

Hon Kris Faafoi
Minister of Justice

Proactive release – COVID-19 Response (Courts Safety) Legislation Bill

Date of issue: 17 March 2022

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

| No. | Document | Comments |
|-----|---|---|
| 1 | Amendments to support the safe operation of courts and tribunals during COVID-19 <i>Cabinet Paper</i> Office of the Minister of Justice 8 February 2022 | Some information has been withheld in accordance with section 9(2)(ba)(i) to protect information which is subject to an obligation of confidence; section 9(2)(f)(iv) to maintain the confidentiality of advice; section 9(2)(g)(i) to protect free and frank expression of opinions; and section 9(2)(h) to maintain legal professional privilege. |
| 2 | Amendments to support the safe operation of courts and tribunals during COVID-19 <i>Cabinet Minute CAB-22-MIN-0014</i> Cabinet Office 8 February 2022 | Some information has been withheld in accordance with section 9(2)(f)(iv) to maintain the confidentiality of advice. |
| 3 | COVID-19 Response (Courts Safety) Legislation Bill: Approval for Introduction <i>Cabinet Paper</i> Office of the Minister of Justice 7 March 2022 | Some information has been withheld in accordance with section 9(2)(f)(iv) to maintain the confidentiality of advice; section 9(2)(g)(i) to protect free and frank expression of opinions; and section 9(2)(h) to maintain legal professional privilege. |
| 4 | COVID-19 Response (Courts Safety) Legislation Bill: Approval for Introduction Cabinet minute: LEG-22-MIN-0015 7 March 2022 | Some information has been withheld in accordance with section 9(2)(f)(iv) to maintain the confidentiality of advice. |

In Confidence

Office of the Minister of Justice

Cabinet

Amendments to support the safe operation of courts and tribunals during COVID-19

Proposal

- 1 I seek Cabinet's agreement to urgent legislative amendments to remove legal barriers to the judiciary and the Ministry of Justice addressing COVID-19 health and safety risks in the courts.

Relation to government priorities

- 2 Reforms are required to ensure that the courts can continue operating effectively and safely as COVID-19 spreads in the community.

Executive summary

- 3 Access to the courts is a cornerstone of a fair and democratic society. The courts must continue to operate during the pandemic in order to enable people to access justice, and when people attend court they must have a reasonable assurance of safety.
- 4 I propose urgent amendments to supplement and clarify the powers of the judiciary and Ministry of Justice (the Ministry) to set safety-related conditions for entering and remaining in the courts and for selecting, empanelling, and managing juries.
- 5 s9(2)(h)
- 6 Without legislative change:
 - 6.1 people going to court – many of whom are legally compelled to attend – could be exposed to a heightened risk of COVID-19;
 - 6.2 some people may be unwilling or unable to attend court because of safety concerns; and
 - 6.3 s9(2)(h)
- 7 These issues could delay access to justice, disrupt court business, and exacerbate existing jury trial backlogs. Court delays are already affecting decisions about whether to prosecute lower-level charges and complainants' willingness to engage in cases.
- 8 The proposals carefully balance safety considerations and the need to maintain rights under the New Zealand Bill of Rights Act 1990 (NZBORA). They would ensure that people legally required to attend court (such as

criminal defendants), or essential to the delivery of justice, would be able to access court even if they did not meet entry conditions. This is consistent with the Government's general approach that vaccination requirements should not place restrictions on people receiving essential services.

- 9 Proposals also take account of the separation of powers. The Government is not mandating any particular safety measures. The proposals will remove barriers to the judiciary and Ministry implementing safety measures that they consider appropriate.
- 10 All amendments would be prospective and time-limited, applying only during the COVID-19 pandemic. The changes would affect all courts (criminal, civil, and specialist), and some tribunals.
- 11 The judiciary and Ministry of Justice are likely to use their proposed powers to strengthen s9(2)(h) recently implemented entry requirements, and to enable additional requirements for jurors (which I expect to include a power for a registrar to request from potential jurors evidence of a vaccination pass or a recent negative COVID-19 test, and defer or excuse them from jury service if they are not willing to provide this).
- 12 I recommend the changes progress urgently to mitigate safety s9(2)(h) as soon as possible, particularly in light of the spread of Omicron. Jury trials, to which many of the issues above relate, have been paused for several months and resumed on 31 January.

Background

In-person court proceedings present COVID-19 transmission risks, but they can be the fairest way to administer justice

- 13 Courts are fundamental to ensuring access to justice and thereby upholding the rule of law. To ensure the administration of justice is fair, the courts observe certain procedural fairness requirements. These requirements, affirmed in the NZBORA, protect the right of parties to be heard, make submissions, and examine witnesses. Where a person is charged with an offence of sufficient severity, they have a right to a jury trial.
- 14 Procedural fairness requirements can often be most readily satisfied when participants in a case physically appear in a court (in-person proceedings), particularly in criminal hearings that determine a defendant's guilt or innocence. This is because in-person proceedings will generally most effectively support participants' understanding of proceedings, their ability to assess the credibility of witnesses and reliability of evidence, and their ability to communicate with others. In-person proceedings can also reflect the gravity of the subject matter of proceedings and afford human dignity to the participants.

Courts may present a heightened risk of COVID-19 transmission

- 15 Court proceedings involve people who have travelled from a number of locations and who are in close proximity for extended periods. Criminal jury trials, for example, require large numbers of jurors and other participants, and typically take from several days to two weeks.
- 16 Some court participants may also be disproportionately vulnerable to COVID-19. Māori and some younger age groups have somewhat lower vaccination uptake than the general population and are overrepresented in the criminal justice system.¹ Anecdotal evidence suggests unvaccinated people may be overrepresented among defendants and in the Family Court. The Māori Land Court involves many people who are over 70 and immunocompromised.
- 17 Additionally, many participants are compelled to be at court, often in stressful circumstances, some of whom may not be inclined to co-operate with voluntary safety precautions.

Current safety measures will not be adequate under the COVID-19 Protection Framework

- 18 The Heads of Bench (the senior judges of each court) are responsible for the orderly and efficient conduct of the business of their courts. The Ministry of Justice is responsible for supporting the judiciary to discharge this role, and for security and safety in court buildings.
- 19 In response to COVID-19, the judiciary and Ministry have introduced measures focused on reducing the number of people in the courts where appropriate, limiting access to the court by those who may be unwell, and reducing transmission risks in the courts.
- 20 These measures, in combination with alert level requirements, significantly reduced the numbers of people in the courts during previous periods when COVID-19 was spreading in the community. The few COVID-19 cases that made it into the courts were dealt with effectively.
- 21 These measures will not be sufficient to manage transmission risks under the COVID-19 Protection Framework. While high vaccination rates offer additional protection:
 - 21.1 many more people will be active in the community and seeking to access the courts than under the alert level system, and
 - 21.2 previous measures are not sustainable long-term, as they involved limiting court operations such that active criminal case numbers (particularly jury trial backlogs) have increased. Since August 2021, Delta restrictions have led to almost 75,000 court events being adjourned or rescheduled. The criminal caseload has increased by

¹ Among adults charged in 2020/21, 43% were Māori. 60% of people charged were aged 34 years old or younger: New Zealand Ministry of Justice data. As at 31 January, 85% of Māori have had their second vaccination and 90% have had their first vaccination. 91% of the 25 – 29 year age group has had their second vaccination, and 95% have had their first. These figures compare to 94% second vaccination and 96% first vaccination for all eligible New Zealanders aged over 12 years old.

almost 8,400 (26%) cases, including an additional 428 (15%) jury trials awaiting trial.

