

In Confidence

Office of the Minister of Corrections

Office of the Minister of Justice

Chair, COVID-19 Ministerial Group

Issuing Epidemic Management Notices to ensure the Parole Board can make decisions and community sentences can be administered effectively

1. This paper notes that the Prime Minister has issued an Epidemic Management Notice under the Epidemic Preparedness Act 2002.
2. This notice covers specific provisions in the Sentencing Act 2002 and the Parole Act 2002. Issuing this notice has ensured that New Zealand's criminal justice system is able to operate in an evolving COVID-19 environment.

Executive Summary

3. The Government issued an Epidemic Notice 2020, effective midnight Wednesday 25 March 2020, under the Epidemic Preparedness Act 2006 [CAB-20-MIN-0135 refers] (Rec 1). Under this notice, Epidemic Management Notices can be issued for relevant agencies (Rec 2).
4. The Epidemic Management Notice issued under section 8(1) of the Epidemic Preparedness Act 2006 ensures the integrity of the justice system during Alert Level Four. This notice applies to specific provisions of the Parole Act 2002 and the Sentencing Act 2002 that:
 - 4.1 empower the Parole Board to function during an epidemic (in sections 13A(1)(a), 13A(1)(b)(i) and (ii), and s56A of the Parole Act 2002) (Rec 3), and
 - 4.2 empower probation officers to vary or remit aspects of community sentences (in sections 54A, 54L, 67A, 69A, 69J, 80ZH and 80ZI of the Sentencing Act 2002) (Rec 4).
5. On the advice of officials, we believed that it was reasonably necessary to bring these powers into force to allow the Parole Board to exercise its functions (to recall and release people), and to enable sentence and release conditions to be varied during the Alert Level Four. The Judiciary and Parole Board supported this request.
6. This notice required urgency given that, due to the requirements of this alert:
 - 6.3 the Parole Board cannot perform its functions, except on a significantly reduced schedule, and
 - 6.4 Corrections cannot administer community sentences in full compliance with the law.

7. The Epidemic Management Notice does not alter the threshold for parole, or the principles and purpose of sentencing, which provides reassurance around community safety. There are other inactive provisions in the Parole Act that will not be activated.
8. Invoking these powers allows the justice system to continue to operate safely, humanely and effectively. The prison system already faces considerable capacity pressures that would have been exacerbated if a notice was not issued to enable the effective functioning of the Parole Board and community sentences. These powers are temporary and will cease once New Zealand moves down to a lower-level Alert and the Epidemic Notice ceases to be in effect.¹

Relation to government priorities

9. As a Government, we are focused on effectively controlling the spread of COVID-19 in New Zealand.
10. An Epidemic Management Notice can be issued as part of the Government's response to COVID-19, to help ensure the continuity of essential government services, such as the justice system, in the changing COVID-19 environment.
11. Efforts to control the spread of COVID-19 have caused disruption to the operations of the Parole Board and the administration of sentences.

Background: Why have epidemic management notices been issued?

12. The Epidemic Preparedness Act 2006 sets out powers to facilitate the management of epidemics or quarantinable diseases. On 25 March 2020, an Epidemic Notice was issued by the Prime Minister (the Notice) (Rec 1).
13. Under the Epidemic Notice, Epidemic Management Notices can be issued by the Prime Minister if she is satisfied that the effects of the outbreak concerned make it, or are likely to make it, reasonably necessary to issue notices (Rec 2). Epidemic Management Notices can:
 - 13.1 activate inactive legislative provisions in specific enactments (with the agreement of the Minister responsible for the enactment), and
 - 13.2 activate prospective modification orders (which modify requirements or restrictions in legislation) that have already been made (with the agreement of the Minister responsible for the enactment). There are no prospective modification orders in respect of the Parole Act or Sentencing Act.

The notice activates inactive provisions in the Parole Act 2002

14. The notice under the Parole Act activates number of epidemic-related provisions (Rec 3). The Parole Board has a number of functions related to releasing prisoners. For instance anyone serving a sentence of more than two years duration must appear before a Parole Board panel to determine whether they can be released. Under normal circumstances, the Parole Board can:

¹ See s 8(3) of the Epidemic Preparedness Act 2006.

