



## FAMILY LAW SECTION NEW ZEALAND LAW SOCIETY

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There were many issues raised with us following our bulletin sent yesterday morning. Since then, you will no doubt know that the Prime Minister yesterday afternoon [announced](#) New Zealand has been lifted from alert level three and would go to alert level four within a further 48 hours.

Below are most of the issues raised with us yesterday and what we are doing to address these so family lawyers have a clear understanding of how they can continue to practice in these challenging times. This is the position as we currently understand it to be.

We are liaising with Ministry of Justice and the Principal Family Court Judge to get answers where possible. Sometimes the answer can only be “we just don’t know at the moment”. As the issues are carefully considered and confirmed advice is able to be given we will share this with you.

You will no doubt have many more questions arising as time goes on. We will not necessarily have the answers to these but do not hesitate to get in touch – if a question occurs to you, chances are someone else has a similar question and we will try to address these in later bulletins.

### **Electronic filing**

Our understanding from the release from the Chief Justice and the Principal Family Court Judge is that electronic filing is permitted for both without notice and on-notice applications. However, the reality is that with the move to level 4 **lawyers should only be filing without notice in urgent matters that make the legal threshold. An exception to this is in PPPR Act matters where without notice is not available.** The court has limited capacity at this stage to accept on-notice applications unless they are urgent PPPR Act applications. Filing non urgent applications will only overwhelm the reduced number

of staff processing applications. We believe that filing electronically on behalf of a client who does not have access to a computer or the internet in circumstances where lawyers are unable to act is permitted so long as you are not recorded on the application as the lawyer for record, however lawyers are able to act in urgent matters that meet the without notice threshold. We have asked for confirmation on this from the ministry.

Email addresses to use for electronic filing are available from the ministry's website – click [here](#).

### **Joint memoranda**

We encourage lawyers to talk to each other and file joint memoranda where possible so the matter is able to be dealt with either on the papers or by teleconference if necessary. Avoid filing anything except on urgent matters while the country remains at level 4.

### **Shared custody of children**

A number of members have asked about whether or not children were able to move between two homes when couples had shared custody of children. Director-General of Health Dr Ashley Bloomfield has confirmed children were able to move between the two homes so long as they are in the same community. Information is to be provided from the government later, however, this does not address the situation where a child may move between three or more carers, where those carers live in different communities or what is to happen in terms of supervised access.

There is no legal definition of “same community” in this context at this time.

We will see whether some better definition can be obtained but suggest parties should be reminded:

1. These are truly exceptional times;
2. The reason for the extreme restrictions is to try and preserve lives. There will be short term inconvenience and sacrifice by many;
3. This situation will be finite – at the moment we are talking about 4 weeks only.
4. Any self help attempts are likely to be looked on adversely by the court in future proceedings;

5. Warrant proceedings are unlikely to be of assistance. They may well not be given priority and it will be difficult to get anyone to enforce one given the likely stretched resources in the current crisis;
6. Focus on practicalities and supporting children in ways that do not risk transmission of the virus e.g. regular video chats with other people who they usually spend time with.

FLS member Prue McGuire has prepared a [brief paper](#) setting out a view that may be of assistance to FLS members. Senior family counsel have seen the draft as have a number of Family Court judges who are of the view that it provides sensible assistance. Please note this is only our view at present. Again we are seeking guidance on this issue and we will be providing an update to members as information comes to hand.

### **Supervised access**

Family lawyers need to recognise the realities of why a level 4 alert has been put in place. This is exceptional and for the short term (at this stage). The current situation may mean that some arrangements for supervised access, particularly at contact centres, may not be able to occur.

### **Essential services**

Questions have been asked whether family lawyers come under the definition of essential services. The [government website](#) lists out essential services which includes courts, tribunals and the justice system. While not specifically listing family lawyers, it states that the list may evolve over time so we urge members to look for updates as the situation evolves. We will also be monitoring things on a daily basis and will provide updates when the information becomes available.

In our view court lawyers (including family lawyers) must fall within the definition of essential services as they essential to the operating of the justice system and are at times dealing with matters that involve personal safety. We are seeking guidance from the Law Society in this respect.

### **Signing of affidavits**

There have been a lot of questions around the swearing of affidavits and how this might

safely be done in the current climate. We do not believe affidavits are able to be sworn via skype, zoom or other remote methods. This accords with the views of Judge Moran. Only urgent applications should be filed so this will reduce the numbers of affidavits required.

We suggest that lawyers use an affirmation rather than an oath so that no bible is required. The deponent could be required to bring their own pen (or a signed version of the document). Social distancing could and should be maintained during the administering of the affirmation with the deponent backing away to allow the affidavit to be witnessed. The lawyer and deponent should wash/sanitise hands before and afterwards. Any surface on which the document has been laid should be similarly sanitised.

