NEW ZEALAND
LAW SOCIETY

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COVID-19 Response (Further Management Measures) Legislation Bill

08/05/2020

Submission on the COVID-19 Response (Further Management Measures) Legislation Bill

1. Introduction

1.1 The New Zealand Law Society |Te Kāhui Ture o Aotearoa (**Law Society**) appreciates the opportunity to comment on the COVID-19 Response (Further Management Measures) Legislation Bill (**the Bill**).

2. Executive Summary

2.1 This submission has been prepared under urgency with input from many of the Law Society's law reform committees and we are grateful for their contribution. We also acknowledge the considerable work by officials and others in preparing this complex omnibus bill in difficult circumstances to address the extraordinary challenges caused by the pandemic.

2.2 This submission focuses on the following aspects of the Bill:

a. **Remote access by audio link in Corrections and Court hearings**

b. **Remote access by AVL for Mental Health (Compulsory Assessment and Treatment) Act assessments and examinations**

c. **Insolvency "safe harbours" and the Business Debt Hibernation scheme**

d. **Unit Titles Act technical amendments**

2.3 The Law Society welcomes the opportunity to be heard.

3. Corrections, Courts – remote access – audio links

Overview

3.1 The Law Society has significant concerns about the Schedules 5 and 6 proposed amendments to the Corrections Act 2004 and the Courts (Remote Participation) Act 2010, allowing use of audio links,[1] as an alternative to audio-visual links (**AVL**), to conduct hearings.

3.2 The Law Society supports measures to address current constraints on participants' remote access via audio-visual equipment to hearings, particularly given the inclusion of the sunset clause repealing these amendments when the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked. However, the Law Society is concerned about the precedent effect of introducing such procedures, even on an emergency basis.

3.3 Section 25 of the New Zealand Bill of Rights 1990 affirms the right to be present at the trial and to present a defence. In the Law Society's view, appearing in a Corrections disciplinary proceeding or a sentencing hearing via audio link only, does not amount to real and effective participation in the process by the prisoner/defendant. Efficiency, or the fact that AVL is difficult to manage or arrange

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[1] Audio link is defined in proposed section 139A of the Corrections Act 2004 and proposed section 7A of the Courts (Remote Participation) Act 2010 as follows: "… audio link or AL, in relation to a participant's appearance at any proceeding, means facilities that enable audio communication between participants when some or all of them are not physically present at the place of hearing for all or part of the proceeding."

in the current situation, should not trump the defendant's right to effectively participate in proceedings which are relevant to his/her liberty.

3.4 The Law Society's concerns are outlined in more detail below. The concerns relate to both Corrections disciplinary hearings (Schedule 5 of the Bill) and criminal hearings, particularly sentencing hearings (Schedule 6 of the Bill). In summary:

3.4.1 The right to be "present" at hearings risks being undermined when presence is reduced to audio link alone.

3.4.2 Disciplinary and sentencing hearings can both have grave consequences for prisoners/defendants. The key purposes of these proceedings, in terms of formally addressing conduct and encouraging behaviour change, risks being severely undermined if the subjects do not feel engaged in the process. In many instances, an audio link alone is much less engaging.

3.4.3 Practical issues also arise including:

a) It is not clear that there are adequate quiet, private spaces available for appropriate audio links to be made. (Currently there is limited availability of AVL facilities, and the same constraints are likely to arise regarding availability of audio equipment.)

b) Some of these proceedings may include the taking of evidence. Presenting exhibits, cross-examination and the like are not practicable by audio alone.

c) Communication assistance and/or interpreter services will be difficult if not impossible by audio link alone.

d) Where victim participation is appropriate, audio-only links may not be appropriate.

e) Court/counsel may struggle to confirm the correct party is on the line.

3.5 The Law Society therefore recommends that clause 2 of Schedule 5 and clause 5 of Schedule 6 are deleted. If these clauses are retained, they should be amended to include an additional requirement that the prisoner/defendant must consent to the use of the audio link.

