ADLS

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WRITTEN SUBMISSIONS ON THE COVID-19 RESPONSE (FURTHER MANAGEMENT MEASURES) AMENDMENT BILL

IN SUPPORT OF THE ORAL SUBMISSIONS MADE BY ADLS PRESIDENT MARIE DYHRBERG QC ON FRIDAY 8 MAY 2020

OVERVIEW

The Auckland District Law Society (ADLS) welcomes the opportunity to make written submissions on the Covid-19 Response (Further Management Measures) Amendment Bill. These written submissions are in support of the oral submissions made by ADLS President Marie Dyhrberg QC on Friday 8 May 2020.

ADLS has a membership base of around 5,000 former and practising lawyers, legal executives, law students and members of the judiciary, based all over New Zealand. ADLS has 14 specialist legal committees comprised of ADLS members with expertise in their particular practice area.

CRIMINAL LAW

SCHEDULE 5: CORRECTIONS

1. With levels going down, we see no reason why prisoners cannot be taken to an AVL booth to participate in Parole Hearings via audio visual link. We are of the view that an audio visual link is more appropriate for prisoners to use in Parole Hearings than merely an audio link.

2. Our reading of the Bill is that it also applies to 'internal' disciplinary type hearings with the Prisons. We are of the view that audio is not suitable for these hearings. Some of these hearings can have significant consequences for the prisoner e.g. increase of security classification, loss of privilege, time in solitary and should be conducted via audio visual link.

SCHEDULE 6: COURTS

3. We have no issue with procedural matters (list court, CRH, and Call over only) proceeding via audio link only – as opposed to audio visual link - which would possibly encourage more defendants to participate. Some clients on bail have refused to come to Court as they do not want to fall sick and / or were classified as 'vulnerable'.

4. We do have an issue with sentencing proceeding via audio only. As eager as the Court is to get rid of its numbers, it's important that the defendant appears (either in person or via AVL) whilst he is being sentenced. Clause 5 proposes to allow a registrar to make the determination for sentencing – if they are to occur a Judicial officer should make that determination (as per s8) not a registrar.

5. Clause 5 removes the participants objection – this should be added into clause 5 so if the participant (or their counsel) believes an audio appearance is contrary to the interests of justice they can in effect object to it being used and have the opportunity to be heard on that point (as under s8(4)c.

CIVIL LAW

SCHEDULE 6: COURTS

6. Clause 3, Schedule 6, Part 2 of the Bill proposes amendments to the Courts (Remote Participation) Act 2010 (the Act) by inserting a new section 7A to permit the use of audio links (AL) in civil proceedings until the Epidemic Preparedness (Covid-19) Notice 2020 expires or is revoked. The introductory wording of the proposed s. 7A limits the application of the new section to circumstances where a judicial officer or Registrar would otherwise have determined that audio-visual links (AVL) would have been appropriate for the appearance of a participant in civil proceedings. In my view that sets the bar too high for this short-term remedial legislation. There are practical differences between AL and AVL and the decision whether or not to use AL should be independent of hypothetical considerations relating to AVL.

7. There are stipulated criteria in the body of the news. 7A which are sufficient, in our view, for the intended purpose of deciding on the use of AL, particular as the provisions of the existing s. 5 of the Act, are incorporated by the provision set out in the draft s. 7A(1)(a). Together the 2 provisions in s. 7A(1)(a) and (b) are all that is required to give full effect to the intention to make AL a practical solution to a temporary problem. In other words, the introductory words of s. 7A(1) "In any circumstances in which a judicial officer or a Registrar would otherwise have determined under section 7 that AVL be used for the appearance of a participant in a civil proceeding, … imposes an unnecessary hurdle which is not justified for this intended ameliorating legislation.

8. On the basis of this draft legislation such AL use may now be jeopardized. The solution is to redraft s. 7A (1) without the introductory words which I have quoted above, so that the clause starts, "A judicial officer or Registrar …"

MENTAL HEALTH AND DISABILITY LAW

SCHEDULE 6: COURTS

9. The suddenness with which mental health law practitioners lost physical/face-to-face contact with our clients/patients was very unexpected and created a bit of a storm of

disquiet. However the prioritisation of physical health risks was largely accepted by practitioners and the rapid implementation of alternative remote access settled matters down to a significant extent.

