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Dr Deborah Russell
Chair, Finance and Expenditure Committee
Parliament Buildings
Wellington

By email: fe@parliament.govt.nz

Dr Russell, tēnā koe

Re: COVID-19 Public Health Response Act 2020

A Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission to the Finance and Expenditure Committee in relation to its inquiry into the operation of the COVID-19 Public Health Response Act 2020 (**Act**).

B General comments

2. The Law Society acknowledges that new legislation to deal with the ongoing public health response to the COVID-19 emergency was both desirable and necessary. The former legislative framework for responding to the crisis—especially the Health Act 1956—was outdated and not well suited to addressing the particular nature and challenges presented by the COVID-19 emergency. The new bespoke framework provided by the Act is a significant improvement. In particular, the Law Society agrees that it is appropriate for the power to make orders to be exercised principally by a Cabinet minister accountable to Parliament, rather than officials.

3. That said, it needs to be acknowledged that the Act is an extraordinary piece of legislation and provides expansive powers to make orders that may impose arguably the most profound peacetime restrictions ever made to the rights and personal freedoms of all New Zealanders. This is particularly so if the Act's powers need to be used in the event that New Zealand returns to a higher alert level than that which is currently in place. As is now well known, restrictions in alert levels 4 and 3 impacted on almost every aspect of New Zealanders' lives.

4. Given its significance, the Law Society is concerned that the COVID-19 Public Health Response Bill (**Bill**) was not referred to select committee for consideration before it was enacted. The Law Society acknowledges that the need for urgency is imperative when passing emergency legislation and that, in the present case, the move from alert level 3 to alert level 2 was seen as critical and unable to be delayed. Nevertheless, the Law Society considers the Bill could and should have been referred to select committee for consideration, even if only for one or two days. Although the Government's response was necessarily evolving to address a very fluid situation, the need to move to level 2 was foreseen and the Bill should have been able to be prepared at least a few days earlier to build in time for select committee consideration. If that

time had been made available, it would have allowed for greater consideration of the legislation prior to enactment and increased its public legitimacy.

5. Although referral to select committee did not occur, the Law Society acknowledges that it was invited by the Attorney-General (together with selected other organisations and individuals) to contribute to the development of the Bill. However, the invitation was extended at 5.30 pm on the evening before introduction to comment on an exposure draft by 10am the following day. This was a difficult timeframe in which to respond meaningfully to a very significant piece of legislation.

6. The Law Society appreciates that the Attorney-General promoted important amendments to the Bill, which were subsequently made during its passage through the House—in particular, to provide that the Act is to be automatically repealed unless Parliament passes a resolution to continue the Act every 90 days. (By contrast, the original proposal was for the Act to remain in force for two years.) The Law Society supports this innovative procedure for limiting the operation of emergency legislation, given the dearth of public scrutiny during the course of the Bill's passage.

7. However, the point remains that the very limited consultation on the exposure draft is not a substitute for proper scrutiny and public input through the normal select committee process. In the circumstances, the Law Society therefore supports the further innovation of referring the Act to select committee for post-enactment scrutiny.

8. One of the downsides with post-enactment review, however, is that the select committee does not have a Bill before it to amend and refer back to the House. Presumably therefore the Government intends to consider the committee's report with a view to introducing an amendment Bill. The development of an amendment Bill will of course require time for policy development and drafting.

9. If that is the case, time is short for the committee to report so that any amendments can be made prior to the 90-day renewal. In this regard, the Law Society notes that:

   a. the committee is required to report back to the House by 27 July 2020;[1]

   b. the Act will be automatically repealed under section 3 on 11 August 2020 if no resolution is passed to continue the Act by the House before then; but

   c. Parliament will adjourn on 6 August 2020, in advance of the New Zealand general election.[2]

10. Accordingly, if the committee reports on 27 July 2020, there will only be six sitting days for Parliament to make any amendments to the Act. Realistically, it seems unlikely that an amendment Bill could be developed, drafted, introduced and passed within that time, especially if it were then to be considered by select committee. It would be particularly ironic, and regrettable, if an amendment Bill introduced to pick up matters that were not able to be considered because the Act was passed under urgency without a select committee process, also had to be passed under urgency and without a select committee process.