3.6 Specific comments on schedules 5 and 6 are set out below.

Schedule 5: Corrections – amendments to the Corrections Act 2004

3.7 Schedule 5, clause 2 of the Bill inserts new section 139A into the Corrections Act, which applies while the epidemic notice is in force. New section 139A enables the use of audio links instead of AVL by persons participating in any hearing or application under sections 133 to 138 of the Corrections Act. The proposed amendment only relates to the disciplinary matters.

3.8 Disciplinary hearings can have significant consequences for a prisoner. For example, it can result in up to 15 days "confinement in a cell" (see section 137(3)(2) of the Corrections Act). While the hearing adjudicator or visiting justice must be satisfied that the use of audio links (rather than AVL)

is not contrary to the interests of justice, the Law Society is of the view that audio links are not suitable for these types of hearings.

3.9 Prisoners can represent themselves at the hearing or apply for legal representation. However, it is not clear if the proposed amendment envisages the lawyer also dialling into the hearing via an audio link.

3.10 Further, disciplinary hearings can involve the cross-examination of witnesses. Practical issues may arise if the hearing is conducted via an audio link including the ability of the prisoner (or their counsel) to effectively cross-examine the witness. If the adjudicator or visiting justice are also joining in the hearing via audio, it will be difficult for the fact finder to assess witness credibility for example.

3.11 The Law Society recommends that if clause 2 is retained in Schedule 5, it should be amended to include an additional consent requirement. This would require the adjudicator or visiting justice, to obtain the prisoner/defendant's consent to audio link, before any decision is made as to its use.

Schedule 6: Courts – amendments to the Courts (Remote Participation) Act 2010

Criminal proceedings – sentencing hearings

Judicial officer to make a determination

3.12 In relation to Schedule 6, clause 5 of the bill, the explanatory note states:

> "Clause 5 inserts new section 8A into the Act. New section 8A enables the use of audio links instead of audiovisual links for participation in criminal procedural and sentencing matters while the epidemic notice is in force. Where the appearance of the defendant in person is not required in a procedural or sentencing matter, a judicial officer or Registrar may determine that audio links be used instead of audiovisual links if the judicial officer or Registrar—
>
> - would otherwise determine that audiovisual links be used for participation; and
> - considers the criteria in sections 5 and 6 in determining whether the use of AL in the circumstances would be appropriate; and
> - determines that the use of AL would not be contrary to the interests of justice."

3.13 The Law Society's concerns noted above in relation to clause 2 (schedule 5) are also applicable to clause 5 (schedule 6). While we do not have any significant concern with the use of audio links for criminal procedural matters (while the Epidemic Notice is in force), we are opposed to defendants appearing via audio links for sentencing matters.

3.14 Section 8(1) of the Courts (Remote Participation) Act 2010 currently allows either a *judicial officer* or *registrar* to make the determination of AVL in respect of a criminal procedural matter. Section 8(2) however, only allows a *judicial officer* to make the determination in respect of a sentencing matter. This highlights the significance of a sentencing hearing given the effect it can have on the liberty of an individual.

3.15 Proposed section 8A would allow both a registrar and a judicial officer the ability to make a determination on the use of audio links in sentencing matters (and procedural matters). This goes

further than what the current legislation allows and inappropriately extends the powers of a registrar. If clause 5 is retained, it should be amended so that only the judicial officer can make the decision to use audio links in a sentencing hearing.

Victim participation

3.16 Issues may also arise around effective victim participation if a defendant appears via audio link. For example, if the victim attends the sentencing in person, they will not be able to see the defendant.

Participant objection

3.17 Under current section 8(4) a motion to determine whether AVL is contrary to the interests of justice may be made by the *participant* or the judicial officer or Registrar. Proposed section 8A removes the participant's objection. We recommend this should be retained so that if the participant (or their counsel) believes an audio appearance is contrary to the interests of justice they can object to it and have the opportunity to be heard on that point.

