



In May 2022 the COVID-19 Public Health Response Act 2020 expires: what then?

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The COVID-19 Public Health Response Act 2020 ('Covid Act') expires on 13 May 2022. A further time-limited legal framework will be needed to support Covid policy. A new Bill will require public submissions and thorough consideration by a parliamentary select committee. The Government should begin discussions now with relevant groups, so that the new Bill is ready for introduction in February 2022.



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Background

The COVID-19 Public Health Response Act 2020 ('Covid Act') was enacted on 13 May 2020 as a tailor-made, 'bespoke' legal response to the then unfolding Covid pandemic [1]. The Covid Act now provides the principal means for making Orders, similar to regulations, that give effect to alert levels. The Act also authorises rules for those arriving in New Zealand, and those working at the border. Although other statutes such as the Health Act 1956 remain important [2], they were not designed specifically for Covid situations.

The issue

The Covid Act was intended to address an emergency, and its extensive powers are therefore time-limited. The Act expires two years after its enactment, that is, 13 May 2022.

The Act cannot be extended, and clearly it was hoped in May 2020 that we might by 2022 be back to pre-Covid 'normal'. Progress has of course been made, including vaccine availability. But now we know that the need for some form of Covid management, and hence a legal framework for such management, is likely to be needed for some time yet: for how long we do not know.

A new Covid Act?

We need to be starting to think now what a new time-limited Covid Act should look like, given the time required for submissions, consideration by a parliamentary select committee, and the usual holiday period.

And if so, what should a new Covid Act look like?

In theory, the present Act could be re-enacted word for word to become law when the present Act expires. But this would be unwise for two main reasons:

First, we have surely learnt lessons from implementing the current Act. Are there provisions that have not worked out as intended; and are there matters not covered in the present Act that should be included? For example, refining some of the offence and penalty provisions may be appropriate. And perhaps there are matters relating to immunisation, and contact tracing, that should be addressed in primary legislation (an act of parliament) rather than secondary legislation (secondary legislation includes orders as well as regulations). It may be helpful to set out overarching principles to guide implementation of the Act and its orders. These principles could refer to the precautionary approach (see section 7 of the Civil Defence and Emergency Management Act 2002); consistency with privacy law; and proportionality.

Secondly, the current Act was passed under parliamentary urgency, with practically no room for consultation with informed groups and very little parliamentary debate. This very inadequate process rightly met with considerable criticism. Minister Parker said that urgency was necessary because the Government didn't think that the Bill could be delayed for a select committee process. Government took on board, however, subsequent suggestions to hold a review of the Act after its enactment [3].

The Finance and Expenditure Committee responsible for this review reported 27 July 2020, with many submissions providing interesting and constructive ideas [4]. The Report focused among other issues on the Act's relationship with Māori and the Treaty of Waitangi, use of warrantless entry powers, privacy, enforcement of the Act, and infringement offences [5].

The Committee did not recommend any changes as a result of the inquiry, and none were made.

But now a new Act is needed, or will be soon. The Government has no option but to reflect on questions of both process and content in developing the new Act. The Government cannot plead urgency this time round: the Bill will require a full Select Committee process.

The development of the Bill must take account of the recommendations of the Inquiry, submissions made to that Inquiry, experience in implementing the present Act, as well as submissions to the future Select Committee responsible for reviewing the new Bill.

Conclusions

1. The Government should clarify its intentions, well before the end of 2021, on its plans for what happens when the COVID-19 Public Health Response Act 2020 lapses in May 2022.
2. Discussion on the content of a new Bill should be undertaken during the last months of 2021, before drafting is finalised.

3. The new Bill should be ready for introduction in early February 2022 to allow a minimum 3 months for submissions to be prepared and considered before enactment in mid-May 2022.
4. The new Bill should be time-limited and automatically expire on a stipulated date. Safeguards made under its authority should be similar to those in the present Act and provide for orders to lapse unless confirmed by Parliament. Consideration could be given to inclusion of principles to guide interpretation and implementation.

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References

1. COVID-19 Public Health Response Act 2020, <https://www.legislation.govt.nz/act/public/2020/0012/30.0/whole.html#LMS344175>
2. These include, apart from the Health Act 1956, the Civil Defence Emergency Management Act 2002, the Immigration Act 2009, and the Epidemic Preparedness Act 2006.
3. New Zealand Parliament Hansard Transcript COVID-19 Public Health Response Act 2020 — Finance and Expenditure Committee Inquiry—Referral (2020) <https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20200514_20200515_64>1
4. For example, see the Human Rights Commission *Inquiry into the COVID-19 Public Health Response Act 2020* (2020); Claudia Geiringer, Eddie Clark, Dean Knight, Nessa Lynch and Geoff McLay, *Inquiry into the operation of the COVID-19 Public Health Response Act 2020* (2020); and Glenn Tootill and Toni Love *Inquiry into the operation of the COVID-19 Public Health Response Act 2020* (Te Hunga Rōia Māori o Aotearoa – The Māori Law Society, 2020).
5. Finance and Expenditure Committee Inquiry into the operation of the COVID-19 Public Health Response Act 2020: Report of the Finance and Expenditure Committee (2020) 7-17*
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