

Powers and authorisations to give effect to Alert Level 3

Purpose

- 1 This paper reports on the authorisations, powers and other measures that may be put in place to implement Cabinet's decision to move from Alert Level 4 to Level 3 effective from 27 April 2020.

Executive Summary

- 2 On 20 April 2020 Cabinet decided that New Zealand will extend Alert Level 4 to 11.59pm on 27 April 2020 and then move to Alert Level 3 for at least two weeks. Existing orders under section 70 of the Health Act 1956 (Health Act) have been amended to extend Alert Level 4 and enable agreed readiness and maintenance activities.
- 3 Implementation of Alert Level 3 rests upon a suite of powers and authorisations under the Civil Defence Emergency Management Act 2002 (CDEMA), the Epidemic Preparedness Act 2006 and the Health Act 1956 (Health Act).
- 4 An order under section 70 of the Health Act is the main authority by which enforcement of the agreed Alert Level 3 measures is possible, with support from other agencies such as WorkSafe exercising powers under the Health and Safety at Work Act 2015 (HSWA). Officials are preparing a draft section 70 order to illustrate how the measures will be implemented. Changes to the legal restrictions on the public imposed by orders under section 70 of the Health Act are for a Medical Officer of Health. The exercise of relevant powers under the Health Act is a discretionary decision for the Medical Officer of Health.
- 5 Powers under CDEMA and the Epidemic Preparedness Act 2006 would continue to complement any Health Act order. They do this by enabling additional enforcement powers; providing clearer legal authority to restrict travel (e.g. in and out of towns, cities or regions in the case of localised outbreaks); and by enabling the Secretary of Education to direct school boards.
- 6 Health Act and CDEMA powers and authorisations are at the "hard" end of the spectrum of compliance and enforcement. Even in that context compliance with and enforcement of powers depends on social licence and public acceptance. This means that work to educate, inform and guide to support voluntary public action is still crucial.
- 7 Officials are undertaking further work to consider how measures at Alert Level 2 will be implemented. Section 70 orders may still be made but there is the possibility that specific COVID-19 recovery legislation may be needed to support some of the measures.

Background

- 8 On 9 April 2020 the COVID-19 Ministerial Group directed Crown Law Office, in consultation with Health, Police and NEMA, to report back to CVD on 21 April 2020 on the authorisations and powers to give effect to the decision of Cabinet on 20 April 2020 about whether and when to step down a level. This paper responds to that direction.
- 9 On 15 April 2020, Cabinet Business Committee considered the Prime Minister's paper entitled *Alert Level Framework for Levels 1, 2, and 3: Details and implementation*. CBC with Power to Act agreed to the measures at Alert Levels 1 to 4 as set out in Table 1, at page 7 of the paper under CBC-20-SUB-0041, subject to any minor edits agreed to the table and the paper by the Prime Minister for consistency and clarity [CBC-20-MIN-0041].
- 10 On 16 April 2020 the detailed tables describing the measures to implement Alert Level 3 were published on covid19.govt.nz.
- 11 On 16 April 2020 the COVID-19 Ministerial Group considered a paper from National Crisis Management Centre (NCCM) officials *Taking a regional approach to COVID-19 alert levels*. Officials concluded that a geographically-differentiated approach to de-escalation is possible if implemented for a relatively small number of regions, and that such an approach may be preferable to premature or postponed nationwide de-escalation if there is not sufficient evidence to support nationwide de-escalation.
- 12 On 20 April 2020 Cabinet decided that New Zealand would extend Alert Level 4 to 11.59 pm on 27 April with minor changes to enable readiness for Alert Level 3. Alert Level 3 will be effective for an initial period of two weeks when the situation will be reviewed again. Officials are preparing a draft order for consideration by the Director-General of Health acting as a Medical Officer of Health. The orders must be considered as draft unless and until they are issued by a Medical Officer of Health.
- 13 This paper reflects the agreed Alert Level Framework and outlines in some detail the powers and authorisations necessary to implement a move to Level 3. This paper also addresses Alert Level 2, identifying areas where further work is required.

Alignment to the principles of the Alert Level Framework

- 14 On 15 April 2020 CBC endorsed a principles-based approach to the Alert Level Framework. The Framework is focussed on mitigating the risks of COVID-19. As noted in the paper, the settings at each Level are more durable where they promote voluntary action.
- 15 The risks of COVID-19 continue at a high level which means that while we can allow some relaxation of controls there are choices to be made and there is a rationing exercise to be done to assist those choices. The rationing exercise is primarily based on public health considerations but it is also relevant and permitted to include other considerations such as the least impact on civil liberties and reducing economic impacts.
- 16 Since 25 March 2020 New Zealand has been in an emergency, legally and practically, which requires and justifies the use of extraordinary powers and restrictions. The extraordinary circumstances have created a high level of public goodwill for and acceptance of the necessary restrictions, meaning that limited enforcement has been necessary. As the risk of spreading COVID-19 decreases we

are now looking ahead to a gradual return to normality. While restrictions will continue to apply these should be increasingly be focused towards a return to decentralised and cooperative approaches between central and local government, regulators, and the community. Such an approach will help to promote public goodwill for the response and ongoing compliance with necessary restrictions without the need for enforcement. It will also reduce legal risk.

