



Inquiry into the operation of the COVID-19 Public Health Response Act 2020

Report of the Finance and Expenditure
Committee

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Inquiry into the operation of the COVID-19 Public Health Response Act 2020

Recommendation

The Finance and Expenditure Committee has conducted an inquiry into the operation of the COVID-19 Public Health Response Act 2020 and recommends that the House take note of our report.

Executive Summary

The Finance and Expenditure Committee has conducted an inquiry into the operation of the COVID-19 Public Health Response Act 2020 (the COVID-19 Act).

We recognise the need for a modern legislative framework to respond to the COVID-19 emergency.

We urge the Government to pass legislation that would provide a modern legal framework to respond to future public health emergencies.

We believe that, if the Government passes enduring health emergency legislation, it would be necessary for the Government to consider providing greater clarity about enforcement officers.

We believe that, if the Government passes enduring health emergency legislation, it would be necessary for the Government to consider whether it is necessary or desirable to incorporate the Treaty of Waitangi, and principles of tikanga Māori, into this legislation.

Our inquiry examined several other issues that should be addressed were the Government to develop enduring health emergency response legislation. Our report discusses these, and we urge the Government to consider the issues noted in our report.

The need for urgent legislation gave rise to our inquiry

The COVID-19 Act established a legal framework to empower many aspects of the Government's response to COVID-19. It was passed by the House of Representatives under urgency. Because of the urgency, there was no opportunity for the usual select committee scrutiny of the bill. Although the House recognises and upholds the importance of detailed parliamentary scrutiny, it accepted that in this case the urgent legislative process was necessitated by the particular nature of the COVID-19 emergency.

In cases of particularly significant emergencies, we expect that bespoke legislation of the kind provided by the COVID-19 Act will almost certainly be required. The Attorney-General assured us that the Health Act 1956 was sufficient to provide a legal basis for the Government's response when New Zealand was in alert levels 3 and 4. However, the

existing mechanisms in the Health Act were unsuited to responding to COVID-19 at alert level 2 or lower.

New Zealand moved to alert level 2 on 13 May 2020. The COVID-19 Act, which went through all stages in the House on 12 and 13 May 2020, was considered by the Government to be urgently needed to provide a clear legal basis for the making of orders to implement alert level 2.

Were it not for the need for urgency, the legislation would have gone through at least a shortened process of select committee scrutiny. In lieu of that scrutiny during the legislative process, the House asked us to examine the COVID-19 Act.

The COVID-19 Act was necessary and appropriate

The COVID-19 Act is legislation specifically designed to respond to the COVID-19 emergency. It modernises the legal framework regarding emergency response legislation in relation to the COVID-19 health emergency. Most submitters with an academic background in public law consider the COVID-19 Act to be a necessary and substantial improvement on the Health Act.

The majority of us believed there was no need for urgent amendments. The importance of a successful public health response to COVID-19 justifies limits on liberty, provided that those limits are necessary and proportional to the threat. The powers conferred by the COVID-19 Act are extraordinary, but this merely recognises that the COVID-19 emergency itself is unprecedented and extraordinary.

A key feature of the COVID-19 Act is that it will automatically be repealed after 90 days, unless there is a resolution of the House to extend it.

... but enduring health emergency response legislation should be developed

However, the Health Act itself is outdated. We believe that there is a need to have suitable and enduring health emergency powers available in legislation in advance of a future emergency. This is consistent with the views of the Legislation Design and Advisory Committee (LDAC). In its submission, the LDAC stated that “in light of the COVID-19 experience, emergency legislation needs to be kept current”.

Our inquiry has revealed some issues with the COVID-19 Act in its current form, which we discuss below. If the Government intends to develop enduring health emergency response legislation, we urge the Government to consider the issues raised in our report, and that the issues we have identified be subject to further policy development.

The submissions we received

We received 1,342 written submissions from organisations and individuals and heard oral evidence from 19 submitters. A significant number were opposed to the legislation on process grounds, and the principle of restrictions on liberty. However, legal academics and

others including the LDAC support the COVID-19 Act and consider it a clear improvement on the Health Act.

The operation of the regime

The Minister of Health is empowered by the COVID-19 Act to issue orders that give effect to the public health response. Orders are empowered by section 11 of the COVID-19 Act. The most significant change from the Health Act has been to empower the Minister of Health as the key decision-maker for the exercise of powers granted by this Act. Normally, under the Health Act it is the Director-General of Health (as a medical officer of health) who is the key decision-maker.

