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CONTENTS

Things Fall Apart: How Legislative Design Becomes Unravelled
Debra Angus 149

Too Secret to Scrutinise? Executive Accountability to Select Committees in Foreign Affairs and Defence
Eve Bain..... 161

Housing in Post-Quake Canterbury: Human Rights Fault Lines
Natalie Baird..... 195

The Politics of Property in Constitutional Reform: A Critical Response to Sir Geoffrey and Dr Butler
Oliver Hailes..... 229

The *South China Sea* Arbitration and New Zealand's Maritime Claims
Joanna Mossop..... 265

Incommensurate Values? Environment Canterbury and Local Democracy
Sascha Mueller..... 293

"Trust the Ministry, Trust the Democracy, Trust the People": Administrative Justice and the Creation of Special Courts and Tribunals in the Liberal Era
Grant Phillipson..... 313

"The Ayes Have it": The Development of the Roles of the Speaker of the House, 1854–2015
Pita Roycroft..... 353

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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.

Rights Commission (HRC) as "one of New Zealand's greatest contemporary human rights challenges."[2] Although it is over seven years since the first earthquake of 4 September 2010, the impact of the earthquakes is still keenly and widely felt, with enduring adverse effects on the realisation of the right to housing in particular. The HRC, in its 2016 report on New Zealand to the Committee on Economic, Social and Cultural Rights noted that "[d]espite the continuing efforts of government – both central and local – many people remain in inadequate housing which is having a significant impact on their mental health and wellbeing."[3] So long after the earthquakes themselves, this suggests that there are some fundamental flaws with the adequacy of human rights protections in New Zealand. Is the human rights framework robust enough to deal with the consequences of a large-scale natural disaster?

This article documents the shortcomings in the realisation of the right to housing in post-quake Canterbury. It considers the right to housing from the perspective of homeowners, tenants and the homeless, with a focus on the longer-term impacts rather than the immediate aftermath of the earthquakes themselves. Mindful of these shortcomings, the article then reflects on what the Canterbury experience illustrates about New Zealand's underlying human rights framework. One of the key conclusions is that when disaster strikes, weaknesses in that framework are readily apparent. To remedy these weaknesses, the article recommends that a comprehensive human rights-based approach to disaster preparedness, response and recovery be embedded in New Zealand.

Part II of this article explains the legal framework of the right to adequate housing. Part III then explores the challenges in realising the right to housing in post-quake Canterbury. Drawing on the consequences for realisation of the right to housing, part IV offers three reflections on what we can learn from these challenges about New Zealand's wider human rights framework, and part V concludes.

II THE RIGHT TO HOUSING

The right to adequate housing is a basic human right. It is more than simply a place to shelter; it implies the right "to live somewhere in security, peace and dignity."[4] In March 2012, the New Zealand Productivity Commission noted that "[t]here are few things more important to New Zealanders than

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2 Human Rights Commission *Monitoring Human Rights in the Canterbury Earthquake Recovery* (December 2013) [HRC *Monitoring Report*] at 7.

3 Human Rights Commission "New Zealand's 4th periodic review under the International Covenant on Economic, Social and Cultural Rights: Submission of the New Zealand Human Rights Commission to the Committee on Economic, Social and Cultural Rights" (January 2016) at [44].

4 Committee on Economic, Social and Cultural Rights *General Comment No 4: The Right to Adequate Housing* E/1992/23 (1991) at [7].

the homes we live in. Housing is a fundamental determinant of wellbeing, central to health, family stability, and social cohesion."[5]

The right to housing falls under the broad umbrella of the right to an adequate standard of living. It can be understood as part of the inherent human right to dignity. Article 25(1) of the Universal Declaration of Human Rights 1948 provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in turn provides that:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Article 11(1) has been interpreted in a way that separates out the different components of an adequate standard of living, so that the right to housing is now widely regarded as a separate right "derived from" the right to an adequate standard of living.[6] In 1991, the Committee on Economic, Social and Cultural Rights (CESCR), the body charged with monitoring states' implementation of their obligations under ICESCR, set out its interpretation of the right to housing.[7] It provided that the right to housing has seven components – legal security of tenure, availability of essential services, affordability, habitability, accessibility, location and cultural adequacy.[8] The Committee specifically referred to victims of natural disasters as among those disadvantaged groups that "should be ensured some degree of priority consideration in the housing sphere."[9] Despite this statement from the Committee, in post-quake Canterbury all seven of the core elements of the right to housing were adversely affected to varying degrees.

The precise challenges in Canterbury are discussed further in part III, but one underlying structural explanation for the fragility of the right to housing perhaps lies in the nature of the obligations on states under art 11, and more broadly ICESCR itself. Article 11(1) itself simply refers to an obligation

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5 New Zealand Productivity Commission *Housing Affordability Inquiry* (April 2012) at iii.

6 Jessie Hohmann *The Right to Housing: Law, Concepts, Possibilities* (Hart Publishing, Oxford, 2013) at 17.

7 CESCR, above n 4. See also Committee on Economic, Social and Cultural Rights *General Comment 7: The right to adequate housing: forced evictions* E/1998/22 (1997).

8 CESCR, above n 4 at [8].

9 At [8(e)].

on states to "take appropriate steps." Article 2 of ICESCR further provides on the one hand that a state party is "to take steps … to the maximum of its available resources" but on the other "with a view to achieving progressively" the full realisation of the rights in the Covenant. CESCR, in an effort to impress upon states that this language is not an excuse for no action has developed the notion of a "minimum core obligation" to suggest a minimum essential level of each right.[10] The right to housing is also caught up in the continuing divide between civil and political rights on the one hand, and economic, social and cultural (ESC) rights on the other. Even though the gap between these two categories of rights has narrowed in the years since the 1993 Vienna Conference proclaimed all rights as "indivisible, interdependent and interrelated," a considerable distance still remains in terms of their perceived importance and enforceability. Many states, such as New Zealand, maintain that ESC rights are matters of policy rather than law and are not suitable subject matter for either constitutional legislation or adjudication in the courts. Further, it was only in 2008 that an individual complaints mechanism for ESC rights was adopted at the international level and not until 2013 that it came into force.[11] The end result is that implementation of ICESCR remains "notoriously underachieved" at a global level.[12]

New Zealand ratified ICESCR in December 1978 and so is bound at international law to meet its obligations under it. Unlike the International Covenant on Civil and Political Rights (ICCPR), whose obligations are now largely (although not fully) reflected in the New Zealand Bill of Rights Act 1990 (NZBORA), there is no single piece of legislation implementing New Zealand's obligations under ICESCR. Instead, New Zealand maintains that its international obligations under ICESCR are given effect via a combination of various government policies and legislation. However, international human rights monitoring bodies regularly express concern that ICESCR has not been fully incorporated into domestic legislation and recommend that New Zealand enact legislation to provide more comprehensive protection for ESC rights such as the right to housing. For example, in 2012 following its review of New Zealand's third periodic report, CESCR recommended that New Zealand should "give the Covenant full effect in its domestic legal order" and "incorporate economic, social and cultural rights into the 1990 Bill of Rights."[13] Similar recommendations were made during New

10 Committee on Economic, Social and Cultural Rights *General Comment 3: The Nature of States Parties' Obligations* E/1991/23 (1990) at [10].

11 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (opened for signature 24 September 2009, entered into force 5 May 2013).

12 Hohmann, above n 6, at 19.

13 Committee on Economic, Social and Cultural Rights *Concluding observations of the Committee on Economic, Social and Cultural Rights* E/C.12/NZL/CO/3 (2012) at [9]–[10].

Zealand's universal periodic review in the UN Human Rights Council in 2014.[14] The issue of legislative protection of ESC rights is explored further in part IV.

International law also protects other rights that support aspects of the right to housing. Article 12 of the UDHR recognises the right to be protected from interference with privacy, family, home or correspondence. This is reflected in art 17(1) of the ICCPR which provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Unlike the more expansive right to housing, art 17(1) is narrower and protects only against arbitrary or unlawful interference with the home. However, as discussed below, as a civil and political right, courts and governments in countries such as New Zealand may find it easier to engage with than the right to housing. Article 17 has not been directly incorporated into the NZBORA, but aspects of the right can be found in s 21 NZBORA, the Search and Surveillance Act 2012, the Evidence Act 2006 and the Privacy Act 1993.

Closely related to the right to housing is the right to property. The right to property is specifically protected in art 17 of the UDHR, but it was not carried over into either the ICCPR or ICESCR, largely as a result of ideological differences during the early Cold War period. It is not found in the NZBORA, although the 2016 Palmer and Butler proposed Constitution for Aotearoa New Zealand recommends its inclusion.[15] The right to adequate housing is however arguably broader than the right to own property. It extends beyond ownership rights and covers "everyone," including those who do not own property.[16] The concept of security of tenure, which is fundamental to the right to housing, applies in a variety of contexts including rental accommodation, lease arrangements, owner-occupation and emergency housing.[17] Commentator Asbjørn Eide argues that the right to an adequate standard of living (including housing) is at the core of the concept of "social rights" whereas the right to property is better categorised as an "economic right."[18] Similarly, the right to adequate housing is not the same as the right to land. Although land, like property, can be an important element to realise the right to

14 Human Rights Council *Report of the Working Group on the Universal Periodic Review: New Zealand* A/HRC/26/3 (2014) at [128.32]–[128.35].

15 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 168.

