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# NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW


The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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# TOO SECRET TO SCRUTINISE? EXECUTIVE ACCOUNTABILITY TO SELECT COMMITTEES IN FOREIGN AFFAIRS AND DEFENCE

***Eve Bain****

*The scrutiny of Executive action in foreign affairs is a constitutional function for which, in New Zealand, the Foreign Affairs, Defence and Trade Select Committee is primarily responsible. To this end Parliament has, in principle, unlimited inquiry powers. Yet our foreign affairs select committee, and those in other Anglo-Commonwealth jurisdictions, have in recent years experienced serious challenges to the fulfilment of their investigatory role. The public interest is being pulled in opposite directions: the Executive relies on national security considerations to justify confidentiality, whereas Parliament can (and should) demand disclosure in order to hold the Government to account. This article explores this tension, assessing whether the recent work of the FADTC achieves the "robust scrutiny" envisaged by the 1985 select committee reforms, followed by a detailed analysis of the validity of statutory secrecy provisions as a limitation on parliamentary inquiry powers.*

## *I INTRODUCTION*

Executive accountability to Parliament is central to New Zealand's democratic system. It is the manifestation of two constitutional principles: parliamentary sovereignty and the separation of powers. The Legislature and the Executive fulfil distinct functions: the "Grand Inquest of the Nation"[1] and the "Defender of the Realm".[2] These labels represent the sometimes opposing forces that follow from the application of these principles, namely, accountability and transparency, contrasted with the

* LLB(Hons)/BA. Submitted as part of the LLB(Hons) programme at Victoria University of Wellington, 2015.

1 Neil Laurie "The Grand Inquest of the Nation: A notion of the past?" (2001) 16(2) Australasian Parliamentary Review 173.

2 Robin Creyke "Executive power – new wine in old bottles?" (2003) 31 FL Rev i at iv; and "Memorandum of Understanding between the Right Honourable Stephen Harper, Prime Minister and the Honourable Michael Ignatieff, Leader of the Official Opposition and Gilles Duceppe, Leader of the Bloc Québécois" (14 May 2010) at [3] ["Memorandum of Understanding"].

confidentiality that foreign relations and military operations understandably require. This paper is concerned with the interaction of these branches of government when their two roles conflict. A fruitful ground for such tension arises in matters of foreign affairs and defence. Current practice indicates that the Executive can and does use national security to place limitations on parliamentary sovereignty, resulting in the avoidance of certain accountability mechanisms. The Executive branch could of course do this if it was empowered by Parliament to do so. This would represent comity, a principle that oils the cogs of the separation of powers. However the current practice indicates more of a one-sided imposition of confidentiality rather than compromise and comity. The status quo, with no mechanisms in place to record or resolve this conflict, is of great concern, as it strikes at the heart of the proper functioning of government.

The 2014 release of the United States Senate Select Committee on Intelligence report on the "Study of the CIA's Detention and Interrogation Program" illustrated the power of select committees to hold government to account, even in the most sensitive areas of Executive activity.[3] It must be noted that "US intelligence agencies are required by law to furnish to the oversight committees any information or material concerning intelligence activities which is in their custody".[4] The question this article poses is whether the Foreign Affairs, Defence and Trade Select Committee ("FADTC") – charged with scrutinising areas of government activity that are often sensitive for reasons of national security – is or should be able to access such classified information to undertake scrutiny of this kind. This article demonstrates that such scrutiny would be full of challenges for any committee that pressed for information the Executive was not willing to disclose. While some current government members of the Committee stood by the effectiveness of the FADTC, other former government members expressed a different view, namely that the committee's work is, in reality, "more theatre than substance".[5]

The Executive may wish to keep the details of such matters outside the public realm. The article submits that national security concerns should not remove such issues from the purview of the Committee. Foreign affairs, defence and trade should be equally subject to parliamentary scrutiny. The level of scrutiny should be equivalent to all other areas of government activity; the process for achieving this should be able to accommodate concerns around sensitive information. New Zealand

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3 United States Senate Select Committee on Intelligence *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (9 December 2014).

4 United States Senate Select Committee on Intelligence *Legislative Oversight of Intelligence Activities: The US Experience* (October 1994) at 10 (internal quotations omitted). See also at 6: "Access to information is the lifeblood of intelligence oversight." However the existence of this power does not obviate all difficulties: see L Elaine Halchin and Frederick M Kaiser *Congressional Oversight of Intelligence: Current Structure and Alternatives* (Congressional Research Service, May 2012) at 34.

5 Interview with John Hayes, former Chair of the FADTC (National) (the author, 17 May 2016) transcript on file with author (Wellington).

does have an Intelligence and Security Committee.[6] Under its legislation, intelligence agencies must disclose information requested by the Committee and, even if deemed to be sensitive, the information may still be disclosed if the Prime Minister considers such disclosure to be in the public interest.[7] However the function of this Committee is limited to the examination of the policy, administration and expenditure of each intelligence and security agency.[8] Thus, with its limited jurisdiction, the existence of this Committee does not compensate for the lacking level of scrutiny in the FADTC, whose distinct function may at times require the provision of such sensitive information.

In practice, security reasons are often cited by officials to justify non-disclosure to the FADTC, frustrating the inquiry function of the Committee. Restrictions often appear to have no specific statutory basis, however remain largely unchallenged.[9] Select committees should not accept dictation from the Executive as to the issues for which it will be held accountable. Compromise may be required to balance competing public interests. Such compromise is captured in the principle of comity, which requires the different branches of government each "to respect the sphere of action and the privileges of the other"[10] and "recognise their respective constitutional roles".[11] The idea of mutual accommodation would at times require select committees to accept the justifications for non-disclosure provided by government agencies. Equally, in other circumstances it would require the Executive to furnish information necessary for committees to carry out their scrutiny functions, despite its sensitivity. The remedies so far advanced to remedy this tension between the Executive and the Legislature have been political and dominated by the Executive. While undoubtedly situated within a sensitive political context, the issue is legal in nature.

To explore the constitutional implications of this issue, the article is divided into six sections. Part II provides an overview of the powers of the House of Representatives and the function of select committees. The next part outlines the activities undertaken by the FADTC, including challenges in holding the Executive to account. Part IV considers the insufficiency of the present solutions to these challenges. The part that follows canvasses the serious stresses placed on this accountability relationship in comparable jurisdictions. Next, in order to understand whether a legal basis exists to justify non-disclosure to select committees, the part VI discusses the application of statutory secrecy provisions to Parliament. The final part considers a number of options for reform, namely:

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6 See Intelligence and Security Committee Act 1996.

7 Sections 17(1) and 17(3).

8 Section 6(1)(a).

9 For example compare definition of "sensitive information" contained in s 3 of the Intelligence and Security Committee Act.

10 *Pickin v British Railways Board* [1974] 1 AC 765 (HL) at 799 per Lord Simon of Glaisdale.

11 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 332 per Lord Browne-Wilkinson.

clarification of the guidelines for officials, formalising accepted grounds for non-disclosure, and the possibility for arbitration of public interest immunity claims.

This article relies on both primary and secondary research, including a review of departmental submissions to the FADTC and committee reports from the 50th and 51st Parliaments. The author also conducted a number of interviews throughout 2015 with former and current MPs, including former Chair and Deputy Chair of the FADTC, and the then-current Chair. This primary research provided insights into the political and practical context in which this important constitutional question is situated. The details of these interviews are contained in Appendix 1.

## *II SELECT COMMITTEES IN NEW ZEALAND*

Select committees are an important accountability mechanism, not uncommonly described as the "engine rooms" of Parliament.[12] They are not only responsible for the examination of draft legislation; their core function includes inquiry into Executive activity. In 1985 there were significant changes to the select committee system in New Zealand.[13] The reform created thirteen subject-specific select committees which mirrored government departments. These committees were given the power to initiate their own inquiries.[14] The objective of these changes was to increase public accountability through systematic scrutiny of Government activities.[15] The architect of these reforms concluded that parliamentary control has been greatly enhanced as a result.[16] However, this positive assessment is not equally true for all select committees.

### *A The Powers of Parliament and its Select Committees*

The House of Representatives has an important role beyond passing legislation. To balance the power of the Executive, the House must scrutinise Government activity. In order to carry out this constitutional role effectively, Parliament possesses certain powers, privileges and immunities, together known as "parliamentary privilege".[17] These include the power to inquire, the power to obtain

12 Jonathan Boston and others *New Zealand Under MMP: A New Politics*? (Auckland University Press, Auckland, 1996) at 79.

13 Standing Orders Committee *First Report: Part I* (July 1985) at [4.1].

14 Standing Orders of the House of Representatives 2014, SO 189.

15 Standing Orders Committee, above n 13, at [4.3.4].

16 Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Melbourne, 2004) at 169.

