LEGISLATION DESIGN AND ADVISORY COMMITTEE

26 June 2020

Dr Deborah Russell
Chairperson
Finance and Expenditure Committee
Parliament Buildings
Wellington

Dear Dr Russell

Inquiry into COVID-19 Public Health Response Act 2020

Introduction

1. Thank you for the opportunity to provide a submission on the COVID-19 Public Health Response Act 2020.

2. The Legislation Design and Advisory Committee (**LDAC**) has a mandate from Cabinet to review legislative proposals against the *Legislation Guidelines* (2018 edition) (**Guidelines**). The Guidelines are the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles.

3. The LDAC's focus is not on policy, but rather on legislative design and the consistency of legislative proposals with the principles contained in the Guidelines.

4. This inquiry provides an important opportunity for Parliament to reflect on making legislation in times of crisis and the process safeguards that such legislation should include to mitigate the risks that such legislation will inevitably give rise to. LDAC considers that it would be appropriate for this Committee to include wider recommendations for legislative responses in times of crisis within the scope of its recommendations.

5. This submission covers the material LDAC provided to the committee in making its oral submission on 3 June 2020 (attached as Appendix) and includes wider comments about making legislation in times of crisis.

Making emergency legislation during times of crisis

6. LDAC classifies legislation relating to emergencies into 3 broad categories: emergency preparedness (for example, the Epidemic Preparedness Act 2006), emergency response (for

example, the COVID-19 Public Health Response Act 2020) and emergency recovery (for example, the COVID-19 Recovery (Fast-track Consenting) Bill). Sometimes response and recovery are combined, as was the case in some of the legislation relating to the Christchurch and the Kaikōura/Hurunui earthquakes. This submission focusses on the first two categories.[1]

Ensuring readiness for emergency legislation

7. Emergency preparedness legislation plays a critical role in emergencies, providing for critical functions such as declarations of emergency and for the overriding of requirements that we know in advance will not be able to be complied with in an emergency.

8. Departmental regulatory stewardship should include an ongoing focus on the scope of any emergency legislation administered and any limitations of that legislation. Departments should know and understand their existing emergency response framework to ensure a clear understanding in advance of what can be done when a crisis occurs. Agencies should also understand the limits of the legislation, and the triggers for an emergency legislative response.

9. In practice, an immediate response will inevitably rely on existing legislative tools. However, it is not possible or desirable to legislate accurately and comprehensively for every eventuality in advance. To attempt this would likely result in broad-reaching legislation that would be disproportionate and draconian without a specific context, and give rise to the risk of "misuse". This is where emergency response legislation plays its role.

10. While it is axiomatic that bespoke emergency response legislation will be unique, departments can prepare for this by understanding previous and existing examples of legislation dealing with specific historical emergencies, including the context in which it arose, and what worked or did not work in that context. An important point here is that, while the legislation may not be directly usable in another situation, it is likely to provide a valuable indication of what may need to be addressed and the safeguards that may be useful.

11. Departments should also undertake ongoing reviews of their ability to maintain business-as-usual development of legislation and support for legislative processes in times of crisis or emergency (for example, using remote technology).

12. In addition to individual departmental stewardship, it would also be useful for one entity (perhaps the National Emergency Management Agency) to maintain a central record of all emergency legislative powers currently in force and examples of techniques that have been used in bespoke legislation. That would allow the identification of gaps or inconsistency in

[1] LDAC' s supplementary material on bespoke legislative solutions is directly relevant to *recovery* legislation: http://www.ldac.org.nz/guidelines/supplementary-materials/bespoke-legislative-solutions/.

different regimes, allow the overall suite of emergency powers to be kept up to date, and provide a useful reference point in emergencies. This should mean that only the missing part of the wheel needs to be reinvented in an emergency.

13. Similarly, Parliament should consider how it can operate during times of crisis or emergency (for example, removing restrictions that prevent using audio visual technology to sit remotely or including standing orders that expressly allow Parliament to sit remotely at short notice during an emergency), thereby allowing more time and opportunities for the consideration and enactment of urgent legislation.

14. The need for preparation in times of peace and security was also emphasised in our oral submission to the Committee.

When should we think about using bespoke legislation?

15. In the case of really significant emergencies, LDAC's view is that bespoke legislation will almost certainly be required. A good indicator that bespoke legislation might be needed is where there is a concern that existing tools will need to be stretched too far to fit response measures as these measures are developed and adjusted.

16. The evidence that might indicate a need for bespoke legislation in times of crisis response could include when:
    - existing powers are scattered/fragmented across different instruments;
    - existing powers do not have the right decision-maker;
    - decision-making criteria in existing legislation does not include the things that you want to take into account in the specific crisis; or
    - extra powers are only needed for a limited amount of time.

17. Whether bespoke legislation should be enacted as amendments to existing powers or as a completely separate legislative response requires consideration in the particular context.[2]

The need for good legislative process and safeguards

18. Legislation made as part of an emergency response raises obvious risks. As an example, such legislation is more likely to raise NZBORA concerns. While the crisis or emergency itself is likely to provide justification for some limitations on rights, proposed limitations will still need to be carefully designed and justified. This is very challenging when working within very compressed timeframes.

