

The Government's COVID-19 response: A new law for Alert Level 2

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This week is another busy week for the Government's COVID-19 response, starting with Monday's announcement that New Zealand will be moving to Alert Level 2 on Thursday 14 May.

The decisions to move New Zealand to Alert Level 4 on 26 March, and to Alert Level 3 on 27 April, were given effect to by the Director-General of Health Ashley Bloomfield issuing orders using the special powers set out in [section 70](#) of the Health Act 1956. Our previous legal updates have summarised the effect of the key orders he has made to date, including our most recent update available [here](#).

There have recently been challenges to the legality of those orders, including most notably through [judicial review proceedings](#) issued by Andrew Borrowdale against the Director-General. Those proceedings allege that three of the orders made by the Director-General are *ultra vires* (that is, they go further than what is permitted by the relevant Health Act powers), and should therefore be declared invalid by the courts.

Attorney-General David Parker has said that the government considers that the exercise of the Health Act powers to date has been lawful. However, on Tuesday the government introduced the COVID-19 Public Health Response Bill, which puts in place a new legal framework for the government's ongoing response to COVID-19. The Bill was passed (with National and ACT voting against it) as the [COVID-19 Public Health Response Act 2020](#) late yesterday, just hours before New Zealand moved to Alert Level 2.

In this update, we summarise the key differences between how the government and officials' response to COVID-19 has been implemented to date under the Health Act, and the new legal framework for responding to COVID-19 under the new Act.

A new power to make orders

Section 70 of the Health Act sets out a range of powers that medical officers of health can exercise in order to manage the spread of infectious diseases such as COVID-19. Key powers in section 70 that have been exercised in relation to COVID-19 include the power to:

- Require persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated and quarantined
- The power to close premises and forbid people from congregating in outdoor areas of amusement or recreation.

The new Act sets out two types of orders that can be made to manage COVID-19, which are broader than the powers that can be exercised under section 70. Specifically, [a section 11 order](#) under the Act can require:

- Persons to take any actions or comply with any measures that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19 (or to refrain from taking any actions that contribute (or are likely to contribute) to that risk)
- Actions to be taken, or measures to be complied with, or prohibitions imposed, in relation to any places, premises, crafts, vehicles, animals or other things to prevent the risk of the outbreak or spread of COVID-19.

Section 11 includes examples of the sorts of orders that could be made, which use language that will be familiar to all of us from the daily COVID-19 briefings. For example, section 11 orders can require people to stay in a specified place, stay physically distant from others in any specified way, refrain from travelling, refrain from carrying out specified activities (eg, business activities that require close personal contact), be isolated or quarantined, not participate in gatherings, report for medical examinations and tests, and provide contact tracing information. Orders that can be made in respect of places include orders that places be closed or opened only if specified measures are complied with, prohibiting gatherings in those places, and prohibiting entry into places unless specified measures are complied with.

The new Act also expressly provides that section 11 orders can be given to specified classes of people or to all people in New Zealand. The inclusion of this provision responds to one of the grounds on which the Health Act orders have been challenged, that the Health Act does not go so far as to permit orders to be given to all New Zealanders.

The first section 11 order came into force at 12.01am on 14 May, just hours after the Act passed into law. A copy is available [here](#). It is this order that formalises the Alert Level 2 requirements that have been described the Government over recent days. Those requirements are set out in more detail [here](#).

Who makes orders, and who can provide advice on orders?

As set out above, the key Health Act orders that put in place Alert Level 4 and then Alert Level 3 were made by the Director-General exercising the 'special powers' set out in section 70 of the Health Act as medical officer of health for all of New Zealand.

In contrast, the new Act provides that section 11 orders can be made by the Minister of Health, or (on a more limited basis) the Director-General.

As with the exercise of 'special powers' under section 70 of the Health Act, a section 11 order can be made only if:

- An epidemic notice has been issued by the Prime Minister under the Epidemic Preparedness Act 2006 (which it has)
- A state of emergency (or a transition period) is in force under the Civil Defence Emergency Management Act 2002 (New Zealand is currently in a transition period, following the expiry of the previously-declared state of emergency on 13 May)
- Otherwise authorised by the Prime Minister (under the new Act) or the Minister (under the Health Act).

Additionally, the new Act specifically requires that, before making a section 11 order, the Minister must take into account advice from a range of government ministers, as well as the Director-General. Specifically, the Minister:

- Must have regard to the advice of the Director-General about the risks of the outbreak or spread of COVID-19 and measures (whether voluntary or enforceable) to respond to those risks
- Must have regard to Government decisions about the level of public health measures appropriate to respond to those risks, which can take into account social, economic, or other factors
- Must have consulted the Prime Minister, Minister of Justice, and any other Ministers that the Minister of Health sees fit.

The Director-General can make section 11 orders only in respect of individual territorial authority districts (rather than the whole country), and only if the Director-General considers that an order is urgently needed to prevent or contain the outbreak or spread of COVID-19 and is the most appropriate way of addressing those matters at the time.

That indicates that the orders moving New Zealand to Alert Level 2 and then Alert Level 1 will be made by the Minister of Health in consultation with other government Ministers, rather than the Director-General, who may be more likely to issue orders if necessary to respond to any new clusters that might emerge. This change is perhaps an acknowledgement of the criticism that controls with such broad scope should be exercised by a Minister, not an official.

Enforcement powers

Section 71A of the Health Act gives the Police a range of powers to assist medical officers of health exercising special powers under section 70 in relation to COVID-19. Those powers include the power to enter and inspect any land, building, aircraft, ship, or vehicle.

