



**National Emergency
Management Agency**
Te Rākau Whakamarumarū



**DEPARTMENT OF THE
PRIME MINISTER AND CABINET**
TE TARI O TE PIRIMIA ME TE KOMITI MATUA

Proactive Release

The following item has been proactively released by the Department of the Prime Minister and Cabinet, and National Emergency Management Agency:

Guidance on the use of CDEM Act key powers during the COVID-19 related state of national emergency

This guidance was current between 25 March 2020 and 13 May 2020, and does not apply outside of this timeframe.

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9 April 2020

To CDEM Groups, Group Controllers, and Local Controllers

Guidance on the use of CDEM Act key powers during the COVID-19 related state of national emergency

Purpose

The purpose of this note is to provide guidance on the use of key powers that are available to Civil Defence Emergency Management (CDEM) Groups, Group Controllers, Local Controllers and those acting under their authority to respond to COVID-19.

Caution

This guidance has been prepared to assist decision-making, but is not a substitute for reading the CDEM Act 2002 (CDEM Act). If you have specific questions about the use of powers, talk to your Regional Emergency Management Advisor (REMA), or seek independent legal advice as appropriate.

Background

Orders issued under the Health Act 1956 (Health Act)

On 24 March 2020, the Prime Minister, with the agreement of the Minister of Health, issued an Epidemic Notice under s5 of the Epidemic Preparedness Act 2006. This allows the use of special powers by Medical Officers of Health (MOOH) in accordance with s70 of the Health Act for the purposes of preventing the outbreak and spread of COVID-19.

The Director General of Health, acting as the Chief Medical Officer of Health, has now issued the following two orders (Section 70 Orders) that are related to this guidance:

1. On **Wednesday 25 March 2020**, the MOOH issued an order pursuant to **s 70(1)(m) of the Health Act** in relation to non-essential business and congregating in a public place of amusement or recreation (refer Appendix A).
2. On **Friday 3 April 2020**, the MOOH issued an order pursuant to **s 70(1)(f) of the Health Act**, requiring all persons within all districts of New Zealand to be isolated and quarantined. That means all persons in New Zealand are directed to remain at their current place of residence, except as permitted for essential personal movement, and to maintain physical distancing. Exceptions are described in the Order (refer Appendix B).

There are also other Health orders in place. These can be accessed at:

<https://covid19.govt.nz/resources/key-documents-and-legislation/>

Enforcement of Section 70 Orders

The Section 70 Orders request that constables (*Police*) to do anything reasonably necessary to ensure compliance with the requirements in the Section 70 Orders, including:

- requiring all non-essential businesses to close/remain closed;
- stop individuals from congregating in a public place of amusement or recreation;
- enforcing the requirements for all people in NZ to remain at their current place of residence, except as permitted for *essential personal movement* or to the extent necessary to access or provide an essential business; and
- requiring physical distancing standards to be maintained, except from fellow residents.

Police have publicly stated that their enforcement approach is to (see Operational Policing Guidelines – Alert Level 4, Scenarios for the Frontline, dated 4 April 2020¹):

- **engage** with the parties and **communicate** with them to identify whether their current behaviour and activities are contrary to the government's response to COVID-19;
- **educate** them on the current requirements (if necessary) to correct their behaviour or activities;
- **encourage** compliance measures if required; and
- **enforcement** – only resort to warnings or prosecutorial measures if **absolutely necessary**.

Declaration of State of National Emergency

On 25 March 2020, the Minister of Civil Defence declared a State of National Emergency, which has since been extended. This enables CDEM Groups, Controllers and Police constables access to emergency powers under the CDEM Act to respond to the impacts of COVID-19.

The State of National Emergency is being reviewed every seven days, and a decision made by the Minister of Civil Defence about its extension for a further seven days.

Directions issued by the Director and National Controller CDEM

The Director CDEM / National Controller has issued two Directions under s 91 of the CDEM Act:

- direction to CDEM Groups and Group Controllers for the duration of the COVID-19 response and recovery – 29 March 2020; and
- direction to CDEM Groups in relation to tsunami alert testing – 4 April 2020).

Both of these directions can be found at <https://covid19.govt.nz/resources/key-documents-and-legislation/>.

