

Hon Andrew Little, Minister of Justice

Proposals for Immediate Modification Orders under the Epidemic Preparedness Act 2006

Date	7 April 2020	File reference	
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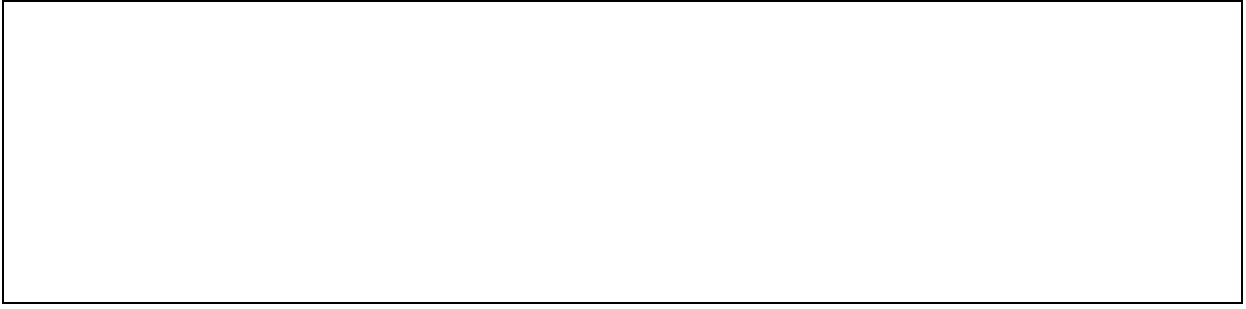
Action Sought	Timeframe
Agree to the recommendations in this paper	7 April 2020

Contacts for telephone discussion (if required)

Name	Position	Telephone (work)	(a/h)	1st contact
Andrew Kibblewhite	Secretary for Justice and Chief Executive	04 494 9850	s9(2)(a)	
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Jenna Reid	Policy Manager COVID-19 Response Policy	04 918 8649		

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
Minister's office comments		



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7 April 2020

Hon Andrew Little, Minister of Justice

Proposals for Immediate Modification Orders under Epidemic Preparedness Act 2006

Purpose

1. This briefing seeks your agreement to seven proposed modifications, subject to assessment by Crown Law Office, for inclusion in Immediate Modification Orders under s 15 of the Epidemic Preparedness Act 2006 ('EPA'). It also seeks your approval of, and agreement to progress, the attached Cabinet paper (**Attachment 1**)

Section 15 of the Epidemic Preparedness Act

2. On 25 March 2020, the epidemic notice issued by the Prime Minister under s 5 of the EPA came into force. As noted in our briefing to you on 22 March, the issuing of an epidemic notice enables the Governor-General to, by Order in Council and on the recommendation of the Minister responsible for the legislation, modify any requirement or restriction imposed by the legislation under s 15 of the EPA
3. To recommend a modification be included in an Immediate Modification Order, a Minister must:
 - 3.1. have received a written recommendation from the chief executive of the department responsible for the legislation that, in their opinion:
 - 3.1.1. the effects of an epidemic of the quarantinable disease stated in the notice are, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with; and
 - 3.1.2. the modifications it makes go no further than is, or is likely to be reasonably necessary in the circumstances; and
 - 3.2. be satisfied that the two matters above are met.
4. Immediate modification orders cannot be used to modify a requirement to release a person from custody or detention, have a person's detention reviewed by a court, Judge or Registrar, modify a restriction on keeping a person in custody or detention, or to modify a requirement or restriction imposed by one of New Zealand's five core constitutional and rights-based statutes, or the EPA.

5. The modification of a requirement or restriction may be absolute or subject to conditions and may be made by stating an alternative means of complying or by substituting a discretionary power for the requirement or restriction.
6. Unlike the epidemic management notices under section 8 of the EPA, there is no built-in revocation mechanism. Each modification therefore needs to address both when any change will apply and when it will cease to apply.

Seven proposals have been identified to include in Immediate Modification Orders

7. The Ministry of Justice is responsible for administering approximately 150 pieces of legislation. Following the issuing of the epidemic notice, the Ministry developed a process for rapid identification and assessment of provisions in its legislation that may require modification under s 15 EPA. Some of the provisions identified were brought to our attention by the judiciary and legal profession.
8. The Ministry has initially identified seven requirements and restrictions ^{s9(2)(f)(iv)} that are impossible or impracticable to comply with under the range of measures imposed under the COVID-19 Alert System. Based on our initial scan, modifications to these requirements and restrictions have been deemed high priority either due to their impact on courts or justice services, public protection, harm minimisation or access to justice. There may be further modifications needed in future and we will keep you updated as identification and assessment work continues.

