

Tuesday 28 September 2010

**Deep concerns over Canterbury earthquake legislation outlined in scholars' open letter**  
*- Call for rethink on Act that lacks constitutional safeguards and sets dangerous precedent -*

A group of 27 legal scholars from New Zealand and overseas has written an open letter outlining their deep concerns over the constitutional implications of the Canterbury Earthquake Response and Recovery Act 2010.

The full text, and contact details for group spokesperson Associate Professor Andrew Geddis, follows below:

**An open letter to New Zealand's people and their Parliament.**

We write as a group of concerned citizens with academic expertise in the area of constitutional law and politics.

We share New Zealand's deep concern about the physical damage to Canterbury and the personal trauma this has caused the region's residents. All levels of government have an obligation to help the people of Canterbury rebuild their homes, businesses and lives as quickly as possible.

However, while we are united in wishing to help Canterbury recover, there is a risk that the desire to do "everything we can" in the short term will blind us to the long-term harms of our actions. In particular, abandoning established constitutional values and principles in order to remove any inconvenient legal roadblock is a dangerous and misguided step.

Yet this is what our Parliament has done, in just a single day, by unanimously passing the Canterbury Earthquake Response and Recovery Act 2010. It represents an extraordinarily broad transfer of lawmaking power away from Parliament and to the executive branch, with minimal constraints on how that power may be used. In particular:

- Individual government ministers, through "Orders in Council", may change virtually every part of NZ's statute book in order to achieve very broadly defined ends, thereby effectively handing to the executive branch Parliament's power to make law;
- The legislation forbids courts from examining the reasons a minister has for thinking an Order in Council is needed, as well as the process followed in reaching that decision;
- Orders in Council are deemed to have full legislative force, such that they prevail over any inconsistent parliamentary enactment;
- Persons acting under the authority of an Order in Council have protection from legal liability, with no right to compensation should their actions cause harm to another person.

These matters are not simply "academic" or "theoretical" in nature. Over and over again history demonstrates that unconstrained power is subject to misuse, and that even well-intentioned measures can result in unintended consequences if there are not clear, formal measures of oversight applied to them.

We do acknowledge that the powers granted by the Act have some restrictions on their

use. They only can be used to achieve the objective of the legislation (although this is very broadly defined). Five key constitutional statutes are exempted from their ambit. Orders in Council inconsistent with the New Zealand Bill of Rights Act 1990 may not be made. Parliament can review and reject Orders in Council, albeit through a rather slow and protracted process.

Nevertheless, the vast amount of lawmaking power given to ministers renders these limits insufficient. In particular, there need to be tight restrictions on the enactments a minister may change through an Order in Council and clear and precise grounds that justify any such change. These grounds also need to be open to review by the judiciary, to ensure that they really are met in any particular case.

Any claim that such safeguards are unnecessary because the Act's powers will be wisely and sparingly applied, and that informal "consultation" and "public pressure" will ensure that this happens, must be resisted. Only formal, legal means of accountability, ultimately enforceable through the courts, are constitutionally acceptable.

Furthermore, the Act now stands as a dangerous precedent for future "emergency" situations. This earthquake, devastating though it has been, will not be the last natural disaster to strike New Zealand. When the next event does occur, inevitably there will be calls for a similar legislative response, which will be very difficult to resist given this example.

Finally, we emphasise that we have no partisan agenda to pursue here. The fact is that all MPs of every party joined in this action. They did so with the best of intentions, driven by an understandable desire to display their solidarity with Canterbury's people.

But we feel their action was a mistake, and they too quickly and readily abandoned basic constitutional principles in the name of expediency. We hope that with a period to reflect on their action and the consequences this might have that they now will revisit this issue in a more appropriate manner.

**Signed:**

Professor Stuart Anderson, Faculty of Law, University of Otago.

Mark Bennett, Faculty of Law, Victoria University of Wellington.

Malcom Birdling, Keble College, University of Oxford.

Joel Colon-Rios, Faculty of Law, Victoria University of Wellington.

Richard Cornes, School of Law, University of Essex.

Trevor Daya-Winterbottom, Faculty of Law, University of Waikato.

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