

INFORMATION REQUEST	
COVID-19: Cabinet 28 April 2020	
Deadline: 24 April 2020	Date of Response: 24 April 2020

Purpose

1. This note provides you with advice on the report back on the case for new powers at lower Alert Levels. This report back will be considered by Cabinet on 28 April.

Key proposal in the paper

2. The report back seeks a Cabinet decision on whether to make no change to the current legal framework for managing COVID-19 risks or to enact a new COVID-19 Response Act.
3. The paper acknowledges that New Zealand has existing powers to underpin the measures currently in the Alert Level Framework. However, if we are to continue at Alert Levels for some time, and potentially move back to higher Levels in future, it would be preferable to establish a modern and specifically designed legislative basis for the Framework.
4. Any new legislation should maintain existing principles, such as the overriding public health basis and independence of Health decisions. This would be more flexible and provide greater options for how measures are implemented, including for example, the potential for infringement notice approach. It would also provide scope for prospective further measures to be added.

Police's view

5. **Police supports the introduction of new legislation** for the ongoing and future management of the Alert Level Framework. It would support the graduated approach taken to control COVID-19 and reduces risks caused by a loss of social licence, possible challenges to restrictions at lower alert levels. It would enable a flexible, practical approach that can be enforced if necessary.

Structure of the report back

6. The report is structured as follows:
 - 6.1. The first part outlines the policy settings for Alert Level 2.
 - 6.2. The second part provides an assessment of the adequacy of the current legal framework for managing legal and COVID-19 risks over the next 12-24 Months.
 - 6.3. The third part outlines factors that need to be taken into account in designing an infringement regime.

- 6.4. The fourth part outlines the principles that should inform the legislative design of the new powers and the safeguards of a COVID-19 Response Act.

The policy settings for Alert Level 2

Alert levels require a mix of voluntary compliance and powers

7. The approach to the Alert Levels Framework is premised on the basis that most people want to do the right thing, but will need help knowing what that is. Rigid compliance management and enforcement is not possible or appropriate at large scale, particularly at lower Alert Levels.
8. This approach allows for a spectrum that emphasises voluntary compliance through education, information and clear guidance, but which allows for resort to the other end of the spectrum in the event of non-compliance – namely warnings, detention and prosecution.

Public support and understanding is critical

9. If the limited extensions at Level 3 and then Level 2 to interaction are understood, make sense to New Zealanders and seem proportionate to manage known risks, people are more likely to comply with continued restrictions.
10. This is key to ensuring continued social licence and supports the graduated enforcement approach for the response to COVID-19.

Adequacy of the current legal framework for managing legal and COVID-19 risks over the next 12-24 Months.

There is a clear legislative basis for the Alert Levels Framework

11. Under Alert Level 4, and soon Alert Level 3, New Zealand relies heavily on the Health Act 1956, CDEMA and the Immigration Act 2009 to provide the legal powers to enforce compliance with the restrictions.
12. There are very few hard restrictions at Level 2, because the risk of widespread outbreaks and community transmission has diminished. The remaining 'hard' restrictions are:
- 12.1. Border entry restrictions (Immigration Act 2009)
 - 12.2. Gatherings restrictions (Health Act 1956, s70 Order, with Epidemic Notice in place), but supplemented by obligations established under existing regulation of venues and events
 - 12.3. Managed isolation of overseas arrivals (Health Act 1956 s70 Order, plus Immigration Act 2009 for non-New Zealanders)
 - 12.4. Isolation or quarantine of domestic cases or high risk individuals (Health Act 1956 s70 powers)

13. All of these Level 2 restrictions have a clear legal basis and related enforcement powers. All other settings under Level 2 are guidance or advisories. For example, asking people to minimise non-essential travel. These have either no or lesser ability for agencies to enforce.

There are risks from relying upon existing legislative settings

14. The powers are not designed for the purpose of being applied where it is unknown exactly what risks will emerge in different contexts. As a result, they are likely to both over-control and under-control in varying circumstances.
15. There is an increasing risk of successful legal challenge to the lawfulness of s 70 notices, through judicial review proceedings or in the context of a prosecution, on the basis they exceed the scope of empowering legislation, or if the limits on rights and freedoms are not justifiable under the New Zealand Bill of Rights Act.
16. There are certain prospective future measures that cannot be required under existing powers, such as [regional variations] should the government decide these are necessary in the future.
17. Less compliance with mandatory restrictions can be expected due to a combination of factors such as restriction fatigue or increasing wellbeing issues and fatigue for regulatory agency staff reducing capacity to respond.

Factors that need to be taken into account in designing an infringement regime

18. The paper notes that Infringement offences are a useful tool for low level offending which does not warrant a criminal conviction but which nevertheless demands some penalty
19. In addition to a prosecutorial response, Police currently has a range of options at their disposal ranging from informal warnings, written formal warnings post arrest pre-charge warnings and diversion. However, there is currently no power to issue infringement notices for offences under section 72 of the Health Act 1956.
20. The paper notes that there will be a future report back on the case for and design features of an infringement regime. This will include consideration of:
 - 20.1. The level of the infringement fee;
 - 20.2. What regulatory regime it should come under;
 - 20.3. who should have enforcement powers; and
 - 20.4. The costs and timings required for the development and implementation of the regime.

Police's view

21. Police agrees that an infringement regime is worth considering. Police already operate a number of infringement regimes (for example traffic offending), as do other agencies.
22. However we note that these cannot be done quickly (or cheaply). They cannot be set up at short notice and must include an assessment of any enforcement agency's ability to support it (establishing the IT etc.). For example, our infringement IT system is already under severe pressure (and is old) and adding to it now may require significant investment and an IT build and the timing associated.
23. Accordingly Police requested that cost and timing as part of any report back on an infringement regime

Principals that should inform the legislative design of the new powers and the safeguards of a COVID-19 Response Act.

24. Should Cabinet agree to establish a COVID-19 Response Act, the paper outlines a number of principals and safe guards for such an Act.
25. The paper recommends the following principals be considered when developing the shape of the new powers:
 - 25.1. to take a proactive and, where appropriate, precautionary approach to minimising movement and contact on an aggregate basis;
 - 25.2. to ensure ongoing access to necessities of life, public health, safety, and security, and to enabling movement and contact at increasing levels where risks are contained; and
 - 25.3. to otherwise support the Government's response to and management of the risks arising from COVID-19.
26. Other key considerations outlined in the paper are:
 - 26.1. The legislation needs to support the full range of controls on behaviour, including less restrictive controls that are appropriate where there is a lower, but still persistent, risk of outbreak and where it is not clear who is sick.
 - 26.2. The ability to use powers flexibly to respond to changing risks and developments
 - 26.3. The legislation should have a clear Lead Agency.
 - 26.4. Broad powers of this kind need to have a strong foundation in terms of transparency and accountability.
 - 26.5. The legislation should set out clear enforcement powers, and continue to enable arrests for breach of requirements

Police's view

27. Police agrees with the principals as detailed in the paper, as well as other considerations. Police supports the inclusion of the outlined safe guards such as ensuring that the new powers are legislative, must be published as legislation, and are disallowable by Parliament.
28. Police does not have a fixed position on who should be the Lead Agency for any Act should it be agreed, but consider that a Health lens is critical as it defines the decision making under that Act.

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