

In Confidence

Office of the Minister of Local Government
Chair, COVID-19 Ministerial Group

Epidemic Preparedness (Local Government Act 2002) Immediate Modification Order 2020

Proposal

1. This paper seeks authorisation for submission to the Executive Council of the Epidemic Preparedness (Local Government Act 2002) Immediate Modification Order 2020. The Order will modify the Local Government Act 2002 (LGA02) using the immediate modification order mechanism in section 15 of the Epidemic Preparedness Act 2006 (Epidemic Act) to enable newly elected local authority members to act as members while close contact restrictions are in place.
2. I also seek agreement to waive the 28-day rule. I consider that the waiver is appropriate because the Order is made in response to an emergency and it will have little or no impact on the public as it relates to local authority representation.

Policy

3. The local government sector has serious and urgent concerns about the impact of COVID-19 on its ability to function effectively and meet statutory obligations. Local authorities have responsibilities under the New Zealand Influenza Pandemic Plan to provide local leadership, maintain essential services, and provide a local Civil Defence and Emergency Management response.
4. The COVID-19 Response (Urgent Management Measures) Legislation Act 2020 (the COVID-19 Response Act) addressed one of the most pressing issues by amending the LGA02 to allow local authority meetings to be conducted wholly by audio or video conferencing while an epidemic notice under the Epidemic Act is in force.
5. There is now a related issue around Clause 14 of Schedule 7 of the LGA02. Clause 14 requires newly elected or appointed members to make an oral declaration at a meeting of the local authority, sign a written version of the declaration and have it witnessed by another member or the chief executive of the local authority, before they may act as a member.
6. This is now a problem for councils as meetings are likely to be conducted solely by audio or audio-visual link, as was enabled by the COVID-19 Response Act. It is likely that not all councils will not have the technology to meet by audio-visual link and will be relying on teleconferences for meetings. Without modification, it is not clear how Clause 14 should function in this context.
7. Modifying the requirement will give certainty that newly elected members can act as members while close contact restrictions are in place. Officials are aware of at least five newly elected community board members who have not yet been sworn into office. There are five by-elections for councillor or community board member positions currently underway or due to begin shortly that will also be affected.

8. It is important that local authorities can function effectively during the COVID-19 epidemic and be seen to do so. Addressing this issue will help to maintain local representation and support local authority decision-making during the COVID-19 epidemic.
9. The Order modifies Clause 14 by:
 - 9.1 Removing the requirement in clause 14(1)(b) for a written declaration before a person can act as a member;
 - 9.2 Creating a new obligation for a signed declaration to be provided to the Chief Executive as soon as is reasonably practicable; and
 - 9.3 removing the requirement for the written declaration to be witnessed as set out in subclause (2) and (3).

The Epidemic Act provides for modification orders to be made to enable statutory compliance during an epidemic

10. 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. On 24 March 2020, the Prime Minister issued an Epidemic Notice under section 5 of the Epidemic Act.
11. Cabinet has invited the Minister of Local Government to issue drafting instructions to the Parliamentary Counsel Office for the preparation of an appropriate Order and to submit it to the group of Ministers with Power to Act on COVID-19 for consideration [CAB-20-MIN-0135].

Section 15 of the Epidemic Act sets out the statutory test to make a modification order

12. Under section 15(2), a modification order can only be made if: the effects of an epidemic are such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with; and the modifications it makes go no further than is, or is likely to be, reasonably necessary in the circumstances.
13. The effects of the epidemic are such that local authority members are no longer able to attend local authority meetings in person because the alert level is at level four.
14. The requirement is impossible or impracticable to comply (or comply fully) with as:
 - 14.1 Local authority meetings can no longer take place in person. While local authority meetings can now take place by audio or audio-visual means (under the COVID-19 Response Act), not all councils have access to audio-visual technology; and
 - 14.2 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).
15. The proposed modifications go no further than is, or is likely to be, reasonably necessary in the circumstances as:
 - 15.1 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

- 15.2 A written declaration will be required to be provided by the member as soon as practicable afterwards.
16. It is not necessary to modify the requirement for a newly-elected member to make an oral declaration at a council meeting. As the COVID-19 Response 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. It is intended that an oral declaration that is seen and heard by members at a meeting is sufficient to enable that person to act as a member of the local authority. 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.
17. As required by section s15(2)(a) of the Epidemic Act, the Chief Executive of the Department of Internal Affairs has advised me that, in his opinion, the effects of the COVID-19 epidemic are such that the requirement in Clause 14 of Schedule 7 of the LGA02 is impossible or likely to be impossible to comply, or comply fully, with and that the proposed modification in the Order goes no further than is, or is likely to be, reasonably necessary in the circumstances. I am also of the opinion that the above conditions are satisfied, as per the test in section 15 (2)(b).
18. I am therefore seeking authorisation for submission to the Executive Council of the Epidemic Preparedness (Local Government Act 2002) Immediate Modification Order 2020.
19. When determining the necessity of this modification, options considered included:
- 19.1 Relying on each local authority to interpret the existing requirements in the context of meetings held by audio or audio-visual link. This would risk a range of responses and, critically, uncertainty about the legitimacy of the declaration and the member's subsequent participation in council decisions; and
- 19.2 Removing or suspending the declaration requirements during the period of the epidemic. This would detract from the significance of the declaration, including for existing members, at a time when commitment to act in the best interests of the community is particularly important.

