



Briefing

MANDATORY RECORD KEEPING: COMPLIANCE AND ENFORCEMENT ISSUES

To: Hon Chris Hipkins
Minister for COVID-19 Response

Date	2/08/2021	Priority	High
Deadline	3/08/2021	Briefing Number	DPMC-2021/22-47

Purpose

This paper seeks your direction on the options for an obligation to keep records for the purpose of contact tracing in view of the compliance and enforcement implications, to inform a paper you intend to take to Cabinet Social Wellbeing Committee on 11 August 2021.

Recommendations

- Note** you are proposing that record keeping be mandated at all Alert Levels in the following settings:
 - visitors to courts and tribunals, indoor public facilities, indoor event facilities and aged care and health facilities;
 - customers at exercise facilities, massage parlours, beauticians, barbers, hairdressers and hospitality venues; and
 - attendees of social gatherings (except where held at private residences).
- Note** there are several outstanding compliance and enforcement issues related to this work, which officials are seeking your direction on before mandatory record keeping proposals are considered (alongside mandatory face covering proposals) by the Cabinet Social Wellbeing Committee on 11 August 2021.
- Note** the Director-General supports introducing a record keeping mandate in a limited set of close-confined business settings (e.g. restaurants and hair salons), where there are benefits to ensuring consistent records are made given the potential risk of undetected transmission in these settings, alongside implementing non-regulatory options.

Who should bear record keeping obligations?

4. **Note** any record keeping obligation borne by a person attending a place or gathering would create significant privacy, compliance monitoring and enforcement issues, and the significant risk of any requirement on individuals to keep records undermining contact tracing efforts in practice.

5. **Note** DPMC officials recommend that any new record keeping obligation should be borne only by the person responsible for the place or gathering that a person attends, requiring them to take reasonable steps to ensure that a record is kept, because of the issues outlined in recommendation 4 above.

6. **Agree** that if Cabinet agrees to mandate record keeping, the legal obligation should be borne by **EITHER**:

6.1. the person responsible for the place or gathering that a person attends, making them responsible for taking steps to ensure that a record is kept and meaning they will need to have systems and processes in place to ensure, so far as is reasonably practicable, that people scan the QR code or provide details in a contact tracing record (DPMC officials' recommended option);

YES / NO

OR

6.2. the person attending the place or gathering, making them responsible for taking reasonable steps to make and keep a record either by using the NZ COVID Tracer App to scan a QR code or by creating an alternative contact tracing record;

YES / NO

OR

6.3. the person responsible for the place or gathering that a person attends and the person attending the place or gathering (a combination of 6.1 and 6.2 above).

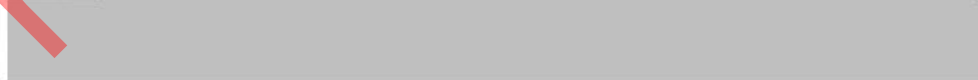
YES / NO

How would compliance with an obligation on individuals be monitored and enforced?

7. **Note** if an individual record keeping obligation were to be enforced, ^{s9(2)(h)}


