its present form.

5.144 Although it is unusual for legislation to provide for compensation to those suffering property loss in a disaster, in practice the State will often accept a wider community responsibility and meet part of that loss. This is recognised in the Public Finance Act 1989 which allows emergency expenditure to be met without specific appropriation (s 13).

5.145 Thus in the case of Cyclone Bola a special assistance scheme to compensate farmers and growers was established by the Government. Compensation at the rate of 60 per cent was paid in respect of assessable losses "which aren't usually able to be insured." (David Webber, Rivers Buchan and Associates, Cyclone Bola Agricultural Assistance Scheme: Economic and Social Impact Study (September/October 1989) Appendix 5, MAF Compensation Claim Instructions)

5.146 Discussions arising out of a consideration of the future of the Earthquake and War Damage Act 1944 and the recovery measures taken after Cyclone Bola highlight the complex issues that arise about the extent to which a government should be vulnerable to pressure for the payment of compensation in the case of emergency events. These events may involve huge costs which the State may not be in a position to meet. Some individuals, but not others, may have covered themselves by insurance. In other cases where disasters impact on the whole community it may not be practicable to ensure that loss is borne evenly. Consider for instance the greatly varying effect across the community of major increases in fuel costs arising from the outbreak of armed conflict.

5.147 Occasionally there may be other ways of recouping losses suffered as a direct result of an emergency. The government may be able to make an international claim for compensation against the government of another State, for example, where wrongful acts are committed by an enemy in wartime, or a nuclear accident causes damage for which another State is liable. If the claim is successful at the government to government level, it will usually then be necessary to enact legislation providing for the assessment of the losses suffered by individuals and the equitable distribution of the compensation paid by the other State.

Action taken to deal with an emergency

5.148 We have said that there are good policy reasons for providing a remedy (usually by way of damages or compensation) in respect of loss or damage caused by action taken to deal with an emergency. Thus it can be expected that a power to requisition property during an emergency will be accompanied by an obligation to compensate for the use of the property, including any loss or damage suffered as a result of that use (see Defence Act 1990 s 10(5) and (6)). There is also legislative precedent for the provision of compensation to persons assisting in an emergency response (Animals Act 1967 s 30(5)).

5.149 There is a still stronger basis for compensation if the action taken to deal with an emergency is unlawful. In practice, however, in the context of a community response to an emergency, the distinctions between lawful and unlawful action may be irrelevant (or largely so). If deliberate destruction of property or the requisition of transport is for the wider public interest, the public as a whole should bear the cost; the fact that the action was lawful is irrelevant. Providing for compensation on a general footing may also avoid practical difficulties of proof of illegality: for instance, in the event of a foot and mouth disease emergency was there reasonable ground for the destruction of animals? A general compensation regime has the further advantage of avoiding the costs to the parties and the State of resolving disputes on such matters. The Canadian Emergencies Act 1988 deals with this issue by providing that reasonable compensation is payable in respect of loss, injury or damage sustained "as a result of any thing done, or purporting to be done" under an emergency power (s 48(1); see also draft War Emergencies Act s 18, Appendix D).

5.150 There will be situations in which it will be difficult to determine whether certain kinds of loss are caused by the events of an emergency itself or actions taken in response. This difficulty may arise where there is an outbreak or threat of an outbreak of an animal or plant disease, where animals or plants and

products and equipment associated with them can be seized and destroyed. Under the Animals Act 1967 s 42 compensation is payable in respect of the slaughter or seizure of animals whether the animals are known to be infected with, or are suspected of being infected with, certain diseases.

5.151 The general principle that the State should provide compensation for loss or damage sustained as a result of measures taken as part of a community response to an emergency may in some instances be outweighed by the practical considerations like those discussed in para 5.146. The measures may involve very extensive damage and huge costs which it is not possible for the State to meet. There may be practical difficulties in providing a fair system of compensation. And there is the difficulty discussed in para 5.150 of determining whether particular loss or damage was caused by the emergency itself or by actions taken in response to the emergency.

5.152 Considerations of this kind may be a justification for the limited provision for compensation in the Civil Defence Act 1983. The only entitlement to compensation under that Act, other than compensation for property requisitioned, is in respect of loss of or damage to property belonging to those who are actually involved in civil defence work and occasioned by that work. The compensation is payable by the Crown or the relevant local authority and is reduced to the extent that the loss is covered by insurance, other entitlements, or ex gratia payment (s 75; see paras 9.68-9.70).

5.153 The better approach may be to give a wider general entitlement to compensation, but to provide that, in relation to a particular emergency, the entitlement may be limited to a particular kind of damage or to a specified amount. The Canadian legislation, for example, leaves open the possibility that regulations may prescribe maximum amounts of compensation and provide for pro rata payments (Emergencies Act 1988 s 49; compare draft War Emergencies Act s 20, Appendix D).

5.154 Sectoral legislation in which provision is made for the payment of compensation regularly provides for methods of resolving disputes about the existence of an entitlement to compensation and its extent. As appropriate, that legislation can draw on existing regimes, such as the Public Works Act 1981, or provide for access to the regular courts or to arbitration. In some specific areas (for example, a major disaster) the preferable course, because of a large volume of claims, may be to set up a special tribunal or procedure, as is the case under the Canadian Emergencies Act 1988 (ss 50-55).

Principle

5.155 Those who suffer loss of or damage to property or other economic loss as the result of the exercise of emergency powers should, in general, be entitled to compensation. This entitlement might be subject to an express recognition that, in some circumstances, the severity and extent of the damage may be

such that it has to be limited. The relevant legislation should also provide for independent methods of resolving any disputes about the entitlement to compensation and its extent, for instance by court proceedings, arbitration, or the establishment of a special tribunal.

LIMITS ON LIABILITY AND REMEDIES

5.156 In contrast to an entitlement to compensation for personal injury or for losses in respect of property, remedies for unjustified interference with liberty of the person and other fundamental freedoms will generally be available without express statutory provision. Those most apt will be judicial review, habeas corpus or an action in tort for damages. These are the main ways in which the courts can ensure that the exercise of emergency powers, such as the detention of individuals who are thought to be a threat to national security or the censorship of certain information, is kept within the bounds of the law.

5.157 Often, however, the relevant legislation will deny aggrieved individuals access to some or all remedies. This denial may take two forms: the exclusion or limitation of remedies which would otherwise be available; and the relaxation in the face of an emergency of obligations arising under the general law. The first set of provisions is, on the whole, designed to benefit officials and others who exercise or purport to exercise the powers conferred by or under the relevant legislation. The second is intended to relieve individuals from what appear to be breaches of their obligations under the general law when they act in an emergency; for example, when an apparent trespasser takes action to save life or prevent injury.

Provisions excluding the bringing of legal proceedings

5.158 We have already recommended that provisions purporting to prevent challenges to the validity of the declaration of a state of emergency itself should not be enacted and that existing ones should be repealed. The legitimate purpose of such provisions - of ensuring that the State has adequate powers - should be pursued directly by the positive grant of the power to declare a state of emergency or to exercise particular emergency powers (paras 5.114-5.115).

5.159 The statute book contains a great number of provisions limiting or denying the liability of bodies and individuals exercising public power conferred by legislation. Our work on this topic, in the context of our references on the Crown and on legislation, confirms that there is no clear pattern. Those bodies or individuals exercising similar powers are protected in some cases but not in others, and the extent of the protection varies greatly, as does the wording of the relevant provisions.

5.160 We will address the question of limiting or excluding liability in detail in our work on those other projects. This Report gives a brief indication of the variety of the existing provisions and makes a proposal in respect of one variant. The provisions can contain the following elements:

- There might be an exemption from liability or a bar on legal action or proceedings. The liability or proceedings might or might not be expressly characterised as civil or criminal, and the provision might preclude judicial review. (The difference between an exemption from liability and a bar on action or proceedings may be significant, especially for vicarious liability.)

- The protection might extend to some or all of those exercising the powers: the body concerned, its members, its staff, or others (such as members of committees or consultants).
- The protection might be for acts, omissions or defaults (or a combination of these) committed in good faith (sometimes omitted) in the exercise of the authority conferred or, sometimes, in its purported exercise. Reasonable care may be required.

5.161 We wish to call particular attention to provisions which exclude any right of redress for persons suffering loss as a result of unlawful actions taken to deal with an emergency. The bar can be imposed directly, as it sometimes is in provisions designed to exclude judicial review of the validity of declarations of a state of emergency (see, for example, the provisions of the Civil Defence Act 1983 cited in para 5.117). It can also be imposed indirectly by the combined effect of a provision which, on its face, protects only the official who is directly responsible, and a separate statutory or common law rule which enables the Crown or relevant superior person or body to benefit from the subordinate's immunity or protection from liability.

5.162 The Crown Proceedings Act 1950 s 6(4) provides that the Crown is not vicariously liable in respect of any tort committed by an officer of the Crown if an enactment negatives the liability of the officer. The common law appears to be to the same effect, and extends beyond Crown officers (Parker v Commonwealth (1964) 112 CLR 295, 300-301 (HC) and Broom v Morgan [1953] 1 QB 597 (CA)). The principle is that the master's vicarious liability does not extend beyond the servant's liability.

5.163 It is in this context that there may be a significant difference between those provisions which state that the officer is not liable and those which protect the officer from legal proceedings. In the absence of statutory provision to the contrary, enactments which apparently exclude the liability only of the individual officer may actually prevent the bringing of any legal proceedings in respect of the allegedly unlawful act. This appears also to be the combined effect of s 86 of the State Sector Act 1988, which protects Crown servants from personal liability, and s 6(4) of the Crown Proceedings Act 1950.

5.164 There may be justification for protecting the individual officer - that is a matter we will consider in work on other projects. But, as indicated, we do not accept that there is any general justification for a complete bar on legal proceedings by those who suffer as a result of unlawful government action. That is contrary to the principle reflected in Crown proceedings legislation and in s 27(3) of the New Zealand Bill of Rights Act 1990.

Principle

5.165 The Law Commission recommends that, if provisions protecting individuals from suit or liability are included in sectoral emergency legislation, care should be taken to ensure that the provisions do not operate as a complete bar to legal proceedings. It should still be possible to sue the Crown or other responsible body in respect of loss caused by the unlawful action of its officers.

Provisions excusing those acting in an emergency

5.166 The second category of limitation or exemption provisions mentioned in para 5.113 has a long history which is well-based in principle: the preclusion of liability under the general law when a person acts in response to an emergency. All legal systems, it has been said, recognise that the strict letter of the law does not stand in the face of extreme distress. This exemption is often implied, but is sometimes made express. For example, under the Trespass Act 1980 it is a defence to a trespass prosecution if the defendant proves the need to remain for the protection of any person or property (ss 3(2), 4(5)).

5.167 Obedience to the constraints imposed by emergency regulations may involve the involuntary breach of a person's legal obligations, especially those arising under a contract (for instance, a contract for the supply of oil or agricultural products). Some (but not all) of the emergency provisions to be found in the statute book expressly excuse such apparent breaches. In some circumstances the law may go even further, and convert an excuse for departing from an obligation into a duty to do so in the face of emergency and necessity. A classic example is the duty of seafarers to help those in danger at sea (codified in New Zealand law by the Shipping and Seamen Act 1952 s 297).

Principle

5.168 In drafting legislation, including emergency regulations, imposing constraints or duties which may lead a person who complies with them to be in breach of other obligations under the ordinary law, consideration should be given to the inclusion of provisions expressly excusing any such breach.

Recommendation

5.169 The Law Commission recommends that sectoral legislation relating to

particular categories of emergencies and any emergency regulations or rules made under that legislation should conform with the principles set out in this chapter, paras 5.32, 5.38, 5.40, 5.47, 5.56, 5.61, 5.63, 5.68, 5.73, 5.77, 5.93, 5.104, 5.123, 5.155, 5.165 and 5.168.

Part II

War and Other Armed Conflicts

Serious Civil Disturbances

Public Welfare Emergencies

Civil Defence

Economic Emergencies

VI

War and Other Armed Conflicts

GOVERNMENT RESPONSIBILITY FOR SAFETY AND SECURITY

6.1 The primary responsibility of the New Zealand Government is to provide for the safety and security of the inhabitants of New Zealand. The outbreak of a major war or serious armed conflict in which New Zealand was involved would be a grave threat to that safety and security. The population might be similarly endangered by the consequences of a nuclear or biological disaster arising from an accident or an armed conflict even if New Zealand itself was not directly involved.

6.2 Notwithstanding New Zealand's relative geographic isolation, the country has been engaged in hostilities in a number of different contexts. Each has called for a different response on the part of the Government. Fortunately New Zealand has never faced armed invasion, but during World War II the country nevertheless found it necessary to commit all its national resources to the war effort. Since then New Zealand has taken part in the Korean and Vietnam conflicts, and New Zealand forces were deployed in counter-terrorist action and confrontation with insurgents in Malaysia. However, these later involvements did not call for any special mobilisation of domestic resources. Nor has this step been necessary in the case of New Zealand's contributions to a variety of United Nations and other peacekeeping operations, or with regard to New Zealand's involvement in the Gulf War.

6.3 These different levels of involvement illustrate the need for a corresponding variation in the level of the measures which the Government may have to take to deal with a situation involving armed conflict. In keeping with the sectoral approach (paras 4.3-4.11), this chapter is concerned with the range of circumstances in which the New Zealand Government might need to marshal the country's resources on a massive scale to combat opposing armed forces or to protect the civilian population from the consequences of a war or analogous danger.

TERMINOLOGY

6.4 This chapter is entitled "War and Other Armed Conflicts" to emphasise the gravity of the situations which would justify the availability of wide emergency powers (although at least one of those situations may not involve hostilities - see para 6.28).

6.5 The reference to "armed conflicts" as well as to "war" is necessary because not all outbreaks of hostilities will be formally characterised as "wars". For various reasons the parties may be

reluctant to acknowledge the existence of a state of war, with all its implications in international and also domestic law. This tendency has been recognised in the 1949 Geneva Conventions which contain provisions applying to cases of declared war or any other armed conflict between two or more parties to the Conventions, as well as to armed conflict not of an international character occurring in the territory of one party. This terminology is retained in the 1977 Protocols additional to the Geneva Conventions which are concerned with "International Armed Conflicts" (Protocol I) and "Non-International Armed Conflicts" (Protocol II) (paras 3.10, 6.41-6.42).

6.6 New Zealand law, too, recognises that not all armed conflicts can be characterised as "wars". Under the Defence Act 1990 s 2 "Enemy" includes "any country, or any armed force ... with which New Zealand ... is at war or is engaged in armed combat operations". Under the War Pensions Act 1954 war pensions are payable in respect of death or disablement arising in connection with

any war ... or ... any emergency, whether arising out of the obligations undertaken by New Zealand in the Charter of the United Nations or otherwise. (s 19(1); see also s 19(5))

6.7 The analysis in this chapter is concerned less with terminology than with the essential characteristics of those grave situations which can be dealt with only by the exercise of far-reaching executive authority. But the requirement that New Zealand should be seriously endangered by "an actual or imminent war, other armed conflict, nuclear incident or biological incident" places limits on the circumstances in which extraordinary powers would be available (see para 6.61 and draft War Emergencies Act s 4(1)(a), Appendix D).

STATUTORY POWERS TO DEAL WITH EMERGENCIES

6.8 The powers that can be exercised under the war prerogative were discussed in paras 4.37-4.41. Although the prerogative can be used to declare war or to commit the armed forces to hostilities, it would be impracticable to conduct a modern war under the authority of the prerogative alone without powers conferred by legislation. This point was made in the Burmah Oil case (para 4.38) by Lord Reid, who said:

The mobilisation of the industrial and financial resources of the country could not be done without statutory emergency powers. (101)

6.9 Modern war may also involve the total commitment of national resources. This has been recognised by Judges of the Australian High Court:

A war of any magnitude now imposes upon the Government the necessity of organizing the resources of the nation in men and materials, of controlling the economy of the country, of employing the full strength of the nation and co-ordinating its use, of raising, equipping and maintaining forces on a scale formerly unknown and of exercising the ultimate authority in all that the conduct of hostilities implies. These necessities make it imperative that [the Government have] authority over an immense field and a most ample discretion. (Australian Communist Party v The Commonwealth (1950-1951) 83 CLR 1, 202 (HC) per Dixon J)

So wide is the impact of modern war upon the life of a community which is fighting for its existence, that there is no aspect of its life as to which an industrious imagination cannot contrive to conjure up some association with defence. (Shrimpton v The Commonwealth (1945) 69 CLR 613, 623 (HC) per Rich J)

6.10 A difficulty is that imagination may take a government too far. Thus it has been said that the powers given in New Zealand under the Emergency Regulations Act 1939 "were sometimes abused by issuing regulations on matters of principle while Parliament was in session and by issuing regulations on subjects that had no particular relation to the war emergency." (Robson (ed), New Zealand: The Development of its Laws and Constitution (2nd ed Stevens & Sons, London, 1967) 131) Wide-ranging emergency powers should be available only when warranted by the nature or scale of the danger. They should be exercised only for the purpose of dealing with the emergency, and, as recommended in Chapter V, they must be accompanied by safeguards. In particular, they should not be exercised in ways that interfere unjustifiably with basic human rights or other fundamental obligations.

POTENTIAL WAR EMERGENCY SITUATIONS

6.11 In this section of the chapter we examine a number of situations involving armed conflict or analogous dangers and identify those which may require the availability of the most ample executive powers, subject to the limits just described.

LOW AND MEDIUM-LEVEL CONTINGENCIES

6.12 As pointed out in the Law Commission's First Report (paras 48-78) the review of New Zealand defence policy undertaken in 1987 (Defence of New Zealand: Review of Defence Policy 1987 AJHR 1986-87 G 4A) involved a change of emphasis which was developed in subsequent Ministry of Defence Annual Reports (AJHR G 4) and in the Quigley Report (Strategos Consulting, New Zealand Defence: Resource Management Review 1988 (Government Printer, Wellington, 1989)). These reviews marked a shift in strategy, within the concept of collective security, towards a greater self-reliance and the maintenance, as far as possible, of the ability to meet or deter credible threats to our own security and that of the island states for which we acknowledge a defence responsibility. These aims called for a close defence relationship with Australia and the capacity to deal

- **independently with low-level contingencies within New Zealand's area of direct strategic concern, ie, mainland Australia, the South Pacific and the Ross Dependency, and**

- independently, or in concert with Australia, with low-level contingencies within our area of direct strategic concern requiring a larger commitment, or with medium-level conflict in our region.

6.13 Since our First Report was released there has been a further review of New Zealand's defence policy (The Defence of New Zealand 1991: A Policy Paper (GP Print, 1991), referred to as the 1991 Policy Paper). This review recognises that it has become accepted that New Zealand should have an independent capability to deploy a national force to carry out certain low-level tasks in and around New Zealand waters and in the South Pacific, but states that New Zealand must also maintain the capacity to contribute to collective security measures where our interests are affected. Thus New Zealand's preferred strategy, described as "Self-Reliance in Partnership", is

to protect the sovereignty and advance the well-being of New Zealand by maintaining a level of armed forces sufficient to deal with small contingencies affecting New Zealand and its region, and capable of contributing to collective efforts where our wider interests are involved. (54)

6.14 In the First Report the Law Commission expressed the view that New Zealand's involvement in low or medium-level contingencies within New Zealand's area of direct strategic concern, ie, mainland Australia, the South Pacific and the Ross Dependency, was unlikely to justify the exercise of wide emergency powers (para 49). In accordance with the Commission's recommendations, the Defence Act 1990 now confers

- the power to requisition any ship, vehicle, aircraft, supplies or equipment (s 10), and
- the power to extend the terms of service of members of the regular forces and to call up members of the territorial and reserve forces in the event of an actual or imminent emergency involving the deployment beyond New Zealand of any part of the armed forces (ss 38(2)(c), 39(3), 40(3), 41-43; and see paras 3.3-3.5).

6.15 The Law Commission is of the view that emergency powers, additional to those recommended in its First Report and included in the Defence Act 1990, will not be required to enable New Zealand to maintain the projected strategy of "Self-Reliance in Partnership". More extensive emergency powers would not be required unless New Zealand were to become involved in a war, high-level armed conflict or be the object of an armed attack.

WAR, HIGH-LEVEL ARMED CONFLICT OR ARMED ATTACK

6.16 The 1991 Policy Paper (para 6.13) reiterates that there are no direct threats to New Zealand's security. It concludes that security problems in the independent countries of the South Pacific are more likely to be internal than as a result of action by distant, larger States (28). The Policy Paper rejects, however, any suggestion that defence planning should be based on the supposition that New Zealand defence forces will never again be deployed outside the South Pacific region (52). It notes that, in the absence of any specific threat, defence planning has been less concerned with New Zealand's security needs than with its security interests. These are increasingly diverse, and are developing in an international setting that is changing rapidly under the influence of shifting coalitions and unusual situations in a much more interdependent world (28).

6.17 The 1991 Policy Paper cautions against attempting to match a force structure to specific scenarios (41). It points out that

We have deployed defence forces in support of our foreign policy a number of times since the Second World War. In no case could the decision to deploy have been foreseen much more than a year beforehand. In most cases the notice was considerably shorter. Uncertainty is thus a constant in our planning. (29)

6.18 That uncertainty extends to the possibility of New Zealand becoming involved in war or other high-level armed conflict or being the object of an armed attack. The Law Commission is not called upon to assess that possibility. Its responsibility is to make recommendations on the powers that the government should have at its disposal if that type of involvement were to occur. We conclude that, in such an eventuality, the government should be in a position to exercise the far-reaching emergency powers which are the subject of this chapter.

THREAT OF NUCLEAR WAR

6.19 Although the threat of an armed attack on New Zealand or of the country's involvement on a major scale in a war or other armed conflict is not regarded as credible in present circumstances, a nuclear war, even if it did not directly involve New Zealand, might have serious consequences for the population of this country. Again this threat may be thought remote. Nevertheless, in the words of the Green Report,

Although the likelihood of nuclear war remains small, it is still high enough to justify concern, given the severity of the impacts it would have. (Green, Cairns, Wright, New Zealand After Nuclear War (New Zealand Planning Council, Wellington, August 1987) 21, referred to as the Green Report)

6.20 The Green Report referred to a 1982 United Nations study which estimated that during a time of international crisis unfortunate combinations of failures and errors could mean a 5 per cent chance of nuclear war. There have been remarkable changes in the international scene since 1982 and 1987, but it must be accepted that a nuclear war, whether by design or accident, remains a possibility. The 1991 Policy Paper points out that, despite the comparative success of the Nuclear Non-Proliferation Treaty, there are now at least six countries, beyond the five acknowledged nuclear weapons States, which are considered either to have nuclear weapons or to be developing them (24). And it suggests that the lowered risk of superpower involvement also means that the stakes are lowered and wars by middle powers made more thinkable (23).

6.21 The Green Report found that any direct danger to New Zealand from a nuclear war would be more likely to arise, not, as has been perceived, from radioactive fallout or extreme nuclear winter effects, but from the devastating effects of an electromagnetic pulse (EMP) resulting from a high altitude nuclear explosion in the Southern Hemisphere. Although it is unlikely that such an explosion would occur over New Zealand, it is plausible that communications bases in Australia could be the targets of an EMP-generating explosion, as well as being directly targeted. A high altitude explosion in eastern Australia could create an EMP that would have severe consequences in New Zealand, damaging or destroying sensitive electrical apparatus, tripping out transmission lines and burning out electronic circuits, thus disrupting power supplies, communications and the operation of electric and electronic equipment (including computers). Further, an EMP-generating explosion over eastern Australia would seriously disrupt economic activity in Australia and consequently interrupt normal trade between Australia and New Zealand.

6.22 Any nuclear conflict would, in all probability, be based in the northern hemisphere. The possibility of a high altitude explosion over Australia was canvassed during the Cold War when joint United States-Australian communications bases in that country were cited as possible targets in this hemisphere. This possibility has diminished as a result of the changes that have taken place in the West's relations with the Soviet Union.

6.23 In these circumstances the devastating consequences for New Zealand of a nuclear war might arise not primarily from its direct physical effects, but from its social and economic impacts. There would be fear, if not panic, that it would have direct effects. There would also be distress associated with isolation and the realisation that established structures and systems, international and national, were breaking down. Loss of imported supplies and of markets for exports would soon undermine business, employment and the financial system. And overall social and economic disruption would be likely to bring with it a breakdown of law and order. The Green Report continues:

Central government would be under intense pressure during the initial weeks of crisis. People's demands for information and direction would be high, while government would be forced into rapid decisions on many urgent issues. Without prior contingency planning these difficulties could prove insurmountable. (In the months and years after a nuclear war the nature of government structures and decision-making might change considerably. Devolution of power to regional or community levels could be the most viable and appropriate option.) (147)

6.24 Under this analysis the outbreak of nuclear war, whether or not New Zealand was involved, would place responsibilities on a New Zealand government that would be little different from those which would arise if New Zealand were engaged in a major conventional war or subjected to an armed attack. As in those cases, the situation could call for the assumption by the government of wide emergency powers, at least to deal with the most immediate consequences.

6.25 The debate that has taken place in New Zealand and elsewhere as to what should be done in face of the nuclear threat has centred on the emphasis that should be given to mitigation on the one hand and preparedness on the other. In the public submissions that were made on the Green Report there was support for the view that emphasis - and resources - should be concentrated on the pursuit of policies that would help to prevent nuclear war, even to the extent of completely ignoring disaster planning. On the other hand, the public opinion poll taken for the 1986 Defence Committee of Enquiry found that 82 per cent of New Zealanders are "strongly of the opinion that there should be some preparation or plans being made for coping with the aftermath of a nuclear war in the Northern Hemisphere" (Annex to the Report of the Defence Committee of Enquiry: Public Opinion Poll on Defence and Security: What New Zealanders Want (Government Printer, Wellington, 1986) 23).

6.26 This planning might embrace the elements of the preparedness phase: disaster planning against the event; action to reduce vulnerability by the stockpiling of medical and other essential supplies; training of civil defence and other personnel; and improved public appreciation of the consequences of nuclear war for New Zealand (Green, 149-152; see also Ministry for the Environment, Report on Public Submissions in Response to the New Zealand Planning Council Report, "New Zealand After Nuclear War" (Wellington, March 1988) and Annex to the Report of the Defence Committee of Enquiry).

6.27 In keeping, however, with its primary focus on the response phase (para 2.30), the Law Commission's recommendation is that nuclear war (whether or not New Zealand is involved) should be included among the situations that might justify the availability of wide emergency powers. (For completeness, the outbreak of a war in which the use of biological weapons poses a serious threat to New Zealand should also be covered.) In relation to planning for war emergencies, including a nuclear war, see further paras 6.77-6.81.

A NUCLEAR EVENT

6.28 The Chernobyl disaster and other breakdowns that have occurred in nuclear plants are a reminder that the nuclear threat need not be associated only with the outbreak of nuclear war. New Zealand's geographical isolation and the absence of major nuclear establishments in neighbouring countries mean that it is most unlikely that a nuclear accident could have an impact in New Zealand of emergency proportions. Nevertheless, as in the case of a nuclear war, such an accident might have serious economic consequences for New Zealand. Comparable events would include also the possibility that a nuclear weapon or a biological weapon might be detonated accidentally, or deliberately but in circumstances that did not amount to war, as might be the case if such weapons were to fall into the hands of persons not under the control of a State. Planning for a nuclear or biological accident should, therefore, be encompassed in planning for the impact of a nuclear war. The assumption of emergency powers would depend on the magnitude of the effects on New Zealand and the absence of other adequate powers to deal with them.

ARMED INSURRECTION OR CIVIL WAR

6.29 This Report would be incomplete if it were not to consider civil war or armed insurrection in New Zealand as a category of potential emergency, however unlikely the possibility may seem. A United Nations survey of countries in which states of emergency were in operation has shown that many of the States concerned justified the establishment of states of emergency by reference to some form of internal crisis or revolt (The Administration of Justice and the Human Rights of Detainees, see para 5.128).

6.30 The Defence Act 1990 makes it clear that the responsibility of the New Zealand Defence Force is to maintain the security of New Zealand against threats from within the country as well as from outside. Under s 5 the purposes for which the armed forces of New Zealand may be raised and maintained include:

- (a) The defence of New Zealand ...
- (b) The protection of the interests of New Zealand, whether in New Zealand or elsewhere ... (emphasis added)

Again, the Defence Act's definition of "Enemy" includes

- (e) All armed persons who are engaged in any mutiny, rebellion, or riot against New Zealand or against any Service authority of the Armed Forces of New Zealand ... (s 2, emphasis added, but see para 6.37)

6.31 The 1991 Policy Paper recognises that there might be "security problems" in the "independent South Pacific", but says nothing of the possibility of the armed forces being confronted with civil war or armed insurrection in New Zealand. This approach is both a reflection of the Policy Paper's theme that defence of the homeland is not to be a determinant of the structure and main tasks of the armed forces and a recognition that an attack from within on the territorial integrity or security of New Zealand is most unlikely. A defence force equipped to perform the eight major tasks laid down by the Policy Paper would nevertheless be available to confront any such attack.

6.32 The deployment of the armed forces in the event of an armed insurrection or civil war must be distinguished from the situation in which the armed forces provide assistance to the civil power in New Zealand. It is accepted that it may be necessary to call upon the armed forces to assist the police in carrying out their task of enforcing the law. We said of that situation in our First Report:

The armed forces act at the request of the police; their duty is to uphold the law; and they remain bound by the law. In other words, the armed forces recognise the primacy of the civil power ... (para 101)

The circumstances in which this assistance may be given by the armed services are spelled out in s 9 of the Defence Act 1990 (formerly s 79A of the Defence Act 1971). The necessary authority may be given where an emergency is occurring in which someone is threatening or causing the death of, or serious injury to, any person, or the destruction of, or serious damage to, any property, and that emergency cannot be dealt with by the police without the assistance of the armed forces. In such a case the armed forces act at the request of the member of the police in charge of the operation (paras 3.41-3.44).

6.33 The same emphasis on police responsibilities is to be found in the International Terrorism (Emergency Powers) Act 1987. The emergency powers given by the Act may be exercised by armed forces assisting the police but "only at, and in accordance with, the request of a member of the police." (s 12)

6.34 The 1991 Policy Paper recognises that one function of the armed forces is to provide "aid to the civil power":

The responsibility for protecting citizens and their property within New Zealand, for upholding our laws and protecting our borders rests with civil authorities such as the Police, Customs and Immigration Services and Civil Defence. However, if in a crisis the demands on them become too great, the NZDF can be tasked ... with providing assistance. (60)

6.35 The 1991 Policy Paper also refers to the need to deter or counter acts of terrorism, such as the placing of explosive devices in aircraft, vehicles and buildings, the taking of hostages, and attacks on public figures. It accepts that well-equipped and trained specialist forces need to be maintained at a continuous level of readiness.

6.36 However, the 1991 Policy Paper does not appear to recognise that the police are primarily responsible for the handling of terrorist situations within New Zealand. These cannot be distinguished from other situations in which the assistance of the armed forces is given to the civil power, a point that is made quite clear in the International Terrorism (Emergency Powers) Act 1987. In other words those well-equipped and trained specialist forces exercise emergency powers in a terrorist situation "only at, and in accordance with" a request from the police and only after they have been authorised to assist the police under s 9 of the Defence Act 1990.

6.37 It is to be noted that the use of the words "armed persons who are engaged in any ... riot against New Zealand" in the definition of "Enemy" in the Defence Act 1990 (para 6.30) confuses the situation in which the armed forces are putting down an armed rebellion with that in which they are rendering assistance to the civil power in the case of a civil disturbance. If opportunity offers, the reference to "riot" should be omitted from the definition.

6.38 The use of the armed forces in a civil war or to quell an armed insurrection presents a different situation. It has already been pointed out that there were occasions in New Zealand during the nineteenth century when it was thought necessary to proclaim a state of martial law, under which the conduct of internal hostilities was the responsibility of the armed forces (paras 4.45-4.48). The controversy that still surrounds those events and the criticism that is now directed at the conduct of New Zealand governments of the day illustrate the sensitivity that attaches to the question of whether emergency powers to deal with armed insurrection should be available to a contemporary government.

6.39 The understandable concern is that an over-zealous government might be too ready to invoke emergency powers to maintain law and order in a domestic situation that falls short of armed rebellion, that is, of a sustained and organised use of force to resist government authority.

6.40 A New Zealand government, responsible for the safety and security of New Zealand and its inhabitants, must be allowed a "margin of appreciation" in deciding whether there is, in fact, a situation of internal armed conflict which would justify the invocation of emergency powers (paras 5.110-5.111). Nevertheless, it is possible to define with reasonable precision the circumstances in which those emergency powers would be available (paras 6.60-6.61). Moreover, the advance preparation of legislation under which a government can authorise the use of armed forces to suppress armed insurrection, but subject to safeguards attached to the exercise of that authority, is to be preferred to the unregulated use of military force after a Proclamation of martial law, followed eventually by indemnifying legislation (paras 4.49-4.50).

6.41 There are other factors that would inhibit a government from declaring a state of war emergency in a situation falling short of armed rebellion:

- The government would be required to acknowledge publicly that internal order had broken down to the point where there was a state of civil war justifying the declaration of war emergency.
- The government would be faced with the likelihood of a claim that the declaration of a war emergency involved it in "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" within the meaning of the Geneva Conventions. This would mean that the government would be under an obligation to observe certain minimum standards of humane conduct set out in common Article 3 of the four Geneva Conventions of 12 August 1949 as supplemented and developed by the Additional Protocol II of 1977 (see para 3.10), thereby subjecting itself to international scrutiny.

6.42 This last proposition emerges directly from the wording of Additional Protocol II. Article 1 distinguishes between internal "armed conflicts" and "internal disturbances and tensions":

1. This Protocol ... shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

This distinction corresponds to the distinction which we make in this Report between those situations which might justify a declaration of a state of war emergency under a War Emergencies Act and a civil disturbance in which the armed forces might be used to support the police under the Defence Act 1990 s 10.

WORLD WAR II EMERGENCY POWERS

6.43 In considering the kind of legislation that might be required to confer appropriate powers that would be available for use in the emergency situations described in paras 6.16-6.42, it is helpful to recall the legislative steps taken at the time of World War II. With war imminent, a Proclamation of Emergency under the Public Safety Conservation Act 1932 made on 1 September 1939 provided the authority for the making of emergency regulations. Some regulations were already available in draft, prepared under the supervision of the Organisation for National Security set up in the Prime Minister's Department in 1937. Four sets of regulations were made on 2 September and 17 on 4 September, the day after New Zealand's declaration of war on 3 September. More were made on 6 and 7 September.

6.44 On 14 September 1939 Parliament passed the Emergency Regulations Act 1939 which gave the Governor-General in Council power to make such regulations

as appear to him to be necessary or expedient for securing the public safety, the defence of New Zealand, the maintenance of public order, and the efficient prosecution of any war in which His Majesty may be engaged, for maintaining supplies and services essential to the life of the community, and generally for safeguarding the interests and maintaining and promoting the welfare of the community. (s 3(1))

There followed a non-limiting list of purposes for which regulations might be made (s 3(2)(a) to (o)).

6.45 The Emergency Regulations Act 1939 gave parliamentary endorsement to, and took over as the continuing legal basis for, the regulations already made under the Public Safety Conservation Act 1932. Although the 1939 Act appeared to give virtually unlimited powers, the Emergency Regulations Amendment Act 1940 recited that

by reason of the development of hostilities ... it has become necessary to extend the [powers in the 1939 Act] in order to secure that the whole resources of the community may be rendered immediately available when required for purposes connected with the defence of New Zealand

Section 2(1) extended the powers accordingly (see para 4.23). The 1940 Amendment also provided that the principal Act was to continue in force until 30 September 1941 and then expire. The Emergency Regulations Amendment Act 1941 extended the principal Act for a further year. Thereafter, annual Amendment Acts continued to extend the principal Act until 31 December in the following year.

6.46 After the end of the war the process of disbanding or, alternatively, giving permanent legislative authority to the regulatory regimes set up by emergency regulation to meet wartime needs was long drawn out. After 1947 it was no longer possible to make new emergency regulations, but some existing emergency regulations were kept in force by annual Emergency Regulations Amendment Acts until 1964. The last of these regulations, the Finance Emergency Regulations 1940 No 2 (as amended), were then continued in force under the Reserve Bank Act 1964. Other emergency regulations had been continued in force on an annual basis under the Supply Regulations Act 1947, itself replaced by the Building Emergency

Regulations Act 1953 which was finally allowed to expire on 31 December 1957. Still others were kept in force for a time under the authority of the Economic Stabilisation Act 1948.

6.47 A wide range of national activity was covered by emergency regulations made under the authority of the above legislation:

- censorship;
- control over shipping and airways, and the requisition of ships, aircraft and motor vehicles;
- introduction of a "command economy";
- seizure of enemy shipping and other property, prohibition of trade with the enemy;
- controls over aliens;
- use of land;
- controls over civilians, such as those on arrival in and departure from New Zealand;
- conscription into the armed forces and the direction of civilians into employment in essential industries (Baker, The New Zealand People at War: War Economy (Department of Internal Affairs, Wellington, 1965) 58-9, 97, 449).

6.48 It is significant that the arrangements for civil defence during World War II - the Emergency Precautions Scheme (EPS) - were set up under emergency regulations made under the Emergency Regulations Act 1939 (SR 1940/187 and 1941/194). The EPS, along with the Home Guard and the Women's War Service Auxiliary, became the Emergency Reserve Corps, administered by the Department of National Service (SR 1940/188). The Emergency Reserve Corps was commissioned to assist in the preparation and operation of plans for securing the public safety, the defence of New Zealand and the efficient prosecution of the war and of plans for maintaining supplies and services essential to the life of the community. The responsibilities of the EPS covered emergencies arising from both national disasters and enemy action or the threat of enemy action "in which the community or any substantial portion of the community is deprived of or is likely to be deprived of the essentials of life or the public safety or the public order is imperilled or likely to be imperilled."

6.49 The Emergency Reserve Corps was part of the defence establishment, but the EPS was not under military control. As the threat of invasion receded, the EPS was scaled down. In 1943 it was designated "Civil Defence" and in 1944 it was handed back to its pre-war administration in the Department of Internal Affairs. (See Appendix F paras F4-F9.)

EXISTING LEGISLATION

6.50 The repeal in 1987 of the Public Safety Conservation Act 1932 and of the Economic Stabilisation Act 1948 means that the New Zealand government is no longer in a position to assume at short notice the battery of powers thought necessary on the outbreak of World War II. It is to be noted too that s 22 of the Civil Aviation Act 1964, which enabled control of the flight of aircraft over New Zealand and of aerodromes "[i]n time of war, whether actual or imminent, or of national emergency", has been repealed, as has s 167 of the Post Office Act 1959 which provided for wartime control of radio stations. Relevant legislative powers that are still available are the Petroleum Demand Restraint Act 1981 under which petroleum products can be rationed; ss 48 and 70 of the Customs Act 1966, enabling control of imports and exports on a very wide basis; and the provisions of the Civil Defence Act 1983 dealing with "national emergencies" (ss 46-49, 58-68, 73-85; see para 3.6).

NATIONAL EMERGENCIES UNDER THE CIVIL DEFENCE ACT 1983

6.51 The original rationale given for the civil defence legislation that preceded the present Civil Defence Act 1983 was the threat of the hydrogen bomb. This accounts for the provisions in the Act dealing with national emergencies. They were designed to authorise the taking of measures not "amounting to actual combat or preparation therefor" to protect the civil population in the event of an emergency arising from an armed attack on New Zealand or "any actual or imminent warlike act whether directed against New Zealand or not" (Civil Defence Act 1962 s 2; Appendix F paras F12-F14, F22). Once a Proclamation of national emergency is in operation, civil defence personnel can exercise a range of powers set out in the Civil Defence Act 1983. Also, emergency regulations may be made conferring powers that both complement and supplement those in the Act "upon any person holding any office under this Act or any Department, organisation, local authority, regional council, territorial authority, constable, or traffic officer" (s 79). (See paras 3.92-3.97.)

6.52 New Zealand's civil defence organisation is focused on providing a response to the natural and industrial disasters listed in the definition of civil defence in s 2 of the Civil Defence Act 1983. It appears that the National Civil Defence Committee established by the Act has made no recommendations, in terms of s 21, that the Minister of Civil Defence should appoint "one or more planning committees to prepare plans in respect of any aspect of ... national emergency." The Secretary for Civil Defence commented in 1985 on the proposal then discussed of amending the Civil Defence Act 1983 to cover any deficiencies arising from the repeal of the Public Safety Conservation Act 1932:

The Civil Defence Act is designed foremost to deal with situations such as natural and other disasters that may cause loss of life, injury or distress to people ... [The provisions in the Act relating to national emergencies], and the corresponding provisions in the former 1962 Act, have never been used. [They] do not sit particularly comfortably, in fact, among provisions relating to civil defence emergencies.

6.53 The position is recognised in a Green Report background paper:

Recovery after nuclear war seems to be excluded from Civil Defence planning: "the only detailed plan to deal with any possible major effect of a nuclear war" (E Latter, 1985) appears to be Auckland Civil Defence organisation's plan to decontaminate irradiated [sic] water supplies. (Mitchell, "Government Agencies for Control and Recovery in New Zealand: Background Paper 14", 9)

6.54 The part that could be played by the Civil Defence Act 1983 and the present Civil Defence organisation in the event of a national emergency arising from the threat or event of a nuclear war was considered in some of the Green Report background papers:

The Civil Defence Act is not necessarily the best possible legislation for dealing with the initial period of crisis management after nuclear war, but it could be used. (Galvin and others, "Policy Options and Planning Approaches for Government: Background Paper 15", 2)

The national civil defence structure is not regarded as having a wide enough brief, sufficient experience, or enough authority to deal with the many consequences likely to follow a nuclear war. Most commentators anticipate a swift suspension of "Westminster rules" with the empowering of an emergency Cabinet, possibly bi-partisan and involving some permanent heads, as a policy/decision-making body. (Mitchell, Background Paper 14, 21)

6.55 On the other hand, the background papers, while emphasising the part that central government must play in the planning and management of a nuclear crisis, recognise that

It is at the local community level that counter-disaster activities have to be implemented, because it is at this level that the social and physical impact of most disaster agents is experienced, even though in some cases the effect of impact is more widespread. It is well-recognized that "grass roots" local government planning for disaster preparedness is an appropriate means of combating threat. (Britton, "Human Responses to Disaster - A Review: Background Paper 11", 6)

Again, the point is made that a pre-war planning objective should be

starting to decentralize government functions, improve local authority decision-making, co-ordinate different levels of responsibility, and improve communications between levels of government ... (Wylie, "The Impact on New Zealand Society: Background Paper 12", 6)

6.56 Under the Civil Defence Act 1983 the Director of Civil Defence is empowered to co-ordinate the use of and, during states of national and civil defence emergency, to use "the personnel, material and services made available by Departments, organisations, local authorities, regional councils, territorial authorities, and other persons" for purposes of civil defence (s 13). There is now in place an organisation, embodying national, regional and local (territorial) resources, trained and equipped to respond to natural and industrial disasters. There can be no suggestion that, in a small country like New Zealand, there should be a parallel and separate organisation that would be responsible for the protection of the civil population in time of armed conflict involving New Zealand or in the event of a nuclear war or a nuclear event not involving New Zealand. This need for a unified structure to protect the civilian population from serious situations ranging from wars to natural disasters has been recognised even in large countries such as the United Kingdom, the United States, Canada and Australia with their "all hazards" approach (Appendix F). For the Law Commission's proposals on the future of the "national emergencies" provisions in the Civil Defence Act 1983 see paras 6.65-6.71 and 9.6-9.9.

A WAR EMERGENCIES ACT

6.57 It is not part of the Law Commission's task to make detailed recommendations with regard to the administrative framework that should be responsible for the planning and co-ordination of resources against possible New Zealand involvement in a war emergency. This is the responsibility of agencies such as the Department of the Prime Minister and Cabinet. The Commission is, however, concerned with the legislative framework that would be necessary to support that planning and co-ordination (paras 6.8-6.10).

6.58 It is the Law Commission's view that there should be in place a "War Emergencies Act" under which emergency powers would be available to respond to the following contingencies:

- war or high-level armed conflict, conventional or nuclear, in which New Zealand is directly involved, whether or not there is a threat of invasion. This situation would call for
 - the mobilisation of national resources for the actual conduct of hostilities, and
 - the taking of measures for the protection of the civilian population;
- the threat or outbreak of major nuclear war in which New Zealand is not directly involved or a major nuclear event which poses a threat to New Zealand;
- armed insurrection or civil war within New Zealand. (First Report, para 46)

6.59 The Law Commission has therefore prepared the draft War Emergencies Act contained in Appendix D to this Report. It has considered in turn

- the circumstances in which the powers given by a War Emergencies Act could be invoked,

- the powers that would be available,
- the procedures and safeguards that would be included, and
- the timing of the enactment of a War Emergencies Act.

THE CIRCUMSTANCES JUSTIFYING THE DECLARATION OF A WAR EMERGENCY

6.60 The drafting of an empowering provision that is wide enough to cover the contingencies listed in para 6.58, but sufficiently narrow to ensure that it is not invoked in situations not calling for the exercise of wide emergency powers, presents difficulties in this case as in others. It is not possible, nor desirable, to deny a government an area of discretion - it must be allowed its "margin of appreciation" (para 6.40).

6.61 Section 4(1) of the draft Act authorises the Governor-General in Council to declare a war emergency where the Governor-General believes, on reasonable grounds

- (a) that, by reason of an actual or imminent war, other armed conflict, nuclear incident or biological incident, there is a situation which
 - (i) seriously endangers the lives, health or safety of New Zealand citizens, or
 - (ii) seriously threatens the ability of the Government of New Zealand, or of a self-governing state, to preserve the sovereignty, security or territorial integrity of New Zealand, or of that self-governing state, and
- (b) that the situation is of such proportions or nature that it cannot be dealt with effectively except by authorising the Governor-General in Council to make war emergency regulations under this Act.

The term "self-governing state" is defined to mean the self-governing state of the Cook Islands or the self-governing state of Niue, as the case requires: s4(4). (See further para 6.64.)

New Zealand involvement

6.62 The wording of s 4(1) reflects indirectly rather than directly the distinction made in paras 6.19-6.28 between New Zealand involvement in a war or other armed conflict (including armed insurrection

or civil war) and a nuclear war or other nuclear event in which New Zealand is not involved. The central issue is not involvement in a conflict as such but the actual or potential effect of the conflict or other event (whether or not New Zealand is involved) on the safety and security of the people and the territory of New Zealand. These criteria are spelled out in subparagraphs (i) and (ii). In the case of a conventional war outside New Zealand the serious consequences there referred to are unlikely to ensue if New Zealand is not "involved". On the other hand, the mere fact of New Zealand's involvement in armed conflict at a low or medium level would not be a sufficient ground for invoking the widest range of emergency powers (paras 6.14-6.15).

War or other armed conflict

6.63 The requirement that there must be an actual or imminent "war [or] other armed conflict ..." reflects the language of the Geneva Conventions and additional Protocols (para 6.5). The declaration of a war emergency is a public acknowledgement that the relevant provisions of those international instruments must be observed. In cases of armed insurrection or civil war, the formula has the important effect of excluding from the ambit of the War Emergencies Act, and emergency regulations made under it, all internal disturbances falling short of armed insurrection or civil war (see paras 6.41-6.42).

Meaning of "New Zealand"

6.64 In s 4(1)(a)(ii) "New Zealand" is used as a territorial description and includes Tokelau and the Ross Dependency and also the two self-governing states associated with New Zealand, the Cook Islands and Niue. The Government of New Zealand has a defence responsibility for the Cook Islands and Niue (see the Cook Islands Constitution Act 1964 s 5 and the Niue Constitution Act 1974 s 6). The section therefore authorises the marshalling of resources in New Zealand to meet a serious external or internal threat involving one or other of the four countries. In the case of the Cook Islands and Niue the responsibility is shared with the government concerned. The terms of the definition of "New Zealand" do not have the effect of making the War Emergencies Act itself a part of the law of the Cook Islands, Niue, Tokelau or the Ross Dependency. Authority for measures required to be taken within those countries must be sought in the local law.

