

Local Government briefing

Hon Nanaia Mahuta
Minister of Local Government

Title: **Approval to draft an Order in Council under the Epidemic Preparedness Act 2006 to make an essential modification to the Local Government Act 2002**

Date: 30 March 2020

Key issues

This briefing outlines that the Chief Executive of the Department of Internal Affairs recommends an essential modification is made to the Local Government Act 2002 (LGA02) using the immediate modification order mechanism under section 15 of the Epidemic Preparedness Act 2006 (EPA).

On 20 and 24 March 2020 we provided you with advice on the local government sector's concerns and the potential use of the EPA to mitigate the impact of COVID-19 on local authorities. Two of these concerns have been subsequently addressed through the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 (the Act). **S. 9(h)**

We are therefore recommending only one modification order at this time. The order would modify the requirement for newly elected members to sign a written declaration and have this witnessed by another member or the chief executive of the local authority before they can act as members. This is a now a problem for council meetings conducted solely by audio or audio-visual link, as was enabled by the Act.

Action sought

Note that this briefing provides the written opinion of the Chief Executive of the Department of Internal Affairs recommending that a modification to Schedule 7, Clause 14 of the LGA02 meets the statutory test in section 15(2) of the EPA;
Agree that you consider the test in section 15(2) of the EPA is met; and
Agree that officials will instruct Parliamentary Counsel Office to prepare a draft Order in Council for you to submit to the group of Ministers with Power to Act on COVID-19 for consideration.

Timeframe

As soon as possible

Contact for telephone discussions (if required)

Name	Position	Direct phone line	Suggested 1 st contact
Paul James	Chief Executive		
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Cohesion reference	3W2DU3RAJ5R2-671180194-64
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Purpose

1. This briefing recommends an essential modification is made to the Local Government Act 2002 (LGA02) using the immediate modification order mechanism under section 15 of the Epidemic Preparedness Act 2006 (EPA).
2. The order will modify the requirement for newly elected members to sign a written declaration and have this witnessed by another member or the chief executive of the local authority before they can act as members.
3. I consider that this modification is necessary because the impact of the COVID-19 epidemic is such that this statutory requirement is, or is likely to be, impossible or impracticable for local authorities to fully comply with. I also consider the proposed modification goes no further than is, or is likely to be, reasonably necessary in the circumstances.

Background

The local government sector has serious concerns about the impact on COVID-19 on its ability to meet certain statutory requirements

4. On 20 March 2020 we briefed you on the local government sector's serious and urgent concerns about the potential impact of COVID-19. At that point key concerns included:
 - 4.1 the requirement for elected members to be physically present at council or committee meetings to be counted towards a quorum;
 - 4.2 the inability to exclude the public from council meetings on public health grounds under the Local Government Official Information and Meetings Act 1987 (LGOIMA); and
 - 4.3 S.9(2)(f)(iv)

Some of the sector's concerns have been addressed since we last briefed you

5. On 25 March 2020, the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 was enacted (the Act). The Act amended the LGA02 so that a member of a local authority, or a committee, has the right to attend any meeting by audio link or audio-visual link, and members attending in this way will be counted for the purposes of quorum.
6. The Act also amended the LGOIMA to clarify how the requirement for meetings of local authorities to be open to the public can be met in the current circumstances. The local authority must, if it is reasonably practicable, broadcast its meetings live and must provide records of the meetings on its website. These amendments will endure for the term of any epidemic notice issued under section 5 of the EPA.
7. Therefore, issues 4.1 and 4.2 above have been addressed, for now.

However, we have identified a further priority concern relating to statutory declarations for newly elected members

8. We have identified a further issue around the requirement for newly elected local authority members to make sign a written declaration and have this witnessed by

another member or the chief executive of the local authority before they can act as members. The elected members who will not be able to take office under the status quo are:

- 8.1 seven newly elected community board members who have not yet been sworn into office; and
 - 8.2 the successful candidates in five by-elections for councillor or community board member positions which are currently underway or due to begin across the country.
9. This is now a problem for council as meetings are likely to be conducted solely by audio or audio-visual link, as was enabled by the Act. Modifying the requirement will enable newly elected members to take office while close contact restrictions are in place due to COVID-19.

