

**Information for prosecutors and Justice Sector Agencies
concerning travel of defendants bailed from the alert level 3 area to a lower alert
level area**

27 September 2021

1. On 21 September 2021 the COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) came into force and was amended on 24 September 2021 (the Order). Clause 19C of the Order imposes COVID-19 testing obligations on certain persons wishing to travel out of the alert level 3 area. From 11:59 pm on 24 September, these obligations extended to defendants in the alert level 3 area who are granted bail to an address in a different alert level region. While they apply whenever a defendant will need to cross the boundary out of the alert level 3 area, particular complexities may arise where bail is granted to an address outside of the alert level 3 area. This document is intended to provide information for public prosecutors to assist them in identifying, and responding to, those complexities.

People released on bail may travel to (or through) a different alert level area

2. Travel between (including transiting through) alert level areas is restricted to travel for the permitted purposes under cl 18 of the Order. Those purposes include leaving or changing a person's home or place of residence as required by a court order, as ordered by a person empowered to determine a person's place of residence, or at the end of a period of detention or a residential requirement (see sch 5 of the Order, items 11 and 12). A person is also entitled to cross alert level boundaries for the purpose of collecting a person and accompanying them to their new address (item 13).
3. These permissions will continue to allow a defendant granted bail to an address in a different alert level area to travel to that address. The defendant must, as far as is reasonably practicable, travel directly without stopping to their destination once in the other alert level area (cl 17(1)(b)).

Obligations on bailed defendants or persons released from detention travelling out of an alert level 3 area

4. Clause 19C, however, imposes new obligations on persons travelling from the alert level 3 area and across the alert level boundary to a lower alert level area for these (and other) purposes. In addition to the obligation to carry evidence of the purpose of travel and the location of the destination (cl 19(1)(v)), they must now also carry evidence of a negative

result from a COVID-19 test administered no more than 72 hours before their journey began (cl 19C(5)(a)) or an appropriate medical certificate (cl 19C(5)(b)). That evidence must be produced to an enforcement officer on request (cl 19C(6)).

5. It is an offence, punishable by up to six months' imprisonment or a fine up to \$4,000, to intentionally fail to comply with a COVID-19 Order (s 26 of the COVID-19 Public Health Response Act 2020). This will include the obligations imposed by cl 19C.

Implications for defendants seeking bail

6. This change to require testing may present an obstacle to certain defendants' ability to comply with bail condition if the proposed bail address requires them to travel into or out of (but not into, through, and out of) the alert level 3 area.
7. So long as the defendant can get a negative COVID-19 test result or certificate prior to crossing the alert level boundary there is unlikely to be a breach of cl 19C(5). However, if the person has not obtained the documents required under cl 19C(5) *prior to release from custody* the person *may* be at risk of:
 - 7.1 Reoffending by breaching the stay-at-home requirement in cl 20 of the Order if released on bail within the alert level 3 area without an available address in that area or the documents required in order to travel to their bail address.
 - 7.2 Reoffending by intentionally travelling to another alert level area without carrying the required evidence under cl 19C(5).
 - 7.3 Breaching the conditions of bail if directed by the Court to travel *directly* to the bail address and reside at that address. Delay and unnecessary travel might occur if the individual is either unable to cross the boundary, or uncertain about their own intended movements, due to the fact they cannot comply with cl 19C(5) and therefore cannot access their bail address. The inclusion of a bail condition to travel "directly" to the approved bail address is often an important mechanism to mitigate risk(s) under s 8(1) of the Bail Act 2000. It is routinely imposed, and also serves to mitigate the risk of incidental reoffending in the context of a pandemic.

Implications for prosecutors and Justice Sector agencies

8. It is important for prosecutors to recognise that the principal focus of a bail hearing must be the mandatory considerations identified in s 8(1) of the Bail Act. Those include the likelihood of offending while on bail, which will extend to intentional breaches of a COVID-19 Order. It is important, however, that prosecutors do not use (or ask the courts to use) the bail process solely to advance public health concerns. Enforcement of the Order's requirements happens in the ordinary way, pursuant to mechanisms in ss 26 and 27 of the COVID-19 Public Health Response Act 2020 (COVID-19 Act). The obtaining of a negative COVID-19 test result (or medical certificate) should not, therefore, be treated as a precondition to the granting of bail whenever a defendant in the alert level 3 area is seeking to be bailed to an address in a lower alert level area. A case-by-case assessment will always be required. The principal question will be how the person's testing status, and attitude towards testing, informs an assessment of the mandatory statutory bail considerations, as well as the extent to which bail conditions can mitigate those risks.

