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Una Jagose QC
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BY EMAIL

Tēnā koe e Una,

RE: SOLICITOR-GENERAL'S INSTRUCTIONS TO PROSECUTORS DURING COVID-19 ALERT – AN OPEN LETTER

I am grateful your letter to Crown prosecutors of 7 April and the further letter of 15 April signed by Ms Brook have been circulated to the wider Bar at your direction; it is important that the Defence Bar is aware in advance of the position the Crown has elected to take in this time of crisis. The second letter clarifies the Crown position, but I remain deeply concerned about their contents and the underlying assumptions you have made. I write further to my letter to you of 14 April, in revised form, taking into account the contents of both letters.

You have issued what appear to be instructions amounting to modifications to bail and sentencing practice during the current Covid-19 lockdown. They are premised on a court's ability to remand in custody or defer substantive disposition of criminal proceedings on Covid-related grounds. Those premises are founded on a legal analysis of the Bail Act 2000 that is to say the least debatable. When determining new practices in response to the Covid-19 outbreak, the Crown must take into account the fundamental rights engaged by such practices. Your letters contain no references to the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993. This is concerning.

You express your views of the effect of the Bail Act in unqualified terms, but they are in reality tendentious arguments of questionable validity. As it is quite possible the Bar and some judicial officers may proceed on the basis your views represent an accurate summary of the applicable law, I write in response. I have already had to conduct bail applications where the prosecution has raised lockdown-related grounds to resist bail and have heard separate reports of custodial remands pending Covid-19 test results (an approach you seem to endorse), making the need to respond with counter-arguments all the more pressing.

The Bail Act 2000 and Just Cause for Continued Detention

In paragraph 4 of your 7 April letter you state:

> [Section] 8(2)(h) of the Bail Act 2000 specifically provides that when considering whether to grant bail, the Court may take into account "any other special matter that is relevant in the particular circumstances". It would therefore be possible for a Judge to decline bail, for example, where the applicant had tested positive for COVID-19 or was awaiting the outcome of a test, on the basis that they should remain in custody to protect the public.

It is abundantly clear that bail may only be declined if there is just cause for continued detention.[1] This arises not only under the Bail Act itself but under the New Zealand Bill of Rights Act 1990. Just cause for continued detention relates to detention arising from and justified by criminal charges faced.

Just cause does not, and cannot, arise through factors external to the criminal justice process.

While the reasons to allow bail are unbounded, there is just cause to detain if, and only if, there is an unacceptable risk (measured as real and significant in the circumstances) of failing to answer bail itself, interference with witnesses or evidence, or offending while on bail, that cannot be mitigated by the imposition of conditions of release. This is reflected in section 8(1) of the Act, but this is merely the statutory crystallisation of the position at common law.[2]

It is also well-established that the *discretionary* criteria in subsection (2) are relevant only insofar as they elevate a subsection (1)(a) risk.[3] They are not independent grounds on which bail could be declined and in that regard subsection (2) is subordinate to subsection (1). This is reinforced by the provisions of section 30 of the Act, which circumscribes the Courts' ability to impose bail conditions. Conditions of bail must mitigate a section 8(1)(a) risk that would otherwise justify a remand in custody.[4] Subsection (4) delimits the power to impose conditions (and this applies to all courts[5]) and imposes the stricture that a bail condition must be reasonably necessary to ensure a defendant:

(a) appears on the remand day;
(b) does not interfere with witnesses or evidence;
(c) does not offend on bail.

