

11 December 2015

Hon David Cunliffe
Chairperson
Regulations Review Committee
Parliament Buildings
Wellington

For: Acting Clerk of the Committee, David Fraser

Dear Mr Cunliffe

Inquiry into Parliament's legislative response to future national emergencies

1. Thank you for the opportunity to present submissions on 22 October 2015 and the invitation for the Law Society to provide further information. During the hearing and by way of email dated 27 October 2015 from the Acting Clerk you sought:
 - (a) comments or speaking notes on matters traversed by James Wilding in opening;
 - (b) examples of powers in the Canterbury Earthquake Recovery Act 2011 that could have been narrowly tailored, were under-utilised or threatened to be used in a way that impeded progress; and
 - (c) the Law Society's view regarding how parties affected by extraordinary powers should have input into reviews.

Matters traversed by James Wilding

2. The focus was on term of reference 11, being the lessons learnt from the implementation of recovery legislation after the Canterbury earthquakes. Our view was qualified, because the Law Society does not purport to know all the lessons learnt. Many are yet to be learnt. Seven aspects were touched upon.
 - i. The need to learn from the past*
3. The 22 February 2011 earthquake occurred against the backdrop of many serious emergencies and earthquakes. Such events tend to demonstrate that lessons from the past

have not been properly learnt. In the context of the Pike River Coal Mine Tragedy, issues included:

- (a) the regulatory agencies and mine operator not ensuring there were proper protections against an emergency;
 - (b) they, and certain other agencies involved in the emergency response, not being sufficiently prepared to cope with an emergency of that type;
 - (c) some of the many agencies involved in the emergency response were not sufficiently conversant with each other. Despite much effort, there was inadequate practical, cross-agency training to ensure proper control of and response to the emergency.
4. The Pike River Royal Commission included four recommendations (13 through 16), directed at emergency preparedness and response. Themes were:
- (a) The need to develop, in advance of an emergency, a current and comprehensive emergency management plan, that is regularly audited and tested.
 - (b) That plan needed to be compatible with the coordinated incident management system (CIMS) used by emergency services and the police. That system needed to be reviewed and rigorously tested by regular practical exercises involving all relevant agencies.
 - (c) Operators of mines needed to have appropriate, modern, emergency management equipment.
5. The response to the Christchurch earthquakes was heroic, but themes similar to those at the Pike River Coal Mine Tragedy were apparent:
- (a) Inadequate steps had been taken to prevent or minimise risk and damage. Potentially unsafe buildings had not been strengthened for years, some with dangerous facades. There had been inadequate impetus for rectification, despite the known earthquake risk in the region and across much of New Zealand.
 - (b) Anecdotally it appears there may have been inadequate control at some sites.
 - (c) Some resources were not properly utilised. An anecdotal example, which may seem minor but has substantial human impact, was the relatively prompt allocation of portaloos to some areas where there was little damage and functioning domestic sewers yet inadequate allocation to more damaged areas.
6. There will be many lessons from the Canterbury earthquake. Whether by commission of inquiry or otherwise, one of the key goals during a recovery stage should be to learn all that can be learnt from a disaster and put in place measures to help prevent, or minimise the effects of, a recurrence. That should be provided for in legislation.¹

¹ The Civil Defence Emergency Management Act 2002 did not sufficiently achieve that purpose.

ii. Large scale emergency recovery requires a lead agency with appropriate tailored powers

7. The scale of the emergency was such that a body was required that could coordinate and direct recovery, including by being a meaningful point of contact for dissemination and receipt of information. It needed powers that were tailored to the circumstances. That tailoring is apparent to a degree in the Canterbury Earthquake Recovery Act 2011, for example:
 - (a) a purpose provision (s 3) and the corresponding restriction of the exercise of powers to those purposes (s 10);
 - (b) the need for a recovery plan to be developed for the Christchurch CBD, amongst other things in consultation with affected communities (s 17);
 - (c) the supremacy of recovery plans (s 26);
 - (d) the ability to commission works, including erecting and demolishing buildings (s 38);
 - (e) the ability to require structural surveys of buildings (s 51); and
 - (f) the ability to acquire and dispose of land (ss 53 and 54).
8. Many of those powers would be of little relevance to some emergency contexts, for example an off-shore oil spill or an infectious disease outbreak.
9. An Act which confers all powers necessary for every emergency would be either very long and detailed or too broad. It would risk conferring substantial power to an undesirable level.

iii. Setting up such an agency and the powers to be granted are matters for Parliament

