In Confidence

Office of the Minister of Justice
Chair, COVID-19 Ministerial Group

Immediate modification orders for justice-related legislation under the Epidemic Preparedness Act 2006

Proposal
1. This paper seeks authorisation for submission to the Executive Council of an immediate modification order under section 15 of the Epidemic Preparedness Act 2006 (the EPA), to modify provisions in legislation governing how enduring powers of attorney can be made. I also seek agreement to waive the 28-day rule, on the basis the order is made in response to an emergency.

Background
2. On 9 April 2020, the COVID-19 Ministerial Group approved the development of immediate modification orders to justice legislation. As the Ministerial Group noted on 16 April, the order modifying the Protection of Personal and Property Rights Act 1988 and Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008 (the PPPR Act and Regulations), was deferred due to time constraints.

3. In accordance with section 15 of the EPA, I have been advised by the Chief Executive of the Ministry of Justice, and I am also of the opinion, that:
   3.1. the order modifies requirements and restrictions that, due to the effects of the COVID-19 epidemic, are impracticable to fully comply with; and
   3.2. the modifications go no further than is, or is likely to be, reasonably necessary in the circumstances.

Policy
4. Under the PPPR Act and Regulations, enduring powers of attorney (EPOAs) must be signed by the person making the EPOA (the donor) and by the attorney in the presence of an authorised witness, for example, a lawyer, legal executive, or member of a trustee organisation. These requirements for physical presence are likely to be impracticable to comply with while movement and gathering is restricted during the COVID-19 epidemic.

5. The immediate modification order to the PPPR Act and Regulations (the Order) removes requirements for donors and attorneys to be physically present with the person witnessing the EPOA, and to physically sign the same document, while the Epidemic Notice is in force. Instead, the EPOA could be signed and witnessed remotely via audio-visual link (AVL), with all parties having a copy of the document before them.

6. Witnesses will be required to state on the document that they have witnessed the donor and attorney(s) signing, and have themselves signed, a copy of the same document by AVL because of the Epidemic Notice being in force. Scans or photos of the copies must be taken as soon as possible after signing, and the parties must ensure that these are sent to and held by one person.
7. Core requirements to ensure protections for vulnerable people, and provide safeguards against fraud and misuse by coercion, will remain. Witnesses must take appropriate steps to be satisfied that the maker is the person signing the document. Witnesses must also certify their belief (on reasonable grounds) that the maker understands the nature and potential risks and consequences of the EPOA, and is not acting under undue pressure or duress.

8. On 9 April, the COVID-19 Ministerial Group agreed those who sign or witness an EPOA remotely would be required to sign or witness the same document in person as soon as it is safe to do so. I consider it is important to ensure remotely-made EPOAs are valid even where this follow-up has not occurred due to the parties’ inability to do so, for example because the person making the EPOA has lost capacity in the meantime. I therefore propose to encourage the practice of post-lockdown physical signing in guidance, rather than requiring it legislatively. I am accordingly seeking rescission of the Ministerial Group’s 9 April agreement to recommendation 2.2.5. in the paper Proposals for justice-related modification orders under the Epidemic Preparedness Act 2006.

Legislative implications

9. The Order will modify primary legislation, for the period in which the epidemic notice issued in respect of COVID-19 under section 5 of the EPA is in force.

Timing and 28-day rule

10. I am seeking approval to waive the 28-day rule on the grounds that the Order is made in response to an emergency. The Order will come into effect on Friday 24 April, after it is published in the Gazette.

Compliance

11. I consider the Order is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, and the Crown’s obligations under te Tiriti o Waitangi.

12. As I noted last week in relation to other orders allowing greater use of AVL, the health benefits of remote ways of connecting may be more pronounced for Māori, who are more likely to have underlying health conditions that increase the risk of complications from the COVID-19 virus. However, these benefits are contingent on access to the relevant technology. Those with limited access to the internet or AVL are disproportionately likely to live in rural and isolated areas, have limited financial resources, or be older. In some areas with high Māori populations, there has historically been limited access to the internet or technology. These factors may combine to produce disproportionate impacts on Māori, which may need to be addressed in the longer term in relation to the Treaty principles of protection, participation, and equity.

13. There are no financial implications for the Crown resulting from the Order.

Regulations Review Committee

14. I do not consider there are grounds for the Regulations Review Committee (or any equivalent Parliamentary accountability mechanism operating during the COVID-19 epidemic) to draw attention to the Order under Standing Order 319.
Certification by Parliamentary Counsel

15. The draft Immediate Modification Order was certified by the Parliamentary Counsel Office as being in order for submission to Cabinet. Crown Law has advised that it considers the requirements and proposed modifications have met the section 15 test in the Epidemic Preparedness Act.

Impact analysis

16. The Treasury has determined that this is a direct Covid-19 response and has suspended the RIA requirements in accordance with CAB-20-MIN-0138.

Publicity

17. The Ministry of Justice’s online communications and guidance on the other immediate modification orders will be updated to include the PPPR Act and Regulations changes. In line with my previous approach, I propose to proactively release this paper in accordance with Cabinet Office requirements as soon as possible after the Order in Council is published in the Gazette, subject to any necessary redactions under the Official Information Act 1982.

Consultation

18. The Department of Internal Affairs, Inland Revenue Department, Land Information New Zealand, Ministry of Health, Ministry of Business, Innovation and Employment, New Zealand Police, Office for Disability Issues, Office for Seniors, the Treasury, and the judiciary were consulted on the proposed modification. The Department of the Prime Minister and Cabinet (Policy Advisory Group) has been informed.

Recommendations

19. The Minister of Justice recommends the Cabinet COVID-19 Ministerial Group:

1. **note** that on 9 April 2020 Cabinet COVID-19 Ministerial Group approved the development of an immediate modification order under the Epidemic Preparedness Act 2006, to modify requirements for enduring powers of attorney to be made in the physical presence of other people under the Protection of Personal and Property Rights Act 1988 and the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008;

2. **note** that approval was granted on the basis that:

   2.1. I have received written advice from the Chief Executive of the Ministry of Justice that he considers the modification order meets the test in s15(2)(a) of the Epidemic Preparedness Act 2006; and

   2.2. I am satisfied the test is met, as per the requirement in s15(2)(b);

3. **rescind** its 9 April agreement to recommendation 2.2.5. in the paper *Proposals for justice-related modification orders under the Epidemic Preparedness Act 2006* that, if an enduring power of attorney is signed or witnessed remotely, the people who signed or witnessed are required to sign or witness the same document as soon as they are able to do so safely (given the relevant alert level);
4. **note** that, instead, non-legislative guidance will encourage those who remotely sign or witness enduring powers of attorney to physically sign the same document as soon as they are able to do so safely;

5. **agree** to waive the 28-day rule, on the grounds that the Orders are made in response to an emergency, so that the regulations can come into force on 24 April 2020; and


Authorised for submission to the COVID-19 Ministerial Group

Hon Andrew Little
Minister of Justice