

31 July 2015

Hon David Cunliffe  
Chairperson  
Regulations Review Committee  
Parliament Buildings  
**Wellington**

**Re: Regulations Review Committee's Inquiry into Parliament's legislative response to future national emergencies**

### Introduction

1. The New Zealand Law Society welcomes the opportunity to make a submission on the Interim Report of the Regulations Review Committee's inquiry into Parliament's legislative response to future national emergencies. The Law Society's Rule of Law Committee has considered the interim report.

### Continuing concerns

2. The Law Society continues to have the same concerns as were indicated in its letter dated 30 January 2015 to the Regulations Review Committee. The Law Society has serious reservations as to the feasibility of achieving the stated goal of the inquiry, namely "to provide a framework to legislate the powers necessary for recovery after the lifting of a state of national emergency".<sup>1</sup>

### *Breadth of terms of reference*

3. As stated in the Law Society's letter of 30 January, the terms of reference of the inquiry, and the issues they give rise to, are very broad. Natural disasters and emergencies occur in many and widely different forms. A pandemic disease outbreak, a massive oil spill, a terrorist act or a major earthquake are each likely to require quite differing responses and emergency powers. It is noted that the interim report refers to some 19 different types of emergency, plus an omnibus category of "Emergencies undefined or broadly defined to include threats to public safety, death or serious injury, damage to property or the environment".<sup>2</sup>
4. The extent and variety of statutory emergency powers contained in the comprehensive catalogue in the interim report also graphically illustrate this. It is acknowledged that in its earlier letter the Law Society suggested the best place to begin the intended inquiry was a catalogue of the statutory provisions that apply to various types of emergency.<sup>3</sup> That letter did, nevertheless, sound a caveat as to how far generic legislation could cover a wide range of differing types of emergencies. The Law Society considers that it would in fact be very difficult for generic legislation to cover all of them.

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<sup>1</sup> Inquiry into Parliament's legislative response to future national emergencies: Interim Report of the Regulations Review committee, 7 May 2015, at p 2.

<sup>2</sup> Interim report, pp 8-9.

<sup>3</sup> NZLS letter 30.1.15, p 2.

*Law Commission's report December 1991*

5. The interim report makes no reference to the Law Commission's Final Report on Emergencies.<sup>4</sup> This report was a substantial and wide-ranging one which examined:
  - various types of emergencies;
  - existing emergency legislation;
  - sources of power in an emergency;
  - the exercise of executive and legislative power in an emergency; and
  - the standards and safeguards that should be included in the enactment of emergency legislation, including the protection of rights and freedoms.
6. The Law Commission considered but did not recommend a generic national emergency statute. Instead it recommended a sectoral approach whereby emergency legislation would be tailored to the needs of particular emergencies.
7. The Law Commission's report should be carefully considered for the purpose of the Committee's inquiry. The issues considered in the Commission's report and its recommendations remain largely valid. Indeed, it would be appropriate and beneficial for the inquiry to be referred to the Law Commission for consideration and an updating report.

*Overseas models*

8. An analysis of comparative overseas models involving legislation governing emergencies could also be useful. However, this would be likely to be a fairly complex exercise.

*Canterbury Earthquake Recovery Act 2011*

9. The Law Society considers that the Canterbury Earthquake Recovery Act 2011 (the 2011 Act) and the issues this statute and the administration of it gave rise to would provide a more feasible initial basis for the Committee's inquiry, or any other review. This legislation provides a workable template to start from and the experience of its administration enables an assessment of the adequacy of the exercise of the emergency powers it provided for. Valuable lessons will have been learned from the mistakes and decisions made under this legislation, including problems with delegated legislation.
10. On 2 July 2015 the Government announced<sup>5</sup> a new plan for the rebuild of Christchurch and a new entity, Regenerate Christchurch, to take over the management of the central city rebuild from the Canterbury Earthquake Recovery Authority (CERA). A bill to replace the 2011 Act is to be introduced this year, entitled The Greater Christchurch Regeneration Bill. This would formalise the transition of CERA's functions to other government agencies, local councils and Ngai Tahu. This plan and proposed bill supports the submission above that a focus on the 2011 Act would be the better initial basis for the Committee's inquiry.
11. Having said that, the Law Society sounds a caution about the extent and duration of both the 2011 Act and the proposed bill. Emergency legislation ought not to continue after an emergency has passed, for any longer than is absolutely necessary. Normal democratic and administrative processes should be restored as soon as possible.

