

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

Proposal

1. This paper seeks approval to develop immediate modification orders under section 15 of the Epidemic Preparedness Act 2006 (the EPA), to modify provisions in legislation affecting justice services, harm minimisation, and access to justice.

Executive summary

2. I seek Cabinet approval of proposals to make modifications to laws under section 15 of the EPA that I consider are reasonably necessary to enable compliance during the COVID-19 epidemic.
3. The proposed modifications would apply to the Oaths and Declarations Act 1957, the Protection of Personal and Property Rights Act 1988, the Wills Act 2007, and the Sale and Supply of Alcohol Act 2012. The proposals would:
 - 3.1. create flexibility in how people can authorise and witness key documents, oaths, affirmations, and declarations. This flexibility is especially important in a time where many and particularly vulnerable people, will be looking to get their affairs in order; and
 - 3.2. modify statutory timeframes to ensure the continued thorough scrutiny of alcohol licence applications while Police and Health resources are necessarily focused on the epidemic.

s9(2)(h)

5. I am therefore seeking authorisation for the Ministry of Justice to issue drafting instructions to Parliamentary Counsel Office. I expect proposed Orders in Council to be considered by COVID-19 Ministerial Group on 16 April 2020.

Background

6. On 24 March 2020, the Prime Minister issued an Epidemic Notice under section 5 of the EPA. While an Epidemic Notice is in force the Governor-General may, by Order in Council made on the recommendation of the Minister of the Crown responsible for the administration of an enactment, modify any requirement or restriction imposed by the enactment.
7. Under section 15 of the EPA, a modification order can be made only if the effects of an epidemic are such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with, and the modifications go no further than is, or is likely to be, reasonably necessary in the circumstances.

8. Consistent with the section 15(2)(a) of the EPA, I am recommending the modification orders proposed in this paper having received from the Chief Executive of the Ministry of Justice a written recommendation stating that, in his opinion:
 - 8.1. the effects of the COVID-19 epidemic are, or are likely to be, such that the requirements or restrictions are impossible or impracticable to comply, or comply fully, with; and
 - 8.2. the proposed modifications go no further than is, or is likely to be, reasonably necessary in the circumstances.
9. In accordance with section 15(2)(b), I am satisfied of both of these matters.

Policy approval is sought to modify justice-related laws

Oaths and Declarations Act 1957

9. The Oaths and Declarations Act 1957 (the OD Act) requires oaths, affirmations, and declarations to be taken or made (respectively) in the presence of another person. These requirements, in sections 3, 4, 8, 9, 11, and 12, have been interpreted to require physical presence. Requirements for the people making and taking oaths, affirmations, or declarations to be physically together are likely to be impracticable to comply with during the COVID-19 epidemic because of the isolation and quarantine requirements. The administering of oaths and taking of affirmations or declarations are not essential services.
10. I propose modifications to 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. The person administering or taking the oath, affirmation, or declaration remotely must keep a record of that occurring due to the Epidemic Notice being in force, and the remote means used.
11. Core requirements would remain the same but could be fulfilled by AVL if available. Some people do not have access to AVL in their homes. For this reason, the modification would not require the use of AVL. If AVL is not available, a person may need to read the document over the phone or use other means appropriate in the circumstances. 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 modification would apply where an oath is administered, or a declaration or affidavit is taken, overseas pursuant to the OD Act. In these cases, the person taking the oath or making the declaration or affidavit would also be required to include a statement explaining the relevant restrictions in place in the country

concerned. An entity receiving the declaration could rely on that explanation in the absence of reliable information about any restrictions that applied in the relevant country at the time it was made.

13. Even with these changes it may be difficult for some people to access appropriate technology and find a witness to take a statutory declaration. The Justice of the Peace Federation states that its members have suspended their services, and it could be difficult for people to get hold of, or pay for, a lawyer for matters in which they are not already engaged. For example, the Financial Markets Authority has issued guidance for applications for KiwiSaver withdrawals on the grounds of significant hardship. It has told Kiwisaver providers that they can, at their discretion, accept applications that use alternative steps to verify the applicant's identity and financial means.
14. I therefore propose a further modification to ensure that the requirement to provide a statutory declaration is not a barrier to people accessing services they need. Entities that would usually receive a statutory declaration could take alternative steps to confirm the matters required in place of one of the people listed in section 9 taking a statutory declaration. The entity could do this if it is satisfied (or believes on reasonable grounds) that it is impracticable for the declaration to be made to one of those people.

