

23 November 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill

Purpose

1. We have considered whether the COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. This advice updates our previous advice of 11 November 2022, which was prepared in relation to version 8.0 of the Bill, to reflect the introduction version of the Bill.

Summary

3. The Bill amends the COVID-19 Public Health Response Act 2020 (principal Act). It aims to enable the ongoing management of COVID-19 by continuing the legislative powers needed to implement public health measures to support the COVID-19 response.
4. Key amendments relate to:
 - a. amending the repeal date so that the principal Act will continue to apply until two years after Royal Assent of the Bill;
 - b. removing the requirement that Parliament must periodically resolve to continue the legislation or it will be repealed;
 - c. reducing the scope of what COVID-19 orders may cover to mainly focus on self-isolation requirements, specified requirements on persons conducting a business or undertaking (PCBUs), and requirements for persons entering New Zealand;
 - d. removing provisions relating to managed isolation and quarantine;
 - e. reducing some enforcement powers and specifying the type of enforcement officers that may be authorised by the Director-General of Health; and
 - f. reducing penalties for non-compliance with the principal Act or COVID-19 orders.
5. The Bill does not remove or change any of the existing prerequisites or safeguards surrounding the use of COVID-19 orders in the principal Act.
6. The amendments mean that many of the measures which COVID-19 orders have been used to implement would no longer be possible.
7. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with:
 - a. section 14 (freedom of expression);
 - b. section 18 (freedom of movement);

- c. section 21 (unreasonable search and seizure);
- d. section 22 (liberty of the person); and
- e. section 25(c) (the right to be presumed innocent until proven guilty).

8. Our analysis is set out below.

The Bill

9. The Bill amends the COVID-19 Public Health Response Act 2020 (principal Act). The principal Act created a bespoke legal framework for managing the risks associated with COVID-19. It allowed the Minister for COVID-19 Response (or the Director-General of Health or Minister for Workplace Relations and Safety in some circumstances) to make enforceable orders in respect of people, businesses and activities.

Extension of principal Act for two years after Royal Assent of the Bill

10. Clause 4 of the Bill replaces section 3 of the principal Act. That section currently provides that the House of Representatives must periodically resolve to continue the Act, or it is repealed. It also provides that the Act expires on the close of 13 May 2023 if not repealed earlier. The new section 3 extends the expiration date of the principal Act so that it will remain in force for two years after Royal Assent of the Bill. There is no longer a requirement House of Representatives to periodically resolve to continue the principal Act.

Reduction of the scope of COVID-19 orders

11. The Bill removes the ability for the Director-General of Health and the Minister for Workplace Relations and Safety to make COVID-19 orders (see clauses 7 and 9).

12. It also reduces the scope of matters for which the Minister for COVID-19 Response can make COVID-19 orders to include:

- a. self-isolation (for COVID-19 cases, household contacts, close contacts), and mask wearing requirements in the community.
- b. requiring travellers to New Zealand to:
 - i. undertake pre-departure and/or post-arrival testing or medical examination;
 - ii. satisfy criteria relating to COVID-19 testing, COVID-19 symptoms or infection, and whether they are subject to a health direction of another country regarding COVID-19;
 - iii. self-isolate when a border order applies or is coming into force;
 - iv. provide information to support contact tracing.
- c. requiring a PCBU to:
 - i. maintain systems and processes to ensure that workers comply with specified self-isolation and masking requirements made under a COVID-19 order, and to mitigate the risk of the spread of COVID-19 where a worker is unable to wear a mask;
 - ii. take specific actions to mitigate the risk of the spread of COVID-19 that arises from, or relates to, a worker leaving self-isolation to carry our work for the PCBU.

- d. requiring specified actions in relation to inbound craft (such as planes and ships), including ensuring that arriving passengers meet the above requirements and wear masks on board.
- e. specifying evidence which must be produced to show compliance with requirements.
- f. prohibiting or authorising persons to import, manufacture, supply, sell, pack or use testing devices.