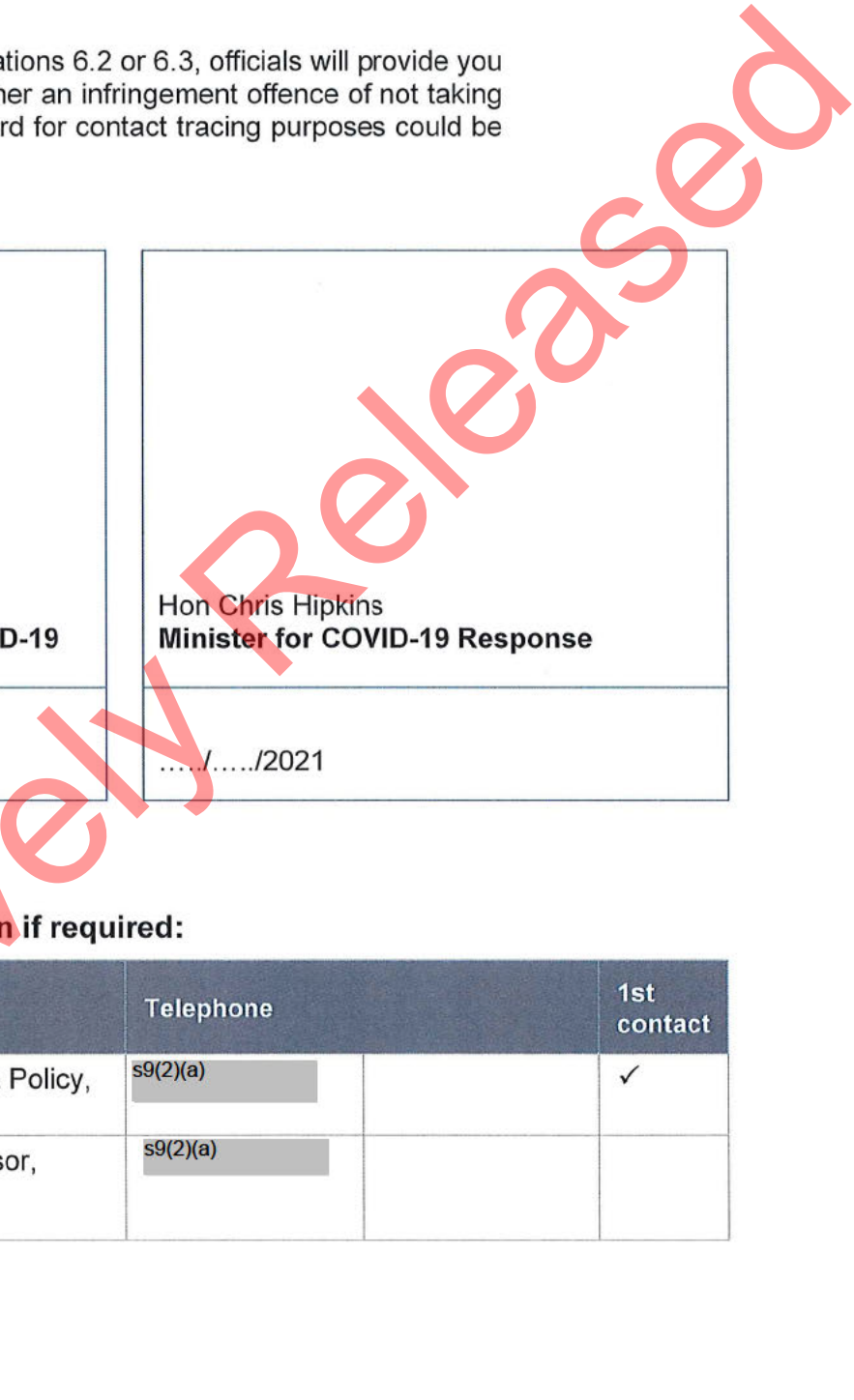


8. **Note** if you agree to recommendation 6.2 or 6.3, officials will provide further advice ^{s9(2)(h)}



Should an infringement offence be created?

- 9. **Note** DPMC officials advise that an infringement offence would provide a more proportionate response (compared to the existing criminal conviction) to non-compliance with any individual record keeping requirement and would align with existing enforcement options for mandatory face coverings.
- 10. **Note** if you agree to recommendations 6.2 or 6.3, officials will provide you with separate advice about whether an infringement offence of not taking reasonable steps to make a record for contact tracing purposes could be created.

