



## Proactive Release

The following documents have been proactively released by the Department of the Prime Minister and Cabinet (DPMC), on behalf of the Minister for COVID-19 Response, Hon Dr Ayesha Verrall:

### **Proposed COVID-19 Public Health Response Legislation**

The following documents have been included in this release:

**Title of paper:** Proposed COVID-19 Public Health Response Legislation  
(CBC-22-SUB-0048 refers)

**Title of paper:** Regulatory Impact Statement: Future of the COVID-19 Public Health Response Act 2020

**Title of minute:** Proposed COVID-19 Public Health Response Legislation  
(CBC-22-MIN-0048 refers)

**Title of minute:** Proposed COVID-19 Public Health Response Legislation  
(CAB-22-MIN-0446 refers)

**Title of minute:** Report of the Cabinet Business Committee: Period Ended 7 October 2022  
(CAB-22-MIN-0434 refers)

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant section of the Act that would apply has been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

### **Key to redaction codes:**

- Section 9(2)(f)(iv), to maintain the confidentiality of advice tendered by or to Ministers and officials;
- Section 9(2)(g)(i), to maintain the effective conduct of public affairs through the free and frank expression of opinion; and
- Section 9(2)(h), to maintain legal professional privilege.

## In Confidence

Office of the Minister for COVID-19 Response

Cabinet

## Proposed COVID-19 Public Health Response Legislation

### Proposal

- 1 This paper seeks Cabinet policy approval to continue some of the powers currently provided for in the COVID-19 Public Health Response Act 2020 (the Act) for two years, from enactment of a bill to amend and extend the Act. Proposals to narrow the scope of these powers have also been provided.

### Relation to government priorities

- 2 This paper concerns the Government's response to COVID-19.

### Executive Summary

- 3 The Act was introduced in 2020 to provide an extraordinary set of legislative powers that have enabled the Government's response to COVID-19. It provides the primary legal framework for implementing the mandatory public health measures required to manage this public health crisis, and is time-limited. The House of Representatives will next debate a motion to continue the Act in December 2022, with the Act self-repealing in May 2023 unless repealed sooner.
- 4 As the risk presented by COVID-19 subsides, retaining the full suite of powers currently in the Act is no longer justified. Many of the extraordinary powers we needed to support earlier phases of our emergency response can now be removed. I am therefore proposing to significantly narrow the powers available in the Act, with only a small subset of powers retained for a further two year period (from enactment of the bill to amend and extend the Act) to support the ongoing management of COVID-19.
- 5 Continuing these powers will mean we retain the tools to implement a small number of mandatory public health measures if needed during this period, while work is progressed to design and implement a future emergency legislative framework that is suitable for all likely infectious diseases threats, drawing on lessons from the current pandemic. A two year continuation of these powers is proposed to enable extensive public and stakeholder engagement on the design of the proposed future legislative framework. The continuation period will also ensure findings from any formal review of the Government's response to COVID-19 can inform the design of this future framework.
- 6 The powers retained in the Act will be much narrower than those currently contained in the Act, with many of the more novel and rights-limiting powers

proposed to be removed. Narrowing the powers in this way will ensure the legislation supporting our COVID-19 response remains proportionate, streamlined and as simple as possible. I propose retaining all existing pre-requisites and conditions for the exercise of these powers via the making of COVID-19 Orders. These include the use of the power being limited to emergency circumstances, consultation requirements before an Order is made, parliamentary scrutiny after an Order is made, and a requirement to be satisfied that the proposed Order is not, or is a justified, limit on rights in the New Zealand Bill of Rights Act 1990.

7 To determine which provisions should continue, officials completed a clause-by-clause analysis of the Act. A two-step triage process was applied, considering:

7.1 which provisions within the Act would likely be required to deliver the COVID-19 Post Winter Strategy and the Variants of Concern Strategic Framework, and

7.2 of those powers identified in 7.1, which are particularly coercive and rights-limiting and/or could be re-implemented via emergency legislation passed under urgency in future, if required.

8 Based on this exercise, it is proposed the following core provisions are retained:

8.1 A ministerial Order making power (currently section 11), narrowed so that the purposes for which COVID-19 Orders can be made is limited to implementing the mandatory reserve public health measures in the below table. Appendix A provides an overview of which public health measures will continue to be able to be implemented under this proposed narrowed Order making power. The current requirements and pre-requisites for making these Orders, as well as the provisions relating to matters such as their prescribed form, publication and effect, will continue.

Context	Public Health Measures
In the community	<ul style="list-style-type: none"><li>• Self-isolation (for cases, household contacts, close contacts), masks, capacity limits.</li></ul>
Travellers to New Zealand	<ul style="list-style-type: none"><li>• Mask use on inbound flights to New Zealand</li><li>• Pre-departure and/or post-arrival testing requirements</li><li>• Requirement for airline/ship operator to prevent passengers who have not complied with pre-departure travel requirements</li><li>• Not boarding a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19</li><li>• Self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere),</li></ul>

	<ul style="list-style-type: none"><li>• Provision of travel history and contact information to support contact tracing.</li></ul>
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- 8.2 Enforcement powers to give directions to provide identifying information; enter land, buildings, craft and places without a warrant; and direct a business or undertaking to close.
- 8.3 Infringement and criminal offences, as well as associated maximum penalties to address non-compliance with requirements. I propose to reduce the maximum penalties for both infringement and criminal offences in line with guidance from the Legislation Design and Advisory Committee and the Ministry of Justice.
- 8.4 Part 4 of the Act, which relates to amendments to the Oranga Tamariki Act 1989 that will continue to be required so long as infringement offences are included in the Act.
- 8.5 Preliminary and administrative provisions, including repeal, interpretation, and transitional provisions.
- 9 To improve proportionality and transparency of COVID-19 powers, and streamline the Act further, I recommend:
- 9.1 Removing the power for the Director-General of Health to make COVID-19 Orders.
- 9.2 Removing the powers relating to Managed Isolation and Quarantine Facilities (MIQ).
- 9.3 Amending section 18(1) to specifically list the types of enforcement officers (in addition to constables) that may exercise enforcement powers under the Act.
- 9.4 Removing some enforcement powers that have been infrequently used throughout the current pandemic or which are superfluous in the context of the narrowed ministerial Order making power noted in paragraph 8.1. These include the ability for warrantless entry to private dwellings (and marae); the power to direct a person to produce evidence of compliance with specified measures; and powers to close roads, public places and stop vehicles.
- 10 I intend to implement the proposals in paragraphs 8 and 9 by extending the term of the Act, and amending it to repeal or narrow powers as outlined in the preceding paragraphs. Doing so will ensure only those powers that are absolutely necessary to support our ongoing management of COVID-19 over the next two years are retained within the Act. Most baseline measures to implement the COVID-19 Post Winter Strategy do not require empowering legislation; however, all reserve measures do and some of these measures (including mandatory masks and self-isolation) may need to be scaled up and down throughout the two-year continuation period as COVID-19 risk levels change. My proposals will continue to enable this.

- 11 If there is an escalation of COVID-19 risk after the Act is amended, and a broader suite of mandatory public health measures were needed, emergency legislation could be passed under urgency to enable these additional measures to be implemented. This will include if we need to, for example, stand up MIQ facilities, or re-implement border restrictions, domestic movement restrictions, or domestic vaccination requirements, including vaccine mandates or mandatory use of My Vaccine Pass. The time to pass this urgent legislation would however push out timeframes to implement these measures, including the timeframes indicated in the Readiness Plan to re-establish MIQ facilities (which are likely to be delayed by at least 3-4 weeks) and the resulting length of time self-isolation would instead need to be relied upon. The booking process and systems required to set up and safely run MIQ facilities rely on the legislative settings, so these would need to be in place before booking and re-establishment could start, with a time lag (of at least a further 3-4 weeks) before people could be accommodated.
- 12 As demonstrated by this MIQ example, my proposals will remove several rights-limiting measures from the amended Act. However, this is achieved at the expense of pace to reimplement these measures in most cases. If urgent containment of COVID-19 is necessary after the Act is amended, existing powers in the Health Act 1956 (the Health Act) could be used to support initial containment efforts while emergency legislation is passed, but only to the extent equivalent powers in the COVID Act are not available. For example, Health Act powers could be used to implement urgent containment measures, such as some movement restrictions (e.g. population-wide stay at home orders), if the COVID-19 situation had escalated to the point of again being considered an urgent public health crisis (e.g. to respond to a new variant of concern). There may, however, be a public expectation that powers more tailored to COVID-19 should be available after the length of time we have been living with this disease, potentially impacting social licence for measures implemented using these Health Act powers. With respect to COVID-19, where available and appropriate, the use of ministerial COVID-19 Orders is more desirable.
- 13 I consider implementing public health measures via COVID-19 Orders (secondary legislation) preferable to amending primary legislation to include a statutory requirement relating to the public health measure. For example, a requirement in primary legislation that all people must wear face masks in specified circumstances. This is principally because of the checks and balances I propose to retain relating to the exercise of this ministerial Order making power as outlined above at paragraph 6.
- 14 Officials carried out limited stakeholder engagement on the proposals outlined in this paper. Engagement occurred with Māori, and stakeholder groups in the transport, business, and tourism sectors; the disabled community (including tangata whaikaha); faith-based communities; and seniors. Overall, most stakeholders indicated support for the narrowing of powers in the Act to improve its proportionality, while retaining the ability to implement a limited set of public health measures. However, some business sector representatives did express concern about retaining the ability to implement public health

measures due to their impact on business. More detailed feedback from this engagement is outlined in the population implications section below (paragraphs 95 - 102).

- 15 Subject to Cabinet's agreement with the proposals, I intend to pass a Bill to extend and amend the Act. There are options around how urgently the Bill is enacted, weighing pace, demands on House time, and engagement and consultation opportunities. The options are:
- 15.1 Option 1: pass the Bill under urgency before the end of December 2022. The December 2022 notice of motion debate to continue the Act would be avoided under this option, but there would be no select committee process. The Bill would likely be passed in the penultimate sitting week of 2022 (6-8 December), with the Act extended to December 2024.
- 15.2 Option 2: introduce the Bill in 2022, with the first reading before Christmas and enactment by early May 2023. Under this option, there would be a four-month select committee process. The House would need to debate a motion to continue the Act until May 2023, meaning introduction of the new Bill and the debate to continue the Act would occur simultaneously in early December 2022. Under this option, the Act would be extended to May 2025.

## Background

- 16 The Act was established as bespoke legislation to manage a nuanced and proportionate response to COVID-19. It provides the primary legal framework for enabling the use of mandatory public health measures as part of managing the COVID-19 pandemic. The Act is time-limited, with the House next considering whether to continue the Act in December 2022 and it ultimately self-repealing in May 2023 (if not repealed earlier).
- 17 A legislative amendment is required to enable the Government to continue to respond to COVID-19 following the current Act's repeal, including providing for the powers to impose mandatory public health measures to mitigate public health risk for future variants of concern or respond to an escalating COVID-19 domestic situation.
- 18 The Act has previously been amended as follows:
- 18.1 August 2020: to enable social, economic, and other factors to be considered where relevant and provide for recovery of MIQ costs.
- 18.2 December 2020: to provide for less restrictive measures under Alert Levels to be applied sooner.
- 18.3 November 2021: to extend the term of the Act and make a range of technical fixes ensuring flexibility and clarity of application, and to improve transparency, accountability, and enforceability of MIQ.

- 19 In its consideration of the paper ‘COVID-19 Strategy for Post Winter’ on 29 June 2022, which set out objectives for a post-winter strategy for managing COVID-19 [SWC-22-MIN-0118 refers], the Social Wellbeing Committee (SWC) noted that:
- 19.1 reserve measures are additional tools that can be used, with caution in emergency circumstances, to reduce COVID-19 transmission if an outbreak is likely to cause an unacceptable health impact on people and systems
- 19.2 reserve measures are likely to limit rights under the New Zealand Bill of Rights Act 1990 and most require empowering legislation to be implemented, and
- 19.3 I, as Minister for COVID-19 Response, intended to introduce legislation to transition the reserve measures to a more enduring emergency legislative framework, and ensure appropriate legislation is in place to temporarily respond to future pandemics while Parliament considers more enduring bespoke solutions, for enactment by May 2023.
- 20 SWC agreed that the timing of the transfer of the All-of-Government strategy and policy coordination function be retained at the Department of the Prime Minister and Cabinet (DPMC) until the legislative reform work noted in paragraph 19.3 is complete, with functions transferred to Manatū Hauora no later than 30 June 2023 [SWC-22-MIN-0118]. Cabinet later confirmed this decision [CAB-22-MIN-0251].
- 21 Work to develop an enduring emergency legislative framework for responding to future epidemics and pandemics that reflects the lessons learned from COVID-19 has begun, led by DPMC and Manatū Hauora. This work intersects key existing epidemic response legislation including the Act, the Health Act and the Epidemic Preparedness Act 2006.
- 22 I am now proposing to progress this future preparedness work on a slower track to the amendments outlined in this paper. Deferring the enactment of separate broader legislation that is suitable for all likely infectious diseases threats will enable more extensive engagement with groups likely to be most affected by infectious diseases and the response to them, including Māori and tāngata whaikaha Māori, and with national and international communicable disease experts. This approach is more consistent with the intent of the Pae Ora (Healthy Futures) Act 2022 (the Pae Ora Act) and will better ensure that the resulting legislative framework is future-proofed and enduring. A longer select committee process also supports increased public engagement and more extensive scrutiny of proposals.
- 23 Additionally, deferring the enactment of legislation suitable for all likely infectious disease threats will enable recommendations from any review of the Government’s COVID-19 response to feed into the design of any future legislative framework.

- 24 Immediate lessons from the current pandemic response will not inform the legislative framework for some time as a result of this deferral. It is also not guaranteed that the powers I am proposing to continue will be available for the full two-year continuation period. This is because the amended Act will retain the provisions requiring the House to resolve to continue it periodically (currently, this resolution process is occurring on a six-monthly basis for the Act).<sup>s9(2)(h)</sup>
- 25 Deferring the more substantive legislative reform work may also have implications for Cabinet’s decision to retain the All-of-Government policy and strategy function within DPMC until the completion of this work. The future framework work will need to be accommodated on the Manatū Hauora legislative work programme.

**Overview of proposals**

- 26 The proposals in this paper seek to balance the need to remove particularly novel and rights-limiting powers as COVID-19 risk subsidies, against the need to ensure some powers are retained to support our ongoing management of COVID-19 over the next two years. To determine which provisions should continue in the amended Act, officials completed a clause-by-clause analysis of the Act. A two-step triage process was applied, considering:
- 26.1 which provisions within the Act would likely be required to deliver the COVID-19 Post Winter Strategy and the Variants of Concern Strategic Framework, and
  - 26.2 of those powers identified in 26.1, which are particularly coercive and rights-limiting and/or could be re-implemented via emergency legislation passed under urgency in future, if required.
- 27 On the basis of this exercise, I am proposing the following:

Area of proposed change	Primary objective
Continuing to provide for COVID-19 powers in legislation	To maintain the ability to make COVID-19 Orders for mandatory (reserve) public health measures if required to support the Government’s ability to continue to respond to COVID-19 and any future variants of concern.
Limiting the scope of the continued powers	To better support simplicity, transparency and proportionality of COVID-19 legislation, including: <ul style="list-style-type: none"><li>• narrowing the purposes for which the Minister can make COVID-19 Orders</li><li>• removing the ability for the Director-General of Health to make COVID-19 Orders</li><li>• removing powers relating to MIQ</li><li>• narrowing available enforcement powers</li><li>• narrowing the types of enforcement officers that may exercise enforcement powers under the Act, and</li></ul>



	<ul style="list-style-type: none"><li>• reducing maximum penalties.</li></ul>
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28 These proposals will ensure that the Government has specific limited tools to respond to COVID-19 until a replacement legislative framework is implemented. This includes enabling a suite of mandatory public health tools that are most likely to be used during the two-year continuation period to implement the Post Winter Strategy, while also ensuring these powers remain proportionate to the risk posed by COVID-19.

**Continuing to provide for COVID-19 powers in legislation**

29 The Act has a self-repeal clause, which acts as a safeguard to ensure that the ability to implement public health measures for COVID-19 that might impact on the New Zealand Bill of Rights Act 1990 is only in place as long as is necessary to fulfil the purposes of the Act.

30 Amendment is required to extend the term of the Act to provide for the continued powers, to ensure the Government can continue responding to COVID-19 surges, including any future COVID-19 variants of concern, using mandatory public health (reserve) measures if needed. I am therefore seeking to continue some COVID-19 powers for two years. I intend to achieve this by amending, and extending the term of, the Act with the extension period ending two years after enactment of the bill to implement this extension and amendment.

31 Continuing these powers means a response to any future COVID-19 variant of concern or escalation in the current outbreak that requires use of mandatory public health measures can be quickly operationalised. Preliminary and administrative provisions similar to those included in the Act will also be retained, including largely the same purpose, interpretation and repeal provisions.

32 I propose to narrow the scope of the continued powers (discussed below). If a broader suite of reserve measures is required after the Act is amended (e.g. a measure not listed as being able to be implemented using this revised ministerial Order making power in Appendix A), emergency legislation could be passed under urgency to enable the implementation of these measures. The Health Act powers (discussed next) could be used to implement urgent containment measures, if appropriate.

*If the COVID-19 powers lapse our response would rely on existing Health Act powers, which may not support the ongoing management of COVID-19*

33 Should the Act expire without replacement legislation, we would need to revert to relying on the generic provisions of the Health Act to support the ongoing management of COVID-19. Section 70 of the Health Act provides broad powers to impose public health restrictions, but only in emergency circumstances. Those powers can, in theory, be used to impose large scale restrictions, including self-isolation of COVID-19 cases, household contacts or close contacts, but only in an urgent public health crisis. For example, the powers could likely be used to respond to a new variant of concern for a short

period while bespoke legislation is passed under urgency. However, the powers would unlikely be available to respond to typical peaks and troughs of COVID-19 cases as this would not be considered an urgent public health crisis.

34 Part 3A of the Health Act provides powers to impose public health restrictions only on named individuals. Any restriction imposed must be proportionate to the risk that is presented by the person; and must be the minimum measure required for the presenting risk. These powers can be used in non-emergency situations, but on an individual-by-individual basis.

35 The Health Act powers do not support the implementation of all mandatory (reserve) public health measures. For example, they do not enable mandatory face mask requirements or capacity limits to be imposed.

36 [Legally privileged] <sup>s9(2)(h)</sup>

[Redacted content]

*Our response to future epidemics and pandemics (other than COVID-19) will continue to rely on these existing Health Act powers*

38 Even with replacement legislation to provide for COVID-19 powers, our response to future epidemics and pandemics (other than COVID-19) will rely on these existing Health Act provisions before replacement emergency legislation that is suitable for all likely infectious disease threats is implemented. This is because the powers proposed for continuation are specific to COVID-19 and cannot be used to respond to other infectious diseases. I am advised these existing Health Act powers will be sufficient to support an *initial* response to any new epidemics or pandemics in this interim period, as they allow for containment measures such as isolation of all positive cases in an urgent public health crisis. Parliament can then consider whether urgent bespoke legislation may be needed to support our ongoing management of the new disease.

*Safeguards around the exercise of continued COVID-19 powers will be retained*

39 The COVID-19 powers proposed for retention are significant with respect to the imposition on the rights of freedoms of New Zealanders, so should not be in place longer than is necessary. To support this, I propose to also retain the following safeguards:


- 39.1 Section 3 of the Act provides that its ongoing continuance requires a resolution to be passed by the House of Representatives within a 90-day period, or some other longer period that is resolved, which to date has been six-monthly.
- 39.2 COVID-19 Orders can only be made under the Act while one of the following prerequisites are in effect – an active Epidemic Notice under the Epidemic Preparedness Act 2006, a section 8 authorisation by the Prime Minister or a State of Emergency (or transitional period) under the Civil Defence and Emergency Management Act 2002.<sup>1</sup>
- 39.3 Use of COVID-19 Orders also requires that before making an Order, the Minister for COVID-19 Response:
- 39.3.1 has had regard to advice from the Director-General of Health regarding the risks of the outbreak or spread of COVID-19 and the nature and extent of measures that are appropriate to address the risks
  - 39.3.2 is satisfied that the Order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990
  - 39.3.3 has consulted the Prime Minister, the Minister of Justice and the Minister of Health, and
  - 39.3.4 is satisfied that the Order is appropriate to achieve the purpose of the COVID-19 Act.
- 40 The safeguards relating to the use of powers to make COVID-19 Orders mean that during the proposed two-year continuation period, there may be periods where the continued powers are not being used, either because there is no justification for a COVID-19 Order and/or the prerequisites for exercising the powers have not been met. It is important to retain the ability to make Orders in case mandatory (reserve) public health measures are necessary and justified.

#### **Limiting the scope of the continued powers**

- 41 I propose to reduce the scope of some powers continued in the amended Act. The powers I propose to narrow are largely those powers that have been identified by officials as not being required to deliver the Post Winter Strategy or Variants of Concern Strategic Framework in the next two to three years. In addition, I am also proposing to narrow or remove some powers that may be required to implement this strategy or framework, but which are considered particularly novel or rights-limiting and/or could be re-implemented using emergency legislation passed under urgency in future, if needed.

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<sup>1</sup> s9(2)(h)



42 The following proposals will assist in ensuring the powers supporting our ongoing COVID-19 response are as proportionate, streamlined and simple as possible. Some of the more rights-limiting or contentious powers within the current Act will be removed, while still enabling escalation of a public health response if required.

*Narrowing the purposes for which the Minister to make COVID-19 Orders*

43 I propose to narrow the scope of the ministerial Order making power currently in section 11 of the Act, limiting the purposes for which COVID-19 Orders can be made to implementing the public health measures in the following table. The measures are divided into whether they are used in the community, or in relation to travellers to New Zealand. The use of the measure in future would continue to depend on its proportionality to the COVID-19 risk at the time to limit and reduce COVID-19 transmission.

44 The below listed mandatory public health reserve measures provide the necessary 'toolbox' to draw on in response to future changes in risk and have served us well at various stages of the pandemic.

Context	Public Health Measures
In the community	<ul style="list-style-type: none"><li>• Self-isolation (for cases, household contacts, close contacts), masks, capacity limits.</li></ul>
Travellers to New Zealand	<ul style="list-style-type: none"><li>• Mask use on inbound flights to New Zealand</li><li>• Pre-departure and/or post-arrival testing requirements</li><li>• Requirement for airline/ship operator to prevent passengers who have not complied with pre-departure travel requirements</li><li>• Not boarding a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19</li><li>• Self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere),</li><li>• Provision of travel history and contact information to support contact tracing.</li></ul>

45 An overview of which public health measures can and cannot be implemented under the narrower power I am proposing be retained is provided as Appendix A. I propose to retain the existing safeguards in the Act relating to the exercise of this power (prerequisites, requirements, and parliamentary scrutiny), as well as the provisions relating to the form, publication and effect of these Orders. Information management provisions relating to information collected for contact tracing purposes will also be retained.

