

Office of the Attorney-General

Chair, Cabinet Legislation Committee

Continuing the COVID-19 Public Health Response Act 2020

Proposal

1. This paper seeks Cabinet agreement to seek a House resolution to continue the COVID-19 Public Health Response Act 2020 (the Act).

Relation to government priorities

2. This paper relates to the Government's response to COVID-19.

Resolution of the House of Representatives needed to continue the Act

3. The Act will automatically repeal at the end of 11 August 2020 unless before that the House of Representatives (the House) passes a resolution to continue it (section 3(1) of the Act).
4. Cabinet Min CAB-20-Min-0270 records that the Attorney in consultation with the Leader of House and the Minister of Health will consider whether there is a need to continue the Act.
5. This paper sets out the reasons why the Act should be continued.
6. In summary, I recommend a resolution be sought to continue the Act before the House rises on 6 August 2020 for the election. This will retain the fit for purpose mechanisms set out in the Act for responding to and managing the risks of COVID-19.
7. A resolution will continue the Act for 90 days unless the House specifies any other period. Due to the election I recommend a resolution be sought for a period ending on 1 December 2020 or the tenth sitting day following the first meeting of Parliament after the 2020 general election, whichever is the later, to provide sufficient time for the election to occur and for a new government to be formed.

Need for Act to support the Government's response to COVID-19

8. The Act provides the legislative framework for the Government's response to COVID-19. It is intended to provide a fit-for-purpose legal framework for responding to COVID-19 at all alert levels.
9. The explanatory note to the COVID-19 Public Health Response Bill noted the intent to establish a fit-for-purpose legal framework for managing the unprecedented circumstances of the COVID-19 epidemic in a co-ordinated and orderly way, even if there is no longer a state of national emergency. It creates a specific legal framework for responding to COVID-19 over the next 2 years or until COVID-19 is sooner brought under control. It notes the Bill (now Act) establishes decision-making processes that are more modern and consistent with

recommended practice. The Act also provides enforcement powers which are proportionate.

10. The Act was also created to take account of the characteristics of COVID-19 such as its contagious nature and potential for asymptomatic transmission, which create the risk of spread and a need to impose restrictions at an aggregate as well as an individual level. These factors which lead to the creation of specific legislation still apply.
11. At the current Alert Level 1, the following orders made under the Act are currently in force:
 - a. COVID-19 Public Health Response (Air Border) Order 2020
 - b. COVID-19 Public Health Response (Maritime Border) Order 2020
12. These orders put in place the measures needed to control the border, including testing, isolation, and quarantining, to minimise the risk of another outbreak of COVID-19 in New Zealand. This includes the current quarantining that is occurring for new arrivals. The measures in these orders can only continue to apply (and be updated) while the Act continues.
13. The COVID-19 pandemic continues to affect the global community. Without border measures New Zealand will not be able to prevent another outbreak. I therefore recommend that a resolution be sought from the House to continue the Act to enable these measures to continue to be kept in place.

Need for Act in the event of a return to higher alert levels

14. In the event there is another outbreak of COVID-19 in New Zealand there may be a need to return to higher alert levels.
15. The Act provides the legislative framework for the Government's response to COVID-19. It is intended to provide a fit-for-purpose legal framework for responding to COVID-19. It replaced the framework that was previously used at Alert Level 3 and 4, the Health Act 1956.
16. The existing mechanisms in the Health Act 1956 were unsuited to responding to COVID-19 at Alert Level 2 or lower. In particular, more nuanced controls on movement and gatherings (that do not rely on the complete closure of premises or places, or as an adjunct to widespread isolation and quarantine) were not available without legal risk. The Act addressed this gap, and provided a legal framework that was suitable for responding to COVID-19 at all alert levels.
17. Legal academics and other commentators have commended the Act for addressing perceived weaknesses in the Health Act 1956 framework.
18. The Act modernised the legal framework in a number of ways:
 - Establishing the Minister of Health as the primary decision-maker. This is more consistent with existing legislative conventions. The scale and wide-ranging implications (health, economic and social) of the decision-making lend themselves to Ministerial-level accountability, where a wider range of Ministerial portfolios can have input. This positions Cabinet and the Director-General of Health in a more conventional decision-making relationship.

