



# **Inquiry into COVID-19 Secondary Legislation**

Report of the Regulations Review Committee

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Fifty-third Parliament  
(Hon Judith Collins, Chairperson)  
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*Presented to the House of Representatives*

Hon Judith Collins  
Chairperson

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# Inquiry into COVID-19 Secondary Legislation

## Summary of recommendations

The Regulations Review Committee has conducted an inquiry into the secondary legislation made in response to the COVID-19 pandemic, and makes recommendations to the Government as listed on pages 36 to 39 of this report.

## Introduction

### What is this report about?

This report takes a big-picture look at the secondary legislation that has been made to deal with COVID-19 and asks:

- Was it consistent with principles for good legislative design?
- Were there grounds for the Regulations Review Committee to draw the secondary legislation to the special attention of the House of Representatives under Standing Order 327?
- How well did the secondary legislation follow the principles that the Regulations Review Committee established in 2016 for emergency legislation?
- Do those principles need to be updated?<sup>1</sup>

We received advice and substantial assistance in drafting this report from Jason McHerron, barrister. We would like to thank Mr McHerron for the expertise and thoroughness he provided to the committee.

### What does the Regulations Review Committee do?

The Regulations Review Committee scrutinises all secondary legislation and the powers in bills to make secondary legislation. It is a part of the committee's job to check that those with delegated powers to make legislation use them in the ways Parliament intended.

This function is constitutionally significant. It assists Parliament to retain control over the content of laws made under delegated powers.

Our scrutiny function has been particularly important during emergencies, such as the COVID-19 pandemic. During periods of emergency, secondary legislation is used to manage extraordinary circumstances and may adversely affect the rights and freedoms that we usually enjoy. So it is important that there are safeguards to ensure those rights are kept in balance with the other work that emergency laws need to do.

We do not examine the policy behind secondary legislation, but instead look at whether the secondary legislation was made in accordance with its empowering provision and consistently with constitutional principles.

Following the Christchurch earthquakes, the Regulations Review Committee of the 51st Parliament reported on its scrutiny of secondary legislation (and powers to make secondary legislation) in response to emergency circumstances.<sup>2</sup> In its final report in 2016, the committee made 11 recommendations for emergency legislation.

It is important to recognise at the outset that there are many differences between the earthquakes that prompted the Regulations Review Committee's 2016 recommendations, and the COVID-19 pandemic. These differences include the different types of originating event, impact to property versus direct health impact, regional versus global effects, and recovery timescales.

In the present inquiry, we wanted to check whether the Regulations Review Committee's 2016 recommendations have been followed, as far as they are relevant to the COVID-19 pandemic, and to consider whether any of the recommendations need to be updated.

Since 2020, we have scrutinised all secondary legislation made in response to the outbreak of COVID-19 and have issued numerous reports recommending changes.<sup>3</sup> Many of our recommendations were accepted by the Government and resulted in improvements to the COVID-19 Public Health Response Act 2020's regulation-making powers and the instruments made under them. In this report, we summarise what we were looking for then, what we found, and what could be done better in future emergencies.

## Why did this inquiry begin?

There was no opportunity for us to scrutinise amendments to the powers to make secondary legislation in the COVID-19 Response (Vaccinations) Legislation Bill prior to its enactment in late 2021. Despite this, we considered that there would be value in retrospectively scrutinising those powers.

So, on 15 December 2021, we began an inquiry into the regulation-making powers in the COVID-19 Response (Vaccinations) Legislation Act 2021 (Vaccinations Act) and the COVID-19 Public Health Response (Protection Framework) Order 2021 (Protection Framework Order).

Part-way through our inquiry, we resolved that it would be beneficial to consider, in a more holistic way, the balance between the use of primary and secondary legislation in the Government's COVID-19 response. This would allow our inquiry to specifically review the structure and content of COVID-19 legislation against the recommendations made in the Regulation Review Committee's 2016 report on its *Inquiry into Parliament's legislative response to future national emergencies* and, perhaps, make recommendations regarding improvements for future legislation.

In light of the decision to expand the scope of the inquiry, in June 2022 we amended our terms of reference for this inquiry as follows:

## The updated terms of reference for our inquiry

Under the amended terms of reference, the inquiry is to:

- evaluate secondary legislation relating to COVID-19, and associated empowering provisions, against the constitutional principles for good legislative design and Standing Order grounds in Standing Order 327<sup>4</sup>
- review legislation relating to the COVID-19 pandemic against the principles considered and recommendations made in the committee's 2016 report on Parliament's legislative response to future national emergencies, focusing on:
  - the appropriate balance between primary and secondary emergency legislation
  - appropriate safeguards for the making of secondary emergency legislation
  - the role of Parliament, and the Regulations Review Committee in particular, in scrutinising secondary emergency legislation
- analyse other matters identified in submissions to the committee that are within our jurisdiction, particularly:
  - whether the non-active provisions in the COVID-19 Public Health Response (Protection Framework) Order 2021 are appropriate as a matter of legislative design
  - whether this approach struck the right balance between the need for transparency and accountability and the need to ensure legislation remains flexible for future amendment
  - whether the complexity, design, and structure of secondary legislation relating to COVID-19 makes it difficult to navigate and access
- consider whether the recommendations from the committee's 2016 report, so far as they relate to secondary legislation and associated empowering provisions, need to be updated in light of the legislative response to COVID-19.