46 The ability to implement the specific measures listed in paragraph 44 has been retained because these measures are most likely to be needed to implement the Post Winter Strategy and Variants of Concern Strategic Framework over the medium term (next two to three years). They are also

likely to be those measures that we want to be able to implement quickly should COVID-19 risk escalate. For example, to contain transmission by requiring self-isolation or by mitigating the risk of a new variant entering the country by implementing testing requirements at the border. Re-implementing these measures via emergency legislation passed under urgency is therefore less viable.

- 47 The section 11 Order making power is currently very broad, enabling implementation of a much wider suite of public health measures than those listed in paragraph 44. By limiting these measures many of the more rights-limiting interventions we have relied upon during the pandemic to date will no longer be available to us including the ability to implement movement restrictions beyond self-isolation requirements (lockdowns and regional boundaries), vaccination requirements (including mandatory use of My Vaccine Pass and vaccination mandates), record keeping for contact tracing purposes, or border restrictions to limit entry into the country.
- 48 Some powers have been excluded from the narrowed Order making power because they are no longer considered necessary to implement the Post Winter Strategy or Variants of Concern Strategic Framework in the medium term. For example, the power to requisition laboratory consumables and capacity in section 11(1)(g), which was introduced in 2021 as part of contingency planning for COVID-19 testing, will be removed under these proposals. I do not consider it proportionate to retain this power given the introduction of self-testing methods (including Rapid Antigen Tests) for COVID-19 and laboratory testing capacity feeding into planning for future variants preparedness.
- 49 A narrower Order making power will also exclude the ability to implement public health measures that require significant implementation lead-in time, and therefore could be re-implemented via emergency legislation in future, if needed. For example, the ability to impose vaccine mandates in the Act will be removed under these proposals. It is unlikely that vaccine requirements would require implementation at pace, given the time required to establish efficacy of vaccines for a potential new variant of concern, secure stock and set up associated vaccination roll-out infrastructure. If required in future, vaccine requirements could be re-implemented through emergency legislation passed under urgency. Officials will work with the Parliamentary Counsel Office to develop template legislation (based on existing models) that could be used in this situation.
- 50 Narrowing the ministerial Order making power as proposed will result in several other provisions in the current Act not being retained in the amended Act. For example, provisions for compensation or payment relating to laboratory requisitions and provisions relating to a person conducting a business or undertaking (PCBUs) and workers affected by vaccination mandates (including the section 11AB Order making power in relation to specified work and related provisions about duties for PCBUs and workers in Subpart 2A) will no longer be required.

*Removing the ability for the Director-General of Health to make and amend COVID-19 Orders*

- 51 Section 10 of the Act provides a mechanism for the Director-General of Health to make COVID-19 Orders in urgent circumstances, within certain boundaries, without any requirement to consult other Chief Executives or Ministers. This mechanism includes safeguards which require the Director-General of Health to be satisfied that the Order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill Rights Act 1990.
- 52 I propose to remove the power for the Director-General of Health to make and amend COVID-19 Orders. This power was intended to enable implementation of mandatory public health measures at pace, in situations where urgent containment may be required. It has not been used to date due to the speed at which the ministerial Order making power has been exercised when necessary. The ministerial Order making power is the preferable mechanism to use, as it contains additional safeguards such as consultation requirements.
- 53 Depending on the scale, if mandatory public health measures are required under greater urgency than possible with the ministerial Order making power to contain an escalating public health risk, the Health Act contains powers for Medical Officers of Health to implement public health restrictions, including section 70 in emergency circumstances and Part 3A (for named individuals) and with greater scope than the proposed narrowed ministerial Order making power.

*Removing powers relating to Managed Isolation and Quarantine Facilities*

- 54 In both the Post-Winter Strategy and Variants of Concern Strategic Framework, self-isolation has been identified as the *primary* form of isolation that will be implemented when necessary and proportionate, with MIQ facilities likely only needed in limited, worst-case scenarios. I am proposing to remove all provisions relating to managed isolation and quarantine in the continued Act on the assumption that re-establishing MIQ facilities, or managing the return of an emergency evacuation flight, would be unlikely. If either of these events do occur, the MIQ Readiness Plan will be activated, and the timing for placing people in facilities is likely to be pushed out by at least 3-4 weeks beyond current timeframes to build in time to pass MIQ-related legislative powers under urgency.
- 55 The Act currently contains broad powers for managed isolation and quarantine, which enable the Ministry of Business, Innovation and Employment (MBIE) to activate its managed isolation and quarantine readiness plan if required. However, if there is an escalation of COVID-19, it is unlikely an elimination strategy, and resulting need to implement managed isolation and quarantine facilities at pace, would be pursued. MBIE's readiness plan notes that self-isolation would be relied upon in the initial phase of a future response, while facilities are stood up again. Self-isolation

would need to be relied upon for a further period if empowering legislation to re-establish facilities and associated systems needed to be reintroduced under urgency.

- 56 I do not consider the retention of MIQ provisions in the amended Act justified or proportionate. If there was a need to re-establish MIQ facilities in future, the legislative provisions to enable this could be included in emergency legislation passed under urgency. This would result in self-isolation needing to be relied on for an extended period while this legislation was passed and the initial phases of re-establishing facilities and systems commenced.
- 57 Repealing the 'cost recovery' provisions in subpart 3A of Part 2 of the Act will remove existing powers relating to the making of regulations for the recovery of MIQ facility costs. Processing cost recovery, waivers and complaints is still an active process for MBIE. Transitional provisions will be included in the amended Act to ensure the ability to recover existing MIQ facility debts is maintained.

*Narrowing available enforcement powers*

- 58 I am proposing to remove three enforcement powers from the legislation that replaces the Act, to support the ongoing proportionality of emergency powers relating to COVID-19. These include:
- 58.1 the ability for warrantless entry to private dwellings (and marae) in section 20(3) (the reporting requirement in section 20(8) would also be removed),
  - 58.2 the power to close roads and public places and stop vehicles in section 22, and
  - 58.3 the power to direct a person to produce evidence of compliance with a specified public health measure.
- 59 I consider the remaining enforcement powers in the Act need to be retained to ensure the enforceability of public health measures able to be implemented under the Act. These include powers to:
- 59.1 enter any land, building, craft, vehicle, place or thing (with or without a warrant)
  - 59.2 give directions, e.g. to stop or take an activity and provide identifying information, and
  - 59.3 direct a business or undertaking to close e.g. to mitigate public health risk due to non-compliance with public health measures.
- 60 Using non-compliance with capacity limits as an example, the ability to enter a premises enables enforcement officers to give directions to reduce the number of people on premises in line with the prescribed capacity limit. Without the power in 59.1 the officer would need to rely on cooperation from the person responsible for the premises to give the direction in 59.2. If the

direction was not complied with, the officer could issue an infringement notice for this non-compliance. However, without the power in 59.3, the officer could not close the premises to mitigate the heightened transmission risk created by that breach. Collectively, the powers in paragraphs 59.1 – 59.3 work together to enable the public health objectives of the Act to be achieved, while also enabling penalties to be imposed for non-compliance.

61 Although a warrantless entry power, the power described in 59.1 is less rights-limiting than the power proposed for removal in 58.1 as it does not enable entry to private dwellings. Further, this power can be exercised by enforcement officers other than constables (e.g. WorkSafe) who advise these powers have a deterrent effect, regardless of how often they may have been used during the current pandemic.

62 Retaining enforcement powers ensures that, if required, mandatory public health requirements can be enforced. *[Legally privileged]*<sup>s9(2)(h)</sup>

*Removing powers for warrantless entry to private dwellings (and marae)*

63 The Act permits warrantless entry to dwellings, if a constable has reasonable grounds to believe that people have gathered there in contravention of a COVID-19 Order and entry is necessary for the purpose of giving a direction. If the warrantless entry power is exercised, a report must be produced on its exercise to an authorised person within New Zealand Police.

64 This power of warrantless entry engages the right to be secure against unreasonable search or seizure under section 21 of the New Zealand Bill of Rights Act 1990. To date it has been justified as being critical to quickly stop gatherings in contravention of Orders that could contribute to the spread of an outbreak of a quarantinable disease.

65 The National Iwi Chairs Forum noted in July 2022 that Māori communities have raised concerns with this warrantless entry power. Communities consider it is in contravention of Te Tiriti o Waitangi, in particular Article Two which outlines that tāngata whenua have tino rangatiratanga over Iwi owned land and resources.

66 During the current pandemic, Police advise they have responded to a large number of complaints about gatherings potentially contravening COVID-19 restrictions. However, in responding to complaints about gatherings at dwellings, it was rare for powers of entry to be relied on. This was because of Police's graduated approach that focusses on education, engagement, and encouragement and, as a last resort, potential enforcement.

67 If the power is removed and gathering limits or in-home isolation or quarantine requirements are implemented during the two-year continuation period, the ability to enforce potential breaches of these requirements at private dwellings (and marae) would be more limited – relying on cooperation by the occupants



of that dwelling and/or a search warrant. This includes the ability to investigate reports of large house parties potentially breaching capacity limits. As the power has only been used two times to support investigations of gathering breaches during the current pandemic, this risk is unlikely to be significant.

- 68 Given the decreasing COVID-19 risk, our shift away from an elimination approach to managing COVID-19, and the impact this power can have on communities, I do not consider it proportionate to retain the power for warrantless entry to private dwellings (and marae) in the amended Act.

*Removing the power to close roads and public places, and to stop vehicles*

- 69 Section 22 of the Act also provides the ability for authorised enforcement officers to restrict public access (with or without vehicles) to any road or place within an area specified in a COVID-19 Order. To date, this power has principally been used to enforce movement restrictions when “lockdowns” have been in place.

- 70 I propose to remove this enforcement power as it is no longer needed to enforce the public health measures able to be implemented under the narrowed section 11 ministerial Order making power.

- 71 Removing this power will result in consequential amendments to the definition of enforcement officer which, in relation to section 22, includes a broader class of persons. For example, this power could be exercised by a Māori warden, nominated representative of an iwi organisation, Pacific warden, or community patroller. The definition of enforcement officer will no longer include these people. In the current Act, this broader class of authorised enforcement officers could only exercise powers in section 22 of the Act.

*Removing the power to direct a person to produce evidence of compliance*

- 72 Section 23A enables an enforcement officer to direct a person to produce evidence of compliance with Subpart 2A of the Act, which relates to worker vaccination requirements and worker duties associated with that requirement. In particular, to verify these vaccination requirements.

- 73 My proposals to narrow the scope of the ministerial Order making power in the amended Act will exclude the ability to implement worker vaccination requirements. This enforcement power, which is specifically linked to this public health measure, is therefore no longer required.

*Narrowing the types of enforcement officers able to exercise enforcement powers*

- 74 Section 18(1) permits the Director-General of Health to authorise a suitably qualified and trained person or class of persons who are employed or engaged by the Crown or a Crown entity, to carry out the function and powers of an enforcement officer. The authorisation must specify the functions and powers that can be carried out by the person or class of persons.

- 75 I propose to specify the type of persons permitted to be authorised to carry out enforcement functions, consistent with the authorisations used to date in

the pandemic, which in addition to Police include: WorkSafe inspectors, Aviation Security officers, Customs officers, members of the Armed Forces, and COVID-19 Enforcement Officers for the Maritime Border.

76 Stating the powers and what type of enforcement officer may exercise them narrows the scope of this provision while still ensuring that police activity is supported where appropriate. The identified enforcement officers who have been authorised in the COVID-19 response to date represent classes of people who meet the requirements for qualifications and training. Although this limitation may impact the flexibility of authorising additional enforcement officers and the potential resource available to respond to COVID-19 in the future, it is not anticipated that additional groups to those authorised in the response to date would be required. Flexibility is retained by enabling the Director-General of Health to specify the functions for which these classes are authorised to undertake based on the response needs and public health measures in place at the time the power is required to be used.

*Reducing maximum penalties*

77 I am proposing to retain offences (infringement and criminal) and penalties. However, to further support ensuring the continued powers are proportionate for potential continued use, I propose reducing the maximum penalties that are currently contained in section 26 of the Act, as follows:

Type of penalty (maximums stated)	Current		Proposed reduction	
	Individual	Any other person (e.g. companies)	New proposed penalty for Individuals	New proposed penalty for any other person
<i>Infringement offence fee</i>	\$4,000	\$12,000	\$1,000	\$3,000
<i>Infringement offence maximum court imposed fine</i>	\$12,000	\$15,000	\$3,000	\$9,000
<i>Criminal offence maximum fine</i>	\$12,000	\$15,000	\$5,000	\$15,000
<i>Criminal offence maximum imprisonment period</i>	6 months	-	6 months	-

78 Penalties in the Act relate to:

78.1 *Infringement offences*: generally specified in COVID-19 Orders. They are strict liability offences that enable an immediate infringement notice and fee to be issued. Infringement offences are an administratively efficient way of managing breaches that are straightforward and do not require consideration of evidence and intent by the court. Throughout the COVID-19 response, infringement offences have been used for breaches of requirements such as border measures.

78.2 *Criminal offences*: specified in the Act as being an intentional failure to comply with a COVID-19 Order, for example, intentionally breaching lockdown rules to travel domestically. These are prosecutable offences that apply to more complex or serious breaches, where a case may be

heard in the court to determine whether the defendant is guilty of the alleged offence, and if so, the judge sets the penalty within the maximum limits set in the Act.

- 79 Retaining offences ensures that, if required, mandatory public health requirements can be enforced. [*Legally privileged*]<sup>s9(2)(h)</sup>
- 80 The maximum penalties currently contained in the Act were significantly increased in 2021 from, for example, an infringement fee of \$300 for individuals to \$4,000, and maximum court imposed fine of \$1,000 to \$12,000. This reflected the context of the COVID-19 response at the time, where non-compliance could result in far-reaching consequences by way of community transmission and the response required to contain an outbreak.
- 81 The COVID-19 Public Health Response (Infringement Offences) Regulations 2021 were enacted to create a sliding scale of penalties and ensure that the maximum penalties only apply to offences likely to cause significant harm in the community (e.g. failure to comply with a quarantine-free travel requirement) and low penalties correspond to administrative offences.
- 82 While the regulations ensure that the penalties are proportionate, it is important that the potential maximum penalties that could be imposed are recalibrated to reflect the reduced risk and to better align with recommended practice. This proposal balances the potential for high penalties to continue to be justified in a future outbreak, depending on the nature of a variant of concern, with the greater impact high penalties have on lower socio-economic groups. Financial penalties are inherently inequitable given they have a proportionately larger impact on lower socio-economic households.
- 83 The proposed new maximum infringement offence penalties are at the upper limit of what the Legislation and Design Advisory Committee recommend for infringement offence fees, which is also supported by advice from the Ministry of Justice. Keeping the maximum penalties relatively high signals the continued seriousness of breaching an Order relating to management of COVID-19 and the significant impact this breach could have across communities. The continued ability to make regulations to graduate penalties ensures penalties can remain proportionate for lower risk and higher risk offences, within the maximums. I therefore propose to retain the power to make regulations to graduate penalties. Other provisions relating to infringement offences (including regarding who may issue an infringement notice, the form the notice and any reminder notices must take, and payment of infringement fees) in the Act should also be retained.

### Proposed process and timeline for the proposed Bill

84 Following discussions at Cabinet Business Committee on 3 October 2022, Parliamentary Counsel Office have commenced drafting of the bill to amend and extend the Act in anticipation of Cabinet approval of the policy proposals outlined in this paper. Manatū Hauora submitted drafting instructions to Parliamentary Counsel Office for the drafting of this Bill on Friday 7 October.

85 Enactment of a solution is required before the Act repeals to ensure there is no period without sufficient legislative backing to continue managing COVID-19, and to implement mandatory public health measures if required. There are options to achieve this, weighing pace of legislative process, demands on House time, and engagement and consultation opportunities. The options are:

85.1 Option 1: pass the Bill under urgency before the end of December 2022. The December 2022 notice of motion debate to continue the Act would be avoided under this option, but there would be no select committee process. The Bill would likely be passed in the penultimate sitting week of 2022 (6-8 December), with the Act extended to December 2024.

85.2 Option 2: introduce the Bill in 2022, with the first reading before Christmas and enactment by early May 2023. Under this option, there would be a truncated four-month select committee process. The House would need to debate a motion to continue the Act until May 2023, meaning introduction of the new Bill and the debate to continue the Act would occur simultaneously in early December 2022. The Act would be extended to May 2023.

86 Estimated timelines for both options are provided in the below table. The option 2 timeframes are dependent on House time being available and approval being granted for a shortened Select Committee period.

s9(2)(f)(iv)		

s9(2)(f)(iv)		

87 I am also requesting authorisation for me, as Minister for COVID-19 Response, to make any necessary policy decisions that may arise during the drafting process, that are consistent with the policy intentions agreed by Cabinet.

**Financial Implications**

88 There are no direct financial implications resulting from the proposals in this paper.

**Legislative Implications**

Continuing the COVID-19 powers outlined in this paper will require legislative amendment, including to extend the term of the current Act and to amend it to narrow or remove the powers that are no longer justified or required.

89 I am seeking a bid for drafting priority on the 2022 Legislative Programme for a Bill to continue COVID-19 powers. The proposed priority is Category 2, to be passed within the calendar year. This is to enable enactment prior to either the Act being considered for continuation by the House of Representatives in December 2022, or when it is due to self-repeal in May 2023 (if not repealed earlier).

**Impact Analysis**

**Regulatory Impact Statement**

90 A Regulatory Impact Statement has been prepared to support the proposed COVID-19 Public Health Response Act Amendment Bill 2022 and is attached to this Cabinet paper.

91 A Manatū Hauora panel has reviewed the Impact Statement titled *‘Future of the COVID-19 Public Health Response Act 2020’*, dated September 2022 and has provided the following comments. The panel considers that the Impact Statement meets the quality assurance criteria. The Impact statement is clear and concise. The policy problem and options are clearly identified.

92 The Regulatory Impact Statement will be published on Manatū Hauora and DPMC websites.

## Climate Implications of Policy Assessment

- 93 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

## Population Implications

- 94 Before my decision to defer work to design and implement a future emergency epidemic legislative framework, DPMC undertook initial engagement with key priority population and sector groups to gauge their experiences of the powers available under the Act. Groups engaged with included the National Iwi Chairs Forum, disability representatives and community groups for Pacific peoples, along with wider stakeholder groups including faith-based community organisations, hospitality groups, the business and retail sector, trade unions, tourism representatives, the aviation and maritime sectors and local government.
- 95 In general, stakeholders' concerns were mainly focused on the pace of decision-making to make or amend COVID-19 Orders, the lack of consultation with affected communities, and the minimal lead in time to implement resulting public health restrictions. More recent engagement on the proposals in this paper indicated some hesitancy around the retention of legislative powers to implement public health measures, including from business groups who noted the inescapable economic impact of public health measures for which they would seek support. The importance of effectively communicating any changes to the international tourism sector was emphasised, as any misinterpretation of New Zealand's stance on continued COVID-19 measures would pose a reputational risk to New Zealand's tourism.
- 96 Disability representatives and the National Iwi Chairs Forum expressed more specific concerns, which are noted under the '*Impact on disabled people*' and '*Impact on Māori*' headings below. During the engagement that took place following Cabinet Business Committee's consideration of this paper on Monday 3 October, representatives from Taituarā indicated no concerns with the latest proposals outlined in this paper. The National Iwi Chairs Forum supported the changes proposed in this paper, noting that the success of implementation of public health measures, particularly with Māori communities, will depend on the strength of communications and central support for community care initiatives. A desire for ongoing support for Māori led communications was expressed.
- 97 The New Zealand Council of Trade Unions stated they believe a fresh approach is needed; one that enables a flexible scheme for responding to the changing circumstances of a pandemic and emphasised that this must be a tripartite effort. They also suggested including measures for ensuring safety in workplaces, and better support for workers displaced by pandemics.
- 98 Based on engagement on other pieces of advice throughout the pandemic, we know that the impacts of COVID-19, and the public health response, have been wide-ranging. Businesses have had to adapt their operations due to staff

illness as well as the impacts of significant response measures, such as lockdowns and border closures. Health impacts of the virus have mostly fallen on the most susceptible to it, and those who have historically experienced poorer health outcomes, including Māori and Pacific peoples, older New Zealanders, tāngata whaikaha Māori and the disabled community. Children and young people have also experienced significant adverse wider health and socioeconomic impacts (e.g. missed education, mental health, family harm) as a result of the COVID-19 pandemic and response.

99 Continuing some COVID-19 powers will retain the ability to implement public health restrictions. The suite of restrictions able to be implemented under the proposed amended ministerial Order making power will be narrower than those currently able to be implemented. Many of these restrictions have also provided protection for those most vulnerable to the health impacts of COVID-19 and other infectious diseases (e.g. by restricting capacity limits and requiring mask use), and are important for ensuring disabled people, including tāngata whaikaha Māori, and their whānau feel safe. However, these restrictions can also adversely impact other population groups, including the ability for Māori to practise tikanga Māori during an epidemic or pandemic (e.g. tangihanga). Retaining the ability to implement mandatory self-isolation will continue to have an impact on business and broader economic costs due to cases being unable to work. Economic supports currently remain available to alleviate this impact, and the Government will need to consider the ongoing availability of these supports if these proposals are agreed.

100 Some of the more rights-limiting powers available under the current Act will not be within scope of the measures able to be implemented under the proposed narrowed ministerial Order making power. For example, border closures and requirements to stay in managed isolation facilities, vaccine mandates, and mandatory use of My Vaccine Pass. These measures have been particularly divisive throughout the pandemic to date and the latter two measures have an implementation cost for business. Narrowing the enforcement powers that are continued, including limiting who can exercise these powers, will likely be welcomed by iwi and hapū Māori, as a narrowing of Crown powers creates more room for tino rangatiratanga to be exercised. The proposals to reduce maximum penalties are likely to be similarly received, as Māori are overrepresented in the justice system.

