

In Confidence

Office of the Minister of Justice
Chair, COVID-19 Ministerial Group

Immediate modification orders for justice-related legislation under the Epidemic Preparedness Act 2006

Proposal

1. This paper seeks authorisation for submission to the Executive Council of immediate modification orders under section 15 of the Epidemic Preparedness Act 2006 (the EPA). The orders would modify provisions in legislation affecting justice services, harm minimisation, and access to justice.
2. I also seek agreement to waive the 28-day rule. I consider that the waiver is appropriate because the orders are made in response to an emergency.

Background

3. On 9 April 2020, the COVID-19 Ministerial Group approved the development of immediate modification orders (the Orders) [CAB-20-MIN 0130 refers] to the:
 - 3.1. Wills Act 2007;
 - 3.2. Oaths and Declarations Act 1957 (the OD Act); and
 - 3.3. Sale and Supply of Alcohol Act 2012 (the SSA Act).
4. In accordance with section 15 of the EPA, I have been advised by the Chief Executive of the Ministry of Justice, and I am also of the opinion, that:
 - 4.1. the Orders modify requirements and restrictions that, due to the effects of the COVID-19 epidemic, are impossible or impracticable to comply (or comply fully) with; and
 - 4.2. the modifications go no further than is, or is likely to be, reasonably necessary in the circumstances.
5. The Ministerial Group also approved modifications to the Protection of Personal and Property Rights Act 1988, and associated regulations. Due to time constraints, I will be seeking approval separately to submit an order making those modifications to Executive Council.

Policy

Wills

6. Under the Wills Act, will-making must be witnessed by two people who generally cannot be beneficiaries of the will. Requirements for physical presence with these witnesses are likely to be impossible or impracticable to comply with during the COVID-19 epidemic, as movement and gathering is restricted.
7. Flexibility is especially important in a time where many, and particularly older or vulnerable people, will be looking to get their affairs in order. The Wills Act Order would remove requirements for witnesses to be physically present with the will-maker, and to physically sign the same document, while the Epidemic

Notice is in force. Instead, the will could be signed and witnessed remotely via audio-visual link (AVL), with the will-maker and witnesses having a copy of the document before them.

8. Witnesses will be required to include a statement that they have witnessed the maker signing the relevant document, and have themselves signed a copy of the same document, by AVL because of the Epidemic Notice being in force. Scans or photos of the copies must be taken as soon as possible after signing, and the parties must ensure that these are sent to and held by one person. Core requirements to provide safeguards against fraud and misuse by coercion will remain. Witnesses must take appropriate steps to be satisfied that the maker is the person signing the document.

Oaths, affirmations, and declarations

9. The Oaths and Declarations Act 1957 (the OD Act) carries similar requirements for oaths, affirmations, and declarations to be taken or made (respectively) in the presence of another person. For the same reasons applying in the context of wills and EPOAs, these requirements are likely to be impracticable to comply with during the COVID-19 epidemic.
10. The OD Act Order would make it explicit that a person taking an oath or making an affirmation or declaration under the OD Act does not need to be physically present with the person administering the oath, or taking the affirmation or declaration, nor to physically sign the same document.
11. I expect that AVL would usually be the preferred method of remotely taking oaths or making affirmations or declarations. Recognising some people will not have access to the necessary technology in their homes, the modification will also allow the use of audio link. Whatever method is used, the person administering the oath or taking the affirmation or declaration can (as now) only do so if satisfied that:
 - 11.1. the person taking the oath, or making the affirmation or declaration, is the person signing the document, has read and understood its contents, and believes its contents to be true; and
 - 11.2. the exhibits attached to the document are those the document refers to.
12. The OD Act Order would make a further modification to reduce the risk that the requirement to provide a statutory declaration acts as a barrier to people accessing services they need. Entities that would usually receive a statutory declaration (for example, KiwiSaver providers dealing with withdrawal applications on the grounds of significant financial hardship) could authorise an officer or employee to take the statutory declaration in place of one of the people authorised under the OD Act.

Alcohol licence applications and renewals

13. Under the SSA Act, Police and Medical Officers of Health¹ must inquire into alcohol licence applications. If they do not file a report to the District Licensing Committee ('DLC')² within 15 working days of receiving the application, covering any matters in opposition to the application, the DLC may assume that neither party opposes the application.
14. Scrutiny of licence applications, by both Police and Medical Officers of Health, is an important part of supporting the harm minimisation objectives of the Sale and Supply of Alcohol Act. However, inquiries under section 103 generally involve reviewing applications, drafting and submitting reports, interviewing applicants, and visiting premises. These activities are not practicable in the context of physical distancing requirements and essential business categorisations. Moreover, it is not possible for Medical Officers of Health and local Police to fulfil the statutory roles under the SSA Act while dealing with the epidemic and its impact.
15. The SSA Order would suspend the obligations on Police and Medical Officers of Health to inquire into any licence or renewal application received or underway, and DLCs' ability to assume that neither party opposes the application, while the COVID-19 Epidemic Notice is in force. After the notice is lifted, Police and Medical Officers of Health would have 30 (rather than 15) working days to file a report with the DLC. This extension recognises the capacity of staff to address the backlog of applications as well as the ongoing impact that the COVID-19 response will have on many non-essential functions.
16. The impact of the Orders may be greater for new licences rather than renewals (although applications for new licences during the epidemic could be low). This is because when licensees apply to their DLC to renew their licence, prior to expiry, this will prevent their licence from expiring. DLCs will be encouraged to contact those whose licences are expiring during the epidemic notice period and explain the need to apply for a renewal in the circumstances.

Legislative implications

17. The Orders would modify primary legislation, for the period in which the epidemic notice issued in respect of COVID-19 under section 5 of the Epidemic Act is in force, and for 30 working days afterward in respect of modifications to the Sale and Supply of Alcohol Act.

