

30 April 2020

Attorney-General

**COVID-19 Response (Further Management Measures)
Legislation Bill (PCO 22874/4.0) – Consistency with New
Zealand Bill of Rights Act 1990
Our Ref: ATT395/313**

1. We have been asked to consider the following provisions in the COVID-19 Response (Further Management Measures) Legislation Bill¹ (“the Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”):
 - 1.1 Schedule 6, Part 1 (amendments to the Coroners Act 2006);
 - 1.2 Schedule 6, Part 2 (amendments to the Courts (Remote Participation) Act 2010);
 - 1.3 Schedule 6, Part 3 (amendments to Epidemic Preparedness Act 2006); and
 - 1.4 Schedule 14 (amendments to the Property Law Act 2007).
2. In our opinion the provisions in the above schedules are not inconsistent with any of the rights and freedoms that are affirmed by the Bill of Rights Act.

Background

3. The Bill amends over 40 Acts in order to make legislative changes that are necessary to respond effectively to the COVID-19 pandemic.
4. It does so across a broad spectrum of legislation. Among the Acts which it amends are the above Acts which are, save for the Epidemic Preparedness Act 2006, administered by the Ministry of Justice. Whilst the Epidemic Preparedness Act is not administered by the Ministry of Justice, that Ministry has provided ministerial approval for the court-related amendments that are contained in the Bill.²

Schedule 6, Part 1: amendments to the Coroners Act 2006

5. Schedule 6, Part 1 inserts a new s 21B into the Coroners Act 2006. It provides that a preliminary inspection of a body performed under s 21A of the Coroners Act must

¹ Version (22874/4.0).

² The Epidemic Preparedness Act 2006 is administered by the Ministry of Health, but the amendments to this Act provide courts and tribunals with a discretion to extend or shorten the time appointed by rules of court or an enactment court order, for doing an act or taking a step on the terms “that the court thinks just if satisfied that it is necessary or do so because of the effects of COVID-19”. As such, the

amendments are relevant to Acts administered by the Ministry of Justice, such as the Criminal Procedure Act 2011.

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also include the taking and testing of nasopharyngeal (i.e. nasal) and oropharyngeal (i.e. throat and mouth) swabs in any case where the deceased person is suspected to have had COVID-19 at the time of death.

6. Section 21B will apply whilst the Epidemic Preparedness (COVID-19) Notice 2020 (“the Notice”) is in force and then for a period of 31 days beginning on the day after the date on which the Notice expires or is revoked.³

Analysis

7. Whilst the common law recognises a number of principles governing the treatment of the bodies of the deceased,⁴ the deceased themselves do not have rights under the Bill of Rights Act.⁵ Therefore, s 21B does not engage any of the rights and freedoms that are affirmed by the Bill of Rights Act, save insofar as it may engage the rights and freedoms of the families of the deceased rather than those of the deceased themselves. For this reason those provisions of the Bill of Rights Act which might be engaged by the power to take nose and mouth swabs from living persons (ss 11 and 21) are not engaged by s 21B.⁶
8. We have considered whether s 21B might engage the rights of family members of the deceased that are affirmed by s 13 of the Bill of Rights Act (the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference).
9. The s 13 rights of family members may be engaged in the event that post-mortem procedures conflict with their religious rules for the handling of the bodies of the deceased.⁷ Members of certain religious or cultural groups may object to autopsies that involve physical interference with the body or the removal of samples from the body.⁸ The jurisprudence from the United Kingdom suggests that such interference

³ New section 21B(3).

⁴ *Takamore v Clarke* [2013] 2 NZLR 733 (SC); *Takamore v Clarke* [2012] 1 NZLR 573 (CA).

⁵ *T v R* [2016] NZCA 148, at [30]-[31] in which it was held that the reference in s 29 to natural persons should be taken to be a reference to living persons. Therefore, the dead have no rights under the Bill of Rights Act.