Defendant's perception and practical difficulties

3.18 On a practical level, the Law Society questions where a defendant in custody would be accessing an audio link. We understand there are currently issues regarding privacy of telephone calls between counsel and clients in custody. These concerns will need to be addressed before audio links are made available as an alternative to AVL.

3.19 We acknowledge that in some circumstances a prisoner/defendant may prefer to appear in a procedural or sentencing matter via audio link, particularly if it results in a quicker resolution. However, there may be issues with how an audio-only sentencing will be perceived by defendants. Without the ability to see the Judge, the formal courtroom and participants, there may be a perception of informality which may lessen the impact of the sentencing remarks and victim impact statement.

3.20 Practitioners also report that at times there have been difficulties confirming the correct defendant is to be sentenced when appearing via AVL. Without the ability to visually confirm the defendant, this will be even more difficult if sentencing hearings are conducted via audio link only.

3.21 Further complications may arise if, for example, an interpreter is needed (this goes to sections 6(a)(i) and (ii) in the Courts (Remote Participation) Act, regarding the defendant's comprehension and ability to participate in proceedings).

3.22 For all these reasons, we recommend that if clause 5 is to be retained in Schedule 6 it is amended to include the additional requirement to obtain consent from the defendant (similar to the recommendation to schedule 5 above).

4. Schedule 11: amendments to Mental Health (Compulsory Assessment and Treatment) Act 1992

Proposed new section 6A: use of Audio-visual links

Overview

4.1 Schedule 11 (clause 4) proposes inserting new section 6A to the Mental Health (Compulsory Assessment and Treatment) Act 1992 (**MHCAT Act**) during the response to the COVID-19 pandemic, to allow audio-visual links (**AVL**) to be used for clinical assessments, examinations, and reviews of patients and proposed patients, and for judicial examinations of patients.

4.2 The Law Society supports measures that aim to address current constraints on in-person assessments and examinations during the COVID-19 pandemic. Remote participation via AVL is appropriate for some proceedings (for example civil proceedings) but the proposed use of AVL for MHCAT Act assessments and examinations has significant implications for the vulnerable people involved, and there should be a higher threshold for its use than is currently proposed. We also recommend that the use of AVL for MHCAT Act assessments and examinations should be subject to a sunset clause (similar to that provided in schedules 5 and 6 relating to AVL for Corrections and Courts hearings) that the section is repealed when the Epidemic Preparedness (COVID-19) Notice 2020 expires.[2]

Comments

4.3 Patients who fall under the MHCAT Act are often some of the most vulnerable and marginalised people in society. An assessment under that Act has the potential to result in periods of compulsory detention amounting to a significant encroachment on the person's fundamental right to freedom. Undertaking assessments and examinations under the Act via AVL should therefore be limited to a narrow set of extraordinary circumstances (as is the case with the current pandemic), and the Law Society recommends that remote examination via AVL should only be used where there is no other possible option available to undertake the examination in person.

4.4 Lawyers practising in this area note it is not uncommon for people suffering from a serious mental illness to experience delusions and/or paranoia about cameras, television screens and other devices. Often, auditory and visual hallucinations are part of a mental health issue. The use of AVL has the potential to exacerbate these problems. A vulnerable person may therefore have a less positive experience with an assessment or examination conducted via AVL as opposed to in person.

4.5 The examination required for a clinician to form an opinion about whether a person is mentally disordered is a crucial step in the decision-making process. During the examination, information is gathered from the patient's verbal and physical presentation as well as from other sources. It will be difficult for clinicians to make accurate assessments when examining the patient via AVL, as many people do not respond well when speaking to a screen rather than a person who is physically present. In addition, many non-verbal responses and cues may be missed via AVL, making it difficult

[2] Schedule 11, proposed new s137A currently provides that the COVID-19 temporary provisions (including new s6A) are repealed on 31 October 2021 or by earlier Order in Council.

for a clinician to properly understand and assess the nuances of a person's communication and their state of mental wellbeing.