- 17 At Alert Level 3, with the state of national emergency and epidemic notice in place, an order under section 70 of the Health Act may be made (and has been drafted) to support key measures at that Level. There are also powers of enforcement found within the Health Act and CDEMA, including some powers of arrest and prosecution.
- 18 However, with more activity in the business sector and in primary and secondary production, there will be an increasing interaction between ordinary regulatory requirements and COVID-19 requirements for work places. The increasing volume of activity, the increasing complexity of the requirements and the mix of restrictions and exceptions, means that the ability to issue lawful notices and enforce them both become more difficult. This complexity will make transparency of the rules and decision-making criteria essential, as well as coordination between regulatory and enforcement agencies.
- 19 To promote and maintain public goodwill for the response, we need:
 - 19.1. clear principles and rules that are applied fairly, equitably, proportionately, and with sufficient flexibility that the rules make sense in different contexts,
 - 19.2. principles and rules to be transparent, so they can be clearly understood both by decision-makers and by the community,
 - 19.3. principles and rules to be applied and enforced with an understanding of the different contexts in which they are applied and enforced,
 - 19.4. compliance and enforcement to be accountable – if mistakes are made, or thinking evolves, agencies front-foot that with the public,
 - 19.5. the community to have an opportunity to participate in application and enforcement, e.g. by reinforcing pro-social norms and by reporting observed non-compliance, and
 - 19.6. enforcement action in cases of obvious non-compliance.
- 20 As time passes it is important to employ, as much as possible, the usual measures of public scrutiny and accountability. Throughout this emergency the Government has employed multiple mechanisms to maintain transparency and legitimacy. Publication of decisions and notices through various communication channels, daily press conferences and guidance material have all contributed.
- 21 In addition, I note that the section 70 order may be published as a legislative instrument under the Legislation Act 2012. It may also be subject to disallowance by the House of Representatives.
- 22 As noted in the CBC Minute [CBC-20-MIN-0041] on 15 April 2020 the Solicitor-General will put in place an inter-agency process to keep the relevant legal instruments (including section 70 Health Act orders) under constant scrutiny to ensure they have a firm legal basis, are sufficiently well-defined, can be

demonstrably justified in the circumstances, and remain proportionate to the threat posed by COVID-19.

Looking ahead to Alert Level 2

- 23 AOG officials are undertaking further work to consider measures that could be implemented at Alert Level 2. A move to Level 2 will be accompanied by a more complex compliance environment. This is because:
- 23.1. There will be an even greater reliance on widespread voluntary compliance than under Level 3 and Level 4.
 - 23.2. Non-compliance with some restrictions could have a disproportionately large public health impact because there are more people interacting.
 - 23.3. COVID-specific powers and restrictions will increasingly interact with business-as-usual regulations (e.g. workplace safety will have public health aspects as well as regular workplace safety aspects).
- 24 At Alert Level 2, if a state of national emergency or local emergency is not in place it may be appropriate for the Minister of Civil Defence to give notice of a national transition period that provides additional powers for the recovery phase. These measures will be combined with agencies' normal regulatory powers such as those under the HSWA.
- 25 Section 70 orders may still be made but there is the possibility that specific COVID-19 recovery legislation may be needed to support some of the measures.
- 26 The Minister of Health and the Leader of the House are reporting back to the Cabinet COVID-19 Committee by 23 April 2020 on whether there is a case for a COVID-19 adapted amendment to the Epidemic Preparedness Act 2006. I propose that officials' advice on any need for legislative change is included in that report.

Authorisations and powers to give effect to Alert Level 3

- 27 The Alert Levels are not themselves legal instruments but give a means of understanding and responding to the level of risk from COVID-19. Compliance with the measures described at Alert Level 3 [CBC-20-MIN-0041] rests on a combination of powers, authorisations and other mechanisms including:
- 27.1. Over-arching mechanisms which have broad application or enable other powers. These are the state of national emergency (which enables police to exercise emergency powers, and enforce them), and the epidemic notice.
 - 27.2. More detailed powers to direct, notify, require and enforce particular activities. These are directly related to COVID-19 and include powers under section 70 of the Health Act (with corollary powers for Police to enforce directions and arrest for non-compliance), directions by the Secretary of Education under Part 33A of the Education Act 1989, and dormant powers in the Sentencing Act 2002 and the Parole Act 2002 that have been activated by Epidemic Management Notices.
 - 27.3. Other mechanisms which support voluntary action, for example clear messages and guidance to help people understand the need for hand washing and other hygiene measures to contain the spread of COVID-19.

Voluntary action becomes increasingly important as we move down through the Alert Levels.

- 28 The overall principle of the controls under each Alert Level is that we adopt the least restrictive measures commensurate with managing the public health risk.