16 OHCHR and UN Habitat "The Right to Adequate Housing" (Fact Sheet No 21 (Rev 1), November 2009) at 7–8.

17 At 8.

18 Asbjørn Eide "Economic, Social and Cultural Rights as Human Rights" in Richard Pierre Claude and Burns H Weston (eds) *Human Rights in the World Community: Issues and Action* (3rd ed, University of Pennsylvania Press, Philadelphia, 2006) 170 at 173.

adequate housing, the right to housing is broader. In any case, international human rights law does not currently recognise an independent right to land.[19]

The right to housing is both instrumental in and inherent to the realisation of other human rights. For example, adequate housing can be a precondition for the realisation of the right to health, the right to education and the right to work. Equally, undermining the right to housing, for example by a forced eviction, may have an immediate impact on the right to education and the right to work. Access to housing is most at risk for those denied the right to education, work or social security.[20] Adequate housing is also important for realisation of the right to family life and the right to culture. The right to housing for women, children and people with disabilities is specifically protected in the Convention on the Elimination of All Forms of Discrimination Against Women,[21] the Convention on the Rights of the Child[22] and the Convention on the Rights of Persons with Disabilities, respectively.[23] Indigenous peoples' housing, land and property rights are also protected by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and, in New Zealand, by the Treaty of Waitangi. UNDRIP protections include rights to traditional lands and territories, the right to improvement of economic and social conditions (including housing), and the right to free, prior and informed consent for any measure affecting them.[24] Finally, civil and political rights such as freedom of expression, assembly and association enable individuals and groups to advocate for stronger protection for housing.[25]

In the context of natural disasters and the right to housing, there are three sets of relatively recent international guidelines emanating from the area of "disaster law" which are also relevant. The 2011 Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters promote a human rights-based approach in the aftermath of a natural disaster and specifically reference rights related to housing, land and property in the longer term.[26] The Sendai

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19 Human Rights Council *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari* A/HRC/4/18 (2007) at [25]–[31].

20 OHCHR and UN Habitat, above n 16, at 9.

21 Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 18 December 1979, entered into force 3 September 1981), arts 14(2)(h) and 15(2).

22 Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990), arts 16(1) and 27(3).

23 Convention on the Rights of Persons with Disabilities (opened for signature 30 March 2007, entered into force 3 May 2008), arts 9 and 28.

24 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/61/295 (2007), arts 10, 19, 21 and 26.

25 OHCHR and UN Habitat, above n 16, at 9.

26 Inter-Agency Standing Committee "IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters" (January 2011) [IASC Guidelines] at [C.1]–[C.2].

Framework for Disaster Risk Reduction 2015-2030 provides that "[m]anaging the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights".[27] Most recently, the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters provide that the "inherent dignity of the human person" is to be protected, and that "[p]ersons affected by disasters are entitled to respect for and protection of their human rights."[28] What is notable about all these standards is that, although they have been drafted with natural disasters at the core, they have all referenced human rights in some way. In this respect, they can be contrasted with post-quake Canterbury where, as documented in part III, an explicit human rights perspective was largely invisible – at least in central government decision-making.

III THE RIGHT TO HOUSING IN POST-QUAKE CANTERBURY

On 4 September 2010 and 22 February 2011, the Canterbury region was hit by two large earthquakes. In the February earthquake, 185 lives were lost. Since September 2010, there have been over 20,000 aftershocks, including two major aftershocks on 13 June 2011 and 23 December 2011.[29] Although it is over seven years since the first earthquake, the human rights impacts of the earthquakes are still having an effect on peoples' lives. The aim of this part is to document the shortcomings in the realisation of just one of those rights: the right to housing. The right to housing was the right most widely impacted in Canterbury – in terms of the number of individuals affected, the continuing challenges in realising this right, and the length of time taken to resolve housing issues. Of the approximately 190,000 dwellings in greater Christchurch, around 91 per cent were damaged by earthquakes.[30] Thousands of homes and sections were rendered temporarily or permanently uninhabitable, creating a large demand for habitable houses, rental accommodation, social housing and new sections. Once the Rebuild phase got underway in 2012, the influx of Rebuild workers compounded housing issues. Adverse impacts on the right to housing were felt across all sectors of society including homeowners, tenants and the homeless. As noted above, all seven elements of the right to housing (legal security of tenure, availability of essential services, affordability, habitability, accessibility, location and cultural adequacy) were adversely affected to varying degrees for different groups. These adverse impacts are now explored.

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27 United Nations Office for Disaster Risk Reduction *Sendai Framework for Disaster Risk Reduction 2015-2030* at [19(c)].

28 International Law Commission *Draft articles on the protection of persons in the event of disasters* A/69/10 (2016), arts 4–6.

29 For up-to-date information, see <www.canterburyquakelive.co.nz>.

30 Environment Canterbury "Preliminary Draft Land Use Recovery Plan" (2013) at 36.

A Homeowners – Residential Red Zone

Various Government acquisition and zoning decisions in post-quake Canterbury had major implications for the right to housing. In June 2011, as a result of the significant land damage caused by the earthquakes, the Government designated certain parts of Christchurch as "residential red zones" (RRZ). This designation ultimately affected 8,060 properties and more than 16,000 people across approximately six square kilometres.[31] Land zoned in this way was said to be either "so badly damaged by the earthquakes it is unlikely it can be rebuilt on for a prolonged period" or, for Port Hills properties, "there is an unacceptable risk to life safety from rock roll or cliff collapse."[32] Although mixed messages were given, it appeared that local authorities would not provide long-term support for RRZ infrastructure such as water, sewerage, electricity and roading. Even in 2017, uncertainty remains about continued provision of essential services within the RRZ.[33] At the same time as designating the RRZ, the Crown offered to buy the properties of insured RRZ property owners for 100 per cent of the 2007 rateable value (RV). In June 2012, the Crown extended this offer to insured RRZ properties under construction and non-residential properties owned by NGOs. In September 2012, the Crown offered to buy vacant land and uninsured residential properties for 50 per cent of the 2007 RV.

A number of concerns arose from this zoning and offer process. While presented as a "voluntary" offer by the Crown, the use of the 2007 RV, the uncertainty about the future of RRZ land and continued provision of essential services, the underlying threat of compulsory acquisition and the unlikelihood of getting insurance or mortgage finance on RRZ property all undermined the proclaimed voluntariness of the process. RRZ residents were faced with either leaving their homes or remaining in what were to become abandoned communities, with degenerating services and infrastructure. In the *Quake Outcasts* case (discussed below), Panckhurst J noted that people in the RRZ were faced with something of a "Hobson's choice."[34] In addition, there was concern at the overall inequity and arbitrariness of the process. There were other parts of Christchurch with the same if not worse land damage which were not red-zoned, allowing those owners to remain in their homes and repair them. Equally there were many homes in the RRZ which were repairable but which were eventually sold to the Crown under the RRZ process.

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31 Margaret MacDonald and Sally Carlton *Staying in the red zones: Monitoring human rights in the Canterbury earthquake recovery* (Human Rights Commission, October 2016) [HRC *Red Zones Report*] at 36.

32 See Department of Prime Minister and Cabinet "Red Zone information" <cera.govt.nz>.

33 HRC *Red Zones Report*, above n 31, at 123–124.

34 *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173, [2014] 2 NZLR 54 [*Quake Outcasts* (HC)] at [93].

While many in the RRZ accepted the Government's offer and moved on with their lives,[35] others found the whole process "a source of great disappointment and stress."[36] One of the Government's aims with its RRZ policy was to provide certainty for homeowners and create confidence for people to move forward.[37] However, for some individuals and families, the outcome was the exact opposite. The amount of the Crown's offer, compounded by Christchurch's housing shortage, meant that some in the RRZ were unable to afford to realise their right to housing by purchasing a new home. Many of these were older people forced out of their long-term family home. Others were single mothers living in a former family home. These and other vulnerable former homeowners were forced into the rental market at a time of great housing pressure.[38]

A particularly affected group were the self-described "Quake Outcasts."[39] These were 46 owners of uninsurable (vacant) or uninsured land in the red zone. As noted above, instead of being offered 100 per cent of the land's 2007 RV, they were offered 50 per cent. The Government's rationale for this decision was that "the land is damaged" and "the land is uninsured."[40] However, at the time, vacant land was not able to be insured until construction had commenced. Further, vacant land was no more damaged than adjacent occupied land. This decision led to inequitable outcomes. Owners who had just started building their homes were offered 100 per cent RV for their land while owners of neighbouring but still vacant land, the large majority of whom were families, were unable to move forward and faced financial ruin.[41] Similar equity issues arose for owners of uninsured land in the red zone. There were a number of reasons why some property owners were uninsured. A number of those who were uninsured were elderly widows whose husbands had been responsible for insurance. When husbands died, insurance policies inadvertently lapsed.[42] Other owners of uninsured properties were migrants for whom insurance was a foreign concept.[43] While the absence of insurance cover was

35 See generally Nielsen *Residential Red Zone Survey (of those who accepted the Crown offer)* (Canterbury Earthquake Recovery Authority, 1 February 2016).

36 HRC *Red Zones Report*, above n 31, at 15.

37 Cabinet Minute "Land Damage from the Canterbury Earthquakes" (27 June 2011) CAB Min (11) 24/15, Appendix F.

38 "Joint Stakeholder Submission: The Human Rights Impacts of the Canterbury Earthquakes: For the Universal Periodic Review of New Zealand (17 June 2013) [EQ Impacts] at [19].

39 See generally <www.savemyhomenz.org> and <www.therealrecovery.org/trrdrupal>.

40 Canterbury Earthquake Recovery Authority *Purchase offer supporting information for: Vacant Land in the Residential Red Zone* (March 2013) at 3.

41 For further information on this issue, see Red Section Owners Group "Submission to the Finance and Expenditure Committee on Andrew Newman's Petition: Pay 100% RFV to vacant landowners in the Red Zones" (12 April 2013).