17 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005) at 605; AV Dicey *Introduction to the Study of the Law of the Constitution* (5th ed, MacMillan, London, 1897) at 357; and Malcolm Jack (ed) *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (24th ed, LexisNexis, London, 2011) at 181.

evidence, and the power to punish for contempt.[18] There is no legal definition of contempt of the House.[19] The Standing Orders provide some examples, which include failing to attend before a committee after being ordered to do so[20] and hindering a witness from giving evidence to a committee.[21]

A select committee may request relevant papers or that any person give evidence before the committee.[22] Only the Privileges Committee has the power to send for persons and papers; all other committees must apply to the Speaker. A summons will be issued if the Speaker is satisfied that the committee has taken all reasonable steps to obtain the evidence and that the evidence is necessary for the committee's proceedings.[23] If Ministers do not attend voluntarily, only the House itself can compel them to do so.[24] The House's power of inquiry is, in principle, unrestricted; yet it has been noted that limitations on the exercise of such power may exist.[25] Any such limitations are uncertain.

These powers were shown to have real substance through a report by the Privileges Committee in 2006. The House punished contempt of Parliament through ordering payment of a $1,000 fine and a formal apology,[26] something which had not been done in 103 years.[27] This power was recently confirmed in legislation but limited to $1,000.[28] The Parliamentary Privileges Act 2014 made clear that this provision in no way limits other powers to punish contempt of the House.[29] Yet the status of these other sanctions is unclear. This is because New Zealand select committees have not attempted to utilise their full constitutional powers and thus define the existence of any boundaries that may

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18 McGee, above n 17, at 606.

19 At 645.

20 Standing Orders of the House of Representatives 2014, SO 410(s).

21 SO 410(u).

22 SO 196.

23 SO 197(2).

24 State Services Commission *Officials and Select Committees – Guidelines* (10 August 2007) at [52] [*Guidelines*].

25 McGee, above n 17, at 434.

26 Privileges Committee *Final Report: Question of privilege on the action taken by TVNZ in relation to its chief executive, following evidence he gave to the Finance and Expenditure Committee* (October 2006) at 4. The Privileges Committee found that TVNZ, by penalising an employee exclusively on the basis of the employee's evidence to a select committee, had acted contemptuously.

27 Privileges Committee *Interim Report: Question of privilege on the action taken by TVNZ in relation to its chief executive, following evidence he gave to the Finance and Expenditure Committee* (April 2006) at 9.

28 Parliamentary Privileges Act 2014, s 22.

29 Section 22(4).

circumscribe them.[30] The power to seek persons has only been invoked once, and only partially. The Justice and Law Reform Committee in June 1996 required three witnesses to attend and the New Zealand Police issued summonses to that effect.[31] The witnesses did not, in any case, appear before the Committee and the matter was not pursued further.[32] Thus we do not know what the punishment would have been for the contempt of Parliament in that case.

The State Services Commission has produced a document called "Officials and Select Committees – Guidelines" which outlines how public servants should interact with these committees.[33] The Cabinet Manual, in reference to these *Guidelines*, also states that officials appear before select committees in support of ministerial accountability and thus their conduct must be consistent with this principle.[34] The *Guidelines* acknowledge that the House may require a minister to produce information and that it is open to the House to punish a minister for continued refusal to supply information.[35] It is noted that this would be an "extreme step".[36] Despite this provision for sanctions, in practice, committees are reliant on cooperation.[37] These powers reinforce the legislature's inquiry function. If they are characterised as theoretical and never invoked, there are few consequences for a government that does not cooperate with an inquiry. It is arguable that the mere potential for a sanction to be imposed by the House might encourage voluntary compliance, perhaps more so for non-governmental witnesses. The political reality is that government members are unlikely to vote to punish one of their own ministers. A system of accountability predicated on cooperation runs into very serious challenges when that cooperation is no longer forthcoming.

## *B The Importance of Select Committee Inquiries*

The work of committees is more effective than debate in the House, by virtue of the expertise of committee members and the capacity to conduct longer, more detailed inquiries.[38] With less legislation to review compared to other select committees, inquiries form a more important role in the FADTC's scrutiny function. One of the strengths of committees is the ability to compile a body of

30 Kirstin Lambert "Limits to Select Committee Investigations – A New Zealand perspective" (2007) 22(1) Australasian Parliamentary Review 169 at 182.

31 At 182.

32 At 181.

33 "See *Guidelines,* above n 24.

34 Cabinet Office *Cabinet Manual 2008* at [3.74].

35 *Guidelines*, above n 24, at [34].

36 At [34].

37 Lambert, above n 30, at 181.

38 Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge (UK), 2014) at 182.

diverse information.[39] Research in the United Kingdom found that public questioning of senior officials and ministers is an integral part of a committee's role, as such detailed public accountability does not take place elsewhere.[40] The same conclusion applies in New Zealand. It is important that select committees are able to perform their inquiry functions, as they are the superior mechanism of doing so than debate in the House.

The ability of the Executive to refuse requests for information could stifle inquiries potentially embarrassing for the government. It is precisely these areas of government activity which are in most need of scrutiny. An inquiry might expose systemic issues or investigate a particular event, and could result in a change of government policy. However inquiries will only be effective if the Executive complies with requests for information from the committee.

## *C Scrutiny of Prerogative Power*

Parliament has not traditionally had an active role in foreign affairs. As external relations are conducted under the prerogative power, there is no equivalent of the parliamentary scrutiny which occurs before a statutory power is created under legislation.[41] Moreover, unlike the framework provided by statute for other exercises of Executive power, there are no such constraints laid down in writing from which to judge the use of the prerogative.[42] Because of this, in foreign affairs, Parliament holds the government to account after decisions have been made, rather than dictating the bounds of action in advance. Moreover, the courts tend to distance themselves from ruling on foreign policy matters. Yet this deference is in part based on the premise that there is an existing accountability mechanism for foreign policy performed by Parliament.[43] The FADTC's subject-matter primarily concerns areas conducted via prerogative power. As the Committee has a lighter legislative workload when compared to other select committees, the FADTC has a greater role in holding the Executive to account through inquiries. However, inquiring into the prerogative can present distinct challenges.

It must be noted that, over the past decade, the New Zealand Parliament has developed a more active role in foreign affairs through examination of international treaties prior to ratification.[44] This now forms a significant part of the workload of the FADTC. Entering into treaties is only one foreign

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39 Meghan Benton and Meg Russell "Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons" (2013) 66 Parliamentary Affairs 772 at 789.

40 House of Commons Liaison Select Committee *Select committee effectiveness, resources and powers: Written evidence from the International Development Committee* (7 November 2012) at [9].

41 FA Mann "The Prerogative in Foreign Affairs" in *Foreign Affairs in English Courts* (Oxford University Press, Oxford, 1986) 1 at 4–5; see also Canadian Library of Parliament *Parliamentary Involvement in Foreign Policy* (10 November 2008).

42 McLachlan, above n 38, at 153.

43 At 189; and Dicey, above n 17, at 393.

44 Standing Orders of the House of Representatives 2014, SO 397–400.

policy activity of the Executive. The examination process itself can be criticised for occurring only once the treaty text has been finalised, raising questions as to the depth of scrutiny achieved. Formulating policy and setting priorities, opening embassies, responding to diplomatic incidents, campaigning for a non-permanent seat on the United Nations Security Council, deploying troops – all of these activities occur outside the legislative and treaty framework, with no consent required from Parliament. Inquiries, in addition to estimates and financial review, form an important, and sometimes overlooked, part of the Legislature's constitutional role in holding the government to account, especially in context of foreign affairs.

## *III THE WORK OF THE FOREIGN AFFAIRS, DEFENCE AND TRADE SELECT COMMITTEE*

The FADTC is responsible for customs, defence, disarmament and arms control, foreign affairs, trade, and veterans' affairs.[45] There are a number of characteristics of its subject matter which may frustrate effective scrutiny.

### *A Annual Reviews and Estimates*

Annual reviews relate to the current operations of each department and its performance in the previous financial year.[46] Select committees send upwards of one hundred written questions to the ministries under review, which are responded to by those ministries and provided as evidence to the committee. Annual reviews are a vital part of Parliament's scrutiny of the Government.[47] Estimates relate to the appropriations for the upcoming financial year in relation to the departments which come within a committee's subject matter. It is through these two processes that the most comprehensive parliamentary scrutiny of the subject matter occurs. This paper will go on to argue that this scrutiny is less than adequate.

There is no expectation that ministers attend select committees outside of the one-hour hearing during Estimates.[48] Ministers on occasion attend select committees at other points during the year, and the Minister of Trade did brief the FADTC a number of times during the 50th Parliament, but it is a rare occurrence.[49] The written questions to the department and the short time available to directly

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45 SO 188.

46 SO 344(1).

47 "Select committees busy with annual reviews" (2 March 2015) New Zealand Parliament <www.parliament.nz>.

48 Interview with Dr Kennedy Graham, member of the FADTC (Green) (the author, 10 August 2015) transcript on file with the author (Wellington); Interview with Hon Trevor Mallard, Assistant Speaker of the House of Representatives (Labour) (the author, 19 August 2015) transcript on file with the author (Wellington); and Interview with Mark Mitchell, Chair of the FADTC (National) (the author, 30 July 2015) transcript on file with author (Wellington).

49 See above at n 48.

question the Minister thus must be effectively used to secure accountability in this annual opportunity for the systematic scrutiny, which was the objective of the 1985 reforms. However the reality for select committees, especially in foreign affairs, is far from the constitutional role of the "Grand Inquest of the Nation". The evidence provided by the various government departments in response to the FADTC's written questions during the previous and current Parliaments are replete with indications of the practical limitations on this Committee's investigatory powers, examples of which are detailed in the following section.