Removal of Managed Isolation and Quarantine

13. The Bill removes all provisions relating to managed isolation and quarantine facilities, but includes a transitional provision to preserve the ability to recover existing debts in relation to managed isolation and quarantine.

Reduction of enforcement powers

14. The Bill also limits or removes some enforcement powers, including:
- a. the power to enter a marae without a warrant;
 - b. the power to close roads and public places, and to stop vehicles;
 - c. the power to direct a person to produce evidence of compliance with a specified measure; and
 - d. reducing the scope of who may be an authorised enforcement officer.

Reducing penalties for non-compliance

15. The Bill reduces the maximum penalties applicable to infringement offences and criminal offences upon prosecution.

Consistency of the Bill with the Bill of Rights Act

Extraordinary nature of the principal Act

16. As we acknowledged in our advice in relation to the principal Act, the backdrop of the Act was an unprecedented public health emergency that required a number of exceptional powers that would be unlikely to be justified in ordinary circumstances.¹ Orders under the principal Act have been used to implement a range of measures as part of the response to COVID-19, including imposing:
- a. different restrictions for different areas under the alert level framework;
 - b. requirements in relation to managed isolation and quarantine facilities; and
 - c. requirements for vaccination and testing of certain workers.
17. Broad emergency powers were appropriate at the beginning of the pandemic when vaccines were not yet available, and COVID-19 variants represented high risks to public health. The landscape has shifted substantially.

¹ Ministry of Justice, Advice on Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 Public Health Response Bill, 11 May 2020
<<https://www.justice.govt.nz/assets/Documents/Publications/COVID-19-Public-Health-Response-Bill.pdf>>

18. While the scope of the COVID-19 orders that may be made under the Bill is considerably narrower than currently under the principal Act, the Bill still permits COVID-19 orders that may impose serious limitations on rights affirmed in the Bill of Rights Act. By repealing the requirement for Parliament to resolve periodically to continue the principal Act, and extending the sunset clause, the Bill enables the residual powers to be triggered and invoked (in the specified circumstances) for two years after the Bill has been enacted. This creates a different context from the one in which we originally assessed the Bill of Rights consistency of the principal Act.
19. It is therefore important to be satisfied that the safeguards in the legislation remain sufficient to ensure that the existence of the power to impose limits on these rights and freedoms is justified.

The existing triggers and safeguards for making COVID-19 orders are retained

20. It is important to note that many of the existing triggers and safeguards for COVID-19 orders to be made are retained. For ease of reference we have included these below. COVID-19 orders may only be made where one of the following circumstances applies:
 - a. an Epidemic Notice for COVID-19 issued under section 5 of the Epidemic Preparedness Act 2006 is in force;
 - b. a state of emergency or transition period in respect of COVID-19 declared under the Civil Defence and Emergency Management Act 2002 is in force; or
 - c. the Prime Minister authorises the use of orders after being satisfied that there is risk of the outbreak or spread of COVID-19.²
21. Before a COVID-19 order can be made, the Minister must:
 - a. have regard to advice from the Director-General of Health about the risk of outbreak or spread of COVID-19 and the nature and extent of measures that are appropriate to address those risks;
 - b. have regard to any decision by the Government on how to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (including taking into account any social, economic, or other factors);
 - c. consult the Prime Minister, the Minister of Justice, the Minister of Health, and any other Minister that the Minister for COVID-19 Response thinks fit; and
 - d. be satisfied that the order is appropriate to achieve the purpose of the Act.³
22. COVID-19 orders must be approved by the House of Representatives within a specified time, or they will be automatically revoked.⁴ In addition, the Minister must keep COVID-19 orders under review.⁵
23. Our previous advice examined the reasonableness of the trigger provision and the other prerequisites and safeguards surrounding the making of orders under the principal Act. That analysis remains relevant to the Bill. We also note that the potential scope of restrictions COVID-19 orders may impose is markedly reduced. For example, the reduced scope would

² See section 8 of the principal Act.

³ See section 9 of the principal Act.

⁴ See section 16 of the principal Act.

⁵ See section 14(5) of the principal Act.

no longer permit nationwide lockdowns, requirements to enter managed isolation and quarantine facilities on entry to New Zealand, or requirements for vaccination and testing of workers.

