



Submission on the COVID-19 Public Health Response Act 2020

27 June 2020

The Equal Justice Project (EJP) is a non-partisan pro bono charity operating out of the University of Auckland. We apply Law students' legal training and knowledge to promote social equality, inclusivity and access to justice in our local and wider community.

Members of the EJP Communications Team (Sophie Bijl-Brown, Tulsi Khanna, Andrew O'Malley Shand, Henry Parker, Ling Yee Wong and Rachel Simpson), as authorised and edited by the Communications Team Managers (Anuja Mitra and Bronwyn Wilde) and Head Editor (Lauren White), have considered the the COVID-19 Public Health Response Act.

We appreciate being able participate in this inquiry given the rushed initial passing of the Act. We strongly encourage an amended Act which is a more proportional infringement on rights to reflect the current Alert Level 1 and the slowing rate of transmission.

Main Recommendations:

- That further clarification is given as to what constitutes ‘reasonable grounds’ for warrantless entry under the Act, in order to minimise intrusions on the rights and prevent abuses of power.
- That changes are made to sections 20 and 27 lessen the discriminatory effect on Māori and allow for better partnership under Te Tiriti o Waitangi respectively.
- That the ways in which officers empowered under this Act can be held accountable by civilians is made clear to the public, in order to promote accountability.

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Executive Emergency Powers

1.1 The COVID-19 Public Health Response Act (the Act) has been described as providing “expansive powers to make orders that may impose arguably the most profound peacetime restrictions ever made to the rights and personal freedoms of all New Zealanders.”¹ It is therefore unsurprising that the Act sparks concerns about the immense power it grants the executive.

1.2 In New Zealand, this is particularly relevant because an important means of ensuring political accountability and avoiding concentrations of power is the separation of powers. Although the judiciary is separated from the other branches of government,

¹ New Zealand Law Society “Submission on the COVID-19 Public Health Response Act 2020” at [3].

executive and legislative powers are largely merged within our parliamentary system. Therefore, if significant power is granted to the executive, the public must feel assured that this power is not overreaching, and safeguards must be in place to protect and preserve people's rights and freedoms.

- 1.3 Such concerns about the executive's power are particularly predictable given the current global consciousness about authoritarian institutions and their impact on human rights. However, in a time of emergency, it is essential that the executive works quickly and preventatively, especially where a major public health crisis and thousands of lives lost are the alternative. Indeed, the public has shown willingness to sacrifice their freedom for this greater good. It is vital that, in light of the fact that public debate and consideration was not possible, the legitimacy of the Act is ensured.

Rights Affected by the Act

- 2.1 When public debate and consideration is not possible, there is the question of whether the community should accept policies imposed upon them that infringe on their human rights. The Act impacts five significant rights: the right to be free from unreasonable search and seizure, the right to freedom of peaceful assembly, the right to freedom from discrimination, the liberty of the person and the right to justice.

Unreasonable Search and Seizure

- 2.2 Section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) states that everyone should be free from unreasonable search and seizure, whether of the person or their property. The Act clearly infringes upon this right. The powers given to police and enforcement officers are open to abuse, especially in lower socio-economic areas where many people may be living in the same house.²

² See Statistics New Zealand *Living in a crowded house: Exploring the ethnicity and well-being of people in crowded households* (May 2018) at 7 and 26.

Freedom of Peaceful Assembly

2.3 Section 16 of NZBORA guarantees everyone the right to freedom of peaceful assembly. New Zealand is an incredibly multicultural nation where peaceful gatherings are a norm and necessity to many cultures. COVID-19 is a disease spread through social interaction, and so the executive has chosen to place severe restrictions on people congregating. However, at some alert levels, gatherings are allowed with safety measures in place and the public seems to respect this new mode of living. Thus, the Act should not infringe on citizens' rights to assemble more than is necessary.

Freedom from Discrimination

2.4 Everyone has the right to freedom from discrimination under s 19 of the NZBORA. It is important to consider how this right may be abrogated under the provisions of this Act even though the Act does not itself authorise discriminatory exercises of its powers. In particular, we might consider the over-policing and surveillance of certain areas in New Zealand, and how the Act might disproportionately impact people living in those neighbourhoods.

2.5 There is also the history of negative interactions between law enforcement and minority groups, with Māori especially being overrepresented in the justice system. It has been acknowledged, for example, that Māori are seven times more likely to be charged as a first offender than Pākehā.³ Other cultural minorities are also at a higher risk of being disadvantaged by the powers conferred by the Act, such as Pasifika communities who have a history of being targeted by police, as seen in the dawn raids of the 1970s.