42 EQ Impacts, above n 38, at [21].

43 At [21].

lamentable, it was arguably inequitable to penalise this small group of people in this way, especially given the impact it had on their right to housing.

The Quake Outcasts eventually challenged the red zoning and offer process in the High Court, alongside property development company Fowler Developments Ltd, which owned 11 RRZ sections. Judicial review proceedings challenged the lawfulness of the 50 per cent offers on the basis that they were not made in accordance with the Canterbury Earthquake Recovery Act 2011 (CER Act). It was also alleged that the offers were oppressive, disproportionate and in breach of human rights. Although the case was brought by only a small subset of those in the RRZ, it involved consideration of all the Crown's RRZ decisions, and so is of wider interest. The case was heard by the High Court in July 2013, the Court of Appeal in October 2013, and the Supreme Court in July 2014.[44] Quake Outcasts and Fowler Developments largely succeeded in the High Court. The Court held that neither the September 2012 decision to offer 50 per cent of RV to uninsurable and uninsured RRZ property owners nor the offers to the applicants were made according to law and directed reconsideration of the decisions. The High Court – controversially – also found that the original June 2011 RRZ decision was not lawfully made.

On appeal by the Crown, the Court of Appeal substantially vindicated the position of the Quake Outcasts, although its decision was narrower and more technical than that of the High Court. The Court of Appeal's decision attracted much interest for its discussion of "residual freedom" as a "third source" of power for executive actions,[45] and its decision that the original June 2011 decision was, in part, a lawful exercise of the Crown's residual freedom.[46] In relation to the September 2012 decision however, the Court found that the Government's decisions were not made in accordance with the CER Act and could not be saved by the residual freedom. The Chief Executive of the Canterbury Earthquake Recovery Authority (CERA) was directed to reconsider the offers made, but the Court held that any substitute offers could lawfully distinguish between owners on the basis of their insurance cover.

Quake Outcasts and Fowler Developments appealed against the Court of Appeal's refusal to declare that the June 2011 establishment of the RRZ was unlawful. They also argued that the Court of Appeal was wrong to hold that insurance status could lawfully be taken into account in making any substitute offers. In March 2015, the Supreme Court held (by a 3-2 majority) that the original June 2011 decisions were not simply the mere provision of information by the Crown, but were decisions which should have been made under the CER Act. However, given the lapse of time, it was too late

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44 See *Quake Outcasts* (HC); *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587 [*Quake Outcasts* (CA)]; and *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 [*Quake Outcasts* (SC)].

45 See for example Bruce Harris "Recent Judicial Recognition of the Third Source of Authority for Government Action" (2014) 26 NZULR 60.

46 *Quake Outcasts* (CA), above n 44, at [130]–[133].

for the June 2011 decisions to be reconsidered, and so a declaration as to their unlawfulness would not serve any useful purpose. The Court agreed with lower court decisions that the September 2012 decision was not lawfully made. It found that, although insurance status could be a relevant consideration, other relevant considerations weighed against insurance cover (or lack of) being determinative. These included the delay in making the September 2012 offer and the very difficult living conditions faced by those in the RRZ.

Following the Supreme Court decision and a public consultation process, CERA published the "Residential Red Zone Offer Recovery Plan" in July 2015.[47] For those living in the Christchurch RRZ, this set out offers of 100 per cent of RV for vacant land and 100 per cent of RV for uninsured land, but nothing for improvements. However, 16 members of the Quake Outcasts group commenced new proceedings challenging the subsequent August 2015 offers on the basis that the offers were contrary to the Supreme Court decision, particularly the Court's comments on the use of insurance as a factor in making differentiated offers. The High Court dismissed the case,[48] but the Court of Appeal found that the Minister's decision to approve the Recovery Plan was unlawful because of improper reliance on insurance status as a factor to discriminate amongst different classes of owner.[49]

A particularly notable aspect of the *Quake Outcasts* litigation was the limited reference to human rights in all judgments, despite the obvious connections between the subject matter of the dispute and the human right to housing. In part, this may be due to the way in which the case was pleaded and argued, with the main claim of the Quake Outcasts being that the 50 per cent offers were not made under the CER Act and were therefore unlawful. As noted above, it was however also alleged that the 50 per cent offers breached the Quake Outcasts' human rights. Despite this, human rights receive only a brief mention.

In the High Court, Panckhurst J noted the general relevance of the UDHR, ICCPR and ICESCR, and in particular art 17 ICCPR which provides protection from arbitrary or unlawful interference with privacy, family and home. He went on to note that "[t]he use and enjoyment of one's home is a fundamental human right," that "the creation of the red zone comprised an interference with that right" and whether that interference was arbitrary or unlawful depended on whether the RRZ decision had to be made pursuant to the CER Act.[50] In the Court of Appeal, although the Court referred to human rights in the context of articulating the issues for its determination,[51] it proceeded simply on the basis of whether the Government decisions under challenge could be made under the so-called residual

47 Canterbury Earthquake Recovery Authority *Residential Red Zone Offer Recovery Plan* (July 2015).

48 *Quake Outcasts v Minister for Canterbury Earthquake Authority* [2016] NZHC 1959.

49 *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] NZCA 332.

50 *Quake Outcasts* (HC), above n 34, at [65].

51 *Quake Outcasts* (CA), above n 44, at [12]–[13].

freedom. Like Panckhurst J, the Court also referred briefly to the human right to enjoyment of the home.[52] In the Supreme Court, the majority judgment noted the argument made by the HRC (as intervener) that the protections in the CER Act "would enhance the protection and domestic justiciability of [human] rights."[53] As for the 50 per cent offers, the HRC argued that in light of New Zealand's international human rights obligations, the Government rationale for a lower offer did not amount to "a rational justification for differential treatment."[54] A footnote reference in the majority judgment to art 17 of the ICCPR and art 21 of the UDHR suggests that, although the June 2011 decisions did not affect property rights in the "narrow sense of the word," there might be some wider impact on the right to protection from arbitrary or unlawful interference with the home.[55] Missing from all judgments was a recognition that the situation faced by the Quake Outcasts also involved the right to housing, particularly the core element of affordability. If the lower Government offer had been accepted, many of the Quake Outcasts would have been unable to afford to purchase another property.

By March 2016, it was estimated that approximately 300 people remained living in the largely abandoned RRZ, and in October 2016, the HRC published an extensive report on the situation of these people.[56] The reasons why people remained living in the RRZ were various and included "attachment to place" and financial considerations.[57] The HRC concluded that "[t]he situation for those who continue to live in the red zoned areas remains uncertain today, both in terms of the future use of the land and the ongoing provision of services."[58]

The particular elements of the right to housing at issue for all those in the RRZ included security of tenure, availability of essential services, affordability, habitability and accessibility. In terms of security of tenure, the RRZ process left homeowners with little choice but to accept the Government's offer. While unlikely to meet the criteria for unlawful eviction, for those who did not want to move, the RRZ process bordered on involuntary displacement. Even for those who had 100 per cent offers, some homeowners such as the elderly and solo parents found it difficult to afford a new home outside the RRZ. For those homeowners who remained in the RRZ, there remain ongoing issues with

52 At [94] and [103].

53 *Quake Outcasts* (SC), above n 44, at [98].

54 At [99].

55 At [134], n 176.

56 HRC *Red Zones Report*, above n 31, at 15.

57 For further discussion, see at pt 5.

58 At 13.

provision of essential services (such as sewerage, roading, postal delivery) and habitability of damaged homes.[59]

B Homeowners – Insurance Woes

For many homeowners, a major issue in the post-quake period was the immense frustration in their dealings with private insurance companies and the Earthquake Commission (EQC) – the Crown entity that provides natural disaster insurance for residential properties under the Earthquake Commission Act 1993.[60] These frustrations can be translated into concerns with core elements of the right to housing including habitability and affordability.

EQC operates a first loss insurance scheme for natural disaster recovery, whereby EQC levies are collected by private insurance companies and forwarded to EQC, which in turn provides natural disaster cover up to a maximum of $100,000 (plus GST). In ordinary times, the EQC scheme thus provides security for most citizens at a low and universal cost.[61] It also insures house contents up to $20,000 and residential land up to a certain level. Before the September 2010 earthquake, EQC was a small Crown financial institution aimed at settling relatively small numbers of claims arising from natural disasters. Following the Canterbury earthquakes, EQC grew dramatically from 22 staff to a peak of around 1,800 staff,[62] with 458 people remaining in January 2017.[63] Before the 2010–2011 earthquakes, EQC typically dealt with events which resulted in around 5,000 claims. The number of claims arising from the Canterbury earthquakes was around 468,000.[64] Undoubtedly, some of the problems experienced by homeowners in their dealings with EQC were due to the unprecedented nature and scale of the Canterbury earthquakes and the dramatic growth in the organisation over a short period of time. In terms of private sector insurers, in 2011, the Canterbury earthquakes represented the second largest insurance event in the world, behind the Japanese tsunami of March 2011. The scale and complexity of the two major earthquakes and their aftershocks undoubtedly made it a complex event with which to deal. Many homeowners were in the position of having to negotiate with two insurers (EQC and a private insurer), whilst EQC had to negotiate with both a private insurer

59 At 58–63.

60 See generally, HRC *Monitoring Report*, above n 2, Section 4.

61 At 138.

62 Georgina Stylianou "More than 300 EQC staff leave in a year" (The Press, online ed, Christchurch, 9 October 2015).

63 EQC "EQC Update: Keeping You Informed" (September 2016).

64 HRC *Monitoring Report*, above n 2, at 41 (number of claims as at 9 September 2013).

as well as an EQC client.[65] As noted by HRC, "[t]he complexity of the insurance situation resulting from the Canterbury earthquakes should not be underestimated."[66]

Despite these undoubted complexities, there was, and remains, deep concern about the actions and omissions of both EQC and private insurers. The Insurance and Financial Services Ombudsman (IFSO) set up a dedicated Canterbury earthquake response team to handle complaints against private insurers. As at July 2015, the IFSO Scheme had dealt with 1,542 complaint enquiries and 138 complaint investigations about the Canterbury earthquakes.[67] Similarly, the Residential Advisory Service (RAS), established in May 2013 as an advisory service for property owners facing challenges in getting their homes repaired or rebuilt, reported as at January 2017 that it had received 15,941 contacts from homeowners and had successfully progressed or resolved the claims of more than 4,111 homeowners.[68] In relation to insurance companies, complaints included unreasonable refusals to accept that loss was covered by insurance policies, delays in agreeing the quantum of claims and delays in paying out on accepted claims.[69] The power imbalance between insurance companies and consumers was also a problem, with some insurance companies adopting the tactic of waiting the clients out until they settled on unfavourable terms.[70] Similar concerns were expressed in relation to EQC along with concerns about incompetence, deliberate obfuscation, misinformation,[71] lack of transparency, and bullying of claimants.[72] The Ombudsman and the Privacy Commissioner also received an inordinate number of complaints about EQC from homeowners, especially in relation to

65 At 43.

66 At 139.

67 Insurance and Financial Services Ombudsman "Insurance and Savings Ombudsman Scheme Canterbury Update" (2 July 2015) <ifso.nz>.

