# INQUIRY INTO THE OPERATION OF THE COVID-19 PUBLIC HEALTH RESPONSE ACT 2020

## PERSONAL DETAILS:

- My name is Richard Simpson.
- I provide professional project management and emergency management contracting services as a Sole Trader (https://simpsonconsulting.online/) to the public, private and not-for-profit sector.
- My submission is as an individual and is not related to any current contracting activities.
- I have worked in regional public health pandemic and emergency management from 2009 to 2017 (Auckland Regional Public Health Service), and in various emergency management contracting roles from 2017 to date.
- I have post-graduate qualifications and professional certification in emergency management, as well as experience in providing tertiary-level training in public health emergency management. I have acted as a member of various regional and national emergency management committees and work groups since 2009.
- I do not wish to appear before the committee to speak to my submission.

## GENERAL POSITION:

Thank you for the opportunity to provide a submission.

I support the principle and basic intentions of the Act, including the urgency in which it was put in place.

The Act provides clarification to existing legislation and describes measures (including enforcement measures) that are critical and necessary to the Covid-19 response.

Any pandemic response must balance an approach based on compliance with one based on public trust and goodwill. Relatively recent epidemic/pandemic guidelines and legislation, including the New Zealand Pandemic Influenza Plan: A Framework for Action (2017)[1], and the Health (Protection) Amendment Act 2016[2] have reinforced this as the preferred Government approach by explicitly outlining the importance of a strategy of voluntary compliance.

New Zealand is an egalitarian society and, to date, the public in general have been receptive to a Covid-19 strategy based primarily on goodwill. However, the Act raises sensitive including the designation of "enforcement officers", the restriction of movement in public roads and spaces, and collection of usually-private information.

The Act also raises themes which relate to the Crown obligations under Te Tiriti o Waitangi to maintain a formal operational CIMS response in partnership with and alongside the tino rangatiratanga and mana motuhake held by any whānau, hapū, iwi and Māori 'community' response. These aspects are contentious, they may be difficult for the general public to understand and there is a risk of misinterpretation. Therefore, these subjects should be addressed clearly and explicitly in any public supplementary documentation to the Act.

Ambiguous areas in the Act – including those outlined above – could be addressed by (creation and) direct reference – within the Act – to a new, designated public Plan/reference that provides more detail.

[1] https://www.health.govt.nz/publication/new-zealand-influenza-pandemic-plan-framework-action
[2] http://www.legislation.govt.nz/act/public/2016/0035/latest/whole.html

## DETAIL

### THE NEED FOR A DIRECT REFERENCE TO A PLAN OR PLANS:

- Examples of a direct reference to a designated Plan are Sections 16-26 of the **Canterbury Earthquake Recovery Act 2011**[3], which outline the mechanism for developing a Recovery Plan, and Sections 39-47 of the **Civil Defence Emergency Management Act 2002**, which outlines the National Civil Defence Emergency Management Plan[4]
- There is currently no singular Plan for public reference about the *all-of-government* response to COVID-19 at the **National Security System**[5] level, and the scope of the Act is broader than the health-led operational (National Coordination Centre level down) response.
    - Specifically, this relates to the need for up-to-date, unrestricted (summary & declassified) information, accessible by the public and by operational response staff about the COVID-19-specific strategy (and/or current working variations to the NZ Influenza Pandemic Plan: A framework for action') at the National Security Committee, ODESC, Watch Group, NSS Directorate and Working/Specialist Group level.
- The **COVID-19 Health and Disability System Response Plan** does not address many of the ambiguities in the Act (refer below), and it would not be the appropriate reference for this all-of-government information;
    - it covers (only) the *"high-level actions for each of the key health and disability sector agencies and organisations to drive and support."* In other words, the scope of the health sector Plan is the Lead Agency-level responsibilities of the Response, excluding the higher-level Response and Government structures as described under the National Security System, and
    - subjects already raised in detail within other Submissions – for example relating to privacy and policing legislation, and the Crown interpretation of components of Te Tiriti o Waitangi (for example the Crown interpretation of tino rangatiratanga as applied to road closures) – are outside the scope of the Lead Agency operational response, or the remit of the Ministry of Health.
- The **Unite against COVID-19 website** does not (currently) contain adequate information to resolve the ambiguities in the Act (refer examples below).