- Making more explicit certain decision-making criteria, and in particular:
 - Requiring orders to be proportionate.
 - Ensuring that a precautionary approach can be taken when determining what measures can be put in place. This is important because COVID-19 is frequently asymptomatic¹ and spreads rapidly.
 - Making explicit that social and economic factors can be considered alongside health factors, in determining measures.
 - Creating an infringement regime, as infringement notices can be a more proportionate way to respond to certain offences rather than relying mainly on imprisonable offences, and are complementary to education and guidance, warnings and prosecutions as a graduated response to compliance.
 - Introducing new safeguards on the exercise of the powers, including:
 - making clear that orders made using the new powers are legislative and are disallowable by Parliament;
 - requiring orders to be published on a publically accessible internet site and in the Gazette;
 - providing orders made by the Minister are revoked if no resolution of the House of Representatives is passed to approve the order within a certain period; and
 - requiring orders to be kept under review.
19. If the Act is not continued then there will be a gap in measures that could be applied at Alert Level 2 or lower, and higher alert levels will require measures to be made again under the Health Act 1956 framework, or a new Act will need to be enacted to provide for measures.
20. Despite New Zealand's success in eliminating community spread of COVID-19, the pandemic continues to affect the global community. While this continues, and unless a medical or other resolution is achieved, New Zealand remains at risk of another domestic outbreak.
21. I therefore recommend that a resolution be sought from the House to continue the Act to also enable the framework that the Act provides to be available to be used in the event there is a need to return to higher alert levels.

Current orders must be approved

22. The two current orders made under the Act must also be approved by the House of Representatives in accordance with section 16 of the Act. The Minister of Health will provide a separate paper on this matter.

FEC inquiry on the operation of the COVID-19 Public Health Response Act

23. The Finance and Expenditure Committee (FEC) reported back its findings on its inquiry into the operation of the Act on 27 July 2020.
24. A copy of the FEC's final report is **attached**.

¹ Asymptomatic includes pre-symptomatic: most people who develop COVID-19 symptoms can infect others for a few days before they display symptoms.

Financial Implications

25. There are no direct financial implications arising from the proposal in this paper.

Legislative Implications

26. A resolution by the House to continue the Act for 90 days or any other period specified by the resolution. This means that existing orders made under the Act can also continue, and new orders can be made.

Impact Analysis

27. The Treasury has determined that the regulatory proposals in this paper are exempt from the requirement to provide a Regulatory Impact Statement (RIS) because they are intended to alleviate the short term impacts of the declared emergency event of the COVID-19 outbreak. These proposals are required urgently to be effective, making a complete, robust and timely impact analysis unfeasible. This measure should be included in the Post Implementation Assessment which is being considered by MBIE for all recent border management proposals.

Population Implications

28. Measures or the lack of measures put in place under the continued Act have the potential to disproportionately affect vulnerable populations including the elderly, Māori, Pacifica, and ethnic communities as well as groups that are more at risk of severe illness from COVID-19 due to age or underlying health conditions.

Human Rights

29. Measures under the continued Act can lead to significant limitations on the fundamental human rights affirmed in the New Zealand Bill of Rights Act 1990, however measures must both be proportionate and comply with that Act.

Consultation

30. The following agencies were consulted on the proposal in this paper: the Ministry of Health, Ministry of Justice, Crown Law, the Parliamentary Counsel Office, the Department of the Prime Minister and Cabinet, National Emergency Management Agency, New Zealand Police, the Treasury.

Communications

31. None.

Proactive Release

32. This paper will be proactively released following Cabinet consideration. Any redactions made will be consistent with the Official Information Act 1982.

Recommendations

The Attorney-General recommends that the Committee:

- 1 **Note** that the COVID-19 Public Health Response Act 2020 (the Act) will automatically repeal at the end of 11 August 2020 unless before that the House of Representatives (the House) passes a resolution to continue it.

I N C O N F I D E N C E

- 2 **Note** that the Act sets out a fit for purpose legal framework which both enables measures to manage the response to COVID-19 at all Alert Levels and enables a set of safeguards for decision-making.
- 3 **Note** two orders made under the Act are currently in force to control the borders to prevent the outbreak of COVID-19 in New Zealand and these orders can only continue while the Act continues.
- 4 **Note** that the COVID-19 pandemic continues to be a threat internationally and the border controls are necessary to protect New Zealand from another outbreak.
- 5 **Note** that there may be a need to return to higher alert levels and that the Act's fit-for-purpose legal framework can only be used if the Act continues.
- 6 **Note** that the two current orders made under the Act must also be approved by the House of Representatives in accordance with section 16 of the Act and this matter will be progressed separately.
- 7 **Note** the FEC reported back its findings on its inquiry into the operation of the Act on 27 July 2020. The FEC's final report is attached.
- 8 **Agree** that for the above reasons I seek a resolution in the House to continue the Act until 1 December 2020 or the tenth sitting day following the first meeting of Parliament after the 2020 general election, whichever is the later, to cover the election period.

Authorised for lodgement

Hon David Parker
Attorney-General