Protection of Personal and Property Rights Act 1988

15. Similar to the OD Act, section 94A of the Protection of Personal and Property Rights Act 1988 (the PPPR Act) requires an Enduring Power of Attorney (EPOA) to be witnessed or signed "in the presence" of an authorised witness (e.g. a lawyer, legal executive, or member of a trustee organisation). This has been interpreted to require physical presence. This requirement is reiterated and reflected in the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008 (the Regulations). As with the OD Act, these requirements are likely to be impracticable to comply with during the COVID-19 epidemic because of the isolation and quarantine requirements.
16. I propose modifications to section 94A of the PPPR Act and the Regulations, where applicable, so that while the Epidemic Notice is in force:
 - 16.1. people signing or witnessing EPOAs (i.e. a donor, authorised witness, and attorney(s)) do not need to be in the physical presence of each other and do not need to sign the same physical copy of the EPOA document;
 - 16.2. enduring powers of attorney can be signed or witnessed via AVL, with the donor, authorised witness and attorney(s) having a copy of the document before them;
 - 16.3. where an EPOA is signed or witnessed remotely, a record must be kept of the reasons the document was signed remotely; and
 - 16.4. if an EPOA is signed or witnessed remotely, the people who signed or witnessed are required to sign or witness the same document as soon as they are able to do so safely (given the relevant alert level).

17. Other core requirements for EPOAs would remain the same, with the authorised witness taking appropriate steps to be satisfied that:
 - 17.1. the person making the decision, or undertaking or giving effect to the power, is the person signing the document;
 - 17.2. that person understands the nature of the instrument and understands its potential risks and consequences; and
 - 17.3. there is no undue influence from other parties.
18. Scans or photos of the copies must be taken as soon as possible after signing, and the parties would need to ensure that these are sent to and held by one person. As outlined at paragraph 16.4 above, as soon as it is safe to do so the same EPOA document must be signed or witnessed by the relevant people.

Wills Act 2007

19. The Wills Act 2007 also requires the physical presence of multiple people. The witnessing process in section 11 of the Wills Act, which applies when making, changing, revoking, or reviving a will, must be undertaken in the presence of two witnesses. Witnesses must sign the document in the will-maker's presence. Again, these requirements are likely to be impracticable to comply with during the COVID-19 epidemic because of the isolation and quarantine requirements.
20. I consider modifications to facilitate will-making in the context of COVID-19 are particularly important, as more people than usual may look to get their affairs in order during the epidemic. The requirements for witnesses to be physically present with the person, and to physically sign the same document, should be removed while the Epidemic Notice is in force.
21. Instead, remote signing and witnessing should take place via AVL, with both the will-maker and witnesses having a copy of the document before them. This could be done simultaneously with all parties on the same AVL call, or if that is not possible, with each witness separately witnessing the will-maker sign the will via AVL. The modification will not move away from the current paper-based wills, as that would add significant complexity and require changes to the probate process.
22. Witnesses must include a statement that they have witnessed the will-maker signing the will 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.
23. Witnesses must take appropriate steps to be satisfied that the will-maker is the person signing (or directing the other person to sign) and has read and understood its contents, and that there is no undue influence from other parties.
24. These settings ensure protections for vulnerable people continue and provide safeguards against fraud and misuse by coercion. The High Court retains a

wide jurisdiction to declare wills valid, regardless of whether they meet witnessing requirements, focusing on evidence of testamentary intent.

Sale and Supply of Alcohol Act 2012

25. Section 103 of the Sale and Supply of Alcohol Act 2012 requires Police, a Medical Officer of Health,¹ and a licensing inspector to inquire into new alcohol licence applications. The requirements also apply to renewals.² If the local Police or Medical Officer of Health have any matters in opposition to the application, they must file a report to the District Licensing Committee ('DLC')³ within 15 working days of receiving the application. If no report is received, the DLC may assume that neither the Police nor the Medical Officer of Health oppose the application.
26. Inquiries under section 103 generally involve reviewing applications, drafting and submitting reports, interviewing applicants, and visiting premises.
27. The finite number of Medical Officers of Health fulfil a specialist, statutory role. At this point in time, their focus is necessarily on the epidemic. The same restriction applies to local Police who are focused on policing the epidemic restrictions and maintaining their other key priorities. It is not possible for them to fulfil the statutory roles under the Sale and Supply of Alcohol Act while dealing with the epidemic and its impact. In addition to significant resourcing issues, physical distancing and essential business categorisations will often mean it is impracticable to conduct inquiries.
28. I propose to modify section 103, to suspend the obligations on Police and Medical Officers of Health to inquire into any application received while the COVID-19 Epidemic Notice is in force. The ability for DLCs to assume that neither Police or Medical Officers oppose any application would also be suspended. This would pause the statutory timeframe for reporting on any licence applications or renewals either underway or received by Police or Medical Officers of Health during that period.
29. The proposed period of time for suspension would apply while the Epidemic Notice is in force. After the notice is lifted, to fulfil the purpose of the modification, Police and Medical Officers of Health would have 30 working days to file a report with the DLC, rather than 15 days. This would apply to any applications or renewals received or underway during the notice period. This 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.
30. I consider these modifications would best ensure that licence applications and renewals are scrutinised by Health and Police to the fullest degree possible. It would also ensure DLCs can make decisions based on all the available