## *B Challenges to Effective Scrutiny*

The FADTC has faced a number of distinct challenges in effectively carrying out its inquiry function. The difficulties facing the Committee were clearly illustrated in a briefing given on the Trans-Pacific Partnership Agreement (TPPA) by New Zealand's lead negotiator, David Walker.[50] Very soon into the briefing, Mr Walker stated that he had "said as much as he was prepared to say" about the detail of the TPPA negotiation. When Committee member David Clark said that he "had a duty" to answer his questions, Mr Walker replied that he had said all that he could. An example of such a question was whether or not there was a "bottom line on dairy" in the TPPA negotiation. When asked about the negotiating mandate, the Chair of the Committee said that such issues were to remain "privy to the negotiating team" and that Mr Clark should not ask "loaded questions". The public interest justification or legal basis for Mr Walker's refusal was not articulated, nor were suggestions for how the members' questions could be accommodated within the sensitive negotiating context. Perhaps there is an implicit understanding of what can be properly disclosed by an official in this setting. Even if this is so, this article argues that any such understanding must be precise, explicit and publicly accessible. This somewhat muddied approach is a recurring theme throughout departmental submissions of evidence to the FADTC. The challenges are grouped under three headings: claims of legal privilege, national security and limitations imposed by statute.

### *1 Legal Professional Privilege and Matters* sub judice

Firstly, claims to legal professional privilege and matters *sub judice* have been employed to justify the non-disclosure of information to the FADTC. In 2015 the Chief of the Defence Force was not prepared to provide the logistical details of the New Zealand personnel deployed to Iraq.[51] The Ministry of Foreign Affairs and Trade (MFAT) also declined to comment on the issue of a waiver of the diplomatic immunity of the Malaysian Defence Attaché because it was *sub judice*.[52] This position was maintained in the annual reviews taking place in early 2016 where, in both written and oral

50 This part of the FADTC meeting on 18 February 2016 was not recorded by transcript. These comments were as recorded by the author who attended the briefing.

51 Foreign Affairs, Defence and Trade Committee *2013/14 Annual review of the Ministry of Defence and the New Zealand Defence Force* (8 April 2015) at 5.

52 At 5.

evidence, the Ministry stated that it was not appropriate for the Ministry to discuss the identified failings while the judicial process continued.[53] This may illustrate the principle of comity between the judiciary and Parliament, however what is lacking is a balanced operation of that same principle between the Executive and parliamentary select committees. In response to the committee's request for a copy of the Crown Law opinion on the release of the Whitehead Report,[54] the Ministry wrote they could not release it to the Committee because it was legally privileged.[55] Moreover, the Ministry informed the FADTC that the advice provided to the Minister regarding the deployment of personnel to Iraq was subject to legal professional privilege.[56]

Legal privilege was again raised at the oral evidence stage of annual reviews of MFAT on 18 February 2016. David Shearer asked the Chief Executive, Brook Barrington, whether the possibility of imminent court action against the New Zealand Government encouraged the controversial agri-hub project in Saudi Arabia. Mr Barrington replied:[57]

> Mr Chair, I would rather not, if we could, go into the to-ing and fro-ing we went through in this committee in June. I don't think that helped anybody in casting light on these matters. But I did claim legal privilege at that time and I will claim it again today at these questions.

These claims to legal privilege may have been appropriate. However, without access to the underlying information or more detail, FADTC´s scrutiny function is ultimately frustrated, and it is also impossible for the Committee to judge the legitimacy of the privilege claim. Comity requires deference by Parliament to the Executive in some cases, but it is not a one-sided principle. Thus, government departments and their Ministers must also work to accommodate the demands of the Legislature. The sensitivity of information alone is not enough to limit the application of comity as a constitutional principle.

## 2 *National Security*

Requests for information by the FADTC have also been repeatedly defected with claims to "national security". In response to a written question regarding risk assessment of deployment of personnel to Iraq, the New Zealand Defence Force (NZDF) stated that, to protect those personnel,

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53 Ministry of Foreign Affairs and Trade "Appendix A: FADTC Supplementary Questions FY2015/16 for Vote: Foreign Affairs and Trade" (11 February 2016) at 4.

54 John Whitehead *Ministerial inquiry into the events surrounding the request for waiver of the diplomatic immunity of a Malaysian Defence Attaché* (28 November 2014).

55 Ministry of Foreign Affairs and Trade "FADTC: Vote FAT Financial Review 2013/14 – Additional Questions" at 8 (question 300).

56 At 8 (question 303).

57 Foreign Affairs, Defence and Trade Select Committee *Transcript 2014/15 Annual Review of the Ministry of Foreign Affairs and Trade* (18 February 2016) at 7.

such information was not disclosed.[58] Further, in regard to New Zealand frigates boarding suspected pirate vessels in the Gulf of Aden, the same justification for non-disclosure was made: disclosure of NZDF rules of engagement would compromise operational security.[59]

In the evidence provided by the NZDF for the 2016 Annual Reviews, there were segments marked as "Redacted", with no indication as to what had been redacted or on what grounds. The Committee also asked about the success, quality and morale of the local soldiers at the Afghan National Army Officer Academy, to which New Zealand contributes eight staff.[60] The NZDF stated that the reports received in regard to Afghan National Army personnel were classified and therefore the reports were not disclosed.

### *3 Statutory Restrictions*

Finally, justifications are not always as general as "national security" and are sometimes hung on a specific statutory provision. When the committee asked what specific recommendations were made in the Court of Inquiry into the suicide of Corporal Doug Hughes in Afghanistan in 2012, certain provisions in the Coroners Act 2006 and the Armed Forces Discipline Act 1971 were relied on to justify non-disclosure.[61] NZDF did not answer how many Official Information requests required clearance for prior to release.[62] The committee has also received copies of the briefing to the incoming Minister with sections blanked out under the Official Information Act, and "commercial sensitivity" has been used to justify non-disclosure.[63] In response to a question for detailed information regarding external contractors, NZDF outlined the individual firm engagements but did not disclose the maximum hourly and daily rates charged, as that would "unreasonably prejudice the commercial position" of such firms.[64] This was stated to be in accordance with accepted practice.[65]

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58 New Zealand Defence Force " Foreign Affairs, Defence and Trade Committee 2013/2014 Financial Review – Vote: Defence Force (questions 2.131 – 2.165)" at [2.139].

59 At [2.153].

60 New Zealand Defence Force "Foreign Affairs, Defence and Trade Committee 2014/2015 Financial Review – Vote: Defence Force" at [2.47].

61 New Zealand Defence Force "Foreign Affairs, Defence and Trade Committee 2012/13 Financial Review" at [1.210]; Coroners Act 2006, s 71; and Armed Forces Discipline Act 1971, s 200T(a).

62 New Zealand Defence Force, above n 61, at [1.68].

63 Interview with John Thomson, Clerk of the Foreign Affairs, Defence and Trade Select Committee (the author, 14 August 2015) transcript on file with author (Wellington).

64 New Zealand Defence Force, above n 61, at [1.18].

65 Interview with James Picker, Select Committees Operations Manager, Office of the Clerk (the author, 12 August 2015) transcript on file with author (Wellington).

In regards to the Whitehead Report and the person who sent the emails central to the incident, Mr Barrington replied that "As for the person who wrote the email, it's an employment matter, and I'm not going to start getting into the position of discussing employment and privacy-related matters in public." And later, "I'm not prepared to comment further on an employment matter."[66]

## *C Lack of Legal Basis for Non-Disclosure*

Maintaining both the confidentiality of advice from officials and legal professional privilege can constitute good reasons for withholding information under the Official Information Act 1982 (OIA).[67] The OIA apples to the Executive but it does not apply to the legislative branch.[68] Even if this Act did apply to select committees, such justifications can be outweighed by the public interest in disclosure.[69] There is great public interest in committees effectively scrutinising government decisions. For example, disclosure of legal advice underlying a foreign policy decision could serve the public interest in upholding accountability. Any potential harm to the public interest from disclosure could be minimised through receiving the evidence in private or in secret.

While matters *sub judice* are considered to possibly justify hearing the evidence in secret,[70] such classification do not take these matters beyond the reach of the FADTC. Furthermore, officials are expected to be as helpful as possible in responding to committee requests.[71] In the examples above, the officials should have applied to give the particular evidence in secret rather than simply declining the request.[72] Such a course of action would be more in line with the principle of comity and mutual accommodation, rather than using the sensitivity of information as insurmountable barrier to scrutiny with no compromise being possible.

In 2014, the Chief of the NZDF responded negatively to the committee's request for a briefing on the situation in Afghanistan, as the situation was too sensitive.[73] While such outright refusals to briefing requests are rare, it can be described as the most extreme version of a trend of Executive self-restraint, in the sense of government departments only disclosing a minimum amount of

66 Foreign Affairs, Defence and Trade Select Committee *Transcript 2014/15 Annual Review of the Ministry of Foreign Affairs and Trade* (18 February 2016) at 21.

