
COVID-19 Response (Management Measures) Legislation Bill 2021

05/10/2021

Submission on the COVID-19 Response (Management Measures) Legislation Bill 2021

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aoteroa (**Law Society**) welcomes the opportunity to comment on the COVID-19 Response (Management Measures) Legislation Bill 2021 (**Bill**). This submission has been prepared under urgency with input from the Law Society's Public and Administration Law Committee and Property Law Section.
- 1.2 The single broad policy of this omnibus Bill is to make amendments relating to matters that are aimed at "assisting the Government and New Zealanders to more effectively manage, and recover from, the impacts of COVID-19".¹
- 1.3 The Law Society does not wish to be heard.

2 Consultation timeframe

- 2.1 This Bill was introduced on 28 September 2021, and referred to the Finance and Expenditure select committee on 29 September 2021 for a consultation period of four working days. This is a difficult timeframe in which to respond meaningfully to a broad piece of legislation.
- 2.2 We appreciate the need for a timely legislative response as the impacts of the COVID-19 epidemic arise. However, we are concerned at the very limited consultation period for this Bill. It seems to us a number of the matters in the Bill could have been anticipated earlier and a greater opportunity for response would provide more considered legislation.

3 Amendments to the Local Electoral Act 2001 (Schedule 1, Part 2)

- 3.1 Schedule 1 of the Bill seeks to amend section 73A of the Local Electoral Act 2001 to allow the Governor-General to make Orders in Council to delay local body elections in an emergency.² If enacted, this provision would effectively enable local body elections to be delayed more than once, and by six weeks at a time.
- 3.2 The clarity of the Bill could be improved by linking these Orders in Council to an epidemic or civil defence emergency notice, or some other health notice,³ rather than simply referring to an epidemic or pandemic in general terms. This would give better certainty around the suspension or delay of local body elections, particularly where an Order in Council delays an election for a long period of time.

4 Amendments to the Property Law Act 2007 (Schedule 6, Part 4)

- 4.1 Part 4 of Schedule 6 of the Bill would insert in certain leases an implied clause that provides for a rent reduction where, by reason of an epidemic, the lessee cannot gain access to all or part of the leased premises "to conduct fully their operations".
- 4.2 The Law Society is aware of the differing views concerning these proposed amendments to the Property Law Act 2007 (**PLA**) and we make no comment on the policy underlying this part of the Bill.

¹ COVID-19 Response (Management Measures) Legislation Bill, Explanatory Note.

² Clause 4(3) of Schedule 1 provides that an emergency includes an epidemic or a pandemic.

³ For example, under the Health Act 1956.

Meaning of “affected period”

- 4.3 The relief clause applies to rent payable by a lessee during the “affected period”. This is defined as a period starting on 28 September 2021 and ending on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 (**EP Notice**) expires or is revoked.⁴
- 4.4 As currently drafted, the affected period would not commence until 28 September 2021 (which is six weeks after the commencement of the current lockdown in the Auckland region). If the Auckland region moves to Alert Level 2 or 1 by mid-October 2021, the affected period will not exceed about two weeks. On this basis, a lessee would be entitled to seek a rent reduction for a period of only two weeks following a lockdown period amounting to almost two months.
- 4.5 In these circumstances, an earlier commencement date for the affected period may be appropriate. For example, 1 September 2021 or even 18 August 2021, when the lockdown in the Auckland region commenced. We note that this provision will apply retrospectively and encourage the select committee to seek and consider advice from officials regarding any practical consequences that may arise from this.

Future lockdowns

- 4.6 When the EP Notice expires or is revoked, the proposed new sections are repealed and the affected period ends. Proposed new clause 3(2) of Schedule 1AA of the PLA contains some saving provisions, but in the event of a subsequent lockdown, the implied clause would no longer apply.
- 4.7 In the event of a future lockdown, it would then be necessary to re-enact these new sections and provide for a new affected period. This would inevitably result in some delays which could be prevented by extending the new sections to provide that the implied clause would apply in future lockdown periods.

A “fair proportion”

- 4.8 Clause 11 of Schedule 6 seeks to amend the PLA by inserting new clause 4A. This proposed new clause provides that a “fair proportion of the rent otherwise payable by the lessee for that rental period will cease to be payable” during the affected period.⁵
- 4.9 Proposed new clause 4A(3) simply states that the fair proportion “will be agreed by the lessor and lessee”. We consider that the process of determining a fair proportion should take into account objective factors concerning the position of both the lessee and lessor, and the need to reach a balanced outcome. We would therefore welcome guidance relating to the factors that should be considered when determining what is a fair proportion.
- 4.10 We suggest amending the Bill to provide that regulations can be made under this legislation to provide such guidance.⁶ The regulations could, for example, consider the following:⁷
- (a) The lessee’s ability to operate remotely;

⁴ Proposed new section 245F(2).

⁵ Subclause (2).

⁶ We would also welcome the opportunity to provide feedback on any proposed regulations.

⁷ This is not an exhaustive list of considerations.

- (b) The nature of the lessee's business;
- (c) The continuing right of the lessee to store goods and business equipment in the premises;
- (d) Any Government wage subsidy;
- (e) The number of staff able to attend at the premises and the extent to which the premises can be used in a manner that is consistent with social distancing requirements; and
- (f) The borrowings and commitments of the lessee in relation to its business and the borrowings and commitments of the lessor in respect of the lessor's building in which the premises are situated.

Dispute resolution

4.11 Subclause (6) of the proposed new clause 4A states:

Any dispute arising under this clause (for example, a dispute about whether this clause applies to a lease) will be referred to arbitration under the Arbitration Act 1996.

4.12 In many (if not most) of these cases, the cost of arbitration would likely exceed the amount in dispute. In these circumstances, arbitration should be a last resort for determining a dispute under this clause.

4.13 We therefore suggest amending subclause (6) as follows:

The parties must endeavour to resolve any dispute arising under this clause (including a dispute about whether the clause applies to the lease) by agreement, negotiation or some other dispute resolution process (for example, mediation, expert determination, or through the Disputes Tribunal). However, if the dispute is not resolved in this manner, it must be referred to arbitration of a single arbitrator under the Arbitration Act 1996.



Herman Visagie
Vice-President
5 October 2021