 Ruth Fairhall Head of Strategy and Policy, COVID-19 Group, DPMC	 Hon Chris Hipkins Minister for COVID-19 Response
28/...../2021/...../2021

Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
Ruth Fairhall	Head of Strategy & Policy, COVID-19 Group	s9(2)(a)	✓
Ashlee Bowles	Senior Policy Advisor, COVID-19 Group	s9(2)(a)	


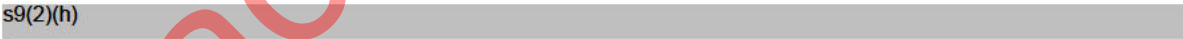
Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

Proactively Released

MANDATORY RECORD KEEPING: COMPLIANCE AND ENFORCEMENT ISSUES

Executive Summary

1. Agencies have raised significant issues relating to the monitoring and enforcement of mandatory record keeping for contact tracing purposes. Your direction on these issues is sought before the proposals are considered by the Cabinet Social Wellbeing Committee on 11 August 2021.
2. Specifically, we are seeking direction on whether record keeping obligations are placed on people responsible for a place or gathering, people attending a place or gathering, or both. Officials provided previous advice on this proposal [DPMC-2020/21-1174 refers] in which you indicated your preference for a dual obligation. Work on mandatory record keeping has progressed significantly since you indicated this preference. Accordingly, DPMC officials now recommend obligations are only borne by people responsible for a place or gathering, due to the privacy issues associated with any obligation placed on the individual, and challenging monitoring and enforcement issues.
3. If individuals bear an obligation, officials also seek direction on whether the obligation arises where the individual fails to make a record upon entering or exiting the relevant place, at the time that they are in the relevant place, or within a specified timeframe after visiting that place. If it is decided to place a record keeping obligation on individuals, DPMC officials advise that the record should be made while at a place where record keeping requirements apply (i.e. before the person exits the place). This option may also mitigate the risk of record keeping becoming a perverse incentive, where fear or knowledge of non-compliance may prevent people coming forward for contact tracing purposes.
4. s9(2)(h)

5. s9(2)(h)

officials would provide further advice on the appropriateness of creating an infringement offence of not making a record. If this requirement is not specified as an infringement offence in the Order, it would instead be a criminal offence to intentionally fail to comply with the requirement. An infringement offence is considered more proportionate to the offending, and aligns with enforcement options available to address non-compliance with face covering requirements.
6. Your direction on these questions is being sought urgently so it can inform the draft Cabinet paper 'Mandatory Face Coverings and Record Keeping for Contact Tracing Purposes'. A draft of this paper will be provided to you by Thursday, 5 August 2021 for Ministerial consultation ahead of consideration at Cabinet Social Wellbeing Committee on 11 August.

Background

7. Officials briefed you on options to mandate face coverings and record keeping in some settings in New Zealand on 2 July 2021 [DPMC-2020/21-1174 refers].
8. In relation to record keeping for contact tracing purposes, we understand you are currently proposing that record keeping be mandated at all Alert Levels in the following settings:
 - a) Visitors to courts and tribunals, indoor public facilities (e.g. libraries, museums and swimming pools), indoor event facilities (e.g. cinemas, theatres, concert venues and casinos) and aged care and health facilities.
 - b) Customers at exercise facilities, massage parlours, beauticians, barbers, hairdressers and hospitality venues (e.g. cafes, restaurants, bars and nightclubs).
 - c) Attendees of social gatherings e.g. weddings, funerals, faith-based services (except where held at private residences).
9. The new mandatory requirement would be created by amending the current section 11 Order under the Act (currently, the COVID-19 Public Health Response (Alert Level Requirements) Order (No 8) 2021).
10. Several outstanding compliance and enforcement issues need to be resolved before it is progressed further. Accordingly, we are seeking your direction on the following questions before you take this proposal back to Cabinet for decision:
 - a) Whether record keeping obligations are placed on the person responsible for the place or gathering that a person attends, the person attending the place or gathering, or both?
 - b) If individuals bear an obligation, whether the obligation arises where the individual fails to make a record when they enter or exit the relevant place, at the time that they are in the relevant premises, or within a specified timeframe of visiting the place?
 - c) s9(2)(h) [REDACTED]
 - d) If individuals bear an obligation, s9(2)(h) [REDACTED] you agree to receive further advice on the creation of an infringement offence of not making a record?
11. The Director-General acknowledges that there are certain benefits to applying a record keeping mandate in some spaces, especially in crowded and closely confined spaces where it is hard to identify people around you. The experiences from other jurisdictions (such as Australia) has indicated that transmission of the Delta variant can occur from fleeting encounters of unknown people, particularly in poorly ventilated indoor settings. Therefore, introducing a record keeping mandate for certain close-confined business settings may bring overall benefits for our contact tracing system while limiting some of the issues and unintended consequences that may result from a mandate.
12. On balance, the Director General supports having the obligation placed on responsible businesses/PCBUs, given that a potential mandate on individuals could create a disincentive for individuals to record keep in non-mandated areas and impact on our ability

