



Proactive Release

The following item has been proactively released by the Rt Hon Jacinda Ardern, Prime Minister:

Noting Paper: Updating the COVID-19 Public Health Response (Alert Level 2) Order

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)(a), to protect the privacy of individuals
- 9(2)(f)(iv), to maintain the confidentiality of advice tendered by or to Ministers and officials
- 9(2)(g)(i), to maintain the effective conduct of public affairs through the free and frank expression of opinion

Noting paper

UPDATING THE COVID-19 PUBLIC HEALTH RESPONSE (ALERT LEVEL 2) ORDER

To: Hon Dr David Clark, Minister of Health

Date	22/05/2020	From	National Crisis Management Centre Ministry of Health
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Purpose

On Monday 25 May, Cabinet will consider changes to our approach to the appropriate level of public health measures under Alert Level 2, including the requirements for gatherings. You may decide to make an amendment to the COVID-19 Public Health Response (Alert Level 2) Order 2020 ('the Order'), having regard to Cabinet's decision.

This paper provides advice on other amendments to the Order that could also be made. These amendments reflect areas of legal risk and where there is scope to clarify current anomalies.

Recommendations

1. **Note** that on 25 May, Cabinet will consider our approach to the appropriate level of public health measures at Alert Level 2, particularly as they relate to gatherings.
2. **Note** that any changes to the current approach cannot be implemented without an amendment to the COVID-19 Public Health Response (Alert Level 2) Order 2020.
3. **Note** that this amendment process provides an opportunity to make additional amendments to clarify parts of the Order where there may be legal risk or where there are request from sectors, industries and agencies for greater clarity.
4. **Note** that the key areas where we recommend considering a change are:
 - a. better-aligning the requirements for sporting, social, cultural and recreational activity with activities that take place within workplaces (rather than having different rules for activities depending on whether or not they take place within a business or service);
 - b. s9(2)(f)(iv), s9(2)(g)(i)
 - c. allowing customers to order and collect food and drink at the counter of cafes and fast food establishments that do not serve alcohol, provided that 1 metre physical distancing is maintained; and
 - d. clarifying that event facilities and hospitality venues can have more than 100 people within a workplace, provided that groups (of up to 100) are kept separated and don't use shared facilities at the same time.
5. **Provide** feedback on the proposals in this paper.

6. **Note** that, subsequent to Cabinet decisions on Monday 25 May, the Director-General of Health will provide you with a revised draft Alert Level 2 Health Order for your consideration and consultation with Ministers.

Contact for telephone discussion if required:

Name		Position	Telephone
Signed out by	Cheryl Barnes	All of Government Strategy and Policy Lead, National Crisis Management Centre	s9(2)(a)
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UPDATING THE COVID-19 PUBLIC HEALTH RESPONSE (ALERT LEVEL 2) ORDER

Purpose

7. On Monday 25 May, Cabinet will consider changes to our approach to the appropriate level of public health measures under Alert Level 2, including the requirements for gatherings. You may decide to make an amendment to the COVID-19 Public Health Response (Alert Level 2) Order 2020 ('the Order'), having regard to Cabinet's decision.
8. This paper provides advice on other amendments to the Order that could also be made. These amendments reflect areas of legal risk and where there is scope to clarify current anomalies.


Background

9. On 14 May 2020, New Zealand moved to Alert Level 2. While many of the restrictions at Levels 3 and 4 are lessened or removed at Level 2, there are still a number of restrictions that need legal backing, including those relating to physical distancing, gatherings, and hospitality.
10. At Level 2, these restrictions were implemented by the COVID-19 Public Health Response (Alert Level 2) Order 2020 ('the Order') under the newly enacted COVID-19 Public Health Response Act 2020.
11. The Order is based around the core public health principles of physical distancing, good hygiene practices, and record keeping to support contact tracing. It has the following key features:
 - a) Gatherings, which are defined as a group of people intermingling within 2 metres of each other, are limited to 10 people. All gatherings, other than gatherings of friends and whanau, require record keeping for contact tracing purposes, but no physical distancing is required.
 - b) Any activity that takes place at a 'business or service' is not a gathering. There are various categories of businesses and services, which are subject to different rules:
 - i) Businesses and services that can control access to their premises – such as office buildings, factories, gyms, swimming pools, and courts – must undertake record keeping and keep people 1 metre apart to the greatest extent practicable. Most of these businesses have no cap on the number of people that may be present, with caps on attendees achieved by the requirements for physical distancing. However, a subset of these businesses – known as 'event facilities' such as cinemas, theatres, stadiums, concert venues, conference venues, and casinos – have a limit of 100 customers per workplace.
 - ii) Businesses such as retailers and takeaway food outlets are not required to keep records of customers, but must keep customers 2 metres apart where practical.
 - iii) Businesses that serve food or drink for consumption on the premises must permit no more than 100 customers on the premises, have no more than 10 customers at a table, ensure that there is at least 1 metre between customers