Overview of proposed modifications

9. The following sections in legislation have been identified as requiring modification by Immediate Modification Order:

#	Statute and sections	Proposed modification	Reason for modification
1	Oaths and Declarations Act 1957 ss 3 & 4 Sections 3 and 4 require oaths and affirmations to be made before (i.e. in the physical presence of) the person taking the oath or affirmation.	Modify the law so that there is no requirement for a person taking an oath or affirmation under the Oaths and Declarations Act 1957 to be physically present with the person making the oath or affirmation or to physically sign the same document while epidemic-related restrictions are in place.	Sections 3 and 4 require oaths and affirmations to be made before (i.e. in the physical presence of) the person taking the oath or affirmation. This is impossible to comply with during the restrictions imposed at COVID-19 alert level 4. Restrictions at lower levels may be impracticable to comply with for vulnerable people (e.g. those with underlying health conditions or over 70 years old).

#	Statute and sections	Proposed modification	Reason for modification
		The core requirements for taking oaths or affirmations remain the same.	
2	<p>Oaths and Declarations Act 1957, ss 8 & 9</p> <p>Section 8 requires a declaration or statutory declaration to be made in the manner prescribed in s 9.</p> <p>Section 9 provides a declaration or statutory declaration must be made before a person listed in s 9(1). This implies a physical presence.</p>	<p>Modify the law so that there is no requirement for a person taking a declaration under the Oaths and Declarations Act 1957 to be physically present with the person making the declaration or to physically sign the same document while epidemic-related restrictions are in place.</p> <p>The core requirements for taking statutory declarations remain the same.</p> <p>Modify s 9 to provide if an entity that would receive a statutory declaration in accordance with a legislative instrument is satisfied (or believes on reasonable grounds) that it is not practicable for the declaration to be made to one of the people listed in s 9, the entity can:</p> <ul style="list-style-type: none"> - elect to take the statutory declaration in place of one of the people listed in s 9 of the Oaths and Declarations Act 1957 following the modified process set out above; or - obtain confirmation of the matters required by the statutory declaration. 	<p>Section 9 provides a declaration or statutory declaration must be made before a person listed in s 9(1). This implies a physical presence.</p> <p>Requirements in ss 8 and 9 are therefore impossible to comply with during the restrictions imposed at COVID-19 alert level 4. Restrictions at lower levels may be impracticable to comply with for vulnerable people (e.g. those with underlying health conditions or over 70 years old).</p>

#	Statute and sections	Proposed modification	Reason for modification
3	<p>Oaths and Declarations Act 1957, ss 11 & 12</p> <p>Section 11 prescribes requirements for a declaration made outside of New Zealand, in particular that the declaration be “made before” a specified person.</p> <p>Section 12 provides that specified servicemen outside of New Zealand may administer an oath or affidavit “sworn before him”.</p>	<p>Modify the law so there is no requirement for a person taking an oath, affirmation or declaration under the Oaths and Declarations Act 1957 to be physically present with the person making the oath, affirmation or declaration or to physically sign the same document while restrictions on movement and face-to-face interactions to manage the effects of COVID-19, such as those in New Zealand, are in place in the country concerned.</p> <p>The deponent should provide an explanation of the relevant restrictions in place in the country concerned. A recipient entity can rely on that explanation in the absence of reliable information about any restrictions that applied in the relevant country at the time it was attested to.</p>	<p>Sections 11 and 12 imply a physical presence where a declaration, oath or affidavit is being witnessed.</p> <p>Requirements in ss 11 and 12 are therefore impossible to comply with during the restrictions imposed at COVID-19 alert level 4. Restrictions at lower levels may be impracticable to comply with for vulnerable people (e.g. those with underlying health conditions or over 70 years old).</p>
4	<p>Protection of Personal and Property Rights Act 1988 (‘PPPR Act’) s 94A</p> <p>Requires the Enduring Power of Attorney (‘EPOA’) to be witnessed/signed “in the presence” of someone else (interpreted to mean the physical presence).</p> <p>Associated references in the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and</p>	<p>Modify s 94A PPPR Act and the PPPR Regulations so that there is no requirement for an EPOA to be witnessed/signed in the physical presence of someone or to physically sign the same document while epidemic-related restrictions are in place.</p> <p>Replace with a new requirement that signing and witnessing should take place by AVL (using remote participation technology with an audio and visual link) with a donor, authorised witness and attorney(s) having a copy of</p>	<p>Section 94A of the PPPR Act and various places on the notes to the EPOA forms and on the forms themselves in the PPPR Regulations requires the EPOA to be witnessed/signed “in the presence” of someone else.</p> <p>These requirements are impossible to comply with during the restrictions imposed at COVID-19 alert level 4. Restrictions at lower levels may be impracticable to comply with for vulnerable people (e.g. those with underlying health conditions or over 70 years old).</p>