We support this change. Given the scale and the wide-ranging implications of the decision-making empowered by this Act, we believe that it is appropriate for orders to be subject to ministerial-level accountability.

Orders under section 11

The COVID-19 Act expands the circumstances in which orders can be issued. Under the COVID-19 Act, orders can be issued following the declaration of a state of emergency, or during the transition period under the Civil Defence Emergency Management Act 2002, by the issuing of an epidemic notice under the Epidemic Preparedness Act 2006, or by an authorisation of the Prime Minister. We believe that this expansion was necessary. The unique challenges posed by the COVID-19 crisis require the Government to issue orders when the direct public health risks are lower, such as during alert level 2. The majority of us believed that more nuanced controls on movement and gatherings were not available under the Health Act.

The orders issued under the COVID-19 Act would allow for the same kind of measures that were put in place under the Health Act. They would be exercised in respect of classes of people, businesses, and other activities such as sporting events, weddings, or funerals.

Infringement regime and entry powers

The COVID-19 Act creates an infringement regime. Non-compliance with orders empowered by the COVID-19 Act could result in a range of enforcement measures. These measures provide the Government with a range of options that have been tailored for the specific nature of the COVID-19 response. For example, businesses that do not comply with mandatory social distancing measures could be ordered to close for 24 hours. This infringement regime provides a graduated response to compliance.

The COVID-19 Act also empowers an authorised officer (including a police officer) to enter premises, including private dwellinghouses and marae, without a warrant if they have “reasonable grounds” to believe that a person is failing to comply with any aspect of a section 11 order. Only a police officer may enter a private dwellinghouse without a warrant if they have reasonable grounds to believe that people have gathered there in contravention of a section 11 order.

Safeguards on the exercise of powers to make section 11 orders

The COVID-19 Act sets out various safeguards for orders empowered by section 11. These safeguards are set out in sections 8 to 10, and are informed by the purpose set out in section 4 of the COVID-19 Act.

Various pre-requisite conditions need to be satisfied before the Minister of Health makes an order. For example, before making an order the Minister must have regard to advice from the Director-General.

Furthermore, there are safeguards to ensure that orders are consistent with Government policy. The Minister may have regard to any Government decision on the appropriateness of measures to respond to the risks of COVID-19. The Minister must also consult the Prime Minister and the Minister of Justice, and may consult any other Minister as appropriate. Orders will also be automatically revoked if not confirmed by the House within a certain time period.

The orders are also subject to the normal level of parliamentary scrutiny and oversight that is afforded to secondary legislation. Orders need to be publicised on a publicly available website and in the *Gazette*. The COVID-19 Act also requires that orders are presented to the House as soon as practicable after they are made. Orders are also legislative in nature, and are therefore instruments that are disallowable by the House.

Finally, given the extraordinary nature of the orders, they are also subject to the extra safeguard of requiring a resolution of the House to continue in effect after a set period.

Enduring health emergency legislation should provide more certainty regarding enforcement officers

Section 18 of the COVID-19 Act gives the Director-General wide-ranging discretion to authorise people to act as enforcement officers. The COVID-19 Act itself provides little clarity as to who those people should be, and what the scope of their responsibilities and powers are. Section 18(1) enables the Director-General to authorise someone who is “suitably qualified and trained”.

Given the significant and broad powers that enforcement officers will potentially hold, we do not think that the current arrangement would be suitable for enduring health emergency legislation. We believe that there should be more certainty around who the enforcement officers would be, and what the nature of their role is.

We expect that, if enduring health emergency legislation were to have a similar lack of guidance, it could create several problems. For example, the COVID-19 Act does not prescribe who the enforcement officers would be accountable to, and what sort of complaints or disciplinary regime they would be subject to. Enforcement officers must be government employees, and therefore presumably subject to some kind of disciplinary process. However, this provides little certainty of whether this disciplinary process is actually suitable for the nature of the work they would be performing as enforcement officers. If a business owner disagreed with a decision of an enforcement officer, there may not be a process for reviewing that decision.

If the enforcement officer was a police officer, the business owner could complain to the Independent Police Conduct Authority. Other organisations, however, do not have similarly suitable formal processes to review decisions and actions. A judicial review would not be a realistic option for many people, including most small businesses, because the process can be prohibitively expensive.

To provide certainty, enduring health emergency legislation should identify specific classes of people that may be authorised as enforcement officers. It should provide clarity around such issues as the nature of the training or qualifications that these people would hold, and who they would be accountable to. We urge the Government to have regard to this issue and, if enduring health emergency response legislation were to be developed, policy-makers should consider:

- what types of people could be made enforcement officers
- what specific powers they would have
- whether existing processes and resources are sufficient for enforcement officers to perform their functions as well as New Zealanders would reasonably expect (this may include a specific complaints process).