- 14.1 release sentenced prisoners prior to their statutory release date, subject to conditions, once they reach parole eligibility (provided that they meet the threshold for release); or
 - 14.2 release sentenced prisoners on their statutory release date, but subject to conditions for six months; and
 - 14.3 recall a person to prison prior to their statutory release date.
15. In making these decisions, the Parole Board is bound by key legislative principles, which are that:
- 15.1 a person must not be imprisoned any longer than is consistent with the safety of the community; and
 - 15.2 they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community; and
 - 15.3 the primary consideration is whether the person poses an undue risk, including the likelihood of reoffending and the seriousness of their offending.

The Parole Board could not continue to make decisions under current parameters

16. Once the country was at Alert Level 4, the Parole Board could not operate its full hearing schedule remotely under current procedure. This was due to the inability of the Board to congregate, the inability for people to be physically present at hearings, and the potential impact of the virus on members of the Parole Board.
17. The Parole Board only has four full time conveners (alongside the Chairperson). Other Parole Board members work part time and often have other professional roles in the community. If the Board had to continue to assemble full panels remotely, there would be significant impacts on an already pressured system, and most scheduled hearings would have needed to be postponed.
18. The Parole Board advises that the impact on case time of hearing matters by a full panel by phone is significant. Panel members would have needed more time to hear matters, deliberate and process transcripts. Additional time is required because members will not be in the same location. Additionally, some members fall within high risk COVID-19 categories, and (even if travel were feasible) prison-based hearings would present significant risks of transmission to staff and prisoners.
19. Over the next week alone, 20 days of hearing time are scheduled, with board members hearing 12-13 cases each day (260 cases over the course of the week). Hearing schedules are always filled to the maximum extent to reduce any backlogs and impacts on prisoners. Prisoners may have significant concerns if their hearing is delayed.

The notice activates specific provisions in the Parole Act

20. An Epidemic Management Notice activates Parole Act provisions to the effect that:
 - 20.1. the chairperson or a panel convenor can act alone (s 13A(1)(b))

- 20.2. the Board (or chairperson or panel convenor) can make decisions on the papers without the offender present (s13A(1)(a) and s 13A(1)(b)(ii))
- 20.3. to allow a probation officer to vary release conditions of an offender if the probation officer has already made an application to the Board (s56A).
21. The Parole Board has advised that, given that a notice has been issued for the inactive provisions in s13 (see paragraph 20), it can accommodate most scheduled hearings over the next month, and it will not need to delay many hearings. Alternatively, if an Epidemic Management Notice was not issued, the Parole Board would have had to operate on a significantly reduced schedule (due to the need to convene full panels and add extra time to hearings), which would have caused significant backlogs and impacts on prisoners (given that many hearings would be delayed).

The notice will enable the Parole Board to continue to make decisions

22. The Epidemic Management Notice provides flexibility for the Parole Board to keep functioning and thereby limit the impact of COVID-19.
23. The majority of the powers activated relate to how the Parole Board will continue to hear matters during an epidemic, to ensure that it can continue to operate. The Epidemic Management Notice does not affect the requirement that the Parole Board must only direct the release of a prisoner on parole if they are satisfied that the prisoner will not pose an undue risk. Parole hearings determine whether a person can be released, and any substantial delays in the Parole Boards' hearing schedule will mean that a person will spend longer in prison than they would have otherwise.
24. Senior Officials at the Ministry of Justice and Corrections have provided advice on the impacts of these notices. On balance, the prospect of significant implications across the justice system require this step. In the absence of these notices, the Parole Board would have largely ceased to function for a month, with only a limited volume of hearings, and community-based sentences could not have been administered lawfully.

