

# Departmental Disclosure Statement

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COVID-19 Public Health Response Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Department of the Prime Minister and Cabinet.

The Department of the Prime Minister and Cabinet certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

11/05/2020

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## Part One: General Policy Statement

This Bill is an omnibus Bill that amends more than 1 Act and is introduced under Standing Order 263(a) because the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. That single broad policy is to establish a fit-for-purpose legal framework for managing the unprecedented circumstances of the COVID-19 epidemic in a co-ordinated and orderly way, even if there is no longer a national state of emergency. To this end, this Bill establishes standalone legislation that provides a different legal framework for responding to COVID-19 over the next 2 years or until COVID-19 is sooner brought under control.

In addition to this, the Bill—

- (a) will apply to all Alert Levels under the COVID-19 Alert Level Framework; and
- (b) addresses the need for some enforcement powers for certain restrictions that may be applied so that these restrictions do not rely on powers provided by a state of national emergency – at Alert Level 2 this may include gatherings and distancing; and
- (c) establishes decision-making processes that are more modern and consistent with recommended practice by legal academics and others; and
- (d) has limited retrospective effect to enable the Alert Level 2 order to be prepared and commence immediately if needed; and
- (e) does not provide retrospective validation of actions already taken on previous orders.

The measures in the Bill take account of the particular characteristics of COVID-19 such as its contagious nature and potential for asymptomatic transmission, which creates the risk of spread and a need to impose restrictions at an aggregate as well as an individual level.

The Bill also amends the Civil Defence Emergency Management Act 2002. The objectives of those amendments are to ensure a nationally consistent approach to the response to and management of risks arising from COVID-19 and to better deal with concurrent emergencies during the COVID-19 response.

### **Purpose**

The purpose of the Bill is to support a public health response to COVID-19 that—

- prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the asymptomatic and contagious nature of COVID-19); and
- avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and
- is co-ordinated, orderly, and proportionate; and

- has enforceable measures in addition to voluntary measures and public health and other guidance.

### **Power to set enforceable measures**

The Bill aims to achieve this purpose by providing that, following the declaration of a state of emergency, the issuing of an epidemic notice, or an authorisation of the Prime Minister, the Minister of Health is given powers to issue orders to give effect to the public health response. This is a change to the position under the Health Act 1956, which made the Director-General of Health (exercising the powers of a medical officer of health) the decision maker for orders. The reasons for making the Minister of Health the decision maker are—

- it is more consistent with existing legislative conventions. The scale and wide ranging implications (health, economic, and social) of the decision-making lend themselves to ministerial-level accountability, where a wider range of ministerial portfolios can have input. This positions Cabinet and the Director-General of Health in a more conventional decision making relationship:
- it allows for public health expertise to remain at the centre of decision-making. It does this by providing that the Minister of Health is the decision maker, and requiring that the Minister of Health have regard to the advice of the Director-General of Health:
- it allows for a wider range of Ministerial portfolios to have input, while allowing the advice of the Director-General of Health to be focused on public health needs and medical expertise.

The power to make orders under the Bill—

- is broadly based on the powers in sections 70 and 92I of the Health Act 1956:
- can be expressly exercised in respect of classes of people, businesses, and other activities (such as sporting events, weddings, funerals, etc), and may apply nationally or to a specified area:
- allows for the same kind of measures to be put in place that have been imposed under the various Health Act 1956 orders to date and that are envisaged under the COVID-19 Alert Level Framework:
- contains the ability to place conditions on the controls made under the orders.

The Minister must be satisfied that the order is appropriate to achieve the purpose of the Bill.

### **Safeguards**

The Bill includes a number of safeguards around the exercise of the Minister's power to issue orders. Before issuing an order, the Minister must have regard to advice from the Director-General of Health. The Minister may also have regard to any Government decision on the risks. The Minister must consult the Prime Minister, the Minister of Justice, and may consult any other Minister that the Minister of Health thinks fit.

Orders are also disallowable instruments and will be automatically revoked if not confirmed by the House of Representatives. Orders must also be published in the *Gazette* and on an internet site maintained by the New Zealand Government 48 hours prior to coming into force unless they need to come into force urgently to prevent or contain the outbreak or spread of COVID-19. Orders must also be presented to the House of Representatives as soon as practicable after they are made.

## **Enforcement**

As with the orders made under the Health Act 1956, non-compliance with orders provided for in the Bill may result in imprisonment or a fine on conviction. A mental element (for example, the person acted intentionally) has been included in these offences to reflect the severity of conviction as a penalty. To further support the enforcement of health measures in the orders and to promote greater compliance, infringement offences have been added for non-compliance with orders.

