

# Departmental Disclosure Statement

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COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment 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 Manatū Hauora (the Ministry of Health).

Manatū Hauora certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

The information in this disclosure statement is based on the version of the Bill set out in PCO 25071/13.7.

21 November 2022.

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## Part One: General Policy Statement

The COVID-19 Public Health Response Act 2020 (the Act), enacted in May 2020, established a bespoke legal framework to manage the unprecedented circumstances of the COVID-19 epidemic in a co-ordinated and orderly way. The Act is an enabling framework that allows the Minister for COVID-19 Response to make COVID-19 orders to give effect to the public health response to COVID-19 (COVID-19 Orders).

COVID-19 orders have been used to implement measures such as—

- setting the restrictions that apply to different regions of New Zealand under the Alert Level System
- establishing isolation and quarantine requirements for people entering New Zealand via the air or maritime border
- requiring vaccination and regular testing of workers if they are to undertake certain work in education and healthcare facilities, and at borders or at managed isolation or quarantine facilities (MIQFs).

### Purpose

The Bill 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.

### Policies included in the Bill

The Bill—

- amends the repeal date so that the Act is repealed 2 years after the day of Royal assent of this Bill
- removes the requirement for the House of Representatives to periodically resolve that the Act remain in force
- removes the power for the Director-General of Health to make COVID-19 orders
- limits the power for the Minister for COVID-19 Response to make COVID-19 orders to only include the following public health measures:

Context	Public health measure
In the community	Self-isolation (for cases, household contacts, close contacts) and masks
Mandatory masks, self-isolation and certain requirements for travellers to New Zealand	<ul style="list-style-type: none"><li>• Mask use on inbound flights to New Zealand</li><li>• Pre-departure and/or post arrival testing requirements</li><li>• Requirement for airline or ship operators to take reasonable steps to ensure passengers comply with pre-departure travel requirements</li><li>• Requirement not to board a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19</li><li>• Self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere)</li><li>• Provision of travel history and contact information to support contact tracing</li></ul>

- limits enforcement powers by-
  - removing the power for warrantless entry to private dwellings and marae, the power to close roads and public places and stop vehicles, and the power to direct a person to produce evidence of compliance with a specified measure
  - specifying the types of enforcement officers that can be authorised by the Director-General of Health consistent with authorisations used to date
- reduces the maximum penalties for infringement offences and criminal offences
- delays commencement of new penalty levels in order to allow time to amend penalties in the COVID-19 Public Health Response (Infringement Offences) Regulations 2021, and thereby ensure that penalties in those regulations remain consistent with the maximum infringement offence penalties in the Act
- repeals section 145 and Schedule 5 of the Residential Tenancies Act 1986, used to activate tenancy termination restrictions during lockdowns, because lockdowns will not be enabled by the Act
- removes all provisions relating to MIQFs, but includes a transitional provision to preserve the ability to recover existing MIQF debts.

The Bill retains some of the existing safeguards of the Act, such as the prerequisites for COVID-19 orders and the requirement that all COVID-19 orders be consistent with the New Zealand Bill of Rights Act 1990.

## 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>
There have been many reviews undertaken into various aspects of the COVID-19 Response. These reviews have informed policy development in general terms but have not directly provided a foundation for the changes in this Bill.	

### 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>
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>[YES]</b>
On 29 September 2022, the Department of the Prime Minister and Cabinet (DPMC), and Manatū Hauora – the Ministry of Health, produced a Regulatory Impact Statement (RIS) titled ' <i>Future of the COVID-19 Public Health Response Act 2020</i> ' to help inform the main policy decisions taken by the Government relating to the contents of this Bill. A copy of the RIS can be found at: <a href="https://www.health.govt.nz/about-ministry/information-releases/regulatory-impact-statements">https://www.health.govt.nz/about-ministry/information-releases/regulatory-impact-statements</a>	

<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>
A Manatū Hauora Quality Assurance Panel reviewed the RIS and provided the following comments:  The Panel considers that the Impact Statement <i>meets</i> the quality assurance criteria. The Impact Statement is clear and concise. The policy problem and options are clearly identified.	

<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>[YES]</b>
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The additional policy decisions reflected in the provisions of the Bill are as follows:

*Non-compliant passengers travelling to New Zealand*

At the time of the RIS it was intended to retain the power to make COVID-19 Orders to set requirements for airline/ship operators to prevent passengers from travelling to New Zealand if the passengers have not complied with pre-departure travel requirements

The provisions in the Bill, however, do not extend to preventing craft from entering New Zealand. A more proportionate response already exists in the Act in the form of offence provisions. In other words, carriers could be penalised for failing to prevent passengers from travelling to New Zealand who have not complied with pre-departure travel requirements.

*Effective date for new penalty levels*

Under clause 2 of the Bill, the amended Act comes into force on the day after Royal Assent, but the new maximum fees and fines for infringement offences, and fines for individuals convicted of offences, come into force on the earlier of: a date set by Order in Council, or 28 February 2023.

Delayed commencement of the maximum penalty levels ensures there is time to make amendments to the COVID-19 Public Health Response (Infringement Offences) Regulations 2021, and thereby ensure the maximum penalties in the Act and in the Regulations are aligned.