Consequences for "national emergencies" under the Civil Defence Act 1983

6.65 Section 4(1) of the draft Act would authorise both

- the mobilisation of national resources for the actual conduct of any hostilities in which New Zealand may be involved, and
- the taking of measures, not involving combat or planning for combat, for the protection of the civilian population of New Zealand from the impact of hostilities or of a nuclear war or a nuclear event, in other words measures of civil defence or civil protection in their widest sense.

6.66 The role of Civil Defence would not be diminished by the inclusion in a War Emergencies Act of the authority to take measures for the protection of the civilian population in time of war or comparable emergency, now provided by the national emergencies provisions in the Civil Defence Act 1983. This protection would require civil defence measures to be put in place at the regional and territorial as well as the national level, and necessarily call for the participation of the present civil defence organisation, with its

primary focus on natural and industrial disasters. There would be no place for two separate and parallel organisations. (See paras 6.51-6.56.)

6.67 Protection of the civilian population in the event of a war emergency would involve measures, and legal authority for those measures, in respect of three phases of the emergency cycle: preparedness and mitigation (embraced in planning), and the response or operational phase.

6.68 As already explained, under the Civil Defence Act 1983 the National Civil Defence Committee may recommend the Minister to appoint one or more planning committees "to prepare plans in respect of any aspect of ... national emergency". No such recommendation has been made and no planning has been undertaken specifically directed to a "national emergency" under the Act (para 6.52). The recently issued "Government Response" section of the National Civil Defence Plan (25 June 1991) does, however, state:

The measures in this plan, described for a state of civil defence emergency, may apply also during a state of national emergency as defined in section 2 of the Civil Defence Act 1983. (Part 1, 1)

6.69 Planning for the situation that would arise should hostilities, a nuclear war or a nuclear event impact directly on New Zealand would extend beyond the measures now in the National Civil Defence Plan. It would include steps to ensure the continuing effectiveness of the machinery of government at the national, regional and district level; the maintenance of order; the provision of supplies and social services; and the physical protection of persons and property. This mobilisation of national resources would need to be co-ordinated by the Department of the Prime Minister and Cabinet, acting through the Co-ordinator Domestic and External Security, or some other central machinery established for the purpose.

6.70 Planning could be expected to precede any declaration of a war emergency under the War Emergencies Act and would necessarily involve Civil Defence, its planning procedures and resources. This means that there must continue to be appropriate provisions in the Civil Defence Act 1983 ensuring that its planning procedures encompass planning for a war emergency. Also, regional and territorial authorities and other "organisations" would need to be committed to the planning process. (See paras 9.6-9.9, 9.47-9.67.)

6.71 Should it be necessary to bring the planned measures into operation in a war emergency, this could be effected by emergency regulations under the War Emergencies Act. These regulations could provide that the relevant provisions of the Civil Defence Act 1983, including the powers conferred by the Act, would apply during the period of the emergency.

POWERS

6.72 One of the advantages of the sectoral approach is that it is usually possible to set out the emergency powers that will be required in the statute itself - it is not necessary to confer wide regulation-making powers. This is clearly not possible in the present case. Experience has shown, and the nuclear threat is such, that the powers available to the government in the event of a war emergency need to be comprehensive. The Canadians recognise this in their Emergencies Act 1988. During a war emergency

the Governor in Council may make such orders or regulations as the Governor in Council believes, on reasonable grounds, are necessary or advisable for dealing with the emergency. (s 40(1))

The only limitation on this extensive grant of power was added after debate in the Senate: the power is not to be "exercised for the purpose of requiring persons to serve in the Canadian Forces." (s 40(1.1))

6.73 A regulation-making power along the lines of the Canadian provision has been included in the draft War Emergencies Act (s 5). Regulations may override all other law, subject however to the exclusion of certain matters which ought to be left to Parliament to deal with even in time of war emergency. The power to make war emergency regulations is also subject to the safeguards discussed below (para 6.76). Recognising, however, that in time of emergency it may be necessary to sub-delegate the exercise of legislative authority (para 5.89), war emergency regulations may authorise the making of rules for any of the purposes for which those regulations may themselves be made, subject to the same safeguards.

6.74 It may be thought appropriate to place some issues outside the scope of the emergency regulation-making power. By way of illustration, rather than as firm recommendations, the draft Act

- replicates the Canadian exclusion of conscription (s 5(5)(a)) and, as a logical extension, provides that the regulations should not be able to override s 37 of the Defence Act 1990 stipulating the minimum age at which minors can be sent on active service overseas (s 5(5)(c)(iv)),
- provides that war emergency regulations should not be able to override the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987 (s 5(5)(c)(iii), and
- provides that no war emergency regulation shall provide for the detention, imprisonment or internment of any New Zealand citizen by reason of that citizen's national origin (s 5(5)(b)).

These are limitations which are unlikely to inhibit the making of emergency regulations authorising all urgent measures that may need to be taken. They raise important issues of policy that are the concern of Parliament. If those issues were to require reconsideration, Parliament should have ample time to meet and to enact any necessary legislation.

6.75 The perception that Parliament should expressly authorise conscription into the armed forces is illustrated by the fact that during World War II the New Zealand government took the step, in 1940, of asking Parliament to amend the Emergency Regulations Act 1939 specifically to authorise the conscription of persons and resources, although this step appeared to be authorised by the wide-ranging general powers that had already been conferred (para 6.45). It should be noted that, as the War Emergencies Act is drafted, the power to direct the civilian labour force into a particular type of work could be conferred by emergency regulation.

SAFEGUARDS

6.76 A War Emergencies Act with the wide regulation-making powers that are envisaged should conform to the standards to be observed in all emergency legislation and include the most stringent safeguards possible (paras 2.6- 2.9, Chapter V and Appendix B). The draft War Emergencies Act

- makes the grant of emergency powers conditional on the public declaration of a war emergency (ss 4(1), 5(1), 7(a), 10);
- carefully defines the circumstances in which a "war emergency" may be declared (s 4(1) and see paras 6.60-6.65);
- consistently with the sectoral approach includes a requirement that the Act is not to be invoked except as a last resort, when, in view of the proportions or the nature of the emergency, the emergency powers available under other sectoral legislation are inadequate (s 4(1)(b)) (for examples of other sectoral emergency powers that should first be drawn upon, see paras 6.14, 6.50, 3.7-3.9);
- requires the Governor-General in Council to believe on reasonable grounds that circumstances exist justifying the declaration of a war emergency (s 4(1) and see paras 5.21-5.32);
- requires that the House of Representatives be advised as soon as possible of the making or the continuation in force of a declaration of a war emergency (s 12(1));
- imposes a time-limit on the duration of a declaration of a war emergency (ss 6, 8(1)), requires that the making of a declaration or its continuation in force be

confirmed by a resolution of the House of Representatives (ss 13, 14), and gives the House the power to revoke a declaration of a war emergency (s 15);

- requires the Governor-General in Council to believe on reasonable grounds that any war emergency regulations are necessary or expedient for dealing with the war emergency (s 5(1) and see para 5.82);
- provides that war emergency regulations
 - may be amended, revoked, or revoked and substituted by the House of Representatives under procedures that are speedier than those laid down in the Regulations (Disallowance) Act 1989, but require an initiative by at least 10 members of Parliament (s 17),
 - must be reviewed by the Governor-General in Council before the continuation in force of a declaration of a war emergency to see if they are still necessary (ss 8(2), 12(3)(b));
- provides that no war emergency regulation shall authorise any measure derogating from the obligations of the Government of New Zealand under
 - Articles 4, 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 of the International Covenant on Civil and Political Rights (s 5(4)(a) and see paras 5.13-5.16), or
 - the Geneva Conventions or the Additional Protocols to those Conventions (ss 5(4)(b), 5(5)(c)(ii) and see paras 6.41-6.42);
- provides procedures for ensuring that meetings of the House of Representatives can be brought forward if the House is adjourned or Parliament is prorogued or dissolved or has expired (s 16 and see Appendix B B29-B32);
- provides that, subject to conditions which may be imposed by ordinary regulations, the Crown is to pay just compensation for property requisitioned, lost, damaged or destroyed as a result of anything done under any war emergency regulation (ss 18, 20 and see paras 5.137-5.155);
- protects individuals from legal proceedings in respect of anything done under any war emergency regulation, but preserves any liability the Crown would otherwise have (s 19 and see paras 5.156-5.168);

- provides for the possibility that the Executive Council may be unable to act because of the unavailability of the Governor-General or members of the Executive Council (s 11 and see Appendix B paras B2-B9, B22).

PREPARATION AND TIMING

6.77 The question will be asked: why should a War Emergencies Act be enacted now? The 1991 Policy Paper (para 6.13) stated that "New Zealand is fortunate to have no visible or foreseeable threat of armed invasion." (58) And the improvement in United States-Soviet Union relations has made a great power confrontation much less likely (para 6.20). On the other hand, the recent outbreak of hostilities in the Gulf demonstrates the validity of the observation that "uncertainty is thus a constant in [defence] planning." (para 6.17) It is a characteristic of emergencies that they are unexpected.

6.78 A theme of this Report is the desirability of taking time to prepare well-drafted emergency legislation that conforms to principle and includes appropriate safeguards. The care taken by the Canadians in the drafting of their Emergencies Act 1988 suggests the approach that should be adopted in New Zealand.

6.79 Preparation should, so far as possible, include the drafting in advance of the emergency regulations that would be required to spell out the powers given in a War Emergencies Act. The steps taken in New Zealand before World War II are both a precedent and a warning. The Organisation for National Security, and its predecessor, the New Zealand Committee of Imperial Defence, spent five years on pre-war planning, including the preparation of the War Book. Draft regulations were prepared and it was possible to introduce the first of these two days before war was declared because the government could make a Proclamation of Emergency under the Public Safety Conservation Act 1932. Even with this advance activity, it is now recognised that New Zealand pre-war preparations for the 1939 outbreak of war were dilatory, with the result that there were planning shortcomings (Baker, 27-50).

6.80 There is a further question. Should a War Emergencies Act embodying the appropriate safeguards, having been prepared in draft, be simply held against the day when its enactment may be required, possibly as a matter of great urgency? The alternative is to introduce and pass a Bill for such an Act even if there is no great likelihood that it will need to be used in the foreseeable future. This second course has the advantage of allowing ample time for public scrutiny of the Bill, and for the making of submissions at the Committee stage. When passed, the Act would be there to be called upon should the need arise. This seems preferable to waiting until there is a demonstrable need to have war emergencies legislation in place and then, perhaps, having to rush the Bill through its various parliamentary stages. Also, the circumstances of the emergency may make it impracticable to pass legislation (see para 4.33). For these

reasons the Law Commission favours the alternative of enacting a War Emergencies Act now, rather than leaving it in draft.

Recommendations

6.81 The Law Commission recommends that:

- the Government should give early consideration to the introduction of a Bill for a War Emergencies Act in the form set out in Appendix D to this Report;
- full opportunity should be given for public discussion of the provisions of the Bill for a War Emergencies Act before its enactment;
- contingency planning should include the drafting of emergency regulations that could be brought into force under the War Emergencies Act if the need should arise by reason of the impact on New Zealand of a war, or other major armed conflict, or a nuclear or biological incident.

VII

Serious Civil Disturbances

INTRODUCTION

7.1 The police force as an arm of the civil power has the primary responsibility for the maintenance of internal peace and security. In carrying out this responsibility police can call on a range of powers that enable them to perform acts which would otherwise expose them to the threat of a criminal charge or a possible civil action. The question arises whether the powers of the police at common law and under statute are extensive enough to enable them to deal effectively with all situations which may arise. Are there emergencies where the normal powers of the police will be inadequate?

7.2 Under the now repealed Public Safety Conservation Act 1932 the possibility that there could be emergencies where normal police powers would be inadequate was met in two ways:

- The Act authorised the making of a Proclamation of Emergency in situations in which the "public safety or public order is or is likely to be imperilled". A Proclamation of Emergency carried with it a wide regulation-making power that could be used to extend police powers. (s 2(1) and (3))
- If these provisions could not be put into effect immediately, due to the suddenness of the occurrence or some other cause, the senior police officer in the locality could (until such time as the emergency was proclaimed) take action to preserve life, protect property and maintain order. (s 4)

7.3 The Public Safety Conservation Act 1932 did not attempt to define those threats to public safety or public order that were sufficiently serious to justify the declaration of an emergency. The Act was repealed in 1987; it was thought that its broad regulation-making power vested too much discretion in the executive. The Government's philosophy was that, where there was a need for emergency powers in particular cases, those powers should be included in legislation specifically tailored to the emergency (First Report, para 36). We have called this the sectoral approach.

7.4 The repeal of the Public Safety Conservation Act 1932 was accompanied by two enactments that gave effect to this sectoral approach: s 79A of the Defence Act 1971 (now s 9(4) of the Defence Act 1990) and the International Terrorism (Emergency Powers) Act 1987, referred to as the International Terrorism Act.

7.5 Section 5(e) of the Defence Act 1990 recognises that the armed forces may be called upon to provide "assistance to the civil power either in New Zealand or elsewhere in time of emergency". Under the conditions set out in s 9(4) the armed forces may be made available to assist the police in

an emergency in which one or more persons are threatening to kill or seriously injure, or are causing or attempting to cause the death of or serious injury to, any other person, or are causing or attempting to cause the destruction of or serious damage to any property

The emergency must be one which cannot be dealt with by the police without the assistance of members of the armed forces. The armed forces act only at the request of the police and they can exercise those police powers that are needed to deal with the particular emergency (Defence Act 1990 s 9(5) and (6); see also First Report, paras 83-105, 134-154).

7.6 International terrorism was identified as a threat which required the availability of special powers. Consequently the International Terrorism Act was enacted. An "International terrorist emergency" is defined as

a situation in which any person is threatening, causing, or attempting to cause -

- (a) The death of, or serious injury or serious harm to, any person or persons; or
- (b) The destruction of, or serious damage or serious injury to,-
 - (i) Any premises, building, erection, structure, installation, or road; or
 - (ii) Any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle; or
 - (iii) Any natural feature which is of such beauty, uniqueness, or scientific, economic, or cultural importance that its preservation from destruction, damage or injury is in the national interest; or
 - (iv) Any chattel of any kind which is of significant historical, archaeological, scientific, cultural, literary, or artistic value or importance; or
 - (v) Any animal -

in order to coerce, deter, or intimidate -

- (c) The Government of New Zealand, or any agency of the Government of New Zealand; or
- (d) The Government of any other country, or any agency of the Government of any other country; or
- (e) Any body or group of persons, whether inside or outside New Zealand,-
for the purpose of furthering, outside New Zealand, any political aim. (s 2)

7.7 It will be noted that the physical element of the definition of emergency in both the Defence Act 1990 and the International Terrorism Act is a situation where any person is threatening, causing or attempting to cause the death of or serious injury to any person(s), or the destruction of or serious damage to property. These are circumstances that are not unique to an international terrorist emergency. In practice they may arise from an outbreak of rioting, a gang confrontation, a hijack, the taking of hostages, or other circumstances that could justify an armed offenders' alert, as well as from a terrorist situation, whether or not it is regarded as "international".

7.8 The question therefore arises as to why international terrorism was singled out as an emergency requiring the availability of special powers.

CONCERN ABOUT TERRORISM

7.9 In his report on the Security Intelligence Service: Report by Chief Ombudsman, made in 1976, Sir Guy Powles referred to "the growing importance of terrorism in the world today, and ... the desirability in the national interest of our being well informed and well prepared in this regard." (AJHR 1976 A 3A, 31) He recommended that the Security Service should attach higher priority to espionage and terrorism, and lower priority to subversion. Sir Guy made no distinction between international and internal terrorism and he recommended that the terms of reference of the New Zealand Intelligence Council should be amended to include oversight of internal as well as external intelligence (AJHR 1976 A 3A, 64).

7.10 This concern about terrorism was reflected in amendments made in 1977 to the New Zealand Security Intelligence Service Act 1969. The collection and evaluation of intelligence regarding terrorism became a specific function of the Security Intelligence Service. A definition of terrorism was included for the first time (see para 7.18). Security is now defined under the Act as "the protection of New

Zealand from acts of espionage, sabotage, terrorism, and subversion, whether or not it is directed from or intended to be committed within New Zealand" (s 2).

7.11 The same year, 1977, also saw the establishment of a police anti-terrorist squad specially selected from the armed offenders' squads. The squad has undergone intensive training focused on the skills and expertise required to deal with a terrorist situation. It maintains a close liaison with the Ministry of Defence to ensure effective co-ordination in the event of a terrorist operation requiring defence support, and joint anti-terrorist exercises are held. The 1987 Defence Review said of the Ministry's responsibilities in this area:

the Army must also have the ability to respond immediately to terrorist threats in New Zealand. The SAS will continue to maintain a high state of readiness to meet any counter-terrorist requirements. (Defence of New Zealand: Review of Defence Policy 1987 1986-87 G 4A, 36)

7.12 The Rainbow Warrior incident in 1985 illustrated that these concerns were well-founded and that New Zealand is not immune from the menace of terrorist activity. The International Terrorism Act was enacted with the aim of ensuring that New Zealand had the powers necessary to protect itself against terrorist threats and violence. The Act was confined in scope to acts of international terrorism, as defined, on the basis that domestic terrorism is unknown to New Zealand. The view was taken that it was good principle to legislate only against a known mischief and to refrain from legislating against other possible future mischiefs.

THE NATURE OF TERRORISM

7.13 Terrorism, the use of terror for political ends, is not a modern phenomenon. The term itself originates from the French Revolution, while activity which would now be described as terrorism occurred long before that. Yet technological developments, particularly in the areas of transport, communications and armaments, including explosive devices, mean that the horrific consequences that may be wreaked by terrorists are potentially far greater. As a result it is often perceived that the nature of the terrorist threat has changed and that modern society is very much at risk.

7.14 **Error! Bookmark not defined.** Although few people are directly affected by terrorist attacks, those attacks have a profound political and psychological impact extending well beyond those immediately affected. Indiscriminate attacks on random targets can engender fear in entire populations. The perception mentioned above is understandable, but the question is whether it is accurate. (In 1985, 17 of the 28 000 000 Americans who travelled abroad that year were killed by terrorists. This one in 1 600 000 chance of becoming a terrorist victim is to be compared to the one in 5 300 chance (in the United States) of dying in an automobile accident.) In the words of Walter Laqueur:

There is a tendency to magnify the importance of terrorism in modern society: society is vulnerable to attack, but it is also astonishingly resilient. Terrorism makes a great noise, but so far it has not been very destructive. (Laqueur, "Reflections on Terrorism" (1986-87) 65 Foreign Affairs 86, 99)

Nevertheless, the broad psychological impact of terrorism places considerable pressure on modern States, given their role of protecting the safety of their citizens, to take or be seen to take counter-terrorist measures.

7.15 Further, as terrorism represents an attempt to achieve political aims by means which are generally perceived as being illegitimate, it is seen as posing a direct threat to democratic processes and institutions. Governments seeking to counter terrorism therefore argue that there needs to be some derogation from the protections ordinarily afforded to individual rights in order to defend democratic institutions in the common interest. The danger is that States will over-react. Wardlaw warns that

it is possible to imagine governmental officials doing more to destroy democracy in the name of counter-terrorism than is presently likely to be achieved by terrorists themselves. (Wardlaw, Political Terrorism: Theory, tactics and counter-measures (Cambridge University Press, Cambridge, 1982) 78)

A strong case must therefore be made for any legislation aimed at countering terrorism.

DEFINING TERRORISM

7.16 The labelling of an action as "terrorism" invariably involves a moral or political judgment. Hence the expression "one man's terrorist is another man's freedom fighter". This moral or political element makes it difficult to formulate a generally accepted definition of terrorism on which to base policy responses.

7.17 There have been many attempts by international agencies, domestic legislatures and academic commentators to provide a definition. An analysis of the definitions reveals that there are three elements that are commonly perceived as being central to the concept of terrorism. These are

- **the use, or threat of use, of violence,**
- **the intention of intimidating or coercing a target group other than the immediate victims, and**
- **the purpose of furthering a political aim through that intimidation or coercion.**

7.18 All three elements are to be found in the definition of terrorism introduced in 1977 into the New Zealand Security Intelligence Service Act 1969:

"Terrorism" means planning, threatening, using, or attempting to use violence to coerce, deter, or intimidate -

- (a) The lawful authority of the State in New Zealand; or

(b) The community throughout New Zealand or in any area in New Zealand for the purpose of furthering any political aim ... (s 2, as amended by s2(1) of the New Zealand Security Intelligence Service Amendment Act 1977)

7.19 The three elements also appear in the definition of "International terrorist emergency" in the International Terrorism Act (para 7.6), although the Act applies only to terrorist activity undertaken "for the purpose of furthering, outside New Zealand, any political aim".

THE PURPOSE OF DEFINING TERRORISM

7.20 It is important to note that definitions of terrorism may have different functional purposes in both domestic and international law. It may be thought necessary to define terrorism in order to create an offence of terrorism, to establish rules relating to the extradition of alleged terrorists, or to provide a basis for the availability of special powers aimed at the suppression of terrorism.

7.21 In some contexts, the political element of terrorism is its most important aspect. For example, an effective long-term strategy for the elimination of terrorism may involve the resolution of the underlying political and social tensions which give rise to it. Again, the tactical approach to the resolution of a hostage situation involving terrorists may differ from that in a hostage crisis with a domestic background. This is due to two factors.

7.22 First, terrorists are likely to be more heavily armed and have a greater commitment to clearly defined objectives than most armed offenders. The resources deployed and tactics employed to combat a terrorist group armed with machine guns and hand grenades will obviously differ from those which are relied on to deal with a lone armed offender. In the former situation it may be thought necessary to call upon the specialised equipment and technical expertise of the armed forces (which can be deployed to assist the police under s 9(4) of the Defence Act 1990).

7.23 Second, terrorist crises may require a political input. Terrorist demands to release prisoners or change government policy call for Ministerial decisions which may impact on the methods adopted to resolve the incident. A terrorist incident may often affect the actions or interests of more than one country. Again, these international considerations necessitate high-level governmental involvement.

7.24 This is a report on emergency powers and therefore we are only concerned with the question of whether there is a need for special powers to counter terrorist activity. These powers would be aimed at the prevention, control or termination of the violence associated with terrorism. The question arises whether, in this context, the political motive for the violence is relevant.

7.25 We examine two types of legislative measures that are described as anti-terrorist. The first, typified by the Prevention of Terrorism (Temporary Provisions) Act 1989 (UK), is preventive legislation that attempts to anticipate terrorist incidents primarily by providing extended powers of arrest, detention, and search and seizure, on the basis of suspicion of involvement in terrorism. This Act must be seen in the light of the ongoing campaign of terrorism associated with the troubles in Northern Ireland.

7.26 The second is the type of measure concerned with the operational response to actual terrorist incidents. The International Terrorism Act, which authorises the exercise of listed powers by members of the police in the event of an international terrorist emergency, is an example of this approach.

7.27 Neither of these legislative approaches is necessarily contingent on or confined to violence or potential violence that is politically motivated. Although the preventive approach may rest on the organised and continuing nature of most terrorist violence, this is not a feature unique to terrorism. The element of organisation or pre-planning may be a feature of other criminal activities.

7.28 It is still more obvious that the powers that the police will need to respond to terrorist incidents do not hinge on the political motivation of the offender. In a hostage situation the powers that the police may need to exercise will be the same, whether the offender is making political demands, is seeking ransom or is deranged. The tactics employed in respect of each of these scenarios may differ (paras 7.21-7.23), but the basket of powers that should be available to the police, and the armed forces if they become involved, will not.

7.29 It follows that situations involving terrorism or the threat of terrorism cannot necessarily be identified as emergencies requiring the availability of special powers.

CONSIDERATION OF POLICE POWERS

7.30 The discussion in paras 7.24-7.29 suggests that in answering the question posed in para 7.1, that is, whether there are emergencies where the normal powers of the police will be inadequate, police powers can be conveniently considered under two headings:

- **preventive or investigative (pre-emptive) powers;**
- **combative or operational (response) powers.**

PREVENTIVE OR INVESTIGATIVE (PRE-EMPTIVE) POWERS

INTELLIGENCE

7.31 The point has been made that the question of giving preventive or investigative powers to the police is not necessarily confined to terrorist-related emergencies (para 7.27). Even so, that question has arisen particularly in relation to the threat of terrorism. This is because terrorism is seen as a premeditated act of violence, planned and prepared by an organised group of persons and directed against the State or some other authority.

7.32 Many commentators have stressed the primary importance of intelligence gathering for the effective prevention of terrorist activity. Mr Justice Hope has said:

The first line of defence against terrorism is intelligence. ... [B]efore really effective preventive action can be taken, the planners must have some idea of what it is that needs to be prevented or protected, what type of attack and what type of person they are guarding against, what measures are likely to be effective and what ineffective, and ideally by whom and when an attack will be made. ... [T]he closer the intelligence approaches this ideal, the more effective preventive action will be. (Hope, Protective Security Review: Report (Australian Government Publishing Service, Canberra, 1979) para 5.1)

7.33 Intelligence has an important function in respect of the prevention of acts of terrorism. It will also play an important part in the resolution of terrorist incidents. In such situations operational intelligence, for example, about the number of terrorists and the arms they are carrying, and background intelligence, such as the assessment of behavioural traits, can be vital.

7.34 Sir Guy Powles recognised that, if terrorism is to be effectively combated, it is important that the authorities have advance warning of likely terrorist activity. Intelligence will play a vital role in providing this warning. Thus the 1977 amendments to the New Zealand Security Intelligence Service Act 1969, which stemmed from the Powles Report Security Intelligence Service, added terrorism to espionage, sabotage and subversion as acts posing a threat to the "security" with which the New Zealand Security Intelligence Service is concerned.

7.35 The main function of the Security Intelligence Service is to obtain, correlate and evaluate intelligence relevant to security. Under section 4A of the Act the Minister in charge of the New Zealand Security Intelligence Service may issue an interception warrant authorising the interception or seizure of any communication, if satisfied that the interception or seizure is necessary either for the detection of activities prejudicial to security or for the purpose of gathering foreign intelligence information essential to security.

7.36 However, the Security Intelligence Service is concerned only with intelligence gathering. It is not its function to enforce measures of security (s 4(2)(a)) and it is given no powers in this regard. It is therefore essential that there be effective co-operation between the Security Intelligence Service and other agencies. (This is also an issue in other Western countries; see, for example, Hope Protective Security Review, paras 4.45-4.46.) In the case of terrorism the agency mainly involved is the police, in view of their primary responsibility for upholding the law and keeping the peace. This matter was addressed in the

Powles Report. The police had expressed concern that they had not received from the Service all relevant or sufficient information in respect of terrorist organisations. Sir Guy Powles said:

It seems that intelligence relating to terrorism (including hijacking and sabotage) should in the national interest be passed freely to those Government agencies which have responsibility to deal with it - agencies such as the Police, the Ministry of Defence and the Ministry of Foreign Affairs. It seems also that clear lines of responsibility must be laid down for the Service and the Government agencies concerned. I have the impression that on occasions in the past this co-operation has not been as effective as it should have been. (Security Intelligence Service, 70)

Sir Guy recommended that the Service and the police consult at ministerial level to improve their working relationship generally, and specifically in relation to terrorism. Clearly, the maintenance and use of channels of communication and the laying down of lines of responsibility as among the Service, police and other interested agencies, such as the New Zealand Defence Force and the Ministry of External Relations and Trade, must continue to be kept under constant review.

ABILITY TO PRE-EMPT OFFENCES

7.37 Viscount Colville has stated, in the context of the terrorist problems in Northern Ireland, that:

Everyone would accept that if arrest and charge can take place under the ordinary criminal law this is preferable to any exceptional powers. But from a potential victim's point of view, it will be too late unless there are adequate powers to found an arrest on reasonable suspicion at the preparatory stage of the commission of offences of violence The havoc wrought by a bomb, grenade or machine gun assault in a busy street or airport lounge may be thought horrific enough to be stopped as far enough in advance as the police can achieve, with reasonable suspicion of involvement in terrorism (Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984 by The Viscount Colville of Culross QC (1987; Cmnd 264) para 4.1.7, referred to as the Colville Review)

The concerns which underlie this conclusion call for an examination of the extent to which the aim of anticipating and preventing the commission of serious offences - and in particular terrorist offences - can be realised under the ordinary law. This entails a consideration of police powers of arrest, search and seizure, and powers available under the Immigration Act 1987.

POWER TO DETAIN

7.38 In general the police have no power to detain a person for interrogation or for any other purpose unless that person has been arrested (Blundell v Attorney-General [1968] NZLR 341 (CA)). An arrest must relate to a specific offence.

7.39 However, we are concerned here with the ability to prevent offences, the object of the police being to frustrate the unlawful objective. It may be that the preparation of the enterprise involves the commission of an offence or offences for which the police can make an arrest. For example, there may be an illegal importation of firearms contrary to the Arms Act 1983, or, at some stage short of the completion of the enterprise, there may be an attempt or a conspiracy to commit an offence. If the prospective offender has entered New Zealand from another country, provisions in the Immigration Act 1987 may be applicable.

Attempt and conspiracy

7.40 There is an attempt to commit an offence if there is an act "immediately or proximately connected with the intended offence" (Crimes Act 1961 s 72(3); R v Wilcox [1982] 1 NZLR 191, 193 (CA)). This means that the conduct necessary to constitute an attempt is not far short of that involved in the actual commission of the offence. Therefore the power to arrest for an attempt has little pre-emptive value.

7.41 Conspiring to commit an offence is itself an offence under s 310 of the Crimes Act 1961. A conspiracy is an agreement between two or more people to commit an offence. The planning and preparation for a terrorist attack would in most cases involve a criminal conspiracy and therefore, in theory, arrests could be made at an early stage. However, it is difficult to prove a conspiracy. The suspicion held by the police may fall short of that required for a valid arrest, or the available evidence, although sufficient to justify an arrest, may not support a charge.

7.42 Viscount Colville (Colville Review, para 4.1.8) considered that one of the major difficulties in relying on conspiracy charges is that it is a feature of terrorist activity that plans may be made in one country and committed in another. This raises complex questions of jurisdiction. The jurisdiction problem does not appear to be as acute in this country. Section 7 of the Crimes Act 1961 states that

For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

Although a conspiracy is complete upon an agreement being reached by the parties, it remains in existence until its discharge, whether by completion of its performance, abandonment or frustration. Thus a conspiratorial agreement made outside New Zealand to commit an offence in this country falls within the jurisdiction of the New Zealand courts if an act in furtherance of the conspiracy is performed here (R v Sanders [1984] 1 NZLR 636 (CA)).

7.43 Although jurisdictional issues appear less complicated in comparison with the situation in the United Kingdom, the difficulties of proof outlined in para 7.41 raise doubts whether the law of conspiracy alone provides sufficient opportunity for the police to pre-empt terrorist offences.

Immigration Act 1987

7.44 The Immigration Act 1987 contains a number of provisions which can be used to avert the possibility of terrorist acts by foreign terrorists in New Zealand. These provisions are discussed in paras 3.29-3.35.

POWER TO SEARCH

7.45 At common law the police have no general power to search, but persons who have been arrested may be searched if there are reasonable grounds for believing that they have on their person either a weapon or any evidence material to the offence with which they are charged.

7.46 A number of statutory provisions give the right to search. For example, under s 57A of the Police Act 1958 a member of the police may search anyone who is taken into lawful custody and is to be locked up in police custody, and may take any money or property found in the detainee's possession.

7.47 Section 198 of the Summary Proceedings Act 1957 is the primary statutory authority for search pursuant to a warrant. It applies to all offences punishable by imprisonment. Any District Court Judge, Justice or Registrar who is satisfied that there is reasonable ground for believing that there is in any building, vehicle, place, etc, any thing in respect of which an offence has been committed, or which is evidence of any such offence or which there is reasonable ground to believe is intended to be used for committing any such offence, may issue a warrant to search that building, vehicle, place, etc. A search warrant may be executed by any constable.

7.48 There are several statutory provisions which allow the police to search persons or places without a warrant. The most relevant in the present context are s 202B of the Crimes Act 1961 and ss 60 and 61 of the Arms Act 1983. Section 202B allows a constable to search any person (or that person's vehicle) if the constable has reasonable grounds for believing that the person is in possession of an offensive weapon in a public place. Section 60 of the Arms Act 1983 authorises the police to search any person in a public place who they have reasonable grounds to suspect is in possession of arms in breach of the Act. Under s 61 a commissioned officer of police may authorise the search of any vehicle or place if there is reason to suspect the presence of any arms in respect of which any offence against the Act or any indictable offence has been or is about to be committed or which may be evidence of any such offence.

7.49 The police may also obtain information which enables them to thwart the unlawful objective of a criminal conspiracy by intercepting private communications. Warrants to intercept private communications may be issued in respect of suspected drug dealing offences (Misuse of Drugs Amendment Act 1978 s 14) or in respect of criminal activities on the part of an organised criminal enterprise (Crimes Act 1961 s 312B). As an organised criminal enterprise is defined as "a continuing association of 6 or more persons having as its object or as one of its objects the acquisition of substantial income or assets by means of a continuing course of criminal conduct" (Crimes Act 1961 s 312A), neither of these provisions is directly applicable to a criminal conspiracy aimed at violent offending.

PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT

7.50 In the light of the powers the police now have to pre-empt terrorist offences it is useful to refer to the experience of the United Kingdom which provides an example of the kinds of powers that one government, confronted with an ongoing programme of terrorism, has decided to give to its police. Special powers have been conferred under a series of Acts known as the Prevention of Terrorism (Temporary Provisions) Acts. This United Kingdom experience illustrates that the powers concerned are not emergency powers in the sense of extraordinary powers needed to deal "with an urgent and unusual situation of a temporary nature" (Emergencies Act 1988 (Canada) s 3). They are special powers that need to be constantly available to the police while there is an ongoing programme of terrorism.

Background to the Act

7.51 The first Prevention of Terrorism (Temporary Provisions) Act was passed in 1974 in the wake of the Birmingham bombings. As the title of the Act suggests, it was intended that the legislation would be of limited duration. It was to lapse unless renewed at least every six months. This renewal took place until the second Prevention of Terrorism (Temporary Provisions) Act was passed in 1976.

7.52 The 1976 Act provided for annual renewals. The Act was renewed annually until it was replaced by the Prevention of Terrorism (Temporary Provisions) Act 1984. That Act provided for annual renewals but was also given a limited lifespan of five years. In a review of the operation of the 1984 Act Viscount Colville recommended that the core controls in the Act should be enacted in permanent legislation, and pointed out that the words "temporary provisions" had a hollow ring (Colville Review paras 3.1.8-3.1.9). To an extent these recommendations were followed in that the lifespan of the Prevention of Terrorism (Temporary Provisions) Act 1989 is not limited. However, the appellation "Temporary Provisions" is retained, and the Act lapses unless renewed annually. The latest order renewing the Act for a period of 12 months came into force on 22 March 1991 (Prevention of Terrorism (Temporary Provisions) Act (Continuance) Order 1991 (SI 1991 No 549)).

Powers conferred by the Act

7.53 The Prevention of Terrorism (Temporary Provisions) Act 1989 includes the following powers:

- Suspected terrorists may be excluded from Great Britain, Northern Ireland or the United Kingdom.
- A number of "terrorist" offences are created. (Police powers of arrest are consequently extended.) It is an offence
 - to fail to comply with an exclusion order,
 - to associate with a proscribed organisation, ie the Republican Army or the Irish National Liberation Army,

- to contribute money or property towards acts of terrorism or the resources of a proscribed organisation, or
 - to withhold information about terrorists.
- The standard of suspicion required for a valid arrest is lowered.
 - Detention without charge is provided for on the premise that this will allow the police time to gather sufficient evidence, either through interrogation or otherwise, to support a charge.
 - The investigative powers of the police, including the power to stop and search, are extended.

Terrorism is defined as meaning "the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear."

7.54 The exceptional powers given by the UK Prevention of Terrorism (Temporary Provisions) Act 1989 must be judged against the background of the spread of IRA violence to the Great Britain mainland and, in the context of a recent extension of the Act to acts of international terrorism, of the increased frequency of such acts in the United Kingdom. The authorities there have faced an ongoing campaign of terror, the source of which is well-defined.

CONCLUSION

7.55 In New Zealand the primary concern is to guard against random and isolated incidents of terrorism. Expanded powers of search and detention will not be a particularly effective weapon against such a threat. Even in extreme circumstances, such as those pertaining in the United Kingdom, the justification for powers of the type contained in the Prevention of Terrorism (Temporary Provisions) Act would need to be considered carefully.

7.56 There has been no suggestion that circumstances in New Zealand call for the conferment on the police of extended preventive or investigative powers specifically designed to enable them to deal with terrorist threats, and, in the Law Commission's view, such a step could not be justified. Since the powers involved would need to be available to the police on a day-to-day basis there must be compelling reasons for their introduction. It would need to be established that in the circumstances the powers were likely to be

effective to meet identified needs and then that the wider interests of the community prevailed over the infringements of individual rights that would be involved.

7.57 This conclusion is not intended to exclude a review of the powers of search, seizure, arrest and detention at present available to the police in the course of their ordinary duties. There have been recent comments by the Court of Appeal indicating a need for a review of the law in respect of the detention of suspects for questioning (Crime Appeal (unreported, Court of Appeal, 25 October 1991, CA 227/91 and 228/91); see also R v Fatu [1989] 3 NZLR 419, 432 (CA); see also R v Beazley [1987] 2 NZLR 760, 767-768 (CA), and R v Admore [1989] 2 NZLR 210, 214 (CA)).

7.58 This is not, however, an issue that falls within the terms of reference of this Final Report. It will be taken up by the Law Commission in its project on criminal procedure.

COMBATIVE OR OPERATIONAL (RESPONSE) POWERS

INTRODUCTION

7.59 This section of the Report begins with a general overview of the statutory and common law powers of the police (paras 7.62-7.73). The definitional and procedural issues that stem from the singling out of international terrorism as an emergency requiring the availability of special powers are then considered. Problems in the operation of the International Terrorism Act - arising from the definition of "International terrorist emergency" and the cumbersome trigger procedure in the Act - suggest that it is inappropriate to confer special powers solely to deal with international terrorism. In the context of the powers which the police may require to respond to a situation involving a threat to life or property, acts of terrorism cannot be distinguished from other acts of violence. (paras 7.74-7.93)

7.60 The response powers set out in s 10 of the International Terrorism Act are then examined. To what extent are these powers available to the police in the normal course of their duties? If they are not available to the police outside the Act, should they be available on a wider basis? The review shows that the police can already call on some of the powers; they have others to a greater or lesser extent under common law; and they have certain powers only in the event of an emergency under the International Terrorism Act. These findings support a conclusion that there is a need for a general review of police powers, which would consider, among other issues, the desirability of a clear definition of police powers. (paras 7.94-7.139)

7.61 The media provisions in ss 14 and 15 of the International Terrorism Act are considered separately. The conclusion is reached that they should not be retained. (paras 7.140-7.162)

DUTIES OF THE POLICE

7.62 The police have the primary responsibility for upholding the law and maintaining the peace. More particularly, the duties of the police are to keep the peace, prevent crime, detect crime and bring criminals to justice, and protect life, limb and property (Rice v Connelly [1966] 2 QB 414, 419 (HC)). Some of these duties are specifically recognised in the police oath, by which all constables swear to discharge all the

duties associated with their office faithfully according to law (see the Police Act 1958 s 37). In carrying out their duties the police have powers that are to be found in the rules of common law and in statute. Resisting or obstructing a police officer acting in the execution of his or her duty is an offence under s 23 of the Summary Offences Act 1981.

STATUTORY POWERS

7.63 Relevant provisions of the Crimes Act 1961 mainly relate to the use of force by police officers in the enforcement of law and the maintenance of order. Police officers may use such force as is reasonably necessary

- to overcome resistance to an arrest,
- to prevent an arrested person from escaping,
- to prevent the commission of offences likely to cause immediate or serious injury to persons or property,
- to prevent a breach of the peace,
- to suppress a riot, and
- to defend themselves or others (Crimes Act 1961 ss 39-48).

7.64 The criticism can be levelled that these provisions give no clear guidance as to what will be a legitimate use of force in any particular situation. Professor Glanville Williams has commented (referring to s 3(1) of the Criminal Law Act 1967 (UK) which allows the use of reasonable force in the apprehension of offenders or the prevention of crime):

To answer all questions with the test of reasonableness was an easy solution politically, but as a rule for application by courts it is illusory. Perhaps the most unfortunate area of doubt is in respect of what the police themselves may now do to frustrate serious crimes. (Williams, Textbook of Criminal Law (1st ed Stevens & Sons, London, 1978) 444)

7.65 There are of course other provisions in the Crimes Act 1961 and other statutes which confer powers on police officers. In so far as these provisions are relevant to the issues raised by the "special" powers contained in s 10 of the International Terrorism Act they are discussed in paras 7.94-7.139.

COMMON LAW POWERS

7.66 When the legality of a police officer's action is called into question, the courts, applying the Ashworth formula (R v Waterfield [1964] 1 QB 164, 170-171 (CCA)), will ask not only whether the officer's conduct falls within the scope of any common law or statutory duty but also whether the conduct involved the unjustifiable use of the powers associated with the duty. In determining the second question, the courts have accepted that, when acting in the course of their duty, the police are justified in doing what is reasonable in the circumstances (Minto v Police [1987] 1 NZLR 374 (CA)).

7.67 In Police v Amos Speight J said:

it is beyond argument that the police must interfere to stop or prevent unlawful conduct, actual or apprehended. In addition circumstances may arise where there is a common law duty on a policeman to take steps which would otherwise be unlawful if he has apprehension on reasonable grounds of danger to life or property, but the limits to which he may go will be measured in relation to the degree of seriousness and the magnitude of the consequences apprehended. There could be less justification for taking what would be prima facie unlawful interference with private rights for the protection of property than there would be in the case of danger apprehended to persons. ([1977] 2 NZLR 564, 569 (SC))

7.68 What is reasonable depends on the facts of the case. At common law a member of the police, indeed any individual, is entitled to detain a person or otherwise to use force to prevent a breach of the peace. Thus in Minto (para 7.66) the President of the Court of Appeal reasoned that the common law permits the temporary detention of chattels as a step to prevent an anticipated breach of the peace, this being a less serious interference with a citizen's liberty than the detention of the individual. Similar reasoning has been applied in recognising a power to enter and remain on private property to prevent an anticipated breach of the peace (Thomas v Sawkins [1935] 2 KB 249, 257 per Lawrence J; but see Shattock v Devlin [1990] 2 NZLR 88 (HC)).

7.69 Other cases further illustrate the flexibility and the potential scope of the common law powers of the police. If the police reasonably apprehend a breach of the peace they may

- **direct a speaker not to address a public meeting,**
- **direct demonstrators to move on,**
- **limit the number of persons in a particular place, or**
- **barricade streets and deny demonstrators access to a particular area.**

In Johnson v Phillips [1976] 1 WLR 65 (DC) it was held that a police officer has the power to direct other persons to disobey traffic regulations if this is reasonably necessary for the protection of life or property. Failure to comply with these directions would amount to obstruction (see para 7.62).

7.70 It follows that the police, when confronted with an emergency such as a terrorist incident, have a wide discretion at common law to take appropriate measures to deal with the emergency. Since the

reasonableness of the measures taken will depend on the magnitude of the apprehended consequences, the courts will be reluctant to second-guess police who are faced with a serious threat to law and order.

FLEXIBILITY VERSUS UNCERTAINTY

7.71 The advantage of this common law approach is its flexibility. An unlimited number of new situations can arise, and it has been said that any attempt to define what a police officer may reasonably do

would have the adverse effect of tying a constable's hands in a given situation where he must exercise his own judgment. (Minto v Police [1987] 1 NZLR 374, 378 (CA) per Bisson J)

7.72 An undesirable consequence of this approach is lack of certainty. Neither the police, armed forces assisting the police, nor the public at large are given clear guidance in advance as to what measures are and are not acceptable. A decision as to the legality of the measures is made after the event. Particular difficulties arise when the armed forces are called upon to assist the police. Members of the armed forces are unlikely to have the training and experience that enable them to decide readily what powers they may exercise in a particular situation (see First Report, para 166).

7.73 Understandably this uncertainty is a matter of concern to members of the police. It is a problem that is not confined to an emergency context - it arises when police officers are acting in the normal course of their duties. The issues involved are broad ones which extend beyond the scope of the present review. The Law Commission will be considering them in the context of its criminal procedure reference.

THE INTERNATIONAL TERRORISM (EMERGENCY POWERS) ACT 1987

7.74 The world-wide increase in acts of terrorism, and particularly of terrorism with an international dimension, combined with New Zealand's own experience of the Rainbow Warrior affair, suggested that the repeal of the Public Safety Conservation Act 1932 should be accompanied by legislation specifically concerned with international terrorism.

7.75 The International Terrorism Act does not create terrorist offences, but it does list powers that are available to the police once the existence of an international terrorist emergency has been established. It will be shown that many of the powers listed are probably available under other statutes or at common law. One advantage of the list is that those who are charged with responding to an emergency have a clear definition of the powers that can be called upon. There is no need for inhibiting uncertainty as to what those powers are.

7.76 Nevertheless, the provisions of the International Terrorism Act raise a number of issues that relate to the future of the Act:

- the definition of international terrorism;
- the procedure for authorising the exercise of the powers given by the Act;
- the relationship between the International Terrorism Act and New Zealand's obligations under the International Covenant on Civil and Political Rights; and
- the extent to which the powers are already available - or ought to be available - to the police on a wider basis.

Definition of "international terrorism"

7.77 The definition of "International terrorist emergency" has already been set out in para 7.6. At the time of the passage of the International Terrorism Act it was recognised as presenting difficulties. Bill Dillon MP, in reporting the Bill back to the House of Representatives from the Justice and Law Reform Select Committee, acknowledged that the definition was not perfect (481 NZPD 9347, 9 June 1987).

7.78 Two difficulties, in particular, about the definition call for consideration:

- The definition requires a determination as to the motives of the offender(s).
- It applies only to "international" terrorism.

7.79 The definition encapsulates the three central elements of the concept of terrorism listed in para 7.17. While these elements provide a useful explanation of what terrorism is, the Ministers of the Crown who are responsible for determining whether a terrorist emergency exists will have difficulty making findings about some of these elements in practice. The use, or threat of use, of violence can be readily determined, but the motives of the offender in many cases will not be outwardly apparent. The International Terrorism Act definition requires consideration of two specific intentions beyond the unlawful activity itself. Not only must the offender be seeking to coerce, deter or intimidate the Government or any governmental agency of New Zealand or any other country, or any other body or group of persons, but the purpose of this intimidation must be the furtherance of a political aim.

7.80 The additional requirement that the terrorist act must be furthering a political aim outside New Zealand presents a further difficulty. The Human Rights Commission in its report on the International Terrorism Bill made the point that this language did not necessarily confine the operation of the Act to an international terrorist incident: "The definition could ... quite possibly allow the exercise of emergency powers by the Police, assisted if necessary by Armed Forces, where there is a threatened mass demonstration against the policies of a foreign government (as might occur if there was another war similar to that in Vietnam or similar disturbances to those which occurred at the time of the 1981 Springbok tour)." (Human Rights Commission, Report on the International Terrorism (Emergency Powers) Bill 1987 (Auckland, 1987) 1) The Human Rights Commission concluded: "It may in fact be almost impossible to draft a suitable definition." (2)

7.81 The Human Rights Commission was concerned that the International Terrorism Act might be used to combat legitimate political dissent within New Zealand. In this respect the definition is too broad. Yet it might also be said that in another respect the definition is too narrow. Although international terrorism, however defined, may pose the most likely terrorist threat in New Zealand, the possibility of a terrorist threat that has as its motive the furtherance of a political aim within New Zealand cannot be discounted. The Powles Report (Security Intelligence Service) and the resulting amendments in 1977 to the New Zealand Security Intelligence Service Act 1969 make no distinction between internal and international terrorism. The SIS is responsible for the protection of New Zealand from acts of espionage, sabotage, terrorism and subversion "whether or not it is directed from or intended to be committed within New Zealand" ("Security" definition, s 2). And the responsibilities of the police anti-terrorist squad and the Army's SAS, with their role of responding to terrorist threats, cannot be regarded as being confined to the possibility of an externally motivated act of terrorism.