These specifications would need to satisfy Parliament that the decision-maker (in this case the Director-General) would not act contrary to the House's intention when authorising people to act as enforcement officers.

Some submitters suggested that enforcement officers should only be drawn from specific agencies such as the Police, the armed forces, or Civil Defence. We believe that this would not be suitable. The intention behind the COVID-19 Act is that the Director-General should have the ability to appoint people who would perform an enforcement role in areas where they have expertise. Whether someone is suitable to act as an enforcement officer in any particular case will vary depending on the functions that the enforcement officers will be expected to undertake. We believe that enduring health emergency legislation would need to balance this intention against the desirability of providing certainty about what the likely nature of enforcement officers would be.

There have been three section 18 authorisations as of 22 July 2020

As of 22 July 2020, the Director-General had made three authorisations under section 18. WorkSafe inspectors have been authorised as enforcement officers for workplaces in which WorkSafe is the regulator. We were assured that WorkSafe inspectors go through a highly selective recruitment process, followed by a six-month training programme. Inspectors undergo ongoing training, and receive various qualifications relevant to their work. They develop the core knowledge, skills, and behaviours required of a competent and qualified health and safety inspector. We have been assured that the Director-General gave due regard to WorkSafe's training and recruitment process before authorising inspectors as enforcement officers.

The Director-General has also authorised aviation security officers and customs officers to act as enforcement officers.

Operational change we recommend to improve clarity around enforcement officers

The Ministry of Health will publish information on its website regarding authorisations that have been made. The published information will include: who has been authorised to be an enforcement officer, the functions and powers they may carry out, and the duration of the authorisation.

However, this is not a perfect solution. The information provided would only be retrospective, so it would not provide clarity as to who may be appointed in the future. The nature of the qualifications and training will be specific to the functions and powers that will be exercised by the enforcement officers. It would therefore be impractical to publish such criteria in advance of the process that the Director-General must go through in making an authorisation.

The relationship between the COVID-19 Public Health Response Act and Māori

Many submitters on this inquiry expressed concern that a sustained COVID-19 outbreak would result in substantially worse health outcomes for Māori in comparison with the general population. We share this concern. Health modelling shows that tangata whenua are at a much higher risk of serious illness or death from COVID-19 compared to non-Māori.

There is also a risk that enforcement measures will disproportionately affect Māori. Māori are already over-represented in police engagement statistics. Māori could be substantially more affected if the Police were granted expanded powers in the event of a further outbreak of COVID-19, or another emergency that required a similar response.

The lessons of the past can provide some guidance for how the Government should develop enduring health emergency legislation. During the influenza pandemic of 1918, Māori died at a rate seven times higher than non-Māori. In part, this was because the unique health needs of Māori communities were largely ignored by the Government of the day. Submitters stressed to us that Māori have been deeply scarred by the effects of the 1918 pandemic, along with other introduced diseases borne by settlers during colonisation. This scarring has been inter-generational.

We believe that the Government should incorporate these lessons into enduring health emergency response legislation.

The Treaty of Waitangi

Specific provision for Treaty matters would be required if, on a policy assessment, it was determined that specific Treaty interests might be affected by the legislation, and that those interests require specific protection. At the time the COVID-19 Act was developed, the Government did not identify specific Treaty interests that would be affected by the legislation.

However, we note that the Crown's Treaty obligations are overarching, and that the Treaty of Waitangi is relevant to all New Zealand legislation, without the need for a specific Treaty clause.

We heard from many submitters who strongly believed that the Treaty of Waitangi should have been specifically incorporated into the regime through a specific Treaty clause. This includes public law academics from Victoria University of Wellington. We heard that this clause should recognise the partnership between the Crown and iwi under the Treaty. In practical terms, it would help to clarify the way in which the Crown's obligations under the Treaty would be given effect in this context, whether generally, or in relation to specific aspects such as enforcement.

Many submitters spoke about the use of roadblocks during alert level 4. We heard that the roadblocks were an example of the Treaty being successfully incorporated into the pandemic response. Roadblocks, organised locally by remote, predominantly Māori, communities, were developed in partnership with the Police and the Government. Submitters, including the New Zealand Police, stressed to us that the roadblocks were safe, and posed little risk to public health. They also afforded the communities the opportunity to exercise the core Treaty principle of tino rangatiratanga, allowing locals to contribute in a positive way towards their own safety.