## Existing legislation used to make secondary legislation for the COVID-19 response

### Epidemic Preparedness Act 2006

Under the Epidemic Preparedness Act 2006, the Prime Minister may (with the agreement of the Minister of Health) issue an epidemic notice declaring that the effects of a quarantinable disease are likely to significantly disrupt essential government and business activity.<sup>5</sup>

An epidemic notice:

- triggers the infectious diseases regime in the Health Act 1956, allowing the making of health orders—special directive powers to prevent the outbreak or spread of infectious disease
- allows Ministers to activate latent emergency provisions in social security, immigration, parole and other legislation
- allows Ministers to issue notices to modify requirements or restrictions in primary or secondary legislation to facilitate the management of the disease. This can be done

either prospectively (in advance of the epidemic) or immediately (while an epidemic notice is in force).<sup>6</sup>

The Epidemic Preparedness Act also allows judges to modify rules of court while an epidemic notice is in force.<sup>7</sup>

## Health Act 1956

A specific infectious diseases regime sits in Part 3 of the Health Act 1956.<sup>8</sup> It gives medical officers of health powers which may be exercised for the purpose of preventing the outbreak or spread of an infectious disease. These powers are activated when a state of emergency is declared,<sup>9</sup> an epidemic notice is issued, or when authorised by the Minister of Health.<sup>10</sup> Section 70 of the Health Act was initially the primary means by which COVID-19 orders were made early in the pandemic.<sup>11</sup> Even after bespoke COVID-19 legislation was enacted, section 70 Health Act orders continued to be made.

## Bespoke legislation for the COVID-19 response

In its 2016 report on Parliament's legislative response to future national emergencies, the Regulations Review Committee of the 51st Parliament concluded:<sup>12</sup>

... we do not recommend passing general legislation in advance for national emergencies. While superficially attractive, the wide range of different types of potential national emergencies we face in New Zealand means that unduly broad powers would need to be conferred to cover all possible eventualities. Rather, we prefer bespoke legislation with appropriate safeguards that can be tailored to the needs of the particular emergency concerned.

A full Court of the High Court made a similar observation in *Borrowdale v Attorney-General*:<sup>13</sup>

When a public health crisis is ongoing, the democratic nature of our constitution means that there comes a point when Parliament ought to pass bespoke legislation to ensure that critical policy decisions are made by ordinary Cabinet decision-making.

In relation to COVID-19, a hybrid approach was taken involving:

- existing legislation designed to deal with health emergencies
- new legislation that was specifically designed to meet the needs of the COVID-19 pandemic.<sup>14</sup>

We believe this is a sensible and pragmatic response that could be applied for other future emergencies.

## COVID-19 Public Health Response Act 2020

On 12 May 2020, the Government introduced an omnibus bill to provide a bespoke legal framework for responding to COVID-19, designed to avoid having to rely on the Health Act 1956 regime. The bill was considered by the Government to be urgently needed to provide a clear legal basis for the country to move down the alert levels to level 2. Due to the extreme urgency inherent in implementing a legislative response to the still-unfolding health

emergency, the bill went through all stages in two days, without select committee scrutiny or public consultation.

Other emergency legislation was also passed.<sup>15</sup> But the COVID-19 Public Health Response Act remained the main statute regulating New Zealand's COVID-19 response throughout. It provides an enabling framework for the making of COVID-19 orders requiring people to comply with public health restrictions and measures. Nearly 200 orders have been made under the COVID-19 Public Health Response Act. COVID-19 orders have been made to implement measures including:

- setting the restrictions for different parts of New Zealand under the Alert Level System
- establishing isolation and quarantine requirements for people entering New Zealand by air or sea
- requiring vaccination and regular testing of workers if they are to undertake certain work in education and healthcare facilities, and at borders or at managed isolation and quarantine facilities.

The COVID-19 Public Health Response Act contains a broader range of powers with a “more modern and robust deliberative framework” than the Health Act 1956 regime.<sup>16</sup> In particular, the COVID-19 Public Health Response Act shifted much of the decision-making from the Director-General of Health to the Minister of Health. The explanatory note to the bill explained that this is more consistent with legislative conventions in light of the scale and wide-ranging implications of the decision-making.