to contact trace. s9(2)(h)

13. The Director-General notes that while introducing non-regulatory options would avoid the issues and unintended consequences associated with a mandate, the potential for a limited mandate applying to those close-confined businesses settings, alongside implementing non-regulatory options to remove barriers to record keeping/scanning, could increase record keeping adherence and improve our ability to contact trace. Furthermore, it is important that businesses and customers/individuals have the necessary support and information to enable them to comply and adhere to the requirement.
14. DPMC notes that non-regulatory measures introduced to date have not been particularly successful in encouraging consistent record keeping in recent months, as indicated by low rates of QR code scanning when the perceived risk of community transmission is low. For example, on 26 July 2021, there were 2.9 million registered users of the NZ COVID Tracer App, but only 540,512 QR code poster scans nationwide. This is why DPMC officials consider mandatory record keeping a viable, and arguably necessary, option to improve record keeping behaviours.
15. Any mandatory record keeping requirement would continue to sit alongside, and be complemented by, non-regulatory approaches to encourage and promote record keeping. Examples include the Unite Against COVID-19 campaign and new-look QR poster that went live on 10 July 2021; work to further specify QR code quantity, quality and location; planned updates to the NZ COVID Tracer App (including the ability to receive reminders to backfill your diary and use previous QR code scans to manually backfill a diary, linking manual entries to contact tracing alerts); and collateral that can be ordered from the United Against COVID-19 website (such as free hard copy record keeping booklets, available in 27 languages).

Who should bear record keeping obligations?

16. If a legal obligation were created, the first question that arises is who should bear that obligation. In the context of mandatory record keeping, there are three broad options:
 - a) The person responsible for the place or gathering that a person attends is responsible for taking steps to ensure that a record is made and kept. This is the approach that we adopted for Alert Level 3 for certain businesses and at Alert Level 2 for organisers of social gatherings.
 - b) The obligation is placed on the person attending the place or gathering to take reasonable steps to make a record. This is the approach that we have adopted at Alert Level 2 for attendees of social gatherings.
 - c) A combination of both option (a) and (b), with obligations borne by both the person responsible for the place or gathering and the person attending that place or gathering.
17. Options (b) and (c) would be the most resource intensive from a compliance monitoring and enforcement perspective. Police would be primarily responsible for enforcement of any new record keeping requirement, with other enforcement officers empowered to play a role if needed, particularly if options (b) or (c) were preferred.
18. You have previously agreed in principle to option (c), requiring individuals to make a record for contact tracing purposes and that people responsible for a place or gathering be

required to have systems and processes to ensure, so far as is reasonably practicable, that a contact tracing record is created [DPMC-2020/21-1174 refers]. This briefing updates you on the further work we have completed on mandatory record keeping particularly on who should bear record keeping obligations.