The Treaty and enforcement officers

The Police have access to a range of options for the provision of culturally appropriate support for different groups. For example, they have a number of people who act as iwi liaison officers. Iwi liaison officers, who are either police officers themselves or employees of the Police, are embedded into every police district in the country. The work done by the iwi liaison officers has helped improve the relationship between the Police and Māori.

If the COVID-19 Act exclusively empowered police officers to exercise enforcement functions, we would be confident that enforcement officers (in this case, police officers) would have appropriate processes and institutional knowledge to account for Treaty interests. However, the COVID-19 Act is much broader than this. It gives the Director-General the authority to empower a wide range of people to act as "enforcement officers". The COVID-19 Act does not define enforcement officers, and it is impossible to know whether enforcement officers, or the government agencies that employ them, would have similar institutional knowledge and experience in working with tikanga Māori.

If enduring health emergency response legislation were to be developed, we urge the Government to develop safeguards to ensure that enforcement officers who engage with Māori are trained and respectful towards tikanga Māori. A way to help ensure this would be for enduring health emergency legislation to create a statutory role for the Ministry of Māori Development. Alternatively, the Minister of Health could be required to consult the Minister of Māori Development before issuing orders.

Powers of entry onto marae

In the initial draft of the COVID-19 Public Health Response Bill, marae were in the same category as private dwellings. Enforcement measures in respect of suspected illegal gatherings were only to be exercised by police officers. Police officers are trained in tikanga Māori and, as discussed, have access to further support in the form of iwi liaison officers.

However, this was altered in the final version of the bill. Because of the limited time available, the Government consulted with a very small number of submitters when drafting

the bill. Some submitters at the time were concerned that marae were singled out in the legislation, and they believed that this was not appropriate.

The change has led to marae being in the same category as businesses and public premises. Because of this change, “enforcement officers” (whoever they may be) would be able to enter onto marae, and to do so with little regard to culturally appropriate practices.

We believe this is inappropriate. We believe that entry powers regarding marae should be tailored to reflect the mana of marae. Enduring health emergency legislation should adopt entry powers that are specific to marae, and mandate a role for specific groups of people to exercise entry powers. We also recommend that this issue be addressed in consultation with iwi, to ensure a solution that is acceptable to both the Government and Māori.

We believe that, where laws directly affect Māori and the exercise of tino rangatiratanga to the extent that the COVID-19 Act does (such as through its empowerment of enforcement officers to exercise warrantless entry powers onto marae), these steps should not be imposed in the absence of partnership between the Crown and Māori. Policy development should be done in the spirit of partnership, with Māori in a position where they can freely give consent in an informed manner.

The COVID-19 Act does afford some specific protections to marae. If the warrantless entry power has been used, section 20(5) requires the constable to provide a written report to the Police Commissioner. Similarly, section 20(6) requires an enforcement officer to provide a report to the Director-General of Health. Under section 20(8), a copy of the report must be sent to the relevant marae committee. However, these safeguards would all apply after the fact, and would do little to address the immediate problem.

Operational guidelines for police entry onto marae

We also considered the Police’s operational guidance regarding entry onto a marae when exercising powers under this Act. This guidance states that entry onto marae should be done sparingly, and only in extreme circumstances. When entry onto a marae is being considered, before exercising this power a police officer should consult their relevant operational command centre. They should also seek guidance from their local Māori responsiveness manager, iwi liaison officer, or the Māori, Pacific and Ethnic Services team. Marae leadership should also be engaged first to be made aware of any issues and concerns and be provided an opportunity to resolve issues. Entry onto marae should only occur with the support of marae leadership to provide guidance. However, as previously discussed, none of the above operational guidance would apply to enforcement officers who are not police officers.

The appropriateness of warrantless entry powers

Some of the submitters we heard from were concerned with the warrantless powers of entry granted under section 20. Section 20 grants police officers the power to enter into any private land, building, or vehicle, if they have reasonable grounds to believe that a person is failing to comply with a section 11 order. Enforcement officers (those who are not police officers) have been granted a similar power, except they cannot enter private homes. Orders

that can be made under section 11 include, for example, directing people to refrain from gathering.

Warrantless powers of entry are a key enforcement measure of the COVID-19 Act. It is critical for the operation of the COVID-19 Act that officers have the ability to immediately enter premises in the appropriate circumstances. This would be done, for example, to disperse gatherings immediately in order to limit the public health risk presented by those gatherings. If a warrant was a necessary condition of entry, the time it would take to acquire one would render this enforcement measure inoperable. International evidence shows that gatherings, especially indoor gatherings, are a major cause of community transmission of COVID-19, and to prevent widespread transmission of the virus, police need to have the appropriate powers.

