

EXPEDITING DEMOCRATIC, CIVIL AND POLITICAL RIGHTS: COVID-19 AND AN IMPROVED MODEL OF EXPEDITED LAW-MAKING

*Maisy Bentley**

Research and scholarship on the use of expedited law-making processes, such as urgency, is limited. That which exists focuses on the dangers of using expedited law-making when there is not a genuine need to do so. Do these dangers vanish when expedited law-making is necessary? Expedited law-making even where used legitimately, for example to respond to COVID-19, can cause harm to civil, democratic and political rights. These harms can be evidenced by the passing of the COVID-19 Public Health Response Act 2020. However, such harms were not isolated. An analysis of Bills passed from the start of the pandemic to the time of writing shows that these harms were widespread amongst legislation passed during this period. Once the existence of these harms has been established, their nature and extent are analysed against 10 principles of good law-making. This article concludes that these harms need not be accepted as inevitable and proposes a new model of law-making, consisting of seven practices to be implemented across the life span of a Bill, which mitigates harms to civil, democratic and political rights without undermining the urgency of expedited law-making. Ultimately, law-making in times of crisis should be efficient, but such law-making must not be governed by fear, panic or haste. Instead, law-making in times of crisis must be governed by the rule of law, democratic ideals and principles of good law-making.

I INTRODUCTION

In 2020, New Zealand, much like the rest of the world, was subject to severe public health measures to combat the threat to life and health posed by COVID-19. Citizens rushed to bring laptops home from work, visit loved ones and stock up on essential items. Simultaneously, New Zealand's lawmakers were urgently passing legislation to ensure that unprecedented public health restrictions

* LLB(Hons, First Class), BA Te Herenga Waka—Victoria University of Wellington, enrolled Barrister and Solicitor of the High Court of New Zealand. This article was originally submitted as a paper for the LLB (Honours) Degree, Faculty of Law, Victoria University of Wellington in October 2021. Thanks to my supervisor Dr Dean Knight for his helpful feedback, encouragement and tweeting.

had proper legal grounding.¹ The use of expedited law-making, even where legitimate, undermines fundamental and constitutional rights of citizens: specifically, the rights to have their views represented in Parliament, to contribute to the law-making process, to debate law-making in a transparent manner, and for any infringement on their rights to be given careful consideration and due process.² Any infringement on such rights warrants an evaluation of how they can be protected. Even more worryingly, infringement of such rights may erode the consent upon which representative democracy is built.³ This erosion of consent may decay the legitimacy of Parliament, which may, in turn, result in citizens avoiding or resisting the application of state power: for example, through civil dissonance or disobedience.⁴ In extreme cases, citizens may deny the state's "rightfulness or relevance"⁵ by explicitly challenging its authority, such as by insurrection.⁶

Part II of this article chronicles the passage of the COVID-19 Public Health Response Act 2020 (COVID-19 Act) to demonstrate how expedited law-making can infringe rights and decay legitimacy in New Zealand's democracy. In Part III, the article then quantitatively analyses all Bills passed from the start of the pandemic in March 2020 until September 2021 to illustrate that these harms—the infringement of rights and decay of democratic legitimacy—were widespread and not isolated incidents.⁷ In Part IV, the nature and extent of these harms are evaluated against 10 principles of good law-making: open debate, scrutiny, citizen participation, transparency, quality legislation, fundamental rights, stable procedural rules, fostering respect, the right to govern, and the quick enactment of legislation in actual emergencies.⁸ Although this article focuses on Parliament, which has authority to pass legislation, much of this evaluation necessarily focuses on procedures within the House of Representatives (the House) as these procedures are central to the law-making process.

1 (25 March 2020) 745 NZPD.

2 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011) at 16–19.

3 John Locke *Two Treatises on Government: A Translation into Modern English* (Industrial Systems Research, Manchester, 2013) at 243.

4 Rodney Barker *Political Legitimacy and the State* (Oxford University Press, Oxford, 1990) at 2.

5 At 2.

6 John Foran *Taking Power: On the Origins of Third World Revolutions* (Cambridge University Press, Cambridge, 2005) at 14.

7 Data is collated from 25 March 2020 (the date that a state of emergency was declared and epidemic notice was in force) to 10 September 2021 (the end of the last sitting block before the conclusion of writing this article).

8 Geiringer, Higbee and McLeay, above n 2, at 16.

Representative democracy is premised on the consent of the majority to be governed by a few.⁹ Elected representatives make laws on behalf of citizens. Representatives must therefore articulate arguments for and against Bills on behalf of citizens.¹⁰ If citizens do not feel represented—for example, if Bills are not debated in Parliament due to limits on debate, as was the case with most expedited laws made in response to COVID-19—that consent may be eroded and the legitimacy of Parliament decayed in turn. Central to the consent upon which Parliament is premised is that citizens can directly and indirectly participate in the legislative process.¹¹ In a representative democracy such participation is generally through elections. However, there are many other mechanisms, such as engagement with elected officials, petitions and select committee submissions. These mechanisms, however, were not present for expedited law-making during the pandemic.¹²

It is an established principle that legislation should not jeopardise fundamental constitutional rights and principles.¹³ Citizens' fundamental rights, such as freedom of movement and association, were heavily restricted during the pandemic.¹⁴ In addition, "[t]he more that legislation affects individual and group rights, the more important it is that it is accorded due process and is carefully considered".¹⁵ However, even where expedited law-making is used legitimately it removes mechanisms that allow for careful consideration. This can leave citizens feeling like their rights have been unduly infringed.¹⁶

These harms, however, need not be accepted as an inevitable consequence of expedited law-making. After demonstrating and assessing the harms expedited law-making poses to democratic, civil and political rights, Part V of this article advances an improved model of expedited law-making consisting of seven practices that should be adopted by Parliament. These practices include an early indication of the government's policy position, which gives time and transparency to build social licence and legitimacy in the face of removing nearly all democratic input. Once this early policy indication has been given and a draft Bill is being produced the minister responsible can give a ministerial statement. Once the Bill is drafted, academics and special interest groups can comment on it. When the Bill is introduced to the House, democratic input can be facilitated through electronic

9 *Laws of New Zealand* Parliament (online ed) at [58].

10 Geiringer, Higbee and McLeay, above n 2, at 2–3.

11 Henry Steiner "Political Participation as a Human Right" (1988) 1 *Harv Hum Rts YB* 77.

12 David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 409–411 and 600.

13 Geiringer, Higbee and McLeay, above n 2, at 18.

14 Alexander Gillespie "Five ways New Zealanders' lives and liberties will be heavily controlled, even after lockdown eases" (16 April 2020) *The Conversation* <www.theconversation.com>.

15 Geiringer, Higbee and McLeay, above n 2, at 18.

16 At 14.

means by directly connecting citizens to elected representatives. After the Bill is passed it should be subject to post-enactment review. At all stages of the process, including the period after the Bill has become law, all official information should be proactively released. Finally, "the full evaluation of the response to Covid-19 must include ongoing concerns for the ways in which that response navigates relationships under te Tiriti".¹⁷

Law-making in times of crisis should be efficient, but it need not be governed by the fear, panic or haste produced by the urgency of responding to emergencies. Instead, law-making in times of crisis must be governed by the rule of law, democratic ideals, and principles of good law-making.

II COVID-19 PUBLIC HEALTH RESPONSE ACT: A DEMONSTRATION OF THE HARMS FROM EXPEDITED LAW-MAKING

Research and scholarship on the use of expedited law-making, such as urgency, is limited. That which exists focuses on the dangers of using expedited law-making when there is not a genuine need to do so. Do these dangers vanish when expedited law-making is necessary? The COVID-19 Act demonstrates that such harms and dangers are still present even where expedited law-making is used legitimately. On 28 February 2020, the first case of COVID-19 was reported in New Zealand, creating a sense of nervousness about what the novel virus meant for the country.¹⁸ Less than a month later, the Director-General of Health made orders under s 70 of the Health Act 1956 that closed New Zealand's borders to all people except citizens and permanent residents.¹⁹ It was the first time in history that the government had closed the country's borders.²⁰

This unprecedented measure anticipated the restrictions that followed. Beyond New Zealand's safely-closed border, over 40,000 people were falling ill and over 2,000 people were losing their lives to the virus each day.²¹ By late March 2020, once again relying on s 70 powers in the Health Act, the government placed New Zealand under Alert Level 4 restrictions.²² At Alert Level 4, citizens were

17 Janet McLean and others "Legality in times of emergency: assessing NZ's response to COVID-19" (2021) 51 *Journal of the Royal Society of New Zealand* 197 at 208.

18 Ministry of Health "Single case of COVID-19 confirmed in New Zealand" (press release, 28 February 2020).

19 Cabinet Minute of Decision "Stronger COVID-19 Border Measures" (19 March 2020) CAB-20-MIN-0122.

20 Gill Bonnett "Covid 19 coronavirus - New Zealand's historic border closure six months on" *New Zealand Herald* (online ed, New Zealand, 19 September 2020).

21 World Health Organization "Situation by Region, Country, Territory & Area" WHO Coronavirus (Covid-19) Dashboard < covid19.who.int >.

22 Jacinda Ardern "Covid-19 Alert Level increased" (press release, 23 March 2020); Section 70(1)(m) Health Act Order (25 March 2020); Section 70(1)(f) notice to all persons in New Zealand (3 April 2020); and Jacinda Ardern "PM Daily COVID-19 Press Conference" (press release, 27 March 2021).

required to stay at home, except for accessing essential services.²³ At Alert Level 3, citizens were still required to stay at home except for accessing permitted businesses or services, and non-essential businesses could operate if all interaction was "contactless".²⁴ At Alert Level 2, schools, food establishments and businesses could reopen, but with public health measures such as physical distancing, mask wearing and occupancy limits.²⁵ At Alert Level 1, there were few restrictions on the general community except, for example, the requirement of face-coverings in certain settings.²⁶ In 2021, once high vaccination rates were reached, the government moved to the COVID-19 protection framework which imposed less prohibitive measures, especially for those who were fully vaccinated.

The virus posed a great risk, particularly to people's right not to be deprived of life. At its peak, the crisis saw nearly 20,000 deaths per day globally.²⁷ If medical systems became overrun due to the uncontrolled spread of the virus, people's right to receive medical treatment and right to health and well-being would be violated.²⁸ There was no doubt that significant restrictions on democratic and civil liberties were necessary, such as requiring people to stay at home, limit social interactions and give up many other comforts of day-to-day life. But there is also no doubt that such restrictions were a severe infringement on citizens' rights.²⁹ The restrictions imposed limits on freedom of expression: for example, gathering for church—an important aspect of religious expression—was banned.³⁰ Rights to work and leisure were also restricted.³¹ A few essential workers could work with strict conditions.³² However, the vast majority of people had to work remotely if possible or cease work.³³

23 "What we need to do at Alert Level 4" Unite Against Covid-19 <www.covid19.govt.nz>; and Jacinda Ardern "PM Address – Covid-19 update" (press release, 21 March 2020) at [11].

24 "What we need to do at Alert Level 3" Unite Against Covid-19 <www.covid19.govt.nz>; and Ardern, above n 23, at [11].

25 "What we need to do at Alert Level 2" Unite Against Covid-19 <www.covid19.govt.nz>; and Ardern, above n 23, at [11].

26 "What we need to do at Alert Level 1" Unite Against Covid-19 <www.covid19.govt.nz>; and Ardern, above n 23, at [11].

27 World Health Organization, above n 21.

28 Universal Declaration of Human Rights GA Res 217A (1948), art 25.

29 Gillespie, above n 14.

30 New Zealand Bill of Rights Act 1990; Section 70(1)(m) Health Act Order (25 March 2020); and Section 70(1)(f) notice to all persons in New Zealand (3 April 2020).

31 Universal Declaration of Human Rights, above n 28, arts 23 and 24.

32 Section 70(1)(m) Health Act Order (25 March 2020); Section 70(1)(f) notice to all persons in New Zealand (3 April 2020); and COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021, s 18.

33 Statistics New Zealand "Four in 10 employed New Zealanders work from home during lockdown" (7 September 2020) StatsNZ <stats.govt.nz>.

Later in the pandemic, mandatory testing and vaccination for some workers also infringed rights, such as the right to refuse medical treatment.³⁴

New Zealand saw a high rate of compliance with public health orders. This achievement was aided by parallel legislative interventions such as a wage subsidy programme.³⁵ The high level of compliance meant New Zealand was soon free of COVID-19.³⁶ By May 2020, the state of emergency and epidemic notice ceased to be in force. Restrictions were set to ease, with the country moving to Alert Level 2 of the government's Alert Level Framework.³⁷

There was ongoing debate about the legality of s 70 orders imposing the nationwide restrictions that gave effect to Alert Levels 3 and 4.³⁸ In response, the government sought to pass the COVID-19 Act, which gave the government sweeping powers to use secondary legislation to impose restrictions on various rights and liberties as discussed above.³⁹ It also conferred wide powers to the Police and other bodies to enforce such restrictions.⁴⁰ The Act was intended to give legal grounding to all national and regional restrictions imposed under the Alert Level Framework going forward.⁴¹

The government had known for several weeks that it intended for restrictions to ease.⁴² The government had also known about the ongoing debate about the suitability of the legal powers previously relied on for imposing COVID-19 restrictions.⁴³ Despite this, the government did not give

34 New Zealand Bill of Rights Act, s 11.

35 Dean R Knight "New Zealand: Legal Response to COVID-19" in Jeff King and Octávio Ferraz (eds) *Oxford Compendium of National Legal Responses to COVID-19* (online ed, Oxford Constitutional Law) at [121]; (17 March 2020) 745 NZPD at 17011; and Grant Robertson "New wage subsidy, leave scheme protects jobs and businesses" (press release, 17 August 2020).

36 Ministry of Health "No active cases of COVID-19" (press release, 8 June 2020); and Jacinda Ardern "New Zealand moves to Alert Level 1" (press release, 8 June 2020).

37 Jacinda Ardern "Post-cabinet press conference" (press release, 11 May 2020); and Cabinet Social Wellbeing Committee Minute of Decision "Report back on the case for new powers for the Alert Level Framework" (29 April 2020) SWC-20-MIN-0022.

38 See for example Andrew Geddis and Claudia Geiringer "Is New Zealand's COVID-19 lockdown lawful?" UK Constitutional Law Association (27 April 2020); Dean R Knight and Geoff McLay "Is New Zealand's COVID-19 lockdown lawful? - an alternative view" UK Constitutional Law Association (11 May 2020); and Cabinet Social Wellbeing Committee Minute of Decision "Report back on the case for new powers for the Alert Level Framework" (29 April 2020) SWC-20-MIN-0022.

39 COVID-19 Public Health Response Act 2020, s 11.

40 Sections 18–27.

41 Section 4.

42 Jacinda Ardern "Level 2 Announcement" (press release, 11 May 2020).

43 David Parker "New Zealand's Covid-19 response - legal underpinnings and legal privilege" (press release, 8 May 2020).

any indication of their intent to create bespoke legislation.⁴⁴ It was not until the Bill was introduced to the House on 12 May 2020 that the opposition, media or citizens knew of its contents.

