



Briefing

SPECIFICATION OF INFRINGEMENT OFFENCES UNDER THE COVID-19 PROTECTION FRAMEWORK

To: Hon Chris Hipkins
Minister for COVID-19 Response

Date	18/11/2021	Priority	Medium
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Purpose

This briefing provides you with information about how offences are specified and classified under the COVID-19 Protection Framework based on new information about how New Zealand Police enforce infringement offences.

Recommendations


1. **Note** that Police's approach to enforcing infringement offences precludes criminal prosecution of these offences, which limits arrest, search and seizure powers.
2. **Note** not having arrest, search and seizure powers may limit Police's ability to effectively respond to some offences where removal of a person from a situation is preferred (e.g. large prohibited gatherings) or search and seizure powers are needed.
3. **Note** the enforcement approach outlined in recommendation 1, and effect of this approach mentioned in recommendation 2, may impact how offences are specified in Orders under the new COVID-19 Protection Framework.
4. **Note** that currently when considering whether offences should be specified as an infringement offence, officials consider the Ministry of Justice's and Legislation Design Advisory Committee's guidelines, but do not consider the impact of different approaches to enforcement.

5. **Note** that when officials advise Ministers on specification of cases in future, an adapted approach will be taken including:
- 5.1. continued consideration of the Ministry of Justice's and Legislation Design Advisory Committee's guidelines on creating infringement offences (as outlined in recommendation 4); and
 - 5.2. consideration of whether arrest, search and seizure powers are likely to be needed to effectively respond to the offending (new).
6. **Note** more serious offending is less likely to be specified as an infringement offence under the adapted specification approach outlined in recommendation 5, which is likely to reduce the number of infringement offences classified as 'high risk' under the proposed graduated infringement offence framework.



Ruth Fairhall
Head of Strategy and Policy, COVID-19
Group, DPMC

18/11/2021



Hon Chris Hipkins
Minister for COVID-19 Response

24/11/2021

Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
Ruth Fairhall	Head of Strategy and Policy, COVID-19 Group	s9(2)(a)	✓
Ashlee Bowles	Senior Advisor, Policy		

Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

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Executive Summary

1. Police has informed officials that when a person commits an offence that is specified as an infringement offence in a COVID-19 Order, Police will only enforce that offence by issuing an infringement notice to that person and will not consider prosecuting that person for the offence of intentionally failing to comply with a COVID-19 Order.
2. s9(2)(h) [Redacted] Police consider it prudent to proceed only by way of an infringement offence in relation to breaches specified as infringement offences.¹
3. Powers of arrest, search and seizure generally depend on the suspected commission of an imprisonable offence (infringement offences are not imprisonable offences). Police's enforcement approach means that in practice Police do not consider exercising such powers in relation to conduct specified as an infringement offence. It may therefore not be appropriate to specify an offence as an infringement offence in some instances, particularly where these powers may be required to respond to offending.
4. Currently, the appropriateness of specifying an offence as an infringement offence is determined with reference to Ministry of Justice and Legislation Design and Advisory Committee guidelines on creating infringement offences. The impact of different enforcement approaches on how an offence is specified is not considered. Given Police's enforcement approach, we consider we need to adapt our approach to determining whether certain breaches of COVID-19 Orders should be specified as infringement offences.
5. The intended new approach will continue to involve consideration of the Ministry of Justice's and Legislation Design and Advisory Committee's guidelines on creating infringement offences in the first instance, followed by consideration of whether arrest, search and seizure powers are likely to be required to effectively respond to or investigate that offending. s9(2)(g)(i) [Redacted]
6. Officials intend to apply this adapted approach to the specification of infringement offences under the new COVID-19 Protection Framework. We expect that fewer serious offences will be specified as infringement offences as a result of this new approach.

¹ This paragraph (2), along with the penultimate sentence of paragraph 8, paragraph 10(a) and paragraph 11 are legally privileged.