We also believe that the powers of entry in section 20 are proportionate. As a part of our inquiry, we were provided a list of warrantless entry powers in other Acts. The Acts that currently include warrantless entry powers are: the Health Act, the Civil Defence Emergency Management Act, the Search and Surveillance Act 2012, the Resource Management Act 1991, the Building Act 2004, the Land Transport Act 1998, the Dog Control Act 1996, the Hazardous Substances and New Organisms Act 1996, the Local Government Act 2002, the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Arms Act 1983, the Oranga Tamariki Act 1989, and the Immigration Act 2009. We believe that if enforcement officers have been granted warrantless entry powers in situations that do not carry the same threat of COVID-19 (such as for example, in order to respond to a noise complaint) then granting similar powers for the purpose of responding to a global pandemic is proportionate.

Furthermore, the powers granted by section 20 of the COVID-19 Act are limited. The power to enter into private homes is for the limited purpose of breaking up unlawful gatherings, and does not extend to search powers.

Section 20 creates a requirement for officers to produce a report after they have exercised this power. The report must be provided to the Commissioner of Police if the power was exercised by a police officer, or provided to the Director-General if the power was exercised by an enforcement officer. We believe this provides an effective safeguard against officers using this power inappropriately. However, we urge the Government to take the position that an equivalent provision in enduring health emergency response legislation should require a report to include such information as age, gender, and ethnicity. This would give those charged with overseeing the use of enforcement measures in this Act sufficient information to determine whether the powers were being used inappropriately.

Operational guidelines for police officers when exercising section 20 powers

The Police provided us with the operational guidelines that police officers must follow when exercising powers of entry:

- Entry must be necessary in order to give a legal direction under section 21.
- The nature of that direction will depend on the restrictions imposed by an order. For example, a gathering in excess of the permitted number of people at a private home may only justify a direction that the relevant people leave the address.

- Reasonable force may only be justified if a person present refuses entry.

The purpose section of the COVID-19 Act

Section 4 of the COVID-19 Act serves as the COVID-19 Act's statement of legislative purpose. This section is crucial to the regime because it functions as an explicit constraint on the Minister regarding the making of section 11 orders. However, section 4 is largely limited to measures that could be required to achieve desirable public health outcomes. We consider that, if enduring health emergency response legislation were to be developed, an equivalent section should be expanded. Section 4(c) states that the response measures should be "proportionate". However, we recommend that enduring health emergency legislation should go further in promoting other relevant considerations that should be taken into account by the Minister when exercising section 11 powers.

We note that section 9(b), which stipulates that the Minister may have regard to other Government decisions, states that those Government decisions "may have taken into account any social, economic, or other factors". We suggest that this concept be expanded, and incorporated into the purpose section of enduring health emergency legislation. By including a similar provision into the purpose section of an Act, it would serve to ensure that the advancement of social, economic, and any other factors deemed relevant is a legitimate purpose of an order equivalent to a section 11 order.

We also urge the Government to consider whether a statement of legislative intent should be supplemented with additional principles. These principles should be designed to act as a safeguard, helping to ensure that emergency response legislation is proportionate and necessary. For example, if principles such as "least restrictive alternative" or "measure to apply no longer than necessary" formed a part of the purpose section, this would act as operational guidance for decision-makers.

Allocation of responsibility between the Minister of Health and Cabinet

Cabinet has responsibility over broad policy settings that dictate New Zealand's epidemic response. This is largely through the extra-legal alert level system, which is determined by Cabinet. However, the COVID-19 Act empowers the Minister of Health, rather than Cabinet, to make orders that implement wider policy decisions made by Cabinet. The COVID-19 Act states that the Minister "may" have regard to "decisions of the Government on the level of public health measures appropriate". The Minister's decisions should be made within the context of the Cabinet's wider strategy, but there is nothing that obliges the Minister to implement this strategy through section 11 orders. There is a risk that this could lead to inconsistency between decisions made by Cabinet, and decisions made by the Minister.

We urge the Government to give further consideration to this issue, if enduring health emergency response legislation were to be developed. We also note that the decision to empower the Minister through this Act, rather than Cabinet, was a policy choice to reflect that it is primarily health-focused decision-making. Empowering Cabinet, as opposed to an individual Minister, may also be impractical, because emergency response legislation often requires rapid decision-making.