Whilst there is dicta from Elias CJ in *Takamore* (SC) that may appear to be to the contrary (“Proper disposal of bodies engages the human rights to dignity, privacy and family” at [1]) those remarks were couched in general terms and do not necessarily refer to those rights which are affirmed by the Bill of Rights Act.

⁶ For completeness, we have considered whether, in the event that the deceased were held to have rights under the Bill of Rights Act, s 21B would be inconsistent with either ss 11 or 21.

In our opinion the taking of mouth or nose swabs would not constitute “medical treatment” for the purposes of s 11 of the Bill of Rights Act since the swabs would be diagnostic for public health purposes rather than being directly therapeutic for the person from whom the swabs are taken. In reaching this conclusion we have considered the Supreme Court’s decision in *New Health New Zealand In v South Taranaki District Council* [2018] NZSC 59. In that case the Court found that large scale public health measures could constitute treatment within the meaning of s 11. However, the Court did so on the basis that the measure under consideration (fluoridisation) was intended to provide direct therapeutic benefit to those drinking the water.

The taking of such swabs would, however, constitute a search within the meaning of s 21 which affirms the right to be secure against unreasonable search and seizure. Whether a search is unreasonable will depend on a range of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale for the search. While the taking of swabs from the mouth and nose is an intrusion on personal privacy in relation to the taking of a bodily sample, we consider it is a minor intrusion only, and there is no less intrusive means of testing. Therefore, the intrusion into personal privacy is proportional to the public interest in preventing the spread of COVID-19 throughout New Zealand and would not be ‘unreasonable’.

⁷ See *R (Goldstein) v HM Coroner* [2014] EWHC 3889 (Admin).

⁸ Skegg & Patterson eds *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) 30.24.3; ‘Scans vs Scalpels: Privacy, Autopsies and new technologies’ (2015) 12 (10) *PrivLB* 270 by Bruce Baer Arnold considers how invasive procedures may be contrary to the religious beliefs and practices of indigenous people and other ethno-religious

will generally involve a justified limitation on the right to religious freedom when the interference is necessary to establish the cause of death and this cannot be achieved through less invasive means.⁹

10. Given the minimal interference involved in taking nose, mouth or throat swabs, we think it highly unlikely that any objection to the taking of such swabs would be advanced on religious grounds. In the unlikely event that the taking of such swabs did prove to be contrary to particular religious practices, it may be that s 21B would involve a limitation on the right to freedom of religion that is affirmed by s 13.
11. However, any such limitation would be justified under s 5 of the Bill of Rights Act as a reasonable limit on that right that is prescribed by law and can be demonstrably justified in a free and democratic society. The interference with the body would be minimal and the procedures confined to those who are suspected of having been infected by COVID-19. The limitation would be in the public interest of preventing the spread of COVID-19 throughout New Zealand. The limitation only lasts whilst the Notice is in force and then for a further 31 days after it expires or is revoked.
12. It is therefore our opinion that the new s 21B of the Coroners Act 2006 would not be inconsistent with any of the rights and freedoms that are affirmed by the Bill of Rights Act.

Schedule 6, Part 2: amendments to the Courts (Remote Participation) Act 2010

13. Schedule 6, Part 2 inserts a new s 7A into the Courts (Remote Participation) Act 2010 (“the 2010 Act”) which provides for the use of audio-links (“AL”) instead of audio-visual links (“AVL”) in civil proceedings. It also inserts a new s 8A which provides for the use of AL links in certain criminal procedural and sentencing hearings.¹⁰ The impact of these provisions must be understood against the backdrop of the existing ss7 and 8 of the 2010 Act.
14. Section 7 of the 2010 Act provides a registrar or judicial officer with the power to determine that a participant¹¹ in civil proceedings may appear by AVL link. The decision-maker is required to take into account whether the parties consent to this mode of appearance and also the criteria set out in s 5 of the 2010 Act (which include the nature of the proceedings (s 5(a)) and the effect of AVL on the effective maintenance of the rights of other parties (s 5(c)).
15. The new s 7A provides a registrar or judicial officer with the power to determine whether a participant in civil proceedings may appear by AL instead of by AVL in circumstances where an appearance by AVL would otherwise be available. In making the determination the decision-maker must consider the criteria in s 5, in relation to AL itself. Finally, the decision-maker must only make the order if satisfied that it would not be unjust to allow an appearance by AL rather than AVL.

communities that include adherents of Judaism, Islam or groups such as the Jehovah’s Witnesses and some Pacific Islanders.