2.6 Even in an unprecedented event like the COVID-19 pandemic, human rights should still be paramount in law-making. Though the NZBORA recognises in s 5 that justified limitations can be placed upon rights, these legal limitations must be

³ RNZ "New Armed Police use could inflame Maori community - Borrows" (March 4, 2020) <www.rnz.co.nz>.

“demonstrably justified in a free and democratic society”. This submission raises concerns around whether the Act impairs rights only to the extent that is necessary.

Warrantless Entry

- 3.1 Warrantless entry of private property is a severe breach of the right to privacy. Section 11 of the Bill provides for a wide range of directions that may be made by the Minister or the Director-General. These are directions that New Zealanders have already grown accustomed to; staying at home, physical distancing; quarantining where necessary, etc. Throughout levels 4 and 3 of the nationwide lockdown, New Zealanders largely followed these directions. They accepted the limitations on their rights and freedoms voluntarily, trustingly, and generally with due diligence. This is commendable.
- 3.2 Prior to this Bill, warrantless entry was a power available to the police to assist a medical officer of health under section 71A of the Health Act 1956. Section 20 of the current Bill limits the broad emergency powers of section 71A to situations where the constable has reasonable grounds to believe that limits to gathering numbers have been breached. The Attorney-General has described the extent of the power as limited to ‘breaking up parties’.⁴ This enables the Government to rely on the new Bill rather than on emergency powers under the Health Act.
- 3.3 However, as New Zealand transitions into the more liberal era of COVID-19 under alert level 1, it must be asked what purpose this, albeit limited, power serves.
- 3.4 If there were an epidemic of rule-breaking parties causing any significant number of infections in New Zealand, codifying such a power into regular legislation would likely be less abrasive; however, 69% of COVID-19 infections in New Zealand were imported or related to imported cases.⁵ Furthermore, New Zealand appears to have eliminated community transmission.⁶ The value of such a power is therefore severely

⁴ (13 May 2020) 745 NZPD (COVID-19 Public Health Response Bill – Third Reading, David Parker).

⁵ Ministry of Health, “COVID-19 - current cases” (25 June 2020) < <https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-current-situation/covid-19-current-cases>>.

⁶ “Covid 19 coronavirus: Level 1 - it's now Prime Minister Jacinda Ardern's decision today” *New Zealand Herald* (online ed, Auckland, 8 June 2020).

diminished, while the cost to the rights and freedoms of New Zealanders remains high.

Limitations

- 3.5 The requirement for ‘reasonable grounds’ for belief that a person is failing to comply with a section 11 order limits the powers of entry of an enforcement officer. However, examples of what reasonable grounds might be are not mentioned, and this leaves a wide scope of what could be considered reasonable to be determined by the relevant officer. This wide discretion leaves the power vulnerable to exploitation.
- 3.6 Section 20(5) requires a written report to be made on the exercise of the power to the Commissioner or a Police employee designated to receive such reports by the Commissioner as soon as practicable after exercising that power. Section 20(6) requires a similar report to be written to the Director-General in the case of an enforcement officer.
- 3.7 The requirement of a report evidently provides some accountability on the exercise of the powers by enforcement officers; however, it relies on self-reporting and occurs after entry has already been made. A report after the fact is unlikely an adequate check on such a significant power.

Recommendations

- 3.8 Exceptional circumstances, such as where there is a serious risk to public health, may permit breach of privacy by way of warrantless entry into a dwellinghouse or marae; however, as community transmission appears to have been eliminated, there is no urgent need for this power. If circumstances were to change and public health were to deteriorate, a more thoroughly considered and consulted-upon provision for warrantless entry into private spaces may prove a useful and effective tool.
- 3.9 To ensure the warrantless entry power is appropriately constrained, we recommend that what constitutes ‘reasonable grounds’ is further clarified, so as to avoid excessive intrusions on the rights of New Zealanders.

Discriminatory effect on Māori

4.1 Should the Act continue to function in remission or resurgence of the virus, it should do more to recognise cultural values, in particular, tikanga Māori, through recognition of Te Tiriti o Waitangi and the Crown's continued commitment to creating equitable outcomes for Māori. We see three reasons as primarily driving these needs:

- a. Destruction of the interconnectedness of Māori whakapapa, hapū and iwi living structures, in addition to other community-centred cultural groups, may lead to additional adverse consequences on Māori as a result of compliance with section 11 orders and application of the warrantless entry provisions.
- b. Māori in particular have a negative history of unjustifiably harsh policing and constitute a disproportionate percentage of those apprehended, convicted and currently serving prison sentences — grossly in excess of the percentage of the population that identify as Māori.⁷
- c. Māori must be afforded greater self-determination through New Zealand's continued commitment to upholding Te Tiriti o Waitangi and the unqualified exercise of Māori rangatiratanga over lands and taonga under Article two.⁸

4.2 It is in light of these concerns that we make the following recommendations.

Recommendations

4.3 EJP commends the removal of the term 'marae' from 20(2) in reaction to the public response. However, the enactment of section 20(8) has now afforded marae even less protection, as they are subject to warrantless entry under subsection (1) where under the draft bill they were previously exempt. This may well have been an oversight as a result of the rapid passing of this Act. Regardless, it must be remedied

⁷ Department of Corrections “Over-representation of Maori in the Criminal Justice System.” <4.0 Overall summary and conclusions>.