9. At the time of the bail hearing (if not before) it will, however, be appropriate, helpful, and probably expeditious for the prosecutor to inquire as to whether the individual has had an opportunity to obtain the evidence required under cl 19C(5). This should be done with a view to ensuring the defendant understands the process to lawfully travel across an alert level boundary to the proposed bail address. Prosecutors, and the justice sector agencies controlling the original place of detention, will engage constructively with defendants and defence counsel in this regard, and agencies will endeavour so far as practicable to assist defendants access a timely test in order to facilitate their ability to travel lawfully to their bail address.

10. If there is reasonably clear evidence that a person applying for bail will be unwilling or unable to comply with cl 19C(5) upon release from custody, it may be appropriate in some circumstances for the prosecutor to oppose bail. This could be because:
 - 10.1 the defendant does not have access to an address in the alert level 3 area and so is likely to re-offend by breaching the stay-at-home requirements in cl 20;
 - 10.2 the defendant remaining in the same community as the complainant or other witnesses, even for a short period, poses an unacceptably high risk of interference with witnesses or evidence;

10.3 the defendant will be practicably unable to comply with conditions of bail that need to be imposed to mitigate a relevant risk under s 8.

As always, the decision whether to accept such risks, and whether to grant bail, sits with the court applying normal bail principles. It is anticipated that bail would only be refused in rare cases where those risks are clear.

11. In almost all cases, applicants for bail will not wish to risk arrest or a fresh charge for breach of the Order, or for breach of an obligation to travel directly to the bail address. Where a prosecutor (or Corrections, or other relevant justice sector agency) considers that a defendant would be likely to be granted bail but may encounter difficulties arising from the new testing requirement, consideration should be given to:

11.1 Where practicable, encouraging and assisting them to obtain a COVID-19 test prior to applying for bail. A prior test would provide assurance that the defendant understands their obligations, and it will ensure they have the evidence they need at the boundary. It will give confidence to the defendant, the court and other justice sector agencies that there is no impediment to the person travelling directly to the bail address.

11.2 Where available, advising the defendant or defence counsel of suitable temporary accommodation in the alert level 3 area where the defendant may reside while awaiting their negative COVID-19 test result before travelling to their bail address outside the alert level 3 area.

11.3 If they have not undertaken a test already and there is no appropriate temporary accommodation option available, prosecutors could seek or support an adjournment of the bail hearing for this to occur.

12. Ultimately, the obligation is on the bailed defendant to comply with the Order, including the testing and evidential obligations in cl 19C. That requirement must be met at the time they seek to cross the border. The absence of a negative test result or a certificate at the time of a bail hearing is not, unless relevant to a bail purpose under s 8, a factor that in itself would justify the prosecutor opposing bail (or the court declining it).

Defendants bailable as of right

13. A person bailable as of right under s 7(1) or s 7(2) of the Bail Act must be granted bail upon making an application. Bail conditions may still be imposed, however, if considered reasonably necessary to meet one of the purposes of bail (Bail Act, s 30(4); *Maddigan v New Zealand Police* [2021] NZHC 1035 at [88]).
14. If a residence condition is considered necessary, the approved address may be in a lower alert level area. And if that is the case, the defendant may face the logistical difficulty of being bailed before receiving the negative COVID-19 test result required to travel to the other alert level area. In order to prevent such a defendant from facing one of the risks outlined at [7] above, the following options are available:
 - 14.1 The Court may direct that the defendant reside at temporary accommodation within the alert level 3 area pending a negative COVID-19 test result, upon receipt of which they may travel to their bail address in the lower alert level area.
 - 14.2 The Court may release the defendant on bail to the other alert level address, but give them sufficient time to reach their address to enable them to first obtain a COVID-19 test result and travel on to the bail address. However, it might be appropriate for the Court to check the defendant's understanding of their obligations within the alert level area from which they are bailed, in order to ensure they are not set up to fail.

This information was amended on 27 September 2021 to take account of COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) Amendment Order 2021. It may be updated as Covid Orders change, or unanticipated factual scenarios arise.

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