

Briefing

Further policy decisions for COVID-19 Public Health Response Amendment Bill: increasing penalties for criminal offences and proposed revocation of Order in Council recommendation

Date due to MO:	16 July 2021	Action required by:	21 July 2021
Security level:	IN CONFIDENCE	Health Report number:	20211586
To:	Hon Chris Hipkins, Minister for COVID-19 Response		
Copy to:	Hon Kris Faafoi, Minister of Justice		

Contact for telephone discussion

Name	Position	Telephone
Maree Roberts	Deputy Director-General, System Strategy and Policy	s 9(2)(a)
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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 Withdrawn | |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:

Further policy decisions for COVID-19 Public Health Response Amendment Bill: increasing penalties for criminal offences and proposed revocation of Order in Council recommendation

Security level: IN CONFIDENCE **Date:** 16 July 2021

To: Hon Chris Hipkins, Minister for COVID-19 Response

Purpose of report

1. This report seeks approval to additional policy decisions for inclusion in the COVID-19 Public Health Response Amendment Bill 2021 (the Bill). The proposed decisions will increase the penalty fine for criminal offences for individuals and introduce a penalty for criminal offences for body corporates, convicted through the courts for criminal breaches of COVID-19 Public Health Response Orders (Orders).
2. Approval is also sought to request the partial revocation of Cabinet recommendation two from the Cabinet paper providing policy approvals for the Bill [entitled *Proposed COVID-19 Public Health Response Amendment Bill*, SWC-21-MIN-0067 refers], which agrees that the COVID-19 Public Health Response Act 2020 (the Act) be amended to allow for it to be repealed (in whole or in part) through an Order in Council.

Summary

Increase in criminal offence penalties

3. In May 2021, Cabinet approved the following policy issues for inclusion in the Bill:
 - a. increase infringement offence penalties;
 - b. introduce an infringement offence penalty for body corporates; and
 - c. enable secondary legislation to create a graduated penalty approach reflective of individual breach circumstances [SWC-21-MIN-0067 refers].
4. Cabinet agreed that the maximum criminal conviction fine in section 26 of the Act be revised to remain consistent with the increase in infringement offence penalties. Cabinet also authorised you, as Minister for COVID-19 Response, to make any necessary policy decisions that may arise during the drafting process, consistent with the policy intentions agreed by the Cabinet Social Wellbeing Committee.

5. The Act currently prescribes the following maximum penalty for convicted offences, to be prescribed by the court:
 - a. imprisonment for not more than six months; or
 - b. a \$4,000 fine.
6. Increasing the penalty fine for convicted offences for individuals and introducing a separate penalty for body corporates would align with the policy decisions taken by Cabinet to increase the penalties for lower-level infringement offences. Increasing the penalty equips enforcement officers with a better tiered structure for responding to non-compliance that reflects the seriousness of the breaches that proceed to a criminal conviction. This also more appropriately holds people to account, and accounts for the growing range of non-compliant behaviours detailed in Orders.
7. Officials have considered penalties for criminal offences in comparable legislation and recommend that:
 - a. the penalty fine for individuals increases to \$5,000 and the maximum term for imprisonment is maintained at six months
 - b. a penalty be introduced for body corporates comprising a fine not exceeding \$15,000.
8. These recommendations are consistent with the policy decisions already made by Cabinet for the Bill.
9. Approval to increase the criminal offence penalty fine for individuals, and to introduce a criminal offence penalty for body corporates, will be reflected in drafting instructions to PCO for inclusion in the Bill.

Partial revocation of Cabinet Recommendation regarding use of Order in Council to repeal the Act

10. The Bill extends the maximum term of the Act to May 2023 (from May 2022). Cabinet had also agreed to allow for the Act to be repealed (in whole or in part) through an Order in Council (OIC). This was to ensure the Act, and particularly the use of Orders, is repealed as soon as possible so that the restrictions on the freedom of New Zealanders are not in place any longer than necessary.
11. Legislation Design Advisory Committee (LDAC) advice has been sought on the design of the Bill, with LDAC recommending consideration of the interactions of this new provision to repeal the Act through an OIC, with the existing provisions in the Act, including the overlap between these powers.
12. Following this advice, we consider that the OIC provision is unnecessary given the requirement in section 3 of the Act for the House to pass resolutions to confirm (or not) the creation or amendment of Orders under the Act and to continue the Act until that expiry date.
13. Ministry of Health officials consider the resolution process in section 3 preferable to the OIC process as the use of the House to make the decisions provides accountability to Parliament as a whole, rather than just Cabinet (as would be required for an OIC). Therefore, your approval is sought to revoke this element of recommendation two through the upcoming LEG paper seeking approval to introduce the Bill.