7.82 It follows that the distinction made in the International Terrorism Act between international and internal terrorism is a difficult distinction to apply in practice. It is also a distinction which is unsustainable if it is thought that the police may require special powers in a terrorist situation, as distinguished from other acts of violence (see para 7.28).

The procedure for authorising the exercise of International Terrorism Act powers

7.83 Where the Commissioner of Police believes that an emergency is occurring, that it may be an international terrorist emergency and that the exercise of emergency powers is or may be necessary to deal with that emergency, the Commissioner must immediately inform the Prime Minister of this belief.

7.84 On being informed of the Commissioner's belief the Prime Minister may call a meeting of not fewer than three Ministers to consider whether to authorise the exercise of the emergency powers contained in the Act. It appears that the Ministers must be physically present at the meeting - a telephone conference would not be sufficient. If the Ministers believe on reasonable grounds that an emergency is occurring, that it may be an international terrorist emergency, and that the exercise of emergency powers is necessary to deal with that emergency, then they may authorise (by notice in writing signed by the presiding Minister) the exercise by the police of the emergency powers set out in the Act (s 6). (Many of the powers which then become available to the police can be compared to powers which can be exercised by a person in charge of a fire brigade in the event of a fire without the need for any special authorisation (Fire Services Act 1975 s 28).)

7.85 The procedure just described may lead to a significant delay between the start of an incident and the forming of a reasonable belief on the part of the Ministers present at the meeting that it may be an international terrorist emergency in terms of the Act and that the police may require emergency powers to deal with it. The police will, of course, have to take measures to deal with the incident during this

period. Indeed, a response that is both immediate and effective could be crucial to the successful resolution of the emergency.

7.86 Section 4 of the Public Safety Conservation Act 1932 allowed the senior police officer present in the locality of a public emergency to take measures to preserve life, protect property and maintain order pending the Proclamation of an emergency under the Act. No similar provision was included in the International Terrorism Act. Such a provision would undermine the safeguards inherent in the procedure set out for authorising the exercise of emergency powers. Nevertheless the procedure in the International Terrorism Act may result in the police having to rely on their normal powers during the initial, and perhaps most critical, phase of a response to a terrorist emergency.

Relevance of International Covenant on Civil and Political Rights

7.87 The provisions of the International Terrorism Act were considered by the United Nations Human Rights Committee when New Zealand made its Second Periodic Report to the Committee in accordance with its obligations under the International Covenant on Civil and Political Rights (Ministry of External Relations and Trade, Human Rights in New Zealand (Information Bulletin No 30, March 1990) 41, 49, 53).

7.88 Questions were raised in the Human Rights Committee about the definition of an "international terrorist emergency". Why was it defined in terms of requiring a political aim outside New Zealand, and why did it include a threat to destroy or seriously damage a chattel of significant historical, archaeological, scientific, cultural or artistic value? The New Zealand delegation explained that the Act had been confined to international terrorism because that - and not home grown terrorism - was a known reality. On the question of chattels of historical or cultural value, there could be a threat to destroy sacred Maori chattels or documents - a threat the Maori community would regard as very serious indeed.

7.89 No member of the Human Rights Committee appears to have raised the question of whether an "international terrorist emergency" as defined in the International Terrorism Act constitutes "a public emergency which threatens the life of the nation" within the meaning of Article 4 of the Covenant. (It is only in such an emergency that a State Party can take measures derogating from its obligations under the Covenant. Article 4 goes on to list a number of rights from which there can be no derogation.) (See paras 5.14-5.16.)

7.90 It must be readily conceded that the provisions of the International Terrorism Act can be invoked in circumstances that cannot be said to constitute a public emergency threatening the life of New Zealand. It follows that the issue is not whether the International Terrorism Act contains measures derogating from New Zealand's obligations under Article 4 of the International Covenant. It is whether those measures would infringe any of the particular rights protected by Articles of the Covenant.

7.91 Covenant rights that might be considered relevant in the present context, such as the right of peaceful assembly (Article 21) and the right to freedom of expression (Article 19), have attached to them limitations or restrictions as to the circumstances in which they apply. The right of peaceful assembly allows for restrictions "imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public) ... or the protection of the rights and

freedoms of others." It can be expected that any interference with the right of peaceful assembly which would result from the exercise of the powers contained in the International Terrorism Act would fall within these restrictions.

7.92 The restrictions to the right of freedom of expression in Article 19, which are not as wide as those permitted by Article 21, will be discussed in relation to the media provisions of the Act (paras 7.150-7.153).

7.93 A further point needs to be made. New Zealand is now a party to the Optional Protocol to the International Covenant. This raises the possibility that individuals may complain to the United Nations Human Rights Committee if they believe that action taken under the International Terrorism Act violates any of their rights under the Covenant. Such claims can be made only by persons who have exhausted their local remedies.

POWERS UNDER THE INTERNATIONAL TERRORISM (EMERGENCY POWERS) ACT 1987

7.94 The powers contained in the International Terrorism Act will be considered under two heads. First the s 10 powers will be considered individually. Then the media control provisions (ss 14 and 15) will be discussed.

SECTION 10 POWERS

Evacuation

7.95 Section 10(2)(a) provides that any member of the police may

Require the evacuation of any premises or place (including any public place), or the exclusion of persons or vehicles from any premises or place (including any public place), within the area in which the emergency is occurring

7.96 The evacuation of an area by the police is a fairly common occurrence, for instance, in the event of an armed offenders' call-out or a bomb threat. Although the police normally rely on public co-operation, a case can be made that the power to evacuate is available to the police at common law, based on their duty to preserve life or as a corollary of their duty to prevent crime.

7.97 However, it may be thought unsatisfactory to rely on an uncertain and ill-defined common law power, given the frequency with which the police find it necessary to evacuate an area in order to protect the public or facilitate crime prevention measures.

Power of entry

7.98 Section 10(2)(b) provides that any member of the police may

Enter, and if necessary break into, any premises or place, or any aircraft, hovercraft, ship or ferry or any other vessel, train, or vehicle, within the area in which the emergency is occurring

7.99 This provision is to be compared with s 317(2) of the Crimes Act 1961:

Any constable, and all persons whom he calls to his assistance, may enter on any premises, by force if necessary, to prevent the commission of any offence that would be likely to cause immediate and serious injury to any person or property, if he believes, on reasonable and probable grounds, that any such offence is about to be committed.

The power of entry in s 317 is not expressly limited to the premises on which the offence is being committed but nevertheless it is much narrower than that in s 10(2)(b). The question of whether common law powers of entry exist in this country is therefore of significance.

7.100 There is common law authority (Thomas v Sawkins [1935] 2 KB 249, followed in Kilmister v Attorney-General (unreported, Supreme Court, Wellington, 23 September 1966, M303/66, Wild CJ)) permitting entry if a breach of the peace is reasonably anticipated. However, in the more recent High Court decision of Shattock v Devlin [1990] 2 NZLR 88 Wylie J held that s 317 is a codification of the right of police officers to enter on private property, to the exclusion of common law rights (compare Adams (ed), Criminal Law and Practice in New Zealand (2nd ed Sweet and Maxwell, Wellington, 1971) para 2514, and Dehn v Attorney-General [1988] 2 NZLR 564 (HC) recognising a common law power of entry to protect life or limb).

7.101 The availability of common law powers of entry may be important as it could apply to a wider range of circumstances than is covered by s 317. Entry can be effected at common law to prevent a breach of the peace or to protect life or limb, and, although there is no direct authority on the point, it would appear that a common law power of entry would extend to "aircraft, hovercraft", etc.

7.102 In summary, the law with regard to powers of entry to prevent the commission of offences, to prevent a breach of the peace or to protect life or limb is unclear and requires clarification.

Restriction of access

7.103 Section 10(2)(c) provides that any member of the police may

Totally or partially prohibit or restrict public access, with or without vehicles, on any road or public place within the area in which the emergency is occurring

7.104 Read with the power to exclude persons or vehicles from any premises or place in s 10(2)(a) (para 7.95), this provision enables the police to prohibit or restrict public access, with or without vehicles, to or on any road, place or premises in the area within which the emergency is occurring.

7.105 This power is to be compared with that contained in s 342A of the Local Government Act 1974:

- (1) Where the senior member of the Police for the time being in charge at any place has reasonable cause to believe that -
 - (a) Public disorder exists or is imminent at or adjacent to that place; or
 - (b) Danger to any member of the public exists or may reasonably be expected at or adjacent to that place; or
 - (c) An indictable offence not triable summarily under section 6 of the Summary Proceedings Act 1957 has been committed or discovered at or adjacent to that place, -

he may temporarily close, for such period as is reasonably necessary, any road at or leading to or from or in the vicinity of that place, or any part of that road, to all traffic or to any specified type of traffic (including pedestrian traffic).

"Road" includes every square or place intended for the use of the public generally, a motorway, a private road and a private way (ss 315, 342A(2)).

7.106 It is questionable whether the powers given in s 10(2)(a) and (c) of the International Terrorism Act add to those already available to the police under s 342A of the Local Government Act 1974. The International Terrorism Act provisions specifically permit the prohibition or restriction of access to any place or premises, but this can be achieved under s 342A. Although the power in s 342A is to be exercised by the senior member of police present, this is unlikely to cause any difficulty in practice and is preferable in principle.

Removal of obstructions

7.107 Section 10(2)(d) provides that any member of the police may

Remove from any road or public place within the area in which the emergency is occurring any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle impeding measures to

deal with that emergency; and, where reasonably necessary for that purpose, may use force or may break into any such aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle

7.108 Section 68B(1)(c) of the Transport Act 1962 provides:

If [a] constable or traffic officer believes on reasonable grounds that a vehicle on a road causes an obstruction in the road or to any vehicle entrance to any property or that the removal of the vehicle is desirable in the interests of road safety or for the convenience or in the interests of the public,-

- (i) Enter, or authorise another person to enter, the vehicle for the purpose of moving it or preparing it for movement; and
- (ii) Move, or authorise another person to move, the vehicle to any place where it does not constitute a traffic hazard.

The purposes for which the power in s 68B(1)(c) can be exercised are expressed in the widest possible terms - the convenience or interests of the public. However, the context suggests that the section is primarily concerned with road safety and the removal of obstructions to traffic and may not cover the removal of vehicles which are impeding counter-terrorist measures. Further, "vehicle" does not cover, for example, ships or aircraft.

7.109 It is likely that the power to remove obstructions is available at common law. In Johnson v Phillips (para 7.69) it was held that a police officer acting to protect life or property could direct a motorist to back the wrong way down a one-way street. The police may also direct the movements of vessels at sea in the course of their duty to protect life and property (Amos, para 7.67). However, again, reliance on an uncertain common law power may be thought to be undesirable.

Destruction of property

7.110 Section 10(2)(e) provides that any member of the police may

Destroy any property which is within the area in which the emergency is occurring and which that member of the Police believes, on reasonable grounds, constitutes a danger to any person

See also ss 11 and 13 which provide for the payment of compensation where property is requisitioned or destroyed.

7.111 Given that this power is expressed to be limited to situations in which property poses a danger to any person, it is considered highly likely that it is available at common law as an adjunct of the duty to preserve life. Alternatively, it may be justified by necessity (see Esso Petroleum Co Ltd v Southport Corporation [1956] AC 218, 228 (HL) per Devlin J). Necessity may provide a defence not only to a civil action but also to a criminal charge:

it must be obvious that just as harm to the person may be justified on the grounds of self defence of the person, so too the destruction of or damage to property may be justified in

defence of the person. (Smith, Hogan, Criminal Law (6th ed Butterworths, London 1988) 693)

7.112 There is the issue of compensation for property which is destroyed or damaged as a result of lawful police actions. This issue extends beyond the destruction of property which constitutes a danger to any person.

Requisition of property

7.113 Section 10(2)(f) provides that any member of the police may

Require the owner or person for the time being in control of any land, building, vehicle, boat, apparatus, implement, or equipment (in this paragraph referred to as requisitioned property) that is within the area in which the emergency is occurring forthwith to place that requisitioned property under the direction and control of that member of the police, or of any other member of the Police

See also ss 11 and 13 which provide for the payment of compensation where property is requisitioned or destroyed.

7.114 There are a number of provisions in New Zealand legislation that confer a power to requisition (First Report, para 57). These now include s 10 of the Defence Act 1990 implementing the First Report recommendation that there should be a power to requisition where there is an emergency involving the deployment of armed forces outside New Zealand (First Report, paras 50-67).

7.115 The requisition provisions in ss 64 and 65 of the Civil Defence Act 1983 can be compared to those in the International Terrorism Act. Where a state of national emergency or civil defence emergency is in force, a Civil Defence Commissioner, Regional or Local Controller or any constable may, if it is "urgently necessary for the preservation of human life", requisition or authorise the requisition of property ranging from any land or building, to a vehicle or medical supplies.

7.116 The police are in the position where they can call upon the armed forces to provide logistic support where they require additional resources in an operation (Defence Act 1990 s 9(1)). Nevertheless, it is the police view that there could be situations in which they might find it necessary to requisition property. This could involve the use of buildings or facilities for tactical or surveillance purposes; or for a dummy operation preliminary to an actual operation; or the commandeering of the use of part of a communications

system, such as a telephone link. These are situations that are not necessarily confined to terrorist incidents; they might arise in any emergency in which there is a threat to life or a threat of serious injury.

7.117 The police envisage that in most of the situations that might arise the owner or occupier will agree to police use of the property involved, it being understood that there will be provision for compensation. The police recognise that in some circumstances reliance on compulsive power may prejudice the success of an operation. However, it is their view that there may be situations in which they will not be able to obtain access to a necessary resource without requisition.

7.118 It is recognised that a power to requisition, if it is to be available, should not be available to the police in the normal course of their duties as it involves a serious interference with individual property rights. However, if on balance a power of requisition is felt to be justified, its availability should not be restricted to terrorist incidents.

Restriction of land, water or air traffic

7.119 Section 10(2)(g) provides that any member of the police may

Totally or partially prohibit or restrict land, air, or water traffic within the area in which the emergency is occurring.

7.120 To the extent that there is an overlap with the power contained in s 10(2)(c) (restriction of access), the discussion in paras 7.103-7.106 also applies to the power conferred by s 10(2)(g).

7.121 Further, in Hoffman v Thomas [1974] 1 WLR 374 (DC) Lord Widgery CJ approved a statement in Halsbury's Laws of England that the police have a power at common law to direct traffic derived from their duty to protect life and property. In Police v Amos (para 7.67) it was held that the police have the power to direct vessels at sea for the same purpose.

7.122 Police cannot themselves control air traffic, but the Civil Aviation Regulations 1953 (Reprint) (SR 1980/88) allow any area to be prescribed (by the Director of Civil Aviation) as a prohibited or restricted area for the purpose of controlling air traffic (reg 33). The Director shall not declare an area a prohibited area unless advised by the Minister, for reasons of military necessity or national security or the public interest, to prohibit the flight of aircraft within the area. In order to declare an area a restricted area the Director must be satisfied that it is necessary in the interests of the safety of air navigation or in the public interest to permit the flight of aircraft within the area only in accordance with such conditions and at such times as may be prescribed.

7.123 Close and ready co-operation between the police and the civil aviation authorities will be required in situations where the police want to restrict air traffic which might hinder their operations. Such co-operation will be necessary in any event in order to ensure air safety.

Interference with and interception of telephonic communications

7.124 Section 10(3) provides that

Notwithstanding anything in any other Act, but subject to this Act, any member of the Police may, for the purpose of preserving life threatened by any emergency to which this section applies, -

(a) Connect any additional apparatus to, or otherwise interfere with the operation of, any part of the telephone system; and

(b) Intercept private telephonic communications -

in the area in which the emergency is occurring.

Section 10(4) provides that

The power specified in subsection (3) of this section may be exercised only by, or with the authority of, a commissioned officer of the Police, and only if that officer believes, on reasonable grounds, that the exercise of that power will facilitate the preservation of life threatened by the emergency.

7.125 The interception of telephonic communications requires the connection of a listening device to the telephone line. In situations where the police are authorised to exercise emergency powers under the International Terrorism Act, this connection can be effected without the consent of the network operator. This means that s 10(3) prevails over s 6 of the Telecommunications Act 1987 which requires the agreement of the network operator for the connection of "any additional line, apparatus, or equipment to any part of a network or to any line, apparatus, or equipment connected to any part of a network owned by that operator."

7.126 Section 10(3) enables the police

- **to intercept communications, including telephonic communications, by means of a listening device; and**
- **to disconnect telephone lines.**

Interception of communications

7.127 The issue of whether the interception of communications should be authorised can arise in two separate contexts:

- The interception may be required for investigative purposes, in particular to acquire security intelligence or evidence of criminal activity. There are three statutes under which an interception warrant can be issued for this purpose:
 - New Zealand Security Intelligence Act 1969 ss 4A and 4B (warrant issued by the Prime Minister);
 - Misuse of Drugs Amendment Act 1978 ss 14-29 (warrant issued by a Judge of the High Court);
 - Crimes Act 1961 ss 312A-312Q (warrant issued by a Judge of the High Court in respect of an "organised criminal enterprise").
- The interception may be required to facilitate police operations in responding to criminal activity. Apart from the International Terrorism (Emergency Powers) Act 1987 s 10(3) and (4), the Crimes Act 1961 ss 216A-216D is relevant.

.128 Section 216B(1) of the Crimes Act 1961 makes it an offence intentionally to intercept a private communication by means of a listening device. Under s 216B(3) this prohibition is not to apply to an interception by any member of the police of a private communication, other than a telephonic communication, by means of a listening device in an emergency where there are reasonable grounds for believing that one person (the suspect) is threatening the life of, or serious injury to, another person. Authority for the interception is given by a commissioned officer who believes on reasonable grounds that the use of the listening device to intercept a communication involving the suspect will facilitate the protection of the person under threat.

7.129 Section 216B(3) has two features:

- It does not apply to telephonic communications.
- It is not an authority to intercept; it is a grant of immunity for what would otherwise be an offence.

7.130 Section 216B(3) is a recognition that there may be situations, which involve a threat to the life of or serious injury to a person or persons but are not terrorist emergencies, when police interception of communications by a listening device is justified. There appears to be no reason in principle why telephonic communications should have been excluded from the provision. The exclusion may have been based on the belief that telephonic interception by the police could be effected with the authority of the Postmaster-General

under s 158 of the Post Office Act 1959. This provision was repealed in 1987 and has no counterpart in Part I of the Telecommunications Act 1987, the source of authority now referred to in s 216B(2)(b)(i).

7.131 Section 216B(3) is not an authority to intercept but a protection from criminal responsibility. Therefore even if the subsection were amended so that it applies to telephonic communications the police would be required to obtain the consent of the network operator before they could attach a listening device to a telephone line (see para 7.125). If this was thought to be inappropriate in an operational situation, an express statutory authority to intercept telephonic communications, overriding s 6 of the Telecommunications Act 1987, would need to be conferred.

Disconnection of lines

7.132 It is a standard tactic in siege situations to cut off telephone lines in an attempt to ensure that the police are the sole point of contact for the offender (see also Hope, Protective Security Review, para 7.92). Section 10(3)(a) of the International Terrorism Act allows this step to be taken in an international terrorist emergency once the exercise of emergency powers is authorised.

7.133 There will, however, be other emergencies involving a threat to the life of or serious injury to a person or persons which do not differ from an international terrorist emergency in any material respect. In these situations the police may want to disconnect telephone lines, but must at present rely on the consent of a private network operator.

7.134 It might be argued that, as the disconnection of a telephone line may affect the contractual rights of third party customers, it should therefore be based on legislative authority rather than depend on an understanding between the police and the network operator. Although a customer's contractual expectations are subject to a broad discretion on the part of Telecom to suspend or restrict a network service "where it is considered reasonable or necessary to do so", it may be thought inappropriate to rely on this contractual provision when the decision to disrupt a network service originates with a non-contractual party.

Conclusion

7.135 The above review of the powers contained in s 10 of the International Terrorism Act suggests that the powers fall into three categories:

- those powers that are otherwise available to the police under common law or statute:
 - to enter premises to prevent the commission of an offence;
 - to restrict access to a public place;
 - to destroy property which constitutes a danger to a person;
 - to restrict air traffic;
 - to intercept non-telephonic communications;
- those powers that may be available to the police to a greater or lesser extent at common law:
 - to evacuate;
 - to enter premises to prevent a breach of the peace or protect life or limb;
 - to enter on to movable property;
 - to remove obstructing vehicles;
 - to restrict land or water traffic;
- those powers which are not available to the police outside the International Terrorism Act:
 - to requisition property;
 - to intercept telephonic communications;
 - to disconnect telephone lines.

7.136 Uncertainty as to the availability and scope of certain of the powers is removed where a decision is made under the International Terrorism Act to authorise the use of the powers contained in the Act. The uncertainty remains

- during any period of delay between an actual act of international terrorism and the authorisation of the exercise of powers under the Act, and
- with regard to analogous acts of violence, whether motivated by a political aim or not, which are not covered by the Act.

7.137 This tends to reinforce the point that if the powers in the Act are to be available to the police, they should be available on a wider basis (as they are in some instances). The Law Commission's conclusion is that there should be a general review of police powers.

7.138 This means that the issues involved do not fall within the scope of the Law Commission's reference on emergencies. They will, however, be considered in the context of a review of law enforcement powers, which the Law Commission is currently undertaking as part of its criminal procedure reference. That consideration will have in mind the desirability, so far as practicable, of clearly defining police powers.

Recommendation

7.139 In view of this conclusion and the Law Commission's further conclusion in respect of the media control provisions in the International Terrorism Act (para 7.162), the Law Commission recommends that the International Terrorism Act be repealed. It is recommended that effect be given to this recommendation at the same time as action is taken on the recommendations of the Law Commission in reporting on the segment of its criminal procedure reference dealing with law enforcement powers.

CONTROL OF THE MEDIA

7.140 It is generally accepted that only in the most exceptional circumstances is it desirable or necessary to attempt to censor media coverage. The conduct of a war is one such circumstance. The question is whether the police response to a terrorist incident is another.

7.141 One of the factors that must be taken into account in answering this question is the provisions of Article 19 of the International Covenant on Civil and Political Rights relating to freedom of expression (paras 7.150-7.153).

The problem

7.142 Media coverage of terrorist events can compromise the efforts of the authorities to resolve those events and may also prejudice further responses to terrorist action. The primary concern is that the terrorists, by following the coverage of the incident, may be alerted to counteractive measures taken by the police and by the armed forces where they are involved. This forewarning may result in the failure of the operation and could place lives, of both anti-terrorist personnel and hostages (if any), at risk.

7.143 This situation nearly arose during the siege of the Iranian Embassy in London in 1980. The siege was the subject of extensive media attention. The police and the SAS eventually made an assault on the building and this was filmed by an ITN film crew. Fortunately this was not broadcast live.

7.144 There are other issues of concern:

- Coverage of anti-terrorist operations may provide terrorist groups with tactical information and technical knowledge which enable them to be better prepared and equipped, therefore making the resolution of terrorist incidents more difficult. British anti-terrorist specialists consider that as a result of the broadcast of the assault on the Iranian Embassy it will not be possible to use the same type of operation in the future.
- Members of the counter-terrorist forces may be identified thus exposing them to the risk of attack from terrorist groups. Retribution is not the only possible motive for such an attack. It is equally likely that anti-terrorist personnel may be the subject of a pre-emptive strike aimed at ensuring that the authorities will not have the benefit of their expertise during future terrorist emergencies.
- The physical presence of the media may obstruct those who are attempting to deal with the emergency.
- Media representatives may become participants in the incident (by communicating directly with the terrorists) and thereby undermine the efforts of the authorities to resolve the situation through negotiation.

7.145 For these reasons the media accept that there should be some restraint on media coverage of terrorist incidents. The crucial issue is whether this restraint should be voluntary or imposed by legislation.

Voluntary guidelines

7.146 In 1984 the police and the media formulated agreed guidelines on the coverage of terrorist situations. These guidelines seek to uphold the principle of editorial responsibility while also providing recognition of the operational perspective of the police. The need for close liaison between the police and

media is stressed. While editors have final responsibility for publications or broadcasts, they are to be fully receptive to police advice and requests.

7.147 The guidelines contain statements that are more definite on matters that do not relate to actual coverage of the event. It is stated that it is of prime importance that the police be the sole group communicating with the terrorists. Besieged terrorists should not be contacted without the consent of the police. Media personnel are not to place themselves in positions of danger where police extrication may become necessary. (The text of the voluntary guidelines is set out in Appendix E.)

International Terrorism (Emergency Powers) Act 1987 provisions

7.148 Section 14 of the International Terrorism Act was included after extensive discussions between the Government and media representatives. The provisions of the section can be summarised:

- Where authority to exercise emergency powers has been given under the International Terrorism Act the Prime Minister may, by notice in writing, restrict or prohibit the publication or broadcasting of
 - information likely to identify any person dealing with that emergency, and
 - information relating to any equipment or technique lawfully used to deal with that emergency.
- The Prime Minister must believe on reasonable grounds that the publication or broadcasting of the information would be likely to:
 - endanger the safety of any person involved in dealing with that emergency, or of any other person; or
 - prejudice measures designed to deal with international terrorist emergencies.

7.149 There are further provisions:

- A notice under s 14 can be revoked at any time and is to expire after one year. However, the Prime Minister can renew the notice at any time, for a period up to five years, if it is necessary to protect the safety of any person or to avoid prejudice to measures designed to deal with international terrorist emergencies (s 15).
- The Commissioner of Police is to include information on the operation of the voluntary guidelines in the Commissioner's annual report to Parliament (s 17(2)).
- Failure to comply with a Prime Ministerial notice is an offence attracting a penalty of three months' imprisonment or a fine of \$2000 in the case of an individual, and a fine of \$20 000 in the case of a body corporate (s 21).

International Covenant on Civil and Political Rights

7.150 The question immediately arises whether these media provisions comply with New Zealand obligations under Article 19 of the International Covenant on Civil and Political Rights. That Article deserves quotation in full:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds; regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputation of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

7.151 The International Terrorism Act can be invoked in circumstances involving a threat to life or limb, damage to certain chattels or injury to any animal. The Prime Minister can bring the media restrictions into operation where the safety of any person is involved or where there may be prejudice to future anti-terrorist measures. Clearly, the gravity of the circumstances in which the provisions will be applied will vary, and questions can be asked whether those circumstances will always involve "the protection of national security or of public order (ordre public)".

7.152 Members of the United Nations Human Rights Committee have levelled a more specific criticism at the media provisions. They have pointed out that a prohibition by the Prime Minister may be extended beyond the period of an "emergency" under the International Terrorism Act. (The prohibition can be imposed after the emergency has ended; unless revoked it does not expire for one year; and it may be extended for periods not exceeding five years, ss 14 and 15.) Members of the Committee have "wondered

whether, for the purposes of compatibility with Article 4 of the Covenant, [ss 14 and 15] could be reviewed and the 'closure provisions' tightened up." (Human Rights in New Zealand (1990), 41)

7.153 It would seem that, if the media provisions in the International Terrorism Act can be justified in terms of Article 19 on the basis that they are necessary for "the protection of national security or of public order (ordre public)", the extension of a prohibition beyond the period of an emergency under the Act cannot be questioned under the International Covenant. This issue, the question of the relevance of Article 4, and other questions relating to the compatibility of the International Terrorism Act with the provisions of the International Covenant raise difficult problems of treaty interpretation. The fact that the questions have been asked point to the need to consider the future of the International Terrorism Act.

New Zealand Bill of Rights Act 1990

7.154 The right of freedom of expression contained in Article 19 of the International Covenant is mirrored in s 14 of the New Zealand Bill of Rights Act 1990. That section provides:

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.

This right is subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Although it cannot be argued that the media control provisions in the International Terrorism Act are invalid or ineffective by reason of s 14 of the Bill of Rights, that section is an important affirmation of the principle of freedom of expression.

Case for International Terrorism Act provisions

7.155 The following case can be made for retaining the media provisions now contained in the International Terrorism Act:

- There is increasing competition amongst the various branches of the media and voluntary restraints may not continue to be effective in the pressures associated with a terrorist emergency. One departure from the media guidelines is likely to lead to their breakdown.
- Given the international publicity and substantial rewards associated with descriptions and pictures of terrorist events, the voluntary guidelines are unlikely to remain effective.

- The voluntary guidelines do not apply to foreign media and their journalists. While statutory provisions are not effective overseas, they do apply to the publication or broadcasting in New Zealand of overseas material.
- The existence of the statutory provisions, with their sanctions, provides an incentive for the observance of the voluntary guidelines.
- Whatever the effectiveness of the provisions as a deterrent, persons who wilfully publish restricted information likely to endanger others or prejudice the maintenance of law and order should be subject to a sanction.
- The repeal of the provisions would have a detrimental psychological impact on frontline police officers. Anti-terrorist personnel have difficult and dangerous responsibilities and they should be given every possible support.

7.156 There is, too, a practical point that may be advanced: since the Government decided to adopt the present provisions after extensive discussions with media representatives those provisions should be retained.

7.157 If a decision is taken to retain the media provisions, but to repeal the other emergency powers in the International Terrorism Act, as is recommended, the media provisions would need to be included in a separate statute. This would involve a consideration of three issues:

- the extension of the definition of terrorism to include domestic terrorism as well as international terrorism;
- a reconsideration of the substance of the provisions in the light of the criticisms made by the Human Rights Committee, in particular the extension of the prohibition notices beyond the period of the terrorist emergency; and
- a decision as to how the provisions are to be invoked (this step might be taken by the Prime Minister, without the preliminary requirement of a decision by three Ministers to authorise the exercise of emergency powers). (See paras 7.159-7.161.)

Case for voluntary guidelines

7.158 The following case can be made for returning to sole reliance on the voluntary guidelines:

- Although other Western countries face a greater terrorist threat than New Zealand and have experienced the problems which the present provisions are designed to meet, they have not introduced comparable media control legislation. (Hope, Protective Security Review, concluded (para 7.82): "Rather than impose information control on the media, it is preferable to foster close liaison between government, police and the media in an effort to establish guidelines which would operate in relation to a crisis incident.")
- The good sense and responsibility of the New Zealand media can be relied upon, as is shown by their past record.
- The voluntary guidelines will be more effective in practice. They reflect the view of many commentators that hard and fast rules do not permit the flexibility necessary to deal with fluid and complex situations.
- The requirement in s 17(2) of the International Terrorism Act that the Commissioner of Police is to report to Parliament on the operation of the voluntary guidelines for the reporting of "terrorist incidents" provides a powerful incentive to the media to comply with those guidelines.
- The voluntary guidelines apply to all terrorist emergencies, not only "International terrorist emergencies".
- New Zealand statutory provisions cannot control the content of overseas media reports to which persons in New Zealand may have ready access.
- There may be delay between the start of an incident and the time at which the statutory prohibition becomes effective (see paras 7.160-7.161).

- There are important issues, not covered by the International Terrorism Act provisions, on which co-operation with the media will be required.
- Questions have been raised, and are likely to continue to be raised, by the United Nations Human Rights Committee as to the compatibility of the statutory provisions with New Zealand obligations under the International Covenant on Civil and Political Rights.

7.159 As pointed out in para 7.157, if the media provisions were retained, a number of issues would need to be considered. Such justification as there is for the adoption of powers of media control has been by reference to problems arising in connection with terrorist emergencies. Therefore even if the distinction made in the International Terrorism Act between international and domestic terrorism were to be abandoned the difficulties of applying a definition referring to the motivation of the offenders would remain.

7.160 Then there is the question of an appropriate trigger. Under the International Terrorism Act two steps are required before the powers in respect of the media can be invoked. In the first place, there must be a meeting of three Ministers of the Crown to authorise the exercise by the police of emergency powers (s 6). That authority having been given, the Prime Minister must believe on reasonable grounds that action should be taken to prohibit or restrict publication or broadcasting as authorised by s 14.

7.161 This procedure is unwieldy and is likely to lead to delays that could frustrate the purpose of the powers. Two questions should be asked. Is the two-step decision-making process necessary? If only one decision is to be made, does it need to be a corporate decision?

Recommendation

7.162 The Law Commission is of the view that the media control provisions are likely to prove ineffective in practice and that, in these circumstances, the encroachment on the right to freedom of expression as set out in Article 19 of the International Covenant of Civil and Political Rights and s 14 of the New Zealand Bill of Rights Act 1990 is not justified. It therefore recommends the repeal of the provisions of the International Terrorism Act authorising the Prime Minister to prohibit the publication or broadcasting of certain matters relating to an international terrorist emergency (ss 14, 15 and 21). The issues arising from media coverage of terrorist incidents should be covered by voluntary guidelines. The provision requiring the Commissioner of Police to include a report on the operation of any agreement with the media in the Commissioner's annual report to Parliament (s 17(2)) should be transferred to the Police Act 1958.

Summary of Recommendations

7.163 The Law Commission's recommendations in paras 7.139 and 7.162 may be summarised as follows:

- At an appropriate time the International Terrorism (Emergency Powers) Act 1987 should be repealed.
- The repeal should take effect at the same time as action is taken on the recommendations of the Law Commission in reporting on the law enforcement powers segment of its criminal procedure reference.
- The provision requiring the Commissioner of Police to include a report on the operation of any agreement with the media with regard to media coverage of terrorist incidents in the Commissioner's annual report to Parliament (s 17(2)) should be transferred to the Police Act 1958.

VIII

Public Welfare Emergencies

INTRODUCTION

8.1 There is a range of emergencies which it is convenient to classify as "public welfare" emergencies, the description adopted by the Canadians in their Emergencies Act 1988. For the purposes of that Act a "public welfare emergency"

means an emergency that is caused by a real or imminent

- (a) fire, flood, drought, storm, earthquake or other natural phenomenon,
- (b) disease in human beings, animals or plants, or
- (c) accident or pollution

and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency. (s 5)

8.2 In New Zealand the State's concern for the welfare of its citizens is manifested by the various statutes which address the problems which arise from the natural, biological and industrial threats falling within the Canadian definition. Many of the legislative provisions included in Appendix A are concerned with the response to emergencies which come within this "public welfare" category. However, each of these provisions must be placed in context. The legislation from which they are drawn also contains provisions relating to other phases of the emergency cycle described in Chapter II (paras 2.25-2.29) - mitigation (including prevention), preparedness and perhaps recovery. In many instances prevention or mitigation is the primary focus of the legislation.

8.3 Further, the legislation may contain provisions which do not relate to the phases of the emergency cycle. Although the Health Act 1956 contains a number of provisions aimed at preventing the outbreak or spread of infectious diseases, it is mainly concerned with the promotion and conservation of public health generally. Similarly the Animals Act 1967 provides for the control of endemic as well as exotic diseases and also for the control and branding of animals.

8.4 The integrated sectoral approach of legislation in this category highlights the difficulty (discussed in paras 2.32-2.34) of distinguishing between "normal" and "extraordinary" powers. While powers involving constraints on or interference with individual rights or freedoms (such as the entering of property without notice or the establishment of road blocks) may not in the context of particular legislation be regarded as extraordinary, the standards and safeguards set out in Chapter V are still relevant.

8.5 The Law Commission cannot attempt to examine in this Report emergency powers in the many statutes that fall under the "public welfare" heading. It is, therefore, confining its comments in this chapter to animal and plant disease, and pollution and hazardous substances. Chapter IX deals with Civil Defence. Animal and plant disease has been chosen because the Ministry of Agriculture and Fisheries has been working on a Biosecurity Bill. This provides an opportunity to consider, by way of illustration, the way in which the standards and safeguards developed in Chapter V can be applied to public welfare legislation. And there is a need to consider the adequacy of powers to respond to emergencies arising from pollution and the escape of hazardous substances now that the Resource Management Act 1991 has been passed.

ANIMAL DISEASE AND PLANT DISEASE

8.6 In New Zealand's agriculturally based economy an outbreak of disease such as foot and mouth disease, or the incursion of a pest such as the oriental fruit fly, could have profound consequences for the economy as a whole and for the environment and public health. The Ministry of Agriculture and Fisheries (MAF) has at its command extensive powers (some have been described as "draconian") that can be used to protect New Zealand's agricultural security.

8.7 Provisions relating to the protection of New Zealand's agriculture industry from diseases and pests are currently contained in the Animals Act 1967, the Agricultural Pests Destruction Act 1967, the Plants Act 1970, the Apiaries Act 1969, the Noxious Plants Act 1978, and regulations made under these Acts. The provisions of the Animals Act 1967 are described in paras 3.49-3.59.

8.8 The Ministry is working on a proposal to replace relevant provisions in these Acts with a Biosecurity Act. There will be another two statutes dealing with primary products and agricultural compounds. A Biosecurity Act would give legislative support to Ministry policies in three areas:

- **agricultural security, that is, the protection of New Zealand's flora and fauna from exotic diseases and pests;**

- the elimination of endemic diseases such as hydatids, tuberculosis, brucellosis, Aujeszky's disease, equine viral arteritis, and sheep measles; and
- the control of pests and weeds on a national or local government level.

8.9 The intention is that a Biosecurity Act should be available for use by other Ministers in situations which fall outside the immediate concern of the Minister of Agriculture. Thus the Ministers of Fisheries, Forestry, Conservation or the Environment might wish to make use of powers given in the Act to control threats to other industries or to the environment.

8.10 Like other legislation in the public welfare area that confers emergency powers, a Biosecurity Act would include provisions dealing with preparedness and mitigation as well as response. The response powers would include powers that would be available to officers of MAF in the normal course of their duties, as well as powers that would become available only on the establishment of a state of emergency. And the Act would largely be concerned with issues relating to the protection of animal and plant health which could not be characterised as "emergency" issues. Work on a Biosecurity Bill therefore provides an appropriate opportunity to consider the application of the standards and safeguards developed in Chapter V to the wide spectrum of powers that the Act would contain.

NATIONAL AGRICULTURE SECURITY SERVICE

8.11 Agricultural security as a collective goal has been described as being essential to aid safe and efficient production in New Zealand's plant, fish, and animal industries and to conserve its indigenous and exotic flora and fauna in order to contribute to improved national economic and social welfare. (Ministry of Agriculture and Fisheries, National Agriculture Security Policy (November 1989) 5)

8.12 To achieve this goal MAF has established a National Agriculture Security Service to administer its national agriculture security policy. The Service is composed of four major service groups dealing with

- import and quarantine management,
- border protection,
- surveillance, and
- exotic pest response.

8.13 Import management is directed at reducing the risk of diseases and pests being introduced from overseas and becoming established in New Zealand. It involves the negotiation of import protocols or

agreements with exporting countries and the development of import specifications, the processing of import applications and the supervision of imports.

8.14 The projected Hazards Control Commission will, in co-operation with MAF, be responsible for decisions on whether to allow the introduction of new organisms to New Zealand. These decisions will involve balancing "the benefits which may be obtained from ... new organisms against the risks and damage to the environment and to the health, safety and economic, social and cultural wellbeing of people and communities" (Resource Management Act 1991 s 345(2); paras 8.62-8.63).

8.15 Some imported animals or plant material require quarantine after arrival in New Zealand. The stringency of procedures is related to the level of assessed risk and can vary considerably from organism to organism.

8.16 Border protection is concerned with the maintenance of protection against the introduction of pests or diseases at ports of entry in New Zealand: airports, commercial seaports, post offices receiving international mail, and selected small coastal ports.

8.17 Surveillance includes:

- the monitoring of the disease and pest status of plant and animal populations in New Zealand and in New Zealand's trading partners;
- the early detection of exotic diseases or pests; and
- the provision of information to interested parties.

8.18 Response activities are directed towards an appropriate reaction to a threat or actual outbreak of an exotic disease or an incursion of an exotic pest.

LEVELS OF RESPONSE POWER

8.19 A Biosecurity Act can be expected to provide for the five levels of response powers for animal and plant disease and pest control along the lines of those now operating under the Animals Act 1967 (para 3.51). There is a hierarchy of five levels of power:

- powers normally available to Inspectors;
- powers available following the declaration of an infected place by an Inspector;
- powers available following the declaration of an infected area by a Chief Officer;
- powers available following the declaration of a control area by a Chief Officer (compare para 3.51); and
- powers available following a Proclamation of a state of animal disease emergency by the Governor-General in Council.

8.20 The declaration of an infected place involves an individual property being quarantined to prevent the spread of a disease or pest. This entails prohibiting or restricting the movement from the property of animals, plants, products or other things.

8.21 Where an infected area is declared, a "stand still" is placed over a larger area embracing several properties in order to assess the situation, and to prevent or minimise the spread of disease or pests by prohibiting or controlling the movement of specified animals or plants. A Chief Officer would have the authority to decide that animals or plants that are diseased or suspected of being diseased, as well as "in-contact" animals or plants, should be destroyed, treated, vaccinated or managed in other ways.

8.22 A control area would be a still larger area around an infected area, the object being to minimise the effect of the escape of any disease or pests from an infected area. The movement of specified animals, plants, their products and conveyances used to transport them would be prohibited, restricted or otherwise controlled. The controls which could be exercised over the movement of conveyances or containers would include any necessary cleaning, disinfection, dissection or fumigation. The declaration of a control area would enable exports from free areas to be continued while strict quarantine on affected areas was maintained.

8.23 The fifth level of disease and pest control involves a Proclamation of a state of emergency by the Governor-General in Council. Further powers then become available in addition to those already available at the first four levels.

"NORMAL" AND "EMERGENCY" RESPONSE POWERS

8.24 The provisions of the Animals Act 1967 and the likely framework of a Biosecurity Act illustrate the dilemma that has arisen at various stages of this Report: that of distinguishing between wide powers, appropriate for use in an emergency situation, that are available to the officers concerned in the course of their ordinary duties, and those powers that can only be exercised once a formal state of emergency has been established. Legislation administered by MAF now confers, and will continue to confer, broad powers on MAF officers. It is likely that these powers will enable an effective response to most situations involving a threat or outbreak of disease or pest incursion. Thus the powers normally available in the Animals Act 1967 were relied on for the measures taken during the Temuka foot and mouth scare in 1981. A Proclamation of an animal disease emergency was not made.

8.25 It would therefore be arbitrary to conclude that, as this Report is concerned with executive powers available in an emergency, attention should be given only to the circumstances in which a Proclamation of a state of emergency is required and to the powers that would then become available. The measures that can then be taken must be seen in the context of disease and pest control measures as a whole. Thus the most significant response powers, even should a state of emergency be proclaimed, will continue to be those available to Inspectors and Chief Officers in their own right. We are concerned with the substance of these powers. Little is to be gained by a discussion as to whether they are to be described as "emergency" or as "normal" powers. As in all situations involving the exercise of public power, the object must be to ensure that the powers available are necessary and justified and that there are appropriate controls over the circumstances in which they are exercised. The need to respect individual rights must be balanced against the rights of others and of the community at large.

8.26 In considering what response powers are appropriate to ensure effective control and prevention of disease and pests, two factors must be taken into account:

- There is recognition in both the agricultural and the general community of the damage that disease and pests can cause to the well-being of individuals, to the environment and to the New Zealand economy as a whole. This damage might be irreversible and affect future generations.
- This recognition carries with it an acceptance of the need for effective preventive and control programmes.

MANAGEMENT PLANS

8.27 This Report stresses that the use of powers involving interference with individual rights should be related to the needs of the situation. This must be the case whether or not the powers are classified as emergency powers. In the words of MAF:

The principal Act will provide an array of tools ... and will also identify which of these tools is available in respect of the various policies. The actual tools to be used will vary on a case by case assessment of the organism concerned.

This means that not all organisms will be treated with the same degree of urgency or the same level of response as foot and mouth disease.

8.28 MAF's recognition of the need to relate the use of the array of powers that will be available to the circumstances of particular cases, as well as the interest of the agricultural community as a whole in the control of diseases and pests, is reflected in MAF's intention to prepare and implement management plans for particular diseases and pests. (MAF has in mind the precedent provided by Part I of the Fisheries Act 1983 which provides for the preparation of Fisheries Management Plans.) This planning will include the preparation of management strategies in advance of, and in readiness for, the possible outbreak or incursion of exotic diseases or pests. A distinction is to be drawn between overall management strategy and annual operational plans which will be required of any agency charged with the duty of implementing the strategy.

8.29 Management plans will deal with diseases or pests of national importance and with those of local importance - the latter to be the responsibility of regional councils. The plans will be drawn up in consultation with interested parties in the private and public sectors and after public discussion. They will include statements by those parties as to the significance of the particular disease or pest and indicate their support for the measures proposed. The issues addressed will include objectives, technical methods, resources required, executing agencies, funding, management structure, responsibilities of particular bodies, and the extent and limits of the programme. A plan should also, in the view of the Law Commission, indicate the statutory powers which might need to be exercised to prevent or control an outbreak of disease or the incursion of a pest.

8.30 A Biosecurity Act should make appropriate provision for the establishment of the management plan regime, with Ministerial approval being required for plans of national importance. Provision should be made for the publication of both national and local plans in a standard format that is readily accessible to the agricultural community.

8.31 The Minister, in approving a plan of national importance, would have to be satisfied that the implementation of the plan is in the interests of New Zealand as a whole and that the national economic and other benefits of the control or eradication of a disease or pest exceed the costs. There should also be regard for New Zealand's international obligations and for the effect the implementation of the plan will have on the rights and freedoms of individuals immediately involved and of third parties.

POWERS IN A BIOSECURITY ACT

8.32 We recognise in this Report that statutory emergency powers should be framed in sufficiently broad language to ensure that the powers conferred will enable an effective response to be made

to the potential danger (para 5.68). A Biosecurity Act would give legislative support to government policies in regard to agricultural security. Therefore, in addition to establishing a management plan regime, the Act can be expected to contain provisions relating to imports, quarantine, surveillance and prevention as well as to the five levels of response power discussed above (para 8.19). The provisions should conform to the standards discussed in Chapter V of this Report and include appropriate safeguards. We return to these standards and safeguards in para 8.38.

Regulatory powers

8.33 It can be accepted that a Biosecurity Act will also authorise the making of regulations spelling out in more detail the way in which the policies of the Act are to be implemented and the procedures to be followed in the exercise of powers. MAF has stressed the need for a broad regulation-making power to allow flexibility to be maintained and to enable account to be taken of future changes. Nevertheless the power to make regulations should also conform to recognised standards (see paras 5.78-5.85). In particular

- **it should be based on the objective formula recognised by the Regulations Review Committee, and**
- **it should provide for prior consultation with the agricultural industry and others concerned.**

(See Report of the Regulations Review Committee 1986: Regulation Making Powers in Legislation AJHR 1986-87 I 16A, 10-12.)

8.34 The grant of a regulation-making power frequently concludes with a general provision that regulations can be made:

providing for such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act or for its due administration. (See Regulations Review Committee 1990 AJHR I 16, 2-5, and para 5.84)

This provision or a variant on it should not be relied on as authority for regulations conferring additional powers for disease and pest prevention and control, and, in particular, powers that are required to respond to an emergency situation. If it is thought that additional powers are required in that event they should be introduced by emergency regulations, made under specific statutory authority available during the currency of a state of emergency. The safeguards attached to a Proclamation of a state of emergency and the making of emergency regulations would then apply. (See paras 8.39-8.47.)

Rules

8.35 MAF is also proposing that the Biosecurity and other projected departmental legislation should authorise the Minister to make rules. (The precedent cited is the provision in the Civil Aviation Act 1990 Part III ss 28-37 for the making of ordinary rules and emergency rules, see paras 3.75-3.83, 5.86-5.88.) Under the proposal rules could be made

- **to provide technical, administrative and procedural detail which is not appropriate for inclusion in regulations and which is at present included in manuals, and**
- **to facilitate policy changes which are necessitated by exceptional events and which in the opinion of the Minister are in the public interest and cannot be put in place quickly enough by way of amendments to the principal Act or regulations.**

If this proposal were to contain the safeguards attached to the Civil Aviation Act 1990 precedent, there would be provision for consultation and publicity and for a reasonably specific description of the technical and administrative details falling under the first purpose referred to above.