The context in which CDEM powers are being used for COVID-19

The consequences of the COVID-19 pandemic are such that the special powers in the CDEM Act are required to respond to the emergency. A State of National Emergency was declared to ensure the necessary powers are available to manage the impacts of COVID-19 and enable

¹ <https://www.police.govt.nz/about-us/publication/operational-policing-guidelines-alert-level-4>

enforcement of the measures the Government put in place at Alert Level 4. Access to the emergency powers may well still be required when the Alert Level is de-escalated.

The powers available to CDEM Groups, Group Controllers and Local Controllers are extensive, but do not operate in a vacuum. This guidance is designed to support decision-making and the use of powers in the particular context of the response to COVID-19.

Remember that the Health Act comes first...

Section 6 of the CDEM Act provides that the *'CDEM Act does not limit, is not in substitution for, and does not affect the functions, duties, or powers of any person under the provisions of any enactment or any rule of law'*.

This means that CDEM Act powers **should not be used in substitution for other legislation**, such as the Health Act, but complement it by enabling access to emergency powers to fill any gaps.

... and that there are constraints on the decisions you can make

During a state of emergency, Local Controllers must follow the directions given by the Group Controller.²

We recommend that CDEM Groups consider discussing with their Group Controller and Local Controllers who should be advised on the potential use of a power by a Group or Local Controller to allow the consideration of:

- any CDEM area wide issues; or
- provide a joined up approach particularly with key partners; or
- to help enable a consistent approach is taken in use of powers across the CDEM area as appropriate.

For example, CDEM Groups could ask that the CDEM Group and/or CDEM Group Manager are advised on the intended use of a power by a Local Controller, where:

- time permits; and
- where the use of the power is for a purpose not already used within the CDEM Group area; or
- the power could have significant impacts on individuals/businesses; or
- where it is likely to be of particular interest to key partners /local authority staff; or
- where other districts in the CDEM area may face similar issues.

During a state of national emergency, Group and Local Controllers must not exercise any power contrary to any priorities for the use of resources and services that have been determined by the Director/National Controller.³

In particular, it is important to note:

- when under a state of national emergency you need to understand your powers and the limits on your powers;
- you cannot act in contravention to a direction from the Director;
- you should not use the CDEM Act where another Act has powers that would do the same job (e.g. Health Act);

² See s 27(2) of the CDEM Act.

³ See s28(4) of the CDEM Act

- you should raise any matters that might be of national importance or have national implications with your REMA and/or the NCMC; and
- dealing with issues can be as much about good communications and engagement as it is powers. We recommended that you follow the Police 'four E' approach (more detail on this below).

Recommended CDEM sector approach to compliance

Any use of CDEM powers must be assessed against the purpose of the declaration of the state of national emergency, which is 'owing to the impact of COVID-19'.

We recommend that CDEM officials follow a similar approach to the Police when enforcing requirements under the CDEM Act – that is 'engage, educate, encourage and enforce only if absolutely necessary'.

Only Police constables have the ability to arrest persons for non-compliance with a requirement/direction under the CDEM Act. Therefore, where there are serious incidents of non-compliance, CDEM Groups and Controllers should contact Police as soon as possible.

We recommend you read the Police [operational guidance](#) to make sure you are comfortable with the enforcement powers available under the Health Act. The guidance provides scenarios to highlight potential situations for the exercise of powers. As always, continue to liaise closely with your Police counterparts.⁴

How to approach use of powers during COVID-19

We recommend you consider the following questions each time you are faced with a situation where you consider using a power:

- Is the use of a power necessary? Are there other ways to achieve the same or similar outcome?
- Are there powers available under another statute that could be used? If so, CDEM powers should not be used.
- Is there any national level direction or advice on the use of powers that you need to consider?
- Is the matter likely to be of national importance or have national implications?
- Does the power align with the purpose of the state of national emergency declaration?
- In exercising the power, have all the elements of the relevant part of the CDEM Act being met?
- Is there anything else I need to consider?