4.6 In summary, the Law Society considers:

a) Many people subject to the MHCAT Act who have difficulties with face-to face interactions may find those difficulties are accentuated via AVL. It will also be difficult for clinicians to make accurate assessments about a person when examining the patient via AVL.

b) In-person assessments and examinations under the MHCAT Act should therefore continue to be the default. AVL should only be used as a last resort and limited to situations where there is no other safe option available to conduct an in-person assessment – rather than the lower threshold proposed in the Bill that AVL may be used if the clinician or judicial officer "considers that it is not practicable for the person to be physically present".[3]

c) In addition, the decision to use AVL should take into account the patient's preference and the urgency of the assessment/examination required. The reasons for using AVL instead of in-person assessments and examinations should also be recorded.

Proposed new section 2AA: meaning of mental health practitioner during COVID-19 response

4.7 The Law Society notes the proposed definition of "mental health practitioner" and amendments to the definition of "health practitioner" in proposed section 2AA.

4.8 The issue of who should be undertaking assessments for the purposes of the MHCAT Act is one of significant concern. The timeframes available do not permit us to provide detailed comment on this issue. However, any changes to the structure of the Act, including any change to the classes of persons permitted to undertake assessments, are serious and need careful consideration. The Law Society recommends the Committee seeks advice from officials and consults the relevant health professionals on this point.

5. Insolvency "safe harbours" and the Business Debt Hibernation scheme

5.1 Our comments in relation to the commercial law elements of the Bill focus on various aspects of the "safe harbours" relating to two directors' duties (set out in the proposed Schedule 12 to the Companies Act) and the Business Debt Hibernation (**BDH**) scheme (set out in the proposed Schedule 13 to the Companies Act).[4]

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[3] Schedule 11, new s6A(2): "If the clinician, psychiatrist, or mental health practitioner considers that it is not practicable for the person to be physically present, the clinician, psychiatrist, or mental health practitioner may use an audiovisual link to access the person to exercise a power under this Act."

[4] Part 2, subpart 4 – Schedule 2, Commerce and Consumer Affairs: Part 2 Amendments to the Companies Act 1993, subpart 1 ("safe harbour" relating to 2 directors' duties), subpart 2 (COVID-19 Business Debt Hibernation scheme).

Safe Harbours regime

Clarity of drafting of 'safe harbours'

5.2 We are concerned that the drafting of the two safe harbours, and in relation to section 135 in particular, may not, in practical terms, enable a director to proceed with confidence and certainty that he or she has the benefit of the proposed protections. Lack of such confidence is likely to undermine the effectiveness of the regime.

5.3 Overall, given the likely needs of many New Zealand businesses in the short term as the country de-escalates through its COVID-19 alert levels, the simplicity of the Australian approach may have been preferable. That is, section 135 might have (effectively) been dis-applied (for a 6-month period) in relation to debts incurred in good faith in the ordinary course of the company's business. We assume, however, that this approach has already been considered and a choice made to proceed with an alternative formulation.

5.4 As drafted, and on its face, the proposed safe harbour purports to provide absolute protection from the duty set out in section 135. Section 135 requires that a director must not agree to the business of the company being carried on, or cause or allow the business to be carried on, in a manner likely to create a substantial risk of serious loss to the company's creditors.

5.5 The conditions to the safe harbour do not appear, on their face, to reflect the full scope of this duty. The duty in relation to "reckless trading" concerns overall solvency (so both aspects of the Companies Act's solvency test – liquidity and assets), and the point at which directors must start to consider the interests of creditors. It is not focussed solely on liquidity issues. However, the conditions to the safe harbour are liquidity-related and therefore appear to bear limited relevance to the scope of the section 135 duty. The conditions require directors to believe, in good faith, that the company has significant liquidity problems driven by the effects of COVID-19 and those liquidity issues will be resolved by September 2021 (or any later date specified). The conditions do not address what happens if a company has sufficient liquidity but nonetheless has issues, in the relevant period, with its overall assets.