Businesses that do not comply with orders (for example, by not ensuring physical distance requirements are met by customers and staff) can be ordered to close for up to 24 hours. The policy objective underpinning these enforcement measures is to enable a graduated response approach to offending.

To enable enforcement of the measures in orders, the Police are given a power to enter premises, including private dwellinghouses and marae, without a warrant if they have reasonable grounds to believe that people have gathered there in contravention of an order and entry is necessary for the purpose of giving people a direction to comply with the order (for example giving an order to disperse). Enforcement officers can enter without a warrant any premises other than private dwellinghouses and marae if they have reasonable grounds to believe that a person is failing to comply with any aspect of an order.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>NO</b>

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>

<b>2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?</b>	<b>NO</b>

### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>NO</b>
The Treasury has determined that this is a direct COVID-19 response and has suspended the RIA requirements (in accordance with CAB-20-MIN-0138)	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>

### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>NO</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>YES</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>YES</b>

COVID-19 is characterised by its rapid spread and that it is frequently asymptomatic. These characteristics mean any attempt to reduce or eliminate its spread will rely largely on activities by every person and business. Current measures include washing hands, distancing, and self-isolating when sick or showing symptoms.

All measures will rely on widespread voluntary compliance to be effective.

Some measures cannot feasibly be enforced (washing hands). However, in general people are more likely to comply with restrictions when they are proportionate and based on clear powers.

The COVID-19 Public Health Response Act modernises the regulatory framework that currently exists which provides for the powers to enable the Government to impose restrictions that are necessary to support the public health response.

The nature of COVID-19 is such that if measures imposed to manage the outbreak are not complied with then the intended public health benefits will not be realised.

This may result in:

- Adverse health outcomes (for instance higher case numbers, and potentially case fatalities as a result of COVID-19 infections)
- Adverse social and economic outcomes from the requirement to impose longer, or additional, restrictions to address outbreak of COVID-19.

Increased enforcement of measures by regulators would likely result in lower levels of non-compliance, particularly for highly visible, reckless, or persistent non-compliance. However, voluntary compliance, supported by education and clear guidance are at this time the preferred mechanism for seeking compliance, rather than the exercise of coercive powers.

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

**3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?**

Officials consulted the Ministry of Foreign Affairs and Trade and consider that the policy in the Bill is consistent with New Zealand's international relations.

### Consistency with the government's Treaty of Waitangi obligations

**3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?**

The content of the Bill does not specifically impact rights and interests of Māori protected by the Treaty of Waitangi, and in the case of customary interests, also protected at common law.

### Consistency with the New Zealand Bill of Rights Act 1990

**3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?**

YES

The Ministry of Justice will provide advice to the Acting Attorney-General (on issuing of a warrant). This is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>



## Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>YES</b>
<p>Sections 18 - 31 contain provisions relating to Enforcement, offences, and penalties</p> <p>The Bill creates criminal offences where a person does any of the following:</p> <ul style="list-style-type: none"> <li>- Intentionally fails to comply with an order made by the Minister or Director General under the Act (a “section 11 order”);</li> <li>- Intentionally fails to comply with a direction of an enforcement officer that may be given under the Act;</li> <li>- Intentionally threatens, assaults, obstructs or hinders an enforcement officer in the exercise of their powers or functions under the Act;</li> <li>- Fails to stop a vehicle as soon as practicable when required to do so by a constable in circumstances where the person knows or ought reasonably to know that the person exercising the power is a constable.</li> </ul> <p>All criminal offences carry a maximum penalty of 6 months imprisonment or a \$4,000 fine:</p> <p>The Bill also creates infringement offences if a person does any of the following:</p> <ul style="list-style-type: none"> <li>- Fails to comply with a requirement that has been prescribed by a section 11 order made by the Minister as an infringement offence:</li> </ul> <p>Infringement fees are set in the Bill at \$300. Infringement fines (imposed by a court only) may not exceed \$1,000.</p> <p>The owner or manager of a business that has been directed by an enforcement officer to close for up to 24 hours under part 2, subpart 3 of the Bill may appeal the revocation of the direction to a District Court Judge.</p> <p>Clause 40 amends section 272 of the Oranga Tamariki Act 1989 in relation to the Youth Court’s jurisdiction over infringement offences against this Bill. If a young person is charged with an infringement offence against this Bill and any other offence for which the young person is required to be brought before the Youth Court to be dealt with, and the offences arise out of the same event or series of events, the offences are dealt with by the Youth Court.</p>	