Privacy considerations

A feature of life in New Zealand during alert levels 4 and 3 was mandatory contact tracing requirements for businesses. Retail businesses such as bars, restaurants, and shops often asked customers to record their contact information on paper forms, which provided little or no privacy safeguards for customers who divulged their information. We believe that a customer who gives private information to a business should have a reasonable expectation that their information is handled in accordance with the principles of the Privacy Act 1993.

A fast and effective contact tracing regime is one of the most critical components of New Zealand's public health response to COVID-19. Section 11(1)(a)(ix) empowers the Minister to make orders that require people or businesses to provide information necessary for the purpose of contact tracing. However, we do note that people may be reluctant to engage, unless there was a reassurance of privacy.

There is nothing in the COVID-19 Act to help ensure that the information sharing which is required by section 11(1)(a)(ix) is guided by the principles of the Privacy Act. Under the COVID-19 Act, operational practice will be guided by the Privacy Act's privacy principles. However, were enduring health emergency legislation to be developed, we would expect that the Government consults with the Privacy Commissioner when developing this legislation. Enduring health emergency legislation should contain statutory assurance that information-sharing measures would be subject to the privacy principles contained within the Privacy Act. This could draw on existing legislation, such as provisions currently in the Health Act. These provisions help ensure that information sharing must serve the public health objective, must put the considerations of the individual's privacy at the centre of any information-sharing regimes, and should enable voluntary provision of information and informed consent.

Advice from the Regulations Review Committee

As a part of our inquiry into the COVID-19 Act, we received advice from the Regulations Review Committee. It noted four regulation-making powers within the COVID-19 Act:

- Section 8(c) provides that the Prime Minister may, by notice in the *Gazette*, authorise the use of section 11 orders (either generally or specifically).
- Section 9 provides a power for the Minister to make an order described in section 11.
- Section 10 provides the equivalent power for the Director-General to make an order described in section 11, but only in respect of a single territorial authority district.
- Section 33 provides a power to make regulations prescribing the form of infringement notices and reminder notices, and providing for other matters contemplated by the COVID-19 Act.

The Regulations Review Committee advised us that it has no concerns about the powers contained in sections 8(c) and 33.

Section 11 orders

The Regulations Review Committee advised us that powers to grant exemptions can be problematic if they have the potential to vary the scope or application of the empowering

legislation. Section 12(1)(d) provides that a section 11 order may exempt a person, or a class of persons. In this case, the Regulations Review Committee is concerned that section 12(1)(d) has the potential to vary the scope of application of orders empowered by the COVID-19 Act.

Normally, powers to grant exemptions (such as the powers in section 12(1)(d)) would have associated safeguards within the legislation. The COVID-19 Act does not explicitly include any such safeguards. Therefore, the Regulations Review Committee is concerned that the power to grant exemptions is too broad.

The majority of us are comfortable that the COVID-19 Act does not require a legislative amendment to address this concern. Although the COVID-19 Act does not set out the relevant criteria for exemptions, any exemption would need to be consistent with the purposes of the Act. Therefore, any exemptions granted through this provision would have to help achieve the purposes of the COVID-19 Act.

Exemptions would also be subject to the requirement of proportionality. Therefore, exemptions would also only last for as long as is necessary to achieve the purposes of the COVID-19 Act. If an exemption is no longer required to help achieve the purposes of the COVID-19 Act, it would no longer be a “proportionate” measure.

Also, the ability to grant exemptions would only vary the order itself, and only by providing relief from the restrictions or requirements in that order. It would not vary the scope of the COVID-19 Act itself.

Given the possible scope of the orders, we believe it is important that the COVID-19 Act provides some flexibility as to who would be able to exercise exemption powers. However, despite this, it would be useful, if enduring health emergency legislation were developed, for the safeguards on exemptions to be made more explicit.

The standard required for enforcement officers to give directions

Section 21 empowers enforcement officers to give directions if they believe that a person is “contravening or likely to contravene” a section 11 order. Under this section, enforcement officers could direct a person to take a certain action, or to stop any activity. It could be used, for example, to direct people to leave a gathering that is contrary to a section 11 order.

The term “likely” is a legal threshold that may be uncertain and difficult for enforcement officers to apply in practice. There is a risk that the threshold would be interpreted in a way that does not afford appropriate protection. In other contexts, the courts have interpreted the definition of “likely” to include “something that might well happen”. It could therefore empower an enforcement officer to require a person to desist from activities that are more likely to be lawful than they are to be unlawful.

We believe that enduring health emergency response legislation should include a clearer threshold for when enforcement officers may issue directions. It would be preferable to apply a bright-line standard that is easier for enforcement officers to understand and apply when they are “on the ground”.