If the Courts do not have the power to impose conditions on any other basis than the mandatory section 8(1)(a) factors, and the leading judgment of the Court of Appeal in *Taipeti* clearly establishes that

[1] This includes the specific reverse onus provisions contained in Part 1 of the Act, insofar as such applications for bail also include the ordinary just cause determinations.
[2] Section 5, Bail Act 2000.
[3] *Taipeti v R* [2018] NZCA, 56, [2018] 3 NZLR 308, paragraph [15].
[4] *R v Keefe & Rymer* (CA162/04; CA 187/04, 22 July 2002).
[5] It used to bind the District Court only, but that changed with the 2013 amending Act. That was largely immaterial as the Court of Appeal in *R v Cole* [2008] NZCA 356 confirmed the High Court's conditions power was equally limited at common law.

proposition if section 30(4) had not already done so, it is very hard to see how a discretionary factor, couched as it is in general terms, can have the effect for which you contend. The obvious conclusion that the conditions powers cannot extend to a Covid-19 lockdown-directed bail term is strong support for the proposition that public health concerns are impermissibly extrinsic to questions of bail.

It is to be noted that, unlike the Corrections Act 2004 for example,[6] the Bail Act contains no Epidemic Preparedness Act 2006 amendments. No Order in Council has or could be made to modify any provision in the Bail Act under either of sections 12, 13 or 15 of the Epidemic Preparedness Act. These Henry VIII powers in do not authorise any modification of a requirement to release a person from custody or detention, or to have any person's detention reviewed by a court, Judge or Registrar.[7] Moreover, they do not authorise any modification of a requirement or restriction imposed by the New Zealand Bill of Rights Act 1990, which includes the rights to be brought before the court promptly and to be released unless just cause exists to refuse bail,[8] or by the Bill of Rights 1688, which prohibits excessive bail. Further, only a medical officer of health has the power to require a person to undergo medical examination, under s 70 of the Health Act 1956: a court cannot order a person detained to undergo medical treatment.[9]

Section 8(2)(h) – "any other special matter that is relevant in the particular circumstances"

Section 8(2)(h) is not a "public interest detention" ground, such as can be found in immigration detention under section 317(3) of the Immigration Act 2009. That Act makes it clear that where Parliament intends that a catch-all public interest consideration may outweigh the liberty right, it says so and expressly.[10]

The Bail Act is replete with express protective provisions and the need to protect public health is not to be found as a relevant criterion in any of them. It cannot be credibly said that Parliament did not turn its mind to protection of the public in circumstances such as we currently face, as the Epidemic Preparedness Act 2006 amply demonstrates. It did, and it elected not to include a pandemic as a reason to depart from the ordinary bail rules. Parliament has expressly excluded epidemic measures from the public interest

[6] Or specific epidemic provisions triggered by section 70 Health Act 1956 notices, such as section 179A, Corrections Act 2004.
[7] See sections 13(3) and 15(3) of the Act.
[8] Sections 23(3) and 24(b) of the New Zealand Bill of Rights Act 1990.
[9] This is prohibited by s 11 of the New Zealand Bill of Rights Act.
[10] *R v Secretary of State for the Home Dep't, Ex Parte Simms* [2000] 2 AC 15 (HL).

criteria that could apply when questions of bail arise, by virtue of exclusion of these from the Henry VIII powers I have just reviewed.

Interpreting section (8)(2)(h) in the manner you do is to adopt a light-handed textual analysis, without considering the legislative purpose, statutory scheme, the fundamental rights engaged, the Epidemic Preparedness Act, or the case law. The provision cannot be construed in isolation, but the underlying assumption in your letter is that it can and should. The discipline of statutory interpretation does not change in a national emergency or epidemic.

To begin with, the expression "any other special matter that is relevant in the particular circumstances" is not apt to justify custody but is more directed to a defendant's particular circumstances warranting release. It naturally corresponds to the mandatory section 8(1)(b) requirement to consider "any matter that would make it unjust to detain the defendant."

Insofar as it may ground detention, it must be related to a subsection (1)(a) consideration. It will readily be appreciated, a remand in custody for health reasons during the Covid-19 outbreak does not fit into any of those considerations, nor could it. No matter the size of the shoe-horn, nor the enthusiasm with which it is employed, none of Cinderella's sisters' feet can be forced into the slipper, without breaking something important.

