

September 2020

How WorkSafe regulates under the COVID-19 Public Health Response Act 2020

Purpose

This policy sets out the regulatory approach our inspectors will take as authorised enforcement officers under the COVID-19 Public Health Response Act 2020 (the COVID Act).

The policy outlines:

- the background to our enforcement powers under the COVID Act
- how we manage our Health and Safety at Work Act 2015 (HSWA) and COVID Act powers
- our regulatory approach to our COVID Act responsibilities
- principles for using COVID Act powers.

More detail is available in the COVID Act guidance.

Background

The Director-General of Health has authorised all WorkSafe inspectors as enforcement officers under the COVID-19 Public Health Response Act 2020 (the COVID Act).

The COVID Act's purpose is to support a public health response to COVID-19 that:

- prevents, and limits the risk of, the outbreak or spread of COVID-19
- avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak
- is co-ordinated, orderly, and proportionate
- has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.

The Minister of Health can issue an Order under section 11 of the COVID Act. Section 11 Orders set out the public

health requirements for New Zealand. Section 11 Orders aren't static. They're likely to be revised or superseded by new Orders.

As authorised enforcement officers our inspectors can enforce a section 11 Order. Under the COVID Act they can:

- enter premises without a warrant if they have reasonable grounds to believe that a business or service is failing to comply with any aspect of a section 11 Order
- direct a business or service to stop an activity or take an action if they have reasonable grounds to believe that a person is contravening or likely to contravene a section 11 Order
- if they're acting under the authority of a constable, totally or partially prohibit or restrict public access to any road or public place
- direct a person to give their identifying information (including full name, full address, date of birth, occupation, and telephone number)
- direct a business or service, or part of one, to close and cease operation for up to 24 hours, where they have reasonable grounds to believe that the business or undertaking, or part of one, is operating in contravention of a section 11 Order or contrary to any conditions imposed on its operation by a section 11 Order
- take enforcement action when offences are committed.

HSWA and the COVID Act

Our inspectors already have a number of powers under HSWA. How they use those powers is guided by our operational policies and guidance.

We need to be clear:

- when, where, and how our inspectors use the powers under the COVID Act¹
- how our inspectors should navigate any potential overlap between HSWA and the COVID Act.

Section 11 Orders set the legal requirements we can enforce. We can encourage mitigations and controls above and beyond what is required in an Order, but we cannot enforce these.

There is an overlap in our powers under HSWA and the COVID Act. **We'll take enforcement relating to a COVID-19 matter under the COVID Act.** The only exception to this is where controlling the risk of COVID infection is, or has become, central to the purpose of the business (such as quarantine facilities [MIQFs] or border operations). In these situations, HSWA may be more appropriate.

At times a business may be in breach of both HSWA and a COVID-19 Order. In these situations, we may need to take enforcement under both the COVID Act and HSWA. When this happens, **we'll clearly distinguish between breaches of HSWA and breaches under the COVID Act, and keep our response(s) to each separate.**

When we take action under HSWA, we'll continue to apply the EDM.

When we take action under the COVID Act, we won't use the EDM. We'll consider the interventions we could take – directives, infringement notices, fines, prosecution, or business closure – and choose the intervention that's proportionate to the issue and risk.

Our approach to our COVID Act responsibilities

We'll focus our COVID Act enforcement powers on the risk of COVID-19 transmission through work. Specifically, our focus is:

- the health and safety of workers in higher risk activities, such as working at managed isolation or quarantine facilities (MIQFs)
- whether businesses and services are meeting COVID Act requirements, including displaying QR codes and ensuring physical distancing
- working with other COVID Act enforcement agencies to support them when required and to ensure our approach is aligned where possible
- supporting the All of Government response to COVID-19.

We'll do this by:

- responding to COVID-19 complaints or concerns
- addressing COVID-19 issues while carrying out business as usual
- responding to patterns or behaviours of concern.

We'll take our intelligence and insights into account when we decide where and how to deploy our inspectors.

When we choose to act we'll take an education and enforcement approach. Enforcement will begin with a verbal or written directive.

This approach is in line with the all-of-government (AoG) Graduated Response to COVID-19 enforcement, which is to educate, warn, then infringe. For WorkSafe, the verbal or written direction forms the warning.

Our inspectors will be doing a mix of remote work and site visits, depending on circumstances.

Principles for using COVID Act powers

We'll use our powers to direct a business or service to close in very limited circumstances

The power to direct a business or undertaking to close is a significant power. We'll only use this power in very limited circumstances, after appropriate consultation.

We'll only direct a business or service to close using our powers under the COVID Act in cases where there is a high risk of harm and/or repeat or deliberate contraventions, and clear evidence of this.

Before an inspector directs a business or service to close they will:

- consider if other interventions would be appropriate, including asking the business or service to close voluntarily
- consider whether all or part of the business needs to close
- consider how long the business or service needs to be closed to enable it to become compliant with an Order (noting the maximum is 24 hours)
- consider what actions may be needed after the closure period finishes
- consult with their manager/chief inspector to discuss whether closing the business or service is appropriate in the circumstances.

If closing the business or service is the confirmed approach, then the inspector will:

- consider if Police support is needed
- make sure the written notice clearly and fairly explains and sets out the decision and grounds for it
- record in their notebook the actions taken under section 24 and the reasons for them
- have ready a copy of any other evidence e.g. photos and statements taken at scene.

These actions are important as the recipient of a closure notice can appeal to the District Court to revoke the direction to close. Any appeal would be dealt with within the 24 hour period.

¹ We may decide that we do not want all our inspectors to have these powers, but might instead select some inspectors to enforce a section 11 Order.

We'll make sure we act in accordance with the Practice Note issued by the Chief District Court Judge on 22 May 2020. Our guidance sets out what we need to do.

We'll clearly distinguish between breaches of HSWA and breaches of the COVID Act

We'll only take enforcement relating to a COVID-19 matter under the COVID Act. The only exception to this is where controlling the risk of COVID infection is, or has become, central to the purpose of the business (such as quarantine facilities [MIQF's] or border operations). In these situations, HSWA may be more appropriate.

At times we may need to take enforcement under both the COVID Act and HSWA, if there are both COVID-19 breaches and work health and safety breaches. When this happens, we'll clearly distinguish between breaches of HSWA and breaches of the COVID Act, and keep our response(s) to each separate.

We'll record and report on when we've used our powers under the COVID Act

We'll accurately record when we use powers under the COVID Act, and do so in a timely way. This will help us to:

- report on our use of the section 20 power of entry, as required under the COVID Act
- contribute to the Government's understanding of how people in New Zealand are responding to what is expected of them
- be accountable for our actions
- share information with others, when appropriate.

We'll ensure our approach aligns with other enforcement agencies

It's important that businesses and services have an idea of what to expect from enforcement officers. We'll do our best to ensure our approach is aligned with that of other enforcement agencies. To do this we'll work alongside other enforcement agencies whenever possible.

We'll apply our normal regulatory principles

The general principles in our operational policies apply to our regulation under all applicable legislation and regulations, including the COVID Act. This means:

- our responses will be proportionate
- we'll be transparent
- our approaches will be consistent
- we'll be accountable for our actions.

We'll apply our existing operational policies to what we do, including the actions we take under the COVID Act.

We'll look after our own health and safety, and that of people we interact with

In doing all of this we'll try to keep our people, and people we interact with, healthy and safe. We'll manage our own health and safety risks, and make sure we comply with section 11 Orders.