⁹ R (*Goldstein*) fn 7, above; R. (*on the application of Rotsztein*) v HM Senior Coroner for Inner North London [2015] EWHC 2764 (Admin).

¹⁰ Schedule 4, Part 2, cls 3 and 4.

¹¹ The range of parties that may appear remotely includes a party, the defendant, counsel, a witness, a jury member, the judicial officer presiding over the proceedings and any other person directly involved whom judicial officer considers appropriate (see Courts (Remote Participation) Act 2010, s 3).

16. Section 8 of the 2010 Act set out the circumstances in which a registrar or judicial officer either may or must determine that a participant in a procedural or sentencing criminal hearing should appear by AVL. Section 9 provides that AVL may be ordered in substantive criminal hearings (but not for a trial unless the defendant consents). In exercising these powers the decision-maker must consider not only the criteria in s 5 but also the criteria in s 6, which require the Court to give consideration to a number of specific ways in which the use of AVL may have an impact on the ability of the accused to conduct his defence.
17. The new s 8A provides a registrar or judicial officer with the power to determine whether a participant in procedural or sentencing criminal hearings may appear by AL instead of by AVL in circumstances where AVL may or must be used. However, this power applies only in respect of those hearings in which the defendant is not required to attend. In making its determination the decision maker must consider the criteria in ss 5 and 6 specifically in relation to AL, and may then only make the order if satisfied that it would not be unjust to allow an appearance by AL rather than AVL.
18. Both provisions (ss 7A and 8A) are repealed when the Epidemic Preparedness (COVID-19) Notice 2020 (“the COVID-19 Notice”) expires or is revoked.¹²

Analysis

19. The right of a party to be physically present at court and to ensure the physical presence of witnesses is a fundamental feature of the right to a fair trial¹³. In criminal proceedings it is affirmed by sections 23(3), 24(c), 25(a) and 25(f) of the Bill of Rights Act. In civil proceedings it is affirmed through s 27(1) which affirms the right to natural justice.
20. However, the decision to allow an appearance by AVL or AL is not necessarily inconsistent with these rights as long as it does not give rise to unfairness.¹⁴
21. Whether it would be unfair will depend on the circumstance of each case. Whilst it is not possible to exhaustively define all those factors which should have a bearing on a particular decision, an important matter will often be the ability to assess the credibility of witnesses and so to effectively challenge those witnesses through cross-examination in the absence of their physical presence in court. In this, and in other respects, appearances by AL may give rise to greater impact on the rights of parties than AVL. As a consequence the decision as to whether to allow AL rather than AVL must be considered with great care.
22. These new provisions provide the court with the power to determine that participants may appear by AL during the period in which the COVID-19 Notice is in force where AVL would otherwise be available. However, the discretion provided in respect of criminal proceedings is not available for substantive hearings, nor for procedural and sentencing hearings of such significance that the defendant is required to be present. It thereby confines the power to those criminal hearings where there is least potential for injustice arising from appearances by AL.

¹² Sections 7A(3) and 8A(2).

¹³ *Jones v R* (2003) 1 AC 1.

¹⁴ *Accused v AG* (1997) CRNZ 148, 153-154; *Donnelly v Ireland* (1998) 1 IR 321 (Supreme Court of Ireland).