Section 11 of the COVID-19 Public Health Response Act gave certain order-making powers to the Minister of Health (nationally) and to the Director-General of Health (in respect of single territorial authority districts).<sup>17</sup> Orders could be made imposing requirements and prohibitions on persons, places, and other things to reduce the risk of the outbreak or spread of COVID-19.

The COVID-19 Public Health Response Act created an infringement regime providing a graduated response to non-compliance with orders. The Act confers warrantless entry powers under which enforcement officers may enter premises if they have “reasonable grounds” to believe a person is failing to comply with an order.<sup>18</sup>

In late 2021, the provisions empowering the making of COVID-19 orders were amended to broaden their purpose, enable material to be incorporated by reference, and improve delegations.<sup>19</sup> The same amendment inserted a new part into the COVID-19 Public Health Response Act relating to managed isolation and quarantine facilities.

### **COVID-19 Response (Vaccinations) Legislation Act**

The COVID-19 Response (Vaccinations) Legislation Bill was introduced on 23 November 2021 and had its first, second and third readings on the same day. The bill received Royal Assent on 25 November 2021 and the Vaccinations Act commenced the following day. The Vaccinations Act amended the COVID-19 Public Health Response Act to:

- enable introduction of the COVID-19 Protection Framework (commonly known as the “traffic light system”)

- impose restrictions on the freedom of unvaccinated people through the implementation of COVID-19 vaccination certificates.

The Attorney-General addressed criticism of the speed of enactment of the Vaccinations Act and the absence of referral of the bill to a select committee by explaining that:<sup>20</sup>

- the traffic light system and the role of vaccination certificates were signalled in advance, so the Government's approach was not a surprise
- orders would continue to be scrutinised by the Regulations Review Committee, allowing "a degree of parliamentary scrutiny that has not always been acknowledged by [the Government's] critics"
- when the country faces a significant crisis—be it war, natural disaster or, in the current case, a pandemic, the Government needs to move quickly
- when legislation is required at pace, urgency throughout the policy- and law-making process is essential and in the public good
- there is huge complexity involved "under the hood" in the development of the policy and "in some ways legislation is the last output when all of the complex practicalities and policy issues have been resolved"
- the speed of law-making is determined by these practicalities, and by society's need to urgently adopt new rules in substitution for existing lockdown restrictions
- this involves political as well as legal judgements, including to maintain the necessary social consensus which every day of a prolonged lockdown puts at risk.

The Vaccinations Act amended the empowering provisions in the COVID-19 Public Health Response Act, to add a series of additional purposes for which orders could be made under section 11 and to specifically provide for the making of orders imposing vaccination requirements.

In addition, a new power was added (section 11AB of the COVID-19 Public Health Response Act) to permit the introduction of vaccine mandates for purposes other than those outlined in section 11, including to ensure continuity of essential services. This power was used to introduce vaccine mandates for the Police and Defence Forces.<sup>21</sup> Section 11AB allows the Minister for Workplace Relations and Safety to make orders specifying work that must only be undertaken by a worker who is vaccinated. The key prerequisites for making such an order were set out in section 11AA. Both sections 11AA and 11AB have now been repealed.<sup>22</sup>

The Vaccinations Act also amended the Employment Relations Act 2000 to include provisions relating to COVID-19 vaccinations. Under clause 3 of Schedule 3A, employees could have their employment terminated for failing to meet the requirements of an order made under the COVID-19 Public Health Response Act.

The Regulations Review Committee did not scrutinise amendments to the powers to make secondary legislation in the COVID-19 Response (Vaccinations) Legislation Bill. That was because the bill was not referred to a select committee before it was enacted on 25 November 2021 (for the reasons outlined by the Attorney-General and set out above). Our present inquiry was initiated to retrospectively scrutinise those powers.

The Protection Framework Order was made on 30 November 2021 under powers in the COVID-19 Public Health Response Act that were added by the Vaccinations Act. The Protection Framework Order implemented the traffic light system to replace the previous alert level system. The Protection Framework Order was revoked on 12 September 2022.<sup>23</sup> The Protection Framework Order has been included within our inquiry.

## **Winding down COVID-19 powers**

In November 2022, the COVID-19 Public Health Response Act was amended to limit the order-making power to measures relating to:

- self-isolation (for cases, household contacts, and close contacts) and masks
- certain requirements for travellers to New Zealand.<sup>24</sup>

The November 2022 amendment also limits enforcement powers and provides for penalties for offences to be reduced, as well as removing provisions relating to managed isolation and quarantine facilities.