Infringement offences are unlikely to be prosecuted by the Police

7. Section 26 of the Act provides for the infringement regime for non-compliance with COVID-19 Orders. There are two categories of offence covered by the section, each with corresponding maximum penalties:
- a) **criminal offence** - if a person is found guilty of committing an offence under section 26 of the Act (intentionally failing to comply with a COVID-19 Order) the person is liable on conviction to either imprisonment for no more than 6 months or a fine not exceeding \$4,000.
 - b) **infringement offence** – if an Order specifies that doing something that is an infringement offence, the current penalties are an infringement fee of \$300 or a fine imposed by a court not exceeding \$1,000.²
8. To date, officials have understood that where a breach of an Order has been specified as an infringement offence, it is open to the Police to consider prosecuting for the criminal offence of intentionally breaching the Order (instead of issuing an infringement notice for the offending or prosecuting as an infringement). s9(2)(h)
9. In practice, this means that where certain breaches have been specified as an infringement offence in the COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) 2021 (the Alert Level Order), Police will only proceed against a person by issuing an infringement notice or prosecuting for the infringement offence. Criminal prosecution is not considered.
10. The rationale for Police's approach is two-fold:
- a) s9(2)(h)
 - b) There are operational challenges for Police associated with having discretion to respond to particular behaviour by way of criminal enforcement or an infringement notice. Police do not currently have this discretion in any other context. Even if legislation were amended to explicitly enable the two options, Police would need to implement policies on how to make these enforcement decisions to avoid disparity of treatment and fairness issues.

² These maximum penalties will be significantly increased pending the passage of the COVID-19 Public Health Response Amendment Bill.

³ Amending the Act to clarify the position will not completely resolve the issue. Police would still need to address operational challenges with training officers in exercising this enforcement discretion (discussed in paragraph 10(b)).

This enforcement approach limits arrest, search and seizure powers...

11. Arrest, search and seizure powers are not generally available in relation to infringement offences. Section 315 of the Crimes Act 1961, for example, restricts the arrest of people without a warrant to situations involving breaches of the peace or the commission of imprisonable offences (or as expressly authorised by another enactment). Similarly, under the Search and Surveillance Act 2012 search (and corresponding seizure) powers are generally provided where, amongst other matters, there are reasonable grounds to suspect a person has committed an offence punishable by imprisonment. However, as noted above, infringement offences are only punishable by an infringement fee or court-imposed fine, and they do not result in the entry of a conviction.

12. s9(2)(h)

13. Another potential issue with not pursuing prosecution of some criminal offences, is the deterrent effect. A person cannot receive a conviction if they are prosecuted for an infringement offence (section 375 of the Criminal Procedure Act 2011). Prosecution and conviction tend to have a greater deterrent effect compared to infringement notices, and also signal seriousness of offending more clearly. Given the risk associated with breach of COVID-19 Orders, deterrence is an important part of penalty regimes.

... and impacts how offences should be specified as infringement offences under the COVID-19 Protection Framework

14. Where arrest, search and seizure powers are likely to be required to enforce compliance with requirements under an Order, you may choose not to specify breach of those requirements as infringement offences in the Order.

15. In light of this, officials propose to consider Police's enforcement approach when providing advice about how offences are specified (as either criminal or infringement offences) in COVID-19 orders moving forward. The Ministry of Justice and Legislation Design and Advisory Committee's guidelines on creating infringement offences will continue to be referred to in the first instance to assist in determining the appropriateness of dealing with prohibited conduct as an infringement offence. Officials will then consider whether arrest, search and seizure powers are likely to be needed before making a final recommendation about whether the offence should be specified as an infringement offence.

16. A likely consequence of this new specification approach is that fewer infringement offences will be classified as 'high risk' in the graduated infringement fee framework that will be introduced through Regulations, subject to the passage of the COVID-19 Public Health Response Amendment Bill.⁴ This is because offending that creates a high risk to public health is less likely to be specified as an infringement offence.

⁴ This framework will set classes of infringement offence and corresponding penalties. The high risk class adopts the maximum penalties in the Act and will apply to infringement offences where the risk of transmitting or spreading COVID-19 as a result of breaching the requirement is probable.

17. This new approach will be taken by officials when providing advice on how offences under the COVID-19 Protection Framework should be specified. The Order to give effect to this new framework is currently being drafted, and you will receive the draft Order for Ministerial consultation at the end of next week. Some offences that were previously specified as infringement offences under Alert Level Framework may no longer be, following this new approach. For those offences that are still specified as infringement offences, the Order will also set out the applicable class (low, medium, high) and corresponding penalty using the Regulations mentioned in the previous paragraph. These Regulations are due to be considered by Cabinet Legislation Committee on Thursday 25 November.

Consultation

18. The Ministry of Health, Ministry of Justice, New Zealand Police, and Crown Law Office were consulted on this briefing.

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