#	Statute and sections	Proposed modification	Reason for modification
	Prescribed Information) Regulations 2008 (PPPR Regulations) will also require modification.	<p>the document before them. Other core requirements for EPOA remain the same.</p> <p>Require that, where an EPOA is signed remotely, a record be kept of the reasons the document was signed remotely</p> <p>and that, as soon as a donor, witness, and attorney are able to safely - given the relevant alert level - they would need to sign the same document.</p>	
5	<p>Wills Act 2007, s 11</p> <p>Requires people making, changing or revoking or reviving their wills to follow the witnessing process in s 11 “in the presence of two witnesses” (including option of will-maker directing another person to sign the document on their behalf in the will-maker’s presence and in the presence of the two witnesses); and for witnesses to sign the document “in the will maker’s presence”.</p>	<p>Remove the requirement for witnesses to be physically present with the person or to physically sign the same document.</p> <p>Replace with a new requirement that signing and witnessing should take place by AVL (using remote participation technology with an audio and visual link) with both the will-maker and witnesses having a copy of the document before them. Other core requirements in the Wills Act remain the same.</p> <p>Witnesses should include a statement that they have witnessed the will-maker signing the will and have themselves signed a copy of the same document by AVL because of the Epidemic Notice being in force.</p> <p>Scans or photos of the copies should be taken as soon as possible after</p>	<p>Requiring people who are making, changing, revoking or reviving their wills to sign the will “in the presence of two witnesses” is impossible to comply with during the restrictions imposed at COVID-19 alert level 4. Restrictions at lower levels may be impracticable to comply with for vulnerable people (e.g. those with underlying health conditions or over 70 years old).</p> <p>Allowing signing and witnessing to occur by AVL provides a practical solution to ensure wills can continue to be made, changed and revoked during this high alert level.</p> <p>Retaining other core requirements will ensure protections for vulnerable people continue and will provide safeguards against fraud and misuse by coercion.</p>

#	Statute and sections	Proposed modification	Reason for modification
		signing, and the parties should ensure that these are sent to and held by one person.	
6	<p>Sale and Supply of Alcohol Act 2012, s 103</p> <p>Requires Police, a Medical Officer of Health ('MOH') and an inspector to inquire into new alcohol licence applications. The Police and MOH must, if they have any matters in opposition to the application, file a report to the District Licensing Committee ('DLC') within 15 working days. If no report is received, the DLC may assume that neither the Police nor the MOH oppose the application.</p>	<p>Modify s 103 to suspend the obligations on Police and MOH to inquire into any application received while the COVID-19 epidemic notice is in place. Also suspend the ability for DLCs to assume that neither Police or MOH oppose any application.</p> <p>The modification would result in Police and MOH needing to inquire into any applications received, but with the statutory time frame paused, allowing a report to be filed with the DLC 15 working days after the epidemic notice is lifted.</p>	<p>The intent of this provision is to ensure that licence applications and renewals are scrutinised by Health and Police, and to allow DLCs to make a decision based on all the available evidence. This scrutiny is an important part of supporting the harm minimisation objectives of the Sale and Supply of Alcohol Act.</p> <p>MOH are public health doctors who are designated by the Director General of Health to perform statutory functions under the Health Act. There are a finite number of people in these specialist, statutory roles, and their focus is necessarily on the epidemic. It is not possible for them to fulfil other statutory roles under the Sale and Supply of alcohol Act at this time.</p>

s9(2)(f)(iv)

#	Statute and sections	Proposed modification	Reason for modification
	s9(2)(f)(iv)		

10. Alternative options to address requirements or restrictions in the provisions were considered in determining what modification was appropriate. This included exploring non-legislative options, the use of existing powers in existing legislation and whether changes could be made by other legislative methods. We have ensured the modifications go no further than is reasonably necessary by proposing that each proposed modification only remove or amend the problematic requirement or restriction in the provision to the extent necessary. Each modification will remain in place until the COVID-19 epidemic notice ends, with the exception of the Sale and Supply of Alcohol Act as outlined above.

s9(2)(f)(iv)

I am satisfied that the proposed modifications meet the s 15 test

12. In line with the requirements in s 15(2)(a)(i) and subject to assessment by the Crown Law Office, I (as Secretary for Justice) am of the opinion that the requirements and restrictions identified by the Ministry are impossible or impracticable to comply with while the epidemic notice and associated measures impacting on public life are in place. I am also of the opinion that the modifications proposed go no further than is, or is likely to be, reasonably necessary in the circumstances as required by s 15(2)(a)(ii).