## **Royal Commission of Inquiry (COVID-19 Lessons)**

On 5 December 2022, the Government announced a Royal Commission to prepare New Zealand for future pandemics through lessons learned from COVID-19. Relevant to our work and recommendations in this report, the scope of the Royal Commission's inquiry will include the legislative settings required:<sup>25</sup>

- for New Zealand's public health response to a pandemic
- to ensure continue supply of goods and services
- to support New Zealand's initial economic response to a pandemic.

The Royal Commission was authorised to begin considering evidence on 1 February 2023 and its report must be delivered by 26 June 2024.

## **Safeguards**

### **What were the safeguards under the Epidemic Preparedness Act 2006?**

The epidemic notice was issued on 25 March 2020 and was renewed three-monthly until it was left to expire on 20 October 2022. The notice served as a linchpin of much of the Government's COVID-19 legislative response. In particular, an epidemic notice was a prerequisite for:

- the making and continuation of an immediate modification order
- the making of an order under the COVID-19 Public Health Response Act.<sup>26</sup>

An epidemic notice can only be made or renewed if:<sup>27</sup>

- the Prime Minister and the Minister of Health agree
- there is an outbreak of a stated quarantinable disease

- the Director-General of Health gives a written recommendation
- the Prime Minister is satisfied the effects of the outbreak are likely to disrupt or continue to disrupt essential governmental and business activity in New Zealand (or stated parts of New Zealand) significantly.

Parliament must meet within seven days of an epidemic notice being given.<sup>28</sup>

The Prime Minister is required to promptly revoke an epidemic notice if no longer satisfied that its preconditions are met.<sup>29</sup> The Director-General of Health is required to monitor the situation that generated the epidemic notice, and keep the Prime Minister and the Minister of Health informed of any changes.<sup>30</sup>

An epidemic notice (or renewal of an epidemic notice) and any prospective and immediate modification orders are secondary legislation. They are required to be published in the *Gazette* and presented to the House as soon as possible after being made. The notice (or renewal) and any orders are disallowable by the House.

Immediate modification orders empower the executive to “modify any requirement or restriction imposed by an enactment” by stating “alternative means of complying with the requirement or restriction” or “by substituting a discretionary power for the requirement or restriction”.<sup>31</sup> They do not allow new criteria to be set. Rather, they are primarily concerned with enabling interactions between people that have or will be affected by a “quarantinable disease” and government agencies.<sup>32</sup>

Immediate modification orders made under section 14 (to facilitate management of disease) may only be made on the written recommendation of the Director-General of Health, stating that, in the Director-General’s opinion, the modifications are, or are likely to be, necessary to enable the effective management of the quarantinable disease or its effects (or both).<sup>33</sup>

Immediate modification orders made under section 15 (to enable compliance) may only be made on advice from the relevant departmental chief executive. The Minister must be satisfied that the requirement or restriction is impossible or impracticable to comply (or comply fully) with and the modifications made go no further than is, or is likely to be, reasonably necessary in the circumstances.<sup>34</sup> Modifications of requirements to release a person from custody or detention; or to review a person’s detention, or restrictions on keeping a person in custody or detention are not authorised.<sup>35</sup> Nor are modifications permitted to be made to the Epidemic Preparedness Act or specified enactments of particular constitutional significance.<sup>36</sup>

### **What were the safeguards under the Health Act 1956?**

Orders under section 70 of the Health Act 1956 may only be made if authorised by the Minister of Health, if a state of emergency has been declared under the Civil Defence Emergency Management Act 2002, or while an epidemic notice is in force. Section 70 orders requiring closure of premises may not be made in relation to certain places, such as private dwellings, parliamentary precincts, courts, and prisons.<sup>37</sup>

Orders made under section 70 of the Health Act are disallowable and are subject to the Regulations Review Committee’s scrutiny and disallowance. However these orders are not

required to be presented to the House and are subject to more limited publication requirements than other COVID-19 orders.<sup>38</sup>

## **What were the safeguards under the COVID-19 Public Health Response Act?**

The COVID-19 Public Health Response Act:

- originally needed to be renewed by a resolution of Parliament every 90 days (this safeguard was removed on 25 November 2022)<sup>39</sup>
- has a sunset provision which originally provided that the Act lapsed finally within two years after commencement (13 May 2022). This was then extended to three years (13 May 2023). Then, on 25 November 2022, section 3 was amended to provide that the Act will not be repealed until 25 November 2024.

Orders under the COVID-19 Public Health Response Act may only be made if one of the following is in force:

- an epidemic notice
- a state of emergency or transition period in respect of COVID-19 under the Civil Defence Emergency Management Act 2002
- a notice by the Prime Minister—after being satisfied that there is a risk of an outbreak or the spread of COVID-19—authorising the use of COVID-19 orders (either generally or specifically).