10. The lead agency had extraordinary powers that continued beyond the immediate life-threatening emergency. Many were coercive in nature and suspended well-established and important rights. Those are matters for Parliament, rather than the Executive exercising discretions provided by legislation.
11. The extent to which extraordinary powers are necessary in a post-emergency phase and the checks and balances required are best assessed by a robust democratic Parliamentary process. Tellingly, in the case of the Canterbury Earthquake Recovery Act 2011 a truncated but adequate process was possible in 2011. There is a separate question whether a more extensive process ought to have occurred later.
12. Such a process also allows for expert input and helps to ensure that those applying the legislation are informed about how and when the powers should be used.

iv. There is a need for effective consultation by the lead agency during the recovery period

13. Much research shows the importance of community involvement in emergency recovery. The community is likely to have a good understanding of and willingness to address some of the on-the-ground and longer term issues. Without its involvement a successful recovery is likely

to be more difficult. There have been many reports that members of the Christchurch community do not feel they have been listened or responded to.

14. Problems complained of or predicted several years ago in Christchurch and that have eventuated so far include:
- (a) Property owners, especially within the CBD, reporting frustration at not being involved in planning, including the development of the blueprint. Some complained of selling land to CERA under threat of compulsion. Similar themes were expressed in relation to the domestic red zone. It is unclear what will happen to much of the land acquired.
 - (b) The relocation of businesses on a semi-permanent or, in some cases, seemingly permanent basis outside the CBD.
 - (c) The existence of substantial areas, particularly to the eastern suburbs, where roads, sewers and properties have not been repaired or adequately repaired. Life is without doubt very difficult for many residents.
 - (d) Substandard repairs. It is now suggested that 6,500 homes need further repairs.
 - (e) Serious and ongoing health and social effects (see below).
 - (f) Major anchor projects for example the sports stadium, the Metro sports centre, the Convention Centre and the Frames have not been delivered or will not be delivered within or close to the timeframes announced.
 - (g) Untimely decision-making and untimely or inadequate provision of meaningful information.²
15. Such problems might have been minimised by proper consultation that identified and responded meaningfully to the issues. Without understanding the issues they cannot be addressed by good planning and implementation.³

v. *The lead agency must be subject to robust reviews of its performance*

16. The Canterbury Earthquake Recovery Act 2011 provides for regular reviews of the Act and its operations.
17. Those reviews have not resulted in problems such as those referred to above being properly addressed. Recovery legislation ought to include a robust review mechanism, which includes proper consultation with those affected by decisions and requires legitimate problems that are identified to be addressed.

² Complaints have been made that much information provided by the lead agency is worded in such a way that it is purely aspirational, or lacks tangible meaning or is unreliable.

³ The Law Society is not in a position to comment on the lead agency's internal planning and implementation processes.

vi. There is a need to understand and where appropriate address the many potential impacts of an emergency

18. In Christchurch property issues received significant attention, but overall health and social effects were either not well understood or not well addressed in many cases. Recovery mechanisms should enable an assessment of all the possible impacts of an emergency, both short and long term, and ensure they can be addressed appropriately.
19. The lead agency should have subject matter experts (for example, planning, geotechnical, medical and social science) at a decision-making level. At the least they need to have direct input into decision-making. The issues are too important for their contributions to be diluted.

vii. Recovery legislation ought to be limited to the extent and duration necessary to achieve its purpose

20. Suspension of rights and the imposition of external control can contribute to uncertainty and resentment. It impedes private sector progress. It is no guarantee that the on-the-ground and longer term issues are being identified and addressed. It is also unsatisfactory for citizens in some areas to have rights others do not.
21. Rights should be re-introduced and external control relinquished as soon as reasonably possible.

Examples of where powers in the Canterbury Earthquake Recovery Act 2011 could have been narrowly tailored, were underutilised or were used in an unhelpful way

22. Below are examples of ways in which some of the issues identified above might be addressed. They cover six areas: the purposes of the Act, the allocation of power, appeal rights, consultation and communication, complaints and reviews. They are designed to work together, for example a purpose provision that includes the restoration of rights as soon as possible and review provisions that will include an assessment against the purposes.
23. They are not intended to be a criticism of the holders of the offices of responsible Minister or the chief executive under the Act. The focus is the design of the legislation. The quality of the drafting of the legislation, given the pressured circumstances in which it was drafted, is acknowledged.
24. While the point might be made that many of the issues that have arisen are operational rather than legislative, reshaped legislation would help ensure that the issues are less likely to arise and are more likely to be addressed if they do arise.
25. Overall, where extraordinary powers are conferred there needs to be a more effective suite of checks and balances, at a legislative, policy and operational level.

i. Purpose provision

26. Section 3 sets out the purposes of the Act. It operates in conjunction with section 10 which requires that the Minister and chief executive exercise their powers, rights and privileges in accordance with those purposes.

