

#### **Proactive Release**

The following items have been proactively released by the Rt Hon Jacinda Ardern, Prime Minister:

Paper: Law Changes in Response to COVID-19

Minute of Decision: Law Changes in Response to COVID-19

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant section of the Act that would apply has been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

#### **Key to redaction code:**

- 9(2)(f)(iv), to maintain the confidentiality of advice tendered by or to Ministers and officials
- 9(2)(h), to maintain legal professional privilege

© Crown Copyright, Creative Commons Attribution 4.0 International (CC BY 4.0)

Office of the Leader of the House

Chair, Cabinet Business Committee

## LAW CHANGES IN RESPONSE TO COVID-19

#### **Proposal**

- This paper seeks agreement to progressing an Omnibus Bill as soon as possible after the House resumes, to progress the law changes needed to support the response to COVID-19.
- 2 It also recommends assessing whether there is a strong case for a COVID-19 adapted amendment to the Epidemic Preparedness Act 2006 (EPA).

## **Executive Summary**

- Government agencies are continuing to identify matters where law changes are required to manage the response to COVID-19. Cabinet, or Ministers with Power to Act, have already agreed to some of these more significant policy changes (such as changes to insolvency and corporate law intended to help keep businesses afloat).
- There are also a number of more minor changes that have been identified, falling into four categories:
  - 4.1 Deferring new regulatory requirements that would increase burdens or where government or businesses may no longer be ready to start by the planned date;
  - 4.2 Deferring statutory deadlines and other minor exemptions where compliance is not possible or unreasonably burdensome;
  - 4.3 Enabling fast-tracking of legislative powers to mitigate impracticability issues:
  - 4.4 Mitigating problems with legislative compliance due to physical presence requirements and other technological reasons.
- This paper recommends progressing an Omnibus Bill to address all these matters. I recommend that the individual portfolio Ministers are delegated authority to agree to the four categories of more minor changes for inclusion in the Bill. This will enable the Bill to be developed and enacted reasonably quickly, given the urgency of some of the matters. I am not seeking approval for any of the proposals for inclusion in the Omnibus Bill, as the significant policy matters will be, or have been, agreed by Cabinet or Ministers with Power to Act.
- I also recommend we consider whether there is a case for a COVID-19 adapted amendment to the EPA, which may allow greater flexibility and responsiveness as we deal with the uncertainty in responding to COVID-19.

## Background

- The COVID-19 Response (Urgent Management Measures) Act was passed under urgency on 25 March 2020. This included a number of amendments to put in place some urgent and necessary arrangements prior to commencement of Alert Level 4 of the COVID-19 alert system, including to:
  - 7.1 Add District Court judges to the list of those who can change court rules
  - 7.2 Allow Civil Defence Emergency Management (CDEM) groups and local government to meet remotely
  - 7.3 Enact rent and eviction freezes
  - 7.4 Enable the Secretary for Education to issue binding directions to schools.
- On 24 March 2020, the Prime Minister issued an Epidemic Notice under the EPA, which came into force on 25 March 2020. The Epidemic Notice provides for Immediate Modification Orders (IMOs), effectively allowing primary legislation to be amended through an Order in Council, so long as certain statutory tests are met. So far one IMO has been made, and a number are being progressed. A consortia of Crown Law, PCO, DPMC, Cabinet Office and MBIE has developed a centralised process for managing IMOs and has issued guidance to departments.

# Agencies are continuing to identify where law changes are required to manage the response

- The Parliamentary Counsel Office (PCO) has developed a centralised register of issues that agencies are concerned are not possible, or the Crown Law Office has advised are not possible, to address via an IMO, as they either:
  - 9.1 do not meet the current high statutory threshold
  - 9.2 involve significant changes, or
  - 9.3 do not fit within the EPA powers for various technical reasons.
- To date, agencies have logged a number of issues, and issues are continuing to emerge and be raised by stakeholders. Agencies are working in the first instance to address these issues via non-legislative routes or within existing powers.