Orders under section 11 must be appropriate to achieve the COVID-19 Public Health Response Act's purpose, which is set out in section 4.<sup>40</sup> The purpose section functions as an explicit constraint on the Minister when making section 11 orders.<sup>41</sup>

The COVID-19 Public Health Response Act sets out a number of other mandatory considerations before the Minister makes an order, including proportionality, consideration of advice from the Director-General, consultation with the Prime Minister and other relevant ministers, consideration of government decisions already taken and satisfaction of rights-consistency (section 9).

COVID-19 orders must be published at least 48 hours before they come into force, except when urgency is required to prevent or contain the outbreak or spread of COVID-19, or when restrictions are being removed or reduced (section 14). Orders must be confirmed by Parliament within 60 days or they lapse (section 16).<sup>42</sup> This process of approval by the House does not operate to make an otherwise invalid order, valid. It exists as a procedural safeguard only.<sup>43</sup>

Orders under the COVID-19 Public Health Response Act must be consistent with the empowering Act and the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).<sup>44</sup> Parliament envisaged that orders may be made which limit rights and freedoms under the Bill of Rights Act, but only if the limit is justified.<sup>45</sup>

Orders prevail over other statutes, including the Health Act 1956, to the extent that they are inconsistent.<sup>46</sup>

The Minister must keep their COVID-19 orders under review.<sup>47</sup> This obligation implies a legislative intention to monitor the justifications for orders in light of changing circumstances.<sup>48</sup> It is an “appropriate place” for reassessment of orders, given the fast-changing nature of the pandemic and the need to respond to it by prompt action.<sup>49</sup>

In its submission to our inquiry, the Legislation Design and Advisory Committee (LDAC) referred to the positive constraints on the powers to make orders provided by the purposes of the COVID-19 Public Health Response Act, the express need for consistency with the Bill of Rights Act, consultation requirements, and disallowance and publication requirements.

However, Te Hunga Rōia Māori o Aotearoa—Māori Law Society noted the failure to include the safeguard of a provision requiring the Minister to consider the principles of te Tiriti o Waitangi when making an order, or any requirement to consult with the Minister for Māori Crown Relations: Te Arawhiti. Similarly, the Human Rights Commission considered that granting extensive powers for the executive to limit rights through secondary legislation fails to provide adequate safeguards, including through active engagement with Tangata Whenua and public scrutiny, an explicit reference to te Tiriti and a strong Tiriti clause to provide a reference point for decisions and guide the Act’s implementation.

### **Additional safeguard introduced by the Vaccinations Act**

Most of the safeguards in respect of the making of section 11AB orders, as introduced into the COVID-19 Public Health Response Act by the Vaccinations Act, were the same or materially the same as the existing safeguards for orders under section 11. However, the Vaccinations Act introduced a new safeguard specifically for section 11AB orders: a requirement that the Minister for Workplace Relations be satisfied that the order is in the public interest.<sup>50</sup> Public interest was defined to include (without limitation):<sup>51</sup>

- ensuring continuity of services that are essential for public safety, national defence, or crisis response
- supporting the continued provision of lifeline utilities or other essential services
- maintaining trust in public services
- maintaining access to overseas markets.

### **Oversight by the Courts**

A critically important safeguard has been the maintenance of the right to challenge COVID-19 secondary legislation in court.

Health orders, COVID-19 Public Health Response Act orders, and immediate modification orders under the Epidemic Preparedness Act 2006 can be invalidated by the senior courts if they are contrary to their empowering Act or breach the Bill of Rights Act.<sup>52</sup>

The express requirement for compliance with the Bill of Rights Act opens a route for challenging the validity of orders in the courts that would not exist if they were enacted in primary legislation.

Court challenges to COVID-19 secondary legislation are summarised in Appendix C.

## Oversight of COVID-19 secondary legislation by other committees

### Finance and Expenditure Committee

The Government referred the COVID-19 Public Health Response Act to the Finance and Expenditure Committee for post-enactment scrutiny. That committee conducted a post-enactment inquiry into the COVID-19 Public Health Response Act in July 2020.<sup>53</sup>

The Finance and Expenditure Committee concluded that:

- the COVID-19 Public Health Response Act was necessary and appropriate
- its extraordinary powers were justified because the COVID-19 emergency itself was unprecedented and extraordinary
- the COVID-19 Public Health Response Act required no urgent amendments.

The Finance and Expenditure Committee agreed it is appropriate that the COVID-19 Public Health Response Act empowers the Minister of Health as the key decision-maker for the exercise of powers under the Act (compared to the Director-General of Health for orders under the Health Act). The committee considered that, given the scale and the wide-ranging implications of the decision-making empowered by the Act, it was appropriate for orders to be subject to this form of ministerial-level accountability.

