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By Email: Bronwyn.jones@lawsociety.org.nz

Bronwyn Jones
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Dear Bronwyn

In-person witnessing/signature of documents by lawyers at alert level 3

- 1 You have asked me for advice on the lawfulness of in-person witnessing and signature of documents by lawyers who live in an alert level 3 area under the COVID-19 Public Health Response (Alert Levels 3 and 2) Order 2020 which came into force at 11:59am on 12 August 2020 (**Order**).

Background

- 2 The need for this advice arises because there are persons who are unable to access or utilise the necessary technology to enable important documents to be remotely executed in a manner that complies with formal legal requirements. There may be significant adverse legal consequences for persons who are unable to have important legal documents, such as wills or powers of attorney, executed while alert level 3 applies.
- 3 The Law Society previously proposed issuing guidance on how lawyers could lawfully attend to the witnessing and signature of client documents in-person when an Alert Level 3 Order was last in place. My advice at that time was that the Law Society's proposed approach was lawful. The question which now arises is whether the position has changed under the new Order. In addressing this question I will focus on the provisions in the new Order and will not repeat all the matters covered in my previous advice. You can proceed on the basis that my advice on those other matters, for example regarding the Health and Safety at Work Act 2015, remains the same.

Travel for work is permissible

- 4 Clause 8(1) of the Order relevantly provides that all persons within the alert level 3 area must:
 - (a) remain at their current home or place of residence except for essential personal movement; and
 - (b) maintain level 3 physical distancing (to the greatest extent practicable) except that physical distancing need not be maintained from any fellow resident.
- 5 A person may leave their home or place of residence to work in any business or service provided the business or service has alert level 3 requirements in place (cl 9(c)). The alert level 3

requirements that apply to all businesses and services other than “category A” and “category B” businesses and services are set out in cl 11(5) of the Order as follows.

A category C business or service must have systems and processes in place to—

- (a) ensure that—
 - (i) level 3 physical distancing can be maintained by persons accessing and using the premises, so far as is reasonably practicable taking into account the nature of the business or service; and
 - (ii) the risks that arise to the extent physical distancing is not fully maintained on the premises are mitigated; and
- (b) ensure that a copy of the QR code for the business or service is displayed in a prominent place at or near the main entrances to the workplace; and
- (c) otherwise support contact tracing of persons who access or use the premises; and
- (d) ensure that—
 - (i) no customers or clients enter the premises (other than only, and then to the minimum extent necessary, to collect goods through a method that minimises physical contact and does not involve entering a building); and
 - (ii) there is no close personal contact with customers or clients.

6 The offices of law firms, barristers chambers, and in-house legal services providers may therefore remain open in an alert level 3 area with staff who live in that area attending for work provided that the above systems and processes are in place at those offices. It can be seen, however, that a client may not enter the premises, other than to collect goods in the manner described. This precludes a client attending their lawyer’s office for in-person signature and witnessing of documents in an alert level 3 area. The question I turn to now is whether lawyers may attend their client’s home or place of residence for this purpose.

Attending at a client’s home

7 Clause 10(1) of the Order provides that premises in the alert level 3 area must be closed unless the business or service that controls those premises complies with the requirements set out in cl 11 (ie the applicable alert level 3 requirements). The definition of premises in the Order has the same meaning as in s 2(1) of the Health Act 1956 and includes private premises. However, cl 10(2)(b) provides that the cl 10(1) requirement, that all premises must be closed unless the applicable cl 11 alert level 3 requirements are met, does not apply to premises that are, or any part of any premises that is, used solely as a private dwellinghouse.¹

8 A significant amount of work in New Zealand is carried out every day at private dwellinghouses by tradespersons, real estate agents, and other mobile goods or service providers. Given this and the fact that private dwellinghouses are not closed by the Order even though they do not comply with the cl 11 requirements,² in the absence of a prohibition on work being able to be carried out at private dwellinghouses in an alert level 3 area, I consider that attendance at a private dwellinghouse for this purpose is lawful.

9 There is no express prohibition in the Order on work being able to be carried out at private dwellinghouses. The Order does not address the fact that work is carried out at private dwellinghouses as a feature of everyday life in New Zealand and that the alert level 3 requirements for businesses or services in cl 11 are not generally capable of being applied to private

¹ By reference to s 12(2)(c) of the COVID-19 Public Health Response Act 2020.

² Although physical distancing must be maintained except as between fellow residents of the dwellinghouse (cl 8(1)(b)(i) of the Order)

dwellinghouses.³ I do not consider that a prohibition on work being able to be carried out at private dwellinghouses should be read as implied in the Order, particularly as this reading would be inconsistent with s 6 of the New Zealand Bill of Rights Act 1990.⁴

10 While I have reached this conclusion based on my analysis of the terms of the Order in its wider legislative context, I am fortified in my conclusion by the fact that current guidance issued by the Ministry of Business, Innovation and Employment (**MBIE**) in relation to *Workers going to customers or a third party premises* at alert level 3 states that:⁵

Plumbers, electricians and tradespeople can work on customers' property (eg in homes).

Couriers and parcel services can operate. Deliveries should be contactless.

Removal/moving companies can operate.

11 In relation to real estate agents MBIE directs inquiries to the Real Estate Agents Authority (**REAA**), whose website relevantly states the following in relation to private viewings at a client's home:⁶

There should be no more than two people who must be from the same extended bubble plus the licensee at the viewing, and physical distancing should be maintained.

12 The REAA's website gives a range of further helpful guidance in relation to private viewings.

13 This guidance could not be given if the view had not been taken by these government agencies, correctly in my opinion, that the Order permits work to be carried out in private dwellinghouses.

14 Against this, the current MBIE guidance also states:

Client-facing workers (such as sales and business development people) must meet with clients remotely unless it is an essential service.

Home cleaners cannot work in clients' homes.

15 I do not know the reasons for the distinctions that MBIE has decided to draw in its guidance. Why, for example, real estate agents may take customers through their clients' homes in private viewings but other client-facing workers (which presumably includes lawyers) may only work remotely, or why plumbing businesses may continue to operate in customers homes during alert level 3 but cleaning businesses may not. In any event, whatever policy justifications there may be for these distinctions, this represents guidance only rather than representing a statement of the law. There is nothing in the Order mandating these distinctions.

Conclusion

16 In my view it is lawful under the Order for a lawyer who lives in the alert level 3 area to attend at a client's private dwellinghouse in the alert level 3 area for the purpose of bringing about the execution of documents by the client. Physical distancing, which means all persons other than fellow residents remaining 2 metres apart from one another, must be maintained.

³ Both as a matter of practical reality and by operation of law in s 12(2)(c) of the COVID-19 Public Health Response Act 2020.

⁴ Requiring the Order to be given a meaning that is consistent with the rights and freedoms in the Bill of Rights, including freedom of association and freedom of movement, if it can be given that meaning.

⁵ See <https://www.business.govt.nz/covid-19/operating-at-alert-levels/#e-21046>.

⁶ <https://www.rea.govt.nz/news/covid-19/conducting-real-estate-business-during-covid-19-alert-level-3/>.

17 There are other requirements which may reasonably be included as part of any guidance by the Law Society to the profession about acting responsibly when attending at a client's home in light of the COVID crisis, such guidance of course being distinct from a purported statement of the law that applies under the Order. I am happy to provide assistance on that guidance separately to giving this advice.

Yours faithfully
Meredith Connell



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