Assessment by Crown Law Office and consultation with key stakeholders

13. The proposed modifications are subject to assessment by Crown Law Office to confirm that they meet the test in s 15 of the Epidemic Preparedness Act. Full templates of the proposed modifications are attached to this briefing (**Attachments 2 – 5**).
14. Crown Law Office was sent the proposed modifications to review on 3 April. s9(2)(h)
15. The judiciary and relevant government agencies were consulted on the proposed modifications and the draft Cabinet paper, albeit with a short period of time to comment. The judiciary and relevant government agencies are supportive of the proposed modifications and the Cabinet paper. We have also consulted with the New Zealand Law Society and the Alcohol Licensing and Regulatory Authority on the proposals relevant to them. No significant issues were raised during that consultation.

16. We are also currently undertaking consultation with the Chief Legal Advisors (CLA) of other departments as per the Crown Law Office process.
17. Pending further discussions with Crown Law Office and any CLA feedback, there may be further amendments required to the draft Cabinet paper before it is lodged. We will work with your office to provide an amended version if this is required.

Next steps

18. In order for the proposals to be put forward for inclusion in an Immediate Modification Order, you must also be satisfied that they meet the test set out in s 15 of the Epidemic Preparedness Act. Based on the advice provided in this paper, we recommend that you agree that the identified requirements and restrictions are impossible or impracticable to comply with while the epidemic notice is in force, and that the proposed modifications go no further than is, or is likely to be, reasonably necessary in the circumstances.
19. If you agree, and following any amendments as noted above, we recommend that you take the attached paper (**Attachment 1**) to the COVID-19 Group of Ministers meeting on Thursday 9 April. Our proposed timeframes for finalising the Immediate Modification Orders are set out below:

Date	Step
7 April	Consult and finalise Cabinet paper. Cabinet paper undergoes Ministerial consultation overnight
8 April	Any agreed amendments made to Cabinet paper, which is lodged with Cabinet office by 4pm
9 April	Cabinet paper considered by COVID-19 Group of Ministers
9 April	Drafting instructions sent to PCO
10-13 April	EASTER
14 April	Minister receives draft Cabinet paper attaching Immediate Modification Orders. Potential Ministerial consultation overnight
15 April	Lodge with Cabinet Office by 4pm
16 April	COVID-19 Group of Ministers
At its next meeting	Send Immediate Modification Orders to Executive Council Governor-General signs Immediate Modification Orders
ASAP	PCO publishes Immediate Modification Orders on the New Zealand Legislation website

Date	Step
ASAP	Immediate Modification Orders presented to the House of Representatives as soon as practicable after they are made

20. These timeframes have been discussed with your office and we are available to discuss them with you if necessary.

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Recommendations

21. It is recommended that you:

1. **Note** that Immediate Modification Orders can be issued under section 15 of the Epidemic Preparedness Act 2006;
2. **Note** that the inclusion of any proposed modifications in Immediate Modification Orders is subject to assessment by Crown Law Office that the proposals meet the section 15 test;
3. **Note** that, as Chief Executive of the Ministry of Justice and subject to Crown Law Office assessment, I am of the opinion that the requirements and restrictions identified by the Ministry are impossible or impracticable to comply with while the epidemic notice is in force and that the modifications proposed go no further than is, or is likely to be, reasonably necessary in the circumstances;
4. **Agree** that, subject to Crown Law Office assessment, the following sections containing requirements or restrictions are impossible or impracticable to comply with while the epidemic notice is in force, and that the proposed modifications to those sections go no further than is, or is likely to be, reasonably necessary in the circumstance :

- | | | |
|------|---|-----------------|
| 4.1. | Sections 3 and 4 of the Oaths and Declarations Act 1957; | YES / NO |
| 4.2. | Sections 8 and 9 of the Oaths and Declarations Act 1957; | YES / NO |
| 4.3. | Sections 11 and 12 of the Oaths and Declarations Act 1957; | YES / NO |
| 4.4. | Section 94A of the Protection of Personal and Property Rights Act 1988 and associated references in the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008; | YES / NO |
| 4.5. | Section 11 of the Wills Act 2007; | YES / NO |
| 4.6. | Section 103 of the Sale and Supply of Alcohol Act 2012; | YES / NO |

s9(2)(f)(iv)



5. **Agree**, subject to Crown Law Office assessment and any final changes, to take the attached paper to the COVID-19 Group of Ministers seeking approval of the proposed modifications; and **YES / NO**
6. **Note** that officials are available to discuss this advice with you.

Andrew Kibblewhite

Secretary for Justice and Chief Executive

APPROVED / SEEN / NOT AGREED

Hon Andrew Little

Minister of Justice

Date: / /

Attachments:

s18(d)