The Finance and Expenditure Committee endorsed the expansion of circumstances in which orders could be made under the COVID-19 Public Health Response Act to allow more nuanced controls on movements and gatherings, compared to the Health Act.

In the course of the Finance and Expenditure Committee's inquiry, the Regulations Review Committee of the 52nd Parliament raised concerns about section 12(1)(d) of the COVID-19 Public Health Response Act, which at that time provided that an order under section 11 may authorise any person or class of persons to grant an exemption from compliance with provisions of the order, or authorise a specified activity that would otherwise be prohibited by the order. These powers concerned the committee because they:

- had potential to vary the scope of the COVID-19 Public Health Response Act without the usual scrutiny from Parliament when Acts are amended
- lacked the usual expected safeguards when Acts grant powers of exemption
- contained no limits on who may be authorised to grant an exemption or authorisation.

The majority of the Finance and Expenditure Committee did not think that the COVID-19 Public Health Response Act required an amendment to address this concern, given that any exemptions must help achieve the purposes of the Act, would be subject to the requirement of proportionality, and would only provide relief from the restrictions or requirements in the order—rather than varying the scope of the Act itself. However, the Finance and Expenditure Committee agreed that if enduring health emergency legislation were developed, the safeguards on exemptions would need to be made more explicit. The safeguards on exemptions in section 12(1)(d) were later improved under the Vaccinations Act.

**Health Committee**

Section 3(1) of the COVID-19 Public Health Response Act originally provided that the Act be repealed on the expiry of a relevant period (as defined in section 3(2)) if no resolution was passed to continue the Act by the House of Representatives in that period.

Sessional orders provide that a notice of motion to continue the COVID-19 Public Health Response Act under section 3 stands referred to a select committee, which must report to the House no later than the first working day, 28 days after the day on which the notice of motion was lodged.<sup>54</sup>

The Health Committee issued four reports recommending the continuation of the COVID-19 Public Health Response Act.<sup>55</sup>

**Oversight by the Regulations Review Committee**

The role of the Regulations Review Committee under Standing Order 326(1) is to examine all regulations. This function has important constitutional significance in assisting Parliament to retain control over the content of all laws made under powers that Parliament has delegated to the Executive.

The Regulations Review Committee routinely reviews secondary legislation and hears complaints from members of the public about secondary legislation, which it assesses against the constitutional and legislative design principles in Standing Orders 326–333. The Regulations Review Committee also reviews provisions in bills empowering the making of secondary legislation.

When the Regulations Review Committee has a concern with secondary legislation, it has powers that can lead to the disallowance of the instrument. However, disallowance rarely occurs. Instead, the committee generally writes to the maker of the instrument, setting out its concern and asking the maker to respond. If it is not satisfied with the response, the Regulations Review Committee may invite officials to discuss the matter in person. It may also report to the House on the instrument. The Government has 60 working days to respond to recommendations made by the Regulations Review Committee.

Health orders, COVID-19 Public Health Response Act orders, epidemic management notices, and immediate modification orders under the Epidemic Preparedness Act 2006 are all subject to scrutiny by the Regulations Review Committee and can be disallowed by the House of Representatives. None of these instruments has been disallowed to date, indicating the Regulations Review Committee's preference to use its powers to communicate and educate and to reserve its disallowance powers for when that fails.<sup>56</sup>

Section 16 of the COVID-19 Public Health Response Act provides for COVID-19 orders to be automatically revoked after 60 days (or 10 sitting days, whichever is longer) unless the order is first approved by the House of Representatives.

Under Sessional Orders for the 53rd Parliament, the Regulations Review Committee must examine each COVID-19 order. It must report to the House within the later of 6 sitting days or 16 working days after the day on which the order was presented to the House.<sup>57</sup>

The Regulations Review Committee of the 52nd Parliament conducted an inquiry into pandemic-related secondary legislation.<sup>58</sup> The committee also raised concerns about the

initial orders made under the Health Act and invited the Government to clarify several matters.<sup>59</sup> The Regulations Review Committee's concerns led to improvements in later orders in respect of the clarity of drafting and avoiding inappropriate incorporation by reference.<sup>60</sup>

## **Scrutiny of COVID-19 secondary legislation by the Regulations Review Committee of the 52nd Parliament**

In this section, we summarise the scrutiny work carried out by our predecessor committee, the Regulations Review Committee of the 52nd Parliament, during the first year of the pandemic, 2020.

On 29 April 2020, the Regulations Review Committee of the 52nd Parliament initiated a briefing to review secondary legislation made in response to the COVID-19 pandemic.