Timing and 28-day rule

18. I am seeking approval to waive the 28-day rule on the grounds that the Orders are made in response to an emergency.
19. It is intended that the Orders will come into effect on Friday 17 April, after they are published in the Gazette.

¹ Medical Officers of Health are public health doctors who are designated by the Director General of Health to perform statutory functions under the Health Act 1956. With an epidemic notice in force, they have specific functions and powers under s70 of the Health Act with the goal of containing and managing the epidemic.

² There are 67 individual DLCs, administered by local councils, that are responsible for determining licence applications in their district.

Compliance

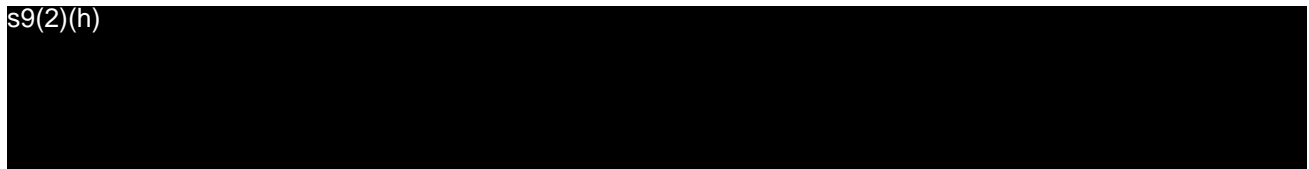
20. I consider the Orders are consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.
21. I also consider the Orders are consistent with the Crown's obligations under te Tiriti o Waitangi. Of particular relevance are the principles of protection, participation, and equity. The health benefits of remote ways of connecting may be more pronounced for Māori, who are more likely to have underlying health conditions that increase the risk of complications from the COVID-19 virus.
22. However, these benefits are contingent on access to the relevant technology. Those with limited access to the internet or AVL are disproportionately likely to live in rural and isolated areas, have limited financial resources, or be elderly. In some areas with high Māori populations, there has historically been limited access to the internet or technology. These factors may combine to produce disproportionate impacts on Māori, which may need to be addressed in the longer term.
23. There are no financial implications for the Crown resulting from the proposals in this paper.

Regulations Review Committee

24. I do not consider there are grounds for the Regulations Review Committee (or any equivalent Parliamentary accountability mechanism operating during the COVID-19 epidemic) to draw attention to the Orders under Standing Order 319.

Certification by Parliamentary Counsel

s9(2)(h)



Impact analysis

26. The Treasury has determined that these Orders directly respond to Covid-19 and has suspended RIA requirements in accordance with CAB-20-MIN-0138.

Publicity

27. Once the Orders are made, I intend to publicly announce the changes. The Ministry of Justice is developing communications and guidance to be published on its website, and will continue to liaise with external stakeholders implicated by the changes.
28. I propose to proactively release this briefing paper as soon as possible after the Order in Council is published in the Gazette, and within 30 business days of decisions being made, in accordance with the principles contained in Cabinet Office Circular CO (18) 4 – *Proactive Release of Cabinet Material: Updated Requirements*. Proactive release will be subject to any redactions that may be warranted under the Official Information Act 1982.

Consultation

29. The Department of Internal Affairs, Inland Revenue Department, Land Information New Zealand, Ministry of Health, Ministry of Business, Innovation and Employment, New Zealand Police, Office for Disability Issues, Office for Seniors, and the Treasury were consulted on the proposed modifications, and have had a brief opportunity to review this paper. The Department of the Prime Minister and Cabinet (Policy Advisory Group) has been informed.
30. The judiciary were consulted briefly on the proposed modifications. The Alcohol Licensing and Regulatory Authority and New Zealand Law Society where relevant, were also consulted on the policy proposals.

Recommendations

31. The Minister of Justice recommends that the Cabinet COVID-19 Ministerial Group:
 1. note that on 9 April 2020 Cabinet COVID-19 Ministerial Group approved the development of immediate modification orders, under section 15 of the Epidemic Preparedness Act 2006 [CAB-20-MIN-0130 refers], to modify:
 - 1.1. requirements for wills, oaths, affirmations, and declarations to be made, modified, taken, and/or signed in the physical presence of other people under the Wills Act 2007 and the Oaths and Declarations Act 1957; and
 - 1.2. timeframes in the Sale and Supply of Alcohol Act 2012 for Police and Medical Officers of Health to inquire into and report on alcohol licence applications;
 2. note that approval was granted on the basis that:
 - 2.1 I have received written advice from the Chief Executive of the Ministry of Justice that he considers the test in s15(2)(a) of the Epidemic Preparedness Act 2006 is met in respect of each modification order; and
 - 2.2 I am satisfied the test is met, as per the requirement in s15(2)(b);
 3. agree to waive the 28-day rule, on the grounds that the Orders are made in response to an emergency, so that the regulations can come into force on 17 April 2020; and
 4. authorise the submission to the Executive Council of:
 - 4.1. Epidemic Preparedness (COVID-19 – Wills Act 2007 – Signing and Witnessing of Wills) Immediate Modification Order 2020;
 - 4.2. Epidemic Preparedness (Oaths and Declarations Act 1959) Immediate Modification Order 2020; and
 - 4.3. Epidemic Preparedness (Sale and Supply of Alcohol Act 2012 – Licence Application Inquiries) Immediate Modification Order 2020;

5. note that I will seek authorisation separately to submit to Executive Council an immediate modification order to the Protection of Personal and Property Rights Act 1988 and the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, further to the decisions in CAB-20-MIN-0130.

Authorised for submission to the COVID-19 Ministerial Group

Hon Andrew Little
Minister of Justice

Proactively Released