101 Impacts on specific population groups are outlined below:

Population group	How the proposals may affect this group
Māori	<p>Throughout the Government’s COVID-19 response, Māori have experienced greater burden from the ongoing health and economic consequences of COVID-19 in addition to existing disparity for Māori in these contexts. Māori are more likely to experience negative outcomes in infections, hospitalisations, and deaths due to inequitable vaccination rates, existing health inequities and co-morbidities, and structural factors (e.g. household characteristics). The application of the current Act has played a role in this inequity, as outlined in the Waitangi Tribunal’s <i>Haumarū: The COVID-19 Priority Report</i>.</p> <p>In order to give effect to legislative requirements (e.g. mass vaccination) that apply nationally, locally provided and whānau-centred approaches to health and</p>

	<p>community care for Māori, including tāngata whaikaha Māori, have been implemented to enable a rapid, flexible, and trusted response to the pandemic. However, this has also led to Māori service providers experiencing high degrees of workforce fatigue, demonstrating the disproportionate impacts of the pandemic on Māori.</p> <p>Retaining the powers in the Act will enable a more nuanced and agile COVID-19 response beyond what can be provided by the existing section 70 Health Act powers. Using these powers, the Government may protect Māori interests and ensure equitable health outcomes for Māori, including tāngata whaikaha Māori, without disproportionately restricting and impacting on Māori social, cultural, and business activities (e.g. the ability to gather at marae). For example, under the existing section 70 Health Act powers, premises like marae may be required to close completely. Under the emergency public health powers currently contained in the COVID-19 Act, gatherings at marae may be permissible if certain public health requirements (e.g. capacity limits) can be met.</p> <p>The importance of ongoing engagement is also reflected in the Waitangi Tribunal's <i>Haumarū: The COVID-19 Priority Report</i>, which stressed the importance of meaningful engagement and partnership with Māori. This has the potential to assist in ensuring that responding to future variants of concern protects, to the best extent possible, the health and wellbeing of Māori communities.</p> <p>One of the primary reasons for the proposed removal of the ability for warrantless entry to marae is a concern expressed by the National Iwi Chairs Forum during our engagement with them that this power limits the ability of Māori to exercise Rangatiratanga over marae. The NICF strongly supports the removal of this power from the Act.</p> <p>Representatives of the National Iwi Chairs Forum supported the proposed changes in this paper and noted that the success of standing up public health measures, particularly with Māori communities, will depend on the strength of communications and central support for community care initiatives. A desire for ongoing support for Māori led communications was expressed.</p>
Disabled people	<p>Throughout the COVID-19 response, existing social inequities for disabled people have been exacerbated. The Human Rights Commission's Inquiry into the Support of Disabled People and Whānau During Omicron report found that "lessening restrictions overall [has led] some disabled people to choose to effectively isolate themselves, some with whānau, the people they live with, or a small bubble of close contacts".</p> <p>Engagement with Whaikaha in August 2022 suggests that the disability community would be supportive of powers being retained to implement mandatory public health restrictions. However, it will also be important to consider how disabled people and the most vulnerable can be empowered to participate into society as the response to COVID-19 evolves. Representatives of the disability community also noted that public health guidelines have driven inequity, creating gaps in information and service accessibility. The digital divide has contributed to this issue.</p> <p>During the October 2022 engagement, members of the disability community noted that the legislation reflects the extra considerations that disabled people have to bear in mind in their daily lives, providing both choice of using personal public health measures, and control of one's wider contact. The importance of strong communications was also reinforced in these engagements.</p>
Pacific peoples	<p>Pacific peoples continue to experience greater burden from the ongoing health, and economic consequences of COVID-19. Recent data shows Pacific peoples have had the highest hospitalisation rates for COVID-19 and their mortality rate</p>



	is four times greater than European and other ethnicities due to inequitable vaccination rates, existing health inequities and co-morbidities, and structural factors (e.g. household characteristics). Consequently, there was also a desire for greater involvement of Pacific peoples in decision-making.
Older people	<p>As is the case for disabled people, older New Zealanders have experienced both the risks of COVID-19 and the impacts of the response disproportionately. Reports indicate some continued “voluntary self-isolation” as well as a more general failure to resume pre-pandemic physical and social activities. A more flexible and responsive framework for addressing potential future COVID-19 needs will need to be paired with effective communication and engagement (including through both online and offline channels), as well as community support for socially isolated or otherwise vulnerable older people.</p> <p>Representatives of the older persons community supported a guiding principle of continuing to protect the most vulnerable, emphasised the importance of strong targeted communications that leverage trusted information sources. A note was made about the importance of both aged care and home care being accessible to seniors during times of increased public health measures; they view them as equally important and should be treated the same for the purposes of health settings.</p>
Children	The proposal to remove the ability to restrict movement (eg due to lockdowns or self-isolation requirements) has the potential for a positive impact on learning in the early learning and compulsory (primary and secondary) education sectors if it results in a reduced frequency of off-site learning, less disruption to staffing, and reduced educational disengagement.
Faith-based communities	Representatives from the Religious Diversity Centre noted that preparedness at a policy-level will be a bottleneck to the success of any rollout of measures, and support should be provided to communities, including to organisations that hold leadership positions within communities, to support their individual preparedness. This includes central Government understanding the services faith-based organisations provide, the facilities they have available for use, and providing coordination support for these organisations when standing up public health measures.

**Te Tiriti o Waitangi**

- 102 The Crown’s obligations to Māori under Te Tiriti o Waitangi are enduring. Continuing some COVID-19 powers will continue to require, amongst other things, active protection of Māori interests and taonga, and a commitment to the principle of partnership that includes good faith engagement with, and appropriate knowledge of the views of iwi and Māori communities.
- 103 The Waitangi Tribunal’s *Haumarū: The COVID-19 Priority Report* has identified a number of areas where the Crown could make improvements to its COVID-19 response in order to give greater effect to its obligations under Te Tiriti o Waitangi. This included upholding tino rangatiratanga and ensuring Māori do not suffer from inequity, as well as making informed decisions on matters affecting the interests of Māori.
- 104 It is important for the Crown to uphold its obligations under Te Tiriti o Waitangi when responding to pandemic and epidemic situations as Māori are usually more disproportionately affected by crisis, particularly where the welfare and safety of Māori is impacted.

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

**Human Rights [Crown Law advice – Legally Privileged]**

106

s9(2)(h)

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Proactively Released

s9(2)(h)



### Consultation

111 This paper was prepared by the DPMC and Manatū Hauora. The following agencies were consulted: The Treasury, Ministry for Primary Industries, Ministry of Transport, New Zealand Police, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, Ministry of Justice, MBIE, Ministry of Housing and Urban Development, Department of Corrections, Te Puni Kōkiri, Parliamentary Counsel Office, Crown Law Office, Te Arawhiti, the New Zealand Customs Service, Ministry of Education, Whaikaha – Ministry of Disabled People, Te Aka Whai Ora, Te Whatu Ora, Ministry of Social Development, Ministry for Pacific Peoples, Inland Revenue Department, Ministry of Culture and Heritage, Public Service Commission, Ministry for Ethnic Communities, Statistics New Zealand, Oranga Tamariki, Sport New Zealand and the National Emergency Management Agency.

112 s9(2)(h)



### Communications

113 If the proposals in this paper are agreed, appropriate communication channels will be used to communicate the changes to those affected, including the general public, along with maintaining clear and accessible communications as COVID-19 settings change over time.

## Proactive Release

- 114 I intend to proactively release this Cabinet paper, excluding legally privileged material and subject to any redactions consistent with the Official Information Act 1982 within 30 business days of decisions being confirmed by Cabinet.

## Recommendations

The Minister for COVID-19 Response recommends that Cabinet:

- 1 note that the policy objective of the proposed COVID-19 Public Health Response Legislation (the legislation) is to:
  - 1.1 support New Zealand's ongoing management of COVID-19 with mandatory public health measures beyond December 2022 if the COVID-19 Public Health Response Act 2020 (the Act) is not renewed by Parliament, or May 2023 when the Act will self-repeal (if not repealed sooner), and
  - 1.2 ensure that the continued powers are proportionate;
- 2 note the policy intent of the legislation is to ensure legislative powers are available to implement the Post Winter Strategy and Variants of Concern Strategic Framework, while also ensuring the continued COVID-19 powers are proportionate, streamlined and as simple as possible;

### *Continuing to provide for COVID-19 powers in legislation*

- 3 agree to continue the COVID-19 powers referred to in recommendations 5 to 29 for two years from enactment of the bill referred to in recommendation 33;
- 4 note a two year continuation will ensure COVID-19 powers remain in place to manage COVID-19 while extensive stakeholder engagement is carried out on the proposed design of a future emergency epidemic legislative framework, and will also enable findings from any formal review of the Government's COVID-19 response to inform the design of that framework;

### *Narrow scope of Order making powers*

- 5 note officials undertook a two-stage clause-by-clause analysis of the Act to determine which powers need to be retained to:
  - 5.1 deliver the Post Winter Strategy and Variants of Concern Strategic Framework, and
  - 5.2 remove the most rights-limiting powers wherever possible (including where these measures could be implemented using emergency legislation passed under urgency in future, if needed);
- 6 agree to remove the section 10 power for the Director-General of Health to make COVID-19 Orders;

7 agree to narrow the current section 11 ministerial Order making power, limiting the purposes for which COVID-19 Orders can be made to implementing the following public health measures:

Context	Public Health Measures
In the community	<ul style="list-style-type: none"> <li>• Self-isolation (for cases, household contacts, close contacts), masks, capacity limits.</li> </ul>
Travellers to New Zealand	<ul style="list-style-type: none"> <li>• Mask use on inbound flights to New Zealand</li> <li>• Pre-departure and/or post-arrival testing requirements</li> <li>• Requirement for airline/ship operator to prevent passengers who have not complied with pre-departure travel requirements</li> <li>• Not boarding a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19</li> <li>• Self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere)</li> <li>• Provision of travel history and contact information to support contact tracing.</li> </ul>

8 note that the ability to require vaccination for COVID-19 will be removed as this measure is not considered an effective tool to quickly respond to a future outbreak;

9 note the current safeguards around the exercise of the section 11 ministerial Order making power will be retained, including the prerequisites in section 8, requirements in section 9, publication requirements in section 14 and parliamentary accountability in section 16;

10 note the current administrative provisions relating to COVID-19 Orders will be retained, including relating to prescribed form, publication and effect of these Orders and information management provisions needed for contact tracing requirements;

11 agree to remove the following provisions which will no longer be relevant if the ministerial Order making power is narrowed as proposed in recommendation 7:

11.1 section 11A relating to compensation or payment to requisitions, which will not be within scope of the revised section 11 power;

11.2 section 11AA relating to requirements for making Orders under section 11AB;

11.3 section 11AB relating to Orders that can be made under the Act relating to specified work, which concerns vaccination mandates that will not be within scope of the revised section 11 power and intent behind narrowing the scope of this power;

- 11.4 subpart 2A relating to duties in relation to specified work, which concerns vaccination mandates that will not be within scope of the revised section 11 power;

*Narrow the scope of enforcement powers*

- 12 agree to remove the following enforcement powers, as these powers have been infrequently used during the pandemic or are no longer required in the context of the narrowed ministerial Order making power noted in recommendation 7:
  - 12.1 section 20(3) powers of warrantless entry to private dwelling houses and marae
  - 12.2 section 22 powers to close roads and public places and stop vehicles
  - 12.3 Section 23A power to direct a person to produce evidence of compliance with specified measure.
- 13 note agreement to recommendation 12.2 will impact the retained definition of authorisation enforcement officers, because that definition will no longer need to include the wider group of authorised persons who are currently able to be authorised to exercise the power recommended for removal in recommendation 12.2;
- 14 agree to narrow the types of enforcement officers that may exercise enforcement powers, consistent with the authorisation used to date during the pandemic, including constables, WorkSafe inspectors, Aviation Security officers, Customs officers, members of the Armed Forces, and COVID-19 Enforcement Officers for the Maritime Border.

*Reduce the maximum penalties*

- 15 note the Minister for COVID-19 Response is proposing to retain offences (both infringement and criminal) and penalties to address non-compliance with these offences;
- 16 agree to reduce the maximum infringement offence fee for individuals from \$4,000 to \$1,000;
- 17 agree to reduce the maximum infringement offence fee for any other persons (for example, companies) from \$12,000 to \$3,000;
- 18 agree to reduce the maximum court-imposed fine for infringement offences from \$12,000 to \$3,000 for individuals;
- 19 agree to reduce the maximum court-imposed fine for infringement offences from \$15,000 to \$9,000 for any other persons;
- 20 agree to reduce the maximum criminal offence penalty for individuals from a \$12,000 fine or six months imprisonment upon conviction, to a \$5,000 fine or six months imprisonment upon conviction;

- 21 agree to retain the power to make regulations to graduate penalties for infringement offences, to ensure these penalties are proportionate and the maximum penalties noted in recommendations 16 to 19 only apply to offences likely to cause significant harm to the community;
- 22 note the provisions relating to infringement offences in the Act will be retained, including those relating to form of infringement notices and reminder notices, who can issue infringement and reminder notices, and payment of infringement fees;

*Remove Managed Isolation and Quarantine (MIQ)-related powers*

- 23 note that removing all MIQ-related provisions in the Act delays the implementation of re-establishing facilities again, should Government decide to pursue an elimination strategy or accommodate an emergency evacuation;
- 24 note that the delays noted in recommendation 23 would necessarily result in longer (and greater) reliance on self-isolation;
- 25 agree to remove all MIQ-related provisions, including Subparts 3A (cost recovery), Subpart 3B (management of MIQFs and other places of isolation or quarantine) and Subpart 4 (miscellaneous provisions);
- 26 note the proposal in recommendation 25 will remove existing powers to make regulations to recover existing MIQ debts;
- 27 note the legislation referred to in recommendation 33 will include transitional provisions to preserve the ability to continue recovering existing MIQ debts;

*Safeguards, preliminary and administrative provisions*

- 28 note that the preliminary and administrative provisions provided in the Act will be retained, including repeal, interpretation, and transitional provisions;
- 29 note that the continued powers to impose mandatory public health measures are subject to prerequisites and safeguards, which means there may be periods where the powers are not used, either because there is no justification for mandatory public health measures and/or the prerequisites for exercising the powers have not been met;

*Impact of narrowing COVID-19 powers*

- 30 note that based on legislative history and judicial comment, existing Health Act 1956 powers are very limited for implementing population-level mandatory public health measures for COVID-19 such as isolation of cases, and that the use of ministerial Orders under the Act is more desirable;
- 31 note if a broader set of public health measures than those listed in recommendations 5 to 29 is required in future, these measures could be implemented through emergency legislation passed under urgency;

- 32 agree to officials working with the Parliamentary Counsel Office to develop template legislation (based on existing models) that could be used in the situation described in recommendation 31;

*Form of proposed COVID-19 Public Health Response Legislation*

- 33 note continuing COVID-19 powers will require legislative changes, progressed using a bill to be enacted by May 2023 at the latest;

- 34 agree to continue the COVID-19 powers noted in recommendations 5 to 29 by extending and amending the Act to repeal powers no longer considered necessary or proportionate;

- 35 note there are options around the urgency with which the bill referred to in recommendation 33, which would implement the decision taken in recommendation 34, is passed with trade-offs around pace, use of House time, and opportunities for consultation and engagement;

- 36 agree that the bill referred to in recommendation 33 is

**EITHER**

- 36.1 passed under urgency by the end of December 2022, with no select committee process. The Act would be extended to December 2024 under this option;

**OR**

- 36.2 introduced in 2022, with the first reading before Christmas 2022 and enactment in late April/early May 2023, with a truncated four-month select committee process. The Act would be extended to May 2025 under this option;

- 37 note implementing public health restrictions using COVID-19 Orders is preferable to including statutory public health requirements in primary legislation because there are several checks, balances and safeguards associated with the exercise of the ministerial Order making power, including limiting the exercise power to emergency circumstances, consultation requirements, parliamentary scrutiny and satisfaction of compliance with the New Zealand Bill of Rights Act 1990;

*Future emergency epidemic legislative framework suitable for all likely infectious diseases threats*

- 38 note that the Minister for COVID-19 Response had intended to introduce legislation to enable an emergency response to future pandemics by May 2023 [SWC-22-MIN-0118 refers] and that the Minister now intends to defer the enactment of legislation suitable for all likely infectious diseases threats to enable more extensive stakeholder engagement, a longer select committee process and incorporation of recommendations from any review of the Government's COVID-19 response;



- 39 note in June 2022, the Cabinet Social Wellbeing Committee agreed to retain the All-of-Government policy and strategy function within the Department of the Prime Minister and Cabinet until the legislative reform noted in recommendation 38 is complete, with this function transferring to Manatū Hauora by June 2023 [SWC-22-MIN-0118 refers];
- 40 note the decision taken by the Minister for COVID-19 Response referred to in recommendation 38 may impact the decision taken by the Cabinet Social Wellbeing Committee referred to in recommendation 39;

*General, process and timing*

- 41 note following discussions at Cabinet Business Committee on 3 October 2022, Manatū Hauora have provided drafting instructions to the Parliamentary Counsel Office to commence drafting of the bill referred to in recommendation 33;
- 42 note the proposed bill to continue COVID-19 powers (the bill) is not currently on the Legislative Programme;
- 43 agree to assign the proposed bill noted in recommendation 33 a Category 2 priority on the Legislative Programme (to be passed in 2022);
- 44 authorise the Minister for COVID-19 Response to make any necessary policy decisions that may arise during the drafting process, that are consistent with the policy intentions agreed by Cabinet;
- 45 note that the Department of the Prime Minister and Cabinet and Manatū Hauora will use appropriate communication channels to communicate the changes to those affected, including the general public.

Authorised for lodgement

Hon Dr Ayesha Verrall

Minister for COVID-19 Response

## Appendix A: Proposed amendments to the ministerial Order making power – overview of what public health measures will be able to be implemented under the proposed narrowed power

Currently, the section 11 ministerial Order making power in the COVID-19 Public Health Response Act 2020 is very broad. The power enables COVID-19 Orders to be made to implement a wide-range of public health measures, ranging from border restrictions to limit entry to New Zealand, domestic movement restrictions to “lock down” the country or parts of the country, vaccination and testing requirements (domestically and at the border), isolation and quarantine requirements, and a range of domestic restrictions such as capacity limits and mask mandates.

Beyond these measures that have formed part of our response to COVID-19 to date, the current scope of section 11 essentially enables implementation of any public health restriction that meets the requirements of section 11(a), in that they are likely to prevent, contain, reduce, control, manage, eliminate or limit the risk of the outbreak or spread of COVID-19. This could include public health measures which may not have been implemented to date.

Under my proposals to narrow the scope of the ministerial Order making power, the range of public health measures able to be implemented through COVID-19 Orders is far narrower. The below table lists the measures used during the pandemic to date, noting whether or not each will continue to be able to be implemented under the narrowed Order making power. Many of the restrictions we have relied upon to date will no longer be able to be implemented under the narrowed power.

The rationale for retaining or removing each measure considers the criteria used by officials during the clause-by-clause analysis of the Act, including:

- **Strategic alignment:** indicates whether the public health measure is required to implement the Post Winter Strategy or Variant of Concern Strategic Framework.
- **Novel/Rights-limiting:** indicates whether the public health measure is considered particularly novel and/or rights-limiting.
- **Urgency:** indicates whether the public health measure would likely need to be implemented urgently in future, and would limit the ability for the measure to be reintroduced via emergency legislation passed under urgency in future.

An indication of whether the proposals to remove or retain each of the public health measure is supported by public health advice has also been provided.

Although some of the measures that are proposed for retention are novel or particularly rights-limiting, it is proposed these are retained because they are required to implement our response strategies and would likely be needed urgently in future (making reintroduction via emergency legislation passed under urgency less viable). Most of the measures proposed for removal are either not required to implement our response strategies, are not considered particularly rights-limiting or novel, and/or could be reintroduced using legislation passed under urgency if required again in future.

**Table: Overview of mandatory public health measures able to be implemented using amended ministerial Order making power**

<b>Mandatory public health measure</b>	<b>Can the measure be implemented using the amended ministerial Order making power</b>	<b>Rationale for retaining or removing</b>	<b>Notes</b>
Pre-departure testing and/or post-arrival testing	✓	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✓ Public health ✓	Depending on the context of the time, it may not be feasible for travellers to New Zealand to undertake PDT in some countries due to an inability to access testing facilities. Post-arrival testing would best reflect a reserve measure and may support a future response if required.
Not to board a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19	✓	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✓ Public health ✓	A useful public health measure to manage new or unknown risk offshore to limit transmission of a new COVID-19 variants of concern into the New Zealand community.
Requirement for airline/ship operator to prevent passengers who have not complied with pre-departure travel requirements to board	✓	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✓ Public health ✓	For example, if a person has not provided evidence of meeting testing requirements, that person must not board the ship or aircraft travelling to New Zealand. The power to prevent any ship or aircraft that does not meet traveller requirements from entering New Zealand will be retained.
Self-isolation and self-quarantine (for cases, household contacts, close contacts)	✓	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✓ Public health ✓	This will include the ability to broaden the requirement back out to household contacts again in future, if required. The ability to implement exemptions from this requirement e.g. the Close Contact Exemption Scheme, Bubble of One and Critical Workers Return to Work Scheme.  This includes self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere) Isolation and quarantine to reduce community transmission remains a potential measure to suppress transmission of COVID-19 and subsequently higher numbers of cases, hospitalisations, and deaths.

Contact Tracing and Case Investigation for people entering New Zealand	✓	Strategic alignment ✓ Novel/rights-limiting ✗ Urgency ✓ Public health ✓	Provision of travel history and contact information to support contract tracing if required. If a highly concerning variant was detected overseas, contact tracing of recent arrivals may need to be put in place rapidly alongside other measures.
Mask requirements	✓	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✓ Public health ✓	These requirements could apply domestically (e.g. in certain high-risk settings), as well as for overseas arrivals to New Zealand (e.g. on their inbound flight to New Zealand, onward domestic flights to their place of residence, and in airports). Exemptions from mask requirements will also continue to be enabled by the proposed narrowed Order making power.
Capacity/Gathering limits	✓	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✓ Public health ✓	
Vaccination requirements for travellers	✗	Strategic alignment ✗ Novel/rights-limiting ✓ Urgency ✗ Public health ✓	Vaccination requirements are an ineffective short term measure. These requirements could be re-introduced under urgency if required in the future.
Entry restrictions at the border	✗	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✓ Public health ✓	Although required to implement our response strategies and potentially being needed in the initial phases of a future response, border entry restrictions are proposed for removal given how novel and rights-limiting this measure is. Immigration Act powers could be used to limit entry of non-citizens into the country if required. Limited restrictions e.g. reintroducing bespoke quarantine-free travel arrangements would not be possible.
New Zealand Traveller Declaration System	✗	Strategic alignment ✗ Novel/rights-limiting ✗ Urgency ✗ Public health ✓	If the Air Border Order is repealed, the business as usual operation of the New Zealand Traveller Declaration System will no longer rely on COVID-19 legislation. If the NZTD is needed in future to collect information on compliance with a mandatory public health requirement to respond to COVID-19, the amended Act will enable this by requiring evidence or information to be collected using the NZTD (e.g. provisions like sections 11(1)(b)(x) and 12(1)(aa) will be retained).
Managed isolation and quarantine	✗	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✗	Legislation would need to be passed under urgency to stand up these facilities in future, and make a voucher for a facility a condition of entry to New Zealand.

