List of people or organisations sent a copy of the exposure draft:

- Hon Tim Macindoe
- David Seymour (ACT)
- Iwi Chairs Forum
- Māori Women's Welfare League
- Māori Council
- New Zealand Law Society
- Legislative Design and Advisory Committee
- NZ Council for Civil Liberties
- Te Rōpū Whakakaupapa Urutā
- John Edwards – Privacy Commissioner
- Paul Hunt – Chief Human Rights Commissioner
- Meng Foon – Race Relations Commissioner
- Dr Siouxsie Wiles
- Associate Professor Dr Dean Knight
- Dr Carwyn Jones
- Dr Edward (Eddie) Clark
- Professor Michael Baker
- Professor Sir David Skegg
- Professor Andrew Geddis
- Professor Claudia Geiringer
- Graeme Edgeler

s9(2)(a)

Subject: FW: Health Order Bill -Level 2

From: Marie Dyhrberg [s9(2)(a).
Sent: Tuesday, 12 May 2020 1:26 PM
To: D Parker (MIN) <D.Parker@ministers.govt.nz>
Subject: RE: Health Order Bill -Level 2

Dear Tracey,

I am sorry for sending you material piecemeal but Nathan Batts, one of our committee members has spent some time reviewing the proposed bill. I would appreciate it if you could add this to the submissions/comments already sent for review.

Clause 11(a) & (b) – this is significant expansion of the power to impose restrictions etc. under s 70 of the Health Act. In essence it authorises orders requiring citizens to stop or start doing anything if doing (or not doing) those things contribute to, or are likely to contribute to, the risk of the outbreak or spread of COVID-19. Note that the bar is set rather low in terms of the powers being authorised where the *risk* is *likely*. Neither term would necessarily require substantive evidence of outbreak and spread, and together they about as good as saying "a possibility". Given the untrammelled ability to restrict individual rights provided for in such orders, the vaguely specified empowering circumstances is concerning.

Clause 16(4) – clause 16 confirms that an order is a disallowable instrument (i.e. it lapses unless approved by Parliament within a specified timeframe). However, sub-clause (4) appears to state that if an order is revoked because it is not approved by Parliament within the required timeframe then that has no effect on any action taken to give effect to or enforce the order. For example, a police officer arrests an individual for failure to comply with the order and they are held in custody overnight – all after the order has been revoked by the operation of clause 16(4). The effect of this sub-clause appears to be that the individual so arrested would have no action for false imprisonment etc. against the arresting officer/Commissioner as would usually be the case.

Clause 20(1) – an enforcement officer may effect a warrantless entry of any land, building, craft, vehicle of place "if they have reasonable grounds to believe that a person is failing to comply with any aspect of a s 11 order." This is quite remarkable when its terms are compared against similar powers in the Search and Surveillance Act (e.g. ss 7, 8, 14, 15, 17, 18, 20 etc.) which only allow warrantless entry where important pre-conditions are met. These include where there are reasonable grounds to suspect an *imprisonable* offence (and in some circumstances where an offence punishable by 14 years imprisonment) is being or has been committed and where entry is necessary to avoid an individual absconding and/or the destruction etc. of evidential material; where a person is unlawfully at large (i.e. subject to an arrest warrant etc.); and where there is a risk to the life/safety of a person requiring an emergency response etc. Significantly, pursuant to clause 25 of the Bill non-compliance with an order *simpliciter* is at best an infringement offence punishable with a fine only (not exceeding $1000). An imprisonable offence (6 month max) is only committed if an individual intentionally fails to comply with an order. However under clause 20 an officer is not even required to suspect such an offence has been committed. This is accordingly a warrantless power to enter any personal property (except a private dwelling/marae) on the basis of a reasonable belief that an infringement offence has been committed…

Clause 20(3) – the same comments as apply to 20(1) apply here. This time the power concerns private dwellings and marae where privacy interests are obviously significantly heightened. This sub-clause provides for the added "protection" that entry can be only exercised if that is necessary to give a direction to the occupiers. I suppose that means that if an officer can give a direction by yelling over the fence, through a window or from the footpath etc. then they would not be able to enter the house.

Clause 22(2) – "a constable or person acting under the authority of the constable": specific authorisation for the community "checkpoints" (roadblocks) we have seen over the last couple of months??

Clause 22(3) – a completely unrestricted power to stop private vehicles if an order restricting movement is in place. This presumably applies regardless of whether or not the relevant travel restrictions permit certain types of travel (as they have under levels 4 and 3) so that even if there was no reason whatsoever to think that the individual was travelling for any reason other than permitted movement, the power to stop would still apply.

Clauses 21 & 26(2) – pursuant to clause 21 an officer can direct a person to stop or start doing anything that is likely to contravene and order if the officer has reasonable grounds to believe that a person is (or is likely) to contravene an order. It is an offence (punishable by 6 months' prison/$4000 fine) pursuant to clause 26(2) to intentionally fail to comply with a direction of an officer under clause 21. The combination of the operation of these two clauses could mean that a person commits a crime who refuses to stop doing something (or start doing something) which they know does not breach an order (say because they have received advice had previously checked that it was OK) simply because an officer has taken the view (on reasonable grounds) that the conduct in question is *likely* to contravene an order. Contrast this against the offence provision that would otherwise be in play where a citizen refuses to comply with a police direction – s 23 of the Summary Offences Act (resisting police). That offence has half the maximum penalty and, importantly, it provides for a specific defence to the charge where an officer is not acting in execution of his/her duty. Ordinarily, a refusal to stop doing something entirely lawful which an officer considers (even on reasonable grounds) to be unlawful would not be an offence. This is because an officer cannot be acting in the exercise of their duties in (mistakenly) directing an individual to stop doing something they are lawfully allowed to do. This would not appear to be the case under clause 26(2).

Ngā mihi | Kind regards,

Marie Dyhrberg QC
P.O Box 47867 Ponsonby
Auckland New Zealand
s9(2)(a) [redacted]
www.mariedyhrberg.co.nz

From: D Parker (MIN) <D.Parker@ministers.govt.nz>
Sent: Tuesday, 12 May 2020 11:24 AM
To: Marie Dyhrberg < s9(2)(a)
Subject: RE: Health Order Bill -Level 2

Dear Marie Dyhrberg QC

I acknowledge receipt of your email.

Kind regards

Tracey

Office of Hon David Parker

Office of Hon David Parker MP | Attorney-General | Minister for the Environment | Minister for Trade and Export Growth | Associate Minister of Finance

From: Marie Dyhrberg [s9(2)(a)
Sent: Tuesday, 12 May 2020 10:33 AM
To: [redacted]

[redacted] s9(2)(a)

Dear Kate,

I am emailing you as President of the Auckland District Law Society, which is a nationwide organisation representing practitioners and other participants in the legal system. I am also convenor of the Criminal Law Committee. It has just come to my attention some 15 minutes ago or thereabouts that there is to be a law change referred to as the health Order bill – Level 2, which has been described to me as follows:

> The intention is that it be rushed through Parliament tomorrow and become law for Thursday. Unbelievably, the Bill proposes (amongst other things) that police have the warrantless power to enter private dwelling houses and Marae if there are "reasonable grounds to believe" there is non-compliance with the 'no gathering' rules. The punishment for obstruction of an office is 6 months imprisonment

I have consulted briefly in the minimal time available with other law societies and committee members. We share the same grave concerns about this measure and the absence of any real consultation from relevant law society bodies.

It is a measure that is entirely unexpected in a democratic society such as New Zealand that this far reaching and invasive measure affecting a citizen's liberty with the sanctity of their homes and freedom of movement as crucial rights, that the Government is acting in this way, namely without reasonable consultation. There has been plenty of time to consider this proposal during the level 3 and level 4 restrictions.

While we recognise these are indeed unusual times we note that our society and other law societies have been widely consolidated in other aspects of law change. Accordingly we urge that the Bill is not passed without wider consultation.

Regards, Marie

Marie Dyhrberg QC
P.O Box 47867 Ponsonby
Auckland New Zealand
[redacted] s9(2)(a)
www.mariedyhrberg.co.nz

From: Meng Foon [s9(2)(a)
Sent: Tuesday, 12 May 2020 9:59 AM
To: D Parker (MIN)
s9(2)(a)
Subject: RE: Letter from the Attorney-General

Morena Minster

E David tena koe

Minister thanks for the opportunity to submit

This submission is similar to the Epidemic Response Committee

The main theme of this submission is the need for this COVID-19 Public Health Response Bill to take into account the Tiriti o Waitangi and incorporate Maori as a statue partner in all design and decision making

I note in the Bill the Treaty of Waitangi and Maori is not mentioned at all

Kia ora Meng

Race Relations Commissioner

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.

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.**

Te Tiriti o Waitangi

- The COVID-19 Public Health Response Bill as part of the government's COVID 19 response **has duty bearer responsibilities** in regard to Human rights and Te Tiriti o Waitangi.
- This exclusion of Māori in the Education themed COVID-19 Public Health Response Bill stands out as an example of failure to engage with tangata whenua in the government's Covid 19 response. The COVID-19 Public Health Response Bill **has fallen short** in terms of meeting its Tiriti based partnership and Tiriti based equity obligations and responsibilities. This failure to partner with and ensure equity of outcomes for tangata whenua is unacceptable on a number of levels. First it breaches Te Tiriti and fails to uphold indigenous human rights of tangata whenua. Second it exacerbates the already deeply entrenched and pervasive disparities and inequities faced by whānau in Aotearoa across all aspects of life.
- The Commission urges the government to activate Tiriti based partnership with tangata whenua in the COVID-19 Public Health Response Bill and operations as part of a broader approach to renew and reinvigorate its commitment to Te Tiriti and to work in partnership with Māori and **jointly devise and implement strategies** in Level 3 and the recovery phase.
- Te Tiriti and the UNDRIP call for proactive support for **rangatiratanga** (self-determination), alongside ensuring **equity** of outcomes for tangata whenua. Rangatiratanga stems from inherent rights, affirmed in He Whakaputanga (1835 Declaration of Independence), Te Tiriti o Waitangi and in international human rights documents including the UN Declaration on the Rights of Indigenous Peoples.
- During the COVID-19 crisis it has been encouraging to see examples of Tiriti **partnership** working in practice and strong leadership being exercised by both partners. Where responsibilities overlap, there has been cooperation reinforced by a strong sense of shared purpose. A positive example is the iwi and hapū-led **checkpoints**, carried out in a spirit of collaboration with police, councils and civil defence. The Commission urges the government to build on this positive example of iwi and government collaborative leadership that has been beneficial to tangata whenua and New Zealanders in helping to limit the spread of te mate korona. (Covid19)
- Overall, a **well-coordinated Tiriti strategy** is required across all government agencies and sectors and **Bills**. This will build on work towards a **national action plan for UN Declaration on the Rights of Indigenous Peoples** – which provides an international human rights dimension to our own Tiriti.

Kia ora Xie Xie

Meng Foon
Race Relations Commissioner | Kaihautū
Whakawhanaungatanga-ā-Iwi
New Zealand Human Rights Commission | Te Kāhui Tika Tangata
s9(2)(a) | w: www.hrc.co.nz
a:PO Box 10424, The Terrace, Wellington 6143
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NZ Human Rights.