State of National Emergency and Epidemic Notice

- 29 The Minister of Civil Defence will need to reassess whether a state of national emergency is necessary or desirable once Cabinet's decision on whether to transition to a new Alert Level is made and before any existing declaration expires. As noted in the 15 April 2020 CBC paper [CBC-20-MIN-0041] Crown Law's assessment from a legal powers perspective remains that retaining CDEMA powers is at least desirable (the test in s 66) at Alert Level 3 if agreed.
- 30 The Minister of Civil Defence may also conclude that a national state of emergency is preferable to a local one given the continuing risk and need for national level resources to support the response. Officials from the National Emergency Management Agency advise that a national state of emergency appears the more effective means of managing under Alert Level 3.
- 31 The Epidemic Notice continues until 24 June unless an earlier expiry date is notified. Section 9 of the Epidemic Preparedness Act 2006 requires the Director-General of Health to keep the situation under review and the Prime Minister must revoke the order promptly if the threshold for making the order is no longer met. The risks of COVID-19 in New Zealand continue to be high which is why Alert Level 3 is a careful recalibration of restrictions. The Epidemic Notice triggers other powers including:
- 31.1. the special powers of medical officers of health under section 70 of the Health Act they can also be activated by the Minister of Health authorising their use or by a state of emergency being declared under CDEMA);
 - 31.2. section 24 of the Epidemic Preparedness Act 2006, enabling Judges to modify rules of court in the interests of justice;
 - 31.3. epidemic management notices under section 8 of the Epidemic Preparedness Act 2006, which can activate dormant provisions of the Criminal Procedure Act 2011, the Immigration Act 2009, the Parole Act 2002, the Sentencing Act 2002, and the Social Security Act 2018;
 - 31.4. the making of immediate modification orders under section 14 and 15 of that Act which enable modification of legislation; and
 - 31.5. the power in new Part 33A of the Education Act 1989, for the Secretary of Education to issue directions to educational entities.
- 32 The need for these special provisions will continue under Alert Level 3.

Powers under section 70 of the Health Act 1956

- 33 As under Alert Level 4, the powers under section 70(1)(f) and (m) are the key mechanisms to support Alert Level 3. Officials have reviewed the existing section 70(1)(f) order requiring all persons in New Zealand to isolate or quarantine, and the existing section 70(1)(m) order closing premises and forbidding outdoor congregation, and consider these need to be revoked and replaced with a new order. The order must be issued by a Medical Officer(s) of Health.

- 34 The respective decision-making powers of Cabinet and the Director-General of Health (acting as Medical Officer of Health) are distinct. Changes to Alert Levels may be made by Cabinet to signal to the public that the level of public health risk has been reassessed and that there are new expectations on how New Zealanders will conduct themselves in those circumstances and the support that government will provide taking account of these expectations. Changes to the legal restrictions on the public imposed by orders under section 70 of the Health Act are for a Medical Officer of Health. The exercise of relevant powers under the Health Act is a discretionary decision for the Medical Officer of Health, taking into account the relevant considerations under that Act.
- 35 The extent to which coercive controls can be lawfully imposed under section 70 turns on the particular context (including the existence or otherwise of a state of emergency or epidemic notice), and the evidential foundation for the necessity for the orders.
- 36 Officials from Crown Law and Parliamentary Counsel Office, in consultation with Ministry of Health officials have prepared a draft section 70 order for consideration by the relevant Medical Officer of Health (most likely the Director-General of Health). The draft order reflects the detailed tables published at [covid19.govt.nz](https://www.covid19.govt.nz) on 16 April 2020.
- 37 The final order once published may be amended over the coming weeks should additional matters come to light as we adjust to the changes under Alert Level 3, or if needed to implement regional differences.
- 38 The draft section 70 order will contain a purpose and a principles clause to make clear that the overriding strategy to eliminate COVID-19 is to reduce movement and contact between people as much as is reasonable and that where movement or contact is permitted, public health principles play a significant part.
- 39 Some of the measures outlined at Alert Level 3 are not mandated by the draft section 70 order. The measures not mandated by the draft section 70 order are highlighted in the table at appendix one. For example we will encourage, not mandate, people at higher-risk of severe illness from COVID-19 to take additional precautions when leaving home. We also expect people to study at home where possible. We expect people to take these steps voluntarily to protect themselves and others.
- 40 Legislation governing work situations interacts with the public health requirements to support their implementation in work situations. For example, HSWA requires businesses to eliminate the risk of transmission of COVID-19 so far as is reasonably practicable, which means they must require staff to work from home wherever possible. In addition, where people must work outside the home, businesses must minimise the risk of transmission of COVID-19 so far as is reasonably practicable, which means that they need to follow public health guidelines such as for physical distancing and hand washing.
- 41 Particular measures reliant on voluntary action include:
- 41.1. Hand-washing and other hygiene actions;
 - 41.2. People accessing the nearest supermarket or place of recreation (rather than a preferred location within the local area);

41.3. Avoiding public transport at peak times (unless travelling for school or work); and

41.4. Limiting the extent of their extended bubbles.

42 A table describing in detail the Alert Level 3 measures and the draft mechanisms for achieving each is attached as appendix one. The discussion below highlights the key differences between the orders issued for Alert Level 4 and Alert Level 3.

43 In our communications it is important that we are clear when actions are mandated and when we are asking people to act consistently with community expectations. That supports social license and legitimacy and reduces the risk of successful legal challenge.

Businesses

44 The measures at Alert Level 3 for businesses and other organisations will be implemented by the proposed order under section 70 of the Health Act 1956 and supported by advice and guidance from the Ministry of Health, MBIE, and WorkSafe to businesses on how to operate under that order.