⁸ “Te Tiriti o Waitangi - The Treaty of Waitangi” *Treaty 2 U* < <http://www.treaty2u.govt.nz/the-treaty-up-close/treaty-of-waitangi>>.

and further highlights the importance of Crown consultation with Māori for proper partnership.

- 4.4 The Act should make reference to Te Tiriti o Waitangi in order to recognise the need to prevent Māori from becoming victims to abuse of warrantless entry powers. In addition, we see a need for explicit mention that the powers in s 20 are not to be used for purposes which are not recognised under the Act's primary purposes in s 4 or else disadvantage Māori.
- 4.5 EJP supports the initiatives taken by local communities and Māori iwi groups in Northland, Gisborne and elsewhere to protect their community from the spread of COVID-19 through road check stations as an exercise of their tino rangatiratanga. We suggest the Act should provide for the recognition of these initiatives by either the Minister or the Director General of Health as enforcement officers under section 27 of the Act. This would better allow for co-governance.
- 4.6 We submit these additional measures, acknowledging the rights and contributions of Māori, do not detract from the efficacy of the Act to fulfil its primary purpose in section 4(a) to prevent and limit the risk of the outbreak and spread of COVID-19.

Accountability and Transparency

- 5.1 Unlike in times of war, there is no obvious reason for the executive to withhold information from the public, or discourage scrutiny and debate of public health order, during a public health crisis such as the COVID-19 pandemic. The usual reason during war — that free flow of information or transparency will aid the enemy — doesn't apply to this pandemic because the "enemy" here, COVID-19, cannot read!
- 5.2 The argument that debate and scrutiny holding the executive accountable will create division and a muddled response misses the point of debate and scrutiny: to improve the quality of decision-making. Indeed, as the Auditor-General states, "[o]ne of the features that makes New Zealand's public sector management special

is our dedication to transparency and accountability”.⁹ Without concrete measures to meet the lofty goals of transparency and accountability, those are just hollow words. We must therefore look at the safeguards towards transparency and accountability of section 11 orders in the Act.

- 5.3 We want to distinguish between the *creation* of a section 11 order and the *administration* of a section 11 order. Both creation and administration require transparency and accountability. The creation of section 11 orders however is more political in nature.
- 5.4 For example, New Zealand chose to eliminate COVID-19, while many European countries and even Australia chose suppression instead.¹⁰ The health orders required to eliminate COVID-19 in New Zealand correspondingly limited more civil liberty than health orders elsewhere. With a different government, the choice could have been different.
- 5.5 Hence, in our view, the creation of section 11 orders is a political decision. And political decisions are accountable in the court of public opinion, in Parliament and in the coming general election. Further accountability and transparency safeguard in the creation of a section 11 order is already addressed in sections 14-17 of the Act, and we have no concerns at this time.
- 5.6 The administration of a section 11 order, on the other hand, is less political and more about how faithful the public sector carries out health order. The enforcer of section 11 orders will either be the police¹¹ or an enforcement officer who is appointed by the Director-General of Health and employed by the Crown or a Crown Entity.¹² We surmise that the Ombudsman has statutory authority to investigate the conduct of most, if not all, enforcement officers,¹³ while the Independent Police

⁹ Controller and Auditor-General *Public Sector Accountability Through Raising Concern* March 2016 at 3.

¹⁰ Michael G Baker, Amanda Kvalsvig and Ayesha J Verrall “New Zealand’s COVID-19 elimination strategy” (19 May 2020) *The Medical Journal of Australia* <<https://www.mja.com.au/journal/2020/new-zealands-covid-19-elimination-strategy>>.

¹¹ Sections 20(3)-(5).

¹² Section 18.

¹³ That is due the fact that the list of Crown Entities in Crown Entity Act 2004 does not match up easily to the list of government agencies Ombudsman has power over in Ombudsman Act 1975.