8.36 MAF proposes that the rules made for the second of those purposes should remain in force only long enough (a 16-week limit is proposed) to enable the Minister to obtain an amendment to the relevant Act or regulation. This would mean that, for the period involved, the Minister could make rules that amended or were inconsistent with the Act or regulations. This is not the position under the provisions of the Civil Aviation Act 1990 relating either to the making of rules by the Minister or of emergency rules by the Director of Civil Aviation Safety. Under that Act ordinary rules can prevail over the bylaws of a local authority and emergency rules over ordinary rules (ss 28(8), 35(6)), but neither can prevail over Acts or regulations, including the Civil Aviation Act and regulations made under it.

8.37 In the view of the Law Commission the Minister should not be empowered to make rules that amend or are inconsistent with Acts or regulations. The Commission accepts that there will be situations in which emergency regulations made by the Governor-General in Council during a state of emergency should override other legislation (para 3.97 and draft War Emergencies Act s 5(3), Appendix D). If there is no time to make appropriate amendments to an Act or regulations, a serious situation can be met by emergency regulations made under the authority of a Proclamation of a state of emergency (para 8.40). This course of action would carry with it the safeguards attached to such a Proclamation and to the exercise of powers available while it is in force.

GENERAL SAFEGUARDS IN A BIOSECURITY ACT

8.38 The control of animal and plant diseases and pests calls for the exercise at a variety of levels of powers that could involve interference with individual rights. Nevertheless, few of the powers that would be included in a Biosecurity Act can in the circumstances of their exercise be described as "extraordinary". However, the standards and safeguards discussed in Chapter V and the discussion on control by the courts in paras 8.44-8.46 will still be applicable:

- **The available powers should be clearly set out, and should so far as possible appear in the statute itself, rather than in regulations.**

- There should be a form of declaration or "trigger" under which particular powers become available and a statement as to who is responsible for that declaration.
- There should be a statement as to who is to authorise the exercise of particular powers and who is actually to exercise them. The authority should be at the highest possible level, having regard to the nature of the powers involved, and to the need for immediacy.
- The powers conferred should be limited to those that are needed and justified at the level at which they might be used.
- There should be provisions requiring consultation with the agriculture industry and other interest groups as to the steps that would be taken, including the powers that might be required, to control or prevent the spread of particular diseases and pests. These steps should be embodied in management plans which are given statutory recognition.
- A regulation-making power should be based on the objective formula recognised by the Regulations Review Committee and should require consultation with the agriculture industry and others concerned before regulations are made. Reliance should not be placed on wide, non-specific authorising provisions to establish new powers by regulation.
- Any authority given to a Minister to make rules having legislative effect should include appropriate provisions for consultation and publicity. The rules should be subject to the same scrutiny as regulations made by the Governor-General in Council. Rules (as distinct from emergency regulations made during a state of emergency (para 8.40)) should not prevail over the provisions of Acts or regulations.
- Provisions authorising the exercise of powers should

- be in clear and specific language, and
- so far as possible describe the circumstances in which they may be exercised in objective rather than subjective language, for example, "has reasonable cause to believe" rather than "believes" (see paras 5.26-5.32).
- Appropriate publicity should be given to measures taken under the Act. This should ensure that
 - persons immediately affected by the measures taken are informed of the nature of those measures and of the reasons for taking them, and
 - where the measures taken affect the wider community there is full publicity explaining those measures.
- There should be appropriate provision for the payment of compensation, having regard to the principles set out in Chapter V (paras 5.137-5.155).

STATES OF EMERGENCY

8.39 Situations may arise in which the prevention or control of animal or plant diseases or pests calls for the exercise of extraordinary powers that are not amongst the powers for which specific provision is made in a Biosecurity Act:

- The outbreak of a disease or the incursion of a pest may pose such a critical threat to the New Zealand economy, environment or public health that prevention or eradication requires the mobilisation of national resources.
- New Zealand may be threatened with an imminent invasion from overseas by a disease or pest and special measures, such as the prohibition, restriction or control of normal commercial practices, may be necessary to prevent that occurrence or to minimise the impact of any invasion.
- The implementation of policy changes arising from exceptional events may require urgent amendments to or qualifications of statutory or regulatory provisions (paras 8.34-8.37).

8.40 A Biosecurity Act might authorise the Governor-General in Council to proclaim a state of emergency should the above circumstances arise. An Act could

- detail specific powers that would then become available to the responsible Minister (for instance, the power to requisition property such as equipment, stores and goods), and
- authorise the making of emergency regulations.

Emergency regulations could be inconsistent with and prevail over the provisions of any Act or regulation including the Biosecurity Act itself (compare para 3.58).

8.41 The Law Commission appreciates that a Proclamation of a state of emergency with the consequences proposed would involve the assumption by the executive of wide powers. These can be justified by the serious impact that an outbreak of some diseases or the incursion of some pests would have in New Zealand. It would, however, be important that as stringent safeguards as are appropriate and practicable should be attached to the response powers involved. The safeguards discussed in para 8.38, where relevant, would apply. Additional safeguards would be provided by controls exercised through Parliament and the courts.

Control by Parliament

8.42 So far as parliamentary controls are concerned, the Law Commission believes that it would not be justified in proposing that the full range of provisions discussed in Chapter V and Appendix B, and incorporated in the draft War Emergencies Act (Appendix D), should appear in a Biosecurity Bill. Nevertheless, there should be provisions under which

- the House of Representatives is advised immediately of the making of the Proclamation of a state of emergency and the making of emergency regulations,
- the House can revoke or amend emergency regulations by resolution,
- the government is required to give parliamentary time to a notice of motion, given in substantially similar terms by 10 members of Parliament, for the revocation or amendment of an emergency regulation (see Appendix B paras B37-B41), and

- the Minister is to make a report to the House, as soon as practicable after the end of the emergency, on the exercise of powers under the authority of the Proclamation of a state of emergency.

8.43 These proposals do not include provision for the House of Representatives to be given any specific powers in relation to the Proclamation of a state of emergency, or for the House to meet immediately, or for Parliament to be summoned. Nor is it proposed that the government should be required to call the House together at the request of a specified number of members of the House (Appendix B para B32). Where there is an outbreak of a disease or the incursion of a pest that presents a serious threat to the New Zealand economy, the government can be expected to use its judgment as to whether the situation calls for an accelerated meeting of the House. Should the House be meeting and the government not take the initiative, the Speaker can be asked to allow a debate on the emergency on the basis that it is a definite matter of urgent public importance (Standing Order 89). Under the above proposals the House would be able to obtain early consideration of a motion to revoke or amend an emergency regulation (para 8.42).

Control by the courts

8.44 The Law Commission is of the view that access to the courts is a safeguard that should be available to citizens. The exercise of powers under a Biosecurity Act should therefore be subject to review by the courts. A number of the safeguards proposed in para 8.38 in respect of response powers that would be set out in the Act itself would facilitate access to the courts should there be claims that those powers had been wrongfully exercised. This protection would be equally important in regard to any action taken to proclaim a state of emergency and to the exercise of emergency powers pursuant to that Proclamation. The emergency provisions should therefore contain the following safeguards:

- There should be a statement of the circumstances in which a state of emergency can be proclaimed. The Governor-General in Council should believe on reasonable grounds that those circumstances exist and that they necessitate the taking of emergency measures.
- Where the Minister is authorised to exercise specific powers once a state of emergency has been declared, the Minister should believe on reasonable grounds that any action proposed is both necessary and expedient for the purpose of controlling the entry or spread of the disease or pest.
- Where the Governor-General in Council is authorised to make emergency regulations, the Governor-General in Council should believe on reasonable grounds that the regulations are necessary and expedient for dealing with the emergency.

8.45 MAF has drawn the attention of the Law Commission to proposals contained in Australian reports on exotic animal disease legislation that the legislation should include a provision precluding injunctive relief. The Australian material argues that an action for an injunction could cause considerable delays to a control programme:

Indeed, while a court was considering the legal niceties of the problem, a high risk and fast spreading disease, such as [foot and mouth disease] could be going unabated. (Whalan, "The Adequacy of Exotic Animal Diseases Legislation in Australia: A Consultancy Report to the Department of Primary Industry of the Commonwealth of Australia" (January 1987) 87)

The Australian proposal was that there be a clause precluding any legal action that could prevent a control programme against such a disease from being instituted or continued. This immunity would not exclude a common law action for damages, on the basis that a government agency should not be protected from the consequences of its negligent action or advice.

8.46 The Law Commission believes that the concern which is said to justify the inclusion of a provision precluding injunctive relief is ill-founded:

- The powers granted under a Biosecurity Act should be wide enough to enable an appropriate response in the event of an emergency. Therefore, unless there has been some abuse of those powers, no questions should arise as to the validity of any action taken.
- Control measures can proceed while any application to the court is being heard.
- The courts have traditionally exercised restraint in emergency situations (paras 5.105-111 and Appendix C).

Other safeguards

8.47 There are other safeguards that should be attached to a Proclamation of a state of emergency:

- A time limit and, where possible, a geographic limit should be imposed.

- There should be a requirement that appropriate publicity be given to the Proclamation, to action taken under it and to the reasons for the Proclamation and action.
- There should be appropriate provision for the payment of compensation having regard to the principles set out in Chapter V (paras 5.137-5.155).

AGRICULTURE (EMERGENCY POWERS) ACT 1934

8.48 The Agriculture (Emergency Powers) Act 1934 contains a regulation-making power of uncertain extent (paras 3.60-3.64). The Law Commission understands that the Act is to be repealed once the projected legislation dealing with biosecurity, primary products and agricultural compounds is in place (para 8.8).

POLLUTION AND HAZARDOUS SUBSTANCES

8.49 There are hazardous substances, including petrochemicals, pesticides, explosives, radioactive substances and pharmaceutical products, which are in widespread use and which contribute to the physical, social, economic and environmental well-being of New Zealanders. Also, processes and activities necessarily associated with today's urban and industrialised society produce waste and emissions which result in pollution. (See Ministry for the Environment, Final Report of the Inter-Agency Coordinating Committee, Pollution and Hazardous Substances Management (November 1988) 12, referred to as the PHS Report.)

8.50 The PHS Report identified the main problems associated with the use of hazardous substances and activities giving rise to pollution as

- **human physical ill health and injury,**
- **social and mental stress,**
- **Treaty of Waitangi partnership failures,**
- **property damage and other economic costs,**
- **environmental degradation, and**
- **resource depletion. (PHS Report, 12-13, 64-72)**

A number of the claims which have been considered by the Waitangi Tribunal have related to the concern of the tangata whenua at the pollution of waterways and fisheries.

8.51 It may be that relatively few of the problems identified in the PHS Report can be classified as "emergencies" or "disasters". But these events can and do arise - as illustrated by the pollution of a municipal water supply and by chemical fires and spillages. The scale of New Zealand industry is such that industrial accidents may not present a national threat. But the 1984 incident at Bhopal in India, in which the release of the chemical methyl isocyanate from a local plant left over 2000 dead and about 200 000 injured, provides a warning of what can happen. There is, too, increasing concern over depletion of the ozone layer, global warming and acid rain.

8.52 It is appropriate that the management of pollution and hazardous substances should concentrate on prevention and mitigation. Nevertheless, given that a pollution incident or the escape of a hazardous substance can result in an emergency, steps must be taken to prepare for those situations and to ensure that adequate response powers are available.

8.53 The PHS Report listed the many statutes which, at that time, related to the control of pollution and hazardous substances:

- **pollution**
 - **Water and Soil Conservation Act 1967**
 - **Clean Air Act 1972**
 - **Marine Pollution Act 1974**
 - **Noise Control Act 1982**
- **hazardous substances**
 - **Toxic Substances Act 1979**
 - **Dangerous Goods Act 1974**
 - **Explosives Act 1957**
 - **Radiation Protection Act 1965**
 - **Pesticides Act 1979**

- **Animal Remedies Act 1967**

Although the primary emphasis of these statutes is on control, including prevention and mitigation procedures, a number contain powers that can be used in response to an emergency (see Appendix A). There are also statutes controlling specific activities with a significant pollution or hazardous substances content, statutes concerned with the management of activities giving rise to pollution or involving the use of hazardous substances, and a large number of statutes having a minor application to those activities (PHS Report 9, 35-38, 104-118).

8.54 The PHS Report pointed out that responsibility for administering this legislation fell on a range of agencies: the Department of Health, the Department of Labour, the Ministry of Transport, some quangos and local authorities (PHS Report, 9).

8.55 The conclusion of the Inter-agency Coordinating Committee was that:

New Zealand has lacked coordinated legislation and administrative procedures for dealing with activities involving the use and disposal of hazardous substances such as toxic and volatile chemicals or explosives. An equal lack has existed with regard to any activities which have the potential to pollute and degrade the environment The result has been, in some cases, overlaps, gaps, and inconsistencies in the implementation of control measures, adherence to procedures, and in assessment and evaluation. (PHS Report, 3)

RESOURCE MANAGEMENT ACT 1991

8.56 The PHS Report was one of a number of reports that led to the enactment of the Resource Management Act 1991. The Act is concerned with the management, use, development and protection of natural and physical resources in a way, or at a rate, which enables the New Zealand public to meet their needs without unduly compromising the ability of future generations to meet their own needs. The Act therefore aims to rationalise and co-ordinate pollution and hazardous substances management. It repeals the "pollution" Acts with the exception of the Marine Pollution Act 1974 (see paras 8.79-8.81).

8.57 The Act integrates existing laws so as to bring together the management of land (including land subdivision), water and soil, minerals and energy resources, the coast, air, and pollution control (including noise control). In so doing it allocates roles to central, regional and territorial governments.

8.58 The Governor-General in Council is authorised to make regulations setting out national environmental standards. In addition, the Minister for the Environment can initiate a procedure which can lead to the issue of national policy statements by the Governor-General in Council "on matters of national significance that are relevant to achieving the purpose of this Act." (ss 43-55)

8.59 Among the functions of regional councils are

- the control of the use of land for the purpose of
 - the avoidance or mitigation of natural hazards,
 - the prevention or mitigation of any adverse effects of the storage, use, disposal or transportation of hazardous substances,
- in respect of any coastal marine area in the region, the control (in conjunction with the Minister of Conservation) of discharges of contaminants into or onto land, air, or water and discharges of water into water, and
- in other cases responsibilities for the control of discharges of contaminants into or onto land, air, or water and discharges of water into water (s 30(1)(c),(d) and (f)).

8.60 Regional councils are required to prepare regional policy statements and regional plans that conform to national environmental standards and relevant national policy statements. These statements and plans may provide for the above functions in so far as they are appropriate to the circumstances of the region. A regional plan may include rules which prohibit, regulate or allow activities (ss 59-71 and Second Schedule, Matters that may be Provided For in Policy Statements and Plans, Part I).

8.61 Territorial authorities are made responsible for the implementation of "rules for the avoidance or mitigation of natural hazards and the prevention and mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances" (s 31(b) and Second Schedule, Matters that may be Provided For in Policy Statements and Plans, Part II).

HAZARDS CONTROL COMMISSION

8.62 In the case of hazardous substances, the above provisions are to be complemented by the establishment of a Hazards Control Commission "to assist in the control of hazardous substances and new organisms." (Part XIII s 345) Although the Resource Management Act 1991 came into force on 1 October 1991, Part XIII will not come into force until a later date still to be decided. The intention is that Part XIII will form the nucleus of separate, more detailed legislation. The responsibilities of the Commission will include functions relating to licensing, monitoring and enforcement in relation to any stage of the existence of hazardous substances or new organisms. The Commission will also advise the Minister for the Environment on the content of regulations specifying national standards for, and controls on, hazardous substances and new organisms (s 347).

8.63 The legislation spelling out the Hazards Control Commission regime is expected to repeal four of the "hazardous substances" statutes listed in para 8.53: the Toxic Substances Act 1979, the Dangerous Goods Act 1974, the Explosives Act 1957 and the Pesticides Act 1979. (The repeal of the Pesticides Act 1979 is also dependent on the passage of agricultural compounds legislation (para 8.8).)

RESOURCE MANAGEMENT ACT 1991 AND EMERGENCIES

8.64 The Resource Management Act 1991 is concerned with the prevention and mitigation of emergencies that might arise from a natural hazard, the escape of a hazardous substance or pollution arising from the escape of a contaminant. The Act places less emphasis on the steps that might be taken should an emergency arise. Section 330 relieves an authority or person taking steps in an emergency from the need to comply with the restrictions protecting the environment that are imposed by the Act. Also, in specified circumstances, a local authority or the Minister of Conservation may, by employees or agents, enter any place to "take such action, or direct the occupier to take such action, as is immediately necessary and sufficient to remove the cause of, or mitigate any actual or likely adverse effect of, the emergency." (see paras 3.65-3.67)

Natural hazards

8.65 In practice the immediate response to an emergency or disaster arising from a natural hazard will come from the police, the fire service and health services, as well as from regional councils, territorial authorities and concerned government departments. At the point that they are unable to mount an effective response Civil Defence will be involved. A civil defence emergency at the appropriate level will be declared and the response powers in the Civil Defence Act 1983 can be invoked (see paras 3.84-3.97, 9.11-9.12).

EMERGENCY RESPONSE

8.66 The emphasis that has been placed on the prevention and mitigation of pollution and the adverse effects of hazardous substances has meant that to date little attention has been given to emergency response in pollution and hazardous substances management reform and reform initiatives. Thus the PHS Report made no specific recommendations on the handling of emergencies. It recognised that incidents may require the attendance of emergency agencies, such as the fire service, police, ambulance services, Civil Defence, Ministry of Transport, Department of Health and departmental and local authority Dangerous Goods Inspectors. The Report also referred to the work of Hazardous Substances Technical Liaison Committees (which operate in most regions) in co-ordinating the various agencies involved in hazardous substances incidents, and to the role the Committees play in pre-planning and de-briefing (PHS Report, 43).

8.67 Appendix 14 to the PHS Report lists 12 emergencies involving toxic substances, all of which occurred over a three-year period (1984-1986). The Appendix concludes that the examples serve to highlight shortfalls in the practice of acceptable safety safeguards. It continues:

Emergency response services themselves suffered from communications breakdown. Problems also included lack of co-ordination of clean-up operations, inadequate facilities on site, and inexperienced emergency response personnel. (PHS Report, 98)

8.68 The Parliamentary Commissioner for the Environment has drawn attention to an incident where condensate flared at the Maui Production Station, Oaonui, in August 1987. The main highway was closed and parents were unable to collect children from the local school. There was uncertainty at the school as to whether it should be evacuated. The Commissioner commented that

the incident highlighted a lack of direct emergency procedures and unclear public responsibilities during such events. (Parliamentary Commissioner for the Environment: Te Kaitiaki Taiao, Maui Stage II Development Environmental Impact Audit (Wellington, October 1988) iv)

The Commissioner made specific recommendations for the formulation of a civil defence plan and for a review of liaison in an emergency between the company and emergency response and community representatives (37).

8.69 The Law Commission's inquiries confirm that increased attention should be, and is to be, given to the preparedness and response phases of pollution and hazardous substances emergencies. Existing statutes give responsibilities to different agencies and persons, and there is potential for difficulties arising from uncertainty as to who is primarily responsible at the scene of an emergency. The legislation does not always address an appropriate allocation of powers - they may be conferred on persons who do not necessarily have the necessary expertise. And Hazardous Substances Technical Liaison Committees have not been uniformly effective.

8.70 It is envisaged that under the Resource Management Act 1991 regional councils will play a lead role in pollution and hazardous substances management. This could involve the establishment of committees which would co-ordinate the pollution and hazardous substances interests of all relevant agencies, groups and industries within the region. The activities of existing committees such as Hazardous Substances Technical Liaison Committees and Civil Defence committees might be amalgamated.

8.71 There is a need for co-ordination at a national level. The problems detailed above have to some extent been exacerbated by the effects of decentralisation and devolution with the establishment of area health boards and the shedding of some responsibility for enforcement and response by the Departments of Health and Labour. This observation applies to training and on-the-job support.

8.72 The Review Group on the Resource Management Bill, in considering the relationship of local authorities with the proposed Hazards Control Commission, expressed the view that there is a clear need for national standards to be set in respect of hazardous substances. It concluded that

the complexities are such that input and guidance at a national level is imperative. (Report of the Review Group on the Resource Management Bill (11 February 1991) 110)

8.73 The reforms and reform initiatives to date are intended to provide a co-ordinated approach to pollution and hazardous substances management (the mitigation phase of the emergency cycle). They do not directly address the similar problems of co-ordination which arise in respect of the preparedness and response phases.

8.74 These issues are to be addressed in the formulation of the legislation which will establish the Hazards Control Commission regime. Clearly, any reform leading to the replacement of existing hazardous substances legislation must involve a consideration of what is to happen to the response powers contained in that legislation. There will be cases where there can be a rationalisation of responsibilities and powers in respect of different hazardous substances; and there will need to be an examination of existing powers in order to determine whether they are adequate or excessive. Grants of power should conform to the standards and be subject to the safeguards discussed in Chapter V of this Report.

THE ROLE OF CIVIL DEFENCE

8.75 What part should Civil Defence play in pollution and hazardous substances emergencies? The Civil Defence Act 1983 includes "serious fire, leakage or spillage of any dangerous gas or substance, or other happening" within the ambit of civil defence responsibilities (definition of "Civil defence", s 2; see para 9.13). This provision, included when the present Act was passed in 1983, was in part a response to chemical spills in urban areas, such as the Parnell incident in 1973 (see the Report of the Commission of Inquiry Into The Parnell Civil Defence Emergency AJHR 1973 H 9).

8.76 Civil defence involvement will not in all instances be an answer to the problems highlighted in paras 8.66-8.74. Most chemical spills, for example, are not of such a scale as to justify the taking of civil defence measures. But in a worst case scenario the ability to exercise powers and make emergency regulations under the Civil Defence Act 1983 might be critical. Civil defence participation could also ensure that proven systems for inter-agency co-operation were in place.

8.77 There are issues to be resolved. Should emergency response planning be undertaken separately from pollution and hazardous substances management, given that the primary emphasis in relation to industrial disasters is and must be on mitigation?

8.78 There is the further question whether civil defence personnel have the necessary expertise to deal with specific pollution and hazardous substances incidents. However, civil defence personnel would be concerned with the impact of the emergency on the public - rescue, handling of casualties, transportation, provision of supplies, communication and information. Expert emergency service staff would tackle the actual hazard. The hazardous substances sub-group of the National Civil Defence Science Advisory Committee would be able to provide advice in the event of a major incident. The question raised in para 8.77 might also be met by liaison between the Advisory Committee and the Hazards Control Commission.

OIL POLLUTION

8.79 Oil pollution at sea has been regarded as a distinct pollution issue and the Marine Pollution Act 1974 was not repealed by the Resource Management Act 1991 (para 8.56).

8.80 This is another area where there are problems relating to co-ordination and unclear responsibilities. The Parliamentary Commissioner for the Environment has reported on the issues that arise and has said that

current legal and institutional arrangements for the administration of oil pollution control in New Zealand are far from satisfactory. (Parliamentary Commissioner for the Environment: Te Kaitiaki Taiao a Te Whare Paremata, The Control of Marine Oil Pollution in New Zealand: A Review of the System (Wellington, April 1991) 6)

The Commissioner has stressed the need for an urgent review of the Marine Pollution Act 1974 and expressed the view that the responsibilities of regional councils in relation to oil pollution control should be reviewed and clarified (17).

8.81 Since the Parliamentary Commissioner for the Environment's report, the Maritime Transport Division and the Oil Pollution Planning Committee have released for comment a strategy document on the control of marine pollution in New Zealand (Maritime Transport: Waka Moana, NZ Marine Oil Spill Response Strategy: A Draft Paper for Discussion (Wellington, August 1991)). The strategy is seen as the first step towards a national policy for the event of a marine oil spill. The stated aim of the Committee is to deal with all the national issues and provide for regional variations. The Committee's work included consideration of the issues raised in the Parliamentary Commissioner's report.

ISSUES FOR CONSIDERATION

8.82 The Law Commission is not in a position to make any firm proposals on the issues that arise with respect to response procedures and powers in relation to pollution and the escape of hazardous substances. The intention to repeal the existing statutes does, however, point to the need and provide an opportunity for careful consideration, not only of the powers that will be available to respond to both pollution and hazardous substances emergencies, but, equally important, for a rationalisation and co-ordination of preparedness procedures.

8.83 In the view of the Law Commission a number of issues await consideration in respect of both pollution and hazardous substances:

- Which body is to have overall national responsibility for co-ordinating emergency preparedness and response in respect of pollution and hazardous substances?
- What steps are being taken to ensure that response planning is being undertaken by regional councils and territorial authorities?
- What role should Civil Defence have in this planning?
- What role should Civil Defence play in responding to a hazardous substances emergency or a pollution incident?
- What powers should be available to those agencies and persons called upon to respond to the escape of a hazardous substance or a pollution incident?

IX

Civil Defence

CIVIL DEFENCE ACT 1983

9.1 This Report deals at some length with the history and responsibilities of the Civil Defence organisation now operating under the Civil Defence Act 1983 (see paras 3.84-3.97) and Appendix F). This is appropriate because the Act contains provisions conferring powers that can be used in a range of emergencies, and because they are the types of emergency which we are most likely to encounter in New Zealand.

9.2 In this chapter we concentrate on a number of specific issues:

- national emergencies provisions in the Civil Defence Act 1983
- scope of civil defence responsibilities
- use of emergency regulations
- monitoring by the House of Representatives
- review by the courts
- civil defence responsibilities of State-owned enterprises and private enterprises
- compensation
- disaster recovery.

9.3 The implementation of Law Commission proposals in respect of these issues would involve significant amendments to the Civil Defence Act 1983. In addition, civil defence procedures and supporting legislation are under constant review having regard to experience gained in a series of disasters and in the recent exercise "Our Fault" (Civil Defence, Report on Exercise "Our Fault" 4-8 March 1991: A Major Testing Exercise, referred to as "Our Fault").

9.4 In the circumstances, the Law Commission believes that a review of the Civil Defence Act 1983 should be undertaken. We therefore conclude this chapter with a recommendation that this review be undertaken and that a new Act replace the Civil Defence Act 1983.

A NOTE ON TERMINOLOGY

9.5 The history of the designation "civil defence" in New Zealand is discussed in Appendix F. The point is made that, as used in the Civil Defence Act 1983, the expression has come to refer to the measures used to respond to natural and industrial disasters. This is in contrast to accepted usage world-wide under which the terms "civil defence" and "civil protection" refer to the protection of the civilian population against the consequences of hostilities and only incidentally with response to other disasters. "Civil defence" is used in this sense in Protocol I Additional to the Geneva Conventions. There is, too, international recognition of an "all hazards" approach which accepts that civil defence is concerned with response to a broad spectrum of emergencies, covering both hostile attack and peacetime disasters.

NATIONAL EMERGENCIES

9.6 The circumstances of the inclusion of provision for a "national emergency" in the Civil Defence Act 1983 have been set out elsewhere in this Report (para 2.11 and Appendix F paras F12-F14). A "national emergency" under the Act is concerned with the protection of the New Zealand public in the event of "an actual or imminent attack on New Zealand by an enemy, or [an] actual or imminent warlike act". The provisions of the Civil Defence Act 1983 relating to "national emergencies" and the responsibilities of Civil Defence in a "war emergency" have therefore been discussed in Chapter VI: War and Other Armed Conflicts (paras 6.51-6.56, 6.65-6.71). We recognise that Civil Defence would continue to have responsibilities, not involving combat or planning for combat, for the protection of the New Zealand public from the impact of hostilities, a nuclear war or a nuclear event. We envisage, however, that those responsibilities would be met as part of the planning for and response to a war emergency.

9.7 The point is made that there must continue to be appropriate provisions in a Civil Defence Act ensuring that civil defence procedures encompass planning for a war emergency and that regional and territorial authorities and other agencies normally involved in civil defence planning are committed to the planning process.

9.8 Response measures, should they be required, would be brought into operation by emergency regulations under the recommended War Emergencies Act. The provisions of Part III (ss 46-49) of the Civil Defence Act 1983 enabling the declaration of a state of national emergency would be repealed.

Recommendation

9.9 · The provisions of the Civil Defence Act 1983 enabling the declaration of a state of national emergency should be repealed.

· A Civil Defence Act should contain provisions under which civil defence planning procedures encompass co-operation in planning for measures, not amounting to active combat or planning for combat, for the protection of the New Zealand public in the event of hostilities or a nuclear war or nuclear event. Regional councils, territorial authorities and other agencies normally involved in civil defence planning should be required to participate in that planning process.

SCOPE OF CIVIL DEFENCE RESPONSIBILITIES

9.10 The scope of the primary responsibilities of Civil Defence, as appearing from the provisions of the Civil Defence Act 1983 and the National Civil Defence Plan, have been discussed in both Chapter III (paras 3.84-3.97) and Appendix F (paras F20-F27) (see also paras 8.75-8.78, 8.83). A definition of a "civil defence emergency" can be expected to have three elements:

- **a listing of possible "disaster" events;**
- **the naming of the disastrous consequences of any such event; and**
- **a requirement that the event cannot be dealt with without the adoption of civil defence measures.**

THIRD ELEMENT - NEED FOR CIVIL DEFENCE MEASURES

9.11 It is convenient to deal first with the third element - the need for the involvement of Civil Defence in a particular situation. In Chapter II we distinguished between accidents or minor emergencies and emergencies in which demands are made on the resources of the community. It is only when the powers and resources of the "task-specific" authorities initially responsible for responding to a situation are inadequate that a call should be made on an authority with extraordinary powers and wider resources. It can be said that there is a first and a second tier of emergency response. (paras 2.2-2.5, 2.43-2.44)

9.12 The provisions of the Civil Defence Act 1983 recognise that Civil Defence is involved in the second tier of response. A civil defence emergency is a situation which "cannot be dealt with by the Police, the New Zealand Fire Service, or otherwise without the adoption of civil defence measures" (s 2). This

requirement is to be kept in mind when we consider what disaster events and their consequences should fall within civil defence responsibilities.

FIRST ELEMENT - LISTING OF DISASTER EVENTS

9.13 In the definition of "Civil defence" the following events are listed as those with which civil defence measures may be concerned:

any explosion, earthquake, eruption, tsunami, land movement, flood, storm, tornado, serious fire, leakage or spillage of any dangerous gas or substance, or other happening ...
(Civil Defence Act 1983 s 2)

On the other hand, the first element in the definition of "Civil defence emergency" refers more broadly to "a situation (not attributable to an attack by an enemy or to any warlike act)"(s 2). This wide statement of competence is qualified by the second and third elements, that is, the situation must be one that is causing loss of life or injury or distress to the public and one that "cannot be dealt with by the Police, the New Zealand Fire Service, or otherwise without the adoption of civil defence measures." The reference to "civil defence measures" involves a reference back to the definition of "Civil defence" and to the list of events in that definition.

9.14 As is pointed out in Appendix F these provisions raise a degree of uncertainty as to the disaster events intended to be covered in the Civil Defence Act 1983. Nevertheless, the definitions are open to the interpretation that civil defence responsibilities can include any disaster, whether arising from natural or human causes, that is not attributable to an attack by an enemy or to any warlike act. The National Civil Defence Plan includes among "man-made" threats "events leading to disaster and associated with human activities such as escape of hazardous materials, diseases, failure of structures or major transportation accidents." (Introduction, 2)

9.15 Natural disasters and the escape of hazardous materials clearly fall within the list of events in the definition of "Civil defence". The reference in the National Civil Defence Plan to failure of structures and major transportation accidents is, however, significant having regard to the fact that they are not listed in that definition. Major accidents in general should in the view of the Law Commission be regarded as an appropriate area of civil defence responsibility.

Infectious disease

9.16 The National Civil Defence Plan recognises that, under s 70 of the Health Act 1956, action may be taken by the Medical Officer of Health to prevent the outbreak or spread of an infectious disease either on the written authority of the Minister of Health or during a declared state of national or regional civil defence emergency (paras 3.68-3.69). This provision appears to draw a distinction between an outbreak of an infectious disease, such as an influenza epidemic, and disease and other health problems resulting from some other disaster event, such as an earthquake.

9.17 Responsibility for preparedness and response in respect of an infectious disease emergency is that of the health system. However, the situation may be one with which the health system is unable to deal using only its own resources. A second tier response may be necessary. This could be provided by the police, the armed forces and Civil Defence. Civil Defence involvement may require a

declaration of a state of civil defence emergency and this would have the advantage that the powers given in the Civil Defence Act 1983 could then be invoked.

9.18 Medical and health problems are likely to arise in an emergency which is not itself a health emergency. These problems are the joint responsibility of Civil Defence and the health system. This is recognised in Part 6 of the National Civil Defence Plan - "Medical and Public Health" - where arrangements for the co-ordination and use of medical and public health services during a civil defence emergency are set out.

Animal or plant disease

9.19 There is a passing reference in the National Civil Defence Plan to the fact that a state of animal or plant disease emergency can be declared under the Animals Act 1967 or the Plants Act 1970. There is, however, no suggestion that Civil Defence might be involved in such an emergency. In Chapter VIII of this Report we emphasise the serious consequences a major outbreak of an animal or plant disease might have for New Zealand. The Animals Act 1967 and the Plants Act 1970 contain, and the proposed Biosecurity Act would contain, extensive powers for dealing with such an outbreak. Nevertheless the situation can be envisaged in which an outbreak is so serious and widespread in its impact on the community that the additional resources and emergency procedures available to Civil Defence need to be called upon.

Conclusion

9.20 In the view of the Law Commission, statutory recognition should be given to Civil Defence second tier responsibilities in the emergency situations we have been discussing. In those sectors where there is legislation providing for the taking of emergency measures, Civil Defence involvement would only be contemplated in extreme situations where the primary mechanisms for emergency response were inadequate. Assistance in describing those situations may be provided by the definition of "public welfare emergency" in the Emergencies Act 1988 (Canada) s 5 (para 8.1):

an emergency that is caused by a real or imminent

- (a) fire, flood, drought, storm, earthquake or other natural phenomenon,
- (b) disease in human beings, animals or plants, or
- (c) accident or pollution

Recommendations

9.21 . There should be a clear statement in a Civil Defence Act of the emergencies for which Civil Defence may be responsible. These should be listed in the definition of "Civil defence emergency" and not in the definition of "Civil defence".

. Accidents and disease in human beings, animals and plants should be included in a list of possible Civil Defence responsibilities. (These responsibilities would arise only in extreme situations where the authorities primarily responsible needed extra resources and perhaps powers.)

. "Civil defence" should be redefined to reflect the new definition of "Civil defence emergency". "Civil defence" would be the measures necessary to respond to a civil defence emergency, including "the planning, organisation, co-ordination, and implementation of such measures and the conducting of, and participation in, training for those measures."

(As to Civil Defence responsibilities in a war emergency see paras 9.6-9.9.)

SECOND ELEMENT - CONSEQUENCES OF DISASTER EVENTS

9.22 A disaster event can be a civil defence emergency under the Civil Defence Act 1983 if it is a situation

that causes or may cause loss of life or injury or distress or in any way endangers or may endanger the safety of the public (definition of "Civil defence emergency" in s 2; compare definition of "Civil defence")

The question arises as to whether this element of the definition should be widened to include damage to property. (In practice an unqualified reference to property would mean that Civil Defence would become involved only if there was widespread or severe damage. It would only be in this situation that the resources of the police and other "task-specific" services might be inadequate (paras 9.11-9.12).)

9.23 The civil defence administration in New Zealand has taken the view that, in the light of the wording of the second element of the definition of "Civil defence", Civil Defence is concerned only with the safety of persons and not with the protection of property. (See also the Report of The Commission of Inquiry Into the Abbotsford Landslip Disaster AJHR 1980 H 7 138-139.) Some civil defence officials are, however, of the view that the reference in the definition to a situation causing "distress" would justify civil defence involvement in an emergency confined to serious property damage.

9.24 The omission of a specific reference to property is to be contrasted with emergency provisions in other statutes. The Resource Management Act 1991 authorises the taking of remedial action in any "sudden emergency causing or likely to cause loss of life, injury, or serious damage to property" (s 330(1)(f)). The Local Authorities Emergency Powers Act 1953, which was replaced by the Civil Defence Acts of 1962 and 1983, was concerned with "damage to life, health, or property" (definition of "Emergency", s 2). (Emphases added.)

9.25 Definitions of disaster emergencies in other countries typically include serious damage to or loss of property as well as danger to life. This is the position in relevant provincial and state statutes in Canada and Australia.

9.26 The primary responsibility of the Civil Defence service is the safety of the public; in most situations that can be envisaged, public safety is also related to the protection of property. It is a constant theme of the debriefing reports that followed Cyclone Bola that maintenance of communications (whether of the spoken word or the transport of persons and supplies) and of sources of power and fresh water were high priority needs.

9.27 Even where there is no injury to or ongoing threat to the safety of any persons there may be a need to call on the resources of Civil Defence. An apt illustration is provided by the tornado that hit the townships of Bellblock and Inglewood on 12 August 1990 (Ministry of Civil Defence, Tornado Event: Inglewood and Waitara: 12 August 1990 (December 1990)). There was substantial damage to property, including residential homes, farm buildings, industrial premises and trees. Seventeen families were evacuated, but the police reported: "There was [sic] virtually no injuries and what were reported were mainly from cleaning up operations." (Tornado Event, Appendix C) Response and recovery were provided by the police, the fire service, local bodies, government departments and volunteers - but with a significant civil defence input of personnel and equipment. An informal appointment of a "recovery co-ordinator" was made by the New Plymouth District Council (compare paras 9.71-9.78).

9.28 Although the Inglewood event was confined to property damage, the decision not to declare a civil defence emergency - which met with some criticism - was justified not on that ground but on the basis that the emergency could be dealt with by the police, fire service "or otherwise" without the adoption of civil defence measures. In the making of this decision, there does not appear to have been any consideration of whether it might have been necessary to take advantage of the emergency powers available under the Civil Defence Act 1983. Thus questions might have been raised as to the legal authority for the road blocks that were maintained around damaged areas by the police, the Ministry of Transport Traffic Safety Service and the Legion of Frontiersmen. It was recognised that the compensation provisions in s 75 of the Civil Defence Act 1983 did not apply. Also, civil defence personnel would not have been afforded the protection from liability given by s 66 of the Act.

9.29 The Civil Defence Commissioner involved in the Inglewood emergency recommended that, in the absence of the co-ordinating responsibilities of Civil Defence, regional and district councils should formulate independent operating procedures with lines of responsibility for situations in which "a declaration of civil defence emergency is not warranted". The recommendations recognised that the procedures would involve "elements of civil defence response" (Tornado Event, 4-8). Such a development would appear to involve unnecessary duplication in the planning for a civil defence emergency.

9.30 The Inglewood event is an example of the way in which communities will respond to an emergency event without regard to legal formalities. On the other hand, it does suggest that, whether or not the decision not to declare a civil defence emergency was justified in the particular case, the situation can arise in which an emergency involving widespread damage to property would call for the declaration of a civil defence emergency.

9.31 Civil defence personnel would in practice take appropriate steps to protect property in the course of their priority task of saving life and protecting the public. The Law Commission is, however, of the view that damage to property should be made a specific civil defence responsibility, independently of whether danger to persons is involved.

9.32 The Canadian Emergencies Act 1988 definition of "public welfare emergency" is again relevant. Such an emergency is one

that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources ... (s 5)

9.33 The Law Commission considered whether the definition of a civil defence emergency should list damage to the environment as a possible consequence of the specified disaster events. It was decided that it would not be possible to define "environment" with sufficient precision. In practice, the environment would be protected in a disaster situation through the exercise of Civil Defence's responsibility to protect the safety of the public and property.

Recommendation

9.34 The definition of "Civil defence emergency" as it appears in the Civil Defence Act 1983 should be amended to include disaster events which cause or threaten to cause damage to property.

USE OF EMERGENCY REGULATIONS

9.35 A major natural disaster, particularly a disastrous flood or a severe earthquake, is the most likely civil defence emergency of national proportions that New Zealand might experience. Such an emergency might call not only for a declaration of a state of national civil defence emergency but also for the making of emergency regulations under s 79 of the Civil Defence Act 1983. (See paras 3.96-3.97.)

9.36 Civil Defence has not yet had cause to invoke the power to make emergency regulations. The recommendation made in "Our Fault" that consideration should be given to the preparation of draft emergency regulations before any need for the use arises is, however, to be welcomed ("Our Fault", 14, 15-16; and see paras 5.55-5.56).

9.37 A declaration of a state of national civil defence emergency is made by the Minister of Civil Defence. It is unlikely that an emergency will arise where there is no Minister of the Crown to make a declaration. Nevertheless, the possibility must be envisaged that the Governor-General and Ministers may not be available to hold the meeting of the Executive Council that is a prerequisite to the making of emergency regulations under s 79. This possibility is anticipated in s 46(2)-(4) of the Civil Defence Act 1983 in the case of a Proclamation of a state of national emergency. Comparable provisions should be attached to s 79 of the Act (Appendix B paras B4-B8; and see paras 9.42-9.43).

Recommendations

9.38 The provisions of s 46 of the Civil Defence Act 1983 relating to action by the Executive Council in a national emergency should be included in s 79 of the Act under which the Governor-General in Council can make emergency regulations.

Emergency regulations should be prepared in advance of the need arising for their use.

MONITORING BY HOUSE OF REPRESENTATIVES

9.39 The Civil Defence Act 1983 already provides that the Minister is to advise the House of Representatives "as soon as practicable" that a state of national civil defence emergency has been declared or extended (s 50(2)). However, there is no requirement that the House be called together to consider the emergency. Nor is the House given specific powers in relation to the emergency.

9.40 A declaration of a state of civil defence emergency is effective for seven days and may be extended by the authority making the declaration (ss 55-57). The likelihood that an emergency will be of short span, or the possibility that an emergency - such as a serious earthquake in Wellington - may be serious enough to make a meeting of the House of Representatives impracticable, justifies the decision not to give the House of Representatives the responsibility of confirming the declaration or determining whether it should be extended. Also, a short time span may mean that there is little point in calling the House together if it stands adjourned or Parliament has been prorogued or dissolved.

9.41 If the duration of a state of national civil defence emergency, or even a state of regional or local civil defence emergency, is likely to be long, the House of Representatives may wish to monitor the emergency or to amend or revoke emergency regulations made under s 79 of the Civil Defence Act 1983 (paras 3.96-3.97). The government of the day may regard the situation as serious enough to call the House together. Also provision is now made in advance for regular meetings of the House. On the other hand, this

could be a sector in which it would be appropriate to give a specific number of members of the House the right to require the government to arrange for the House to meet (see Appendix B para B30).

9.42 The possibility that a government will not be prepared to make time available to discuss an emergency is considered elsewhere in this Report (Appendix B paras B37-B41). It is the view of the Law Commission that a specific provision should be attached to s79 of the Civil Defence Act 1983 that would enable urgent consideration of a notice of motion to revoke or amend an emergency regulation. As pointed out in Appendix B, the time frame provided in the Regulations (Disallowance) Act 1989 is too long where emergency regulations are involved. One of the approaches discussed in Appendix B should be adopted.

Recommendations

9.43 · There should be a provision in the Civil Defence Act 1983 designed to ensure that the government gives parliamentary time to a notice of motion for the revocation or amendment of an emergency regulation.

· Consideration should be given to the possibility of including in the Act a provision under which a specified number of Members of Parliament can require the government to call the House together to consider a civil defence emergency.

REVIEW BY THE COURTS

9.44 Under the Civil Defence Act 1983 a decision to declare a state of civil defence emergency may be protected from review by the courts in two respects:

- **The power to declare an emergency is in subjective terms.** In the case of the civil defence emergencies the declaration may be made "If at any time it appears to [the authority concerned] that a civil defence emergency has occurred or may occur" (ss 50(1), 51(1), 52(1)).
- **A privative clause is attached to each provision authorising the declaration of a state of emergency:**

The fact that [the authority] declares a state of ... emergency shall be conclusive evidence of his authority to do so, and no person shall be concerned to inquire whether the occasion requiring or authorising him to do so has arisen or has ceased. (ss 50(3), 51(7), 52(6))

In Chapter V (paras 5.26-5.32, 5.113-5.123) the Law Commission questions the use of subjective formulas and privative clauses. The Law Commission is of the view that the empowering words in ss 50(1), 51(1) and 52(1) should be in objective terms. A declaration of a state of civil defence emergency should be made only if the authority concerned "has reasonable cause to believe". Also, the privative clauses in ss 50(3), 51(7) and 52(1) should be repealed.

9.45 The objective wording of the grant of power in s 79 of the Civil Defence Act 1983 to make emergency regulations "for such matters as are necessary or expedient for the purpose of securing the public safety and generally safeguarding the interests of the public" conforms to the principles discussed in Chapter V (para 5.82). The actual grant of power in s 79 would appear to be wide enough to enable a government to respond to any emergency that might arise within the scope of the Act (paras 3.96-3.97).

Recommendations

9.46 The following changes should be made to the Civil Defence Act 1983:

- Objective language should be used where appropriate. The formula, "If at any time it appears to [the authority concerned]" should be replaced by "If [the authority concerned] has reasonable cause to believe" in ss 50(1), 51(1) and 52(1).
- The privative provisions in ss 50(3), 51(7) and 52(6) should be repealed.

CIVIL DEFENCE RESPONSIBILITIES OF STATE-OWNED ENTERPRISES AND PRIVATE ENTERPRISES

9.47 Quarantelli has characterised a disaster or major emergency by reference to the re-alignment of organisations that takes place in the local community: "Even a relatively moderate size disaster will force dozens of unfamiliar local and extra-local organizations to work together on unfamiliar or new tasks that are part of the community response network." (para 2.5)

9.48 The need to involve a wide range of organisations in the planning of the response to a civil defence emergency is recognised in the provisions of the Civil Defence Act 1983. The long title to the Act includes as one of its objects:

to provide for planning and other responsibilities of Departments of State and other organisations in relation to national emergencies and civil defence ...

9.49 The Civil Defence Act 1983 places obligations on "Every Department, organisation, local authority, regional council, and territorial authority"

- to plan to continue its essential functions during a civil defence emergency (s 43),

- to undertake civil defence measures or perform any functions or duties required under the Act or any regulations or any national civil defence plan (s 44), and
- to make adequate provision for rescue, first aid and relief of distress in premises under its control or occupied by it (s 45).

"Department" means those departments named in Part I of the First Schedule to the Ombudsmen Act 1975. The provisions of the Civil Defence Act 1983 ceased to apply to State-owned enterprises (SOEs) and to former government departments now privatised when they were no longer named in Part I.

9.50 For the purposes of the Civil Defence Act 1983 "Organisation" includes various educational institutions, hospital boards, the Earthquake and War Damage Commission, the Fire Service Commission and the New Zealand Railways Corporation (s 2). It is clear that the present list needs to be updated and a recommendation to this effect is made in "Our Fault" (13). Under the Act, the General Manager of the New Zealand Railways Corporation is a member of the National Civil Defence Committee (s 19(2)(i)). A representative of NZ Rail Ltd (an SOE) has replaced the General Manager of the Corporation on the Committee.

9.51 The question arises as to the responsibility of those SOEs and private enterprises which have functions that are an essential element of civil defence planning and response to plan for and be prepared to respond to civil defence emergencies. The obligation placed on regional and territorial authorities to prepare civil defence plans in respect of their areas of responsibility cannot be carried out without the co-operation of those enterprises (s 34).

9.52 The National Civil Defence Plan (Part 1, Annexe A) contains a list detailing "the responsibilities in a civil defence emergency of government and other authorities which manage major resources essential to an effective response to disaster." The responsibilities of each authority have been formulated in agreement with the authority concerned.

9.53 The National Civil Defence Plan list includes government departments and agencies which control relevant resources, and the following:

- *State-owned enterprises*
 - Airways Corporation of New Zealand Limited
 - Coal Corporation of New Zealand Limited
 - Electricity Corporation of New Zealand Limited
 - New Zealand Post Limited
 - Radio New Zealand Limited

- New Zealand Rail Limited
- Television New Zealand Limited
- Works and Development Services Corporation (NZ) Limited
- *Authorities independent of government*
 - GP Office
 - Insurance Council of New Zealand
 - New Zealand Press Association
 - Telecom Corporation of New Zealand Limited
- Reserve Bank of New Zealand
- *Voluntary organisations*
 - Amateur Radio Emergency Corps
 - New Zealand Red Cross Society Inc
 - Salvation Army

NZ Rail, Telecom and Works and Development send representatives to the National Civil Defence Committee.