[2] The Legislation Guidelines (2018 edition) require an assessment as to whether legislation is necessary (and counter against making legislation that is not necessary to achieve the policy objective) and also emphasise the importance of ensuring new legislation will not conflict with existing legislation, and any such overlaps are expressly dealt with in the legislation. See chapters 2.3 and 3.1-3.3.

19. This emphasises the importance of ensuring the best legislative process possible in the time available – for example, select committee scrutiny is highly desirable. As we have indicated earlier in this letter, the more preparation that is done to ensure that departments and Parliament are able to run legislative processes quickly and efficiently during a crisis, the greater their ability to ensure the best legislative process possible.

20. In thinking about what safeguards should be built into bespoke emergency legislation, it is useful to think differently about ex-ante and ex-post measures. Ex-ante requirements will, by necessity, be general and "broad-brush" because they will need to cover a range of circumstances and requirements. They can and should be used to prevent grossly inappropriate use of emergency powers, but they will be counterproductive if they impose detailed process or justification requirements before urgent action can be taken (likely precluding responses that are reasonable and appropriate when viewed in the context of particular circumstances). The relatively small number of immediate modification orders made under the Epidemic Preparedness Act 2006 in relation to the Covid-19 response to date raises the question of whether the section 15 "impossible or impracticable to comply with" threshold was a sufficiently useable threshold. This low number of these orders contrasts with the large number of relatively technical amendments made in COVID-19 Response (Further Management Measures) Legislation Act 2020.

21. Ex-post safeguards (such as sunset clauses, confirmation requirements) are capable of allowing detailed consideration of actual circumstances and options while ensuring that any negative aspects or impacts of the use of emergency powers can be limited (and in some circumstances possibly reversed). However, it is important that ex-post safeguards are configured and implemented so as not to provide a disincentive for decision-makers from making appropriate and good faith use of emergency powers.

22. The 90 day review requirement in the COVID-19 Public Health Response Act is a novel form of ex-post protection. We can see some benefits as an ongoing safeguard process for other emergency legislation. We would be concerned, however, if it was seen to be a substitute for good legislative design up front, whether in terms of preparedness legislation or in using such opportunities as are possible in the circumstances for getting emergency legislation right in the first place.

23. Prevention and cure both have their place, but the risks and benefits, and therefore legislative design criteria are different in each case.

Recommendations

24. We **recommend** that the Committee emphasise in its report:
    - That departments review existing and past emergency preparedness and response legislation to ensure they are as well prepared as possible for future crisis
    - That a central agency be responsible for monitoring emergency legislative powers currently in force

- That Parliament review and enhance its ability to operate effectively in a range of emergency situations
- Identify particular aspects of the COVID-19 Public Health Response Act 2020 that could be usefully changed in the short term
- How the 90 day review requirement for the COVID-19 Public Health Response Act 2020 might be developed to provide an appropriate model for a safeguard process for other emergency legislation.

25. Thank you for considering our submission, which has been provided to you further to our presentation provided to the Committee on 3 June 2020.

Yours sincerely

Karl Simpson
Chair
Legislation Design and Advisory Committee

Appendix

Presentation by LDAC to Finance and Expenditure Committee on **COVID-19 Public Health Response Act 2020**
Presented: 3 June 2020

Your inquiry focuses on the Act and its operation. That embraces also the Order and the Amended Order commencing 29 May, given that such orders are what the Act was designed to enable.

Positioning the Act

The Act is *emergency* legislation (as opposed, say, to *disaster recovery* legislation). The COVID-19 emergency is also causing a financial disaster, but other legislation and responses seek to deal with that.

The Act was designed to provide a clear legal basis for the making of orders to implement "Level 2". In that regard it has dealt with any concerns over the *vires* of "lockdown orders" going forward.

The Act appropriately sets prerequisites for, and mandatory considerations affecting, "section 11 orders". These are set out in ss 8-10, which are informed by the purpose set out in s 4. LDAC sees these as appropriate.

Standing back, the nature of the COVID-19 threat justified the imposition of constraints on the liberty of the citizenry. At Levels 4 and 3 that threat was (as explained by public health experts) such as to require very great constraints. The relative simplicity of Level 4 and 3 (that is, the uniformity of constraints across the board) could not be sustained at Level 2 where more business and other activity was (in the view of experts) able to be accommodated without undue risk. The judgment was made that legislation was required to empower the sort of Order required.

Importantly the Act is able to be applied in light of risk assessed from time to time. That is, new Orders made. The Amendment Order expanded liberty in light of perceived diminishing of risk.

That basic framework is appropriate. Overall, the Act did not confer extraordinary or unlimited power. It operates within the standard paradigm whereby the importance of the objective (public health) in a time of great peril justifies proportionate limits on liberty. It is the nature of the peril that is unprecedented in modern history.

Might there have been legislation of this type earlier?