Stopping vehicles on public roads

Section 22(3) provides that a constable may stop a vehicle for the purposes of a section 11 order. Section 27(3) makes it an offence for someone who “fails to stop as soon as practicable when required to do so by a constable”. The person must know, or reasonably ought to have known, that the person asking them to stop is a constable. There is a risk, however, that a person who is of less than average mental acuity at the time (they may, for example, be distressed), and who fails to stop when asked, would have no defence.

We note that section 19 of the COVID-19 Act requires all enforcement officers to identify themselves when exercising powers, unless they are uniformed police officers. Consequently, any person stopped will either be approached by a uniformed police officer, or the police officer will need to identify themselves.

However, we believe that if enduring health emergency response legislation were to be developed, consideration should be given to containing safeguards within an equivalent provision. We note that in other statutes that include a similar power, there is a requirement to ensure that the enforcement officer’s position is known to the driver.

Infringement notices for children

Infringement notices can be issued under the COVID-19 Act to people under the age of 18. These notices would result in a fine. From an operational perspective, we are confident that police officers would encourage compliance by children through education and warnings, and not resort to issuing infringement notices except in extreme circumstances. The youth justice principles of the Oranga Tamariki Act allow police to consider alternative enforcement measures for youth offending.

Any enduring health emergency response legislation should distinguish between adults and children. We believe that it is important for enduring health emergency legislation to reflect that it is not appropriate to apply identical sanctions to children. This would reflect the rights of children that are in the United Nations Convention on the Rights of the Child, and the Oranga Tamariki Act.

Indemnity for those exercising powers under the COVID-19 Act

Section 34 of the COVID-19 Act provides indemnity for persons exercising authority under the COVID-19 Act. It does this by applying section 129 of the Health Act. Section 129(2) to (5) of the Health Act provides various procedural and substantive protections that would not be afforded to ordinary litigants in civil cases. For example, section 129(4) of the Health Act states that no proceedings could be brought against the Crown unless a claimant applies to bring proceedings within 6 months after the incident in question.

Section 27(3) of the New Zealand Bill of Rights Act 1990 provides that the Crown, or Crown employees, should be treated in civil litigation the same as any ordinary litigant. If enduring health emergency response legislation were to be developed, an equivalent indemnity provision should be limited. Claimants taking civil action against the Crown should not have the sort of procedural barriers of the type imposed by section 129(2) to (5) of the Health Act. We note, however, that the indemnity provision in section 129(1) of the Health Act is similar

to other indemnity provisions in New Zealand legislation. These provisions are treated as consistent with section 27(3) of the Bill of Rights Act.

The obligation to keep section 11 orders “under review”

Section 14(5) of the COVID-19 Act says that the Minister and Director-General must keep section 11 orders “under review”. Some submitters were concerned that this obligation was too vague. It is unclear what the requirement on the Minister and the Director-General is exactly.

We believe that the COVID-19 Act includes sufficient safeguards, and that an amendment to this provision is not required. For example, the COVID-19 Act creates an ongoing requirement for orders issued under the COVID-19 Act to be proactively renewed by the House every 90 days.

However, were enduring health emergency legislation to be developed, an equivalent provision should be sufficiently clear by what is meant by keeping orders “under review”. For example, this could include mandating proactive publication of the reviews.

The Government’s compliance strategy

As a part of our examination of the COVID-19 Act, we considered the compliance strategy underpinning the legislation. To date, New Zealand’s response to COVID-19 has been successful. This has been made possible by the high degree of compliance displayed by New Zealanders during alert levels 4 and 3. Public surveys found that New Zealanders were both very supportive of and compliant with the lockdown measures. These findings were supported by cell phone tracking data, which showed that rates of movement curtailed significantly during alert levels 4 and 3.

Academic research underpinning the approach to compliance

The Government’s strategy was informed by a large body of academic research. The approach adopted by the Government was a mixture of voluntary and enforceable measures. This recognises that the compliance strategy needed to apply to the full range of people within the community.

New Zealand adopted an approach to compliance known as “responsive regulation”. The approach was outlined in the Cabinet paper: *Report back on the case for new powers for the Alert Level Framework*, which noted that:

While we can be confident that the vast majority of New Zealanders will voluntarily comply, for some continued motivation to comply will be influenced by the level of compliance by others. In addition, those New Zealanders who ‘do the right thing’ will expect others to also do so, and to be able to be sanctioned if they do not.