The Bill passed through an expedited process before coming into force the next day.⁴⁵ No formal mechanisms were in place for citizens to express their views. As a result, some felt it was "rushed through" to intentionally limit scrutiny of the sweeping powers.⁴⁶ This caused a "wave of sound and fury".⁴⁷ That fury manifested in petitions and protests which breached restrictions and put lives at risk.⁴⁸ Such a response demonstrates that citizens were highly motivated to engage with the content of the law, but were deprived of the usual democratic mechanisms for doing so. Certain provisions and their potential use raised particular concern. For example, warrantless entry to marae caused a "firestorm".⁴⁹ That concern was the subject of numerous news articles and was acknowledged by members in the House.⁵⁰ Limited debate in the House and few opportunities for engagement with the minister responsible for the Bill meant these concerns could not be dispelled. Regardless, the Bill was passed and provided the legal basis for subsequent restrictions, including both regional and nationwide lockdowns to protect against an outbreak of the COVID-19 Delta variant.⁵¹ The Act was the first Bill passed in response to COVID-19 that did not have the support of all parties in Parliament.⁵²

44 Collette Devlin "Coronavirus: New COVID-19 law gives police power to conduct warrantless searches amid civil liberty concerns" (14 May 2020) Stuff <www.stuff.co.nz>; and "Level 2 enforcement law passed too quickly: Human Rights Commissioner" (16 May 2020) RNZ <www.rnz.co.nz>.

45 (12 May 2020) 745 NZPD; and (13 May 2020) 745 NZPD.

46 Deborah Russell and others *Inquiry into the operation of the COVID-19 Public Health Response Act 2020* (Finance and Expenditure Committee, July 2020) at 4.

47 Claudia Geiringer "The COVID-19 Public Health Response Act 2020" [2020] NZLJ 159 at 159.

48 "Timeline: The year of Covid-19 in New Zealand" (24 March 2020) RNZ <www.rnz.co.nz>; and Linda Dalglish "Petition to the New Zealand Parliament: We do not want the COVID-19 Public Health Response Act 2020" (2 June 2020).

49 Geiringer, above n 47, at 159.

50 (12 May 2020) 745 NZPD; (13 May 2020) 745 NZPD; Collette Devlin "Coronavirus: New COVID-19 law gives police power to conduct warrantless searches amid civil liberty concerns" (14 May 2020) Stuff <www.stuff.co.nz>; Andrew Geddis "The level two law is necessary - and full of flaws" (14 May 2020) *The Spinoff* <www.thespinoff.co.nz>; "Law professor scrutinises Public Health Bill" (13 May 2020) RNZ <www.rnz.co.nz>; and Collette Devlin "Government tweaks COVID-19 level 2 law after marae controversy" (13 May 2020) Stuff <www.stuff.co.nz>.

51 See for example COVID-19 Public Health Response (Alert Level 3 and 2) Order 2020; COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021; Ministry of Health "COVID-19: Current cases" (17 August 2021) <health.govt.nz>; and Ministry of Health "COVID-19: News and media updates" (13 October 2020) <health.govt.nz>.

52 Amelia Wade "Covid19 coronavirus: Controversial Bill passed to enforce alert level 2 powers" *New Zealand Herald* (online ed, Auckland, 13 May 2020).

Over a year later, discontent remained about the way the Bill had been passed and it has been the subject of academic commentary, media scrutiny and even citizen petitions.⁵³ The Act demonstrates the harms to the rule of law, democratic ideals, and principles of good law-making posed by even the legitimate use of expedited law-making in response to emergencies. These harms were again demonstrated in late 2021 with the passage of the COVID-19 Response (Vaccinations) Legislation Bill.⁵⁴

After repeated lockdowns, the emergence of new COVID-19 variants, and the arrival of safe and effective vaccines, the government, like much of the world, decided to move away from lockdowns and virus elimination.⁵⁵ This also required the government to move away from its Alert Level Framework. On 2 December 2021, the government implemented the COVID-19 Protection Framework (also known as the "traffic light system") in its place.⁵⁶ The government introduced the COVID-19 (Vaccinations) Legislation Bill to enact the new system, passing it through the House in a single day. The new framework focused on reducing virus spread rather than eliminating it. The framework allowed more freedoms for those who were vaccinated compared to those who were not. This was enforced through a vaccine pass system. Around the same time, the government also implemented compulsory vaccination for several sectors, such as health and disability, police and border forces.⁵⁷

All vaccine pass requirements ended on 4 April 2022.⁵⁸ The traffic light system ended on 12 September 2022.⁵⁹ All vaccine mandates had ended by late 2022; the last remaining sector-wide mandate was for health and disability workers.⁶⁰ Nearly all rules had been removed following the end of the traffic light system, aside from mandatory isolation for those who test positive.⁶¹

The infringements on rights that resulted from attempts to control the virus were outlined earlier in this article. However, the COVID-19 Response (Vaccinations) Legislation Bill presented unique

53 Gayleen Putt "Petition to the New Zealand Parliament: It's time to repeal the Covid-19 Public Health Response Act 2020" (1 June 2021); Geiringer, above n 47; and Mark Quinlivan "COVID-19 law 'much better' than first lockdown, Government has 'raft of power' – expert" (13 August 2020) Newshub <www.newshub.co.nz>.

54 COVID-19 Response (Vaccinations) Legislation Bill 2021 (101).

55 Jacinda Ardern "All of Government Press Conference" (press release, 17 November 2021).

56 "Timeline of important events" Unite Against Covid-19 <covid19.govt.nz>.

57 COVID-19 Public Health Response (Vaccinations) Order 2021.

58 Jacinda Ardern "Post-peak plan a safe return to greater normality" (press release, 23 March 2022).

59 Jacinda Ardern and Ayesha Verrall "COVID-19 Protection Framework retired NZ moves forward with certainty" (press release, 12 September 2022).

60 Ardern and Verrall, above n 59.

61 Ardern and Verrall, above n 59.

and additional infringements. The Bill had far reaching consequences, requiring almost 40 per cent of the workforce to be vaccinated to keep their jobs.⁶² The Ministry of Justice analysed whether the Bill complied with the New Zealand Bill of Rights 1990 (NZBORA), concluding that the Bill infringed on eight different rights.⁶³ Professor Andrew Geddis described it as "a Bill that allows the state to say 'put this in your body or else largely forgo social interactions'", and noted that a Bill of that type "should be given time for proper scrutiny and debate".⁶⁴

While the government wanted to implement the new scheme quickly, there was no real need to pass the legislation in a single day. Vaccination in New Zealand had begun on 20 February 2021 and the government had been successfully rolling out a vaccination programme with high uptake rates.⁶⁵ Five weeks had passed between the policy announcement and the Bill being introduced,⁶⁶ so there was time to draft a Bill and have a longer legislative process. There was no particular outbreak or threat that required the new system to be in place urgently. There was confusion, even among legal academics, as to why the government did not commence the legislative process earlier.⁶⁷ Similarly, opposition parties and the Speaker of the House argued that the legislative process could have begun much earlier and prevented the need for urgency.⁶⁸

The Bill bypassed the select committee process and went through all stages of the legislative process in one day.⁶⁹ The Ministry of Justice noted that its advice assessing whether the Bill was consistent with NZBORA was prepared in relation to a draft version of the Bill and in an extremely short timeframe not consistent with Cabinet Office guidance.⁷⁰ The Opposition and all minor parties, except the government's confidence and supply partner, the Green Party, opposed the legislation despite most parties supporting its purpose.⁷¹ Opposing parties said that this was because they wanted

62 (24 November 2021) 756 NZPD at 6558.

63 Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 (Vaccinations) Legislation Bill* (23 November 2021).

64 Andrew Geddis "In rushing through the 'traffic light' legislation, the government has failed us" (24 November 2021) *The Spinoff* <www.thespinoff.co.nz>.

65 Ministry of Health "Covid-19 vaccines" <health.govt.nz>.

66 Ardern, above n 55; and NZPD, above n 62.

67 Craig McCulloch "Opposition condemns 'mad scramble' in traffic light system legislation" (24 November 2021) *RNZ* <www.rnz.co.nz>.

68 McCulloch, above n 67; Michael Neilson "Covid 19 Delta: 'Contemptuous' Covid Bill passes within 24 hours amid opposition" (24 November 2021) *RNZ* <www.rnz.co.nz>.

69 (24 November 2021) 756 NZPD.

70 Ministry of Justice, above n 63, at 1.

71 (24 November 2021) 756 NZPD at 6593.

more scrutiny of the Bill.⁷² The process was described as a "constitutional disgrace"⁷³ and was criticised by the Chief Human Rights Commissioner for being "highly problematic both constitutionally and in terms of the state's human rights and Te Tiriti o Waitangi obligations".⁷⁴

III WIDESPREAD USE OF EXPEDITED LAW-MAKING: WIDESPREAD HARM

The way the COVID-19 Act and COVID-19 Response (Vaccinations) Legislation Bill were passed and the concerns raised in response were not isolated incidents. While secondary legislation was used to implement most public health measures, central features of the government's response, such as new welfare supports, were implemented through the creation of new primary legislation.⁷⁵

Data from 25 March 2020 (when a state of emergency and pandemic notices were first issued) until 10 September 2021 (the end of the most recent sitting block at the original time of writing),⁷⁶ shows that nearly all Bills related to COVID-19 went through an expedited process.⁷⁷ This was so even where there were no restrictions in place,⁷⁸ indicating there was no outbreak or active public

72 At 6593.

73 Bryce Edwards "Political Roundup: Today's constitutional disgrace in Parliament" *NZ Herald* (online ed, New Zealand, 24 November 2021).

74 Human Rights Commission "Scrutiny and Public Input Needed Urgently on New COVID-19 Legislation Says Human Rights Commission" (press release, 23 November 2021).

75 See for example COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill 2020 (237); COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; Immigration (COVID-19 Response) Amendment Bill; and COVID-19 Recovery (Fast-track Consenting) Bill.

76 This article has been subsequently updated in late 2022 to include discussion of the COVID-19 Response (Vaccinations) Legislation Act 2021, but the data set remains unchanged and only covers the period from 25 March 2020 (when a state of emergency was declared and a pandemic notice first issued) until 10 September 2021.

77 See Appendix 1 for a table outlining the type of expedition seen at each stage of each Bill. Note that the statistics below do not include government finance Bills such as budget or imprest and supply Bills where these were used among other things to confirm or supply funding for COVID-19-related initiatives. This is because these are general government administration Bills that would have occurred despite the emergency and the spending confirmed through these Bills had their policy decision implemented through separate legislation: for example, the Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill. Data was collected by recording every Bill that received royal assent during this period. Hansard was read for each stage of each Bill and it was recorded whether an urgency motion was accorded for that stage of the legislative process, whether leave of the House was successfully sought to expedite that stage of the legislative process or whether a determination of the Business Committee expedited that stage of the legislative process. A Bill is classed as a COVID-19-related Bill if its primary function was related to the COVID-19 response: for example, if the Bill related to public health measures, managed isolation and quarantine, economic recovery or vaccination.

78 See for example Medicines Amendment Bill; and COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill.

health threat in the community that required an urgent response.⁷⁹ Bills often bypassed the select committee (a core scrutiny and democratic mechanism),⁸⁰ frequently had no debate at multiple reading stages, and sometimes skipped, or had highly abridged, Committee of the whole House stages.⁸¹ Some Bills came into force the same day or within a few days of introduction, indicating the speed with which legislation was being enacted.⁸² Finally, and most notably, Bills passed at the start of the pandemic were expedited with leave of the House, which requires permission from all members,⁸³ thereby indicating consent across the House for the hurried process. However, later Bills were instead passed under urgency, with opposition members voting against the Bill, often on procedural grounds, demonstrating a lack of universal support for the expedited process.⁸⁴

Parliamentary proceedings were disrupted from 26 March 2020 until 28 April 2020. Accordingly, no Bills were passed during this period.⁸⁵ On 28 April 2020, when New Zealand moved to Alert Level 3, Parliament resumed but with social distancing, reduced member numbers and proxy voting.⁸⁶ Parliament was again disrupted from 17 August 2021 until 23 August 2021 as a nationwide lockdown was in force. Parliament also sat under Alert Level 3 protocols from 24 August 2021 until 7 September 2021. By this stage of the pandemic most necessary laws were in place, several outbreaks had been dealt with, and no state of emergency was declared, reflecting the different nature of these restrictions. Only seven Bills were passed between 25 March 2020 and 13 May 2020 when a state of emergency was in force.⁸⁷ Two of these were routine Bills: the Imprest Supply Bill and an Appropriation Confirmation and Validation Bill (for 2018/2019).⁸⁸ The other five related to COVID-19.⁸⁹ All five

79 "About the Alert System" Unite Against Covid-19 <www.covid19.govt.nz>.

80 See Appendix 1.

81 See Appendix 1.

82 See Appendix 1.

83 Standing Orders of the House of Representatives 2020, SO 3(1); and McGee, above n 12.

84 See Appendix 1.

85 (25 March 2020) 745 NZPD at 17322.

86 Knight, above n 35, at [48].

87 COVID-19 Public Health Response Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill; Immigration (COVID-19 Response) Amendment Bill; and COVID-19 Response (Further Management Measures) Legislation Bill.

88 Imprest Supply (Third for 2019/20) Bill; and Appropriation (2018/19 Confirmation and Validation) Bill.

89 COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; and COVID-19 Public Health Response Bill and the COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill.

COVID-19 Bills had all stages expedited, skipping the select committee and Committee of the whole House stages, and came into force the same day they were introduced.⁹⁰

As noted, these Bills were expedited with leave of the House. Where leave is granted, procedural rules laid down by the Standing Orders may be set aside.⁹¹ Leave of the House is an alternative to using a formal motion such as urgency.⁹² In emergencies, where many other scrutiny and accountability mechanisms are surpassed, using leave of the House to demonstrate consensus for expedited law-making may be preferable to passing legislation under urgency. However, the negative effect on the principles of good law-making, such as diminished scrutiny and democratic input, is the same regardless of which expedited process is used.⁹³

Parliament passed 82 Bills between 25 March 2020 and 10 September 2021.⁹⁴ Of the 17 Bills which related to COVID-19,⁹⁵ 13 had the first reading expedited, 12 skipped the select committee stage, 13 had the second reading expedited, 12 had the Committee of the whole House expedited, and 12 had all stages expedited.⁹⁶ The majority of these Bill were expedited under urgency. Consensus within the House for expedited law-making was hard to gain once the country was out of the height of the crisis. Urgency can be accorded by a government motion and does not require consensus. Passing legislation under urgency expedites the process in four ways: extending sitting hours of the House,⁹⁷ prioritising the matter that has been accorded urgency,⁹⁸ bypassing usual restrictions on how fast a Bill can progress through stages of the legislative process,⁹⁹ and bypassing the select committee process.¹⁰⁰

90 COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; COVID-19 Public Health Response Bill; and the COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill.