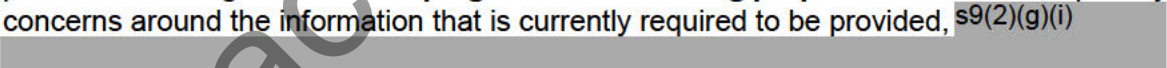

at different tables, keep customers seated other than when using the toilet or paying, keep records for contact tracing, and have only a single server per table.

- iv) Businesses that involve close contact are not required to comply with physical distancing requirements, where close contact is integral to the service provided (such as hairdressers, professional or semi-professional sports players, and taxis).
- c) There are specific rules for funerals and tangihanga, with gatherings of up to 50 allowed for these purposes, provided that they are registered with the Ministry of Health and comply with certain requirements.
- d) There are a number of exemptions from the order, including health services, many transport services, prisons, and education entities.
- e) Some voluntary and not-for-profit activities are treated as businesses or services, but sporting, recreational, social or cultural activities are not.


How is the Order working?

- 12. The purpose of the Alert Level 2 Order is to prevent, and limit the risk of, the outbreak or spread of COVID-19. In general, the Order is working well, and guidelines are being applied sensibly.
- 13. However, issues have been raised over the last week – and which may also be raised with your colleagues – where there may be legal risk or where further clarification, or amendments would support practical arrangements. In particular, issues have been raised that suggest the need to consider:
 - a) **Better-aligning the requirements for sporting, social, cultural and recreational activity with activities that take place within workplaces** (rather than having different rules for activities depending on whether or not they take place within a business or service).
 - b) s9(2)(f)(iv), s9(2)(g)(i)

 - c) **Predictable rules** that communities, businesses, and people can understand and comply with (for example, at present, the public and businesses may struggle to reconcile why only ten people may attend a wedding in close proximity on a beach, but 100 people may attend a wedding at a conference centre, and an unlimited number may attend a wedding at a museum venue, as long as physical distancing requirements are adhered to).
- 14. Should you decide to make an amendment to the Order following Cabinet's decisions on gatherings on 25 May, we recommend considering making further change to the Order to support its application in practice and provide greater clarity where required.
- 15. Further detail on the key issues raised is provided below, followed by our recommendations on how to address them. We do not recommend changing the Order for all issues raised, but have focused on the issues where there is the greatest case for change (such as where there is a substantial lack of clarity, legal risk, or significant implementation issues at present).

Key issues raised by agencies, businesses, and individuals

16. The National Crisis Management Centre has been co-ordinating comments on the Alert Level 2 Order and requests for amendments from agencies and sectors, following the move to Alert Level 2. Some of the main issues raised by agencies, businesses, and individuals are:
- a) **Counter-service.** The current restriction on ordering at the counter at cafes and bars has been raised as problematic by many hospitality businesses and the hospitality association. For example, it is currently possible to pay at the counter when dining in but not to place an order.
 - b) **Not-for-profit groups.** We have received queries as to why a not-for-profit activity (such as yoga in a community hall) is subject to a cap of 10, whilst an equivalent for-profit activity (such as a yoga class at a gym) is not subject to an overall cap; especially where the public health control measures are the same.
 - c) **Multi-activity venues.** Greater clarity has been sought by businesses that own and operate different types of services within the same venue or premises as to how to apply the requirements. For example, a mall may operate both retail stores and a food court within the same venue. Similarly, a garden centre may primarily be a retail store but may also operate a cafe.
 - d) **Capacity limits.** Event facilities (such as cinemas, casinos, and concert venues) that are subject to the 100 person cap have asked whether this is an overall venue cap or whether they can operate multiple groups of 100, provided that they are kept separate. They have also questioned whether, if the event facility is able to keep groups separated, what this means for shared facilities and entrances.
 - e) s9(2)(f)(iv), s9(2)(g)(i)

17. We also note that a range of agencies have raised concerns relating to the Order's provisions relating to **record keeping for contact tracing purposes**. This includes privacy concerns around the information that is currently required to be provided, s9(2)(g)(i)

 We note that you have separately decided to not make changes to the Order's record keeping requirements at this time.
18. In addition to the above, the Regulations Review Committee has raised two concerns about the Order:
- a) **Unusual/unexpected use of power to specify infringement offences.** The Regulations Review Committee has raised that one of the infringement offences in the Order inappropriately allows a business, service, or organiser of a gathering to create the basis of criminal liability, and that it is insufficiently clear.
 - b) **Unclear impact on personal rights and liberties.** In particular, the Regulations Review Committee recommends amending the Order to make it clear how it affects church services.