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1 "Inquiry into the operation of the COVID-19 Public Health Response Act 2020" (21 May 2020) New Zealand Parliament <www.parliament.nz>.

2 "Election Timeline 2020" (14 February 2020) New Zealand Parliament <www.parliament.nz>.

11. To avoid this situation, the Law Society encourages the committee to report (even if on an interim basis) to the House at the earliest available date in relation to any amendments it proposes, so that there is time for these to be considered and enacted without using urgency.

C Recommended changes to the Act

12. The Law Society has carefully considered the Act and recommends the following amendments.

Safeguards on the exercise of the section 11 power

Section 9

13. Section 9 sets out requirements for the making of a section 11 order. These operate as safeguards on the exercise of the section 11 power. Such safeguards are critical, given the restrictions that have already been imposed on the rights and freedoms of all New Zealanders under the Health Act, and which may be imposed again under the new Act.

14. However, the Law Society notes that:

    a. Most of the safeguards are procedural. The Minister must have regard to both advice from the Director-General (s 9(1)(a)) and any decision by the Government on the level of public health measures appropriate (s 9(1)(b)), and must have consulted with the Prime Minister and the Minister of Justice (s 9(1)(c)).

    b. The only substantive criteria for making an order is that the Minister is satisfied that the order is "appropriate" to achieve the purpose of the Act (s 9(1)(d)).

15. The Law Society **recommends** that the Act is amended so that, before making an order, the Minister must be satisfied that the order is "reasonably necessary" to achieve the purpose of the Act. The Law Society submits that this higher threshold is appropriate:

    a. given the significant scope of the power conferred;

    b. because it better captures the fact that the decision required of the Minister involves a balancing of wider economic and social considerations, and not simply an assessment of what public health measures are appropriate; and

    c. is consistent with the purpose of the Act as set out in section 4, which includes supporting a public health response that is "proportionate".[3]

Section 16

16. Section 16 contains a further safeguard. It provides that a section 11 order made by the Minister is automatically revoked unless a resolution of the House is passed approving the order within the relevant period.

17. The Law Society supports this scrutiny by Parliament. The Law Society **recommends** that the Act is amended so as to require the Minister, on the making of a section 11 order, to lay before the House the advice received from the Director-General under section 9(1)(a) about the risks of the outbreak or spread of COVID-19 and the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks. This will:

    a. strengthen the oversight process; and

[3] Section 4(c).

b. ensure that Parliament's scrutiny of orders is properly informed. It would be anomalous if Parliament had to decide whether to allow an order to expire without the benefit of the advice that was available to the Minister. Doing so may not achieve a public health response consistent with the purpose set out in section 4 of the Act.

Public access to section 11 orders

18. Section 14(2) provides that a section 11 order must be published at least 48 hours before it comes into force on a publicly accessible Internet site maintained by or on behalf of the New Zealand Government and notified in the *Gazette*. The Law Society supports this provision, whose purpose is to allow members of the public to check what orders are in place and so plan how to act in compliance.

19. However, section 14(3) provides that the Minister or Director-General need not comply with the 48-hour time limit in subsection (2) if satisfied that the order should come into force urgently to prevent or contain the outbreak or spread of COVID-19. In such cases, the Minister or Director-General must comply with the publication requirements as soon as possible.

20. Given the nature of the threat posed by COVID-19, the Law Society accepts that there may be cases where it is appropriate to allow a process to make orders on an emergency basis. However, if an order is made on an emergency basis the question is what happens where a person is charged with:

    a. a breach of the order occurring before the order was published; or

    b. non-compliance with directions of an enforcement officer that are authorised by the order but were not previously authorised.

