Te Tari Ture o te Karauna
Crown Law

7 April 2020

TO: Crown Solicitors
Public prosecutors

Tēnā koutou e hoa mā

COVID-19: New processes for bail, home detention and community-based sentences
Our Ref: CLO311/487

1. Further to my letter of 24 March 2020, I write to update you on changes that are being made to criminal justice processes across the Justice Sector, to ensure the effective administration of justice while the level 4 restrictions remain in place.

2. These changes, which primarily relate to bail and community-based sentences, have been made by Police and Corrections under the oversight of the Justice Sector COVID-19 Working Group ("Working Group"), of which Crown Law is a member. They are designed to ensure that all participants in the criminal justice system are as safe as possible. It is critical to ensure that defendants who are released from custody are not put at risk of contracting COVID-19, and equally that they do not inadvertently put occupants of their addresses at risk.

3. I have set the various processes out below. These are initial steps, and they will evolve as we see how they operate in practice and as the Working Group receives further guidance from the Ministry of Health. They are most relevant to Police and Crown prosecutions; but other prosecuting agencies will need to be aware of the general principles being applied.

Opposition to bail and electronically monitored bail (EM bail) on public safety grounds

4. As you know, s 8(2)(h) of the Bail Act 2000 specifically provides that when considering whether to grant bail, the Court may take into account "any other special matter that is relevant in the particular circumstances". It would therefore be possible for a Judge to decline bail, for example, where the applicant had tested positive for COVID-19 or was awaiting the outcome of a test, on the basis that they should remain in custody to protect the public.

5. Where the defendant has been in Corrections custody for at least 14 days, this situation is extremely unlikely to arise. Corrections will be able to provide clear information to the Court about that person's health status and COVID-19 risk. While there are currently no confirmed cases of COVID-19 in any of New Zealand's prisons, many have been suspected cases and quarantined pending the outcome of a test. These prisoners have been voluntarily complying with quarantine in prison so it has not been necessary for formal orders to be made under the Health Act 1956. But such orders, requiring the prisoner to remain in quarantine in prison (even

beyond their statutory release date) would inevitably be made in respect of a non-compliant prisoner who sought bail. Bail would presumably be refused in such a situation, on the basis a fresh application could be made once the Health Act orders were lifted.

6. The position with respect to defendants who have recently been in the community will be more difficult. Prosecutors will need to provide any known information about a defendant's COVID-19 status or risk to the Court, and oppose bail on that basis in appropriate cases (particularly those where a defendant is symptomatic and awaiting the outcome of a test). I have set out below the steps Police and Corrections are taking to collect that information.

Assessing proposed addresses for bail, EM bail, home detention and other community-based sentences

7. In other cases, the fact of the COVID-19 epidemic and the Government's response will obviously be highly relevant when considering appropriate residential conditions. As you will be aware, proposed addresses are assessed by the prosecution (in respect of bail) and Corrections (in respect of EM bail, home detention, community detention, intensive supervision and supervision; all of which require residential conditions to be imposed). The assessment processes are being modified to ensure that all relevant information is put before the Court, in respect of the defendant, the occupants of the proposed address and the address itself. I **attach**, for your information, copies of documentation prepared by both the Police and Corrections in this regard.

8. While prosecution agencies and Corrections may *request* the information set out in those documents, from the defendant and the occupants of proposed addresses, they have no power to compel its provision. Where defendants are represented, prosecutors should liaise with defence counsel to ensure all relevant information is put before the court. It would obviously be helpful if that information was provided to the Court in advance of the hearing, rather than the matter needing to be adjourned for further enquiries to be made.

9. Prosecutors should oppose defendants being permitted to leave custody, or being sentenced to a community-based sentence, unless there is a suitable address at which the defendant will not be at greater risk of contracting COVID-19, and where he or she will not pose a risk to other occupants of that address. Where a defendant is otherwise suitable for bail but is simply unable to identify a suitable address, emergency accommodation will be available through the Ministry of Civil Defence Emergency Management (CDEM). I understand that information about accessing this accommodation will soon be provided to the legal profession as well as relevant agencies (Corrections, Police, Oranga Tamariki and Courts). Emergency accommodation involves the person being in total isolation for what is, at present, an indefinite period. There will be difficult cases involving vulnerable defendants where Judges will need to consider whether a further remand in custody may in fact be preferable.

Addresses will need to be re-assessed in some cases

10. I also note that addresses which have been assessed as being suitable prior to 23 March 2020 will need to be re-assessed in light of subsequent events (that was the

day the Prime Minister announced the level 3 and 4 restrictions were coming into force shortly). The composition of many households will have changed as a result of the level 4 restrictions. Occupants who were previously content to have defendants living at their address may no longer be willing to do so in light of the restrictions, particularly if, for example, there are vulnerable people in their bubble. In other words, an address that was approved prior to 23 March may no longer be suitable. This will affect a number of matters set down for hearing in the coming weeks, where assessments have already been completed.

Variation of residential conditions

11. Changes of bubble arrangements are not anticipated by the level 4 restrictions. There will be cases, however, where a change of address is unavoidable. For example, where there is a family violence incident at a defendant's address, which does not result in charges being laid but other occupants withdraw consent for them to live there as a result. This is particularly relevant with respect to EM bail and home detention.