*Continued regulation of Point-of-Care tests*

The Bill provides for orders to be made for the ongoing regulation of COVID-19 tests which will facilitate the continued regulation of Point-of-Care tests. A positive result from these tests may trigger self-isolation requirements, and so it is desirable that the Government maintains the ability to ensure these devices are safe and reliable.

*Repeal of section 145 and Schedule 5 of the Residential Tenancies Act 1986*

These provisions in the COVID-19 Response (Management Measures) Legislation Act 2021 support tenants to stay in their rental homes during outbreaks of COVID-19 if a COVID-19 Public Health Response order is made that restricts people from moving house during lockdowns. The provisions enable Ministerial orders to be made to activate tenancy termination restrictions. Given the power to impose lockdowns is being removed from the Act, section 145 and Schedule 5 are no longer required.

*Allowing a more limited range of qualified staff to exercise enforcement powers*

Under the Bill, staff engaged or employed by a narrower range of listed agencies and crown entities are able to be appointed by the Director-General to exercise enforcement powers where appropriately trained and qualified. This replaces a provision in the current Act that enabled appropriately trained and qualified staff from any part of the Crown or Crown entity to be appointed by the Director-General.

*Ongoing resolution of the House of Representatives to continue the COVID-19 Public Health Response Act 2020, and expiry of the Act*

The Bill removes the requirement for the House of Representatives to periodically resolve that the Act remain in force. The most contentious and rights limiting powers in the Act will be removed by the Bill, and so it is no longer necessary for Parliament to periodically resolve that the Act continue given existing safeguards.

Instead of continuing to apply indefinitely, the Act will continue to apply until 2 years after the Royal assent of the Bill.

## 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>	[NO]
<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>	[YES]
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	[YES]
<p>A qualitative assessment of the marginal costs and benefits of the policy approach given effect in the Bill is set out at pages 26-28 of the RIS.</p> <p>As noted in the RIS, the marginal cost benefit analysis is based on two key assumptions:</p> <ul style="list-style-type: none"> <li>the experience to date of using the Act for managing COVID-19 using and enforcing mandatory public health measures</li> <li>the level of compliance with the Act seen generally since it was enacted in 2020.</li> </ul>	

<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>	[YES]
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	[YES]
<p>The RIS at pages 12-19 discusses and analyses Option Three (Continuing the powers in the Act, narrowing the powers to a core set of provisions for the ongoing management of COVID-19) which is the policy approach given effect in the Bill.</p> <p>That discussion addresses the potential implications of reduced penalties in the context of narrower or reduced powers under the Act, and the importance of maintaining social licence alongside the graduated approach to compliance which includes education, engagement, encouragement, and enforcement as a last resort.</p>	

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>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?</b>
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The Ministry of Foreign Affairs and Trade has been consulted on the policies in this Bill.

This Bill does not affect New Zealand's international obligations.

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

<b>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?</b>
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While the guarantees under Te Tiriti are enduring, the uncertain and ever-shifting context of a pandemic or epidemic requires an agile yet continually receptive response to balance both of these considerations meaningfully. The impact of exercising legislative powers should consider the collective rights guaranteed under Te Tiriti o Waitangi as well as the individual rights protected by the New Zealand Bill of Rights Act 1990.

DPMC undertook engagement with Māori as a tangible step to determine consistency with Treaty principles and te ao Māori. Key reference documents include the Haumarū COVID-19 Priority Report and response available here:

<https://covid19.govt.nz/about-our-covid-19-response/proactive-releases/covid-19-reviews-and-audits/>

One of the primary reasons for the proposed removal of the ability for warrantless entry to marae is a concern expressed by the National Iwi Chairs Forum (NICF) that this power limits the ability of Māori to exercise Rangatiratanga over marae. The NICF strongly supports the removal of this power from the Act.

Representatives of the National Iwi Chairs Forum supported the policy approach in the Bill. They noted that the success of standing up public health measures, particularly with Māori communities, will depend on the strength of communications and central support for community care initiatives. A desire for ongoing support for Māori led communications was expressed.

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

<b>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?</b>
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[YES]

The Bill has been provided to the Ministry of Justice for vetting.

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, 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>	[YES]
<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	[NO]
<p>Clauses 21 and 22 of the Bill reduce the maximum penalties for infringement offences and criminal offences under sections 26 and 27 of the Act.</p> <p>Clauses 35, 36, and 37 of the Bill consequentially amend the COVID-19 Public Health Response (Infringement Offences) Regulations 2021 to remove references to infringement offences that relate to repealed provisions of the Act.</p>	

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	[YES]
The Ministry of Justice was consulted throughout the development of the policy proposals and the drafting of the Bill.	

