

Office of the Minister for Covid-19 Response
Chair, Cabinet Legislation Committee

Government Response to the Report of the Regulations Review Committee examination of orders made under section 11 of the COVID-19 Public Health Response Act 2020 between 18 and 31 August 2021

Proposal

- 1 This paper seeks approval of the government's response to the Regulations Review Committee's examination of orders made under section 11 of the COVID-19 Public Health Response Act 2020 (the Act) between 18 and 31 August 2021.

Background

- 2 The Act gives the Minister for COVID-19 Response broad powers to make orders that require people to do or not do things for the purpose of limiting the outbreak or spread of COVID-19.
- 3 Orders made under the Act may be used to impose isolation, quarantine, and physical distancing requirements, require premises to be closed, and restrict entry into New Zealand ports, among other things.

The Regulations Review Committee findings

- 4 The Committee examined seven orders made under section 11 of the Act. Of the seven orders, the Committee made one recommendation:
 - 4.1 That the Government amend any current COVID-19 order, and draft any future COVID-19 order, that grants powers to the Director-General of Health to make class exemptions so that those exemptions are described as disallowable instruments that must be presented to the House, and that the Government require those class exemptions to include the reasons for them being made.

Comment on the Regulations Review Committee findings and recommendations

- 5 The recommendation set out above comprises three issues.

Disallowable instruments stated as class exemptions

- 6 On the first issue relating to disallowable instruments, even though the COVID-19 orders do not include an express statement that the class exemptions are disallowable instruments, s9(2)(h) [REDACTED] Nonetheless, this will be resolved when the Legislation Act

(Sub-delegated Secondary Legislation) Regulations 2021 comes into force on 28 October 2021 because the Regulations will declare the exemptions to be secondary legislation, with the effect of making the exemptions disallowable instruments.

- 7 All of the COVID-19 orders will be amended by the Legislation Act (Sub-delegated Secondary Legislation) Regulations 2021 to declare the exemptions to be secondary legislation. s9(2)(h)

- 8 The Government considers this to be a significant improvement as it makes the position clear as to whether or not the exemptions are disallowable (without reference to the “significant legislative effect” test). This change took effect from when the Legislation Act 2019 commenced, on 28 October 2021.

Requirement to present class exemptions to the House

- 9 The second issue relates to the requirement to present class exemptions to the House. Any COVID-19 Order that is made after 28 October 2021 will state that exemptions are secondary legislation. s9(2)(h)

Accordingly, the requirement for class exemptions to be presented to the House will be phased in over time as COVID-19 Orders are made or replaced after 28 October 2021. It is open to the Minister for COVID-19 Response to present such exemptions to the House.

Class exemptions should include reasons for them being made

- 10 The third issue relates to the requirement that class exemptions include reasons for them being made.
- 11 Consistent with the approach to be taken in relation to presentation of exemptions, the Government will consider phasing in a requirement of this nature in COVID-19 Orders made or replaced after 28 October 2021.
- 12 The Government response to the Report of the Regulations Review Committee’s on Examination of COVID-19 orders presented between 18 and 31 August 2021 must be presented to the House by 3 December 2021.

Consultation

- 13 The following agencies have been consulted: Parliamentary Counsel’s Office; and the Ministry of Health.

Financial implications

- 14 Note that there are no financial implications related to this Cabinet paper.

Proactive Release

- 15 The Minister for COVID-19 Response proposes to release the paper proactively in whole within 30 business days subject to redactions as appropriate under the Official Information Act 1982.