### **First interim report (May 2020)**

The Regulations Review Committee first reported to the House on its briefing in May 2020.<sup>61</sup> It identified the following concerns:

- Unauthorised subdelegation of the power to make secondary legislation—especially in relation to the setting of timeframes—which the committee identified as an unusual or unexpected use of the powers conferred by the enactment under which they are made, potentially in breach of what is now Standing Order 327(2)(c).
- Unauthorised retrospectivity in two instruments (though the committee thought the harm was limited in each case and was well explained in one case). Nevertheless, it was potentially in breach of what is now Standing Order 327(2)(g).
- Legislation that was unclear or drafted as guidance rather than rules. The committee thought this was because the legislation had been drafted in haste without the usual policy and legislative design process. The committee was particularly concerned about guidance statements that were relied on for enforcement action.
- Instrument titles that did not identify the instrument's COVID-19 purpose.

### **Second interim report (June 2020)**

The Regulations Review Committee presented its second interim report to the House in June 2020.<sup>62</sup> It raised two concerns in relation to the COVID-19 Public Health Response (Alert Level 2) Order 2020 (LI 2020/84):

- A lack of clarity as to how the Order affected church services—whether they are gatherings (subject to a limit of 10 people) or business and services (subject to a limit of 100 people). The Regulations Review Committee considered this created uncertainty as to the Order's intended impact on a person's right to manifest their religion or belief, affirmed by section 15 of the Bill of Rights Act. The committee considered that any intended impact on fundamental freedoms, particularly those protected in the Bill of Rights Act and the right to privacy, must be clear from the order itself, not just from guidance about the order. The Regulations Review Committee recorded that this concern was addressed in the COVID-19 Public Health Response (Alert Level 2)

Amendment Order 2020 (LI 2020/97), which clarified the rules for faith-based gatherings.<sup>63</sup> The rules for social gatherings applied, rather than the rules for business and services.

- The requirement in clause 8 of the Order that a person must comply with reasonable measures put in place by a business or service or by the organiser of a gathering to meet the requirements of the order, and that are brought to the attention of that person. Clause 8(2) stated that failure to comply with such a measure is an infringement offence. The Regulations Review Committee considered it was inappropriate that this provision allowed a business, service or organiser to make decisions about substantive criminal liability, without being accountable for the measures they require their customers to comply with. The committee thought this power was inconsistent with the principle that a person should be able to know the content of the criminal law sufficiently well to have confidence they are complying with it. If the intention of the Order was to impose enforceable obligations on customers and clients, the Regulations Review Committee considered it would be better to do that in the Order itself, rather than via the requirements of businesses, services, and organisers. The committee recorded that this concern was addressed in the COVID-19 Public Health Response (Alert Level 2) Amendment Order 2020 (LI 2020/97) which replaced clause 8 with a new clause linking the infringement offence to a failure to comply with requirements specified in the Order.

#### **Fourth interim report (August 2020)**

No concerns were identified by the Regulations Review Committee in its third interim report (July 2020) but, in its fourth interim report,<sup>64</sup> the committee raised a concern about the COVID-19 Public Health Response (Air Border) Amendment Order 2020. In particular, the committee was concerned about the transfer of certain decisions from the Director-General of Health to the Chief Executive of the Ministry of Business, Innovation and Employment. The committee accepted the Minister's explanation for this transfer: that it was justified because the relevant decisions required operational, as well as clinical, input.

#### **Final report of the Regulations Review Committee of the 52nd Parliament (August 2020)**

The Regulations Review Committee's final report<sup>65</sup> expressed a concern that clauses 27 and 34 of the COVID-19 Recovery (Fast-track Consenting) Bill were Henry VIII powers allowing regulations to extend the operation of the Act beyond what is set out on the face of the bill.<sup>66</sup> The Regulations Review Committee wrote to the Environment Committee recommending that, as part of its scrutiny of the bill, it satisfy itself that these powers were necessary.

The Regulations Review Committee's final report also expressed concerns about some COVID-19 related secondary legislation made under existing empowering provisions.<sup>67</sup> In particular, the committee was concerned about regulations that subdelegated the power to fix timeframes, in breach of Standing Orders 319(2)(a)<sup>68</sup> and 319(2)(c).<sup>69</sup>

In respect of the Education (Early Childhood Services) Regulations, the Regulations Review Committee raised concerns about:

- the unauthorised subdelegation of power to the Secretary of Education
- the need for publication of the legislation, presentation to Parliament, and providing expressly that the exercise of the power is disallowable