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
The Ministry of Justice was consulted and provided input throughout the development of the Bill and the underlying policy.	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
<p>Section 23 gives an enforcement officer the power to direct a person to provide identifying information for the purposes of exercising enforcement powers under the Act.</p> <p>Section 11 orders may impose a range of measures, for example require people undertaking certain activities or businesses to request and maintain records that will enable individuals to be identified to carry out contract tracing to contain the spread of COVID-19 in the community.</p>	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>NO</b>

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>NO</b>

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
<p>The proposals have been developed by the All of Government Law Reform team in consultation with a wide range of Crown organisations including, the Ministry of Health, Ministry of Justice, the Crown Law Office, New Zealand Police, Ministry of Business Innovation and Employment, the Department of the Prime Minister and Cabinet, the National Emergency Management Agency.</p>	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	<b>NO</b>

### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	<b>NO</b>

### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>NO</b>

### Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>NO</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>NO</b>
Please however note the creation of an infringement offences as discussed at question 3.4.	

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>YES</b>
Section 33 grants the same immunity available under section 129 of the Health Act 1956 to any person acting under the authority of the new Act.	

## Significant decision-making powers

<p><b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b></p>	<p><b>YES</b></p>
<p>The Bill provides the Minister and in specific circumstances the Director-General of Health with the power to make section 11 orders. Section 11 orders allow for a broad range of measures to be imposed as set out in sections 11 and 12.</p> <p>Part 2, subpart 3 of the Bill also provides a number of enforcement powers to support the current graduated enforcement model. The new powers are:</p> <ul style="list-style-type: none"> <li>• A warrantless entry power (which does not apply to private dwelling houses or marae) if an enforcement officer has reasonable grounds to believe that a person is failing to comply with any aspect of a section 11 order.</li> <li>• A limited warrantless entry power that may also be exercised in respect of private dwelling houses or marae only if a constable has reasonable grounds to believe that people have gathered in contravention of a section 11 order and entry is necessary for the purpose of giving people a direction under the Act (for example to leave the premises and return directly home).</li> <li>• An enforcement officer may, if they have reasonable grounds to believe that a person is contravening or likely to contravene a section 11 order, issue a direction to stop particular activity that is in contravention of the order or take any action to prevent or limit the extent of non-compliance. This could be used, for example to direct people who are gathering at a park in contravention of a section 11 order to disperse and return home.</li> <li>• A constable may restrict access to any road or public place in an area in which a section 11 order provides for such restriction.</li> <li>• A constable may require a vehicle to stop for the purpose of a section 11 order that provides for restrictions on travel. This will allow police to set up checkpoints to enforce measures such as restrictions on interregional travel.</li> <li>• For the purposes of enforcing a section 11 order, an enforcement officer may direct a person to provide their full name, address, date of birth, occupation and telephone number, and any other particulars as to the person’s identity or information. Obtaining this information is necessary to enable an enforcement officer to issue an infringement notice or take other enforcement action.</li> <li>• An enforcement officer may give a direction to a business to close for a period of up to 24 hours if the enforcement officer has reasonable grounds to believe that the business is open or operating in contravention of a section 11 order. This could apply if a business was operating without complying with requirements to maintain records for contact tracing or ensure physical distancing.</li> </ul> <p>The CDEM Act amendments in the Bill amend the power for a local state of emergency or local transition period to be made in relation to COVID-19 matters without the prior approval of the Minister. This is considered necessary to ensure a nationally consistent approach to support the Government’s response to and management of the risks arising from COVID-19.</p>	

## Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>YES</b>
<p>Section 11 orders are disallowable instruments that may also provide for exemptions from compliance from the requirements in the order and may also authorise persons or class of persons in the order to grant exemptions and other authorisations specified in the order.</p> <p>Section 11 orders made by the Minister may also specify which acts or omissions under the order are to be treated as infringement offences under the Act. The infringement fee (\$300) and fine (\$1000 max) are set in the Act.</p>	

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>YES</b>
<p>Section 32 includes a regulation making power to prescribe alternative infringement notices and reminder notices.</p>	

## Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>YES</b>
<p>Section 16 provides that section 11 orders made by the Minister are revoked after a specific period of time unless they are confirmed by the House of Representatives. An order that is revoked under this section immediately ceases to have effect, but revocation does not affect the validity of any action taken to give effect to or enforce the order. This procedure provides parliamentary oversight of orders made by the Minister.</p> <p>Clause 2 of schedule 1 contains a provision to facilitate the preparation of a section 11 order in advance of the enactment or the commencement of the Bill.</p>	