New safety measures are being introduced in the courts, but legal barriers exist

New measures will contribute to safety

- 22 The judiciary and Ministry have prepared the courts as far as possible to operate under the COVID-19 Protection Framework, supported by Ministry of Health advice. From 31 January, new safety measures began to come into force. These include more remote participation, vaccination requirements for Ministry staff and contractors, staggered court hearings, and enhanced court entry requirements.
- 23 People attending court will be required to show a vaccination pass or provide evidence of a recent negative COVID-19 test or Rapid Antigen Test before they can enter the court. People legally required to attend court, such as defendants, will not be prevented from entering the court if they do not comply with the requirements. Instead, the Ministry will implement additional safety measures to facilitate their presence.
- 24 The judiciary has also recently used powers under the Epidemic Preparedness Act 2006 to modify the Jury Rules 1990 to help reduce close mingling of jurors during the jury selection process.
- 25 The courts operated under the previous alert level protocols until the new measures came into force. During this period only a very limited number of jury trials were heard. Jury trials were not held in Auckland over the five months between the August 2021 lockdown and 31 January 2022.

There are legal barriers to these measures

- 26 The judiciary and Ministry are using powers under existing legislation and inherent and implied powers to introduce these safety measures. Inherent and implied powers are non-legislative powers that enable Heads of Bench to set practice requirements to facilitate the orderly and efficient conduct of the business of their courts.
- 27 However legal barriers are limiting their response, because:
 - 27.1 s9(2)(h)
 - 27.2 legislative barriers in court-related legislation prevent some safety measures being implemented. In particular, prescriptive requirements for jury selection make it difficult to avoid close and prolonged mixing of vaccinated and unvaccinated people.

Unless these barriers are overcome, safety concerns impair the courts' ability to operate effectively

- 28 If these barriers are not addressed, there are risks that:
- 28.1 people coming to court (many of whom are legally compelled to attend) may be exposed to a heightened risk of COVID-19;
 - 28.2 some key participants - like witnesses, lawyers, and interpreters - will be unwilling to physically participate in the courts due to safety concerns, or could become unable to participate part way through a proceeding if they contract COVID-19 or are a close contact; and
 - 28.3 s9(2)(h)
- 29 Surveys suggest there is public concern about serving as a juror in the current environment.² Representatives of the legal profession have indicated significant reluctance among lawyers to participate in-person in court unless entry requirements relating to vaccination and testing are in place (as provided for under the new measures). Anecdotal evidence suggests some third-party service providers like communication assistants, who work in close proximity to parties in court, have similar concerns.
- 30 If key participants are unwilling or unable to physically participate in court, proceedings may need to be delayed or adjourned. Adjourning trials partway through will significantly extend their timeframes and potentially require the trial to be stopped and a new trial scheduled. A break of three to four days in a criminal jury trial will often be sufficient to require this. An Auckland High Court trial is delayed by about a year if this occurs.
- 31 With already significant jury trial backlogs, delays could limit defendants' NZBORA rights to be tried without undue delay. Long delays also affect prosecution decisions for lower-level criminal matters, with delays already meaning some prosecutions are not being filed (for example, for breaches of sentence conditions). Delays are also affecting complainants' willingness to pursue cases.
- 32 Delays and appeals extend uncertainty – and often distressing experiences – for complainants, victims, families, and others involved in proceedings. Delays also affect public confidence in the courts.

I propose introducing new powers for the judiciary and Ministry to respond to safety risks

- 33 I am proposing legislative changes to remove legal barriers and ensure the judiciary and Ministry can introduce measures that provide court participants with a reasonable assurance of safety, while maintaining access to justice and public confidence. I propose changes that would:

² Research NZ, 'Serving as a juror' survey, undertaken between 18 and 23 November 2021. About half of respondents would not be comfortable serving as a juror if certain safety measures were not in place. More detail about the results is outlined in this paper in the section discussing proposed amendments to the Juries Act 1981. The survey was repeated in late 2021, and preliminary results suggest similar findings.

- 33.1 supplement the judiciary and Ministry's core risk-management powers, by strengthening their ability to set and enforce conditions for entering and remaining in any court and some tribunals;
- 33.2 enable the judiciary to reduce close and prolonged mixing of jurors by setting additional conditions for selecting and managing juries; and
- 33.3 clarify that safety measures and remote hearings are not inconsistent with public and media rights to access criminal hearings.

Strengthen judicial and Ministry powers to manage conditions for entry and remaining in the court

34 I propose amending the Courts Security Act 1999 to provide that the judiciary and the Ministry may set and enforce conditions for entering and remaining in a court to take account of the effects of COVID-19. These changes would supplement their existing powers to manage health and safety.

35 s9(2)(h)

36 s9(2)(h)

37 s9(2)(h)

38 My proposed changes would:

s9(2)(h)

- 38.1 enable the judiciary and Ministry Chief Executive to impose measures in response to the effects of COVID-19;
 - 38.2 enable Heads of Bench (or a person responsible for a tribunal) and the Ministry Chief Executive to set these measures in relation to the courtroom and elsewhere in the court respectively, to support consistent measures being set across courts; and
 - 38.3 provide that the powers of a court security officer include directing any person to produce evidence to confirm their compliance with the measures when they seek to enter or are within the court; deny entry if a person does not comply with the measures or a request for evidence; and use reasonable force in denying a person entry or removing them.
- 39 The following provisions in the Courts Security Act would apply:
- 39.1 a person denied entry or removed from a court because they did not comply with a safety measure could enter the court if they later complied with the measure; and
 - 39.2 the fact that a person was denied entry or removed from a court because they did not comply with a safety measure would not, by itself, give a person a reasonable excuse for not doing anything that person was required or wanted to do at the court.
- 40 Safeguards would apply. Before introducing a measure, the judiciary and Ministry would need to be satisfied that it was in the interests of justice and health and safety in a court, taking into account COVID-19 and NZBORA, which applies to acts of the judiciary and Ministry. The legislation would provide that a presiding judicial officer could direct that a person could enter or remain in the court despite any general measure, to avoid measures inadvertently compromising a person's rights in an individual case.

Permit new judicial powers to safely manage jury processes

- 41 I propose amending the Juries Act 1981 to overcome legislative barriers to the judiciary addressing health and safety issues relating to COVID-19. Jurors are compelled to come to court, and they should be able to do so with a reasonable assurance of safety.
- 42 The Juries Act sets out detailed requirements for summoning and empanelling jurors. Potential jurors must physically attend court and be in the court precincts. Often one hundred or more⁴ potential jurors mingle in the court building. Many jury facilities are small. Using larger court spaces (such as a courtroom instead of a jury room) significantly reduces the amount of court business that can be undertaken.
- 43 People are increasingly choosing a jury trial (rather than a judge alone trial), increasing pressure on backlogs. On average over the past five years, jury trials made up 24% of all criminal trials in the District Court and 96% of all criminal trials in the High Court (a total of about 2,900 annually).

⁴For an upcoming multi-defendant trial in Christchurch, over 2000 jurors will be summoned.

- 44 Surveys suggest people would not be comfortable serving as a juror if:⁵
- not everyone in the courtroom was wearing a mask (64% not comfortable)
 - there was no social distancing (57% not comfortable)
 - they did not know whether the other jurors were vaccinated (58% not comfortable).
- 45 Safety concerns will likely exacerbate existing challenges summoning enough jurors. Only about 25% of summoned jurors end up attending court on average.⁶
- 46 There is also a risk of a juror becoming infected with COVID, resulting in that juror and others in court having to self-isolate. This would almost certainly mean the trial would need to be halted and a new one scheduled.
- 47 The proposed amendments would enable the judiciary to set additional requirements to reduce these risks. They would:
- 47.1 allow the Chief District Court Judge and Chief High Court Judge to set additional process requirements for summoning and empanelling juries, and allow the Chief High Court Judge and Chief District Court Judge or a presiding judge to impose additional requirements on jurors during a trial;
 - 47.2 provide that nothing in the Juries Act limits any inherent or implied powers of the Chief High Court Judge, Chief District Court Judge, or a presiding judge to make directions setting requirements that must be met by jurors; and
 - 47.3 enable a registrar to ask people summoned as jurors to provide information relevant to their ability to comply with any such requirements, and permit a registrar or judge to excuse or defer a person from jury service if they have not confirmed that they meet the requirements. A deferral could occur more than once in a 12-month period.
- 48 The judicial powers to set requirements could only be exercised if it is reasonably necessary and in the interests of justice and health and safety in the courts, taking account of the effects of COVID-19 and NZBORA. An individual presiding judge could depart from the additional requirements in the interests of justice. A person could seek a judge's review of a registrar's decision to defer or excuse them under the new powers.
- 49 A verdict could not be challenged because a person was deferred or excused from jury service, or served on a jury, pursuant to these new provisions.
- 50 Additionally, to help avoid large numbers of jurors mingling in the court or taking up additional space in court buildings, I propose amendments to enable

⁵ Research NZ, 'Serving as a juror' survey, undertaken between 18 and 23 November 2021. The survey was repeated in late 2021, and preliminary results suggest similar findings.

