



LEGISLATION DESIGN AND ADVISORY COMMITTEE

4 February 2022

Chris Penk
Chairperson
Regulations Review Committee
Parliament Buildings
Wellington

Dear Mr Penk

Inquiry/briefing into the regulation-making powers in the COVID-19 Response (Vaccinations) Legislation Act 2021 and the COVID-19 Public Health Response (Protection Framework) Order 2021

Introduction

1. Thank you for the opportunity to provide a submission on your Committee's inquiry.
2. The Legislation Design and Advisory Committee (**LDAC**) has a mandate from Cabinet to review legislative proposals against the *Legislation Guidelines* (2021 edition) (**Guidelines**). The Guidelines are the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles.
3. The LDAC's focus is not on policy, but rather on legislative design and the consistency of legislative proposals with the principles contained in the Guidelines.
4. You have focussed on 2 key questions:
 - How do the new powers to make secondary legislation (or amendments to such powers) in the COVID-19 Response (Vaccinations) Legislation Act 2021 align with constitutional principles for the design of legislation?
 - Is the COVID-19 Public Health Response (Protection Framework) Order 2021 made consistently with the intention of Parliament and with the constitutional principles for the design of legislation.
5. We have focussed on the first of these questions. In our view, the inquiry provides an opportunity for Parliament to reflect on the division between primary and secondary legislation in times of crisis and the safeguards that such legislation should include. The Committee may wish to include wider recommendations for legislative responses in times of crisis. The matters that could be covered by such recommendations are the principal focus of this submission.

Delegating powers to make secondary legislation during times of crisis

6. The COVID-19 Response (Vaccinations) Legislation Act 2021 (“**the Amending Act**”) broadens the COVID-19 orders that the Minister for COVID-19 Response and the Director-General of Health can make under the section 11 of the COVID-19 Public Health Response Act 2020 (“**the CPHR Act**”). Specifically, the Amending Act provides for new orders:
 - a) requiring persons to permit individuals to enter a place or provide a service regardless of that person’s vaccination status;
 - b) specifying the evidence that may be required to demonstrate compliance with a specified measure;
 - c) specifying, for the purposes of a COVID-19 vaccination, the required doses for each COVID-19 vaccine or combination of vaccines; and
 - d) relating to applications for, and the issue, renewal, and extension of, COVID-19 vaccination certificates.

7. In addition:
 - a) Section 7 of Amending Act creates new secondary legislation making powers for the Minister for Workplace Relations and Safety (section 11AB). These powers allow the Minister to make COVID-19 orders specifying work, or classes or work, that may not be carried out by an affected worker unless that worker is vaccinated and/or undergoes medical examination or testing for COVID-19. An ‘affected worker’ is defined as a person who is employed to carry out specified work.
 - b) Section 13 of the Amending Act introduces a new power (section 33AA) to make regulations, by Order in Council, prescribing an assessment tool may be used by a person conducting a business or undertaking to ascertain whether it is reasonable to prohibit workers from carrying out work unless they are vaccinated and/or have undergone medical examination or testing for COVID-19.

8. In relation to the first of the inquiry’s questions, generally, we are satisfied with the legislative design of these powers. In this respect, we consider that the new powers conferred are ‘of a kind’ with those already contained in the CPHR Act and appear consistent with the purposes of the Act set out in section 4. We also note that:
 - the CPHR Act clearly states who can exercise the power and the criteria required before an order can be made;
 - the powers to make orders are expressly constrained by:
 - the purposes of the CPHR Act;
 - the New Zealand Bill of Rights Act 1990 (**NZBORA**)¹; and
 - consultation requirements (with the exception of orders made by the Director-General which can only be made under urgency).

¹ see sections 9(1)(ba), 10(c) and 11AA(1)(a) of the CPHR Act.

- Orders made under the CPHR Act are secondary legislation, are disallowable and subject to the publication requirements under the Legislation Act 2019.
9. These safeguards are important and appropriate for powers of these kinds. Notwithstanding this, the powers under the new section 11AB of the CPHR Act may involve significant limitations on rights contained in the NZBORA.² As noted above, section 11AB authorises the making of orders that require a person to be vaccinated, or otherwise exempt, in order to undertake work. Such requirements may raise issues under sections 11 (right to refuse to undergo medical treatment) and 19 (freedom from discrimination) of the NZBORA.
 10. As a matter of general principle, LDAC always advises that caution be exercised before delegating to secondary legislation measures that are likely to involve significant limitations of fundamental rights. LDAC's rationale for caution is twofold. First, matters affecting fundamental human rights are typically matters of significant policy that should be decided by Parliament.³ Second, unless expressly stated otherwise, provisions that empower secondary legislation will be interpreted, by virtue of section 6 of the NZBORA, as only empowering secondary legislation that is consistent with the NZBORA. Secondary legislation that is inconsistent with the NZBORA will generally be invalid.⁴
 11. We are not saying that rights-limiting measures cannot be delegated to secondary legislation. Secondary legislation can, and often does, limit such rights where those limits are justified and within the scope of the empowering provision. LDAC's position is that legislators need to be cognisant of the consequences and risks of delegating such matters to secondary legislation. In particular, there is a need to be mindful that a Court will strike down secondary legislation that it finds to unjustifiably limit on NZBORA rights. This may have undesirable consequences in an emergency response situation.
 12. In the Amending Act, Parliament has differentiated in the scope of its delegation to secondary legislation. In the case of the "vaccination to work" mandates, the requirement to be vaccinated to carry out specified work is set out in new section 17D of the Act. Secondary legislation is limited to identifying the types of work to which the mandate applies and making ancillary provision. In the case of the requirements to be set in the traffic light framework, Parliament provided more flexibility for secondary legislation to specify vaccination requirements to enter certain places. The distinction appears to relate to which type of mandates is likely to be more intrusive from an NZBORA perspective (work v leisure). In both cases, Parliament has sought to mitigate the risks identified above by expressly providing for the relationship between NZBORA and secondary legislation made under the Act.