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 Sale and Supply of Alcohol Act, section 129.

³ There are 67 individual DLCs, administered by local councils, that are responsible for determining licence applications in their district.

evidence. This scrutiny is an important part of supporting the harm minimisation objectives of the Sale and Supply of Alcohol Act.

31. The processing of applications for new alcohol licences will be potentially delayed across the country for weeks or months due to the proposed modification. However, steps can be taken to help ensure that existing licensees will still be able to trade and work in the alcohol industry post-epidemic. The Sale and Supply of Alcohol Act provides that when licensees apply to their DLC to renew their licence, their licence is prevented from expiring. My officials are working on providing guidance for DLCs to encourage them to contact those whose licences are expiring, and make those people aware of the need to apply for a renewal before their licence expires.

Legislative and financial implications

32. The proposals would modify primary legislation, for the period in which the Epidemic Notice issued under section 5 of the Epidemic Act is in force. ^{s9(2)(h)}
[REDACTED]
33. There are no financial implications for the Crown resulting from the proposals in this paper.

Impact analysis

34. The Treasury has determined that this is a direct Covid-19 response and has suspended the RIA requirements in accordance with CAB-20-MIN-0138.

Population implications

Māori

35. In the context of COVID-19, AVL and other remote ways of connecting decrease the risk of virus transmission and associated health complications. The health benefits of remote ways of connecting may also be more pronounced for Māori, who are more likely to have underlying health conditions⁴ that increase the risk of complications if they contract the COVID-19 virus.
36. However, those with limited access to the internet or AVL technology are disproportionately likely to live in rural and isolated areas, have limited financial resources, or be elderly. These barriers may disproportionately affect Māori, as in some areas with high Māori populations, there has historically been limited access to the internet or technology.

Older people

37. Older people are likely to be less mobile and more susceptible to complications from COVID-19, and therefore benefit from remote ways of connecting. The realisation of these benefits may be limited as older people are likely to have more difficulty accessing the necessary technology.

⁴ See, for example, *Wai 2575: Māori Health Trends Report*, 2019, Wellington, Ministry of Health.

38. New Zealand has high rates of elder abuse; at least one in ten people aged 65 and above will experience some form of elder abuse. Many people who create EPOAs may be elderly. An EPOA gives wide-ranging powers over a donor to the attorney, and so may be coercively created. While the PPPR Act has specific safeguards to protect against such coercion, remote witnessing requirements may make it harder for authorised witnesses to fulfil their statutory duties to detect coercion or undue influence.
39. However, AVL acts as an in-person proxy and we do not consider that alternative forms of remote witnessing or signing would be appropriate. Authorised witnesses may still reserve the right not to witness an EPOA if they are not satisfied the person is not under any undue influence.

People with disabilities

40. Similar considerations to those discussed in relation to older people apply in relation to those with disabilities. The health benefits of allowing AVL in more circumstances may be more pronounced, given the greater likelihood of underlying health conditions that increase the risk of complications from COVID-19. People with physical disabilities are also likely to benefit from changes allowing remote completion of statutory processes or participation in court proceedings.
41. Limitations in access to the necessary technology, which may be more prevalent for people with disabilities, are likely to mean these benefits are not easily realised in all cases. People with disabilities may also be more susceptible to coercion and undue influence, which could be more difficult for witnesses to detect and guard against via AVL.

Human Rights

42. I consider the proposed modifications are consistent with the New Zealand Bill of Rights Act and the Human Rights Act 1993.

Communications and proactive release

43. Once the modification orders are made, I intend to publicly announce the changes. The Ministry of Justice will continue to proactively liaise with external stakeholders implicated by the changes, such as professional legal organisations and relevant regulatory authorities.
44. I propose to proactively release this paper as soon as possible after the Order in Council is gazetted 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

45. Consultation has been necessarily limited by the urgency of these proposals and the short time to progress them. However, 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 have been consulted on the proposed modification orders, and/or have had a brief opportunity to review this paper. The Department of the Prime Minister and Cabinet (Policy Advisory Group) has been informed.