Recommendations

- 16 The Minister for COVID-19 Response recommends that the Cabinet Legislation Committee:
- 16.1 **Note** that on 9 September the Regulations Review Committee presented its report to the House entitled “Examination of COVID-19 orders presented between 18 and 31 August 2021”;
 - 16.2 **Note** that the select committee recommended that the Government amend any current COVID-19 order, and draft any future COVID-19 order, that grants powers to the Director-General of Health to make class exemptions so that those exemptions are described as disallowable instruments that must be presented to the House. The select committee also recommended that the government require those class exemptions to include the reasons for class exemptions being made;
 - 16.3 **Note** the submission of the Minister for COVID-19 Response and in particular his advice that two of the select committee’s issues will be addressed through the Legislation Act (Sub-delegated Secondary Legislation) Regulations;
 - 16.4 **Note** that in relation to the third issue raised by the select committee, the Government will consider phasing in a requirement that class exemptions include reasons for them being made;
 - 16.5 **Approve** the government response, attached to this submission, to the Report of the Regulations Review Committee entitled “Examination of COVID-19 orders presented between 18 and 31 August 2021”;
 - 16.6 **Note** that the government response must be presented to the House by 3 December 2021; and
 - 16.7 **Invite** the Minister for COVID-19 Response to present the government response to the House in accordance with Standing Order 252.

Authorised for lodgement

Hon Chris Hipkins

Minister for COVID-19 Response

**Government Response to
Report of the Regulations Review Committee**

on

**Examination of COVID-19 orders presented between 18 and 31
August 2021:**

- **COVID-19 Public Health Response (Alert Level Requirements)
Order (No 9) 2021**
- **COVID-19 Public Health Response (Alert Level Requirements)
Order (No 9) Amendment Order 2021**
- **COVID-19 Public Health Response (Alert Level Requirements)
Order (No 9) Amendment Order (No 2) 2021**
- **COVID-19 Public Health Response (Alert Level Requirements)
Order (No 9) Amendment Order (No 3) 2021**
- **COVID-19 Public Health Response (Alert Level Requirements)
Order (No 9) Amendment Order (No 4) 2021**
- **COVID-19 Public Health Response (Alert Level Requirements)
Order (No 9) Amendment Order (No 5) 2021**
- **COVID-19 Public Health Response (Alert Level Requirements)
Order (No 10) 2021**

Presented to the House of Representatives

In accordance with Standing Order 256

Proactively Released

Government response to Report of the Regulations Review Committee on seven COVID-19 orders presented between 18 and 31 August 2021

Introduction

- 1 The Government has carefully considered the Regulations Review Committee's report on seven COVID-19 orders presented between 18 and 31 August 2021.
- 2 The Government thanks the Committee for their efforts, and responds to the report in accordance with Standing Order 256.

Recommendation and government response

- 3 **Recommendation:** We recommend that the Government amend any current COVID-19 order, and draft any future COVID-19 order, to require that class exemptions are disallowable instruments that must be presented to the House. We also recommend that the Government require class exemptions to include the reasons for them being made.
- 4 **Response:** The Government thanks the Committee for its recommendation and addresses each of the issues raised in turn.
- 5 The first issue raised relates to the status of class exemptions made under COVID-19 orders as disallowable instruments.
- 6 It has been canvassed already in correspondence with the Committee that under the current position, regardless of whether these exemptions are expressly stated to be disallowable, they nevertheless will be disallowable if they meet the threshold of having "significant legislative effect" under sections 38 and 39 of the Legislation Act 2012.
- 7 However, all of the COVID-19 orders will be amended by the Legislation Act (Sub-delegated Secondary Legislation) Regulations 2021 to declare the exemptions to be secondary legislation. The effect of this will be that all class exemptions made under the COVID-19 orders will be expressly stated to be secondary legislation and accordingly, will be disallowable.
- 8 The Government considers this to be a significant improvement as it makes the position absolutely clear as to whether or not the exemptions are disallowable (without reference to the "significant legislative effect" test). This change will take effect from when the Legislation Act 2019 commences, on 28 October 2021.
- 9 The second issue raised relates to the requirement to present class exemptions to the House.
- 10 As the Committee has noted, the current position is that class exemptions made under COVID-19 Orders are not required to be presented. Due to the

transitional regime under the Legislation Act 2019, that will continue to be the position in relation to any COVID-19 Orders in force as at 28 October 2021.