		Public health ✓	
Testing – for people in self-isolation or who would otherwise be required to self-isolate	✗	Strategic alignment ✗ Novel/rights-limiting ✓ Urgency ✗ Public health ✓	
Movement restrictions beyond self-isolation requirements e.g. localised or national “lockdowns”	✗	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✓ Public health ✓	Although required to implement our response strategies and potentially required in the initial phases of a future response, movement restrictions are proposed for removal given how novel and rights-limiting this measure is. All associated restrictions and systems will also be out of scope of the amended section 11 Order making power e.g. general stay at home requirements for all people (regardless of whether they or someone in their home had tested positive for COVID-19), monitored boundaries, and domestic travel exemptions.
Worker vaccine mandates	✗	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✗ Public health ✓	
My Vaccine Pass	✗	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✗ Public health ✓	E.g. movement restrictions based on vaccination status - a mandatory requirement to provide proof of vaccination to enter premises or access services
Record keeping for contact tracing purposes	✗	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✗ Public health ✓	This is the requirement for a person responsible for a place or gathering to have systems and processes to ensure people make a record of their visit to the premises, and to provide an alternative way of making this record to QR code scanning. Contact tracing powers are contained in the Health Act 1956.
Requirement to display QR codes	✗	Strategic alignment ✓ Novel/rights-limiting ✓ Urgency ✗ Public health ✓	



**DEPARTMENT OF THE  
PRIME MINISTER AND CABINET**  
TE TARI O TE PIRIMIA ME TE KOMITI MATUA



**MINISTRY OF  
HEALTH**  
MANATU HAUORA

**Regulatory Impact Statement:**

# **Future of the COVID-19 Public Health Response Act 2020**

**September 2022**

## Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing: final Cabinet decisions regarding the future of the COVID-19 Public Health Response Act 2020
Advising agencies:	The Department of the Prime Minister and Cabinet and Manatū Hauora - the Ministry of Health
Proposing Ministers:	Hon Dr Ayesha Verrall (Minister for COVID-19 Response)
Date finalised:	29 September 2022
Problem Definition	
<p>The COVID-19 Public Health Response Act (the Act) is due to self-repeal in May 2023. If the Act expires, management of COVID-19 will rely on existing powers in the Health Act 1956 and Epidemic Preparedness Act 2006. These powers are not fit for purpose to support the ongoing management of an epidemic through the Government's 'prepared, protective, resilient, and stable' approach. If the powers in the Act are continued, there is an opportunity to narrow the powers within the Act to ensure they remain proportionate to the current context.</p>	
Executive Summary	
<ol style="list-style-type: none"><li>1. The legislative powers that have enabled our COVID-19 response to date include the Health Act 1956 (Health Act), the Epidemic Preparedness Act 2006 (Epidemic Act), and the Act. The Act was established in 2020 as a bespoke piece of legislation as the Health Act and Epidemic Act did not enable a nuanced and proportionate response to COVID-19.</li><li>2. With the Act due to self-repeal in May 2023, officials have considered the options for continuing the powers in the Act to support the ongoing response to COVID-19. Regardless of the option chosen in this context, officials have also begun a longer-term work programme to develop a disease-agnostic legislative framework that will eventually replace the Act.</li></ol>	
<i>Summary of the Preferred Option</i>	
<ol style="list-style-type: none"><li>3. The preferred option is to:<ol style="list-style-type: none"><li>a. continue the powers in the Act but,</li><li>b. narrow the scope of ministerial order making powers to<ol style="list-style-type: none"><li>i. self-isolation (for cases, household contacts, close contacts)</li><li>ii. mask requirements</li><li>iii. capacity/gathering limits</li><li>iv. mask use on inbound flights to New Zealand</li><li>v. pre-departure and/or post-arrival testing requirements</li><li>vi. requirement for airline/ship operator to prevent passengers who have not complied with pre-departure travel requirements</li><li>vii. not boarding a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19</li><li>viii. self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere)</li></ol></li></ol></li></ol>	

- ix. provision of travel history and contact information to support contact tracing
  - c. exclude or narrow other powers, including those providing for or relating to:
    - i. the Director-General to make COVID-19 Orders.
    - ii. managed Isolation and Quarantine Facilities.
    - iii. the types of enforcement officers that may exercise enforcement powers
    - iv. enforcement powers that have been infrequently used throughout the current pandemic, including warrantless entry to private dwellings (including marae), and powers to close roads, public places and stop vehicles.
    - v. the power to direct a person to produce evidence of compliance within specified measure
    - vi. enabling the requisition of laboratory testing and consumables.
  - d. reducing the penalties within the Act
  - e. retain safeguards, preliminary and administrative provisions.
4. This option will ensure a proportionate legislative basis is in place to support the ongoing management of COVID-19 beyond May 2023 by:
- a. enabling effective, proportionate and streamlined public health measures to be implemented that are tailored to the characteristics of COVID-19 variants
  - b. delivering the COVID-19 Post Winter Strategy and the Variants of Concern Framework.
  - c. mitigating the risk of powers within continuing the Act inequitably impacting different groups, including the impact high financial penalties have on lower socio-economic groups, and
  - d. allowing for some, albeit reduced, stakeholder engagement within the select committee process regarding the proposed changes.
5. Other options considered include the status quo of letting the Act self-repeal in May 2023, extending the Act without amendment, and enacting a disease agnostic legislative framework prior to the repeal of the Act.

#### *Risks and benefits of the preferred option*

6. Continuing the powers in the Act to respond to and manage COVID-19 means that, if the COVID-19 situation escalates again in New Zealand (e.g. due to a more severe variant being detected, or further waves of the current variants of concern), the Government will have the ability to respond in a way that mitigates the risk of transmission or other adverse effects of COVID-19 for New Zealanders, including economic impacts and illness or death. The benefits of this will be realised by all New Zealanders, but especially the more vulnerable populations in New Zealand.
7. The risks relating to this option centre around the continuing of the powers in the Act (and therefore retention of the powers in the Act) not being proportionate to the risk posed by COVID-19 moving forward as it is anticipated that we will continue to experience waves of infection, but the realised severity of future variants is likely to gradually reduce (SWC-22-SUB-0108). This risk is mitigated through safeguards in the Act that require specific conditions to be met prior to powers in the Act being exercised.
8. s9(2)(f)(iv) [REDACTED] If the House does not continue the Act within the extension period, the management of COVID-19 will again rely on existing powers in the Health and Epidemic Acts as the powers in the Act are specific to COVID-19 and cannot be used to respond to other epidemics that may arise. Officials have begun a work programme to develop disease-agnostic replacement legislation that will eventually replace the Act.



9. There is also some risk in relation to the shortened select committee timeframes required to enact the proposed changes by May 2023. Insufficient engagement poses a risk for communities who are disproportionately impacted by epidemic events (including Māori and the disabled community) to comment on the proposed changes. Previously, when the Act was extended for an additional year in November 2021, a truncated select committee process was also followed. The risks associated with the proposed truncated select committee process are mitigated through the nature of the proposals, which seek to reduce rights-limiting powers and ensure that an appropriate legal framework is in place to manage the negative impacts of COVID-19 on at risk communities.
10. Consideration has also been given to whether the powers in the Act should be continued for six month, twelve months, or two, or more, years. The option to continue the powers in the Act by two, or more, years is the preferred approach. This would provide sufficient time for enhanced stakeholder engagement and a robust select committee process and allow for any new recommendations from any formal review of the Government's COVID-19 response to be incorporated into the design of the future emergency epidemic framework. However, with this timeframe, any immediate lessons from the current pandemic response to date will not be adopted for some time.

#### Limitations and Constraints on Analysis

11. Due to the timeframes to enact a bill by May 2023, stakeholder engagement has not occurred on the proposed continuation of, and changes to, the powers in the COVID-19 Public Health Response Act (the Act). However, initial engagement has begun relating to the emergency epidemic legislative framework more broadly which is interlinked with this work. Consultation on the related Cabinet paper has been undertaken with most Government agencies.
12. s9(2)(g)(i)  
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13. Due to evolving public health risk posed by COVID-19, there is no reliable way to predict when there may be ingress of a new variant of concern into New Zealand and what characteristics a new variant may have. As such, the proposals reflect a precautionary approach to enable responsiveness to the potential for escalating public health risk of COVID-19 in future, rather than a concrete view that the powers will be needed based on evidence.

#### Responsible Manager(s)

*Alice Hume*  
Head of Strategy and Policy  
COVID-19 Group  
Department of the Prime Minister and Cabinet



28 September 2022

Stephen Glover  
Group Manager  
COVID-19 Policy  
Strategy, Policy and Legislation  
Manatū Hauora – The Ministry of Health



29 September 2022

**Quality Assurance (completed by QA panel)**

Reviewing Agency: Manatū Hauora – The Ministry of Health

Panel Assessment & Comment: The Quality Assurance Panel has reviewed the Impact Statement titled “Regulatory Impact Statement: Future of the COVID-19 Public Health Response Act 2020” produced by the Ministry of Health and the Department of Prime Minister and Cabinet and dated August 2021. The Panel considers that the Impact Statement *meets* the quality assurance criteria. The Impact Statement is clear and concise. The policy problem and options are clearly identified.

## Section 1: Future of the COVID-19 Public Health Response Act powers - Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. The legislative powers that have enabled our COVID-19 response to date are contained in the following pieces of legislation (further information is provided in Attachment A):
  - a. the Health Act 1956 (Health Act) – contains powers for Medical Officers of Health under section 70 to manage the immediate risk of infectious diseases.
  - b. the Epidemic Preparedness Act 2006 (Epidemic Act) – enables the Prime Minister to create an Epidemic Notice where an outbreak of a quarantinable disease is likely to significantly disrupt essential government and business activity, whereby the Epidemic Notice triggers powers in other legislation to support an epidemic response (e.g. enabling the use of the Act powers).
  - c. the COVID-19 Public Health Response Act 2020 (the Act) – gives powers to the Director-General of Health and the Minister for COVID-19 Response to support the ongoing management of COVID-19 using COVID-19 orders.
2. The Act was established as bespoke legislation to manage a more nuanced and proportionate response to COVID-19 than the Health Act and Epidemic Act enabled. The Act provides the primary legal framework for enabling the use of mandatory public health measures as part of managing the COVID-19 pandemic. Unlike the Health Act and the Epidemic Act, the Act is time-limited and will self-repeal in May 2023.

*Cabinet has agreed to the post-winter COVID-19 approach*

3. Cabinet has recently agreed to the 'prepared, protective, resilient, and stable' approach to underpin the public health response to COVID-19 in the post-winter period and beyond (SWC-22-MIN-0118 and CAB-22-MIN-0251). This approach includes baseline measures (e.g. enduring or non-mandatory public health measures that are in place to manage the impacts of COVID-19) and reserve public health measures. When considering this approach Cabinet noted that reserve measures are:
  - a. additional tools that can be used, with caution in emergency circumstances, to reduce COVID-19 transmission if an outbreak is likely to cause an unacceptable health impact on people and systems, and
  - b. likely to limit rights under the New Zealand Bill of Rights Act 1990 and most require empowering legislation to be implemented.
4. Although the severity of future variants is likely to reduce (SWC-22-SUB-0108), the Government may need to implement reserve public health measures for the management of variants of concern that are more severe than expected. Likewise, should population immunity to these variants wane and cases increase significantly, it is likely that reserve measures will need to be implemented. In addition, there is residual risk in relation to the ongoing management of variants of concern that are currently prevalent in the New Zealand community, including BA.5, in that they may cause large waves of infection that severely impact upon the health system. These reserve measures require a legislative backing to be implemented.
5. This legislative backing is currently enabled through the Act. The Act's purpose<sup>1</sup> includes supporting the public health response to COVID-19 by enabling measures to be implemented that prevent, and limit the risk of, the outbreak or spread of COVID-19. The Act provides this legislative backing until May 2023 when the Act will self-repeal. To use

<sup>1</sup> Section 4 of the COVID-19 Public Health Response Act 2020  
<https://www.legislation.govt.nz/act/public/2020/0012/latest/LMS344139.html>

the Act for the purposes of imposing reserve public health measures certain conditions must be met<sup>2</sup> to ensure their use is justified and proportionate. Without the Act, ongoing response to COVID-19 would rely on the Health and Epidemic Acts which are not sufficient to support the 'prepared, protective, resilient, and stable' approach.

6. While the powers within the Health Act can be used to manage the initial response to epidemics or pandemic, which may include future COVID-19 variant of concern. The Borrowdale judicial review<sup>3</sup> identified that the powers in the Health Act (in particular large-scale use of section 70 powers) are not suitable as part of a long-term response to an infectious disease, and rather powers would be reserved to respond only to an urgent public health crisis. Relying on the Health Act, even in the short term, does not support the agreed approach as the powers within the Health Act are narrow and cannot enable all the measures within the approach's 'toolkit'. For example, while the Health Act can require businesses to close for a period of time, the powers are unable to enable more proportionate measures (e.g. physical distancing, face mask requirements, capacity caps) to be put in place when appropriate. It is noted that the Epidemic Preparedness Act, which enables measures to reduce or deal with the impacts of the public health restrictions being implemented, also makes up the current legislative framework.

### What is the policy problem or opportunity?

*Once the Act expires, the legislative framework will not be fit for purpose for managing the response to COVID-19*

7. If the Act is not extended beyond the current self-repeal date of 13 May 2023, there will be no legislative basis for the ongoing management of COVID-19 that is tailored to the characteristics of COVID-19 variants in the community. This means the 'prepared, protective, resilient, and stable' approach (previously agreed by Cabinet SWC-22-MIN-0118 and CAB-22-MIN-0251), and the variant plan which supports it (CAB-22-MIN-0223), will not be able to be implemented fully, as the powers within the Health and Epidemic Acts do not support the implementation of all mandatory (reserve) public health measures that may be required to deliver that approach and plan. For example, mandatory mask requirements could not be implemented. The powers within the Act will likely be needed in some form to enable the Government to introduce mandatory public health measures for COVID-19 from May 2023.

*There is an opportunity to narrow the powers within the Act to ensure they remain proportionate to the current context*

8. When the Act was last extended in November 2021 the Government was still pursuing an elimination strategy. Having since moved to the minimisation and protection strategy and moving forward into the 'prepared, protective, resilient, and stable' approach, some of the powers within the Act may no longer be proportionate.

*Stakeholder have not raised concerns regarding the Act, but the more stringent powers remain a concern for some*

9. Officials have undertaken initial engagement regarding the powers within the Act. Due to time constraints, the proposed options in continuing the powers in the Act have not been specifically tested with stakeholders.

10. Key insights include:

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<sup>2</sup> Section 9 of the COVID-19 Public Health Response Act 2020  
<https://www.legislation.govt.nz/act/public/2020/0012/latest/LMS344175.html>

<sup>3</sup> [https://www.courtsofnz.govt.nz/assets/cases/Borrowdale-v-D-G-of-Health-V\\_1.pdf](https://www.courtsofnz.govt.nz/assets/cases/Borrowdale-v-D-G-of-Health-V_1.pdf)

- a. stakeholders<sup>4</sup> have not raised concerns regarding the Act itself; but have expressed general comments about the difficulties they face in implementing requirements due to the speed at which the powers have been utilised to date.
  - b. the more stringent powers within the Act remain a concern for some (e.g. the warrantless entry power).
11. One of the most contentious powers within the COVID-19 Act has been the warrantless entry power – which has been subject to comment from the July 2020 Inquiry into the operation of the COVID-19 response<sup>5</sup> and was a focus throughout the select committee process when the Act was amended in 2021.<sup>6</sup> The National Iwi Chairs Forum have raised that they do not support the continued inclusion of this power within the Act as this power particularly impacts the communities they represent and infringes on the tino rangatiratanga of whenua and the marae that reside on it.
12. Stakeholders have raised several other issues, through formal and informal engagement, regarding the COVID-19 response to date. This includes concerns about the breadth of consultation required before using powers within the Act being focussed on public health without taking a wider economic or societal view; and a lack of clarity regarding the requirements to review measures after they have been implemented.
13. However, there is limited ability to address these broader issues within the short term as significant consultation would be required to ensure any amendment is appropriate. Therefore, this regulatory impact statement primarily considers the implications of maintaining the powers currently within the Act. The broader concerns will be captured by analysis within the work underway to develop a future emergency epidemic legislative framework.

*Continuing the powers in the Act would continue to trigger the Crown's Te Tiriti o Waitangi obligations*

14. Continuing the powers in the Act will continue to trigger the Crown's responsibilities to Māori under Te Tiriti o Waitangi that require, amongst other things, active protection of Māori interest and taonga, and a commitment to the principle of partnership that includes good faith engagement with, and appropriate knowledge of the views of iwi and Māori communities.
15. The Waitangi Tribunal's Haumarū: The COVID-19 Priority Report (Haumarū Report) has identified several areas where the Crown could make improvements to its COVID-19 response to give greater effect to its obligations under Te Tiriti o Waitangi. These areas include, upholding tino rangatiratanga and ensuring Māori do not suffer from inequity, as well as making informed decisions on matters affecting the interests of Māori.

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<sup>4</sup> Canterbury Chamber of Commerce; Disability sector (Autism NZ, Carers Alliance, Disabled Persons Organisations Coalition - Association of Blind Citizens New Zealand, Deaf Aotearoa, and Kāpo Māori Aotearoa, Human Rights Commission, New Zealand Disability Support Network, Office for Disability Issues Parent/Whānau/Family Network, Te Ao Mārama o Aotearoa, Te Roopu Waiora, Whaikaha Community Reference Group); Faith-based organisations; Local Government New Zealand; National Iwi Chairs' Forum; Aviation sector (Air New Zealand, Auckland Airport, Christchurch Airport, E Tū, Jetstar Airways, NZ Airports Association; Queenstown Airport, Wellington Airport) New Zealand Council of Trade Unions; Strategic Public Health Advisory Group; and Tourism Industry Aotearoa.

<sup>5</sup> Inquiry into the operation of the COVID-19 Public Health Response Act 2020- Report of the Finance and Expenditure Committee, July 2020 [https://www.parliament.nz/resource/mi-NZ/SCR\\_99623/490dd746ad574d91a42a76c447459083b0e4e7d0](https://www.parliament.nz/resource/mi-NZ/SCR_99623/490dd746ad574d91a42a76c447459083b0e4e7d0)

<sup>6</sup> Health Committee Report regarding the COVID-19 Public Health Response Amendment Bill (No 2) [https://www.parliament.nz/resource/en-NZ/SCR\\_117747/83717f3e562fc857664cf52b1939e36e499a7b0d](https://www.parliament.nz/resource/en-NZ/SCR_117747/83717f3e562fc857664cf52b1939e36e499a7b0d)

16. It is important for the Crown to uphold its obligations under Te Tiriti o Waitangi when responding to the continuously evolving COVID-19 context as Māori are usually disproportionately affected by crises, particularly where the welfare and safety of Māori is impacted. The impact of exercising legislative powers should consider the collective rights guaranteed under Te Tiriti o Waitangi as well as the individual rights protected by the New Zealand Bill of Rights Act 1990 (NZBORA).

*New Zealand Bill of Right Act: Considerations with respect to constitutional issues regarding maintaining powers to respond to COVID-19 [legally privileged]*

17. s9(2)(h)

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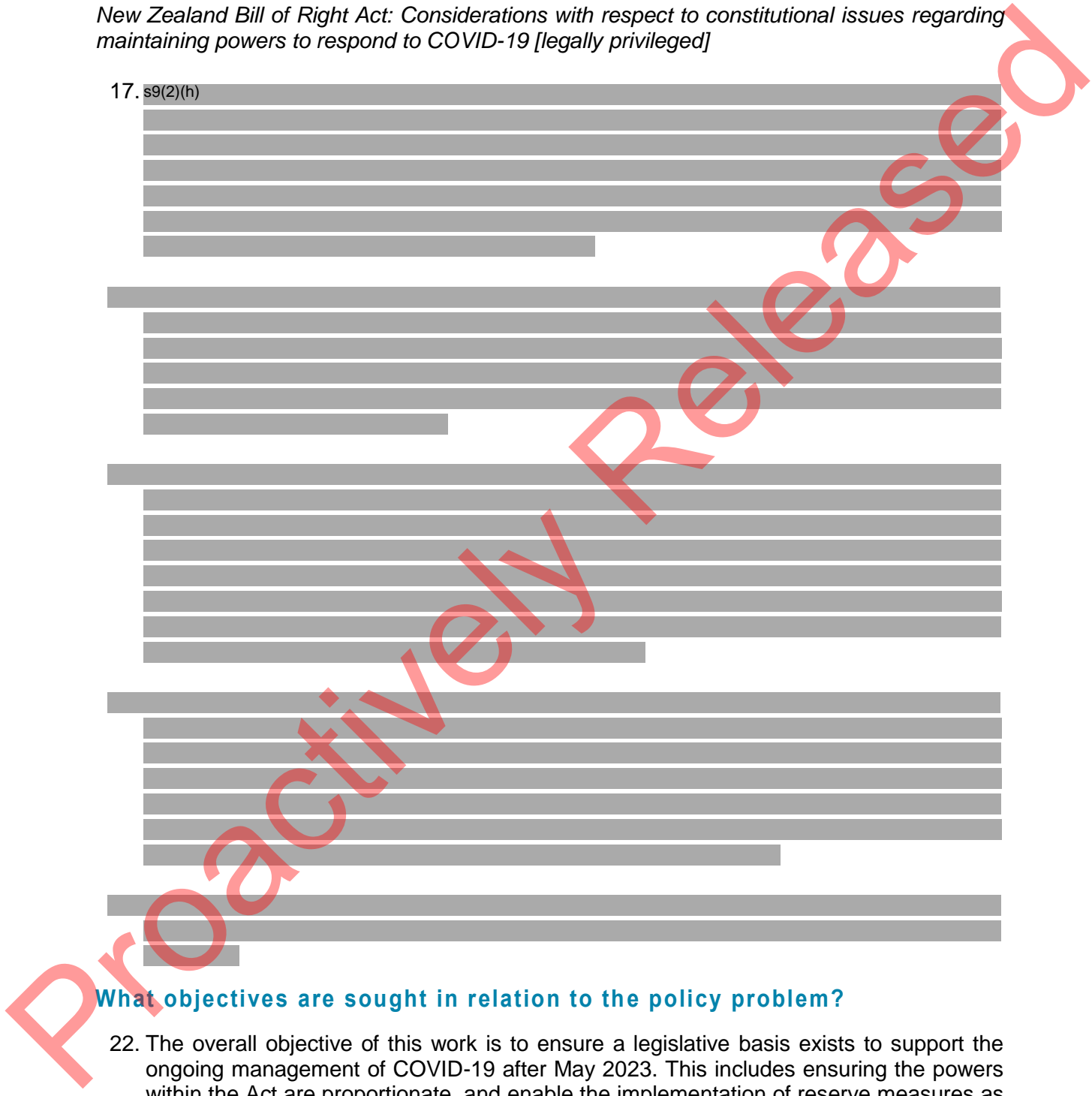
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**What objectives are sought in relation to the policy problem?**

22. The overall objective of this work is to ensure a legislative basis exists to support the ongoing management of COVID-19 after May 2023. This includes ensuring the powers within the Act are proportionate, and enable the implementation of reserve measures as set out in the prepared, protective, resilient, and stable approach (i.e. respond to a new COVID-19 variant of concern [SWC-22-MIN-0118 and CAB-22-MIN-0251 refers]).