67 Respectively, Official Information Act 1982, ss 9(f)(iv) and 9(h).

68 The House of Representatives is not a "department" for the purposes of the section: see s 2.

69 Section 9(1).

70 *Guidelines*, above n 27, at [37].

71 At [31].

72 Standing Orders of the House of Representatives 2014, SO 220.

73 Interview with Dr Kennedy Graham, above n 48; and Interview with John Thomson, above n 63.

information.[74] A qualitative, rather than quantitative, approach is more appropriate in this context. The routine provision of non-sensitive information to select committees does not demonstrate the full Executive accountability. It is how a system responds in a crisis that is important.[75] At present, there are few effective measures Parliament may take if faced with the government's refusal to produce documents.

# *IV INSUFFICIENCY OF CURRENT SOLUTIONS TO THE STALEMATE*

It is legally possible that the FADTC could follow up a refusal by requesting a summons from the Speaker. As described above, a summons has only ever been requested once, and not by the FADTC. This is unlikely to happen for a number of reasons, one of them being an understanding that the Opposition will one day be in Government, thus "do unto others as you would have them do unto you".[76] There are also constraints on parliamentary time. Such an extreme measure would only be invoked in the most serious instances of non-production, if at all, where the committee knew specifically what information was being withheld. This means that for a wide range of information the Government can essentially impose limitations on committees' field of inquiry with little resistance.

## *A Inclusion of Adverse Comments in Committee Reports*

It is possible to include adverse comments regarding the lack of cooperation in the committee's report to Parliament. This is a political consequence for which the minister is accountable.[77] Some members take comfort in the idea that the truth will surface in time and that there might be accountability after the sensitivity of the issue has passed.[78]

It appears that the inclusion of adverse comments about reticent government departments in select committee reports represents the highpoint of Executive accountability to Parliament. This is a very diluted and oblique form of accountability. First, select committee reports are rarely debated in the House. The practice is for the reports to sit on the Order Paper for fifteen sitting days, after which they are considered dealt with.[79] If speaking time is allocated to foreign affairs, the debate is rarely

74 Interview with Dr Kennedy Graham, above n 48.

75 Interview with Sir Geoffrey Palmer, Former Prime Minister of New Zealand (Labour) (the author, 4 August 2015) transcript on file with author (Wellington).

76 Interview with Trevor Mallard above n 48. Similar comments were also made in the Interview with James Picker, above n 65 and the Interview with Kennedy Graham, above n 48.

77 Interview with James Picker, above n 65.

78 Interview with Trevor Mallard, above n 48.

79 Standing Orders of the House of Representatives 2014, SO 74(4).

extensive.[80] The Estimates for the departments in the FADTC's subject area are debated for approximately one hour during the Budget debate as the "External Sector".

Secondly, adverse comments are likely to be included in the minority view of a report, which is not guaranteed to be included in the final report. While not common practice, minority views have been blocked from the official reports of the FADTC.[81] Thirdly, the making of adverse comments is a *political* consequence. This may result in a question to the Minister in the House and some attention in the media. In answering questions in the House or in the media, ministers are more likely to use justifications for non-disclosure such as national security or pure political deflection. In the end, even if there is a short period of uncomfortable attention on the government, the information with which the Committee was concerned remains secret. At best, there can be some shallow scrutiny for non-disclosure of information *if* the matter is brought to the attention of the House or the media, yet the robust scrutiny envisaged by the 1985 reforms remains unrealised.

## *B Use of Private and Secret Evidence*

Select committee proceedings are generally open to the public.[82] To take into account practical considerations surrounding sensitive information, committees are able to hear evidence in either private or secret.[83] Evidence received in private remains confidential until reported to the House whereas secret evidence remains secret unless the House expressly authorises otherwise.[84] There is a high threshold for secrecy: it must be shown that there is no other way to get the information and it is a matter of leave, so all members must agree.[85] The Office of the Clerk advises against the use of secret evidence in part because the security concerns it raises, notably the possibility of information being leaked.[86] Yet it is said to be one of the powers that facilitates very deep scrutiny.[87] Since 2009, the FADTC has heard evidence in private on 25 occasions and in secret on nine occasions.[88]

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80 John Hayes, former Chair of the Foreign Affairs, Defence and Trade Select Committee "Is Parliamentary Scrutiny of International Issues Adequate?" (New Zealand Institute of International Affairs Annual Keynote Address, Victoria University of Wellington, 9 April 2015).

81 Interview with Keith Locke, former member of the FADTC (Green) (the author, 16 August 2015) transcript on file with author (Wellington).

82 Standing Orders of the House of Representatives 2014, SO 222(1).

83 SO 218– 219.

84 SO 218(3) and 219(3) respectively.

85 SO 219.

86 Interview with James Picker, above n 65.

87 Interview with James Picker, above n 65.

88 Email from John Thomson, Clerk of the Foreign Affairs, Defence and Trade Select Committee (20 June 2016).

The greater use of private and secret evidence would cut across the objective of direct public engagement. Yet it must be that, in some cases, full public disclosure would not be in the public interest. The use of secret evidence is a mechanism that allows Parliament to accommodate the Executive's role as "Defender of the Realm" while still carrying out its scrutiny role. This idea of accommodation between the branches of government will be returned to in the final section of this article.

In the 2015 Estimates, the Minister of Foreign Affairs declined to provide a copy of legal advice, claiming legal professional privilege.[89] The advice related to the multimillion dollar payment to establish a demonstration sheep farm "agri-hub" in Saudi Arabia. The Prime Minister declined to comment in detail on the issue in the House as the matter "will bear the scrutiny of the Auditor-General".[90] The Green Party Co-Leader called for the resignation of the Minister of Foreign Affairs, but he did not call for an investigation by the FADTC, instead stating that the "confusion and contradiction" surrounding the issue highlighted the need for an investigation by the Auditor-General.[91] This indicates that the FADTC may not always be seen as the most appropriate or effective scrutiny mechanism for foreign policy, although the payment seems to fall squarely within the committee's terms of reference.

## *V EXPERIENCES IN COMPARABLE JURISDICTIONS*

The foreign affairs committees of the United Kingdom, Australia and Canada have also faced challenges to their inquiry function in recent times.[92] While not explored here, similar issues also have arisen in the United States.[93] As the following examples illustrate, Executive-imposed constraints on gathering evidence have limited the ability of these committees to scrutinise their respective governments. Owing to similar constitutional arrangements, the experiences of these jurisdictions allow insight into the weaknesses of New Zealand's accountability mechanisms.

89 Ministry of Foreign Affairs and Trade "Appendix A: FADTC Additional Questions FY2015/16 for Vote: Foreign Affairs and Trade and Vote: Official Development Assistance" at [11].

90 John Key (19 August 2015) 707 NZPD at 5928.

91 James Shaw (19 August 2015) 707 NZPD at 5943.

92 See generally McLachlan, above n 38, at 181–189.

93 See Emily Berman "Executive Privilege Disputes Between Congress and the President: A Legislative Proposal" (2010) 3 Albany Government Law Review 741; and Vicki Divoll "The 'Full Access Doctrine': Congress's Constitutional Entitlement to National Security Information from the Executive" (2011) 34 Harvard Journal of Law and Public Policy 493.

## *A United Kingdom*

In July 2003, the Foreign Affairs Committee of the House of Commons conducted an inquiry into the Government's decision to go to war in Iraq.[94] The Committee faced a distinct lack of cooperation from the Government. Officials did not reply to Committee requests to give evidence, let alone attend such meetings.[95] Further, the Committee was refused access to intelligence reports, precluding a full understanding of the very sequence of events which was the subject of the inquiry.[96] The Committee concluded that:[97]

> … continued refusal by Ministers to allow this committee access to intelligence papers and personnel, on this inquiry and more generally, is hampering it in the work which Parliament has asked it to carry out.

In the official response, the Secretary of State for Foreign and Commonwealth Affairs wrote that it was for the Government to decide what level of disclosure was appropriate for a select committee briefing on intelligence.[98] In reply to the Committee's recommendation that ministers comply with its requests, the Government stated that it expected the need for the Committee to have insight into the intelligence underlying a given policy will remain an exception.[99]

The issues that plagued the efficacy of the House of Commons Foreign Affairs Committee in 2003 were the focus of a more general inquiry into select committee effectiveness in 2012.[100] This inquiry was conducted by the House of Commons Liaison Committee, which is made up of the select committee chairs. The inquiry found that a number of committees had experienced delay and obstruction in the supply of information and constraints over the choice of government witnesses.[101] Interestingly, the Foreign Affairs Committee did not raise issues around information-seeking in their submission.[102] However, the Defence Committee and the International Development Committee gave

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94 House of Commons Foreign Affairs Committee *The Decision to go to War in Iraq* (7 July 2003).

95 At [6].

96 At [27].

97 At [168].

98 Secretary of State for Foreign and Commonwealth Affairs *Response to the Ninth Report of the Foreign Affairs Committee: The Decision to go to War in Iraq* (November 2003) at 7.

99 At 7.

100 House of Commons Liaison Select Committee *Select committee effectiveness, resources and powers – Volume 1: Report, together with formal minutes, oral and written evidence* (8 November 2012) [*Select committee effectiveness* (Report)].