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Te Rōpū Whakakaupapa Urutā
NATIONAL MĀORI PANDEMIC GROUP

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

Te Rōpū Whakakaupapa Urutā: Professor Dr Papaarangi Reid, Associate Professor Dr Sue Crengle, Associate Professor Dr Elana Curtis, Dr Rawiri Jansen, Dr Donna Cormack, Dr Jade Tamatea , Associate Professor Dr Matire Harwood, Teresa Wall : Comments on COVID-19 Public Health Response Bill Exposure Draft

Clause Reference	Comment
General comment	There is neither a general Treaty clause nor any obligation to have regard to the Treaty or its principles at any point of decision making or performance of functions under the Act. This seems a particularly important omission given: • there is no broader consultation requirement before the Minister is able to make a section 11 order, other than to those class of persons listed in section 9 (which does not include Maori); • a section 11 order may directly and/or indirectly affect Maori disproportionately to non-Maori; • a number of other provisions in the Act could be implemented to the specific detriment (or benefit to be fair) of Maori - for instance, clause 12 allows the imposition of different measures for different circumstances and classes of people; • there is no way for Maori to participate in the implementation of this Act other than through clause 18 – if they are authorised by the D-G, or clause 22 – if they are authorised by the constable in relation to closing roads.
Clause 4(b) - Purpose	States that a purpose of the Act is to support a public health response to Covid-19 that "avoids, mitigates, or remedies the actual or potential adverse effects of the Covid-19 outbreak (whether direct or indirect)"

	However, the Act is, in reality, tightly focused. It really just provides for section 11 orders and enforcement of those orders. It's difficult to see how it provides a broader public health response to the actual or potential, direct or indirect, effects of Covid-19. If one of the purposes of the bill is to mitigate etc. the impact both direct and indirect then needs to include in subsequent clauses and subsections more specificity as to the who, the what and the how. Implies that that due regard will be taken of the social determinants, and the needs of sub-populations rather than an approach that focuses on a one size fits all response. Section 2 should include that the purpose of the Act is to support a public health response to COVID-19 that: "(e) is consistent with the principles of the Treaty of Waitangi Under Section 9, when making a section 11 order, the Minister must be satisfied that the order is appropriate to achieve the purposes of the Act, which are set out in section 2. The Minister will then be required to be satisfied that the orders are consistent with the Treaty of Waitangi so this will force consideration of Treaty principles in crafting the terms of the order. The issue of proportionality is significant. To date Māori have collectively responded to the COVID-19 response in partnership with the Crown because of an acknowledgment of the devastating harm that uncontrolled community transmission would bring to the nation. There have been concerns around insufficient consultation and engagement with Māori and specifically not drawing on the expertise and knowledge that lies within Māori communities and with Māori public health experts and practitioners. However, compliance on the whole has been high and supportive and Māori communities have demonstrated culturally informed innovation to enhance collective security and maintain community safety. To ensure that there is no further erosion of goodwill it is critical that actions are proportionate and are enacted within a high trust environment. In particular there must be recognition of the significance of marae and their expression of mana motuhake. The Public Health Response Bill needs greater checks and balances to ensure that any actions, including enforcement actions, are culturally informed and sit clearly within a Tiriti framework. A recognition that marae are sovereign spaces and are treated accordingly is critical.
Power to set enforceable measures	At present (under the Health Act 1956) the Director-General of Health is the decision maker for orders. The COVID-19 Public Health Response Bill would give the power to make orders to the Minister of Health. While acknowledging the rationale for such a change, concerns include the diminishing of the powers of expert led opinion and the potential for

	decision making to be seen as furthering political interests rather than public health interests. The issue of proportionality could be compromised when enforcement powers could over-reach or over-step their mark. Presently, the Director-General must confer with the Minister of Health and this may provide a greater safeguard than allowing the power to sit with the Minister. It is not clear that public health expertise would remain at the centre of decision making if powers were transferred to the Minister of Health. Indeed, input across ministries may actually dilute public health arguments as other interests converge. While wide input across Ministries is valuable a degree of independence from political decision making seems appropriate and necessary in a public health crisis. The Bill states that the Minister must have regard to advice bit there is no legal compulsion to seek or take that advice. There again seems to be no regard to culturally informed evidence based decision making. It is of great concern that the interests of Māori are not referred to at all in this section. Given that all manner of enforcement powers (and associated sanctions) have, historically and contemporaneously, been used disproportionately against Māori this absence raises alarm.
Clause 20 – Powers of entry	Suggest that dwellinghouse and marae be defined in the interpretation section – positive that marae are treated differently to other buildings etc but lack of definition has generated disquiet that mentioning marae intimates that Māori are problematic. The legislation could also go further and require that any entry into marae is to be notified to the local iwi contact person (and where practicable, the iwi contact accompany the police) or at the very least, the reports provided to the Commissioner under section 20(5) are to be provided to the local iwi/relevant marae committee (either proactively or upon request). That then gives the marae/iwi an opportunity to monitor the enforcement action and raise issues. If the government was thinking from a partnership perspective, they would fund iwi to provide assistance to police when undertaking enforcement action at marae. This is likely to be more effective in achieving the public health outcomes and in ensuring Treaty compliance. It also recognises the Treaty partner and the important role they can play.
Clause 22 – Powers to close roads, and public places and stop vehicles	Suggest an amendment be included which enables the Police Commissioner or the local Senior police Commander or some other person to appoint a representative from the local iwi, hapu to act as "an enforcement officer" with the powers described in subsections (1),(2), (3) & (4).

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

Instructions for filling out table feedback:

- Please provide comments on provisions in the order they appear in the Bill (first couple of clauses completed for example).
- Please also identify the clause reference by number and title.
- Please include in the yellow box who the comments are made by.

[Mrs Denise Te Tuhi Ewe (President of Pacific Women's Watch (New Zealand).

Comments on COVID-19 Public Health Response Bill
Exposure Draft

Clause Reference	Comment
1 – Explanatory note	Police powers to enter on to marae: Must be accompanied by the Maori Community Police Liaison officer and a Maori warden. Rationale: Explicit and known 'unconscious bias' that has been stated by Police. Ministry of Health already underserve Maori communities. Health inequities and inequities toward Maori are the constant failure of Ministry of Health over decades.
2 - Commencement	
3 – Repeal of this Act	

12th May 2020

Hon. David Parker
Attorney General
Parliament Buildings
Wellington

Email: david.parker@parliament.govt.nz
s9(2)(a).

COVID-19 Public Health Response Bill

We congratulate the Government moving to Level 2 to enable businesses to open and the economy to recommence after the gains made from Alert Level 3 & 4. We appreciate that the legal framework for enforcement of Alert Level 2 restrictions needs to be clear to the authorities.

The nature of this stage of recovery is one of variable restrictions that will change back and forth and at times quite quickly. This could lead to confusion and frustration in an atmosphere of increasing difficulty as we move forward through the challenges of the next 18 months. Minister Davis signalled the urgency on Friday and asked for a response from Pou Tikanga of National Iwi Chairs Forum which was provided on Sunday however we were unaware of the legislative time crush prescribed by Government.

We are deeply concerned however; that these new restrictions will in some instances be policed by armed units of the police force in some areas and given that there will be a necessary period of adjustment by the community and there is potential for misunderstandings and conflict between the authorities and Māori to escalate. This undermines the partnership approach we have taken with Police pre and during the COVID-19 Pandemic response as exemplified in the Community Check points, the weekly National Commissioner of Police updates and information sharing.

History and experience shows us that Māori are most effected during Pandemics in terms of mortality, unemployment, and other social determinants and we advise our people to move into Alert Level 2 very cautiously. However, the prescription for Marae is heavy handed and inconsistent with the Rangatiratanga of each marae, the Treaty relationships built up at local, regional and national level and the gatherings in large non-Māori venues as opposed to Māori venues i.e. Clubs, Bars, RSA's, Malls, Food Courts and Restaurants where 10 x 10 people can gather at any one time for a period of at least 2 hours. Marae are manned on a voluntary basis as opposed to paid employees and therefore our expectation is that any enforcement workforce including the Police will work in partnership with Marae committee to inform and enable compliant practices.

History and experience also shows us that Māori are 6 times more likely to be apprehended, arrested and incarcerated on any given transgression in comparison with non-Māori. How can we be sure that the 'graduated response approach to offending' won't be institutionally biased against Māori; as other similar approaches have been deemed to be.

The Prime Minister and this Government have recognised the significant contribution of Iwi/Māori in the Pandemic Response to COVID-19. Iwi/Māori along with Police have supported and worked alongside each other to establish and man Blockades in communities deemed to be vulnerable and susceptible to COVID 19. Māori have been most compliant throughout the Alert Levels. The overall health and social gains achieved by working together to drive down the impacts and consequences of COVID-19 must not be ignored. Iwi leaders have also be proactive by making public safety messages through the Maori media.

It is disappointing that this Government is still indifferent to Iwi/Māori contribution to the social and economic recovery of this country and missing in action when it comes to engagement and consultation with Iwi/Māori on Legislation that has a major impact on whānau Māori. The time provided to consider the content of this Bill (received at 6:53pm for response by 10am the following today) is unreasonable and insufficient to provide robust and considered responses. However as with the COVID-19 (Fast Track Consenting) Bill, Iwi/Māori are reduced to providing commentary rather than meaningful input.

This Bill must have been considered as part of a suite of supporting legislation to underpin and strengthen this Government's Alert Levels Framework and actions in response to the COVID-19 Pandemic and therefore opportunities would have existed to consult and engage early with Iwi/Māori. We make these points strongly but it is not exhaustive due to the time constraints give.

We are also concerned that these decisions will be made by Minister Clark who from his own admission breached his own Lockdown rules under Alert Level 4. We believe that Director General Health in consultation the Minster for Māori Development should make any decisions particular in regards to Marae.

Māori are cautious as we don't want our people to be put at risk, especially our Koroua and Kuia as they are most susceptible. We will be advising our people and marae to "Kia ata haere", "Kia tupato", and "Kia mataara" (be patient, be cautious, and be alert) and that it is wise not to rush back to "Hongi, Hariru, Hakari" but to retain their rahui for a longer period.

We ask that this Government fulfil its obligation under Te Tiriti and partner with us to combat non-compliance and develop methods of enforcement together that strengthen our Nation's resolve to eliminate COVID-19 and come out of this stronger as a people and as a Nation.

Naku noa, na

Ngahiwi Tomoana

National Iwi Chairs Forum – Pandemic Response Group Chair

Cc: Prime Minster Rt Hon. Jacinda Ardern Email: jacinda.ardern@parliament.govt.nz

Hon. Stuart Nash – Minister of Police Email: stuart.nash@parliament.govt.nz

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

Instructions for filling out table feedback:

- Please provide comments on provisions in the order they appear in the Bill (first couple of clauses completed for example).
- Please also identify the clause reference by number and title.
- Please include in the yellow box who the comments are made by.