Example 1

27. It is important to ensure a focus on the extent to which extraordinary powers are needed and when and how they ought to be truncated or cease. The purpose should include the restoration as soon as possible of any rights that have been suspended, limited or modified during the emergency and by the Act, including the restoration of rights:
- (a) affirmed by the New Zealand Bill of Rights Act 1990;
 - (b) conferred by any other enactment;
 - (c) conferred by international treaties to which New Zealand is a signatory.

Example 2

28. The recovery contemplated by section 3 can only occur if the potential impacts of the emergency are identified, assessed and where appropriate addressed. The purposes provision should include the ongoing assessment of the possible negative impacts of an emergency and then protecting against, addressing and, if that is not possible, mitigating those impacts.
29. That does not mean that the lead agency, in this case CERA, needs to protect against, address and mitigate those impacts itself. It could liaise with other agencies which might more naturally undertake those tasks. However, it is well placed to help coordinate and identify where agencies need help.

Example 3

30. A purpose ought to be the gathering and dissemination or notification to the appropriate people or agencies of information that the lead agency holds that may help prevent or minimise the impact of future emergencies.

ii. Allocation of power under the Act

31. The Act focusses very substantial powers in the Minister and the chief executive. Their functions, provided for in sections 8 and 9 respectively, are broad and intrusive. Those powers and functions are coupled with truncated appeal rights.⁴
32. Provision of such powers may be desirable in the immediate post-emergency period, but later becomes increasingly discordant with New Zealand's democratic values. Greater accountability is desirable.

⁴ Sections 68 and 69.

33. The concentration of power also means there is limited subject matter expertise (for example planning, geotechnical, medical and social science) at the decision-making level. The result is that power may be used inappropriately or under-utilised.

Example 4

34. The lead agency should be governed by a board, the members of which include community and subject matter experts, to which board the chief executive is accountable. That board ought to be accountable to the Minister.

iii. Appeal rights

35. During and immediately after an emergency, appeal rights may sometimes legitimately be truncated. However, the rule of law, international convention and section 27 of the New Zealand Bill of Rights Act 1990 clearly contemplate appeal rights existing outside of the actual emergency and immediate emergency response.
36. There may be a concern that appeal rights can cause delay. But the better view is that concerns about delay are outweighed by the advantages of appeals. The ability to appeal results in enhanced decision-making, regardless of whether appeals are pursued. Appeals can correct wrongs where successful and result in guidance regardless of success.
37. Pre-existing legitimate concerns about planning processes in Christchurch are in the longer term better addressed by a review of planning legislation and processes, rather than using single region emergency legislation long after the emergency has passed.

Example 5

38. Post-emergency decisions made under the Act should be appealable to the extent that they would ordinarily be. If there is justifiable concern about the impact of delay, a speedy independent first instance review mechanism could be provided for in the Act.

iv. Consultation and communication

39. Issues with consultation have been raised. The case law and legislation regarding consultation and what is required in order for it to be meaningful is of little benefit if there is no consultation obligation or the obligation cannot be enforced.
40. There is a related concern about communication. Poor communication has been described as a major and consistent complaint. Section 30 of the Act provides that the chief executive may disseminate information and advice on matters relating to work and activities under the Act. That power is subject to consideration of issues of confidentiality and commercially sensitive information. Other bodies, for example local government, are subject to similar limitations yet are able to operate in a more open way than the lead agency.
41. The lead agency has been reported as having 25 staff working in communications in 2015. It has stated that the communications budget had almost doubled in 2015 because it will be winding down next year bringing a *“need to keep the public informed on this major change and what it means for them.”* This suggests a one way flow of information. In contrast, the

Canterbury Communities' Earthquake Recovery Network said that the lead agency could “*still do more to understand how and what it is that the community want and need to know.*” This suggests the need for a two way flow of information.⁵

Example 6

42. The Act ought to include enhanced consultation obligations, which make clear that the lead agency ought to consult with those who may be affected by its decisions in a way that is meaningful. A possibility is a streamlined version of the consultation provisions contained in sections 82 to 87 of the Local Government Act 2002.
43. As part of that consultation, at an operational level, there ought to a communications officer with responsibility for ensuring that relevant information reaches those affected, and reporting back to the lead agency what those affected understand the information to mean and issues and concerns raised by them.