Taking affidavits to courts does not appear to be an option – people will not be let into the court buildings for this purpose and many courthouses are locked as they have limited security working and are trying to comply with social distancing requirements. We will endeavour to continue to liaise with the ministry on this issue to ensure that there is the ability to have evidence sworn/affirmed for urgent applications.

#### **Income level thresholds for FLAS and legal aid**

We have sought advice from Legal Aid Services on situations where a person's income has suddenly stopped due to covid-19 and how that might impact their eligibility to access either FLAS or legal aid. We will update on advice once that has been received from Legal Aid Services.

#### **Income eligibility for FDR**

The Ministry of Justice has considered the funding form along with the current FDR guidelines. There is provision within the funding form where a person's income has changed in the past three months and a text box provided to explain the circumstance. The guidelines support this with the following which details acceptable evidence:

- a declaration that the applicant has had no income and that includes the number of dependants and a statement explaining why the applicant has had no income and how they have supported themselves without any income. A declaration of

- this sort is suitable for applicants whose financial situation has changed suddenly and cannot provide proof of three months' income; for example, they may be in the process of applying for a welfare benefit, or may have left work to care for children.
- any other evidence deemed sufficient by the person carrying out the funding determination.

The ministry has advised that this should not be a barrier for anyone wanting to access FDR who may have lost income due to covid-19, however it will be up to FDR providers to assess these on a case by case basis.

### **Court-appointed counsel payments**

The ministry has confirmed it is continuing to pay court-appointed counsel invoices in the same way as normal. Just like other businesses, they have staff in place (even if that is working from home), to pay staff and other outgoings such as court-appointed counsel costs. See the below item for work subsidies which may be of assistance to those who employ staff.

### **Work subsidies**

Click [here](#) to access information about leave, holidays and other wage subsidies available because of covid-19.

### **Lawyer for child**

With the increase in threat level in our view it will be an exceptional case that would see counsel visiting a child. If that arises, counsel visiting with children should follow the Ministry of Health guidelines as to keeping a safe "social distance", basic hygiene and not meeting with the children if there has been a risk of exposure to the virus either to the children, counsel or any other person who is residing in the same household. If a lawyer for child has been appointed even in respect of an urgent application counsel should consider seeking a direction from the court in their initial report that there is no need to meet with the children until after the threat level has been appropriately reduced. Where there are older children a telephone call or FaceTime call may be an option to obtain their views.

If there is no urgency, we suggest that you consider seeking an extension of time for the filing of your report as a matter of courtesy to the court. Realistically you may not get a response to that request but at least a court officer looking at the file will be aware of your position.

### **PPPR Act applications – contact with subject person**

On a practical basis, most applications under the PPPR Act are accompanied by medical evidence, that sets out the medical practitioner's view as to the person's capacity – whether the person has total or partial capacity, whether the person lacks capacity to understand the nature and foresee the consequences of decisions relating to their personal care and welfare. The report usually comments on the person's ability to communicate and their physical health. Again, the majority of those who are the subject of such applications, often have fragile physical health and will be vulnerable to covid-19 because of this. It would only be in exceptional cases, while the current threat level remains at 3 or 4, that counsel should be considering a face to face visit.

Frequently the subject person resides in a facility with other vulnerable persons. Such facilities have developed and will continue to develop visitor policies in terms of risks and will be guided by Ministry of Health guidelines. Counsel will have to comply with any visitor restrictions in place. Where a medical report records a subject person who is physically frail, totally lacking capacity and no or limited verbal communication, counsel should consider not attending upon the subject person even after the threat level has reduced to 1 or 2.

Temporary orders may be able to be made: either a temporary property order for three months or a temporary welfare guardianship order for six months pending counsel being able to attend upon the subject person.

Where a lack of capacity is at issue and/or there is some communication ability, counsel should consider whether video conferencing etc may be appropriate. If there is no urgency, proceedings should be adjourned.

### **Working from home**

Most of us now will be working from home. While some members may be quite used to

this on a limited basis, most will not be used to working continuously from home. The Healthy Work Company have put together some [useful tips](#) about healthy working from home.

Please be patient as we grapple with the various practicalities of the current environment and work through solutions with others such as the Ministry of Justice, the Law Society and the Principal Family Court Judge in order to confirm answers to your queries. Some of these issues are not able to be resolved immediately and may take some time in order to be able to provide communication that sets out a considered and practical solution.

We suggest members email their regional representative who will then feed through information to the manager and executive or the manager directly. Please do not email the same issue to numerous people. We are working as hard as we can to resolve as many issues as possible and provide confirmed information. This situation will continue to change and quickly so we will be providing regular bulletins that give information to members as soon as we have that.

We recognise this is a stressful time for our clients and also ourselves. Please stay calm and take care of those around you.

*Kirsty Swadling  
FLS Chair*