5.6 It may be that the policy intent is to simply provide for a safe harbour under section 135 to the extent that the relevant issues are liquidity related. However, the policy intent is not clear from the Bill as currently drafted.

5.7 With these questions in mind, we recommend that the Committee seek final clarification from relevant persons, as to the intended scope of the safe harbour and whether the drafting of the safe harbour (and in particular, the conditions to assessing it) provides sufficient clarity, to the reasonable director, on the protection that is intended to be available and what is required of him or her in order to proceed confident of the safe harbours' protections. Accountants' views will be required to answer the technical points; we are not qualified to an answer it ourselves but hope that the Committee is able to explore the issue with others.

5.8 We do recommend however, and come what may, that Schedule 12 include an express and detailed statement of overall legislative purpose and schedule overview (equivalent to that provided in Schedule 13), as discussed further below.

5.9 Guidance will be helpful as to the application of the safe harbour in any event. Specifically, to remove any doubt that a debt cannot be incurred in the ordinary course of business when the company is otherwise insolvent (thereby undermining the effectiveness of the safe harbour). Again, borrowing from the Australian example, a debt incurred to maintain the continuity of the business during the 6-month period (for example to undertake some restructuring) is to be taken as having been incurred in the ordinary course. In this way, directors will achieve the much-desired certainty that the safe harbour is intended to apply not only to debts incurred as part of the ordinary day-to-day trading activity but also to debts incurred to restructure a business it to continue trading through the COVID-19 crisis.

No statement of statutory intent

5.10 The terms of Schedule 12 do not make clear the purpose of the proposed regime (equivalent to clause 1 of Schedule 13, in relation to the BDH scheme), and we strongly recommend that such a statement is included in this Schedule.

5.11 The two touchstones of statutory interpretation are (a) to understand the language employed in the drafting and (b) to understand the statutory purpose, to help interpret the language should such assistance be required. Such statements of intent are likely to be particularly important where, as here, the legislation is passed under urgency, in response to an acute situation, and without the benefit of the full legislative process. A clear statement of statutory purpose will be essential to any person, including a judge, considering the provisions in the future when memories of today's crisis-driven circumstances have mellowed.

5.12 As a general point, we strongly recommend that the drafters state, expressly, the purpose behind the safe harbour provisions and what they are seeking to achieve. Such clarity will aid interpretation by directors seeking to understand, clearly and with confidence, their obligations and what protection they have during the next 18 months. A related point is the necessity for directors to now consider is the risk of court action that is funded by litigation funders who are well aware of the fact that many companies' D&O insurance policies are able to 'respond' in relation to a claim for breach of the duty set out in s135, where they do not generally respond in relation to other breaches of statutory duty. The duties in section 135, and its safe harbour, will be coming under intense scrutiny in the next two years as things progress, and with the perhaps inevitable company failures despite best efforts. As much clarity as possible on the terms of the safe harbour is going to assist directors to navigate this environment.

Parameters to regulation-making power

5.13 We recommend that the regulation making power, set out in clause 8 of Schedule 12, is amended to include a reference to the legislative intent of Schedule 12.

5.14 The regulation making power, as currently drafted, is stated very broadly and with few parameters. Currently, the Ministers are only required to have regard to the effect of the proposed regulations on the "creditors of companies that have significant liquidity problems" and "the integrity of corporate insolvency law". There is no requirement for the Ministers to have regard to what the safe harbour regime is trying to achieve (as applies to the regulation making power provided for in

relation to the BDH scheme), and we recommend that they are required to consider that overall legislative purpose for the safe harbours also.

5.15 As noted above, Schedule 12 does not set out a clear statement of its legislative intent (as appears in Schedule 13, in relation to the BDH scheme) and we recommend that such a statement is included.

Safe harbour provisions (onus of proof)

5.16 A person who wishes to rely on a provision of the (safe harbours) in a proceeding for, or relating to, a breach of section 135 or 136 has the burden of proving that the provision applies. There is no guidance about what this means.