#### Agencies have identified the need for urgent law change after the lockdown

- Agencies have identified a number of issues where there is a need for reasonably urgent legislative change, which require an immediate response once Parliament resumes.
- The key proposals are of an important remedial nature intended to enable businesses, local government, and others to manage the immediate impacts of the response to COVID-19. Providing flexibility on these issues is likely to facilitate the Government responding to the public health needs of COVID-19

- (for example remaining at Alert Level 4, or moving up and down alert levels), while mitigating any unnecessary and potentially long-term impacts on society.
- However, the proposals do not come (for various reasons) within the scope of the current remedial powers to relax requirements in the EPA.

# I recommend that a COVID-19 Omnibus Bill is progressed as soon as possible after the House resumes

- To enable the wide range of urgent changes to be addressed, I recommend another COVID-19 Omnibus Bill, which would include:
  - 14.1 Any urgent remedial COVID-19 management measures approved, or to be approved, separately by Cabinet or Ministers with Power to Act on COVID-19 matters. These include:
    - 14.1.1 **Insolvency and corporate law changes:** insolvency and corporate law changes agreed by COVID-19 Ministers with Power to Act on 3 April 2020, and any other related changes subsequently agreed to by those Ministers under Recommendation 18 of the 3 April Cabinet minute;

14.1.2	s9(2)(f)(iv)	

- 14.1.3 Any other matters approved by Ministers with Power to Act on COVID-19 matters that can be developed in time for inclusion in the Omnibus Bill.
- 14.2 In addition, agencies have logged a number of more minor management measures that can be grouped into several categories. I recommend that responsible portfolio Ministers be delegated the ability to approve matters for inclusion in the Omnibus Bill that come within the policy parameters for those categories set out below. This will facilitate approvals being obtained, and drafting starting, as soon as possible, so as not to delay the introduction of the Omnibus Bill. I will report back on the use of these delegations.

Deferring the start of new regulatory requirements that would increase burdens or where government or businesses may no longer be ready to start by the planned date

A number of pieces of legislation are due to come in to force over the next few months. In some cases, Alert Level 4 has made it difficult to carry out or prioritise the preparation needed to implement the legislation, or in the current situation the new requirements would increase the burden on already stretched sectors, for example the requirement for retailers to disclose a food's country of origin.

- Amendments of this kind would defer commencement dates in a number of pieces of legislation, including a new regulation that will apply to supermarkets as to country of origin labelling, a new licensing regime for financial benchmark administrators, and potential new regulations for financial advisers.
- 17 I recommend commencement dates or other deadlines for new regulatory requirements be deferred in the Omnibus Bill if the responsible Ministers considers it appropriate due to the unreasonable burden that it would now impose, as a result of COVID-19, to commence on the previously planned date.

# Deferring critical deadlines or providing exemptions in legislation where compliance is not possible or is burdensome

- A range of entities have deadlines and other statutory obligations that cannot be met, either because compliance would contravene the rules under Alert Level 4, or compliance presents an unjustifiable burden against the focus on other COVID-19 related matters. The proposals approved by COVID-19 Ministers on 3 April 2020 in relation to corporate governance legislation are an example.
- I recommend that responsible Ministers be delegated power to approve, for inclusion in the Omnibus Bill, exemptions from requirements (on terms and conditions) if:
  - 19.1 those matters are not significant in policy terms
  - 19.2 an exemption is needed to facilitate the response to COVID-19 or to mitigate the impact on entities or others, and
  - 19.3 the exemption is no more than reasonably necessary to meet the need.

# Enabling fast-tracking of current legislative powers to mitigate impracticality issues

- The response to COVID-19 has created a number of impracticality issues. For example, there is no ability in the Immigration Act 2009 to enable conditions, expiry dates or waivers to be applied to classes of visas it must be done on a case by case basis. This makes it difficult to re-deploy essential workers, and is a huge burden on the immigration system.
- Changes to legislation would involve the fast-tracking of temporary COVID-19 related mitigations to better use current options in legislation. For example, enabling the Commerce Commission to fast-track provisional or straight-forward authorisations of arrangements between competitors (for instance to ensure supply in supermarkets), enable urgent updates of the Responsible Lending Code so as to facilitate access to credit, to enable class use of various immigration powers and to enable the government to suspend immigration visa applications.
- I recommend that responsible Ministers be delegated power to approve, for inclusion in the Omnibus Bill, minor changes to current legislative processes and powers that would enable their quicker use to mitigate issues relating to COVID-19.