The Bill removes section 3 of the principal Act

24. Clause 4 of the Bill replaces section 3 of the principal Act. That section provides that the Act will be repealed:
 - a. on the expiry of a relevant period if the House of Representatives does not pass a resolution to continue the Act within that period (see section 3(1) principal Act); or
 - b. on the close of 13 May 2023 if not repealed sooner (see section 3(3) principal Act).
25. The new section 3 repeals the principal Act two years after Royal Assent of the Bill, thereby extending it beyond the current sunset date of 13 May 2023. It also removes the requirement for the House of Representatives to resolve to continue the principal Act in the meantime.
26. We note that in our previous advice we referred explicitly to the intrusions on rights and freedoms being of a temporary nature,⁶ and that the Bill enables these intrusions to be extended beyond the period initially provided for.
27. However, the scope of matters that may be included in COVID-19 orders will be reduced by the Bill. We also acknowledge that the other safeguards in the principal Act are retained. While the amendment to section 3 means that the Act continues for two years after the Bill is enacted, we consider that the trigger provision for making COVID-19 orders remains reasonable and that there are appropriate safeguards in place surrounding the making of COVID-19 orders. We also observe that each COVID-19 order must be a proportionate response to the public health risk identified. This is discussed further below in relation to the particular rights engaged.

Section 18 – Freedom of movement

28. Section 18(1) of the Bill of Rights Act provides that everyone lawfully in New Zealand has the right to freedom of movement in New Zealand. Section 18(2) of the Bill of Rights Act provides that every New Zealand citizen has the right to enter New Zealand.
29. Clause 8 of the Bill amends section 11 of the principal Act which provides what measures can be implemented by COVID-19 orders. The Minister may make a COVID-19 order requiring 1 or more classes of persons to self-isolate in any specified place or specified way. These orders may apply to COVID-19 cases, household contacts, close contacts, or people entering New Zealand. The orders may also require specified actions to be taken for the purpose of managing the movement of people to, from, and within their place of self-isolation.
30. Requirements relating to self-isolation and restrictions around the movement of people to, from and within their place of self-isolation engage freedom of movement.
31. COVID-19 orders may also impose other requirements on people prior to entry into New Zealand. For example, they may require travellers to New Zealand to satisfy criteria relating to whether they have undergone testing for COVID-19; whether they have COVID-19 infection or symptoms; or whether they are subject to another country's health direction regarding COVID-19. Orders may also require contact tracing information to be provided

⁶ Ministry of Justice, Advice on Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 Public Health Response Bill, 11 May 2020, para 21.

before entering New Zealand. These requirements may impact the ability of New Zealand citizens to enter New Zealand and therefore also engage freedom of movement.

32. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of section 5 of that Act. The section 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression; and if so, whether the limitation is rationally connected and proportionate to that objective and limits the freedom of expression no more than reasonably necessary to achieve that objective.⁷

Do the limits serve a sufficiently important objective?

33. The purpose of these provisions is to prevent, reduce or eliminate the risks of the spread of COVID-19, and to respond to new variants of concern or an escalating COVID-19 outbreak. We consider this public health objective to be of sufficient importance to justify some limit on freedom of movement.

Are the limits rationally connected to the objective?

34. Restrictions on the movement of COVID-19 cases, household contacts and close contacts is rationally connected to the purpose of the principal Act, to prevent, and limit the risk of, the outbreak or spread of COVID-19. Limiting people's movement by requiring self-isolation will assist in limiting the ability of the virus to spread to others.
35. Restrictions on persons entering New Zealand is also rationally connected to the objective, for example as a response to new variants of concern. Requiring people to complete certain requirements as a pre-requisite to entering New Zealand may assist with preventing the entry of new variants.

Does the limit impair the freedom no more than is reasonably necessary?

36. The Bill is designed to enable a continued proportionate and streamlined approach to the management of COVID-19 when there is a need for this. There are several safeguards in the principal Act prior to a COVID-19 order being made (as discussed at para 20 to 23 above).
37. We also note that the scope of orders will be confined to specific classes of people in relation to self-isolation, and to imposing requirements on people entering New Zealand. There is no general power to impose isolation requirements on persons who are not COVID-19 cases or their contacts or to restrict movement more generally.

