

# Health Report

## Renewal of the Epidemic Notice under section 7(1) of the Epidemic Preparedness Act 2006 (No 3)

**Date due to MO:** N/A **Action required by:** 21 December 2020

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**Security level:** E.g. IN CONFIDENCE **Health Report number:** 20202097

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**To:** Rt Hon Jacinda Ardern, Prime Minister  
Hon Chris Hipkins, Minister for COVID-19 Response  
Hon Andrew Little, Minister of Health

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### Contact for telephone discussion

Name	Position	Telephone
Dr Ashley Bloomfield	Director-General of Health	s 9(2)(a)
Maree Roberts	Deputy Director-General, System Strategy and Policy	s 9(2)(a)

### Minister's office to complete

- |   |                                    |  |
|---|------------------------------------|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Decline   | <input type="checkbox"/> Noted               |
| <input type="checkbox"/> Needs change         | <input type="checkbox"/> Seen      | <input type="checkbox"/> Overtaken by events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |  |

Comment:

# Renewal of Epidemic Notice under section 7(1) of the Epidemic Preparedness Act 2006 (No 3)

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**Security level:** IN CONFIDENCE      **Date:** 15 December 2020

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**To:** Rt Hon Jacinda Ardern, Prime Minister  
Hon Chris Hipkins, Minister for COVID-19 Response  
Hon Andrew Little, Minister of Health

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## Purpose of report

1. This report sets out my written recommendation, as Director-General of Health, that the Epidemic Preparedness (COVID-19) Notice 2020 (Epidemic Notice) be renewed and seeks your agreement to renew the Epidemic Notice.

## Key points

2. The Epidemic Preparedness (COVID-19) Notice 2020 (Epidemic Notice), issued under section 5 of the Epidemic Preparedness Act 2006 (Act), came into force on 25 March 2020 for a maximum period of three months. That notice was renewed under section 7 of the Act on 24 June 2020 and again on 23 September 2020.
3. The Epidemic Notice can be renewed by the Prime Minister whether the outbreak is occurring in New Zealand or overseas:
  - a. with the agreement of the Minister of Health;
  - b. after considering my written recommendation, as the Director-General of Health; and
  - c. if the Prime Minister is satisfied that the effects of the outbreak concerned are likely to continue to disrupt essential governmental and business activity in New Zealand significantly.
4. This report provides my written recommendation, as the Director-General of Health, that the Epidemic Notice be renewed. My recommendation is that the Epidemic Notice be renewed for the reasons set out in this report. These include that:
  - a. based on the ongoing international risk, and the continued risk of further outbreaks in New Zealand, COVID-19 will continue to disrupt essential governmental and business activity in New Zealand; and
  - b. while the COVID-19 epidemic still presents significant disruption both in New Zealand and overseas, it is essential to continue to have the legislative tools that are available while an epidemic notice is in force, for use as needed.

5. If the Epidemic Notice is renewed, as soon as possible after that renewal, the Prime Minister must present a copy of the renewed Epidemic Notice to Parliament. This can be presented even if Parliament is not sitting.

## Recommendations

It is recommended that you:

- a) **Note** that there continue to be large scale outbreaks of COVID-19 globally, which pose an ongoing risk to New Zealand.
- b) **Note** that an Epidemic Notice under section 5 of the Epidemic Preparedness Act 2006 is currently in place and expires at the close of 23 December 2020.
- c) **Note** that the Epidemic Notice includes powers that require persons to refrain from taking any specified actions that contribute to, or are likely to contribute to, the risk of the outbreak or spread of COVID-19, or require persons to take specified actions to comply with specified measures that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19.
- d) **Note** my advice that the current outbreak of COVID-19 globally, and the current measures to prevent community transmission in New Zealand, are likely to continue to disrupt essential governmental and business activity in New Zealand significantly.
- e) **Note** that the Epidemic Notice can be renewed whether the outbreak is occurring in New Zealand or overseas.
- f) **Note** that the Epidemic Notice is the enabling framework for a range of legislative instruments used to address the effects of the COVID-19 epidemic.
- g) **Note** my recommendation that the Epidemic Notice be renewed.
- h) **Note** the Prime Minister is required to make the decision as to whether the Epidemic Notice is renewed.
- i) **Agree**, as the Minister for COVID-19 Response, that the Epidemic Notice is renewed (*Minister for COVID-19 Response only*). Yes/No *CA*
- j) **Agree**, as the Minister of Health, that the Epidemic Notice is renewed (*Minister of Health only*). Yes/No
- k) **Agree**, as the Prime Minister, that the Epidemic Notice be renewed: Yes/No
- (i) having considered the written recommendation of the Director-General of Health; and
  - (ii) being satisfied that the effects of the outbreak concerned are likely to continue to disrupt essential governmental and business activity in New Zealand significantly (*Prime Minister only*).