9.54 Under the State-Owned Enterprises Act 1986 the principal objective of every SOE is to operate as a successful business and to this end to be

An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so. (s 4(1)(c))

The SOEs included in the above list, and Telecom, have recognised that they have a social responsibility to carry out civil defence functions. These involve the production of plans required by s 43 of the Civil Defence

Act 1983 "which meet their own priorities", and the provision for rescue, first aid and relief of distress required by s 45. So far as functions and duties under a national civil defence plan are concerned (s 44), the enterprises concerned are prepared to ensure that those essential services that are normally their corporate responsibility will be maintained free of charge in an emergency. Any additional services required will be provided, but on a full cost recovery basis. (Ministry of Civil Defence, Civil Defence in New Zealand: A Short History (Ministry of Civil Defence with the assistance of the Historical branch Department of Internal Affairs, 1990) 43-44)

9.55 It can be accepted that non-government enterprises should be reimbursed, where this is appropriate, for carrying out civil defence responsibilities. What can be questioned is whether an SOE or private enterprise, in so far as the services it provides by their nature entail public or social responsibilities, should be free to decide, perhaps on purely commercial considerations, what part it will play in the disaster cycle of mitigation, preparedness, response and recovery. The Airways Corporation, TVNZ, Radio New Zealand, New Zealand Post, NZ Rail and Telecom clearly have vital responsibilities for the maintenance of communications in an emergency, while Electricorp and associated supply authorities would be required to maintain and, if need be, to re-establish power supplies. In the civil defence context these obligations should be no different from those imposed by ss 43, 44, and 45 of the Civil Defence Act 1983 on departments, organisations, regional councils and territorial authorities.

PUBLIC FUNCTIONS OF NON-GOVERNMENT ENTERPRISES

9.56 There is an increasing recognition by public lawyers that non-government enterprises may have public functions or a responsibility to provide public services for which they should be accountable. Comparison has been invited with the position of innkeepers and common carriers. Under common law they are still required to provide services to all comers at reasonable prices.

9.57 This accountability cannot be effectively ensured by the availability of contractual arrangements alone. This fact has been recognised by the Government in its retention of a "Kiwi share" when it was selling Air New Zealand and Telecom. It is not suggested that the Kiwi share provides an answer to the civil defence issue with which we are concerned, but its use illustrates the point that some non-government agencies have, by virtue of the functions they perform, public responsibilities. As Professor Michael Taggart has said:

The publicity given to the Telecom pledges and the retention of a kiwi share to prevent breach by Telecom, illustrates [sic] clearly the public interest in the pricing practices in the telecommunications industry. It is an industry of strategic importance to the country. This public, national or governmental interest, call it what you will, cannot be denied simply by changing ownership from public to private hands. Retention of a kiwi share recognises that some form of regulation is necessary and that questions of pricing in a strategic industry cannot be left safely to market forces. But the kiwi share is a very crude form of "regulation" which, by itself, is not certain to be effective. ("Corporatisation, Privatisation and Public Law" (1991) 2 Public Law Review 77, 99-100, emphasis added)

9.58 Professor Taggart raises the possibility that the New Zealand courts will follow the lead of the English Court of Appeal in the Datafin case (R v Panel on Take-overs and Mergers, Ex parte Datafin Plc [1987] QB 815; Taggart, 104-106). They could have regard to the nature of a power rather than its source and extend the supervision they exercise over public power to public functions carried out by non-government bodies.

SOE RESPONSIBILITIES

9.59 It has been recognised that some SOEs have public or national responsibilities. A special select committee of Parliament, appointed to review the application of the Ombudsmen Act 1975 and the Official Information Act 1982 to SOEs said in its report:

While SOEs may see their functions as being "commercial" in nature, quite clearly some are still carrying out functions which are yet to be seen as appropriate private sector activities ...
(Report of State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee AJHR 1990 I 22A, 8)

The select committee cited with approval a submission by the Legislation Advisory Committee:

at some point in the past the function of each [SOE] has been considered to be appropriately a state function; indeed some of the functions are perceived as inherent in the state and not as merely appropriate, at least at present. Consider the vital function of the Airways Corporation in ensuring that our skies are safe. That is comparable to the function of the Ministry of Transport, including its traffic officers, on land. It has the added dimension that it involves giving effect to New Zealand's treaty obligations undertaken within the International Civil Aviation Organisation. That is also a central aspect of the work of Telecom and New Zealand Post, for those bodies too are means by which New Zealand gives effect to other treaties relating to international communications. In those areas the government must retain the ability to require the enterprises to comply with those obligations. That would be so even if the government no longer owned the business.
(AJHR 1990 I 22A, 6-8)

9.60 We have already referred to the provision in the State-Owned Enterprises Act 1986 which recognises the social responsibilities of SOEs (s 4(1)(c); para 9.54). SOEs are required to provide their shareholding Ministers with statements of corporate intent (SCIs). The following information required to be included in the SCI could be relevant in considering the civil defence responsibilities of SOEs:

- **the objectives of the SOE;**
- **the nature and scope of the activities to be undertaken;**
- **any activities for which the SOE seeks compensation from the Crown (s 14(2)(a),(b) and (i)).**

An SOE is required to consider comments made by shareholding Ministers on a draft SCI (s 14(3)).

9.61 There has been criticism of the amount of information available in some SCIs. The Controller and Auditor-General has said that SCIs have been imprecise about the social responsibility objective, and that in some cases it has been ignored altogether. The Auditor-General has recommended:

Guidance on the type of measures envisaged for good employer and social responsibility needs to be provided, as this is a particularly difficult area to measure. Report of the Controller and Auditor-General on Statements of Corporate Intent: September 1990 AJHR 1990 B 29A, 24; see also 8, 12, 23)

This is an issue that can be addressed by shareholding Ministers in their comments on a draft SCI. The information provided could be expected, in the case of those SOEs involved, to include details of their civil defence responsibilities. In addition, since a major disaster could involve payments of compensation from the Crown, the information should include a definition of the civil defence activities in respect of which compensation would be claimed.

LEGISLATIVE AUTHORITY

9.62 Ideally, decisions as to the contributions of non-government enterprises to civil defence planning and response should be reached in agreement between Civil Defence and the enterprises concerned; and the expectation must be that agreements will be reached. The Law Commission is nevertheless of the view that the civil defence responsibilities on the part of non-government enterprises should be given statutory recognition.

9.63 The provisions of the State-Owned Enterprises Act 1986 discussed above demonstrate that non-government enterprises may have public or social responsibilities. While those provisions are consistent with the proposition that SOEs may have civil defence responsibilities they cannot be relied on to ensure that those responsibilities will in fact be recognised and performed. Moreover, if an SOE is privatised it should not be relieved of any civil defence obligations it may have. The civil defence responsibilities of an enterprise are not related to its status. We are concerned with the functions which an enterprise, state-owned or private, carries out.

9.64 Another important point is that civil defence responsibilities can require involvement through the range of the disaster cycle: mitigation, preparedness, response and recovery. In particular, they involve participation in the planning process; and as we have noted above there are three enterprises - NZ Rail, Telecom and Works and Development - which accept that they should be involved in the work of the National Civil Defence Committee (para 9.53).

9.65 The Civil Defence Act 1983 contains a power to requisition (s 64) which would enable property under the control of an SOE or a private enterprise to be used in an emergency. Also, the government could take advantage of the wide regulation-making power conferred by s 79. However, these powers are available only in the response phase of a civil defence emergency. They cannot be used to require an enterprise to take an active part in civil defence planning.

9.66 The Law Commission is not making a firm recommendation as to how statutory recognition of the civil defence responsibilities of SOEs and private enterprises might be effected. The following possibilities have been suggested:

- Non-government enterprises which have civil defence responsibilities might be included by name in the list of "organisations" defined in the Civil Defence Act 1983. One difficulty of this approach, already adverted to (para 9.50), is the possibility of changes in the names of the organisations concerned. Provision might be made for amendments to be made to the list by Order in Council.
- "*Our Fault*" (13) proposes that there should be a definition of SOEs in the Civil Defence Act 1983 along with a specific reference to SOEs in those sections of the Act which refer to the services made available by, and the functions or responsibilities imposed on, departments, organisations and local authorities. The sections involved are ss 8(3)(b), 13(1)(a), 21(2)(a), 22, 27, 32(2)(a), 41(1)(a), 43, 44, 45, 66, 71(1), 72 and 79(2). This approach would not include a private enterprise such as Telecom.
- A different approach would be to attach a condition to the statutory licence or authority under which a non-government enterprise is exercising public functions. This condition would make the authority or licence subject to the performance of civil defence responsibilities. The difficulty here is that a particular licensing regime may not necessarily be continued.

Recommendation

9.67 Appropriate legislative steps should be taken to require non-government enterprises with civil defence responsibilities to make their services available in the planning for and the response to emergencies under the Civil Defence Act 1983.

COMPENSATION

9.68 The Civil Defence Act 1983 provides for the payment of compensation in two situations:

- Property is requisitioned during a national or civil defence emergency (ss 64, 65).
- Members of a civil defence organisation suffer loss or damage to personal property in the exercise of their duties during an emergency (s 75).

9.69 In the view of the Law Commission these compensation provisions should be reconsidered in two respects:

- In each case the compensation payable is confined to compensation for the use of the property or any loss or damage to the property itself. It does not include compensation for other loss or damage suffered as a result of that use or that loss or damage.
- The provisions do not cover the situation of a person with an interest in property who sustains loss or damage as a result of the use, loss or damage to that property sustained in the course of any action taken or purporting to have been taken under the Act or any emergency regulations made under the Act (except to the limited extent covered under ss 64 and 75).

(See Chapter V, paras 5.137-5.155, especially paras 5.152-5.153; compare draft War Emergencies Act s 18, Appendix D.)

Recommendation

9.70 The compensation provisions in the Civil Defence Act 1983 should be reviewed taking account of the principles set out in Chapter V of this Report.

DISASTER RECOVERY

9.71 Both the Civil Defence Act 1983 (Part VI ss 69-76) and the Local Government Act 1974 (Part XLIIIA ss 692A-692K) contain provisions relating to disaster recovery.

9.72 If a state of civil defence emergency is in force, the Minister of Civil Defence may, if satisfied that the relevant responsibilities cannot be undertaken by the appropriate regional council or territorial authority, appoint a Disaster Recovery Co-ordinator (DRC) (Civil Defence Act 1983 s 69). The responsibilities of the DRC are to direct and co-ordinate

the use of all resources and services made available by departments, organisations, local authorities, regional councils, and territorial authorities for the restoration of necessary services, amenities and habitation ... (ss 71(1), 72)

9.73 Under the Local Government Act 1974 ss 692B and 692C the Governor-General may by Order in Council appoint a Commissioner for Disaster Recovery and Deputy Commissioners in respect of the district of any regional council or territorial authority where

- a state of civil defence emergency is current or has just expired, and

- the council or authority is unable adequately to exercise its powers, functions, and duties.

The same person may be appointed as the DRC under the Civil Defence Act 1983 and as Commissioner for Disaster Recovery under the Local Government Act 1974.

9.74 In the case of Cyclone Bola it was soon clear that a major recovery operation would be needed in the East Coast region. A state of regional civil defence emergency was declared on 7 March 1989. The Minister of Civil Defence, after discussions between the Director of Civil Defence and the Domestic and External Security Co-ordinator (DESC), appointed a DRC on 8 March. The DRC was responsible to the Civil Defence Commissioner for the direction and co-ordination of the use of resources while the state of emergency was in force (s 71). A report on the Cyclone Bola recovery operation recorded that while the emergency remained in force "[i]t was necessary to tread a fine line between preparing for recovery operations and not getting involved in, or in the way of, rescue operations being carried out by Civil Defence." (Office of the Co-ordinator Domestic and External Security, Cyclone Bola - Recovery Operations (September 1988) 2)

9.75 The Civil Defence Act 1983 provides that, once the state of civil defence emergency ceases to be in force, the DRC is responsible to the Secretary of Civil Defence. However, the practice now is that the DRC is responsible to DESC, a position held by the Chief Executive of the Department of the Prime Minister and Cabinet.

9.76 The circumstances surrounding Cyclone Bola demonstrate the responsibilities that central government must assume in any civil defence emergency of any proportions, particularly at the recovery phase. Central government is represented by DESC who administers recovery resources on behalf of the Department of the Prime Minister and Cabinet.

9.77 Under DESC's terms of reference, DESC is required to advise on the resources required to prepare mobilisation plans to meet the contingencies of war, civil disaster or any other emergency. This central role of DESC on behalf of the government in the recovery phase of emergencies is reflected in the DRC's Final Report on Cyclone Bola, and a paper attached to that Report (Final Report of Disaster Recovery Co-ordinator East Coast/Wairoa Cyclone Bola Region (July 1988)). The DRC was briefed by DESC and, in his own words, "At all times I have been directed by him and at all times I have reported directly to him." (Appendix Three, 4) There are other significant passages in the DRC's paper:

The DRC is required to represent the government on the local scene

DESC confers that high level of authority and permits the DRC to have rapid and positive response from Cabinet. ...

Ready access to the Prime Minister, Cabinet and the most senior officials by DESC has been the most outstanding feature of the whole Bola recovery concept. (Appendix Three, 1, 3, 4)

The DRC also makes the point that there were situations in which negotiations were conducted directly between DESC and the local authority involved.

9.78 In this situation it is an anomaly that under the provisions of the Civil Defence Act 1983 the DRC is appointed by the Minister of Civil Defence and, once a state of civil defence emergency is terminated, is responsible to the Secretary of Civil Defence.

Recommendation

9.79 The procedure for the appointment of the Disaster Recovery Co-ordinator and the Co-ordinator's channel of responsibility should be clarified.

Concluding Recommendation

9.80 The Law Commission recommends that there should be a review of the Civil Defence Act 1983 which would take account of the recommendations made in this chapter (paras 9.9, 9.21, 9.34, 9.38, 9.43, 9.46, 9.67, 9.70 and 9.79). There should then be a new Act replacing the Civil Defence Act 1983.

X

Economic Emergencies

THE NATURE OF ECONOMIC EMERGENCIES

10.1 Although New Zealand is no stranger to economic crises, economic emergencies are not pursued in a substantive way in this Report. The Law Commission's work suggests that economic emergencies are qualitatively different from other, more tangible emergencies. And they are elusive. A quick look at history shows that the boundary between intervention as a result of economic crisis and intervention in pursuit of an economic direction can be blurred. In addition, the role "confidence" and consequently secrecy play in staving off economic crises makes them difficult to appreciate except for those closely involved. Finally, we have been influenced by the fact that our consultations suggest that there is no perception that further powers are needed. Although Parliament has moved away from conferring wide powers on the executive to intervene in the economy, there are a number of statutes granting powers that can be used to respond to particular situations. (See paras 3.98-3.105.)

10.2 There is also the point made in Chapter III (para 3.98) that a distinction, not always easy to make, is to be drawn between economic emergencies strictly so-called and the economic consequences of other categories of emergency. The powers to deal with the economic consequences of other categories of emergency are to be looked for in the sectoral legislation relating to the particular category.

10.3 In this chapter the Law Commission sets out in more detail the reasons for its decision not to recommend the conferral of powers additional to those already available to respond to economic emergencies. We canvass the questions of how to recognise and define an economic emergency, what powers exist at present to deal with economic emergencies, and the need for further powers. It will appear that the powers already available in existing legislation cover most foreseeable situations. The indications are that, whatever the gaps may be, they would be better dealt with by particular legislation, perhaps on an ad hoc basis, rather than by general or sectoral emergency legislation.

WHAT IS AN ECONOMIC EMERGENCY?

10.4 An examination of recent crisis situations in New Zealand that can be said to have had an economic genesis illustrates the elusive nature of those crises, the lack of agreement as to what constitutes an "emergency", and the range of response techniques that can be used. Examples are:

- the international oil crisis in the mid and late 1970s and regulatory controls on petrol consumption (under the Economic Stabilisation Act 1948 and the Petroleum Demand Restraint Act 1981);
- the Public Service Investment Society collapse in 1979 and special legislation putting it under statutory management (Public Service Investment Society Management Act (No 2) 1979);
- unsustainable inflation in the early 1980s and the wage and price freeze (under the Economic Stabilisation Act 1948 and other Acts);
- the foreign exchange crisis at the time of the change of government in 1984 involving the closure of the foreign exchange market by the Reserve Bank and devaluation of the currency by the Minister of Finance;
- the run on the United Building Society in 1988, stemmed after two announcements from the Reserve Bank on the second day that there was no reason for loss of depositor confidence;
- the Equiticorp collapse in 1989 with numerous companies placed under statutory management under the provisions of the Companies Special Investigation Act 1958 (replaced by the Corporations (Investigation and Management) Act 1989);
- Bank of New Zealand losses arising from bad debts leading the Government as major shareholder to arrange an injection of funds; and
- the issues that have arisen over Government responsibility for the consequences of the collapse of the Development Finance Corporation.

10.5 It is evident from this list that a theoretical approach backed up by a thorough economic history is needed to advance a definition of an economic emergency beyond a general statement that it is an urgent and critical situation of an economic or financial nature that seriously threatens the welfare of the New Zealand community or any substantial proportion of it, either immediately or in the foreseeable future.

THE NEED FOR ECONOMIC EMERGENCY POWERS

10.6 The Law Commission held consultations with the Treasury and the Reserve Bank to gain an appreciation of the adequacy of current provisions for dealing with economic emergencies. The discussions reinforced the Law Commission's impressions as to the difficulty of recognising a real emergency. A dominant theme was that, wherever possible, the economy, as a set of voluntary interactions, should be relied upon to restore normal prices as quickly as possible. However, it was also acknowledged that major crises where the market cannot cope are conceivable, and that a direct response may be required.

10.7 Three events were regarded as having the potential to reach emergency proportions:

- the collapse of a bank;
- a foreign exchange crisis; or
- a breakdown in the functioning of essential domestic industries or services.

THE COLLAPSE OF A BANK

10.8 The Reserve Bank considers that the monitoring processes and statutory management powers under the Reserve Bank of New Zealand Act 1989 are adequate in the event of the collapse of a New Zealand bank. A major thrust of Part V of the Act is to prevent bank failures. It is nevertheless recognised that collapses may occur and a number of "failure management" powers are incorporated in the Act. The primary purpose of these powers is to minimise damage to the financial system and to maintain public confidence in the system at a time of actual or potential bank failure. In other words, the intention is that any failure should be handled in a way which allows the remainder of the system to continue to operate normally. If this can be done successfully, a bank failure will not reach the level of an emergency. In practice, it may not always be easy to achieve the stated goals in situations which are complex or involve jurisdictions outside New Zealand. The Reserve Bank has no proposal for additional powers that could be used to counter the difficulties which arise in these situations.

A FOREIGN EXCHANGE CRISIS

10.9 The situation can be envisaged in which a foreign exchange crisis leads to a collapse of the exchange market and to serious disruption in New Zealand's international trade. The Reserve Bank of New Zealand Act 1989 is constructed on the basis that dealing in foreign exchange is the mechanism for influencing or setting the exchange rate. The Minister may direct the Reserve Bank to deal within guidelines or, if authorised by Order in Council, at a specified rate. It was suggested to the Law Commission that, although this latter avenue could in most situations have the effect of fixing the exchange rate, it might not be

sufficient to hold it in a real emergency and that it might need to be backed up in that circumstance by a power to impose exchange control. As always, the definition of the circumstances in which such a power should be available remains the critical but unresolved issue. The Reserve Bank would prefer such a power to be in emergency legislation rather than in their constituting Act.¹

BREAKDOWN IN ESSENTIAL SERVICES OR INDUSTRIES

10.10 A major breakdown in the functioning of essential domestic industries or services, such as a failure in the generation or distribution of electricity, could reach emergency proportions. The question is: who should make decisions about the production and distribution of commodities in very short supply? Should the government have some powers, or should it be left to the normal distributors? Our concern is with situations in which normal response mechanisms are inadequate. Once again the cause of the emergency will determine the source of emergency powers. Breakdowns arising from a war or nuclear event will be accommodated by the proposals in this Report. There may be other situations in which ad hoc legislation may be necessary (see First Report, paras 229, 234-235).

CONCLUSION

10.11 The only proposal for specific legislative action that emerged from the Law Commission's consultation on economic emergencies is for an emergency power to impose exchange control. The Reserve Bank was of the view that such a power should not be included in the Reserve Bank of New Zealand Act 1989 as it would be inconsistent with the philosophy of that Act. On the other hand, it was recognised that, in the unlikely event of an emergency arising that required the imposition of exchange control, there might not be time to pass ad hoc emergency legislation. .

10.12 Since the Law Commission has not attempted a full examination of economic emergencies, it is not making a recommendation that permanent legislation authorising the emergency imposition of exchange control should be passed. The issue is raised, however, so that the Government can consult its advisers.

1 Examples of economies with a floating currency where the government has the power to fix the exchange rate or intervene in foreign exchange include:

Australia: the Governor-General may make regulations in order to conserve, in the national interest, the foreign exchange resources of the Commonwealth (Banking Act 1959-1973 s 39);

United States of America: the President, under the International Emergency Economic Powers Act 1977, has broad regulatory power over foreign exchange transactions;

Japan: the Minister of Finance can order suspension of foreign exchange transactions, if the Minister deems this urgently necessary, when there is a sudden change in the international economic situation (Foreign Exchange and Foreign Trade Control Act (Law No 65, 1979) Article 9);

Switzerland: the Federal Council (the executive) has powers in the event that balanced economic development is disrupted by excessive inflow of funds, or in time of war or of disturbed monetary conditions (National Bank Law 1953); however the Federal Council cannot introduce overall foreign exchange control.

APPENDICES

- A Table of emergency powers
- B Exercise of executive and legislative powers in an emergency
- C Court challenges to emergency action
- D Draft War Emergencies Act
- E Guidelines agreed by police and media on media coverage
of terrorist incidents (1984)
- F A background to civil defence in New Zealand
- G Select bibliography

APPENDIX A

Table of emergency powers

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
AGRICULTURE & FISHERIES						
Agriculture (Emergency Powers) Act 1934 (RS 1)	Regulations to give effect to the Commissions of Inquiry into the conditions of the dairy industry and to secure effective conduct of primary products industries (s 27)	Governor-General in Council		When the Governor-Commission of Inquiry into the conditions of	Regulations to be laid before House of Representatives within 16 sitting days; confirmation by Act	No liability for breach of contract occasioned while complying with regulation
Agricultural Pests Destruction Act 1967 (RS 19)	Require immediate destruction of pests by occupier, or if occupier does not comply, ensure destruction (ss 102 and 103)	Inspector		If Inspector believes there		Occupier liable for cost where Inspector destroys (s 104)

	Do all things necessary to ensure destruction of pests on Crown or Maori land (s 107)	Inspector	Consent necessary	of Minister	If Inspector believes there	Expense recovered from occupier (s 108)	
Animals Act 1967 (RS 21)	Enter any conveyance, land or premises (excluding dwelling-house) or on board any ship or aircraft (s 6(1))	Inspector (may be accompanied by member of police)			At any time for the fittings, fodder or other thing subject	Must carry evidence of appointment and warrant if necessary, and produce on entering and wherever thereafter reasonably required (s 6(1B)). Written notice required if no prior arrangement and occupier or person in charge not there	No liability on Crown, Director-General of Agriculture, employee of State Services, or registered veterinary surgeon appointed by Director-General, for death of animal, loss or damage caused by lawful exercise by Inspector or veterinary surgeon of functions under Act or by their omission to carry out functions, unless wilful neglect or default (s 10)
	Enter dwellinghouse (s 6(1))	Inspector (or member of police)	any	District Court Judge by warrant (s 6(1A))	For any of above purposes		

Direct owner of anything subject to Act to take measures relating to inspection, treatment, etc; to muster animals (s 6(2))	Inspector		Where it is reasonably	Must advise reason for mustering animals	
Apply diagnostic tests (s 6(3))	Inspector who is a registered veterinary surgeon		For the purpose of		
Restrict or prohibit movement of any animal etc (s 13A)	Minister		For purpose of controlling parasite or organism	Notice must briefly state reasons	
Seize animals etc and destroy etc (s 13A(4))	Inspector	Minister's notice and Chief Veterinary Officer's direction	If animal etc in area in		Expenses to be borne by owner and no compensation (s 19(4))
Seize animal, animal products etc and destroy if directed (s 19)	Inspector	Chief Veterinary Officer's direction	If animal unlawfully		No compensation
Require baggage or package to be opened (s 19(5))	Inspector		If baggage or package		

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
	Make regulations to provide for seizure or slaughter of animals; regulate movement of animals, people, things; manage animals and areas; treat animals; control exports; cleanse and disinfect persons, things, land; and generally for all or any such purpose as considered necessary for preventing the spread of disease (s 25)	Governor-General in Council		From time to time (see ase Control Regulations 1966 (SR		Compensation for slaughter (ss 42-45)
	Limit movement of persons in and out of an infected place; remove animals, animal products from infected place; seize and otherwise dispose of animals etc moved without permission (s 29)	Inspector	Inspector, by declaring an infected place. Inspector may seize; disposal at direction of Minister	If Inspector has cause to sease; remains in force until revoked	Notice must be served on occupier; if notice is impracticable there may be public notice; must immediately notify Chief Veterinary Officer	No compensation payable

Limit movement of animal, animal produce etc within an infected area or into or out of infected area; seize and destroy or otherwise dispose of animals etc moved without permission (s 29)	Chief Veterinary Officer	Chief Veterinary Officer by Inspector may seize; disposal at direction of Minister	While a declaration of infected area; remains in force until revoked by Minister	No compensation payable
Require road blocks to be established by police or traffic officer, require police or traffic officer to stop and search vehicles by force if necessary, and do all things in respect of vehicle necessary for carrying out provisions of Act (s 29)	Chief Veterinary Officer	Chief Veterinary Officer by Inspector may seize; disposal at direction of Minister	While a declaration of infected area; remains in force until revoked by Minister	
Declare state animal disease emergency (s 30); regulations during emergency (s 25(w) & (x))	Governor-General by Proclamation approved in Executive Council		If it appears to Governor-General in any part of New Zealand	Six month time limit; another proclamation can be made at any time
Require registered veterinary surgeon anywhere in New Zealand, or fit male over 18 years who resides or works in vicinity of emergency to assist in preventing, eradicating or limiting spread of disease; require owner of article, equipment, premises, ship or aircraft to transfer or permit use of equipment and premises by any person for specified period (s 30)	Minister or person authorised by Minister in writing		Existence of animal	Remuneration or compensation for assistance
Take measures, directions for	Minister		Existence of animal	

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
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eradicating or limiting spread of disease (s 31)

able

Limit removal of animal or thing out of disease control place (s 32)

Inspector

Inspector, by declaration of disease control place

If Inspector has cause to believe disease and is on land; declaration approves; may be revoked at any time

Notice must be served on occupier unless occupier cannot be found quickly; if such notice impracticable there may be public notice

Kill an animal to conduct post-mortem examination (s 34)

Inspector

If on examination

Advise owner of result of post-mortem examination

Inspect animals (s 34(3))

Registered veterinary surgeon

Chief Veterinary Officer

If after postmortem or

Notice to owner

	Cause steps to be taken to eradicate disease or destroy animal under supervision of Inspector (s 35)	Minister		If Minister satisfied that		Cost recoverable
	Seize and destroy diseased animal (s 50)	Inspector		If diseased animal found Inspector thinks fit	Keep record of animal destroyed	
	Direct slaughter of cattle affected with tuberculosis or brucellosis (s 53AA)	Director-General		Director-General satisfied		Compensation as prescribed by regulations (s 53AC)
Apiaries Act 1969 (RS 21)	Direct destruction of or destroy bees, honey appliances, and direct treatment of hives (s 14)	Inspector	Inspector by declaring an infected area (s 13)	Where bees, honey or	Inspector to give notice to beekeeper, occupier within infected area; Inspector to notify infected area to Director-General who must publish notice (s 13)	Compensation as determined by the Bee Advisory Committee payable if anything is destroyed (s 15). Otherwise no compensation for lawful actions under the Act (s 40)
	Control movement of bees, honey, appliances (s 16)	Inspector	Inspector by declaring an infected area or Director-General by declaring a disease control area by notice in gazette	When an Inspector has		
	Direct beekeeper to destroy bees, honey, appliances, or take measures to eradicate disease or remove infection, destroy them; or Inspector may do these things	Inspector		Bees etc (1) infected with ry to eradicate disease etc; or (2) in	In case of (2) concurrence of second Inspector required	

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
(s 19)	Prevent the keeping or establishment of bees in an area otherwise than in accordance with Minister's specified conditions (ss 30,31)	Minister	Minister, by declaring a restricted area	Where the Minister		
	Seize and destroy honey (s 33)	Inspector		Bees, appliances in		
Fisheries Act 1983	Amend fishery management plans by regulation (s 11)	Governor-General in Council		Where an emergency management plan exists	Regulations to be made on recommendation of the Minister of Fisheries after consultation with the Fishing Industries	

Board and the Minister of Conservation; may remain in effect no longer than 90 days, and may be extended once before expiry of 90 days

Halt or restrict fishing (s 12)

Minister by notice in Gazette

If an emergency occurs per fish or aquatic life for which there

Notice to be given after consultation with the Fishing Industry Board or the Minister of Conservation; notice to be given for not more than 28 days but may be renewed

Marine Farming Act 1971
(RS 22)

Halt or restrict taking of fish or marine vegetation from a leased or licensed area used in the farming of fish or marine vegetation; require lessee or licensee to take steps to purify or treat fish or marine vegetation, eradicate disease or pest from area, or destroy diseased or contaminated fish or marine vegetation in the area (s 42)

Minister, by declaring an area diseased, infected, contaminated or likely to be contaminated

If Minister is satisfied on pests, contaminated or likely to be the area unfit for human consumption vegetation in the area is likely to be

Notice in writing to licensee or lessee

No payment or compensation by Crown to any person for or in respect of the removal or destruction or disposal (s 42A)

Noxious Plants Act 1978

Immediate use of a chemical to control or eradicate Class A plants (s 47)

District Noxious Plants Authority Noxious Plants Council

When Noxious Plants Conservation Act 1967 or any other

Chemicals must have prior approval of the Agricultural Chemicals Board; general rules of procedure are to be followed; affected occupiers and the appropriate acclimatisation society are to be advised where practicable; Regional Water Board requirements are to be satisfied

No liability if acting in good faith and with reasonable care

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
Pesticides Act 1979	Regulations prescribing measures to counteract any hazard existing or likely to exist because of the application of controlled pesticides, and, in respect of such cases, empowering any Pesticides Inspector to require any person to leave any locality, place or premises (s 53(1)(i))	Governor-General in Council		From time to time	Regulations to be made on advice of Minister of Agriculture and Fisheries tendered on recommendation of Pesticides Board	
Plants Act 1970 (RS 21)	Prohibit or restrict the introduction of any plant material, disease, pest, soil, package, or any other thing whatsoever (s 6)	Director-General of Agriculture & Fisheries by notice in the Gazette		At any time for the	Expires after six months but may be renewed from time to time	

	Director owner or occupier to do whatever is necessary to eradicate, control or prevent spread of serious disease or pest (s 11(1))	Inspector		To eradicate, control, or		No liability for loss or damage resulting from exercise of powers under the Act by Inspector or assistant unless caused otherwise than in reasonable exercise of those powers (s 23)
	Carry out above measures (s 11(2))	Inspector	Director-General of Agriculture & Fisheries	If owner, occupier etc fails		
	Declare state of plant disease emergency (s 12)	Governor-General by Proclamation approved in Executive Council		If it appears to Governor-General that there is a serious disease or pest in New Zealand	Six months time limit; another Proclamation may be made at any time at any time	
	Direct that measures be taken as necessary for the prevention of the establishment of a serious pest or disease in any part of New Zealand or its eradication (s 13)	Minister, or other person authorised in writing by Minister		Existence of plant disease		Compensation may be paid at fair market value to owner of anything destroyed
	Regulations to declare infected area; control movement of things in infected area; prescribe treatment, cleansing etc of things, destruction or special treatment (s 14)	Governor-General in Council		Regulations for any of		Provision may be made for compensation for destruction or treatment
Poultry Act 1968 (RS 18)	Require owner to destroy, dispose of, isolate or ensure non-removal of diseased poultry or	Inspector		Where Inspector finds that there is a First or Second Schedule disease	Notice in writing	Compensation payable if destroyed poultry found to have a

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
	take other steps (s 9(4) & (5)) if owner fails to, Inspector may do so at owner's expense (s 9(6))					Third Schedule disease (s 10)

COMMERCE

Designs Act 1953 (RS 6)	Use of design during emergency (s 19)	Government department or a person authorised by government department	Order in Council published in Gazette	During any period of emergency situations in New (services)	Order in Council to be laid before Parliament within 28 days [No time limit on emergency]	
	Close Patent Office for the transaction of public business at short notice (s 45A)	Commissioner of Designs		Where Commissioner of it is or will be necessary or desirable	Display public notice in or on building in which Patent Office is situated, if practicable; publish notice of exercise of powers in	

International Energy Agreement Act 1976 (RS 26)	Declare petroleum emergency (s 3)	Governor-General by Proclamation approved in Executive Council	When it appears to require the taking of emergency
	Regulations to control regulate, prohibit or make provision as to the production, acquisition, distribution, supply or use of petroleum, and authorising Ministerial directions to producers, distributors and users (s 4)	Governor-General in Council	Existence of petroleum Regulations to be made after the Minister has held appropriate consultations and to be laid before Parliament as soon as is practicable Regulations may (a) be repugnant to or inconsistent with any other Act; and (b) provide for non-liability for failure to comply with other enactments or any contractual obligation (s 5)
	Direct producers, suppliers, purchasers, distributors and users of petroleum to maintain stocks at specified level (s 6)	Minister	Where it appears required by the International Energy Direction in writing (s 8)
Import Control Act 1988	Prohibit imports (s 3)	Governor-General in Council	In the public interest
Patents Act 1953 (RS 10)	Use of invention during emergency (s 58)	Government department or a person authorised by a government department	Order in Council
	Close Patent Office for the transaction of public business at short notice (s 5A)	Commissioner of Patents	Where Commissioner of it is or will be necessary or desirable Display public notice in or on building in which Patent Office is situated, if practicable; publish

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
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notice of exercise of powers in Patent Office Journal as soon as practicable

Petroleum Demand Restraint Act 1981	Regulations to restrain demand for, reduce consumption of, or ensure the equitable distribution of petroleum products that are likely to be in short supply (s 4)	Governor-General in Council	in	Governor-General in Council sufficient to maintain stocks at normal	Regulations to be laid before House of Representatives within 16 sitting days (s 4(5)). They expire unless expressly confirmed by Act of Parliament passed during session in which they were laid (s 6)	Minister to hold appropriate consultation before issuing directions under the regulations; Minister to publish directions in Gazette and lay a copy before
	Directions to distributors and users of petroleum (s 7)	Minister				

<p>Trademarks Act 1953 (RS 11)</p>	<p>Close Patents Office for the transaction of public business at short notice (s 76A)</p>	<p>Commissioner of Trade Marks</p>	<p>Where Commissioner of Patents Office Journal</p>	<p>Display public notice in or on building in which Patent Office is situated, if practicable; publish notice of exercise of powers in Patent Office Journal as soon as practicable</p>
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CONSERVATION

<p>Conservation Act 1987</p>	<p>Close any conservation area to public entry (s 13)</p>	<p>Minister of Conservation</p>	<p>For reasons of public</p>	<p>Director-General of Conservation to take all reasonable steps to ensure that public are aware of closure and reasons</p>
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CUSTOMS

<p>Customs Act 1966 (RS 2)</p>	<p>Regulations to prohibit imports (s 48)</p>	<p>Governor-General in Council</p>	<p>If in Governor-General's of the revenue, for the prevention of</p>
	<p>Regulations to prohibit exports (s 70)</p>	<p>Governor-General in Council</p>	<p>(1) In Governor-General's preservation of NZ's flora and fauna; exportation is necessary in the public interest to prevent the spread of disease</p>

DEFENCE

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
Defence Act 1990	Provide public service in connection with an industrial dispute (s 9)	Armed forces	Minister	When Minister authorises public service(s) that may be provided	Inform House of Representatives forthwith if House sitting, or at earliest practicable time otherwise, that authority given and reasons, and lay copy of authority before House; authority lapses after 14 days unless House extends it by resolution, or Governor-General extends by Proclamation approved in Executive Council (when Parliament dissolved or expired)	
	Assist the police in dealing with an emergency; exercise any power of a member of the police (s 9)	Armed forces	Prime Minister or next most senior Minister available, on information supplied by Commissioner of Police, or a	Prime Minister or the next senior Minister available, on information supplied by Commissioner of Police, or a member of armed forces exercising police	Armed forces act at request of senior police officer; inform House of Representatives forthwith if House sitting, or at	Armed forces assisting police enjoy same protections from civil and criminal

Deputy Commissioner of Police

earliest practicable time liability as police, as otherwise, that authority given well as own and reasons, and lay copy of protections authority before House; authority lapses after 14 days unless House extends it by resolution or Governor-General extends by Proclamation approved in Executive Council (when Parliament dissolved or expired)

Requisition any ship, vehicle, aircraft, supplies, or equipment necessary for armed forces; or land, building or installation necessary to enable use of ship, vehicle etc by armed forces (s 10) Chief of Defence Force Minister of Defence

Where Minister is satisfied part of armed forces and that it is Written statement to owner of property or person in control, by Chief of Defence Force as soon as possible Just compensation payable for use, including loss, damage, injury; court of competent jurisdiction to determine dispute about compensation

EARTHQUAKE AND

WAR DAMAGES

COMMISSION

Earthquake and War Damages Act 1944 (RS 6) Provide sums to Commission from public money without further appropriation than this section (s 13) Minister

If assets of Commission

EDUCATION

Education Act 1989 Close a school (s 65E) Board of Trustees of the

At any time, because of

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
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school

ENVIRONMENT

Soil Conservation & Rivers Control Act 1941 (RS 17)	Maintain and improve watercourses and defences against water in any drainage or river district or area under control of any local authority or public body, without notice and objection procedures (s 133); interfere with road, street etc under control of local authority or public body without giving notice (s 136); construct work on private land without notice and objection procedures (s 137)	Catchment Board		Urgent work to meet an	Where reserve or catchment area is vested in local body or public authority for water supply purposes or there is an adjacent watercourse, consent is required	
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Resource Management Act 1991	Take action to remove or mitigate any adverse effect on the environment or any sudden emergency causing or likely to cause loss of life, injury, or serious damage to property (s 330(1))	Person responsible for work, natural and physical resource or area, or project or work	In opinion of person	No person to be prosecuted for taking action under s 330; action taken may be a defence to prosecution for failure to observe restrictions imposed by the Act (ss 18 and 341)
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Enter any place without notice and take action or direct occupier to remove or mitigate any adverse effect on environment, or any sudden emergency causing or likely to cause loss of life, injury or serious damage to property (s 330(2))	Local authority or Minister of Conservation with financial responsibility for public work or with jurisdiction over natural and physical resource or area	Reasonable opinion that	Reimbursement where action because of person's default; compensation for persons suffering damage not arising from failure to observe provisions of Act (s 331)
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EXTERNAL

RELATIONS & TRADE

The United Nations Act 1946 (RS 11)	Regulations to enable New Zealand to fulfil obligations undertaken under Article 41 of the Charter of the United Nations	Governor-General in Council	Security Council calls on Council	Nothing in Act or regulations to operate to relieve any person of liability for any offence punishable independently of Act
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FORESTRY

Forests Act 1949 (RS 23)	Regulations prescribing treatment, or destruction of trees,	Governor-General	From time to time	Reasonable notice of entry, to be at reasonable time; person	Minister may pay compensation to
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Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
	tree seed, timber, forests, forest products, buildings, structures; prohibiting or controlling movement of diseased trees, tree seed, timber, forest products; authorising forestry officers to enter land and inspect at reasonable times (s 70)				entering must carry a warrant of authority (s 71B)	owner of destroyed trees equal to fair value at time of inspection (s 70A)
	Require owner or agent of imports or exports of tree, tree seed, timber or timber product to remove them for observation; require them to be treated, disinfected, destroyed or authorise disposal of or arrange for this at the owner's expense (s 69)	Authorised officer		If authorised officer has		

Forests & Rural Fires Act 1977 (RS 23)	Endeavour by all practical means to extinguish a fire and prevent its spread to save lives and property in danger; enter land, buildings etc and if necessary break open doors; take apparatus through land, buildings etc; destroy or remove vegetation, buildings etc or fences; control supply of water; close roads etc; disconnect gas and electricity; remove persons unless they have a pecuniary interest; at the expense of the owner and during or after the fire pull down or shore up any wall or building likely to become dangerous to life or property (s 36)	Principal Fire Officer and Rural Fire Officer	Outbreak of a fire	Use of water subject to overall requirements of Civil Defence during a state of civil defence emergency under the Civil Defence Act 1983	Damage to property done in good faith in course of duties deemed to be fire damage for fire insurance purposes (s 55). No action or proceeding for damage to property done in good faith in course of duties, except for damage to property arising from use of fire engine or motor vehicle for transport purposes (s 56)
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Require any fit person over the age of 18 years residing or working within the specified area or within 8 kms of the boundary to assist in extinguishing the fire (s 38)	Fire Officer
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In the event of a fire in	Remuneration to be paid by responsible fire authority
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HEALTH

Food Act 1981	Recall food or appliance or require destruction or denaturing of food that is unsound or unfit for human consumption or is damaged or contaminated (s 40)	Minister of Health	Need to protect the public	No criminal or civil liability for acting in pursuance or intended pursuance of functions under the Act unless act in bad faith or without reasonable care (s 39)
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Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
Health Act 1956 (RS 19)	Prohibit use of land, buildings; destroy buildings, animals, things; require people to be medically examined; isolate, quarantine, disinfect persons, buildings, ships, animals; control movement of ships, people, animals, things; forbid discharge of sewage; close down public places and schools; enter land, buildings and ships (s 70)	Medical Health Officer	of	Minister of Health, or the declaration of a national or regional civil defence emergency	For the purpose of	No personal liability by reason of anything lawfully done
	Possess, occupy and use lands and buildings (for accommodation and treatment of patients); requisition vehicles, drugs, food, drink, or other	Medical Health Officer	of	Minister of Health in writing, or the declaration of a national or regional civil defence emergency	In the event of an outbreak	Compensation payable if loss or damage suffered

material (s 71)

Toxic Substances Act 1979	Enter and inspect premises, land, vehicle etc (s 47(2))	Police Officer	or	Customs	Officer has reasonable	Entry at all reasonable times	
	Enter and inspect dwellinghouse (s 47(2) & (11))	Police Officer	or	Customs	Officer has reasonable	Entry at all reasonable times	Public or person
	Enter or inspect vessel or aircraft before inward report received by Customs Officer (s 47(4))	Police Officer	or	Customs	In an emergency and at		
	Open container covering; mark, seal, secure or impound a toxic substance or contaminated foodstuffs or articles; take appropriate measures, including decontamination, destruction or disposal (s 47(5)-(7))	Police Officer	or	Customs	Officer has reasonable		Person claiming interest in marked etc property may apply to District Court within seven days for return or compensation
	Destroy or dispose of contaminated substances etc within time for application to District Court (ss 47(8), 49)	Police Officer or Medical Officer of Health	or	Customs	Officer is of the opinion		

INTERNAL AFFAIRS

Civil Defence Act 1983	Declare a state of national emergency (s 46)	Governor-General by Proclamation, recommendation of Executive Council			It appears to Governor-	Terminates after 28 days (s 47) but can be extended by Proclamation for up to 28 days (s 48); Parliament to be	No liability for damages for actions in good faith in exercise of functions under the
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Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
					informed forthwith (s 49)	<p>Act (s 66). Compensation for loss of or damage to personal property for persons carrying out work in national or civil defence emergency (s 75)</p> <p>(Note: ss 66 and 75 apply generally to exercise of powers under the Act. There are privative provisions under which the authority of person declaring a national or civil defence emergency cannot be questioned, ss 46, 50, 51 and 52)</p>

Declare a state of national civil defence emergency (s 50)	Minister	It appears to Minister that itude to be beyond the resources of	Minister to advise Parliament as soon as practicable (s 50(2)); expires after seven days (s 54); can be extended for up to seven days by Minister (s 55); public notice to be given (s 57)
Declare a state of regional civil defence emergency (s 51)	Chairman of regional council, or Regional Controller if the Chairman is out of communication with the Regional Controller, or Director of Civil Defence or Regional Civil Defence commissioner	It appears that a civil be beyond resources of the territorial :clare local civil defence emergency	Expires after seven days (s 54); can be extended for up to seven days by the Director, or by the Chairman of the regional council with concurrence of Director (s 55); public notice to be given (s 57)
Declare a state of local civil defence emergency (s 52)	Chairman of territorial authority or Regional Civil Defence Commissioner, or Local Controller if the Chairman is out of communication with the Local Controller, or any person nominated in operative civil defence plan if both Chairman and Local Controller are out of communication with that person, or Regional Civil Defence Commissioner	It appears that a civil cal civil defence plan	Expires after seven days (s 54); can be extended for up to seven days by Civil Defence Commissioner or by Chairman of territorial authority with concurrence of Commissioner (s 55); public notice to be given (s 57)
Carry out works, remove dangerous structures; rescue people and remove to safety;	Regional council, territorial authority with operative civil defence	While a state of national are, owing to the suddenness of the hority is prevented from carrying out	Where territorial authority exercising power during national emergency, or national or

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
	provide first aid; provide emergency food, clothing, shelter; conserve and supply essential supplies; regulate land, air, water traffic; dispose of dead; disseminate information; provide equipment, accommodation facilities (s 58)	plan, or senior member of police			regional civil defence emergency, powers must be exercised subject to directions and requirements of Regional Controller or Civil Defence Commissioner; if police exercising power, authority ceases when authorised person able to exercise powers	
	Evacuation of place, or exclusion of persons or vehicles from place (s 60)	Any person authorised by Civil Defence Commissioner, Regional or Local Controller, or constable	Civil Defence Commissioner, Regional or Local Controller, or constable	Where during state of opinion that the action is urgently		
	Enter and if necessary break into	Civil	Defence	Civil Defence Commissioner,	During state of national	

premises (s 61)	Commissioner, Regional or Local Controller or constable or any person acting under their authority	Regional or Local Controller or constable	Defence Commissioner, Regional or Local Controller or constable	or saving life, or preventing injury, or any urgent measure to relieve suffering	
Close or restrict access to road or public place (s 62)	Civil Commissioner, Regional or Local Controller, constable or any person authorised in operative regional or local defence plan		Defence Commissioner, Regional or Local Controller, constable or any person authorised in operative regional or local defence plan		During state of national emergency
Remove vehicle impeding civil defence operations, using force or breaking into vehicles where reasonably necessary (s 63)	Civil Commissioner, Regional or Local Controller, constable or traffic officer, or person acting under their authority		Defence Commissioner, Regional or Local Controller, constable or traffic officer, or person acting under their authority		During state of national emergency
Requisition land, buildings, vehicles, equipment, food, medicines etc (s 64)	Civil Commissioner, Regional or Local Controller or constable or any person acting under their authority	Civil Defence Commissioner, Regional or Local Controller or constable	Defence Commissioner, Regional or Local Controller or constable	During state of national emergency	Written statement specifying property and naming person under whose control property is to be placed to be given to requisitioned property owner or person in charge of requisitioned property
Enter into contract on behalf of regional council or territorial authority (s 68)	Regional or Local Controller, Chairman, Deputy Chairman, principal administrative officer, treasurer, engineer, or any other employee (specified in the operative civil defence plan) of a		Regional or Local Controller or constable		During state of national emergency
					Report full circumstances of exercise to next ordinary meeting of council or authority

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
	Direct regional council or territorial authority or person to perform or to cease performing functions etc conferred on that council, authority or person by the Act (s 73)	regional council or territorial authority	Minister	Where a state of national emergency or threat of a national emergency or		
	Make regulations for such matters as are necessary or expedient for the purpose of securing the public safety and generally safeguarding the interests of the public during any state of national emergency or		Governor-General in Council	During state of national or	To be in force only while state of national emergency or civil defence emergency is in force and only in respect of an area to which the emergency relates; must be laid before the House of Representatives no later than	

civil defence emergency (s 79)

seven sitting days after being made; House may by resolution amend or revoke any of the regulations

Fire Service Act 1975

Exercise powers of an Inspector of Dangerous Goods under the Dangerous Goods Act 1974 and an officer under the Toxic Substances Act 1979 (s 28(3A and 3B))

Chief Fire Officer, Deputy Chief Fire Officer or person in charge of fire brigade

In the event of any fire
Officer or person in charge of fire

Can be exercised until the arrival of an Inspector of Dangerous Goods or an officer under the Toxic Substances Act 1979

Enter land, buildings etc; take equipment through land, buildings; remove dangerous material; control water and shut off water, electricity, gas, fuel; control movement of traffic and people; pull down or shore up any building or structure; cut or pull down any tree; remove impeding vehicles; remove, using reasonable force if necessary, any person interfering with operations or who is in danger; require owner of property, or owner's agent, to carry out duties; generally do all other things that are reasonably necessary for protecting life or property (ss 28 and 28A)

The person for the time being in charge of the fire brigade

In the event of fire or other

In non-fire emergency person in charge of brigade shall not exercise powers without authorisation of person in charge of operations, unless the former is of the opinion that lives or property are in imminent danger

Expense of pulling down or shoring up a building or structure borne by owner (s 28(4)).