Recommendations

We recommend you:

- a) **Note** that Cabinet agreed to revise the maximum criminal conviction fine in section 26 of the COVID-19 Public Health Response Act 2020 (the Act) to remain consistent with the increase in infringement offence penalties. **Noted**
- b) **Note** that Cabinet authorised you, in your capacity as Minister for COVID-19 Response, to make any necessary further policy decisions that may arise during the drafting process of the COVID-19 Public Health Response Amendment Bill 2021 (the Bill), consistent with the policy intentions agreed by Cabinet. **Noted**
- c) **Note** that the agreed changes to the infringement offence regime will introduce a separate and higher fee/fine for body corporates [SWC-21-MIN-0067 refers]. **Noted**
- d) **Agree** to increase the maximum criminal offence fine for individuals to \$5,000 upon conviction and maintain the maximum term for imprisonment for criminal offences for individuals at not more than six months. **Yes/No**
- e) **Agree** to include a criminal offence penalty for body corporates that comprises a fine not exceeding \$15,000 upon conviction. **Yes/No**
- f) **Note** that Cabinet approved a recommendation that the Bill allow for the Act to be repealed in whole or in part via Order in Council. **Noted**
- g) **Agree** to seek revocation of the Order in Council recommendation through the upcoming LEG paper, in favour of maintaining the current section 3 of the Act instead. **Yes/No**
- h) **Direct** officials to issue drafting instructions to Parliamentary Counsel Office to reflect these decisions in the COVID-19 Public Health Response Amendment Bill. **Yes/No**



Maree Roberts
**Deputy Director-General, System
Strategy and Policy**

Date:



Hon Chris Hipkins
Minister for COVID-19 Response

Date: 23/7/2021

While I agree to these recommendations, I would like advice in the next 2-3 weeks on increased penalties for border averters. It's hard to see why someone breaching health and safety legislation, that potentially has an impact on a defined number of people, are subject to much higher fines than someone who puts the whole country at risk by deliberately breaching border restrictions. CH

Further policy decisions for COVID-19 Public Health Response Amendment Bill: increasing penalties for criminal offences and proposed revocation of Order in Council recommendation

Background

1. The COVID-19 Public Health Response Act 2020 (the Act) provides the primary legal framework for addressing the COVID-19 pandemic and delivering the Government's COVID-19 Elimination Strategy. The Act allows the Minister for COVID-19 Response (or the Director-General of Health in specified circumstances) to make COVID-19 Public Health Response Orders (Orders) to give effect to the public health response. There are provisions in the Act to create infringement offences for when requirements in Orders are not complied with.
2. The purpose of the Act's infringement regime is to ensure New Zealanders meet the requirements set out in the Act and Orders to help New Zealand respond to the global COVID-19 pandemic. Therefore, the infringement regime empowered by the Act needs to reflect the range of non-compliant behaviours detailed in Orders and appropriately hold people to account for these.
3. The provisions in the Act for infringement offences refer to breaches that are of relatively low seriousness. An additional provision in the Act refers to criminal offences, whereby court proceedings consider a person's intentions in:
 - a. breaching the requirements of Orders;
 - b. obstructing or intentionally threatening, assaulting or hindering an enforcement officer in undertaking their functions under the Act;
 - c. failing to comply with directions given by an enforcement officer, for example directing a person to provide identification or directing a business or undertaking to close;
 - d. occupying closed roads or public spaces;
 - e. failing to stop in a vehicle when required to do so by a constable.
4. In May 2021, Cabinet agreed to increase the penalties for infringement offences through the COVID-19 Public Health Response Amendment Bill 2021 (the Bill) for individuals, introduce infringement offence penalties for body corporates and enable secondary legislation to create a graduated approach for managing infringement offence breaches up to the maximum penalties in the Act. The purpose of these changes is to appropriately deter and manage non-compliance. The following maximum penalties were approved for infringement offences:

- a. For an individual, an infringement fee of up to \$1,000 and a maximum court fine of \$3,000; and
 - b. For a body corporate, an infringement fee of up to \$3,000 and a maximum court fine of \$9,000.
5. Cabinet also agreed that the maximum criminal conviction fine in section 26 of the Act be revised to remain consistent with the increase in infringement offence penalties, however no maximum limit was presented or agreed. It was intended that the maximum penalty for criminal offending would be set after consultation with the Ministry of Justice.
6. The Act currently prescribes the following maximum penalty for convicted offences, to be prescribed by the court:
- a. imprisonment for not more than six months, or
 - b. a \$4000 fine.
7. At their current levels, the penalties for criminal offences in the Act do not adequately reflect the difference in seriousness of criminal offences compared to infringement offences.