## 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>	[YES]
<p>Clause 8 narrows the types of orders that can be made under section 11 of the Act. This includes removing the ability to create orders to mandate record keeping for contact tracing purposes, and to require the use of My Vaccine Pass.</p> <p>Clause 19 of the Bill repeals section 23A of the Act and thereby remove the power of an enforcement officer to direct a person to produce evidence of compliance with a specified measure.</p> <p>Clause 23 repeals, inter alia, subpart 3B of the Act which includes section 32T, a provision that requires persons in respect of whom charges are payable to provide their contact details.</p> <p>The repeal of the above sections will reduce the extent to which personal information is collected or disclosed.</p>	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	[YES]
The Privacy Commissioner was consulted on the provisions in the Bill and indicated comfort with the proposed amendments.	

## 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>[YES]</b>
<p>DPMC officials carried out limited engagement on the policy proposals reflected in the Bill (excluding the additional policy decisions outlined in section 2.3.2 above, which occurred after this engagement). Engagement occurred with the National Iwi Chairs Forum, disability representatives and community groups for Pacific peoples, along with wider stakeholder groups including faith-based community organisations, hospitality groups, the business and retail sector, trade unions, tourism representatives, the aviation and maritime sectors and local government.</p> <p>Overall, most stakeholders indicated support for the narrowing of powers in the Act to improve its proportionality, while retaining the ability to implement a limited set of public health measures. Key concerns raised related to:</p> <ul style="list-style-type: none"> <li>• the economic impact on businesses</li> <li>• the lack of consultation with affected communities when decisions to make or amend COVID-19 Orders occur at pace</li> <li>• minimal lead in time to implement public health restrictions</li> <li>• the potential reputational risk to New Zealand’s tourism without clear communication of changes</li> <li>• the risk of lessening public health restrictions on vulnerable populations, including the impact on their participation in society.</li> </ul>	

## 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>DPMC and Manatū Hauora consulted with the following agencies on the policy details in the Bill: The Treasury, Ministry for Primary Industries, Ministry of Transport, New Zealand Police, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, Ministry of Justice, MBIE, Ministry of Housing and Urban Development, Department of Corrections, Te Puni Kōkiri, Parliamentary Counsel Office, Crown Law Office, Office of the Privacy Commissioner, Te Arawhiti, the New Zealand Customs Service, Ministry of Education, Whaikaha – Ministry of Disabled People, Te Aka Whai Ora, Te Whatu Ora, Ministry of Social Development, Ministry for Pacific Peoples, Inland Revenue Department, Ministry of Culture and Heritage, Public Service Commission, Ministry for Ethnic Communities, Statistics New Zealand, Oranga Tamariki, Sport New Zealand and 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>
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### 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>
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The Bill removes the power to charge for MIQ and provides a transitional provision to ensure that existing debts can still be recovered. These charges relate to cost recovery rather than being in the nature of a tax.

### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>[NO]</b>
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### 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>[YES]</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>[NO]</b>

The Bill amends offence provisions by revoking regulations 6A, 6B, 6C, 7, and 8 of the COVID-19 Public Health Response (Infringement Offences) Regulations 2021 which define infringement offences against sections 17B, 17C, 17D(1), 32P, and 32T, respectively, of the Act.

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>[NO]</b>
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### Significant decision-making powers

<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>	<b>[NO]</b>
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The Bill retains section 12(2) of the current Act which provides that a COVID-19 order may not apply only to a specific individual.

## 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>[NO]</b>
<p>The Bill empowers the making of orders that clarify the interpretation of certain terms in the Bill (see definitions of definitive laboratory evidence and infectious period introduced by clause 6. This is necessary to reflect changes that may occur in scientific understanding over time.</p> <p>The Bill enables requirements to be specified in orders. Orders are disallowable instruments that may also provide for exemptions from compliance from the requirements in the order, and may also authorise persons or classes of persons in the order to grant exemptions and other authorisations specified in the order which may now only be made at Ministerial level.</p> <p>Orders continue to be subject to safeguards specified in the original Act. This includes that they must be consistent with the New Zealand Bill of Rights Act 1990, be consulted on, and be appropriate to achieve the purpose of the Act.</p>	

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>[YES]</b>
<p>The Bill amends the powers to make COVID-19 Orders:</p> <ul style="list-style-type: none"> <li>• Clause 7 repeals section 10, which removes the Director-General’s power to make COVID-19 orders. This leaves only the Minister with the power to make COVID-19 orders.</li> <li>• Clause 8 amends section 11, which specifies the type of orders that can be made under the principal Act. This amendment repeals the existing powers of the Minister to make orders and replaces them with a narrower set of powers to make orders requiring— <ul style="list-style-type: none"> <li>➢ COVID-19 cases, household contacts, and close contacts to self-isolate</li> <li>➢ people to wear masks in specified places and ways</li> <li>➢ travellers to New Zealand to comply with certain measures</li> <li>➢ airline and ship operators to require evidence of compliance with requirements by travellers to New Zealand and provide for any prohibitions or duties that apply in respect of the use and production of that evidence.</li> </ul> </li> <li>• Clause 13 consequentially amends section 16 to reflect that only the Minister will have the power to make COVID-19 orders.</li> </ul>	

## 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>Clause 4 of the Bill replaces section 3 of the Act. It means that the Act will not require the House of Representatives to periodically resolve that the Act remain in force. The Act will continue to apply until 2 years after the Royal assent of the Bill.</p>	