New Zealand Law Society
Te Kāhui Ture o Aotearoa

Severe Weather Emergency Recovery Legislation Bill

29/03/2023

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1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Severe Weather Emergency Recovery Legislation Bill (**Bill**).

1.2 This submission has been prepared with input from the Law Society's Public and Administrative Law Committee and Rule of Law Committee.

1.3 The Law Society wishes to be heard in relation to this submission.

2 Executive summary

2.1 The Law Society strongly supports the aim of assisting communities devastated by Cyclone Gabrielle, but we do not consider this Bill is a constitutionally appropriate way to do so, and it raises fundamental rule of law issues.

2.2 The Law Society has a number of serious concerns with the Bill as currently drafted, including:

(a) the extensive use of 'Henry VIII' clauses to permit amendments by the Executive to a range of legislation, subject to a low threshold of 'desirable', and encompassing a range of enactments for which the rationale is unclear.

(b) the further use of a Henry VIII clause to allow the Executive to extend the number of enactments that can be amended via Order in Council and to retrospectively authorise actions.

(c) imprecision around the definitions of 'support' and 'unanimous or near unanimous', leaving too great a discretion to the Minister.

2.3 In addition, the timeframe provided for making submissions to Select Committee is extraordinary, and one of the shortest timeframes the Law Society has encountered. It is insufficient to enable proper scrutiny of the Bill. This deficiency is exacerbated by the significance of its content, and the length of time for which these orders will remain valid.

2.4 We also note we have not had time to properly review the list of enactments in Schedule 2, or consider whether each Act should be subject to the Order in Council power.

3 Urgency as justification

3.1 Clause 7 of the Bill allows for the making of Orders in Council which grant exemptions from, modify, or extend provisions of certain legislation (specified in Schedule 2 of the Bill). Such provisions, which provide the ability to amend primary legislation through an executive order, are known as 'Henry VIII' clauses. These clauses are usually objectionable under the principles of the rule of law, particularly where they can fundamentally affect rights or obligations. Henry VII clauses raise significant rule of law and constitutional issues and should be used infrequently, and only where absolutely necessary.

3.2 The Bill is premised on an assumption that the Henry VIII clause is needed because changes to legislation, by way of standard Parliamentary procedure, would be too slow. However, we note that Parliament does have the ability to pass laws swiftly under urgency, if it so wishes

(acknowledging there is less sitting time this year because of the election). Any analysis of the expeditiousness afforded by the Bill must take into account the speed of passing legislation through standard Parliament processes:

(a) The Bill requires comment from the public, and a number of bodies (including, for example, the Severe Weather Events Recovery Review Panel provided for in clause 13) before the Henry VIII clause can be invoked. It is apparent that this consultation process is expected to progress quickly – for example, clause 9(1)(c) requires feedback on the effects of a proposed order to be provided within three working days, or a "longer time" allowed by the relevant Minister. This ability to extend the consultation timeframes raises questions as to *how quickly* these consultations are expected to progress. If the Minister considers further community engagement is necessary before the Henry VIII clause can be invoked, why not take the time provided by the usual parliamentary process? In our view, it is difficult to justify use of a Henry VIII clause when Parliament also has the ability to pass laws very swiftly.

(b) By default, Parliamentary processes provide the opportunity for community input and engagement (and so too does the Executive, where feedback is sought on exposure drafts prior to the introduction of a bill). In our view, the level of urgency required to justify the use of Henry VIII clauses should be high enough such that ordinary levels of consultation and engagement are not justified.

3.3 The Law Society has serious concerns about Clause 19, which provides that the list of enactments set out in Schedule 2 can also be amended by Order in Council. This provision effectively enables the Minister to expand the list of enactments which can be amended by Orders in Council, without any consideration or input by Parliament. While the current list of enactments subject to the Bill will be scrutinised by Parliament, subsequent additions would not be. In our view, this use of a Henry VIII clause is not justified.

4 Consultation with leaders of political parties

4.1 The Bill treats consultations with leaders of political parties as a form of safeguard against overreach (see for example clauses 8(1)(c) and 19(2)(b)). These clauses effectively empower the Minister to determine whether political parties' views express "support" for a proposed change (see clause 19(2)(b)), and to what extent. As a basic principle, only Parliament should have the right to determine whether an amendment to an Act is "supported". However, because this Bill focuses on "support" and "near unanimous" support, it essentially places the Minister in the role of Parliament. In practice, this means:

(a) the Minister is able to decide what "support" looks like (recognising that political views are often not binary);

(b) the Minister is not obliged to place proportionate weight on leaders' views based on their political party and representation in Parliament (which means, for example, that 'support' from the Leader of the Opposition may be given no greater weight than the 'support' of the leader of a minority party); and

(c) the Minister ultimately may not be obliged to contact every party (see clause 19(2)(b) which allows the Minister to exclude leaders if they are not reasonably contactable).

4.2 This safeguard might seem laudable at first blush, but it essentially puts the Minister in the shoes of Parliament and provides them with troubling levels of discretion and judgment as to what constitutes "support".

4.3 We also note the Bill refers to the Minister being satisfied there is unanimous or near-unanimous support. The Bill does not clarify what constitutes "near unanimity." It is not clear whether, for example, "near unanimity" would be met by support from the leaders of all but one political party and, again, whether the comparative levels of representation in Parliament would be relevant to this assessment.