- l) **Note** the renewal of the Epidemic Notice will take effect upon publication in the Gazette and expire three months after its commencement, unless earlier renewed or revoked.
- m) **Note** when the renewal of the Epidemic Notice is signed, a copy of that renewal must be presented as soon as possible to Parliament.



Dr Ashley Bloomfield  
**Director-General of Health**



Hon Chris Hipkins  
**Minister for COVID-19 Response**

Date: 17/12/2020

Hon Andrew Little  
**Minister of Health**

Date:

Rt Hon Jacinda Ardern  
**Prime Minister**

Date:

# Renewal of the Epidemic Notice under section 7(1) of the Epidemic Preparedness Act 2006 (No 3)

## Proposal

6. This paper recommends that the Epidemic Preparedness (COVID-19) Notice 2020 (Epidemic Notice) be renewed under section 7 of the Epidemic Preparedness Act 2006 (the Act).

## Background

7. On 24 March 2020, the Prime Minister, with the agreement of the Minister of Health, after considering my written recommendation, issued the Epidemic Notice under section 5 of the Act. Unless earlier revoked or subsequently renewed, the Epidemic Notice expires three months after its commencement.
8. The first Epidemic Notice was to expire on 24 June 2020.
9. On 24 June 2020, the Prime Minister, with the agreement of the Minister of Health, after considering my written recommendation, renewed the Epidemic Notice. The Epidemic Notice was then due to expire on 23 September 2020.
10. On 23 September 2020, following due process, the Prime Minister renewed the Epidemic Notice for a second time. The Epidemic Notice now expires on 23 December 2020.
11. To renew the Epidemic Notice, the Prime Minister must:
  - a. have the agreement of the Minister of Health;
  - b. have considered my written recommendation, as the Director-General of Health and
  - c. be satisfied the effects of an outbreak of COVID-19 are likely to continue to disrupt essential governmental and business activity in New Zealand significantly.
12. The Act states that an epidemic notice should be made with the agreement of the Minister of Health. I understand that the Prime Minister has written to the Minister for COVID-19 Response to provide that he is the Minister of Health for the purposes of the COVID-19 response. As the renewal of an epidemic notice falls within the portfolio of the Minister for COVID-19 Response, it is appropriate for both the Minister of Health and the Minister for COVID-19 Response to agree to the renewal of the Epidemic Notice.
13. As at 15 December 2020:
  - a. the World Health Organisation (WHO) has declared the COVID-19 outbreak a global pandemic and has recommended that countries take a comprehensive approach to stopping the spread of COVID-19;

- b. there is widespread community transmission of COVID-19 globally which continues to challenge New Zealand's border measures;
  - c. the outbreak of COVID-19 globally continues to have a significant impact on New Zealand's economy through disruption to internal and external markets, supply chains and workers.
14. As required by the Act, I, as the Director-General of Health, have kept under review, and have kept you informed of, the situation during which the Epidemic Notice has been made.

## Effects of an Epidemic Notice

### Legislative powers: COVID-19 Public Health Response Act 2020 and the Health Act 1956

- 15. The Epidemic Notice allows for the use of powers under the COVID-19 Public Health Response Act 2020 (COVID-19 Act) and 'special powers' under section 70 of the Health Act 1956 (Health Act). These powers include requiring persons to refrain from taking any specified actions that contribute to or are likely to contribute to the risk of the outbreak or spread of COVID-19, or requiring persons to take specified actions to comply with specified measures that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19.
- 16. These powers have been used by me, as the Director-General of Health (acting with the powers of a medical officer of health in accordance with section 22 of the Health Act), to issue notices to classes of people in New Zealand. These powers have now been augmented by the COVID-19 Act.
- 17. Medical officers of health have been using the 'special powers' in individual circumstances to prevent further outbreak or spread of COVID-19. This has included requiring persons to be quarantined/isolated and/or submitting themselves for medical examination and testing in an effort to minimise the risk to public health.
- 18. Powers under the COVID-19 Act are currently used to mandate preventative measures at Alert Level 1 (e.g. mandatory QR codes and masks on domestic flights) and to continue border-related requirements such as managed isolation and quarantine arrangements.

