



Briefing

COVID-19 ORDERS: INCREASED PENALTIES FOR NON-COMPLIANCE

To: Hon Chris Hipkins
Minister for COVID-19 Response

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|----------|------------|-----------------|-----------------|
| Date | 11/08/2021 | Priority | Medium |
| Deadline | 19/08/2021 | Briefing Number | DPMC-2021/22-83 |

Purpose

This briefing provides you with options to amend section 26 of the COVID-19 Public Health Response Act 2020, to increase the penalties for offences specified as infringement offences in COVID-19 Orders, including non-compliance with any Quarantine-Free Travel conditions.

Recommendations

1. **Note** you have directed officials to undertake work to increase the section 26 maximum penalties for infringement offences, above what the COVID-19 Public Health Response Amendment Bill 2021 (the Bill) will propose [DPMC-2020/21-1265 refers].
2. **Note** that you have directed officials to progress this increase via a Supplementary Order Paper, to be introduced during the Select Committee stage of the Bill [HR20211742 refers].
3. **Note** officials have advised that increased penalties are unlikely to materially reduce non-compliant behaviour with COVID-19 Orders, including with any QFT conditions in the Air Border Order, and would come with equity, proportionality and consistency considerations [DPMC-2020/21-1265 refers].
4. s9(2)(g)(i)
[REDACTED]
5. **Note** that where non-compliance with a COVID-19 Order is intentional, individuals may be liable to a criminal offence and a higher fine (currently \$4,000) upon criminal conviction.

6. **Direct** officials to progress an amendment to the Bill (via a Supplementary Order Paper) to increase the infringement offence penalties for non-compliance with COVID-19 Orders so these penalties are **EITHER**:

6.1. 25% higher than the level proposed in the Bill: an infringement fee of \$1,250 and court imposed fine of \$3,750 for individuals;

YES / NO

OR

6.2. 50% higher than the level proposed in the Bill: an infringement fee of \$1,500 and court imposed fine of \$4,500 for individuals;

YES / NO

OR

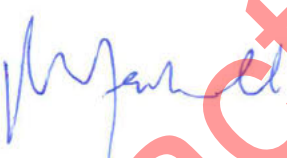
6.3. ~~100%~~ higher than the level proposed in the Bill: an infringement fee of ~~\$2,000~~ and court imposed fine of ~~\$6,000~~ for individuals.

YES / NO

7. **Note** that any agreed increase to the section 26 maximum infringement offence penalties will apply to all offences specified as infringement offences in a COVID-19 order, not just those specified as infringement offences in the Air Border Order, including for non-compliance with QFT conditions.


8. **Agree** that this briefing is proactively released, with any appropriate redaction where information would have been withheld under the Official Information Act 1982, at the same time as any resulting Cabinet paper is released.

YES / NO



Ruth Fairhall
 Head of Strategy and Policy, COVID-19 Group, DPMC

11/18/2021



Hon Chris Hipkins
 Minister for COVID-19 Response

17/8/2021

It's crucial that someone can be fined more for taking possession than for potentially bringing COVID-19 into New Zealand. Given the huge social and economic consequences a single case of COVID-19 in the community can have I think we need to take a much firmer line. CH

Contact for telephone discussion if required:

| Name | Position | Telephone | 1st contact |
|---------------|--|-----------|-------------|
| Ruth Fairhall | Head of Strategy & Policy, COVID-19 Group | s9(2)(a) | ✓ |
| Ashlee Bowles | Senior Policy Advisor, Strategy & Policy, COVID-19 Group | s9(2)(a) | |

Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

Proactively Released

COVID-19 ORDERS: INCREASED PENALTIES FOR NON-COMPLIANCE

Background

1. DPMC previously provided you with advice about the infringement regime for non-compliance with QFT conditions, including whether the maximum penalties for non-compliance with COVID-19 Orders could be increased beyond what is proposed in the COVID-19 Public Health Response Amendment Bill 2021 (the Bill), to better deter and address non-compliance with Quarantine-Free Travel (QFT) conditions [DPMC 2020/21-1265 refers].
2. The infringement regime for non-compliance with COVID-19 orders, including non-compliance with QFT conditions contained in Air Border Orders, is provided for in section 26 of the COVID-19 Public Health Response Act 2020 (the Act). There are two categories of offence covered by the section, each with corresponding maximum penalties.
 - a) Infringement offence: a person who fails to comply with a COVID-19 requirement that has been identified as an infringement offence commits an offence and is liable for an infringement fee of \$300 or a court imposed fine not exceeding \$1,000.
 - b) Criminal offence: a person who intentionally fails to comply with a COVID-19 order is liable *on conviction* for a fine not exceeding \$4,000 or term of imprisonment not exceeding six months.
3. The Bill will propose to increase the infringement fee to \$1,000 (currently \$300) and court imposed fine to \$3,000 (currently \$1,000) for individuals. You have directed officials to progress work to increase these maximum infringement offence penalties further, to better deter and address non-compliance with QFT conditions.
4. This briefing does not discuss maximum criminal offence penalties (as outlined in paragraph 2(b) above). The Ministry of Health provided you with separate advice on increasing the penalties for criminal offences in July 2021 [Health Report 20211586 refers]. You agreed to:

Increase fine to \$10,000

 - a) increase the maximum criminal offence fine for individuals to \$5,000 (currently \$4,000) upon conviction and to maintain the maximum term of imprisonment for criminal offences for individuals at not more than six months; and
 - b) introduce a criminal offence penalty for body corporates that comprises a fine not exceeding \$15,000 upon conviction.
5. The Bill will also propose to create a power to make regulations that set out a graduated infringement offence fee framework, as agreed by Cabinet [SWC-21-MIN-0067 refers]. Work is underway to develop this framework, which will prescribe infringement classes and corresponding penalty fees and fines commensurate to the offence. The framework will prescribe penalties up to the maximums specified in section 26 of the Act.

