

Departmental Disclosure Statement

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| COVID-19 Response (Courts Safety) Legislation Bill |
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

23 February 2022

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Part One: General Policy Statement

This Bill supports people's ability to safely access justice through courts and tribunals during the COVID-19 outbreak.

The Bill is an omnibus Bill introduced under Standing Order 267(1)(a). That Standing Order provides that an omnibus Bill amending more than 1 Act may be introduced if the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. The single broad policy of the Bill is to support the safe and effective operation of courts and tribunals by making amendments to reduce the risk of transmission of COVID-19 among those who use or visit the courts or carry out work at the courts.

Access to the courts is critical in a fair and democratic society. People should be able to access justice with a reasonable assurance they are safe doing so, and courts must be able to continue operating effectively during the COVID-19 outbreak.

In-person court proceedings present a risk of COVID-19 transmission, as proceedings involve people who have travelled from many locations, are in close proximity for extended periods, and who may be disproportionately vulnerable to COVID-19.

The Bill removes legal barriers to the judiciary and the Ministry of Justice (the Ministry) addressing those risks. The judiciary and the Ministry share responsibility for the safe operation of the courts.

The Bill strengthens the existing ability of the judiciary and the Ministry to set and enforce conditions for entering and remaining in any court and some tribunals. It also enables the judiciary to set additional requirements for selecting and managing juries, to reduce close and prolonged mixing of jurors. It also clarifies that health and safety measures and remote hearings are not inconsistent with legislative open justice protections.

Without legislative change people going to court – many of whom are legally compelled to attend – could be exposed to a heightened risk of COVID-19. Some people may be unwilling or unable to attend court because of safety concerns. These issues could delay access to justice, disrupt court business, and exacerbate existing jury trial backlogs.

Most of the amendments in the Bill will only be in force for the duration of the COVID-19 Public Health Response Act 2020. Some provisions, however, continue to have effect for an additional 2 years because that is the length of time that jury service may be deferred under the Bill. As well, one of the clauses expands the grounds for excusing a person from jury service in that 2-year period. These clauses are later themselves repealed.

The judiciary will use secondary legislation to set requirements for selecting and managing juries. The delegation of that power is set out in the Bill. It is consistent with the judiciary's constitutional responsibility for the orderly and efficient conduct of the courts, and the need for rapid changes in requirements in response to evolving health risks and interventions.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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| 2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill? | NO |
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Relevant international treaties

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| 2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty? | NO |
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Regulatory impact analysis

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| 2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill? | NO |
| A regulatory impact statement (RIS) is not required for this Bill on the grounds that the proposals are intended to manage the short-term impacts of COVID-19 and they are required urgently to be effective (making a complete, robust and timely RIS unfeasible). | |

Extent of impact analysis available

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| 2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill? | NO |
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| 2.5. For the policy to be given effect by this Bill, is there analysis available on: | |
| (a) the size of the potential costs and benefits? | NO |
| The Bill helps to reduce the resourcing impacts of delay. Delays result in additional court events that increase workload across the justice system. Registry staff, the judiciary, the legal profession (with an associated increase in legal aid costs), Police and Crown Prosecution, Oranga Tamariki, and Corrections all need to support the extra court events. Court delays also lead to an increase in time on remand, which currently costs about \$300 per person per day. | |
| (b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth? | NO |

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| 2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by: | |
| (a) the level of effective compliance or non-compliance with applicable obligations or standards? | YES |
| (b) the nature and level of regulator effort put into encouraging or securing compliance? | NO |

The Bill enables the judiciary and Ministry to impose and enforce requirements for entering and remaining in the courts, to take account of the effects of COVID-19. They plan to communicate the entry requirements widely and through multiple channels. If parties were routinely unwilling to comply with the requirements, there would be an impact on costs and benefits. However, the thresholds in the Bill for imposing the requirements, and Ministry and judicial priorities for the design of new requirements, mean the vast majority of people will be able to access the courts and tribunals in person on the same basis as usual, as they will be able to meet expected requirements.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

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| 3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations? |
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| The Ministry has not identified any obligations that conflict with the policies contained in the Bill. |
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Consistency with the government's Treaty of Waitangi obligations

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| 3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi? |
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| <p>During the policy development process, consideration was given to the impacts of the amendments on Māori. Due to the urgency of the issues, consultation on the policy was limited. Te Hunga Rōia Māori o Aotearoa - the Māori Law Society provided a perspective on Māori court users' experiences in the court during COVID-19.</p> |
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| <p>The Bill engages the Crown's duty of active protection and Māori rights to equal treatment under the law. Māori are overrepresented in parts of the justice system (eg, in the criminal justice system both as defendants and victims, in Oranga Tamariki care, and in the Waitangi Tribunal and Māori Land Court). Māori have a somewhat lower vaccination rate than the general population, and experience health and living conditions that are associated with vulnerability to COVID-19. In the Waitangi Tribunal and Māori Land Court many participants are over 70 and immunocompromised.</p> |
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| <p>Measures that mitigate risks of COVID-19 transmission could have more pronounced health benefits for Māori court users. However, as Māori are disproportionately represented in certain court proceedings, safety requirements that affect how people participate would have a small disproportionate impact on Māori court users' access to justice.</p> |
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Consistency with the New Zealand Bill of Rights Act 1990

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| 3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990? | YES |
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| <p>A copy of the advice will be available following the introduction of the Bill at: https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/</p> |
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Offences, penalties and court jurisdictions