Conduct Authority (IPCA) will have clear statutory authority to investigate police conduct.¹⁴

Recommendations

- 5.7 To promote accountability, the Act should be amended to clearly state the Ombudsman can investigate the conduct of all enforcement officers other than the police.
- 5.8 The Act is amended so persons affected by section 11 orders must be informed by enforcement officers or the police that they can call on the Ombudsman or IPCA respectively if they wish to make complaints on enforcement decisions. This is especially important for people put in mandatory isolation guarded by enforcement officers under section 11 orders, so they know they can hold the enforcement officers accountable for any lapse, and to encourage good behaviour in the enforcement officers to begin with.
- 5.9 We want to acknowledge that the Act recognises the power of courts in reviewing the creation and administration of section 11 orders.¹⁵ However, we also want to point out that the court process is slow and expensive, even during non-lockdown periods. The Ombudsman, on the other hand, is free for the public to call on. If the public are not happy with the Ombudsman's investigation and decision, the courts remain a fallback option.

Appropriateness of Emergency Response

Rushed enactment

- 6.1 The legitimacy of the Act has been questioned due to its rushed passing and lack of debate. Some fear that it is a symptom of authoritarianism which has been looming globally.¹⁶ Others consider it to be a direct endorsement of repressive state apparatus, at a time when discussions about the role of the police are deeply lodged

¹⁴ Per Independent Police Conduct Authority Act 1988.

¹⁵ Section 13(3).

¹⁶ "Dunedin MP slams Ardern as 'Muldoon with slogans' *Otago Daily Times* (online ed, New Zealand, 13 May 2020).

in public consciousness.¹⁷ Drafting emergency legislation in such a precarious time of heightened tensions and unfettered media scrutiny is inevitably going to be difficult.

- 6.2 However, a quick response is inherent in the nature of emergency legislation, and the capacity to empower the executive and respond to a crisis finds its justification in the concept of necessity or may be inherent in the nature of sovereignty.¹⁸ Even countries such as Taiwan, which largely avoided a lockdown and increased police powers due to extensive contact tracing, still required emergency law.¹⁹
- 6.3 While this Act will eventually be automatically repealed, aspects of it may be incorporated into new public health legislation, and it may be looked at if New Zealand ever experiences another national emergency.²⁰ Amidst public fears, it is important to consider how emergency law should be dealt with going forward, and the kind of precedent this sets.

Proportionality

- 6.4 The key consideration for emergency legislation is whether the limits on liberties are proportionate to the threat on public safety or welfare. It is right to stay vigilant about the pandemic; it certainly is a serious demand on the resources of the community that requires nothing less than a swift and coordinated response.²¹ If emergency laws had not been utilised by the Government, we would have seen many more deaths, disproportionately in our Pasifika communities, where underlying health conditions are common.²²

¹⁷ Sela Jane Hoggood “Public Health Response Bill sparks concern in Pacific community” *Radio New Zealand* (online ed, New Zealand, 18 May 2020).

¹⁸ Sascha Mueller “Extraordinary Powers and Political Constitutionalism” (2017) 23 *Canterbury Law Review* 65 at 67.

¹⁹ James Fyfe “Coronavirus: Taiwan reports no new cases of COVID-19, shows merits of acting early” *Newshub* (online ed, New Zealand, 15 April 2020).

²⁰ Alastair Hercus and others “The Government’s COVID-19 response: A new law for Alert Level 2” (14 May 2020) Buddle Findlay <<https://www.buddlefindlay.com/insights/the-governments-covid-19-response-a-new-law-for-alert-level-2/>>.

²¹ Kenneth James Keith *Final Report on Emergencies* (NZLC R22, 1991) at [1.13].

²² Mario Koran “The disease is ripping through’: why coronavirus is devastating California’s Pacific Islanders” *The Guardian* (online ed, California, 22 May 2020).

- 6.5 While we respect the immense risk of COVID-19, the proportionality of allowing warrantless entry (section 20(1)) requires further consideration. Warrantless entry is an extremely invasive breach of rights that should be reserved for an immediate risk to life or safety. By the time enforcement officers interrupt a gathering of people, the virus is likely to already have spread.
- 6.6 Therefore, the risk here is qualitatively different to what would be classed as an immediate risk and is not proportionate to the liberty being limited.²³ However, we recognise that there might be instances where a gathering is about to happen, and the presence of a person with COVID-19 is known. Parliament should clarify that the privilege of warrantless entry will only apply in a case of immediate risk, as is the regular law.

Legislation in Future Emergencies

- 6.7 In most countries, the propriety of emergency powers is determined by establishing the constitutional norm, whether the power in question derogates upon that norm, and whether that derogation is justified.²⁴ In New Zealand, we have no codified constitution, and the courts can only review the exercise not the content of the powers.
- 6.8 It has often been considered that the constitutional conversation in New Zealand will unlikely engage the public without a nationwide crisis.²⁵ Emergency laws will never be perfect, but they should always consider the needs and desires of a nation's people, and there is no better way to solidify these than when discussions about what it means to be a New Zealander are on the global stage.

²³ New Zealand Bill of Rights Act 1990, s 21.

²⁴ Mueller at 66.

²⁵ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 12.