91 McGee, above n 12.

92 At 15.

93 At 15.

94 See Appendix 1.

95 See Appendix 1.

96 See Appendix 1.

97 Standing Orders of the House of Representatives, SO 58 (1).

98 Standing Order 59(1).

99 Standing Order 293(1)(a).

100 Geiringer, Higbee and McLeay, above n 2, at 25; and Standing Orders of the House of Representatives, SO 296(1).

This data shows that expedited law-making was heavily relied on during COVID-19. This creates a greater risk that potential harms from expedited law-making, such as removing mechanisms for civic engagement and potentially decaying legitimacy of Parliament, will manifest in New Zealand. In response, the next section of this article will assess whether expedited law-making during the COVID-19 pandemic upheld principles of good law-making. Where it did not, this article advances suggestions for how principles of good law-making can be adopted in times of urgency. Doing so can minimise the risk that harms posed by expedited law-making will manifest.

TABLE 1

	25 March 2020-13 May 2020	25 March 2020-10 September 2021
Total Bills passed	7	83
Bills related to COVID-19	5	17
General Bills	2	54
COVID-19 Bills: first reading expedited	5 total all through leave of the House	13 total 10 under urgency 3 through leave of the House
COVID-19 Bills: skipped select committee	5 total all through leave of the House	12 total 9 under urgency 3 through leave of the House
COVID-19 Bills: second reading expedited	5 total all through leave of the House	13 total 10 under urgency 3 through leave of the House
COVID-19 Bills: Committee of the whole House expedited	5 total all through leave of the House	12 total 9 under urgency 3 through leave of the House
Covid-19 Bills: third reading expedited	5 total all through leave of the House	12 total 9 under urgency 3 through leave of the House
COVID-19 Bills: all stages expedited	5 total all through leave of the House	12 total 9 had all stages under urgency 3 had all stages expedited through leave of the House

IV ANALYSING HARMS TO DEMOCRACY FROM EXPEDITED LAW-MAKING AGAINST PRINCIPLES OF GOOD LAW-MAKING

A Introduction

The preceding analysis established that infringements on democratic, civil, and political rights, in general terms, are manifesting in New Zealand's democracy, particularly in the context of the government's response to COVID-19. Geiringer, Higbee and McLeay have developed a bespoke framework for assessing harms caused by expedited law-making.¹⁰¹ The framework consists of 10 principles of good law-making:¹⁰² open debate; scrutiny; citizen participation; transparency; high quality legislation; upholding fundamental constitutional rights; stable procedural rules; fostering respect; the right to govern, and the quick enactment of legislation in actual emergencies.¹⁰³ These principles can be applied to expedited law-making during COVID-19 to further evaluate the nature and extent of the harms caused. An evaluation of such harms lays the foundation for the following section, which advances practices that should be adopted to address derogation of expedited law-making from these 10 principles of good law-making.

B A Preface: Te Tiriti o Waitangi/The Treaty of Waitangi

While Geiringer, Higbee and McLeay's framework takes account of constitutional principles and rights under Principle 6, this is interpreted narrowly to focus on NZBORA and the rule of law.¹⁰⁴ The framework does not explicitly account for te Tiriti o Waitangi/the Treaty of Waitangi (te Tiriti) or its relevance to law-making. Whether law-making infringes or upholds obligations under te Tiriti should explicitly be considered as a principle of good law-making. This is because te Tiriti gives the state authority to govern.¹⁰⁵ If that authority "is not exercised in accordance with te Tiriti—it is constitutionally illegal and illegitimate".¹⁰⁶ To reflect this, compliance with te Tiriti obligations is assessed as a precursor to the framework, as a foundational entry point for good law-making.

Under te Tiriti, the state has the right to govern while Māori retain tino rangatiratanga.¹⁰⁷ Māori exercised tino rangatiratanga in response to the pandemic in various ways, such as by restricting

101 Geiringer, Higbee and McLeay, above n 2.

102 At 15–16.

103 At 16.

104 At 18.

105 Ani Makire "Tikanga as the first law of New Zealand" (2007) 10 Yearbook of New Zealand Jurisprudence 24.

106 Claire Charters "The Relevance of Te Tiriti o Waitangi in the COVID-19 Era" (2020) 9 MAI Journal 17 at 18.

107 Waitangi Tribunal *The report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 22.

access to communities, and providing flu vaccination and personal protective equipment.¹⁰⁸ In some instances, those exercising Crown authority and those exercising Māori authority worked together. For example, the Police and iwi in some locations collaborated to enforce restrictions through vehicle checkpoints.¹⁰⁹ This was not without challenge. Many questioned the legitimacy and purpose of iwi-led checkpoints despite legal experts agreeing they were both lawful and justified.¹¹⁰

It is noted by Māori academics that te Tiriti obligations could have been better recognised. Specifically, co-governance and an equitable approach to the COVID-19 response could have given effect to the special interest of Māori.¹¹¹ The COVID-19 Recovery (Fast-track Consenting) Act 2020 provides a useful example. The Act, passed under urgency, expedites Resource Management Act 1991 requirements in an attempt to stimulate economic recovery. It is well recognised that in te ao Māori the cultural significance of rivers, mountains and other geographical features is stronger than in te ao Pākehā.¹¹² Such geographical features are also protected as taonga under te Tiriti.¹¹³ Fast tracked consenting processes reduce opportunities for engagement with local Māori about the impact of consents and how to mitigate them. The impact of the fast-track consenting legislation on Māori is distinguishable from the impact on non-Māori, and therefore an approach that provides for co-governance and equity is needed.¹¹⁴ Co-governance would have had to be ideated and established by Māori for Māori in partnership with the Crown. It is generally accepted that this was not present and therefore the urgent law-making process did not uphold te Tiriti obligations in regard to protecting taonga.¹¹⁵ The same can be said about the COVID-19 Act. The controversial nature of warrantless entry onto marae has already been discussed.¹¹⁶ Māori academics note that although some Māori were approached to comment on an exposure draft of the Bill, they "were given only hours to comment,

108 Charters, above n 106, at 19.

109 At 19.

110 Kerensa Johnston "Whose land is it anyway?" *E-Tangata* (online ed, New Zealand, 19 April 2020); Rawiri Taonui "Checkpoints - A Pākehā or Māori problem?" Waatea News (24 April 2020) <www.waateanews.com>; and Max Harris and David V Williams "Community checkpoints are an important and lawful part of NZ's Covid response" (28 May 2020) University of Auckland: News and opinion <www.auckland.ac.nz>.

111 Charters, above n 106, at 18.

112 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 3.2.1 and 3.2.3.

113 At 3.1.

114 Charters, above n 106, at 18.

115 At 19.

116 See for example (12 May 2020) 745 NZPD at 17678.

and some important contributions were rejected or ignored".¹¹⁷ In light of this, "greater and more influential Māori involvement in the development of the Covid-19 Act" was needed.¹¹⁸ Other scholars have noted that such failures not only breach constitutional obligations but also provide practical anomalies in failing to achieve the purpose of the law.¹¹⁹ Specifically, the law failed to "recognise the role of Māori authorities located in communities that the state is unable or at least poorly equipped to serve on its own".¹²⁰

C Analysis against the 10 Principles of Good Law-making

1 Principle 1: informed and open debate

Principle 1 of the framework is that Parliament should allow time and opportunity for informed and open policy deliberation.¹²¹ The Privy Council has said: "Political debate is at the core of representative democracy."¹²² Elected representatives make laws on behalf of citizens so must articulate arguments for and against Bills in their place and provide reasons for their actions.¹²³ Debate outside the House is also important. Experts can provide an understanding of the law that is not readily accessible to the public. That more detailed understanding can also produce informed media commentary.¹²⁴ Such commentary, in turn, influences the public debate.¹²⁵ The public then engages with members of Parliament which enriches debate within the House.¹²⁶ For most of the laws passed during the COVID-19 crisis, there was less than a day for informed and open debate.¹²⁷

During the height of the crisis (March 2020–May 2020) it was common to have one member of each party (usually the relevant spokesperson) to speak briefly at the third reading of a Bill.¹²⁸ For

¹¹⁷ Charters, above n 106, at 18.

¹¹⁸ At 18.

¹¹⁹ Rhys Jones "Why equity for Māori must be prioritised during the Covid-19 response" (18 March 2020) The Spinoff <www.thespinoff.co.nz>; and Elana Curtis "An open letter to the government from a Māori public health specialist" *E-Tangata* (online ed, New Zealand, 5 April 2020).

¹²⁰ McLean and others, above n 17, at 209; and Johnston, above n 110.

¹²¹ Geiringer, Higbee and McLeay, above n 2, at 16.

¹²² *Lange v Atkinson* [2000] 1 NZLR 257 (PC) at 260.

¹²³ Geiringer, Higbee and McLeay, above n 2, at 15.

¹²⁴ At 16.

¹²⁵ At 16.

¹²⁶ At 16.

¹²⁷ See for example (25 March 2020) 745 NZPD; (12 May 2020) 745 NZPD; and (13 May 2020) 745 NZPD.

¹²⁸ (25 March 2020) 745 NZPD at 17286–17307; (12 May 2020) 745 NZPD at 17609–17655; and (12 May 2020, continued on 13 May 2020) 745 NZPD at 17659–17697.

more substantial Bills, such as the COVID-19 Public Health Bill, there was more debate on the first, second and third reading from across the floor.¹²⁹ This allowed for even greater articulation of arguments for and against the Bill.¹³⁰ However, by and large, debate was significantly diminished during this period. This demonstrates the impact of expedited law-making on citizens' rights to be represented in Parliament and to have arguments for and against Bills be made in their place.

Outside of the House, academics frequently commented on the government's COVID-19 response.¹³¹ For example, early in the pandemic academics initiated and contributed to debate about the legality of the lockdown and the suitability of the Health Act for imposing nationwide public health measures.¹³² This debate contributed to the government's desire to create bespoke legislation in the form of the COVID-19 Act.¹³³ In the 24 hours following the passing of the COVID-19 Act, there were several pieces of academic commentary published in the media.¹³⁴ Some academics were given a very limited opportunity (overnight from 11 May 2020 before the Bill was introduced on 12 May 2020) to debate and provide feedback on an exposure draft of the Bill.¹³⁵ This resulted in some changes, the most significant being the introduction of a sunset clause.¹³⁶ Given the reactive nature of such changes, they are best described as accountability functions rather than debate that helps shape the policy response. In this regard, expedited law-making prevented the debate on Bills from being informed by experts, thereby reducing scrutiny. Expedition also removed the opportunity for the government to increase social licence by clearly explaining contentious matters, flaws, benefits and protections in the law.

129 (12 May 2020) 745 NZPD at 17609–17655; and (12 May 2020, continued on 13 May 2020) 745 NZPD at 17659–17697.

130 (12 May 2020) 745 NZPD at 17609–17655; and (12 May 2020, continued on 13 May 2020) 745 NZPD at 17659–17697.

131 Heather du Plessis-Allan "Legal powers around lockdown rules may not stand up in court" (7 April 2020) Newstalk ZB <www.newstalkzb.co.nz>; "Law professor scrutinises Public Health Bill" (13 May 2020) RNZ <www.rnz.co.nz>; and "Public law expert talks about inquiry into COVID patients [sic] details" (30 July 2020) RNZ <www.rnz.co.nz>.

132 Geddis and Geiringer, above n 38; and Knight and McLay, above n 38.

133 Parker, above n 43.

134 Collette Devlin "Coronavirus: New Covid-19 law gives police power to conduct warrantless searches amid civil liberty concerns" (14 May 2020) Stuff <www.stuff.co.nz>; "Level 2 enforcement law passed too quickly: Human Rights Commissioner" (19 May 2020) RNZ <www.rnz.co.nz>; Alexander Gillespie "Are New Zealand's new COVID-19 laws and powers really a step towards a police state?" (19 May 2020) The Conversation <www.theconversation.com>; Andrew Geddis "The level two law is necessary – and full of flaws" (14 May 2020) The Spinoff <www.thespinoff.co.nz>; and "Law professor scrutinises Public Health Bill", above n 131.

135 (13 May 2020) 745 NZPD at 17743 and 17752.

136 At 17752.

The media played a significant role in consolidating and facilitating the debates and views of different communities, members of Parliament and experts. Press freedom was not restricted, and journalists were classed as essential workers even under the most severe restrictions.¹³⁷ The government provided daily media updates on the number of cases and their locality, even over a year after the pandemic began.¹³⁸ In the height of the emergency, daily media briefings were given by the Prime Minister and Director-General of Health. Where appropriate, other senior public servants or other ministers participated in the briefings to provide updates on specific matters. Although this meant the media had access to information, there was limited opportunity and time to debate such information. Throughout 2020, *The Conversation*, a platform where academics write short-form pieces designed for consumption by the general public, published an average of eight COVID-19-related articles a week.¹³⁹ The majority of these articles were posted between March 2020 and May 2020 during the height of the pandemic.¹⁴⁰ The national media outlet, Radio New Zealand, posted on average over 200 COVID-19-related articles per month during 2021.¹⁴¹ While this debate can inform the public and prompt citizens to engage in democratic processes, if there are no pathways to do so the debate is of no utility. Similarly, if the debate prompts citizens to contact members of Parliament, but they are then unable to speak on the Bill in the House, the debate within the media and electorate is of little benefit.

With information technology and social media, open and informed policy deliberation can occur faster and involve members directly.¹⁴² These methods were used effectively by the electorate to participate in open and informed policy debate. One Opposition member noted during the third reading of the COVID-19 Public Health Bill:¹⁴³

Judging by the deluge of emails that I have received – text messages, phone calls to my electorate office, posts on social media, and so on – I believe that the Government has badly misjudged public sentiment.

Other members noted that their contributions to the law-making process had been informed by the messages and emails they had received from constituents. For example, Tim Macindoe MP noted his support to ease restrictions on funerals, tangihanga, weddings and other religious services, "because I have been inundated in the last 24 hours by messages of concern by people throughout New

137 Health Act (COVID-19 Alert Level 3) Order 2020 (24 April 2020); and Knight, above n 35, at [67].

138 Ministry of Health "COVID-19: News and media updates" (13 October 2020) <www.health.govt.nz>.

139 "Edition: New Zealand" *The Conversation* <theconversation.com>.

140 "Edition: New Zealand" *The Conversation* <theconversation.com>.

141 "COVID-19 coverage" RNZ <www.rnz.co.nz>.

142 Andy Williamson "The Effect of Digital Media on MPs Communication with Constituents" (2009) 62 *Parliamentary Affairs*; and McGee, above n 12, at 396.

143 (12 May 2020) 745 NZPD at 17699.