Increasing the individual criminal conviction fine

8. Officials have considered penalties for comparable criminal offences such as failure to comply with orders or directions of authorised people in the Health Act 1956, the New Zealand Health and Disability Act 2000 and the Health and Safety at Work Act 2015. Penalties for comparable criminal offences vary widely between these pieces of legislation, from \$2,000 with no imprisonment, to imprisonment of up to five years or a fine of up to \$600,000. A summary of these penalties is provided in **Appendix One**.
9. The current penalty for criminal offences relating to Orders prescribes either a fine or imprisonment, but not both.
10. Officials from a number of government agencies (including the Ministry of Health, Ministry of Justice, New Zealand Police, the Ministry of Business, Innovation and Employment and the Crown Law Office) consider that a higher fine of \$5,000 is appropriate to balance the intent of appropriately managing non-compliant behaviours and the subsequent public health risk these pose, and the potential for the penalty to be considered unreasonable comparable to other public health offence penalties.
11. It is not proposed that the current maximum term for imprisonment be increased. Comparable legislation supports a 6-month term being reasonable for the nature of criminal offences to which this penalty applies.
12. The current approach to compliance with Orders and requirements within them, to educate and support individuals to meet the requirements first, before resorting to issuing infringement offences or undertaking prosecutions, will be maintained.

Introducing a criminal offence penalty for body corporates

13. A consistent approach to differentiating penalties for body corporates is recommended, where non-compliance by a person conducting a business or undertaking (PCBU) may warrant a higher fee than an individual. This is a similar approach to that of the Health

and Safety at Work Act 2015, where flexibility in infringement approach is appropriate to make sure the infringement fines are proportionate both to the risk posed by non-compliance and the resources available to an individual versus a body corporate to meet infringement penalties.

14. The Cabinet-approved changes to penalties for infringement offences presents a ratio of 1:3 for individual and body corporate penalties. Following the same ratio, an appropriate body corporate fine for criminal offences would be \$15,000. Ministry of Health officials consider the penalty comprising a fine to this maximum amount to be appropriate for body corporates. This is consistent with the penalty for individuals and is reflective of the harm that could be caused by a PCBU neglecting or refusing to comply with the requirements in Orders.
15. This penalty is significantly lower than those penalties for PCBUs in the Health and Safety at Work Act. I consider this penalty appropriately balanced to deter non-compliant behaviour, while not disproportionately impacting small business owners and their workforce, who have experienced economic loss as a result of the COVID-19 pandemic to date. A higher penalty for body corporates risks being counter-productive, economically unfavourable and could be contentious. Additionally, prosecution under the Health and Safety at Work Act is also available as an option, as not complying with PCBU obligations would have significant workplace health and safety implications as well.

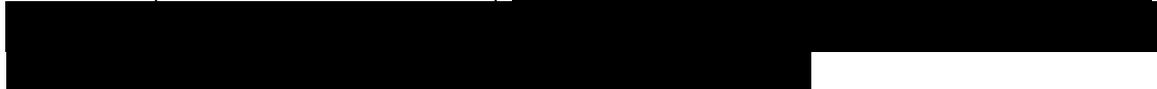
Partial revocation of Cabinet Recommendation regarding use of Order in Council to repeal the Act

16. The Bill extends the maximum term of the Act to May 2023 (from May 2022). Cabinet had also agreed to allow for it to be repealed (in whole or in part) through an Order in Council (OIC). This was to ensure the Act is repealed as soon as possible, so that the restrictions on the freedom of New Zealanders are not in place any longer than necessary.
17. However, officials have since sought advice on the design of the Bill from the Legislation Design and Advisory Committee (LDAC), who recommended consideration of the interactions of this new provision with the existing provisions in the Act, including the overlap between these powers.
18. Following this advice, we consider that the OIC provision is unnecessary given the requirement for the House to pass resolutions to confirm (or not) the creation or amendment of Orders under the Act and to continue the Act until that expiry date, provided in section 3.
19. Ministry of Health officials consider the resolution process in section 3 preferable to the OIC process as the use of the House to make the decisions provides accountability to Parliament as a whole, rather than just Cabinet (as would be required for an OIC). Therefore, your approval is sought to revoke this element of recommendation two through the upcoming LEG paper seeking approval to introduce the Bill.

Human Rights

20. Any regulatory changes around the COVID-19 response have the potential for significant New Zealand Bill of Rights Act 1990 (BORA) implications. Rights engaged include

freedom of assembly, movement including the right of a citizen to enter New Zealand, search and seizure, and expression.

