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# Emergency Management Bill

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*3/11/2023*

## Submission on the Emergency Management Bill 2023

### 1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Emergency Management Bill (**Bill**), which seeks to replace the Civil Defence Emergency Management Act 2002, and establish a more flexible regulatory framework for setting standards and managing the emergency management system.<sup>1</sup>
- 1.2 The Law Society supports the introduction of a bespoke legislative framework for responding to future emergencies. This submission, prepared with input from the Law Society's Public Law Committee,<sup>2</sup> makes some recommendations to improve the Bill.
- 1.3 The Law Society does not wish to be heard in relation to this submission.

### 2 General comments

- 2.1 This Bill is generally well-drafted, and provides a clear and detailed framework for managing future emergencies. For example, the Bill:
- (a) Contains detailed requirements for committees and plans at national and local levels, and places requirements on critical infrastructure entities to plan for services during emergencies, and to publish those plans.<sup>3</sup>
  - (b) Sets out in detail the various requirements and standards relating to the roles and responsibilities of central and local government, iwi and Māori, and essential utilities.<sup>4</sup>
  - (c) Contains appropriate regulation-making powers, and sets out the various purposes which can be fulfilled by regulations.<sup>5</sup>
  - (d) Includes a safeguard to the power available to the Director of Emergency Management (**Director**) to make rules, by requiring the Director to publish a notice of their intention to make rules, and to provide interested persons with reasonable time to make submissions on the proposed rules.<sup>6</sup>
- 2.2 Subject to the comment below on appeal rights, the Bill also strikes an appropriate balance between individuals' rights, and the need to give officials the ability to appropriately deal with emergencies.
- 2.3 We believe this bespoke legislative framework will reduce the need to pass legislation under urgency during an emergency, bypassing opportunities for important public scrutiny and input. It also conforms with the rule of law by providing an accessible, intelligible, clear, and predictable legal framework for taking necessary actions, and exercising necessary powers.

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<sup>1</sup> Explanatory Note of the Bill.

<sup>2</sup> See the Law Society's website for more information about these committees:  
<https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

<sup>3</sup> Part 2 of the Bill.

<sup>4</sup> Part 2 of the Bill.

<sup>5</sup> Clauses 143-146.

<sup>6</sup> Clause 147.

- 2.4 In the event the Bill has not been reinstated in the new Parliament, we encourage the incoming Government to introduce an alternative bespoke framework which provides as much clarity and specificity as possible about the options available to a future government responding to a pandemic. Learnings from the Royal Commission of Inquiry into COVID-19 will no doubt assist when designing an appropriate legislative framework, as will the Law Commission's recent Study Paper, *The Legal Framework for Emergencies in Aotearoa New Zealand*, written by Professor Janet McLean KC.<sup>7</sup>

### **3 Compensation for loss or damage to personal property**

- 3.1 It is a general principle that property should not be taken without compensation.<sup>8</sup> New legislation should be drafted to respect this, typically through the establishment of fair and rigorous procedures for the provision of compensation. Such a procedure is reflected in clause 116 of the Bill, which applies where the power in clause 105 is exercised. However, the Law Society does have some observations in respect of the adequacy of the compensation regime.
- 3.2 In the case of loss or damage arising from the exercise of powers under clauses 101 to 107, the Bill is less clear. It appears this component of the compensation regime is intended to operate as follows.
- (a) Clause 119 provides for compensation for loss or damage due to the exercise of powers under clauses 101 to 107.
  - (b) Clause 120 limits this liability to no more than the replacement value of property concerned. In respect of personal property, compensation is limited to \$20,000 less any insurance cover for that property (clause 120(7)(c)).
  - (c) Any shortfall would then be reliant on an *ex gratia* payment from the Crown or an Emergency Management Committee (clause 120(6)).
- 3.3 However, the current drafting of these provisions is unclear in two key respects:
- (a) Clause 119 does not refer to property at all and clause 120 does not clearly limit claims to damage or loss in respect of property only. In addition, clause 119(2)(b) is imprecise in its drafting and introduces significant subjectivity and uncertainty. For example, is the assessment of whether 'the good done' was disproportionate to the loss of damage caused, intended also to encompass non-economic considerations? There is limited guidance in this provision for both decision maker and claimant.
  - (b) Clause 120(7), as noted above, appears intended to limit liability for damage or loss to personal property to an amount not exceeding \$20,000, less any insurance cover for that personal property. However as currently drafted, this limitation is included within a definitional clause. It could therefore be read as meaning that 'personal property' only includes property with a value of \$20,000 or less. On this basis personal property of value higher than \$20,000 is not covered by the scope of the compensation regime. To remedy this, the limitation on liability may be better