The EPA provides for the modification of statutory requirements in certain cases

10. The EPA contains a mechanism to temporarily modify any legislative requirement via an Order in Council, once an epidemic notice has been issued. There are strict statutory criteria for making such modifications.
11. On 24 March 2020, the Prime Minister issued an epidemic notice under section 5 of the EPA.

I am recommending modifying a statutory requirement in the LGA02 using the immediate modification order mechanism under section 15 of the EPA

12. While an epidemic notice is in force, the Governor-General may, by Order in Council made on the recommendation of the Minister of the Crown responsible for the administration of an enactment, modify any requirement or restriction imposed by the enactment.
13. Orders in Council can only be promoted by the Minister responsible for the enactment to which the proposed modification applies, once the relevant Chief Executive has made a written recommendation to the Minister on the need for a modification.
14. The test is that the Chief Executive is of the opinion that:
 - 14.1 the effects of the epidemic are, or are likely to be, such that the particular requirement or restriction is impossible or impracticable to comply with, or comply fully with (section 15(2)(a)(i)); and
 - 14.2 the modifications in the proposed order go no further than is, or is likely to be, reasonably necessary in the circumstances (section 15(2)(a)(ii)).
15. You must also be of the opinion that the above conditions are satisfied (section 15(2)(b)).
16. **S. 9(h)**
[REDACTED]
17. To be able to confirm to you, under section 15(2)(a)(ii), that the modifications go no further than reasonably necessary I need to consider, scope, time, and other elements that go to the proportionality of the modification to address the need. I also must recommend the option that departs least from the status quo.

I am recommending a modification to a provision relating to statutory declarations for newly elected members

18. I am recommending a modification to Clause 14 of Schedule 7 of the LGA02. This requires newly elected local authority members to make an oral declaration at a council meeting and sign a written declaration and have this witnessed by another member or the chief executive of the local authority before they can act as members.
19. It is not necessary to modify the requirement for a newly-elected member to make an oral declaration at a council meeting. As the Act enables local authority meetings to be conducted by audio or audio-visual link, a newly-elected member can still give an oral declaration at a council meeting. However, it is not possible for a member to arrange for a written declaration to be witnessed by another member or the chief executive at this time. The modification will therefore modify this requirement so that a newly-elected member must provide a signed written declaration to the council as soon as is reasonably practicable after giving the oral declaration at a council meeting.

It is my opinion that this requirement and proposed modification meet the test in section 15 of the EPA

20. **The effects of the epidemic** are such that local authority members are no longer to attend local authority meetings in person because New Zealand because the alert level is at level four.
21. The requirement is **impossible or impracticable** to comply (or comply fully) as:
 - 21.1 While local authority meetings can now take place by audio or audio-visual means (under emergency legislative amendments passed 25 March 2020), not all councils have access to audio-visual technology; and
 - 21.2 It is impossible or impracticable for a new member to have the written declaration witnessed by a member or chief executive as currently envisaged by clause 14(2) without audio-visual means (the attestation cannot be witnessed by audio means).
22. The proposed **modifications** go no further than is, or is likely to be, reasonably necessary in the circumstances:
 - 22.1 Members will still be required to give an oral declaration at a meeting (which may be conducted by audio or audio-visual means) before they can act as members; and
 - 22.2 A written declaration will be required to be provided by the member as soon as practicable afterwards.

23. **S. 9(h)**

[REDACTED]

Process for making an immediate modification order under section 15

24. Cabinet has invited you to issue drafting instructions to the Parliamentary Counsel Office (PCO) for the preparation of an appropriate Order and to submit it to the group

of Ministers with Power to Act on COVID-19 (COVID Ministers) for consideration [CAB-20-MIN-0135 refers].