101 At 3.

102 Foreign Affairs Committee "Written evidence from the Foreign Affairs Committee" in House of Commons Liaison Select Committee *Select committee effectiveness, resources and powers – Volume 2: Additional written evidence* (8 November 2012) 31 [*Select committee effectiveness* (Evidence)].

evidence of challenges in fulfilling their inquiry function. For example, the Defence Committee noted how its work had been obstructed by the Government's continued unwillingness to provide estimated costs of military operations.[103] Similarly, the International Development Committee stated that it was disappointed with the Government's refusal to provide certain documents, which had impeded its work.[104] The inquiry concluded that government cooperation was crucial to effective scrutiny.[105] In response to the recommendation that committees should be able to question any government witness they see fit, the Government briefly noted that it planned to conduct a consultative review into this question as part of the Civil Service Reform Plan.[106]

The inquiry also recommended that Parliament should, in light of the lack of clarity surrounding the enforceability of select committee powers, set out a statement of its powers and how they are to be exercised in a resolution to the House.[107] In its response, the Government did not express a view but stated that the House should carefully consider whether the extent and frequency of the existing problems warrant reform at all.[108] The Government concluded by noting that such questions would be best considered by the Joint Committee as part of its comprehensive review of parliamentary privilege. Upon receipt of this government response, the Liaison Committee was "not yet convinced" that the Government had fully accepted the changed mood in the House and the need for a new partnership approach with Parliament.[109] This perception has proven accurate. As outlined below, the United Kingdom Government's tepid response to subsequent reports has not resulted in any reform to date.

In its final report, the Joint Committee considered that it is in the public interest to ensure that committees have the powers they need to function effectively.[110] The Joint Committee considered that select committee powers to summon witnesses and documents could not be considered separately

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103 Defence Committee "Written evidence from the Defence Committee" in *Select committee effectiveness* (Evidence) 10 at 10.

104 International Development Committee "Written evidence from the International Development Committee" in *Select committee effectiveness* (Evidence) 34 at [13]–[14].

105 *Select committee effectiveness* (Report), above n 100, at [105].

106 House of Commons Liaison Select Committee "Appendix A" in *Select committee effectiveness, resources and powers: responses to the Committee's Second Report of Session 2012–13* (24 January 2013) 5 [*Select committee effectiveness* (Response)].

107 *Select committee effectiveness* (Report), above n 100, at [134].

108 See "Appendix A" in *Select committee effectiveness* (Response) 5.

109 House of Commons Liaison Committee "Government underestimates our resolve, say Committee Chairs" (24 January 2013) United Kingdom Parliament <www.parliament.uk>.

110 Joint Committee on Parliamentary Privilege *Parliamentary Privilege Report of Session 2013-14* (3 July 2013) at [60].

from the parliamentary power to punish for contempt.[111] Furthermore, the Committee noted that, given the expansion of the scope of work undertaken by select committees, questions of contempt were most likely to arise in the context of select committee inquiry.[112] The report concluded that, if clarification of Parliament's penal powers was the object of reform, doing nothing was not a viable option.[113] This idea of a "new partnership" between the Executive and Legislature is a key plank in the suggested reform addressed in the final section of this paper.

## *B Australia*

The accountability relationship between the Executive and Legislature in the foreign affairs context has also been tested in Australia. In 2002, a Commonwealth Senate Committee inquired into false allegations that children had been thrown from boats carrying asylum seekers in Australian waters.[114] The report concluded that Government involvement with the inquiry had been "characterised by minimal cooperation and occasionally outright resistance".[115] A Cabinet decision prohibited the ministerial staff in question from attending the committee to give evidence.[116] Further, the Minister of Defence refused to allow certain officials to appear before the Committee.[117] The Committee rightly concluded that such Executive-imposed constraints are an anathema to accountability.[118] The report noted that the penalties for contempt of the Senate were imprisonment or a significant fine.[119] However the Committee decided against compulsion of witnesses as it considered it would be unjust to expose staff to such liability when they had been instructed by their minister to refuse to give evidence.[120] The report also concluded that, more broadly, there was an accountability vacuum within ministers' offices. Ministerial advisers had come to possess a certain level of separate executive authority, not subject to individual ministerial responsibility.[121] The committee found that these advisers had played a key role in the failure of the Government to correct

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111 At [48].

112 At [48].

113 At [61].

114 Senate Select Committee on a Certain Maritime Incident *Inquiry into a Certain Maritime Incident* (23 October 2002).

115 At xxxvii.

116 At xxxiv.

117 At xxxiv.

118 At xxxiv.

119 At xxxv.

120 At xxxiv.

121 At xxxiii.

the public record (no children had in fact been thrown overboard), the very matter under inquiry.[122] Yet these staff refused to appear before the Committee.

Further, in a 2009 inquiry, the Senate Standing Committee on Foreign Affairs, Defence and Trade faced challenges in obtaining the necessary information from the Ministry of Defence.[123] The inquiry concerned the removal of two sailors from a naval ship and the subsequent naval investigation. This inquiry related to the conduct of specific individuals.

The Committee was at pains to highlight the distinction between the character of this task, where the objective was to ascertain what had happened in this particular workplace, and the nature of an inquiry into government implementation of policy.[124] It was thus inappropriate for the Department of Defence to require the approval of staff submissions or to deter personnel from appearing as witnesses.[125] The potential dissuasion of witnesses was noted in the Committee's report as a possible contempt of the Senate.[126] The Committee stated, in no uncertain terms, that the Department could not place any restrictions on the material its staff wished to convey on their own behalf as part of the inquiry and that this was a manifestation of an individual's "untrammelled right" to communication with parliamentary committees without fear of interference.[127]

The Committee considered that the *Government Guidelines for Official Witnesses* offered confused advice to officials in this situation and was of the strong view that the guidelines needed to be revised.[128] The 2015 version of the Australian *Guidelines* do provide for officials giving personal accounts of events that they have witnessed. In such situations, there must be no constraints on the content of their evidence.[129] However the guarded language, capable of bearing many interpretations, still remains.[130] The New Zealand *Guidelines* do not distinguish between the nature of different types of inquiries.

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122 At xxxiv.

123 Senate Standing Committee on Foreign Affairs, Defence and Trade R*eport on parliamentary privilege: Inquiry into matters relating to events on HMAS* Success (18 March 2010).

124 At [1.7].

125 At [1.36].

126 At [1.1].

127 At [1.37]–[1.38].

128 At [1.32] and [1.39].

129 Department of Prime Minister and Cabinet (Australia) *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (February 2015) at [1.5.3].

130 At [6.1.3]; and *Inquiry into matters relating to events on HMAS* Success, above n 123, at [1.31].

## *C Canada*

The tension placed on the accountability relationship in the foreign affairs context was also brought to the forefront in a ruling of the Speaker of the Canadian House of Commons in April 2010. The Government had denied the Special Committee on the Canadian Mission in Afghanistan access to information on the treatment of Afghan detainees who had been transferred to local authorities by Canadian personnel. The Speaker ruled that there had been a prima facie breach of privilege.[131] The objective of the inquiry was to determine if those personnel were aware of the risk of mistreatment before the transfer took place.[132] In 2011, a FADTC member called for a select committee inquiry into the same issue regarding New Zealand Defence Force personnel stationed in Afghanistan.[133] This inquiry did not progress due to lack of support.[134]

In Canada, the majority of officials refused to provide the requested information to the Committee. The option to hear evidence in private did not alter the position of the officials.[135] Documents were denied on the basis of solicitor–client privilege and also by virtue of the Canada Evidence Act 1985.[136] When the House of Commons ordered the production of documents, the Government tabled thousands of heavily redacted documents.

The Speaker ruled that the ability of the House to require the production of documents was more than an indisputable privilege, it was also an obligation.[137] The production of papers was described as a "broad, absolute power that on the surface appears to be without restriction".[138] The existence of sufficient grounds to justify non-disclosure was ultimately a decision for the House, not the Executive.[139] The Speaker gave the political parties themselves the responsibility to reach a compromise within two weeks of his ruling. The Government, while negotiating with the Opposition parties, insisted on its ability to withhold documents based on Cabinet confidentiality and solicitor–

131 Peter Milliken (27 April 2010) 145 CPD HC 2039–2045.

132 Heather MacIvor "The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege?" (2010) 19 *Constitutional Forum* 11 at 12.

133 Interview with Keith Locke, above n 81; and "Locke to push for Select Committee Inquiry on SAS" (1 May 2011) Green Party of Aotearoa New Zealand <home.greens.org.nz>.

134 Interview with Keith Locke, above n 81.

135 MacIvor, above n 132, at 12.

136 At 12; see also Canada Evidence Act RSC 1985 c C-5, s 38; analogous to section 6(a) of the New Zealand Official Information Act 1982.

137 Peter Milliken (27 April 2010) 145 CPD HC 2042.

138 At 1525, quoting Audrey O'Brien and Marc Bosc (eds) *House of Commons Procedure and Practice* (2nd ed, Thomson Reuters, Toronto, 2000) at 978–979.