Zealand".¹⁴⁴ Additionally, the Hon Marama Davidson MP supported amendments to the inclusion of marae because "there has been public outrage"; she also wanted to put that outrage "on record".¹⁴⁵ A similar effect was seen in regard to the vaccination legislation, with several members sharing the perspectives of local constituents including business owners and disabled people.¹⁴⁶ The debate within the House that facilitated this democratic involvement and gave debate within the electorate some utility was largely due to the decision not to expedite the Committee of the whole House stage and temporary changes to allow more calls at that stage. Such decisions are not guaranteed and this debate in the House could easily be expedited in different circumstances.

Ultimately, there was a lot of debate that demonstrated interest from the general public in the COVID-19 legislation being passed by the government. However, there was not enough time or opportunity for that debate to flourish. Some ad hoc mechanisms such as increased calls at the Committee of the whole House stage supported debate. Overall, however, these mechanisms were weak, which is reflected in the limited social licence and influence on the law resulting from informed and open debate.

2 *Principle 2: time and opportunity for scrutiny*

Principle 2 is that the legislative process should allow sufficient time and opportunity for adequate scrutiny of Bills.¹⁴⁷ It is a core function of the House to scrutinise the government. Opposition members need to be given the opportunity to ask questions, examine Bills and listen to experts and citizens to realise that scrutiny.¹⁴⁸ Scrutiny is further supported by select committees and an orderly progression of Bills.¹⁴⁹ Scrutiny is essential to democratic rights as it can draw attention to and advocate for change of any proposed legislation that may adversely affect citizens. It can also identify and amend flaws, thereby improving the quality of legislation. Scrutiny also provides an opportunity to debate and dispel concerns and gain social consent.

During the COVID-19 pandemic, there was very limited opportunity for Opposition members to ask questions or examine Bills.¹⁵⁰ Generally, one representative of each party was able to speak

144 At 17679.

145 At 17678.

146 See for example (23 November 2021) 756 NZPD at 6466–6468 and 6470.

147 Geiringer, Higbee and McLeay, above n 2, at 16.

148 At 16.

149 At 16.

150 Elena Griglio "Parliamentary oversight under the Covid-19 emergency: striving against executive dominance" (2020) 8 TPLeg 49 at 49.

briefly.¹⁵¹ However, greater scrutiny was afforded for more substantial Bills, such as the COVID-19 Public Health Bill. The benefit of this was acknowledged by the Minister of Justice:¹⁵²

It has been a very instructive debate through all the stages of the House in the last day or so. I thank all members, and particularly the members of the Opposition who were right to vigorously scrutinise and contest and challenge the legislation the way that they did.

Of the 17 laws related to COVID-19, 12 skipped the select committee stage, which serves as a key scrutiny mechanism.¹⁵³ Other mechanisms were put in place in attempts to reinstate this scrutiny to some extent. The Epidemic Response Committee, and, during the second COVID-19 outbreak, special virtual COVID-19 select committee meetings, allowed for discussion of legislative settings, scrutiny of government action and the ability to listen to experts.¹⁵⁴

The need to have increased dialogue with ministers and facilitate more "conversational scrutiny"¹⁵⁵ was recognised by all parties. In response, all parties agreed to suspend limits on calls during the select committee stage so that there could be increased questioning of the minister responsible for a Bill.¹⁵⁶

Scrutiny mechanisms were significantly abrogated. For most Bills, there was no select committee and highly expedited debate. Scrutiny mechanisms were increased for controversial Bills, but often at the Committee of the whole House stage where the benefits were limited. This stage is after most public debate has occurred, just before the law comes into effect and where there is limited ability to

151 (25 March 2020) 745 NZPD at 17286–17307.

152 (12 May 2020) 745 NZPD at 17697.

153 Medicines Amendment Bill 2021 (41); COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill 2021 (42); Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill 2021 (8); COVID-19 Public Health Response Amendment Bill 2020 (3); COVID-19 Response (Further Management Measures) Legislation Bill (No 2) 2020 (318) Bill; Social Security (COVID-19 Income Relief Payment to be Income) Amendment Bill 2020 (267); Remuneration Authority (COVID-19 Measures) Amendment Bill 2020 (266); COVID-19 Response (Further Management Measures) Legislation Bill 2020 (244); COVID-19 Response (Urgent Management Measures) Legislation Bill 2020 (239); COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill 2020 (237); COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill 2020 (240); COVID-19 Public Health Response Bill 2020 (246); and McGee, above n 12, at 280–354.

154 Knight, above n 35, at [43]; Gabor Hellyer "Assessing Parliament's Response to the COVID-19 Pandemic" (2021) 17 Policy Quarterly 20 at 21; and (25 March 2020) 745 NZPD at 17316.

155 David Wilson "How the New Zealand Parliament responded" in *Parliaments and the Pandemic* (online ed, Study of Parliament Group, 2021) 187 at 191–193.

156 At 191.

amend the law in response to scrutiny. The dereliction of scrutiny has significant consequences, such as passing the wrong law, which will be discussed in greater detail under Principle 5.¹⁵⁷

3 *Principle 3: citizen participation*

Principle 3 is that citizens should be able to participate in the legislative process, both directly and indirectly. Political participation is also central to international human rights norms.¹⁵⁸ Representative democracy is premised on the consent of the majority to be governed by a few.¹⁵⁹ The ability of elected officials to represent citizens requires them to be aware of their views and concerns through citizen participation. Citizen participation can be divided into two categories: indirect participation through political parties that represent diverse views, or direct participation such as engagement with a member or a parliamentary process such as a select committee.¹⁶⁰ Direct involvement is "particularly vital for members of minority groups whose views may not be represented by the parliamentary parties".¹⁶¹

Citizen participation, in all forms, was sweepingly curtailed by expedited law-making during the COVID-19 pandemic.¹⁶² For early Bills, there was no chance for citizen participation, and given the height of the crisis and the urgency required this was not heavily criticised. Following the height of the crisis in mid-May, when Parliament was able to resume but a state of emergency was still in force, the government was heavily criticised for its lack of citizen participation.¹⁶³ Beyond this, once the state of emergency ceased a further 17 COVID-19 related Bills were passed through an expedited legislative process with no formal mechanisms for citizen participation.¹⁶⁴

157 Thomas Coughlan "Parliament passes the wrong law in an afternoon of urgent law-making" (1 May 2020) Stuff <www.stuff.co.nz>; and Wilson, above n 155, at 191.

158 Steiner, above n 11.

159 Locke, above n 3.

160 Geiringer, Higbee and McLeay, above n 2, at 17.

161 At 17.

162 Griglio, above n 150, at 50 and 52; and Knight, above n 35, at [21].

163 Devlin, above n 134.

164 COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; COVID-19 Public Health Response Bill; Medicines Amendment Bill; COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; Immigration (COVID-19 Response) Amendment Bill; Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill; COVID-19 Public Health Response Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill (No 2); COVID-19 Public Health Response Amendment Bill; COVID-19 Recovery (Fast-track Consenting) Bill; Social Security (COVID-19 Income Relief Payment to be Income) Amendment Bill; Remuneration Authority (COVID-19 Measures) Amendment Bill; COVID-19

Citizens could participate by directly contacting their local member. However, expedited debate in the House meant the influence of individual members was limited.

Limited public participation was facilitated through the Finance and Expenditure Committee's inquiry into the operation of the COVID-19 Act.¹⁶⁵ The committee received 1,342 written submissions.¹⁶⁶ However, this inquiry was retrospective; citizens had no formal mechanism to express their views during the passage of the legislation. The lack of citizen participation diminished social licence. Social licence means that citizens respect the law and the process Parliament used to create it. The lack of citizen participation and the harms this creates were exacerbated by the law containing powers to significantly infringe civil rights.

The benefits of citizen participation can be seen clearly in the positive changes made to the COVID-19 Act in response to recommendations of legal academics and special interest groups.¹⁶⁷ The government adopted several features such as a sunset clause and post-enactment review.¹⁶⁸ However, only a select few people were afforded this opportunity to review the legislation, and those that were had such little time that they could not engage with their communities, thus diminishing the value of their input.¹⁶⁹

Citizen-initiated participation was seen through citizens commenting on social media posts, contacting members and creating petitions.¹⁷⁰ Members noted the number of phone calls, emails and social media interactions they received and echoed those views in the House.¹⁷¹ As a result, some changes were made to reflect citizens' concerns.¹⁷² So, by allowing members to speak on Bills the views of citizens are bought into the House and its law-making.

Response (Further Management Measures) Legislation Bill; Immigration (COVID-19 Response) Amendment Bill; and COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill.

165 COVID-19 Public Health Response Bill (select committee report – inquiry of the Finance and Expenditure committee).

166 Dean R Knight "Lockdown Bubbles through Layers of Law, Discretion and Nudges - New Zealand" (7 April 2020) *Verfassungsblog: On Matters Constitutional* <www.verfassungsblog.de> at 4.

167 (12 May 2020) 745 NZPD at 17697.

168 Zane Small "COVID-19 law allowing warrantless police searches faces 'post-enactment review'" (15 May 2020) *Newshub* <www.newshub.co.nz>; and (12 May 2020) 745 NZPD at 17697.

169 (12 May 2020) 745 NZPD at 17697.

170 At 17699.

171 At 17688.

172 Collette Devlin "Coronavirus: Government tweaks Covid-19 level 2 law after marae controversy" (13 May 2020) *Stuff* <www.stuff.co.nz>.

Although democratic input is hard to facilitate while responding to emergencies, it is an essential element of the rule of law, representative democracy and upholding civil and political rights. In order to represent the views of citizens, elected representatives need to be aware of what those views are. Where citizen participation is not facilitated and citizens do not feel represented, the consent upon which representative democracy is premised begins to erode. A lack of democratic input can also undermine the social licence of a particular law, resulting in protest or a lack of compliance, as seen in response to some of the Bills passed during the COVID-19 pandemic.¹⁷³ The realisation of these harms demonstrates that citizen participation was not sufficient.

4 *Principle 4: transparency*

Principle 4 is that Parliament ought to operate in a transparent manner.¹⁷⁴ Transparency is primarily facilitated by Bills passing through the House at a measured pace, and by ensuring there is opportunity for public submissions and media reporting.¹⁷⁵

At the most basic level, all pieces of legislation produced in response to COVID-19 were collated and made publicly available on the government's COVID-19 website.¹⁷⁶ Additionally, Hansard and any other relevant materials were easily accessible on the New Zealand Parliament website.¹⁷⁷

In New Zealand, proactive release of official information has become commonplace, especially regarding government decision-making.¹⁷⁸ Since 2019, Cabinet papers have been proactively released no later than 30 business days after they were lodged.¹⁷⁹ This gives New Zealand "a degree of transparency most other countries would never contemplate".¹⁸⁰

However, the government's approach to proactive release has not been without criticism. For example, as the country emerged from the height of the crisis, the government was criticized by journalists for the time and scale of releases, such as when it released a large number of documents

173 Melanie Earley "Coronavirus: More than a thousand turn out for anti-lockdown rally in Auckland" (12 September 2020) Stuff <www.stuff.co.nz>.

174 Geiringer, Higbee and McLeay, above n 2, at 17.

175 At 17–18.

176 "Legislation and key documents" Unite Against COVID-19 <covid19.govt.nz>.

177 See New Zealand Parliament "Read Hansard Reports" <www.parliament.nz>; and New Zealand Parliament "Bills and Laws" <www.parliament.nz>.

178 Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at [12.17]–[12.43].

179 Cabinet Office "Proactive Release of Cabinet Material: Updated Requirements" (23 October 2019) CO(18)4 at [2].

180 Thomas Coughlan "Explainer: Why the Government's coronavirus document dump matters" (11 May 2020) Stuff <www.stuff.co.nz>.

on a Friday evening without any notice. Journalists argued that this approach hinders the transparency afforded by proactive release. Because it was not foreshadowed, "many media organisations had to scramble staff to dive into the pile of documents".¹⁸¹ The time of the release, a Friday evening, was when media audiences were low and gave journalists little time to engage with ministers via their offices before the weekend.¹⁸² The Prime Minister acknowledged the criticism and agreed to release documents in the morning and with notice.¹⁸³

The government's proactive release of all COVID-19 related documents temporarily ended with the last release on 1 April 2021 and then "returned to pre-covid processes for proactive releases",¹⁸⁴ meaning that individuals need to make requests under the Official Information Act 1982 to individual departments to obtain official information.¹⁸⁵ This reduces transparency by creating delays, putting the onus on citizens or media to request documents, and limiting the information that may be released as a result of a government culture of "minimum compliance" with the Official Information Act.¹⁸⁶ Despite New Zealand being out of the height of the pandemic at this time, the government still subsequently passed urgent legislation in relation to vaccine approval and border measures for which transparency is still required.¹⁸⁷ Proactive release through the government's COVID-19 website was reinstated during a second nationwide outbreak in August 2021, and continued even as restrictions eased.¹⁸⁸

In one high profile instance, the government relied on future proactive release as an excuse to deny an Official Information Act request. In early November, the government announced that it would introduce vaccine passes.¹⁸⁹ An Official Information Act request was made to obtain more information on the policy and associated advice, but was denied on the basis that the information would be proactively released in a few months' time.¹⁹⁰ However, only five weeks later the

181 Coughlan, above n 180; and Jason Walls and Derek Cheng "Live - Government dumps thousands of pages of official Covid papers" *New Zealand Herald* (online ed, New Zealand, 8 May 2020).

182 Coughlan, above n 180.

183 Coughlan, above n 180.

184 "Legislation and key documents – proactive release" Unite Against COVID-19 <www.covid19.govt.nz>.

185 "Legislation and key documents – proactive release" Unite Against COVID-19 <www.covid19.govt.nz>.

186 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, New Zealand, 2014) at 281.

187 COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; and Medicines Amendment Bill.

188 "Proactive release documents" Unite Against Covid-19 <covid19.govt.nz>.

189 Ardern, above n 55.

190 Ben Strang "Government refuses to release policy advice on vaccine passes and certificates" (24 November 2021) Stuff <www.stuff.co.nz>.

government introduced legislation under urgency to create the legal framework for mandatory vaccine passes.¹⁹¹ Having more information on vaccine passes in the public could have allowed for greater transparency, open debate and dialogue before the urgent legislative process took place.

Although transparency was present throughout the pandemic, it could have been improved to ensure the benefits were maintained and not undermined by expedited law-making.

5 *Principle 5: high quality legislation*

Principle 5 is that Parliament ought to strive to produce high quality legislation.¹⁹² As Geiringer, Higbee and McLeay outline:¹⁹³

The quality of legislation can be detrimentally affected by: (a) inadequate and abbreviated pre-introduction scrutiny; (b) insufficient time for members to give bills adequate consideration; or (c) insufficient time for the public, including expert submitters, to provide advice, feedback and new ideas.