45 At the time this paper was finalised the drafting of the section 70 order was underway. The draft order for implementing Alert Level 3 shifts focus away from “essential businesses” as the only businesses permitted to operate. For Alert Level 3, to meet the infection control requirements/health objectives, businesses will be permitted to operate if appropriate infection control measures are in place and public interaction is managed. However employees who can work from home should continue to do so.

46 Another category of services will implement infection requirements as far as reasonably practicable given the nature of the service. This will include services which are sufficiently necessary to be permitted to operate in the context of Alert Level 3 conditions (for example, primary healthcare), but may not be able to maintain the same degree of infection control measures as required of other businesses.

47 This approach may also be adopted if a re-escalation to Alert Level 4 is required in the future. First, this would avoid further, potentially confusing, changes. Second the existing approach, while sound, has become complex over time. An alternative based on the ability to maintain infection control better enables calibration to achieve the desired levels of public health controls while allowing increased social and economic activity.

Premises

48 Premises are closed unless the business or service has infection control measures in place which:

48.1. do not permit members of the public to enter the premises, and

48.2. ensure physical distancing can be maintained and support contact tracing of all persons who use or access the premises.

49 A smaller, defined, category are required to have sufficient systems and processes in place to ensure physical distancing can be maintained as far as reasonably practicable (taking into account the nature of the service).

- 50 This approach addresses the public health risks and will be easier to understand, implement and manage. Some businesses, such as nail salons, hairdressers or public venues such as pools or museums, will be unable to comply with infection control measures and therefore their premises will need to remain closed.

Personal Movement

- 51 All persons are to remain at home except for “essential personal movement”. The definition of essential personal movement is extended from the previous definition to include travel that is part of:
- 51.1. accessing or providing local services and businesses (as opposed to essential businesses previously),
 - 51.2. an extended bubble arrangement in the same region,
 - 51.3. going to work, school (for years 1-10), early childhood and tertiary institutions, provided infection control measures are in place,
 - 51.4. accessing judicial services and giving effect to court orders,
 - 51.5. travelling to controlled gatherings within the same region, and
 - 51.6. relocating a home or business.
- 52 No new legal self-isolation requirements beyond the general isolation or quarantine requirements are proposed where a person is unwell. Voluntary action and public messaging will continue to be the strongest mechanism to encourage, what is expected to be, a diminishing number of people to self-isolate. In addition, a Medical Officer of Health may require (under section 70 of the Health Act) an individual to isolate and a constable may make a similar order under CDEMA while the state of emergency continues.
- 53 There may also need to be some change to inter-region travel permissions if Alert Levels differ between regions.

Enforcement of orders

- 54 Achieving the greatest level of compliance with the measures described in Alert Level 3 will depend on public understanding of the need for compliance and voluntary action. Agencies such as the Ministry of Primary Industries, Employment Services (MBIE), WorkSafe and others have also supported compliance especially where managing COVID-19 risks intersects with other regulatory requirements e.g. physical distancing in meatworks / bakeries. This will increasingly be the case as we emerge from Alert Level 4 and people go back to work.
- 55 However, Police have powers to enforce the legal restrictions imposed under the Health Act and CDEMA. The main mechanisms for Police to enforce compliance are outlined here together with the factors considered in exercising them.
- 56 Section 71A(1) of the Health Act states that constables may do anything reasonably necessary to assist in ensuring compliance with an order under section 70. This includes:
- 56.1. compelling, enforcing or ensuring compliance with the order; and

- 56.2. preventing, or reducing the extent or effect of, the doing of those things forbidden or prohibited by the order.
- 57 A non-exhaustive list of steps that constables may take is set out in s 71A(2), including entering premises and stopping vehicles.
- 58 Pursuant to s 72 of the Health Act, a failure to comply with a direction given by a medical officer of health constitutes an offence, as does obstructing or hindering a constable acting under s 71A.
- 59 These offences are punishable on conviction by a maximum of six months' imprisonment and/or a maximum fine of \$4000. Accordingly, Police can arrest without warrant any person whom they have good cause to suspect has committed these offences.
- 60 In preparing the draft section 70 order officials have aimed to set out clear expectations and behavioural requirements that all New Zealanders can understand. Police constables have a clear legal basis to enforce these requirements under section 71A. The s 71A powers and related power of arrest must, however, be exercised lawfully in each particular case.
- 61 For the duration of a state of national emergency, or in a local state of emergency, Police also have emergency and enforcement powers under the Civil Defence Emergency Management Act. The use of these powers is assessed against the purpose of the declaration – that is, to slow the spread and reduce the impact of COVID-19 (and thereby save lives). These include, for example:
- 61.1. The power to enter premises if the constable believes on reasonable grounds that the action is necessary for saving life or preventing injury (s 87(a));
- 61.2. The power to prohibit or restrict public access to any roads or public places, in order to prevent or limit the extent of the emergency (s 88);
- 61.3. The power to direct any person to stop any activity that may cause or substantially contribute to an emergency, and request any person to take any action to prevent or limit the extent of the emergency (s 91).
- 62 There are a number of correlating offence provisions in the Civil Defence Emergency Management Act. As they are punishable by imprisonment, Police are empowered to arrest without warrant any person whom they have good cause to suspect of having committed one of the offences. The emergency and enforcement powers must also be exercised lawfully. The orders under section 70 of the Health Act provide clarity as to behavioural requirements and permissible movements, and hence clarity as to the exercise of these powers.
- 63 There are also analogous powers available to Police if a transition period is declared by the Minister of Civil Defence to support a period of recovery from an emergency.
- 64 Once powers under section 70 of the Health Act or CDEMA are no longer available, these enforcement options also fall away. Management of the risk of COVID-19 then becomes a matter of supporting voluntary action with the remaining restrictions unless specific legislation is enacted to continue the management of the disease and the economic/societal recovery from its management to date.