² See report from Ministry of Justice dated 23 November 2021 and entitled "Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 (Vaccinations) Legislation Bill".

³ Legislation Guidelines, chapter 14.1

⁴ Legislation Guideline 14.9 states: "*Legislation should not empower secondary legislation that is inconsistent with the New Zealand Bill of Rights Act 1990*"

Legislative Process

13. The LDAC appreciates that the Amending Act was passed as part of an ongoing emergency response to the COVID-19 pandemic.
14. Although emergency legislation will often be justified by the circumstances, it will nonetheless contain serious risks that need to be mitigated. For example, emergency legislation is more likely to raise NZBORA concerns. While the crisis or emergency itself is likely to provide justification for some limitations on rights, proposed limitations will still need to be carefully designed and justified. This is very challenging when working within very compressed timeframes.
15. Most importantly, the process by which legislation is enacted is critical for enabling the public to participate, and see democracy in action. Without this, the legitimacy of the legislation, and the social contract on which it relies, can be undermined.
16. Governments and Parliament should therefore be focussed on ensuring the best legislative process possible – select committee scrutiny, in particular, is highly desirable. The more preparation that is done to ensure that departments and Parliament are able to run legislative processes quickly and efficiently during a crisis, the greater their ability to ensure the best legislative process possible.
17. In the case of the Amending Act, the Government and Parliament considered that there was an urgent need to move to the traffic light framework, and this legislation was necessary for that move. LDAC wonders whether, admittedly with the benefit of hindsight, there was potential for earlier preparation that might have enabled greater Parliamentary, including select committee, consideration.

Additional Safeguards

18. In addition to proper legislative process, safeguards should be built into bespoke emergency legislation. It is useful to consider these safeguards in two categories, proactive safeguards and reactive (or after the event) safeguards.
19. Proactive safeguards are prospective. They will, by necessity, be general and “broad-brush” because they will need to cover a range of circumstances and requirements. For example, the requirement that the Minister, or Director-General, be satisfied that Orders are consistent with the NZBORA. Proactive safeguards can and should be used to prevent grossly inappropriate use of emergency powers, but will be counterproductive if they impose detailed process or justification requirements before urgent action can be taken (likely precluding responses that are reasonable and appropriate when viewed in the context of particular circumstances).
20. Reactive safeguards (such as review and confirmation requirements) apply after the event. They allow for detailed consideration of actual circumstances and options while ensuring that any negative aspects or impacts of the use of emergency powers can be limited (and in some

circumstances possibly reversed). However, it is important that reactive safeguards are configured and implemented so as not to provide a disincentive for decision-makers from making appropriate and good faith use of emergency powers.

21. In the current context, we consider that section 3 of the CPHR Act is an essential reactive safeguard. Section 3 requires the House of Representatives to review the CPHR Act every 90 days. If the House does not resolve to extend the Act within that period, the Act is repealed. A final sunset date of 12 May 2023 is imposed by subsection (3). In effect, section 3 ensures that the CPHR Act is continuously reviewed to ensure that any limits on rights continue to remain justified and can never be considered to represent the 'status quo'.
22. We can see the benefit of such provisions as an ongoing safeguard process for other emergency legislation. We would be concerned, however, if it was seen to be an alternative to using such opportunities as are possible in the circumstances for ensuring the quality of the emergency legislation and using proactive safeguards.
23. Prevention and cure both have their place, but the risks and benefits, and therefore legislative design criteria are different in each case.

COVID-19 Public Health Response (Protection Framework) Order 2021

24. The LDAC advises departments in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared. The matters that the LDAC advises on includes:
 - the underlying framework and design of the legislation;
 - consistency with fundamental legal and constitutional principles;
 - the allocation of policy between primary and secondary legislation; and
 - the appropriateness of exposure draft Bills.
25. Advising on the design of secondary legislation is outside the scope of the LDAC's mandate..⁵

Recommendations

26. We **recommend** that the Committee emphasise in its report:
 - That departments review existing and past emergency preparedness and response legislation to ensure they are as well prepared as possible for future crisis
 - That Parliament review and enhance its ability to operate effectively in a range of emergency situations
 - Identify particular aspects of the COVID-19 Public Health Response Act 2020 that could be usefully changed in the short term
 - How the 90-day review requirement for the COVID-19 Public Health Response Act 2020 might be developed to provide an appropriate model for a safeguard process for other emergency legislation.

⁵ Legislation Guidelines, chapter 14.1

27. Thank you for considering our submission.

Yours sincerely

Mark Steel

Chair

Legislation Design and Advisory Committee