Obligations on businesses and organisers

19. Under this option, the person responsible for the place or gathering that a person attends will be responsible for taking steps to ensure that a record is kept. In practice, this will involve having systems and processes in place to ensure, so far as is reasonably practicable, that people scan a NZ Tracer App QR code or provide details in a contact tracing record. This would enable and encourage (but not require) individuals to create a record of their visit to the place or gathering.
20. This new requirement will go beyond current record keeping-related requirements placed on a person in control of an applicable workplace at all Alert Levels, to ensure that a copy of a QR code for the workplace is displayed in a prominent place.¹ The new requirement would essentially reflect what has been required of people responsible for a place or gathering at Alert Level 3, when certain businesses have been required to have systems and processes in place to ensure, so far as is reasonably practicable, that each person who enters the place scans the QR code or provides their details in the alternative contact tracing record.
21. Having systems and processes in place to ensure a record is kept will mean having alternative record keeping options available (e.g. a ballot box to provide paper copies of contact information or a tablet for individuals to complete an online form), and encouraging customers or visitors to make a record where practical (e.g. this could include staff being stationed at the entrance asking customers to scan a QR code). What is reasonably practicable will be different for different places and gatherings, e.g. depending on their size and number of staff working.
22. Under current legislation, if a person responsible for the place or gathering intentionally failed to comply with this new requirement, they would commit an offence and be liable on conviction to a fine not exceeding \$4,000 or term of imprisonment of up to 6 months.² Failing to display a QR code as outlined above, and failing to comply social gathering Alert Level 2 record keeping requirements,³ will continue to be an infringement offence carrying an infringement fee of \$300 or court imposed fine not exceeding \$1,000.⁴
23. Placing the obligation on businesses and organisers avoids some of the problems related to obligations also being placed on individuals, such as what to do if an individual refuses to scan a QR code or provide contact details. This is because there would be no mandatory requirement for individuals to make a record. This approach also has the advantage of

¹ Clauses 8 and 9 of the COVID-19 Public Health Response (Alert Level Requirements) Order (No 8) 2021 refer.

² Pursuant to section 26 of the COVID-19 Public Health Response Act 2020.

³ At Alert Level 2, organisers of social gatherings are required to have systems and processes in place to ensure, so far as is reasonably practicable, that each person who attends the gathering either scans the QR code for the gathering or provides their details in the alternative contact tracing record provided by the organiser.

⁴ Note that if passed, the COVID-19 Public Health Response Amendment Bill 2021 will amend the COVID-19 Public Health Response Act 2020 to increase maximum penalties contained in section 26 of the Act. This includes increasing the maximum penalties for an infringement offence to include an infringement fee of \$1,000 (currently \$300) and court imposed fine of \$3,000 (currently \$1,000), with the maximums being \$3,000 and \$9,000 respectively for a body corporate [SWC-21-MIN-0067 refers].

being enforceable without requiring a person to divulge their records (i.e. it is less intrusive for the individual).

24. However, there are risks with placing the record keeping obligation on those responsible for a relevant place or gathering:

a) There would be an additional burden on businesses to maintain systems and processes for ensuring record keeping (e.g. such as having employees stationed at the entrance to ask people to scan a QR code). While it is not practical for Government to fund, or advise on these systems and processes in detail, guidance will be made available on the Unite Against COVID-19 website to support businesses' compliance. This guidance will draw on feedback received from stakeholders and interested agencies, including from the Office for Disability Issues and Ethnic Communities.

b) s9(2)(g)(i)



c) Employees being exposed to abuse from customers. s9(2)(g)(i)



Obligations on individuals

25. Under this option, an individual visiting or attending a place or gathering will be required to make a record for contact tracing purposes, which will include using the NZ COVID Tracer App to scan a QR code or by creating an alternative contact tracing record (in the event that they do not have the App or it is not reasonably practicable for them to use it). The current requirements in the COVID-19 Public Health Response (Alert Level Requirements) Order (No 8) 2021 will continue to apply, which will go some way to supporting an individual's compliance with any new mandatory requirement.⁶

26. If a person were identified as intentionally having failed to comply with this new mandatory record keeping requirement, they would commit an offence and be liable on conviction to a fine not exceeding \$4,000 or term of imprisonment of up to 6 months under existing legislation.⁷ There is also an outstanding question about whether an infringement offence should be created for failing to make a record for contact tracing purposes, which is discussed in the next section of this paper.

⁵ <https://privacy.org.nz/tools/knowledge-base/view/552>.

⁶ Clause 8 and 9 of the COVID-19 Public Health Response (Alert Level Requirements) Order (No 8) 2021 refer.