- 65 To support the measures at Alert Level 3 and the section 70 order New Zealand Police will review and issue new operational guidelines.

Education entities

- 66 The measures at Alert Level 3 for schools and other education entities will be implemented by the proposed order under section 70 of the Health Act and supported by advice and guidance from the Ministry of Education to the schooling and tertiary sectors on how to operate under that order.
- 67 If necessary, to augment the proposed Health Act order, the Secretary of Education may issue directions under Part 33A of the Education Act 1989 to implement any of the additional measures not covered by the section 70 order or to clarify how these can be safely operated should that be required.

Existing powers

- 68 The Health and Safety at Work Act 2015 is the main regulatory regime which will enable the Alert Level 3 and 2 measures for businesses to return to work safely. I note that the Ministry of Business Innovation and Employment (MBIE), WorkSafe, the Ministry of Health, industries and unions (as well as other key relevant agencies) are working together to assist business with their preparedness planning under different alert levels.
- 69 Throughout this emergency duties under the HSWA have continued to apply. WorkSafe has recently published guidance for essential services and has set out its expectations of duty holders at this time. WorkSafe has continued its work by responding to concerns and undertaking the proactive work of advice and guidance. In this it has been supported by the advice from the Ministry of Health on management of COVID-19.
- 70 As we return to work, businesses must develop safe work practices to limit exposure to COVID-19. This means assessing the risks, and eliminating them, so far as is reasonably practicable. If elimination is not reasonably practicable, risks must be minimised, so far as is reasonably practicable. WorkSafe supports compliance with a strong emphasis on advice and guidance.
- 71 MBIE and WorkSafe officials advise that the HSWA regulatory regime is designed to deal with a wide range of risks and is fit for purpose to deal with management of disease risks in the workplace generally. However, the powers in it are designed to support health and safety at work, and are not designed to manage the public health risks of a pandemic.
- 72 WorkSafe has a range of enforcement options including improvement notices, prohibition notices, and prosecutions. Specific criteria must be met before notices are issued, and WorkSafe considers that powers under the Health Act are more appropriate if the closure of a non-compliant business is required.
- 73 WorkSafe officials are developing their operational approach to Alert Level 3. To the extent possible complaints will continue to be dealt with remotely with visits where a resolution cannot be achieved. Inspectors visiting premises will focus on infection control.

- 74 MBIE and WorkSafe will be communicating to businesses the expectation that all businesses are to carefully consider any specific guidance for their sector or industry, and their health and safety obligations.
- 75 Businesses must self-assess their ability to operate safely at Alert Level 3, in line with public health advice. We expect businesses to develop a written “start up” plan in consultation with workers showing how they can re-open safely. WorkSafe will be carrying out spot checks to ascertain whether these are in place and adequate.
- 76 A cross-government approach to compliance will be needed. WorkSafe is a small agency with specific focus on areas of greatest work-related risk. WorkSafe does not have full knowledge of all New Zealand businesses nor the ability to interact proactively to all businesses operating at Alert Level 3. Officials are developing a cross-government approach to compliance at Alert Levels 3 and 2.
- 77 I have also asked officials to advise whether the power to give infringement notices and fees under this Act is available in cases of non-compliance with infection control measures in the context of an epidemic. Further legislative change may be desirable if needed.

Implementation

- 78 In preparation for Alert Level 3 from 27 April 2020 the Director General of Health acting as Medical Officer of Health has advised that he will issue amendments to the existing section 70 orders as needed to extend to 27 April 2020 and to enable readiness activities and maintenance.
- 79 To implement Alert Level 3 from 27 April 2020 the various decision-makers will consider and issue the orders, declarations and directions.

Milestone/Activity	Decision-maker	Timeframe
Extension of the State of National Emergency	Minister of Civil Defence	Prior to 12:21 on Wednesday 22 April. A decision on the extension must be made regardless of the decision on 20 April 2020.
Amendments to existing 70 orders under Health Act 1956	Medical Officer of Health	On 21 April 2020 to 1) enable readiness and maintenance activities and 2) extend the timeframe to 23.59 on Monday 27 April.
New section 70 orders under Health Act 1956 for Alert 3	Medical Officer of Health	Prior to 23:59 on Monday 27 April. This is needed because the current order under section 70(1)(f) requiring people to stay home expires at this time and the section 70(1)m order will be revoked and replaced.

		The section 70 order on the border remains in place.
Directions under Part 33A Education Act 1989	Secretary for Education	Timing to reflect any change in Alert Level.
Updated Police Operational Guidance	New Zealand Police	As needed to reflect changes in Alert Level.