21. It is incompatible with basic principles of the rule of law to expose individuals to criminal liability under an undiscoverable law.[4]

22. Accordingly, the Law Society **recommends** that the Act is amended either by:

    a. Inserting a savings provision to exempt from criminal liability anyone charged with acts which are unlawful under, or are in non-compliance with, a section 11 order before the order is published.

    b. Alternatively, if that is seen as making enforcement too hard or frustrating the emergency order's purpose, allowing a defence of reliance on previously published orders or other official material. The defence would be available where:

        i. a person is charged with conduct that contravenes the emergency order;

        ii. the conduct occurs before there is a reasonable opportunity to learn of the emergency order; and

        iii. the defendant discharges an evidential onus to raise the issue of reasonable reliance on the previously published information.

    With such a defence, a defendant who simply did not check the information would not be protected. However, a defendant who had made reasonable efforts to ascertain the legal position and to comply with it would have protection.

[4] Legislation Design and Advisory Committee *Legislation Guidelines* (2018 ed) at 23.

Enforcement, offences and penalties

Section 20 – warrantless entry

23. Section 20(1) confers a warrantless power of entry on an enforcement officer if they have reasonable grounds to believe that a person is failing to comply with "any aspect of a section 11 order".

24. The power does not apply to a private dwellinghouse.[5] A constable may enter a private dwellinghouse without a warrant under section 20(3) only if they have reasonable grounds to believe that "people have gathered there in contravention of a section 11 order and entry is necessary for the purpose of giving a direction under section 21" to stop a contravention or a likely contravention.

25. The Law Society submits that the risk threshold for the exercise of a warrantless power of entry under the Act needs further consideration. Under the general law, a warrantless power of entry is only available where there are reasonable grounds to suspect that:[6]

    a. an offence is being committed, or is about to be committed, that would be likely to cause injury to any person, or serious damage to, or serious loss of, any property; or

    b. there is a risk to the life or safety or any person that requires an emergency response.

26. The warrantless power of entry conferred under the Act appears to be wider in scope than that available under the general law, given that:

    a. The law is generally concerned with immediate risks to life or safety. The type of risks associated with COVID-19 which are capable of being policed under the Act are in a different category. For instance, the power of entry in relation to dwellinghouses appears to be intended to break up a gathering contravening maximum participant limits. All gatherings (even ones permitted under section 11 orders) pose some risk of spreading COVID-19. The risk associated with a gathering with one or two people more than the maximum permitted under a section 11 order is both incremental and likely to have already crystallised by the time a power of entry is exercised. In this way, the risk is qualitatively different to the risk to life or safety posed by ordinary criminal offending, for instance, an assault or arson.

    b. The powers apply to breaches of a section 11 order made at any alert level. While the 'risk to life or safety' standard could arguably be met in higher alert levels, that is unlikely to be the case at lower alert levels.

    c. The power given to enforcement officers under section 20(1) applies in relation to the failure to comply with "any aspect of a section 11 order" regardless of whether it is a serious breach or one likely to give rise to a significant risk of the spread of COVID-19.

27. The Law Society recognises that there are competing interests at stake between the need to take enforcement action to prevent the spread of COVID-19 and the rights of citizens to be free from unreasonable searches.[7] However, the balance between these interests could be better struck.

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5 Section 20(2).

6 Search and Surveillance Act 2020, s 14.

7 Guaranteed by s 21 of the New Zealand Bill of Rights Act 1990.

28. To that end, the Law Society **recommends** that the Act is amended to adopt a two-tier entry regime under which:

    a. The warrantless power of entry is reserved only for those cases where a constable has reasonable grounds to believe that it is necessary to enter premises to provide a direction under section 21 to prevent an immediate risk to the life or safety of any person.

    b. A warrant is required to enter premises in respect of any other breach of a section 11 order.

29. This would align the warrantless power of entry with the approach taken in the general law. It would also alleviate concern about the overreach of the existing power, while still ensuring that measures to prevent, and limit the risk of, the outbreak or spread of COVID-19 are enforceable.