⁶ Attendance rates are expected to further reduce as additional deferrals or excusals are sought on the basis of financial hardship resulting from COVID-19.

jury selection to take place outside court buildings, where alternative venues are available.

Clarify the relationship between open justice protections and safety measures

- 51 I propose clarifying that the right of the public and media to be present at criminal hearings does not affect judicial and Ministry powers to conduct hearings remotely or to set measures relating to entry and remaining in the courts, where the measures respond to the effects of COVID-19. s9(2)(h)
- 52 The Criminal Procedure Act 2011 provides that every criminal hearing is open to the public and provides for broad access to criminal hearings for media. Exceptions to these provisions do not clearly encompass safety measures relating to COVID-19.
- 53 s9(2)(g)(i)

s9(2)(h)

Proposals would only apply during the pandemic

- 54 The proposals would only apply during the COVID-19 pandemic. This would reflect that the measures respond to risks associated with the pandemic, and ensure permanent changes are not made without a full policy and Parliamentary process. This is particularly important where changes could potentially impact on peoples' rights under NZBORA.

The proposals reflect a careful balancing of access to justice and safety considerations

- 55 In recommending these proposals, I have carefully balanced safety considerations and the need to maintain access to justice and NZBORA rights. I have placed more weight on access to justice, given the fundamental importance of access to the courts.

Access to the courts would be preserved where necessary to protect rights

- 56 The proposals would not directly engage NZBORA rights, but would empower the judiciary and the Chief Executive of the Ministry to implement measures that could. The measures could affect who can access the courts and under

what conditions, and therefore could affect rights to natural justice and minimum standards of procedural fairness.

- 57 As the new powers involve the exercise of discretion and the pandemic continues to evolve, I cannot be definitive about how they would affect court participants. However, I understand the judiciary and Ministry's most pressing priorities are reinforcing s9(2)(h) the new measures (such as entry requirements involving vaccination certificates or a negative test, except where someone is legally compelled to attend), and strengthening powers to set requirements for potential jurors (which could also involve requirements related to vaccination or testing).
- 58 Based on these priorities, it is anticipated that the vast majority of people will be able to access the courts and tribunals in person in the usual way, as they will be able to meet expected entry requirements (as the large majority of people are vaccinated, or are expected to be willing to obtain a negative COVID-19 test).
- 59 If a person did not meet the entry requirements, the following is anticipated to occur:
- 59.1 if the person is required to attend court in person due to a legislative requirement, summons, or judicial direction, they would still be able to physically access the court (e.g. criminal defendants attending their trial, witnesses whose evidence cannot be given remotely, or parties to civil proceedings directed by the judge to attend); and
- 59.2 they would not be able to physically enter unless a judge directed this (e.g. lawyers, support people, the media, and the general public).
- 60 The proposals would allow the judiciary to introduce measures enabling potential jurors to be deferred or excused from jury service if they did not indicate they were able to comply with safety measures. Those measures are expected to include evidence of vaccination or (as an alternative) a recent negative COVID-19 test, and willingness to undergo testing during the course of a trial. A presiding judge would have discretion to allow a person who did not meet these safety measures to nonetheless be a juror, if the judge considered this was necessary in the interests of justice. A person who has been excused from jury service on the basis of the safety measures could seek to have that decision reviewed.
- 61 Our high and increasing vaccination rates, and the option for unvaccinated people to show evidence of a negative test as an alternative to vaccination, mean the proposed judicial measures are likely to have limited impacts on the diversity of juries. If in a specific case there were concerns about diversity or potential bias (eg, if COVID-19 was relevant to the case), the presiding judge could allow a person who did not meet the safety measures to be a juror.
- 62 **Appendix One** provides more detail about how the judiciary and Ministry are expecting to use the proposed new powers, and the anticipated impacts on court participants.

- 63 These proposals preserve access to the courts by those who are compelled to attend court or where access is necessary in the interests of justice. NZBORA would apply to the exercise of the judicial and Ministry powers, and individual presiding judicial officers would have discretion to depart from any general measures to ensure an individual's rights are not compromised. The proposals are therefore consistent with the Government's general approach that vaccination mandates should not place restrictions on people receiving essential services.

Limits on procedural rights are justified by health needs

- 64 Measures that affect how lawyers, interpreters, other support people, witnesses, the public, and media appear in court will engage parties' rights to instruct a lawyer and to examine witnesses, and defendants' rights to a public hearing. They could also affect the quality of their participation, and potentially contrary to tikanga principles emphasising face-to-face engagement.
- 65 Several safeguards will ensure the power to implement safety measures is reasonably exercised. The powers will only exist for the period of the COVID-19 pandemic. They could only be exercised where reasonably necessary to respond to COVID-related health and safety risks and in the interests of justice. They would have to be exercised consistently with NZBORA. There would also be judicial discretion to make directions in individual cases that enable exceptions to a general measure. A person who considered their case had been unfairly affected by the health measures could also appeal their case, or potentially judicially review the health measure if they considered it had not been lawfully made.
- 66 On balance I therefore consider these are justified limitations to an individual's rights and freedoms under the NZBORA. I discuss NZBORA considerations further in the 'Human Rights' section below.

The proposals also take account of separation of powers

- 67 The design of the proposals has also taken account of their consistency with the separation of powers between the judiciary, executive and legislature. The proposals will remove barriers to the judiciary and the Ministry exercising their traditional constitutional roles in the administration of the courts. They do not mandate any measures. This is consistent with current policy settings. For example, the judiciary already has significant powers to manage access to the courts under the legislation like the Courts Security Act.
- 68 This approach will help maintain public trust and confidence in the judiciary as an independent branch of government, including independence to scrutinise the actions of the executive relating to the pandemic.

I recommend the proposals are rapidly progressed

- 69 I recommend amendments progress urgently to mitigate safety s9(2)(h) as soon as possible, particularly in light of the threat of Omicron. Jury trials, to which many of the issues above relate, have been paused for several months and resumed on 31 January.

Financial implications

- 70 The proposals in this paper will strengthen and extend judicial and Ministry powers to introduce safety measures. They do not have any direct fiscal costs.
- 71 In 2020, the Government agreed time-limited funding through to June 2022 from the COVID-19 Response and Recovery fund for additional District and High Court Judges to help address the COVID-19-related case backlogs. The proposals in this paper would supplement the funding initiative by enabling measures that would allow the courts to safely hear more jury trials. This would support the judicial resource to be more fully deployed. s9(2)(f)(iv)
- 72 The proposals will help to reduce the resourcing impacts of delay. Delays result in additional court events that increase workload across the justice system. Registry staff, the judiciary, the legal profession (with an associated increase in legal aid costs), Police and Crown Prosecution, Oranga Tamariki, and Corrections all need to support the extra court events. Court delays also lead to an increase in time on remand, which currently costs about \$300 per person per day.

Legislative implications

- 73 As noted above, urgent legislation is required to implement the proposal.
- 74 s9(2)(f)(iv)
- 75 I plan to submit a Bill to the Cabinet Legislation Committee for consideration as soon as possible. I will propose a truncated two-week select committee process, completing the remaining Parliamentary stages by mid-April. The legislation would come into force shortly after enactment and apply to cases currently before the courts as well as future cases during the period of the COVID-19 pandemic.
- 76 The proposals amend legislation that binds the Crown.

Impact Analysis

- 77 The Treasury's Regulatory Impact Analysis team has determined that the proposals in this paper to temporarily remove legislative barriers to the safe operation of courts during COVID-19 are exempt from the requirement to

provide a Regulatory Impact Statement (RIS). The exemption is on the grounds that the proposals are intended to manage the short-term impacts of the COVID-19 emergency and they are required urgently to be effective (making a complete, robust and timely RIS unfeasible). Any proposals to permanently remove legislative barriers to the safe operation of the courts are not exempt and would require impact analysis.