## Section 2: Deciding upon an option regarding the future of the COVID-19 Public Health Response Act

### What criteria will be used to compare options to the status quo?

23. The options set out will be assessed against the following criteria:
- Effectiveness** – the extent to which the option enables continued management of COVID-19
  - Proportionality** – the extent to which the option contains powers proportionate to the current and potential future risk and the current and future response strategies
  - Equity** – the option mitigates the risk of powers within the Act inequitably impacting different groups, including the impact high financial penalties have on lower socio-economic groups
  - Transparency** – the option allows for stakeholders to maintain visibility, and develop a good understanding, of the legislative changes proposed by allowing adequate time to undertake engagement and select committee processes.
24. There is a trade-off between criterion (a) and criterion (d) as there is a shortened period of time for the proposed legislative changes to be progressed to allow for a continuous legislative basis for the COVID-19 response.

### What scope will options be considered within?

*Legislative backing is required to support the ongoing COVID-19 response while a future disease-agnostic legislative framework is developed*

25. Officials have begun work regarding the design of a future disease-agnostic legislative framework for the management of pandemics. This work is being led by the Department of the Prime Minister and Cabinet (DPMC) and Manatū Hauora and encompasses key epidemic response legislation that intersect with the Act, including the Health and Epidemic Acts.
26. However, in order to enable any recommendations from any formal inquiry into the Government's COVID-19 response to be incorporated into the design of the future framework this work has been deferred for two or more years (DPMC-2022/23-60). It would also ensure the proposed design of a future framework is informed by sufficient stakeholder engagement and a full select committee process. Therefore, this regulatory impact statement focusses on the options to ensure there is legislative backing to enable the 'prepared, protective, resilient, and stable' approach for managing COVID-19 while the future framework is developed. For completeness' sake, this regulatory impact statement briefly discusses the option of introducing a broader disease-agnostic framework once the Act self-repeals (see option 4, paragraphs 81 - 90) and includes a discussion of options for different lengths of continuing the existing framework (see paragraphs 94 – 110)

*We considered relevant experience from other countries in setting the scope for options identification and development*

27. All comparable international jurisdictions examined<sup>7</sup> used enabling primary legislation to facilitate the use of emergency public health measures to respond to the COVID-19 pandemic. For some jurisdictions, suitable primary legislation was already available, while others created bespoke legislation to supplement existing powers, like New Zealand's Act. Some jurisdictions made amendments to existing primary legislation, for example to streamline enforcement or add special COVID-19 response powers.

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<sup>7</sup> New South Wales, Queensland, Victoria, Singapore, United Kingdom.

28. So far, most jurisdictions that created COVID-specific legislation have either allowed it to repeal without replacement or extended fixed repeal dates. However, the state of Victoria has taken another approach by future-proofing its pandemic legislation by providing for disease-agnostic pandemic powers within its Public Health and Wellbeing Act 2008.<sup>8</sup> This approach will be a good comparator when considering options for our own future emergency epidemic legislative framework.

### What options are being considered?

29. The options considered within this regulatory impact statement focus on those that support the Government's ongoing ability to respond to COVID-19 future variants of concerns beyond May 2023. Specifically, the following options have been considered:

- a. Option 1: Status Quo (the Act self-repeals in May 2023)
- b. Option 2: Continuing the powers in the Act without additional changes
- c. Option 3: Continuing the powers in the Act, narrowing the powers to a core set of provisions for the ongoing management of COVID-19 (preferred option)
- d. Option 4: Implement disease-agnostic legislation before the Act self-repeals in May 2023.

#### Option One – Status Quo (*the Act self-repeals May 2023*)

30. Under this option, the Act would self-repeal in May 2023. This option would result in the government relying on the limited the powers within the Health and Epidemic Acts to implement the 'prepared, protective, resilient, and stable' approach and the variant plan that supports it.

*This option does not meet the objectives identified*

31. While this option would be easy to implement, it would not address the key objective identified above (paragraphs 23) to support the ongoing management COVID-19. This is because the powers within the Health and Epidemic Acts are not fit-for-purpose and, at a large scale, are best suited for initial, short-term management of quarantinable diseases, and their impacts.

#### Option Two – Continuing the powers in the Act without changes

32. This option would see the powers in the Act extended. A bill would be required to extend the powers in the Act beyond May 2023 to enable the continued management of COVID-19 through use of reserve measures (these are typically more significant, costly, and/or rights-limiting measures such as mask requirements, physical distancing, and lockdowns). This option would include retaining the current enforcement penalties, warrantless entry power and requisition powers. These powers within the Act are considered to be rights-limiting and therefore do not support proportionality and equity criteria.

*This option partially meets the objectives identified as it would continue to allow for public health restrictions to be put in place if needed...*

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<sup>8</sup> Victoria's Public Health and Wellbeing Act is an emergency framework where the Chief Medical Officer may exercise broad powers if necessary to investigate, eliminate, or reduce a risk to public health. In 2021 the Public Health and Wellbeing Act was amended to reduce a new Part (Protection of life and public health during pandemics), which allows pandemic powers to be renewed for longer periods of time than the emergency powers, shifts powers to the Minister of Health (unless a higher threshold of risk is met, in which case the Chief Medical Officer has some powers available), and creates oversight structures which report to Parliament on the use of powers.



33. This option partially meets the objectives set out for this work in that it would enable the ongoing management of COVID-19 and thereby enable mandatory public health restrictions to be put in place in times, where these restrictions are justified and proportionate based on increased COVID-19 (i.e. the necessary pre-requisites for making COVID-19 Orders are met).

*... but there are risk associated with the renewal requirement within the Act and the shortened timeframes.*

34. There are risks related to the shortened select committee timeframes required to enact changes by May 2023. Although the proposals seek to reduce rights-limiting powers, insufficient engagement poses a particular risk upon the ability for at-risk communities who are disproportionately impacted by epidemic events (including Māori and the disabled community) to comment on the proposed changes, however this risk will be somewhat mitigated through engagement during the select committee stage.

35. An additional risk relates to the renewal requirement in the Act, which undergoes regular review by the House in which its proportionality and utility are examined. If at any point the House considers that the powers the Act enables are disproportionate to the context of the COVID-19 pandemic, and/or COVID-19 is under control, they may decide to repeal the Act. In this case, the government would need to manage its subsequent response to COVID-19 by utilising the powers within the Health and Epidemic Acts.

*This option would not address stakeholder concerns regarding the more stringent powers within the Act*

36. Stakeholders<sup>9</sup> engaged to date have not raised any concerns regarding the government maintaining the ability to respond to COVID-19 as required in the short to medium-term. A common theme within feedback from community and business groups was that there has been some difficulty in operationalising the measures (e.g. changes to border settings such as pre-departure testing and implementing the requirements in line with higher alert levels) that are given effect to by powers within the Act.

37. The continuation of the warrantless entry power from within the Act is not supported by the National Iwi Chairs Forum. Members of the Forum noted in July 2022 during engagement that this power particularly impacted the communities they represent and infringes on the tino rangatiratanga of whenua and the marae that reside on it. This feedback is consistent with the themes and subsequent impacts detailed in the Waitangi Tribunal's Haumarū Report.

### **Option Three – Continuing the powers in the Act, narrowing the powers to a core set of provisions for the ongoing management of COVID-19 (preferred option)**

38. This option would continue the Act, stripping powers it back to those absolutely necessary to support the ongoing management of COVID-19 over the next two years.

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<sup>9</sup> National Iwi Chairs' Forum; Aviation sector (Auckland Airport, Christchurch Airport, Wellington Airport, Queenstown Airport, Air New Zealand, Jetstar Airways, E Tū, NZ Airports Association); Disability sector (DPO Coalition - Association of Blind Citizens New Zealand, Deaf Aotearoa, Kāpo Māori Aotearoa, Carers Alliance, Te Roopu Waiora, Autism NZ, Te Ao Mārama o Aotearoa, Human Rights Commission, New Zealand Disability Support Network, ODI Parent/Whānau/Family Network, Whaikaha Community Reference Group); New Zealand Council of Trade Unions; Tourism Industry Aotearoa; Local Government New Zealand; and the Canterbury Chamber of Commerce.

39. The ministerial order making power (currently section 11) would be narrowed so that the purposes for which COVID-19 Orders can be made is limited to implementing the following mandatory reserve public health measures:
- a. self-isolation (for cases, household contacts, close contacts)
  - b. mask requirements
  - c. capacity/gathering limits
  - d. mask use on inbound flights to New Zealand
  - e. pre-departure and/or post-arrival testing requirements
  - f. requirement for airline/ship operator to prevent passengers who have not complied with pre-departure travel requirements
  - g. not boarding a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19
  - h. self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere)
  - i. provision of travel history and contact information to support contact tracing
40. A full list of changes under this option are provided in Appendix B, amongst those the notable provisions that would be excluded or narrowed in the continued version of the Act would be:
- a. exclude the power for the Director-General to make COVID-19 Orders.
  - b. exclude powers relating to Managed Isolation and Quarantine Facilities.
  - c. narrow section 18(1) to specifically list the types of enforcement officers (in addition to constables) that may exercise enforcement powers under the Act.
  - d. exclude some enforcement powers that have been infrequently used throughout the current pandemic or which are superfluous in the context of the narrowed ministerial order making power. These include the ability for warrantless entry to private dwellings (and marae); and powers to close roads, public places and stop vehicles
  - e. exclude the power to direct a person to produce evidence of compliance within specified measure
  - f. retain safeguards, preliminary and administrative provisions.
41. In addition, it would exclude the requisition of laboratory testing and consumables and would seek to reduce the penalties within the Act.

*The narrowed set of powers would be those required to deliver the Post Winter Strategy or Variants of Concern Framework in the next two to three years*

42. The narrower set of powers carried forward in the continued version of the Act would ensure it continues to be as proportionate, streamlined and simplified as possible. The principles to narrow the set of powers are (as outlined in Appendix B):
- a. which provisions within the Act would likely be required to deliver the COVID-19 Post Winter Strategy and the Variants of Concern Framework (with some of the powers discontinued to potentially be reintroduced in emergency for some Variants of Concern scenarios), and
  - b. whether any of the provisions are novel, coercive actions would deprive people of choice and/or could be re-implemented via emergency legislation passed under urgency in future, if required.
43. This option meets the objectives by enabling the ongoing management of COVID-19 with the use of powers to remain proportionate to both the current context of the pandemic and the approach being utilised to manage the impact. Supported by the safeguards in the Act for utilising the Order-making power, this will provide Parliament with assurance

that the powers within the Act continue to be proportionate. As such, this option is preferable to amending the Health Act 1956, as alternative option to the policy problem and objective being addressed here.

*There are some risks associated with the proposed timeframe and the narrowing of powers*

44. There are also risks related to the shortened select committee timeframes required to enact changes to the Act by May 2023. Although the proposals seek to reduce rights-limiting powers, insufficient engagement in the policy development stage poses a particular risk upon the ability for at-risk communities who are disproportionately impacted by epidemic events (including Māori and the disabled community) to comment on the proposed changes, however this risk will be somewhat mitigated through engagement during the select committee stage.
45. In addition, it may be possible that a future variant of concern would be better managed by enabling the enforcement of mandatory restrictions (both through utilising higher penalties and warrantless entry powers) or would require the requisition of laboratory testing and consumables to support an alternative testing strategy. Should this scenario occur, urgent legislative change may be required to reintroduce any relevant powers (such as warrantless entry if justified) to support the response to any such variants of concern.

*This option would address stakeholder concerns regarding the more stringent powers within the Act*

46. Stakeholders engaged to date have not raised any concerns regarding the government maintaining the ability to respond to COVID-19 as required in the short to medium-term. A common theme within feedback from community and business groups was that there has been some difficulty in operationalising the measures that are given effect to by powers within the Act.
47. The removal of the warrantless entry power from within the Act is supported by the National Iwi Chairs Forum who noted during engagement in July 2022 that this power particularly impacted the communities they represent and infringes on the tino rangatiratanga of whenua and the marae that reside on it.

## **Risks and Benefits of the proposed continued powers within the Act**

### ***Narrowing the purposes for which the Minister to make COVID-19 Orders***

48. The current section 11 order-making power is currently very broad, enabling implementation of a wide suite of public health measures. The narrowed order-making power would exclude powers that are no longer considered necessary to implement the Post Winter Strategy or Variants of Concern Framework.
49. Those measures would likely need to be implemented quickly should COVID-19 risk escalate (to contain transmission by requiring self-isolation or by mitigating the risk of a new variant entering the country by implementing testing requirements at the border, for example) and re-implementing them via emergency legislation passed under urgency is therefore less viable.
50. A narrower order-making power would exclude the ability to implement public health measures that require significant implement lead-in time, and therefore could be re-implemented via emergency legislation in future, if needed.

### ***Removing the ability for the Director-General of Health to make and amend COVID-19 Orders***

51. This power enables implementation of mandatory public health measures at pace, in situations where urgent containment may be required. It has not been used to date due to the expediency at which the Ministerial order-making power has been exercised when necessary. The Ministerial order-making power is the preferable mechanism to use, as it contains additional safeguards such as consultation requirements, it is therefore not considered essential for delivering the Post Winter Strategy or Variants of Concern Plan.

### *Removing powers relating to Managed Isolation and Quarantine Facilities*

52. The Act currently contains broad powers for managed isolation and quarantine, which enable the Ministry of Business, Innovation and Employment's (MBIE's) managed isolation and quarantine readiness plan. However, the Variants of Concern Framework recommends self-isolation would be the primary form of isolation that will be implemented when necessary and proportionate.

53. If there is an escalation of COVID-19 risk, it is unlikely managed isolation and quarantine facilities would need to be implemented at pace (i.e. in the first one to three days of a response). MBIE's readiness plan notes self-isolation would be relied upon in the initial phase of a future response, while facilities are stood up again at which point legislative provisions to enable this would be included in emergency legislation passed under urgency.

54. The exclusion of all provisions relating to managed isolation and quarantine is made on the assumption that re-establishing MIQ facilities, or managing the return of an emergency evacuation flight, would be unlikely. If either of these events do occur, the MIQ Readiness Plan will be activated, and the timing for placing people in facilities will be pushed out 3-4 weeks beyond current timeframes to build in time to pass MIQ-related legislative powers under urgency. This would result in self-quarantine needing to be relied on for an extended period while this legislation was passed, and the initial phases of re-establishing facilities and systems commenced.

### *Reduced penalties*

55. The maximum penalties currently contained in the Act were significantly increased in 2021 from, for example, an infringement fee of \$300 for individuals to \$4,000, and a maximum court imposed fine of \$1,000 to \$12,000. This reflected the context of the COVID-19 response at the time, where non-compliance could result in far-reaching consequences by way of transmission and the response required to contain that.

56. At the same time the COVID-19 Public Health Response (Infringement Offences) Regulations 2021 were enacted to create a sliding scale of penalties and ensure that the maximum penalties only apply to offences likely to cause significant harm in the community (e.g. failure to comply with a quarantine-free travel requirement) and low penalties correspond to administrative offences.

### *The proposal to reduce the penalties would ensure they remain proportionate*

57. To ensure the penalties within the Act remain proportionate for potential use over an extended period, option 3 proposes that the maximum penalties currently contained in section 26 of the Act are reduced as follows:

Type of penalty (maximums stated)	Current		Proposed reduction	
	Individual	Any other person (e.g. companies)	New proposed penalty for Individuals	New proposed penalty for any other person
<i>Infringement offence fee</i>	\$4,000	\$12,000	\$1,000	\$3,000

Type of penalty (maximums stated)	Current		Proposed reduction	
	Individual	Any other person (e.g. companies)	New proposed penalty for Individuals	New proposed penalty for any other person
<i>Infringement offence maximum court imposed fine</i>	\$12,000	\$15,000	\$3,000	\$9,000
<i>Criminal offence maximum fine</i>	\$12,000	\$15,000	\$5,000	\$15,000
<i>Criminal offence maximum imprisonment period</i>	6 months	-	6 months	-

58. While the regulations ensure that the penalties are proportionate, this option proposes that the potential maximum penalties that could be imposed are recalibrated to reflect the reduced risk and to better align with recommended practice, informed by the Ministry of Justice and the Legislation Design and Advisory Committee (LDAC).
59. The proposed new maximum penalties are at the upper limit of what the LDAC recommend for infringement fees, which is also supported by advice from the Ministry of Justice. This signals the continued seriousness of breaching an order relating to management of COVID-19 and the significant impact this breach could have across communities. The continued ability to make regulations to graduate penalties ensures these can remain proportionate for lower risk and higher risk offences. As such, this will provide Parliament with assurance that the penalties within the Act continue to be proportionate.
60. In making these recommendations, officials have considered similar offence provisions that involve where an order or instruction is given, and that order or instruction is deliberately contravened by the offender, which could be an individual or business. The range of comparative legislation is small, particularly reflecting the uniqueness of the Act and the context, and the need to be responsive and flexible as the context changes. The new proposed penalty levels will be more aligned with existing statutory provisions.

Officials have also considered reverting the penalties to how they were set prior to the 2021 amendment. However, this option has been discounted as these lower penalties do not align with the risk that could arise with future, unknown variants of concern. Instead, when the penalties are applied during periods where the context is less risk adverse, the sliding scale within the regulations can ensure that the use of penalties is proportionate.

*Although lower penalties may be perceived as a lower deterrent this is outweighed by the benefits*

61. Although a reduction in penalties may be perceived as a lower deterrent, they may in fact provide increased opportunities for them to be applied, where enforcement of offending that attracts disproportionately higher penalties may be avoided. The new proposed penalty are graduated, rising equally by \$2,000 for penalties that apply to individuals and by \$3,000 for penalties that apply for any other persons. This has the effect of creating certainty in the law, and therefore increasing the accessibility of the law – making it easier for an enforcement officer to use.
62. This proposal balances the potential for high penalties to continue to be justified in a future outbreak, depending on the nature of a variant of concern, with the greater impact high penalties have on lower socio-economic groups. Financial penalties are inherently inequitable given they have a proportionately larger impact on lower socio-economic households.

63. In their report<sup>10</sup> on COVID-19 Public Health Response Amendment Bill the health committee noted that the infringement fees were being sharply increased and questioned if the penalties were 'proportionate, appropriate, and would act as a deterrent for people who repeatedly failed to comply with COVID-19 orders'. Police's graduated approach that focussed on education, engagement, and encouragement and, as a last resort, potential enforcement has meant that infringement penalties have been used in a way that is proportionate to the circumstances and the context of the outbreak at that time. For instance, in late 2021 Police issued over 1350 infringements in the Auckland, Northland and Waikato Alert Level 3 areas, while issuing just over 300 in the Alert Level 2 area. The majority of agencies consulted regarding this change (DPMC-2022/23-60) were supportive of the proposals, though some noted that the current high penalties may continue to be justified in a future emergency epidemic legislative framework.

#### *Removal of the warrantless entry power*

64. Option 3 also proposes that the Act is narrowed to remove the powers for warrantless entry to private dwellings (including marae) to support the ongoing proportionality of emergency powers relating to COVID-19. The Act permits warrantless entry to dwellings, including marae, if a constable has reasonable grounds to believe people have gathered there in contravention of a COVID-19 order, for example, if entry is necessary for the purpose of giving a direction. If the warrantless entry power is exercised, a report must be produced on its exercise to an authorised person within New Zealand Police.

65. This power of warrantless entry impacts the right to be secure against unreasonable search or seizure under section 21 of the NZBORA. To date it has been justified as being critical to quickly stop gatherings in contravention of orders that could contribute to the spread of an outbreak of a quarantinable disease.

*The risks associated with removing this power from the Act are largely mitigated by other policing approaches*

66. During the current pandemic, Police advise they have responded to a large number of complaints about gatherings potentially contravening COVID-19 restrictions. If the power is removed and gathering limits are implemented, the ability to enforce potential breaches of these limits at private dwellings would be more limited – relying on cooperation by the occupants of that dwelling and/or a search warrant. However, in responding to complaints about gatherings at dwellings Police have used the warrantless entry powers sparingly (that is, these powers have been used twice to date) because of Police's graduated approach that focussed on education, engagement, and encouragement and, as a last resort, potential enforcement. Therefore, this risk is largely mitigated by other policing approaches.

*This proposal would better support the Government in meeting its obligations under Te Tiriti o Waitangi*

67. The National Iwi Chairs Forum noted in July 2022 that Māori communities have raised concerns with this warrantless entry power. Communities consider it is in contravention of Te Tiriti o Waitangi, in particular Article Two which outlines that tangata whenua have tino rangatiratanga over Iwi owned land and resources. This feedback is consistent with the themes and subsequent impacts detailed in the Waitangi Tribunal's Haumarū Report.

68. With a shift in the COVID-19 response approach to de-escalate from an elimination approach and the impact this power has on Māori communities, officials consider that the power for warrantless entry is no longer proportionate for the purposes of the Act.

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<sup>10</sup> [https://www.parliament.nz/resource/en-NZ/SCR\\_117747/83717f3e562fc857664cf52b1939e36e499a7b0d](https://www.parliament.nz/resource/en-NZ/SCR_117747/83717f3e562fc857664cf52b1939e36e499a7b0d)

Removing this power will provide Parliament with assurance that the powers within the Act continue to be proportionate to the evolving context of the COVID-19 pandemic.

#### ***Removing the power to close roads and public places, and to stop vehicles***

69. Section 22 of the Act provides the ability for authorised enforcement officers to restrict public access (with or without vehicles) to any road or place within an area specified in a COVID-19 Order. However, this enforcement power as it is, is no longer needed to enforce the public health measures able to be implemented under the narrowed ministerial order making power to implement the Post Winter Strategy or Variants of Concern Framework.

#### ***Removing the power to direct a person to produce evidence of compliance within specified measure***

70. Section 23A enables an enforcement officer to direct a person to produce evidence of compliance with Subpart 2A of the Act, which relates to worker vaccination requirements and worker duties associated with that requirement. In particular, to verify these vaccination requirements.

71. The narrowed scope of public health measures using the ministerial order making power retained beyond May 2023 will exclude the ability to implement worker vaccination requirements. This enforcement power, which is specifically linked to this public health measures, is therefore no longer required.