68 Email Ken Pope (Manager of the RAS) to Natalie Baird regarding the number of complaints received and resolved (31 January 2017).

69 See also Sarah Miles *The Christchurch Fiasco: The Insurance Aftershock and its Implications for New Zealand and Beyond* (Dunmore Publishing, Auckland, 2012); and Jeremy Finn "Insurance Issues" in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) 196.

70 Finn, above n 69, at 197–198.

71 Neilsen *CERA Wellbeing Survey Report 2012* (Canterbury Earthquake Recovery Authority, 2012) at 69.

72 Insurance Watch "Quake Rebuild Insurance Woes Relentless" (press release, 7 April 2014).

access to information.[73] In addition, EQC was beset by numerous allegations of nepotism and corruption amongst its staff and contractors.[74]

A particular concern in relation to both EQC and private insurers was around prioritisation of repairs and rebuilds. Two to three years after the earthquakes, and even still in 2017, many residents remained in houses that were not weatherproof, raising habitability concerns. Despite this, homes with minimal damage were repaired while more badly damaged homes waited to be assessed. While both EQC and private insurers had criteria for identifying vulnerable occupiers, there were numerous examples of home owners who appeared to come within the criteria, but were not adequately prioritised.

Voluminous litigation dealing with earthquake insurance matters has been filed, heard and indeed, is still ongoing, against both EQC and private insurers.[75] A dedicated "Earthquake List" was established in the High Court in May 2012 in order to manage litigation resulting from the earthquakes.[76] As at June 2017, 881 cases had been filed on the Earthquake List. These cases involve both residential and commercial insurance issues, and concern, amongst other things, interpretation of EQC's obligations under the Earthquake Commission Act 1993, the terms of private insurance contracts and complex elements of New Zealand's insurance law. Although these cases have a contractual focus, in many of the cases involving residential properties, the underlying issue is the right to housing.

In terms of the specific human rights impacts linked to the actions and omissions of EQC and private insurers, delays and obfuscation by EQC and insurance companies raised questions in terms of the right to adequate housing under art 11 ICESCR. While the earthquakes themselves unavoidably affected the right to housing, the inability to get homes repaired in a timely fashion as a result of EQC and insurer delays has had a negative and avoidable impact on the habitability of many homes. Inevitably, these delays raised issues of affordability of housing as people needed to rent or buy elsewhere if unable to live in damaged homes, as well as impacting on other rights such as the right to health.

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73 Beverley Wakem and Marie Shroff *Information fault lines: Accessing EQC Information in Canterbury* (Ombudsman and Office of the Privacy Commissioner, December 2013).

74 See for example Martin van Beynen "Review of nepotism at EQC had gaps" (The Press, online ed, Christchurch 16 March 2012); and Melanie Reid "Allegations of EQC favouritism, bias and nepotism" (13 September 2015) NewsHub <www.newshub.co.nz>.

75 See Finn, above n 69; and Henry Holderness "Recent New Zealand Earthquake Cases" (2015) 26 Insurance Law Journal 246.

76 Courts of New Zealand "The High Court Earthquake List" <www.courtsofnz.govt.nz>. See also Nina Khouri "Civil justice responses to natural disaster: New Zealand's Christchurch High Court earthquake list" (2017) 36 Civil Justice Quarterly 316.

C Tenants

Many tenants as well as homeowners experienced a significant decline in their housing situation after the earthquakes. The HRC has described the impact of the earthquakes on the rental market as being "especially acute."[77] In the immediate aftermath of the earthquakes, the greater Christchurch area saw a loss of housing stock and a drop in the availability of new rental housing. This was caused by the destruction of housing caused by the earthquakes themselves. The number of rental units available at affordable prices for low-income earners decreased significantly.[78] Over 1,000 social housing units were lost.[79] The decision to establish and clear the RRZ also had an impact as homeowners and tenants in the RRZ all sought new places to live. From 2012 onwards, the influx of construction workers to work on the Rebuild also increased demand for rental properties[80] So too did the pressure of homeowners needing temporary rental accommodation while their homes were repaired or rebuilt, with many private landlords opting for the more lucrative short-term rental market (often funded by private insurance policies) at the expense of longer-term tenants. All of these factors led to significant rent increases, with a 31 per cent increase on the average weekly rent reported between August 2010 and March 2013.[81] In the year to July 2013, average private weekly rents increased by 12 per cent in Christchurch.[82] Over 85 per cent of tenants who received rent increases in the first two years after the earthquakes reported that their well-being or right to health had been negatively affected by the increases.[83] Demand for emergency or temporary housing and other types of support for people on low incomes increased dramatically.[84] There was an increase in homelessness and numerous media reports of people living in cars, caravans and garages.[85] However, with the repair

77 HRC *Monitoring Report*, above n 2, at 59.

78 Ministry of Business, Innovation & Employment *Housing Pressures in Christchurch: A Summary of the Evidence* (March 2013) [MBIE *Housing Pressures*] at 11.

79 HRC *Monitoring Report*, above n 2, at 60.

80 MBIE *Housing Pressures*, above n 78, at 9 and 24.

81 At 8.

82 HRC *Monitoring Report*, above n 2, at 60.

83 Laura Gartner "Tenants' Protection Association (CHCH) Rental Survey 2013: A Study of Increasing Rents and Housing Standards in Canterbury" (June 2013).

84 MBIE *Housing Pressures*, above n 78, at 1.

85 See for example Charlie Gates "Quake Housing crisis drives poor to sleep in cars" (The Press, online ed, Christchurch, 29 March 2012); and Cate Broughton "Canterbury's housing recovery neglects the poor" (The Press, online ed, Christchurch, 2 June 2015).

of existing homes and many new rebuilds, by mid-2015 it was reported that the pressure on the rental market was starting to ease.[86]

There were numerous problems faced by tenants including insufficient supply of rental accommodation, huge rent increases and sub-standard rental accommodation. Reframing these issues in human rights terms, the key issues for tenants in realising their right to housing were affordability, habitability and security of tenure. In terms of affordability, the Government was largely content to leave "the market" to respond to problems for tenants in securing affordable accommodation.[87] Only nine days after the February 2011 earthquake, the Tenants' Protection Association called for the Government to introduce temporary rent control measures to prevent rent-gouging by landlords,[88] but this call was never heeded. The Government did however take some steps to address affordability of housing, including the Land Use Recovery Plan, provision of temporary accommodation villages, the temporary accommodation allowance and Housing New Zealand's Canterbury Investment Plan.[89] The Government and the Christchurch City Council also adopted the "Christchurch Housing Accord" in September 2014 which, although expressing a preference for a "well-functioning, private sector-led housing market,"[90] did recognise the seriousness of the housing situation. While these measures were useful, in a market where landlords had the upper-hand, the vulnerable and disadvantaged including solo parents, children and young people, older people, migrants, refugees, Māori and Pasifika families, those with mental health issues and those with poor credit ratings had serious difficulties finding affordable homes to rent.[91] In 2013, Aviva (formerly Christchurch Women's Refuge) identified the lack of affordable housing as the most significant factor affecting families living with family violence. Many women (with children) chose to remain in violent homes because of the risk of homelessness if they left.[92]

Habitability was also a concern. In the immediate aftermath of the February earthquake, many homes, including rental homes, had cracked exteriors, unstable chimneys and liquid seeping through

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86 Liz McDonald "Christchurch rental market turns to favour tenants" (The Press, online ed, Christchurch, 21 May 2015); and Liz McDonald "Christchurch rents on downward slide, landlords finding it tougher" (The Press, online ed, Christchurch, 11 June 2015).

87 Michael Berry "Christchurch rent crisis 'best left to market'" (The Press, online ed, Christchurch, 20 March 2012).

88 Amanda Morrall "Tenants Protection Association urges Government to consider rent freeze in earthquake ravaged Christchurch" (3 March 2011) <www.interest.co.nz>.

89 HRC *Monitoring Report*, above n 2, at 63.

90 New Zealand Government and Christchurch City Council “Christchurch Housing Accord” (11 September 2014) at [3]. See also New Zealand Government and Christchurch City Council "Christchurch Housing Accord" (2017) at [3].

