



1 March 2022

Attorney-General

**COVID-19 Response (Courts Safety) Legislation Bill [PCO 24480/6.0] – Consistency with the New Zealand Bill of Rights Act 1990**

**Our Ref: ATT395/352**

1. We have considered the provisions in the COVID-19 (Courts Safety) Legislation Bill<sup>1</sup> (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**).
2. Having done so our conclusion is that the provisions in the Bill are not inconsistent with any of the rights and freedoms that are affirmed by the Bill of Rights Act.
3. We understand a further draft of the Bill is to be prepared before introduction. We do not expect that draft to alter the conclusions we have reached but will provide you with further advice if we consider that to be the case.

**Purpose of the Bill**

4. The Bill is intended to support the safe and effective operation of courts and tribunals by making amendments to reduce the risk of transmission of COVID-19 among those who use or visit the Courts or work at the courts.
5. The Bill is also intended to maintain access to the courts, reassure people accessing the courts that they can do so with a reasonable assurance they are safe in doing so, and assist courts to continue operating effectively during the COVID-19 epidemic. The Bill recognises the risk in-person court proceedings

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<sup>1</sup> PCO 24480/6.0.

present for COVID-19 transmission, as proceedings may involve persons who have travelled from different locations, are in close proximity for extended periods and who may be disproportionately vulnerable to COVID-19.

6. The Bill strengthens existing judicial and Ministry powers to set and enforce conditions for entering and remaining in any court and some tribunals. It enables the judiciary to set additional conditions for selecting and managing juries, and to reduce close and prolonged mixing of jurors. It also provides that health and safety measures and remote hearings are not inconsistent with legislative open justice protections.
7. The Bill is also intended to address related or consequential issues of access to justice, disruption to Court business and jury trial delays.

#### **Schedule 1: Courts Security Act 1999 temporarily amended**

8. The Bill inserts a new temporary Schedule into the Courts Security Act that replaces various sections of the Act. The Schedule provides that a person may enter into and remain in an area of the court that is open to the public if the person complies with all directions given and requirements imposed by the relevant head of bench. In respect of COVID-19, the presiding judicial officer in a courtroom where proceedings are being heard and the chief executive of the Ministry of Justice in relation to any area in a court other than a courtroom.<sup>2</sup>
9. Before any direction or requirement is made the person giving the direction or imposing the requirement must be satisfied that the direction or requirement is reasonably necessary in the interests of justice and to protect health and safety in the courts.
10. A person who does not comply with a direction or a requirement given or imposed by a presiding judicial officer or the Chief Executive still may enter and

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<sup>2</sup> Consistently with other COVID-19 empowering legislation, the Bill does not specifically address vaccination and the issues it raised. The High Court has found this surprising; see *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012 and *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 at [74], noted in *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 29 at [6].

remain in an area of the court if the presiding judicial officer considers it reasonably necessary in the interests of justice for them to do so.

11. Court security officers are given power to deny entry or remove any person who fails to provide evidence of the person's compliance with a direction given or requirement imposed by a head of bench. These powers are subject to the limits set out in ss 24 to 29 of the Court Security Act, which mean they will not generally apply to presiding judicial officers, exempted persons and persons in custody.
12. We anticipate that the directions given and requirements made under the Schedule may require persons to provide evidence of their vaccination status. This engages the right under s 11 of the Bill of Rights to refuse to undergo medical treatment. The ability to impose directions and requirements also engages s 18 freedom of movement rights, and s 27 rights to justice.

### ***Analysis***

13. We consider the proposed authorisation is not inconsistent with the rights and freedoms affirmed by the Bill of Rights Act. We note the proposed power is discretionary and before issuing directions or making requirements the person authorised to do so must be satisfied that the direction or requirement is reasonably necessary in the interests of justice and to protect health and safety in the courts.
14. In order to comply with their obligations under s 3(a) of the Bill of Rights Act, persons authorised to issue such directions or impose such requirements must consider whether a contemplated direction or requirement would unjustifiably limit the rights and freedoms protected by the Bill of Rights Act, and not issue the direction or impose the requirement if they considered the direction or requirement would have such an effect.
15. We note the Schedule will be in force only while the COVID-19 Public Health Response Act 2020 is in force, and that a presiding judicial officer may still allow a person who has not complied with a direction given or requirement imposed

by a presiding judicial officer, the chief executive or a court security officer, to enter and remain in an area of the court if the presiding judicial officer considers it reasonably necessary in the interests of justice to permit or require the person to do so.