Population Implications

- 78 The proposals in this paper would enable the Ministry and judiciary to implement measures that could have a more positive health impact on Māori and Pacific court participants than on other court participants. Māori and Pacific peoples are at greater risk of COVID-19 in the courts, as a result of being overrepresented in among criminal defendants,⁷ and experiencing more pre-existing health conditions and crowded living conditions than the general population. Māori are overrepresented among victims of crime,⁸ and have a somewhat lower vaccination rate. Safety measures enabled by these proposals would help to mitigate the risk of COVID-19 transmission in court. They would be consistent with the Crown duty to actively protect Māori court participants.
- 79 The measures could have a small disproportionate impact on young people, Māori, and Pacific peoples' access to justice. These groups are disproportionately represented in certain court proceedings, meaning safety measures that affect how people participate in the courts would have a particular impact on them. Young people are vulnerable due to their age and are particularly reliant on support persons in court. They could be adversely affected if entry requirements affect the attendance of whānau in particular.
- 80 Safety measures may have a small negative impact on the diversity of juries, if measures mean people who are unvaccinated jurors are unwilling to be tested are excluded from the juror pool, and this leads to fewer Māori jurors being available for selection (due to somewhat lower Māori vaccination rates relative to the general population). However, as noted above, our high and increasing vaccination rates, and the option for unvaccinated people to show evidence of a negative test as an alternative to vaccination, mean the changes are likely to have limited impacts on the diversity of juries. Additionally, if jurors are reluctant to serve due to safety concerns, there may be an impact on both diversity of juries and the ability to undertake criminal trials.
- 81 The measures could also have disproportionate impacts on other groups who face structural challenges accessing justice, such as members of ethnic

⁷ All adults aged 18 plus, and using estimated prioritised ethnic populations, in 2020/21:

- Māori were 2.5 times more likely than Pasifika and 6.2 times more likely than European/Other adults aged 18 plus to be charged in court, and
- Pasifika were 2.5 times more likely than European/Other adults aged 18 plus to be charged in court.

⁸ Māori are significantly more likely to experience crime across all offences, household offences and personal offences (38% compared with the New Zealand average of 30% in 2018/19): Ministry of Justice (2021) Maori victimisation in Aotearoa New Zealand.

communities and disabled peoples who already face greater language barriers or difficulties accessing quality legal representation.

- 82 Some of the safeguards outlined above would help mitigate these risks (for example, the requirement that safety measures are consistent with the NZBORA, and the judicial discretion to make directions in individual cases that enable exceptions to a general measure).

Human Rights

- 83 As outlined above, while the proposals would not directly limit rights, they would empower the Ministry and judiciary to make measures that could. The measures would principally affect rights to natural justice, rights of people charged, and rights to minimum standards of criminal procedure.
- 84 Additionally, if safety measures include vaccination and testing, the right to refuse medical treatment will be engaged where the affected person has to attend court to carry out their profession. (As the entry requirements would not apply to people legally obliged to attend court, the measures would not limit these people's rights to refuse medical treatment).
- 85 Several safeguards will help to ensure safety measures are reasonable and go no further than is necessary. They may only be made during the period of the COVID-19 pandemic. They would have to be consistent with the NZBORA. They must be reasonably necessary to respond to COVID-related health and safety risks and in the interests of justice. There would be judicial discretion to make directions in individual cases that enable exceptions to a general measure.
- 86 I consider the limits on rights to be reasonable and justifiable, as the proposals respond to health risks of COVID-19 in the court and cases are likely to be significantly delayed if further measures are not taken. Such delays could limit parties' rights to procedural justice, particularly rights to have cases tried without undue delay as affirmed by the NZBORA.

Consultation

- 87 The Chief Justice has written to and met with the Attorney-General to outline the judiciary's concerns about the courts' powers to manage physical access to the courts in a manner that maintains safety and confidence of participants and the wider public. She noted particular concerns about the ability to conduct jury trials safely, and the risk of exacerbating jury trial backlogs.
- 88 The Attorney-General and I have also met with senior judicial representatives about these concerns.
- 89 My officials closely consulted judicial representatives during the development of these proposals, and also consulted chairs of Ministry-supported tribunals. They support the proposals, saying the combination of specific statutory amendments and confirmation of certain inherent and implied powers will appropriately address legal uncertainty and legislative barriers.

- 90 The judicial preference is for the Juries Act amendments relating to inherent and implied powers to be made permanent, on the grounds previous legislative encroachment on these powers was unintentional. They also support permanent changes where proposals would be useful regardless of the pandemic (jury balloting outside the court building and clarifying the relationship between open justice protections and entry requirements and remote hearings).
- 91 I recommend any changes should only apply during the COVID-19 pandemic. As noted above, this reflects that the measures respond to risks associated with the pandemic, and ensures permanent changes are not made without a full policy and parliamentary process. This is consistent with the approach taken to most legislation dealing with the pandemic.
- 92 My officials met seven legal professional groups⁹ in December 2021 to discuss issues relating to the operation of the courts under the Protection Framework. Their principal concerns are reflected in the body of this paper.
s9(2)(ba)(i)
- 93 Crown Law, the Ministry of Health, the Department of Corrections, Police, Oranga Tamariki, Te Arawhiti, Te Puni Kōkiri, Ministry for Ethnic Communities, Ministry for Pacific Peoples, Office of the Privacy Commissioner, Ministry for Business, Innovation, and Employment, Ministry for the Environment, the New Zealand Defence Force, and the Treasury were consulted on the proposals. The Department of Prime Minister and Cabinet was informed.
- 94 Agencies supported efforts to improve safety, emphasised the desirability of clear communication about the potential impacts of the options on court users, and highlighted the lack of consultation with Māori, particularly given that Māori are disproportionately represented in the justice system.
- 95 Due to the urgency of the issues, wider consultation with other court participants and interested parties has not been possible. The lack of consultation with Māori is not consistent with the Crown's partnership obligations under Te Tiriti o Waitangi, and means it has not been possible to more fully understand implications for Māori or understand expectations for measures in this area. In consultation, Te Hunga Rōia Māori o Aotearoa - the Māori Law Society has highlighted the Crown's duty of active protection and advocated for strengthened safety measures to protect Māori and other court participants. It also highlighted compounding structural issues Māori face in accessing justice, including lower vaccination rates, challenges accessing quality legal representation, and general stresses arising from COVID-19.

⁹ Officials consulted the New Zealand Law Society, Te Hunga Rōia Māori o Aotearoa - the Māori Law Society, Auckland District Law Society, the New Zealand Bar Association, the Defence Lawyers Association New Zealand, Public Defence Service, and several Crown prosecutors.

- 96 I have consulted the Leader of the House and the Parliamentary Counsel Office on adding a bill to the Legislation Programme to make these changes.

Communications

- 97 My office will consult with the Ministry and judiciary in the preparation of media statements and communications to key stakeholders once Cabinet decisions are taken. The Ministry and the judiciary will communicate any changes they make under the powers, and will publish protocols and requirements on their websites.

Proactive Release

- 98 I will proactively release this paper, subject to any redaction as appropriate under the Official Information Act 1982, within 30 business days of decisions being confirmed by Cabinet or earlier if possible to support public and select committee consideration.