23. In respect of both civil and criminal matters the safeguards to ensure that the discretion is exercised fairly are that the criteria for s 5 and (in respect of criminal hearings) s 6 must be considered specifically in relation to AL, but also that the decision-maker must be satisfied that it would not be unjust to allow the appearance to take place by AL rather than by AVL.
24. Unlike ss 7 and 8 the new provisions do not expressly require the Court to take into account whether the parties consent to an appearance by AL. However, this will be a relevant consideration that should be taken into account under s 5(d) (any other relevant matters).
25. Finally, ss 3 and 6 of the Bill of Rights Act¹⁵ have the effect that these provisions must be interpreted and applied so as to give effect to the rights affirmed by the Bill of Rights Act.
26. In our opinion these provide sufficient safeguards to ensure that, if properly applied, the discretion to allow appearances by AL will be exercised in accordance with the rights affirmed by the relevant provisions of the Bill of Rights Act.
27. We therefore conclude that the amendments to the Courts (Remote Participation) Act 2010 are not inconsistent with the rights and freedoms that are affirmed by the Bill of Rights Act.

Schedule 6, Part 3; Amendment to the Epidemic Preparedness Act 2006

28. Schedule 6, Part 3 of the Bill inserts new Schedules 1 and 2 into the Epidemic Preparedness Act 2006.
29. Schedule 2 gives courts a discretion to extend or shorten the time appointed by rules of court or an enactment, or fixed by a court order, for doing an act or taking a step on the terms “that the court thinks just if satisfied that it is necessary or do so because of the effects of COVID-19, the workloads of the courts generally or the progress of a particular proceeding”.
30. Schedule 2 applies to all court proceedings, both criminal and civil, as well as to Tribunal proceedings.
31. Schedule 1 provides that any such extension or shortening of time will apply to the proceedings until they are concluded, whether or not Schedule 2 is repealed before the proceedings are concluded.
32. Schedule 2 is to continue in force until either (depending on which occurs first):
 - 32.1 31 October 2021; or
 - 32.2 a date set by the Governor-General by Order in Council made on the recommendation of the Minister of Health with the agreement of the Minister of Justice.¹⁶

¹⁵ Section 3(a) provides that the Bill of Rights applies to acts done by the legislative, executive, or judicial branches of the Government of New Zealand; s 6 provides that “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning”.

¹⁶ New s 27(2) that Schedule 4, Part 3 inserts into the Act.

33. The recommendation of the Minister for Health may be made if the Minister is satisfied that it is unnecessary for Schedule 2 to remain in force because either the effects of COVID-19 have diminished to such an extent that it is no longer necessary to rely on the changes made to the law or for some other reason the provision is no longer necessary.¹⁷

Analysis

34. We have considered whether Schedule 2 is consistent with the rights of a person arrested and detained that are affirmed by s 23, the rights of person charged that are affirmed by s 24, the minimum rights of criminal procedure that are affirmed by s 25 and the right to natural justice that is affirmed by s 27(1).
35. Neither ss 23, 24 nor 25 themselves provide specific time limits by which particular steps in the process of criminal investigation and prosecution must be taken. However, they do require various steps in the criminal process to be taken ‘promptly’ ‘as soon as possible’ and ‘without undue delay’¹⁸ as well as affirming the principle that an accused person must have adequate time for the preparation of his defence.¹⁹
36. Section 27(1) affirms the right to natural justice, which involves the right to a fair hearing. The right to a fair hearing in turn may involve the rights to notice (as to hearing and as to the content of the case against one, where relevant), to representation, to an impartial determination, to an oral hearing, and to consultation with a legal representative in advance of the hearing.²⁰ It may also be argued that s 27(1) requires the procedural rules which govern the conduct of legal proceedings to reach the minimal standards of accessibility, intelligibility, clarity and predictability that are required by the rule of law,²¹ insofar as this is necessary to ensure a fair hearing in a particular case.
37. However, none of this is inconsistent with the power of the Courts to amend the time limits relating to the conduct of individual proceedings, when it is in the interests of justice to do so.
38. It should be noted that most of the significant procedural rules in civil and criminal matters are contained in the Criminal Procedure Rules 2012, the High Court Rules 2016 and the District Court Rules 2014, all of which already provide the Courts with a discretion to extend or shorten the time set by the respective rules for doing anything in a proceeding.²² The discretion that is provided by Schedule 2 goes further in that it enables the Court to adjust the time limits that are contained in primary legislation. However, this power may only be exercised ‘on the terms that the court thinks just’.