Authority of person carrying out functions or duties under Act cannot be questioned (s 28(6)).

Damage to property done in performance in good faith of duties to be fire damage for fire insurance purposes (s 42).

No action or proceeding for damage to property caused by actions done in good faith in course of duties except for damage to property arising from use of fire engine or motor vehicle for transport purposes (s

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
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43)

Land Drainage Act 1908 (RS 6)	Raise special loan without consent of ratepayers (s 41)	Land Drainage Board	For the purpose of
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Local Government Act 1974 (RS 25)	Enter any land or building without prior notice (s 708A)	Local authority, by its officers and agents	In any sudden emergency of danger to any works or property by enactment	Inform owner and occupier as soon as practicable
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JUSTICE

Corporations (Investigation and Management) Act 1989	Declare any corporation or associated person subject to statutory management (s 38)	Governor-General in Council on advice of Minister of Justice on recommendation of Securities Commission		Securities Commission tutory management on a number of ivity or preserving the interests of its	Moratorium on proceedings against corporation subject to statutory management (s 42). Securities Commission, statutory managers etc indemnified by Crown for liability relating to exercise or omission to exercise powers (s 63)
Electoral Act 1956 (RS 19)	Adjourn the polling of an election at a polling place to the following day or from day to day if necessary (s 125)	Deputy Returning Officer		Polling cannot start or has	
Judicature Act 1908 Second Schedule: High Court Rules	Close High Court and its office for period not exceeding one week at any one time	Judge of the High Court		When an epidemic or an	
Sale of Liquor Act 1989	Order licensees within a specified area to close licensed premises for sale of liquor for specified time (s 173)	District Court Judge or two or more Justices at request of senior member of police		Where a riot occurs, or	Order not to have effect beyond the expiry of day on which it is made
Dangerous Goods Act 1974 (RS 24)	Enter, inspect and examine any premises (by force if necessary), vehicle, vessel, aircraft or hovercraft (s 19)	Inspector of dangerous goods	Justice of Peace by warrant for entering dwellinghouse (s 20)	Where Inspector has	Need warrant to enter house unless have reason to believe imminent damage to person or public (ss 19(4), 20); need to be accompanied by pilot, owner, or representative of owner, of aircraft or hovercraft when entering, inspecting or examining the aircraft or hovercraft; produce warrant of No action or proceedings lie against Crown, local licensing authority or Inspector or person acting on instructions of Inspector, in respect of action taken in good faith and with reasonable care for

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
					appointment if asked by occupant (s 19(2))	purposes of carrying out provisions of Act or regulations; immunity does not extend to liability arising from use of motor vehicle when liability does not result from presence of dangerous goods (s 25)
	Examine and test equipment, take photographs and make drawings (s 21(a) & (b))	Inspector of dangerous goods		Equipment used for		
	Open or cause to be opened container (s 21(c))	Inspector of dangerous goods		Believe or suspect		

all practicable steps to determine as speedily as possible whether s 7(1) applies

NEW ZEALAND

SECURITY

INTELLIGENCE

SERVICE

NZ Security Intelligence Service Act 1969 (RS 21)	Intercept or seize communication not otherwise lawfully obtainable (s 4A)	NZ Security Intelligence Service	Minister in charge of NZ Security Intelligence Service on application by Director of Security	If Minister is satisfied that intelligence essential to security, and	Annual report to Parliament on use of interception warrants	No civil or criminal liability for lawful interception; issue of warrant not subject to judicial review
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THE PRIME MINISTER

AND CABINET

International Terrorism (Emergency Powers) Act 1987	Authorise exercise by police of emergency powers (s 6)	Three Ministers of the Crown		Three Ministers of the an international terrorist emergency,	Expires when emergency ends or after seven days (s 6(4)). House of Representatives to be informed of reasons forthwith; House may, by resolution, extend the period of the emergency for up to two periods (s 7). House may, by resolution, revoke the authority (s 8)	No action or proceeding against Crown, police or armed forces for damage or loss to property caused by acting or failing to act in good faith in the pursuance of duties under the Act (s 16)
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Evacuate premises or place; exclude persons or vehicles;

For purposes of dealing y that emergency

Owner of requisitioned property to be given written statements

Compensation for use, loss, damage or

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
	enter any vehicle, place etc; prohibit or restrict access of people or vehicles to roads or public place; remove vehicles etc; destroy dangerous property; requisition land, building, vehicles, etc; prohibit or restrict land, air or water traffic (s 10(2))				(s 11). Commissioner of Police to report to House of Representatives on exercise of power as soon as practicable after end of emergency (s 17)	destruction of requisitioned property (s 13)
	Interfere with operation of telephone system or intercept private telephonic communications in area where emergency occurring (s 10(3))	Police	Commissioned officer of police	For purpose of preserving reasonable grounds that the exercise	Offence to disclose private communications other than in performance of duty (s 18). Notice to be given that private communication to be used as evidence (s 19). Evidence of an unrelated offence is inadmissible (s 20)	

Prohibit or restrict publication or broadcasting of identity of person or information or equipment or technique involved or used in dealing with emergency (s 14)	Prime Minister by notice in writing	Where use of emergency casting would be likely to endanger o expire after one year but may be	PM must not restrict broadcasting or reporting of proceedings of House or Representatives. Commissioner of Police to include in annual report information on operation of any guidelines agreed between police and media (s 17)
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RESERVE BANK

Reserve Bank of New Zealand Act 1989	Direct Reserve Bank to deal in foreign exchange within guidelines (s 17)	Minister of Finance by notice in writing	For purpose of influencing	If direction under ss 17 & 18 inconsistent with policy targets fixed under Act Minister and Governor must within one month substitute new policy targets (ss 9 & 19)
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Direct rates at which Reserve Bank is to carry out foreign exchange dealings (s 18)	Minister of Finance by notice in writing	Governor-General in Council within 30 days before direction	From time to time	If direction inconsistent with economic objective of monetary policy Bank may give notice of non-compliance; Bank need not comply unless economic objective changed (ss 12, 20)
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Temporarily suspend foreign exchange business (s 22)	Governor of Reserve Bank by notice in writing to all registered banks		Governor is satisfied that it	Written notice to Minister of exercise of power as soon as practicable; remains in force until revoked by Order in Council or by written notice by Governor to all registered banks
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Cancel registration of registered	Governor-General in		Reserve Bank is satisfied	Bank to have seven days written
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Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
	bank (s 77)	Council on advice of Minister of Finance in accordance with recommendation of Reserve Bank		ending in financial market, or has not	notice and reasonable opportunity for submissions, and Reserve Bank to have regard to submissions; submission plus Reserve Bank recommendation to go to Minister; bank to have written notice of grounds of cancellation as soon as practicable after Order in Council	
	Place bank or associated person under statutory management (s 117)	Governor-General in Council, on advice of Minister of Finance in accordance with recommendation of Reserve Bank		Reserve Bank is satisfied payment or is unable to meet system (s 118)	Written notice of reasons to be given by Reserve Bank as soon as practicable after the making of the Order in Council (s 118)	Moratorium on proceedings against bank subject to statutory management (s 122). Reserve Bank, statutory managers and authorised persons indemnified by

Crown for liability arising from exercise or omission to exercise powers; Minister is to advise House within 12 sitting days of any such payment (s 146)

SOCIAL WELFARE

Emergency Forces Rehabilitation Act 1953
(RS 6)

Regulations to provide for protection of landlords and tenants; protection of debtors and regulation and restriction of legal proceedings; the rehabilitation of servicemen; or modification or suspension of any enactment (s 2)

Governor-General in Council

It appears necessary or promoting the welfare of persons who Lay regulations before Parliament within 28 sitting days

SURVEY AND LAND

INFORMATION

Public Works Act 1981

Enter on land without usual notice in order to remove natural material required for construction or maintenance work (s 27(2) & (5))

Crown or local authority

In event of earthquake,

Provisions for compensation for claimants under the Act (Part V ss 59-102)

Enter on land and do emergency work on trees, debris etc (ss 133 & 135)

Minister or local authority

There is imminent danger arising from trees or debris

Advise owner or occupier as soon as practicable, if no notice given; if this not possible display notice in prominent place on land

If powers are exceeded or unnecessary damage is done, the work shall be deemed not to have been authorised

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
	Enter on land to undertake emergency remedial measures (s 234)	Minister or other authority having control of the public work		There is imminent danger immediate remedial measures required	Give such oral notice as is practicable to owner or occupier	No action or proceedings shall be brought against Crown etc for damage to property occasioned in exercise in good faith of powers

TRANSPORT

Civil Aviation Act 1990	Detain or prohibit operation of aircraft or seize aeronautical product, including any class of aircraft or product (s 21)	Director of Civil Aviation Safety	Warrant given by a District Court Judge, Justice of the Peace or Registrar on written application or oath	Director believes on	Detention or seizure maintained only as long as necessary in interests of safety (except where needed for evidence); Director must provide written reasons for seizure to owner on request; appeal against exercise of power lies to District Court	Director liable for costs and expenses incurred by any person as a result of action taken under this section only if decision reversed by court
	Prohibit or impose conditions on operation of aircraft or class of aircraft or the use of an aeronautical product or class of product, detain aircraft or seize aeronautical products (s 21)	Director of Civil Aviation Safety		Director believes on any endanger persons or property and	Detention or seizure maintained only as long as necessary in interests of safety (except where needed for evidence); appeal against exercise of power lies to District Court	Director liable for costs and expenses incurred by any person as a result of action taken under this section only if decision reserved by court
	Make emergency rules (s 31)	Director		Necessary to alleviate or property, and it is impracticable for the	Director must first consult with persons, representative groups, government departments and Crown agencies as Director considers appropriate; rule is to be notified in Gazette unless inappropriate for safety or security reasons, in which case Director to notify such persons as considered appropriate or necessary in circumstances; in force for up to 90 days and may be renewed once; prevails over ordinary rules (s 35). Rule is regulation for purposes of Regulations (Disallowance) Act 1989 (s 31)	

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
Civil Aviation Regulations 1953 (Reprint SR 1980/88)	Prohibit flight in an area without written permission from Minister (reg 33)	Director of Civil Aviation Division of Ministry of Transport, by declaration of prohibited area	Minister of Transport	Minister advises Director of interest	Director to give notice of action in appropriate publication as Director deems necessary	
	Restrict flight in a specified area so that it is only possible in accordance with specified conditions (reg 33)	Director of Civil Aviation by declaration of restricted area		When Director is satisfied interest	Director to give notice of action in appropriate publication as Director deems necessary	
	Restrict flight in a specified area (reg 33)	Director of Civil Aviation by declaration of danger area		When Director is satisfied in the area	Give information as to potential danger; give notice of action in appropriate publication as Director deems necessary	

<p>Marine Pollution Act 1974 (RS 24)</p>	<p>Instruct master or owner of ship or any person in charge of salvage operation or servant or agent to take specified action with respect to ship or cargo or both, including removal, salvage, sinking or destruction and taking over of control; instruct master of any NZ ship or hometrade ship or ship in NZ waters to render assistance to any ship that is or is likely to be a shipping casualty; instruct master of NZ or hometrade ship to take on board equipment, to sail to any place, to assist ships which are assisting a casualty or engaged in cleaning, removal or dispersal of pollution, and to obey instructions of person authorised by Minister to exercise control over shipping casualty (s 25)</p>	<p>Minister of Transport or, in some instances, person authorised by Minister</p>	<p>Where as a result of a pollution or risk of pollution to NZ</p>	<p>Must notify master of measures proposed unless situation is urgent; must consult with owner of ship before giving instructions to master to render assistance; instructions to be served in specified manner</p>	<p>Where action or measures taken under ss 25 or 26 of Act were not reasonably necessary to eliminate or prevent or reduce pollution or risk of pollution, or were such that the good they were likely to do was or was likely to be disproportionately less than expense incurred or loss or damages suffered, person who incurs expense, loss or damage may recover compensation from Crown (s 27). No civil liability for Minister or person who takes action or refrains from taking action pursuant to instructions issued under ss 25 or 26</p>
	<p>Instruct owner or person in charge of offshore installation, or person in charge of or carrying on operations for exploration of seabed and subsoil and exploitation of its natural resources, or owner of pipeline, or servant or agent of any of above, to take any specified action with respect to offshore installation, operations, pipeline etc; take measures with respect to offshore installation, operations, pipeline etc (s 26)</p>	<p>Minister of Transport or person authorised by Minister</p>	<p>Where as a result of an risk of pollution to NZ water or coast or risk of pollution in or risk of</p>	<p>Notify owner of proposed measures unless need to act urgently; written concurrence of Minister of Mines required; instructions must be served in specified manner</p>	

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
Shipping and Seamen Act 1952 (RS 4)	Direct persons present at wreck; require persons to assist, including master and crew of ships or vessels; demand use of any vehicle or horses (s 343). Right to pass over adjoining land (s 344)	Receiver of wreck		Where any ship or aircraft ship or aircraft or the lives of persons		Damage to adjoining land shall be a charge on the ship or aircraft or cargo
	Apprehend persons; use force to suppress plundering, disorder, or obstruction and command persons to assist (s 345)	Receiver of wreck		Where a ship or aircraft is		
Transit NZ Act 1989	Enter land to construct or maintain in good repair roads under control of Minister of	Minister of Transport		In the case of any	Owner's consent needed if land within curtilage of a dwelling or other building or within an	

Transport without 10 days' written notice and in derogation of provisions of Resource Management Act 1991 (s 48)

orchard, vineyard, airstrip, garden, etc

(Same power of entry may be exercised by Transit NZ in respect of state highway where there is any emergency or danger under s 61)

Works or maintenance on state highway, government road or road under local authority control without the consent of the relevant authority (s 52)

Local authority or person having lawful power to execute or maintain works

Where immediate repair or emergency

Enter land and do necessary work on tree, hedge, plant or debris without following formal procedure with notice (ss 55 & 57)

Responsible authority

If there is imminent danger arising from any tree, hedge, plant,

Advise owner or occupier of entry as soon as practicable, and if owner or occupier not available display prominent notice on land

Excess of power or unnecessary damage is deemed unauthorised

Alter road, tramway, watercourse, drain, public work, water or gas supply pipe, power supply or tele-communication link as may be necessary without first preparing plan of alteration and discussing with local authority or owner (s 77)

Transit NZ

Any emergency or danger

Notice as soon as possible to local authority or owner

Transport Act 1962
(RS 16)

Direct Transit NZ or territorial authority responsible for a road to remove danger to public safety (s 74A)

Minister of Transport

Minister has cause to territorial authority has not carried out if public safety

Minister must first inquire into circumstances

Department and Act	Nature & Extent of Emergency Powers	Exercised by	Authorised by	Definition/ Circumstances	Additional Safeguards	Compensation & Liability
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TREASURY

Local Authorities Loans Act 1956 (RS 24)	Borrow by way of overdraft, in anticipation of revenue, beyond normal limits of borrowing (ss 20 & 21)	Local authority		It becomes necessary to ood, storm, landslip, earthquake, fire	Prior sanction of Local Authorities Loans Board is required	
	Borrow by way of special loan pursuant to a resolution of the local authority and without prior consent of electors (ss 21, 28 & 42(c))	Local authority		It becomes necessary to ood, storm, landslip, earthquake, fire,		

Public Finance Act 1989 Approve unappropriated Minister of Finance
expenditure of public money or
incurrence of costs (s 13)

There is a declared state Notice in Gazette as soon as
h or safety of NZ or any part of it that practicable; statement of
expenditure and costs incurred
to be included in Crown's
annual financial statement and
in an Appropriation Bill for
sanction by Parliament

APPENDIX B

Exercise of Executive and Legislative Powers in an Emergency

- B1 The impact of an emergency may be such that difficulties arise in
- taking formal executive action such as the making of a Proclamation by the Governor-General or the holding of a meeting of the Executive Council, or
 - convening a meeting of the House of Representatives so that it can
 - pass emergency legislation, and
 - control or monitor an emergency response.

There are a variety of procedures under which the House can control or monitor an emergency response.

EXERCISE OF EXECUTIVE FUNCTIONS

B2 **Error! Bookmark not defined.** **Error! Bookmark not defined.** Some emergency situations may call for the making of a Proclamation by the Governor-General acting with the approval of the Executive Council (Animals Act 1967 s 30). Also, emergency regulation-making powers may be given to the Governor-General in Council (Civil Defence Act 1983 s 79). Provision should therefore be made for the situation where the Governor-General or members of the Executive Council are not available to act in

an emergency because they are absent from Wellington, are casualties in the emergency, or are unable to act for some other reason. There may, also, be the extreme situation in which there is the need to form an interim government.

GOVERNOR-GENERAL UNABLE TO PERFORM FUNCTIONS

B3 Error! Bookmark not defined. Error! Bookmark not defined. If there is a vacancy in the office of Governor-General or the Governor-General is unable to perform the functions of the office, the following are authorised to perform those functions as the Administrator of the Government: the Chief Justice, followed in order of availability by the President of the Court of Appeal and the next most senior Judge of the Court of Appeal (Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1983/225) cl XII). The Governor-General and each of the potential Administrators are based in Wellington. They could be killed or incapacitated in a major Wellington earthquake or other disaster. This possibility can be met by an amendment to the Letters Patent which would include High Court Judges in order of seniority in the chain of persons authorised to act as Administrator. This would include judges from outside Wellington.

ACTION BY THE GOVERNOR-GENERAL IN COUNCIL

B4 Error! Bookmark not defined. Error! Bookmark not defined. The Executive Council consists of those Ministers of the Crown who are appointed by the Governor-General from amongst members of Parliament. A decision by the Governor-General in Executive Council is made by the Governor-General (or the Administrator of the Government) and a quorum of at least two members of the Executive Council. If the Governor-General or the Administrator is not presiding a third member must be available to preside. In that event the approval of the Governor-General or Administrator is obtained after the Executive Council meeting (Letters Patent cls VII-IX and Acts Interpretation Act 1924 s 23).

B5 Error! Bookmark not defined. Error! Bookmark not defined. Section 46 of the Civil Defence Act 1983 deals with the possibility that the Governor-General or members of the Executive Council may not be available in an emergency, whether or not as a consequence of the emergency itself. Under s46 a Proclamation of a state of national emergency is made by the Governor-General on the recommendation of the Executive Council. If the Executive Council cannot meet the Governor-General may make a Proclamation on the recommendation of the Prime Minister alone (s 46(2)). A meeting of three members of the Executive Council may act if the Governor-General (or Administrator) is unavailable, while the Prime Minister may act when both the Governor-General and members of the Executive Council are unavailable (s 46(3) and (4)). There is no provision authorising the Governor-General to act alone, that is, without the benefit of ministerial advice.

B6 It is anomalous that s 46(2)-(4) of the Civil Defence Act 1983 does not apply to s 79 of the Act which authorises the Governor-General in Council to make emergency regulations during both a state of national emergency and a state of civil defence emergency. An emergency that is serious enough to present difficulties in the holding of a meeting of the Executive Council is likely to call for the making of emergency regulations. Such a situation could arise if there was a major earthquake in Wellington, an event which is thought to be a distinct possibility and in which there could be difficulties holding a meeting of the Executive Council (National Contingency Plan: Major Earthquake in the Wellington Area, approved by the Minister of Civil Defence, 7 September 1989).

B7 The Law Commission is recommending the repeal of the "national emergency" provisions in the Civil Defence Act 1983 (para 9.9). So far as civil defence emergencies are concerned, difficulties arising from the unavailability of the Governor-General, Administrator of the Government or members of the Executive Council can be met by attaching the provisions of s 46(2)-(4) to s 79. The Law Commission is also recommending that a provision along the lines of s 46(2)-(4) should be included in the proposed War Emergencies Act (para 6.76 and draft War Emergencies Act s 11, Appendix D).

B8 In the event of a major emergency, s 79 of the Civil Defence Act 1983 or the provisions of a War Emergencies Act may not be the only provisions involving action by the Governor-General in Council that may need to be invoked. Action under other statutes may be required. One approach to this possibility would be to provide that, during a national civil defence emergency or a war emergency, provisions along the lines of s 46(2)-(4) in the Civil Defence Act should apply to other statutes conferring authority on the Governor-General in Council. The Law Commission has decided not to recommend such a comprehensive provision. Should the need arise the government can rely on the emergency regulation-making powers given to it under the Civil Defence Act 1983 or a War Emergencies Act.

FORMATION OF INTERIM GOVERNMENT

B9 Error! Bookmark not defined. Error! Bookmark not defined. A major disaster in Wellington may cause the death or disablement of members of the Executive Council, Ministers of the Crown and other members of Parliament, and raise the issue of the formation of an interim government. The Governor-General or the Administrator of the Government can appoint members of the Executive Council and Ministers of the Crown from members of Parliament who are available. Having regard to the provision in s 6(1) of the Constitution Act 1986 requiring members of the Executive Council and Ministers of the Crown to be members of Parliament, difficulties could arise if there were not enough members of Parliament available, or whom the Governor-General regarded as qualified, to be members of an interim government (see also Letters Patent Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1987/8) cl I). This would be an extraordinary situation for which no advance legislative solution can be suggested. The Governor-General or the Administrator of the Government may have to rely on the prerogative or the doctrine of State necessity to draw together an ad hoc committee of advisers to form an interim government (paras 4.33-4.43).

MEETINGS OF THE HOUSE OF REPRESENTATIVES

B10 Error! Bookmark not defined. Error! Bookmark not defined. There may be emergencies in which it is necessary to bring forward or postpone a meeting of the House of Representatives, to expedite or postpone the summoning of Parliament, or to change the place of meeting of Parliament. This may be necessary in the following circumstances:

- The government wishes to provide an opportunity for a parliamentary debate because the emergency raises issues of national importance, as was the case with the decision to send RNZAF transport aircraft and a New Zealand Army medical team to support the multinational force in the Gulf war.
- A Proclamation or declaration of a state of emergency requires the confirmation of the House.
- Emergency regulations require the confirmation of the House.
- The extension of a Proclamation or declaration requires a decision of the House.
- There is a need to pass urgent legislation.
- A disaster in Wellington means that a meeting of the House of Representatives has to be postponed or the place of meeting changed.

PROCEDURAL DIFFICULTIES

B11 **Error! Bookmark not defined. Error! Bookmark not defined.** The procedures that might be followed in an emergency will depend on whether the House of Representatives is actually in session or stands adjourned, or Parliament has been prorogued, or has been dissolved or has expired.

B12 There is no difficulty if Parliament is actually in session and the House is in a sitting period, unless the impact of the emergency is such that there must be a change in the place of meeting of Parliament (paras B20-B21).

B13 If Parliament has been prorogued or dissolved (or has expired) the position is governed by the Constitution Act 1986:

The Governor-General may by Proclamation summon Parliament to meet at such place and time as may be appointed therein ... (s 18(1))

The Governor-General also prorogues or dissolves Parliament by Proclamation (s 18(2)). The three powers - summons, prorogation and dissolution - are by constitutional convention exercised by the Governor-General on the advice of the Prime Minister, who countersigns the Proclamation. Under s 20 of the Constitution Act 1986 parliamentary business does not carry over to the next session on the prorogation of Parliament unless the House of Representatives resolves to that effect.

B14 In an emergency the Governor-General can summon Parliament to meet if it has been prorogued, or to meet as soon as the election writs have been returned if it has been dissolved or has expired (Constitution Act 1986 s 19).

B15 **Error! Bookmark not defined. Error! Bookmark not defined.**

the following situations:

Difficulties can arise in

- The House of Representatives has been adjourned and it is desired to bring forward or postpone the meeting or to change the place of meeting of Parliament.
- The House is already sitting and it is desired to change the place of meeting of Parliament.

CHANGING THE DAY OF AN ADJOURNMENT

B16 The Standing Orders of the House of Representatives contain no provisions under which a meeting of the House that has been adjourned to a particular day can be brought forward or postponed by the Speaker (compare Civil Defence Act 1983 s49(3)). The only formal action that can be taken requires the Governor-General to issue two Proclamations, one to prorogue the session of Parliament, and the other to re-summon Parliament for an earlier or later date. The second Proclamation can also change the place of meeting of Parliament if this is necessary.

B17 The House of Representatives' debate on 22 January 1991 on the Government's decision to send transport aircraft and a medical team to the Gulf was made possible only by the prorogation and re-summoning of Parliament. On 19 December 1990 the House was adjourned until 19 February 1991. On 18 January 1991 the Governor-General issued two Proclamations, one proroguing Parliament until 22 January 1991, the other summoning Parliament to meet on that day (New Zealand Gazette, Issue No 6, 18 January 1991). On 22 January the Governor-General opened the second session of the forty-third Parliament. The House immediately gave leave for the reinstatement of business before the House at the conclusion of the preceding session (512 NZPD 4, 22 January 1991).

B18 A more straightforward way of changing the date of an adjourned meeting would be to make an addition to the Standing Orders of the House of Representatives. The Speaker could be authorised, at the request of the Prime Minister, to bring forward the day of an adjourned meeting of the

House. A useful precedent is provided in the Standing Orders of the House of Commons in the United Kingdom:

12. Earlier meeting of House in certain circumstances. (1) Whenever the House stands adjourned and it is represented to the Speaker by Her Majesty's Ministers that the public interest requires that the House should meet at the time earlier than that to which the House stands adjourned, Mr Speaker, if he is satisfied that the public interest does so require, may give notice that, being so satisfied, he appoints a time for the House to meet, and the House shall accordingly meet at the time stated in such notice. (Boulton (ed), Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (21st ed Butterworths, London, 1989) 980)

B19 An important feature of this Standing Order is the requirement that the Speaker must be satisfied that the public interest requires that the House should hold an earlier meeting. A Standing Order along the lines of this House of Commons precedent would cover a wider range of emergency situations if it authorised the Speaker to postpone as well as to bring forward the day to which the House has been adjourned. However, such an extension is open to the objection that it might be used by a government in circumstances that did not justify a postponement.

CHANGING THE PLACE OF MEETING

B20 The practice is to include the place of meeting in the Proclamation summoning Parliament. In the past Parliament has been summoned to meet "in the Parliament House, in the City of Wellington". More recently Parliament has been summoned to meet "in the City of Wellington" because Parliament is now meeting in its temporary chambers in Bowen House (New Zealand Gazette, Issue No 205, 22 November 1990).

B21 The effect of s 18 of the Constitution Act 1986 (para B13) would appear to be that, once Parliament has met, the place of meeting cannot be changed without the prorogation of Parliament and the summoning of a new session. The Constitution Act should therefore be amended to make it clear that, if Parliament has met in a particular place in response to a summons, it can be adjourned, if necessary by the Speaker at the request of the Prime Minister, to another place as well as another time, without the need to prorogue Parliament.

PROPOSALS

B22 The following proposals discussed in paras B2-B21 are incorporated in Chapter IV of this Report (para 4.56):

- **Error! Bookmark not defined.Error! Bookmark not defined.** Clause XII of the Letters Patent Constituting the Office of Governor-General of New Zealand should be amended to include High Court Judges, in order of seniority, amongst the persons who can be called upon to act as the Administrator of the Government and so to perform the functions of the office of Governor-General.

- When an emergency provision involves the intervention of the Governor-General in Council consideration should be given to the desirability of providing for the possibility that the Governor-General or members of the Executive Council may not be available to act.
- The House of Representatives should consider the desirability of making a Standing Order under which the Speaker of the House can, if satisfied that it is in the public interest, bring forward (or possibly postpone) the day to which the House has been adjourned.
- The Constitution Act 1986 should be amended to make it clear that, if Parliament has met in a particular place in response to a summons, it can be adjourned, if necessary by the Speaker at the request of the Prime Minister, to another place as well as another time, without the need to prorogue Parliament.

CONTROL OF EMERGENCIES BY THE HOUSE OF REPRESENTATIVES

B23 We have been discussing the procedural steps that may need to be taken to hold a meeting of the House of Representatives during an emergency. The assumption has been that the emergency is one calling for the attention of the House. Not all emergencies fall within this category, but there are a number of procedures that are available to ensure that the House has the opportunity to consider those emergencies which do call for its attention.

B24 This is an issue on which the government of the day can normally be expected to take an initiative. This was the case with the recent debate on the Gulf crisis. There are also procedures generally available to the House which may enable it to consider emergency issues (paras 5.96-5.99).

B25 In some cases the emergency legislation itself will include provisions involving Parliament and the House of Representatives in the response to an emergency. These may relate to

- **informing the House**

- requiring the House to meet
- action by the House
- allocation of parliamentary time
- situations where Parliament is unable to meet.

INFORMING THE HOUSE OF REPRESENTATIVES

B26 Emergency legislation may require that the House of Representatives is to be advised of a declaration of a state of emergency. Section 49(1) of the Civil Defence Act 1983 requires that in the case of a national emergency this be done "forthwith" (compare Civil Defence Act 1983 s 50(2)). In other situations there might be a requirement that the action be taken within a specified number of sitting days (Emergencies Act 1988 (Canada) s 58).

B27 Under the Regulations (Disallowance) Act 1989 s 4 regulations are to be laid before the House of Representatives not later than the sixteenth sitting day after the day on which they are made. In an emergency statute this process might be expedited. Thus emergency regulations under the Civil Defence Act 1983 are to be laid before the House not later than seven days after they have been made (compare draft War Emergencies Act s 17, Appendix D).

B28 Emergency legislation may require that a Minister or official is to report to the House of Representatives on the exercise of emergency powers (International Terrorism (Emergency Powers) Act 1987 s 17).

HOUSE OF REPRESENTATIVES REQUIRED TO MEET

B29 The provision that the House of Representatives is to be informed of a declaration of emergency may be supplemented by a provision ensuring that the House meets to consider a declaration of emergency or emergency regulations. Thus the Civil Defence Act 1983 s 49 provides that, when a Proclamation of a state of national emergency has been made, a House which has been adjourned or a Parliament which has been prorogued is to meet within seven days of the making of the Proclamation. If Parliament has been dissolved or has expired, it is to meet not later than seven days after the latest day appointed under the Electoral Act 1956 for the return of the election writs. In the case of prorogation, dissolution or expiry, this acceleration is effected by Governor-General's Proclamation; in the case of adjournment by the Speaker of the House. There are no comparable provisions in respect of a declaration of a state of national civil defence emergency although the House is to be advised "as soon as practicable" that a declaration has been made (s 50).

B30 There could be a number of reasons why it would be inappropriate to require Parliament or the House of Representatives to meet to consider a declaration of a state of emergency or an emergency regulation (see paras 8.42-8.43, 9.40-9.41). Nevertheless, there could be a situation in which

issues arising during the emergency should be addressed in the House. In particular the House might wish to consider an emergency regulation. This situation would be met by a provision under which members of Parliament could themselves take the initiative in requiring the government to arrange for the House of Representatives to meet to discuss the emergency.

B31 The Canadian Emergencies Act 1988 ss 59 and 61 contains procedures under which a notice of motion signed by 20 members of the House of Commons to the effect that a declaration of emergency be revoked or an emergency order be revoked or amended is to be taken up, considered and disposed of within stated periods (see para B41). These provisions assume that the House is already sitting. Under the 1988 Act all declarations of emergency have to be confirmed by the House, and there is a procedure (s 58) for calling the House together for this purpose similar to that in s 49 of the Civil Defence Act 1983.

B32 In the New Zealand situation an extension of the Canadian precedent might be adopted in the case of those emergencies which might develop in a way calling for the attention of the House of Representatives, but in which a provision requiring that the House be called together was not appropriate. That is, a prescribed number of members of Parliament might be empowered to require the Speaker to arrange for the House to meet if it stands adjourned, or the government to arrange for Parliament to meet as soon as practicable if it has been prorogued or dissolved or has expired.

ACTION BY THE HOUSE OF REPRESENTATIVES

B33 What action can the House of Representatives be asked to take or authorised to take in respect of a declaration of a state of emergency or of emergency regulations?

B34 The emergency statute may require that a declaration of a state of emergency is to be confirmed by the House of Representatives within a specified time. If not so confirmed, it is revoked. This procedure may also apply to any extension of the state of emergency (see draft War Emergencies Act s 14, Appendix D). An alternative procedure is to require that any extension of a declaration is to be made by the House (Defence Act 1990 s 9; and see para B39). The emergency statute may also, with or without a confirmation requirement, authorise the House to revoke a declaration of emergency (draft War Emergencies Act s 15, Appendix D).

B35 The House of Representatives may be given the opportunity to confirm emergency regulations. Thus under the Public Safety Conservation Act 1932 s 3(3) (repealed) a resolution of the House was required to continue emergency regulations in force after 14 days from their being laid before the House (compare Petroleum Demand Restraint Act 1981 s 6(1)).

B36 An emergency statute may authorise the House of Representatives to amend or revoke emergency regulations (Civil Defence Act 1983 s 79(8)). The Regulations (Disallowance) Act 1989 (ss 5, 9) now provides procedures under which the House can disallow, amend or revoke and substitute regulations (see para B40).

ALLOCATION OF PARLIAMENTARY TIME

B37 While the House of Representatives is sitting the question can arise whether the government is prepared to allocate parliamentary time for the consideration of emergency issues. This is not a difficulty when the government is required to obtain House confirmation within a specified time of any action it has taken or to obtain House extension of an authority to take emergency action (see para B39).

B38 The issue of availability of parliamentary time can, however, arise if the House is given no specific responsibilities in respect of a declaration of which it has been informed. This may be the position even in those cases in which the obligation to inform the House is accompanied by a procedure for calling the House together (compare Civil Defence Act 1983 ss 49-50). The Government may not be prepared to initiate a debate. In that event, it can be expected that, where there is a reasonable call for a debate on a declaration of a state of emergency or on significant developments during the course of an emergency, the Speaker of the House will allow a motion that the House take notice of a definite matter of urgent public importance (Standing Order 89).

B39 Under the International Terrorism (Emergency Powers) Act 1987 s 7 and the Defence Act 1990 s 9 the extension of an authority to exercise emergency powers must be made by the House within a stated time (seven days and 14 days respectively). There are no provisions in either Act under which a meeting of the House can be expedited, although the Governor-General in Council can act for the House if the Parliament is dissolved or has expired (para B44). This means that a government wishing to extend an authority to take emergency action must either follow the procedure for calling the House together that is appropriate in the circumstances (para B11) and allocate parliamentary time for a consideration of the extension, or issue a new authority for the exercise of the emergency powers.

B40 The Regulations (Disallowance) Act 1989 deals with the issue of parliamentary time in the case of disallowance of regulations (s 6). If a notice of motion to disallow any regulations, given by a member of the Regulations Review Committee of the House of Representatives, is not disposed of within 21 sitting days the regulations are deemed to be disallowed. The same procedure is not available in respect of the amendment or substitution of regulations (s 9). The 21-day time frame of this provision will not be appropriate where an emergency regulation is under attack and in emergency legislation, might be reduced to, say, three days. Such a procedure would be justified only if there was a reasonable amount of support in the House for a particular notice of motion. However, the Standing Orders of the House of Representatives do not provide for more than one member to give notice of motion (compare the Canadian procedure discussed in para B41). The desired result can be achieved by providing that, if a specified number of Members of Parliament give, in substantially similar terms, a notice of motion to amend, revoke, or revoke and substitute a regulation, the procedure comes into operation. If one of the notices of motions has not been called, moved and disposed of within the time limit the amendment, revocation, or revocation and substitution is to be taken as having been made. This procedure is proposed in the Law Commission's draft War Emergencies Act s 17(4), Appendix D; and see s 15(2).

B41 Comparable procedures have been adopted in the Canadian Emergencies Act 1988. A motion that a declaration of emergency be revoked or an emergency order or regulation be revoked or amended may be signed by 20 members of the House of Commons. In the case of a declaration of emergency, the motion is to be taken up and considered within three sitting days and debated without interruption for not more than 10 hours. On the expiry of that time, or earlier, the Speaker is to put every question necessary for the disposition of the motion without further debate or amendment (s 59). In the case of an order or regulation the motion is to be taken up and considered within three sitting days, it is to be debated without interruption and the question is to be put when the House is ready (s 61). (The same procedures are available in the Senate on the motion of 10 members of the Senate.)

PARLIAMENT UNABLE TO MEET

B42 **Error! Bookmark not defined. Error! Bookmark not defined.** Parliament may be unable to meet either because it is dissolved or has expired or because the emergency makes a meeting impracticable.

B43 **Error! Bookmark not defined. Error! Bookmark not defined.** When Parliament is dissolved or has expired the only action that can be taken to expedite the passage of emergency legislation or to involve the House of Representatives in the control or monitoring of government action is to arrange for the summoning of Parliament for a day immediately following the return of the election writs (compare s 49 of the Civil Defence Act 1983 (para B29); and see the Constitution Act 1986 s 19).

B44 **Error! Bookmark not defined. Error! Bookmark not defined.** Emergency legislation may require that an authority to exercise emergency powers lapses after a specified period unless it is extended by a resolution of the House of Representatives. The practice has been to include a provision for the Governor-General in Council to carry out this function during a dissolution of or on the expiry of Parliament. (See the International Terrorism (Emergency Powers) Act 1987 s 7(3); and Defence Act 1990 s 9(8)(b).)

B45 There could be an emergency, such as a major earthquake in the Wellington area, which makes it impracticable for the House of Representatives to meet in Wellington or elsewhere. In that event there would be problems if there were provisions under which a declaration of a state of emergency, or emergency regulations, were to lapse if not confirmed by the House within a specified time. It may have been in anticipation of this difficulty that the Civil Defence Act 1983, although providing for the reference of declarations of a national emergency or a national civil defence emergency to the House, gives the House no specific responsibilities in relation to the declarations (paras B26, B29). To the same effect is the

provision in s 79 of the Act under which the House must take an initiative if it wishes to revoke or amend emergency regulations. There is no requirement that the regulations be confirmed by the House.

CONCLUSION

B46 A choice may be made from a number of procedures that are available for ensuring that the House of Representatives has an opportunity to consider an emergency response. See the summary list in Chapter V, para 5.102. In some situations a selection of these procedures may be appropriate.

APPENDIX C

Court Challenges to Emergency Action

- C1 This appendix summarises the consequences of court challenges to the validity of
- declarations of a state of emergency, and
 - regulations made and other actions taken during a state of emergency.

DECLARATIONS OF A STATE OF EMERGENCY

C2 Challenges to the legality of declarations of states of emergency have, in general, failed. The Malaysian Constitution empowered the Head of State to proclaim a state of emergency if "satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened" (Constitution of Malaysia Article 150). As a consequence of difficulties arising from the dismissal of the Chief Minister of Sarawak, the Head of State made such a Proclamation. The Privy Council rejected the challenge to its validity. It was not, the Judicial Committee said, for it to criticise or comment on the wisdom or expediency of the steps taken by the Government to deal with the constitutional situation. The questions of the gravity of the emergency and the existence of a threat to the security of Sarawak "were essentially matters to be determined according to the judgment of the responsible Ministers in the light of their knowledge and experience." (Ningkan v Government of Malaysia [1970] AC 379, 391) The Privy Council left open the question (on which the Court below had divided) whether the validity of the Proclamation was even justiciable: in its view, that question of far-reaching importance remained "unsettled and debatable" on the present state of the authorities (391-392).

C3 Challenges to the validity of Proclamations or declarations of emergency made in New Zealand, India and Australia have also failed, with similar comments being made about the very broad, or even absolute, discretion of the Government. See, for example, Hewett v Fielder [1951] NZLR 755, 760 (SC (Full Ct)); Bhagat Singh v King Emperor (1931) LR 58 IA 169 (JC) (the Governor-General "alone" could decide whether there was an emergency and had "absolute power" in making Ordinances); King-Emperor v Benoari Lal Sarma [1945] AC 14, 22 (JC); and Dean v Attorney-General of Queensland

[1971] Qd R 391 (SC); see also The State v Adel Osman [1988] LRC (Const) 212, 220 (Sierra Leone SC). For a most interesting discussion of the theories of necessity and exceptional circumstances see Mitchell v DPP [1986] LRC (Const) 35 (Grenada CA).

EMERGENCY REGULATIONS AND OTHER ACTIONS

C4 The argument and judgments in the cases just cited link closely with, and often refer to, cases on the validity of regulations and other actions taken by the executive following the Proclamation of a state of emergency or under particular emergency legislation. Once again the courts have stressed the great width of the powers conferred on the executive - and the consequences of that for the courts. "The legislature has left the matter to His Majesty and this court has no control over it" (R v Comptroller General of Patents Ex parte Bayer Products Ltd [1941] 2 KB 306, 315 (CA); and also at 311-312).

C5 For further examples see Lipton Ltd v Ford [1917] 2 KB 647, 654 (upholding an order taking a supply of raspberries for the Army); R v Halliday [1917] AC 260 (HC) (a majority upholding regulations providing for the internment by the Secretary of State of any person of hostile origin or associations where, on the recommendation of a competent naval or military authority, the detention appeared to the Secretary of State expedient for serving the public safety or the defence of the realm); Hackett v Lander and Solicitor-General [1917] NZLR 947 (SC); Liversidge v Anderson [1942] AC 206 (HL) (a majority holding that a court cannot inquire whether in fact the Secretary of State had reasonable grounds for the belief that a person was of hostile origin and by reason thereof ought to be controlled, and detained); Reference re Regulations (Chemicals) under War Measures Act [1943] 1 DLR 248 (SCC); Attorney-General for Canada v Hallet & Carey Ltd [1952] AC 427 (JC); Ross-Clunis v Papadopoulos [1958] 1 WLR 546 (JC); McEldowney v Forde [1971] AC 632 (HL (NI)) (a majority upholding the extension of regulations made under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, which made it an offence to do any act promoting the objects of any unlawful association, to include "republican clubs' or any like organisation howsoever described").

C6 While the cases on the whole uphold the validity of the executive action, there are exceptions. If the relevant constitutional or legislative instrument requires that named persons take the requisite steps to declare an emergency and others act in their place, the Proclamation may be invalid (Law Society of Lesotho v Minister of Defence [1988] LRC (Const) 226 (Lesotho HC)). The courts have also struck down regulations made under broad empowering provisions where the regulations purport to abrogate specific rights long recognised by the law, such as

- the right of access to the courts (Chester v Bateson [1920] 1 KB 829),
- the right to the fair market value of goods which are requisitioned and to a judicial determination of the amount (Newcastle Breweries Ltd v The King [1920] 1 KB 854), and
- the right to be taxed only by Parliament unless it has clearly authorised some other body to tax (Attorney-General v Wilts United Dairies (1921) 37 TLR 884 (CA); 38 TLR 781 (HL)).

APPENDIX D
Draft War Emergencies Act

WAR EMERGENCIES ACT 19[91]

Public Act [] of 19[91]

Assented to on []

Comes into force on []

CONTENTS

PART 1

PURPOSES AND EFFECT

- 1 Purposes of the Act
- 2 Definitions
- 3 Functions, duties and powers under other Acts or general law not affected

PART 2

DECLARATION OF A WAR EMERGENCY AND WAR EMERGENCY REGULATIONS

- 4 Declaration of a war emergency
- 5 War emergency regulations
- 6 Duration of a declaration of a war emergency
- 7 Duration of war emergency regulations
- 8 Continuation of a declaration of a war emergency
- 9 Revocation of a declaration of a war emergency
- 10 Public to be informed
- 11 Substituted authority where Governor-General in Council unable to act

PART 3

SUPERVISION BY THE HOUSE OF REPRESENTATIVES

- 12 House of Representatives to be informed
- 13 Confirmation by the House of Representatives of a declaration of a war emergency
- 14 Confirmation by the House of Representatives of the continuation of a declaration of a war emergency
- 15 Revocation by the House of Representatives of a declaration of a war emergency
- 16 Early summoning of Parliament or meeting of the House of Representatives
- 17 Amendment or revocation of war emergency regulations by the House of Representatives

PART 4

COMPENSATION

- 18 Right to just compensation
- 19 Protection from legal proceedings

20 Regulations on compensation

PART 5

AMENDMENTS

21 Amendments

SCHEDULES

1 International Covenant on Civil and Political Rights (Extracts)

2 Consequential Amendments

The Parliament of New Zealand enacts the War Emergencies Act 19[91]:

PART 1

PURPOSES AND EFFECT

1 Purposes of the Act

1 The purposes of this Act are

- (a) to empower the Government of New Zealand to respond to situations arising from a war, other armed conflict or comparable event which seriously endanger the safety of New Zealand citizens or the sovereignty, security or territorial integrity of New Zealand, by declaring a war emergency and making war emergency regulations, and
- (b) to protect human rights and fundamental freedoms by providing that a war emergency may be declared only if the situation cannot otherwise be dealt with effectively, that war emergency regulations may not be inconsistent with the obligations of the Government of New Zealand under the specified treaties and Acts, and that the exercise of powers under this Act is subject to the supervision of the House of Representatives.

Definitions: for "New Zealand", "war emergency" and "war emergency regulation" see s 2(1).

For the meaning of "armed conflict" see the Geneva Conventions, the First Protocol and the Second Protocol referred to in s 5.

For provisions identifying who is a New Zealand citizen, see the Citizenship Act 1977 and the Citizenship (Western Samoa) Act 1982.

2 Definitions

(1) In this Act

biological incident means the detonation of a biological weapon or any other event which releases microbial or other biological agents, or toxins whatever their origin or method of production, of types or in quantities that have no justification for prophylactic, protective or other peaceful purposes;

New Zealand, when used as a territorial description, includes the self-governing state of the Cook Islands, the self-governing state of Niue, Tokelau and the Ross Dependency;

nuclear incident means the detonation of a nuclear explosive device or any other event which releases nuclear energy or gives rise to radioactive fallout, ionising radiation or an electromagnetic pulse;

Proclamation means a Proclamation made by the Governor-General in Council and, where the case requires, includes a writing signed under section 11;

war emergency means a war emergency declared under section 4;

war emergency regulation means a regulation made under section 5 and includes a provision of such a regulation, or a rule or a provision of a rule made under the authority of such a regulation, or a rule or a (2) A reference to a time for the doing of any thing under this Act means the date and the time of day for the doing of that thing; and if no time of day on that date is specified or required to be otherwise arrived at, means the beginning of the day on that date.

Origin: "New Zealand" and "Proclamation" cf [Interpretation Act 1991](#), s 19 [Definitions].

For the meaning of "biological weapon" see the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Article 1, reproduced in the Fifth Schedule to the [New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987](#). For the meaning of "nuclear explosive device" see s 2 [Interpretation] of the [New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987](#).

3 Functions, duties and powers under other Acts or general law not affected

Except as otherwise provided in this Act or in a war emergency regulation, nothing in this Act or in such a regulation limits, or is in substitution for, or in any way affects the functions, duties or powers of any person under any other enactment or rule of law.

Origin: Civil Defence Act 1983, s 4.

Definitions: for "war emergency regulation" see s 2(1); for "enactment" see Interpretation Act 19[91], s 19(1) [Definitions].