139 Peter Milliken (27 April 2010) 145 CPD HC 2042.

client privilege.[140] This was accepted by two of the Opposition parties and the accord was subsequently accepted by the Speaker. This appears to have introduced a limitation to the power described as "unlimited".

An *ad hoc* committee of parliamentarians was established and given access to all the relevant information.[141] If that committee decided the information was necessary to the inquiry, the information was referred to the Panel of Arbiters, composed of three "eminent jurists".[142] The Panel would then determine how to disclose that information without compromising national security. Its decision was to be guided by the principle of maximum disclosure, conditioned by the Government-imposed constraints.[143] After one year of work, 4,000 partially censored documents were released to the House of Commons.[144] This left an estimated 36,000 documents that will not be publically released.[145]

These examples illustrate that there are practical constraints on the ability of foreign affairs committees to carry out their inquiry role. Whether there is a legal basis to these restrictions is an unsettled question. The next section will seek to provide an answer, at least in part, through a focus on whether statutory secrecy provisions limit the information that committees may lawfully request. It will become apparent that there is a significant disparity between the scope of constitutional powers that committees possess and those actually exercised in practice. Such a disparity has substantial implications for Executive accountability.

## *VI STATUTORY SECRECY PROVISIONS*

The passing of the Official Information Act 1982 signalled a shift towards more open government in New Zealand. However, that legislation's guiding principle of availability is tempered by a significant qualification: information can be withheld if there is a good reason for doing so. There are a number of conclusive reasons for withholding official information which relate to the FADTC's field of inquiry. For example, information can be justifiably withheld if its disclosure would be likely to prejudice the country's security or international relations.[146] There are other secrecy provisions in

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140 MacIvor, above n 132, at 134; and "Memorandum of Understanding" at [7].

141 At [1].

142 At [6] and [8].

143 At [7].

144 Laura Payton "Afghan detainee records still hold questions, MPs say" (22 June 2011) CBC News <www.cbc.ca>.

145 Payton, above n 144.

146 Official Information Act 1982, s 6(a). The reasons contained in s 6 are conclusive, unlike those contained in s 9, which must outweigh public interest in disclosure.

New Zealand legislation that only provide for disclosure in very limited circumstances.[147] The important question is whether such statutory secrecy provisions may be relied on by the government in declining to provide information to the House, so as to limit select committee inquiry powers. This would provide a legal basis for the restrictions on the committee's access to information which evidently exist in practice. This question is particularly pertinent to the FADTC, not only because the issues under inquiry tend to be sensitive, but also because the Executive can have an effective monopoly over the provision of defence or foreign affairs-related information.[148] Thus a refusal to disclose requested information is a very significant barrier to scrutiny.

## *A States Services Commission Guidelines*

The State Services Commission *Guidelines* acknowledge that the Official Information Act "does not formally constrain the powers of the House", yet states that information should nonetheless be provided in accordance with the Act's principle that information shall be released unless there are good reasons for withholding it.[149] These guidelines have no formal legal status nor have they been adopted by Parliament. Created by the Executive, their application to the committees of the House is unclear. Parliament should adopt its own guidance to regulate its own conduct. The guidelines state that certain statutes may restrict the disclosure of information to committee.[150] The ambiguous advice contained in these guidelines at best creates the perception of an uncertain legal position of secrecy provisions in relation to select committees.

## *B Previous Consideration by Select Committees*

The effect of statutory secrecy provisions has previously been raised by the FADTC.[151] In 1994, the Committee requested a copy of a Serious Fraud Office (SFO) report into a military court of inquiry. The Committee was informed that the Serious Fraud Office Act 1990 prevented the report being released to them.[152] Following meetings with the SFO Deputy Director, the Committee later received the report with certain personal details deleted. This was accompanied by an acknowledgement that the Committee's power to request papers was not limited by the Act.[153] As detailed below, this incident may however raise more questions than answers as to the application of secrecy provisions to select committees.

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147 See for example Tax Administration Act 1994, s 81.

148 Benton and Russell, above n 39, at 790.

149 *Guidelines*, above n 24, at [13].

150 At [30].

151 Foreign Affairs, Defence and Trade Select Committee *Financial Procedures at RNZAF Ohakea* (1994).

152 At [3].

153 At [3].

While warning all public sector organisations that they could be scrutinised by the House,[154] the Committee's comments also indicated an acceptance that secrecy provisions may in some instances justifiably preclude the disclosure of information. They wrote that the public interest would sometimes be better served through non-disclosure, particularly in cases where personal reputations or commercial operations were at risk.[155] The Committee further noted that it did not want its push for the disclosure to be "interpreted as an automatic precedent for a 'backdoor' means of gaining access to and publicising information otherwise protected by statute".[156] Thus information subject to a secrecy provision was not seen as information that the committees were entitled to as a matter of parliamentary privilege. Moreover, the Committee's policy concerns do not appear to have been attenuated by the ability to use secret evidence in such situations.

This particular case study may be of limited use given the nature of the discretion conferred on the SFO Director by the Act. The relevant section provides that the Director may release information to any person who the Director is satisfied has a proper interest in receiving such information.[157] Therefore the SFO's compliance with the FADTC's request cannot be held up as a guiding example of the direct prioritisation of parliamentary privilege over statutory secrecy provisions. It can be equally characterised as an example of a public servant exercising discretion under the governing legislation.[158]

Five years later, the secrecy provisions of the Tax Administration Act 1994 were said to limit the Finance and Expenditure Committee's inquiry into the Inland Revenue Department.[159] The Solicitor-General advised the Committee that select committee inquiries did not constitute an exception to the officials' obligation to maintain confidentiality.[160] The Committee concluded that it must obey the law and somehow reconcile its request for information with any applicable secrecy provisions.[161] Yet the Committee added, ambiguously, that while not "strictly bound by the law", there was an obligation to take statutory secrecy provisions into account.[162] This position may be justified because

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154 At [4].

155 At [4].

156 At [4].

157 Serious Fraud Office Act 1990, s 36(2)(e).

158 Peter McHugh and Russell Keith "Statutory Secrecy Provisions" (seminar presented to Australian and New Zealand Association of Clerks-at-the-Table, Wellington, January 2005) at 5.

159 Lambert, above n 30, at 179.

160 At 179.

161 Finance and Expenditure Select Committee *Inquiry into the powers and operations of the Inland Revenue Department* (October 1999) at 10.

162 Lambert, above n 30, at 179.

committees, which are part of the Legislature, should conform to the Legislature's policy decisions on the restriction of disclosure of such information. This argument can be further supported by the comments of the Privileges Committee, which noted that Parliament could be brought into disrepute if select committees encouraged witnesses to disclose information where there were more appropriate processes that could be used.[163]

These two cases relate to information about specific individuals rather than material informing government foreign policy. Perhaps there is more justification for committees to exercise restraint when it comes to personal information and the protection of privacy. Arguably Parliament is not the best mechanism for scrutiny of such issues, where there are more appropriate institutions to look into individual claims, such as the judiciary. The same justification could not be made for information concerning Executive acts more generally, such as the deployment of troops.

## *C Unlikely to Apply to the House in the Absence of Express Words*

There does not appear to be a conclusive answer as to the application of secrecy provisions to select committees. The Standing Orders Committee in 1995,[164] despite receiving expert evidence on the question, did not include the topic in their final report.[165] In his evidence, Phillip Joseph stated that the search for a single answer will be inconclusive, as the character and wording of the provisions, and thus their effect, are varied.[166] However as parliamentary privilege is part of the general law of New Zealand, privilege can be modified by statute. An example of this is the New Zealand Bill of Rights Act, which applies to the House.[167]

Thus a secrecy provision that explicitly stated that it bound the House would limit Parliament's access to the information protected by the provision. In such a case it would be unlawful for the House to use its coercive powers to try to obtain the information, despite the general power to inquire.[168] However, secrecy provisions do not generally contain reference to parliamentary inquiries. When read in light of the constitutional role of the House, it seems unlikely that secrecy provisions would limit the powers of the House by implication.[169]

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163 For example the Protected Disclosures Act 2000; and Privileges Committee, above n 26, at 6.

164 Standing Orders Committee *Report of the Standing Orders Committee on the review of Standing Orders* (1995).

165 Standing Orders Committee "Review of Standing Orders" [1993–1996] XLIII AJHR at 237.

166 See McHugh and Keith, above n 158, at 4.

167 See New Zealand Bill of Rights Act 1990, s 3(a).

168 McGee *Parliamentary Practice in New Zealand*, above n 17, at 435.

169 At 436.

In Canada, parliamentary privilege may only be abrogated by express words.[170] In Australia, an express statutory declaration is required, relying on a general secrecy provision is not enough.[171] However something less than express words may be sufficient in New Zealand.[172] The statutory interpretation principle of necessary implication applies to parliamentary privilege.[173] The constitutional significance of such an implication may however require a higher threshold.[174] It must be clear that Parliament intended to limit its own powers. The legislation, which in practice is used to justify non-disclosure, does not expressly or by necessary implication apply to select committees. While it is possible that the inquiry powers of committees could be legally circumscribed in the future, the current practice does not appear to have a legal basis. The only possibility is a general reliance on the principle of comity. Greater clarity regarding the application of statutory secrecy provisions is one way to reinforce the inquiry powers of select committees.