10. As for the court hearings, the first few weeks were dominated by very varied AVL access. Counsel access to quite a few hearings was by audio (phone) link only, but I believe that has largely settled down now - with most hearings being fully participated in on an AVL basis.

11. As to the near future - viz Level 2, there is a great deal of uncertainty. The hospitals seem more likely to allow us face-to-face client/patient interviews (as in 2m social distancing) whilst we get the feeling (admittedly on no particular evidence) that the Courts may continue with AVL for a while longer.

ENVIRONMENT AND RESOURCE MANAGEMENT LAW

SCHEDULE 8: ENVIRONMENT

12. There are two changes to the Resource Management Act being proposed:

    a. New section 2AC states that public notices etc. only need to be made available online and physical copies of documents are no longer required (but are optional). This is a pragmatic step and we support this measure.

    b. New section 39AA states the hearing authority can direct that a hearing will occur over audio or audio-visual link. This is a positive step and we endorse it. However, new section 39AA(6) states:

> *Exclusions*
>
> *(6) This section does not apply—*
>
> *(a) to a public hearing if the relevant authority is represented by 1 or more persons appearing in person at the hearing and 1 or more persons make submissions or give evidence by means of a remote access facility; or*

13. The exclusion above is very restrictive and would mean that the new power would only apply to the smallest / simplest of proceedings, when in fact experience over the last weeks has shown significantly more complex matters can proceed successfully remotely. We consider the committee should seek the exclusion be deleted so that the hearing authority retains discretion to direct the hearing to proceed via audio / audio-

visual link or not. The hearing authority will be able to judge whether the matter is too complex to proceed remotely.

14. The above changes will apply retrospectively from 25 March 2020 and have sunset clauses of 31 October 2021 to allow time to consider whether the changes should remain in place permanently.

HEALTH AND SAFETY LAW

SCHEDULE 11: HEALTH

15. We have concerns about what has not been covered in workplace safety, worker health, workplace PPE and the Regulatory management matters (such as any compliance notices that have been issued by Inspectors during Covid19, elapsing limitation periods etc). The overlap between what has been proposed here and what may be rolled out as part of any changes if alert levels go down to level 2 next week is a concern because we sense the special powers and the notices being relied upon by the Government and the MOH under s70 of the Health Act 1956 are being used to centralise all Government powers across public movements and workplaces. This is legally not without some difficulties even if it is the most practical way of imposing national rules and expectations.

16. Overall the other changes being suggested were seen to be sensible in the whole even if the law perhaps allowed for some of these things to be done anyway. On that point the Committee thinks that the directions to do with preliminary examinations of a body could possibly have been affected by direction to pathologists via their discretion – but the changes make sense.

PROPERTY LAW

SCHEDULE 12 – HOUSING

17. Although a small part of the Bill, Schedule 12 of the Bill regarding the Unit Titles Act amendment has a significant impact for Body Corporate meetings. It's a change we want to see but it's important the drafters of the Bill get it right.

18. This is a welcome amendment and one that has been called for by industry stake holders for some time, including ADLS. Although the amendment will only apply during Covid 19,

it is important to ensure the proposed change works adequately for all Bodies Corporate and the wider unit title industry during this period.

Correction required

19. The reference to "constitution" in proposed new s 88(3)(a) is incorrect. It should refer to "operational rules" (not "constitution") to be consistent with terminology in the Unit Titles Act 2010 (UTA). Although "constitution" is a defined term in proposed section 8 of the Bill, it has no relevance or application within the UTA. Instead a Body Corporate must comply with the UTA and its regulations already referred to in proposed new s 88(3)(b), and it must have and comply with a set of "operational rules". See section 105 of the UTA.

Needs retrospective application

20. Proposed new s 88(4) of the UTA provides that s 88(3) applies while the Epidemic Preparedness (COVID-19) Notice is in force. It is not clear whether this section should apply from 25 March 2020 being the date the Notice came in to force, or from the date the Bill becomes law. If it is intended to apply retrospectively, then a retrospective start date should be added to be consistent with other retrospective amendments in the Bill. Section 88(3) should apply retrospectively, otherwise Body Corporate meetings already held by audio or visual link after 25 March until the Bill comes into force could be invalid and open to challenge. Many Bodies Corporates have had to hold meetings during this period to meet UTA compliance and many of those have been by audio or visual link as a work around to ensure compliance. It is essential that those meetings already held remotely can rely on proposed section 88(3) and be considered valid meetings.

