

4 April 2020

Hon Simon Bridges MP
Chair, Epidemic Response Select Committee
Parliament Buildings
Wellington

By email: Simon.Bridges@parliament.govt.nz

Tēnā koe Mr Bridges

Inquiry into the Government's response to Covid-19 – New Zealand Law Society offer of assistance

The New Zealand Law Society | Te Kāhui Ture o Aotearoa has considered what it can do to assist the Epidemic Response Committee in its urgent work responding to the management of the Covid-19 epidemic. As you and your colleagues will be keenly aware, the Committee plays a crucial role in parliamentary oversight of the New Zealand Government's management of the epidemic while Parliament is currently adjourned.

The Law Society has called together legal experts from its Rule of Law, Human Rights and Privacy, and Public and Administrative Law committees to discuss how the Law Society might be able to help the Epidemic Response Committee and the Government deal with the epidemic. Like everybody else in New Zealand, lawyers and the Law Society recognise the danger Covid-19 poses to New Zealanders and the complexity of dealing with this unprecedented state of affairs. Responding to the crisis requires a commitment to the fundamental values that underpin our legal system. The Law Society stands ready to assist the Committee in its consideration of the legal measures needed to meet this extraordinary event.

The importance of the rule of law and clarity

There is a general acceptance that in times like this the first duty of government is the protection of its people, and governments might need to use the law in ways we do not normally accept. This does not mean the rule of law is any less important; in many ways the rule of law is more important now than ever before. New Zealanders must accept restrictions in order to defeat Covid-19. However, clarity about the constraints on our usual freedoms of movement and association and on commerce, and clarity about the legal basis for these constraints, is central to ensuring compliance and ongoing public confidence and support.

The Law Society considers it important to identify the legal foundations for the various responses by the Government to the Covid-19 epidemic. The most conspicuous example is the public confusion that resulted from government communications merging activities that are now legally impermissible—that is, contrary to law—and activities that, though lawful, are undesirable and discouraged.

Both types of communications from the Government are helpful and necessary: just as in more normal times, not every behaviour needs or can have a criminal or other regulatory response. But the law should be clear, clearly enforceable, and able to be easily accessed and understood by all to whom it applies.

We anticipate that some of the confusion may be addressed by the most recent order dated 3 April 2020 made under s70 of the Health Act 1956.

Providing public access to underlying instruments and policy documents

The Law Society also welcomes the publication of key legislation, orders and other documents on the Covid-19 website. The website could be improved further by creating an explicit link between particular practical instructions or directions and the legal basis on which they are made. Legal prohibitions should be explicitly identified, as should the consequences of default. All the legal instruments, policy papers and explanations of their legal foundations should be published as soon as they are available, so that New Zealanders can clearly see the justifications for what is being done and the statutory powers being relied upon.

Where possible consultation and the usual law-making process should be done

The Committee, like the Government, will be thinking about what the next stage of the Covid-19 response will look like. As far as possible, there should be an ongoing attempt to replicate the normal policy and law-making process. The Law Society recognises the realities of the current crisis have prevented this to date. But, as time goes on, draft instruments and policy papers should be made available to enable New Zealanders to comment on proposed measures that affect them or in which they are otherwise interested.

It is particularly important that the values and processes set out in the Legislation Guidelines are maintained as much as possible. People affected should be consulted where feasible. Decisions that affect peoples' rights should be reviewable in some way. Where there are constraints on rights and interests usually recognised by law, sunset clauses are desirable to prompt re-examination of the need for ongoing restrictions.

If the Henry VIII powers in the Epidemic Preparedness Act 2006 are used, Parliament needs to be able to exercise its disallowance power even if it cannot meet as it usually might. Any future statute that contemplates more extensive Henry VIII powers should be carefully tailored to provide for public consultation where possible and should be subject to approval or disallowance through the Parliamentary process. Some thought should be given to establishing a role for this Committee in the process, as well as the Regulations Review Committee.

Consideration also needs to be given to re-convening Parliament, if that can be done in a safe way, before the end of the currently notified Level-4 period, and certainly if it is extended.

In reflecting on the matters canvassed in this letter, the Law Society has had the considerable advantage of reading a paper prepared by Professor Geiringer from Victoria University of Wellington. Professor Geiringer has identified potential gaps in the current legislative regime that require attention. The Law Society anticipates that the Committee might find the paper equally valuable, and accordingly it is **enclosed** as an attachment to this letter.

I conclude by acknowledging the important work being carried out by the Government and Epidemic Response Committee, and by reiterating the Law Society's offer of help in shaping the legal regime needed to go forward in the fight against Covid-19.

Nāku iti noa, nā

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

Tiana Epati
President, New Zealand Law Society | Te Kāhui Ture o Aotearoa

Encl.