These features, specifically insufficient time for consideration by members and for public input, have been explained in reference to earlier principles and will not be revisited in any detail here. More relevant here is mapping the impact of such deficiencies in reducing the quality of legislation.

On 30 April 2020, the COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill passed under urgency.¹⁹⁴ The Bill that was passed differed from the Bill circulated to all parties prior to the debate.¹⁹⁵ It included the establishment of a small business loan scheme.¹⁹⁶ Only one member noted the difference in the Bills during debate at its third reading.¹⁹⁷ The mistake appears to have been a miscommunication between law drafters and printers.¹⁹⁸ Regardless of its cause, the mistake gathered attention in the media. Specifically, it was noted that such a mistake undermines trust and confidence in the House's scrutiny mechanisms.¹⁹⁹ If citizens do not believe the House is providing appropriate scrutiny, the utility and authority of such scrutiny mechanisms may be called into question, and citizens may seek to rely more on other measures such as protests. More significantly, if such scrutiny mechanisms fail to the extent that citizens do not feel that Parliament is

191 (23 November 2021) 756 NZPD at 6458.

192 Geiringer, Higbee and McLeay, above n 2, at 18.

193 At 18.

194 (30 April 2020) 745 NZPD at 17429.

195 Wilson, above n 155, at 191.

196 At 191.

197 At 191.

198 At 191.

199 Coughlan, above n 180; and Wilson, above n 155, at 191.

passing good laws, they may begin to revoke the consent upon which representative democracy is based.

In addition to explicit errors, other Bills were accused of being low quality due to a lack of clarity. For example, privacy experts criticised the COVID-19 Response (Vaccinations) Legislation for being unclear and incomprehensible, even to them as legal experts.²⁰⁰ They raised specific concerns around offences for the illegitimate use of COVID-19 tracing and vaccination data, which in some instances created liability of up to six months imprisonment or \$12,000 in fines.²⁰¹

Finally, in late 2020, the government passed under urgency the COVID-19 Public Health Response Amendment Bill. This allowed the Minister to make an order in council to charge fees for Managed Isolation and Quarantine at the border.²⁰² In May 2021, the government realised that there was an error in the promulgated order and that it had illegally charged Australian citizens.²⁰³ Rather than accepting their mistake and dismissing the small financial loss, the government instead passed retrospective legislation under urgency to validate the charges.²⁰⁴ This breaches the fundamental principle of the rule of law that law should not be retrospective.²⁰⁵ The purpose of the law is to regulate human behaviour through clear rules. "To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose."²⁰⁶ Citizens cannot regulate their behaviour to avoid the negative consequences of breaching the law. Retrospective law-making can be unjust, ineffective, undermine the legitimacy of law, prevent compliance and be of little utility.

Expedited law-making during the COVID-19 pandemic significantly reduced the quality of legislation. The expedited process produced legislation that breached fundamental principles of law-making and the rule of law, on one occasion saw the wrong Bill get enacted, or produced legislation containing flaws that had to be addressed subsequently. This reflects a lack of scrutiny mechanisms. Low-quality legislation is not only ineffective but also reduces trust in Parliament and its processes. Breaching fundamental principles of law-making such as retrospectivity exacerbates the erosion of

200 Gehan Gunasekara, Marcin Betkier and Kathryn Dalziel "NZ's Covid vaccination legislation: the fastest law in the west" (3 December 2021) Newsroom <www.newsroom.co.nz>.

201 Gunasekara, Betkier and Dalziel, above n 200.

202 COVID-19 Public Health Response Amendment Act, s 33A.

203 (20 May 2020) 752 NZPD.

204 COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill.

205 Lon Fuller *The Morality of Law: Revised Edition* (Yale University Press, London, 1963) at 51–62.

206 At 53.

such trust. A lack of trust in Parliament may lead to social dissonance, social disruption and in the most severe cases a constitutional crisis, anarchy, or insurrection.²⁰⁷

6 Principle 6: fundamental constitutional rights and principles

Principle 6 is that legislation should not jeopardise fundamental constitutional rights and principles.²⁰⁸ "The more that legislation affects individual and group rights, the more important it is that it is accorded due process and is carefully considered."²⁰⁹ The COVID-19 pandemic resulted in a curtailment of citizen's' rights and freedoms more significant than any other crisis in recent memory. Accordingly, it is even more important that due process is carefully considered. However, expedited law-making circumvents due process and eludes careful consideration.

Certain pieces of urgent legislation such as the COVID-19 Act caused "widespread concern".²¹⁰ At the heart of this concern was the lack of social acceptance of the law. The government could have gained social acceptance of the legislation by explaining how the legislation operates, dispelling common concerns, and highlighting accountability and safeguard mechanisms. However, due to the expedited law-making process, such explanations were not provided.²¹¹ The more legislation infringes on rights and freedoms, the more important it is that due process is followed.²¹² The process of expedited law-making during COVID-19 did not take account of the need to provide as many opportunities for careful consideration as possible in light of heightened civil liberty concerns. Paul Hunt, New Zealand's Chief Human Rights Commissioner, said:²¹³

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

207 Locke, above n 3, at 243–250.

208 Geiringer, Higbee and McLeay, above n 2, at 18.

209 At 18.

210 Devlin, above n 134.

211 Devlin, above n 134.

212 Geiringer, Higbee and McLeay, above n 2, at 18.

213 Devlin, above n 134.

Similarly, the expedited process used to pass the vaccination legislation was criticised for being "problematic",²¹⁴ a "constitutional disgrace",²¹⁵ and "simply not good enough",²¹⁶ especially when balanced against the significant infringements on a variety of rights that it facilitated.

Ultimately, a lot of the legislation passed in response to COVID-19 infringed on citizens' fundamental rights. Although technically following due process, no additional consideration was given to take account of the fact that most due process functions and mechanisms for careful consideration had been removed by expedition. This led to a significant deficit in social licence. An absence of social licence can lead to a lack of compliance or even explicit resistance to laws.²¹⁷ Small instances of resistance were seen in the form of petitions, protests and breaches of public health measures, although these were not widespread or well-established.²¹⁸

7 *Principle 7: stable procedural rules*

Principle 7 is that Parliament should follow stable procedural rules.²¹⁹ This principle reflects Fuller's rule of law framework which purports that law must remain consistent.²²⁰ Following stable procedural rules is conducive to a stable policy environment and greater scrutiny.²²¹ Maintaining a stable procedure may not be possible, especially in health emergencies where knowledge of the illness and appropriate responses are evolving. For example, during the COVID-19 pandemic there was a need to adopt altered procedural rules, such as adjusted sitting hours, social distancing, and proxy voting.²²² However, procedural rules should be as stable as possible.

Parliament did not take a consistent approach to its use of expedited law-making during the COVID-19 pandemic. Such inconsistencies can be highlighted by looking to the use of post-enactment review and the Epidemic Response Committee as part of the expedited law-making process. Only the COVID-19 Act was referred for post-enactment review, which also received feedback from academics and special interest groups such as the National Māori Pandemic Group/ Te

214 Human Rights Commission, above n 74.

215 Edwards, above n 73.

216 Geddis, above n 64.

217 See Jonathan Jackson and others "Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions" (2012) 52 *Brit J Criminol* 1051.

218 Earley, above n 173.

219 Geiringer, Higbee and McLeay, above n 2, at 19.

220 Fuller, above n 205, at 79–81.

221 Geiringer, Higbee and McLeay, above n 2, at 19.

222 Wilson, above n 155, at 190.

Rōpū Whakakaupapa Urutā.²²³ The Epidemic Response Committee was only in place for the height of the pandemic.²²⁴ So, although the laws passed before the lockdown were subsequently discussed in this committee, later Acts were not. During a later outbreak, a different approach was adopted with virtual COVID-19 hearings of already established select committees.²²⁵ The COVID-19 Response (Vaccinations) Legislation did not go to a select committee or the COVID-19 committee and the government repeatedly denied calls for a post-enactment review, saying it was "unnecessary".²²⁶

Overall, Parliament did not follow stable procedural rules. Many responses to try to reinstate transparency and scrutiny were ad hoc. Although these responses were somewhat valuable in doing so, their ad hoc nature meant the full benefit of such mechanisms was not realised.

8 *Principle 8: foster respect*

Principle 8 is that Parliament should foster, not erode, respect for itself as an institution.²²⁷ Respect for Parliament is an underlying component of its legitimacy. The fact that correct procedures have been followed builds respect for laws.²²⁸

Parliament did not deviate from correct procedures, although these procedures were dramatically altered or nullified due to the adoption of expedited law-making.²²⁹ However, "urgency comes at a cost".²³⁰ Parliament following the correct procedures is not always enough to foster trust and respect when so many of Parliament's usual procedures are altered or nullified.

In some instances of urgent law-making, the government failed to "gain social acceptance of the law and explain how it operates".²³¹ As a result, citizens felt like their rights were being unduly inhibited, which reduced trust in the Parliamentary process.²³² For example, the inclusion of "marae" alongside dwelling house in the COVID-19 Public Health Bill was deeply misjudged and caused

223 (12 May 2020, continued on 13 May 2020) 745 NZPD at 17610.

224 Knight, above n 35, at [43].

225 New Zealand Parliament "Covid-19 Response select committees" (24 August 2021) <www.parliament.nz>.

226 (23 November 2021) 756 NZPD at 6498.

227 Geiringer, Higbee and McLeay, above n 2, at 19.

228 At 19.

229 At 19.

230 At 1.

231 Devlin, above n 134.

232 Alexander Gillespie "Are New Zealand's new COVID-19 laws and powers really a step towards a police state?" *The Conversation* (New Zealand, 19 May 2020).

"public outrage".²³³ Similar comments were made about the COVID-19 Response (Vaccinations) Legislation, with one respected commentator noting that it "gives the perception of human rights being easily trampled over and will do little to quell the concerns of those worried about the mandates",²³⁴ and that the process looked like one designed to "set off the conspiracy minded and undermine the social licence needed for success".²³⁵ This is far from Parliament fostering respect for itself as an institution.

As was noted before, Parliament passing the wrong Bill, having to amend flaws in several Bills, and breaching fundamental principles of law also undermined confidence and trust in Parliament.

Derogation from principles of good law-making previously discussed all serve to erode respect for Parliament. Lack of social licence through citizen involvement and lack of scrutiny reducing the quality of law are particularly harmful in this regard. If citizens do not respect Parliament, they may not consent to it governing on their behalf; the absence of consent could undermine the legitimacy of Parliament and representative democracy.

9 *Principle 9: the right to govern*

Principle 9 is that the government has a right to govern, so long as it commands a majority in the House.²³⁶ During the height of the crisis, the coalition government consisting of the Labour Party, New Zealand First and the Green Party. Following the election in late 2020 the Labour Party alone commanded a majority and was able to govern.²³⁷

10 *Principle 10: quick enactment in emergencies*

Principle 10, the final principle, is that Parliament should be able to enact legislation quickly in emergencies.²³⁸ All government Bills related to COVID-19 brought to the House were passed,²³⁹ and

233 (12 May 2020, continued on 13 May 2020) 745 NZPD at 17678.

234 Claire Trevett "Government rams through 'no jab, no job' law at its peril" *New Zealand Herald* (online ed, New Zealand, 24 November 2021).

235 Geddis, above n 64.

236 Geiringer, Higbee and McLeay, above n 2, at 19.

237 Knight, above n 35, at [59]–[62].

238 Geiringer, Higbee and McLeay, above n 2, at 19.

239 COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; COVID-19 Public Health Response Bill; Medicines Amendment Bill; COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; Immigration (COVID-19 Response) Amendment Bill; Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill; COVID-19 Public Health Response Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill (No 2); COVID-19 Public Health Response Amendment Bill;

13 of them came into force within 1–2 days of being introduced.²⁴⁰ As has been outlined, proxy voting, adoption of electronic process and other changes to standing orders and the law-making process were able to occur.²⁴¹ Notably, during the early stages of the crisis, all parties supported Bills and acknowledged the need for Parliament to quickly enact legislation in emergencies.²⁴² Opposition parties noted the role of the House in providing scrutiny and accountability without being a hindrance.²⁴³

D Summary

An assessment of expedited law-making against Geiringer, Higbee and McLeay's framework has shown derogation from most of the 10 principles to a varying extent. Although some ad hoc mechanisms were adopted that went some way to reinstate these principles, their full value was not realised due to their ad hoc and restrained nature. The derogation from these principles can have profound consequences, such as eroding the consent upon which representative democracy is built and in turn decaying the legitimacy of Parliament.

V A NEW MODEL OF EXPEDITED LAW-MAKING: SEVEN PRACTICES TO UPHOLD PRINCIPLES OF GOOD LAW-MAKING

Law-making in times of crisis must be efficient, but expediting the law-making process can undermine principles of good law-making and democratic, civil and political rights. This has been demonstrated through the passing of the COVID-19 Act. A quantitative analysis of all legislation passed between 25 March 2020 and 10 September 2021 showed that harms to such principles and rights were not isolated to specific statutes but were widespread among legislation created during this

COVID-19 Recovery (Fast-track Consenting) Bill; Social Security (COVID-19 Income Relief Payment to be Income) Amendment Bill; Remuneration Authority (COVID-19 Measures) Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill; Immigration (COVID-19 Response) Amendment Bill; and COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill.

240 Medicines Amendment Bill; COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill; COVID-19 Public Health Response Amendment Bill; COVID-19 Response (Further Management Measures) Legislation Bill (No 2); COVID-19 Public Health Response Amendment Bill; Social Security (COVID-19 Income Relief Payment to be Income) Amendment Bill; Remuneration Authority (COVID-19 Measures) Amendment Bill; COVID-19 Response (Requirements for Entities—Modifications and Exemptions) Bill; COVID-19 Response (Urgent Management Measures) Legislation Bill; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Bill; and COVID-19 Public Health Response Bill.

241 Wilson, above n 155, at 190; and Knight, above n 35, at [48].

242 See for example (25 March 2020) 745 NZPD at 17300–17306.

243 At 17308.

period. The nature and extent of these harms have been shown in the preceding section by analysing expedited law making against Geiringer, Higbee and McLeay's 10 principles of good law-making.

Law-making in times of crisis should be governed by the rule of law, democratic ideals and principles of good law-making, not by the fear, panic or haste produced by the urgency of responding to a crisis. This can be achieved through a new model of law-making that embraces these characteristics. This section of the article advances seven practices that should be adopted by Parliament to mitigate the aforementioned harms and to uphold principles of good law-making. The seven practices are presented according to their place in the life cycle of a Bill rather than in direct response to each principle. This approach demonstrates what the new model of law-making is to look like when adopted. To assist with the transition from principle to practice the table below demonstrates which principles are upheld by each practice.

This section uses a positive counterfactual—in which this new model of law-making was adopted during the passing of the COVID-19 Act—to demonstrate the value of adopting such a framework. The seven practices that constitute this model are then expanded on, along with a further explanation of their utility and efficacy in mitigating the harms posed by expedited law-making.