Recommendations

The Minister of Justice recommends that the Committee:

1. Note that the judiciary and the Ministry of Justice share responsibilities for the safe operation of the courts, and this includes responding to the risks of COVID-19 to health, safety, and the administration of justice;
2. Note there are legal barriers that limit the ability of the judiciary and Ministry to manage COVID-19 transmission risks in a manner that provides court participants with a reasonable assurance of safety, and this could exacerbate jury trial backlogs and compromise access to justice;

Confirm and extend judicial and Ministry powers to respond to COVID-19 risks through the Courts Security Act

3. Agree to amend the Courts Security Act 1999 to provide that:
 - 3.1. Heads of Bench and persons responsible for a tribunal may set measures for entering and remaining in a courtroom to take account of the effects of COVID-19, if satisfied the measures are reasonably necessary in the interests of justice and health and safety in the courts and tribunals;
 - 3.2. the Chief Executive of the Ministry may set measures for entering and remaining elsewhere in the court to take account of the effects of COVID-19, if satisfied the measures are reasonably necessary in the interests of justice and health and safety in the courts;
 - 3.3. court security officers have powers to administer and enforce measures made under recommendations 3.1 and 3.2 in relation to any person entering or in the court, including:
 - 3.3.1. powers to direct a person seeking to enter a court or within a court to provide evidence of compliance with the measures;

- 3.3.2. powers to refuse entry to and remove a person from the court based on non-compliance with the measures or with a request for evidence to confirm compliance; and
- 3.3.3. powers to use force in denying a person entry to the court or removing them;
- 3.4. a presiding judicial officer in the interests of justice may direct that a person may enter or remain in the court, despite any measure made pursuant to powers proposed under recommendations 3.1 or 3.2;
- 4. Note a person denied entry or removed from a court because they do not comply with a measure made under recommendations 3.1 and 3.2 may enter if they later comply with the measure;
- 5. Note the fact that a person was denied entry or removed from a court because they do not comply with a measure made under recommendations 3.1 or 3.2 does not, by itself, give a person a reasonable excuse for not doing anything that person was required or wanted to do at the court;

Remove barriers to additional safety measures in jury processes through the Juries Act 1981

- 6. Agree to amend the Juries Act 1981 to:
 - 6.1. allow the Chief High Court Judge and Chief District Court Judge to set additional requirements relating to processes to summon and empanel juries where reasonably necessary in the interests of justice and health and safety in the courts, to take account of the effects of COVID-19;
 - 6.2. allow the Chief High Court Judge, the Chief District Court Judge, or a presiding judge to impose additional requirements on jurors during a trial, where reasonably necessary in the interests of justice and health and safety in the courts, to take account of the effects of COVID-19;
 - 6.3. provide that nothing in the Juries Act 1981 limits any inherent or implied powers of the Chief High Court Judge, the Chief District Court Judge, or a presiding judge to make directions setting requirements that must be met by jurors, where reasonably necessary in the interests of justice and health and safety in the courts, to take account of the effects of COVID-19;
 - 6.4. enable a registrar to direct people summoned as jurors to provide evidence relevant to their ability to comply with the requirements made pursuant to the proposed new powers in recommendations 6.1 – 6.3;
 - 6.5. permit a registrar to excuse or defer a person from jury service if they have not confirmed that they meet the requirements following an inquiry permitted pursuant to the proposed new powers in recommendation 6.4, or if the registrar is unsure whether to excuse or defer, to refer the matter to a judge;
 - 6.6. provide that a potential juror's jury service could be deferred more than once in a 12-month period pursuant to the powers in recommendation 6.5;

- 6.7. provide that a person could seek a judge's review of a registrar's decision to excuse or defer that person's jury service pursuant to powers in recommendation 6.5;
- 6.8. provide that a presiding judge could in the interests of justice make an order in a particular case that departs from the additional requirements made pursuant to the new powers proposed in recommendations 6.1 – 6.3;
- 6.9. remove the legislative restriction that jury selection must occur in the court precinct;
- 6.10. provide a verdict would not be affected because a person was deferred or excused from jury service, or served on a jury, because of steps taken pursuant to the new powers proposed in recommendations 6.1 – 6.8;

Clarify the relationship between open justice protections and health and safety measures through the Criminal Procedure Act 2011

- 7. Agree to clarify that the provisions of the Criminal Procedure Act 2011 relating to public and media access to criminal proceedings do not affect the ability to conduct criminal hearings via audio-links or audio-visual links or to implement requirements relating to the entry to courts that have been made to take account of the effects of COVID-19 under other Acts or inherent or implied powers;

Legislative drafting

- 8. s9(2)(f)(iv)
- 9. Note I intend to seek agreement from the Cabinet Legislation Committee to introduce the Safety in Courts (COVID-19 Urgent Measures) Legislation Bill in early March 2022;
- 10. Invite me to instruct Parliamentary Counsel Office to draft legislation to give effect to the above proposals;
- 11. Agree to authorise me to take any detailed policy decisions that may arise during the drafting of the legislation, in consultation with the Attorney-General and Minister for Courts.

Authorised for lodgement

Hon Kris Faafoi

Minister of Justice

Appendix One: Anticipated impacts on court participants

1. As noted in the body of the paper, the proposals would strengthen powers of the judiciary and the Ministry of Justice's Chief Executive. As the powers would be exercised at their discretion (subject to a range of thresholds and criteria), as the pandemic continues to evolve, it is not possible to be definitive about how the powers would affect court participants.
2. However, the judiciary and Ministry's most pressing priorities are reinforcing s9(2)(h) the new safety measures (such as entry requirements involving vaccination certificates or a negative test, except where someone is legally compelled to attend), and strengthening powers to set requirements for potential jurors (which could also involve requirements related to vaccination or testing).
3. Based on these priorities, it is anticipated that:
 - Participants who are required to attend by law (by a legislative requirement, summons or judicial direction) will be able to physically access the court even if they do not meet court entry requirements. This would include the following categories of people:
 - Criminal defendants
 - Young people before the Youth Court
 - Summoned witnesses, if they cannot attend remotely
 - Summoned jurors, and
 - Anyone subject to a judicial direction (eg, some parties in civil proceedings).

The proposals would enable potential jurors to be deferred or excused from jury service if they did not indicate they are able to meet safety measures (which could include evidence of a vaccination pass or a recent negative COVID-19 test, and willingness to be tested during the course of a trial). These measures could be implemented before a potential juror entered the court building, so it is anticipated most summonsed jurors would meet the entry requirements.

If in a specific case there were concerns about diversity or potential bias (eg, if the COVID was relevant to the case), the presiding judge in the case would have discretion to allow a person who did not meet these measures to nonetheless be a juror, if that is necessary in the interests of justice. Additionally, a person who has been excused from jury service on the basis of the safety measures could seek to have that decision reviewed.

If participants do not meet entry requirements, measures will be put in place to reduce the risk of these people attending court. For example, participants may be offered the option of remote participation. Enhanced

masking and distancing measures will be in place if they physically appear.

- Other people will need to meet the entry requirements to enter, unless a presiding judge directs they should be allowed to physically enter the court even though they have not met entry requirements (with remote participation a potential alternative means of access). These include:
 - Victims
 - Lawyers
 - Mackenzie Friends, Lay Assistants
 - Support persons such as family, friends and whānau (subject to any legislative requirements specifically enabling their presence, in which case they fall in the category above)
 - Parties to civil proceedings
 - Third party providers including interpreters, communication assistants, specialist report writers, Family Court counsellors, supervised contact providers, Victim Support (third-party providers engaged by the Ministry will need to be vaccinated)
 - Psychologists, psychiatrists and forensic nurses
 - Pathologists
 - Social workers
 - Other stakeholders
 - Members of the public
 - Media.