12. Defendants who wish to amend their residential conditions will need to do so via the Court in the usual way. The new addresses will need to be assessed and suitability determined on a case by case basis. The Ministry of Health is providing advice to the Working Group on an ongoing basis. Provided the proposal is for the defendant to move from one low-risk bubble to another, the occupants of the new bubble consent to the defendant joining their bubble, and the new address is deemed suitable, these variation applications should be able to be dealt with by consent and granted by the Registrar without requiring a Court appearance. As set out above, where no suitable alternative address is available, CDEM will provide emergency accommodation where that is preferable to a return to custody.

Variation of other conditions

13. Aside from residential conditions, there are other types of conditions commonly imposed which are incompatible with the level 4 restrictions. For example, a large number of people are required to report to Police stations on a regular basis. The Police have identified all of those people and are contacting the "low-risk" defendants to advise them they do not need to report to Police while the level 4 restrictions remain in place.

14. We anticipate some people will have entered into bubble arrangements which are inconsistent with other conditions (for example, non-association conditions) without seeking a variation to those conditions. The Police will be taking a pragmatic approach to enforcement and/or variation of bail conditions in such cases, and obviously compliance with the level 4 restrictions would likely constitute a "reasonable excuse" justifying non-compliance with bail conditions in any event.

15. There is the potential for some confusion where defendants are subject to more than one set of orders (for example, bail conditions and orders made under s 70 of the Health Act, whether on an individual or *en masse* basis), where neither "trumps" the other. It may be helpful for Judges to make clear which bail conditions are subject to orders under s 70 of the Health Act and which are not. For example, a curfew to a residential address would appropriately be subject to a s 70 order (eg that the person be quarantined in a hospital). A condition forbidding contact with victims would

not. Prosecutors should alert Judges to any situation where confusion might arise and seek appropriate clarification.

Transport of defendants from Courts or prisons to their bubble addresses

16. Prosecutors should seek that conditions be imposed requiring defendants to travel directly to their residential address from Court (or prison, as applicable). As will be clear, the plan for transport to a new address will be an important component of assessing the suitability of that address. Prosecutors should ensure information is put before the Court in this regard.

17. Defendants are responsible for making their own transport arrangements. Typically this involves whānau members providing transport; or public transport. Both of these options remain available; travel to assist a person to move to a Court-ordered address is expressly contemplated by the most recent order under s 70(1)(f) of the Health Act 1956 as essential personal movement. I **attach** a letter from the Secretary for Justice to the Commissioner of Police which confirms these arrangements.

18. Corrections does make available, on a voluntary basis, transport from prisons to local addresses or transport hubs using third party "out of gate" providers. That will continue.

19. As for transport from Court to a bail address, the preferred mode of transport remains whānau or other support people from the defendant's bubble. Where this is unavailable, buses and taxis may be used, where they are still operating. Some defendants may qualify for social support from the Ministry of Social Development or Oranga Tamariki. Transport by Police or Corrections may be used as a last resort and, as always, is subject to deployment requirements.

20. Please note that, while there is no limit on the distance a person may travel for these purposes, there will be practical limitations. For example, the Working Group understands that Air New Zealand will not accept defendants on flights while the restrictions remain in place.

Youth Court

21. The same general principles apply to Youth Court matters, save that of course there are special considerations and additional support required where young people are concerned.

22. Prior to bail determination, there will be discussion between Police and Oranga Tamariki staff as to the appropriateness of proposed bail plans recognising the particular needs of tamariki and their whānau (including approval of proposed bail addresses). Young people subject to supervision with residence orders under the Oranga Tamariki Act (s 311) will also be released by the Court under s 314 (early release provisions) if applicable criteria are met, or will be released from a Youth Justice Residence following expiry of the order (if they were not released earlier). Oranga Tamariki are considering the implications of such releases in the COVID-19 environment.

23. Oranga Tamariki provide reports to the Court before a young person is released from Residence under the early release provisions (and this could include

information about any COVID-19 risks that may be present). Oranga Tamariki will make attempts to source any emergency accommodation that may be required for tamariki during the lockdown.

Appeals

24. On sentence appeals where there is a possibility of imprisonment being commuted to home detention or some other community-based sentence, prosecutors should ensure the Court orders fresh reports before commuting the sentence, so that addresses can be re-assessed in accordance with the new procedures. Similarly, addresses may need to be reassessed for bail appeals.

Unscheduled releases from prison

25. It would be very helpful to Corrections if they had advance warning that prosecutions were coming to an end other than by way of sentencing. Examples are:

    25.1 Withdrawal of charges;

    25.2 Dismissal of charges under s 147 of the Criminal Procedure Act 2011;

    25.3 Stays of proceedings.

26. These unscheduled releases pose particular challenges in the current environment, as Corrections have no time to ensure there is plan in place which will ensure the defendant's safety upon release. If you become aware that such an outcome is imminent (for example, because you plan to withdraw charges in respect of a defendant in custody), please email cs_help_desk@corrections.govt.nz as soon as possible.

27. I hope the above information is useful. Charlotte Brook is Crown Law's representative on the Working Group. Please do not hesitate to contact Charlotte if you have any queries about the information in this letter (charlotte.brook@crownlaw.govt.nz; 027 702 4882).

Ngā manaakitanga
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