PART 2
DECLARATION OF A WAR EMERGENCY
AND WAR EMERGENCY REGULATIONS

4 Declaration of a war emergency

- (1) The Governor-General in Council may, by Proclamation, declare a war emergency if the Governor-General in Council believes, on reasonable grounds,
 - (a) that, by reason of an actual or imminent war, other armed conflict, nuclear incident or biological incident, there is a situation which
 - (i) seriously endangers the lives, health or safety of New Zealand citizens, or
 - (ii) seriously threatens the ability of the Government of New Zealand, or of a self-governing state, to preserve the sovereignty, security or territorial integrity of New Zealand, or of that self-governing state, and
 - (b) that the situation is of such proportions or nature that it cannot be dealt with effectively except by authorising the Governor-General in Council to make war emergency regulations under this Act.
- (2) A declaration of a war emergency must specify the situation constituting the emergency.
- (3) A declaration of a war emergency comes into force at the time when the declaration is made or at the time specified in the declaration, whichever is the later.
- (4) In this section, **self-governing state** means the self-governing state of the Cook Islands or the self-governing state of Niue, as the case requires.

Origin: Emergencies Act 1988 (Canada), ss 3, 37, 38, 39(1); Civil Defence Act 1983, s 2, definition of "national emergency", and s 46.

Definitions: for "biological incident", "New Zealand", "nuclear incident" and "Proclamation" see s 2(1).

For "Governor-General in Council" see Interpretation Act 19[91], s 19(1) and see s 16 of that Act concerning the powers of the Administrator of the Government when the Governor-General is unable to discharge any of the functions of the office.

See s 11 of this Act for an alternative source of authority to declare a war emergency when it is not feasible for a Proclamation to be made by the Governor-General in Council.

For the meaning of "armed conflict" see the Geneva Conventions, the First Protocol and the Second Protocol referred to in s 5 of this Act.

For provisions identifying who is a New Zealand citizen see the Citizenship Act 1977 and the Citizenship (Western Samoa) Act 1982.

5 War emergency regulations

(1) The Governor-General may, by Order in Council, at any time while a declaration of a war emergency is in force, make such regulations as the Governor-General in Council believes, on reasonable grounds, are necessary or expedient for dealing with a war emergency.

(2) War emergency regulations may

(a) create offences in respect of the breach of a war emergency regulation, or non-compliance with any direction given by a person acting under an authority conferred by a war emergency regulation;

(b) prescribe as the penalty for an offence created by a war emergency regulation

(i) where the offence is committed by an individual, imprisonment for a term not exceeding 12 months or a fine not exceeding \$15,000 or both;

(ii) where the offence is committed by a body corporate, a fine not exceeding \$40,000.

(c) authorise any person specified in a war emergency regulation to make rules for any of the purposes for which war emergency regulations may be made.

(3) Subject to subsection (5),

(a) no war emergency regulation is invalid because it deals with any matter already provided for by or under any other Act, or because of repugnancy to or inconsistency with any other Act, and

(b) in the event of any conflict between any war emergency regulation and any other Act, regulation or bylaw, a war emergency regulation prevails.

(4) No war emergency regulation shall authorise any measure derogating from the obligations of the Government of New Zealand under

(a) articles 4, 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 of the International Covenant on Civil and Political Rights, the English text of which articles is set out in Schedule 1, or

(b) the Geneva Conventions, the First Protocol or the Second Protocol (the English texts of which, without their annexes, are set out in the Schedules to the Geneva Conventions Act 1958).

(5) No war emergency regulation shall

(a) require any person to be appointed to, or enlisted or engaged in the New Zealand armed forces, or

(b) provide for the detention, imprisonment or internment of any New Zealand citizen by reason of that citizen's national origin, or

(c) be inconsistent with any provision of

(i) this Act, or

(ii) the Geneva Conventions Act 1958 or any regulations made under that Act, or

(iii) the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987, or

(iv) section 37 [Liability of minors for active service overseas] of the Defence Act 1990.

(6) A war emergency regulation comes into force at the time at which the regulation is made, or the time specified in the regulation, whichever is the later.

(7) In this section **Order in Council**, where the case requires, includes a writing signed under section 11.

Origin:

(1): Emergencies Act 1988 (Canada), s 40(1); cf Civil Defence Act 1983, s 79(1).

(2): Civil Defence Act 1983, s 79(3); Emergencies Act 1988 (Canada), s 40(2).

(3): Civil Defence Act 1983, s 79(5) and (6).

(5)(a): Emergencies Act 1988 (Canada), s 40(1.1).

(5)(b): cf Emergencies Act 1988 (Canada), s 4(b).

(5)(c): cf Emergencies Act 1988 (Canada), s 4(a).

(6): cf Civil Defence Act 1983, s 79(7).

Definitions: for "war emergency" see s 2(1).

For "Governor-General in Council" and "Order in Council" see Interpretation Act 19[91], s 19(1), and see s 16 of that Act concerning the powers of the Administrator of the Government when the Governor-General is unable to discharge any of the functions of the office.

See s 11 of this Act for an alternative source of authority to make war emergency regulations when it is not feasible for the regulations to be made by the Governor-General in Council.

For the meaning of "New Zealand armed forces" see the Defence Act 1990, s 11(2).

For provisions identifying who is a New Zealand citizen see the Citizenship Act 1977 and the Citizenship (Western Samoa) Act 1982.

6 Duration of a declaration of a war emergency

Unless it is sooner revoked or continued in force in accordance with this Act, a declaration of a war emergency ceases to be in force

(a) on the expiration of 3 months from the time at which the declaration came into force, or

(b) at the time or on the expiration of the period specified in the declaration, or if the House of Representatives has passed a resolution under section 13 confirming the declaration for such shorter or longer period as is specified in the resolution, then on the expiration of that period,

whichever is the earlier.

Origin: Emergencies Act 1988 (Canada), s 39(2); Civil Defence Act 1983 ss 47(2) and 48(1).

Definitions: for "war emergency" see s 2(1).

7 Duration of war emergency regulations

A war emergency regulation made during the currency of a declaration of a war emergency ceases to be in force at

(a) the time at which the declaration ceases to be in force, or

(b) the time specified by the regulation, or

(c) the time from which the regulation is revoked by the Governor-General in Council,

whichever is the earliest, subject, however, to the operation of section 17(3).

Origin: [Civil Defence Act 1983](#), s 79(7); [Emergencies Act 1988](#) (Canada), s 45(1).

Definitions: for "war emergency" and "war emergency regulation" see s 2(1).

8 Continuation of a declaration of a war emergency

(1) If, while a declaration of a war emergency is in force, the Governor-General in Council believes, on reasonable grounds, that the situation constituting the emergency still comes within section 4, the Governor-General in Council may, by Proclamation, continue the declaration in force for a further period, not exceeding 6 months, as is specified in the Proclamation.

(2) Before making a Proclamation continuing in force a declaration of a war emergency, the Governor-General in Council must review each war emergency regulation then in force, and determine whether there are reasonable grounds for believing that it continues to be necessary or expedient for dealing with the emergency, and, to the extent that there are not, the Governor-General in Council must revoke or amend that war emergency regulation.

(3) Where a Proclamation has been made under subsection (1), the declaration of a war emergency continues in force, unless sooner revoked, until the time at which the period specified in the Proclamation expires or, if the House of Representatives has passed a resolution under section 14 confirming the continuation in force of the declaration for such shorter or longer period as is specified in the resolution, then on the expiration of that period.

(4) A declaration of a war emergency may be continued in force more than once under this section.

Origin: [Emergencies Act 1988](#) (Canada), s 43.

Definitions: for "Proclamation", "war emergency" and "war emergency regulation" see s 2(1).

For "Governor-General in Council" see the [Interpretation Act 19\[91\]](#), s 19(1) and see s 16 of that Act concerning the powers of the Administrator of the Government when the Governor-General is unable to discharge any of the functions of the office.

See s 11 of this Act for an alternative source of authority to continue a declaration of a war emergency when it is not feasible for the Proclamation to be made by the Governor-General in Council.

9 Revocation of a declaration of a war emergency

A declaration of a war emergency may be revoked by

- (a) the Governor-General in Council, by Proclamation, with effect from the time at which the Proclamation is made or such later time as is specified in the Proclamation, being a time not later than that at which the declaration would otherwise cease to be in force;
- (b) the House of Representatives under section 15(1);
- (c) the operation of section 13, section 14 or section 15(2).

Origin: Emergencies Act 1988 (Canada), ss 41, 42, 58(7), 59(3), and 60(6); Civil Defence Act 1983, s 47(2).

Definitions: for "Proclamation", "war emergency" and "war emergency regulation" see s 2(1).

For "Governor-General in Council" see the Interpretation Act 19[91], s 19(1) and see s 16 of that Act concerning the powers of the Administrator of the Government when the Governor-General is unable to discharge any of the functions of the office.

See s 11 of this Act for an alternative source of authority to revoke a declaration of a war emergency when it is not feasible for the declaration to be revoked by the Governor-General in Council.

10 Public to be informed

(1) The Prime Minister or another minister of the Crown must immediately inform the public, by any means practicable in the circumstances, that a Proclamation has been made declaring a war emergency or continuing in force or revoking a declaration of a war emergency.

(2) A Proclamation referred to in subsection (1) must be published in the Gazette as soon as practicable.

Origin: Civil Defence Act 1983, s 46(5).

Definitions: for "Proclamation" and "war emergency" see s 2(1).

11 Substituted authority where Governor-General in Council unable to act

(1) This section applies on any occasion when the need arises for the exercise of a power vested by this Act in the Governor-General in Council (except the power to make regulations on compensation under section 20) and it is not possible, without undue delay, for the power to be exercised by the Governor-General acting on the advice and with the consent of the Executive Council.

(2) If on an occasion when this section applies, it appears to the Governor-General that the Executive Council is dispersed or that for any other reason it is not possible to hold a meeting of the

Council, the power may be exercised by the Governor-General on the advice of the Prime Minister, by a writing signed by the Governor-General and counter-signed by the Prime Minister.

(3) If on an occasion when this section applies, it appears to three or more members of the Executive Council present at a meeting of the Council that the Governor-General is out of communication with the Executive Council, the power may be exercised by the presiding member of the Council on the advice and with the consent of the Council, by a writing signed by that presiding member.

(4) If on an occasion when this section applies, it appears to the Prime Minister that the Executive Council is dispersed or that for any other reason it is not possible to hold a meeting of the Council and that the Governor-General is out of communication with the Prime Minister, the power may be exercised by the Prime Minister by a writing signed by him or her.

(5) If on an occasion when this section applies, it appears to any other available Minister or, if more than one other Minister is available, to the most senior of them, that it is not possible for the power to be exercised under subsection (2), (3) or (4), the power may be exercised by that Minister, by a writing signed by him or her.

(6) A writing signed under this section has, for the purposes of this Act, the same effect as a Proclamation or an Order in Council, as the case requires.

(7) No question may be raised as to whether the occasion authorising any person to exercise any power in accordance with this section has arisen or has ceased.

Origin: Civil Defence Act 1983 ss 46(2)-(4) and (6), and s 47(3).

Definitions: for "Proclamation" see s 2(1).

For "Order in Council" see the Interpretation Act 1991, s 19(1) and see s 16 of that Act concerning the powers of the Administrator of the Government when the Governor-General is unable to discharge any of the functions of the office.

PART 3

SUPERVISION BY THE HOUSE OF REPRESENTATIVES

12 House of Representatives to be informed

(1) The Prime Minister or another Minister of the Crown must inform the House of Representatives of the making of a Proclamation declaring a war emergency or continuing in force or revoking a declaration of a war emergency, immediately, if the House of Representatives is then sitting, or, if it is not then sitting, as early as practicable on its next sitting day.

(2) In the case of a Proclamation declaring a war emergency, the Prime Minister or other Minister must explain the reasons for the declaration.

(3) In the case of a Proclamation continuing in force the declaration of a war emergency, the Prime Minister or other Minister must

(a) explain the reasons for continuing the declaration in force for the period specified in the Proclamation; and

(b) lay before the House a report on the review of war emergency regulations conducted under section 8(2), together with a list of those war emergency regulations to be continued in force.

Origin: Civil Defence Act 1983, s 49(1); cf Emergencies Act 1988 (Canada), s 58(1).

Definitions: for "war emergency" and "war emergency regulations" see s 2(1).

13 Confirmation by the House of Representatives of a declaration of a war emergency

If, on the sitting day when the House of Representatives is informed, under section 12, of the making of a Proclamation declaring a war emergency, the House of Representatives does not pass a resolution confirming the declaration of a war emergency

(a) for the period specified in the Proclamation, or

(b) for such shorter or longer period (not being more than 3 months from the time at which the declaration came into force) as is specified in the resolution,

the declaration (unless it has earlier ceased to be in force) is revoked as from the expiration of that sitting day.

Origin: Emergencies Act 1988 (Canada), s 58(1).

Definitions: for "Proclamation" and "war emergency" see s 2(1).

14 Confirmation by the House of Representatives of the continuation of a declaration of a war emergency

If, on the sitting day when the House of Representatives is informed, under section 12, of the making of a Proclamation continuing in force a declaration of a war emergency, the House of Representatives does not pass a resolution confirming the continuation in force of the declaration

(a) for the period specified in the Proclamation of continuation, or

(b) for such shorter or longer period (not being more than 6 months from the time at which that Proclamation was made) as is specified in the resolution,

the declaration (unless it has sooner ceased to be in force) is revoked as from the expiration of that sitting day or the time at which the declaration would cease to be in force but for the proposed continuation, whichever is the later.

Origin: Emergencies Act 1988 (Canada), s 60.

Definitions: for "Proclamation" and "war emergency" see s 2(1).

15 Revocation by the House of Representatives of a declaration of a war emergency

(1) At any time while a declaration of a war emergency is in force, the House of Representatives may revoke the declaration by resolution with effect from the time of the resolution or any later time (but not later than the time at which the declaration would otherwise cease to be in force) specified in the resolution.

(2) If, at the expiration of the third sitting day after the day on which not less than 10 members of Parliament have given, in substantially similar terms, notice of a motion to revoke a declaration of a war emergency

(a) the notices have not been withdrawn and no motion has been moved, or

(b) a motion to revoke a declaration of a war emergency has been called on and moved but has not been withdrawn or otherwise disposed of,

the declaration is revoked as from the expiration of that sitting day or the time of revocation specified in the motion, whichever is the later.

Origin: Emergencies Act 1988 (Canada), s 59; cf Regulations (Disallowance) Act 1989 ss 5 and 6.

Definitions: for "war emergency" see s 2(1).

16 Early summoning of Parliament or meeting of the House of Representatives

(1) If at the time when a Proclamation is made declaring a war emergency, or continuing in force a declaration of a war emergency, a circumstance referred to in subsection (2), (3) or (4) will delay the time at which the House of Representatives can be informed under section 12, Parliament shall be summoned, or a place and time shall be appointed for the House of Representatives to meet, in accordance with the applicable subsection.

(2) If Parliament has been prorogued until a date more than 7 days after the date of the declaration, or until a date which has not been determined, a Proclamation shall immediately be made under section 18 of the Constitution Act 1986 summoning Parliament to meet at the place and time appointed in the Proclamation, the time to be not more than 7 days after the date of the declaration.

(3) If Parliament has been dissolved or has expired and has not been summoned to meet on a date within 7 days of the date of the declaration, a Proclamation shall immediately be made under section 18 of the Constitution Act 1986 summoning Parliament to meet at the place and time appointed in the Proclamation, the time to be not more than 7 days after the date of the declaration or after the latest date appointed under the Electoral Act 1956 for the return of the writs for the election of members of Parliament, whichever is the later.

(4) If the House of Representatives has been adjourned until a date more than 7 days after the date of the declaration, or until a date which has not been determined, the Speaker of the House of Representatives shall immediately, by notice in the Gazette, appoint a place and time for the House of Representatives to meet, the time to be not more than 7 days after the date of the declaration; and the House of Representatives shall accordingly meet and sit at the place and time so specified.

Origin: Civil Defence Act 1983, s 49.

17 Amendment or revocation of war emergency regulations by the House of Representatives

(1) The Prime Minister or another Minister must lay every war emergency regulation before the House of Representatives not later than the second sitting day after the day on which it is made.

(2) The House of Representatives may, by resolution, exercise any power conferred on the Governor-General in Council by section 5 to

- (a) amend any war emergency regulation, or
- (b) revoke any war emergency regulation, or
- (c) having revoked a war emergency regulation, substitute any other war emergency regulation.

(3) If the House of Representatives passes a resolution amending, revoking, or revoking and substituting any war emergency regulation, the amendment, revocation or substitution comes into force at

- (a) the time of the passing of the resolution, or
- (b) the time (if any) specified in the resolution as the time at which the amendment, revocation or substitution is to come into force,

whichever is the later.

(4) If, at the expiration of the third sitting day after the day on which not less than 10 members of Parliament have given, in substantially similar terms, notice of a motion to amend, revoke, or revoke and substitute any war emergency regulation

- (a) the notices have not been withdrawn and no motion has been moved, or
- (b) a motion to amend, or revoke and substitute the war emergency regulation has been called on and moved and has not been withdrawn or otherwise disposed of,

the amendment, revocation or substitution shall be taken as having been made and as coming into force at the expiration of that sitting day or at the time specified in the motion as the time of amendment, revocation or substitution, whichever is the later.

(5) Notice of every resolution or notice of motion effecting any amendment, revocation or substitution of a war emergency regulation under this section shall be printed and published under section 4 of the Acts and Regulations Publication Act 1989 as if it were a regulation.

(6) Nothing in the Regulations (Disallowance) Act 1989 applies to any war emergency regulation.

Origin: Emergencies Act 1988 (Canada), s 61; Civil Defence Act 1983 s 79(7A) and (8); Regulations (Disallowance) Act 1989, ss 4-7, 9 and 10.

Definitions: for "war emergency regulation" see s 2(1).

PART 4
COMPENSATION

18 Right to just compensation

- (1) A person having an interest in any property
- (a) requisitioned under a war emergency regulation, or
 - (b) lost, damaged or destroyed as a result of anything done or purported to be done under a war emergency regulation,

is entitled to just compensation, out of money appropriated by Parliament, for the use of the property or any loss or damage suffered by that person and arising from that use, loss, damage or destruction, subject, however, to any regulations made under section 20.

(2) No compensation shall be paid to a person under this section unless that person, in consideration of the compensation, signs a release of any right of action which that person may have against the Crown in respect of the use of the property or any loss or damage arising from its use, loss, damage or destruction.

(3) Where a person entitled to any compensation under this section has a claim against any other person (excluding the Crown) for damages or compensation for the use, loss, damage or destruction of property in respect of which that compensation is payable, the Crown may do all or any of the following things:

- (a) deduct from the compensation payable to that person under this section any amount recovered by that person through the enforcement of that claim;
- (b) recover from any person to whom compensation has been paid under this section any amount that is in excess of the amount properly payable to that person, having regard to paragraph (a);
- (c) require, as a condition precedent to the payment of all or any of the compensation payable to that person under this section, that all reasonable steps be taken to pursue that claim or enable it to be pursued;
- (d) meet the whole or such part as the Crown thinks fit of the costs and expenses incurred in pursuing that claim.

(4) Subject to any regulations made under section 20, a court of competent jurisdiction may determine a dispute about the liability of the Crown to pay compensation under this section, or the amount of any compensation, or the entitlement of any person to all or part of the compensation payable.

Origin: Emergencies Act 1988 (Canada), s 48; cf Civil Defence Act 1983, ss 65 and 75; Defence Act 1990, s 10; Accident Compensation Act 1982, s 86.

Definitions: for "war emergency regulation" see s 2(1).

19 Protection from legal proceedings

(1) No action or proceeding shall be brought against any person to recover damages for any use, loss or destruction of, or damage to, any property or any loss or damage arising from that use, loss, damage or destruction on the ground that the use, loss, damage or destruction is due directly or indirectly to anything done or purported to be done, or to anything failed to be done, in the exercise or performance in good faith of that person's functions, duties or powers under this Act or any war emergency regulation.

(2) Subsection (1) does not relieve the Crown of any liability for damages which it would otherwise have under this or any other Act or any rule of law for the use, loss, damage or destruction referred to in that subsection, whether or not that liability arises from anything done or failed to be done by any person protected from legal proceedings by that subsection.

Origin: Emergencies Act 1988 (Canada), s 47; cf Civil Defence Act 1983, s 66.

Definitions: for "war emergency regulation" see s 2(1).

20 Regulations on compensation

The Governor-General may by Order in Council make regulations

(a) prescribing the form of applications for compensation and the manner of making application, and the information and evidence to be submitted and the procedure to be followed in the consideration of applications for compensation;

(b) prescribing the period within which applications for compensation must be made;

(c) prescribing the criteria to be used in determining the eligibility of any person for compensation;

(d) prescribing the methods and criteria to be used in assessing any use, loss, damage or destruction for which compensation is payable;

(e) prescribing the maximum amount of compensation that may be paid to any person, either generally or with respect to any particular use, loss, damage or destruction;

(f) prescribing the terms and conditions for the payment of compensation;

(g) providing for the payment of compensation in a lump sum or by periodic payments;

- (h) providing for pro rata payments of compensation;
- (i) establishing priorities among persons eligible for compensation on the basis of classes of persons or classes of use, loss, damage, destruction or otherwise;
- (j) providing for the giving of notices to persons affected by applications for compensation;
- (k) authorising any person or body (whether or not established by the regulations) to hear and determine any claim for compensation or any appeal from any such determination; and
- (l) providing generally for such matters as are contemplated by or necessary for giving full effect to this Part and for its due administration.

Origin: Emergencies Act 1988 (Canada), s 49.

Definitions: for "Order in Council" see Interpretation

Act 19[91], s 19(1).

PART 5

AMENDMENTS

21 Amendments

The enactments listed in Schedule 2 are consequentially amended as indicated.

SCHEDULE 1

(See s 5)

International Covenant on Civil and Political Rights

(Extracts)

Article 4

1 In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2 No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3 Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 6

1 Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2 In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3 When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4 Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5 Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6 Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1 No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2 No one shall be held in servitude.

...

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 15

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2 Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 18

1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2 No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3 Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4 The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

SCHEDULE 2

(See s 21)

Consequential Amendments

[See recommendations in Chapter IX for amendments to the Civil Defence Act 1983 to remove the references to "national emergencies" and make other changes to the provisions of that Act consequential on the enactment of a War Emergencies Act.

It would also be necessary to amend the Local Authorities Loans Act 1956, by omitting from s 21 the words "national emergency", and the Public Finance Act 1989, by omitting from s 13(1)(a) the words "state of national emergency or" and inserting in that section, after paragraph (a), the following paragraph

"(aa) A war emergency is declared under the War Emergencies Act 19[91]; or".]

APPENDIX E

Guidelines Agreed by Police and Media on Media Coverage of Terrorist Incidents (1984)

Terrorist Situations: Police/Media Policy:

- 1 The extremely serious nature of incidents involving terrorists means that effective police/media relations will be vital in minimising further risk to life.
- 2 While experienced reporters can be relied upon to exercise discretion and commonsense, there have been worrying incidents where broadcast or published reports have put people at risk. These have not been malicious or wilful but seemed to stem from a lack of appreciation of the dramatic effects reporters' actions or news contact can have on an offender.
- 3 A set of guidelines has been prepared which should serve the needs of both police and the news media. The guidelines make it clear that police have neither the authority nor the desire to diminish editorial responsibilities. On the other hand as police bear the direct consequences of any negative terrorist response evoked by media reports they expect media recognition of their operational perspective.
- 4 The guidelines are:
 - 4.1 A "terrorist situation" in which the agreed media liaison policy is to be invoked will be clearly designated as such by police from the earliest possible contact with the media.
 - 4.2 Police employ specially trained teams to negotiate with terrorists. It is therefore of prime importance that they be the sole group co-ordinating communication with the terrorists.
 - 4.3 Besieged terrorists should not be contacted without the consent of police. To do so may complicate a tense situation and prevent police from maintaining essential negotiations.
 - 4.4 Where terrorists contact a reporter the police should be told and given as full an account of the communication as soon as possible. Such information may be vital in bringing the operation to a satisfactory conclusion. Conversely withholding information could have dire consequences. If an editor or station manager prefers the police to instigate legal proceedings to secure the information the police still need to be told as soon as possible that contact has been made.
 - 4.5 While final editorial responsibility remains with editors and station managers, the media should be receptive to advice on the handling of any communication received. A police liaison officer will be available at all times for consultation on whether or not

the broadcast or publication of the communication is likely to exacerbate the operation.

- 4.6 Terrorists are likely to have access to radios and television receivers and possibly newspapers. For this reason the broadcast or publication of details of police movements, plans, staff, disposition, or speculation in these areas may help offenders and increase risk to police, hostages and the public. Therefore the closest liaison is necessary to ensure this type of broadcast is phrased so as not to assist offenders.
- 4.7 Delayed telecasts and broadcasts may be necessary to enable proper news media editing of material to ensure that no unauthorised information of value is made known to the terrorists. Final responsibility for what is published or broadcast rests with editors and station managers, but again they should remain fully receptive to police advice and requests.
- 4.8 In circumstances where the presence of large numbers of media representatives could impede the police operation, the concept of pool coverage may have to be considered. The selection of personnel to service pool coverage is a matter for the news media and not the police. Once invoked police would deal only with the media-appointed pool.
- 4.9 Reporters, photographers and film crews are not to place themselves in danger or positions where police extrication may become necessary.

APPENDIX F

A Background to Civil Defence in New Zealand

THE BRITISH PRECEDENT

F1 The provisions of the Civil Defence Act 1983 must be considered against the background of the development of New Zealand civil defence legislation in the period since the beginning of World War II. There is valuable material in Martin R Rawlinson's MA thesis, "Organisation for Disaster: The Development of Civil Defence in New Zealand: 1959-1970" University of Canterbury, 1971 and in Civil Defence in New Zealand: A Short History (Ministry of Civil Defence with the assistance of the Historical Branch Department of Internal Affairs, 1990).

F2 These publications trace the British influence. When the British Government embarked on a rearmament programme in 1935, it included provision for civil defence as part of home defence. Civil defence was designed to provide the passive defence of the country against enemy attack. Its administration was centralised in 1938 with the appointment of a Cabinet Minister to co-ordinate all those departments involved with civil defence and to be directly responsible for ARP (Air Raid Precautions). The extension of government preparations beyond the immediate demands of the passive defences of ARP resulted in the emergence of the term "civil defence" to describe "almost all the exceptional war-time measures to be undertaken by civil departments". The same authority went on to say that "civil defence was both civil and military." (O'Brien, Civil Defence, History of the Second World War cited in Rawlinson, 1-2, 5-8)

F3 The British adopted a regional approach to the organisation of civil defence. Each civil defence region was the responsibility of a Regional Commissioner who was to provide the co-ordination between central government and the local authorities. This approach was based on a strong emphasis on ARP as a local voluntary service rooted in local leadership and enthusiasm, and on adapting plans evolved at the centre to local differences.

CIVIL DEFENCE IN NEW ZEALAND DURING WORLD WAR II

F4 In the mid 1930s, the New Zealand Government began its preparations for the protection of the civil population in the event of war by adopting the British approach. Emergency precautions organisations were to be developed throughout the country under the aegis of the Department of Internal Affairs. These organisations were to be community-oriented as a local government responsibility.

F5 The Emergency Precautions Scheme (EPS) emerged in 1939. The Scheme was "designed to meet emergency conditions arising from enemy attack, epidemics, earthquakes and other

natural disasters, although obviously at this time the first of these was the main concern" (Civil Defence in New Zealand, 5). In 1940 administrative responsibility was transferred to the Department of National Service and it was, in the first instance, given legal backing by the Emergency Precautions Regulations 1940 (SR 1940/187) under the authority of the Emergency Regulations Act 1939. At the same time the EPS, along with the Home Guard and the Women's War Service Auxilliary, became part of the Emergency Reserve Corps (SR 1940/188). In 1941 the Emergency Precautions Regulations 1940 were consolidated in the Emergency Reserve Corps Regulations 1941 (SR 1941/194).

F6 The Emergency Reserve Corps was established for "the purpose of assisting in the preparation and operation of plans for securing the public safety, the defence of New Zealand, and the efficient prosecution [of the war], and of plans for maintaining supplies and services essential to the life of the community" (SR 1941/194 reg 3(1); compare SR 1940/188 reg 3(1)). An "emergency" meant

an emergency, whether arising from fire, flood, earthquake, enemy action, a threat of enemy action, or otherwise howsoever, in which the community or any substantial portion of the community is deprived or is likely to be deprived of the essentials of life, or the public safety or the public order is imperilled or is likely to be imperilled. (SR 1941/194 reg 2; compare SR 1940/187 reg 2)

This provision would appear to be drafted widely enough to include both injury to persons and damage to property.

F7 A feature of the regulations was that responsibility for preparing and implementing Emergency Precautions Schemes was placed on local authorities, and local schemes were co-ordinated by Regional Commissioners and District Controllers. One of the functions of the Commissioners and Controllers was to maintain contact with the defence authorities operating in their area and to pass on military orders or instructions (Emergency Reserve Corps Regulations 1941 Amendment No 2 (SR 1942/93) reg 3).

F8 EPS activities were scaled down in the latter part of 1942 as the Japanese threat receded. In 1943 the EPS was designated Civil Defence and in 1944 responsibility for its administration was handed back to the Department of Internal Affairs. At the end of the war most local EPS organisations were disbanded.

F9 It is of interest that the EPS was not called into service as a result of enemy action; but local EPS organisations were called upon in a natural disaster role following severe earthquakes in Wellington and Masterton in 1942.

LOCAL AUTHORITIES' EMERGENCY POWERS ACT 1953

F10 The next move in the establishment of a civil defence organisation was effected by the Local Authorities' Emergency Powers Act 1953. The Act gave local authorities certain functions in respect of emergencies

arising from earthquake, fire, flood, or other natural phenomenon, or from action in time of war by enemy powers or enemy sympathizers, which causes or is likely to cause in New Zealand large-scale loss of or injury or damage to life, health, or property. (definition of "Emergency" s 2)

Note the inclusion of damage to property.

F11 Rawlinson says that the Government, in introducing this legislation, appeared to be following the lead of countries like Britain and the United States which had introduced civil defence legislation as a response to the development of atomic weapons: "While the Bill was concerned with the threat of both enemy attack and natural disaster, its timing suggested that the threat of attack was the primary motive for introduction." (Rawlinson, 15) Questions were raised as to the relationship between the Bill and the Public Safety Conservation Act 1932. In introducing the Bill the Minister of Internal Affairs, the Hon W A Bodkin, stated:

It in no way interferes with the Public Safety Conservation Act, because that measure's main objective is to prevent civil disorders and to ensure the preservation of law and order. (300 NZPD 1855, 15 October 1953)

A review in 1960 of civil defence during the 1950s recalled:

The broad policy from 1953-58 in New Zealand emergency planning was to concentrate on major earthquakes and thereby cover most of the risks common in wartime attack. During that period people were thinking in terms of the atom bomb. (Address to the Homeserviceman's Association reported in the Christchurch Star, 29 August 1960, cited in Rawlinson, 19)

Rawlinson's comment on this retrospective is succinct: "More to the point, it appeared that little thought was given to the problem of either an atomic attack or a major earthquake." (19)

THE INFLUENCE OF THE HYDROGEN BOMB

F12 The Government's Review of Defence 1958 pointed out that the development of "the disastrously destructive hydrogen bomb and guided missiles of up to intercontinental range" had altered both the concept and the strategy of war far more radically than had the earlier atomic bomb (AJHR 1958 A 12, 6). Under the heading "Civil Defence", the Review continued:

58. The safeguarding and educating of the civil population against the nuclear effects of war must, for the first time, become an essential part of national defence plans. The geographical position of New Zealand no longer affords the country security from the worst impact of a global conflict. A nuclear war and the hazards to civilian population of radioactivity will not necessarily be confined to the countries of the main combatants. Radioactivity knows neither frontiers nor distance ...

59. The defence plan must also take into account the possibility of a direct attack on this country with nuclear or non-nuclear weapons

60. In these circumstances, adequate measures to protect our civilian population would become a most important defence task. (AJHR 1958 A 12, 15)

The Review proceeded to state the Government's intention to give planning for civil defence a high priority and to establish a Ministry of Civil Defence. Emphasis would be placed on public education as to the precautions that might be taken in an emergency "so that our citizens will be aware of the limits of any danger, and not succumb to panic. ... Civil-defence planning is not related to any belief that a nuclear threat to New Zealand is imminent, but it is considered that we should have the foundation of such an organisation ready." (AJHR 1958 A 12, 16)

CIVIL DEFENCE ACT 1962

F13 The Ministry of Civil Defence was established as a branch of the Department of Internal Affairs in April 1959. Although three Regional Commissioners were appointed Civil Defence priorities remained confused. No steps were taken to give the Ministry statutory powers until the passage of the Civil Defence Act 1962. Although the rationale for civil defence continued to be the threat of nuclear attack, attempts were made to disassociate the word "defence" from its military context. "It has no military aspect It means defence of the civil population in a protective sense", the Minister of Civil Defence explained (New Zealand Counties Association, Proceedings of the Thirty-Fourth Conference, 1959, 21; Rawlinson, 27). Thus "Civil defence" was defined as meaning

the planning, organisation, co-ordination, and implementation of measures, other than measures amounting to actual combat or preparation therefor, that are necessary or desirable in respect of the safety of the public, and are designed to guard against, prevent, reduce, or overcome the effects or possible effects of a national emergency or a major disaster (s 2, emphasis added)

F14 The limb of Civil Defence concerned with the protection of the public in the event of a nuclear (or other armed) attack was covered by the provisions of the 1962 Act dealing with a national emergency. The Act defined "National emergency" as

an emergency due to an actual or imminent attack on New Zealand by an enemy, or to any actual or imminent warlike act whether directed against New Zealand or not, whereby loss of life or injury or distress to persons or danger to the safety of the public is caused or threatened to be caused in New Zealand, or in any part of New Zealand (s 2)

That definition is identical with that now in s 2 of the Civil Defence Act 1983.

F15 The second limb was concerned with major disasters. A "Major disaster" was defined as any fire, explosion, earthquake, eruption, seismic sea wave, flood, storm, tornado, or other happening, not attributable to an attack by an enemy or to any warlike act, that causes or threatens to cause large scale loss of life or injury or distress to persons or in any way endangers the safety of the public in New Zealand or in any part of New Zealand. (s 2, emphasis added)

It will be noted that the legislation no longer contained a specific reference to damage to property.

F16 Powers conferred by the 1962 Act could be invoked in the event of a declaration of national emergency or in the event of a declaration of a state of national major disaster, a state of regional major disaster or a state of local major disaster.

F17 The 1963 nuclear test ban treaty led to decreased concern about the prospect of nuclear conflict. This change was reflected in a statement made by the new Minister of Civil Defence, the Hon D C Seath. Early in 1964 he told the first meeting of the National Defence Committee:

I am not suggesting that planning against the consequences of nuclear disaster should be ignored, but first let us bend our energies to prepare against the known powers of natural disaster ... (Rawlinson, 68)

Henceforth natural disaster became the main civil defence priority.

F18 Nevertheless, criticism of the administration of the Civil Defence Act 1962 emerged. In his 1964 report the Ombudsman, Sir Guy Powles, drew attention to the slow progress that was being made in summoning the National Civil Defence Committee, appointing planning committees and preparing advance plans (Report of the Ombudsman for the year ended 31 March 1964 A 6 8-9, 35-36). This Report, the appointment of the Hon Mr Seath as Minister and the appointment of a permanent full-time Director of Civil Defence stimulated more rapid development. Sir Guy was able to say in his 1965 report that he was "satisfied that the Department [of Internal Affairs] had the matter of central administration of civil defence well in hand." (Report of the Ombudsman for the year ended 31 March 1965 AJHR 1965 A 6, 30)

CIVIL DEFENCE AMENDMENT ACT 1968

F19 A significant change in terminology was made by s 2 of the Civil Defence Amendment Act 1968. The words "civil defence emergency" replaced the words "major disaster" wherever they appeared. From then on, the 1962 Act was concerned with national emergencies, and states of national civil defence emergency, regional civil defence emergency and local civil defence emergency. The change was explained on the ground that the term "emergency" was less emotive than "disaster" and might, for psychological reasons, make it easier for local authorities to make a declaration when it was called for. Or, as the Hon Mr Seath explained to Parliament: the new term "gives a more readily understandable meaning to the circumstances in which the civil defence organisation may be called into operation" (357 NZPD 2062, 3 October 1968; Rawlinson, 123, 138).

CIVIL DEFENCE ACT 1983

F20 A number of factors led to the decision to enact the Civil Defence Act 1983. The 1962 Act had been amended a number of times and it was time for a consolidation. Local government reorganisation in 1979 had led to each of the new regional councils being made a civil defence region. The tasks of the councils needed to be defined. And the Report of The Commission of Inquiry Into the Abbotsford Landslip Disaster (AJHR 1980 H 7 137-142, 174-175) had made recommendations on civil defence, in particular on the circumstances in which a civil defence emergency might be declared.

F21 The Civil Defence Act 1983 provided a new definition of "Civil defence":

the measures necessary or desirable for the safety of the public and which are designed to guard against, prevent, reduce, or overcome the effects or possible effects of any explosion, earthquake, eruption, tsunami, land movement, flood, storm, tornado, serious fire, leakage or spillage of any dangerous gas or substance, or other happening that causes or may cause loss of life or injury or distress to persons or in any way endangers or may endanger the safety of the public in New Zealand; and includes the planning, organisation, co-ordination, and implementation of such measures and the conducting of, and participation in, training for such purposes. (s 2, emphasis added)

This definition combines elements of the 1962 definition of "Civil defence" with the substance of the 1962 definition of "Major disaster" (which became in 1968 the definition of "Civil defence emergency").

F22 The significant changes in this 1983 definition of "Civil defence", as compared with the 1962 definition (para F13), are:

- "Civil defence" no longer specifically includes measures to deal with the effects of a national emergency.
- The words "other than measures amounting to actual combat or preparation therefor" have been omitted. This involves the loss of the words in the 1962 Act which made it clear that although a national emergency is one "due to an actual or imminent attack on New Zealand by an enemy" (para F14) it is concerned only with the "defence of the civil population in a protective sense" (para F13). As a consequence there has been confusion as to what is involved in the retention in the Act of provisions relating to a national emergency.

- The "happenings" - explosion, earthquake, etc - that might constitute a "Civil defence emergency" are listed under the definition of "Civil defence" and no longer under the definition of "Civil defence emergency" (see para F23).
- The addition of "serious fire, leakage or spillage of any dangerous gas or substance" to the list of "happenings" which fall within the ambit of "Civil defence" involves the inclusion of industrial as well as natural disasters.

F23 A definition of a civil defence emergency can be expected to have three elements: a listing of possible disaster "happenings" - earthquake, fire, etc; a description of possible consequences of such an event; and a requirement that the event cannot be dealt with without the adoption of civil defence measures. The definition of "Civil defence" in the 1983 Act (para F21) contains the first two of these elements. "Civil defence" comprises the measures required to deal with a situation having the following two elements:

- any explosion, earthquake, eruption, tsunami, land movement, flood, storm, tornado, serious fire, leakage or spillage of any dangerous gas or substance, or other happening
- that causes or may cause loss of life or injury or distress to persons or in any way endangers or may endanger the safety of the public in New Zealand (s 2 and para F21; emphasis added)

F24 On the other hand, a "Civil defence emergency" is defined as

- a situation (not attributable to an attack by an enemy or to any warlike act)
- that causes or may cause loss of life or injury or distress or in any way endangers or may endanger the safety of the public
- and cannot be dealt with by the Police, the New Zealand Fire Service, or otherwise without the adoption of civil defence measures (s 2)

In this definition the first element becomes merely "a situation"; the language of the second element in the definition of "Civil defence" is substantially repeated; and the third element is added. "[A]n attack by an enemy or ... any warlike act" is excluded from the definition of "Civil defence emergency" but forms the basis of the definition of "National emergency" (para F14).

F25 The definition of "Civil defence emergency" raises the question whether "a situation" is intended to include a wider range of disasters than those listed in the definition of "Civil defence". Any such situation is one that cannot be dealt with without the adoption of "civil defence measures". This involves a reference back to the definition of "Civil defence" where the events listed in the first element include any "other happening". Does this mean that any event, other than one involving an enemy attack or a warlike act, that "causes or may cause loss of life or injury or distress or in any way endangers or may endanger the safety of the public" and that cannot be dealt with by the police, etc, is covered by the definition of "Civil defence emergency"?

F26 This ambiguity about the responsibilities of Civil Defence is reflected in the National Civil Defence Plan (Introduction, 1) which comes into operation "where a disaster is of sufficient magnitude that civil defence measures are needed." The Plan goes on to list the threats which the organisation and procedures outlined in the Plan are designed to counter. These include:

Man-made threats within New Zealand: events leading to disaster and associated with human activities such as escape of hazardous materials, diseases, failure of structures or major transportation accidents. (Introduction, 2)

F27 Later the scope of the Plan is described as applying "to situations ranging from localised disasters which can be handled by regional councils and territorial authorities ... to disasters of such widespread and intense impact that the Government itself must assume initial control and direction of the civil defence response." (Part 1, Government Response, 1) Elsewhere, the Plan recognises that a state of civil defence emergency may be declared in some but not all of "a variety of events". It goes on to distinguish between states of emergency declared under the Civil Defence Act 1983 and those declared under the Animals Act 1967 or the Plants Act 1970, and action authorised by the Minister under the Health Act 1956 (Part 2, Disaster Recovery, Annexe A: Recovery Plan, 1-2).

A NOTE ON THE TERM "CIVIL DEFENCE"

F28 The emphasis which early New Zealand civil defence legislation placed on protection against attack by an enemy, particularly nuclear attack, and the subsequent history of that legislation invites consideration of the use of the term "civil defence".

F29 "Civil defence" and the frequently used alternative "civil protection" involve different responsibilities and measures from country to country. A Swiss authority has pointed out that differences of definition are based on the kinds of threat for which preparations should be made:

Some civil defence organizations concentrate their efforts entirely on protection and rescue actions in peacetime and there are others that are concerned exclusively on mastering, or at least helping situations created by warfare [sic]. There also are organizations that do both. They generally have a primary duty and consider the other as an additional or secondary duty. (Mumenthaler, "Civil Defence (Protection) and Aid in Case of Disaster taking into consideration possibilities of International Cooperation, as seen by the Swiss Confederation" (1988) International Civil Defence Journal (4th ed) 6)

GENEVA PROTOCOL I AND CIVIL DEFENCE

F30 Protocol I Additional to the Geneva Conventions is in part concerned with the protection of the civilian population against the effects of armed conflict. (See paras 3.10, 6.41-6.42.) Included are provisions requiring respect for and protection of civilian civil defence organisations and their personnel in the performance of their tasks. "[C]ivil defence" for the purposes of the Protocol means the humanitarian tasks "intended to protect the civilian population against the dangers ... of hostilities or disasters" (see para 2.21). This definition reflects the distinction between the primary and secondary duties of a civil defence organisation. The Red Cross Commentary says that

it is clear that the term "disasters" in the introductory sentence should be broadly construed. "It covers natural disasters as well as any other calamities not caused by hostilities". (International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Martinus Nijhoff Publishers, Geneva, 1987) 721)

F31 Protocol I sets out a list of 15 humanitarian tasks which invite comparison with those given in New Zealand to Civil Defence under the provisions of the Civil Defence Act 1983:

- (i) warning;
- (ii) evacuation;
- (iii) management of shelters;
- (iv) management of blackout measures;
- (v) rescue;
- (vi) medical services, including first aid, and religious assistance;
- (vii) fire-fighting;
- (viii) detection and marking of danger areas;
- (ix) decontamination and similar protective measures;
- (x) provision of emergency accommodation and supplies;
- (xi) emergency assistance in the restoration and maintenance of order in distressed areas;
- (xii) emergency repair of indispensable public utilities;
- (xiii) emergency disposal of the dead;

- (xiv) assistance in the preservation of objects essential for survival;
- (xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organisation (definition of "civil defence", Article 61(a), Fifth Schedule to the Geneva Conventions Act 1958)

F32 Article 61(b) of Protocol I defines "civil defence organisations" as

those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of [the 15 tasks listed in para F31 above], and which are assigned and devoted exclusively to such tasks.

UNITED STATES APPROACH

F33 A perusal of the literature from the United States suggests that "civil defence" and "civil protection" are frequently seen as giving priority to the protection of the civil population against the effects of hostilities, with some emphasis on protection against nuclear attack. This approach is starkly presented by the American Civil Defence Association in its Journal of Civil Defence:

The Journal of Civil Defence presents authentic information relating to civil defence - to the survival of free government, the United States and peace in the nuclear age. Its aim is public education in this field and service as a forum.

F34 In contrast, the Federal Emergency Management Agency (FEMA) in the United States is committed to what has become known as an "all hazards" approach. The FEMA Director, Julius Becton, testified before a House of Representatives subcommittee:

Civil Defence funds made available to states for attack preparedness may be used for preparing for, and providing emergency assistance in response to, peacetime disasters to the extent such use is consistent with, contributes to, and does not detract from attack related preparedness. (Hazard Monthly (1986) 8, cited in Drabek, Professional Emergency Manager (University of Colorado, 1978) 47)

"ALL HAZARDS" IN THE UNITED KINGDOM

F35 **Error! Bookmark not defined.** **Error! Bookmark not defined.** Under the United Kingdom Civil Defence Act 1948 "civil defence" is defined as including "any measures not amounting to actual combat for affording defence against any form of hostile attack by a foreign power" (s 9). The Civil

Protection in Peacetime Act 1986 gives legislative support to the "all hazards" approach by authorising the use of civil defence resources "[w]here an emergency or disaster involving destruction of or danger to life or property occurs or is imminent"(s 2(1)). In the words of E E Alley, a Civil Defence Adviser at the Home Office (UK):

The all hazards approach is based on the fact that there is a broad spectrum of emergencies we could conceivably face and for which we must be prepared. These are disasters sufficiently severe and widespread to put the emergency service under pressure and to require central co-ordination of the response. As I have already said at one end of the scale we might place severe flooding, snow or storms; further up the scale, leakage of dangerous chemical from a major industrial accident; further still hostile attack on this country using conventional or perhaps chemical weapons; at the worst extreme nuclear attack. (Natural Disasters Organisation, Proceedings of the Civil Defence Symposium (Canberra, 1987) 49-50)

THE AUSTRALIAN APPROACH

F36 **Error! Bookmark not defined. Error! Bookmark not defined.** A paper delivered in 1982 on behalf of the Australian Department of Defence on "The Current State of Natural Disaster/Civil Defence Planning in Australia" recognised that the term "civil defence" had been traditionally used to refer in general terms to the protection of the civil population from the effects of hostile action. The point was then made that, from a humanitarian point of view, there was little reason to differentiate between types of disaster. Whatever the cause, the immediate effects seemed much the same. This had clearly been the thinking behind the definition of "civil defence" in Article 61 of the first Geneva Protocol. The writer went on:

To avoid confusion ... I propose to use the term "disaster preparedness", a recognised term in international usage, when dealing with arrangements to cope with threats to the civil population irrespective of origin, and to use the term "civil defence" in the more limited context of threats arising from hostile action. It should be apparent, however, that standard national terminology in this field is needed if we are to avoid confusion in debate both at home and abroad Civil defence must also be distinguished from civil support for defence. The purpose of civil defence is the preservation of lives. (Department of Defence (Australia), "The Current State of Natural Disaster/Civil Defence Planning in Australia", Conference on Civil Defence and Australia's Security (19-22 April 1982), Australian National University Research School of Pacific Studies Strategic and Defence Studies Centre, 3-4)

F37 Australia has established, at the Commonwealth level, a Natural Disasters Organisation (NDO) to co-ordinate Commonwealth physical assistance to the States and Territories in the event of natural or human disasters.