National Iwi Chairs Forum – Pandemic Response Group - Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
Explanatory Note Page 2 Enforcement para 2	This paragraph is not consistent with Clause 20 Bill/Act. In the Bill/Act it states that only a Constable can enter a private dwelling/house or marae to give direction. However; in the explanatory note Enforcement Officers are able to exercise this same power.
9 – Minister may make a Section 11 Order	When making Section 11 Orders that apply within the boundaries of a single territorial authority district (referred to as District), the Minister for Health recognises and respects the Rangatiratanga of Iwi, Marae, Hapū for that District and acts in a manner that gives effect to Te Tiriti o Waitangi. In so doing the Minister of Health must notify the mandated Iwi Authority of the District of any decisions to be made under this Bill/Act that may affect or prohibit whānau Māori and/or the performance of cultural, customary or lore protocols (Tikanga) and seek prior and informed consent. This action recognises that those officers provided special powers under this Bill/Act (Prime Minister, Minister of Health, Director General of Health) do not have the knowledge to make absolute decisions that affect whānau Māori or the impact of those decisions on the performance of cultural, customary or lore protocols (Tikanga).

National Iwi Chairs Forum – Pandemic Response Group - Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
10 - Director-General may make section 11 orders	When making Section 11 Orders that apply within the boundaries of a single territorial authority district (referred to as District), the Director General for Health recognises and respects the Rangatiratanga of Iwi, Marae, Hapū for that District and acts in a manner that gives effect to Te Tiriti o Waitangi. In so doing the Minister of Health must notify the mandated Iwi Authority of the District of any decisions to be made under this Bill/Act that may affect or prohibit Māori and/or the performance of cultural, customary or lore protocols (Tikanga) and seek prior and informed consent. This action recognises that those officers provided special powers under this Bill/Act (Prime Minister, Minister of Health, Director General of Health) do not have the knowledge to make absolute decisions that affect whānau Māori or the impact of those decisions on the performance of cultural, customary or lore protocols (Tikanga).
12 – General Provisions para 1(c) & 1(d)(i)	Allows granting of an exemption (with or without conditions) from compliance with or the application of any provisions of the order any person or class of persons or things. There is no definition as to what constitutes an exemption within the Bill/Act.
18 – Authorised Persons	This section outlines who is deemed as an authorised person to be carry out any functions and powers of an enforcement officer under this Act. The Enforcement Officers have significant power under this Bill/Act to direct people and businesses who do not comply or contravene the Section order. This offence is liable for a conviction, court action and/or infringement. There is no clarity as to where these Officers will "sit" other than they can not be an employee of the Ministry of Health. Will they be Civil Defence employees or employed by Local Government as are Parking Wardens, Noise Pollution Officers, Animal Welfare Officers, or be part of the New Zealand Police as non-sworn officers? Iwi believe that specialist unarmed de-escalation units together with the inclusion of Maori wardens be established in key areas. Enforcement Officer unit must also have a lead officer within this workforce who has the relevant knowledge of Tikanga Māori (as with Civil Defence Iwi Liaison Officers) to ensure that appropriate culturally competent responses are provided to support whānau Māori and provide insight back to the governing body.

National Iwi Chairs Forum – Pandemic Response Group - Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
20 – Powers of Entry paras (3) & (4)	This relates to the powers of a Constable to enter a marae without a warrant where there is deemed to be reasonable grounds. Recognition of Rangatiratanga of Mana whenua / hapū on their marae must be upheld. Every effort must be taken by the Police through the District Manager Māori Responsiveness and Iwi Liaison Officers to proactively engage with Marae, and provide guidance that enable Mana Whenua/hapū to establish processes and practices that uphold the performance of their cultural, customary rites, lore and protocols and enables them to comply with the Section 11 order. Where it is deemed necessary that a Constable enter on to a Marae prior notification must be provided to the Chair of the Marae Committee and the relevant Iwi Mandated Authority before any action is taken. An Iwi Liaison Officer must also be in attendance. Mana whenua / Hapū must be given every opportunity to enact their rangatiratanga on their Marae and resolve any actions that contravene the Section 11 order without Police action.
20 – Powers of Entry paras (3) & (4)	This relates to the powers of a Constable to enter private dwelling/house without warrant where there is deemed to be reasonable grounds. Where it is identified that the private dwelling/house is occupied by whānau Māori; Iwi Liaison Officers must be in attendance.
20 – Powers of Entry para (5)	Where a warrantless entry power is exercised in relation to an incident on a marae or a private dwelling/house occupied by whānau Māori; the said written report on the exercise of that power must be provided to the Chair of the Marae where applicable and to the mandated Iwi Authority of that district.
29 – Infringement Notices	This Bill/Act is heavily weighted towards court action, conviction and infringement. There is nowhere in the Bill/Act which requires the Enforcement Officers or the Constables to act in a manner that intervenes or identifies resolution for non-compliance without conviction, court action or infringement. Rather the Bill/Act refers to "direction to comply with the order". Enforcement Officers and Constables must work to enable compliance and reduce potential for prosecution/infringement. The Bill/Act must outline a requirement to Enforcement Officers and Police to consider other options first rather than court action, conviction and infringement. If not it will be left to the individual to

	determine and use their common sense to find an equitable resolution which is flawed as it doesn't provide for consistency of action through the application of this Bill/Act.

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12 May 2020

Hon David Parker
Attorney-General

By email: d.parker@ministers.govt.nz s9(2)(a).

Tēnā koe

Re: Covid-19 Public Health Response Bill

The New Zealand Law Society | Te Kāhui Ture o Aotearoa acknowledges receipt of the consultation draft of the Covid-19 Public Health Response Bill last night and the invitation to make comments on the Bill by 10am today.

The Bill is intended to be introduced and passed through all stages today under urgency and to be enacted tomorrow, before the country moves to Alert Level 2 at 11.59pm tomorrow.

This is a very significant piece of legislation affecting all New Zealanders until May 2022 (unless repealed earlier by Order in Council, if COVID-19 is sooner brought under control). The Bill covers all COVID-19 Alert Levels, and contains profound restrictions on New Zealanders' rights and on New Zealand businesses, and extensive state powers during this period.

The Law Society appreciates the country needs a fit-for-purpose legal framework for managing the COVID-19 epidemic, even if there is no longer a national state of emergency. This is an urgent and unprecedented situation. But in our view it is unacceptable in a democratic system to rush through legislation of this magnitude with no real consultation. Level 2 comes as no surprise – the timing was uncertain, but it was certainly foreseeable and more planning and notice of the legislative changes was expected.

In the extremely short time available the Law Society makes the following key points:

a. The offence provisions appear draconian.

b. There is a risk of unjustified breaches of human rights.

c. As a fallback, a much shorter sunset should be considered, while further consultation and refinement is worked on.

Specific concerns include:

1. The offence provisions appear too broad and draconian, particularly given the sunset provisions mean that these could be in place for up to 2 years.

2. There appear to be provisions that may unjustifiably undermine rights, particularly search and possibly assembly/freedom of expression and movement.

3. There is a longstanding issue with "dual" infringement and criminal provisions (a "two in one") which needlessly complicates prosecutions, even for serious offences, where those offence happen to have infringements specified as well.

4. The oversight provisions should also be strengthened:

   a. There should be a provision that the Minister of Health is required to formally report to the House, on a quarterly basis on the exercise of powers under the Act, as there was in s 88 of the Canterbury Earthquake Recovery Act 2011 (the 2011 Act):

      > 88 Quarterly report on operation of this Act
      >
      > (1) The Minister must prepare and present to the House of Representatives quarterly reports on the operation of this Act.
      >
      > (2) Each report must include a description of powers exercised by or on behalf of the Minister or the chief executive under this Act during the period reported on.

      This was one of the recommendations of the Regulations Review Committee in its inquiry into legislation in response to national emergencies (see **attached** report p 25).

   b. Also, consideration should be given to the appointment of an external review panel, headed by a retired High Court Judge, to review section 11 orders before they are made, as in ss 72 and 73 of the 2011 Act. Alternatively, a draft of the order could be given to the Epidemic Response Committee or Regulations Review Committee, with a duty in each case for the maker of the proposed order to have regard to any comments made by the Review Panel or Committee before the order is made.

5. In short:

   a. The immediate need to change certain procedures and restrict activities does not necessarily entail immediate criminal enforcement.

   b. More time is required to consult and properly input on proposed offence and search provisions (along with other aspects of the Bill).

   c. The Law Society cannot support the Bill as drafted.

Nāku noa, nā

Tiana Epati
President

Encl (1)

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

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[David Seymour/ ACT Leader's Office] Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
3(a) – Repeal of this Act	Why is this 2 years? We would suggest amending 2 years to 1 year. The next Parliament will have the opportunity to draft a new law.
10 - Director General may make section 11 orders	We understand the intention of this section together with the previous section (9) to transfer some power from the Director General to Ministerial responsibility but believe that the Director General should only have the powers under section 10 to make section 11 orders urgently and only for a period up to 48 hours after which point the section 11 order expires. This gives the Minister of Health the time to put in place a section 11 order or for the order to lapse.
14(3) and (4)– Form, publication, and duration of section 11 orders	Following on from above - We believe there should be Ministerial responsibility for any order over 48 hours in length. The Minister of Health should not be able to make a section 11 order under 48 hours, however, the Director General should be able to for urgent matters. The Director General's section 11 order should expire after 48 hours.
15(2) - Amendment or extension of section 11 orders	We would remove the Director General's ability to extend a section 11 order as there should only be Ministerial responsibility for any order over 48 hours in length.
18 – 24 – Authorised persons through to Power to direct	Who does the Minister have in mind for this enforcement? We believe only the Police should have these powers. However, if the Director General has authority to appoint persons, there must be accountability mechanisms put in place in the legislation. There is usually the ability to complain about the conduct of an authority which is missing here.

business or undertaking to close	(1) The enforcement officer must on entering a premise provide in writing to the recipient information outlining who they are, the recipients rights, and how they can complain to the Director-General about misconduct. (2) If a complaint is made about the conduct of an enforcement officer, the Director-General must consider the complaint within a certain timeframe. (3) The legislation should specify which authority complaints are referred to if not the Director-General, for example, in the case of a person acting under the authority of the constable (section 22(2)).

COVID-19 Public Health Response Bill

Comments on Exposure Draft

12 May 2020

Joint comments of:

- Dr Eddie Clark, Victoria University of Wellington
- Professor Claudia Geiringer, Victoria University of Wellington School of Law
- Professor Dean Knight, Victoria University of Wellington School of Law
- Professor Geoff McLay, Victoria University of Wellington School of Law

Comments on COVID-19 Public Health Response Bill
Exposure Draft

General comments:

- We support the primary intention of the Bill to clarify the legislative powers on which any coercive actions under levels 2, 3 and 4 are based, and to relocate the locus of such power with a minister who is politically accountable but acting at arms-length from Cabinet decision-making.

- Given the extremely limited timeframe for feedback, we have concentrated our remarks on the key provisions governing the s 11 power. We have read the feedback submitted by Professor Andrew Geddis and are in general agreement with it.