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<sup>4</sup> Law Commission Report No. 22, December 1991

<sup>5</sup> Announcement made by the Prime Minister, the Hon John Key.

12. It is also to be noted that Parliament was able to pass the 2011 Act and its 2010 predecessor, the Canterbury Earthquake Response and Recovery Act 2010, within relatively short timeframes.<sup>6</sup> So any tailored emergency legislation could be expected to be passed in an even shorter timeframe in the future.
13. A recently published book by two members of the Faculty of the School of Law, University of Canterbury, includes discussion of the 2011 Act.<sup>7</sup> The authors conclude<sup>8</sup> that “*the Act provides an excellent precedent for further natural disasters*”. The authors also discuss some caveats to this conclusion based on experience from the operation of the statute, including court cases relating to the interface of public, property and resource management law and two specific issues as to waste disposal and displaced landowners, which they consider will need to be addressed for the future.

*Proposed new system for the emergency management of buildings*

14. In addition, the Government has recently released<sup>9</sup> a discussion document relating to a new system for the emergency management of buildings following a major disaster or emergency, based on the lessons learned from the Canterbury earthquakes. This further serves to highlight that a sectoral rather than generic approach to legislation dealing with national emergencies is more appropriate and feasible. The proposals in this discussion document include:
- a review of the use of emergency powers;
  - how powers should transition to the local authority after the emergency event; and
  - effecting a significant improvement on what occurred in Christchurch in 2010 and 2011 so as to ensure that the powers, responsibility and legal tests will be clearer.

**Practical aspects**

15. The Law Society is also concerned that in considering legislative initiatives the practical aspects of emergency management are not overlooked. The emergency responses to recent major emergencies such as the Pike River Coal Mine tragedy, the Christchurch earthquakes and the Rewa sinking, revealed significant problems with, amongst other things:
- the chain of command;
  - the expertise of decision makers;
  - the relationships between emergency responders;
  - the training, including inadequate multi-responder combined training;
  - emergency relief to those affected; and
  - the availability of suitable provisions and equipment.
16. Those aspects, including the necessary funding, will warrant attention.

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<sup>6</sup> The 2011 Act was passed 55 days after the 22 February 2011 Canterbury earthquake.

<sup>7</sup> *Legal Response to Natural Disasters*, Thomson Reuters, 2015, Jeremy Finn & Elizabeth Toomey.

<sup>8</sup> *Ibid*, at p 347.

<sup>9</sup> On 19 May 2015, announced by the Minister of Building and Housing, Hon Dr Nick Smith.

## Conclusion

17. However the proposed inquiry by the Committee is progressed, a basic concern will be the relationship between any generic statute governing national emergencies and the large number of specific emergency statutes and regulations. This is an important and potentially difficult issue. Indeed, given the large number of statutes on the statute book relating to emergencies of widely differing types, the Law Society considers it is difficult to see how any generic statute could usefully be designed.
18. A further concern is that an inquiry as proposed by the Committee runs a substantial risk of being unmanageable and beyond its resources. As the Law Society understands it, at present there is no Minister or government department responsible for the proposed inquiry.
19. The Law Society also has concerns as to the precise definition of the problems sought to be addressed by the inquiry. As stated, the issues are very general and wide-ranging and in the Law Society's view the inquiry currently lacks focus.<sup>10</sup> A proper problem definition is needed before substantial work on the inquiry can proceed. Often a broad outline of the proposed bill can assist in identifying the issues that need to be addressed. Consultation with many government and other agencies responsible for, affected by or having a substantial interest in existing emergency statutes will be required to adequately achieve the purpose of any workable generic legislation.
20. Regardless of the course of the inquiry, practical aspects that affect emergency response, including training, will warrant attention.
21. If you wish to discuss the above comments please do not hesitate to contact the convenor of the Law Society's Rule of Law Committee, Austin Forbes QC, through the Law Reform Manager, Vicky Stanbridge ([vicky.stanbridge@lawsociety.org.nz](mailto:vicky.stanbridge@lawsociety.org.nz) / 04 463 2912).

Yours sincerely,



Kathryn Beck  
**Vice President**

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<sup>10</sup> Reference is made to the Legislation Advisory Committee Guidelines 2014 Part I, which emphasises that the problem of definition is fundamental to any proposed legislation. The broad policy objective must be clearly defined and discernible.