## *VII SUGGESTIONS FOR REFORM*

The experiences of our own Parliament and that of comparable jurisdictions show that there are inevitable tensions between the Executive's claim to confidentiality and the Legislature's right to know. This tension can go both ways, with legitimate claims on either side. Public interest is being pulled simultaneously in opposite directions. If, in practice, there are accepted grounds that the Government can claim to justify non-disclosure, these limitations should be clearly and formally acknowledged. Moreover, if the Legislature and Executive disagree whether disclosure is in the public interest, there should be some mechanism for resolving the disagreement. In addition, guidance to officials must be reformed to accurately reflect constitutional principles, such as parliamentary sovereignty, manifested in its inquiry powers.

### *A Identification of Grounds for Non-Disclosure*

Currently in New Zealand there are no clear grounds on which the Executive can legally withhold information requested by the House. There are no statutory secrecy provisions which apply expressly to Parliament, yet the FADTC has accepted those limitations on their inquiry powers as if it did apply to the committees of the House.

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170 *Re House of Commons and Canada Labour Relations Board* (1986) 27 DLR (4th) 481 at 490 per Pratte J; and *Harvey v New Brunswick (Attorney-General)* (1996) 137 DLR (4th) 142 at [70] per McLachlin J. See also McGee, above n 17, at 610.

171 "Grounds for Public Interest Immunity Claims" (second attachment) at 5–6 in letter from Rosemary Laing (Clerk of the Senate of Australia) to Sophie Dunstone (Secretary of the Legal and Constitutional Affairs References Committee) regarding the determination of public interest immunity claims (7 January 2014) in Legal and Constitutional Affairs References Committee *Appendix 4: Evidence from the Clerk of the Senate*.

172 McGee, above n 17, at 610.

173 Peter McHugh and Russell Keith, above n 159, at 3.

174 At 4.

The reason why committees are reluctant to press for information and request summons is unclear. Perhaps government members are motivated by political considerations, accepting whatever information is given in order not to embarrass the Executive and disrupt their own career progression. There is some evidence to support this proposition. One interviewee said that "in terms of realpolitik the job of a select committee chair is to make sure the Government doesn't cop any flack and make sure there are no surprises for the Government. If you didn't do that you wouldn't keep your job."[175]

There is an unclear line between what government departments and select committees are, respectively, constitutionally obliged to disclose or entitled to receive. And the proper considerations in such a balancing exercise are open to debate. Perhaps Parliament has come to accommodate the Executive in its pursuit of foreign policy and agrees that government claims of national security exclude certain activities from scrutiny. However, it does not seem that receiving evidence in secret is a complete solution to the impasse given its infrequent use.

A model based on the 2009 Australian Senate process described below might be useful in clarifying what, if any, limits to scrutiny powers may be accepted by the House in accommodating the distinct tasks of Government and Parliament.

The Australian Senate set out a process for the Executive to claim public interest immunity.[176] In the assessment of the Australian Legislature, these guidelines have resulted in some improvement in responses to orders for production of documents.[177] This order consolidated existing practice. In 1975 the Commonwealth Senate had resolved the power for the Senate to summon documents was "subject to the determination of all just and proper claims of privilege".[178] Rather than a limitation on the Legislature's power, the Order represents an acknowledgement that some information should not be disclosed, signalling that such claims will at least be entertained.[179] The responsible minister must provide the committee with the ground justifying non-disclosure, specifying the harm to the public interest which could result.[180] If the committee finds this unsatisfactory, it can report the matter to the

175 Interview with John Hayes, above n 5.

176 Order of the Commonwealth Senate (Australia) J.1941-2 (13 May 2009), now contained in Standing orders and other orders of the Senate 2015 at 130, Procedural Order 10(c)(3).

177 See Senate Standing Committee on Procedure *Second Report of 2015: Third party arbitration of public interest immunity claims* (23 June 2015).

178 Resolution of the Commonwealth Senate (Australia) J.831 (16 July 1975), now contained in Standing orders and other orders of the Senate 2015 at 146, Procedural Order 35.

179 Harry Evans and Rosemary Laing (eds) *Odgers' Australian Senate practice* (13th ed, Department of State, Canberra, 2012) ch 19.

180 Standing orders and other orders of the Senate 2015 at 130, Procedural Order 10(c)(3).

Senate, which may order the production of the documents.[181] The Senate makes the ultimate decision regarding disclosure. The Order itself does not list what may justify non-disclosure. There are, however, a number of accepted grounds outlined in the Australian guidelines, including national security.[182]

In New Zealand there is limited guidance of what may justify non-disclosure. Committees have accepted limitations from time to time, but this is not the same as a consistent and clear resolution from the Legislature. The State Services Commission *Guidelines* state that "legitimate concerns" around disclosure should be communicated to the committee, which may agree to receive the information in a different form.[183] There is no explanation of what constitutes a "legitimate concern" or who is to judge the claim's legitimacy. Each committee must approach non-disclosure on a case by case basis, uncertain as to whether the committee is legally entitled to demand the information.[184]

A statement from Parliament similar to that of the 1975 resolution of the Australian Senate would be useful in clarifying each branch's rights and obligations. It would also be in line with suggestions in the United Kingdom. The inquiry into select committee effectiveness called for a review of the relationship between government and select committees, and joint guidelines for departments and committees which recognise ministerial responsibility and the legitimate wish of Parliament for more effective accountability.[185]

Such guidelines would acknowledge and formalise a practice that already occurs in the FADTC. It would force ministers to articulate the reasons for their refusals and limit the reasons that could be relied upon. Ministers would need to outline the harm to the public interest that would follow disclosure, making it more difficult to withhold information for purely political reasons. At the very least, this process could make the issue of Executive compliance with select committee requests more transparent to the public. Currently this is only exposed through the rare adverse comment in a committee report, whereas in Australia statistics on compliance are available.[186] Difficulties obtaining information are not necessarily included in all committee reports, thus a systematic record in the form of public statistics on this issue would at least enable a fuller understanding of the extent of the

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181 *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, above n 129, at [21].

182 At [11].

183 *Guidelines*, above n 24, at [32].

184 Lambert, above n 30, at 178.

185 *Select committee effectiveness* (Report), above n 100, at [115].

186 "Orders for production of documents not complied with" Commonwealth Parliament of Australia <www.aph.gov.au>.

problem. A move towards publishing statistics on agency compliance with the Official Information Act is a positive step in this direction.[187]

Such a resolution could also note the ability to receive secret evidence as a mechanism to avoid harm to the public interest through open disclosure. While public participation in select committees is one of the strengths of our democracy, one cannot deny that there is some information which cannot be made public. Sensitive government activity that concerns national security must still be scrutinised. Not all scrutiny has to be public in order to be effective. While trust (or lack thereof) of non-government members may be a concern,[188] the Office of the Clerk does have mechanisms in place to manage secret evidence, by keeping the material in their custody and collecting numbered copies of the documents to prevent leaks. If select committees are not seen as an effective place to receive sensitive evidence, such briefings might be pushed into the side-lines, excluding some committee members and moving the process further away from democratic accountability.

However, such clarification is only part of the answer. There also needs to be a process to manage disagreement over where the public interest falls in a particular case, when the inevitable tensions between Legislature and Executive arise. To fail to have such a process in place is to accept the Executive as the judge of its own cause when it comes to particularly sensitive issues. While there is a sphere of Executive action and discretion, that discretion should not exist beyond the reach of parliamentary scrutiny.

## *B Dispute Resolution Process*

In New South Wales (NSW) there is a process for independent arbitration of public interest immunity claims, which may serve as a model for breaking the stalemate between the Legislature and the Executive. The NSW Legislative Council, following a refusal to a summons for the provision of documents, suspended the responsible Minister from the House, resulting in that Minister challenging the powers of the Council in the courts.[189] The information at issue was Government consent to a proposed goldmine and the environmental impact of the project.[190] The subsequent decision of the NSW Court of Appeal in *Egan v Willis* held that the Council had an inherent power to require the production of documents and impose sanctions in cases of non-compliance.[191] While the basis of the

187 "OIA 'league tables' getting closer, says Chief Ombudsman" (18 July 2016) New Zealand Law Society <www.lawsociety.co.nz>.

188 Interview with Trevor Mallard, above n 48.

189 Senate Standing Committee on Legal and Constitutional Affairs *A claim of public interest immunity made over documents* (6 March 2014) at 3.

190 Judith Bannister, Gabrielle Appleby and Anna Olijnyk *Government Accountability: Australian Administrative Law* (Cambridge University Press, Melbourne, 2015) at 165.

191 John Evans "Orders for Papers and Executive Privilege: Committee Inquiries and Statutory Secrecy provisions" (2002) 17 Australasian Parliamentary Review 198 at 211.

powers of the NSW Parliament is different to that of New Zealand, the focus of the Court's reasoning was on the function rather than the foundation of the powers. The power to demand papers was characterised as an inherent power of the House which exists to the extent that it is reasonably necessary for the proper exercise of its functions.[192] It was held that the Legislature had an imperative need for access to material in order to effectively consider both the introduction of new laws and the operation of current laws.[193] The Court's reasoning shows that this power is crucial in enabling the Legislature to fulfil its constitutional function and is equally applicable to New Zealand.