21. BORA implications were considered for changes to the infringement regime presented to Cabinet [SWC-21-MIN-0067 refers]. ^{s 9(2)(h)}

22. A NZBORA vet will be undertaken on the Bill, including for the proposals in this paper once the Bill has been introduced.

Equity

23. Equity implications were considered for changes to the infringement regime presented to Cabinet [SWC-21-MIN-0067 refers]. These implications are also applicable to the proposals in this paper.
24. Additionally, the court must consider the intent of the person in breaching the requirements subject to criminal offence penalties, meaning the imposition of a fine or imprisonment must be considered in the context of the offence and the risk of COVID-19.

Consultation

25. Officials consulted the Ministry of Business, Innovation and Employment, Ministry of Justice, New Zealand Police, Crown Law Office and LDAC on the proposals in this paper, who expressed general support for these proposals.
26. The Ministry of Justice commented that increasing the criminal fines and body corporate punishments reflects and appropriate stepped set of responses to manage non-compliance.

Next steps

27. Subject to your approval, drafting instructions will be prepared for PCO for inclusion in the Bill. There are no further outstanding policy issues that require further policy decisions before the Bill is finalised for LEG consideration and Introduction.

ENDS.

Appendix One: Comparison of penalties for similar criminal offences

Source	Penalty	Application
Health Act 1956		
s72	Upon conviction, a fine not exceeding \$4000, imprisonment not exceeding 6 months, or both.	Relating to infectious and notifiable diseases, obstructing a Medical Officer of Health or people assisting a Medical Officer of Health e.g. threaten, assault.
s92V	Upon conviction, a fine not exceeding \$2000.	Relating to management of infectious diseases, failure to comply with a direction given by a Medical Officer of Health.
s92W	Upon conviction, a fine not exceeding \$2000.	Relating to management of infectious diseases, a parent, guardian or person in charge of an individual lacking legal capacity, obstructing compliance of the individual they represent with a direction given by a Medical Officer of Health.
s92ZW	Upon conviction, a fine not exceeding \$2000 or imprisonment not exceeding 6 months.	Intentional failure to comply with an order.
s92ZX	Upon conviction, a fine not exceeding \$2000.	A parent, guardian or person in charge of an individual lacking legal capacity, intentionally obstructing compliance of the individual they represent with an order.
s92ZZH	Upon conviction, a fine not exceeding \$2000.	Regarding contact tracing, failure to provide information, intentionally omitting information or providing false information.
s112	Upon conviction, a fine not exceeding \$2000, imprisonment not exceeding 3 months, or both.	Regarding quarantine: <ul style="list-style-type: none"> the Master of ship permitting a person liable to quarantine to leave the ship a person liable to quarantine leaving the ship a person arriving on an aircraft liable to quarantine, leaving the aerodrome or any place where they are lawfully detained for quarantine.
New Zealand Public Health and Disability Act 2000		
s59E	Upon conviction, a fine not exceeding \$10,000	Failure to comply with a requirement imposed by the chairperson of a mortality review committee.

s86	Upon conviction, a fine not exceeding \$10,000	<ul style="list-style-type: none"> • Failure to provide evidence • Contravening an order • Obstructing or hindering an inquiry board • Failing to comply with a requirement of an inquiry board or authorised person • Wilfully interrupting or obstructing any hearing conducted by an inquiry board.
Health and Safety at Work Act 2015		
s47	<p>Upon conviction:</p> <ul style="list-style-type: none"> • for an individual, imprisonment not exceeding 5 years or a fine not exceeding \$300,000 • for an individual who is a PCBU, imprisonment not exceeding 5 years or a fine not exceeding \$600,000 • for any other person, a fine not exceeding \$3 million. 	For a person who has a duty, engaging in conduct that exposes any individual to whom that duty is owed to a risk of death or serious injury or serious illness, and is reckless as to that risk.
s56	Upon conviction, for an individual a fine not exceeding \$10,000 and for any other person a fine not exceeding \$50,000.	The failure of a Person Conducting a Business or Undertaking (PCBU) to report a notifiable event.
s159	Upon conviction, for an individual a fine not exceeding \$50,000 and for any other person, a fine not exceeding \$250,000.	Failure to comply with an order.
s178	Upon conviction, a fine not exceeding \$10,000.	Failure to provide an inspector with a correct name and residential address.
s187	Upon conviction, a fine not exceeding \$10,000 and for any other person, a fine not exceeding \$50,000.	Hindering or obstructing a health and safety medical practitioner.
s209	Upon conviction, a fine not exceeding \$10,000 and for any other person, a fine not exceeding \$50,000.	Providing false or misleading information.