Financial Implications

80 There are no financial implications arising from this paper.

Legislative Implications

81 There are no legislative implications arising from the recommendations in this paper.

Impact Analysis

Regulatory Impact Statement

82 This paper does not propose any changes to legislation or regulations and so the impact analysis requirements do not apply.

Population Implications

83 The population implications of the decision to transition to Alert Level 3 were considered in the Alert Levels Framework Paper and need not be further addressed here.

Human Rights

84 The measures likely to be imposed by the new order under section 70 of the Health Act place significant restrictions on fundamental human rights. Specifically, the suite of measures clearly limits all New Zealanders' rights to movement, association and assembly, protected by sections 16 – 18 of the New Zealand Bill of Rights Act 1990 (NZBORA). Restrictions on gatherings could also limit the rights of ethnic, religious or linguistic minorities to enjoy the culture, to profess and practice the religion, or to use the language, of that minority affirmed in section 20 of NZBORA (the minority rights); and the right to manifest a person's religion or belief individually or in community with others as set out in s 15.

85 The measures also have the potential to limit the right to be free from discrimination affirmed in section 19(1) of NZBORA, in that the same treatment could have differential and disadvantageous effects on some groups (for example Māori, Pacific peoples, people who practice religion, older people, people with disabilities and women).

86 Limits on rights or freedoms are permissible if they are reasonable, prescribed by law, and demonstrably justified in a free and democratic society. The limits must be in proportion to the objective of the order, namely preventing the spread of COVID-19 and protecting the public health and lives of New Zealanders.

- 87 This is a legitimate objective, which could not be achieved in a manner that allows for greater liberty and enjoyment of movement, association and assembly rights (and/or the minority rights or manifestation of religion/belief rights). Public health advice is that the Level Three measures, and therefore the restrictions imposed by the order, are necessary to prevent the spread of COVID-19. The measures have been tailored to allow businesses, services, and schools to operate to the greatest extent that they can, without significant contact with the public and the accompanying risk of transmission. Additional exceptions and exclusions to the requirement to stay at home allow people to move outside their homes to access services they need (beyond those simply providing the necessities of life), obtain fresh air and exercise, and have further contact with others, including for one-off life events; all assessed within the necessary public health framework and appropriately balanced against risk to public health. This demonstrates a proportionate and lawful response, which allows for movement and association and activities that have a sufficiently low risk of contact and transmission of the virus.
- 88 I would have concluded also that allowing small gatherings for commonly held religious services (which would need definition) could be justified under the Bill of Rights Act at Alert Level 3, if for a short period of time. However, that has not been necessary because the policy intention at Alert Level 3 is to confine permitted small gatherings to big life moments (such as funerals) which could not wait or be done online and to limit social gatherings which can lead to clusters of the virus.
- 89 Any prima facie discrimination that may potentially be established would be indirect. While indirect discrimination turns very much on its facts, we anticipate it would be justified, given the strong public health imperative against which the discrimination would be analysed.
- 90 Several rights affirmed in the International Covenant on Economic, Social and Cultural Rights may also be engaged. The limitations on these rights can be justified for the same reasons put forward above. The Covenant rights engaged include:
- 90.1. The right to work, as a significant number of people are unable to engage in their normal employment (article 6).
- 90.2. The right to the highest attainable standard of physical and mental health (article 12), for example through limitations on access to elective procedures and other health care not directly related to Covid-19 (although article 12 also requires states to prevent, treat and control epidemic illnesses, and so also provides some basis for the measures in the order under section 70).
- 91 The relevant departments will keep all restrictive measures under review to ensure they remain necessary and are implemented in a way that is consistent with NZBORA. This will be part of the inter-agency process, led by the Solicitor-General. This will assist with making sure the exercise of powers remains demonstrably justified in the circumstances and proportionate to the threat posed by COVID-19.

Consultation

- 92 This paper was prepared by Crown Law officials in consultation with the Ministry of Health, New Zealand Police and the National Emergency Management Agency. The following agencies were consulted: Ministry of Education; Ministry for the Environment; Ministry of Transport; Ministry of Foreign Affairs and Trade; Ministry of Business, Innovation and Employment; Department of Prime Minister and Cabinet; National Crisis Management Centre; the Treasury; Ministry for Primary Industries;

Ministry for Culture and Heritage; Ministry of Housing and Urban Development; Ministry of Justice; Ministry of Social Development; Oranga Tamariki- Ministry for Children; New Zealand Customs Service; Department of Corrections, Department of Internal Affairs; WorkSafe.

- 93 The Commissioner for Disability Rights was also consulted on this paper. As she noted, her comments raised a number of concerns beyond the scope of this paper. I will refer the Commissioner's letter to the Ministry for Disability Issues and to AOG officials considering the implementation of Alert Level 2.

Communications

- 94 The Prime Minister will communicate the decision made to transition to Alert Level 3.

Proactive Release

- 95 I intend to release this paper as soon as it is considered by Cabinet.