The central notion of responsive regulation is that regulators should seek compliance through the least intrusive response possible and acceptable. Instead of aiming for compliance through deterrence-based strategies, academic research supports the adoption of less punitive and less restrictive strategies.

However, if those strategies did not achieve the desired outcome, the regulator should escalate to more intrusive measures. These more intrusive measures would be targeted towards specific individuals, and not the community as a whole.¹

The responsive regulation model is based on an assumption that people can be broken into different groups, for example:

- those who are willing and able to do the right thing
- those who try to do the right thing, but do not always succeed
- those who do not want to comply
- those who have decided not to comply.

The model assumes that the first two groups of people (those who are willing and able to do the right thing, and those who are willing to comply but may need guidance or other support) comprise the bulk of the population. The percentage of the population within each group gets progressively smaller, with the smallest group being those who have decided not to comply. These assumptions are supported by evidence from recent studies in the behavioural sciences.²

Each group of people should have a tailored, targeted approach to compliance. For the vast majority of people, compliance strategy should be limited to things that simply make it easier for them to comply. At the other end of the scale, prosecutions, imprisonment, and fines would be more appropriate for those who have made a conscious decision not to comply with various measures.

This quote, taken from academic research and supplied to us as a part of our inquiry, summarises the approach: “the trick of successful regulation is to establish a synergy between punishment and persuasion”.³

Responsive regulation in a COVID-19 context

The Government’s compliance strategy, which underpins the COVID-19 Act, can be summarised as follows:

- Engage with parties and communicate with them to identify whether their current behaviour or activities are contrary to the Government’s response to COVID-19.
- Educate them on current requirements (if necessary) to correct their behaviour or activities.
- Encourage compliance measures if required.
- Warn only where evidence of education exists and when offences are repeated or are sufficiently serious.

¹ Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: Oxford University Press, 1992.

² Jerome van der Heijden, *Behavioural Insights and Regulatory Practice: A Review of the International Academic Literature. State of the Art in Regulatory Governance Research Paper – 2019.01*, Wellington: Victoria University of Wellington/Government Regulatory Practice Initiative, 2019.

³ Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: Oxford University Press, 1992.

- Use enforcement only as a last resort to arrest or prosecutorial measures if absolutely necessary.

For the vast majority of people, a compliance strategy could be limited to education campaigns, or providing vulnerable or disadvantaged people with help to comply, such as assistance with shopping. The most severe enforcement measures in the COVID-19 Act are designed only for a small minority of people.

National Party minority view

The National Party does not believe this inquiry was necessary, and could have been avoided if the Government had used the period between level 4 lockdown and early May to more proactively frame the legislation it believed was necessary to manage the COVID-19 response at lower levels.

Instead, the Government chose to ram through legislation under urgency without any public scrutiny despite the resulting significant curtailment of New Zealanders' fundamental freedoms. While we acknowledge the need for a framework to reduce the spread of the virus, there were already significant questions about whether the actions the Government had taken under the Health Act 1956 were legal and the Government refused to release the advice it had received on this matter.

We also believe that the best committee to undertake this inquiry was the Epidemic Response Committee, a committee specifically set up as the oversight committee for COVID-related matters. National believes the selection of the Finance and Expenditure Committee to undertake the inquiry and the subsequent closing down of the Epidemic Response Committee was designed to ensure that Government members had a majority on the committee conducting this inquiry.

This report makes a number of references to changes that could be made to 'enduring legislation', should it be passed, including (inter alia) who should be an authorised officer, the relationship between the Minister of Health and Cabinet, stopping vehicles, infringement notices for children, and indemnities for those exercising powers. This highlights to us the many shortcomings of the COVID-19 Public Health Response Act that could have been addressed with better preparation and a limited select committee process prior to the Act passing into law.

Appendix

Committee procedure

We met between 18 May and 24 July 2020 to consider the inquiry. We called for public submissions with a closing date of 28 June 2020. We received 1,342 written submissions from organisations and individuals and heard oral evidence from 19 submitters.

Committee members

Dr Deborah Russell (Chairperson)
Kiritapu Allan
Andrew Bayly
Rt Hon David Carter
Tamati Coffey
Hon Judith Collins (until 22 July 2020)
Hon Paul Goldsmith
Hon Todd McClay (from 22 July 2020)
Ian McKelvie (until 22 July 2020)
Greg O'Connor
David Seymour
Jamie Strange
Fletcher Tabuteau
Dr Duncan Webb
Hon Michael Woodhouse (from 22 July 2020)

Advice and evidence received

We received documents as advice and evidence for this inquiry. They are available on the Parliament website, www.parliament.nz.