TABLE 2

X indicates that the principle listed in the row is upheld by the practice in the column.

	Early indication of policy position	Increased use of ministerial statements	Exposure drafts	Direct electronic engagement between citizens and members	Post-enactment review	Proactive release	Upholding te Tiriti obligations	The new approach as a whole
1 – Informed and open debate	X	X	X	X	X	X		X
2 – Time and opportunity for scrutiny	X	X	X	X	X	X		X
3 – Citizen participation	X		X	X	X		X	X
4 – Transparency	X	X		X	X	X		X
5 – High quality legislation	X	X	X	X	X		X	X
6 – Fundamental constitutional rights and principles	X			X	X		X	X
7 – Stable procedural rules		X						X

A The Model in Action—A Positive Counterfactual

It is mid-2020. After nearly two months of a nationwide lockdown that significantly curtailed the rights and freedoms of citizens, New Zealand is being hailed as the first country to successfully eliminate COVID-19.²⁴⁴ Doing so has protected citizens from the despair of death and disease seen in other nations.²⁴⁵ Due to this success, the government is seeking to ease restrictions.²⁴⁶ The government has realised that s 70 of the Health Act, the section previously relied on as the legal basis for issuing public health restrictions orders, is not fit for purpose going forward.²⁴⁷ The powers in s 70 are largely designed for implementing only a handful of restrictions on individuals or households in an active state of emergency.²⁴⁸ The powers are not as well suited to the nationwide, often pre-emptive, less restrictive measures that were now needed. Realising this, the government announces its intent to create a new piece of legislation based on the Alert Level Framework. The government also shares the key features of that legislation, such as who has the power to promulgate an order, the potential substance of orders and who can enforce orders.

Legal academics and medical experts have time to consider the policy response and provide comments to the media debating flaws or benefits and providing explanations to the public. The public feels informed and has time to consider media articles and contact their local member if they have concerns. The media also has time to engage with ministers, officials, and their offices about the policy position through various interactions such as daily press briefings. Similarly, Opposition members have the chance to question the minister responsible when the minister delivers a ministerial statement to the House. Members can raise issues of concern that the electorate has broached with them directly or that they have seen dominate the media narrative. Throughout this process, the minister can dispel common concerns or panic. During this period citizens can provide their views directly through submissions to the select committee that will review the legislation ex post. Citizens have a formal way to participate. Their concerns about their rights being infringed are ameliorated by due process being followed and that a select committee process will occur, albeit after the passing of the legislation.

244 Charlotte Graham-McLay "Can't quite believe it': New Zealand tiptoes towards elimination of coronavirus" *The Guardian* (online ed, United Kingdom, 4 June 2020); and Sophie Cousins "New Zealand eliminates COVID-19" (2020) 395 *The Lancet* 1474. See also Michael G Baker, Amanda Kvalsvig and Ayesha J Verrall "New Zealand's Covid-19 elimination strategy" (2020) 213 *MJA* 198 for a discussion of New Zealand's COVID-19 elimination strategy.

245 World Health Organization, above n 21.

246 Ardern, above n 42.

247 See for example Geddis and Geiringer, above n 38; Knight and McLay, above n 38; and Parker, above n 43.

248 Geddis and Geiringer, above n 38.

Next, special interest groups and academics provide comment on an exposure draft. Even if such groups are only given a short period to give comment, they have now had some time since the policy position was announced and plenty of information through media coverage, a ministerial statement and proactively released official information to inform their comments, providing richer scrutiny. Further, such groups may have now had the opportunity to engage with and collate the views of their communities. This consultation in miniature can increase democratic input and social licence among those groups who may not fairly be represented in Parliament.

By the time the Bill reaches its introduction it has already been subject to scrutiny, debate, democratic input, increased social licence and quality assurance—all with great transparency and without increasing to any significant degree the time it will take to pass the law. While the Bill is in the House, citizens, although not able to have their usual input through select committees, are provided with a mechanism to directly present their views to members. This mechanism is through an online form on Parliament's website. Such a form may be similar to that which already exists for submitting to a select committee.²⁴⁹ Submissions through this form can then inform the member's contributions to the debate in the House. Even where that debate is highly expedited, "such mechanisms linking constituents directly with elected representatives not only enhances participation but also serves to bolster representative democracy".²⁵⁰

After the legislation is enacted, it is subject to post-enactment review. Post-enactment review has already served a great purpose *ex ante* in providing a channel for citizens to submit their views and by reassuring them that they will have a mechanism for input. Post-enactment review can now assess whether the law has worked effectively and "promote acceptance of government authority and the citizens' confidence in the government's administration".²⁵¹ Following this, the public, media, academia, and the Opposition are informed about how the law is used when documents continue to be proactively released. Proactive release provides ongoing accountability mechanisms and social licence.

B Practice 1: Early Indication of Policy Position

In the new model of law-making, the protection of civil and democratic rights begins before a Bill is introduced. The first practice to be adopted is an early indication of a general policy position. The indication can be given before a Bill is drafted, it may be modelled on a disclosure statement, and could be delivered by a verbal briefing from key officials at a press conference. During the pandemic, the general policy position was decided by Cabinet and then implemented through primary or

249 "How to make a submission" (27 November 2015) New Zealand Parliament <www.parliament.nz>.

250 Michael Neblo and Kevin Esterling *Politics with the People: Building a Directly Representative Democracy* (Cambridge University Press, Cambridge, 2018).

251 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 464.

secondary legislation.²⁵² Thus, Cabinet will have identified a policy position in advance of legislation being drafted. This requirement then is neither a burden on the government, nor does it obstruct quick law-making, thereby upholding Principles 9 and 10: the right to govern and to quickly enact legislation in emergencies.

Publicly available disclosure statements support transparency by indicating the general policy intent of the Bill and "the presence of certain significant powers or features in the bill that might be of particular Parliamentary or public interest and warrant an explanation".²⁵³ However, disclosure statements were brief for legislation passed during COVID-19, given the rapid speed at which legislation had to be implemented.²⁵⁴ Additionally, disclosure statements are only made available when the Bill is put on the order paper.²⁵⁵ Where law-making is expedited, there is a short time between the Bill being introduced and it receiving Royal Assent—in some cases a single day. Consequently, there is little time for public discussion and expert input based on the information contained in the disclosure statement.

Indicating a policy position early better informs Parliamentary and public scrutiny of legislation, upholding Principle 2 (time and opportunity for scrutiny).²⁵⁶ This scrutiny promotes good practice for the development of legislation, for example, by assessing and identifying any infringements on rights, upholding Principle 6 (fundamental constitutional rights and principles). Early indication allows the media and the Opposition to pick up on and debate possible contentions, as is contemplated by Principle 1 (informed and open debate). Citizens can then express their views on such contentions to members, realising Principle 3 (citizen participation). Finally, when academics and special interest groups get the chance to comment on an exposure draft, they have had more time to identify core issues and suggest solutions. Collectively these all improve the quality of legislation, upholding Principle 5 (high quality legislation).

It is well established that important decisions should be taken through Parliament in a democratic process and that delegated power reduces transparency and legitimacy.²⁵⁷ However, when important decisions go through Parliament in a highly expedited manner, this does not provide the democracy, transparency and legitimacy that is expected (Principle 3 (citizen participation), Principle 4

252 Knight, above n 35, at [28].

253 COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill (disclosure statement).

254 COVID-19 Response (Urgent Management Measures) Legislation Bill (disclosure statement); and COVID-19 Public Health Response Bill (disclosure statement).

255 Parliamentary Counsel Office "Disclosure statements" <pc.o.govt.nz>.

256 The Treasury "Departmental Disclosure Statements" (20 June 2017) <treasury.govt.nz>.

257 *Borrowdale v Director-General of Health* CA520/2020, 25 June (Submission on behalf of New Zealand Law Society Te Kāhui Ture o Aotearoa as intervenor) at [23].

(transparency) and Principle 8 (foster respect), respectively). An early indication of a general policy position can go some way to reinstate these features.

Sharing an early indication of a policy position can identify flaws in the law or elements that cause strong public backlash. Given the Bill is still being drafted, the government can consider the legitimacy of these concerns and amend the legislation accordingly.²⁵⁸ The benefit of an early indication can again be demonstrated by reference to the COVID-19 Act. There was no prior indication of the policy position and although there was strong public backlash regarding certain provisions, these remained unchanged or were only marginally amended.²⁵⁹ An early indication of policy position reinforces Principle 1 (informed and open debate), Principle 4 (transparency) and Principle 5 (high quality legislation), as transparency allows for open debate that can improve the quality of legislation. Citizen participation, Principle 3, is also bolstered as citizens are informed and have the opportunity to contact members, speak to the media or exercise other democratic rights to influence the law. Further, giving a pre-emptive indication of a policy position creates a sense of deliberative democracy where citizens have a role in engaging and influencing the law rather than being informed about it after the fact. This strongly increases legitimacy.

Legitimacy can be further bolstered by the public accountability that an early indication of a policy position can provide. "Public accountability ... provides voters with the information needed for judging the propriety and effectiveness of the conduct of the government."²⁶⁰ During the pandemic, daily media briefings "saw the government interrogated deeply about all aspects of the pandemic and response".²⁶¹ If an indication of the policy position was also given at these briefings, this position could be interrogated deeply.

Those who were asked to comment on an exposure draft of the COVID-19 Act noted that they had very little time to do so.²⁶² An early indication of a general policy position can allow experts and special interest groups to form opinions and identify key issues before they receive the exposure draft. Additional time allows them to provide more vigorous comments and scrutiny.

The benefits of an early announcement of a policy position for both democratic and political scrutiny can be seen in the Firearms Amendment Bill. Cabinet met 72 hours after the Christchurch

258 Bovens, above n 251, at 450.

259 Devlin, above n 172.

260 Bovens, above n 251, at 463.

261 Dean R Knight "New Zealand: Rendering Account During the COVID-19 Pandemic" (19 April 2021) *Verfassungsblog: On Matters Constitutional* <www.verfassungsblog.de> at 3.

262 (13 May 2020) 745 NZPD at 17750–17753.

terrorist attack and decided that it would ban military-style and semi-automatic assault rifles.²⁶³ At the time, no Bill had been drafted and a Bill was not introduced until 10 days later.²⁶⁴ Leave of the House was given to pass the Bill under a highly expedited process, although a week was allowed for select committee.²⁶⁵ As an example, the national broadcaster Radio New Zealand produced six articles capturing public opinion and debate on all sides of the issue in the 48 hours following the announcement.²⁶⁶ It produced several more that captured political debate.²⁶⁷ Providing an early indication of a policy position can go a long way in reinstating the democratic and political ideals undermined by expedited law-making.

C Practice 2: Increased Use of Ministerial Statements

Once this early policy indication has been given and a draft Bill is being produced, the responsible minister can give a ministerial statement. During COVID-19, there was limited opportunity for usual debate, questions and scrutiny.²⁶⁸ Additionally, Cabinet alone made many decisions, and a few ministers were responsible for most of the legislation being brought to the House.²⁶⁹ In this context, all parties recognised the need to have greater dialogue with ministers and facilitate more "conversational scrutiny" by engaging directly with ministers.²⁷⁰ Ministerial statements have previously informed the House about emergency responses.²⁷¹ The leader of each party with six or more members is entitled to comment on the statement for up to five minutes; the House has previously agreed to extend this to smaller parties, which would be suitable in an emergency

263 Jacinda Ardern and Stuart Nash "New Zealand bans military style semi-automatics and assault rifles" (press release, 21 March 2020).

264 (2 April 2020) 737 NZPD at 10118.

265 At 10107.

266 Lew Stoddart "Opinion: Gun law reform strikes a fair balance" (22 March 2019) RNZ <www.rnz.co.nz>; Brigitee Morten "Action is what NZ needed on gun control, and what PM Jacinda Ardern delivered" (22 March 2019) RNZ <www.rnz.co.nz>; "Wide support for government's move to tighten gun laws" (21 March 2019) RNZ <www.rnz.co.nz>; Kevin Clements "Ban on military style semi-automatic weapons should be 'applauded'" (21 March 2019) RNZ <www.rnz.co.nz>; and "World reacts to military-style semi-automatic weapons ban in New Zealand" (21 March 2019) RNZ <www.rnz.co.nz>.

267 See for example "Politicians must stop inciting division after shootings – MP" (20 March 2019) RNZ <www.rnz.co.nz>; and "ACT leader David Seymour sounds warning on pace of gun law reform" (21 March 2019) RNZ <www.rnz.co.nz>.

268 Griglio, above n 150, at 49.

269 Knight, above n 35, at [27]–[43].

270 Wilson, above n 155, at 193.

271 See for example (22 February 2011) 670 NZPD at 16937; (23 February 2011) 670 NZPD at 16943; and (8 March 2011) 670 NZPD at 16948–16951.

context.²⁷² The minister may then respond to each comment for up to two minutes.²⁷³ As a result, the engagement with the minister in charge of the Bill is significantly increased which reinstates some of the transparency and scrutiny that is removed by expedited law-making.

The ability of ministerial statements to increase engagement with ministers and reinstate civil and democratic rights in the face of expedited law-making has been duly explored. The next matter to explore is the most effective way to realise that value. There are several benefits of using ministerial statements rather than other procedural mechanisms.

First, ministerial statements occur just before question time. Question time is "undoubtedly the most high-profile aspect" of parliamentary proceedings and has high media viewership.²⁷⁴ Consequently, the scrutiny and information facilitated through ministerial statements is more likely to be reported in the media, further increasing debate (Principle 1), scrutiny (Principle 2), public input (Principle 3) and transparency (Principle 4). Additionally, there is public interest in scrutiny through House procedure when it is readily available across platforms. Research has shown that New Zealanders are six times more likely to have watched or listened to a select committee after lockdown than before.²⁷⁵

Second, a further benefit of ministerial statements is that debate prompted by them is informed, thereby upholding Principle 1. Specifically, the minister can dispel common unease or panic concerning certain impacts of the law. Social acceptance of the law increases as a result and in turn so does respect for Parliament—Principle 8 (foster respect). For example, if citizens are concerned about how certain provisions in a draft Bill may be implemented, a minister can directly confirm that a certain situation will not occur under the Bill or that the government does not intend for certain actions to occur under the Bill.

The use of ministerial statements is preferable to the removal of the limit on calls used during the COVID-19 emergency for several reasons. First, due to the reactivate nature of the government's response to COVID-19, some Bills were passed before the change to standing orders was made, meaning they were subject to less of this kind of scrutiny.²⁷⁶ Secondly, the removal of the limit on calls is only at the Committee of the whole House stage of the law-making process, which can be

272 McGee, above n 12, at 264.

273 At 264; and Standing Orders of the House of Representatives, SO 364–367.

274 Phil Larkin "Ministerial Accountability to Parliament" in Keith Dowding and Chris Lewis (eds) *Ministerial Careers and Accountability in the Australian Commonwealth Government* (ANU E Press, Canberra, 2012) 95 at 99.