46. My officials have also discussed the proposals and their implementation with the judiciary, and the Alcohol Licensing and Regulatory Authority and New Zealand Law Society where relevant.

Recommendations

47. The Minister of Justice recommends that the Cabinet COVID-19 Ministerial Group:
1. note that, in accordance with section 15(2) of the Epidemic Preparedness Act 2006, I have received, and agree with, advice from the Chief Executive of the Ministry of Justice that:
 - 1.1. the effects of the COVID-19 epidemic are, or are likely to be, such that the requirements or restrictions to be modified as described in recommendations 2.1 to 2.4 below are impossible or impracticable to comply (or comply fully) with; and
 - 1.2. the modifications described in recommendations 2.1 to 2.4 go no further than is, or is likely to be, reasonably necessary in the circumstances;
 2. agree to modify, under section 15 of the Epidemic Preparedness Act 2006 for the period the Prime Minister's Epidemic Notice is in force in respect of COVID-19:
 - 2.1. sections 3, 4, 8, 9, 11, and 12 of the Oaths and Declarations Act 1957 so that:
 - 2.1.1. the taker of an oath, or maker of an affirmation or declaration, does not need to be physically present with the person administering or taking it respectively, nor to sign the same physical copy of the relevant document;
 - 2.1.2. where the taker of an oath or maker of a declaration or affidavit is overseas, they will be required to provide an explanation of the relevant restrictions in place in the country concerned, which an entity receiving the declaration can rely on in the absence of other reliable information as to that matter; and
 - 2.1.3. an entity legislatively required to receive a declaration could elect to take it directly, or confirm the matters required by it, if the entity were satisfied or believed on reasonable

grounds that the declaration could not practicably be made to one of the people statutorily authorised to take it;

2.2. section 94A of the Protection of Personal and Property Rights Act, and the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, so that:

- 2.2.1. people signing or witnessing enduring powers of attorney (i.e. a donor, authorised witness and attorney(s)) do not need to be in the physical presence of each other and do not need to sign the same physical copy of the enduring powers of attorney document;
- 2.2.2. enduring powers of attorney can be signed and witnessed via AVL, with the donor, authorised witness and attorney(s) having a copy of the document before them;
- 2.2.3. where an enduring power of attorney is signed or witnessed remotely, a record must be kept of the reasons the document was signed remotely;
- 2.2.4. scans or photos of the copies must be taken as soon as possible after signing, and sent to and held by one person; and
- 2.2.5. if an enduring power of attorney is signed or witnessed remotely, the people who signed or witnessed are required to sign or witness the same document as soon as they are able to do so safely (given the relevant alert level);

2.3. section 11 of the Wills Act 2007, so that:

- 2.3.1. wills can be signed and witnessed via AVL, with both the will-maker and witnesses having a copy of the document before them;
- 2.3.2. witnesses must include a statement that they have witnessed the will-maker signing the will and have themselves signed a copy of the same document by AVL because of the Epidemic Notice being in force; and
- 2.3.3. scans or photos of the copies must be taken as soon as possible after signing, and sent to and held by one person;

2.4. section 103 of the Sale and Supply of Alcohol Act 2012, so that:

- 2.4.1. the requirement for Police and Medical Officers of Health to inquire into and report on alcohol licence applications, for applications under consideration or received during the Epidemic Notice period, is suspended while the Epidemic Notice is in force;

- 2.4.2. the ability for district licensing committees to assume that Police and Medical Officers of Health do not oppose any application is also suspended;
 - 2.4.3. once the Epidemic Notice period has ended, the timeframes for Police and Medical Officers of Health to report to district licensing committees on applications received is extended from 15 working days to 30 working days, applying to applications or renewals received by Police and Medical Officers of Health during the Epidemic Notice period;
- 3. authorise drafting instructions to be issued to Parliamentary Counsel Office for immediate modification orders in respect of recommendations 2.1 to 2.4;
- 4. note that, should the Ministerial Group agree to recommendations 2.1 to 2.4 and 3, I intend to seek the Group's authorisation on 16 April to submit the immediate modification orders to the Executive Council; and
- 5. note that I will be seeking agreement 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 as soon as possible.

Authorised for submission to the COVID-19 Ministerial Group

Hon Andrew Little
Minister of Justice