- Overall, although we think the drafters have done an admirable job within tight time constraints, we worry about a degree of looseness in the language that is being deployed to shape and constrain the s 11 power. Most of the specific suggestions made below are with a view to bringing that language into sharper focus, and thereby bringing to bear even more discipline on the circumstances in which, and way in which, officials will be able to exercise this power.

Clause Reference	Comment
2 – Commencement	- We are disappointed that this bill is to be put through all its stages under urgency. While we appreciate the pressing regulatory challenge, the need for legislation to transition to stage 2 has been known for some time. Referral to select committee and a brief period to allow for public submission has been deployed with success on previous occasions in recent history and should have been deployed here.

	- As a consequence of the rushed process, the risk of drafting errors and unintended consequences is extremely high. We suggest that, post-enactment, the legislation should immediately be sent to select committee to allow time for public submission and revision if necessary.
4 – Purpose	- The statement of purpose is crucial because the key operational provisions rely on it to define the appropriateness of the orders. We are generally happy with the statement of purpose, subject to the following. - The use of the word "support" as the key verb frames the purpose very broadly and passively, thereby weakening its role in limiting permissible action. This is especially so because the related operative clause, 9(1)(d), is framed in terms of "satisfied that the order is appropriate to achieve the purpose" (not consistency with purpose per se). We suggest another word, such as "enable". - As suggested below, the bracketed language at the end of cl 9(1)(b) would fit better here in the purpose section. Its function seems to be to clarify that the advancement of social, economic and other factors is a legitimate purpose of a s 11 order, albeit a subsidiary one. - We agree with the reference to a need for proportionality in the purpose. However, proportionate to what? This should be spelled out. Language similar to s 92F of the Health Act 1956 could be used. - We think the statement of legislative purpose needs to be supplemented with a separate clause stating the *principles* that underly the operational parts of the Act. These might again be drawn from Subpart 1 of Part 3A of the Health Act 1956 (eg protection of public health as a paramount consideration, together with a detailed statement of principles such as proportionality and necessity).
8 – Prerequisites for all section 11 orders	- The importance of these emergency powers being subject to temporal constraints (albeit with a possibility of being rolled over) is well-established in the literature. The prerequisite in cl 8(c) is not currently subject to a temporal limit and should be. A 90-day time limited (renewed as necessary) would be consistent with that provided in relation to epidemic notices and the emergency transition periods.
9 – Minister may make section 11 orders	- The substantive threshold for the making of an order encapsulated in (1)(d) – currently "appropriate to achieve the purpose of the Act" – is critical to the integrity of the regime. It is too low. The potential for substantive

	restrictions to be placed on rights and freedoms and the existence of a wide Henry VIII clause (cl 13) justify a threshold of necessity rather than appropriateness. We also suggest the importance of (1)(d) is such that it should be placed at the beginning of cl 9 in its own sub-clause, rather than buried at the end of a list of procedural considerations. - The wording of (1)(a) is ambiguous as to whether the Minister is required to actively seek advice from the Director-General each time a new order is contemplated, or is simply required to have regard to any advice he/she happens to have received. This should be clarified to stipulate that the Minister must actively seek advice on each occasion. - The importance of acting on the basis of authoritative advice from New Zealand's senior public health expert should be further emphasised by requiring "particular regard" rather than just "regard" to the Director-General's advice. - The word "Government" deployed in (1)(b) is ambiguous. It has no one authoritative meaning in public law, and is not defined in the bill itself. We could not agree amongst ourselves, for example, if the drafters' intention was to allow the Minister to have regard to decisions of Cabinet (that therefore have the authoritative imprimatur of the government as a whole) or to relevant decisions made at all levels of government. If the latter, would it be limited to central government or also comprehend decisions made at the sub-national level, such as by local authorities? The intended meaning needs to be specified more clearly. - As noted above, the bracketed language at the end of (1)(b) sits oddly. It might be better placed in the purpose section as it seems its real function is to clarify that the advancement of social, economic and other factors is a legitimate purpose of a s 11 order, albeit a subsidiary one.
10 – Director-General may make section 11 orders	- The wording of this clause is clunky and hard to follow. We suggest para (b) be expressed as subsection (1), ie "The director-general may make a section 11 order if, in their opinion, the order (etc)". And we suggest para (a) be reframed as subsection (2) as a hard limit to that discretion, ie "An order under (1) may apply only within (etc)".

11 – Orders that can be made under this Act	- We worry that the introductory wordings in (a) and (b) (ie "require people to refrain from taking any actions") might allow general and unspecific actions to be required in orders. We think it is important that any orders set out clear, unambiguous and specific actions required of people so that the orders are consistent with rule-of-law expectations and are capable of being complied with. The listed subparagraphs (i)-(viii) / (i)-(v) do so adequately. However, we suggest the general introductory wording might be recast as an additional and final subparagraph, as a residual catch-all, eg "otherwise require persons to refrain from taking specified actions that contribute or are likely to contribute to the risk (etc)". As necessary, a clause could be added to clarify that the listed actions in (i)-(viii) do not limit the scope of the final catch-all subparagraph. Alternatively, introductory wording could be changed, replacing "any actions" with "specified actions".
13 – Effect of section 11 orders	- We have mixed views about the prioritisation of orders in the case of inconsistency with enactments, especially whether more statutes (in addition to the NZ Bill of Rights) should be included in the catalogue of protected statutes in subsection (2). This is an especially important provision and we think it is deserving of deeper consideration, including in an immediate post-enactment review. One possibility might be that the catalogue of protected statutes could be extended to include the constitutionally significant statutes previously protected in, for example, previous earthquake legislation (see s 11, Hurunui/Kaikoura Earthquakes Recovery Act 2016). We have not had time to properly grapple with the potential effect of any orders on the Electoral Act 1993 in particular (especially in the light of its own emergency provisions). However, we think there needs to be deliberateness in managing the interaction between orders and electoral provisions.

COVID-19 Public Health Response Bill

Comments on Exposure Draft – Human Rights Commission

11 May 2020

NZ Human Rights.
Human Rights Commission
Te Kāhui Tika Tangata

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Human Rights Commission Comments on COVID-19 Public Health Response Bill ('the Bill')
Exposure Draft

As a general comment, the Commission considers that the Bill should not be passed under the urgency proposed and without an available NZBORA assessment and select committee scrutiny. We consider that, while there is urgency, it is insufficient to justify the Bill bypassing these processes given its human rights implications.

While we appreciate the opportunity, we also note the very short period of time given to the Commission and other external agencies to provide comment on the Exposure Draft.

Our comments below are made notwithstanding our general position set out above.

Clause Reference	Comment
Clause 3 – Repeal of the Act	The Commission notes that the Bill provides that it will repeal 2 years after commencement. While we agree that a sunset clause is necessary, we note that the Bill limits rights and freedoms under both the New Zealand Bill of Rights Act 1990 and New Zealand's related international treaty commitments under the ICCPR while bypassing the usual Parliamentary and public scrutiny and the NZBORA assessment and reporting process provided under s 7 of the NZBORA. We consider that this is not proportionate. 2 years is an inordinately long period for such rights-limiting legislation to remain in force without Parliamentary and public scrutiny and impact, notwithstanding its proposed

	safeguards/limitations (such as the prerequisites under clause 8 and Parliamentary approval for continuation of section 11 orders under clause 16) and the unprecedented nature of the COVID-19 emergency. **We therefore recommend that the duration of the legislation be limited to the minimum necessary to achieve the implementation of its public health objectives, and no longer than a maximum of one year, and that the legislation also be subject to regular, periodic review by select committee.** We also consider that the extended nature of the 2-year period proposed by the Bill raises the issue of whether the New Zealand Government ought to notify the UN of its intention to derogate from its ICCPR commitments, pursuant to Article 4. Article 4 of the ICCPR provides that, in a time of public emergency, States Parties may take measures derogating from their obligations under the ICCPR to the extent "strictly required by the exigencies of the situation" and "provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Article 4 goes on to provide that States wishing to use their right of derogation "shall immediately inform" the other States Parties to the ICCPR, through the Secretary-General of the United Nations. Professor Martin Scheinin, former UN Special Rapporteur and member of the UN Human Rights Committee, has recently observed that the safest course for States as regards their human rights obligations in the emergency context of COVID-19 is to initially insist on the *principle of normalcy*[1], by which he means: *"to handle the crisis through normally applicable powers and procedures and insist on full compliance with human rights".* However, he goes on to note: *"One can insist on the principle of normalcy and on full respect for human rights. What can be done under the framework of permissible restrictions, should be preferred. If those available options prove insufficient during COVID-19, then it is better to derogate than not to derogate."*

[1] M Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?, 6 April 2020,* OpinioJuris

The UN Human Rights Committee has also held that in the current COVID emergency, States should not derogate from their ICCPR obligations as a matter of course:

States parties should not derogate from Covenant rights or rely on a derogation made when they can attain their public health or other public policy objectives through invoking the possibility to restrict certain rights…in conformity with the provisions for such restrictions set out in the Covenant, or through invoking the possibility of introducing reasonable limitations on certain rights… in accordance with their provisions.[2]

However, the Bill's lack of any explicit human rights considerations, combined with its proposed 2-year duration, places the derogation issue clearly in frame. However, this may be able to be mitigated through inclusion of human rights provisions in the Bill's purpose clause and general provisions (as noted below).

We also refer to the Siracusa Principles[3], which provide the definitive legal interpretation of the application of Article 4 of the ICCPR. The World Health Organisation has summarised the application of the Siracusa Principles as regards the legitimate restriction of human rights in public health emergencies in the following terms[4]:

- The restriction is provided for and carried out in accordance with the law;
- The restriction is in the interest of a legitimate objective of general interest;
- The restriction is strictly necessary in a democratic society to achieve the objective;
- There are no less intrusive and restrictive means available to reach the same objective;
- The restriction is based on scientific evidence and not drafted or imposed arbitrarily i.e. in an unreasonable or otherwise discriminatory manner

We therefore recommend that should the Bill pass with the current 2-year sunset clause that urgent advice is sought from the Ministry of Foreign Advice and Trade and Crown Law as to whether the Government is required to formally notify the UN of any intention to derogate from the ICCPR, pursuant to Article 4 of the ICCPR and in accordance with General Comment 29 of the UN Human Rights Committee (2001)[5] and the Siracusa Principles (1984).