The question to be resolved by the NSW process is whether the information should enter the public domain.[194] Where a claim is made, a description of the document is prepared along with reasons for the executive privilege claim. The documents are then delivered to the Clerk to be made available only to members of the Legislative Council.[195] Any member may dispute the validity of the claim to privilege; the Clerk will then submit the document to an independent arbitrator, who submits an advisory report within one week.[196]

The important issue of asylum-seekers recently forced the consideration of whether such a process is necessary in the Commonwealth Senate. In November 2013 the Senate ordered the production of all communications relating to recent "in water operations".[197] The documents were not disclosed due to national security risk.[198] The Senate rejected this claim of public interest immunity and called again for the documents.[199] The Minister defended the immunity claim.[200] It was at this point that the Senate referred the matter for inquiry to the Legal and Constitutional Affairs References Committee. The Government did not produce any further information, although presentation could have been *in camera* or in an altered form. The Committee was precluded from assessing the validity of the Government's national security concerns, concluding that the lack of cooperation only heightened their suspicions.[201] The Committee could only suggest the Senate follow political remedies such as it

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192 *Egan v Willis* (1996) 40 NSWLR 650 (CA) at 664 per Gleeson CJ.

193 *Egan v Willis* (1998) 195 CLR 424 per Gaudron, Gummow and Hayne JJ at 454, referring to (1996) 40 NSWLR 650, at 692–3.

194 Senate Finance and Public Administration References Committee (Australia) *Independent Arbitration of Public Interest Immunity Claims* (February 2010) at 15.

195 Standing Orders of the Legislative Assembly of New South Wales 2010, SO 52(5).

196 SO 52(6).

197 Senate Standing Committee on Legal and Constitutional Affairs, above n 189, at 1–2.

198 At 3.

199 At 3–4.

200 At 3–4.

201 At 16.

had done in the past.[202] As Executive non-compliance is an on-going obstacle to Senate effectiveness, the Committee recommended consideration of reform. Their report proposed that the Senate Standing Committee on Procedure consider the process of independent arbitration adopted in NSW. The Australian Senate Standing Committee on Finance and Public Administration considered a similar proposal in 2010, ultimately recommending against adoption of an independent arbitration model.[203] The recommendation was based on a specific proposal, details of which served as a basis for criticism from the majority report.[204]

In June 2015, the Senate Standing Committee on Procedure reported back on the proposal. The Committee concluded that the NSW process of third party arbitration of public interest immunity claims could not be successfully transferred to the Commonwealth Senate.[205] The report noted that there was "no doubt that there remains considerable scope for improvement in responsiveness to orders and requests for information."[206] The Committee gave unsatisfying reasons for why the process was inappropriate for the Senate. The principal fault was the process would be "unenforceable in practice", because the Executive would still need to consent to providing the disputed information to the arbiter.[207] It is deeply unconvincing to use the crux of the problem to justify the status quo. The Committee ultimately concluded that "[d]isputes are invariably addressed by political means according to the circumstances of each case."[208] These conclusions are an example of the incorrect classification of the issue as a purely political one, consequently relegating it beyond the reaches of public law and constitutional principles. Comity requires balance between the branches of government. The highly political nature of foreign affairs and defence issues does not permanently reprieve the Executive of its accountability to Parliament while operating in this sphere.

Such a process could be useful in New Zealand. However, it is unlikely to gain traction unless the extent of the problem becomes clear. Thus any dispute settlement mechanism in this context would need to follow clarification of the status and scope of public interest immunity claims by the Executive, which is patently uncertain at present.

## *VIII CONCLUSION*

There exists a significant inconsistency between the technical powers of the House to undertake effective scrutiny of sensitive areas of government activity and the manifestation of these powers in

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202 At 17.

203 Senate Finance and Public Administration References Committee (Australia), above n 194, at vii.

204 At 3.

205 Senate Standing Committee on Procedure, above n 177, at 15.

206 At 14.

207 At 12.

208 At 12.

actual practice. It does not appear that the FADTC is willing or able to carry out its constitutional role of inquiry to its fullest. In practice, statutory secrecy provisions restrict the inquiry powers of the FADTC. Evidence is regularly withheld during the Estimates process, which is meant to represent the highpoint of scrutiny. These limitations lack a clearly articulation in statute or policy but remain unchallenged by the Committee. The House has not clearly acknowledged any limitations to parliamentary privilege. However actions speak louder than words: reading the responses to written questions provided to FADTC over past two parliamentary terms shows that certain government activities exist beyond the reach of committee scrutiny.

Parliament and the Executive need to accommodate one another in their sometimes competing constitutional functions. This is implicit in the notion of the balance of powers. Central to that principle is that each branch does, in fact, retain a distinct role free from interference by the other branches. If the House is prepared to limit its inquiry function to accommodate claims of public interest immunity, this should be clearly formulated so as to keep the restrictions within tight boundaries. If there are accepted grounds to justify non-disclosure, independent arbitration might need to follow to resolve any disagreements as to the validity of claims. Mechanisms exist to allow scrutiny without compromising national security. For example, secret evidence could be used more frequently to avoid an accountability vacuum. While there is a public interest in openness, there is a greater public interest in achieving effective scrutiny. Further, advice to officials must be clarified as the present ambiguity contained in the State Services Commission's guidelines assumes limitations on committees' inquiry powers, dissuading members from pressing for answers when met with an initial refusal.

Political remedies are an unsatisfactory answer to a constitutional question of such significance. Adverse comments in committee reports and possible debate in the House is not the robust scrutiny envisaged by the 1985 reforms to select committees. Foreign affairs and defence policy is unique due to its prerogative basis and potential sensitivity. This may result in some differences to the Legislature's scrutiny measures, but does not justify putting certain issues beyond parliamentary scrutiny. The idea that the level of investigation into foreign affairs is to be determined by the Government's own political judgment is antithetical to democratic accountability.[209] Parliament has a duty to scrutinise the Executive and must reform itself to enable the realisation of its constitutional function.

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209 See Evans and Laing, above n 180, at 597.

## *IX APPENDIX 1*

| **Interviewee** | **Date of interview** |
|---|---|
| **Sue Kedgley**<br>Former Green MP (1999–2011)<br>Chair of the Health Committee (2005–2008) | 27 July 2015 |
| **Mark Mitchell**<br>Current National MP (2011–present)<br>Chair of the FADTC (2014–2017) | 30 July 2015 |
| **Diane Yates**<br>Former Labour MP (1993–2008)<br>Chair of the FADTC (2005–2008) | 31 July 2015 (via email) |
| **Rt Hon Sir Geoffrey Palmer QC**<br>Former Prime Minister of New Zealand (1989–1990)<br>Former Labour MP (1979–1990) | 4 August 2015 |
| **Dr Kennedy Graham**<br>Former Green MP (2008–2017)<br>Deputy Chair of the FADTC (2011–2014) | 10 August 2015 |
| **James Picker**<br>Current Select Committee Operations Manager<br>Office of the Clerk | 12 August 2015 |
| **James Thomson**<br>Current Clerk of the FADTC<br>Office of the Clerk | 14 August 2015 |
| **Keith Locke**<br>Former Green MP (1999–2011)<br>Member of the FADTC (1999–2011) | 16 August 2015 (via email) |

**John Hayes ONZM** _____ 17 May 2016

Former National MP (2005–2014)

Chair of the FADTC (2008–2014)

**Hon Trevor Mallard** _____ 19 August 2015

Current Labour MP (1984–1990, 1993–present)

Assistant Speaker

The Pipitea Victoria University of Wellington Human Ethics Committee approved the interview process for this research in 2015.

# HOUSING IN POST-QUAKE CANTERBURY: HUMAN RIGHTS FAULT LINES

***Natalie Baird****

*The 2010–2011 Canterbury earthquakes and their aftermath have been described by the Human Rights Commission as one of New Zealand's greatest contemporary human rights challenges. This article documents the shortcomings in the realisation of the right to housing in post-quake Canterbury for homeowners, tenants and the homeless. The article then considers what these shortcomings tell us about New Zealand's overall human rights framework, suggesting that the ongoing and seemingly intractable nature of these issues and the apparent inability to resolve them indicate an underlying fragility implicit in New Zealand's framework for dealing with the consequences of a large-scale natural disaster. The article concludes that there is a need for a comprehensive human rights-based approach to disaster preparedness, response and recovery in New Zealand.*

## *I INTRODUCTION*

New Zealand tends to pride itself on its human rights record. However, recent years have suggested that this pride may be misplaced, especially in relation to economic, social and cultural (ESC) rights, such as the right to housing. Challenges have included persistent economic and social inequalities of Māori and Pacific peoples, high levels of child poverty, the realisation of the right to housing in Auckland and beyond, and the human rights issues raised by the 2010–2011 Canterbury earthquakes.[1] The earthquakes, and even more so their aftermath, have been described by the Human

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1 See generally Margaret Bedggood and Kris Gledhill (eds) *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011); and Judy McGregor, Sylvia Bell and Margaret Wilson *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books, Wellington, 2016) at 51–65.