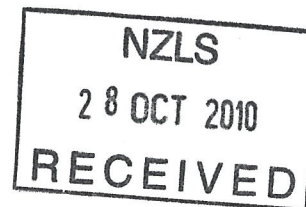




Office of the Attorney General

27 OCT 2010



Mr Jonathan Temm
President
New Zealand Law Society
PO Box 5041
Lambton Quay
WELLINGTON 6145

Dear Mr Temm

CANTERBURY EARTHQUAKE RESPONSE & RECOVERY ACT 2010

Thank you for your letter of 30 September 2010 about the above-named Act.

As Attorney-General, with responsibilities for the rule of law, I am mindful of the concerns that you raise. I continue to review the Orders in Council as the situation in Canterbury progresses.

I consider that Orders made under the Act are subject to a number of limitations and protections. The Orders in Council are limited to the purpose set out in the Act and can be reviewed if they are not necessary or expedient for that purpose. It is only the Minister's recommendation which is protected by the legislation. Orders in Council are also subject to the Parliamentary disallowance procedure.

The Act is also subject to a sunset clause setting an expiry date of 1 April 2012. The Act may also expire earlier by an Order in Council made under s 17(a) of the Act. The Orders in Council made under the Act also include expiry dates, earlier than that provided for the Act.

It is not yet clear what further Orders in Council will be necessary or whether it will be possible to set an earlier expiry date. The full extent of the necessary recovery work is still emerging.

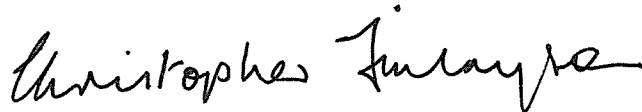
In the meantime the Recovery Commission now established under the Act will consider all proposed Orders; examining the policy behind them and making recommendations to a Cabinet Committee established for Canterbury. As with most legislative proposals, future Orders will require a regulatory impact statement.

The Government has also signalled that there may be a case for a more generic statute to be put in place to cater for future emergencies arising from natural disasters. Experience gained responding to the Canterbury earthquake will inform any decision-making processes in this area. I think that all parties agree that it is undesirable to develop urgent legislation in an uncertain situation.

I appreciate that the New Zealand Law Society continues to take seriously its obligations for the rule of law as set out in the Lawyers and Conveyancers Act 2006.

Thank you for taking the time to write to me.

Yours sincerely

A handwritten signature in black ink that reads "Christopher Finlayson". The signature is written in a cursive, flowing style.

Hon Christopher Finlayson
Attorney-General



30 September 2010

Hon Christopher Finlayson
Attorney-General
Parliament Buildings
Wellington

Dear Mr Finlayson

Canterbury Earthquake Response and Recovery Act 2010

As you know, the New Zealand Law Society and its members have a special obligation in relation to the rule of law. This is expressly confirmed by sections 4(a) and 65(e) of the Lawyers and Conveyancers Act 2006.

The Society's Rule of Law Committee has considered the Canterbury Earthquake Response and Recovery Act 2010. This letter records the concerns that the Society considers the Act gives rise to and offers some suggestions for ameliorating them.

First, it is accepted that the Canterbury earthquake and its aftermath justified some form of emergency legislation to facilitate the speedy restoration of the region. The powers in the Act to make exemptions, modifications or extensions to relevant legislation are, to that extent, understandable. The Society notes also that the Act expires on 1 April 2012.

That said, the Society considers the extent of the power that Parliament has delegated to Ministers by s6 of the Act is very problematic. By s6(4), an Order in Council may make exemptions from, or modify or extend, the provisions of any enactment save for the five listed in s6(c). As has been pointed out by others, this would include the Crimes Act 1961, all of the revenue legislation, and many other enactments that could not possibly be germane to rebuilding Canterbury.

While it may be said that any legislation not necessary for the restoration would never be dispensed with or extended, that is not a satisfactory answer to the important rule of law concerns the Act gives rise to. The Society accepts that Ministers and their officials would no doubt propose to act with the best intentions in the interests of the region, but it is concerned at the approach of legislating for broad powers and relying upon the restraint of Ministers and public officials as a safeguard for the rights of citizens. Apart from other potential problems, even actions taken in good faith by officials can extend beyond the apparent purposes of Parliament in enacting particular legislation. And, given the privative clause in the Act, it will be difficult, if not impossible, for affected persons to obtain a judicial ruling on whether the powers in the Act have been used lawfully or appropriately. This concern is urgent because inappropriate decisions that infringe upon the legitimate rights of citizens may be being made in the meantime.

The Society believes that the Act should be reviewed by Parliament within the next three months, so as to reconsider which provisions are truly necessary to meet the situation in Canterbury. Or you, as the Senior Law Officer of the Crown, might consider that it was appropriate to initiate a review now.

An alternative approach would be:

- a) to specify which Acts might be the subject of Orders in Council in terms of the Act; and
- b) that all Orders in Council are capable of judicial review; and
- c) that the Act should be reviewed by Parliament every two months so that any concerns can be debated.

It is possible that this could still be done by way of amendment.

The Society would be pleased to work with the relevant officials or others in dealing with the concerns that are being voiced, not just by the Society and some of its members, but by others – including international criticism of the Act as it currently stands. The Society's Rule of Law Committee generally agrees, for instance, with the open letter initiated by Associate Professor Andrew Geddis and signed by a considerable number of academic lawyers. This is attached for your information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm
President

Encl. (1)