



**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)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
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:

---

<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.

---

<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)

[Redacted text block]

[Redacted text block]

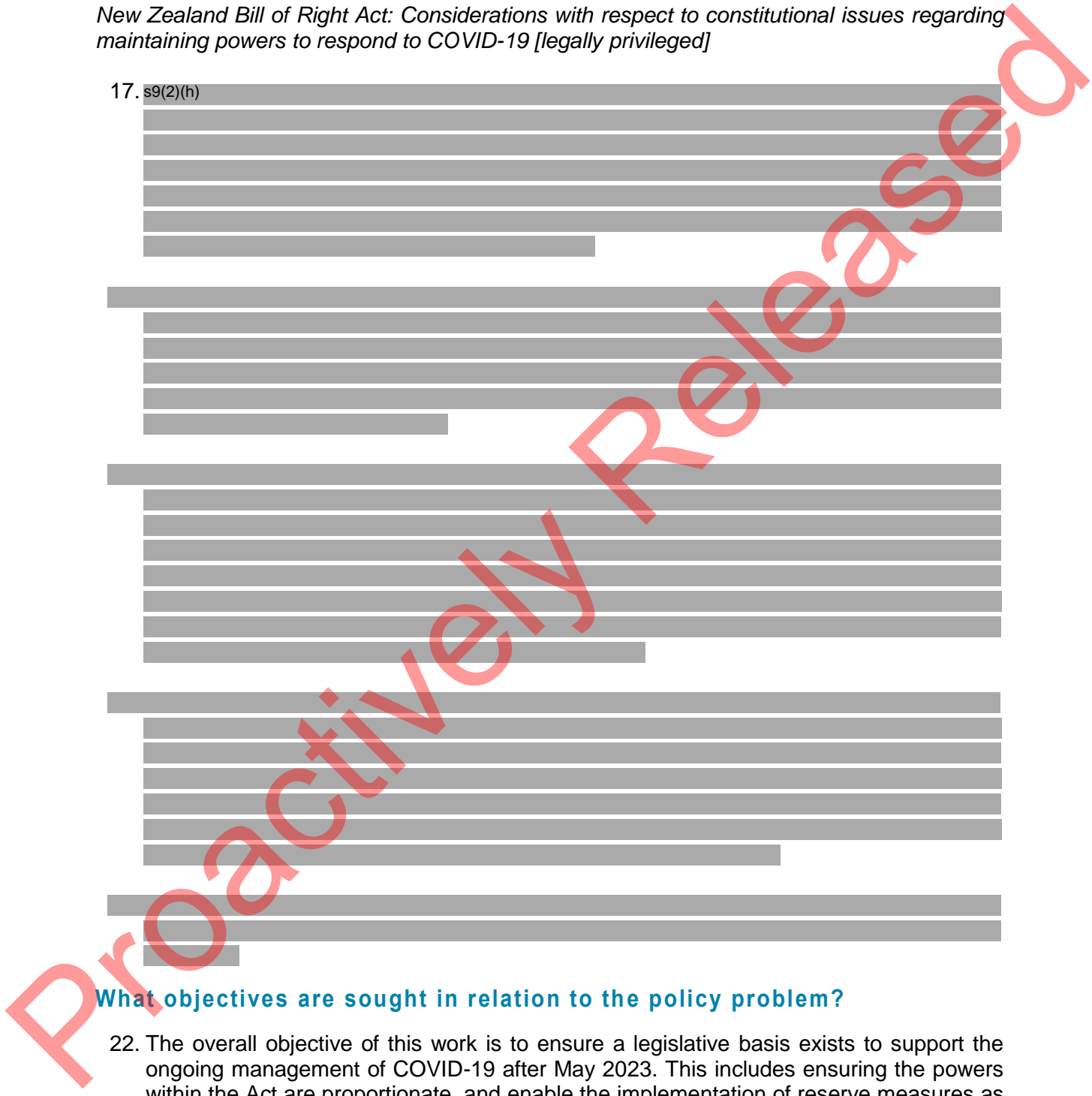
[Redacted text block]

[Redacted text block]

[Redacted text block]

**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.

---

<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...*

---

<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.

---

<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.

<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 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-10, 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	+	++	+

Proactively released

## 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>			
<b>Regulated groups</b>			
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
<b>Regulators</b>			
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
<b>Others</b>			
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.

Proactively Released

---

<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

---

<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.

---

<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	Provides for warrantless powers of entry for the purpose of enforcing COVID-19 Orders.  Limits these powers in the case of private dwellinghouses to constables, rather than all enforcement officers.  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.	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 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 PBCUs 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 or complied 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	

Proactively Released