91 EQ Impacts, above n 38, at [24].

92 HRC *Monitoring Report*, above n 2, at 63.

the floorboards as a result of liquefaction; while others had no electricity, water or sewerage.[93] A number of tenants tried to terminate their tenancies or have their rent abated on the grounds that their houses were "so seriously damaged as to be uninhabitable."[94] Some landlords resisted as this would cause them financial loss. Tenants and landlords turned to the Tenancy Tribunal, which was faced with a number of "earthquake-unique" claims, and required to grapple with an under-developed area of law under the Residential Tenancies Act 1986.[95] One commentator concluded that the lack of appeals from the Tribunal "suggests that while clients may not have been particularly happy with a Tribunal decision, their dissatisfaction was not so great as to spur them to appeal,"[96] although, for tenants at least, many would have been unable to afford the emotional or financial costs of an appeal. The fear of eviction by landlords may also have prevented further litigation.

After this immediate post-quake period, a growing issue for some tenants was being forced by circumstances beyond their control to live in substandard housing. The pressure in the housing market enabled unscrupulous landlords to let substandard housing. Some of the rentals on the market were described as "quake-damaged properties investors had snapped up at low prices in order to make a quick buck … and [they] were not necessarily fit for purpose."[97] Houses with only temporary repairs, or in some cases, no repairs, were let to tenants desperate for a roof over their head. A large number of rental houses were cold, damp, unsafe, unhealthy and overcrowded. A Tenants' Protection Association survey in 2013 found that 60 per cent of tenants were living in earthquake-damaged homes with damage including cracks in walls, sunken floors, wastewater problems, broken pipes, dampness and mould, and doors not shutting.[98]

The third issue for tenants in post-quake Canterbury was the lack of security of tenure, a key component of the right to housing. The Residential Tenancies Act allows a landlord to give 90-days' notice without cause to terminate a tenancy.[99] This provision enabled landlords to terminate a tenancy in order to re-let it at a higher cost. This undermined tenants' security of tenure, with adverse consequences given the lack of housing supply and the high costs of renting. It adversely affected tenant wellbeing and community cohesion.[100] It also had wider impacts as tenants with children who

93 Elizabeth Toomey "Residential Tenancies" in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) 275 at 276.

94 Residential Tenancies Act 1986, s 59(1).

95 For a discussion of some of these cases, see Toomey, above n 93, at 276–289.

96 At 276.

97 Lois Cairns "Push to set up rentals register" (The Press, online ed, Christchurch, 24 January 2014).

98 Gartner, above n 83, at 11.

99 Residential Tenancies Act 1986, s 51(1)(d).

100 Gartner, above n 83, at 24.

were forced to move in such a situation had to change their children's school, impacting on their right to education. Although assistance with temporary accommodation was provided to homeowners while their homes were being repaired or rebuilt, renters did not routinely receive support and assistance to find and access adequate temporary housing.[101]

D Homeless

"Homelessness" is defined by Statistics New Zealand as living situations where people have no other options to acquire safe and secure housing: they are without shelter, in temporary accommodation, sharing accommodation with a household or living in uninhabitable housing.[102] This includes those who are sleeping rough, living in uninhabitable housing and living in overcrowded housing. This definition is intentionally wide – it goes beyond just those "living rough" and includes all people living in situations unacceptable for permanent habitation by New Zealand norms.[103] Before the earthquakes, it was estimated that around 3,750 people were homeless in Christchurch. By 2013, the figure had almost doubled and it was estimated that between 5,510 and 7,405 people were homeless.[104]

Other indicators of homelessness included the pressures on temporary or short-term accommodation. NGOs involved in providing social housing in Christchurch reported that people were staying longer in emergency and temporary accommodation because of the shortage of affordable rental accommodation.[105] For example, in 2013 the YWCA, which had never been full before the earthquakes, reported having a regular waiting list of 50 women plus their children.[106] In 2015, the HRC observed that 2,200 people were living in temporary accommodation (up 50 per cent from 2006), with 700 more people living in mobile homes and makeshift shelters.[107]

Many instances of increased homelessness were not caused directly by the earthquakes but by secondary displacement. For example, before the earthquakes there were six Child Youth and Family (CYF) homes providing supported housing for young people. Partly as a result of the earthquakes and

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101 Michael JV White and Andrew Grieve "Human Rights and Dignity: Lessons from the Canterbury Rebuild and Recovery Effort" in Simon Butt, Hitoshi Nasu and Luke Nottage (eds) *Asia-Pacific Disaster Management: Comparative and Socio-Legal Perspectives* (Springer, Heidelberg, 2014) 245 at 256.

102 Statistics New Zealand "New Zealand Definition of Homelessness" (July 2009) <www.stats.govt.nz>.

103 Human Rights Commission *Human Rights in New Zealand: Ngā Tika Tangata o Aotearoa* (2010), 210.

104 MBIE *Housing Pressures*, above n 78, at 1.

105 HRC *Monitoring Report*, above n 2, at 61.

106 Shelley Robinson "More women, kids, homeless in Christchurch" (NZ Herald, online ed, Auckland, 18 September 2013).

107 Human Rights Commission "Homelessness part and parcel of Christchurch social crisis" (30 April 2015) <www.hrc.co.nz>.

also from changes of use, by mid-2013, there were only three, making it very challenging to find supported housing for young people, especially 17 year olds who did not fall under the CYF mandate but were also not eligible for HNZ assistance.[108] Another example was the difficulty in finding housing for recently released prisoners. A privately-owned lodge, which had formerly provided accommodation appropriate for recently released prisoners, was re-purposed to be used primarily for migrant workers arriving in Christchurch for the Rebuild.[109]

There has yet to be a coordinated whole-of-system response to the increase in homelessness in Christchurch. This mirrors shortcomings at the national level in responding to the problem of homelessness. Homelessness is notoriously difficult to measure and respond to, but even today there remains no clear picture of the nature and extent of homelessness in New Zealand.[110] There is no national government strategy, let alone legislation, to respond to homelessness. Only two New Zealand local authorities have a specific homelessness strategy.[111] The Christchurch City Council does not have a homelessness strategy, although it does have a robust Social Housing Strategy,[112] and in 2016 it adopted an explicitly rights-based Housing Policy.[113]

Through a human rights lens, being homeless can be regarded as a symptom of unaffordable and inaccessible housing, as well as inadequate support for vulnerable and marginalised individuals.[114] As noted recently by the UN Special Rapporteur on the Right to Housing, homelessness is not just about housing, it is a broader "human rights failure."[115] Fulfilling the right to housing in cases of severe housing deprivation requires the Government to step in and provide housing as a last resort where people are unable to provide it for themselves. The provision of HNZ housing to those in need is one way in which the Government fulfils the right to housing for those who need assistance. So too

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108 EQ Impacts, above n 38, at [30].

109 At [30].

110 See Cross-Party Inquiry on Homelessness *Ending Homelessness in New Zealand: Final Report of the Cross-Party Inquiry on Homelessness* (10 October 2016); and Paul Bellamy "Homelessness in New Zealand" (Parliamentary Library Research Paper, July 2014). For an older study, see New Zealand Coalition to End Homelessness *Homelessness in Aotearoa: Issues and Recommendations* (October 2008).

111 Wellington City Council *Te Mahana: Ending Homelessness in Wellington: A strategy for 2014–2020* (2014); and Auckland Council *Auckland Council Homelessness Action Plan 2012-2015* (2012).

112 Christchurch City Council *Social Housing Strategy* (June 2007).

113 Christchurch City Council "Housing Policy" (2 November 2016) <www.ccc.govt.nz>.

114 Human Rights Commission, above n 103, at 210.

115 Leilani Farha "Homelessness is not just about housing - it's a human rights failure" (29 February 2016) Citiscope <citiscope.org>.

is the provision of the Accommodation Supplement.[116] When looking at the increase in homelessness in Canterbury, real questions arise as to whether the Government did enough to assist those with the most severe housing needs to realise their right to housing – was housing recognised as a human right or simply as a commodity?

IV REFLECTIONS ON NEW ZEALAND'S HUMAN RIGHTS FRAMEWORK

This part reflects on what the complexity of the challenges discussed above in realising the right to housing in post-quake Canterbury suggests about New Zealand's underlying human rights framework. It steps back from the detail of the housing challenges and offers some observations on the current framework, ultimately suggesting that what is required to strengthen that framework is a comprehensive human rights-based approach to disaster preparedness, response and recovery in New Zealand.

A Reflection one: Human rights beyond Government

The first and most positive reflection arising from post-quake Canterbury is the growing role of many different actors in the human rights space beyond central government. This reflects a shift from the orthodox view of human rights that individuals are the beneficiaries of rights, while the state alone is the duty-bearer. At the domestic level in New Zealand, this has typically meant that it is central government which has borne the primary responsibility for protecting individuals' human rights. In the context of the right to housing in post-quake Canterbury, however, a number of other actors beyond central government agencies eventually came to participate and engage in human rights dialogue.

At the grassroots level, many individuals and groups in Canterbury clearly appreciated that their housing situation raised human rights issues, even if the Government did not. At many of the protest marches in Christchurch, protestors carried placards with messages such as "Housing is a Human Right." Community groups formed almost organically to support people in resolving their concerns about housing rights.[117] As discussed above, the Quake Outcasts represented owners of uninsurable or uninsured land in the RRZ and used the language of rights in their litigation. Other organisations focused on issues of zoning and land status included the Brooklands Residents, 100% Rates Relief, the Red Section Owners Group and the Sumner Red Stickered Group.[118] Some organisations addressed EQC and insurance issues, including the Canterbury Communities' Earthquake Recovery

116 The Accommodation Supplement is a weekly payment which helps people with their rent, board or the cost of owning a home. See <www.workandincome.govt.nz>.