⁷ Pursuant to section 26 of the COVID-19 Public Health Response Act 2020.

27. The advantages of this approach are that it reduces the burden for business (they would have limited additional obligations under this option) and employees being less exposed to abuse from customers.
28. However, there are the following outstanding risks and issues with this approach.

How non-compliance is identified

29. Officials consider there are three broad options, including requiring the record to be made upon entry or exit from the place, while at the place, or within a specified time period (e.g. within a week) after visiting the place. The first option is considered problematic from a public health perspective, as it may encourage crowding at the point of entry or exit. The last option is problematic because people may forget to create a record and this option would also potentially require an individual to present their record of movements for an entire week, which is likely to be considered unnecessarily intrusive.
30. For these reasons, DPMC officials recommend that a person be required to either scan or record details before exiting a relevant place. It is acknowledged that with this added flexibility (i.e. not requiring the record to be made at the point of entry or exit), the ability to monitor compliance through observation (e.g. observe an individual making a record) is more difficult, making enforcement more challenging. For example, when an enforcement officer arrives at a place where record keeping obligations apply, a person whose compliance is checked at entry, and who has not made a record of their visit to that place, may simply indicate that they were intending to make a record on their way out of the place.

Equity considerations

31. It will be important to have alternative record keeping methods available that can be used by different population groups/communities (e.g. those without a smartphone) and to accommodate those with disabilities, to ensure these groups are able to comply with the law.
32. As previously noted, collateral can be downloaded from the Unite Against COVID-19 website, including hard copy record keeping booklets available in 27 languages, providing an alternative record keeping method for those without smart phones. The ability to order these booklets is a strong mitigation to this equity concern. However, there would still be privacy concerns related to carrying a written diary on your person. DPMC officials have also engaged with agencies that represent the interests of minority groups who we understand experience high rates of digital exclusion to understand whether there are any alternative record keeping options that are more fit for purpose and should be more strongly encouraged over others. The results of this engagement will be reflected in general guidance produced on the Unite Against COVID-19 website.

Unintended consequences that pose a risk to contact tracing abilities

33. There is a risk that people may be deterred from disclosing their presence at a location out of fear of admitting that they had failed to comply with the obligation to keep a record of their visit and fear of potential punishment. Further, there may be some individuals who will not want to record their activities due to their unlawful migrant status and the fear of being found that they are in New Zealand illegally.
34. A key mitigation for these issues would be that when contact tracers request people's record keeping information for contact tracing purposes, this can legally only be used for

the effective management of infectious diseases.⁸ This constraint, and the use of any information required to be provided to enforcement officers, would need to be clearly communicated publicly to allay any fears of being culpable of these other offences.

Complexity

- 35. When considered in conjunction with the proposed mandatory face covering settings (which will apply in different places), record keeping requirements may make what is expected of an individual difficult to understand. This may result in higher rates of unintentional non-compliance.
- 36. To mitigate this concern, all public queries received by government agencies will be directed to the Unite Against COVID-19 website (or equivalent helpline) for accurate information about where and when record keeping is required. Any new record keeping requirement will also be supported by Unite Against COVID-19 information campaigns and engagement with affected businesses and locations, including FAQs for employers and staff, and advice about what information gathered for record keeping purposes will be used for. Key information will be distributed through industry and sector networks, with information on the Unite Against COVID-19 website translated into 27 languages.

Enforceability (discussed further in the enforcement powers section of this paper below)

- 37. It is unlikely that enforcement officers will be able to maintain a constant presence to observe compliance or respond to every report of non-compliance. There will be challenges enforcing the requirement to make a record while at, or before exiting, a place, if this is your preferred option for point of compliance.

s9(2)(g)(i)

38. s9(2)(g)(i)

Bill of Rights Act 1990 considerations

39. s9(2)(h)

Obligations on both business and individuals

- 40. Under this option record keeping obligations will be borne by both business and individuals. Individuals will be required to make a record and businesses will be required to have systems and processes to ensure, so far as is reasonably practicable, that a contact tracing record is created.
- 41. The considerations outlined above for the business-only and individual-only option would apply to this option as well.

