



REGULATIONS REVIEW COMMITTEE

20 April 2020

Dr Ashley Bloomfield
Director-General of Health
Ministry of Health
PO Box 5013
WELLINGTON 6140

Dear Dr Bloomfield

Notices issued under section 70 of the Health Act 1956

Under Standing Order 318(1), all regulations are subject to examination by Parliament's Regulations Review Committee. As part of the committee's scrutiny of the use of delegated legislation to respond to the current epidemic, we examined the notices issued under section 70 Health Act 1956 in response to the COVID-19 epidemic (the Notices)¹ at our meeting on 15 April 2020.

The committee has three specific concerns about the design of these instruments that appear to reach the thresholds in Standing Order 319(2)(a) and (c) for drawing the instruments to the special attention of the House.² In addition, we have concerns about the clarity of drafting of the orders (and material incorporated by reference on the covid19 website) given that these instruments form the basis for significant restrictions on rights and for criminal liability.

We appreciate that these Notices have been made in very challenging circumstances. Our concerns are recorded here to assist you in improving the legislative quality of future Notices.

¹ Notices issued on the following dates: 16 March 2020, 25 March 2020, 31 March 2020, 3 April 2020 and 9 April 2020.

² Standing Order 319(2)(a) that the regulation is not in accordance with the general objects and intentions of the enactment under which it is made; 319()(c) that the regulations appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made.

The committee has four principal concerns in respect of these Notices:

- Unexpected use of the power
- Unauthorised sub-delegation
- Inappropriate incorporation by reference
- Unclear drafting

Unexpected use of the power

In respect of the “Notice to all persons in New Zealand under s 70(1)(f), dated 3 April 2020”, which requires all persons within New Zealand to be isolated or quarantined by remaining at home, we are concerned that this Notice may go beyond what was intended by the empowering provision.

Section 70(1)(f) authorises a Medical Officer of Health to require persons to be “isolated, quarantined, or disinfected as [that person] thinks fit”. The use of the words “isolate” and “quarantine” in the Health Act 1956 appears to refer to actions taken in relation to individuals who have been infected or exposed to disease, rather than to everyone in New Zealand regardless of whether they are infected or have been exposed to a disease.

The Health Act 1956 deals with the concept of “quarantine” in several different ways. The Act primarily uses the word “quarantine” in the context of border controls set out in Part 4 of the Act. However, in a more general sense, quarantine indicates a public health intervention to separate a person or persons who have been exposed to infectious disease from those not so exposed. The International Health Regulations,³ for example, define quarantine in relation to people and things as meaning:

...the restriction of activities and/or separation from others of suspect persons who are not ill ... in such a manner as to prevent the possible spread of infection or contamination...

Quarantine is distinct from “isolation”, which also involves segregation but relates to sick people who are diagnosed as having a specific condition of concern.

A power to require persons to be quarantined or isolated in this context does not appear to have been intended to be applied to every single individual in New Zealand, regardless of whether there is any concern that they have been exposed to a disease. We therefore consider that this Notice appears breach the threshold in Standing Order 319(2)(c) in that it makes some unusual or unexpected use of the powers conferred by the enactment under which it is made.

Unauthorised sub-delegation

The *Notice to arrivals under section 70(1)(e), (ea) and (f), dated 9 April 2020*, in clause 5(g) and (i) purports to delegate further decision-making to the Director-General of Health to set additional rules that apply under the Notice. The relevant paragraphs of section 70(1) clearly contemplate that any such requirements be prescribed in the Notices themselves. Providing

³ See reference <https://www.health.govt.nz/our-work/border-health/border-health-protection/border-health-measures>.

for the Director-General to set additional requirements outside of the Notice itself is a further delegation of the power granted under s 70(1) and is neither expressly provided for nor contemplated by the Act. This therefore appears to amount to a case of an unauthorised sub-delegation and appears breach the threshold in Standing Order 319(2)(a) in that it is not in accordance with the general objects and intentions of the enactment under which it is made.