Significant proposed changes to the Alert Level 2 Order

19. Some of the queries received have been dealt with through providing additional guidance, but clarification or amendments would be desirable in a number of areas.
20. Below, we set out some high-level proposed changes to the Alert Level 2 Order that could be implemented at the same time as the overall cap on gatherings is reviewed. This is followed by a more detailed list of proposals set out in Attachment A.
- a) **More equivalent treatment between the same types of activities, regardless of where they occur.** Currently, gatherings that take place at a business venue are regulated in accordance with the business' requirements. The Alert Level 2 Order could be amended to ensure that the gathering rules apply consistently regardless of where they occur.
 - b) s9(2)(f)(iv), s9(2)(g)(i)

 - c) **Allow customers to order and collect food and drink at the counter of hospitality venues (but not licensed premises),** provided that 1 metre physical distancing is maintained. Feedback from the industry is that the requirements for hospitality outlets to implement table service is not always feasible for outlets that do not typically operate according to this model. Officials consider that the risks associated with counter service in cafes and fast food outlets that do not serve alcohol is relatively low, as venues will still be required to maintain 1 metre physical distancing. However, officials propose continuing to prohibit counter service in venues that serve alcohol, as physical distancing is likely to be more difficult to enforce in such situations.
 - d) **Clarify that event facilities and hospitality venues can have more than 100 people within a workplace,** provided that groups are kept separated and don't use shared facilities at the same time.
21. All of the proposed changes are consistent with the public health principles that guide Level 2.

Next Steps

22. Cabinet will consider our overall approach to the appropriate level of public health measures, in particular relating to gatherings at Alert Level 2, on Monday 25 May. The option to raise the cap on gatherings numbers to 100 will best achieve the objective of better-aligning the requirements for sporting, social, cultural and recreational activity with activities that take place within workplaces. However, regardless of which option is ultimately chosen, it may still be desirable to make many of the changes proposed in this paper.
23. Following Cabinet's decisions, Crown Law and the Parliamentary Counsel Office will draft a revised order for your further consideration and consultation with Ministers. Under the COVID-19 Public Health Response Act, a 48 hour notice period is required between the Order being made and coming into force.

Consultation

24. The National Crisis Management Centre and the Ministry of Health have consulted with the following agencies on proposed amendments to the Order: Ministry of Business, Innovation and Employment, Ministry of Justice, Ministry of Transport, Crown Law, Oranga Tamariki, Police, Customs, Corrections, Sport NZ, Ministry of Education, WorkSafe, Ministry of Housing and Urban Development, and the Department of Internal Affairs.
25. Some agencies have proposed changes that are not included in the proposed list of amendments contained in Attachment A. This is due to a range of reasons, including prioritisation due to time constraints, a view that the status quo should be retained, or the ability to achieve the intent without requiring changes to the Order (such as through guidance).
26. We note that you will also need to separately consult with Ministers in accordance with s 9 of the COVID-19 Public Health Response Act.

MBIE comment

27. The Order places a requirement on all businesses and services to keep records to support contact tracing, with the exclusion of retail businesses (such as shopping malls, supermarkets, marketplaces, takeaway-food stores, and retail stores). The policy intent is that if businesses operating premises where people are likely to congregate or linger are able to quickly provide information about who has been on their premises, this allows fast and reliable tracing of the close contact of a confirmed/suspected case of COVID-19.
28. Many businesses are using technology solutions to collect personal information to support contact tracing, but it is likely some of these solutions do not meet the Order's requirements for businesses to hold customers' personal information (as opposed to engaging a third-party service to hold the information on their behalf). For now, a physical register is most likely to meet business' contact tracing obligations, but there are privacy risks around how businesses are using the information collected. Complaints are already being made by people, including of harassment by businesses' workers using information obtained from physical registers.
29. MBIE believes clarity is needed about what is required from businesses to support contact tracing: do they need to hold this information themselves, or do they just need to be able to access it if requested by the Ministry of Health or a PHU? There may need to be corresponding amendment of the Order to ensure alignment with the policy intent, and guidance about which of the available technology solutions can help businesses meet their legal requirements in terms of the Order and the Privacy Act.