#### ***Narrowing the types of enforcement officers able to exercise enforcement powers***

72. Under the preferred option, the Act would specify the powers and what type of enforcement officer may exercise these powers, thereby narrowing its scope (while still ensuring that police activity is supported where appropriate).

73. Section 18(1) currently permits the Director-General to authorise a suitably qualified and trained person or class of persons who are employed or engaged by the Crown or a Crown entity, to carry out the function and powers of an enforcement officer. The authorisation must specify the functions and powers that can be carried out by the person or class of persons.

74. The type of persons permitted to be authorised to carry out enforcement functions in the Act, consistent with the authorisations used to date in the pandemic, in addition to Police, would include: WorkSafe inspectors, Aviation Security officers, Customs officers, members of the Armed Forces, Airline Liaison officers, Biosecurity officers, and COVID-19 Enforcement Officers for the Maritime Border.

75. Although this limitation may impact the flexibility of authorising additional enforcement officers and the potential resource available to respond to COVID-19 in the future, it is not anticipated that additional groups to those authorised in the response to date would be required. Flexibility is retained by enabling the Director-General of Health to specify the functions for which these classes are authorised to undertake based on the response needs and public health measures in place at the time the power is required to be used.

#### ***Removal of the requisition of laboratory testing and consumables power***

76. Finally, option 3 proposes removing the extraordinary powers set out in section 11(1)(g) of the Act that enable COVID-19 Orders to requisition testing consumables and capacity of laboratories that undertake COVID-19 testing for the public health response, and any related provisions.

77. This power was introduced in 2021 as part of contingency planning for COVID-19 testing, reserved for situations when a COVID-19 outbreak reached a point that was placing extreme pressure on government-contracted testing resources. With the introduction of self-testing methods including Rapid Antigen Tests since then, this power has not been required for COVID-19 despite experiencing two peaks during the Omicron outbreak since the beginning of 2022.

*The risks associated with removing this power from the Act are largely mitigated by the variant plan*

78. There is a risk that future variants of concern may no longer be able to be detected by the self-testing methods currently available. In this instance it is possible that additional laboratory capacity and testing consumables may be required to detect and monitor a future variant.

79. However, this risk is mitigated by the preparedness work to plan for future variants of concern (the variant plan), which has factored in laboratory capacity in case new variants require PCR testing as part of the response approach.

*This will provide parliament with assurance that the powers remain proportionate*

80. Removing this extraordinary power will provide Parliament with assurance that the powers within the Act continue to be proportionate. It will also provide laboratories and suppliers of testing consumables with confidence that their resources will remain under their control thereby enabling better planning and forecasting of resources.

#### **Option Four – Implement disease agnostic legislation**

81. Under this option, a new piece of emergency epidemic legislation would be enacted prior to the Act self-repealing in May 2023. There are two primary aspects to this new piece of legislation, i.e. rehousing the powers currently available in the Act and making these powers disease-agnostic. While this option will provide a legislative framework that enables the Government's 'prepared, protective, resilient, and stable' approach for managing COVID-19, it will also enable the government to respond to other diseases. However, as the work designing this broader framework, including how and when the powers within it would be used, is still to be completed this is not the preferred option.

*'Rehousing' the powers to enable COVID-19 response*

82. The powers currently available within the Act would be moved into a different piece of legislation when the Act self-repeals in May. This could be achieved by either creating a new part within the Health Act or by creating a new piece of legislation.

*Amending the powers to become disease-agnostic*

83. In addition to moving the powers currently within the Act to a new legislative 'home', the powers would be amended to be disease agnostic. This option would also involve amendments to the Health and Epidemic Acts to incorporate some of the lessons learnt through the COVID-19 Response to ensure the powers within these Acts remain fit-for-purpose.

84. As with Option 3, this option proposes that the penalties within the Act are reduced and the powers that provide for warrantless entry to private dwellings (including marae) and the requisition of laboratory testing and consumables are removed to maintain proportionality, along with further changes reflecting the lessons learned from the response to COVID-19.



85. As the work related to the future disease-agnostic legislative framework (see paragraphs 25 - 26) has been deferred these additional changes are not considered fully within this Regulatory Impact Statement. Instead, this Regulatory Impact Statement focusses on the implications this option poses for the ongoing management of COVID-19. Broader amendments within a future emergency epidemic legislative framework will be considered in an additional Regulatory Impact Statement at a later date.

*This option meets the objectives identified as it enables COVID-19 measures to be utilised through powers proportionate to the current context*

86. Progressing this option would achieve the objective by providing a legislative basis to continue managing COVID-19 (and as a by-product support future epidemic preparedness). As with option 3, the proposed amendments to the powers (analysed in more detail in paragraphs 38 - 80) are more aligned to the current context where COVID-19 is circulating within the community and where the approach is now to manage the impacts of COVID-19 where possible (rather than an elimination strategy). Supported by the safeguards in the Act for utilising the Order-making power, this will provide Parliament with assurance that the powers within the Act continue to be proportionate.

*There are some risks associated with the proposed timeframe*

87. The risks predominantly relate to the truncated timeframes required to enact the broader legislative amendments by May 2023. These timeframes would not allow sufficient time for a robust policy development process, including engagement, on a future disease-agnostic legislative framework and would require a truncated select committee process, thereby resulting in reduced scrutiny to inform and test the detailed policy proposals for a broader purpose than managing COVID-19. This will particularly impact upon the ability for at risk communities, that are disproportionately affected by epidemic events (including Māori and the disability community), to fully participate in the engagement processes due to time constraints. It will also affect the ability to genuinely meet and reflect Te Tiriti o Waitangi obligations in the solution. This risk will be mitigated to some extent by targeted engagement planned with key stakeholders, including Māori, Pasifika and the disability community prior to the Introduction of the Bill into Parliament.

88. This option would allow for the immediate lessons learned from the COVID-19 response to be captured in the design of the new legislative framework. However, it would precede any formal review of the Government's COVID-19 response, which may produce recommendations relating to a future emergency epidemic legislative framework that would need to be incorporated later. The timing of this legislative change is considered in more detail in paragraphs 94 – 110 below.

*This option would address stakeholder concerns regarding the more stringent powers within the Act*

89. Stakeholders engaged to date have not raised any concerns regarding the government maintaining the ability to respond to COVID-19 as required in the short to medium-term. A common theme within feedback from community and business groups was that there has been some difficulty in operationalising the measures that are given effect to by powers within the Act. During recent engagement, the Auckland business community has raised concerns that the powers that exist for pandemic management may be used more frequently in future, now that they have been activated for the COVID-19 response.

90. The removal of the warrantless entry power from within the Act is supported by the National Iwi Chairs Forum who noted during engagement in July 2022 that this power particularly impacted the communities they represent and infringes on the tino rangatiratanga of whenua and the marae that reside on it.

## How do the options compare to the status quo?

	<b>Option One – Status quo (the Act self-repeals May 2023)</b>	<b>Option Two – Continuing the powers in the Act without additional changes</b>	<b>Option Three – Continuing the powers in the Act, narrowing the powers to a core set of provisions for the ongoing management of COVID-19 (preferred)</b>	<b>Option Four – Implement disease agnostic legislation</b>
<b>Effectiveness</b>	0	++ (Will allow the continued use of COVID-19 Act powers where required)	++ (Will allow the continued use of COVID-19 Act powers where required)	++ (Will allow the continued management of COVID-19)
<b>Proportionality</b>	0	0 (Some powers within the Act are not proportionate to the current and potential future context (i.e., risk and the agreed direction for the COVID-19 response approach of only using mandatory reserve measures when baseline measures are not sufficient) and therefore Parliament may not consider the powers proportionate and could revoke the Act)	++ (Removes or limits powers within the Act to give Parliament assurance that the powers are proportionate to the current and potential future context (i.e. current risk and the agreed approach for managing COVID-19))	++ (Removes or limits powers within the Act to give Parliament assurance that the powers are proportionate to the current and potential future context (i.e. current risk and the agreed approach for managing COVID-19))
<b>Equity</b>	0	- (The penalties within the Act are not proportionate to the current and potential future context (i.e. current risk and the agreed approach for managing COVID-19))	+ (Reducing the penalties within the Act ensures they are proportionate to the current and potential future context (i.e. current risk and the agreed approach for managing COVID-19) however, urgent legislative change may be needed to reintroduce some of these powers in response to a relevant future variant of concern)	+ (Reducing the penalties within the Act ensures they are proportionate to the current and potential future context (i.e. current risk and the agreed approach for managing COVID-19) however, urgent legislative change may be needed to reintroduce some of these powers in response to a relevant future variant of concern)

	<b>Option One – Status quo (the Act self-repeals May 2023)</b>	<b>Option Two – Continuing the powers in the Act without additional changes</b>	<b>Option Three – Continuing the powers in the Act, narrowing the powers to a core set of provisions for the ongoing management of COVID-19 (preferred)</b>	<b>Option Four – Implement disease agnostic legislation</b>
<b>Transparency</b>	0	<p style="text-align: center;">+</p> <p>(While this option will not allow for much engagement, the Act is well understood by stakeholders who know how and when the powers within it can be used)</p>	<p style="text-align: center;">+</p> <p>(While this option will not allow for much engagement on the proposed changes, the Act is well understood by stakeholders; with the narrowed powers not presenting much change from an implementation point of view, while mitigating rights-limitation concerns compared to the status quo)</p>	<p style="text-align: center;">-</p> <p>(This option will not allow for much engagement, in the time before the current Act self-repeals – therefore, the transparency of this option is significantly reduced compared with the status quo. The policy proposals within this option are complex and stakeholders will likely require more time to engage with them fully)</p>
<b>Overall assessment</b>	0	+	++	+

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## What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

### The most effective solution is Option 3 (continue the powers in the Act, narrowing the set of powers to a core set of provisions for the ongoing management of COVID-19)

91. Future variants of concern may or may not require mandatory (reserve) public health measures for management, guiding us towards taking a precautionary approach in determining the most effective solution.
92. The preferred option strips the powers continued in the Act back to powers absolutely necessary to support our ongoing management of COVID-19 over the next two years to deliver the COVID-19 Post Winter Strategy and the Variants of Concern Framework. This option will ensure a legislative basis exists that is proportionate and supports the ongoing management of COVID-19 after May 2023 because it:
  - a. supports the continued management of COVID-19 by providing the legislative framework for powers that enable measures tailored to the characteristics of COVID-19 variants in the community (**effectiveness**)
  - b. supports the use of powers that are proportionate both to the current context of the pandemic (i.e. current variants) and the current approach that no longer focuses on elimination (**proportionality**)
  - c. mitigates the risk of powers within the continued version of the Act inequitably impacting different groups, including the impact high financial penalties have on lower socio-economic groups (**equity**)
  - d. allows for some stakeholder engagement on the proposed changes and ensures continuity of the current bespoke legislative framework for managing the impacts of COVID-19 (**transparency**).
93. This options also better supports the government to meet its obligations under Te Tiriti o Waitangi. As noted above, the National Iwi Chairs Forum considers the Act's warrantless entry power is in contravention of Te Tiriti, in particular Article 2 which outlines that tangata whenua have tino rangatiratanga over Iwi owned land and resources. The proposal to remove this power mitigates the concerns raised by the Forum regarding this power.

### There are choices around how long to continue the powers within the Act for

94. The length of extension of the Act directly corresponds to the broader work referenced above (paragraph 25 and 26) on standing up an enduring, disease-agnostic emergency epidemic legislative framework. The key objectives in deferring this work are to provide more time for stakeholder engagement, including through a longer select committee process, and enabling recommendations from any formal review of the Government's COVID-19 response to be reflected in the framework's design.
95. In this context, officials consider that there are three deferral options:
  - a. Option 1 deferral corresponds to a six-month extension of the Act (i.e. future epidemic legislation Bill introduced in 2023, enacted by the end of 2023)
  - b. Option 2 deferral corresponds to a 12-month extension of the Act (i.e. future epidemic legislation Bill introduced in late 2023, enacted in 2024)
  - c. Option 3 deferral corresponds to a two-year extension of the Act (i.e. future epidemic legislation Bill introduced in late 2024, enacted in 2025).

### Option 1 – 6-month continuation

96. This option would continue the powers within the Act by 6 months to allow the future emergency epidemic legislative framework to be developed in the short-term (i.e. future epidemic legislation Bill introduced in early 2023, enacted by end of 2023).
97. This timing would provide an additional three months to undertake policy development and stakeholder engagement on the proposed future emergency epidemic legislative framework. It will also allow for an additional 3 months as would be required to enact legislation by May 2023 for the select committee to consider the future epidemic legislation Bill.
98. However, with the 2023 General Election due to occur next year there is a risk that the House may rise before the future epidemic legislation Bill can be enacted. This could result in the government being without a legislative basis to effectively respond to COVID-19, or other epidemics, in the future. This risk would be mitigated by further continuing the powers within the Act under urgency prior to the House rising, if required. While this option would allow for the immediate 'lessons learnt' from the COVID-19 response to be incorporated into the future epidemic legislation Bill, it would not allow for any recommendations from a future formal inquiry into the COVID-19 response to be included; and therefore risks the future emergency epidemic legislative framework not being able to address a diverse range of public health events as intended.

#### Option 2 – 12-month continuation

99. This option would continue the powers within the Act by 12 months to allow the future emergency epidemic legislative framework to be developed in the medium-term (i.e. future epidemic legislation Bill introduced in late 2023, enacted in 2024).
100. This timing would provide more time to develop the proposed future emergency epidemic legislative framework. This time would allow for more in-depth stakeholder engagement to take place as well reflecting any feedback from public consultation in the proposals. This option would also allow for an extended select committee process.
101. While this option would allow for the immediate 'lessons learnt' from the COVID-19 response to be incorporated into the future epidemic legislation Bill, it would not allow for any recommendations from a future formal inquiry into the COVID-19 response to be included. This risks that the future emergency epidemic legislative framework is not as fit-for-purpose as intended.
102. It is also noted that a transfer of functions from the Department of Prime Minister and Cabinets COVID-19 Group to health agencies is due to occur before June 2023. This will mean there likely will not be a central policy function to provide an All of Government perspective on the future legislative framework. This risk can be mitigated by ensuring careful handover processes of the All of Government consultation function and any analysis to date on this work.

#### Option 3 – 2 years + continuation

103. This option would continue the powers within the Act by 2 or more years to allow the future emergency epidemic legislative framework to be developed in the long-term (i.e. future epidemic legislation Bill introduced in late 2024, enacted in 2025).
104. This timing would allow the proposed future emergency epidemic legislative framework to be developed within normal timeframes, including fulsome stakeholder engagement and public consultation on the proposals as well as a full select committee process.
105. In addition to allowing for the immediate 'lessons learnt' from the COVID-19 response to be incorporated into the future epidemic legislation Bill, this option would allow any future formal inquiry into the COVID-19 response to take place and the recommendations

to be incorporated. This would support the establishment of an emergency epidemic legislative framework that is comprehensive and effective. However, deferring the work to develop emergency epidemic legislative framework may risk the work losing momentum and become deprioritised as other work takes precedence.

106. A longer continuation risks Parliament deciding that the powers within the Act are no longer proportionate and revoking the Act before the Bill establishing the emergency epidemic legislative framework can be enacted. This would result in the government being without a legislative basis to effectively respond to COVID-19, or other epidemics, if required before the new legislation can be enacted. This risk is mitigated to a certain extent by the proposals to reduce rights-limiting powers within the Act. Likewise, the COVID-19 response has shown that the Health and Epidemic Acts are not sufficient for longer term nuanced response to epidemics. Therefore, should another epidemic arise before the development of the future emergency epidemic legislative framework is complete the government may be left without a legislative basis to effectively respond.

107. As with a 12-month deferral, a similar, but reduced, risk exists around the disestablishment from mid-2023 (at the latest) of a centralised policy function within DPMC to provide an all-of-government perspective on COVID-19 matters.

***A continuation of 2 years (or more) is the preferred option***

108. The option to continue the powers within the Act by two, or more, years is the preferred approach. This would provide time for more extensive engagement with stakeholders, including groups most affected by COVID-19, as well as a robust select committee process. This would be consistent with the intent of the Pae Ora (Healthy Futures) Act 2022 and better ensure that the resulting legislative framework is future-proofed and enduring.

109. However, a longer continuation will mean that immediate lessons from the current pandemic response will not inform the legislative framework for some time and may risk the future emergency epidemic legislative framework becoming deprioritised leaving the government without an appropriate legislative basis to respond to epidemics (other than COVID-19).

110. However, officials have already begun capturing these lessons while they are still fresh in people's minds. In addition, a longer deferral will also allow for any new recommendations from any formal review of the Government's COVID-19 response to be incorporated into the design of the future framework.

## What are the marginal costs and benefits of the option proposed option for COVID-19 Public Health Response Act?

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
Regulated groups			
Health System	N/A	N/A	N/A
Iwi/Māori	It is possible that the reduced penalties may not have the same impact as a deterrent against non-compliance with Orders under the Act. As Iwi/Māori are disproportionately impacted by COVID-19, the effectiveness of the Act in lessening the impact on the Iwi/Māori may be reduced.	Low	Low
Vulnerable Communities (e.g. Pacifica, Disabled, Older New Zealanders)	It is possible that the reduced penalties may not have the same impact as a deterrent against non-compliance with Orders under the Act. Therefore, the effectiveness of the Act in lessening the impact on the vulnerable communities may be reduced.	Low	Low
Businesses	The powers within the Act, if used, can require businesses to meet certain conditions, which can result in compliance costs being placed on businesses. These powers within the Act, even if not implemented, may negatively affect business confidence through consumer behaviour changing due to the potential for powers to be implemented (e.g. border restrictions). This risk is mitigated by the safeguards contained within the Act that mean Orders can only be made if the situation deteriorates to a point where they are justified.	Medium	Low
General Public	The powers within the Act can enable rights limiting measures, which could result in increased non-compliance. Penalties have a greater impact on lower socio-economic groups and are inherently inequitable given they have a proportionately larger impact on lower socioeconomic households. This risk remains regardless of the level at which the penalties are set.	Medium	Low
Regulators			
Manatū Hauora – The Ministry of Health	When compared to the status quo of allowing the Act to self-repeal, there are costs incurred by Manatū Hauora that are associated with the on-going process of supporting parliament to periodically renew the Act. However, these costs would likely be present to continue managing COVID-19 regardless of which legislative mechanism is used.	Low	Low
Others			
The wider government	There are additional costs associated with administering the Act which will be borne by wider government.	Low	Low
<b>Total monetised costs</b>	<b>Not available</b>	<b>Not available</b>	<b>Not available</b>
Non-monetised costs		Low	Low

Additional benefits of the preferred option compared to taking no action			
Regulated groups			
Health System	The continuation of the powers in the Act will have benefits for the Health System as the powers will be available to implement mandatory public health measures to reduce pressure on the health system should it be required.	Medium	Low
Iwi/Māori	Using the powers available through the continuation of the powers in the Act, the Government can protect Māori interests and ensure equitable health outcomes for Māori, without unduly restricting and impacting on Māori social, cultural, and business activity. In particular, the removal of the warrantless entry powers will benefit Iwi Māori by enhancing tino rangatiratanga over iwi owned land and resources as it mitigates concerns that this power is in contravention to Article Two rights regarding tino rangatiratanga over Iwi owned land and resources.	Medium	Low
Vulnerable Communities (e.g. Pacifica, Disabled, Older New Zealanders)	The continuation of the powers in the Act will have benefits for the vulnerable communities as the powers will be available to implement measures to provide additional protections should they be required.	Low	Low
Businesses	The continuation of the powers in the Act will have benefits for the businesses as the powers will be available to implement nuanced measures to provide additional protections, should they be required, while enabling economic activity to continue.	Low	Low
General Public	The continuation of the powers in the Act will have benefits for the general public as the powers will be available to implement measures to provide additional protections should they be required.	Low	Low
Regulators			
Manatu Hauora – The Ministry of Health	The continuation of the powers in the Act will have benefits for Manatū Hauora as it will make available powers to support public health interventions for managing the impacts of COVID-19 if required.	Low	Low
Others			
The wider government	The continuation of the powers in the Act will have benefits for the wider government as it will make powers available to them respond to the impacts of COVID-19 if required.	Low	Low
<b>Total monetised benefits</b>	<b>Not available</b>	<b>Not available</b>	<b>Not available</b>
<b>Non-monetised benefits</b>	<b>As described above</b>	<b>Low-Medium</b>	<b>Low</b>

111. The marginal cost benefit analysis above is based on two key assumptions, which are:
- the experience to date of using the Act for managing COVID-19 using and enforcing mandatory public health measures, and
  - the level of compliance we have seen generally since the Act was enacted in 2020.



112. Our experience in implementing the Act has to date been characterised by measures being introduced, or removed, rapidly as the COVID-19 context evolves. This has left little to no lead-in times to ease implementation pressures. While the COVID-19 context is more stabilised, and these changes are now being made with longer lead in times, it is possible that a variant of concern could again require rapid responses. In this circumstance we anticipate that there will again be additional compliance costs for regulated groups, and for Manatū Hauora, as the regulator, and the wider government in administering the Act.

113. Since the Act was enacted in 2020 there has generally been a high level of compliance. Though research<sup>11</sup> tracking the overall sentiment and behaviours of New Zealanders has found social licence and compliance has waned somewhat over the last twelve months we anticipate similar levels of compliance to occur should the powers within the Act need to be utilised in the future.

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<sup>11</sup> <https://covid19.govt.nz/assets/Proactive-Releases/Research/19-August-2022/Behaviour-and-Sentiment-Report-May-22-Update.pdf>

## Section 3: Delivering the continued and narrowed COVID-19 Public Health Response Act powers

### How will the new arrangements be implemented?

114. There are limited considerations in relation to the implementation of continuing the powers in the Act as it is a continuance of existing primary legislation. Manatū Hauora will continue to be responsible for the on-going administration and operation of the Act.
115. Implementation needs are identified for each of the additional changes proposed in the table below:

Proposal	Implementation
Narrowing the powers to a core set of provisions for the ongoing management of COVID-19	A change, whether a step up or down within the scope being proposed, in requirements would need a coordinated implementation led by Manatū Hauora.  If there is an escalation of COVID-19 risk and a broader suite of mandatory public health measures is needed, emergency legislation could be passed under urgency to enable additional measures to be implemented.
Remove powers to requisition laboratory testing and consumables	No implementation needs identified, as this power has not been used to date.
Reduce penalties	Manatū Hauora will work closely with New Zealand Police to ensure enforcement systems are updated to reflect these changes.
Remove power for warrantless entry to private dwellings (including marae)	

### What are the implementation risks?

116. There are limited implementation risks associated with the proposed continuance as it does not involve significant policy changes. A continuation of the powers in the Act will retain the power to make COVID-19 Orders to introduce mandatory public health measures.
117. Implementation risks could arise when developing Orders. However, these matters will be considered when the proposal is being developed. Any implementation risks will be identified and mitigated in consultation with the government agencies that have responsibility and accountability for implementation, and where possible/appropriate with the individuals and organisations that will be impacted by any proposed change.
118. To support mitigation of these risks, the power to make COVID-19 Orders will remain subject to the safeguards in place in the Act to ensure proportionate and appropriate use, which requires that the Minister for COVID-19 Response:
- has had regard to advice from the Director-General of Health regarding the risks of the outbreak or spread of COVID-19 and the nature and extent of measures that are appropriate to address the risks

- b. is satisfied that the Order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990
- c. has consulted with the Prime Minister, the Minister of Justice and the Minister of Health
- d. is satisfied that the Order is appropriate to achieve the purpose of the Act.