Example 7

44. The Act ought to impose an obligation, rather than confer a discretion, on the chief executive to provide or make publicly accessible in a timely manner tangible information about its activities and plans, except where such a matter is able to be legitimately withheld for recognised reasons. Such withholding ought to be reviewable, at least by the Minister.

v. Complaints

45. Some of the complaints about the post-emergency operation of the Act involve low level issues that might have been addressed by swift intervention by a statutory officer, preferably of some standing, with authority to investigate, access information and address grievances or require that they be addressed.⁶
46. One possibility is an ombudsman. Another possibility would be the equivalent of District Inspectors of Mental Health, being statutory officers who perform an on-the-ground role of investigating complaints of breaches of rights. Regardless of the option chosen, it is important to avoid an overly bureaucratic process.

Example 8

47. Those affected by the use or non-use of the powers in the Act should have the ability to complain to a properly resourced independent statutory complaints officer or ombudsman with meaningful powers of intervention.

vi. Review provisions

48. Sections 88 and 92 of the Canterbury Earthquake Recovery Act 2011 provide for quarterly reports on the operation of the Act and annual reviews on the operation and effectiveness of

⁵ <http://www.stuff.co.nz/the-press/business/the-rebuild/70266198/Cera-doubles-its-communications-budget>

⁶ The power of the chief executive under s 32 of the Act to investigate any matter or cause any matter to be investigated is not seen as a complaints mechanism. If it is, then it has been unsuccessful.

the Act. They do not expressly focus on the Act's purposes nor do they expressly require consultation with those affected by the emergency and the powers under the Act (whether used or not).

49. Both sections place the obligation to carry out the review on the Minister responsible for the administration of the Act, yet it is the Minister who holds much of the power under the Act. The lack of independent review in the context of extraordinary powers is undesirable.

Example 9

50. The review provisions ought to require an independent assessment of the Act and its operation against the purposes of the Act. That assessment ought to include assessment of the extent to which there are problems identified that are not being addressed or properly addressed.
51. The reviewer will need to be able to access information held by the lead agency. It is preferable that the review be undertaken by a body that includes a suitable expert and a community representative.

Example 10

52. The review mechanisms ought to require that that assessment is carried out after consultation with those who are affected by the Act. In addition to various state agencies and local bodies, those consulted ought to include:
- (a) representatives of affected communities;
 - (b) representatives of those involved in assessing and addressing the impact of the emergency;
 - (c) any ombudsman or other official who works with or has received complaints from members of the affected communities; and
 - (d) a statutory complaints officer or ombudsman appointed under the Act.

How parties affected by extraordinary powers should have input into reviews


53. The Act contains a number of mechanisms for community input, directly and indirectly. They include:
- (a) regular meetings of a community forum of people invited by the Minister (s 6);
 - (b) cross-party Parliamentary forums (s 7); and
 - (c) the preparation of a recovery plan by the Christchurch City Council, in consultation with the affected communities (s 17).
54. There is no express community consultation required for the purpose of the quarterly and annual reviews conducted under sections 88 and 92.

55. Community input into the operation of the Act and reviews is best enhanced by a combination of mechanisms, including those referred to above:
- (a) the lead agency being led by a board that includes community members and subject matter experts;
 - (b) access to a statutory complaints officer or ombudsman, who can in turn be consulted during reviews;
 - (c) appeal rights, the resulting decisions from which can be taken into account operationally and during reviews; and
 - (d) reviews that involve consultation with those listed under the heading "*Review provisions.*"

Concluding comments

56. Where extraordinary powers are conferred, a far greater suite of checks and balances is required. As the emergency recedes, the checks and balances should increase and the powers truncated and ultimately cease.
57. Concern might be expressed that the examples given would result in a lead agency that has duties and accountability that fetter its ability to be responsive. The better view recognises that although there were many benefits to having a lead agency in Christchurch, there were also many problems. An agency with limited accountability and that was intended to have a relatively short duration has been in existence for far longer than intended. Its impact will be felt for years.
58. More conventional arrangements for the wielding of power and accountability, albeit with some streamlining, are likely to result in better decision-making and a better recovery for communities affected by emergency.
59. The Law Society is happy to discuss these issues further. If that would assist, please contact the Law Society's Law Reform Manager (vicky.stanbridge@lawsociety.org.nz / 04 463 2912) in the first instance.

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized initial 'C' followed by a long horizontal line.

Chris Moore
President