117 For a list of some of these organisations, see HRC *Monitoring Report,* above n 2, at Appendix 5. For comment on the role of community groups in the RRZ, see HRC *Red Zones Report*, above n 31, at 96–97.

118 See Sumner Community "Sumner Red Stickered Group" <sumnercommunity.co.nz>.

Network (CanCERN),[119] the Wider Earthquake Communities Action Network (WeCan),[120] and Insurance Watch.[121] More recently, in May 2016, EQC Fix was established, following a declaratory settlement between EQC and the EQC Action Group. EQC Fix is an independent public justice project whose overarching goal is to ensure that EQC meets its obligations under the Earthquake Commission Act 1993.[122] As well as these earthquake specific groups, existing organisations such as the Tenants' Protection Association continued their work advocating for the right to housing. It is notable that many of these groups sought to lobby and advocate not only at the domestic level, but also internationally. This reflected both a frustration at the lack of available avenues for domestic redress and also a growing awareness of the potential utility of international human rights monitoring mechanisms. For example, for New Zealand's universal periodic review in 2014, the University of Canterbury UPR Submission Group coordinated a submission, endorsed by 26 organisations, focusing on the human rights impacts of the earthquakes.[123]

Just as the complexity of life in post-quake Canterbury prompted grassroots engagement with human rights, so too did it lead to greater engagement with rights language at local government level. Until recently, both in New Zealand and around the world, local government and human rights have "rarely connected."[124] Increasingly however, human rights frameworks are coming to be seen as relevant to local government activities. As noted above, in response to housing issues in post-quake Canterbury, in 2016 the Christchurch City Council, building on its progressive Social Housing Strategy, adopted a new Housing Policy which lists one of its key principles as the "human right - to adequate housing that is secure, affordable, habitable, accessible, well located, and culturally appropriate."[125] This language reflects the core elements of the right to housing identified by CESCR in 1991.

A third actor engaging in the human rights space is local iwi, Ngāi Tahu, which played a significant role in post-quake Canterbury. Ngāi Tahu was responsible for facilitating the Iwi Maori Recovery Programme in partnership with CERA, Te Puni Kōkiri and the Maori Community Leaders Forum as part of the Recovery Strategy for Greater Christchurch. As noted by former Ngāi Tahu Kaiwhakahaere Mark Solomon in 2013, this partnership was "the best expression of the Treaty [of

119 See <www.cancern.org.nz>. CanCERN was disestablished in December 2015.

120 See <www.wecan-nz.com>.

121 See <www.insurancewatch.org.nz>.

122 See generally <www.eqcfix.nz>.

123 EQ Impacts, above n 38, at Annex A.

124 International Council on Human Rights Policy *Local Government and Human Rights: Doing Good Service* (2005) at 1.

125 Christchurch City Council, above n 113.

Waitangi] relationship" he had ever seen.[126] Although Ngāi Tahu's approach was not explicitly premised on human rights, it did put people at the centre, including by reference to the principle of "manaakitaka/caring communities."[127]

Another group of actors who eventually came to engage with human rights aspects of housing in post-quake Canterbury was businesses. Initially, there were real concerns about the adverse impact of businesses on peoples' right to adequate housing. In the early post-quake days, human rights seemingly played no part in business decision-making. As noted in part III, the actions of many businesses including insurance companies, landlords and building companies, had (and continues to have) a significant impact on the right to housing. Insurance companies had a particularly significant impact on people in Canterbury, with the HRC noting that "[t]he significance of the insurance model having such a large bearing on recovery cannot be underestimated."[128]

In recent years, there has been growing recognition not only that businesses may have a negative impact on the rights of individuals, but that businesses can also potentially have a huge role in ensuring that peoples' human rights are realised. In 2011, the United Nations adopted the UN Guiding Principles on Business and Human Rights.[129] The Principles are premised on the "protect, respect, remedy" framework, whereby states retain the primary duty to protect individuals from human rights abuses by third parties (including business); but businesses have a responsibility to respect human rights, and there needs to be greater access for victims to effective remedies. There are also industry-specific guidelines, which in the insurance and housing context, include the Principles for Responsible Investment 2006 and the UNEP Principles for Sustainable Insurance 2012.

For most businesses in Canterbury, thinking in human rights terms was a completely new experience; but prompted in large part by advocacy by grassroots organisations and the HRC, the recovery phase has resulted in some interesting developments. For example, grassroots group WeCan supported a number of individuals to file complaints about insurance companies' compliance with the human rights principles in the OECD Guidelines on Multinational Enterprises.[130] Although many of these claims are still in progress, and the individual claimants still await justice, the first settled claim resulted in the adoption by Arrow International, a private insurance company, of an external social

126 "Future Vision" (20 July 2013) Te Karaka <ngautahu.iwi.nz>.

127 Ngāi Tahu *He Huanui Ara Ake mō Waitaha – A Pathway to Recovery for Canterbury* (22 July 2011) at 2–3.

128 HRC *Monitoring Report*, above n 2, at 138.

129 Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework* A/HRC/17/31 (2011).

130 WeCan "Major NZ companies named in human rights claims" (Press release, 2 April 2015).

responsibility policy.[131] This policy commits Arrow to "respecting human rights in all client relationships" and to investigating any human rights complaints made under the policy.[132]

The final key actor beyond central government was the Human Rights Commission, in its role as New Zealand's national human rights institution. Although the HRC is part of the wider state sector, it operates as an independent Crown entity. The HRC took a strong leadership role in advocating for greater recognition of the human rights of those affected by the earthquakes. It published two major reports on the human rights impacts in 2013 and 2016.[133] Between September 2010 and April 2016, it dealt with 450 inquiries and complaints relating to the Canterbury earthquakes.[134] These complaints included difficulties dealing with EQC and private insurers, Government zoning decisions in relation to the RRZ and inadequate housing generally. The Commission also took the relatively novel step of intervening in the *Quake Outcasts* litigation,[135] and has been proactive in initiating wider discussion in New Zealand on business and human rights.

B Reflection Two: The Invisibility of Human Rights

In sharp contrast to the emerging engagement with human rights by actors beyond central government is the relative invisibility of human rights in the decision-making processes of the three branches of government: Parliament, the executive and the courts.

In 2011 Parliament enacted the CER Act. This Act (now repealed) governed many key decisions from 2011–2016, with the notable exception of the original RRZ decisions (see part III above). Two of the purposes of the CER Act were "to enable a focused, timely, and expedited recovery" and "to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities." While these purposes may have some degree of congruence with human rights principles, s 3 could have gone significantly further and explicitly provided that the recovery and restoration were to be based on human rights principles. Although there was a requirement in the Cabinet Manual when the CER Act was enacted that legislative proposals consider New Zealand's "international obligations,"[136] there is no evidence that serious consideration was given to these obligations in the drafting of the CER Act. Rather, human rights were largely invisible in the drafting and enactment processes.

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131 Arrow International "External Social Responsibility Policy: Respecting People and Communities" (November 2015) <www.arrow.com>.

132 At [3.2.4] and [6.2].

133 HRC *Monitoring Report*, above n 2; and HRC *Red Zones Report*, above n 31.

134 See Human Rights Commission "Canterbury Earthquake Recovery" <www.hrc.co.nz>.

135 Human Rights Act 1993, ss (5)(2)(a) and (j). The HRC typically intervenes in two to three cases each year.

136 Cabinet Office *Cabinet Manual 2008* at [7.60].

The invisibility of human rights is even more striking with central government decision-making, not least because it is the executive branch of government which enters into international treaty obligations on New Zealand's behalf. There are a number of examples of this invisibility. In relation to the RRZ, and as pointed out by the HRC in its submissions in the *Quake Outcasts* case, the Government was seemingly of the view that its decisions in relation to the RRZ simply did not engage human rights.[137] The impact of the RRZ decisions on individuals' right to housing was not a factor in decision making. While the right to property was implicitly considered, the right to housing was not. As noted above, this meant that some homeowners were left in a precarious position – either unable to afford to purchase a new house or, in the case of the uninsured in the RRZ, effectively stuck and unable to move on with their lives. Similarly, EQC did not appear to regard the right to housing as a relevant factor in its interactions with homeowners, with major consequences for habitability of homes. Likewise, the decision to leave tenants to the mercy of "the market" at a time of severe housing shortage does not reflect a commitment to respecting and protecting the right to housing.

In relation to the courts, although the right to housing was pleaded in the *Quake Outcasts* case, the courts, for the most part, simply did not engage with the right to housing, although there were references to the related right to be free from arbitrary interference with privacy and home (art 17 ICCPR). Although this may be partly explained by gaps in the legislative framework for human rights (see below), it also confirms the preference by the courts for engaging with the more familiar civil and political rights, rather than ESC rights. In some human rights contexts, even where there has not been direct statutory incorporation of the right at issue, New Zealand courts have used either the administrative law doctrine of mandatory relevant considerations or the broader statutory interpretation presumption that Parliament intends to legislate consistently with New Zealand's international obligations to enable some judicial scrutiny of international law obligations.[138] However, as observed by Claudia Geiringer and Matthew Palmer, in relation to ESC rights:[139]

> New Zealand courts have expressed a general reluctance to bring their judicial review powers to bear in the area of socioeconomic entitlement because of the "political" nature of social policy questions.

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137 Human Rights Commission "Submissions by the Human Rights Commission" submission in *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* CA 571/2013 (14 October 2013) at [71]–[72].

138 See Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66; and Claudia Geiringer "International Law through the lens of *Zaoui*: Where is New Zealand at?" (2006) 17 PLR 300.

139 Claudia Geiringer and Matthew Palmer "Human Rights and Social Policy in New Zealand" (2007) 30 Social Policy Journal of New Zealand 12 at 37.