There should be a designated Plan (or reference) – specified within the Act – that provides a clear, current and explicit interpretation of the following sections (in particular):

- **The criteria used for the threat assessment of COVID-19 to determine the extension or repeal of the Act:**
    - There is currently a disconnect between the criteria and Levels used for the COVID-19 response and the phases (including the triggers and thresholds) in the New Zealand Influenza Pandemic Plan: A framework for action[6]. This is understandable, given the urgency of the response, the implementation of an early, high-level decision about restrictive border closure and the implementation of new 'lockdown' levels, the nature of the particular COVID-19 threat and the need to give clear public guidelines about degrees of public contact tracing and quarantine/isolation at

[3] http://prd-lgnz-nlb.prd.pco.net.nz/act/public/2011/0012/latest/whole.html#DLM3653590

[4] http://www.legislation.govt.nz/act/public/2002/0033/latest/whole.html?search=ts_act%40bill%40regulation%40deemedreg_civil+defence_resel_25_a&p=1#DLM150739 – with a the scope of the National CDEM Plan Order 2015 (as stated in Section 6(c) of that legislation) being supported by the Guide to the Plan that is issued by the Director under section 9(3) of the Act - http://www.legislation.govt.nz/regulation/public/2015/0140/latest/DLM6485804.html

[5] https://dpmc.govt.nz/publications/national-security-system-handbook-html#:~:text=It%20has%20oversight%20of%20the,(either%20domestic%20or%20international).

[6] https://www.health.govt.nz/publication/new-zealand-influenza-pandemic-plan-framework-action

various stages. Nevertheless, there is still a disconnect which needs to be acknowledged and explained.

- Although COVID-19 is listed as a Quarantinable infectious disease under Schedule 1 Part 3 of the **Health Act 1956**[7], the 'enhanced' measures introduced in the COVID-19 Public Health Response Act 2020 would not have been appropriate for other recent emergency responses to other listed Quarantinable infectious diseases[8].
    - There should be clear information about what combination of risk factors for this virus make it a threat that warrants the use of measures listed in the Act.
    - Not only is this because of the precedent that this Act sets for pandemic strategy in the future, but also for the current COVID-19 response if the disease risk assessment needs to change after further research into the virus, and/or once vaccination and treatment measures can be introduced at scale to manage some elements of that risk.
- The Act does not refer to any of the new COVID-19 'Levels' 1-4. It is unclear whether the Act is designed to be in place for all or some of these levels.

- **The definition of "suitably qualified and trained" in Section 18(1), in relation to an Authorised person:**
    - Some provisions in the Act – such as the collection of personal information (Section 23) or the judgement that there are "reasonable grounds to believe that a person is contravening or likely to contravene a section 11 order" (section 21) – require specific training.
    - A definition of "suitably qualified and trained" raises the natural question of what agency can conduct the training, and the criteria for ensuring this training is adequate. This information should also be publicly available.
    - The public should be given confidence that these authorized persons are competent in areas such as cultural competency, privacy legislation and conflict management.

- **The list of the class of persons who are currently authorised, the functions and powers that may be carried out and the term of the authorisation:**
    - This information should be updated regularly and be publicly accessible.
    - It is reasonable to assume that it may be unclear who is an "authorised person" under the Act, and the scope of their function and powers.
        - Such as whether a Council employee (e.g. Civil Defence personnel or a Parking Warden) is by definition also an "authorised person", and whether that authorisation is to be by locality, region, or nationally.
        - A reference should also specify the classes of people who already have similar powers – such as Health Protection Officers – that are (presumably) also now classified as "authorised persons" with respect to the powers of the Act.
    - Community volunteers have been utilised in the early stages of the COVID-19 response, in particular to staff checkpoints on roads and public places. It is currently unclear whether some or all of these personnel – whether or not this includes a constable being at the same location – need to be classed as "authorised" or "suitably qualified and trained".

[7] http://www.legislation.govt.nz/act/public/1956/0065/latest/DLM308729.html
[8] Such as the response strategy for the *H1N1pdm09 ('Swine Flu')* response, and the management of potential cases and contacts during the *Zaire ebolavirus* (2014-15) response.

- **The identification and documentation – including uniform, signage and any printed ID – that must be used by an authorised person or class of persons:**
    - Including visual examples of what a member of the public would expect to see if they were to ask for "evidence of that person's appointment as an enforcement officer" under Section 19(a) of the Act.
    - Standard guidelines for enforcement officers on the definition of "reasonable grounds" under Section 20(1) and Section 24(1) of the Act and further detail of a "written report" under Section 20(6)-(7) of the Act.
    - Further clarification of "written report" in section 20(7), for example;
        - how the information should be treated from an information security and privacy perspective,
        - who else may have access to any of the information recorded (e.g. Medical Officer of Health or other Health personnel),
        - the process by which a member of the public can request information collected (and/or for that information to be corrected), and
        - the penalties that an enforcement officer (or anyone with access to the information) may be liable to if the information is mishandled.
    - It is reasonable to assume that someone would be hesitant to stop on a road/public place, give personal information and/or allow access into their house or place of work to someone unless they were comfortable that they could identify the person as on "official" business.