# Mitigating problems with legislative compliance due to physical presence requirements and other technological reasons

- As an increasing number of entities are operating remotely in order to comply with Alert Level 4 and reduce the spread of COVID-19, a number of problems have arisen in complying with current process requirements. For example, legislation requires people to be physically present for certain court hearings, or to take an oath or declaration.
- 24 Changes to a range of pieces of legislation would enable compliance more readily through other technological methods (such as online and video communications, remote participation and electronic signatures). For example, allowing broader use of audio-visual technology in courts, enabling statutory declarations to be completed remotely and electronic signatures for multiple purposes, amending the Gambling Act 2003 so that charities can take remote interactive payments online or over the phone, particularly as street appeals are not feasible.
- I recommend that responsible Ministers be delegated power to approve, for inclusion in the Omnibus Bill, changes that enable alternative methods of compliance with processes that currently require physical presence.

# I recommend assessing whether there is a strong case for a COVID-19 adapted amendment to the Epidemic Preparedness Act 2006

- The current number of proposals that are relatively minor in policy terms, but will make a significant difference overall in managing the impact of COVID-19, reflects that the current powers to modify statutory requirements or restrictions in the EPA by Order in Council are too narrow to address the current need.
- The situation is also highly dynamic and many agencies are at early stages of analysing their responses. More issues are likely to emerge over the course of the next few weeks, as departments advance their analysis, become aware of other problems, or if additional flexibility is necessary as a result of the need to adjust the levels of the lockdown.

#### The current EPA powers are narrow and the test is high

- The purpose of the powers under the EPA are to enable the relaxation of some statutory requirements that might not be capable of being complied with, or complied with fully, during an epidemic (section 3 of the EPA).
- Before an Order in Council can be made certain criteria must be met. This includes a threshold test that requires the effects of an epidemic to be, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with.

30	s9(2)(h)	

#### s9(2)(h)

- Of the 24 proposals made for Orders under the EPA in the last week, 16 have been assessed as not meeting the high tests in the EPA (including situations where the proposal is not "necessary" because the ability to achieve the outcome exists).
- Cases do not meet this high test or cannot fit within the scope of the EPA's relatively inflexible powers, typically because:
  - 32.1 While the requirement or restriction is highly burdensome, it is not impossible or practically impossible to comply with. The difficulty on this front is particularly high (and likely to increase) if we shift down from Alert Level 4 where it will technically be more possible to comply with various requirements. For example, it has been determined that a change should not be made under the EPA to enable Audio Visual facilities to be used to undertake visits, clinical assessments and other matters under the Mental Health (Compulsory Assessment and Treatment) Act 1992 on the basis that it was not "impossible or impracticable" to carry out the required steps in person.
  - 32.2 The change needed does not focus on a "requirement or restriction" but instead would modify powers, preconditions, functions, or various statutory rules. For example, it has not been possible to make, through this means, a change to entitle New Zealanders who are stranded overseas to New Zealand superannuation as they cannot meet the precondition of being in New Zealand.
- There are other changes that would never meet the test for this type of power because the change proposed is too significant either in policy terms or because entire new regimes or powers are needed. For these, primary legislation will always be needed.
- However, these issues may demonstrate that the EPA's powers are too narrow and the tests are too high and inflexible to deal with the range of factors that the government may want to balance over the coming months in response to COVID-19.