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Amendments to Support the Safe Operation of Courts and Tribunals During COVID-19

Portfolio Justice

On 8 February 2022, Cabinet:

- 1 **noted** that the judiciary and the Ministry of Justice (the Ministry) have responsibilities for the safe operation of the courts, and this includes responding to the risks of COVID-19 to health, safety, and the administration of justice;
- 2 **noted** there are legal barriers that limit the ability of the judiciary and Ministry to manage COVID-19 transmission risks in a manner that provides court participants with a reasonable assurance of safety, and this could exacerbate jury trial backlogs and compromise access to justice;

Confirm and extend judicial and Ministry powers to respond to COVID-19 risks through the Courts Security Act

- 3 **agreed** to amend the Courts Security Act 1999 to provide that:
 - 3.1 Heads of Bench and persons responsible for a tribunal may set measures for entering and remaining in a courtroom to take account of the effects of COVID-19, if satisfied the measures are reasonably necessary in the interests of justice and health and safety in the courts and tribunals;
 - 3.2 the Chief Executive of the Ministry may set measures for entering and remaining elsewhere in the court to take account of the effects of COVID-19, if satisfied the measures are reasonably necessary in the interests of justice and health and safety in the courts;
 - 3.3 court security officers have powers to administer and enforce measures made under paragraphs 3.1 and 3.2 in relation to any person entering or in the court, including:
 - 3.3.1 powers to direct a person seeking to enter a court or within a court to provide evidence of compliance with the measures;
 - 3.3.2 powers to refuse entry to and remove a person from the court based on non-compliance with the measures or with a request for evidence to confirm compliance; and
 - 3.3.3 powers to use force in denying a person entry to the court or removing them;

- 3.4 a presiding judicial officer in the interests of justice may direct that a person may enter or remain in the court, despite any measure made pursuant to powers proposed under paragraphs 3.1 or 3.2;
- 4 **noted** that a person denied entry or removed from a court because they do not comply with a measure made under paragraphs 3.1 and 3.2 may enter if they later comply with the measure;
- 5 **noted** the fact that a person was denied entry or removed from a court because they do not comply with a measure made under paragraphs 3.1 or 3.2 does not, by itself, give a person a reasonable excuse for not doing anything that person was required or wanted to do at the court;

Remove barriers to additional safety measures in jury processes through the Juries Act 1981

- 6 **agreed** to amend the Juries Act 1981 to:
- 6.1 allow the Chief High Court Judge and Chief District Court Judge to set additional requirements relating to processes to summon and impanel jurors where reasonably necessary in the interests of justice and health and safety in the courts, to take account of the effects of COVID-19;
- 6.2 allow the Chief High Court Judge, the Chief District Court Judge, or a presiding judge to impose additional requirements on jurors during a trial, where reasonably necessary in the interests of justice and health and safety in the courts, to take account of the effects of COVID-19;
- 6.3 provide that nothing in the Juries Act 1981 limits any inherent or implied powers of the Chief High Court Judge, the Chief District Court Judge, or a presiding judge to make directions setting requirements that must be met by jurors, where reasonably necessary in the interests of justice and health and safety in the courts, to take account of the effects of COVID-19;
- 6.4 enable a registrar to direct people summoned as jurors to provide evidence relevant to their ability to comply with the requirements made pursuant to the new powers in paragraphs 6.1 – 6.3;
- 6.5 permit a registrar to excuse or defer a person from jury service if they have not confirmed that they meet the requirements following an inquiry permitted pursuant to the proposed new powers in paragraph 6.4, or if the registrar is unsure whether to excuse or defer, to refer the matter to a judge;
- 6.6 provide that a potential juror's jury service could be deferred more than once in a 12-month period pursuant to the powers in paragraph 6.5;
- 6.7 provide that a person could seek a judge's review of a registrar's decision to excuse or defer that person's jury service pursuant to powers in paragraph 6.5;
- 6.8 provide that a presiding judge could in the interests of justice, make an order in a particular case that departs from the additional requirements made pursuant to the new powers in paragraphs 6.1 – 6.3;
- 6.9 remove the legislative restriction that jury selection must occur in the court precinct;

- 6.10 provide a verdict would not be affected because a person was deferred or excused from jury service, or served on a jury, because of steps taken pursuant to the new powers in paragraphs 6.1 – 6.8;

Clarify the relationship between open justice protections and health and safety measures through the Criminal Procedure Act 2011

- 7 **agreed** to clarify that the provisions of the Criminal Procedure Act 2011 relating to public and media access to criminal proceedings do not affect the ability to conduct criminal hearings via audio-links or audio-visual links, or to implement requirements relating to the entry to courts that have been made to take account of the effects of COVID-19 under other Acts or inherent or implied powers;

Legislative drafting

- 8 **s9(2)(f)(iv)**
- 9 **noted** the Minister of Justice intends to seek agreement from the Cabinet Legislation Committee to introduce the Safety in Courts (COVID-19 Urgent Measures) Legislation Bill in early March 2022;
- 10 **invited** the Minister of Justice to instruct Parliamentary Counsel Office to draft legislation to give effect to the above decisions;
- 11 **authorised** the Minister of Justice to take any detailed policy decisions that may arise during the drafting of the legislation, in consultation with the Attorney-General and Minister for Courts, in line with the decisions under CAB-22-SUB-0014.

Michael Webster
Secretary of the Cabinet

In Confidence

Office of the Minister of Justice
Chair, Cabinet Legislation Committee

COVID-19 Response (Courts Safety) Legislation Bill: Approval for Introduction

Proposal

- 1 I seek approval to:
 - 1.1 introduce the COVID-19 Response (Courts Safety) Legislation Bill (the Bill); and
 - 1.2 revoke and replace a recommendation relating to postponed jury service.

Policy

- 2 The Bill will remove legal barriers to the judiciary and the Ministry of Justice (the Ministry) addressing COVID-19 health and safety risks in the courts. It will supplement and clarify the powers of the judiciary and Ministry of Justice to set conditions for entering and remaining in the courts, and for selecting and managing juries.
- 3 Access to the courts is critical in a free and democratic society. The Bill will help court participants feel and be safe in the courts, and support courts to continue operating effectively.
- 4 The Bill strikes a balance between supporting safety measures in the court and ensuring access to justice and that people's rights are preserved. Those people who have been legally compelled to attend court, such as criminal defendants, will continue to be able to access the courts on the same basis as they usually do, even if they do not comply with safety measures enabled by the Bill.

A Bill is needed to provide new judicial and Ministry powers to manage risks

- 5 The judiciary and Ministry are responsible for the safe running of the courts. They have prepared the courts as far as possible to operate under the COVID-19 Protection Framework. This has included more remote participation, vaccination requirements for Ministry staff and contractors, and enhanced court entry requirements.
- 6 The changes are necessary because:
 - 6.1 physical court proceedings present a risk of COVID-19 transmission, but must continue even while COVID-19 is circulating as they can be the fairest way to decide cases; and

6.2 s9(2)(h)

legislative barriers to some

desirable safety measures.

7 Without legislative change:

- 7.1 people going to court – many of whom are legally compelled to attend – could be exposed to a heightened risk of COVID-19;
- 7.2 some people may be unwilling or unable to attend court because of safety concerns;
- 7.3 s9(2)(h)

8 These issues would delay access to justice, disrupt court business and increase the number of cases awaiting jury trial. It would exacerbate the impacts of Delta-related restrictions on court business. Since August 2021, Delta restrictions have led to almost 80,000 court events being adjourned or rescheduled. This means around 25% of court activity was directly impacted by Delta restrictions.

9 Cabinet agreed to the policy changes above on 8 February 2022 [CAB-22-MIN-0014 refers].

The Bill strengthens judicial and Ministry powers to manage entry to the court

10 The Bill amends the Courts Security Act 1999 to clarify that the judiciary and the Ministry may set requirements for entering and remaining in a court to take account of the effects of COVID-19.

11 It enables court security officers to direct any person to produce information and evidence to confirm their compliance with the requirements, deny entry to the court if a person does not comply with the requirements, and use reasonable force if necessary in denying a person entry or removing them.

12 These powers will apply in all courts - criminal (including the Youth Court), civil, family, and specialist courts. They will also apply to those tribunals to which the Courts Security Act already applies.

The Bill clarifies the relationship between open justice protections and safety measures

13 The Bill amends the Criminal Procedure Act 2011 to clarify that the right of the public and media to be present at criminal hearings does not affect judicial and Ministry powers to conduct hearings remotely or to set measures relating to entry and remaining in the courts. This would strengthen judicial measures that make media and public access to the court dependent on meeting entry requirements, and that provide for use of remote hearings.

14 s9(2)(g)(i)

The Bill permits new judicial powers to safely manage jury processes

- 15 The Bill amends the Juries Act 1981 to enable the judiciary to allow judges to set additional safety requirements for summoning and empanelling juries, and set safety requirements for jurors during a trial, to reduce health risks in jury processes.
- 16 It permits a registrar or judge to postpone or cancel a person's jury service if they have not confirmed that they meet the requirements.
- 17 The Bill provides that a verdict cannot be challenged because of errors or informalities in how a person was engaged for jury service, or how their service was postponed or cancelled under the new provisions. This extends an existing provision that applies to errors and informalities in jury processes generally.
- 18 Additionally, the Bill enables jury selection to take place outside court buildings, where alternative venues need to be used to reduce close mingling of jurors.