[2] Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, CCPR/C/128/2, 24 April 2020, para 2(c)
[3] The Siracusa Principles were developed in 1984 by a colloquium of 31 distinguished international law experts held in Siracusa, Italy and arranged by the American Association for the International Commission of Jurists
[4] https://www.who.int/tb/features_archive/involuntary_treatment/en/
[5] see n 2 at para 2

Clause 4(e) - Purpose	We note the purpose statement of the Bill in clause 4 (c) provides that a purpose of the legislation is to ensure that COVID-19 related public health measures are *"co-ordinated, orderly, and proportionate."* The Commission supports the inclusion of the term "proportionate" which implicitly references an aspect of the human rights requirement that any limitation on rights be legitimate (i.e. legal), and strictly necessary and proportionate. However, overall, the purpose statement is notable for its lack of express acknowledgment of the Crown's bedrock human rights and Te Tiriti obligations when undertaking emergency public health measures. The Commission considers that this Bill, given its rights limiting implications, must give express regard to human rights and Te Tiriti obligations. There is precedent for this approach in other legislation, for example the Intelligence and Security Act 2017 which contains a rights affirmative purpose statement against which its expanded surveillance measures must be interpreted.[6] Similar approaches are also evident in the Oranga Tamariki Act 1989[7], the Children's Act 2014[8] and the Privacy Bill.[9] **We therefore recommend that, given the Bill's rights-limiting effects, the purpose statement in clause 4 contain explicit recognition of the State's human rights obligations and provide that any public health measures that limit those rights will be strictly necessary and proportionate in conformity with those obligations (NOTE: Such a clause may mitigate the need to consider an Article 4 derogation).** **We also recommend that clause 4 contain a purpose statement that requires decisions and decision-making processes to reflect the Crown's obligations under the Te Tiriti o Waitangi when considering development and implementation of orders under section 11 that directly impact upon Māori whānau, hapū and iwi and Māori whenua.**
Clause 12(d) - General provisions relating to section 11 orders	The Commission notes that clause 12(d) provides that section 11 orders may authorise persons or classes of persons to grant exemptions or authorise activities that would otherwise be prohibited by a section 11 order. This confers the possibility of discretion being exercised.

[6] Intelligence and Security Act 2017, s 3
[7] Oranga Tamariki Act 1989, s 5(1)(b)
[8] Children's Act 2014, s 6
[9] Privacy Bill, clause 3

	In the Commission's view, however, the exercise of discretion *must* be available to be utilised. As Walker J recently held in ***Christiansen v Director-General of Health*** [2020] NZHV 887, 4 May 2020 at [47]: *"A decision-making public body entrusted with a decision* ***must not adopt rigid rules that disable it from exercising discretion in individual cases****. Decision-makers cannot rely on fixed frameworks which "close [their] mind to the possibility that special circumstances may exist outside those categories", particularly when the law in question gives the decision-maker some flexibility."* As regards the exercise of discretion itself, her Honour held at [50]: *"Where a person has made a submission to a decision-maker on a discretionary relevant factor, it becomes mandatory for the decision-maker to consider that factor."* **The Commission therefore recommends that clause 12 of the Bill is amended to provide that section 11 orders *must* authorise a person or class of persons to grant exemptions or authorise activities otherwise prohibited by the order.**

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

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Office of the Privacy Commissioner -

Comments on COVID-19 Public Health Response Bill
Exposure Draft

Clause Reference	Comment
New clause	See comment below

OPC notes that the Bill does not provide additional authority for sharing personal details for Covid 19 purposes (i.e. the sharing contact details for contact tracing purposes).

The declaration of the state of national emergency triggered the Civil Defence National Emergencies (Information Sharing) Code of Practice 2013, issued under the Privacy Act 1993. https://www.privacy.org.nz/the-privacy-act-and-codes/codes-of-practice/civil-defence-national-emergencies-information-sharing-code-2013/

OPC understands that the Code has proved to be of great assistance to agencies during the Covid 19 emergency, including for contact tracing. The Code permits disclosures of personal information by any agency (public or private sector) for emergency related purposes. This provides clear authority for the disclosure of personal details needed to trace individuals, and provides supplementary authority to Part 3(5) of the Health Act 1956.

The Code will expire 20 working days following the expiry of the state of national emergency. This will give rise to a gap in authority and reduced certainty about the basis for sharing personal details in certain circumstances to respond to the epidemic.

This gap could be addressed by making appropriate provision in the Bill. In the time available we have identified two potential models that might inform an information sharing provision to maintain support for contact tracing: (a) a provision based on clause 23B of Schedule 7 to the Tax Administration Act 1994; http://legislation.govt.nz/act/public/1994/0166/latest/LMS185719.html or (b) a Schedule based approach that permits information sharing for Covid related purposes, see for example Schedules 4A and 5 of the Privacy Act 1993.

COVID-19 Public Health Response Bill

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New Zealand Council for Civil Liberties Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
3 – Repeal of this Act	In paragraph (a) substitute '6 months' for '2 years'. There will be a general election later this year, and whatever Government is formed after that should have to commit itself afresh to the serious powers and constraints on liberties contained in this legislation. In addition, this would provide for proper select committee scrutiny of any legislation seeking to renew the provisions of this Bill.
8 – Prerequisites for all section 11 orders	In paragraph (c) insert a requirement for the Prime Minister to make a statement to the House of Representatives, just as an epidemic notice or state of emergency notice must be.
8 – Prerequisites for all section 11 orders	After paragraph (c) add a new paragraph (d) requiring that the Attorney General must lay before the House of Representatives a report on each section 11 order, identifying any provisions which, prima facie, are inconsistent with the provisions of the New Zealand Bill of Rights Act 1990, and on whether any inconsistencies are proportional and demonstrably justified in a free and democratic society. [Note, we recognise this is stronger than s. 7(b) of the NZ Bill of Rights Act, but so too are the powers sought by the Government in this Bill. Exceptional powers require exceptional transparency and accountability.]
9 – Minister may make section 11 orders	After paragraph (c) insert a paragraph requiring the Minister to consult, and receive written advice from, the Attorney General on the NZ Bill of Rights Act issues the order may give rise to.

11 – Orders that can be made under this Act	In paragraph 1(a) delete '(without limitation)'. There is no need to give such an unlimited definition to what may be required of people under section 11 orders. The Government has shown itself willing and able to legislate at speed if it feels necessary to do so, and so any further additions to the provisions in clause 11(1)(a)(i)-(viii) should be a matter of legislation. Not to do so permits dangerous additions without public debate, such as mandating people to install a smartphone app or carry a card transmitting and receiving data from others, or to carry some form of officially designated identity document. If the Government wants to mandate identity cards or similar, it must be prepared to have the public debate first.
11 – Orders that can be made under this Act	We note that sub-paragraphs 1(a)(i), (ii), (ii), (iv), (v) and (vii) could all be used to prohibit people gathering to listen to speeches, march, or protest for or against a matter of public concern. We understand the health concerns motivating these provisions, but note also the proposal for this legislation to last for two years, and the absence of any limit in clause 14 on duration for a section 11 order made by the Minister. Given the offence provisions in this Bill, these orders are likely to represent a serious departure from the freedom of peaceful assembly and freedom of association in sections 16 and 17 of the NZ Bill of Rights Act. We strongly urge the Government to consider drafting provisions which would restrict section 11 orders under this Bill from having this effect when the purpose of any assembly or association is to protest – while physically distanced from other people as envisaged in clause 11(1)(a)(iii) – a matter of public interest.
11 – Orders that can be made under this Act	In relation to sub-paragraph 1(a)(viii) (report for medical examination or testing) this comes dangerously close to, if not actually overstepping, the protections in sections 10 and 11 of the NZ Bill of Rights Act. While we would want to encourage people to be tested or examined if medically necessary, people should retain their right to refuse, while understanding what the implications may be – a period of quarantine for example. The Bill must have a provision added to it specifying that the offence provision in section 25 cannot apply to non-compliance with a request to report for medical examination or testing, and that instead the person may be quarantined for a specified period under sections 70(1)(f) or 97(2) of the Health Act 1956. The provisions of clause 12(1)(c) and 12(1)(d) do not provide sufficient comfort on this matter, and it should be addressed in an amendment to this Bill, rather than leaving matters to the discretion of officials or Ministers drafting or reviewing any draft section 11 orders.
11 – Orders that can be made under this Act	In paragraph 1(b) delete '(without limitation)'. There is no need to give such an unlimited definition to what may be required of places, premises, crafts, vehicles, animals or other things under section 11 orders.
11 – Orders that can be made under this Act	In relation to sub-paragraph 1(b)(iii) see our concerns (above, re: clause 11(1)(a)) about freedom of assembly and association.

14 – Form, publication, and duration of section 11 orders	Insert after paragraph 14(3) a new paragraph (4) stating: 'A section 11 order made by the Minister expires 3 months after the date on which it comes into force, unless it is sooner revoked or extended.' It is completely unacceptable that a section 11 order made by the Minister may have duration for the two full years envisaged as the duration of this law by clause 3(a). The experience with COVID-19 to date is that the situation has changed rapidly and so has the required response. The science is still rapidly evolving. Given the truly extraordinary powers sought by the Government in this Bill – while at the same time trying to move away from being in a state of emergency – the duration of section 11 orders should be tightly constrained. The fact that clause 15 permits their extension means that they can be rolled over if the circumstances require it, but Parliament should be given not less than quarterly opportunities to review the necessity for these orders. We note that Epidemic Notices last 3 months, so this period is already well understood within government.
14 – Form, publication, and duration of section 11 orders	Paragraph 14(5) is too vague. 'Under review' is meaningless unless there is an obligation to publish a report of such reviews. We suggest adding a new paragraph after this provision requiring the Minister and Director-General to publish a report on any section 11 orders they have made every month, specifying too that the detailed requirements for such reports must be laid out in regulations made under clause 32 of the Bill. Holding exceptional powers requires higher levels of transparency and accountability than a vague obligation to keep matters 'under review'.
15 – Amendment or extension of section 11 orders	In clause 15(1) insert 'by up to 3 months on each occasion' after 'made by the Minister'. This amendment parallels the proposal above to add a new paragraph to clause 14 limiting the duration of section 11 orders made by the Minister.
19 – Evidence of identity	Given the requirements of section 129 of the Search and Surveillance Act 2012 (Duty to provide information), we see no reason for the exclusion of Police constables from the obligation to provide evidence of their identity when exercising their powers. Police constables should be required to provide people with their name or unique identifier (see s. 129(a) of the 2012 Act).
20 – Powers of entry	We are deeply concerned by the breadth of clauses 20(1) and 20(3), to enter land, buildings, craft, vehicles, places, a house, or a marae without a warrant. It is wide open to abuse and discriminatory application. Further, given the significant number of calls to the Police about people allegedly not complying with previous Alert Level requirements, it is quite likely that we will see this provision being used in response to false and malicious allegations from people involved in neighbour disputes or acting on their prejudices and misguided assumptions. We suggest consideration be given to an offence of maliciously alleging infringement of a section 11 order.