Hearings will be by phone in almost every circumstance, but a reduced panel, or sole convenor, will be required to prevent delays

25. The Parole Board will do everything it can to hear almost every matter by telephone link. However in the short term, it can only determine a reasonable flow of hearings if there is a reduced panel of two, or if the convenor acts alone. This change will ensure prisoners will still have their matter heard.
26. Every effort will be made to convene a panel with at least two members, but that may not always be possible. If the requirement to assemble a three-person panel remained, the Board advises it would have to adjourn most hearings over the next month.
27. Without these additional powers, a significant volume of hearings would have needed to be delayed, with flow on implications for the length of time prisoners are in custody (and their right to liberty when they meet the threshold for release).
28. On balance, the proposed powers provide the right mix between altered procedure during an epidemic and ensuring that prisoners can be heard and released (where appropriate). While assembling reduced panels by phone link will still cause delays, efforts will be made

to ensure that some matters can be heard by a panel (albeit reduced to two people), where technology and other feasibility issues allow.

Discussion about hearings on the papers

29. In rare circumstances, the Epidemic Management Notice could result in the Parole Board to making decisions on the papers (i.e. through looking at documents rather than hearing from people in person). The powers allow a decision to be made without the offender present, which removes a current right.
30. However, the ability to hear matters on the papers will only be used in an extremely limited range of situations and will essentially be a reserve power. Hearings on the papers will only be resorted to in the case of a significant telecommunications breakdown. Even then, the Parole Board will make case-by-case decisions about adjournments. The Parole Board has advised that hearings will only proceed (or continue) on the papers if a lawyer, or the prisoner, has provided comprehensive written submissions. The Parole Board will adjourn any hearing if it perceives that natural justice issues will outweigh the impact of a delay for the prisoner.

Support for written submissions for all hearings

31. Support is available to assist people with written submissions, including for people with disabilities or who have low literacy levels (or other needs). Additionally, the Ministry of Justice's Legal Services has provided assurances around the availability of legal aid lawyers during Alert Level Four.
32. There will still be impacts on prisoners from these changes. However, overall, the Notices will help ensure that release or decisions can be made, with the parameters that the Parole Board will implement around the use of this power. This will reduce the inevitable backlogs of hearings and minimise person-to-person contact. This provides reassurance for prisoners who expect their matter to be heard within the next month, and that other interested parties will continue to be heard.

One of these provisions applies to release conditions (s56A) for people on parole

33. Sometimes release conditions require offenders to do something upon the direction of a probation officer. However, other conditions impose absolute requirements that can only be altered by the Parole Board. Without an Epidemic Management Notice, people on parole will be subject to conditions that they cannot comply with, due to the requirement to self-isolate. Probation officers need the ability to make lawful variations to these conditions.
34. If we did not instigate the ability for a probation officer to vary release conditions, significant pressure would have been placed on the Parole Board while we are at Alert Level Four. While the Parole Board will continue to operate under these notices, the large volume of applications to vary conditions could have overwhelmed the Parole Board, given that this could have applied to the vast majority of the 2,269 parolees.
35. While there are implications of changing procedure, this will allow the Parole Board to maintain the majority of its hearing programme, which is important for prisoners and the community.

The notice will not activate other epidemic provisions in the Parole Act

36. The remaining Epidemic Preparedness Act 2006 powers in the Parole Act will not be activated, which provide that:
 - 36.1. the Board may delay considering an offender's hearing after the epidemic comes to an end, if other offenders have been waiting longer for a hearing (s27B)
 - 36.2. the Board will only have to consider a recall application as soon as reasonably practicable (s65A)
 - 36.3. the courts can adjourn the hearing of an application for an extended supervision order (s107GA).

Assessment of the number of people impacted

37. 550-600 people appear before the Parole Board each month. In the absence of an Emergency Management Notice, officials anticipate that there would be a significant backlog of hearings after we move to a lower Alert Level. There are approximately 35 applications for recall each month, which might also be delayed as resources would have been stretched.
38. If these changes had not been made, and the parole system had not been able to function effectively, people in prison would have had their release dates extended with a flow on impact on prison beds. s9(2)(g)(i)
People will still be remanded in custody during the Alert Level Four.