Here the question is whether there might have been "bespoke" COVID legislation at the outset of the pandemic, as opposed to the use of existing legislation (Health Act, Epidemic Preparedness Act, CDEM).

From a "legislative design" perspective, the likelihood is that every crisis will have its own unique features making a bespoke response necessary at some point. As has happened here.

Two points arise out of the recent experience:

(a) the need for departments/Ministries to be aware of the tools they have in current legislation and to consider their utility in dealing with the particular emergency. This ought to be essential planning, in light of the COVID experience. Emergency legislation needs to be kept current. Processes for notification of secondary legislation have to be thought through.
(b) the need to make practical provision for Parliament to enact urgent bespoke legislation that is required, even if it cannot function in the usual way but needs to act through Members appearing remotely. That sort of reform is obviously for the House to consider. Making such reform in times of peace and security is ideal; otherwise valuable time will be lost in setting up systems when an emergency requires urgent action.

Are the limits on liberty proportionate?

Here it is necessary to focus on the *powers in the Act* (relating to the criteria for, and the enforcement of, Orders) and the *actual Orders* made.

As to the Act:

LDAC considered the criteria for s 11 orders were appropriate.

As to enforcement powers – the warrantless arrest power has attracted criticism, including whether there ought to be time for a warrant in at least some settings. In large part this is a matter of balancing the consequences of allowing large gatherings in private houses or marae to continue despite known infection risk in the community. As the risk abates the internal mechanism of the Act is that Orders ought to be amended (that is, liberalised, as risk permits). Against that background, the power of warrantless entry is always in service of the need to prevent actions that threaten containment of the disease. If the restrictions on liberty are not constantly evaluated and adjusted, the general powers may seem draconian.

The Order actually made (and Amendment effective 29 May)

It is possible to quibble with some of the distinctions made in the initial Order. This being a review of the Act and its operation, it is not enough simply to say that the initial Order has now been ameliorated as to some of those distinctions. The question is whether they were appropriately made. That said, the view of LDAC is that whether or not any particular distinction was or is justifiable – e.g. whether religious gatherings are more comparable to gatherings in cafés and restaurants than to gatherings of family and whanau – is likely to be a matter for evidence including about transmission modes. And, as the Chief Justice of the United States put it (rejecting a preliminary injunction against the California Governor's restrictions on Californian churches' ability to gather): when "local officials are actively shaping their response to changing facts on the ground", they "should not be second-guessed by the judiciary." (*South Bay United Pentecostal Church v Newsom* 590 US __ (May 29, 2020)). These are fact and context dependent inquiries.

So far as the Act is concerned, these kinds of concerns might well become the subject of litigation (where aspects of the Order are claimed to be beyond the powers given in the Act). That is a legitimate possibility: the Act itself is clear that it "does not limit or affect the application of the New Zealand Bill of Rights Act 1990" s 13(2)). The point is that the orthodox application of the Bill of Rights still provides a framework for analysis even in times of great risk.

[LDAC notes in passing that this affirmation of the impact of the Bill of Rights is technically redundant – the Bill of Rights will always apply to legislation (and powers authorised by legislation) unless it is expressly excluded, or if the legislation is *inescapably* inconsistent with it. Here, the express *inclusion* of the Bill of Rights as a limit on the power to make s 11 orders was no doubt included to make it plain there was no intent to exclude it.]

The overall point is that the Act and the Orders are subject to the conventional rules of interpretation in which matters of human rights carry weight and are balanced against the importance of governmental objectives. Nothing in the Act displaces these orthodox concerns of the legal order.

The manner in which the Act was passed

There has, however, been some criticism of the speed and the absence of time for Select Committee consideration. The nature of emergency legislation will mean this is probably always a concern to be reckoned with. That said, there could and should have been time for some Committee consideration, even if brief – accepting that the need to move from Level 3 to Level 2 was seen as acute and unable to be delayed. (In effect the criticism is that the Bill ought to have been prepared a little earlier so as to facilitate Committee consideration and public input.) Even one day's Committee scrutiny is important for legitimacy.

LDAC welcomed the fact that it was able to contribute in the development of the Bill (while it was being drafted, but at a time a draft Bill was not yet available) and along with others including the Law Society it received the opportunity to comment at 5.30 pm on the evening before introduction.

The unique process of a post-enactment Select Committee Review

The "90 day renewal" aspect of the Bill, and referral of the Act to this Committee for review, is an innovative procedure. LDAC considers it broadly analogous to the disallowance process.

For the process to work as it might – that is, for it to lead to the making of improvements or removal of problematic features – some thought can usefully be given to the best outcomes. Plainly the Committee has no Bill

before it to amend and refer back to the House. But the expectation is that the Government will consider the Committee's report with a view to introducing amendments to the Bill as it sees appropriate. That in turn may require time for policy development and drafting, which speaks to the Committee's report being made in time for that to occur.

This – the 90 day renewal and ex post facto review – may be a feature of emergency legislation that can be replicated. But it must not, of course, be a substitute for work being done up front.

Paul Rishworth QC

Matthew Smith, Barrister

Members of LDAC