Is the limit in due proportion to the importance of the objective?

38. Although the Bill provides for significant restrictions to be imposed on certain classes of people, this is in the context of an ongoing global pandemic of a highly transmissible virus. The powers enabled under the Bill reflect an approach to mitigating the spread of COVID-19 that is limited in scope, and targeted to classes of persons who may be most at risk of spreading COVID-19 (those who are COVID-19 positive, their contacts and persons who have entered New Zealand when a border order is or will be in force).
39. There are also a number of safeguards in the principal Act to ensure the powers are used transparently, based on public health advice, and are subject to Parliamentary scrutiny.

⁷ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

40. For these reasons we are satisfied that the limits these orders may place on freedom of movement are justified under section 5 of the Bill of Rights Act.

Section 22 – Liberty of the person

41. For completeness we have also considered whether orders for self-isolation requirements enabled under clause 8 of the Bill may engage section 22 of the Bill of Rights Act, which affirms that everyone has the right not to be arbitrarily arrested or detained. The purpose of the right not to be arbitrarily detained is the protection of human dignity, autonomy, and liberty.⁸
42. Where an enactment is inconsistent with section 22, there can be no role for justification under section 5 of the Bill of Rights Act. Rather, the term “arbitrarily” is intended to provide a measure of the reasonableness of statutory powers,⁹ as well as the exercise of those powers. At issue is whether there is sufficient justification for detention and whether the Bill carefully circumscribes who may detain a person, for how long, and under what conditions.
43. In our view the orders authorised under clause 8 are not “arbitrary” for the purposes of section 22 of the Bill of Rights Act. Orders relating to self-isolation may be made only in relation to COVID-19 cases, household contacts, close contacts and persons entering New Zealand. Isolation requirements will therefore ensure that potentially infectious persons are kept apart from others when they may be at risk of spreading the virus. Each order will need to be based on public health advice and proportionate to the risk posed.
44. We therefore consider that the Bill appears consistent with the right not to be arbitrarily arrested or detained affirmed in section 22 of the Bill of Rights Act.

Section 21 – Right to be secure against unreasonable search or seizure

45. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, their property or correspondence, or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹⁰

Reduction of the warrantless entry power in the principal Act in relation to private homes and marae

46. Clause 16 of the Bill amends section 20 of the principal Act, which provides for a warrantless power of entry where an enforcement officer has reasonable grounds to believe a person is failing to comply with a COVID-19 order. The current power may not be exercised in relation to a dwellinghouse (except in limited circumstances). Clause 16 removes the ability to enter a dwellinghouse in even those limited circumstances and provides that this warrantless entry power also may not be exercised in relation to marae.
47. There is a greater expectation of privacy in relation to marae and private homes. Removing the power to enter a dwellinghouse or marae without a warrant is therefore rights enhancing and consistent with section 21 of the Bill of Rights Act.
48. We consider that the power of warrantless entry in relation to other places remains reasonable and proportionate with the existing safeguards. There is a lower expectation of privacy for buildings, land, aircraft, ships or other things that are not private homes or marae,

⁸ *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.

⁹ Andrew Butler and Petra Butler, *New Zealand Bill of Rights Act: a Commentary* (2nd ed, LexisNexis, Wellington 2015), at [19.8.1].

¹⁰ *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

and the requirements in the principal Act to report on each use of the entry power are retained. We therefore consider that this power remains reasonable under section 21 of the Bill of Rights Act.