# A COVID-19 adapted EPA may be justified to allow greater flexibility and responsiveness if it can be properly limited

- It is clear that in the coming months as the government is dealing with uncertainty in responding to COVID-19, law changes will be needed at many levels of significance. It will be important to be flexible and responsive as issues arise while ensuring important safeguards are in place for adequate scrutiny and transparency.
- Many of the problems that have been identified as needing legislative change through the Omnibus Bill are of a kind that could be addressed in a COVID-19 adapted EPA, including deferring statutory deadlines, the use of alternative

- technologies, and to address process issues that have arisen due to difficulties related to Alert Level 4.
- While a COVID-19 adapted EPA would not, and should not, address every issue, it may be another important way to provide a more resilient legal framework with which to address and resolve issues as they arise. This may minimise the pressure on Parliament to resolve relatively minor management measures, and enable it to progress its other critical priorities.
- If this proposal were to be advanced, the purpose of the amendment should be to enable relatively low level changes to legislation needed:
  - 38.1 to facilitate the Government responding to the public health needs of COVID-19 (for example remaining at Alert Level 4, or moving up and down alert levels), while
  - 38.2 mitigating any impacts on society from the epidemic, or the response needed to contain it, that are unnecessary or undesirable.
- The framework should be limited to only those key changes necessary to make the EPA a more flexible tool for the current context, and to build in consultation and parliamentary oversight of a kind that is currently missing from the EPA. Changes should be strictly limited in application to the current COVID-19 circumstances.
- However, it is as yet unclear whether, and to what extent, ongoing issues will continue to emerge of a kind that are suitable to solve through this tool. Powers that permit Orders in Council to override an Act of Parliament are extraordinary, and so proposals to broaden the scope and/or lower the threshold of such powers in the EPA raise constitutional issues. These must be considered alongside and inform the problem identification, the nature and extent of the amendments proposed and the development of appropriate safeguards.
- I propose to support the Minister of Health in assessing whether there is a strong case for a COVID-19 adapted amendment to the EPA with a view to reporting back to you in the next 1-2 weeks.
- To inform the advice on assessing whether relaxation of EPA thresholds is justified, officials will take into account such matters as:
  - 12.1 Pressures on parliamentary time,
  - 42.2 The need to provide appropriate transparency, scrutiny and accountability for orders made under the EPA,
  - 42.3 The existence of a sufficient volume of technical and operational subject matter which may be time sensitive, or whether those affected will benefit significantly from the reassurance that an order can provide.
- Should the advice be to relax the EPA thresholds, there would still be an expectation on Ministers and agencies to use all available and appropriate existing statutory and operational measures to respond to the circumstances.

#### **Financial Implications**

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

## **Legislative Implications**

- It is proposed that a COVID-19 Omnibus Bill to give effect to the policy recommendations in this paper is introduced to the House the week of 28 April 2020.
- It is proposed that the Omnibus Bill is referred to the Epidemic Response Committee for a shortened select process, to enable enactment in mid-May.

#### **Impact Analysis**

#### **Regulatory Impact Statement**

The Treasury has determined that this is a direct Covid-19 response and has suspended the RIA requirements in accordance with (CAB-20-MIN-0138). The paper makes reference to impacts and mitigations for the proposal.

## **Population Implications**

48 No significant population implications arise from the proposals in this paper.

#### **Human Rights**

The proposals in this paper appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final view as to whether the proposals will be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 will be possible once the legislation has been drafted.

#### Consultation

- The following agencies have been consulted on the proposals in this paper: the Ministry of Education, the Ministry of Health, the National Emergency Management Agency, the Ministry of Justice, the Ministry of Business, Innovation and Employment, the Department of Internal Affairs, the Department of Corrections, the Ministry of Social Development, the Ministry for Primary Industries, the Parliamentary Counsel Office, and the Department of the Prime Minister of Cabinet.
- The Crown Law Office has been consulted and has not raised any significant issues with the paper. The Crown Law Office will work with officials on assessing whether there is a strong case for a COVID-19 adapted amendment to the EPA.

#### **Communications**

52 None.

#### **Proactive Release**

The paper will be proactively released subject to redaction as appropriate under the Official Information Act 1982.