¹⁷ New section 27(3).

¹⁸ For example, s 23(3) provides that an arrested person must be charged promptly or released; s 23(4) that an accused person arrested and not released must be brought before a court ‘as soon as possible’; 24(a) everyone charged shall be informed ‘promptly’ of the nature and cause of the charge; s 25(b) the accused has the right to be tried without undue delay.

¹⁹ Section 24(d).

²⁰ These principles, developed under the common law right to natural justice, are now also affirmed through s 27(1).

²¹ Lord Bingham “The Rule of Law” (2007) Cambridge Law Journal, Volume 66, Issue 1 at 67–69.

²² Rule 1.7 of the Criminal Procedure Rules 2012; r 1.9 of the High Court Rules 2016; r 1.23 of the District Court Rules 2014.

39. Further, on the basis of ss 3 and 6 of the Bill of Rights Act,²³ Schedule 2 must be interpreted and applied consistently with the rights affirmed by the Bill of Rights Act. Were a Court to exercise the discretion provided by Schedule 2 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 Court or Tribunal in question. It would not be an inconsistency that arose from Schedule 2 itself.
40. Certain provisions of the Bill of Rights Act require steps in criminal proceedings to take place in an unequivocally expeditious manner (for example, the right of the accused to be informed ‘promptly’ of the nature and cause of the matter with which he is charged).²⁴ The obligation to comply with them would be unchanged by Schedule 2. Other procedural rights require the courts to consider a range of factors, most notably the right to be tried ‘without undue delay’²⁵. Determinations as to what is ‘undue’ might well take into account the impact of COVID-19 as envisaged by Schedule 2.
41. We therefore conclude that the amendments to the Epidemic Preparedness Act 2006 that the Bill would bring into force are not inconsistent with the rights and freedoms that are affirmed by the Bill of Rights Act.

Schedule 14: amendments to the Property Law Act 2007

42. Schedule 14 contains the following amendments to the Property Law Act 2007 (‘the 2007 Act’).
43. New ss 120A to 120E amend those sections of the 2007 Act which relate to remediation of defaults on mortgages over land. Specifically, these new sections extend the period for the remediation of defaults from 20 to 40 days (“outbreak extension remedial period”) if the default occurs between 1 April 2020 and the close of the 6-month period that starts on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked (“the COVID-19 period”).
44. If, during the COVID-19 period, a notice for remediation of default is served under s 120 of the 2007 Act, the outbreak extension remedial period applies to it.²⁶ Enforcement action which has been commenced during the COVID-19 period but before the commencement of these provisions and is inconsistent with them is deemed not to comply with the requirements for valid notice and therefore the powers available to the mortgagee to enter possession, manage, sell or recover income are not available.²⁷ Further, these provisions apply to any legal proceedings commenced, but not finally determined, before the commencement of these provisions.²⁸
45. Similarly, new ss 129A to 129E extend the period for remediation of defaults on mortgages over goods. The period for remediation of breaches of such mortgages is

²³ See fn 15, above.

²⁴ Section 24(a) of the Bill of Rights Act.

²⁵ Section 25(b) of the Bill of Rights Act.

²⁶ New section 120B of the Property Law Act 2007.

²⁷ New section 120D which provides that such action does not comply with section 119(1) of the 2007 Act. However, 120D preserves the interests of those who have acquired interests in mortgaged property in good faith.

²⁸ New section 120E.

extended from 10 to 30 days.²⁹ This extension remedial period applies in the same manner as the remedial period for mortgages over land to notices, enforcement action and legal proceedings.

46. Finally, new ss 245A to 245E apply to a lease if it is in operation at any time in the COVID-19 period and the rent has been in arrears at any time during that period. These provisions extend the period of rent arrears, following which a lease can be cancelled under s 245 of the 2007 Act, from 10 days to 30 days.³⁰ This extension period applies to notices, enforcement action and legal proceedings taken in respect of the rent arrears during the COVID-19 period, in the same way as the preceding provisions in relation to mortgages.