Requirements for persons to undergo COVID-19 testing or medical examination

49. Clause 8 of the Bill allows for COVID-19 orders to require persons entering New Zealand to report for and undergo medical examination or testing before entering New Zealand, on entering New Zealand, or within a specified period after entering New Zealand (see clause 8, new section 11(4)(c)).
50. It has been well established by the courts that physical searches of a person and removal of bodily samples engages section 21 of the Bill of Rights Act.¹¹ In order for a statutory power to be consistent with section 21, the intrusion into the values noted above must be justified by a sufficiently compelling public interest. The intrusion must be proportional to that interest and be accompanied by adequate safeguards to ensure it will not be exercised unreasonably. The Supreme Court has held that, logically, an unreasonable search or seizure cannot be demonstrably justified with reference to section 5 of the Bill of Rights Act.¹² Rather, the assessment is first, whether what occurs is a search or seizure, and if so, whether that search or seizure is reasonable.
51. We consider that the ability for the Minister to make an order requiring persons to be tested for COVID-19 constitutes a search for the purposes of section 21. We have considered whether this is a reasonable power.
52. The purpose of enabling testing in these situations relates to the detection of COVID-19 entering New Zealand. New variants of concern may well emerge in other countries. There is therefore a public health rationale in allowing for orders to require testing of persons entering New Zealand.
53. We note that testing is a physical intrusion on a person and there may be circumstances where it would not be a proportionate public health response to require it. However, the Minister is required to keep orders under review. Orders that are no longer proportionate should be revoked. Overall, we consider that enabling the detection of COVID-19 entering the country is proportionate to help manage the public health risks that may be posed by new variants of concern and the ability to make these orders does not result in an unreasonable search power.

Section 14 – Freedom of expression

54. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information.¹³
55. Clause 8 of the Bill provides that COVID-19 orders may require a person to provide information necessary for the purpose of contact tracing either before entering New Zealand, or on entering New Zealand (see clause 8, new section 11(4)(b)). It also provides that orders

¹¹ *Hamed v R* [2012] 2 NZLR 306; *Reekie v Attorney-General* [2009] NZA 598.

¹² *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

¹³ See for example *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

may be made requiring persons to wear masks in specified places or circumstances (see clause 8, new section 11(3)(a)).

56. These provisions *prima facie* engage freedom of expression. A requirement to provide information engages freedom of expression in that it impacts a person's right not to say something. Requirements for mask use also engage freedom of expression as they may affect how people are able to present themselves in the places where mask use is required.
57. We consider that any limit on section 14 is justified. Both contact tracing information requirements and requirements for mask use are rationally connected to the important objective of enabling a proportionate ongoing public health response to COVID-19.
58. The limits impair the right no more than reasonably necessary and are proportionate to the importance of the public health objective. Contact tracing information is of limited expressive value and will only be required from persons entering New Zealand who may need to be contacted if variants of concern are detected amongst their fellow passengers. Mask use will only apply in specified places and circumstances, which will need to be based on public health advice.
59. For these reasons, we consider that the limits on freedom of expression in clause 8 of the Bill are justified under the Bill of Rights Act.

Section 25(c) – Right to be presumed innocent until proven guilty

60. The Bill amends several penalties, reducing the maximum fines for a number of offences. This includes reducing the maximum infringement fee from \$4,000 to \$1,000.
61. As strict liability offences, infringement offences *prima facie* limit section 25(c) of the Bill of Rights Act which affirms the right to be presumed innocent until proven guilty. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.
62. Although infringement offences do not result in a criminal conviction, the Court of Appeal in *Henderson v Director, Land Transport New Zealand* held that the rights in sections 24 and 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.¹⁴
63. We note that infringement offences may be set out in COVID-19 orders. These orders will be secondary legislation and must be consistent with the Bill of Rights Act, otherwise there is a risk they will be *ultra vires*.
64. We consider that the reduction of infringement fee level lessens the limit on the presumption of innocence affirmed in section 25(c) of the Bill of Rights Act and remains justifiable under section 5 of that Act. The existing penalty level in the principal Act has been considered proportionate to the importance of the Act's objective.¹⁵ We consider that the reduced penalty represents a proportionate response commensurate with the reduction of powers in the Bill and the move to a regime that provides for more limited ongoing public health measures.

¹⁴ [2006] NZAR 629 (CA).

¹⁵ The penalty for infringement offences was considered in the Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the COVID-19 Public Health Response Amendment Bill, 14 September 2021.

Conclusion

65. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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