More worryingly, your letter to the Crown sector amounts to an invitation to use the Bail Act for a collateral purpose. This is problematic as a general proposition of public law, but it is especially troubling when the matter under consideration is bail and the presumptive right to liberty. The Court of Appeal has made it clear the collateral use of the bail regime is not lawful and will not be countenanced.[11] Bail (and its refusal) is to be used for criminal justice purposes, and those alone. A different approach cannot be justified as between people facing criminal charges and those who do not, when the reasons to detain are common to both, but the power to do so is absent (or qualitatively different) for the latter.

While it is understandable that the government would wish to use every means to support the public health measures now in place those means must remain within the bounds of the law. The Crown ought to be guided by the Chief Justice's direction that bail applications are essential court business that will continue to be heard as before, regardless of the public health measures in place.

[11] *Nunn v R* (CA359/03, 30 October 2003).

Put simply, there is no justification to be found in the Bail Act, for bail applications to be adjourned or deferred for any reason other than those which obtained prior to the public health measures were put in place. A remand in custody to await Covid-19 testing is especially objectionable. The Crown Law Office's 15 April letter promotes such an unlawful course of action by a court. While that subsequent letter states the circumstances where the prosecutor should oppose bail on Covid-19 grounds alone "should be extremely rare",[12] this presumes the Bail Act authorises such a ground for opposing bail. It does not. Notwithstanding the reference to the high-level appellate case law in my previous letter, repeated above, your advice to the Crown network does not contain a single argument supported by rigorous statutory analysis, or the applicable case law.

Residential Bail conditions

It is equally objectionable for your Covid-19 concerns to be given indirect effect through the use of unwarranted residential conditions of bail. As observed above, the test for the imposition of conditions is but for the condition the court would remand in custody. In the absence of a need for a curfew, based on the offending alleged, it will be rare indeed where a residential condition is a *sine qua non* for bail. If the underlying reason for seeking a residential requirement is Covid-based, the injunction against collateral purpose use of the bail regime precludes the imposition of a residential condition. Trojan Horses are not allowed.

Covid-19 Regulated by Health Act1956 / Civil Defence Emergency Management Act 2002

The Health Act and CDEMA powers are wide, but they fall outside the proper considerations applicable to applications for bail. The Director-General of Health may exercise general or particular powers, but they are not relevant in a bail application, except arguably where the D-G has made a direction in respect of a particular individual. Even then it is debatable whether that ought to be drawn to a Judge's attention, as it is likely such a determination has independent and over-reaching effect of a bail grant or bail conditions.

[12] Paragraph 10, 15 April 2020 letter from Ms C Brook to Crown and Public prosecutors.

Whether or not the D-G's powers cut across a grant of bail, the Courts are constrained to act within the law and the scope of their powers. If there is a tension between a grant of bail and a direction under the Health Act, that matter will be resolved by the High Court, just as it should be, and undoubtedly on an expedited basis. It is that Court's constitutional function to resolve conflicts in the exercise of public power, not ours.

Discrimination on Health Grounds

In addition to the protections in the New Zealand Bill of Rights Act 1990 and the Bill of Rights Act 1688, section 19 of the New Zealand Bill of Rights Act prohibits discrimination on any of the grounds in the Human Rights Act 1993. Under section 21 of that Act, this includes disability, based on "the presence in the body of organisms capable of causing illness." This will include conduct where the conduct is based on the suspicion of the presence of such an organism.

While the prohibition of discriminatory conduct will be limited or excluded where it results from the direct application of the Health Act 1956, the same limitation cannot extend to the application of the Bail Act 2000. Your suggestions to the Crown network are not only premised on a tendentious view of the Bail Act itself, they also appear to constitute unlawful discrimination.