#### Recommendations

The Leader of the House recommends that the Committee:

- Note that government agencies are continuing to identify issues for which there is a need for urgent legislative change;
- Note that these proposed law changes are of an important remedial nature to enable businesses, local government and others to manage the immediate impacts of Alert Level 4;

#### A COVID-19 Omnibus Bill

- Agree to progress a COVID-19 Omnibus Bill as soon as practical after the House resumes sitting;
- Agree that the Omnibus Bill will include urgent COVID-19 management measures approved by Cabinet or by the group of Ministers with Power to Act on COVID-19 matters, including:
  - 4.1 The insolvency and corporate law changes agreed by COVID-19 Ministers with Power to Act on 3 April 2020, and any other related changes subsequently agreed to by those Ministers under Recommendation 18 of the 3 April Cabinet minute;
  - 4.2 s9(2)(f)(iv)
  - 4.3 Any other matters approved by Ministers with Power to Act on COVID-19 matters that can be developed in time for inclusion in the Omnibus Bill;
- Note that agencies have registered a number of minor management measures that can be grouped into several categories;
- Agree that responsible Ministers are delegated the power to approve matters for inclusion in the Omnibus Bill that come within the following policy parameters;

Deferring the commencement of new regulatory requirements

- Note that a number of pieces of legislation are due to come into force over the next few months which will be difficult or burdensome to prepare adequately for implement;
- Authorise responsible Ministers to defer commencement dates or other deadlines for new regulatory requirements, if the Minister considers it appropriate;

Deferring critical deadlines or providing exemptions where compliance is not possible or is burdensome

- Note that a range of entities have statutory deadlines and other obligations that cannot be met, either because the compliance would contravene lockdown rules, or are an unjustifiable burden at this time;
- Authorise responsible Ministers to approve exemptions, for inclusion in the Omnibus Bill from requirements (on terms and conditions) if:
  - 10.1 those matters are not significant in policy terms;
  - 10.2 it is desirable to facilitate the response to COVID-19 or mitigate its impact on entities or others, and;
  - 10.3 the exemption is no more than reasonably necessary to meet the need;

Enabling fast-tracking of legislative powers to mitigate impracticality issues

- Note that the response to COVID-19 has created a number of legislative impracticability issues;
- Authorise responsible Ministers to approve minor changes, for inclusion in the Omnibus Bill to current legislative processes and powers that would enable their quicker use to mitigate issues relating to COVID-19;

Mitigating problems with legislative compliance due to technological reasons

- Note that an increasing number of entities are operating remotely due to the current lockdown, which has led to problems complying with statutory processes;
- Authorise responsible Ministers to approve amendments that enable alternative methods of compliance with processes that currently require physical presence;

Consideration of a COVID-19 specific amendment to the Epidemic Preparedness Act

- Note that the number of relatively minor proposals for legislative change demonstrate the current powers in the Epidemic Preparedness Act 2006 (EPA) to modify statutory requirements are insufficient;
- Note that I will support the Minister of Health in assessing whether there is a strong case for a COVID-19 adapted amendment to the EPA;
- 17 **Direct** officials to consider the following matters when assessing whether relaxation of EPA thresholds is justified:
  - 17.1 Pressures on parliamentary time;
  - 17.2 The need to provide appropriate transparency, scrutiny and accountability for orders made under the EPA;

- 17.3 The existence of a sufficient volume of technical and operational subject matter which may be time sensitive, or where those affected will benefit significantly from the reassurance that an order can provide;
- **Agree** that the Minister of Health and I will report back to the Cabinet COVID-19 Committee by 24 April 2020 on whether there is a case for a COVID-19 adapted amendment to the EPA.

Agree that the Omnibus Bill will be referred to the Epidemic Response Committee for a shortened select committee process.

Authorised for lodgement

Hon Chris Hipkins Leader of the House



# Cabinet Business 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.

# Law Changes in Response to COVID-19

Portfolio

Leader of the House

On 15 April 2020, the Cabinet Business Committee, in accordance with the Power to Act authorised by Cabinet [CAB-20-MIN-0145]:

- 1 noted that government agencies are continuing to identify issues for which there is a need for urgent legislative change;
- **noted** that these proposed law changes are of an important remedial nature to enable businesses, local government and others to manage the immediate impacts of Alert Level 4;