Recommendations

The Attorney-General recommends that the Committee:

- 1 **note** that the COVID-19 Ministerial Group directed Crown Law, in consultation with Health, Police and NEMA, to report back to CVD on 21 April 2020 on the authorisations and powers that will be or have been put in place to give effect to the decision of Cabinet on 20 April to remain at Level 4 or move New Zealand to another level;
- 2 **note** Cabinet's decision on 20 April 2020 that New Zealand will move to Alert Level 3 for a minimum of two weeks effective from 11.59pm on 27 April 2020;
- 3 **note** that implementation of Alert Level 3 rests upon a suite of powers and authorisations under the Civil Defence Emergency Management Act 2002, the Epidemic Preparedness Act 2006 and the Health Act 1956 in combination with other regulatory regimes such as the Health and Safety at Work Act 2015;
- 4 **note** that an order under section 70 of the Health Act 1956 is the primary mechanism for imposing restrictions consistent with the agreed Alert Level 3 measures discussed by Cabinet. The order must be issued by the Medical Officer(s) of Health based on the public health evidence available to them when making the order;
- 5 **note** that on 21 April 2020 the Director-General of Health, acting as a Medical Officer of Health, amended the existing orders under section 70 as needed to extend Alert Level 4 and enable maintenance activities and preparation for Alert Level 3;
- 6 **note** that officials have prepared a new draft section 70 order for consideration of a Medical Officer of Health based on the detailed tables published on 16 April 2020 on [covid19.govt.nz](https://www.covid19.govt.nz);
- 7 **note** that some or all of the existing section 70 orders may be revoked by a Medical Officer of Health if the new draft order is made;
- 8 **note** that the section 70 order for Alert Level 3 may be amended by a Medical Officer of Health if needed to accommodate unforeseen details or practical matters of implementation;

- 9 **direct** that AOG officials report to CVD on 23 April 2020 on any legislative change to implement Alert Level 2 and any legislative change needed to implement additional infringement notice and fees under the Health and Safety at Work Act 2015.

Authorised for lodgement

Hon David Parker

Attorney-General

Released by the Attorney-General

Appendix One- Table showing how Alert Level 3 measures are implemented

Implementation may vary in the final published order.

	<i>Level 3 Setting published on COVID-19 website as at 16 April 2020</i>	<i>Implementation</i>
<i>Public Health Measures</i>	<p>People are to keep 2 metres apart outside home where possible (apart from with people within their extended bubble).</p> <p>This requirement does not apply to emergency and frontline public services (e.g. healthcare).</p> <p>In a controlled environment such as a workplace, 1 metre distancing is required.</p>	<p>Draft s 70 order requires all persons to maintain “physical distancing” except from fellow residents (including extended bubble arrangements) and to access “permitted contact services” (e.g. healthcare). Added “extended bubble” concept.</p> <p>“Physical distancing” defined as 1 metre for particular environments.</p>
<i>Personal Movement, Isolation and Quarantine Requirements</i>	<p>Anyone who feels unwell must immediately self-isolate from others in their extended bubble.</p>	<i>Voluntary Action</i>
	<p>People at higher-risk of severe illness from COVID-19 (e.g. those with underlying medical conditions, especially if not well-controlled, and the elderly) are encouraged to take additional precautions when leaving home. They may work, if they agree with their employer that they can do so safely.</p>	<i>Voluntary Action</i>
	<p>People are to stay at home, other than movement for:</p> <ul style="list-style-type: none"> (a) accessing local services and businesses, (b) going to work and school (only for those who have to), (c) low-risk recreation in a local area, (d) shared and extended bubble arrangements, (e) emergencies and giving effect to court orders, (f) travelling to permitted gatherings, (g) relocating a home or business, 	<p>Draft s 70 order requires all persons to be isolated by remaining at their current residence except for “essential personal movement” as defined.</p> <p>Recreation is limited to outdoor activity in the local area that does not infringe physical distancing or non-congregation requirements and does not involve activities of a kind with exposure to danger.</p> <p>The order permits a framework to be developed and published by the Director-General for “authorised travel” in limited circumstances.</p> <p>The section 70(1)(f) order of 9 April 2020 (quarantining of new</p>

	<ul style="list-style-type: none"> (h) medical reasons, (i) those who have an exemption to travel, and (j) foreign nationals leaving New Zealand, New Zealanders returning home, and arrivals (after 14 days' isolation/quarantine at port of arrival). 	arrivals) will remain in place.
<i>Travel and transport</i>	<p>Avoid mass transport if sick, awaiting a result from a COVID-19 test, or required/recommended to self-isolate.</p> <p>Public transport should be avoided at peak times unless travelling for school or work.</p>	<i>Voluntary Action</i>
	No restrictions on freight.	Nothing needed in the order.
	<p>Travel must be within one's region only for the above movement except for:</p> <ul style="list-style-type: none"> (a) going to work or school (only in the neighbouring region), (b) shared bubble arrangements, (c) relocating a home or business, (d) travel for medical reasons, (e) emergencies and giving effect to court orders, (f) those who have an exemption to travel on compassionate grounds, (g) foreign nationals leaving New Zealand, (h) New Zealanders resident in the Realm returning home, and (i) New Zealanders returning home after 14 days' isolation/quarantine at the port of arrival. <p>All other travel is not allowed.</p>	<p>Travel to access services or businesses, or attend a controlled gathering, is only permitted within the same or adjacent region in the draft section 70 order.</p> <p>Shared bubble arrangement only includes those within the same or adjacent regions (other than for shared custody arrangements).</p>
<i>Gatherings</i>	Gatherings of up to 10 people are allowed for wedding services, funerals	These are defined as "controlled gatherings" and are limited to 10