25. If you agree with my recommendation, PCO will draft an Order in Council to be submitted to COVID Ministers. We will provide you with a cover note for the draft Order, in lieu of a Cabinet paper (as per the current process for briefing COVID Ministers). COVID Ministers meet daily at 10.30am and immediately form an Executive Council afterwards, if required.
26. We understand that the Prime Minister's Office (PMO) is co-ordinating agendas for the COVID Ministers meetings and we will work with your office to provide any additional information required by PMO.
27. Modification Orders are disallowable instruments. The Order needs to be presented to Parliament as soon as it is made and can be disallowed if Parliament resolves, within six sitting days, to disallow it.

We are still working with the local government sector on its concerns

The sector's concerns about requirements relating to timeframes and deadlines relating to local authority chief executive employment contracts cannot be addressed through the EPA

S.9(2)(f)(iv)

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S.9(2)(h)

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S.9(2)(f)(iv)

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Further modifications will be needed

32. The Department is continuing to engage with the local government sector to determine the extent, and priority, of other statutory restrictions or requirements which they may not be able to fulfil or may be unreasonably burdensome during the COVID-19 response period.
33. Further amendments to the relevant local government legislation are likely to be required depending on the length of time the emergency persists. Transitional arrangements may be necessary to restore the ordinary operation of the relevant legislation when the temporary modifications end.
34. Officials are reviewing legislation that is administrated by other government departments that places statutory requirements on local authorities. Chief executives from those departments will need to make recommendations for modification orders directly to their responsible Ministers.
35. We are expecting to brief you further on 3 April 2020 with advice on the modifications required.
36. We consider this one modification should still be progressed now, as it maintains important local representation and democracy during the COVID event.

Consultation

37. We have identified this issue with the local government sector, including Local Government New Zealand and the Society of Local Government Managers.
38. The Department of the Prime Minister and Cabinet, the Parliamentary Counsel Office, Crown Law and Treasury have been consulted on the proposed modifications and will be consulted on the draft Order in Council and paper for submission to COVID Ministers.

Recommendations

39. I recommend that you:
 - a) **note** that on 24 March 2020 an epidemic notice was issued under the Epidemic Preparedness Act (EPA) 2006;
 - b) **note** that section 15 of the EPA provides a mechanism to temporarily modify any legislative requirement via an Order-in-Council, once an epidemic notice has been issued, within strict legislative requirements;
 - c) **note** that Cabinet has invited you to issue drafting instructions to the Parliamentary Counsel Office for the preparation of an Order in Council under the EPA, and to submit it to the group of Ministers with Power to Act on COVID-19 for consideration [CAB-20-MIN-0135 refers];

- d) **note** that the Chief Executive of the Department of Internal Affairs recommends that Schedule 7, Clause 14 of the Local Government Act 2002 be modified to remove the requirement for a signed and witnessed written declaration to be given before a newly-elected member can act as a member;
- e) **note** that in this briefing the Chief Executive of the Department of Internal Affairs has provided his written opinion that the statutory tests under section 15(2) of the EPA are met in relation to the proposed modification in recommendation d);
- f) **agree** that in accordance with section 15(2)(b) of the EPA you are satisfied that: **Yes/No**
- i. the statutory requirement proposed to be modified is, or is likely to be, impossible or impracticable for local authorities to comply (or comply fully) with; and
 - ii. the proposed modification in the draft Order in Council goes no further than is, or is likely to be, reasonably necessary in the circumstances; and
- g) **agree** that officials will instruct Parliamentary Counsel Office to prepare a draft Order in Council for you to submit to the group of Ministers with Power to Act on COVID-19 for consideration. **Yes/No**

Paul James
Chief Executive

Hon Nanaia Mahuta
Minister of Local Government

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