I recommend a revised policy approach to a jury process

- 19 I recommend revoking and replacing a previous Cabinet decision relating to jury processes. When I obtained Cabinet's agreement to policy changes in February, I proposed enabling a person's jury service to be postponed more than once during a 12-month period if they did not meet safety requirements set by the judiciary under powers enabled by the Bill. This would have allowed a person's jury service to be repeatedly postponed if they did not meet safety requirements when their jury service came due, but might do so in the future. (Jury service is postponed to a specific month in the next year).
- 20 I now propose that the Bill:
 - 20.1 retains the Juries Act's current restriction of one postponement per year, but extends the period over which a person's service could be postponed from 12 months to 24 months; and
 - 20.2 provides that if the person is still unable to comply with the safety requirements at the time their jury service has been postponed to, they are excused from jury service on that occasion¹ (but a judge would have a power to enable a person in this situation to nonetheless be summoned if it was in the interests of justice).
- 21 This change would mean that a person's jury service could be postponed for a longer period if it appeared likely this would better enable them to undertake service in future. It would avoid the unnecessary churn that could occur with

¹ Excusal cancels a person's jury summons on that particular occasion, but the person is still eligible to be randomly selected for jury service at a later date.

multiple postponements for people who continue not to meet the safety requirements.

- 22 Cabinet granted me authority to take any detailed policy decisions that may arise during the drafting of the legislation, in consultation with the Attorney-General and Minister for Courts. I have consulted my Ministerial colleagues on this change, and I am now seeking Cabinet's confirmation of this new policy decision and the revocation of its previous decision (paragraph 6.6 of CAB-22-MIN-0014)

The Bill carefully balances access to justice and safety considerations

- 23 Crown Law is providing advice to the Attorney-General on the Bill's consistency with the New Zealand Bill of Rights Act 1990 (NZBORA).
- 24 I consider the Bill is consistent with NZBORA, the Privacy Act 2020 and the Human Rights Act 1993. The Bill would not directly engage NZBORA rights, but would empower the judiciary and the Ministry to implement measures that could. Affected rights include rights to natural justice and minimum standards of procedural fairness, rights to freedom of expression, and (if measures involve vaccination and testing) rights to refuse to undergo medical treatment and rights to be free from unreasonable search and seizure.
- 25 The judiciary and Ministry anticipate they would use the new powers to reinforce the foundation of existing court entry requirements (which include evidence of a vaccination pass or alternatively a negative test), and to introduce new requirements ahead of someone being able to serve on a jury. New juror requirements could include providing evidence of vaccination or (as an alternative) a recent negative COVID-19 test, and willingness to undergo testing during the course of a trial.
- 26 Such requirements could have a small disproportionate impact on young people, Māori, and Pacific peoples' access to justice. These groups are disproportionately represented in criminal, Youth Court and some Family Court proceedings, meaning safety measures that affect how people participate in the courts would have a particular impact on them. Young people are vulnerable due to their age and are particularly reliant on support people in court. They could be adversely affected if entry requirements affect the attendance of whānau in particular.
- 27 I consider that these limits on rights are justified. The Bill serves the critically important objectives of responding to health risks of COVID-19, and avoiding disruptions to court proceedings arising from COVID-19. Ongoing disruptions could in turn negatively affect parties' rights to procedural justice, particularly rights to have cases tried without undue delay.
- 28 Additionally, there are safeguards to ensure rights are not limited unreasonably. Where new powers are conferred on the judiciary and the Ministry, the Bill provides that those powers can only be exercised where reasonably necessary

to respond to COVID-related health and safety risks and in the interests of justice. NZBORA would apply to the exercise of the power. A judge could depart from a general safety measure in an individual case, where a person's physical attendance in court or presence on a jury is necessary in the interests of justice.

- 29 Consistent with the Government's position on vaccination requirements, measures would not restrict access to essential justice services. Under the judiciary and Ministry's proposed use of the new powers, the vast majority of people will be able to access the courts and tribunals in person.
- 30 People who are legally compelled to attend court will be able to access the court on the same basis as usual, even if they do not meet court entry requirements (for example, criminal defendants, young people before the Youth Court and anyone subject to a judicial direction, such as people who the Family Court require to attend a hearing, and parties in some civil proceedings). In these cases, remote participation is likely to be considered, and if that is not appropriate or available, a Rapid Antigen Test will be offered to help the person comply with entry requirements. If neither option is possible, physical proceedings with additional safety precautions will be arranged.
- 31 Where people are not legally compelled to attend court but legislation entitles or allows them to be present, and they do not meet entry requirements, they are likely to be offered the option to participate remotely or to take a free Rapid Antigen Test. If they seek to be physically present, they would be expected to meet entry requirements unless a judge directed otherwise.

The Bill is consistent with the separation of powers

- 32 The Government is not mandating any particular safety measures. The Bill will remove barriers to the judiciary and the Ministry undertaking their constitutional responsibilities for the safe operation of the courts. Consistent with the separation of powers and current policy settings, the judiciary and Ministry will continue to be responsible for assessing health and safety risks in the court, and implementing appropriate safety measures in response.

Impact analysis

- 33 The policy proposals reflected in the Bill are exempt from the requirement to provide a Regulatory Impact Statement (RIS). The Treasury's Regulatory Impact Analysis team determined an exemption applies as the Bill's amendments are intended to manage the short-term impacts of COVID-19 and they are required urgently, making a complete, robust and timely RIS unfeasible.

Compliance

- 34 The Bill complies with the following:

- 34.1 the principles of the Treaty of Waitangi (while noting the very limited consultation during policy development was not consistent with the principle of partnership, as noted below);
- 34.2 the rights and freedoms contained in the NZBORA and the Human Rights Act 1993. However as noted above, the Bill enables the judiciary and the Ministry to implement measures that could limit the rights and freedoms contained in the NZBORA;
- 34.3 the disclosure statement requirements (a disclosure statement has been prepared by the Ministry of Justice and is attached);
- 34.4 the principles and guidelines set out in the Privacy Act 2020;
- 34.5 relevant international standards and obligations; and
- 34.6 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Consultation

- 35 The following agencies were consulted on the proposal and the draft Bill: Crown Law, the Ministry of Health, the Department of Corrections, Police, Oranga Tamariki, Te Arawhiti, Te Puni Kōkiri, Ministry for Ethnic Communities, Ministry for Pacific Peoples, Office of the Privacy Commissioner, Ministry for Business, Innovation, and Employment, Ministry for the Environment, the New Zealand Defence Force, and the Treasury. The Department of Prime Minister and Cabinet was informed.
- 36 Agencies that commented supported efforts to improve safety, but highlighted the lack of consultation with Māori during policy development, particularly given that Māori are disproportionately represented in the justice system.
- 37 Oranga Tamariki noted that it would continue work with the Ministry of Justice to ensure those attending proceedings taken under the Oranga Tamariki Act 1989 in the Youth and Family Court are appropriately supported to engage with the Court where they wish to do so. It noted the importance of managing impacts on rights of children and young people to express their views in proceedings that relate to them; on access for parents and whānau to proceedings in respect of their children and young people in the Family Court; and on access for those providing support to children or young people in the Youth or Family Courts.
- 38 Judicial representatives were consulted on the Bill and during the policy development stages. At the time of lodgement, their feedback on the Bill as it stood was being addressed, and officials were continuing to work with them as the Bill was finalised. As noted when I sought Cabinet policy agreement, the judiciary supports some of the Bill's temporary changes being made permanent. During the policy development stages, the Attorney-General and I met the Chief Justice and senior judicial representatives about the concerns to which the Bill

responds. My officials also briefly consulted the chairs of Ministry-supported tribunals during policy development. The chairs are comfortable with the policy changes in the Bill that affect tribunals.