More recently, it has been noted that, although there has been an increase in the number of cases relying on ESC rights, the courts remain reluctant to grant a remedy in the absence of explicit statutory incorporation.[140]

Human rights is therefore still far from being "mainstreamed" into decision-making processes in New Zealand. While the courts are hindered by the lack of statutory incorporation (for ESC rights in particular), there is less justification for the absence of human rights in decision-making by Parliament and the executive. Interestingly, in its 2016 report to the Committee on the Rights of the Child, the Government did at least assert that "[t]he Government is committed to ensuring human rights are at the forefront of on-going decisions around the recovery and rebuild of Canterbury."[141] However, a request for more information on how the Government was ensuring that human rights were at the forefront of decision-making elicited the unexpected response that there were "no processes specific to Canterbury and the earthquake recovery."[142]

C Reflection Three: The Need for a Human Rights-based Approach

The invisibility of human rights in post-quake decision-making in Canterbury suggests that fundamental change is required at the framework level. Although natural disasters have traditionally been seen as creating challenges related to the provision of humanitarian assistance in the immediate days and weeks after the event, increasing attention is being paid to the need for a human rights-based approach in the longer-term recovery phase and in preparedness for future events. This is important because often the human rights impacts of a natural disaster "are the result of inadequate planning and disaster preparedness, inappropriate policies and measures to respond to the disasters, or simple neglect."[143] As noted by the Quake Outcasts group, "it was certain government policies that actually exacerbated, if not created more suffering."[144] More broadly, the HRC noted that "many people found the disaster itself easier to deal with than the processes associated with the recovery and rebuild."[145] In order to mitigate these risks, the HRC has recommended that future disaster recovery frameworks should be founded on a human rights-based approach, the hallmarks of which are compliance with

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140 Margaret Wilson, Judy McGregor and Sylvia Bell "The impact of economic and social human rights in New Zealand case law" (2015) 21 Australian Journal of Human Rights 143.

141 *New Zealand Government response to the list of issues in relation to the Fifth Periodic Report under the United Nations Convention on the Rights of the Child* CRC/C/NZL/Q/5/Add.1 (23 August 2016) at [123].

142 Letter from Hon Nicky Wagner (Minister supporting Greater Christchurch Regeneration) to Natalie Baird regarding Government measures to incorporate human rights considerations into decision-making (23 May 2017).

143 IASC Guidelines, above n 26, at 2.

144 See Quake Outcasts New Zealand "About Quake Outcasts" (2011) <www.savemyhomenz.org>.

145 HRC *Red Zones Report*, above n 31, at 14.

human rights standards, and the principles of non-discrimination, participation, empowerment and accountability.[146]

1 *Human rights standards*

The first element of a human rights-based approach is compliance with relevant human rights standards. However, it is clear that there are some significant gaps in the applicable standards in New Zealand. First and fundamentally, as has been remarked upon elsewhere,[147] the NZBORA is limited because it protects only civil and political rights. Economic, social and cultural rights, such as the right to housing, are not protected by the NZBORA. Although New Zealand has ratified ICESCR, and so has obligations internationally to protect ESC rights, the lack of statutory incorporation at the domestic level makes it much harder for litigants to run successful rights-based arguments. This was amply demonstrated by the reluctance of the courts to consider the right to housing as of anything but marginal relevance in the *Quake Outcasts* case. This suggests that in the case of ESC rights, the NZBORA needs to be amended if there is to be meaningful domestic protection. Interestingly, in their proposed Constitution for Aotearoa New Zealand, although Geoffrey Palmer and Andrew Butler propose that the right to property should be included in the list of protected rights, the right to housing, along with other ESC rights, is treated as a "non-justiciable principle."[148] The rationale given is that "court processes are not always adequate to the task" of adjudicating or enforcing ESC rights such as the right to housing.[149] However, it is arguably partly because of the inability to enforce the right to housing in the courts that housing issues are still of such major concern in post-quake Canterbury.

A second shortcoming in domestic human rights protections is in the area of discrimination. Although the Human Rights Act 1993 (HRA) currently lists a fairly comprehensive 13 prohibited grounds of discrimination, the post-quake experience suggests the need for additional grounds. The exacerbation of existing socio-economic inequalities as a result of the earthquakes suggests that a ground that is currently missing from the HRA is "socio-economic status." Another possible additional ground would be a future-proofing "or other status" ground. A similar phrase is found in the discrimination provisions of international human rights treaties, including ICCPR art 2(1) and ICESCR art 2(2). These provisions enable a possible route for protection in the case of unjustified differential treatment against other identifiable groups of people. In Canterbury for example, it might have enabled the Quake Outcasts to frame their dispute from the beginning as involving unjustified

146 At 20.

147 Joss Opie "A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" (2012) 43 VUWLR 471.

148 Palmer and Butler, above n 15, see arts 104 and 106.

149 At 171.

discrimination on the grounds of insurance status. Those who still live in the RRZ could perhaps claim ongoing unjustified discrimination on the grounds of their zoning status.

A third limitation of domestic human rights protections, especially given the current narrow focus of the NZBORA on civil and political rights, is the failure to mainstream human rights throughout the statute book. While a strong bill of rights that protects both civil and political rights and ESC rights is highly desirable, this does not obviate the need for a rights-based approach in other statutes. For example, s 3 of the Education Act 1989 currently protects the right to free primary and secondary education. There is no reason why other statutes could not be similarly based on human rights principles. So for example, the Residential Tenancies Act 1986, which sets the framework for the landlord-tenant relationship, could state that an underlying principle of the Act is to protect the right to housing. As noted above, the CER Act could have drawn on human rights principles to frame its key purposes.

As well as these shortcomings in national laws for the protection of human rights, there are also gaps in New Zealand's obligations at the international level. While New Zealand has a reasonably respectable record of ratification, having ratified seven of the nine core human rights treaties and seven of the nine associated protocols, some of the human rights issues arising from the earthquakes fall in the areas where New Zealand has not yet ratified the relevant international treaty. For example, in relation to the right to housing, New Zealand has not ratified the Optional Protocol to ICESCR, which enables individuals to take communications to CESCR alleging that New Zealand has violated their rights.

2 Non-discrimination and vulnerability

A rights-based approach is premised on the principle of non-discrimination. As noted in the 2011 IASC Guidelines, "[p]eople are at their most vulnerable in time of crisis so preventing discrimination and abuse is vital."[150] However, international experience has shown that "pre-existing vulnerabilities and patterns of discrimination usually become exacerbated in situations of natural disasters."[151] This appears to be the case no matter the level of development of the country concerned; "[e]ven in developed countries, disasters have a knack of finding the poor and vulnerable."[152] This proved to be exactly the case in Canterbury, with the human rights impacts being felt more sharply by already vulnerable individuals and communities, resulting in exacerbation of existing social inequalities. For

150 IASC Guidelines, above n 26, at v.

151 At 2.

152 Charles W Gould "The Right to Housing Recovery after Natural Disasters" (2009) 22 Harv Hum Rts J 169 at 169.

individuals, these impacts were compounded in cases of intersectional vulnerability, where people were exposed to multiple factors of vulnerability at the same time.[153]

Low income households were particularly affected. As is the case elsewhere in New Zealand, Māori, Pasifika and people with disabilities in Canterbury were disproportionately represented in lower socio-economic groups, and many of these lived in the worst-affected areas in the east of Christchurch. Low income individuals and families were also more likely to live in rental accommodation which was inadequately built or maintained and more vulnerable to damage.[154] Once damage occurred, they had fewer available resources to put towards recovery, as they lacked assets, had little (if any) insurance and had fewer options to find a place to stay when they had to leave their homes.[155] In 2015, the Chief Executive of the Canterbury District Health Board noted that the earthquake recovery had "failed to address the housing needs of the region's poorest people, creating a vicious cycle of mental illness and dependence".[156]

Other vulnerable groups that experienced adverse outcomes included older people, migrants, women living in violent relationships and people with disabilities. For many older people, a key concern was the length of time taken to resolve housing and insurance issues given their age and stage in life. Many were worried that their houses would not be rebuilt or repaired during their lifetimes – "[u]nfortunately time is the one thing that is not on us older folk's side."[157] As the Rebuild phase got underway, large numbers of migrant workers arrived in Christchurch which added to the overall housing pressures. There were reports of Filipino migrant workers facing conditions akin to bonded labour, including living in sub-standard and overcrowded housing.[158] In 2014, it was reported that the continued lack of affordable rental accommodation had doubled the length of time that women and children spent staying at Aviva (formerly Christchurch Women's Refuge) and had also led to men breaking protection orders and returning to the family home.[159] The reduction in housing stock also impacted on the availability of social housing which could accommodate people with disabilities. A

153 Margaret MacDonald and Sally Carlton *Best practice guidelines for the prioritisation of vulnerable customers* (Human Rights Commission, 2016) [HRC "Vulnerability Guidelines"] at 2.

154 Nicola Shirlaw "Children and the Canterbury Earthquakes" (background paper, Child Poverty Action Group, February 2014).

155 Gartner, above n 83, at 22.

156 Cate Broughton "Canterbury's housing recovery neglects the poor" (The Press, online ed, Christchurch, 2 June 2015).

157 John Patterson "Open letter to the Powers in Canterbury on behalf of our older generations" (13 November 2014).

158 Tess McClure "Migrants treated like 'bonded labour'" (The Press, online ed, Christchurch, 26 August 2014); and James Liu "Rebuilding from the Ashes: Institutional Racism and the Christchurch Rebuild" (press release, 1 September 2014).

159 Shirlaw, above n 154, at 6.

consequence of this was that some young people with disabilities were inappropriately placed in aged-care and rest home facilities.[160] While this may have been inevitable in the short-term, there needed to be a mechanism to ensure that such people were prioritised for permanent arrangements.

