

Mainstreaming emergency management into law: An update and questions for future study...



Professor Stephen Dovers and
Dr Michael Eburn
Fenner School of Environment and Society and
ANU College of Law.

A suite of related projects

- Sharing responsibility – RMIT
- Land use planning – UC
- Future scenarios and economics – ANU
- Insurance – La Trobe

The hypothesis

“That improved community outcomes through better policy responses before, during and after major fire events can be achieved through 'mainstreaming', or the incorporation of fire and emergency management considerations in other policy sectors.”

The assumption

That law and policy does not incorporate emergency management and may hinder the preparation for and response to emergencies.

But is that the case?

- Emergency management *is* considered in environmental, planning, OHS etc law.
- There is a wide ‘extent’ of mainstreaming, but is it ‘strong’?
(see Eburn and Jackman, (2011) 28(2) *Environmental and Planning Law Journal* 59-76)
- How are competing factors to be balanced? What is the objective of emergency management policy?

Proposition: The problem is that there *is* no policy!

- There is no clearly articulated, all of government statement, about what are we trying to achieve in emergency management.
- Is it that no-one dies? That there is no fire?
- What's the acceptable level of risk? Who decides?
- How do we know if the objective's been achieved? Do we, can we, or should we “measure” success?

Fire and emergency management

- Has moved from a matter of local concern to a central government activity.
- The VBRC recommended ‘a clear statement of objectives expressed as measurable outcomes’ but only for government departments, not for the whole of government.

In NSW the Minister is responsible for:

- “ensuring that adequate measures are taken by government agencies to prevent, prepare for, respond to and assist recovery from emergencies.”

State Emergency and Rescue Management Act 2002 (NSW) s 10.

- But adequate for what?

M Keelty review of 2011 WA Fires

There remains one question the answer to which eluded the Special Inquiry but it is an answer that requires further examination and that is: What is the measure of success of the outcome of a bushfire. Is the loss of no lives the only performance measure? If so, how many houses is an acceptable number to lose? Does one performance indicator have the potential to cloud the 'Shared Responsibility' of all to build resilience of our community?

The balance to be struck is political

‘Politics is *the* essential ingredient for producing workable policies, which are more publicly accountable and politically justifiable ... it is integral to the process of securing defensible outcomes. We are unable to combine values, interests and resources in ways which are not political.’

Davis et al, cited in Dovers S., *Environment and Sustainability Policy* (2005, The Federation Press), p 26.

Governments do not have to protect everyone?

Graham Barclay Oysters v Ryan

(2002) 211 CLR 540, [81] (McHugh J).

“Ordinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk. And public authorities are in no different position. A public authority has no duty to take reasonable care to protect other persons merely because the legislature has invested it with a power whose exercise could prevent harm to those persons.”

Stuart v Kirkland-Veenstra

(2009) 237 CLR 215, [87]-[88] (Gummow, Hayne and Heydon JJ)

“... the proposed duty would mark a significant departure from an underlying value of the common law which gives primacy to personal autonomy ... Personal autonomy is a value that informs much of the common law. It is a value that is reflected in the law of negligence. The co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law.”

Why, in a liberal democracy, is this a government problem?



And is this evidence of policy failure?



But our governments ...

- Spend a lot of money, time and effort trying to save life and protect private property ... why?
- What's the policy objective?

Are policy objectives

- Clearly articulated, measurable and commonly understood?
- Is there a clear policy statement that identifies the problem, the policy direction, implementation and monitoring process?

Dovers S., *Environment and Sustainability Policy* (2005, The Federation Press), p 100.

Who sets the policy?

- The emergency services?
- Government?
- The media?
- The chair of the last inquiry?

Developing policy by increment

- May lead to governments being held responsible for the impact of hazard events even where people could, and should, have taken steps to protect themselves or been left to face the consequences of their own choices.

Clearly articulated aims and objectives

- *may* make it clear to everyone (including Royal Commissioners) what they should expect from their government and its emergency services.

Forward research agenda: What are the policy objectives?

- Why are we here?
- Why do you do what you do?
- What is *your* measure of success?
- What is *your* measure of failure?
- Are they the same as the Minister's? The electorate's? The *Herald-Sun* or the *Daily Telegraph*?

Questions? Comments?

Contact:

Dr Michael Eburn

michael.eburn@anu.edu.au

P: 6125 6424

Prof. Stephen Dovers

stephen.dovers@anu.edu.au

P: 6125 4588