39 My officials met seven legal professional groups² in December 2021 to discuss issues relating to the operation of the courts under the COVID-19 Protection Framework. The Bill will enable the judiciary and Ministry to take steps to respond to the key safety concerns they raised.

40 Due to the urgency of the issues, wider consultation with other court participant and interested parties has not been possible. The lack of consultation with Māori is not consistent with the Crown's partnership obligations under Te Tiriti o Waitangi. In consultation, Te Hunga Rōia Māori o Aotearoa-the Māori Law Society highlighted the Crown's duty of active protection and advocated for strengthened safety measures to protect Māori and other court participants during the COVID-19 pandemic. It also highlighted compounding structural issues Māori face in accessing justice.

Binding on the Crown

41 The Bill will be binding on the Crown.

Creating new agencies or amending law relating to existing agencies.

42 The Bill does not create any new agencies or amend the law relating to existing agencies.

Allocation of decision-making powers

43 The Bill clarifies and strengthens judicial powers to set requirements for entering and remaining in the courts. It also enables the judiciary to set additional requirements relating to the selection and management of juries. These powers are consistent with the judiciary's constitutional responsibility for the orderly and efficient conduct of the business of their courts.

44 It is anticipated that the additional requirements will add to the grounds on which prospective jurors' jury service may be postponed or cancelled. This means the secondary legislation will add to requirements set by Parliament, and so in effect amend the jury process set out in a primary Act. As noted above, the powers will be subject to safeguards limiting the circumstances and time period in which the powers may be exercised.

Associated regulations

45 Regulations will not be needed to bring the Bill into operation. The Bill makes minor consequential amendments to the Jury Rules 1990. I note rule amendments are usually made in consultation with the judiciary and New

² Officials consulted the New Zealand Law Society, Te Hunga Rōia Māori o Aotearoa - the Māori Law Society, Auckland District Law Society, the New Zealand Bar Association, the Defence Lawyers Association New Zealand, Public Defence Service, and several Crown solicitors.

Zealand Law Society. Amendments via the Bill are appropriate given their minor and urgent nature. The judiciary is comfortable with this process.

Other instruments

- 46 The Bill enables the judiciary to set new requirements relating to jury selection and management, where they are reasonably necessary in the interests of justice and health and safety in the courts, taking account of the effects of COVID-19. These requirements will be secondary legislation.
- 47 Empowering the judiciary to make this secondary legislation is consistent with the principles in the Deemed Regulations Report of the Regulations Review Committee. The Bill sets a defined scope and thresholds for the exercise of the power. The delegation is consistent with the judiciary's constitutional responsibility as an independent branch of government for the orderly and efficient conduct of the courts, and the need for rapid change in requirements in response to evolving health risks and interventions. The explanatory note reflects these reasons.
- 48 Secondary legislation made via the Bill's new powers will be presented to the House and be disallowable.

Definition of Minister/department

- 49 The Bill does not contain a definition of Minister, department, or equivalent government agency, or chief executive of a department or equivalent position.

Commencement of legislation

- 50 The Bill will come in to force the day after Royal Assent.
- 51 With one exception, the amendments will only remain in force for the duration of the COVID-19 Public Health Response Act 2020. The exception is a transitional provision that expands the grounds for excusing a person from jury service in the 12-month period after that Act is repealed. This provides that people whose jury service has been postponed for COVID-related reasons during the pandemic are able to request to be excused in the 12 months after the end of the pandemic. This aims to ensure that people are not adversely affected by a requirement to undertake jury service if they exhausted their opportunity to postpone service during the pandemic. This change will be repealed 12 months after the repeal of the COVID-19 Public Health Response Act 2020.

Parliamentary stages

- 52 s9(2)(f)(iv)
- 53 The Bill should progress rapidly to help mitigate safety s9(2)(h) as soon as possible, particularly in light of the spread of Omicron. I propose that the Bill be introduced on 7 March 2022 s9(2)(f)(iv)

- 54 I propose that the Bill be referred to the Justice Committee and that Select Committee consideration be limited two weeks, including a recess week if necessary.
- 55 As the Bill has been developed at pace, I am seeking agreement for Parliamentary Counsel Office to continue to make minor quality assurance changes to the Bill before Cabinet.

Proactive Release

- 56 I will proactively release this paper, subject to any redaction as appropriate under the Official Information Act 1982, within 30 business days of decisions being confirmed by Cabinet or earlier if possible.

Recommendations

The Minister of Justice recommends that the Committee:

- 1 s9(2)(f)(iv)
- 2 **note** that the Bill removes legal barriers to the judiciary and the Ministry of Justice setting requirements for entering the courts and for selecting and managing juries, to ensure the courts can continue operating effectively and safely as COVID-19 spreads in the community;
- 3 **revoke** paragraph 6.6 of CAB-22-M N-0014 which approved an amendment to the Juries Act 1981 to enable jury service to be postponed more than once during a 12-month period if a person is not able to comply with COVID-19 requirements;
- 4 **agree** to amend the Juries Act 1981 to:
 - 4.1 allow a person's jury service to be postponed for up to 24 months if they are unable to comply with COVID-19 requirements; and
 - 4.2 provide that if a person is unable to comply with COVID-19 requirements at the time their jury service has been postponed to, that they will be excused from jury service on that occasion;
- 5 **agree** to Parliamentary Counsel Office continuing to make minor quality assurance changes to the COVID-19 Response (Courts Safety) Legislation Bill before it is considered by Cabinet;
- 6 **approve** the COVID-19 Response (Courts Safety) Legislation Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 7 **agree** that the Bill be introduced as soon as possible after Cabinet approval;
- 8 **agree** that the Government propose that the Bill be:

- 8.1 referred to the Justice Committee for consideration;
- 8.2 that the Committee's consideration should be two weeks;
- 8.3 s9(2)(f)(iv)

Authorised for lodgement

Hon Kris Faafoi

Minister of Justice

Proactive release



Cabinet Legislation Committee

Minute of Decision

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COVID-19 Response (Courts Safety) Legislation Bill: Approval for Introduction

Portfolio Justice

On 3 March 2022, the Cabinet Legislation Committee:

- 1 **s9(2)(f)(iv)**
- 2 **noted** that the Bill removes legal barriers to the judiciary and the Ministry of Justice setting requirements for entering the courts and for selecting and managing juries, to ensure the courts can continue operating effectively and safely as COVID-19 spreads in the community;
- 3 **noted** that on 8 February 2022, Cabinet agreed to amend the Juries Act 1981 to enable jury service to be postponed more than once during a 12-month period if a person is not able to comply with COVID-19 requirements [CAB-22-MIN-0014];
- 4 **agreed** to recommend that Cabinet:
 - 4.1 rescind the decision in paragraph 3; and instead
 - 4.2 agree to amend the Juries Act 1981 to:
 - 4.2.1 allow a person's jury service to be postponed for up to 24 months if they are unable to comply with COVID-19 requirements; and
 - 4.2.2 provide that if a person is unable to comply with COVID-19 requirements at the time their jury service has been postponed to, that they will be excused from jury service on that occasion;
- 5 **agreed** to Parliamentary Counsel Office continuing to make minor quality assurance changes to the COVID-19 Response (Courts Safety) Legislation Bill before it is considered by Cabinet;
- 6 **approved** the COVID-19 Response (Courts Safety) Legislation Bill [PCO 24480] for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;

- 7 **agreed** that the Bill be introduced on 7 March 2022;
- 8 **agreed** that the government propose that the Bill be:
- 8.1 referred to the Justice Committee for consideration;
- 8.2 that the Committee's consideration should be two weeks;
- 8.3 **s9(2)(f)(iv)**

Rebecca Davies
Committee Secretary

Present:

Hon Chris Hipkins (Chair)
Hon Andrew Little
Hon David Parker
Hon Poto Williams
Hon Kris Faafoi*
Hon Michael Wood
Hon Kiri Allan
Hon Dr David Clark
Hon Aupito William Sio
Hon Meka Whaitiri
Kieran McAnulty, MP

Officials present from:

Office of the Prime Minister
Officials Committee for LEG