Legislative implications

20. The Order will modify Clause 14 of Schedule 7 of the LGA02 for the period in which the epidemic notice issued under section 5 of the Epidemic Act is in force.

Timing and 28 day rule

21. I am seeking approval to waive the 28-day rule on the grounds that the Order is made in response to an emergency. It is important that local authorities can continue to fully function to enable an effective COVID-19 response.
22. This Order will have little to no impact on businesses, individuals or not-for-profit entities. Therefore, little time is needed to prepare for the change.
23. The Order will come into effect on the day following its publication by Gazette notice.

Compliance

24. The proposals in the attached Order in Council are not inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

25. There are no financial implications for the Crown resulting from the proposals in this paper.

Regulations Review Committee

26. I do not consider that there are grounds for the Regulation Review Committee (or any equivalent Parliamentary accountability mechanism operating during the COVID-19 emergency) to draw attention to the regulation under Standing Order 319.

Certification by Parliamentary Counsel Office

27. The Parliamentary Counsel Office, with advice from the Crown Law Office, has certified that the Order in Council is appropriate for submission to the Executive Council.

Impact analysis

28. The Treasury has determined that this is a direct Covid-19 response and has suspended the Regulatory Impact Analysis requirements in accordance with CAB 20 MIN-0138. The Treasury has discussed the proposal with the Agency and concluded that the regulatory impacts of this action are minor.
29. As per the limited analysis that the Department of Internal Affairs was able to do, I consider this proposal has little to no impact on individuals, businesses and not-for-profits. There are no costs and few risks or possible unintended impacts from this proposal. The main benefit of this proposal is that it helps to maintain local representation and decision-making during the period the epidemic notice is in force, to ensure local authorities can contribute to an effective COVID-19 response.

Publicity

30. Once the Order is made, I intend to publicise the change to the local government sector. I propose to proactively release this briefing paper as soon as possible after gazettal of the Order, within 30 business days of decisions being made, in accordance with the principles contained in Cabinet Office Circular CO (18) 4 – Proactive Release of Cabinet Material: Updated Requirements. Proactive release will be subject to any redactions that may be warranted under the Official Information Act 1982.

Consultation

31. Consultation has been necessarily limited by the urgency of this proposal and the short time to progress it. The Department of the Prime Minister and Cabinet (Policy Advisory Group), the Parliamentary Counsel Office, Crown Law Office, the Treasury, the Ministry of Health and the Ministry of Justice have been consulted on this paper.
32. My officials have discussed the proposals and their implementation with representatives of the local government sector from Local Government New Zealand and the Society of Local Government Managers.

Recommendations

33. The Minister of Local Government recommends that the Cabinet COVID-19 Ministerial Group:
1. Note that on 23 March 2020 Cabinet:
 - 1.1 noted that the Minister of Local Government is proposing that a modification order be made to enable local government to operate under the COVID-19 Alert Level 4; and

- 1.2 invited the Minister of Local Government to issue drafting instructions to the Parliamentary Counsel Office for the preparation of an appropriate order and to submit it to the group of Ministers with Power to Act on COVID-19 for consideration [CAB-20-MIN-0135];
2. note that Clause 14 of Schedule 7 of the Local Government Act 2002 requires newly elected members to sign a written declaration witnessed by another member or the chief executive of the local authority before they can act as members;
3. note that the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 amended the Local Government Act 2002 (LGA02) so that a member of a local authority has the right to attend any meeting by audio or audio-visual link;
4. note that the requirement in Clause 14 will be impossible or impracticable for local authorities to comply, or comply fully with, while close contact restrictions relating to COVID-19 are in place;
5. note the modification will:
 - 5.1 remove the requirement in clause 14(1)(b) for a written declaration before a person can act as a member;
 - 5.2 create a new obligation for a signed declaration to be provided to the Chief Executive as soon as is reasonably practicable; and
 - 5.3 remove the requirement for the written declaration to be witnessed as set out in subclause (2) and (3)
6. note that I have received written advice from the Chief Executive of the Department of Internal Affairs that he considers the test in s15(2)(a) of the Epidemic Preparedness Act 2006 to make a modification order is met;
7. note that I consider the test is met, as per the requirement in s15(2)(b);
8. note that a waiver of the 28-day rule is sought:
 - 8.1 so that the regulations can come into force as soon as possible;
 - 8.2 on the grounds that the Order is made in response to an emergency to enable council decision-making. It is important that local authorities can continue to fully function to enable an effective COVID-19 response;
9. agree to waive the 28-day rule so that the regulations can come into force on the day following its publication by Gazette notice; and
10. authorise the submission to the Executive Council of the Epidemic Preparedness (Local Government Act 2002) Immediate Modification Order 2020.

Authorised for submission to the COVID-19 Ministerial Group

Hon Nanaia Mahuta

Minister of Local Government