16. These additional safeguards reinforce our conclusion that the discretionary power to issue directions or impose requirements conferred by the Schedule of the Bill is not inconsistent with any of the fundamental rights and freedoms that are affirmed by the Bill of Rights Act because it needs to be read consistently with those rights and freedoms.

**Schedule 2: Criminal Procedure Act 2011 temporarily amended**

17. Schedule 2 of the Bill temporarily amends the Criminal Procedure Act 2011. It provides that nothing in ss 196 to 198 of that Act limits or affects the ability of a court to conduct a hearing wholly or partly by audio visual link (**AVL**) or audio link (**AL**) and to require some or all members of the media or public who wish to observe the hearing to attend by AVL or AL.
18. Schedule 2 also provides that nothing in ss 196 to 198 limits or affects any inherent or implied powers of a judicial officer to give directions or impose requirements that must be met by persons entering a court, or the powers of a head of bench or the chief executive of the Ministry to give directions or impose requirements under the Courts Security Act that must be met by persons entering and remaining in a court.

***Analysis***

19. Schedule 2 raises issues with the right to be present at trial affirmed by s 25(e) of the Bill of Rights Act, and the right to natural justice affirmed by s 27(1) of the Bill of Rights Act. The latter right includes the opportunity to be heard on the making of a decision.<sup>3</sup>

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<sup>3</sup> *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] 2 NZLR 56 (CA) at [11] per Glazebrook and Hammond JJ.

20. The right to be present at trial has previously been interpreted to include physical presence before the courts,<sup>4</sup> and is considered a fundamental safeguard against unfairness or other error in court proceedings. In respect of criminal proceedings, the right is reflected in the specific protections of the rights to be brought before a court following arrest, to instruct counsel, to a fair hearing, to be present at trial and to examine witnesses on an equal basis to the prosecution under ss 23(3), 24(c), 25(a), 25(e) and 25(f) of the Bill of Rights Act.
21. The Courts (Remote Participation) Act 2010 specifies the criteria that must be considered before a judicial officer or a Registrar may decide whether it is appropriate to use AVL or AL in a criminal proceeding, and imposes restrictions on the use of AVL and AL in certain criminal proceedings.<sup>5</sup>
22. We have previously advised that amendments to the Courts (Remote Participation) Act to allow greater use of AL instead of AVL were not inconsistent with any of the rights and freedoms affirmed by the Bill of Rights Act.<sup>6</sup> The amendments embodied in Schedule 2 will not amend the safeguards and criteria specified in the Courts (Remote Participation) Act that must be followed before AVL or AL can be used in criminal matters. It follows, in our opinion, that those parts of Schedule 2 of the Courts Safety Legislation Bill which deal with AVL and AL are not inconsistent with any of the fundamental rights and freedoms that are affirmed by the Bill of Rights Act.
23. Schedule 2 also provides that nothing in ss 196 to 198 limits or affects any inherent or implied powers of a judicial officer to give directions or impose requirements that must be met by persons entering a court, or the powers of a head of bench or the chief executive of the Ministry to give directions or

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<sup>4</sup> See *Connelly v R* [1998] 3 NZLR 763 (HC).

<sup>5</sup> Sections 8, 8A, 9 Courts (Remote Participation) Act 2010.

<sup>6</sup> Advice to Attorney-General on COVID-19 Response (Further Management Measures) Legislation Bill (PCO 22874/4.0) – Consistency with New Zealand Bill of Rights Act 1990 dated 30 April 2020, at 27.

impose requirements under the Courts Security Act that must be met by persons entering and remaining in a court.