Carryover provision required

21. There needs to be a carryover provision built in so that if the Epidemic Notice is expired or revoked between a general meeting being called and the date the meeting is held, that meeting can still be held remotely and rely on section 88(3). Body Corporate general meetings are called up to 3 to 6 weeks in advance (6 weeks for layered developments) under the Unit Titles Regulations 2011. It is not known how much warning will be given prior to the Epidemic Notice being revoked or expiring as this is a fast moving and constantly changing environment. Bodies Corporate need certainty when they issue their notice for a remote meeting while the Epidemic Notice is in force. Should it be revoked or expire after the meeting is called but before the meeting is held, section 88(3) needs to still apply to that meeting.

22. As many Australian states have this as a permanent part of their Unit Title Legislation, we would encourage the government monitor how this works and if there are no issues of concern, ensure that this becomes a permanent feature of our legislation which would enable more engagement by owners in body corporate meetings.

SCHEDULE 14: JUSTICE

23. This schedule, which covers mortgages and leases, is titled 'justice'. We suggest changing the title to something more specific with a property focus. This will also make it easier for people to locate in the Bill.

24. Section 245A provides that s245B – 245E apply to a *lease*…… if s245 applies to the *lease* under s206…

25. Section 245 also applies to licences under s206 but it is not clear whether the amended sections (s245B – 245E) also apply to licences – licences are not included in the definition of "lease". We expect that the intention is that the clauses would apply to licences, but this should be clarified.

26. The clauses only amend s245 of the lease (cancellation for failure to pay rent). Consideration should be given to whether s246 (cancellation for other breaches) should also be amended. If it isn't, leases could be cancelled "at the expiry of a period that is reasonable in the circumstances…" under clause 246 for, for example, failure to pay outgoings. A blanket change to s246 is unlikely to be fitting however, because there are other breaches where it may not be appropriate to require a longer period because they are not related to Covid 19 (for example, if the tenant changes the use without consent, or makes significant alterations without consent, or assigns the lease without consent). Another common clause that should be considered is the "keep open" clause (where a tenant is required to keep the premises open for trade). The questions is should the landlord be able to rely on this clause to say the tenant has been in breach during lockdown (surely not) or in the subsequent months.

GENERAL OBSERVATION ON COMMENCEMENT PROVISIONS

27. The Bill provides for ameliorating legislation on a temporary basis, and thus encompasses repeals in due course of the temporary amendments. By and large the amending provisions conclude with a subclause reading, "This section is repealed on [a specific date]." So far as I can see the Interpretation Act 1999 does not specifically provide at what time a repeal comes into force, whereas s. 10 (1) of the Interpretation Act 1999 specifically states that an enactment comes into force at the beginning of the day on which the enactment comes into force. By analogy, therefore, one would argue that a repeal comes into force on the beginning of the day when the repeal comes into force. [This is a different issue from the effect, continuing or otherwise, of a repealed enactment, which is a matter dealt with in detail in sections 17-22 of the Interpretation Act 1999.]

28. However, clause 3, Schedule 16, inserts a new s 65I into the Arms Act, in which the draft s 65I(9) provides, “This section is repealed on the close of 25 September 2021.” In other words the repeal would come into force at the end of the day, contrary to the beginning-of-the-day situation which applies, in my view to all other repeal provisions bar this one. In my view, good legislative practice requires that, as with enactments, repeals always come into force at the beginning of the day they come into force.

29. In our view it is unsatisfactory to have a repeal expressed to come into force at the end of a day. It is contrary to (1) all the other repeal provisions (so far as I can ascertain in the short time available, (2) the analogous concept of an enactment coming in to force at the beginning of the day (under s. 10 (1) the Interpretations Act 1999), and (3) common sense.

30. To achieve the intended effect the draft s. 65I(9) should be reworded by reference to the following day, as “This section is repealed on 26 September 2021.”