20 – Powers of entry	Clause 20(7) is too vague and does not require the capture, recording and reporting of data which will enable people to ascertain patterns of discriminatory action by the Police or enforcement officers. We already have strong concerns about the Police failure to capture and report on data about the use of tasers, dogs, and armed response teams that enable such analysis, and this Bill is an opportunity to begin to rectify that problem. We strongly urge an amendment to clause 20(7) to delete the full stop at the end of paragraph (b) and add the following: '; and (c) the age, gender and ethnicity of the people against whom the powers were exercised; and (d) such geographic and other information as may be specified in regulations made under **section 32**.'
20 – Powers of entry	There is no point in requiring the provision of written reports under clauses 20(5) and 20(6) if such data is not published to facilitate scrutiny, analysis and accountability. How is the Independent Policy Conduct Authority (in relation to constables), or the Ombudsman (in relation enforcement officers) meant to have any data on which to make an assessment of whether to use their powers to initiate an investigation if no data or reports are required to be published? How are civil society organisations such as the NZ Council for Civil Liberties meant to draw concerns to the attention of Members of Parliament or the media if no data or reports required to be published. Again, with such extraordinary powers, there need to be strong duties of publication of the data gathered in the exercise of them. We urge the addition after clause 20(7) of a new paragraph (8) as follows: '(8) The Commissioner of Police in relation to the reports referred to in **subsection (5)**, and the Director-General in relation to the reports referred to in **subsection (6)**, must publish on a website every month a report on the exercise of the powers described in this section, which includes the verbatim information provided to them as described in **subsection (7)** as well as numerical data relating to the age, gender and ethnicity of the people against whom the powers were exercised.'

23 – Power to direct person to provide identifying information	This power is far too broad, going beyond the powers of the Police in sections 32 and 33 of the Policing Act 2008. Similarly the duty to destroy the information gathered set out in section 34 of the Policing Act is not mirrored here. Given the breadth of section 11 orders under this Bill, it is effectively license for an enforcement officer to snoop on anyone they feel like. We already know that some Police officers misuse their access to such information for personal gain or other reasons. There's not even any inclusion in clause 23 of the Bill of a duty to keep the information confidential and only to use it for the purposes for which it was gathered. Yes, someone might be able to make a complaint under the Privacy Act, but it is unlikely that this is sufficient deterrent to prevent misuse of these extraordinary powers. Sections 105A and 105B of the Crimes Act apply to corrupt use of official information to gain an advantage or pecuniary gain, not to misuse of personal information for things like stalking someone. We recommend the amendment of clause 23 so that it mirrors sections 32 and 33 of the Policing Act. We also recommend a specific offence of using the information gathered under clause 23 for any other purpose than to exercise the powers in this subpart of the of the Bill.
29 – Infringement offences	There is no obligation to collect data or publish statistics on the people served with infringement notices under this clause. This should be rectified to as to enable greater transparency and accountability about this aspect of the Bill's operation. We recommend adding after paragraph (4): '(5) Where an enforcement officer issues an infringement notice to a person, the enforcement officer must retain a copy of it and report to the Commissioner of Police or Director-General on (a) the age, gender and ethnicity of the people to whom the notice was issued; and (b) such geographic and other information as may be specified in regulations made under **section 32**. (6) The Commissioner of Police in relation to the reports supplied by a constable, and the Director-General in relation to the reports supplied by any enforcement officer (other than a constable) under **subsection (5)**, must publish on a website every month a statistical report on the data supplied.'

s9(2)(a)

From: Chris Tooley s9(2)(a)
Sent: Tuesday, 12 May 2020 9:32 AM
To: s9(2)(a)
Cc: s9(2)(a)
Subject: COVID-19 Public Health Response Bill
Attachments: Letter from Hon David Parker.pdf; COVID_19 Public Health Response Bill-v5.4.pdf; COVID-19 Bill - Comments on Exposure Draft.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Tēnā koe Nicholai,

Thank-you for providing an opportunity to comment on the COVID-19 Public Health Response Bill. We are responding to Hon David Parkers Letter dated 11 May 2020.

On behalf of Te Puna Ora o Mataatua, we would like to raise the issue that the words "Māori" and "Treaty" are omitted entirely from this Bill.

With such a quick turnaround required, we suggest that a Treaty Principle be included that has the statutory weighting of "recognise and provide for the principles of the Treaty of Waitangi". This is a broad enabling clause that covers the scope of the Bill and has precedent in other legislation. We suggest it is included in Part 1 of the Bill.

Let me know if you have any questions.

Ngā mihi,
Chris.

Dr Chris Tooley
Chief Executive

s9(2)(a)

COVID-19 Public Health Response Bill

Comments on Exposure Draft

12 May 2020

LEGISLATION DESIGN AND ADVISORY COMMITTEE: Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
Clause 5(2)	We note that it would be preferable to specify which definitions from the Health Act are applied (especially given the multiple sections of the Health Act containing definitions) but we understand that timing will likely prevent this, unless you have a ready list of definitions available.
Clause 9(1)(b)	This para refers to a Government decision, but is it clear what kind of Government decision it is contemplating? Is it contemplating a decision such as a decision made by Cabinet on how NZ should respond? If so, then how will the Minister weigh this against the other factors? Suggest: More clarity on what would comprise a Government decision, and how this might direct / restrict what the Minister could include in an order.
Clause 11	Does there need to be something said about the D-G's s 11 order for a district prevailing over any extant national order, if such there be? We assume that would be the intention. There may be a situation where the provisions are not inconsistent but the general order goes beyond the local order. So there may be disputes over that, i.e. as to what counts as inconsistency.
Clause 11(1)(a)	Should "require persons to refrain from taking any actions …" read "require persons to refrain from taking any specified actions …", otherwise the Order is effectively able to state generally that persons must refrain from any actions that contribute to outbreak or spread.
Clause 12	The use of "things" throughout this section seems unusual – being used as a sort of global term for places and ships and animals.

Clause 12(2)(c)	Does the drafting of s 12(2)(c) leave open the possibility that an order could be made closing Parliament / courts under s 11 (other than s 11(1)(b))? If so, that seems to raise some constitutional issues, particularly given there is no requirement for consultation with the Speaker or the Chief Justice or Heads of Bench.
New clause	It could be argued that breaches of a s 12(d) exemption or authorisation are not breaches of a s 11 order (but rather of the exemption / authorisation). Given this, should there be a new clause to clarify which of clauses 20-24 enforcement provisions apply to breaches of authorisations or exemptions granted by an authorised person under cl 12(1)(d)(i) and (ii)? [It would seem that a breach of conditions would probably justify a forced closure or a revocation of the authorisation (which in itself would create a forced closure)].
New clause	Further to the above comment, should there be a new clause to clarify what, if any, of the offence and penalty provisions would apply for failures to comply with an authorisation or exemption granted by an authorised person under cl 12(1)(d)(i) and (ii)?

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

Instructions for filling out table feedback:

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- Please include in the yellow box who the comments are made by.

Louise Delany and Michael Baker, both from: University of Otago, Wellington
Comments on COVID-19 Public Health Response Bill
Exposure Draft

Clause Reference	Comment
4 purpose	The term "contagious" is no longer generally used. Recommendation: that this word be replaced by "infectious", ie in this sentence "…infectious" nature…
5 - Interpretation	The term "enforcement officer" is defined narrowly as (a) the Director-General; (b) (c) and (d) which relates to enforcement officers under proposed section 18. Proposed Section 18 provides for the Director-General to authorise suitable persons or classes of persons who are **not** employees of the Ministry of Health to carry out functions and powers of enforcement officers. The authorisation of non-Ministry of Health people is appropriate, but there is nothing explicit about people who currently act as enforcement officers under the Health Act. The Health Act provides powers for health protection officers, also environmental health officers. This lack of any explicit reference to current enforcement officers under the Health Act may raise questions about the powers of health/environmental protection officers to carry out functions under the Bill. Subsection (2) implies that if a term is defined in the PH response bill, then that is its meaning. Therefore the terms used in the Health Act would not apply. The upshot is that the definition of enforcement officers does not include most people who are likely to be undertaking

	current activities relating to COVID-19; compare the definition of enforcement officer under the Health Act. It could be argued that section 18 allows the DG to appoint health protection officers who are employees of **DHBs** (and hence not necessarily Ministry of Health employees) as 'authorised persons'. We don't think that this is intended, but if so it is unnecessary and unclear. Enforcement officers under this Act should include health staff such as health protection officers who carry out enforcement activities. We recommend that: (1) the term 'enforcement officer' specifically include environmental/health protection officer; and (2) that the Bill provide for the D-G to authorise suitably qualified and trained persons (and classes of persons who *are* employees of the Ministry of Health to act as authorised persons
10 D-G may make section 11 orders	Should the restriction on where the order may apply be 'single territorial authority district' (as drafted) or health district?
11 Orders that can be made under this act	We draw to your attention the fact that the terms "isolated" (or "isolation") or "quarantined" (or "quarantine") are not defined in the Bill. They are not defined in the Health Act either, but presumably that 1956 Act relied on generally understood meanings. In today's world those terms are not so clear, and their meanings may possibly be more disputed than in former times. Below are standard definitions of these terms, as they are used in the epidemiological and infectious disease fields.* **Isolation** The term "isolation" is applied to **infected persons** and defined as: "Separation, for the period of communicability, of infected persons or animals from others under such conditions as to prevent or limit the transmission of the infectious agent from those infected to those who are susceptible or who may spread the agent to others." This concept includes "Strict isolation" to prevent transmission of particularly infection and harmful infections that may be spread by both air and contact and "Contact isolation" for less transmissible or serious infections and diseases. *Source: Porta, M., Ed. (2014). A dictionary of epidemiology, Oxford university press. This definition is consistent with the perhaps somewhat simpler definition in the World Health Organization International Health Regulations. The IHRs state that "isolation" means separation of ill or contaminated persons or affected baggage, containers, conveyances, goods or postal parcels from others in such a manner as to prevent the spread of infection or contamination The term "quarantine" is applied to people who may have been in **contact with infected people** (which includes the

presumption of contact for people arriving from a country or region where a particular infectious disease is thought to be circulating) and defined as:
"Restriction of the activities of well persons or animals who have been exposed to a case of communicable disease during its period of communicability (i.e., contacts) to prevent disease transmission during the incubation period if infection should occur."
Quarantine includes "Absolute or complete quarantine" which involves limiting freedom of movement of those exposed to a communicable disease for a period of time not longer than the longest usual incubation period of that disease in such manner as to prevent effective contact with those not so exposed. Modified quarantine is a selective, partial limitation of freedom of movement of contacts.

*Source: Porta, M., Ed. (2014). A dictionary of epidemiology, Oxford university press.

"Quarantine" is also defined in the World Health Organization International Health Regulations: "quarantine" means the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination"

We think it would be preferable for the Bill to use the terms "quarantine" and "isolation" in ways that are technically correct as this will assist in communication with health workers and with international agencies.

NOTES:

(1) We have not, however, checked if the above definitions are consistent with any use of the terms "isolation" and "quarantine" in any orders already made under the Health Act for COVID-19 purposes. If they are inconsistent it may be preferable to omit any definitions, and leave this issue for later clarification in a more comprehensive review of public health legislation (hopefully to follow).

(2) It may be useful to distinguish higher and lower levels of supervision for these processes. For example, "supervised quarantine" which takes place in a designated facility, and "self quarantine" where the affected person conducts this process in another place such as their home.

(3) Similarly, "supervised isolation" would be in a designated facility, usually a treatment facility such as a hospital, where the affected person was receiving health care, and "self isolation" would be where the infected person recovers in another place such as their home.