⁴ <https://www.police.govt.nz/about-us/publication/operational-policing-guidelines-alert-level-4>

Scenarios for considering the use of powers during COVID-19

These scenarios use the framework suggested above as a way to think about the use of powers in response to COVID-19:

Questions from the above framework	Scenario: Local leaders are asking that a road checkpoint is established to reduce the risk of people from other areas entering a small community	Scenario: CDEM Group needs to requisition a car park to establish temporary facilities associated with food distribution.	Scenario: The Controller has seen a non-essential business open.
Is the use of a power necessary? Are there other ways to achieve the same or similar outcome? E.g. engage, education, encourage.	Yes, it may be necessary to reduce the risk of non-essential travel.	Yes. The car park owner will not allow the use of the car park. Alternative places have been considered and the car park chosen is best suited for this purpose.	The Controller could stop and talk to the business owner at a safe distance and encourage them to close. The Controller should only do this if they are confident they are aware of the policies around essential or non-essential. If the business owner does not close the business, the Controller could refer the matter to Police.
Are there powers in place in another statute or local bylaw that do the same thing the CDEM Act powers is expected to do?	Yes, powers under the Health Act. Then CDEM Act powers should not be used.	No.	Yes, powers under the Health Act, so the CDEM Act powers should not be used.
Is there any national level direction or advice on the use of powers that you need to consider	Yes	No	No.
Is the matter likely to be of national importance or have national implications?	Yes.	No.	No.

Does the power align with the purpose of the state of national emergency declaration?	Yes, it deals with the impacts of Covid-19.	Yes, it deals with the impacts of Covid-19.	Yes, it deals with the impacts of Covid-19.
In exercising the power have all the elements in the CDEM Act being met? Do I need independent legal advice in order to answer this question?	Not applicable	Yes. Independent legal advice may need to be sought to work through the compensation and liability provisions in the CDEM Act relating to requisition.	Not applicable
Is there anything else I need to consider?	Letting key partners know about the approach that is being taken.		

Guidance on specific powers available under a state of national emergency

This guidance focuses on three specific powers that are being used during the COVID-19 state of national emergency:

- the use of check-points
- the ability to requisition; and
- the power of direction.

Guidance on the use of check points (as issued by the CDEM work stream at 8.17pm on Tuesday 7 April 2020)

The issue of COVID-19 checkpoints and roadblocks in our communities is gaining momentum. There are increasing number of requests from local and regional government for New Zealand Police and CDEM Groups to take positive action and establish checkpoints. In some cases, communities have acted of their own accord and set up community-led checkpoints (with or without police support). The calls for COVID-19 checkpoints have increased as we approach the Easter Holidays.

There needs to be a consistent approach to the establishment and operation of COVID-19 checkpoints and roadblocks across CDEM Group Areas/NZ Police Districts. Our overriding objective is to ensure compliance with Alert Level Four expectations and therefore reduce the risk of spread of COVID19.

The following advice has been provided to CDEM Group Controllers and Police District Commanders via the CDEM pillar and New Zealand Police.

First, to clarify terminology:

- 1 **Checkpoints** are to confirm compliance with notices issued under s 70(1) of the Health Act (in particular the requirements to self-isolate, close business premises providing non-essential services, and not congregate in outdoor places of amusement or recreation). They will be ad-hoc in nature, and may vary from location to location depending on localised risk-based factors.
- 2 **Roadblocks** may be used in situations of uncontained community transmission of Covid-19, particularly to keep the virus out of vulnerable communities. They will be 24-hour in nature, and involve CDEM Group Controllers. They are likely to be enduring and require the deployment of non-Police resources such as the New Zealand Defence Force.

Checkpoints

The NZ Police and the National Emergency Management Agency (NEMA) have issued the following operational guidance to support NZ Police District Commanders and CDEM Group Controllers in their decision making in relation to establish a COVID-19 **checkpoint**:

- The consideration of a COVID-19 checkpoint must be based on an increased risk of the spread of COVID-19, which is supported by objective information (i.e. evidence of ongoing non-essential travel).
- The necessity to establish a COVID-19 checkpoint must be supported by NZ Police District Commander, as being a suitable tactic to reduce the risk of COVID-19 spread in the context of the regional demand profile.
- **The principal powers to be used for the COVID-19 checkpoints are those conferred by the sections 71A of the Health Act 1956.**
- The NZ Police District Commander is responsible for agreeing the timings, location and duration of checkpoints.
- The NZ Police District Commander is responsible for determining a deployment model and appropriate resourcing; the CDEM Group Controller will provide any non-police resources required to support the deployment model determined by the NZ Police District Commander. The costs of any non-Police resources, required to support the deployment, will be borne by the territorial authority where the checkpoint is deployed.
- Community-led checkpoints should be discouraged. Where community-led checkpoints already exist, the NZ Police District Commander and CDEM Group Controller should work with community leaders. Efforts should be made to engage with the community, educate them as to why the checkpoint is not needed, and that by manning the checkpoint they are in breach of s 70(1)(f). Enforcement measures to close the checkpoint should only be used as a last resort.

Roadblocks

NZ Police and NEMA have issued the following operational guidance to support NZ Police District Commanders and CDEM Group Controllers in their decision making in relation to establish a COVID-19 **roadblock**:

Implementing a roadblock over and above a checkpoint should be based on a definable risk that access to that community is likely to significantly increase risk of transmission and that existing health-based provision and provisions made under health legislation are insufficient to manage that risk. If checkpoints or other existing approaches are sufficient, a roadblock should not be

proposed. In these situations, local CDEM Groups, in partnership with NZ Police District Commanders and Medical Officers of Health, should work with their local community to identify appropriate responses.

This risk could be due to, for example, a very low incidence within that community facing the risk of an increase in movement into the community bringing in COVID-19 transmission risk, or an outbreak within a community and the risk of increased transmission by movement into, and subsequently out of that community.

If the NZ Police District Commander and/or the Group Controller believe that a roadblock is required, following engagement with the local community/Iwi, the Ministry of Health, NZ Police and the local CDEM Group, the Group Controller would make a proposal to the Director CDEM/National Controller (Sarah Stuart-Black) who will put the proposals to the All of Government Response Leadership Team. That group meets regularly and will discuss the issue, including alternative mitigations or supporting options to manage this risk and what the best legislative option is based on the particular circumstances (if required).

The ability to requisition – section 90 of the CDEM Act

Because the powers of requisition in the Health Act primarily relate to the treatment of patients (s71), CDEM Controllers or constables may be required to use the requisition powers in the CDEM Act in order to enable preservation of human life and limit the extent of the emergency. For example, the requisition of a private carpark to enable the distribution of food to vulnerable people.

Section 90(2) CDEM Act provides that:

- (2) *The Controller or constable, or a person authorised by him or her, may direct the owner or person for the time being in control of any land, building, vehicle, animal, boat, apparatus, implement, earth-moving equipment, construction materials or equipment, furniture, bedding, food, medicines, medical supplies, or any other equipment, materials, or supplies, to immediately place that property (requisitioned property)—*
- (a) *under his or her control and direction; or*
 - (b) *under the control and direction of a Controller or a constable, or person authorised by that Controller or a constable, if that person has requested the person making the requisition to do so on his or her behalf.*

We recommend that you work through the questions (page 4 above) to help you with your considerations prior to exercising the power to requisition.

Some key things in the legislative tests to note:

- A Controller/constable must only requisition property where he/she considers it is **necessary for the preservation of human life**.
- A Notice of Requisition must be in writing.
- The person whose property is being requisitioned should also be advised that they may be entitled to compensation under s107 of the CDEM Act. Where a CDEM Group exercises the power to requisition they are liable for any costs, so should discuss this with the CDEM Group or person requiring the use of the requisitioned property first.

Section 91 – power to give directions

Section 91 provides the power to give directions. Specifically,

91(1) While a state of emergency is in force, a Controller or a constable, or any person acting under the authority of a Controller or constable, may—

- (a) direct any person to stop any activity that may cause or substantially contribute to an emergency:*
- (b) request any person, either verbally or in writing, to take any action to prevent or limit the extent of the emergency.*

A scenario where CDEM Controllers may use this power include directing freedom campers to move from a closed freedom camping site to a different, specified campsite.

We recommend that you work through the questions (page 4 above) to help you with your considerations prior to exercising the power to give directions.

Some key things in the legislative tests to note:

- The power of direction is to **stop** an activity (s91(1)(a)).
- By contrast, the power in s91(1)(b) **requests persons to take a positive action**.

Proactively Released