Inappropriate incorporation by reference

All of the Notices, to some extent, seek to rely on material contained on the Covid19 website to make aspects of the Notice operative. This is most clearly obvious in respect of the *Notice to close premises and forbidding congregation in outdoor places of amusement or recreation under s 70(1)(m), dated 25 March 2020*, which relies on the content of the website to describe an essential business.

Section 137A of the Health Act 1956 allows material to be incorporated by reference (such as the list of essential businesses on the webpage in this instance) into “compliance documents” issued under the Act, which would appear to include these Notices. Incorporation by reference is allowed where the Minister or the Director-General consider the material is “too large or is impractical to include in, or print as part of, the instruments concerned.” However, the incorporated material is the “material as it exists at the time that the instrument is made or issued” (see s 137A(3)(a)).⁴ Accordingly, only those businesses listed on the website on 25 March 2020 are essential businesses for the purposes of the Notice. The website is not archived to show exactly which businesses were listed as at 25 March and instead it states that: “This (stet) contents of this page will evolve over time. The page was last updated at 4pm, 8 April 2020.”

It is likely that there have been updates to the list on the website after 25 March 2020 which are not, because of the operation of s 137A(3)(a) of the Act, able to form part of the description of essential businesses referred to in the Notice.

Unclear drafting

The Notices are, in general, drafted in a way that makes their operation unclear. This is problematic as they restrict fundamental rights of people and it is an offence to fail to comply with these Notices (see s 72).

The *Notice to arrivals under s 70(1)(f), dated 31 March 2020* is in a similar form to the 16 March Notice of the same name (now expired). Both of these Notices are unclear as they suggest that the direction to quarantine will only be made if voluntary compliance with the Ministry of Health guidance is inadequate. There is no description about how the decision about adequacy will be made and how it will be communicated to the individuals concerned. It is also unclear whether the assessment of adequacy is made in relation to individual people or across the whole class of people who are subject to it.

⁴ Section 137B permits amendments to material incorporated by reference only if the Director-General adopts the amendment by notice in the Gazette.

The *Notice to arrivals under section 70(1)(e), (ea) and (f), dated 9 April 2020* appears to be intended to supersede the 31 March Notice, but that is not stated. Therefore, both notices operate concurrently, which makes it very unclear what the specific requirements are.

The *Notice to close premises and forbidding congregation in outdoor places of amusement or recreation under s 70(1)(m), dated 25 March 2020* includes a requirement that all premises in New Zealand to be closed until further order. The Notice excludes premises that are “necessary for the performance or delivery of essential businesses”. The definition of “essential business” given in the Notice is: “means businesses that are essential to the provision of the necessities of life and those businesses that support them”. The Notice then refers to a list of “essential services” on the Covid19 website as “describing” these businesses. In addition to listing particular categories of business, the website contains information that suggests that there are conditions of the opening of these essential businesses. There does not appear to be any legislative authority for this as section 70(1)(m) does not permit the imposition of conditions. The introductory information on the website must therefore be guidance. We consider that it is imperative that a clear distinction is made between legislative rules and guidance.

Conclusion

We suggest that, for future Notices, the Ministry of Health:

- make greater use of legal drafters to improve the clarity and certainty of these Notices
- ensure that Notices are clearly authorised by the empowering provisions
- ensure that Notices that rely on website material to support their operation comply with the requirements of section 137A to 137G of the Health Act 1956 and contain express links between the Notice and the legislative authority under which the material is being incorporated
- make a clear separation between website content that contains a legal requirement and those that are guidance.

Your response

Please email your response to our concerns to the Clerk of the Committee, Tara Elmes at regulations.review@parliament.govt.nz by Friday 1 May 2020. If meeting this timeframe will not be possible due to the impact on the Ministry of the outbreak of COVID-19, please let the Clerk of the Committee know.

Yours sincerely



Alastair Scott
Chairperson