5 Enactments that can be amended by Order in Council

5.1 Schedule 2 lists the legislation that can be amended by Order in Council. This list includes a wide range of enactments that cover most of the ordinary business of New Zealanders. We acknowledge there may be situations where existing legislation will hamper or prevent recover and that parliamentary processes, even under urgency, may take too long. To that end, the inclusion of some of these enactments appear to be sensible and necessary (for example, the Local Government (Rating) Act 2002 may have timeframes that need to be extended for setting rates). The Law Society agrees it is sensible to include the Oaths and Declarations Act 1957, the intention of this being to allow for remote swearing of oaths and declarations in circumstances where physical attendance at a lawyer's office is not possible.

5.2 However, it is unclear why some other enactments (such as the Heritage New Zealand Pouhere Taonga Act 2014, and the Sale and Supply of Alcohol Act 2012) and secondary legislation made under those enactments are included in the Schedule 2 list. There does not appear to have been any policy analysis dedicated to the inclusion of the specified legislation (and secondary legislation). If such work has been undertaken, it is not clear from the documents we have had time to review.

6 Requirement for Orders in Council to be "necessary" or "desirable"

6.1 The Bill allows for the making of Orders in Council if the Minister is satisfied the order is necessary or desirable for 1 or more purposes of the Act (clause 8(1)(a)(iv)). In our view, Orders in Council should only be permitted where they are necessary. The "or desirable" element of the test in clause 8(1)(a)(iv) is too low a threshold, especially in light of the broad purposes in the Bill (discussed further in section 8 below) and the expansion on those purposes in clause 8(3). We also note the Regulatory Impact Statement for the Bill appears to support the "necessary" test but not the "or desirable" element of that test. The Court of Appeal has provided clear guidance on the inappropriateness of a 'desirability' test for powers such as this, following the enactment of similar powers in the Canterbury Earthquake Recovery Act 2011.[1]

[1] See *Canterbury Regional Council v Independent Fisheries Ltd* [2013] 2 NZLR 57.

6.2 In addition, the Minister should also be required to balance the reason for making an order against the interests protected or provided for by the legislation that is being modified or exempted, and the effect of the Order on other persons. This is provided for to some extent in respect of RMA matters (clause 8(1)(e)) but not more generally.

7 Retrospectivity

7.1 Clauses 18(2) and 19(4) allow for the retrospective application of this legislation, and to validate actions taken before the making of a particular order. We note that legislation should generally have prospective, not retrospective effect, and invite the select committee to consider whether retrospectivity is appropriate in this context. While there may be instances where actions were taken in good faith which should not be treated as a breach of statute, we do not think the retrospective application of orders is an appropriate means of addressing or validating such actions. We question why this aspect of the Bill needs to proceed urgently, and recommend that more information be sought, and a more considered legislation response be developed.

8 Duration of Orders in Council

8.1 Clause 17 provides that the orders made under this Bill remain valid for a period of five years (unless revoked sooner). This timeframe is too long given the significant potential effects of the Orders in Council in modifying or suspending legislation. In our view, this period should be two years at most. If Parliament still considers in two years' time that a longer duration is needed, the legislation could then be amended to provide for a longer period.

9 Climate change considerations

9.1 As currently drafted, the Bill would allow an Order in Council to be issued to modify or nullify provisions in the legislation listed in schedule 2, which includes the Climate Change Response Act 2002 and the Resource Management Act 1991. It is difficult to reconcile that a natural disaster that it is broadly accepted was exacerbated by climate change would then be used as justification for a Bill that could be used to provide exemptions from the obligations and requirements imposed by these climate and environment-focussed pieces of legislation.

10 The use of "purpose" as a safeguard

10.1 Clause 8 states that the Minister must only use the Henry VIII clause "for the purposes of this Act". However, the Bill includes some broad purposes, which include:

(a) "temporarily" relaxing and making more flexible "some legislative requirements" (explanatory note);

(b) taking account of "actions taken to respond to… severe weather events" (clause 3(2)(b)); and

(c) "facilitating the restoration and improvement of… economic, social and cultural wellbeing" (clause 3(1)(a)).

10.2 When these broad purpose statements are read in conjunction with a "desirable" need to amend the legislative requirement in question, it becomes apparent that the Minister has a very broad discretion to use the Henry VIII clause.

10.3 We also note that some of these purposes appear to go much further than rebuilding in areas which have been affected by the severe weather events. This could potentially allow for significant infrastructure or building developments outside of the affected area, that are not required to comply with the RMA or other relevant documents focussed on environmental protection (for example, relevant national policy statements and national environmental standards).

11 Next steps

11.1 Given this Bill raises some very significant issues, we recommend that this Bill be withdrawn and redrafted to address the concerns raised in this submission. However, in the event the select committee considers the Bill should progress, we make the following recommendations:

(a) "Desirable" is not an acceptable standard for amending legislation by Orders in Council. "Necessary" should be the appropriate standard for such amendments;

(b) As noted above, the Minister should also be required to balance the reason for making an order against the interests protected or provided for by the legislation that is being modified/exempted and the effect of the Order on other persons;

(c) Remove the ability conferred by clause 19 to amend and expand the list of enactments in Schedule 2 by Order in Council;

(d) The purpose clause should be amended to include respect for the constitution, democracy and the importance of people having a right to be heard;

(e) The power to make orders relating to developments outside of the affected area should be limited;

(f) Clause 19(2)(b) should be amended very carefully to address the Law Society's concerns regarding the Minister's role in determining "support" for a proposed change; and

(g) Undertake a review by a select committee of the general issue of recovery legislation to develop a sound framework based on sound principles for such legislation.

David Campbell
Vice-President