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<sup>7</sup> Professor Janet McLean KC *The Legal Framework for Emergencies in Aotearoa New Zealand* (Te Aka Matua o te Ture | Law Commission, November 2022).

<sup>8</sup> See [Legislation Guidelines 2021](#), Legislation Design and Advisory Committee, at Chapter 4, Part 4.

placed within clause 120(2). If the Bill is intended to exclude any personal property with a value exceeding \$20,000, the Select Committee may wish to consider whether this is fair.

- 3.4 We suggest the Select Committee review the adequacy of the compensation regime in general, and whether it complies with the principle that property should not be taken without compensation. The Select Committee may wish to consider:
- (a) Whether loss or damage caused by the exercise of powers under clause 102 and 104 of the Bill should be subject to the limitation of liability under clause 120. Both powers border on the taking of personal property.
  - (b) Whether the \$20,000 limitation on compensation in clause 120(7)(c) (subject to our comments above) is adequate. While any figure set will be arbitrary to some degree, this figure may currently be too low to achieve that respect for property rights. Reliance on an *ex gratia* payment to address any unfairness or hardship arising from this is insufficient, particularly in an emergency context where Crown finances may be under pressure, and decision-makers not minded to remedy unfairness.
  - (c) It may be appropriate to index any specified dollar amount in clause 120 to CPI. The Civil Defence Emergency Management Act 2002 has been in place for over 20 years. If this Bill remains in force for a comparable period, the current proposed limitation of \$20,000 will provide considerably less compensation in the event of an emergency 18 years' from now. This could lead to unfairness or hardship, and an over-reliance on *ex gratia* payments.

#### **4 Appeal rights**

- 4.1 Clause 142 of the Bill grants an appeal right against the exercise of the following powers, on the ground that the exercise of the power was unreasonable:
- (a) Proposed sections 16, 19(6), 30, and 47(3), which empower the Director, the National Recovery Manager, Area Recovery Managers, Local Recovery Managers, and Emergency Management Committees, to require information; and
  - (b) Proposed section 106(3), which allows specified persons to require an owner of a structure to obtain an assessment of the effect of an emergency on the structure.
- 4.2 The Bill also allows for the exercise of various other significant powers to:
- (a) Direct the evacuation of any premises or places (clause 101);
  - (b) Enter certain premises and places (clause 102);
  - (c) Close roads and public places (clause 103);
  - (d) Remove vehicles and crafts (clause 104);
  - (e) Requisition land or other property (clause 105); and
  - (f) Direct a person to stop an activity, or to take action (clause 106).
- 4.3 We note there are no appeal rights for these powers. We expect this recognises the need for emergency responses to be nimble and unhindered. However, these powers are extensive

and allow empowered persons to undertake actions which interfere with persons' autonomy and property, potentially to a considerable extent and/or for some time. We suggest the select committee consider, and discuss with officials, whether in addition to the ability to seek judicial review of these powers there should also be appeal rights, even if they could be exercised after the fact, to ensure the use of these powers is subject to some judicial oversight and guidance as to their use.

**5 Emergency Management Committees not considered PCBUs (clause 32)**

- 5.1 Clause 32 provides that Emergency Management Committees are not PCBUs for the purpose of the Health and Safety at Work Act 2015. While this may be appropriate during an emergency, if the committees will be able (whether that is in fact intended) to employ or contract individuals to carry out work, such a general exclusion is not appropriate.



Caroline Silk  
**Vice-President**