119. The safeguards relating to using the powers in the Act to make COVID-19 orders mean that during the period of continuation proposed, there may be time when the Act lays dormant with no implementation needs, unless mandatory (reserve) public health measures are needed to respond to a new variant of concern.

### How will the new arrangements be monitored, evaluated, and reviewed?

120. The Act and associated legislative instruments (including any changes) will continue to undergo significant monitoring and review, as set out below.
- a. Section 14(5) of the Act requires that the Ministry of Health keeps any Orders made under this Act under review. This ongoing review considers the context of the approach in place at the time, for example in shifting from Minimisation and Protection to a 'prepared, protective, resilient, and stable' approach.
  - b. The provisions of the Act are dependent on continuation of the Epidemic Preparedness (COVID-19) Notice 2020, a State of Emergency under the Civil Defence and Emergency Management Act, or authorisation by the Prime Minister. Each pre-requisite requires a consideration of proportionality and public health advice about the risk associated with COVID-19.
  - c. The Act and associated legislative instruments are subject to review by the Regulations Review Committee, which ensures detailed parliamentary oversight of secondary legislation issued under the Act.
  - d. Many decisions and actions taken under the Act are subject to review by the courts, Ombudsmen's Office, and in some cases the Health and Disability and Privacy Commissioners.
  - e. Strong public and media interest ensure there is a high degree of public scrutiny of actions taken under the Act.

# Appendix A: Overview of current emergency epidemic legislative framework

## Section 70 of the Health Act was relied upon heavily during the Government’s initial response to COVID-19, but is not suitable for longer-term response management

1. Under section 70 of the Health Act, a medical officer of health has broad powers to, for example, restrict movement; close premises; require people, places, or things to isolate or quarantine; require people to undergo a medical examination or test; and under section 71, to requisition premises, land or vehicles, including for the purpose of disposing of bodies. These powers can only be exercised for the purposes of preventing the outbreak or spread of an infectious disease, and section 71 powers for managing an outbreak. The powers require that either a state of emergency has been declared under the Civil Defence Emergency Management Act 2002, an epidemic notice is in force, or Ministerial authorisation has been granted.
2. Section 71 powers were not used in the COVID-19 response. In the earlier stages of the pandemic the section 70 Health Act powers were used by the Director-General of Health to give effect to the Alert Level 4 and 3 restrictions. This included closure of premises (except those providing essential services), prohibiting congregation in outdoor places, and requiring people to remain at home in their “bubbles” except to access essential services and exercise.
3. s9(2)(g)(i)  
[Redacted text]
4. Compared to the order-making powers in the Act, there are fewer safeguards associated with the exercise of section 70 powers. For example, there are no express consultation requirements, meaning the decision might not sufficiently take account of non-public health considerations. This legislative context, and recent judicial comments,<sup>12</sup> indicate section 70 powers are intended to be used to respond to an urgent public health crisis, and are not suitable as part of a long-term response.

## The Epidemic Preparedness Act was then used to unlock a range of public health and non-public health powers to respond to COVID-19, but some sectors experienced challenges using these powers

5. On 24 March 2020, the Prime Minister issued the Epidemic Preparedness (COVID-19) Notice 2020 under section 5 of the Epidemic Act. This notice immediately unlocked powers in other pieces of legislation (e.g. the Corrections Act) to support our response, and also enabled Ministers to make immediate modification orders (IMOs). IMOs enable legislative requirements or restrictions, which are impossible or impracticable to comply with due to the effects of an epidemic, to be modified by order in council without parliamentary intervention.<sup>13</sup>

<sup>12</sup> *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [102].

<sup>13</sup> Immediate modification orders are enabled by sections 14 and 15 of the Epidemic Preparedness Act 2006.

6. A number of IMOs were successfully made under section 15 of the Epidemic Act to ensure statutory compliance during the COVID-19 pandemic. An example is the Epidemic Preparedness (Local Government Act 2002) IMO 2020. This IMO modified the declaration requirements for new members of local authorities in the Local Government Act, allowing declarations to be made remotely. This meant people did not need to travel or come together to facilitate such declarations while restrictions on movement were in place under the Alert Level system.
7. However, there were also instances during the pandemic where the IMO power was not able to be used to make minor legislative amendments, even though the situation appeared to be ideally suited to using an IMO. This was either because the proposed modification did not relate to a “requirement” or “restriction”, or because the ‘impossible or impracticable’ test to use the power was not able to be met.
8. These limitations on the use of IMOs resulted in a large omnibus bill being passed in March 2020 to progress some of these amendments,<sup>14</sup> and several subsequent stand-alone amendments to primary legislation. Extra pressure was placed on parliamentary time as a result, which could have otherwise been dedicated to more substantial policy matters.
9. An example of where the IMO power was not able to be used because the proposed modification was not a requirement or restriction, relates to a proposal to modify the Corrections Act 2004. Section 139 of the Corrections Act 2004 allows for (but does not require) disciplinary hearings of prisoners to be conducted by video link rather than by being present in person. Due to insufficient capacity for video link hearings during periods of mandatory lockdowns and isolation during this pandemic, an amendment was needed to permit the use of audio link technology as another way of conducting these hearings. The test for an IMO was not met because section 139 is phrased as a power rather than a requirement or restriction. As a result, an urgent amendment to the Corrections Act was progressed to permit a wider use of technology to facilitate these hearings.
10. An example of where the IMO power was not able to be used because the ‘impossible or impracticable’ test could not be met relates to a proposed modification to the dates for preparation and presentation of planning documents in the Crown Entities Act 2004. During the current pandemic, all entities needed to prepare and finalise the annual planning documents, and some also needed to prepare and finalise three-year planning documents as required within this Act. A number of entities were unable to meet, or indicated they would experience difficulty in meeting, these timeframes due to the uncertain impacts of COVID-19 on being able to accurately state future operations, performance, finances and resourcing as well as the constrained availability of senior leaders, Board Members and Ministers through the development and sign-off process. Because the proposed IMO would have applied to a whole class of entities, but some were able to meet the statutory timeframes, it was determined that the IMO did not meet the ‘impossible or impracticable’ test. As an IMO could not be used, these timeframes were required to be extended via legislation instead.
11. In addition to IMOs, the Epidemic Act also provides for the making of prospective modification orders (PMOs). Like IMOs, PMOs are orders in council to modify statutory restrictions or requirements. The distinction is that PMOs are created in advance of an epidemic and lie dormant until they are activated by an epidemic management notice made by the Prime Minister under the Epidemic Act. During the passage of the Law Reform (Epidemic Preparedness) Bill, it was clear that parliament intended for the bulk of emergency regulations to be created as PMOs, with IMOs referred to as a last resort in the debates.<sup>15</sup> However, since the Epidemic Act came into force in 2006, no PMOs have been created, meaning no PMOs were in place to be activated during the current pandemic, and reliance was instead placed on IMOs. Increased awareness of the PMO power, or

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<sup>14</sup> COVID-19 Response (Urgent Management Measures) Legislation Act 2020.

<sup>15</sup> (5 December 2006) 636 NZPD (Law Reform (Epidemic Preparedness) Bill – Second Reading, Pete Hodgson) 6900.

improved guidance around its use, may increase uptake to support future epidemic preparedness where appropriate.

### **The COVID-19 Public Health Response Act was enacted to support the ongoing management of COVID-19 and expires in May 2023**

12. After the initial emergency phase of the COVID-19 response, it was clear that more nuanced and centralised powers were needed to support the ongoing management of the virus, particularly as the country stepped down Alert Levels. The enactment of the Act enabled this more tailored response.
13. The framework set up by the Act contemplated what future orders may be needed to respond to various scenarios of how COVID-19 could play out. This has meant the Government has been legislatively well supported to deliver the Elimination Strategy (via the Alert Level system) and the subsequent Minimisation and Protection Strategy (via the COVID-19 Protection Framework).
14. The order-making power in the Act provides for more granular requirements that are not available under the Health Act. For example, orders made under the Act can permit businesses or services to operate conditionally, with e.g. capacity limits and social distancing requirements in place, rather than these businesses being required to close completely under the Health Act. Mandatory mask requirements, vaccine requirements for specified workers, use of vaccine certificates and border entry requirements can also be given effect through orders made under the Act. Orders can be made by both Ministers and the Director-General of Health, subject to prerequisites and requirements being met.<sup>16</sup>
15. The breadth of the powers under the Act enable an agile, precautionary COVID-19 response that considers social and economic considerations, counterbalanced by additional safeguards (including decision-making at a ministerial level, informed by public health advice). One of the safeguards is the periodic review and continuation of the Act by Parliament, and a sunset provision that will repeal the Act in May 2023 (unless repealed earlier). These provisions reflect Parliament's original intention for the Act to provide the legal framework for the management of COVID-19 for only as long as mandatory public health measures are needed to manage the risk of outbreak or spread of COVID-19 and the potential adverse effects of an outbreak, including on the health system.
16. The powers in the Act are also specific to COVID-19, intended to be used for the purpose of supporting a public health response to COVID-19. This means that, even if the Act was continued beyond May 2023, the current powers could not be used in future to respond to epidemics of other quarantinable diseases.

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<sup>16</sup> An order can only be made if either an epidemic notice is in force for COVID-19; a state of emergency in respect of COVID-19 is in force (or a subsequent transition period); or the Prime Minister has authorised the use of COVID-19 orders (if satisfied there is a risk of an outbreak or spread of COVID-19). In addition, the Minister must have regard to advice from the Director-General of Health and may have regard to any decision by the Government; be satisfied that the order does not limit, or is a justified limit on NZBORA rights and freedoms and that the order is appropriate to achieve the purpose of the Act; and consult the Prime Minister, Minister of Justice, Minister of Health (any may consult any other Minister) before making the order.

## Appendix B: Preferred option – core set of continued powers within the COVID-19 Public Health Response Act 2020 from May 2023

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
<b>Order-making powers</b>					
Prerequisites for making COVID-19 Orders	<p>Provides that COVID-19 Orders may only be made while at least one of three conditions is met:</p> <ul style="list-style-type: none"> <li>- An epidemic notice is in force with respect to COVID-19</li> <li>- A state of emergency or transition period is in force with respect to COVID-19</li> <li>- The PM has authorised the use of Orders, after being satisfied that there is a risk of an outbreak or the spread of COVID-19.</li> </ul>	Indirectly	No	Retain	N/A
Power for Minister to make COVID-19 order and requirements for making COVID-19 Orders	<p>Sets basic requirements for the Minister to make Orders under section 11 of the Act. In particular, the Minister:</p> <ul style="list-style-type: none"> <li>- must have had regard to advice from the Director-General of Health on certain matters</li> <li>- must be satisfied that the Order does not limit or is a justified limit on the rights and freedoms in the NZ Bill of Rights Act 1990; and</li> <li>- must consult with certain other key Ministers.</li> </ul>	Directly	No	Retain	N/A

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
Power for Director-General to make COVID-19 Orders	<p>Provides a mechanism for the Director-General of Health to make COVID-19 Orders unilaterally in urgent circumstances and sets the requirements that must be met. The Director-General must:</p> <ul style="list-style-type: none"> <li>- specify the boundaries within which an Order applies</li> <li>- be satisfied that it is urgently needed to prevent or contain the outbreak of spread of COVID-19</li> <li>- must be satisfied that the Order does not limit or is a justified limit on the rights and freedoms in the NZ Bill of Rights Act 1990.</li> </ul>	No	Yes	Exclude	N/A
Purposes for which an order can be made	<p>Establishes the purposes for which a COVID-19 Order may be made and gives examples. Includes:</p> <ul style="list-style-type: none"> <li>- preventing, containing, reducing, controlling, managing, eliminating, or limiting the risk of the outbreak or spread of COVID-19</li> <li>- avoiding, mitigating, or remedying the actual or potential adverse public health effects of the outbreak of COVID-19 (whether direct or indirect).</li> </ul>	Directly	Yes	Retain with changes	<p>Limit scope of section to only include powers to implement the following mandatory reserve public health measures:</p> <ul style="list-style-type: none"> <li>i. self-isolation (for cases, household contacts, close contacts)</li> <li>ii. mask requirements</li> <li>iii. capacity/gathering limits</li> <li>iv. mask use on inbound flights to New Zealand</li> </ul>



Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
					<p>v. pre-departure and/or post-arrival testing requirements</p> <p>vi. requirement for airline/ship operator to prevent passengers who have not complied with pre-departure travel requirements</p> <p>vii. not boarding a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19</p> <p>viii. self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere)</p> <p>ix. provision of travel history and contact information to support contact tracing</p>
Compensation or payment relating to requisitions	Provides for compensation at the market rate for consumables requisitioned or services supplied by medical laboratories in accordance with an Order under s11(1)(g).	No	No	Exclude	

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
Power for the Minister to make a COVID-19 Order relating to specified work	Provides a power for the Minister to make a COVID-19 Order which imposes a requirement on individuals to be vaccinated against COVID-19 to carry out certain kinds of work, and deals with related matters (such as record keeping requirements).	No	Yes	Exclude	
Requirements for making a COVID-19 Order relating to specified work	Sets out basic requirements for the Minister to make a COVID-19 Order which imposes a requirement on individuals to be vaccinated against COVID-19 to carry out certain kinds of work under s11AB.	No	No	Exclude	
General provisions relating to COVID-19 Orders	Allows for Orders made under the Act to include evidentiary requirements, exemptions or provisions allowing matters to be determined by notice. Also limits Orders, including that they may not apply only to a specific individual and that certain restrictions may not apply to a private dwellinghouse, a prison, the parliamentary precinct or court facilities.	Directly	No	Retain	

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
Effect of COVID-19 Orders	Provides that a COVID-19 Order may not be held to be invalid merely because of inconsistency with another Act (other than NZBORA) which relevant to the Order, or because it confers a discretionary power.	Indirectly	No	Retain	
Form, publication and duration of COVID-19 Orders	<p>Sets requirements for Orders including that they must be in writing, state when they come into force and generally must be published at least 48 hours before they come into force.</p> <p>Limits the duration of an Order made by the Director-General to a maximum period of 1 month after it comes into force, unless extended.</p> <p>Imposes a duty on the Minister and Director-General to keep their COVID-19 Orders under review.</p>	Indirectly	No	Retain with changes	Consequential amendment required subject to decision to remove the Director-General order-making power
Amendment or extension of COVID-19 Orders	Provides for the amendment or extension of a COVID-19 Order, subject to the same requirements as would apply for a new Order. Allows COVID-19 Orders to be revoked at any time, without being subject to these requirements.	Indirectly	No	Retain with changes	Consequential amendment required subject to decision to remove the Director-General order-making power

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
COVID-19 Order revoked if not approved by House of Representatives	Provides that a COVID-19 Order is automatically revoked if it is not approved by a resolution of the House of Representatives within a specified period.	Indirectly	No	Retain	
Duties in relation to specified work	Imposes duties on individuals who are required to be vaccinated against COVID-19 in order to carry out certain work, and the persons conducting a business or undertaking where (or for which) they are carrying out this work.	No	Yes	Exclude	
<b>Enforcement powers</b>					
Power for the Minister to specify which provisions of an Order are an infringement offence and which class	Creates a power for the Minister to use an Order to specify which breaches of an Order are an infringement offence, and the class of that infringement offence for the purposes of Regulations made under the Act (eg: a low-risk infringement offence).	Indirectly	No	Retain	
Power for the Director-General of Health to authorise enforcement officers	Creates a power for the Director-General of Health to authorise individuals or classes or suitably qualified people employed or engaged by the Crown or a Crown entity to act as	Yes	Yes	Retain with changes	Amend section 18(1) to specifically list the types of enforcement officers (in addition to constables) that may exercise enforcement powers under the Act, including: WorkSafe inspectors, Aviation

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
	enforcement officers under the Act.				Security officers, Customs officers, members of the Armed Forces, Airline Liaison officers, Biosecurity officers, and COVID-19 Enforcement Officers for the Maritime Border
Requirement to produce evidence of identity	Imposes a duty on enforcement officers (other than uniformed constables) to carry and produce on request while exercising their powers evidence of their appointment as an enforcement officer and evidence of their identity.	Indirectly	No	Retain	
Powers of warrantless entry	<p>Provides for warrantless powers of entry for the purpose of enforcing COVID-19 Orders.</p> <p>Limits these powers in the case of private dwellinghouses to constables, rather than all enforcement officers.</p> <p>Imposes a requirement on constables and other enforcement officers to provide a written report on the use of this power, and in the case of the use of this power to enter a marae, to provide a copy of the report to the committee of that marae.</p>	Directly	Yes	Exclude	

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
Power to give directions	Provides enforcement officers with the power to give directions under certain circumstances for a person to stop any activity that is contravening or likely to contravene an Order or rule under the Act, or to make any action to prevent or limit the extent of their non-compliance.	Directly	No	Retain	
Power to close roads and public places and stop vehicles	Provides for a constable or an enforcement officer acting under the supervision of a constable to stop people on foot or in vehicles from entering or leaving an area via any road or other public place, if this is provided for in a COVID-19 Order.  Allows a person to be appointed as an enforcement officer without being employed or engaged by the Crown, if recognised by the Commissioner of Police as being a Māori warden, a nominated representative of an iwi organisation, a Pasifika warden or a community patroller	No	Yes	Exclude	
Power to direct a person to provide	Provides a power for enforcement officers to direct a person to give	Yes	No	Retain	

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
identifying information	identifying information for the purpose of exercising their powers.				
Power to direct person to produce evidence of compliance with specified measure	Provides a power to direct a person to provide evidence of compliance with a measure in a COVID-19 Order, such as negative test result or a vaccination certificate.	Yes	No	Retain	
Power to direct business or undertaking to close	Provides a power for an enforcement officer to direct a business or undertaking to close for a period of up to 24 hours, if they believe on reasonable grounds that the business is operating in contravention of a COVID-19 Order or any conditions imposed on its operation by a COVID-19 Order.	No	Yes	Exclude	
Directions may be given verbally or in writing	Enables directions to be given verbally or in writing.	Indirectly	No	Retain	
Offences and infringement offences	Establishes that it is an offence to intentionally fail to comply with a COVID-19 Order.  Provides for penalties on conviction for individuals and other persons.	Indirectly	Yes	Retain with changes	Proposal to reduce the maximum penalties.

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
	<p>Provides for infringement offences to be specified in COVID-19 Orders.</p> <p>Provides that a breach of a rule made under s32Q (with respect to an MIQ facility) is an infringement offence.</p> <p>Provides for the maximum level of infringement fees and fines, and for these to be varied by regulation.</p>				
Offences relating to non-exercise of enforcement powers	<p>Establishes offences relating to non-compliance with, or obstruction of, enforcement officers exercising powers under the Act.</p> <p>Provides for penalties on conviction for individuals and other persons.</p>	Indirectly	No	Retain	
Provisions relating to MIQ infringement offences	Sections 28 to 32 set out provisions which underpin the administration of infringement offences and infringement fees with respect to a breach of a COVID-19 Order or a rule made under s32Q (for MIQ).	No	Yes	Exclude	
Power to make regulations to	Contains a power to prescribe infringement offence and offence penalties in regulations	Indirectly	No	Retain with changes	Update maximum penalties to reflect



Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
prescribe penalties	up to the maximum penalties set out in the Act.				proposed reduction in penalties.
<b>Managed Isolation and Quarantine Powers</b>					
Cost recovery powers	Sections 32A to 32I provide for the partial recovery of costs of the operation of managed isolation and quarantine facilities from some individuals arriving in New Zealand.	No	Yes	Exclude	
Management of MIQFs and other places of isolation and quarantine	Sections 32J to 32T provide for: <ul style="list-style-type: none"> <li>- arrangements for allocating rooms in MIQ facilities</li> <li>- restrictions on movement within an MIQ facility, and the making of rules to ensure the effective and orderly operating of facilities</li> <li>- a power for the chief executive (of MBIE) to hold things which are not permitted under the rules of the MIQF, and requires that these things be returned at the conclusion of a person's stay</li> <li>- a complaints process for MIQFs</li> <li>- a power to collect information about people in respect of whom charges are payable</li> </ul>	No	Yes	Exclude	
Power to make regulations in	Enables regulations to be made that prescribe charges for MIQF costs, who is liable to pay the	No	Yes	Exclude	

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
relation to cost recovery	charges, and how the charges may be paid/collected.				
<b>Other powers</b>					
Repeal of the Act	Provides for the automatic repeal of the Act on 13 May 2023, or if not continued by resolution of the House at least every 90 days.	Directly	No	Retain with changes	Proposal to continue the Act for two years
Purpose	<p>The purpose of this Act is to support a public health response to COVID-19 that—</p> <ul style="list-style-type: none"> <li>- prevents, and limits the risk of, the outbreak or spread of COVID-19 (taking into account the infectious nature and potential for asymptomatic transmission of COVID-19); and</li> <li>- avoids, mitigates, or remedies the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and</li> <li>- is co-ordinated, orderly, and proportionate; and</li> <li>- allows social, economic, and other factors to be taken into account where it is relevant to do so; and</li> <li>- is economically sustainable and allows for the recovery of MIQF costs; and</li> <li>- has enforceable measures, in</li> </ul>	Directly	No	Retain with changes	Repeal MIQF -related provisions

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
	addition to the relevant voluntary measures and public health and other guidance that also support that response.				
Regulations to prescribe an assessment tool for determining vaccine requirements for specified workers	Power to create regulations to specify an assessment tool for PCBUs to determine whether it is reasonable that workers of that PCBU are required to be vaccinated to carry out their duties, and whether they are required to undergo testing for COVID-19.	Yes	Yes	Exclude	
PCBU may conduct work assessment	Provides a power for PCBUs to use the assessment tool.	Yes	Yes	Exclude	
Power to incorporate material by reference	Enables incorporation of material by reference into COVID-19 Orders made under the Act, including: <ul style="list-style-type: none"> <li>- standards, requirements, or recommended practices published by or on behalf of any body or person in New Zealand or in any other country</li> <li>- standards, requirements, or recommended practices of international or national organisations</li> <li>- standards, requirements, or recommended practices of any</li> </ul>	Indirectly	No	Retain	

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
	country or jurisdiction - any other material that, in the opinion of the Minister (or, as appropriate, the Director-General), is too large or impractical to be printed as part of the instrument concerned.				
Requirements for the availability of material incorporated by reference	Sets out requirements for ensuring availability of any material incorporated by reference, including certification of the material and publishing requirements.	Indirectly	No	Retain	
Protection of persons acting under authority of the Act	Extends the protections of section 129 of the Health Act 1956 to persons authorised as enforcement officers under this Act, which include protections from liability.	Indirectly	No	Retain	
Protection of contact tracing information	Ensures that the provision of information for contact tracing is only used for that purpose and that it is an offence to use the information for other purposes.	Indirectly	No	Retain with changes	Reduce the penalties for breaching the privacy requirements to reflect reduced maximum penalties.
Protection of evidence for collection for determining whether a person is vaccinated	Ensures that the collection of information for the purpose of determining whether a person is vaccinated with a COVID-19 Order may only be used to determine vaccination status, determine compliance with an Order, or enforce the Act of an Order, or the Health Act. It establishes an offence for using	Directly	No	Retain with changes	Amend the penalties for breaching the privacy requirements to reflect reduced maximum penalties.