Section 21 – power to give directions

30. Section 21 allows an enforcement officer to give directions if they have reasonable grounds to believe that a person "is contravening or likely to contravene" a section 11 order.

31. The Law Society submits that the power to issue a direction where a person is "likely to contravene" an order is problematic. In other contexts, the courts have held that "likely" does not mean more probable than not, but rather "a real risk, a substantial risk, something that might well happen"[8] or "a risk that might well eventuate".[9]

32. Given this, there are at least two problems with adopting a "likely to contravene" standard for the issuing of directions:

    a. It would (applying those definitions) empower an enforcement officer to require a person to desist from activities that are more likely to be lawful than they are to be unlawful. The executive should not be able to restrain lawful activities.

    b. The "likely" threshold is uncertain and difficult for enforcement officers to apply in practice. From an enforcement perspective, it would be preferable to apply a bright line standard that is easier for enforcement officers to understand and apply on the ground.

33. In addition, the Law Society queries whether the intention of including "likely" contraventions was to capture conduct that would occur unless restrained, rather than conduct of uncertainty legality.

34. The Law Society **recommends** that the Act is amended by deleting the words "is contravening or likely to contravene" and substituting it with "is contravening or is about to contravene". That would avoid the difficulties noted above. It is also the language adopted in other statutes to capture conduct that would occur if not restrained.[10]

Section 22 and 27 – power to stop vehicles and associated offence

35. Section 22(3) provides that a constable may stop a vehicle for the purposes of a section 11 order that provides for a restriction of movement. Section 27(3) makes it an offence if a person:

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8 *R v Piri* [1987] 1 NZLR 66 (CA) at 79 and see also 84.

9 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 411.

10 Search and Surveillance Act 2020, s 14(2)(a).

a. fails to stop as soon as practicable when required to do so by a constable exercising the power under section 22(3); and

b. knows or ought reasonably to have known that the person exercising the power is a constable.

36. The general law contains a power to stop vehicles and an associated offence provision in sections 114 and 52A of the Land Transport Act 1998. The Land Transport Act contains safeguards on the exercise of the power, in the form of requirements to ensure that the enforcement officer's position is known to the driver. Under the Land Transport Act, an enforcement officer may only require the driver of a vehicle to stop if:

a. the enforcement officer is in uniform, or wearing a distinctive cap, hat, or helmet, with a badge of authority affixed to it;[11] or

b. the enforcement officer is in a vehicle and requires the driver to stop by displaying flashing blue, or blue and red, lights or sounding a siren.[12]

37. By contrast, under the Act there is no requirement for the enforcement officer's position to be apparent to the driver and it is an offence to stop if the driver "ought reasonably to have known that the person exercising the power is a constable".[13] As a result, a person who is of less than average mental acuity at the relevant time (whether as a result of a medical or psychological condition or of temporary matters such as distress or shock), and does not realise that a constable in plain clothes directing the vehicle to stop is a constable, may have no defence.

38. The Law Society **recommends** that the Act is amended by requiring a constable directing a vehicle to stop to be wearing an identifying uniform or wearing a distinctive cap, hat, or helmet, with a badge of authority. This:

a. would make enforcement of the Act simpler because it would be unnecessary for the prosecution to get into issues of whether the driver's ground for believing the constable was not a constable were reasonable or unreasonable; and

b. would not unreasonably impede the enforcement of the Act, as constables should have the relevant identifying equipment with them for ordinary road policing.

Technical amendments

Section 34 – protection from liability

39. Section 34 provides protection for persons acting under the authority of the Act. It does this by applying section 129 of the Health Act 1956 "as if that Act included a reference to this Act". In turn, section 129 of the Health Act provides that:

a. No one can be civilly or criminally liable in respect of any act or omission in pursuance or intended pursuance of any provisions of that Act on any ground unless they have acted, or failed or refused to act "in bad faith or without reasonable care".[14]

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11 Land Transport Act 1998, s 114(1).
12 Land Transport Act 1998, s 114(2).
13 Section 27(3)(b).
14 Health Act 1956, s 129(1).

b. No proceedings, whether civil or criminal, can be brought against any person who has the benefit of that protection, except by leave of a Judge of the High Court.[15]

c. The High Court Judge shall not grant leave unless satisfied "that there is substantial ground for the contention that the person against whom it is sought to bring the proceedings has acted, or failed or refused to act, in bad faith or without reasonable care".[16]

d. Leave cannot be granted unless an application for such leave is made within six months after the act, failure, or refusal complained of, or in the case of a continuance of injury or damage, within six months after the ceasing of the injury or damage.[17] There is no power to extend this time.