11 Orders that can be made under this act	We have identified one significant omission in the list of orders which can be made. While section 11 is clear that the kinds of orders under cl 11(1)(a) is not exclusive, ie the orders 'include' various matters 'without limitation', we nevertheless consider that clarity requires reference to what will be a major policy measure over the next months, namely contact tracing. The contact tracing provisions in subpart 5 of the Health Act will of course continue to apply. But these subpart 5 provisions are framed very clearly as measures for individuals, not groups of people. We recommend that section 11 specifically reference to orders being able to require persons to provide on request information on identity and contact details of contacts; along with details relevant to circumstances where and when possible transmission may have occurred; and ensuring a duty to comply with that request. Cl 23 does enable enforcement officers, as defined in the Bill, to direct a person to give various details, but this is (a) in order to exercise powers under that part of the Bill; and (b) in relation to individuals. We consider it would be more straight-forward , if appropriate, for orders under section 11 to require people generally to provide information details where appropriate.
Other matters (1)	We note that directions (and orders) will continue to be able to be made under the HA with respect to an *individual* with COVID-19/suspected COVID-19. We wonder if it would be helpful to make this clear, but do not recommend it either way.
Other matters (2)	The Health Act will continue to apply to people liable to quarantine; provisions that will continue to be very important in coming months. The question of when a person who is liable to quarantine becomes no longer liable is very vague; s 98(2) states 'every person liable to quarantine shall continue to be so liable until he is released from quarantine pursuant regulations made under this Act." However there are no relevant regulations which provide when a person is released from quarantine. One possibility would be to amend this section with regard to COVID-19: ie "every person liable to quarantine shall continue to be so liable until he is released from quarantine pursuant regulations made under this Act or, in the case of a person who is infected with COVID-19, or who may be so infected, until the medical officer or health protection officer is satisfied that the person no longer poses a risk to the public and may be released. This would still mean that the time limits in section 97E would apply.

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

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Professor Andrew Geddis, University of Otago, Faculty of Law: Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
8(c)	The PM's notice is not subject to any time limit (cf a notice under the Epidemic Preparedness Act (3 months), or declaration of civil defence emergency + transition (1 week + 90 days)). A notice under 8(c) similarly should lapse after 3 months, unless it is revoked earlier or renewed.
11(1)(b)(i), (ii), (iv) and (v)	The use of the word "**things**" to designate the object of these powers is problematic: - These powers are specific examples of the general power to impose requirements on "in relation to any places, premises, crafts, vehicles, animals, **or other things**." As such, the use of the word "things" might appear to apply the specific powers *only* to those objects/entities that are not "places, premises, crafts, vehicles, animals" - This problem can be seen by contrasting what "thing" assumedly means in cl 11(1)(b)(i), (iv) & (v) with what "thing" assumedly means in cl 11(1)(b)(ii). The former power seems intended to include places and premises. The latter power cannot be so intended. - The use of the word "thing" in these provisions also may be contrasted with the use of "places and premises" in cl 11(1)(b)(iii). Why is *this* power applied to a different object?
12(2)(c)(i) + cl 20(1)	The carry-over from the Health Act of "any premises that are, or any part of any premises that is, used **solely as a private dwellinghouse**" is problematic. It excludes premises where a person: - Carries out any form of work from home; or

	- Offers their home for temporary rent on services such as Air B&B. In short, the sharp distinction between "work" and "home" that may have existed in 1956 no longer applies in 2020. I note that an enforcement officer's power of entry under cl 20(1) cannot be exercised in relation to "a dwellinghouse", as opposed to premises that are "used solely as a private dwellinghouse". I also note that cl 12(c)(i) does not exempt marae from the cl 11(1)(b)(i) power, despite such premises being exempt from an enforcement officer's entry power under cl 20(1). This disparate treatment seems strange (why treat marae as equivalent to a "dwellinghouse" in relation to one power but not the other?).
cl 20(1)	This power of entry includes premises such as prisons, courts and parliamentary precincts. Should it?
cl 24(1)	It is not clear how directions are to be given under this clause – can they be verbal, or must they be written? While this matter may be dealt with by regulation, I think that the clause should make clear: - They must be made in writing; - They must set out the basis for the enforcement officer's "reasonable grounds to believe" that a section 11 order is not being complied with; - They must state the exact time on which they lapse; - They must inform the recipient of their right to challenge the order before a District Court judge; - The fact that any such direction has been issued must be reported to the Director General (similar to the requirement on police constables under cl 20(5)).
cl 24(3)	Where a Judge revokes a direction, this fact should be relayed to the Director General (it may be relevant to deciding whether to revoke an enforcement officer's authorisation).

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

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CARWYN JONES Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
4 – Purpose	Clause 4 should include explicit reference to equity, Te Tiriti o Waitangi/the Treaty of Waitangi, and/or human rights obligations. An equitable public health response is vital. Communities that are structurally oppressed will inevitably suffer disproportionately worse health outcomes and will also be disproportionately subject to the coercive state powers under this legislation if an equitable response is not embedded in the purpose of this bill. Similarly, Te Tiriti and human rights will be made unnecessarily vulnerable if not explicitly included as part of the purpose of the legislation. Again, this would have a disproportionate impact on structurally oppressed communities, including on the health of those communities. Suggested drafting: 4. The purpose of this Act is to support a public health response to COVID-19 that— (a) prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the contagious nature and potential for asymptomatic transmission of COVID-19); and

	(b) avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and (c) is co-ordinated, orderly, **equitable,** and proportionate; and **(d) is consistent with Te Tiriti o Waitangi/the Treaty of Waitangi and New Zealand's human rights obligations; and** **(e)** has enforceable measures, in addition to the relevant voluntary measures and public health and other guidance that also support that response.
9 – Minister may make section 11 orders	Clause 9(c) should require the Minister to consult with the Minister of Māori Development. This is to ensure that there is input on the impact of Māori communities of any proposed order. This is important both in terms of consideration of Te Tiriti obligations and to help understand the impact of an order on structurally oppressed communities. If equity, Te Tiriti, or human rights are not otherwise explicitly referred to in the cl 4, cl 9 should require the Minister to be satisfied that the order is equitable and consistent with rights obligations. Suggested drafting: 9 Minister may make section 11 orders (1) The Minister may make a section 11 order in accordance with the following provisions: (a) the Minister must have had regard to advice from the Director-General about— (i) the risks of the outbreak or spread of COVID-19; and (ii) the nature and extent of measures (whether voluntary or enforceable) that are appropriate to address those risks; and (b) the Minister may have had regard to any decision by the Government on how to respond to those risks and avoid, mitigate, or remedy the effects of the outbreak or spread of COVID-19 (which decision may have taken into account any social, economic, or other factors); and (c) the Minister must have consulted the Prime Minister**, the Minister of Māori Development,** and the Minister of Justice, and may have consulted any other Minister that the Minister of Health thinks fit; and (d) before making the order, the Minister must be satisfied that the order is **equitable, consistent with Te Tiriti o Waitangi/the Treaty of Waitangi and other human rights, and is** appropriate to achieve the purpose of this Act. (2) Nothing in this section requires the Minister to receive specific advice from the Director-General about the content of a proposed order or proposal to amend, extend, or revoke an order.

10 – Director-General may make section 11 orders	Any orders made urgently by the Director-General under cl 10 ought to be automatically referred to the Minister for confirmation (or revocation). This would enable broader considerations (including taking advice on equity and Te Tiriti implications) to be taken into account without limiting the ability for an initial response to be taken urgently where necessary. It may be appropriate to put a timeframe around this confirmation by the Minister. This confirmation process could be included in cl 10 or may be more appropriate to be included in cl 14.

s9(2)(a)

From: s9(2)(a)
Sent: Monday, 11 May 2020 9:45 PM
To: D Parker (MIN)
Cc: D Parker (MIN); s9(2)(a)
Subject: RE: Letter from the Attorney-General

Follow Up Flag: Follow up
Flag Status: Flagged

Dear David, thank you for the letter and attached notes. I have also spoken with the Peter Douglas in the Prime Ministers Office.

One amendment I would suggest is the removal of the word "Marae", Page 7, Clause 20 of the explanatory note. There is no reason why Marae should be inserted in deference to a non-Maori gathering place such as a hotel conference centre or a house birthday party – it could be seen as unfairly targeting Maori and the places where we gather. It also sets Maori against non-Maori in legislation intended for all. Ity also might infer that Maori are less trustworthy. I just don't think the word itself or its use is necessary.

Other than that happy to support the Bill if someone can get back to me on the use of Marae above.

Nga mihi,

Matthew Tukaki
Executive Director, New Zealand Maori Council
Chairman, New Zealand Maori Council Auckland District
Member, National Executive of New Zealand Maori Council
Chairman, the National Maori Authority Nga Ngaru

A: 1508/438 Queen Street, Auckland Central 1010, NZ
P: ATTENTION: Matthew Tukaki PO BOX 5451, Victoria Street West, Auckland 1142, New Zealand
s9(2)(a)
W: www.maoricouncil.com I www.maorieverywhere.com

From: D Parker (MIN) <D.Parker@ministers.govt.nz>
Sent: Monday, 11 May 2020 6:53 PM
To: D Parker (MIN) <D.Parker@ministers.govt.nz>
Subject: Letter from the Attorney-General

Kia ora

Please find attached correspondence from the Attorney-General seeking any comments you may have on the Exposure Draft of the COVID-19 Public Health Response Bill by 10am tomorrow.

Please also find attached:

- **the Exposure Draft; and**
- **a table that we request you use for any comments you may have.**

Kind regards

Office of Hon David Parker

Office of Hon David Parker MP | Attorney-General | Minister for the Environment | Minister for Trade and Export Growth | Associate Minister of Finance

Authorised by Hon David Parker MP, Parliament Buildings, Wellington

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

Instructions for filling out table feedback:

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Professor David Skegg (University of Otago) – Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
1 – Title	
2 - Commencement	
3 – Repeal of this Act	
11 – **Orders that can be made under this Act**	Subclause (1) (a) (v) – The second part of this sentence needs to be rephrased to fit with the stem sentence. Thus change "require specified activities to be carried out..." to "carry out specified activities..."

COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

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Graeme Edgeler's Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
2 - Commencement	With the deeming provisions continuing the section 70 orders as section 11 orders, there are criminal offences under the bill that apply immediately upon the bill entering into force. When this is should be clear. If the default position (the day after the date assent is granted, ie midnight) is not to apply, the bill should provide an exact time, not have enforcement of different criminal offences rely on evidence as to when the bill actually received the assent.
5 – Interpretation	Consideration should be given to providing a definition for COVID-19 as while COVID-19 is listed in schedules to the Health Act, it is not actually defined in the Health Act
8 – Prerequisites for all section 11 orders	The invocation of paragraphs (a) and (b) require, under their respective empowering statutes, notice to the House of Representatives, but Prime Ministerial notification under paragraph (c) does not, and should. It enables extraordinary powers not unlike those in the Epidemic Preparedness Act and the Civil Defence Emergency Management Act. Consideration should also be given to time-limiting such authorisation in the same manner in which epidemic notices are.
11 – Orders that can be made under this Act	The power available under clause 11(1)(a)(ii) to allow the Minister or Director-General to require persons to refrain from associating with specified persons appears unnecessary on its terms. It may be that there should be a power, but the concept of *association* is too broad, as the concept is well-knows to Courts etc. and requirements around non-association prohibit things like telephone contact. The idea of "specified persons" also appears to be in conflict with clause 12 which prohibits orders in respect of a specific individual. At the very least, if clause 11(1)(a)(ii) is to remain, and

	is to continue to use the term *association*, an example or examples of the types of orders anticipated should be provided (as occurs in clause 11(1)(a)(v)).
16 – Section 11 order made by Minister revoked if not approved by House of Representatives	Clause 16 should recognise and give effect to the power the House of Representatives has under section 119 of the Legislation Act 2019 to amend or replace secondary legislation.
21 – Power to give directions	Clause 21 provides that where an enforcement officer believes that a person is contravening or likely to contravene a section 11 order they may "... direct ***any*** person... " to stop, etc. This should instead begin: "... direct ***that*** person...". If there are no reasonable grounds to believe a person is contravening an order nor likely to contravene one, an enforcement officer should not have the power to direct them to do anything. If the power is written as it is to encompass a direction to eg a child's parent or guardian, where the child is the person who may be contravening the order, that should be made clear, instead of permitting orders against any person, even when that person is not the person contravening an order.
23 – Power to direct person to provide identifying information	The power under clause 23 is more extensive than the analogous powers in section 10(1)(a) or 32(c) of the Search and Surveillance Act, or even section 32(5)(a) of the Policing Act (eg it can require a person to name their employer and telephone number). A rationale should be provided establishing why additional personal information is needed than is needed at other police stops, or even upon arrest.
24 – Power to direct business or undertaking to close	The appeal provided in clause 24(2) should lie to the District Court, not to "a District Court Judge". While it is appropriate (and other laws will provide) that a judge, rather than say a registrar, will hear any appeal, they should do so in the exercise of the powers of the District Court. As well as being more constitutionally appropriate, this may avoid practical considerations around, for example, appeal rights, which lie against decisions of the *Court* (consider eg sections 124 and 128 of the District Court Act).
Schedule 1 – Transitional, savings, and related provisions	Under clauses 9 and 10 of the Bill, section 11 orders can be made by either the Minister, or the Director-General, but orders made by the Director-General may only apply within a single territorial district. As the current section 70 orders were made by the Director-General, but could not be made by him under this Bill (because they relate to more than one territorial authority district), if the bill is to continue these orders schedule 1 clause 1(1)(a) should either: (a) deem them as having been made by the Minister; or (b) record that they continue in effect despite section 10(a). I favour the former, but either way, to avoid confusion, clause 1(1)(a) should be clear whom the rules are deemed to have been made by, as different provisions apply with respect to amending, extending and revoking them (for example, if made by the Director-General, they only last for 30 days (from when, the date of continuation by this legislation, or the

	date they were made?), or if made by the Minister, they must be confirmed by the House etc.). It should be clear which rules apply. As a matter of drafting, schedule 1 is not actually divided into parts, so may not need a "Part 1" heading.
Provision not presently in the bill that could be included in the bill	Consideration should be given to adding this legislation to the list of laws in sections 12(3)(c) and 15(3)(c) of the Epidemic Preparedness Act that cannot be modified by modification orders and immediate modification orders.

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12 May 2020

Hon. David Parker
Attorney-General
Parliament
Wellington

s9(2)(a).

Tēnā koe Mr Attorney

Health Act Order Bill - Level 2

We have been advised that the Government is proposing to introduce the above legislation to ensure compliance with Level 2 requirements.

We understand that the Bill proposes that police have the warrantless power to enter private dwelling houses and Marae if there are "reasonable grounds to believe" that there is non-compliance with the 'no gathering' rules. The punishment for obstruction of an officer is 6 months imprisonment.

The New Zealand Bar Association supports the position of the New Zealand Law Society on this legislation. In particular, we believe that a provision if this kind, which has the potential to breach fundamental human rights, requires careful consultation and must not be included in the Bill until there has been an opportunity to consider it.

We oppose the passing of this provision under urgency. The long term effects of this provision on people who are subject to it should not be underestimated. They may be subject to breaches of their human rights and rights in respect of search and assembly/freedom of expression and movement.

We also support the Law Society's position in respect of the sunset clause and believe that two years is too long.

Finally, we support greater oversight and an external review panel to review orders as they are made, but reserve our position in respect of submitting the orders to the Epidemic Response Committee or Regulations Review Committee, until we have had more time to consider this legislation.

Nāku noa, nā

Paul Radich QC
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COVID-19 Public Health Response Bill

Comments on Exposure Draft

11 May 2020

Instructions for filling out table feedback:

- Please provide comments on provisions in the order they appear in the Bill (first couple of clauses completed for example).
- Please also identify the clause reference by number and title.
- Please include in the yellow box who the comments are made by.

[Malcolm Harbrow] Comments on COVID-19 Public Health Response Bill Exposure Draft

Clause Reference	Comment
5 - Interpretation	Does COVID-19 need a definition?
8 - Prerequisites for all section 11 orders	The triggers in s8(a) and (b) both require that the instrument be presented to the House, and that Parliament be recalled if necessary to debate it. The trigger in s8(c) should have the same safeguards.
11 - Orders that can be made under this Act	These orders are potentially extremely broad, and may *prima facie* violate the freedoms of assembly, association, movement, expression, and the manifestation of religion. Such violations may be demonstrably justified in a free and democratic society - I certainly think the current lockdown order is - but there needs to be some checks and balances to ensure that. Requiring the Attorney-General to give a formal report to Parliament on the consistency of each order when it is issued (or as soon as possible afterwards) would do that, and inform the House on any decision to confirm or disallow.
11(1)(a)(viii)	This seems immediately to engage the right to refuse to undergo medical treatment (s11 BORA). While Medical Officers of Health currently enjoy such powers under s70(1)(e) and (ea) of the Health Act, that is on an individual level, not on a mass-level, and as we have seen this week, people can still refuse. It is unclear why the Minister should be making medical decisions for people in the absence of either qualifications, or individualised circumstances, and it seems inappropriate and intrusive. This clause should be omitted. Local Medical Officers of Health can make such orders on

	individuals if required.
14 - Form, publication, and duration of section 11 orders	The requirement that the Minister keep such orders "under review" is too vague. An Epidemic Notice lasts only three months, unless renewed. The same should apply to s11 orders, and that would ensure that they were subject to regular, meaningful review, rather than it being an illusory exercise which never happens in practice.
16 - Parliamentary approval	This and s17 are good safeguards.
20 - Powers of entry	A warrantless entry power immediately engages the right to be free from unreasonable search and seizure (s21 BORA). Whether such a limitation is demonstrably justified in a free and democratic society will depend very much on the specific order that is being enforced. In the absence of such specifics, it seems generally unjustifiable, even where the purpose is to give a direction. Its like giving noise-control officers the power to kick down your door to merely tell you to turn the stereo down. The entry power needs to be limited in some way. Restricting it use to enforcing non-infringement offences (that is, things deemed serious enough to warrant criminal conviction) seems like an obvious limit. Written reports on warrantless entries seem like a good safeguard, but there's no requirement that they be reviewed, or that anything be done with them at all. At the least, statistics need to be published monthly or quarterly on the use of these powers, and what action they led to, so that parliament and the public can judge if they are being used appropriately.
23 - Power to direct person to provide identifying information	This power needs to be restricted explicitly to the purposes of issuign a direction, or when stopped at a roadblock. At present, police may only demand identifying particulars from those they have arrested, or intend to issue a summons to (s32 and 33 Policing Act), or from people in vehicles stopped in traffic stops or roadblocks. They may not do so merely when exercising a search warrant. There is no generalised power, and any demand obviously engages the right to freedom of expression (s14 BORA), which includes the right *not* to speak. So far, our society has judged that a generalised power to demand identifying particulars is *not* demonstrably justified in a free and democratic society (because "papers, please" is rightly seen as a hallmark of totalitarianism).
29 - Infringement Notices	Statistics need to be published monthly or quarterly on the use of these powers, and what action they led to, so that parliament and the public can judge if they are being used appropriately.

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[Professor Tracey McIntosh,] Comments on COVID-19 Public Health Response Bill Exposure Draft	
Clause Reference	**Comment**
1 – Purpose	The issue of proportionality is significant. To date Māori have collectively responded to the COVID-19 response in partnership with the Crown because of an acknowledgment of the devastating harm that uncontrolled community transmission would bring to the nation. There have been concerns around insufficient consultation and engagement with Māori and specifically not drawing on the expertise and knowledge that lies within Māori communities and with Māori public health experts and practitioners. However, compliance on the whole has been high and supportive and Māori communities have demonstrated culturally informed innovation to enhance collective security and maintain community safety. To ensure that there is no further erosion of goodwill it is critical that actions are proportionate and are enacted within a high trust environment. In particular there must be recognition of the significance of marae and their expression of mana motuhake. The Public Health Response Bill needs greater checks and balances to ensure that any actions, including enforcement actions, are culturally informed and sit clearly within a Tiriti framework. A recognition that marae are sovereign spaces and are treated accordingly is critical.
2 - Power to set enforceable measures	At present (under the Health Act 1956) the Director-General of Health is the decision maker for orders. The COVID-19 Public Health Response Bill would give the power to make orders to the MInister of Health. While acknowledging the rationale for such a change, concerns include the diminishing of the powers of expert led opinion and the potential for decision making to be seen as furthering political interests rather than public health interests. The issue of proportionality could be compromised when enforcement powers could over-reach or over-step their mark. Presently,

	the Director-General must confer with the Minister of Health and this may provide a greater safeguard than allowing the power to sit with the Minister. It is not clear that public health expertise would remain at the centre of decision making if powers were transferred to the Minister of Health. Indeed, input across ministries may actually dilute public health arguments as other interests converge. While wide input across Ministries is valuable a degree of independence from political decision making seems appropriate and necessary in a public health crisis. It is of great concern that the interests of Māori are not referred to at all in this section. Given that all manner of enforcement powers (and associated sanctions) have, historically and contemporaneously, been used disproportionately against Māori this absence raises alarm.
3 – Safeguards	The Minister must have regard to advice bit there is no legal compulsion to seek or take that advice. There again seems to be no regard to culturally informed evidence based decision making.
4 – Enforcement	As noted above enforcement and sanctions are disproportionately used against Māori. Police powers to enter marae without warrant demonstrate an extension of powers that does not foster better relationships between Police and Māori and does not signal the type of community partnership that would uphold the principles of the Treaty or facilitate a collective response to COVID-19. Indeed such actions are likely to harm collective responses. The proposed Bill recognises that there are special protections afforded to private dwelling houses and marae in that only constables can enter but there is no recognition of culturally informed practice. Actions should be proportionate and the potential of abuse of powers are significant. There does not seem to be any evidence of consultation with iwi or hapū in this section.
5- Departmental disclosure statement	No links provided to allow scrutiny of this Bill
	Overall my concern is that the interests of Māori are not taken into account. Given the necessity of Māori being fully engaged to ensure a positive health response this lack is significant.