Analysis

47. These provisions may have an adverse impact on the property rights of mortgagees and lessors. However, the Bill of Rights Act provides no substantive protection for property rights.³¹ Therefore, the issue is whether the provisions engage any of the procedural protections that the Bill of Rights Act affirms.
48. The provisions have retrospective effect in that they expressly provide that they are to have an effect on notices, enforcement actions and legal proceedings that were served or commenced before the provisions came into force.³²
49. Sections 25(g) and 26(1) affirm the right to be free from retrospectivity in relation to criminal proceedings.³³ However, the Bill of Rights Act contains no express affirmation of the right not to be subject to retrospective legislation in civil matters. It may be suggested that s 27(1) (the right to natural justice) implies a principle of non-retrospectivity in relation to civil matters. However, for the following reasons it is our opinion that it does not do so:
- 49.1 the principles and implications of the right to natural justice may be broad but not so broad as to embrace the distinct and separate principle of non-retrospectivity;³⁴
- 49.2 whilst the common law and international law prohibition on retrospectivity in criminal matters is firm and longstanding,³⁵ the approach to retrospectivity affecting civil rights is more flexible;³⁶ and

²⁹ New section 129B.

³⁰ New section 245B.

³¹ In *Westo Lagan v AG* [2001] 1 NZLR 40 (HC), the Court held that neither s 21 (protection against unreasonable search and seizure) nor s 27(1) (the right to natural justice) gave rise to any right to compensation for loss of property through the actions of the state.

³² Retrospectivity is the subject of various, competing definitions (see the discussion in '*Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance*' (2006) 22 NZULR 17 by Prebble, Prebble and Smith). However, these provisions fall within the definition of retrospective legislation that is found in Part 1 and 2 of chapter 12 of the Legislation Guidelines (2018 Edition).

³³ Section 25(g) provides the right, 'if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty'; section 26(1) provides that 'No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred'.

³⁴ Accounts of the principles of natural justice to be found in such cases as *Ridge v Baldwin* [1964] AC 40, do not refer to the principles of non-retrospectivity.

³⁵ *R v Pora* [2001] 2 NZLR 37, Elias CJ at [32]; Article 15 of the ICCPR.

³⁶ *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

- 49.3 the fact that Parliament chose to expressly affirm the right not to be subject to retrospectivity in criminal matters but not in relation to civil matters is an indication that it was not Parliament's intention to affirm a right to not be subject to retrospectivity in civil matters.
50. In the event that we are wrong and s 27(1) does affirm the right to be free from the adverse effects of retrospective legislation in civil proceedings, we have gone on to consider whether the limitation on the right brought about by these provisions would be justified under s 5 of the Bill of Rights Act, in that it subjects the right to a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society. In our opinion such a limitation would be justified under s 5 in that:
- 50.1 the limitation is introduced as a result of a pressing and urgent public need; namely the impact of COVID-19 and of the measures properly taken to limit the spread of COVID-19 on the ability of mortgagors and lessees to meet their ongoing obligations; and
- 50.2 the measures have effect for a limited period only and are tied to the ongoing existence of this pressing social need.
51. For these reasons it is our opinion these provisions are not inconsistent with any of the fundamental rights and freedoms that are affirmed by the Bill of Rights Act.

Review of this advice

52. In accordance with Crown Law's policies, this advice has been peer reviewed by Crown Counsel, Vicki McCall.

Noted

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Hon David Parker
Attorney-General
01 / 05 / 2020

Whilst s 7 of the Interpretation Act 1999 provides that an enactment does not have retrospective effect, this is subject to the principle of Parliamentary sovereignty which requires that such legislation must have retrospective effect when the legislation in question expressly provides that it shall. This is reflected by the approach of the common law to retrospective legislation in civil proceedings, where legislation is interpreted in order to avoid it having retrospective effect, except insofar as it was Parliament's clear intention that it should have retrospective effect (see *Maxwell v Murphy* (1957) 96 CLR 261, 267).