	<p>and tangihanga. Wedding receptions and other celebrations are not allowed.</p> <p>Workplaces, education facilities and public transport are not considered gatherings.</p>	<p>people at any one time for funeral service, tangihanga, and weddings/civil union services only.</p>
	<p>Consumption of food and drink is not permitted.</p>	<p>Included in the draft section 70 order.</p>
	<p>All gatherings must record attendees to ensure contact tracing can be conducted if necessary.</p> <p>Physical distancing must be maintained, and infection prevention and control requirements must be met.</p> <p>Those with COVID-19 symptoms or who need to be in isolation/quarantine for any reason are not permitted to attend.</p>	<p>“Controlled venues” may hold “controlled gatherings” if sufficient systems and processes are in place to ensure physical distancing and contact tracing and to prevent high risk persons from attending.</p> <p>The physical distancing requirement is captured in the draft section 70 order.</p> <p><i>Voluntary action is also required from those who may have COVID-19 symptoms.</i></p>
<i>Workplaces</i>	<p>People are required to work from home unless that is not possible. Workplaces can only open if workers cannot work from home.</p>	<p><i>Voluntary action and public messaging required to encourage working from home where possible.</i></p>
	<p>Business premises should remain closed where they cannot operate safely. “Operating safely” means:</p> <ul style="list-style-type: none"> (a) complying with Alert Level 3 settings, (b) meeting appropriate public health requirements for their workplace, including for workers (e.g. putting up physical barriers), and (c) fulfilling all other health and safety obligations. <p>Business must be able to trade without physical contact with customers (e.g. through phone/online orders, delivery, pick-up and drive-through).</p>	<p>Closure of premises except venues, businesses, services or educational entities that have control measures in place that do not permit members of the public to enter the premises, and systems and processes in place to ensure physical distancing can be maintained and contact tracing is supported.</p> <p>Closure does not apply to premises with exceptions in s 70(1) of the Health Act 1956 (e.g., courts).</p>
	<p>Businesses cannot offer services that involve close personal contact, unless they provide an essential service, or it is an emergency or critical situation.</p> <p>Supermarkets, dairies and petrol stations can have customers on their</p>	<p>A specific definition will cover these few businesses and services.</p> <p>These must have sufficient systems and processes to ensure physical distancing to the extent</p>

	premises.	that is reasonably practicable taking into account the nature of the business or service and have other risk mitigations in place (e.g., Perspex barriers at checkouts).
<i>Health and Disability Care Services</i>	<p>Hospitals operate in line with the National Hospital Response Framework.</p> <p>Primary care services are open (including dental and allied health) and use virtual, non-contact consultations where possible.</p> <p>Residential facilities remain open with strict visitor policies. In-home visiting is required for priority populations.</p> <p>Pharmacies remain open.</p>	These services will be included in a defined category, requiring physical distancing to the extent that it is reasonably practicable, taking into account the nature of the service.
<i>Education</i>	<p>Early learning centres and schools are open for children up to Year 10, with appropriate health measures in place.</p> <ul style="list-style-type: none"> • Early learning centres will be open to provide childcare for parents and caregivers who need to send their children to ECE and school. Children will not be able to attend playcentres and play groups. Home-based care, education and supervision of young children can resume to the maximum of 4 licenced children including the educator's children if public health control measures can be implemented. • Primary and intermediate schools are open. Secondary schools are open for young people in Years 9 and 10 who may require supervision. • Tertiary education facilities are open for limited activities involving small groups (up to 10 people), and with distance learning provision for others. <p>Educational facilities connected to a confirmed or probable case of COVID-</p>	<p>“Controlled educational entities” to restrict students’ attendance to years 1 to 10 (for schools) and tertiary education facilities.</p> <p>The draft section 70 order requires them to have sufficient systems and processes to do the following:</p> <ul style="list-style-type: none"> • Initially the number of children and young people must be limited to 10 in a bubble, increasing to 20 when all processes are running smoothly. There can be multiple bubbles but they cannot mix. • Facilities/entities must ensure that the specific requirements set by public health in each education setting are adhered to. • Facilities/entities must support contact tracing of anyone who uses or accesses its premises. <p>The messaging for parents and caregivers that if they can keep</p>

	<p>19 must close on an individual or group basis for 72 hours to allow contact tracing, and then potentially for a further 14 days.</p>	<p>their children and young people at home they should do so. Parents and caregivers who need to send their children and young people to ECE or school can do so.</p>
	<p>If there is a parent or caregiver available to look after children at home and school children have online access, children and young people are encouraged to continue distance learning at home.</p>	<p><i>Voluntary action and public messaging to encourage distance learning where possible.</i></p>
	<p>All young people in Years 11–13 learn from home.</p>	<p>Covered by the draft section 70 order</p>
<p><i>Public Venues</i></p>	<p>Public venues closed (e.g. museums, cinemas, food courts, gyms, pools, amusement parks, playgrounds, farmers' markets).</p> <p>Public open spaces (e.g. parks) may open, but people need to maintain physical distancing outside their bubbles.</p>	<p>Draft section 70 order states that premises that are not a permitted contact business or service must be closed to the public.</p> <p>The physical distancing requirement remains for all persons.</p>

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