5.17 The term 'evidential burden' is defined in the Australian provisions to mean the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

5.18 We submit that similar guidance is needed here, for certainty.

Business Debt Hibernation scheme

Scheme complexity

5.19 We are concerned that the complexity (and particularly the procedural complexity) of the BDH scheme, as drafted, will mean the scheme is effectively out of reach for the SME community and so will not meet the desired policy goals. A solution may be for a shorter and simpler (and so faster) process, aimed specifically at smaller entities, to be formulated in due course. We recommend, in any event, that guidance on the BDH scheme be provided seeking to assist smaller entities to navigate the scheme.

Confident compliance – statutory declarations

5.20 We are concerned about the ability of directors to 'confidently comply' with the BDH scheme, given the need for directors to make statutory declarations as to matters which are inherently uncertain, when such declarations may not be necessary in any event. If directors are not able to comply confidently, the uptake of the scheme will be limited.

5.21 The difficulty arises from the requirement for directors to confirm, by statutory declaration, their view that the company is more likely than not going to be able to pay its debts as they fall due after September 2021. Directors, given potential liability consequences, and particularly in a challenging trading environment, are driven to act conservatively – and many may well find it impossible to make the required statutory declaration even if there is a decent chance of the company surviving the crisis. Given this is critical step in starting the BDH process, and that creditors can keep asking for such a statutory declaration to be provided, there seems to be a significant risk of directors choosing simply not to take the risk, and so not participating in the scheme.

5.22 However, it is not clear why the step of requiring a statutory declaration is necessary, given that creditors must vote on the proposal. By definition, the company's creditors will have been involved with the business before the crisis, and so will have their own views about whether the company is

likely to weather the storm. If a creditor does not feel the company will survive, it is hard to see how a statutory declaration saying otherwise is going to change that creditor's mind. This is particularly so for a creditor holding an "all assets" type security interest (ie GSA or equivalent). The voluntary administration process commences with a creditor vote, with no requirement for statutory declarations from directors.

5.23 Conceptually, we can understand why a statutory declaration of the sort currently provided for could seem appropriate. However, in practice the benefit of directors providing such statutory declarations appears limited. Further, the need for such declarations may mean that directors – proceeding with inevitable caution – will decide not to provide them, and so not make use of the scheme and so defeat its purpose.

Parameters to the regulation making powers

5.24 We recommend that the drafting of the regulation making power in relation to the BDH scheme, to appear in Section 395B(4)(a) of the Companies Act be amended, so as to require the two Ministers who recommend the regulations, to do so having taken into account of:

> "*(a) the "purposes of **Schedule 13** as set out in clause 1 of that Schedule; and*
>
> *(b) the effect of the regulations on…"*

6. Schedule 12: Housing – amendments to the Unit Titles Act 2010

6.1 The Law Society recommends three technical amendments to proposed new section 88, to provide greater clarity and certainty in relation to body corporate meetings under the Unit Titles Act 2010 (**UTA**).

6.2 Proposed new section 88(3)(a) should refer to "operational rules" rather than "constitution", to be consistent with terminology in the UTA.

6.3 Proposed new section 88(4) of the UTA provides that subsection 88(3) applies while the Epidemic Preparedness (COVID-19) Notice is in force. The Departmental Disclosure Statement does not mention the UTA amongst the amendments that have a retrospective effect, and it is not clear whether this section should apply from 25 March 2020. If it is intended to apply retrospectively, then the date should be added to be consistent with other retrospective amendments in the Bill. If it does not apply retrospectively, then body corporate meetings held by audio or visual link after 25 March until the Bill comes into force could be invalid.

6.4 Under new section 88(3), it should be made clear that general meetings set to take place by audio/audiovisual link during the COVID-19 period can validly proceed by AVL even if the Epidemic Notice expires or is revoked before the date of the meeting or the adjourned date of that meeting.

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