40. Section 129 of the Health Act predates the enactment of the New Zealand Bill of Rights Act 1990. Section 27(3) of the New Zealand Bill of Rights Act provides that, in effect, the Crown should be treated in civil litigation the same as any ordinary litigant. Ordinary litigants do not have the procedural or substantive protections of the type found in section 129 of the Health Act.

41. The Law Society recognises that there are many liability immunity provisions on the statute book of the type described in paragraph 39.a) above, and they have been introduced since the enactment of the New Zealand Bill of Rights Act. However, few, if any, place the sort of procedural barriers of the type described in paragraphs 39.b) to 39.d) above prior to the commencement of civil litigation as are imposed by section 129 of the Health Act.

42. The Law Society **recommends** that section 34(1) of the Act is amended so that the reference to section 129 of the Health Act is limited to section 129(1) of the Health Act. This would align with more modern drafting practices and give a person who acts in the pursuance, or the intended pursuance, of the powers conferred by the Act:

a. protection so long as they have not acted in bad faith or without reasonable care; but

b. not give them the benefit of the outdated procedural barriers found in sections 129(2)–(5) of the Health Act.

<u>Section 28 – proceedings for infringement offences</u>

43. Section 28 contains procedural provisions for proceedings for infringement offences. It raises a technical issue relating to an existing inconsistency in the law between the procedure under the Criminal Procedure Act 2011 and the Summary Proceedings Act 1957.

44. Under section 21(1) of the Summary Proceedings Act, leave of a Judge or Registrar is required before a charging document can be filed in relation to an infringement offence. In contrast, no leave is required before a charging document for an infringement offence can be filed under the Criminal Procedure Act 2011. There is no principled reason for the difference in the regimes.

45. It appears that the Act is intended to override the requirement for leave by providing in section 28(1)(a) that a person who is alleged to have committed an infringement offence may

[15] Section 129(2).
[16] Section 129(2).
[17] Section 129(4).

be "proceeded against by the filing of a charging document under section 14 of the Criminal Procedure Act 2011" (that is, there is no requirement for leave).

46. The Law Society **recommends** that it would be better to amend the Act to make this point express. That could be done by including a provision in the same terms as that found in section 138(2) of the Land Transport Act 1998 which provides that: "Despite section 21 of the Summary Proceedings Act 1957, leave of a District Court Judge or Registrar to file a charging document is not necessary if the enforcement authority commences proceedings for an infringement offence by filing a charging document under the Criminal Procedure Act 2011."

Section 30 – service of infringement notices

47. Section 30(3) provides that an infringement notice sent by post is to be treated as having been served when it was posted. The time for payment of an infringement fee is determined by the date on which the notice was served.

48. There is a potential unfairness in treating an infringement notice under the Act as having been served on a person when it was sent, given that New Zealand Post now only delivers mail three days a week and any notices will be sent in the context of the COVID-19 pandemic where—particularly if New Zealand returns to higher alert levels—there may be delays in postal delivery.

49. Accordingly, the Law Society **recommends** that section 30(3) is amended to provide that an infringement notice sent by post is to be treated as having been served seven days after it was posted.

D Conclusion

50. The Law Society asks the committee to recommend the amendments to the Act set out above in paragraphs 15, 17, 22, 28, 34, 38, 42, 46 and 49.

51. We look forward to appearing to speak to this submission on 10 June.

Nāku noa, nā

Tiana Epati
President