Attachments

Attachments:	
Attachment A:	Table of proposed changes to the Order

ATTACHMENT A

Table of proposed changes to the Order

30. The below tables set out a non-exhaustive list of proposed changes to be considered for inclusion in the revised Order.
31. Crown Law and the Parliamentary Counsel Office may draft additional and/or alternative changes to the order that are consistent with the changes proposed in this briefing and other Government policy decisions.

Significant changes			
Issue #	Description of issue	Proposed change	Reason for change
1	Events that take place in the premises of a business or service (such as a conference or wedding) are treated as a business or service, not a gathering. This means that currently, they must comply with 1 metre physical distancing and record keeping for contact tracing, but do not face a cap on the number of people attending those events (as an equivalent gathering outside of a business or service would face).	<p>Provide for the rules on gatherings to apply where the premises of a business or service is hired for a private gathering to which the usual gatherings rules would otherwise apply (such as a wedding).</p> <p>This would only apply to customers/visitors, not employees, to prevent, for example, meetings of office workers inadvertently being captured by the cap on gatherings.</p>	The fact that something is either a gathering, or a business or service, leads to inconsistencies that are not related to the public health risk of an activity. For example, the public and businesses may currently struggle to understand why, currently, a wedding held on a beach could have 10 attendees in close proximity, but an unlimited amount of people could attend a wedding at (for example) a museum, as long as minimum physical distancing requirements are adhered to. The proposed change will mean that the same restrictions on attendees will apply regardless of whether or not a gathering takes place at a business or service facility, outdoors or private venue.

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2	Currently, different rules apply to sporting, recreational, social and cultural activities depending on whether they are voluntary or not-for profit (which are treated as gatherings) or for-profit (which are subject to the rules for businesses and services).	Lifting the overall cap on gatherings numbers will have the effect of better aligning sporting, recreational, social, or cultural activities, regardless of whether they are for-profit or not-for-profit. However, different measures will still apply as between for-profit and not-for-profit activities. Officials will continue to work through these issues with Crown Law.	Currently, a (for example) not-for-profit yoga class is treated as a gathering, and is subject to a cap of 10 people. However, a commercial yoga class has no limit on numbers, provided that 1 metre physical distancing is maintained and records are kept for contact tracing. If the not-for-profit yoga class can meet the same public health requirements as the commercial yoga class, it is not clear why the rules aren't the same.
3	s9(2)(f)(iv), s9(2)(g)(i)		
4	Current rules only allow food and drink to be ordered while seated. This is a problem for some establishments that do not normally operate in this way for dine-in customers (such as fast food chain restaurants, and some cafes and pubs)	Amend the Order to enable dine-in customers to order and collect food and drink from the counter of venues that do not serve alcohol (i.e. most cafes and fast food outlets) if the required physical distancing can be maintained.	The intention was to require people to order from their tables to limit people mingling and queuing at the counter. However, for some hospitality outlets (at which people can order takeaways at the counter) providing table service is not practical for dine-in customers. It is therefore proposed people can order at the counter as long as required physical distancing can be maintained.
5	There is uncertainty as to whether event facilities and hospitality venues may have more than 100 customers in a workplace, if each group of 100 is clearly separated from each other. For example, it is unclear whether the 100 person cap applies to a cinema complex overall, or to each cinema within the complex.	Clarify that event facilities and hospitality venues can have more than 100 people within a workplace, so long as each group of 100 is separated from each other and uncontrolled mingling can be prevented.	The 100-person limit on hospitality businesses and event facilities is to reduce the risk of uncontrolled mingling between large groups of people. So long as they are kept physically separate, there is no reason why multiple groups of up to 100 in delineated areas should not be allowed in the same premises.

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6	It is an offence for individuals not to comply with reasonable measures put in place by a business or service or organiser of a gathering to meet the requirements of the Order. The Regulations Review Committee has raised concerns that this approach inappropriately allows a business, service, or organiser of a gathering to create the basis of criminal liability, and that it is insufficiently clear.	Amend the Order to specify the measures that individuals are required to comply with (e.g. physical distancing and providing information to enable contact tracing).	The amended approach will ensure the substance of criminal liability is provided by the Order, and is clearly specified.
Minor/technical changes			
Issue #	Description of Issue	Proposed change	Reason for change
6	Some businesses have requested clarification around how they apply the rules under the order if they have different types of activities operating within their venue or business. For example, how the rules apply to a cafe that sits within a garden centre, or gaming machines within a pub.	Clarify that different spaces in the same workplace can be used according to different rules for that activity, provided that they are appropriately separated/delineated.	<p>Businesses operating different activities on the same premises should be allowed to operate the different activities in line with the requirements relevant to that activity, provided that activities are 'delineated' so that staff and customers are clear on the requirements on them when in different parts of the premises, and when undertaking different activities.</p> <p>For example, a pub with gaming facilities, could have customers seated for a drink, who could then go play the gaming machines, but they could not bring a drink into the gaming area. The dining area would need to operate within the requirements for a business providing food and drink, while the gaming area would need to meet the requirements relevant to that activity. They would also need to manage the entry and exit points so the two areas don't mix and mingle.</p>