Analogy to the Criminal Procedure (Mentally-Impaired Persons) Act 2003

While on matters relating to health and detention, it is useful and instructive to look at section 38 of the Criminal Procedure (Mentally-Impaired Persons) Act, as it governs the liberty status of those within the criminal justice process where there is a need for a health-related assessment.

Subsection (2) permits a court to remand a defendant in custody or to a hospital for the purposes of obtaining a mental health assessment. Subsection (3)(b) however makes it clear that there can be no such custodial or hospital remand if "the person would have been released on bail but for the need for an assessment report."

This is a criminal justice enactment that makes it clear health assessment requirements do not affect normal bail considerations and cannot justify custody, even where the health issue has a direct bearing on the criminal proceeding. This principle applies with even greater force when the issue of public health

has not been incorporated in criminal justice legislation. The contrast between the restriction in section 38(3) and the position for which you advocate could not be more apparent.

A Different Response?

We all accept that the Covid-19 outbreak (or rather the need for its containment and elimination) represents an unprecedented challenge to New Zealand society. One of the manifestations of that society is its legal system and those of us who work within it must adapt; pragmatism is an aspect of adaptation. That has its limits; pragmatism must not impair the rule of law. A flexible approach is required, but the flexibility must first come from the State, for whom it costs least. In the absence of generally available public transport, the police and the Corrections Department may have to make greater use of their transport facilities to enable defendants to get to bail (or sentence) addresses where individuals may not be able to arrange private travel, due to the emergency. This must be consistent with workplace safety, but the necessary steps can hardly be characterised as unfeasible.

The State brought about the limitation on travel, albeit for perfectly valid reasons. The corollary is the State must assume an additional burden to ameliorate the consequences for those who, but for the state of emergency, would also be in the community. It follows that your suggestion that prosecutors should seek bail applications or community-based sentencings from custody be deferred for Covid-19 reasons is unsupportable, and plainly wrong.

Your letter records the Justice Sector Covid-19 Working Group's[13] understanding that Air New Zealand is currently not accepting defendants as passengers. In a time of extraordinary government powers this is something that should be the subject of high-level discussions with the national carrier, and possible executive direction. The Secretary for Justice has designated travel from custody as an essential activity after all. If the prison population is not currently infected, the justification for that refusal is questionable.

In any event, this is a time for lateral thinking and the employment of the full logistical resources of the State. One may properly practice social distancing in the belly of a C-130 Hercules, if uncomfortably.

[13] I note with consternation, but not with surprise, that the Working Group contains no members appointed by any of the NZLS, NZBA or CBANZ.

Case for a Decrease in the Prison Population

There is a good argument that the prison population should be kept to an absolute minimum at this time. While you state there are currently no diagnosed Covid-19 cases in our prisons, an influx from the community is highly undesirable, lest the prisons become nests of infection. Basic epidemiology dictates a disease of this nature will flourish where people are held in numbers and close proximity. This has occurred is certain prisons in the United Kingdom. Suggesting that bail applications be deferred for testing will increase the prison population in the short term, but transmission of the disease does not wait for testing. An influx to the prison muster from an infected community creates a vector for infection into a vulnerable population. Your approach has the real prospect of aggravating the situation.

Your letter contains other contentious statements regarding such things as the police practice of address checking, which you all but elevate to a right on their part. The need for a swift reply does not allow for a response to such matters, but please do not take their omission here as an acceptance of your suggestions or underlying assumptions. Suffice it to say, freighting in non-criminal justice-related considerations to other aspects of the consideration of bail has all the same problems I have identified above and with the same vitiating consequences.

I accept without reservation that your directions to the Crown network are intended as good-faith measures in a time of national crisis, but it is at times like these that the need to respect human rights is at its highest. Every incursion into civil liberties is invariably premised on some perceived immediate need in the interest of the wider public. That is what makes such incursions so pernicious.

I strongly urge you to reconsider your position. I would welcome engagement with members of the legal profession over the issues I have raised in this letter.

Yours sincerely,

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Barrister

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