- **A description of "public place" in Section 22(2) of the Act, and an up-to-date list.**
    - A current list of these road closures and "public places" should be available to the public, especially to ensure public confidence that any closure/restriction someone encounters has been authorised under section 22(2) of the Act.
    - This is also a requirement of an epidemic response under Section 92D(3) of the **Health (Protection) Amendment Act 2016** – "Individuals and communities should be encouraged to take responsibility for their own health and, to that end, to participate in decisions about how to protect and promote their own health and the health of their communities."[9]
        - i.e. this participation should extend to knowledge and input about the planned or current (authorised) closures and restrictions in place in their own community.

## OTHER COMMENTS

- **Section 22(2) (and if needed, Section 22(3) and Section 27(3)) should be expanded to include situations where the person exercising the power to stop a vehicle is an enforcement officer rather than a constable.**
    - It is reasonable to assume there would be situations where:
        - a constable may not be present at a site, or
        - a constable may not be visible to the driver of a vehicle when they are directed to slow down and stop, especially on a state highway.

[9] http://www.legislation.govt.nz/act/public/2016/0035/latest/whole.html

- **The powers listed of a constable or an enforcement officer in the Act – in particular in receiving information under Section 23 – are not sufficient for their duties**
    - The information under Section 23 of "full name, full address, date of birth, occupation and telephone number" would not always be sufficient for the constable or enforcement officer to make the necessary judgement about a direction or a closure.
    - If the constable is expected to use other powers under the Police Act to gather other information to inform a decision/judgement/belief, then this should be specified in the Act.
    - For example, the **Ministry of Transport**[10] lists the following private travel as permitted under Level 3, but these are unrelated to Section 23 information such as "address" and "occupation" and would necessitate providing an enforcement officer or constable with more information:
        - Accessing local businesses or services
        - Going to education (including in neighbouring region)
        - Facilitating extended bubble arrangements
        - Travelling to a funeral or tangihanga, wedding or civil union service
        - Facilitating shared caregiving arrangements
        - Relocating a home or business
        - Travelling for medical reasons
        - Travelling for an emergency or to give effect to a court order, or to attend a judicial institution
        - A foreign national leaving New Zealand
    - The information "occupation" under Section 23 is not sufficient for an enforcement officer or constable to determine if travel or access is valid (i.e. essential and/or local), unless the member of the public is also required to disclose the name and/or address of their workplace.
    - Some information may be personal or sensitive, a member of the public may be hesitant to disclose the information, and it is not listed as a requirement under the Act, for example – someone travelling during Level 3 for valid reasons…:
        - to facilitate shared caregiving arrangements might assume they are being asked to disclose information about custody arrangements,
        - for medical reasons might assume they are being asked to disclose information about their medical condition, status and current treatment,
        - for an emergency might assume they are being asked to disclose information about the nature of the emergency,
        - for a court order or to attend a judicial institution might assume they are being asked to disclose information about their relation to the order/institution, including sensitive information such as whether they are a defendant, witness or jury member,
        - when granted an exemption to travel for compassionate reasons might assume they are being asked to provide evidence of this exemption.

[10] https://www.transport.govt.nz/about/covid-19/transport-and-travel-by-alert-level/

- People might also be asked to disclose personal medical information, including their health status. For example, during Level 3 someone cannot travel if an appropriate authority has asked them to self-isolate or if they have been directed to self-isolate or quarantine.
    - Therefore, it is reasonable to assume that the enforcement officer and constable would also need to – implicitly or explicitly – confirm whether a person falls within these categories.
- Enforcement officers are expected to determine "reasonable grounds" to believe (under section 20(1) that someone is failing to comply with Section 11, or to believe certain things about a business or undertaking under section 24(1). The Act does not give information about what information the enforcement officer should be entitled to request (or receive from another agency that legitimately possesses that information – such as an enforcement officer working alongside the Police) in order to make that judgement.

- **The use of "reasonable force" should be specifically addressed and explained in a way that is easily understandable**
    - In particular, there should be a specific explanation available (e.g. in a central Plan/reference to the Act) about why "reasonable force" may be needed and justified as per section 20(4) of the Act – for the collation of *information* to determine whether a person, premises or business is complying with an *order* – whereas force is specifically described as "not permissible" for the presumably more significant reason to secure *compliance* with a *direction* under section 92Y of the **Health (Protection) Amendment Act 2016**.[11]