### Epidemic Preparedness Act 2006

- 19. The Epidemic Notice also unlocks the power to for the Prime Minister to also make Epidemic Management Notices. Three notices are in place: the Epidemic Preparedness (Epidemic Management – COVID-19) Notice 2020, the Epidemic Preparedness (Epidemic Management – COVID-19) Notice (No 2) 2020 and the Epidemic Preparedness (Epidemic Management – COVID-19 – Parole Act 2020 and Sentencing Act 2002) Notice 2020. These notices amend 12 statutory provisions across four statutes. For examples, they enable greater flexibility in relation to managing parole conditions, given physical distancing requirements.
- 20. There are also nine immediate modification orders in place under section 15 of the Act, through which the effect of primary legislation is temporarily modified to relax statutory requirements or restrictions to enable compliance that would otherwise be impossible or impractical. For example, the immediate modification orders relax

requirements for citizens to physically complete forms or be physically present to participate in activities or access government or other services.

21. In addition, a number of the provisions introduced through the COVID-19 Response (Further Management Measures) Legislation Act 2020 are contingent on the Epidemic Notice remaining in place. For example, one of the provisions is an obligation on coroners to test for COVID-19. Another provision enables the Commerce Commission to authorise conduct that may technically breach the restrictions on cartel conduct, but which is of such a benefit to the public that it should be permitted.

### **An epidemic notice can only be issued or renewed if the effects COVID-19 are likely to disrupt essential government and business activity**

22. By issuing and renewing the Epidemic Notice, the Prime Minister declared she was satisfied the effects of an outbreak of a quarantinable disease were likely to significantly disrupt essential government and business activity in New Zealand. This continues to be the case due to the ongoing risk of further outbreaks due to the worsening outbreaks overseas. While progress is underway for the approval and rollout of COVID-19 vaccines, it will still take months for a vaccine to be approved and rolled out in New Zealand and other jurisdictions.

### **The disruption to New Zealand's economy is ongoing**

23. The outbreak overseas has continued to have an impact on the New Zealand economy through disruption to supply chains, and ongoing impacts felt by restrictions imposed by higher Alert Levels.
24. Domestically, the economic impacts of COVID-19 are significant and ongoing:
  - a. the reduction in GDP as a result of the implementation of the alert levels ranges from an estimated 5 percent at Alert Level 1 to 35 percent at Alert Level 4; and
  - b. operating deficits are predicted to average around \$31.7 billion in 2020/21 while net core Crown debt is expected to increase on average by around \$29.4 billion per year<sup>1</sup>.

### **The global situation continues to pose a significant risk to New Zealand**

25. The continued effective operation of the Government is best served if the health impacts of COVID-19 are managed and minimised.
26. The WHO reported on 15 December 2020 that there were 71 051 805 cases of COVID-19 reported globally, and 1 608 648 deaths. The global situation continues to worsen as the numbers of weekly cases and deaths continue to increase.
27. The scale of the COVID-19 pandemic presents a high risk of further outbreaks of COVID-19 in the New Zealand community. People arriving into New Zealand from high risk countries with ongoing COVID-19 cases may lead to infection being introduced into the community. Despite managed quarantine and isolation measures in place, case numbers could quickly escalate. New Zealand's COVID-19 Elimination Strategy includes

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<sup>1</sup> Pre-election Economic and Fiscal Update 2020 (16 September 2020) produced by New Zealand Treasury.

border controls, case detection and surveillance, contact tracing and managed isolation/quarantine, and community support for control measures.

### **The Epidemic Notice provides the enabling framework for other legislative instruments**

28. The Government Administration Committee reported on the Law Reform (Epidemic Preparedness) Bill (which became the Epidemic Preparedness Act 2006), and noted that there should be a graduated approach to implementing and scaling back immediate modification orders. The Committee also commented that, to facilitate the graduated approach, an Epidemic Notice should remain in force for as long as an epidemic remains a threat. It was suggested that as an epidemic recedes, "the immediate modification orders should be scaled back gradually to facilitate society's return to normality,"<sup>2</sup> implying that the Epidemic Notice would be the last to be revoked.

29. s 9(2)(h)

30. All other instruments, particularly the epidemic management notices, will remain under review, and will be revoked if and when they are no longer necessary. The Epidemic Notice is the enabling framework for a range of other legislative powers and instruments, including epidemic management notices, and immediate modification orders (both made under the Act).