- 11 Any COVID-19 Order that is made after 28 October 2021 will state that exemptions are secondary legislation. That will mean that the exemptions made under such an Order will be both disallowable *and* required to be presented to the House. Accordingly, the requirement for class exemptions to be presented to the House will be phased in over time as COVID-19 Orders are made or replaced after 28 October 2021.
- 12 The Government considers that this adequately addresses the matter. In particular, the Government does not propose to take action in relation to all COVID-19 Orders in force as at 28 October 2021 in order to add a requirement that class exemptions made under those orders be presented to the House.
- 13 To do so would likely involve dis-applying the transitional regime under the Legislation Act 2019 in relation to this one category of secondary legislation. Such an action would be inconsistent with the approach being taken across the statute book as a whole. For COVID-19 Orders made or replaced before 28 October 2021, the Minister for COVID-19 Response has agreed to present such exemptions to the House.
- 14 The third issue raised relates to the requirement that class exemptions include reasons for them being made.
- 15 The Government acknowledges the Committee's recommendation. Consistent with the approach to be taken in relation to presentation of exemptions (outlined above), the Government will consider phasing in a requirement of this nature in COVID-19 Orders made or replaced after 28 October 2021.

Conclusion

- 16 The Government thanks the Committee for its work.
- 17 In relation to disallowance, from 28 October 2021, all class exemptions made under the COVID-19 orders will be expressly stated to be secondary legislation and accordingly, will be disallowable.
- 18 In relation to presentation, any COVID-19 Order that is made after 28 October 2021 will state that exemptions are secondary legislation. Exemptions made under such an Order will be both disallowable and required to be presented to the House. The requirement for class exemptions to be presented to the House will be phased in over time as COVID-19 Orders are made or replaced after 28 October 2021.
- 19 In relation to a requirement to include reasons, the Government will consider phasing in a requirement of this nature in COVID-19 Orders made or replaced after 28 October 2021.



Cabinet Legislation Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Government Response to the Report of the Regulations Review Committee Examination of COVID-19 Public Health Response Act 2020 Orders

Portfolio **COVID-19 Response**

On 25 November 2021, the Cabinet Legislation Committee:

- 1 **noted** that on 9 September 2021, the Regulations Review Committee presented its report to the House entitled “Examination of COVID-19 orders presented between 18 and 31 August 2021”;
- 2 **noted** that the Committee recommended that the government:
 - 2.1 amend any current COVID-19 order, and draft any future COVID-19 order, that grants powers to the Director-General of Health to make class exemptions so that those exemptions are described as disallowable instruments that must be presented to the House;
 - 2.2 require those class exemptions to include the reasons for class exemptions being made;
- 3 **noted** the submission of the Minister for COVID-19 Response and in particular his advice that two of the select committee’s issues will be addressed through the Legislation Act (Sub-delegated Secondary Legislation) Regulations 2021;
- 4 **noted** that in relation to the third issue raised by the select committee, the government will consider phasing in a requirement that class exemptions include reasons for them being made;
- 5 **approved** the government response, attached to the submission under LEG-21-SUB-0211, to the Report of the Regulations Review Committee entitled “Examination of COVID-19 orders presented between 18 and 31 August 2021”;
- 6 **noted** that the government response must be presented to the House by 3 December 2021;
- 7 **invited** the Minister for COVID-19 Response to present the government response to the House in accordance with Standing Order 252.

Rebecca Davies
Committee Secretary

Attendees: (see over)

Present:

Hon Chris Hipkins (Chair)
Hon David Parker
Hon Poto Williams
Hon Kris Faafoi
Hon Jan Tinetti
Hon Kiri Allan
Hon Dr David Clark
Keiran McNulty, MP (Senior Government Whip)

Officials present from:

Office of the Prime Minister
Officials Committee for LEG

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Cabinet

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Report of the Cabinet Legislation Committee: Period Ended 26 November 2021

On 29 November 2021, Cabinet made the following decisions on the work of the Cabinet Legislation Committee for the period ended 26 November 2021:

[REDACTED]	[REDACTED]	[REDACTED]
LEG-21-MIN-0211	Government Response to the Report of the Regulations Review Committee Examination of COVID-19 Public Health Response Act 2020 Orders Portfolio: COVID-19 Response	CONFIRMED
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

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Michael Webster
Secretary of the Cabinet

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