24. As we note above, the discretionary power to issue any such direction or impose such a requirement must, on the basis of s 3(a) of the Bill of Rights Act,<sup>7</sup> be exercised consistently with the rights affirmed by the Bill of Rights Act. If the discretionary powers authorised under Schedule 2 were exercised by a judicial officer or the chief executive in a manner that was inconsistent with the rights affirmed by the Bill of Rights Act, that inconsistency would be the result of the decision of the judicial officer or the chief executive. It would not be an inconsistency that arose from Schedule 2 itself.
25. For these reasons we conclude that those parts of Schedule 2 which provide that nothing in ss 196 to 198 of the Criminal Procedure Act limits or affects any inherent or implied powers of a judicial officer to give directions or impose requirements that must be met by persons entering a court, or the powers of a head of bench or the chief executive of the Ministry to give directions or impose requirements under the Courts Security Act that must be met by persons entering and remaining in a court are not inconsistent with any of the fundamental rights and freedoms that are affirmed by the Bill of Rights Act.

**Schedule 3; Temporary amendments to Juries Act 1981, Jury Rules 1990 and to the Legislation (Publication) Regulations 2021**

26. Schedule 3 of the Bill temporarily amends the Juries Act 1981, the Jury Rules 1990 and the Legislation (Publication) Regulations 2021 while the COVID-19 Public Health Response Act 2020 is in force or, in certain limited respects, for 12 months after that Act is repealed.
27. The amendments to the Juries Act give the Chief High Court Judge and the Chief District Court Judge power to make a protocol setting out requirements that are in addition to the Juries Act and the Jury Rules applicable to all people in

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<sup>7</sup> Section 3(a) provides that the Bill of Rights Act applies to acts done by the legislative, executive, or judicial branches of the Government of New Zealand.

relation to jury service, jury lists, summoning of jurors, or empanelling of juries, and all jurors during any jury trial in the court. A head of bench may make such a protocol if they think it is reasonably necessary in the interests of justice and to protect health and safety in the courts to take account of the effects of COVID-19. As previously noted, Schedule 3 of the Bill does not specifically empower a vaccination requirement but on our reading would empower such a requirement.

28. The Bill also empowers Judges to permit or require a person who has not complied with any requirement set out in a head of bench protocol to enter the court and be eligible to serve as a juror if a Judge thinks it is in the interests of justice to do so. A Judge may also impose requirements on jurors during a trial if the Judge thinks it is reasonably necessary in the interests of justice and to protect health and safety in the courts to take account of the effects of COVID-19.
29. A Registrar may ask a person summoned to attend as a juror to provide information and evidence that is relevant to that person's ability to comply with the COVID-19 jury requirements, and may defer or excuse that person from jury service if they fail to confirm to the Registrar's satisfaction that they have met COVID-19 jury requirements. The Registrar may refer the exercise of powers of deferral or excuse to a Judge and any person dissatisfied with a Registrar's decision may appeal against that decision to a Judge. A Judge may also excuse a person summoned to attend as a juror in the court in which the Judge sits if the Judge is not satisfied that the person meets the COVID-19 jury requirements.
30. A Registrar may also defer a person's jury service if their attendance would cause undue hardship or serious inconvenience to them, any other person or the public.
31. A Registrar may ask a person summoned to attend as a juror to provide information and evidence relevant to the person's ability to comply with

COVID-19 jury requirements and may also ask a person to produce evidence in support of an application to defer or excuse jury service if the Registrar reasonably thinks that evidence is necessary to determine the application.

32. The Bill empowers a judge to excuse a person from jury service if they have not confirmed to the Judge's satisfaction that the person meets the COVID-19 jury requirements.
33. The Bill will also amend s 33 of the Juries Act to provide that a verdict is not affected if a juror has been erroneously summoned otherwise than as is required by a protocol under cl 5 of Schedule 2, or if there is any error omission or informality in a deferral of jury service, an excusal of jury service, the selection or swearing in of a person as a juror or the discharge of a person as a juror under schedule 2, the jury rules or an protocol made under that schedule. The Schedule applies to summons issued before, on or after the commencement date of the Schedule.
34. Part 2 of the Schedule contains related temporary amendments to the jury rules. Part 3 provides for a temporary amendment to the Legislation (Publication) Regulations providing that any protocol made under the cl 5 of schedule 2 of the Juries Act is to be forwarded to Parliamentary Counsel Office without delay so that PCO may indicate where a user may access the protocol on the legislation website.