A good example of a human rights approach to prioritising vulnerable individuals and groups in the post-disaster context is the HRC's 2016 "Best practice guidelines for the prioritisation of vulnerable customers."[161] When the HRC surveyed New Zealand insurers in order to understand how the industry was responding to the claims of vulnerable customers, the responses revealed variation in assessment of vulnerability. As a result of the HRC's findings, the vulnerability guidelines were developed. Although these are specific to the insurance sector, they do "have the potential to improve outcomes for vulnerable customers across all claims contexts and in the broader social services sector."[162]

3 Participation and empowerment

The third and fourth elements of a human rights-based approach – participation and empowerment – are closely related. Participation has been described as "the 'right of rights,' because it allows us to claim our other rights."[163] Participation is itself supported by various human rights including the right to freedom of expression which includes the right to seek, receive and impart information and the right to take part in the conduct of public affairs.[164] Key components of participation are good communication and access to information. Communication is critical, but in its 2016 report, the HRC noted that people remaining in the RRZ were "very dissatisfied" with the communication from agencies involved in the RRZ and that poor communication created "considerable stress" and hindered people's ability to recover.[165] In terms of access to information to support robust community participation, the Ombudsman and the Privacy Commissioner noted in their 2013 report that access to information is not just a "nice to have"; instead, it "enables individuals to engage effectively with government agencies, and to have a proper say in decisions that profoundly affect their lives."[166] A key advantage of participation is that "[t]he inclusion of affected people in post-disaster decision making can help to counter uncertainty, sense of loss and stress."[167] This is pithily captured in a slogan

160 EQ Impacts, above n 38, at [28].

161 HRC "Vulnerability Guidelines," above n 153, at 2.

162 At 1.

163 Alicia Ely Yamin "Suffering and Powerlessness: The Significance of Promoting Participation in Rights-Based Approaches to Health" (2009) 11(1) Health and Human Rights 5 at 6.

164 ICCPR, arts 19 and 25.

165 For further discussion, see HRC *Red Zones Report*, above n 31, pt 6.

166 Ombudsman and Privacy Commissioner, above n 73, at 6.

167 HRC *Red Zones Report*, above n 31, at 15.

regularly heard around Christchurch after the earthquakes: "Nothing about us without us!"[168] This community advocacy was a response to a sense that the Canterbury earthquake recovery was based on top-down central government decision-making, which did not take account of the voices of affected people in decision-making processes.[169]

Although one of the purposes of the CER Act 2011 was to enable community participation in the planning of the recovery, and a Community Forum was established for this purpose,[170] the Forum was not involved in some significant decisions, such as those involving the RRZ. Indeed, the RRZ decisions have been criticised for "insufficient consultation and a distinct lack of participation and engagement with the public," with the Government itself noting that its decisions were partly based on "the Government's assessment of what is best for the community".[171] One commentator has suggested that the inherent tension between community participation on the one hand and a time-bound recovery process on the other meant that the necessity of a timely recovery worked against the generation of meaningful community participation, with a resultant strain on democratic processes.[172]

Meaningful participation enables empowerment of rights-holders and means that those who are affected by the disaster can claim rights from particular duty-bearers rather than simply being passive beneficiaries and recipients of charity.[173] Empowerment involves building the capacity of all people to exercise their rights, either as individuals or as community members. Thus, empowerment requires building rights-awareness so that individuals and communities understand their rights and are supported to actively participate in the development of policy and practices which affect their lives. Human rights awareness across New Zealand generally is low, and although a national strategy for civics education was proposed by the Constitutional Advisory Panel in 2013, little has been done to implement it. As noted above, community advocacy for the right to housing in Canterbury has had the ancillary benefit of increased right awareness at the grassroots level, but much remains to be done.

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168 This saying has its origins in Central European political traditions. See for example Poland's 1505 constitutional legislation, *Nihil Novi*. It was later adopted by disability advocates in the 1990s, and has since come to be used more broadly in the social justice and human rights context to claim participation rights.

169 Human Rights Council *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21* A/HRC/WG.6/18/NZL/3 (4 November 2013) at [15].

170 Canterbury Earthquake Recovery Act 2011, ss 3(a) and 6.

171 White and Grieve, above n 101, at 257.

172 See Sally Carlton "Share an Idea, spare a thought: Community consultation in Christchurch's time-bound post-earthquake rebuild" (2013) 1(2) Journal of Human Rights in the Commonwealth 4.

173 IASC Guidelines, above n 26, at 2.

4 Accountability

The final element of a rights-based approach is accountability. This requires monitoring and evaluation to ensure compliance of government actions with the applicable human rights standards. A good example of exactly such a monitoring system can be found in the HRC's 2013 report, which sets out a comprehensive guide to monitoring of economic and social rights following the earthquakes.[174] To date however, the Government itself has not taken a human rights approach to monitoring and evaluation in Canterbury.

In addition to monitoring, accountability also requires effective remedies for human rights violations. However, partly as a result of New Zealand's weak human rights standards (especially for ESC rights), there has been a lack of effective remedies for individuals whose right to housing was breached. Proceedings under the Human Rights Act are only available in cases of discrimination on one of the 13 prohibited grounds. Although the Ombudsman has the power to investigate complaints made against core government departments and public sector agencies, and has used its powers extensively in the post-quake context, it can only make recommendations rather than binding orders.[175] Even where international remedies are available, domestic remedies need to be exhausted first, and the views of an international treaty body are recommendatory only.

In the absence of rights-specific remedies, other remedies were used in post-quake Canterbury in order to achieve a human rights outcome. This was exemplified most obviously in the *Quake Outcasts* litigation, which, while clearly involving the right to housing, was determined on judicial review grounds. Similarly, for tenants in sub-standard housing, the Residential Tenancies Act 1986, the Health Act 1956, the Housing Improvement Regulations 1947 and the Building Act 2004 could potentially have been used to enforce their right to adequate housing.[176] However, in some cases, there was simply no remedy available. For the RRZ decisions, there was no established appeals mechanism for challenging the RRZ decisions, with the practical result that, aside from the Quake Outcasts and those who opted to remain in the RRZ, the large majority of those in the RRZ simply accepted the Government's offer.

Even in the absence of a strong legislative framework for ESC rights protection in New Zealand, the Government could still have chosen to take a human rights-based approach to its decision-making processes in post-quake Canterbury. Indeed, in 2012 CESCR recommended that New Zealand "adopt a human rights approach to reconstruction efforts."[177] In its 2013 report for the UPR process, although

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174 HRC *Monitoring Report*, above n 2, at 161–163.

175 See Anand Satyanand "The Ombudsman Concept and Human Rights Protection" (1999) 29 VUWLR 19.

176 For further discussion, see Lyndon Rogers *Paper Walls: The Law that is Mean to Keep Rental Housing Healthy* (Social Justice Unit of the Anglican Diocese of Christchurch, November 2013).

177 Committee on Economic, Social and Cultural Rights, above n 13 at [21].

the Government identified that responding to the Canterbury earthquakes was one of its six key priorities, it described that priority as "[e]nsuring any human rights impacts of the Canterbury Earthquakes are accounted for in the on-going decisions around the rebuild"[178] – hardly language that suggests an all-encompassing rights-based approach. This is disappointing because it clearly indicates the marginalisation of human rights in central Government decision-making and policy processes.

V CONCLUSION

As demonstrated by the November 2016 Kaikōura earthquake, New Zealand remains highly susceptible to devastating and destructive earthquakes. It is therefore important to ensure that New Zealand's human rights framework is robust enough to respond when natural disaster strikes. However, the challenges in protecting the right to housing in post-quake Canterbury reveal some significant gaps in New Zealand's underlying human rights framework.

Although human rights language is now being used by individuals and communities at the grassroots level and actors beyond central Government are increasingly thinking in human rights terms, human rights remain surprisingly invisible in central Government decision-making around disaster preparedness, response and recovery. Worryingly, this is despite Government rhetoric to the contrary. This invisibility suggests that an explicit human rights-based approach is needed to ensure that human rights are truly at the forefront of Government decision making, rather than simply being asserted to be so. Such an approach would require stronger human rights standards, including the incorporation of ESC rights, such as the right to housing into the NZBORA, the extension of the prohibited grounds of discrimination in the NZBORA and the HRA to include socio-economic circumstances, and the mainstreaming of human rights across New Zealand's statute book. Greater access by rights-holders to specific and effective remedies for human rights violations is also needed. Particular attention must be paid to vulnerable and marginalised communities so that their needs are prioritised in the post-disaster context. A human rights-based approach also requires compliance with the principles of non-discrimination, participation, empowerment and accountability. As noted by the HRC, a rights-based approach is "relevant to everyone, everywhere, all the time."[179]

The ongoing and seemingly intractable nature of housing issues in post-quake Canterbury suggests an underlying fragility implicit in New Zealand's framework for the protection and promotion of human rights. While individuals, communities and other actors are increasingly engaged in constructive human rights dialogue, what is urgently needed is more authentic commitment and deeper engagement from central Government to a rights-based approach in post-disaster decision making. Such an approach will, if used to its full potential "protect life, limit damage, and, potentially,

178 *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* A/HRC/WG.6/18/NZL/1 (8 November 2013) [4].

179 HRC *Red Zones Report,* above n 31, at 8.

embed resilience in communities likely to suffer."[180] In other words, it will help to prevent further human rights fault lines in subsequent natural disasters.

180 Christy Shucksmith "Methods to Incorporate Human Rights Law into Disaster Prevention and Reduction Strategies" (28 February 2017) EJIL:Talk! <www.ejiltalk.org>.