The notice allows community sentences to be administered during the Alert Level Four

39. While we are at Alert Level Four, people on a community-based sentence will not be able to comply with every condition imposed by the courts. To address this challenge, an Epidemic Management Notice was needed under the Sentencing Act (Rec 4).
40. People will not be able to attend community work during the Alert Level Four. While Corrections can remit up to 10 percent of a community work sentence, it could not suspend the sentence temporarily. Greater flexibility was required to ensure that this sentence can be administered lawfully.
41. Like parolees, people on sentences of supervision, intensive supervision, community detention and home detention (or post-detention conditions) are subject to standard and special conditions. Conditions can only be varied by the court, and not all conditions allow probation officers to exercise discretion.
42. Senior Officials advised that this places Corrections and offenders in a difficult position, given that conditions remain in force, but offenders cannot comply. While courts will continue to sit, variations on this scale require a huge volume of applications, which could have inundated the court system during the epidemic. Applications will still need to be filed in most cases, but variations can come into effect before they are heard.

The notice activates specific provisions in the Sentencing Act

43. Issuing the Epidemic Management Notice provides probation officers with the power to vary, cancel or suspend aspects of sentences. Under normal circumstances, these powers sit entirely with the judiciary, apart from small, discrete aspects (such as the standard power to remit up to 10 percent of community work hours.)
44. Probation officers still have to adhere fully to the purpose and principles of the Corrections Act 2004, including public safety, and the requirements of the Sentencing Act.
45. The powers vary according to the sentence, and allow a probation officer to:
 - 45.1. vary, cancel or suspend conditions of a sentence of supervision (s54A) or sentence of intensive supervision (s54L);
 - 45.2. remit the hours of community work for offenders – but no more than 8 hours in any week, and no more the lesser of 48 hours in total or one-third of the sentence imposed (s67A);
 - 45.3. extend the maximum time to complete a community work sentence by up to twelve months (s69A);
 - 45.4. vary the curfew period for community detention (s69J); or
 - 45.5. vary the special conditions or the post detention conditions of a sentence of home detention (s80ZH and s80ZI).
46. In most cases the probation officer will still need to file an application in the court contemporaneously, but the probation office's variations will come into effect immediately. These changes could potentially be applied to 7,260 people on supervision, 4,683 people on intensive supervision, 11,109 people on community work, 1,514 people on home detention, 1,515 people on community detention, and 1,330 people on post-detention conditions.²

Further comments on the implications of a notice under the Sentencing Act

47. This notice assists the Chief Executive of Corrections to ensure that the principles that guide the corrections system are met during the Alert Level Four. These principles include public safety, fair treatment of people, and not administering sentences or orders more restrictively than is reasonably necessary.
48. For people on community work, these powers could mean that some people are subject to the sentence for longer than they would be otherwise. However, these powers will not alter the overall nature of the sentence (unless a portion is remitted). The wider framework for variation and cancellation of sentences will still apply. For instance, people will not be required to do more community work hours than imposed by the court.
49. These powers sit with the judiciary under normal circumstances. We are aware that there are implications for the independent role of the judiciary. However, these powers are necessary in the circumstances and the Chief Justice does not object to the Notices.

² Numbers as at 29 February 2020.

50. It is important to note that variations, cancellations and suspensions will also have benefits for people in providing more flexibility around how their sentences are administered during the epidemic. Wider public safety considerations will still be given full consideration.

These powers will only be in force while an Epidemic Notice is in place

51. These powers will only remain in effect while an Epidemic Notice is in force. Officials anticipate that the justice system will resume relatively normal operations once the Alert Level comes down below Alert Level Three. Additionally, the totality of the sentence imposed by the court will not change. Variations apply to aspects of sentences, and not the entire sentence.