### ***Analysis***

35. We have considered whether Schedule 3 of the Bill is consistent with the rights of a person charged with certain offences to have the benefit of a trial by jury affirmed by s 24(e) of the Bill of Rights Act. We have also considered whether this Schedule is consistent with the minimum rights of criminal procedure affirmed by s 25 and the right to natural justice affirmed by s 27(1) of the Bill of Rights Act.
36. While the amendments do not on their face restrict the right to trial by jury, there is overseas case law to the effect that the right to trial by jury requires

that the pool of candidates for jury service be truly representative, and a fair cross section of the community.<sup>8</sup> This raises the question whether excluding someone from jury service who is not vaccinated or who refuses to provide evidence of vaccination will or might impact on the representative nature of a jury. There have been instances in other jurisdictions where attempts to limit juries to vaccinated persons has given rise to legal challenge.<sup>9</sup>

37. It seems to us that the high vaccination rates achieved in New Zealand generally tell against such concerns.<sup>10</sup> More particularly, we note the power to make a protocol is discretionary and before making such a protocol a head of bench must be satisfied that the protocol is reasonably necessary in the interests of justice and to protect health and safety in the courts to take account of the effects of COVID-19.
38. In order to comply with their obligations under s 3(a) of the Bill of Rights Act, a head of bench authorised to make a protocol under the Bill must also consider whether a contemplated protocol would unjustifiably limit the rights and freedoms protected by the Bill of Rights Act, and not make the protocol if they considered it would have such an effect. If a head of bench exercised the discretion provided by Schedule 3 in a manner inconsistent with the rights affirmed by the Bill of Rights Act, that inconsistency would be the result of the exercise of the protocol making power. It would not be an inconsistency that arose from Schedule 3 itself. In addition we note that cl 5 of Schedule 3 empowers a Judge, in the interests of justice, to permit or require a person who has not complied with a protocol requirement to enter a court and be eligible to serve as a juror.

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<sup>8</sup> Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (2<sup>nd</sup> ed, Lexis Nexis, Wellington 2015, at 22.7.18.

<sup>9</sup> See, for example [R v Eserjose 2022 ABQB 90](#), [R v C.D. 2021 SKQB 268](#), [United States v O'Lear 2022 U. Dist. LEXIS 25447](#) and [United States v Cole 2022 U.S. Dist. LEXIS 20070](#).

<sup>10</sup> As at 26 February 2022 95.1% of New Zealanders aged 12 and over were fully vaccinated, and 70.4% of those aged 18 and over had received a booster. The equivalent statistics for Māori were 87.3% fully vaccinated and 59.3% boosted, and for Pacific Peoples 95.8% fully vaccinated and 57.7% boosted. Vaccination rates according to DHB of residence ranged from Northland DHB at 87.8% fully vaccinated and 68.8% boosted, to 98.7% fully vaccinated and 72.7% boosted at Canterbury DHB: Source COVID-19: Vaccine data Ministry of Health NZ.

39. For these reasons we conclude that the provisions of Schedule 3 empowering the making of protocols are consistent with the minimum rights of criminal procedure affirmed by s 25 and the right to natural justice affirmed by s 27(1) of the Bill of Rights Act.

### Conclusion

40. We conclude that the temporary amendments to the Court Security Act, The Juries Act, the Jury Rules and the Legislation (Publication) Regulations 2021 that the Bill would bring into force are not inconsistent with the rights and freedoms that are affirmed by the Bill of Rights Act.

### Review of this advice

41. In accordance with Crown Law's policies, this advice has been peer reviewed by Crown Counsel, Kim Laurenson.



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Peter Gunn  
Crown Counsel  
027 702 2511

**Noted**



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Hon David Parker  
**Attorney-General**  
3 / 3 /2022

**Encl**