#### A COVID-19 Omnibus Bill

- 3 agreed to progress a COVID-19 Omnibus Bill as soon as practical after the House resumes sitting;
- 4 agreed that the Omnibus Bill will include urgent COVID-19 management measures approved by Cabinet or by the group of Ministers with Power to Act on COVID-19 matters, including:
  - 4.1 the insolvency and corporate law changes agreed by COVID-19 Ministers with Power to Act on 3 April 2020, and any other related changes subsequently agreed to by those Ministers under Recommendation 18 of the 3 April Cabinet minute;
  - 4.2 s9(2)(f)(iv)
  - 4.3 any other matters approved by Ministers with Power to Act on COVID-19 matters that can be developed in time for inclusion in the Omnibus Bill;
- 5 **noted** that agencies have registered a number of minor management measures that can be grouped into several categories;
- agreed that responsible Ministers are delegated the power to approve matters for inclusion in the Omnibus Bill that come within the following policy parameters;

#### Deferring the commencement of new regulatory requirements

7 **noted** that a number of pieces of legislation are due to come into force over the next few months which will be difficult or burdensome to prepare adequately for implement;

**authorised** responsible Ministers to defer commencement dates or other deadlines for new regulatory requirements, if the Minister considers it appropriate;

# Deferring critical deadlines or providing exemptions where compliance is not possible or is burdensome

- 9 **noted** that a range of entities have statutory deadlines and other obligations that cannot be met, either because the compliance would contravene lockdown rules, or are an unjustifiable burden at this time;
- authorised responsible Ministers to approve exemptions, for inclusion in the Omnibus Bill from requirements (on terms and conditions) if:
  - 10.1 those matters are not significant in policy terms;
  - 10.2 it is desirable to facilitate the response to COVID-19 or mitigate its impact on entities or others;
  - 10.3 the exemption is no more than reasonably necessary to meet the need;

## Enabling fast-tracking of legislative powers to mitigate impracticality issues

- **noted** that the response to COVID-19 has created a number of legislative impracticability issues;
- authorised responsible Ministers to approve minor changes, for inclusion in the Omnibus Bill to current legislative processes and powers that would enable their quicker use to mitigate issues relating to COVID-19;

# Mitigating problems with legislative compliance due to technological reasons

- noted that an increasing number of entities are operating remotely due to the current lockdown, which has led to problems complying with statutory processes;
- authorised responsible Ministers to approve amendments that enable alternative methods of compliance with processes that currently require physical presence;

## Consideration of a COVID-19 specific amendment to the Epidemic Preparedness Act

- noted that the number of relatively minor proposals for legislative change demonstrate the current powers in the Epidemic Preparedness Act 2006 (EPA) to modify statutory requirements are insufficient;
- **noted** that the Leader of the House will support the Minister of Health in assessing whether there is a strong case for a COVID-19 adapted amendment to the EPA;
- directed officials to consider the following matters when assessing whether relaxation of EPA thresholds is justified:
  - 17.1 pressures on parliamentary time;
  - the need to provide appropriate transparency, scrutiny and accountability for orders made under the EPA;

- 17.3 the existence of a sufficient volume of technical and operational subject matter which may be time sensitive, or where those affected will benefit significantly from the reassurance that an order can provide;
- agreed that the Minister of Health and the Leader of the House will report back to the COVID-19 Ministerial Group by 24 April 2020 on whether there is a case for a COVID-19 adapted amendment to the EPA;
- **agreed** that the Omnibus Bill will be referred to the Epidemic Response Committee for a shortened select committee process.

# Vivien Meek Committee Secretary

#### Present:

Rt Hon Jacinda Ardern (Chair)

Rt Hon Winston Peters

Hon Kelvin Davis

Hon Grant Robertson

Hon Phil Twyford

Hon Dr Megan Woods

Hon Chris Hipkins

Hon Andrew Little

Hon Carmel Sepuloni

Hon Dr David Clark

Hon David Parker

Hon Nanaia Mahuta

Hon Stuart Nash

Hon Iain Lees-Galloway

Hon Jenny Salesa

Hon Damien O'Connor

Hon Kris Faafoi

Hon Ron Mark

Hon Tracey Martin

Hon Shane Jones

Hon Peeni Henare

Hon James Shaw

#### Officials present from:

Office of the Prime Minister

Department of the Prime Minister and Cabinet

Treasury

Ministry of Business, Innovation and Employment

Ministry of Health

New Zealand Police

Ministry for Primary Industries