Human Rights

Impacts on the right to natural justice - Parole Act procedure

52. Prisoners, victims and other people who have the right to be present for Parole Board hearings, will not always have the opportunity to be present under these measures, or have their matter heard under normal procedure.
53. However, in almost every case (except in the event of significant telecommunications break downs where other circumstances are met), hearings will be by phone. Hearings on the papers will only be used in situations where there is no other option that would adequately balance the right to natural justice with the right to liberty.
54. Additionally, for all Parole Board hearings, there are a number of mitigations, given that:
- 54.1. hearings will not take place or continue, without either the prisoner being present (including by phone) or the Parole Board having their comprehensive written submission;
 - 54.2. prisoners, and others who have a right to be heard, will always have the opportunity to make written submissions to the Parole Board, irrespective of the form the hearing takes;
 - 54.3. forms have been developed for prisoners to make written submissions;
 - 54.4. prisoners can instruct a lawyer to make submissions on their behalf;
 - 54.5. support will be provided to prisoners who need writing assistance;
 - 54.6. interpreters will still be available for people who need translation assistance;
 - 54.7. the Board will have a psychologist present for hearings involving preventive detainees and prisoners on life sentences; and
 - 54.8. prisoners can seek a Judicial Review in the High Court.
55. Similarly, hearing matters alone differs from standard procedure, which has implications for prisoners and other interested parties. While there will be implications for the right to natural justice, overall, this should substantially reduce the inevitable backlog of hearings (which would also positively impact rights) and should be considered alongside the right to liberty. Any decision that is questioned could still be the subject of a judicial review.

These measures will ensure prisoners who are granted parole are released in a timely fashion.

Rights to natural justice - Amendments to release or sentence conditions

56. Additionally, with some small exceptions, decisions to vary sentences sit with the courts. This has significant implications for the right to natural justice under section 27 of the New Zealand Bill of Rights Act.
57. People can also seek a judicial review of any sentence variation. Officials have advised that, as a matter of course, probation officers will still ask the judiciary to determine particularly complex sentence variations. The courts will also determine any matters that fall outside of the scope of the epidemic provisions.

Impacts on right to liberty

58. If Parole Board procedure was not altered, there could also have been limitations on the right to liberty affirmed in section 22 of the New Zealand Bill of Rights Act if Parole Board. These limitations will stem from the reality that some prisoners will spend more time in custody if their hearing is delayed. Additionally, by opting not to invoke the provisions that would permit delays, agencies have given proper consideration to section 22.
59. Sitting alone will also allow the Board to hear matters according to a relatively normal schedule (if conveners sit alone). The Notice allowing amended procedure provides reassurance to prisoners that their matter will be heard during the Alert Level Four, and they will not have their time in prison prolonged due to delays.
60. Corrections is drafting national guidance for variations of sentence and release conditions, to provide extensive guidelines for probation officers about the need to comply with the Sentencing Act and Parole Act. The guidance will require all decisions to be cross-checked by a service manager at Corrections.

Consultation

61. The judiciary and the Parole Board have been consulted about the proposed Epidemic Management Notice. There is no objection from the Parole Board or the Chief Justice to the Epidemic Management Notice issued that activates sections in the Parole Act 2002 and Sentencing Act 2002. Furthermore, the Parole Board had advised that it cannot continue to operate effectively without the Notice.

Proactive Release

62. We intend to proactively release this Cabinet paper with redactions, in accordance with the Official Information Act 1982.

Recommendations

The Minister of Corrections and the Minister of Justice recommend that the Committee:

1. **Note** the Prime Minister has issued an Epidemic Notice under section 5 of the Epidemic Preparedness Act 2006.

2. **Note** that now that an Epidemic Notice is in effect, Epidemic Management Notices may be issued.
3. **Note** the Prime Minister has issued an Epidemic Management Notice in relation to the Parole Act 2002 (sections 13A(1)(a), 13A(1)(b)(i) and (ii), and s56A) on the basis that it is reasonably necessary to do so.
4. **Note** the Prime Minister has issued an Epidemic Management Notice in relation to the Sentencing Act 2002 (sections 54A, 54L, 67A, 69A, 69J, 80ZH and 80ZI) on the basis that it is reasonably necessary to do so.

Authorised for lodgement

Hon Kelvin Davis
Minister of Corrections

Hon Andrew Little
Minister of Justice

Proactively Released