The new Act has more detailed enforcement provisions, in that it empowers the Director-General to appoint 'enforcement officers' to exercise enforcement powers under the Act. 'Enforcement officers' include Police, but can also be suitably qualified and trained persons who are employed or engaged by the Crown or a Crown entity. Enforcement officers' powers under the new Act include the power to enter any land, building, aircraft, ship, or vehicle if they have reasonable grounds to believe that a section 11 order is not being complied with – including in some cases without a warrant.

The issue of the Act empowering Police to enter homes (and other premises) without a warrant caused considerable controversy during Parliamentary debate on the new Act. However, it is interesting to note that the Health Act already grants constables assisting medical officers of health the power of warrantless entry into any building. Those specific enforcement powers were inserted into the Act relatively recently (in 2006).

The Act provides that enforcement officers can:

- Direct that people stop activities that are in breach of a section 11 order, or take action to limit their non-compliance
- Require people to provide identifying information
- Direct that businesses operating in contravention of a section 11 order close.

Both the Health Act and new Act include offence provisions, including that persons who fail to comply with orders and directions can be imprisoned for up to six months and fined up to \$4,000. However, the new Act also provides that section 11 orders can specify that certain things constitute infringement offences, and that enforcement officers may issue infringement notices and be liable to pay an infringement fee of \$300 or a fine of up to \$1,000.

Road blocks

There have been a number of media reports of communities setting up 'road blocks' to restrict or prohibit travel in and out of certain areas while the Alert Level 4 lockdown was in place. The Health Act does not include provisions that specifically deal with road closures, however the Civil Defence Emergency Management Act 2002 provides for the total or partial prohibition or restriction of public access to roads or public places while a state of emergency is in force.

The new Act anticipates that a section 11 order might also provide for such restrictions. Similar to the Civil Defence Emergency Management Act, the new Act provides that a Police constable (or an enforcement officer acting under the constable's authority) may enforce such orders by restricting access to roads or places. However, only a Police constable (and not persons acting under their authority) can stop vehicles if enabled by a section 11 order.

Checks and balances

The Health Act does not generally specify requirements as to how a medical officer of health exercising special powers under section 70 is to give notice of the exercise of such powers (with some exceptions). Nor does it place time limits on the exercise of special powers.

In contrast, the new Act requires that section 11 orders:

- Be in writing
- Be published on the internet and notified in the *Gazette* at least 48 hours before being made unless the order has to come into effect urgently (noting that it is specifically contemplated that the first section 11 order made under the Act will be made on this urgent basis)
- Expire 1 month after being made (in the case of orders made by the Director-General) (though they can be extended, or revoked before the 1 month expiry)
- Be kept under review by the Minister or Director-General
- Must be presented to Parliament as soon as practicable after being made, and will be revoked if not approved by Parliament within a specified period.

The Ministry of Justice has determined that the Bill is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights 1990 because the various restrictions imposed by the Bill are proportional to the significant risk that COVID-19 poses to public health and wellbeing. The Ministry of Justice also found that the Bill has sufficient safeguards to ensure that the powers are used transparently, no more than necessary, and subject to extensive public and parliamentary scrutiny.

The ability to challenge section 11 orders

The exercise by the Director-General of powers under the Health Act has already been challenged by way of unsuccessful habeas corpus applications (*A v Ardern* and *B v Ardern*), and through a successful judicial review of a decision by Ministry of Health officials to refuse to allow an individual to cut short his mandatory 14-day isolation period to see his dying father (*Christiansen v Director-General*). The judicial review proceedings brought by Andrew Borrowdale (discussed at the beginning of this article) are yet to be heard.

Section 11 orders can still be challenged in the same way, however, the new Act limits the basis on which orders can be ruled invalid by the Courts. In particular, the Act provides that orders are not invalid if they are inconsistent with the Health Act or other relevant Acts (except that the New Zealand Bill of Rights Act 1990 still applies), or because the order confers a discretion on, or allows a matter to be determined by, any person (including someone other than the Minister or Director-General).

The new Act is not retrospective

The Act is not intended to operate retrospectively. The explanatory note to the Bill indicates that the Act "does not provide retrospective validation of actions already taken on previous orders". Schedule 1 of the Act, which contains various transitional provisions, makes that clear. Clause 3 of that schedule provides that "nothing in this Act affects any proceedings commenced before the commencement of this Act, and those proceedings must be decided as if this Act had not been enacted".

The Act does have some potential application to the Health Act orders made on 31 March and 9 April, which require persons arriving in New Zealand to go into quarantine. Those orders could be replaced by a new section 11 order. However, the Act also enables these orders to be amended, extended, or revoked by a section 11 order (rather than under the Health Act). However, even if this is done, the Act expressly allows legal challenges against the making of those Health Act orders.

If the courts invalidate any of the previous Health Act orders, then Parliament may pass legislation to declare those orders valid. It is not without precedent for Parliament to do so. However, it often raises constitutional issues when Parliament takes that path. In the circumstances of this pandemic, and where the vast majority of New Zealand would have understood those orders to be legally effective, any remedial legislation may ultimately be justifiable. Ultimately, it would be best if it were not needed at all.

Final thoughts

While the Health Act remains in force alongside the new Act, we expect that the Government will rely on the new Act as the legal basis for New Zealand's COVID-19 response from now on, including if we need to move back into Alert Levels 3 or 4. However, it does not provide a legal framework for the management of pandemics more generally, as the Act only enables the exercise of powers to respond to COVID-19, and will be automatically repealed (the repeal could occur as early as 90 days after 13 May, or at latest, two years after its commencement).

We can expect, at some point in the future, that there will be a wide-ranging review of the powers available to the government and public health officials to manage pandemics. It may be that aspects of the new Act will be reflected in new public health legislation.

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