NDO may be involved in all types of disasters, natural, man-made or as a result of hostilities. It does not become involved in aid to the civil power, that is, the maintenance of law and order in the event of acts such as terrorism. However, if a major disaster occurred as a result of an act of terrorism NDO could become involved in counter disaster activities. (Natural Disasters Organisation in conjunction with the State and Territory Emergency Services of Australia, Australian Counter Disaster Arrangements (Canberra, 1988))

APPENDIX G

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Index

Abbotsford landslip, see Report of the Commission of Inquiry into the Abbotsford Landslip Disaster

Accident Compensation Act 1982, 5.138, 5.141

accidents, major, 1.104, 9.14-9.15, 9.20-9.21

Act of indemnity, 1.28, 4.35, 4.47, 4.49-4.50, 4.53, 4.55, 6.40

Acts Interpretation Act 1924, B24

Acts and Regulations Publication Act 1989, 3.79, 5.87

Adams (ed), Criminal Law and Practice in New Zealand, 7.100

Administrator of the Government, persons who can act as, 4.56, B3, B22

Agriculture (Emergency Powers) Act 1934, 3.60-3.64, 3.105, 8.48

Agriculture Pests Destruction Act 1967, 3.49, 8.7

aid to the civil power, see armed forces, assistance to Police

"all hazards" approach, 6.56, 9.5, F2, F31, F34-F37

Animals Act 1967, 1.87-1.88, 2.31-2.32, 3.49-3.59, 5.42, 5.148, 5.150, 8.3, 8.7, 8.19, 8.24, 9.19, B2, F27

animal disease, 1.86, 1.89, 1.100, 1.104, 2.29, 3.50-3.59, 4.7, 8.3, 8.5-8.8, 8.19-8.31, 8.38-8.41, 8.43, 8.45, 9.14, 9.19-9.21

see also Animals Act 1967; Biosecurity

Act proposals

Animal Remedies Act 1967, 8.53

Annex to the Report of the Defence Committee of Enquiry: Public Opinion Poll on Defence and Security: What New Zealanders Want, 6.25-6.26

Apiaries Act 1969, 3.49, 8.7

armed conflict, see war

armed forces,

assistance to Police, 1.3, 1.53, 3.40-3.44, 6.32, 6.34-6.37, 6.42, 7.5, 7.11, 7.22, 7.72

essential services, provision of during industrial dispute, 1.3, 3.41, 3.43

public services, provision of, 1.3, 3.41, 3.43-3.44, 3.95, 7.116, 9.17

regular service personnel, extension of terms of service, 1.3, 3.5, 6.14

reserve forces, call up of, 1.3, 3.5, 6.14

territorial forces, call up of, 1.3, 3.5, 6.14

armed insurrection, 1.47, 1.52-1.53, 2.10, 4.45-4.46, 6.29-6.32, 6.38-6.42, 6.58, 6.61-6.63, 6.81

Arms Act 1983, 3.17, 7.39, 7.48

arrest, power to, 1.68-1.70, 3.35, 7.25, 7.37-7.41, 7.53, 7.55-7.58

Ashworth formula, 7.66

attempt, 7.39-7.40

Attorney-General v Wilts United Dairies (1921), C6

Attorney-General for Canada v Hallet & Carey (1952), C5

Attorney-General of Cyprus v Mustafa Ibrahim (1964), 4.42

Australian Communist Party v The Commonwealth (1950-1951), 6.9

Aviation Crimes Act 1972, 3.23-3.25

Baker, The New Zealand People at War: War Economy, 6.47, 6.79

bank collapse, 10.7-10.8

Bhagat Singh v King Emperor (1931), C3

Burmah Oil Co Ltd v Lord Advocate (1965), 4.38-4.39, 6.8

Bill of Rights for New Zealand: A White Paper, 5.11

Burrows, "Parliamentary Law Making", 4.20

biological incident, 1.47, 1.56, 6.1, 6.7, 6.27-6.28, 6.61, 6.81

Biosecurity Act proposals, 1.86-1.91, 1.100, 5.5, 8.5, 8.8-8.10, 8.19-8.26, 8.30, 8.32-8.48, 9.19

Canadian Emergencies Act, see Emergencies Act 1988 (Canada)

Birmingham bombings, 7.51

censorship, see media coverage of terrorist events, control of

Blundell v Attorney-General (1968), 7.38

central government responsibility, 1.21, 2.46-2.49, 3.46, 6.1, 7.14

Bonner, Emergency Powers in Peacetime, 2.34

Chester v Bateson (1920), C6

Boulton (ed), Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, B18

Civil Aviation Act 1964, 6.50

breakdown in essential services or industries, 10.7, 10.10

Civil Aviation Act 1990, 3.48, 3.75-3.83, 5.87, 8.35-8.36

see also cricket commentaries, proposed axing of; industrial disputes

Civil Aviation Regulations 1953, 7.122

Broom v Morgan (1953), 5.162

civil defence, 1.6, 3.1, 3.84-3.97, 6.48, 8.5, 8.65, 8.68, 9.1-9.80, F1-F37

Bulk Gas Users Group v Attorney-General (1983), 5.119

Australian approach, F36-F37

United Kingdom approach, F2-F3, F11, F35

Building Emergency Regulations Act 1953, 6.46

United States approach, F11, F33-F34

see also "all hazards" approach

Civil Defence, history of, 9.1, 9.5, F1-F27

Civil Defence in New Zealand: A Short History, 9.54, F.1, F5

Civil Defence, Report on Exercise "Our Fault" 4-8 March 1991: A Major Testing Exercise, 9.3, 9.36, 9.66

Civil Defence, responsibilities of, 1.54, 1.102-1.105, 3.84-3.85, 3.90, 6.56, 6.66-6.68, 6.70, 9.1-9.2, 9.6-9.7, 9.9-9.34

Civil Defence Act 1962, 2.17, 3.6, 4.5, 5.76, 5.82, 5.125, 6.51-6.52, 9.24, F13-F16, F18-F22

Civil Defence Act 1983, 1.96, 1.101, 1.107, 1.109, 2.15-2.17, 2.44, 3.68, 3.85-3.94, 3.96-3.97, 4.5, 5.20, 5.35, 5.39, 5.42-5.44, 5.60, 5.62, 5.76-5.77, 5.82, 5.117, 5.152, 5.161, 6.50-6.56, 6.66, 6.68, 6.70-6.71, 7.115, 8.65, 8.75-8.76, 9.1-9.10, 9.12-9.14, 9.17, 9.22, 9.24, 9.28, 9.34-9.35, 9.37-9.46, 9.48-9.51, 9.54-9.55, 9.65-9.73, 9.75, 9.78, 9.80, B2, B5-B8, B16, B26-B27, B29, B31, B36, B38, B43, B45, F1, F20-F25, F27, F31

national emergency under, 1.54, 2.11, 3.6, 3.86, 5.42, 6.50-6.56, 6.66, 6.68, 9.2, 9.6-9.9, 9.37-9.38, B5-B7, F14, F16, F19, F22, F24

proposed amendments to, 1.102, 1.104-1.106, 9.3, 9.7-9.9, 9.20-9.21, 9.34, 9.37-9.38, 9.43-9.44, 9.46, 9.70, 9.80 proposed replacement of, 1.101, 9.4, 9.21, 9.80

see also accidents, major; industrial

disasters; natural disasters

Civil Defence Act 1948 (UK), F35

Civil Defence Amendment Act 1968, 2.17, F19

Civil Defence Emergency Regulations 1978, 4.5

Civil Protection in Peacetime Act 1986, F35

civil war, see armed insurrection

Clean Air Act 1972, 8.53

closure of roads, public places, 3.94, 7.69, 7.103-7.106

Commissioner for Disaster Recovery, 9.73

common law necessity, 1.28, 4.1, 4.35, 4.44, 4.46, 4.51, 4.53, 5.166, 7.111

communications, interference with, 7.124, 7.126, 7.132-7.134, 7.135

power to intercept, 3.36, 7.35, 7.49, 7.124-7.131, 7.135

Companies Special Investigation Act 1958, 10.4

compensation, 1.41-1.44, 1.62, 1.106, 3.59, 5.2, 5.70, 5.1355.137-5.156, 6.76, 7.110, 7.112, 7.113, 7.117, 8.38, 8.47, 9.2, 9.28, 9.68-9.70

conscription, 1.60, 4.23, 5.70, 6.47, 6.72, 6.74-6.75

conspiracy, 7.39-7.43, 7.49

Constitution Act 1986, 4.2, 4.30-4.32, 4.56, B9, B13-B14, B22, B43

Constitution of the International Labour Organisation, 5.133

consultation, requirement of, 1.35, 3.76-3.77, 5.49-5.56, 5.85, 5.90, 8.35, 8.38

consultation, undertaken in preparing Final Report, 1.8-1.9

Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, 3.22-3.24, 3.27

Convention on the Prevention, Punishment of Crimes against Internationally Protected Persons 1973, 3.22-3.24, 3.27

Convention for Suppression of Unlawful Acts Against Safety of Civil Aviation 1971, 3.22-3.24, 3.27

Convention for Suppression of Unlawful Acts against Safety of Maritime Navigation 1988, 3.22-3.24, 3.27

Convention for Suppression of Unlawful Seizure of Aircraft 1970, 3.22-3.24, 3.27

Convention on Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons, etc 1972, 3.11, 3.15

Cook Islands Constitution Act 1964, 6.64

Corporations (Investigation and Management) Act 1989, 3.105, 10.4

Council of Civil Service Unions v Minister for the Civil Service (1985), 4.52

Crimes Act 1961, 3.17, 7.40-7.42, 7.48-7.49, 7.63-7.65, 7.99-7.101, 7.127-7.131

Crime Appeal (1991), 7.57

Crimes (Internationally Protected Persons and Hostages) Act 1980, 3.23-3.24, 3.26

Crimes of Torture Act 1989, 3.14

Criminal Law Act 1967 (UK), 7.64

Dean v Attorney-General of Queensland (1971), C3

Crown liability, 5.159-5.165, 6.76, 8.45

Defence Act 1971, 3.3, 3.5, 6.32, 7.4

Crown Proceedings Act 1950, 5.162-5.163

Defence Act 1990, 1.3, 1.46, 1.53, 1.60, 2.16, 2.44, 3.3-3.5, 3.7, 3.40-3.44, 3.95, 4.34, 5.20, 5.45, 5.148, 6.6, 6.14-6.15, 6.30, 6.32, 6.37, 6.42, 6.74, 7.4-7.5, 7.7, 7.22, 7.114, 7.116, B34, B39, B44

Customs Act 1966, 3.9, 3.105, 6.50

see also armed forces; low and medium-level contingencies

Customs Import Prohibition (Iraq and Kuwait) Order 1990, 3.9

Defence of New Zealand 1991: A Policy Paper, 1.46, 3.5, 6.13, 6.16-6.17, 6.20, 6.31, 6.34-6.36, 6.77

Cyclone Bola, 2.12, 5.98, 5.145-5.146, 9.74, 9.76-9.77

Defence of New Zealand: Review of Defence Policy 1987, 3.3, 6.12, 7.11

Dairy Board (Local Marketing) Regulations 1987, 3.61

Defence of the Realm Act 1914 (UK), 5.25

Dairy Factory Supply Regulations 1989, 3.61

Dehn v Attorney-General (1988), 7.100

Dangerous Goods Act 1974, 3.73, 8.53, 8.63

delegation of authority, 3.80

see also sub-delegated legislation

David Webber, Rivers Buchan and Associates, Cyclone Bola Agricultural Assistance Scheme: Economic and Social Impact Study, 5.145

Department of Defence [Australia], "The Current State of Natural Disaster/Civil Defence Planning in Australia", F36

Department of the Prime Minister and Cabinet, 6.57, 6.69, 9.75-9.77

de Smith, Brazier, Constitutional and Administrative Law, 4.41-4.42

Despouy, The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency 1990, 5.128, 6.29

destruction, power of, 3.55, 3.68, 3.71, 3.92, 3.106, 4.44, 5.70, 5.149-5.150, 7.110-7.112, 7.135, 8.21

detention of individual, 1.60, 1.68, 1.70, 3.30-3.33, 3.35, 5.121, 6.47, 6.74, 7.25, 7.38-7.39, 7.44, 7.53, 7.55-7.58, 7.68

direction, power of, 3.52, 3.58, 3.92, 3.106, 5.69, 6.47, 6.75, 7.69

disaster, 1.16, 2.4-2.5, 2.17-2.24

disaster recovery, 9.2, 9.27, 9.71-9.79

Disaster Recovery Co-ordinator,

appointment of, 1.110, 9.72-9.74, 9.78

-9.79

relationship with Department of the Prime Minister and Cabinet, 1.110, 9.75-9.77, 9.79

Domestic and External Security Co-ordinator, 6.69, 9.74-9.77, 9.79

Drabek, Professional Emergency Manager, 2.28, F34

Earthquake and War Damage Act 1944, 3.105, 5.142-5.143, 5.146

Earthquake and War Damage Regulations 1984, 5.142

Earthquake and War Damage (Land Cover) Regulations 1984, 5.142

economic emergencies, 1.111-1.115, 2.10, 3.1, 3.98-3.105, 4.26, 5.75, 10.1-10.12

need for powers to deal with, 1.113

-1.115, 10.1, 10.3, 10.6, 10.8-10.12

see also bank collapse; breakdown in

essential services or industries; exchange

control, imposition of; foreign exchange

crisis; wage and price freeze

Economic Stabilisation Act 1948, 3.101-3.104, 4.5, 4.9, 6.46, 6.50, 10.4

Economic Stabilisation Emergency Regulations 1942, 3.101

Electoral Act 1956, 4.2, B29

Emergencies Act 1988 (Canada), 2.35-2.36, 2.42-2.43, 4.6, 4.14, 5.20, 5.28, 5.53, 5.82, 5.103, 5.149, 5.153-5.154, 6.72-6.74, 6.78, 7.50, 8.1-8.2, 9.20, 9.32, B26, B31-B32, B41

emergency,

characteristics of, 1.20, 2.35-2.44, 5.34,

6.77

meaning of, 1.11-1.16, 2.2-2.5

phases of, 1.17-1.18, 1.84, 1.87, 1.92- 1.94, 1.98-1.100, 2.25-2.31, 2.47, 3.46,

4.9, 4.18, 5.57, 6.25, 6.27, 6.67, 8.2

-8.3, 8.10, 8.32, 8.52-8.53, 8.64, 8.66,

8.73-8.74, 8.77-8.78, 8.82-8.83, 9.55, 9.64

emergency action as a defence, 5.157, 5.166-5.168

see also common law necessity

emergency action without authority, 4.1, 4.35, 4.49-4.50, 4.53

emergency legislation,

basis for emergency action, 1.28-1.29,

4.1, 4.33-4.53, 4.55

passage during an emergency, 4.22-

4.32, 5.36, 6.80, 10.11, B10

passage under urgency, 4.22, 4.27-4.32

preparation in advance, 1.27, 2.41, 4.1- 4.2, 4.12-4.21, 5.1, 6.40, 6.78-6.81

sectoral approach to, 1.2-1.3, 1.5, 1.22- 1.24, 2.14, 2.31, 4.1, 4.3-4.11, 5.1,

5.23, 5.65, 5.74-5.75, 5.118, 6.72,

6.76, 7.3, 8.4

Emergency Planning Canada, Safety and Security in Emergencies: Background Papers: Studies in Various Aspects of Emergencies Legislation, 4.14

emergency powers, 1.19, 1.31, 1.37, 1.85, 2.5, 2.31-2.34, 2.45, 2.48, 3.1-3.2

3.47-3.49, 3.106, 4.1, 4.9-4.10, 4.12-4.14, 4.19-4.20, 4.22, 4.24-4.25, 4.35-4.39, 4.44-4.46, 4.51, 4.53, 4.55, 5.1-5.5, 5.7, 5.34, 5.52, 5.64-5.77, 5.92-5.93, 5.114-5.115, 5.156, 6.4, 6.8-6.11, 6.18, 6.24, 6.27-6.28, 6.33, 6.38-6.40, 6.43-6.47, 6.50-6.51, 6.58-6.60, 6.72-6.75, 7.3, 7.6, 7.8, 7.20, 7.24-7.29, 7.50, 7.56, 7.59-7.60, 7.75, 7.82-7.86, 7.105-7.106, 7.118, 7.127-7.131, 7.135-7.139, 7.148-7.163, 8.4-8.10, 8.19-8.26, 8.32, 8.34, 8.36-8.41, 8.74, 8.76, 8.82-8.83, 9.11-9.12, 9.17, 9.19, 9.28, Appendix A, B28, B44, C4

invocation of, see state of emergency,

declaration of

see also closure of roads, public places; communications, power to intercept; conscription; destruction, power of; detention of individual; direction, power of; emergency regulations; entry, power of; evacuation, power of; exchange control, imposition of; inspection, power of; media coverage of terrorist events, control of; movement, power to

control; removal of obstructing vehicles; requisitioning; search, power to

entry, power of, 3.52, 3.66, 3.71, 3.94, 4.44, 5.70, 5.115, 7.68, 7.98-7.102, 7.135, 8.4

Emergency Precautions Regulations 1940, F5

Esso Petroleum Co Ltd v Southport Corporation (1956), 7.111

Emergency Precautions Scheme, 6.48-6.49, F5-F9

European Convention for Protection of Human Rights, Fundamental Freedoms, 2.7, 2.9, 5.111

Emergency Preparedness Canada, Bill C-77: An Act to Provide for Safety and Security in Emergencies: Working Paper, 3.99

evacuation, power of, 3.94, 3.96, 7.95-7.97, 7.104, 7.135

emergency regulations, 1.23, 1.37, 1.39, 1.59-1.62, 1.90, 3.8, 3.38, 3.64, 3.69, 3.96-3.97, 3.100-3.103, 3.105, 4.5, 4.7, 4.10, 4.23, 4.25, 4.55, 5.12, 5.28, 5.43, 5.54-5.56, 5.66, 5.69, 5.74-5.86, 5.88-5.90, 5.92-5.93, 5.99, 5.102, 5.168, 6.10, 6.43-6.48, 6.51, 6.72-6.76, 6.79, 6.81, 7.2-7.3, 8.34, 8.37, 8.39-8.43, 8.48, 8.76, 9.2, 9.35-9.38, 9.41-9.43, 9.45, 9.65, 9.69, B2, B6-B8, B10, B29-B31-B33, B35-B36, B40-B41, B45, C1, C4-C6

exchange control, imposition of, 1.114-1.115, 3.105, 10.9, 10.11-10.12

Executive Council, members of, when unable to act in an emergency, 4.54-4.56, 6.76, 9.37-9.38, B1-B2, B5-B8, B22

Emergency Regulations Act 1939, 3.100, 4.23, 4.41, 5.89, 6.10, 6.44-6.45, 6.48, 6.75, F5

Explosives Act 1957, 3.17, 8.53, 8.63

Emergency Regulations Amendment Act 1940, 4.23, 6.45, 6.75

Export Prohibition Regulations 1953, 3.9, 3.105

Emergency Regulations Amendment Acts, 6.45-6.46

Extradition Act 1965, 3.24

Emergency Reserve Corps, 6.48-6.49, F5-F6

Federal Emergency Management Agency, F34

Emergency Reserve Corps Regulations 1941, F5, F7

Final Report of Disaster Recovery Co-ordinator East Coast/Wairoa Cyclone Bola Region, 9.77

Finance Emergency Regulations 1940 No 2, 6.46

Fire Service Act 1975, 2.15, 2.32, 3.70-3.74, 5.44, 7.84

Governor-General, when unavailable to act in an emergency, 4.54-4.56, 6.76, 9.37-9.38, B1-B3, B5-B8, B22

Fisheries Act 1983, 5.50, 8.28

Greek Case (1969), 2.9, 5.111

Foot and Mouth Disease Control Regulations 1966, 3.51, 3.55-3.56

Green, Cairns, Wright, New Zealand After Nuclear War, 6.19-6.21, 6.23, 6.25-6.26

background papers, 6.53-6.55

Forced Labour Convention 1930, 3.14

Gulf War, see Kuwait, Iraqi invasion of

foreign exchange crisis, 10.7, 10.9, 10.11-10.12

Hackett v Lander and Solicitor-General (1917), C5

Fugitive Offenders Act 1881 (UK), 3.24

Hawkins v Sturt (1990), 5.122

General Agreement on Tariffs and Trade Act 1948, 3.105

hazardous substances, escape of, 1.86, 1.92-1.100, 3.70, 3.73, 8.5, 8.49-8.55, 8.59, 8.61-8.64, 8.66-8.79, 8.82-8.83, 9.14-9.15

Geneva Conventions and Protocols, 1.62, 2.21, 3.10-3.11, 5.134, 6.5, 6.41-6.42, 6.63, 6.76, 9.5, F30-F32, F36

role of Civil Defence, 1.96-1.98, 8.70, 8.75-8.78, 8.83, 9.14-9.15, 9.20

Geneva Conventions Act 1958, 2.21, 3.10, F31

Hazardous Substances Technical Liaison Committees, 8.66, 8.69-8.70

Hazards Control Commission, 1.93, 1.95, 1.98, 8.14, 8.62-8.63, 8.72-8.74, 8.78

Health Act 1956, 2.15, 2.31, 3.68-3.69, 5.44, 8.3, 9.16, F27

Hewett v Fielder (1951), C3

Hoffman v Thomas (1974), 7.121

Hogg, "Necessity in a Constitutional Crisis", 4.42

Hope, Protective Security Review: Report, 7.32, 7.36, 7.132, 7.158

House of Representatives,

bringing forward (or postponing)

meeting when adjourned, 4.31, 4.56,

6.76, 9.40-9.43, B1, B10-B11, B15

-B19, B22

changing venue when adjourned, 4.32,

4.56, B10-B11, B15-B16

changing venue when sitting, B10-B12,

B21-B22

unable to meet because of emergency,

B42, B45

human disease, 1.104, 2.29, 3.68-3.69, 8.3, 9.14, 9.16-9.18, 9.21

human rights, 1.30, 1.37, 1.62, 1.80-1.82, 2.6-2.9, 2.13-2.14, 2.32, 2.45, 3.2, 3.12, 4.6, 4.12, 5.6-5.16, 5.22-5.23, 5.65-5.67, 5.70-5.71, 5.73, 5.80, 5.91-5.93, 5.99, 5.101, 5.108-5.111, 5.121, 5.124, 5.126-5.134, 5.156, 6.10, 7.15, 7.56, 8.5, 8.25, 8.27, 8.31, 8.38

see also International Covenant on Civil and Political Rights; International Law Association, "Minimum Standards of Human Rights Norms in a State of Exception"; New Zealand Bill of Rights Act 1990

Human Rights Commission, 5.124

Human Rights Commission Act 1977, 5.124

Human Rights Commission, Report on the International Terrorism (Emergency Powers) Bill 1987, 7.80-7.81

Immigration Act 1987, 3.28-3.30, 3.34-3.35, 7.37, 7.39, 7.44

Immigration Amendment Act 1991, 3.31-3.33

Immigration Regulations 1987, 3.29

Import Control Act 1988, 3.104-3.105, 5.24-5.25

importation of animals, control of, 3.50

Indemnity Act 1882, 4.50

industrial disaster, 1.101, 1.104, 2.21-2.24, 2.29, 6.52, 6.56, 6.66, 9.5, 9.14-9.15, 9.20, F22-F26, F34-F37

see also hazardous substances, escape

of; pollution

industrial disputes, 1.3-1.4, 2.10, 4.26, 10.10

inspection, power of, 3.52

interim government, formation of, B2, B9

International Commission of Jurists, States of Emergency: Their Impact on Human Rights, 4.16

International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 2.22, F30

International Covenant on Civil and Political Rights, 1.30, 1.62, 1.81, 2.7-2.8, 3.12, 3.14, 5.13-5.16, 5.19, 5.59, 5.91-5.93, 5.111, 5.127-5.128, 5.130-5.131, 6.76, 7.76, 7.87, 7.89-7.93, 7.141, 7.150-7.153, 7.158, 7.162

derogation from, 2.8, 5.14-5.16, 5.67,

6.76, 7.89-7.90

Optional Protocol, 5.130, 7.93

see also New Zealand Bill of Rights Act 1990; United Nations Human Rights Committee, consideration of International Terrorism (Emergency Powers) Act 1987

International Convention Against Taking of Hostages 1979, 3.22-3.24, 3.27

International Decade of Natural Disaster Reduction 1990-2000, 2.20

International Law Association, "Minimum Standards of Human Rights Norms in a State of Exception", 2.13-2.16, 4.17

International Energy Agreement Act 1976, 3.105, 5.50, 5.54

International Labour Organisation Conventions, 5.133

international obligations, 3.2, 3.10-3.15, 3.75-3.83, 5.91-5.93, 6.10, 8.31

monitoring of, 5.91, 5.94, 5.126-5.134

International Terrorism (Emergency Powers) Act 1987, 1.6, 1.64, 1.71-1.73, 1.77-1.79, 1.81-1.83, 3.40, 3.42, 3.45, 4.8, 4.34, 5.3, 5.28, 6.33, 6.36, 7.4, 7.6-7.7, 7.12, 7.19, 7.26, 7.59-7.61, 7.65, 7.74-7.139, 7.148-7.163, B28, B39, B44

"International terrorist emergency",
definition of, 3.45, 7.6, 7.19, 7.59,
7.76, 7.77-7.82, 7.88
procedure for invoking, 1.71, 1.77,
1.81, 7.59, 7.76, 7.83-7.86, 7.158,
7.160-7.161
Iranian Embassy siege, 7.143-7.144
Ireland v United Kingdom (1978), 5.111
Jennings, Constitutional Problems in Pakistan, 4.40
Johnson v Phillips (1976), 7.69, 7.109
judicial review, see safeguards, judicial safeguards
Kilmister v Attorney-General (1966), 7.100
King-Emperor v Benoari Lal Sarma (1945), C3
Korean conflict, 6.2
Kuwait, Iraqi invasion of, 3.7, 3.9, 5.97, 6.2, 6.77,
B10, B17, B24
Laqueur, "Reflections on Terrorism", 7.14
Larchbank v British Petrol (1943), 2.39
Law Commission, First Report on Emergencies: Use of the armed forces, 1.2-1.4, 1.46-1.47, 2.48, 3.3-3.4, 3.44, 3.95, 4.4, 4.6, 4.8, 4.11, 4.15, 4.26, 4.38, 5.74, 6.12-6.15, 6.58, 7.3, 7.5, 7.72, 7.114, 10.10
storage of, see National Archives
see also armed forces; emergency legislation, sectoral approach to; industrial disputes; low and medium-level contingencies
Law Commission, manual on legislation, 5.72
Law Commission, reference, criminal procedure, 5.58, 7.73, 7.138-7.139, 7.163
Law Commission, reference, the law and the Crown, 5.122, 5.159-5.160, 5.164
Law Commission, reference, legislation, 5.159-5.160, 5.164
Law Society of Lesotho v Minister of Defence (1988), C6
Lee, Emergency Powers, 4.40
Legislation Advisory Committee, 9.59

Legislation Advisory Committee, Legislative Change: Guidelines on Process and Content, 2.45, 5.4, 5.81, 5.118

Legislation Advisory Committee, Report of the Legislation Advisory Committee: 1 April 1988 to 31 December 1989, 5.4

Letters Patent Constituting the Office of Governor-General of New Zealand, 4.56, B3, B4, B9, B22

liability, limits on, 1.45, 1.62, 3.67, 3.74, 5.113-5.116, 5.135, 5.156-5.168, 6.76, 8.74, 9.28

Lipton Ltd v Ford (1917), C5

Liversidge v Anderson (1942), 5.108, C5

Local Authorities Emergency Powers Act 1953, 9.24, F10-F11

Local Government Act 1974, 7.105-7.106, 9.71, 9.73

low and medium-level contingencies, 1.46, 3.3, 3.5, 6.12-6.15, 6.62

Malaysia, deployment of New Zealand troops in, 6.2

"margin of appreciation", 5.110-5.112, 6.40, 6.60

Marine Pollution Act 1974, 1.93, 8.53, 8.56, 8.79-8.80

Maritime Transport: Waka Moana, NZ Marine Oil Spill Response Strategy: A Draft Paper for Discussion, 8.81

martial law, 1.29, 4.1, 4.35, 4.45-4.48, 4.50-4.51, 4.53, 6.38, 6.40

McEldowney v Forde (1971), C5

media coverage of terrorist events, control of, 1.75-1.82, 5.3, 7.61, 7.92, 7.94, 7.139-7.163

statutory provisions, 1.77-1.79, 1.81

-1.82, 5.3, 7.61, 7.92, 7.94, 7.139,

7.148-7.163

voluntary guidelines, 1.76, 1.79-1.80,

7.146-7.147, 7.155, 7.158, 7.162-7.163,

Appendix E

Military Service Act 1916, 4.23

Ministry of Agriculture and Fisheries, National Agriculture Security Policy, 8.11

Ministry for the Environment, Final Report of the Inter-Agency Coordinating Committee, Pollution and Hazardous Substances Management, 8.49-8.51, 8.53-8.56, 8.66-8.67

Ministry for the Environment, People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform, 2.49

Ministry for the Environment, Report on Public Submissions in Response to the New Zealand Planning Council Report, "New Zealand After Nuclear War", 6.26

Ministry of Civil Defence, Tornado Event: Inglewood and Waitara: 12 August 1990, 9.27, 9.29

Ministry of External Relations and Trade, Human Rights in New Zealand 1990, 5.131, 7.87, 7.152

Ministry of Foreign Affairs, Human Rights in New Zealand 1984, 5.131

Minto v Police (1987), 7.66, 7.68, 7.71

Misuse of Drugs Amendment Act 1978, 7.49, 7.127

Mitchell v DPP (1986), 4.42, C3

movement, power to control, 3.55-3.56, 3.68, 3.71, 3.92, 3.96, 3.106, 5.70, 6.47, 7.69, 7.103-7.106, 7.119-7.123, 7.135, 8.4, 8.20-8.22, 9.28

Mumenthaler, "Civil Defence (Protection) and Aid in Case of Disaster taking into consideration possibilities of International Cooperation, as seen by the Swiss Confederation", F29

National Agriculture Security Service, 8.12-8.18

National Civil Defence Committee, 3.88, 6.52, 6.68, 9.50, 9.53, 9.64, F18

National Civil Defence Plan, 2.12, 2.18, 3.88, 6.68-6.69, 9.10, 9.14-9.16, 9.18-9.19, 9.52-9.53, F26-F27

National Civil Defence Science Advisory Committee, 8.78

National Contingency Plan: Major Earthquake in the Wellington Area, B6

National Development Act 1979, 3.104

"National emergency", definition of, 1.11, 1.15, 2.10-2.12, 4.5

natural disaster, 1.101, 1.104, 2.10, 2.20-2.24, 2.29, 4.7, 6.52, 6.56, 6.66, 9.5, 9.14-9.15, 9.20, 9.35, F5-F6, F9-F11, F13, F15, F21-F26, F30, F34-F37

Natural Disasters Organisation, Proceedings of the Civil Defence Symposium, F35

Natural Disasters Organisation in conjunction with the State and Territory Emergency Services of Australia, Australian Counter Disaster Arrangements, F37

natural hazards, 8.59, 8.61, 8.64-8.65

Newcastle Breweries Ltd v The King (1920), C6

New Zealand Bill of Rights Act 1990, 1.30, 4.19, 4.52, 5.6-5.13, 5.118, 5.164, 7.154, 7.162

role of courts, 5.8-5.10

role of legislature, 5.8, 5.11-5.12

New Zealand Committee of Imperial Defence, 6.79

New Zealand Defence: Resource Management Review 1988, 6.12

New Zealand Intelligence Council, 7.9

New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987, 1.60, 3.11, 6.74

New Zealand Security Intelligence Service Act 1969, 3.28, 3.36, 7.10, 7.18, 7.35-7.36, 7.81, 7.127

Ningkan v Government of Malaysia (1970), C2

Niue Constitution Act 1974, 6.64

Noise Control Act 1982, 8.53

non-government enterprises, civil defence responsibilities of, 1.107-1.109, 9.2, 9.47-9.67

Noxious Plants Act 1978, 3.49, 8.7

nuclear incident, 1.47, 1.50-1.51, 2.10, 3.6, 4.7, 5.147, 6.1, 6.7, 6.19-6.28, 6.53-6.56, 6.61-6.62, 6.65, 6.69, 6.81, 9.6, 9.9, 10.10

Official Information Act 1982, 9.59

Office of the Co-ordinator Domestic and External Security, Cyclone Bola - Recovery Operations, 9.74

Oil Pollution Planning Committee, 8.81

Ombudsman, 5.124-5.125

Ombudsmen Act 1975, 9.49, 9.59

Organisation for National Security, 6.79

"Our Fault", see Civil Defence, Report on Exercise "Our Fault" 4-8 March 1991: A Major Testing Exercise

Parker v Commonwealth (1964), 5.162

Parliament,
 emergency action when prorogued,
 dissolved or expired, 4.33-4.34, 6.76,
 9.40-9.43, B1, B10-B11, B13-B14, B42
 -B43
 unable to meet because of emergency,
 B1, B10, B25, B42, B45

Parliamentary Commissioner for the Environment:
 Te Kaitiaki Taiao, Maui Stage II Development Environmental Impact Audit, 8.68

Parliamentary Commissioner for the Environment:
 Te Kaitiaki Taiao a Te Whare Paremata, The Control of Marine Oil Pollution in New Zealand: A Review of the System, 8.80-8.81

Patents Act 1953, 3.105

pests, incursion of, 1.86, 1.89, 1.100, 8.6-8.8, 8.19-8.31, 8.38-8.41, 8.43, 8.45

Pesticides Act 1979, 8.53, 8.63

Petroleum Demand Restraint Act 1981, 3.105, 5.50, 6.50, 10.4, B35

plant disease, 1.86-1.87, 1.89, 1.100, 1.104, 8.5, 8.7-8.8, 8.19-8.31, 8.38-8.41, 8.43, 8.45, 9.14, 9.19-9.21

see also Biosecurity Act proposals; Plants Act 1970

Plants Act 1970, 3.49, 5.42, 8.7, 9.19, F27

Police Act 1958, 7.46, 7.62, 7.149, 7.162-7.163

Police v Amos (1977), 7.67, 7.109, 7.121

police, duties of, 3.16, 7.62, 7.66-7.67

police powers, 1.63-1.66, 1.68-1.74, 1.83, 3.18, 3.33, 3.35, 3.37-3.40, 3.45, 7.1-7.2, 7.6, 7.8, 7.25-7.31, 7.37-7.39, 7.44-7.50, 7.53-7.61, 7.63-7.76, 7.94-7.141, 7.148-7.157, 7.159-7.163

at common law, 1.63, 1.72-1.74, 3.18,
 3.45, 7.1, 7.45, 7.59, 7.66-7.73, 7.75,
 7.96-7.97, 7.99-7.102, 7.109, 7.111,
 7.134-7.138

see also arrest, power of; closure of roads, public places; communications, interference with; communications, power to intercept; destruction,

power of; detention of individual; direction, power of; entry, power of; evacuation, power of; movement, power to control; removal of obstructing vehicles; requisitioning; search, power to

8.45-8.46

"prosecute or extradite" principle, 3.24

pollution, 1.86, 1.92-1.100, 8.5, 8.49-8.55, 8.57, 8.59, 8.64, 8.66-8.83

Protocol for prohibition of use in War of asphyxiating, poisonous or other Gases, etc 1925, 3.11, 3.15

Post Office Act 1959, 6.50, 7.130

Public Finance Act 1989, 3.105, 5.144

Powles Report, see Security Intelligence Service: Report by Chief Ombudsman

publicity, need for, 1.36, 3.76, 3.78-3.79, 5.49, 5.57-5.62, 5.90, 8.35, 8.38

prerogative, 1.28, 1.49, 3.4, 3.41, 4.1, 4.35, 4.37-4.42, 4.46, 4.51-4.53, 4.55, 6.8, B9

Public Safety Conservation Act 1932, 3.37-3.40, 4.5, 4.8-4.9, 4.15, 4.23, 4.41, 5.42, 5.74, 6.43, 6.45, 6.50, 6.52, 6.79, 7.3-7.4, 7.86, B35, F11

Prevention of Terrorism (Temporary Provisions) Acts, 7.50-7.55

Public Service Investment Society Management Act (No 2) 1979, 10.4

Prevention of Terrorism (Temporary Provisions) Act 1989 (UK), 7.25

public welfare emergencies, 1.84-1.100, 3.1, 3.46-3.83, 5.75, 8.1-8.5

Prevention of Terrorism (Temporary Provisions) Act (Continuance) Order 1991, 7.52

Public Works Act 1981, 5.154

privative clauses, 1.106, 1.140, 1.191, 3.74, 5.112-5.123, 5.158, 5.160-5.161, 8.45-8.46, 9.44, 9.46

bars on interim relief, 5.120-5.122,

Quarantelli, Organizational Behaviour in Disasters and Implications for Disaster Planning, 2.4, 2.35, 2.37, 9.47

Radiation Protection Act 1965, 8.53

Rainbow Warrior incident, 7.12, 7.74

R v Admore (1989), 7.57

Rawlinson, "Organisation for Disaster: The Development of Civil Defence in New Zealand: 1959-1970", 2.17, F1-F2, F11, F13, F17, F19

R v Beazley (1987), 7.57

Reference re Regulations (Chemicals) under War Measures Act (1943), C5

R v Comptroller General of Patents Ex parte Bayer Products Ltd (1941), C4

Regulations (Disallowance) Act 1989, 3.79, 5.86-5.87, 5.99, 5.102, 6.76, 9.42, B27, B36, B40

R v Fatu (1989), 7.57

Regulations Review Committee, 4.19, 5.54-5.56, 5.99, B40

R v Halliday (1917), 5.109, C5

R v Panel on Take-overs and Mergers, Ex parte Datafin Plc (1987), 9.58

Regulations Review Committee, Regulations Review Committee 1990: Inquiry into the Drafting of Empowering Provisions, 5.84, 8.34

R v Sanders (1984), 7.42

Regulations Review Committee, Report of the Regulations Review Committee 1986: Regulation-Making Powers in Legislation, 5.51, 5.81, 8.33

R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority (1989), 4.39

Re Manitoba Language Rights (1985), 4.42

R v Toohy: Ex Parte Northern Land Council (1981), 4.52

remedies, limits on claims for, see liability, limits on

R v Waterfield (1964), 7.66

removal of obstructing vehicles, 3.94, 3.106, 7.107-7.109

R v Wilcox (1982), 7.40

Report of the Commission of Inquiry into the Abbotsford Landslip Disaster, 2.23, 9.23, F20

- Report of the Commission of Inquiry into the Parnell Civil Defence Emergency, 8.75
- Report of the Controller and Auditor-General on Statements of Corporate Intent: September 1990, 9.61
- Report of the Delegated Legislation Committee, 5.74, 5.81
- Report of the Ombudsman for the year ended 31 March 1964, 5.125, F18
- Report of the Ombudsman for the year ended 31 March 1965, 5.125, F18
- Report of the Primary Production Committee on the Inquiry into Government Assistance to the East Coast Region in the Wake of Cyclone Bola, 5.98
- Report of the Review Group on the Resource Management Bill, 8.72
- Report of State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee, 9.59
- requisitioning, 1.3, 1.5, 3.58, 3.69, 3.94, 3.106, 5.70, 5.137, 5.148-5.149, 5.152, 6.14, 6.47, 7.113-7.118, 7.135, 9.65, 9.68
- Reserve Bank Act 1964, 6.46
- Reserve Bank of New Zealand Act 1989, 3.104-3.105, 5.50, 10.8-10.9, 10.11
- Resource Management Act 1991, 1.93, 3.48, 3.65-3.67, 8.5, 8.14, 8.56-8.62, 8.64, 8.70, 8.72, 8.79, 9.24
- Review of Defence 1958, F12
- Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984 by The Viscount Colville of Culross QC, 7.37, 7.42, 7.52
- Rice v Connelly (1966), 7.62
- Robson (ed), New Zealand: The Development of its Laws and Constitution, 6.10
- Ross-Clunis v Papadopoulos (1958), C5
- rules, authority to make, 1.90, 3.48, 3.76-3.83, 5.86-5.88, 6.73, 8.35-8.38

"Self-Reliance in Partnership", 1.46, 3.5, 6.13

see also Defence of New Zealand 1991: A Policy Paper

safeguards, 1.24, 1.30-1.45, 1.61-1.62, 1.88-1.91, 1.106, 2.13-2.16, 2.45, 4.4-4.6, 4.10, 4.12, 4.14, 4.19, 4.24, 4.51-4.53, 5.2-5.5, 5.48-5.49, 5.90, 5.94-5.134, 6.10, 6.40, 6.59, 6.73-6.76, 6.78, 6.80, 8.4, 8.10, 8.25, 8.32, 8.33, 8.35-8.38, 8.41-8.47, 8.74, 9.2, 9.39-9.46, B1, B10, B23-B46, C1-C6

judicial safeguards, 1.40, 1.91, 1.106,

4.6, 4.46-4.47, 4.51-4.52, 5.8-5.10,

5.22, 5.27, 5.29-5.31, 5.37, 5.81, 5.83,

5.94, 5.105-5.123, 5.156, 5.158, 5.160

-5.161, 6.76, 8.33, 8.38, 8.41, 8.44

-8.46, 9.2, 9.44-9.46, C1-C6

parliamentary safeguards, 1.33, 1.39,

1.106, 2.16, 3.43, 3.63, 3.91-3.97,

3.102, 4.6, 4.51, 5.8, 5.11-5.12, 5.45,

5.62-5.63, 5.75, 5.85-5.86, 5.90,

5.94-5.104, 6.76, 8.41-8.43, 9.2, 9.39

-9.43, B1, B10, B23-B46

see also consultation, requirement of: liability, limits on: privative clauses: publicity, need for

search, power to, 1.68-1.70, 3.25, 3.56, 7.25, 7.37, 7.45-7.49, 7.53, 7.55-7.58

Security Intelligence Service, co-operation with other agencies, 7.36

Security Intelligence Service: Report by Chief Ombudsman (the Powles Report), 7.9, 7.34, 7.36, 7.81

serious civil disturbances, 1.63-1.83, 2.29, 3.1, 3.16-3.45, 7.1-7.8, 7.12, 7.21-7.30, 7.37, 7.55-7.56, 7.59-7.60, 7.70, 7.73, 7.78, 7.82-7.86, 7.88-7.90, 7.97, 7.105, 7.118, 7.128, 7.130, 7.136-7.139, 7.157, 7.159

see also terrorism

Serious Fraud Office Act 1990, 5.120

Shattock v Devlin (1990), 7.68, 7.100

Shipping and Seaman Act 1952, 5.167

Shrimpton v The Commonwealth (1945), 6.9

Smith, Hogan, Criminal Law 1988, 7.111

South Pacific Nuclear Free Zone Treaty 1985, 3.11

Standing Orders, 4.19-4.20, 4.28-4.29, 4.31, 4.56, 5.54, 5.97-5.99, 8.43, B16, B18-B19, B22, B38

state of emergency, 1.31, 2.6-2.9, 6.29

declaration of, 1.32, 1.34-1.36,

5.2, 5.16, 5.18-5.32, 5.41-5.48, 5.67,

8.38, 8.40, B10, B26, B29-B31, B33

-B34, B38, B41, B45, C1-C3

extension of, 1.33, 5.36-5.38, 5.45,

B10, B34

limits on, 1.31, 5.33-5.40, 6.76, 8.47

publicity as to, 1.36, 8.42

State necessity, 1.28, 4.1, 4.35, 4.42-4.44, 4.46, 4.51, 4.53, B9, C3

State-Owned Enterprises Act 1986, 9.54, 9.60, 9.63

State-owned enterprises, civil defence responsibilities of, see non-government enterprises, civil defence responsibilities of

State Sector Act 1988, 5.163

Stock Act 1908, 3.51

Stock Diseases Regulations 1937, 3.51, 3.55

sub-delegated legislation, 5.89-5.90, 6.73

Summary Offences Act 1981, 3.17, 7.62

Summary Proceedings Act 1957, 7.47

Supply Regulations Act 1947, 6.46

Taggart, "Corporatisation, Privatisation and Public Law", 9.57-9.58

Taggart (ed), Judicial Review of Administrative Action in the 1980s, 5.119

Taylor, Disasters and Disaster Stress, 2.22, 2.40

Teh Cheng Poh v Public Prosecutor (1980), 5.37

Telecommunications Act 1987, 7.125, 7.130-7.131

Temuka foot and mouth scare, 8.24

terms of reference, 1.1

terrorism, 1.64-1.65, 1.67-1.69, 1.71, 1.73, 1.75-1.83, 2.12, 3.16-3.36, 3.45, 6.35-6.36, 7.4, 7.6-7.8, 7.9-7.29, 7.31-7.34, 7.36-7.37, 7.41-7.44, 7.50-7.56, 7.59-7.61, 7.74-7.86, 7.142-7.145

definition of, 3.20-3.21, 7.16-7.19,

7.53, 7.79

distinction between international and
internal terrorism, 1.64, 1.81, 7.6-7.9,
7.12, 7.19, 7.78, 7.80-7.82, 7.88, 7.159
role of intelligence in prevention of,
7.32-7.36
see also International Terrorism
(Emergency Powers) Act 1987

The State v Adel Osman (1988), C3

The Zamora (1916), 5.107

Thomas v Sawkins (1935), 7.68, 7.100

Toxic Substances Act 1979, 3.73, 8.53, 8.63

Transport Act 1962, 7.108

Treaty on Non-Proliferation of Nuclear Weapons
1968, 3.11, 3.15, 6.20

Treaty banning Nuclear Weapon Tests in
Atmosphere etc 1963, 3.11, 3.15, F17

Treaty on Prohibition of Emplacement of Nuclear
Weapons etc on Seabed etc 1971, 3.11, 3.15

Treaty of Waitangi, 8.50

Trespass Act 1980, 5.166

United Nations Act 1946, 3.7-3.9, 5.25

United Nations General Assembly, 5.129

United Nations Charter, 3.8, 5.25, 5.127

United Nations Commission on Human Rights, Sub-
Commission on Prevention of Discrimination and
Protection of Minorities, 5.127-5.128

see also Despouy

United Nations Convention Against Torture etc
1985, 3.14, 5.132

United Nations Disaster Relief Co-ordinator,
Disaster Prevention and Mitigation, 2.19, 2.26

United Nations Human Rights Committee, 5.130-
5.132, 7.93

consideration of International Terrorism

(Emergency Powers) Act 1987, 5.131,

7.87-7.89, 7.152, 7.157-7.158

United Nations peacekeeping operations, 3.7-3.8,
6.2

United Nations Sanctions (Iraq and Kuwait)
Regulations 1990, 3.9

Vietnam conflict, 6.2

wage and price freeze, 3.103

Waitangi Tribunal, 8.50

war, 1.47, 1.48-1.49, 2.10, 2.29, 3.1, 3.3-3.4, 3.7-3.12, , 4.7, 4.45-4.46, 5.79, 5.146-1.147, 6.1-6.10, 6.15-6.18, 6.56, 6.58, 6.61-6.63, 6.65, 6.77, 6.81, 9.6, 9.9, 10.10

protection of civilian population, 1.54,

1.102, 2.11, 2.21, 3.6, 6.3, 6.48, 6.55

-6.71, F2, F4-F5, F10-F14, F16-F17,

F22, F28-F37

War Book, 6.79

War Damage Act 1941, 5.142

Wardlaw, Political Terrorism: Theory, tactics and counter-measures, 7.15

war emergencies, 1.6, 1.47, 1.56-1.58, 5.16, 5.37, 5.76, 5.79, 6.11, 6.16-6.42, 6.58-6.71, 6.76, 9.6-9.7, 9.9

see also armed insurrection; biological

incident; nuclear incident; war

War Emergencies Act (draft), 1.55-1.62, 1.102, 4.21, 4.26, 5.16, 5.35, 5.37, 5.62, 5.76, 5.80, 5.89, 5.92, 5.101, 5.149, 5.153, 6.7, 6.58-6.66, 6.70-6.77, 6.79-6.81, 8.37, 8.42, 9.8, 9.69, 10.10, B7-B8, B27, B34, B40, Appendix D

preparation and timing of, 6.59

War Measures Act 1914, 4.13, 4.15

War Pensions Act 1954, 6.6

Water and Soil Conservation Act 1967, 8.53

Whalan, "The Adequacy of Exotic Animal Diseases Legislation in Australia: A Consultancy Report to the Department of Primary Industry of the Commonwealth of Australia", 8.45

Williams, Textbook of Criminal Law 1978, 7.64

World War II emergency legislation, 2.42, 4.23, 6.43-6.48, 6.79

References are to paragraph numbers; the first number or letter denotes the chapter (1-10) or appendix (A-F).