31. s 9(2)(h)

### **The powers resulting from renewing the Epidemic Notice are significant**

32. The powers resulting from the renewed Epidemic Notice are broad-ranging. They include the power to search (e.g. by way of testing) and detain persons (e.g. by way of orders directing an individual to isolate or quarantine in a managed facility). These are some of the most intrusive and significant powers a State can exercise over its people.
33. Exercising these powers limits the rights and freedoms in the New Zealand Bill of Rights Act 1990. They may only be limited by the Executive Government where this is demonstrably justified in a free and democratic society. Exercise of the powers in any individual case must be necessary, reasonable and proportionate to the risk COVID-19 presents to the New Zealand community.
34. The power to make Immediate Modification Orders, which have the effect of modifying requirements set out in primary legislation, is also extraordinary and constitutionally unique.

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<sup>2</sup> Page 5 Law Reform (Epidemic Preparedness) Commentary – accessed on 11 June 2020 at [https://www.parliament.nz/resource/en-NZ/48DBSCH\\_SCR3588\\_1/bb53df3ec76505d2dfb175afc97631aed1cf0789](https://www.parliament.nz/resource/en-NZ/48DBSCH_SCR3588_1/bb53df3ec76505d2dfb175afc97631aed1cf0789).



35. s 9(2)(h) [REDACTED] In addition, the Ministry of Health constantly reviews the situation justifying the Epidemic Notice, and I will keep you informed. I will advise the Prime Minister to promptly revoke the Epidemic Notice if it appears the effects of COVID-19 outbreak are no longer likely to disrupt essential government and business activity.

## Recommendation to renew the Epidemic Notice

**Given the impact on government and business activity, it is proposed the epidemic notice be renewed for a period of three months from 23 December 2020**

36. The scale and extent of COVID-19 outbreaks overseas means COVID-19 continues to have a significant impact on government and business activity. This impact may go on for some time in light of the significant risk of further future outbreaks of COVID-19 in New Zealand.
37. My recommendation is therefore that the Epidemic Notice is renewed for a further three months before its expiry on 23 December 2020. If the Epidemic Notice is renewed, it would continue in force (unless earlier revoked or renewed) until 22 March 2021.

## There are safeguards and processes in place for the Prime Minister to renew the Epidemic Notice

38. There are important safeguards and forms of Parliamentary scrutiny in place to ensure that the use of powers associated with the Epidemic Notice are reasonable, including:
- a. the Prime Minister is required to notify the House of Representatives as soon as reasonably practicable that an Epidemic Notice has been issued or renewed;
  - b. the House of Representatives has the opportunity to scrutinise Orders made during an epidemic. This provides a layer of swift scrutiny, and enhances the legitimacy of the Orders without imposing impractical requirements;
  - c. while the issuing of an Epidemic Notice would allow the modification or relaxation of laws, laws that protect fundamental rights and freedoms are prevented from being modified in this way, such as significant constitutional legislation including the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicial Review Procedure Act 2016, the New Zealand Bill of Rights Act 1990, or the Parliamentary Privilege Act 2014.

## Timing

39. The renewal of the Epidemic Notice will be published in the Gazette as soon as possible.
40. As soon as possible after giving the Epidemic Notice, the Prime Minister must present a copy of the Epidemic Notice to Parliament. This can be provided to the Office of the Clerk.

## Equity

41. The spread of COVID-19 disproportionately harms older people and those with long term conditions such as diabetes or heart disease. Additionally, the disruption likely to result from spread of the disease in New Zealand, and measures to contain it, is likely to disproportionately affect those who are unable to work from home, and people in certain industries, such as health, education, retail, aviation, tourism and hospitality.
42. There are a number of factors to balance in considering equity implications:
  - a. we know from historical examples that Māori and Pacific peoples are likely to be disproportionately affected by a widespread epidemic;
  - b. we also know that the spread of COVID-19 disproportionately harms older people, and those with long-term conditions such as diabetes or heart disease;
  - c. the disruption likely to result from the spread of COVID-19 in New Zealand, and measures to contain it, is likely to disproportionately affect those who are unable to work from home, and people in certain industries, such as health, education, retail, aviation, tourism and hospitality; and
  - d. we know that, in particular, Māori and Pacific communities are likely to be disproportionately affected by the impact of any controls, for example, they are less likely to be able to work remotely.
43. The moves that have been taken to strongly and quickly control the outbreak have struck the correct balance between these factors.
44. The renewal of the Epidemic Notice will allow the government to rapidly and more effectively introduce measures early in an outbreak to reduce the peak of an epidemic, prevent and/or reduce community transmission, and mitigate harm to those most vulnerable.

## Next steps

45. If the Epidemic Notice is renewed, the Ministry of Health will make arrangements for the Notice to be published in the Gazette and to come into effect as soon as possible. Officials will work with the Department of Prime Minister and Cabinet to arrange for the Epidemic Notice to be presented to Parliament.

**ENDS.**