275 Colmar Brunton *Research on audience for Select Committees* (New Zealand Parliament, June 2020).

276 Wilson, above n 155, at 194; and (6 May 2020) 745 NZPD 17517–17534.

expedited.²⁷⁷ Finally, the ad hoc and unique nature of this mechanism means it may not be implemented in future emergencies. In contrast, ministerial statements are a well-established practice and incorporated into convention and standing orders. The established nature of ministerial statements serves to uphold Principle 7 by providing more stable procedural rules. Significantly, the presentation of and response to ministerial statements occur independently of the law-making process, so are not impacted by expedition of the law-making process.²⁷⁸

Ministerial statements increase scrutiny, transparency, inform debate and build social licence in a way that is preferable to other measures. Most importantly, ministerial statements strike a suitable balance between the need for Parliament to urgently pass legislation while upholding good law-making principles such as scrutiny, transparency, increased policy deliberation and public trust.

D Practice 3: Exposure Drafts of Bills

Once the Bill is drafted, it can be used as an exposure draft to receive comments from academics and special interest groups. The release of draft legislation requires the Attorney-General's approval and, following best practice, the consent of Cabinet.²⁷⁹ Obtaining this consent is not arduous and the discretion to release is wide, meaning it is feasible in emergencies.²⁸⁰ As a result, Principle 10, the ability to pass legislation quickly, is not undermined. In fact, this process was followed for the COVID-19 Act and improved the quality of the legislation, created legitimacy and facilitated citizen participation, thereby upholding Principle 5 (high quality legislation), Principle 8 (foster respect) and Principle 3 (citizen participation), respectively.

Exposure drafts "can deliver significant value".²⁸¹ Specifically, exposure drafts ensure that legislation achieves its policy purpose, tests assumptions and checks the quality of the legislation, which serve to bolster Principles 2 (time and opportunity for debate) and 5 (high quality legislation). Further, exposure drafts can obtain stakeholder agreement,²⁸² which upholds Principles 3 and 8 as such agreement requires citizen participation and fosters respect for Parliament. Exposure drafts

277 The Business Committee can decide that a Bill does not need to be considered in the Committee of the whole House, thereby skipping this stage. Additionally, the third reading and the Committee of the whole House can be taken together under urgency: Wilson, above n 155, at 194; (6 May 2020) 745 NZPD 17517–17534; Geiringer, Higbee and McLeay, above n 2, at 38; and Standing Orders of the House of Representatives, SO 307.

278 Standing Orders of the House of Representatives, SO 364–367.

279 Cabinet Office *Cabinet Manual 2017* at [7.48].

280 At [7.48]; and Cabinet Office Circular "Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown" (16 April 2019) CO19/2 at [7]–[10].

281 Legislation and Design Advisory Committee "Legislation Guidelines" (2018) at 16.

282 Legislation and Design Advisory Committee "Legislation Guidelines – Supplementary materials Exposure draft Bills" (2018) at 2.

require agencies to provide explanations and create contextual material on the intent of the Bill.²⁸³ This contextual material can be referenced by courts, practitioners and those enforcing the law.²⁸⁴ When law-making is expedited in an emergency there may be omissions or errors; contextual material can alleviate the impact of those mistakes by providing additional guidance.

The ability of Māori and a handful of academics to comment on an exposure draft of the COVID-19 Act was generally regarded as successful. Important changes and safeguards such as a sunset clause were introduced as a result and this contribution was acknowledged by lawmakers.²⁸⁵

Māori academics note that they were given only hours to comment, contributions were rejected, and that overall greater Māori involvement was needed.²⁸⁶ Commenting on exposure drafts of all Bills may help to alleviate these concerns by enabling Māori to give input into all Acts. Further, an early indication of the general policy position will mean that those asked to comment have more time to develop and articulate their views and the views of their communities. Exposure drafts are a draft and should be malleable.²⁸⁷ The government should not present exposure drafts to special interest groups for comment if it is not going to recognise the validity of those comments, or if the draft Bill is in reality the final version.

The evidence of the positive contribution of exposure drafts has been shown through their use during COVID-19. The benefits of exposure drafts of Bills can be further leveraged by adopting the new model of expedited law-making advanced in this article.

E Practice 4: Formal Electronic Engagement between Citizens and Members

Once the Bill is introduced to the House, procedures need to better support the direct engagement of citizens with elected representatives and their role in the democratic process—in essence, Principle 3. It is well established that "democracies are generally not prepared to sustain deliberation and

283 At 3.

284 At 3.

285 (13 May 2020) 745 NZPD at 17750–17753.

286 Charters, above n 106, at 2.

287 Legislation and Design Advisory Committee, above n 282, at 2.

participation in times of crisis".²⁸⁸ But the ability to participate in the legislative process is a fundamental right in liberal democracies.²⁸⁹

Recent scholarship has noted that large-scale democratic innovations can function in health crises and other emergencies. However, they need to be put in place before such emergencies occur.²⁹⁰ It is crucial then that a new model of law-making that outlines suitable democratic innovations is adopted to future-proof the protection of this fundamental participatory right. In recognition of its fundamental nature, the discussion of all other elements of this new model of law-making and their utility refers to citizen participation in some regard.

By affording more opportunities for members to speak on Bills, Parliament can support in the views of citizens, expressed in this way, being brought into the House and thus the democratic process. Thus, in upholding Principle 1 by allowing for open debate, Principle 3 is also realised as that debate allows citizens to participate in the legislative process. Most members speaking on the COVID-19 Public Health Response Bill referenced the views of citizens directly communicated to them, as well as media discourse or comments and views received through the draft exposure process.²⁹¹ For example, the Hon Tim Macindoe MP referenced an email from a citizen.²⁹² The Hon Marama Davidson MP acknowledged and raised concerns of certain communities.²⁹³ The Hon Alfred Ngaro MP highlighted comments made by particular communities on the exposure draft, especially discussing concerns of Māori.²⁹⁴ The Hon Kiritapu Allan MP similarly acknowledged concerns of Māori over marae.²⁹⁵ Erica Stanford MP referenced media commentary on the matter.²⁹⁶ Finally, the Hon David Parker MP referenced comments of the Human Rights Commission and legal experts.²⁹⁷

288 Lucy J Parry, Hans Asenbaum and Selen A Ercan "Democracy in flux: a systemic view on the impact of COVID-19" (2021) 15 TGPPP 197 at 201.

289 Human Rights Commission "Submission to the Finance and Expenditure Committee Inquiry into the COVID-19 Public Health Response Act 2020"; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis NZ, Wellington, 2015).

290 Parry, Asenbaum and Ercan, above n 288, at 201.

291 (13 May 2020) 745 NZPD at 17734–17753.

292 At 17734–17735.

293 At 17741–17742.

294 At 17742–17743.

295 At 17737–17738.

296 At 17745–17746.

297 At 17750–17753.

Similarly, while there was no draft exposure process for the COVID-19 Response (Vaccinations) Legislation, many members shared the views of constituents, academics and other commentators.²⁹⁸

Parliament can facilitate direct engagement between citizens and members through an online submission form. The communication of views directly to government representatives through online forms has also been suggested by other scholars.²⁹⁹ "Such mechanisms linking constituents directly with elected representatives not only enhances participation but also serves to bolster representative democracy."³⁰⁰ An online form is better at building social licence than citizen-initiated engagement with members, such as commenting on their social media posts, because it is a formal mechanism that therefore has more legitimacy.

The use of technology previously to allow for greater democratic input into law-making has been effective in a range of ways. For example, the New Zealand Parliament posts links to select committee pages on social media; by following these links citizens can make a submission online using a simple form.³⁰¹ Additionally, the Green Party has previously crowdsourced questions via social media to ask in the House during Question Time, acknowledging the member of the public who asked the question.³⁰² This method was used to increase public engagement and allow the public to see their views being expressly represented in Parliament.

Further, when the government announced that it planned to ban all automatic firearms and to tighten New Zealand's gun laws, there were strongly held views that the public was eager to express to decision makers. No legislation had been drafted at the time this policy position was announced.³⁰³ The Office of the Clerk set up an email address to provide a mechanism for citizens to submit their views until the select committee occurred.³⁰⁴ It was made clear that this was not a formal submission but that these emails would be passed on to the select committee in due course, who may consider them as evidence or submissions. This allows greater democratic input and captures views and opinions when engagement is highest. It also creates social licence as citizens have an input mechanism while the Bill is being passed rather than feeling as though their rights are being surreptitiously curtailed. Social licence means that citizens respect the law and the process Parliament

298 See for example (23 November 2021) 756 NZPD at 6467, 6470 and 6472–6473.

299 Parry, Asenbaum and Ercan, above n 288, at 202.

300 Neblo and Esterling, above n 250.

301 McGee, above n 12, at 320 and 409.

302 (29 April 2015) 704 NZPD at 2989–2991; and Stacey Kirk "Want to hold the Government to account on climate change? Now's your chance" (24 April 2015) Stuff <www.stuff.co.nz>.

303 Jacinda Ardern "PM statement on Christchurch mosques terror attack – 18 March" (press release, 18 March 2019).

304 New Zealand Parliament "Public input on gun law changes proposed by the Government" (21 March 2019) <www.parliament.nz>.

used to create it—in essence, Principle 8. The previous and successful use of such mechanisms endorses their viability and utility.

Although democratic input is hard to facilitate in actual emergencies, it is an essential precondition for representative democracy and upholding the legitimacy of Parliament.³⁰⁵ The negative consequences of bypassing such mechanisms through expedited law-making are clear.³⁰⁶ Simple mechanisms such as an online submission form and pre-emptive receipt of submissions via email go a significant way in reinstating democratic input, ensuring that democracy is representative, and maintaining the legitimacy of Parliament and its laws.

F Practice 5: Post-enactment Review

Once the Bill has become law it should be subject to post-enactment review. The post-enactment review of substantial legislation has been described as "a novel but appropriate and swift way to address the democratic deficit of the urgent law-making process".³⁰⁷ The COVID-19 Act was referred to the Finance and Expenditure Committee for post-enactment review.³⁰⁸ This was recommended by legal academics in their comments on the exposure draft.³⁰⁹ The COVID-19 Response (Vaccinations) Legislation was not subject to post-enactment review despite it being called for by all parties; the government said it was "unnecessary".³¹⁰

New Zealand has a "plethora of ad hoc review mechanisms at varying levels", but does not have a great tendency to utilise them.³¹¹ Key factors influencing the limited effectiveness of post-enactment review include limited guidance and a lack of links between the pre- and post-enactment process.³¹² Having post-enactment review and procedural details identified as part of the pre-enactment process addresses these issues by providing guidance and establishing a link between the pre-enactment process and the post-enactment review. However, if post-enactment review were not adopted as an established practice within a new model of law-making and only relied on as an ad hoc mechanism,

305 Locke, above n 3, at 243.

306 At 243.

307 Collette Devlin "Parliament sends controversial new COVID-19 Level 2 law to be reviewed at Select Committee" (15 May 2020) Stuff <www.stuff.co.nz>.

308 Small, above n 168; and Russell and others, above n 46.

309 (13 May 2020) 745 NZPD at 17750–17753; and Devlin, above n 307.

310 (23 November 2021) 756 NZPD at 6498.

311 Derek Gill and Susy Frankel "Learning the Way Forward? The Role of Monitoring Evaluation and Review" in Susy Frankel and John Yeabsley (eds) *Framing the Commons: Cross-Cutting Issues in Regulation* (Victoria University Press, Wellington, 2014) at [2.2.2].

312 Tayla Crawford "Post-legislative scrutiny in New Zealand: is a more formal mechanism necessary?" (LLB(Hons) Dissertation, Victoria University of Wellington, 2017) at 19 and 21–24.

then these problems remain. Making post-enactment review the norm when enacting expedited legislation in an emergency prevents reliance on ad hoc measures that may not be used or used in a way that garners the full benefit of post-enactment review.

To some degree, post-enactment review by select committee has been adopted in the United Kingdom.³¹³ This has generally been regarded as positive and has increased scrutiny, public input and the efficacy of law.³¹⁴ Post-enactment review in that instance has been effective at evaluating whether the law is working as intended, improving it if not, and importantly addressing any unintended consequences and accounting for how citizens respond.³¹⁵ Taking account of how citizens have responded and particularly how this has undermined the efficacy of the law—for example, through a lack of compliance—creates a pathway for citizen participation.³¹⁶ It requires an understanding of how citizens have responded, which could be ascertained through public submissions. This kind of citizen engagement is exactly that foreseen by Principle 3.

Post-enactment review can also build legitimacy when the response of citizens is accounted for either in the review report or by informing amendments to the law. Bovens notes that where respect for governmental authority is dwindling, the process of accountability allows those in power to explain and justify.³¹⁷ Citizens and interest groups can pose questions and offer their opinions.³¹⁸ This process can "promote acceptance of government authority and the citizens' confidence in the government's administration".³¹⁹ In other words, it can foster respect for Parliament as an institution: Principle 8.

Another commonly acknowledged benefit of the scrutiny provided by post-enactment review is its encouragement of learning and improvement of the regulatory system.³²⁰ Learning is one of Bovens' three measures of accountability.³²¹ In this context, accountability is a tool to keep governments "effective in delivering their promises".³²² In this sense, post-enactment review realises Principle 2 by providing an opportunity for scrutiny.

313 United Kingdom Law Commission "Post-Legislative Scrutiny" (No 302, 2006) at [2.4].

314 At [2.4].

315 At [2.4].

316 Lydia Clapinska "Post-Legislative Scrutiny of Acts of Parliament" (2006) 32 CLB 191 at 198.

317 Bovens, above n 251, at 450.

318 At 464.

319 At 464.

320 Gill and Frankel, above n 311, at 210-221.

321 Bovens, above n 251, at 447.

322 At 464.

Post-enactment review allows the opportunity to establish social licence and legitimacy through democratic input and scrutiny. Further, it allows for reconciliation of Parliamentary legitimacy where this has been harmed through expedited law-making.

G Practice 6: Proactive Release

All official information related to a Bill should be proactively released at all stages of the law-making process, including the period after the Bill has become law. Proactive release has become commonplace in New Zealand.³²³ Proactive release can strengthen accountability, inform public understanding, facilitate informed participation, and improve public trust and confidence.³²⁴ Proactive release primarily serves to realise Principle 4 (transparency), but also facilitates Principle 1 (informed and open debate), Principle 2 (time and opportunity for scrutiny), Principle 3 (citizen participation) and Principle 8 (foster respect), respectively.

Proactive release reduces the burden on government agencies of responding to individual requests for information.³²⁵ This is particularly relevant when government actors are busy responding to the emergency itself. It is also relevant to citizens because the diversion of operational government resources to respond to the emergency may create delays or omissions in responding to individual requests. Such delays reduce transparency and scrutiny, particularly in emergencies when attention is given to the issues of the day.