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			This is the most likely interpretation of the current order. However, there is benefit associated with explicitly clarifying this.
7	Currently, hospitality businesses are required to ensure that only 1 worker serves at any table (the 'single server' rule).	Provide that the single server rule should be implemented, except where: <ul style="list-style-type: none"> • A server finishes their shift • A server goes on a break 	There are a number of situations where it will not be possible to keep one server per table. This includes when a server finishes their shift, or needs to go on a break.
8	The definition of "household unit" in clause 4 means that for the purpose of shared parenting arrangements, a child or shared caregiver can only be part of a gathering of friends or whānau of more than 10 people (as provided for in clause 17(1)(b)(ii)) if they live in a "household unit", not in a hostel or boarding house. The definition of a household unit is also problematic for Corrections reintegrative and rehabilitative accommodation services and whether they fit under either the definition of a household unit or boarding house.	Amend the definition of "household unit" so that it does not exclude parents, children or shared caregivers that live in hostels or boarding houses from being part of a gathering of friends or whānau that is larger than 10 people. Amend the definition of household unit to include reintegrative and rehabilitative services where operated for Corrections purposes.	There is no policy intent to exclude parents or caregivers who are in shared parenting arrangements from participating in friends or whānau gatherings of their living arrangements. Clarification required to ensure Corrections accommodation services are covered appropriately under the Order.
9	There is currently a specific category for funerals and tangihanga that may not be required if the gatherings cap is increased.	If the cap on gatherings is increased above 50, remove the specific category for funerals and tangihanga.	Funerals and tangihanga are currently subject to a higher cap on gatherings numbers than other gatherings, provided that they are registered with the Ministry of Health and comply with certain requirements. However, if the overall cap on gatherings is raised to at least 50, then the separate category for funerals and tangihanga is no longer required.
10	It is not entirely clear how sports clubs and other associations (e.g. RSA) are treated	Clarify that clubs and RSAs are businesses and services under the Order.	Many clubs and associations sell food and are licensed to sell alcohol. They are possibly prevented from doing so under the Order

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	under the Order, and whether they are able to sell food and drink		given the definition of businesses or services. It is not intended to do so if they meet all relevant requirements under the Order.
11	Currently, residences established under section 364 of the Oranga Tamariki Act 1989 are excluded from the requirements of the Order (alongside other exclusions such as health services, prisons, and public transport). However, community-based remand homes and care and protection homes are not specifically excluded.	Expand the exclusion to capture community-based remand homes and care and protection homes.	The current approach is likely to have been an oversight.
12	Some transport services, including public transport, are exempt from the Order. However, others – such as small passenger services – are treated as ‘proximity services’.	Ensure that all transport services are excluded under the Order to the extent that the public health risks is the same. This is to ensure all transport services are treated consistently under the Order.	It is not clear that there is a good rationale for excluding some transport services, but not others, from the Order.
13	Correction’s community operations requires an exemption under clause 21 in addition to the exemption for prisons and transport.	Include Corrections community operations as an exemption under Clause 21 (1)	Clarification required to ensure Corrections can continue to conduct and comply with Corrections legislative obligations without breaching the Order.
14	The application of the Order to religious services has caused confusion. The Regulations Review Committee has raised a concern that the order produces considerable uncertainty about how rights are impacted, and recommended amending the Order to make it clear how it affects church services.	Amend the definition of “businesses and services” to provide examples of voluntary or not-for-profit activities that do not constitute businesses and services, including community sports and religious services.	The amendment will make it clear that the gathering rules (not the businesses and services rules) apply to religious services.

15	<p>Currently, the Order requires businesses and services to keep the following information about their customers/visitors where record keeping is required:</p> <ul style="list-style-type: none">• A person's full name• Their residential address• An effective means of communicating with them (for example, an active phone number or email address)• The date on which, and the times at which, the person arrived and left the relevant place.	Remove the requirement for residential address to be provided.	There are serious privacy concerns being raised by agencies and individuals about the requirement for customers and visitors to provide their residential address for record keeping purposes. Even without a residential address, people will still be required to provide an effective means of communicating with them.
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