Options to increase the section 26 maximum penalties

6. s9(2)(g)(i)

In addition to there being no evidence that higher penalties will have a corresponding higher deterrent effect, higher penalties will also have equity, proportionality and consistency consequences:

- a) Equity: infringement fees have a proportionately larger impact on lower socio-economic households.
 - b) Proportionality: further increasing the maximum infringement offence penalties would conflict with the Legislation Design and Advisory Committee's guidance on creating infringement offences, which provides that, in general, infringement fees should not exceed \$1,000, and if they do exceed \$1,000, it is preferable that the amount is fixed in primary legislation.¹ This notion is reiterated in the guidance issued by the Ministry of Justice for new infringement schemes.² Responding to more severe misconduct is more appropriately done through the courts.
 - c) Consistency: while New Zealand law contains a number of infringement provisions that impose penalties in excess of \$1,000, these are typically used to address financial incentives for non-compliance. An example is the maximum infringement fee of \$3,000 available in section 297(1)(nc) of the Fisheries Act 1996 to deter, for example, taking more than the allowable catch of pāua, which can be worth significant sums of money.
7. In addition, increasing the maximum infringement penalties may also have New Zealand Bill of Rights Act 1990 implications, in particular, the section 25(c) right to be presumed innocent until proven guilty. This is because the onus of proof is placed on the defendant, requiring them to disprove an element of the offence to escape liability.

Existing alternative enforcement options

8. A person who is identified as intentionally failing to comply with a COVID-19 order may be pursued for prosecution. As outlined above in paragraph 2(b), if found guilty by the court, the individual would be liable to a fine of up to \$4,000 or to a term of imprisonment not exceeding six months. More serious conduct, where higher penalties apply, is dealt with by the court to ensure judicial oversight in how these penalties are applied, and in what circumstances. This consideration should be borne in mind when considering any further increases to maximum penalties for infringement offences.

Australian comparison

9. Looking to Australia for comparison, the following on-the-spot infringement penalties apply:
 - a) In New South Wales, Police may also issue on-the-spot fines to individuals of \$1,000 for breach of an order made under the Public Health Act 2010. A smaller \$500 fine is

¹ [25. Creating infringement offences | The Legislation Design and Advisory Committee \(ldac.org.nz\)](https://www.ldac.org.nz/).

² <https://www.justice.govt.nz/assets/Documents/Publications/infringement-governance-guidelines.pdf>.

available for a person aged 18 and above not wearing or carrying a mask when required to.³

- b) In Victoria, Police can issue on-the-spot fines of up to \$1,817 for adults for refusing or failing to comply with emergency directions, a public health risk power direction or Public Health Direction to provide information. A smaller \$200 fine is available for not wearing a face mask when required to.⁴
- c) In Queensland, an individual who does not comply with Public Health Directions may be given an on-the-spot fine of \$1,378. A smaller \$206 fine is available for failing to wear a mask when required to.⁵

10. Higher penalties are then available through the court system for non-compliance with COVID-19 requirements in these states, ranging from \$11,000 to \$21,808 for individuals, or a term of imprisonment.

Options to increase the section 26 infringement offence penalties

11. Officials request that you indicate your preference for the level of any increased maximum penalties:
- a) 25% higher than the level in the Bill: an infringement fee of \$1,250 and court imposed fine of \$3,750;
 - b) 50% higher than the level in the Bill: an infringement fee of \$1,500 and court imposed fine of \$4,500; or
 - c) 100% higher than the level in the Bill: an infringement fee of \$2,000 and court imposed fine of \$6,000.

12. Of the above options, option (a) is relatively more proportionate and equitable.

13. s9(2)(g)(i)



Next steps

14. If you agree to increase the infringement offence penalties further than those proposed in the Bill, officials will prepare a Cabinet Paper and Supplementary Order Paper to increase the penalties. Officials consider it prudent to submit the Supplementary Order Paper to a Cabinet committee for approval to rescind previous Cabinet decisions relating to the maximum penalties. Cabinet authorised you to make necessary policy decisions that may

³ <https://www.nsw.gov.au/covid-19/rules/legislation-and-penalties>.

⁴ <https://online.fines.vic.gov.au/News/Covid-restrictions-and-penalties-in-Victoria>.

⁵ <https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/current-status/public-health-directions/movements-gatherings>.

arise during the Bill's drafting, but only where these are consistent with the policy intentions previously agreed [SWC-21-MIN-0067 refers].

15. Related to the infringement regime for non-compliance with COVID-19 Orders, officials are also progressing work on an enforcement strategy for non-compliance with QFT conditions. Officials will report back to you on this work by the time any green flights with Australia are resumed.

Consultation

16. The Ministry of Justice, New Zealand Police, Parliamentary Counsel Office, Crown Law and the Ministry of Health were consulted on this briefing.

Proactively Released