Proactive release allows for a greater body of information to reach a greater number of people. When a request must be made, the response is often sent only to the individual who made the request. When requesting information, citizens must have a line of inquiry already identified to request associated information. In contrast, even if no line of inquiry has yet been established, proactive release allows information to be publicly available. Further, the information being widely accessible means that trends or obscurities can be identified across the information.

The government was previously applauded for its proactive release and transparency.³²⁶ Proactive release ended on 1 April 2021 and citizens again needed to make Official Information Act requests to individual departments.³²⁷ Despite New Zealand being out of the height of the crisis at this time, the government still subsequently passed urgent legislation regarding vaccine approval and border

323 Public Service Commission *Proactive release of official information – Agency guidance*.

324 Ombudsman *Proactive release: Good practices for proactive release of official information* (December 2020) at 3.

325 At 3.

326 See for example Knight, above n 35, at [67]–[69].

327 "Legislation and key documents – proactive release" Unite Against Covid-19 <covid19.govt.nz>.

measures for which transparency is still required.³²⁸ Proactive release was reinstated through the government's COVID-19 website during a second nationwide outbreak in August 2021.³²⁹ Proactive release continued even as restrictions eased.³³⁰ As noted above, in one high profile instance the government relied on future proactive release as an excuse to deny an Official Information Act request. A request was made to get more information on the policy and associated advice related to the vaccination legislation; it was denied on the basis that the information would be proactively released in a few months' time.³³¹ The release would occur months after the relevant legislation had been passed. The purpose of proactive release is to prevent delays caused by the request-and-respond process, not to justify delays to legislation and the release of information after it is most relevant and it should be used accordingly.

Given the trend towards proactive release, it is unusual for such documents to not carry on being proactively released. Not doing so fails to realise the extensive benefits proactive release provides. Proactive release should continue so long as decisions relating to the emergency as still being made.

H Practice 7: Upholding te Tiriti Obligations

Finally, "the full evaluation of the response to Covid-19 must include ongoing concerns for the ways in which that response navigates relationships under te Tiriti".³³²

Māori scholars have advanced several aspirational approaches to uphold te Tiriti obligations. The first suggested approach is the inclusion of a direct reference to te Tiriti obligations in legislation.³³³ Direct reference to te Tiriti can enable an equitable approach and prevent the unjust application of seemingly neutral laws.³³⁴ For example, if explicit consideration was given to Treaty principles the warrantless entry powers granted in the COVID-19 Act would not be exercised without "the consent of the relevant tangata whenua of the rohe where the marae sits".³³⁵ This approach would avoid or curtail the outrage caused by such provisions and would foster respect for Parliament, thus upholding Principle 8.

328 COVID-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill; and Medicines Amendment Bill.

329 "Legislation and key documents – proactive release", above n 327.

330 "Proactive release documents" Unite Against Covid-19 < covid19.govt.nz >.

331 Strang, above n 190.

332 McLean and others, above n 17, at 208.

333 At 208–209.

334 Charters, above n 106, at 3; and Curtis, above n 119.

335 Charters, above n 106, at 19.

The second approach to uphold te Tiriti obligations is co-governance and earlier engagement with Māori.³³⁶ Co-governance would have to be ideated and established by Māori for Māori in partnership with the Crown. Such a relationship can allow for Principle 3: shared expertise and citizen participation. Further, it would allow for Māori to effectively fulfil a role in their communities which the state cannot, upholding Principle 5 by producing high quality legislation that fulfils its purpose. Further, this would create an understanding of an equally shared authority to regulate, and in turn uphold the constitutional rights in te Tiriti as is contemplated by Principle 6.³³⁷

It has been argued that the practices advanced in this article, such as Māori input into exposure drafts of Bills, go some way to uphold obligations under te Tiriti. Ultimately, the Crown exercising kawanatanga and Māori exercising tino rangatiratanga must work in partnership to uphold te Tiriti obligations.³³⁸

VI CONCLUSION

The passage of the COVID-19 Act created a "firestorm" and was met with the "sound of fury".³³⁹ The COVID-19 Response (Vaccinations) Legislation created literal fire and fury on the parliament lawn as protesters carried out an occupation.³⁴⁰ Such a response aptly captures the reaction of citizens to expedited law-making that, even when used legitimately and necessarily, undermines fundamental and constitutional rights. These rights, specifically, include the rights of citizens to have their views represented in Parliament, to contribute to law-making, to debate law-making transparently, and for any infringement on their rights to be given careful consideration and due process.³⁴¹ Any infringement on such rights warrants an evaluation of how they can be protected. Even more worryingly, infringing such rights may erode the consent upon which representative democracy is built.³⁴² A lack of consent may, in turn, decay the legitimacy of Parliament. An absence of such legitimacy may lead to civil dissonance or disobedience, and, in the most severe cases, a constitutional crisis, anarchy or insurrection.³⁴³

336 At 18; and Human Rights Commission, above n 289, at [63]–[64].

337 Charters, above n 106, at 2.

338 McLean and others, above n 17.

339 Geiringer, above n 47.

340 Eva Corlett "Fires and clashes break out at New Zealand parliament as police move in to clear protest" *The Guardian* (online ed, London, 2 March 2022).

341 Geiringer, Higbee and McLeay, above n 2, 16–19.

342 Locke, above n 3, at 243.

343 At 243–250.

The outrage, petition and protest seen in response to the COVID-19 Act are a reminder of how tangible these threats are, even though they may at times seem distant. Quantitative analysis of other Bills passed between 25 March 2020 and 10 September 2021 shows that nearly all Bills related to COVID-19 went through a highly expedited process, even when there was no active outbreak. Such Bills often skipped the select committee, had no debate on multiple readings, and skipped or had a highly abridged Committee of the whole House.

In response to such harms manifesting in New Zealand's democracy, this article has advanced a model of law-making, focusing on seven specific practices, that mitigates such harms and ensures the realisation of principles of good law-making. Applying this model of law-making to the passage of the COVID-19 Act provides an apt counterfactual of how expedited law-making can and should occur.

The seven practices that comprise this model of law-making are (1) an early indication of a policy position, (2) ministerial statements, (3) exposure drafts of Bills, (4) direct electronic engagement between citizens and members, (5) post-enactment review, (6) proactive release, and (7) maintenance of te Tiriti obligations through co-governance or reference to te Tiriti in legislation.

The risks to fundamental rights, democracy and state legitimacy are present whenever expedited law-making subverts principles of good law-making. Although the model of law-making advocated in this article grounds its examples and justifications within the COVID-19 emergency, the harms posed by expedited law-making are present in all emergencies. It is essential then that in all emergencies, a model of law-making that effectively mitigates such harms is also adopted.

Ultimately, law-making in times of crisis should be efficient, but such law-making must not be governed by the fear, panic or haste produced by the urgency of responding to a crisis. Instead, law-making in times of crisis must be governed by the rule of law, democratic ideals and principles of good law-making.

APPENDIX

Bills and their legislative process from 25 March 2020 – 10 September 2021

This table documents whether any stage the legislative process was expedited and documents the type of mechanism used to expedite that stage. The table includes all bills passed through the House from 25 March 2021 (the date that a state of emergency was declared and pandemic notice was first in force) until 10 September 2021 (the last sitting block before the conclusion of writing this paper).

The table does not include government finance bills such as budget or imprest and supply bills. This is because these as general government administration bills would have occurred despite the crisis and the spending confirmed through these bills had their policy decision implemented through separate urgent legislation, for example, the Taxation (COVID-19 Resurgence Support Payments and Other Matters) Bill. Additionally, such bills are nearly always expedited but under unique settings.

Data was collected by recording every bill that received Royal Assent during this named period. Hansard for each stage of the bill was read and it was recorded whether an urgency motion was accorded for that stage of the legislative process, whether leave of the house was successfully sought to expedite that stage of the legislative process or whether a determination of the business committee expedited that stage of the legislative process.

Key:

V – Expedited through leave

X – Expedited through urgency

/ – Expedited in accordance with determination of the Business Committee

* – State of emergency in force

– Covid-19 related Bill (A bill is classed as a Covid-19 related bill if its primary function was related to the Covid-19 response, for example, public health measures, managed isolation and quarantine, economic recovery or vaccination to name a few).

Bill- chronologically (by date given royal assent)	First reading expedited	Select Committee Skipped	Second reading expedited	Committee of the whole House expedited	Third reading expedited
Covid-19 Response (Taxation and Social Assistance Urgent Measures) Bill * #	V	V	V	V	V
Covid-19 Response (Urgent Management Measures) Legislation Bill * #	V	V	V	V	V
Covid-19 Response (Taxation and Other Regulatory Urgent Measures) Bill * #	V	V	V	V	V
Covid-19 Public Health Response Bill * #	X	X	X	X	X
Covid-19 Response (Further Management Measures) Legislation Bill * #				V	
Covid-19 Response (Requirements for Entities—Modifications and Exemptions) Bill * #	X	X	X	X	X
Immigration (Covid-19 Response) Amendment Bill * #			V	V	
Customs and Excise (Tobacco) Amendment Bill	X	X	X	X	X
Family Court (Supporting Families in Court) Legislation Bill	X		V	V	
Remuneration Authority (Covid-19 Measures) Amendment Bill #	X		V	V	
Smoke-free Environments (Prohibiting Smoking in Motor Vehicles Carrying Children) Amendment Bill					
Overseas Investment (Urgent Measures) Amendment Bill	X	X	X	X	X

Bill- chronologically (by date given royal assent)	First reading expedited	Select Committee Skipped	Second reading expedited	Committee of the whole House expedited	Third reading expedited
Social Security (Covid-19 Income Relief Payment to be Income) Amendment Bill #	X	X	X	X	X
Climate Change Response (Emissions Trading Reform) Amendment Bill			X	V	
Arms Legislation Bill				X	
Electoral (Registration of Sentenced Prisoners) Amendment Bill			X	X	X
Greater Christchurch Regeneration Amendment Bill				V	V
Land Transport (Rail) Legislation Bill			X	X	X
Mental Health and Wellbeing Commission Bill				V	X
Privacy Bill				V	X
Public Finance (Wellbeing) Amendment Bill	X	X	X	X	X
Racing Industry Bill				V	V
Resource Management Amendment Bill	X	X	X	X	X
Electoral (Registration of Sentenced Prisoners) Amendment Bill (No 2)	X	X	X	X	X
Auckland Regional Amenities Funding Amendment Bill					
Covid-19 Recovery (Fast-track Consenting) Bill #	X	X	X	X	X
New Zealand Māori Arts and Crafts Institute Vesting Bill					
New Zealand Superannuation and			X	X	

Bill- chronologically (by date given royal assent)	First reading expedited	Select Committee Skipped	Second reading expedited	Committee of the whole House expedited	Third reading expedited
Veteran's Pension Legislation Amendment Bill					
Education and Training Bill			X	X	X
Covid-19 Public Health Response Amendment Bill #	X	X	X	X	X
Covid-19 Response (Further Management Measures) Legislation Bill (No 2) #	X	X	X	X	X
Crimes (Definition of Female Genital Mutilation) Amendment Bill				V	
Dairy Industry Restructuring Amendment Bill (No 3)				V	
Equal Pay Amendment Bill			X		
Films, Videos, and Publications Classification (Commercial Video on-Demand) Amendment Bill			X		
Forests (Regulation of Log Traders and Forestry Advisers) Amendment Bill	X	X			
Infrastructure Funding and Financing Bill					
International Crimes and International Criminal Court Amendment Bill			X		
Land Transport (NZTA) Legislation Amendment Bill			X		
Public Finance Amendment Bill					(Only had 3 rd reading)

Bill- chronologically (by date given royal assent)	First reading expedited	Select Committee Skipped	Second reading expedited	Committee of the whole House expedited	Third reading expedited
Public Service Bill					(Only had 3 rd reading)
Rates Rebate (Statutory Declarations) Amendment Bill			X	X	
Support Workers (Pay Equity) Settlements Amendment Bill					
Taumata Arowai—the Water Services Regulator Bill			X	X	
Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill			X		
Urban Development Bill			X		
Veterans' Support Amendment Bill (No 2)	X			V	
Fuel Industry Bill	X		X	X	X
New Zealand Public Health and Disability Amendment Bill				V	V
Residential Tenancies Amendment Bill			X	X	X
Smoke free Environments and Regulated Products (Vaping) Amendment Bill				V	V
Covid-19 Public Health Response Amendment Bill #	X	X	X	X	X
Drug and Substance Checking Legislation Bill	X	X	X	X	X
Taxation (Income Tax Rate and Other Amendments) Bill					
Taxation (Covid-19 Resurgence Support Payments and Other Matters) Bill	X	X	X	X	X

Bill- chronologically (by date given royal assent)	First reading expedited	Select Committee Skipped	Second reading expedited	Committee of the whole House expedited	Third reading expedited
Food (Continuation of Dietary Supplements Regulations) Amendment Bill	X				
Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill	X		X	X	X
Climate Change Response (Auction Price) Amendment Bill	X		X	X	X
Child Protection (Child Sex Offender Government Agency Registration) Amendment Bill	X	X	X	X	X
Child Support Amendment Bill					
Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2)					
Regulatory Systems (Transport) Amendment Bill				V	V
Taxation (Annual Rates for 2020-21, Feasibility Expenditure, and Remedial Matters) Bill	X				
Local Government (Rating of Whenua Māori) Amendment Bill				X	
Ngāti Hinerangi Claims Settlement Bill					
Financial Market Infrastructures Bill					
Immigration (Covid-19 Response) Amendment Bill #					
Holidays (Increasing Sick Leave) Amendment Bill	X			V	V

Bill- chronologically (by date given royal assent)	First reading expedited	Select Committee Skipped	Second reading expedited	Committee of the whole House expedited	Third reading expedited
Overseas Investment Amendment Bill (No 3)	X				X
Covid-19 Public Health Response (Validation of Managed Isolation and Quarantine Charges) Amendment Bill #	X	X	X	X	X
Medicines Amendment Bill #	X	X	X	X	X
Taxation (Budget 2021 and Remedial Measures) Bill	X	X	X	X	X
Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill					
Health (National Cervical Screening Programme) Amendment Bill					
Intelligence and Security (Review) Amendment Bill				/	
Social Security (Financial Assistance for Caregivers) Amendment Bill					
District Court (Protection of Judgment Debtors with Disabilities) Amendment Bill					
<i>Annual Reporting and Audit Time Frames Extensions Legislation Bill</i>	X	X	X	X	X
Education and Training (Grants—Budget Measures) Amendment Bill					
Gas (Information Disclosure and Penalties) Amendment Bill					

Bill- chronologically (by date given royal assent)	First reading expedited	Select Committee Skipped	Second reading expedited	Committee of the whole House expedited	Third reading expedited
Fair Trading Amendment Bill					
Family Court (Supporting Children in Court) Legislation Bill					
Reserve Bank of New Zealand Bill					