## THE ACT IN RELATION TO TE TIRITI O WAITANGI

- The Act does not refer to iwi, Māori or **Te Tiriti o Waitangi**, and 'marae' is only mentioned in the context of 20(8) under Powers of entry.
- It is clear – i.e. from the Parliament debates, media coverage, public discussion (e.g. on social media) and previous submissions – that some items relating to this Act are of immediate and urgent public interest with regard to Te Tiriti o Waitangi interpretation. In particular:
    - The status of marae with respect to powers of entry in the Act.
    - The interpretation of iwi-led closures/restrictions of roads and public places as or alongside an expression of tino rangatiratanga and mana motuhake.
    - The appointment and expectations placed on enforcement officer and constables – with appropriate regard for perceived historical discrimination and institutional racism.
- This is a particular risk because – as outlined above – there is no currently publicly accessible, central document/reference describing the strategic-level interpretation of an All-of-Government response, including with respect to Te Tiriti o Waitangi responsibilities.
    - The **Initial COVID-19 Māori Response Action Plan**[12] does not cover items described within the Act and would not be the appropriate place for this information, as that Plan only covers "a framework to ensure the health and wellbeing of Māori is protected" during the response. i.e. the relationship of the Crown-led, all-of-government response and the iwi-led expression of tino rangatiratanga in a true partnership relationship goes beyond the operational, Health sector led response.

[11] http://www.legislation.govt.nz/act/public/2016/0035/latest/whole.html
[12] https://www.health.govt.nz/publication/initial-covid-19-maori-response-action-plan

  - The **New Zealand Influenza Pandemic Plan**[13] states the tangata whenua role of Māori in the context of population vulnerabilities, the need to respect tikanga, and the need for targeted messaging, but does not explicitly cover *partnership* under Te Tiriti or the expression of *tino rangatiratanga* (or *options*) at a strategic level.

- There is a risk that the Act will reinforce misunderstanding and misinterpretation of **Te Tiriti o Waitangi** – by either not directly addressing the items above, or where the Act may be seen as making a judgement about the legal application of Te Tiriti during an epidemic.
  - For example, the definition of an "authorised person" under Section 18(1) as someone "employed or engaged by the Crown or a Crown entity" may lead people to assume the Act's interpretation of this aspect of the response is a narrow one based on the principle of "Active protection" in relation to vulnerable Māori populations.
  - However, if there was a central, publicly accessible Plan/reference to the Act that outlined the requirements of Crown agencies to work with Iwi/Māori at a strategic level (e.g. risk assessment of populations, locations of road closures and need for restrictions of public spaces) – this would educate and inform people that any response must also be conducted with full recognition of the principles of tino rangatiratanga and partnerships.
- The following points – at the least – should be explicitly stated in a Government COVID-19 reference, in an easy-to-understand way for the general public, to avoid ongoing confusion about the implementation of lockdowns, road closures, entry into private dwellings, etc.:
  - As a population, Māori have specific rights under **Te Tiriti o Waitangi** and this means that options around road closures and restrictions on public places that are initiated by iwi (in coordination with the Crown response) should be treated differently – i.e. given priority – compared to a road closure planned/initiated by another population.
  - Māori representatives – including mana whenua in relation to local and regional response frameworks – must be active partners in determining closures/restrictions to roads and public places. During a pandemic this is an essential part of their engagement with the regional operational response as outlined in the Coordinated Incident Management System.[14]
  - The public should have the ability to find out whether any current restriction is in place because of a rāhui, and/or because it has been specifically designated as closed under section 22(2) of the Act.
    - The public should be encouraged to do the right thing either way, but the legality differs and it should be clear to the public under what authority any restriction is being enforced.
  - There should be an explicit (publicly available) protocol for when access or the enforcement of a direction or closure relates to marae or iwi-held land or property. This must include appropriate consultation with mana whenua Māori and conduct by enforcement officers and constables that it is in line with tikanga.
- The public – in particular Māori and Non-Māori with limited knowledge of **Te Tiriti o Waitangi** – should be informed (in a central, dedicated Plan/reference to the Act – as described above) of how tino rangatiratanga and options are expressed and recognised during the COVID-19 response. Again, this includes strategic, all-of-government topics such as the relationship with the Police with respect to closures and access to private dwellings, therefore beyond the scope of existing public documents like the '**Initial COVID-19 Māori Response Action Plan'**. For example, this includes a recognition that anyone acting as an "authorised person" under the Act must meet the same criteria with respect to training, identification, treatment of information, etc., and that cultural competency and cultural safety training and oversight should be built into all levels of a response.

[13] https://www.health.govt.nz/publication/new-zealand-influenza-pandemic-plan-framework-action - pages 17-18
[14] https://www.civildefence.govt.nz/assets/Uploads/CIMS-3rd-edition/CIMS-3rd-edition-FINAL-Aug-2019.pdf - pages 12-13