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| 3.4. Does this Bill create, amend, or remove: | |
| (a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)? | NO |
| (b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)? | YES |
| The Bill clarifies and supplements the ability of the judiciary to set safety requirements for entry to the courts and for the running of jury trials, consistent with their constitutional responsibility for the orderly and efficient conduct of the business of the courts. | |
| 3.4.1 Was the Ministry of Justice consulted on these provisions? | |
| Yes, the Ministry led the policy development of the Bill. | |

Privacy issues

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| 3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information? | YES |
| <ul style="list-style-type: none"> The Bill enables a court security officer to ask any person who wants to enter or is in a court to provide the officer with evidence of compliance with any safety requirements set by the judiciary or Ministry, and The Bill enables a court registrar to ask a person who has been summoned to be on a jury to provide evidence and information relevant to the person's ability to comply with any safety requirements set by the judiciary. | |
| 3.5.1. Was the Privacy Commissioner consulted about these provisions? | YES |
| The Office of the Privacy Commissioner was consulted via email on the draft policy proposals described above and an early draft of the Bill. No concerns were raised. | |

External consultation

| 3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill? | YES |
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| <p>The Ministry closely consulted judicial representatives across November 2021 – February 2022 while developing the policy and Bill, to inform its understanding of issues and ensure the policy appropriately took account of the role of the judiciary as a separate branch of government. It also undertook more limited consultation with chairs of Ministry-supported tribunals during this period.</p> <p>The Ministry met with seven legal professional groups¹ in December 2021, to inform its understanding of issues. Public perspectives on jury service during the COVID-19 pandemic were gathered from an independent survey undertaken on behalf of the Ministry of Justice.²</p> | |

Other testing of proposals

| 3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete? | YES |
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| <p>The Bill has been informed by experiences with existing safety requirements used in the courts by the judiciary and Ministry during the COVID-19 pandemic, which were developed with the assistance of Ministry of Health advice.</p> | |

¹ The Zealand Law Society, Te Hunga Rōia Māori o Aotearoa - the Māori Law Society, Auckland District Law Society, the New Zealand Bar Association, the Defence Lawyers Association New Zealand, Public Defence Service, and several Crown solicitors.

² Research NZ, 'Serving as a juror' survey, undertaken between 18 and 23 November 2021.

Part Four: Significant Legislative Features

Compulsory acquisition of private property

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| 4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property? | NO |
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Charges in the nature of a tax

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| 4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax? | NO |
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Retrospective effect

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| 4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively? | NO |
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Strict liability or reversal of the usual burden of proof for offences

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| 4.4. Does this Bill: | |
| (a) create or amend a strict or absolute liability offence? | NO |
| (b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding? | NO |

Civil or criminal immunity

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| 4.5. Does this Bill create or amend a civil or criminal immunity for any person? | NO |
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Significant decision-making powers

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| 4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests? | YES |
| <p>The Bill does not directly limit rights. However, it empowers the judiciary and the Ministry to make requirements that could. The requirements would principally affect rights to natural justice, rights of people charged, and rights to minimum standards of criminal procedure. Additionally, if judicial or Ministry requirements include vaccination and testing, the right to refuse medical treatment would be engaged where the affected person has to attend court to carry out their profession.</p> <p>Several safeguards help to ensure safety requirements are reasonable and go no further than is necessary. The requirements may only be made during the period of the COVID-19 pandemic. They must be reasonably necessary to respond to COVID-related health and safety risks and in the interests of justice. Requirements need to be consistent with the New Zealand Bill of Rights Act 1990. A judge is able to direct that a person may enter or remain in the court or participate on a jury where this is necessary in the interests of justice, even if the person does not comply with the safety requirements. A person may appeal a registrar's decision to defer or excuse them from jury service.</p> | |

Powers to make delegated legislation

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| 4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation? | YES |
| <p>The Bill enables the judiciary to set requirements relating to the selection and management of juries, where they are reasonably necessary in the interests of justice and to protect health and safety in the courts, to take account of the effects of COVID-19.</p> <p>The requirements will be secondary legislation. The Bill provides the requirements may add to, and apply despite, certain provisions in the Act. This means secondary legislation may in effect amend primary legislation. This provision is necessary as the existing law is very detailed. The provision recognises that requirements relating to COVID-19 that add to the law may necessarily have the effect of varying it.</p> <p>Enabling the judiciary to set these requirements for the period of the pandemic reflects the need to enable rapid changes to requirements in response to evolving health risks and interventions. It is also consistent with the judiciary's constitutional responsibility for the orderly and efficient conduct of the courts. The Bill limits the circumstances and time period in which these requirements may be set.</p> | |

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| 4.8. Does this Bill create or amend any other powers to make delegated legislation? | YES |
| <p>As noted above, the Bill enables the judiciary to set additional requirements relating to the selection and management of juries. These requirements will be secondary legislation.</p> <p>Empowering the judiciary to make this secondary legislation is consistent with the principles in the Deemed Regulations Report of the Regulations Review Committee. The Bill sets a defined scope and conditions for the exercise of the power. The delegation is also consistent with the judiciary's constitutional responsibility for the orderly and efficient conduct of the courts, and the need for rapid changes in requirements in response to evolving health risks and interventions.</p> <p>Secondary legislation made under the Bill will be presented to the House and be disallowable.</p> | |

Any other unusual provisions or features

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| 4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment? | NO |
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