Provision	Description	Required to deliver COVID-19 Post Winter Strategy and the Variants of Concern Framework	Contains novel, coercive actions	Retain or exclude	Change required
	information for other purposes than stated.				
Amendments to the Civil Defence Emergency Management Act 2002	Amends the Civil Defence Emergency Management Act to manage when multiple states of emergency are declared for different purposes.	No	No	Exclude	
Amendment to Oranga Tamariki Act 1989	Where infringement offences are in place, this provision supports appropriate enforcement of requirements for youth.	Indirectly	No	Retain	



# Cabinet Business Committee

## Minute of Decision

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### Proposed COVID-19 Public Health Response Legislation

Portfolio                      COVID-19 Response

On 3 October 2022, the Cabinet Business Committee:

#### Background

- 1        **noted** that the policy objective of the proposed COVID-19 Public Health Response Legislation (the legislation) is to:
  - 1.1      support New Zealand’s ongoing management of COVID-19 with mandatory public health measures from May 2023 when the COVID-19 Public Health Response Act 2020 (the Act) will self-repeal; and
  - 1.2      ensure that the continued powers are proportionate;
- 2        **noted** that the policy intent of the legislation is to ensure legislative powers are available to implement the Post Winter Strategy and Variants of Concern Strategic Framework, while also ensuring the continued COVID-19 powers are proportionate, streamlined, and as simplified as possible;

#### Continuing to provide for COVID-19 powers in legislation

- 3        **agreed** to continue the COVID-19 powers referred to in paragraphs 5 to 29 for two years to 13 May 2025;
- 4        **noted** that a two-year continuation will ensure that powers remain in place to manage COVID-19, while extensive stakeholder engagement is carried out on the proposed design of a future emergency epidemic legislative framework, and will also enable findings from any formal review of the Government’s COVID-19 response to inform the design of that framework;

#### Narrow scope of Order making powers

- 5        **noted** that officials undertook a two-stage clause-by-clause analysis of the Act to determine which powers need to be retained beyond May 2023 to:
  - 5.1      deliver the Post Winter Strategy and Variants of Concern Strategic Framework; and
  - 5.2      remove the most rights-limiting powers wherever possible (including where these measures could be implemented using emergency legislation passed under urgency in future, if needed);

- 6 **agreed** to remove the section 10 power for the Director-General of Health to make COVID-19 Orders;
- 7 **agreed** to narrow the current section 11 ministerial Order-making power, limiting the purposes for which COVID-19 Orders can be made to implementing the following public health measures:

Context	Public Health Measures
In the community	<ul style="list-style-type: none"> <li>• Self-isolation (for cases, household contacts, close contacts), masks, capacity limits.</li> </ul>
Travellers to New Zealand	<ul style="list-style-type: none"> <li>• Mask use on inbound flights to New Zealand</li> <li>• Pre-departure and/or post-arrival testing requirements</li> <li>• Requirement for airline/ship operator to prevent passengers who have not complied with pre-departure travel requirements</li> <li>• Not boarding a flight to New Zealand while exhibiting COVID-19 symptoms or if under a public health order in another country or if currently positive for COVID-19</li> <li>• Self-isolation and self-quarantine for people arriving from at risk countries (or potentially from anywhere)</li> <li>• Provision of travel history and contact information to support contact tracing.</li> </ul>

- 8 **noted** that the ability to require vaccination for COVID-19 will be removed, as this measure is not considered an effective tool to quickly respond to a future outbreak;
- 9 **noted** that the current safeguards around the exercise of the section 11 ministerial Order-making power will be retained, including the prerequisites in section 8, requirements in section 9, publication requirements in section 14, and parliamentary accountability in section 16;
- 10 **noted** the current administrative provisions relating to COVID-19 Orders will be retained, including relating to prescribed form, publication, and effect of these Orders and information management provisions needed for contact tracing requirements;
- 11 **agreed** to remove the following provisions, which are now no longer relevant as a result of the decision in paragraph 7:
  - 11.1 section 11A relating to compensation or payment to requisitions, which will not be within scope of the revised section 11 power;
  - 11.2 section 11AA relating to requirements for making Orders under section 11AB;
  - 11.3 section 11AB relating to Orders that can be made under the Act relating to specified work, which concerns vaccination mandates that will not be within scope of the revised section 11 power, and intent behind narrowing the scope of this power;
  - 11.4 subpart 2A relating to duties in relation to specified work, which concerns vaccination mandates that will not be within scope of the revised section 11 power;

### Narrow the scope of enforcement powers

- 12 **agreed** to remove the following enforcement powers, as these powers have been infrequently used during the pandemic, or are no longer required in the context of the narrowed ministerial Order-making power noted in paragraph 7:
- 12.1 section 20(3) powers of warrantless entry to private dwelling houses;
  - 12.2 section 22 powers to close roads and public places and stop vehicles;
  - 12.3 Section 23A power to direct a person to produce evidence of compliance with specified measure;
- 13 **noted** that agreement to paragraph 12.2 will impact the retained definition of authorisation enforcement officers, because that definition will no longer need to include the wider group of authorised persons who are currently able to be authorised to exercise the power recommended for removal in paragraph 12.2;
- 14 **agreed** to narrow the types of enforcement officers that may exercise enforcement powers, consistent with the authorisation used to date during the pandemic, including constables, WorkSafe inspectors, Aviation Security officers, Customs officers, members of the Armed Forces, and COVID-19 Enforcement Officers for the Maritime Border;

### Reduce the maximum penalties

- 15 **noted** that the Minister for COVID-19 Response is proposing to retain offences (both infringement and criminal) and penalties to address non-compliance with those offences;
- 16 **agreed** to reduce the maximum infringement offence fee for individuals from \$4,000 to \$1,000;
- 17 **agreed** to reduce the maximum infringement offence fee for any other persons (for example, companies) from \$12,000 to \$3,000;
- 18 **agreed** to reduce the maximum court-imposed fine for infringement offences from \$12,000 to \$3,000 for individuals;
- 19 **agreed** to reduce the maximum court-imposed fine for infringement offences from \$15,000 to \$9,000 for any other persons;
- 20 **agreed** to reduce the maximum criminal offence penalty for individuals from a \$12,000 fine or six months imprisonment upon conviction, to a \$5,000 fine or six months imprisonment upon conviction;
- 21 **agreed** to retain the power to make regulations to graduate penalties for infringement offences, to ensure these penalties are proportionate and the maximum penalties noted in paragraphs 16 to 19 only apply to offences likely to cause significant harm to the community;
- 22 **noted** that the provisions relating to infringement offences in the Act will be retained, including those relating to form of infringement notices and reminder notices, who can issue infringement and reminder notices, and payment of infringement fees;



**Remove Managed Isolation and Quarantine (MIQ)-related powers**

- 23 **noted** that removing all MIQ-related provisions in the Act delays the implementation of re-establishing facilities again, should the Government decide to pursue an elimination strategy or accommodate an emergency evacuation;
- 24 **noted** that the delays noted in paragraph 23 would necessarily result in longer (and greater) reliance on self-isolation;
- 25 **agreed** to remove all MIQ-related provisions, including Subparts 3A (cost recovery), Subpart 3B (management of MIQFs and other places of isolation or quarantine), and Subpart 4 (miscellaneous provisions);
- 26 **noted** that the decision in paragraph 25 will remove existing powers to make regulations to recover existing MIQ debts;
- 27 **noted** the legislation referred to in paragraph 34 will include transitional provisions to preserve the ability to continue recovering existing MIQ debts;

**Safeguards, preliminary, and administrative provisions**

- 28 **noted** that the preliminary and administrative provisions provided in the current Act will be retained, including repeal, interpretation, and transitional provisions;
- 29 **noted** that the continued powers to impose mandatory public health measures are subject to prerequisites and safeguards, which means there may be periods where the powers are not used, either because there is no justification for mandatory public health measures and/or the prerequisites for exercising the powers have not been met;

**Impact of narrowing COVID-19 powers**

- 30 **noted** that, based on legislative history and judicial comment, existing Health Act 1956 powers are very limited for implementing population-level mandatory public health measures for COVID-19 such as isolation of cases, and that the use of ministerial Orders under the Act is more desirable;
- 31 **noted** that if a broader set of public health measures than those listed in paragraphs 5 to 29 is required in future, these measures could be implemented through emergency legislation passed under urgency;
- 32 **directed** officials to work with the Parliamentary Counsel Office to develop template legislation (based on existing models) that could be used in the situation described in paragraph 31;

**Form of proposed COVID-19 Public Health Response Legislation**

- 33 **noted** that continuing COVID-19 powers will require legislative changes, progressed using a bill to be enacted by May 2023;
- 34 **agreed** to continue the COVID-19 powers referred to in paragraphs 5 to 29 by extending and amending the Act to repeal powers no longer considered necessary or proportionate;

35 **noted** that implementing public health restrictions using COVID-19 Orders is preferable to including statutory public health requirements in primary legislation, because there are several checks, balances, and safeguards associated with the exercise of the ministerial Order making power, including limiting the exercise power to emergency circumstances, consultation requirements, parliamentary scrutiny, and satisfaction of compliance with the New Zealand Bill of Rights Act 1990;

### **Future emergency epidemic legislative framework suitable for all likely infectious disease threats**

36 **noted** that the Minister for COVID-19 Response had intended to introduce legislation to enable an emergency response to future pandemics by May 2023 [SWC-22-MIN-0118], but now intends to defer the enactment of legislation suitable for all likely infectious diseases threats to enable more extensive stakeholder engagement, a longer select committee process, and incorporation of recommendations from any review of the Government's COVID-19 response;

37 **noted** that in June 2022, the Cabinet Social Wellbeing Committee agreed to retain the All-of-Government policy and strategy function within the Department of the Prime Minister and Cabinet until the legislative reform noted in paragraph 36 is complete, with this function transferring to Manatū Hauora by June 2023 [SWC-22-MIN-0118];

38 **noted** that the decision of the Minister for COVID-19 Response referred to in paragraph 36 may impact the decision that was taken by the Cabinet Social Wellbeing Committee, referred to in paragraph 37;

### **General, process and timing**

39 **authorised** the Minister for COVID-19 Response to issue provide drafting instructions to the Parliamentary Counsel Office to give effect to the decisions under CBC-22-MIN-0048;

40 **noted** that the proposed bill to continue COVID-19 powers (the bill) is not currently on the Legislation Programme;

41 **agreed** to assign the bill a category 2 priority on the Legislation Programme (to be passed in 2022);

42 **authorised** the Minister for COVID-19 Response to make any necessary policy decisions that may arise during the drafting process, which are consistent with the policy intentions agreed under CBC-22-MIN-0048;

43 **noted** that the Department of the Prime Minister and Cabinet and Manatū Hauora will use appropriate communication channels to communicate the changes to those affected, including the general public.

Jenny Vickers  
Committee Secretary

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**Hard-copy distribution: (see over)**

**Present:**

Rt Hon Jacinda Ardern (Chair)  
Hon Grant Robertson  
Hon Kelvin Davis  
Hon Dr Megan Woods  
Hon Chris Hipkins  
Hon Carmel Sepuloni  
Hon Andrew Little  
Hon David Parker  
Hon Nanaia Mahuta  
Hon Poto Williams  
Hon Damien O'Connor  
Hon Michael Wood  
Hon Kiri Allan  
Hon Dr Ayesha Verrall

**Officials present from:**

Office of the Prime Minister  
Department of the Prime Minister and Cabinet

Proactively Released



# Cabinet

## Minute of Decision

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### Proposed COVID-19 Public Health Response Legislation

**Portfolio**                      **COVID-19 Response**

On 17 October 2022, following reference from the Cabinet Business Committee (CBC), Cabinet:

- 1        **noted** that the policy objective of the proposed COVID-19 Public Health Response Legislation (the legislation) is to:
  - 1.1        support New Zealand’s ongoing management of COVID-19 with mandatory public health measures beyond December 2022 if the COVID-19 Public Health Response Act 2020 (the Act) is not renewed by Parliament, or May 2023 when the Act will self-repeal (if not repealed sooner);
  - 1.2        ensure that the continued powers are proportionate;
- 2        **noted** that the policy intent of the legislation is to ensure legislative powers are available to implement the Post Winter Strategy and Variants of Concern Strategic Framework, while also ensuring the continued COVID-19 powers are proportionate, streamlined and as simple as possible;

#### **Continuing to provide for COVID-19 powers in legislation**

- 3        **agreed** to continue the COVID-19 powers referred to in paragraphs 5 to 29 from enactment of the bill referred to in paragraph 33 until new pandemic legislation is enacted;
- 4        **noted** a continuation will ensure COVID-19 powers remain in place to manage COVID-19 while extensive stakeholder engagement is carried out on the proposed design of a future emergency epidemic legislative framework, and will also enable findings from any formal review of the Government’s COVID-19 response to inform the design of that framework;

#### **Narrow scope of Order making powers**

- 5        **noted** that officials undertook a two-stage clause-by-clause analysis of the Act to determine which powers need to be retained to:
  - 5.1        deliver the Post Winter Strategy and Variants of Concern Strategic Framework,
  - 5.2        remove the most rights-limiting powers wherever possible (including where these measures could be implemented using emergency legislation passed under urgency in future, if needed);

6 **agreed** to remove the section 10 power for the Director-General of Health to make COVID-19 Orders;

7 **agreed** to narrow the current section 11 ministerial Order making power, limiting the purposes for which COVID-19 Orders can be made to implementing the following public health measures:

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

8 **noted** that the ability to require vaccination for COVID-19 will be removed as this measure is not considered an effective tool to quickly respond to a future outbreak;

9 **noted** that the current safeguards around the exercise of the section 11 ministerial Order making power will be retained, including the prerequisites in section 8, requirements in section 9, publication requirements in section 14 and parliamentary accountability in section 16;

10 **noted** that the current administrative provisions relating to COVID-19 Orders will be retained, including relating to prescribed form, publication and effect of these Orders and information management provisions needed for contact tracing requirements;

11 **agreed** to remove the following provisions which will no longer be relevant if the ministerial Order making power is narrowed as proposed in paragraph 7:

11.1 section 11A relating to compensation or payment to requisitions, which will not be within scope of the revised section 11 power;

11.2 section 11AA relating to requirements for making Orders under section 11AB;

11.3 section 11AB relating to Orders that can be made under the Act relating to specified work, which concerns vaccination mandates that will not be within scope of the revised section 11 power and intent behind narrowing the scope of this power;

11.4 subpart 2A relating to duties in relation to specified work, which concerns vaccination mandates that will not be within scope of the revised section 11 power;

**Narrow the scope of enforcement powers**

12 **agreed** to remove the following enforcement powers, as these powers have been infrequently used during the pandemic or are no longer required in the context of the narrowed ministerial Order making power noted in paragraph 7:

12.1 section 20(3) powers of warrantless entry to private dwelling houses and marae;

12.2 section 22 powers to close roads and public places and stop vehicles;

12.3 Section 23A power to direct a person to produce evidence of compliance with specified measure;

13 **noted** that agreement to paragraph 12.2 will impact the retained definition of authorisation enforcement officers, because that definition will no longer need to include the wider group of authorised persons who are currently able to be authorised to exercise the power recommended for removal in paragraph 12.2;

14 **agreed** to narrow the types of enforcement officers that may exercise enforcement powers, consistent with the authorisation used to date during the pandemic, including constables, WorkSafe inspectors, Aviation Security officers, Customs officers, members of the Armed Forces, and COVID-19 Enforcement Officers for the Maritime Border;

### **Reduce the maximum penalties**

15 **noted** the Minister for COVID-19 Response is proposing to retain offences (both infringement and criminal) and penalties to address non-compliance with these offences;

16 **agreed** to reduce the maximum infringement offence fee for individuals from \$4,000 to \$1,000;

17 **agreed** to reduce the maximum infringement offence fee for any other persons (for example, companies) from \$12,000 to \$3,000;

18 **agreed** to reduce the maximum court-imposed fine for infringement offences from \$12,000 to \$3,000 for individuals;

19 **agreed** to reduce the maximum court-imposed fine for infringement offences from \$15,000 to \$9,000 for any other persons;

20 **agreed** to reduce the maximum criminal offence penalty for individuals from a \$12,000 fine or six months imprisonment upon conviction, to a \$5,000 fine or six months imprisonment upon conviction;

21 **agreed** to retain the power to make regulations to graduate penalties for infringement offences, to ensure these penalties are proportionate and the maximum penalties noted in paragraphs 16 to 19 only apply to offences likely to cause significant harm to the community;

22 **noted** the provisions relating to infringement offences in the Act will be retained, including those relating to form of infringement notices and reminder notices, who can issue infringement and reminder notices, and payment of infringement fees;

### **Remove Managed Isolation and Quarantine (MIQ)-related powers**

23 **noted** that removing all MIQ-related provisions in the Act delays the implementation of re-establishing facilities again, should the Government decide to pursue an elimination strategy or accommodate an emergency evacuation;

24 **noted** that the delays noted in paragraph 23 would necessarily result in longer (and greater) reliance on self-isolation;

- 25 **agreed** to remove all MIQ-related provisions, including Subparts 3A (cost recovery), Subpart 3B (management of MIQFs and other places of isolation or quarantine) and Subpart 4 (miscellaneous provisions);
- 26 **noted** the proposal in paragraph 25 will remove existing powers to make regulations to recover existing MIQ debts;
- 27 **noted** the legislation referred to in paragraph 33 will include transitional provisions to preserve the ability to continue recovering existing MIQ debts;

### **Safeguards, preliminary and administrative provisions**

- 28 **noted** that the preliminary and administrative provisions provided in the Act will be retained, including repeal, interpretation, and transitional provisions;
- 29 **noted** that the continued powers to impose mandatory public health measures are subject to prerequisites and safeguards, which means there may be periods where the powers are not used, either because there is no justification for mandatory public health measures and/or the prerequisites for exercising the powers have not been met;

### **Impact of narrowing COVID-19 powers**

- 30 **noted** that based on legislative history and judicial comment, existing Health Act 1956 powers are very limited for implementing population-level mandatory public health measures for COVID-19 such as isolation of cases, and that the use of ministerial Orders under the Act is more desirable;
- 31 **noted** that if a broader set of public health measures than those listed in paragraph 5 to 29 is required in future, these measures could be implemented through emergency legislation passed under urgency;
- 32 **agreed** to officials working with the Parliamentary Counsel Office to develop template legislation (based on existing models) that could be used in the situation described in paragraph 31;

### **Form of proposed COVID-19 Public Health Response Legislation**

- 33 **noted** that continuing COVID-19 powers will require legislative changes, progressed using a bill to be enacted by May 2023 at the latest;
- 34 **agreed** to continue the COVID-19 powers noted in paragraphs 5 to 29 by extending and amending the Act to repeal powers no longer considered necessary or proportionate;
- 35 **noted** that there are options around the urgency with which the bill referred to in paragraph 33, which would implement the decision taken in paragraph 34, is passed with trade-offs around pace, use of House time, and opportunities for consultation and engagement;
- 36 **agreed** that the bill referred to in paragraph 33 be passed under urgency by the end of December 2022, with no select committee process, and extended until new new pandemic legislation is enacted;
- 37 **noted** that implementing public health restrictions using COVID-19 Orders is preferable to including statutory public health requirements in primary legislation because there are several checks, balances and safeguards associated with the exercise of the ministerial Order making power, including limiting the exercise of power to emergency circumstances,

consultation requirements, parliamentary scrutiny and satisfaction of compliance with the New Zealand Bill of Rights Act 1990;

### **Future emergency epidemic legislative framework suitable for all likely infectious diseases threats**

- 38 **noted** that the Minister for COVID-19 Response had intended to introduce legislation to enable an emergency response to future pandemics by May 2023 [SWC-22-MIN-0118] and that the Minister now intends to defer the enactment of legislation suitable for all likely infectious diseases threats to enable more extensive stakeholder engagement, a longer select committee process and incorporation of recommendations from any review of the Government's COVID-19 response;
- 39 **noted** that in June 2022, the Cabinet Social Wellbeing Committee agreed to retain the All-of-Government policy and strategy function within the Department of the Prime Minister and Cabinet until the legislative reform noted in paragraph 38 is complete, with this function transferring to Manatū Hauora by June 2023 [SWC-22-MIN-0118];
- 40 **noted** that the decision taken by the Minister for COVID-19 Response referred to in paragraph 38 may impact the decision taken by the Cabinet Social Wellbeing Committee referred to in paragraph 39;

### **General, process and timing**

- 41 **noted** that following discussions at CBC on 3 October 2022, Manatū Hauora have provided drafting instructions to the Parliamentary Counsel Office to commence drafting of the bill referred to in paragraph 33;
- 42 **noted** that the proposed bill to continue COVID-19 powers (the bill) is not currently on the 2022 Legislation Programme;
- 43 **agreed** that the proposed bill noted in paragraph 33 be given a Category 2 priority on the 2022 Legislation Programme (must be passed in 2022);
- 44 **authorised** the Minister for COVID-19 Response to make any necessary policy decisions that may arise during the drafting process, that are consistent with the policy intentions agreed by Cabinet;
- 45 **noted** that the Department of the Prime Minister and Cabinet and Manatū Hauora will use appropriate communication channels to communicate the changes to those affected, including the general public.

Rachel Hayward  
Acting Secretary of the Cabinet





# Cabinet

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Report of the Cabinet Business Committee: Period Ended 7 October 2022

On 17 October 2022, Cabinet made the following decisions on the work of the Cabinet Business Committee for the period ended 7 October 2022:

[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]

CBC-22-MIN-0048

**Proposed COVID-19 Public Health Response Legislation**  
Portfolio: COVID-19 Response

Separate minute:  
CAB-22-MIN-0446

Rachel Hayward  
Acting Secretary of the Cabinet