⁸ Note that it is an offence not to comply with a direction to provide required information about contacts to contact tracers, pursuant to section 92ZZH of the Health Act 1956.

Conclusion

42. On balance, DPMC officials recommend the obligation is borne by business and organisers only. The compliance monitoring and enforcement issues related to any individual record keeping obligation (discussed in more detail in the following section) cannot be sufficiently mitigated to make an individual obligation viable.

43. s9(2)(g)(i)



How would compliance with an obligation on individuals be monitored and enforced?

44. s9(2)(h)



45.

46.

47.

⁹ Note that this position was conveyed to DPMC prior to our receipt of the Director-General of Health's latest advice on the record keeping proposals outlined in this briefing. We will provide updated advice from OPC once OPC has had a chance to consider the Director-General's latest advice.

s9(2)(h)

s9(2)(h)

48. s9(2)(h)

49. s9(2)(h)

50. s9(2)(h)

Measures to mitigate risks of abuse in respect of any enforcement powers

51. s9(2)(g)(i)

52. s9(2)(h)

53.

Should an infringement offence be created?

54. If a mandatory record keeping obligation were introduced, and an obligation is borne by individuals, there is a question around the appropriate infringement regime for addressing any identified non-compliance with this new requirement.

55. Any new requirement would be provided for by amending the current section 11 Order under the Act. The infringement regime for non-compliance with COVID-19 Orders is provided for in section 26 of the Act. There are two categories of offence covered by the section, each with corresponding maximum penalties:

- a) **Infringement offence:** a person who fails to comply with a COVID-19 requirement that has been identified as an infringement offence commits an offence and is liable for an infringement fee of \$300 or a court imposed fine not exceeding \$1,000.¹¹
 - b) **Criminal offence:** a person who intentionally fails to comply with a COVID-19 order is liable *on conviction* for a fine not exceeding \$4,000 or a term of imprisonment not exceeding six months.
56. Once any record keeping requirement comes into effect, enforcement action for non-compliance would be limited to criminal prosecution unless an infringement offence is created. In other words, enforcement action would be limited to addressing intentional failures to comply with the requirement to make a record. This non-compliance would be addressed by an enforcement officer (who will be limited to the New Zealand Police if these are incidents of wilful non-compliance) laying a charging document and the individual who allegedly committed the offence appearing in court. If found guilty by the court, the person could be sentenced to pay a fine of up to \$4,000 or to a term of imprisonment not exceeding six months.
57. An infringement offence would provide a more proportionate response (compared to the criminal conviction) to non-compliance with any individual record keeping requirement, and would also align well with how non-compliance with current face covering requirements are addressed. If you decide that a record keeping obligation should be borne by the person attending a place or gathering, officials will provide you with further advice about whether an infringement offence can be created of not making a record.

58. s9(2)(h)

Next Steps

59. Pending your decisions on this briefing, officials will prepare a draft Cabinet paper seeking agreement to proposals for mandatory face coverings and record keeping for contact tracing purposes. A draft paper will be provided to your office by Thursday 5 August for Ministerial consultation and consideration by the Cabinet Social Wellbeing Committee on 11 August 2021.

Consultation

60. The Ministry of Justice, Ministry of Health, Crown Law Office, Parliamentary Counsel Office, New Zealand Police and the Office of the Privacy Commissioner have been consulted on this briefing.

¹¹ Note that if passed, the COVID-19 Public Health Response Amendment Bill 2021 will amend the COVID-19 Public Health Response Act 2020 to increase maximum penalties contained in section 26 of the Act. This includes increasing the maximum penalties for an infringement offence to include an infringement fee of \$1,000 (currently \$300) and court imposed fine of \$3,000 (currently \$1,000).

Communications

61. Any decisions made in response to this briefing will be communicated when Cabinet's decisions on face covering and record keeping requirements are announced, once these have been considered by Cabinet.

Proactively Released