- the lack of clarity and accuracy of the drafting.<sup>70</sup>

In respect of each of its concerns, the Regulations Review Committee wrote to the relevant Minister. In some instances, the Minister replied disagreeing that there was a subdelegation. Rather, the Minister considered that it was a limited administrative or factual decision based on whether there are exceptional circumstances, rather than a legislative decision. The committee maintained its concerns that this mechanism is a constitutional concern when the decision is legislative rather than administrative in nature and is not expressly authorised by the empowering Act. The committee considered that it may also be an unusual or unexpected use of the empowering enactment in terms of Standing Order 319(2)(c).<sup>71</sup>

### **Epidemic Management Notices and Immediate Modification Orders**

The Regulations Review Committee of the 52nd Parliament observed that:<sup>72</sup>

- it had no concerns about the epidemic management notices that were made under section 8 of the Epidemic Preparedness Act 2006,<sup>73</sup> which the committee observed was “to be expected given that they clearly express Parliament’s previous intention as to how the operation of respective Acts should be altered in the event of an epidemic”
- the power to make immediate modification orders under section 15 of the Epidemic Preparedness Act 2006<sup>74</sup> was generally being used conservatively to address straightforward administrative matters that were necessary when the country went into lockdown.

### **Recommendation to facilitate all-of government examination of COVID-19 secondary legislation**

The Regulations Review Committee of the 52nd Parliament recommended that the Government should facilitate an all-of-government examination of COVID-19 secondary legislation (and powers to make that legislation) to seek ways of improving the quality of secondary legislation in future emergencies.<sup>75</sup>

### **Review by Regulations Review Committee of orders under section 70 of the Health Act 1956**

The first legislation to impose isolation and quarantine, to close premises, and to restrict movement and gatherings across the whole of New Zealand in relation to COVID-19 was an order under made section 70 of the Health Act 1956 by the Director-General of Health.

Section 70 orders are not required to be drafted by the Parliamentary Counsel Office or published on the Government’s legislation website.<sup>76</sup> Before the outbreak of COVID-19, the Ministry of Health drafted secondary legislation fairly infrequently. Entities that draft secondary legislation infrequently do not tend to retain drafting expertise. It was unsurprising, therefore, that section 70 orders made by medical officers of health in response to the sudden outbreak of COVID-19 in early 2020 raised concerns in terms of the grounds for bringing secondary legislation to the attention of the House in Standing Order 327(2).

The Regulations Review Committee of the 52nd Parliament wrote to the Director-General on several occasions with its concerns about the section 70 orders, including whether the

orders were covered by the power in section 70, unauthorised subdelegation of powers, inappropriate incorporation of material by reference, and unclear drafting. The Regulations Review Committee offered to assist the Ministry of Health to improve the legislative quality of future notices.

The committee's final report referred to several concerns with orders made under section 70 of the Health Act 1956, namely that:<sup>77</sup>

- section 70(1)(f) might not permit isolation and quarantine requirements to be imposed on all persons within New Zealand
- permitting the Director-General to set additional rules applying under the notice was an unauthorised subdelegation of the power to make secondary legislation
- relying on material on the COVID-19 website to describe an essential business was an inappropriate incorporation by reference of that material
- the orders were not clearly drafted (which was particularly problematic given that notices restricted fundamental rights, and failure to comply with a requirement in a notice was an offence)
- there were errors in the instruments.

The Regulations Review Committee acknowledged that the orders were made under very challenging circumstances. Its intention was to record the concerns to assist the Ministry of Health to improve the legislative quality of future orders. The committee noted that the quality of orders under section 70 had since improved over time, including in the following respects:

- subsequent orders were drafted by the Parliamentary Counsel Office and were published on the New Zealand Legislation website
- criteria for discretionary decisions by the Director-General were set out in the instruments, making those decisions administrative rather than legislative
- all aspects of requirements of the order were provided in the instrument itself, rather than the instruments incorporating material on the COVID-19 website.

## **Review of COVID-19 secondary legislation by the Regulations Review Committee of the 53rd Parliament**

It is our role to examine all regulations and associated empowering provisions against the grounds in Standing Order 327 and the constitutional principles for good legislative design. We have examined all COVID-19 secondary legislation to date, reporting to the House in each case, including to make recommendations where we had concerns.

We have also engaged with the Ministers who were the main decision makers in relation to each order, putting questions and suggested improvements to them.

Where we had concerns, we wrote to the Minister to outline them. Generally, if the Minister agreed with our concerns,<sup>78</sup> this would result in an amendment to the relevant provision.<sup>79</sup> In cases of disagreement with our recommendations, the Minister would generally explain why.<sup>80</sup> Where we considered that the Minister had offered an acceptable explanation, we said so in a report.<sup>81</sup>

## **Our review of orders made under section 70 of the Health Act**

In August 2021, we commenced a further review of section 70 orders, given that the Director-General of Health had continued to use these instruments to require isolation or quarantine and medical testing for COVID-19 across New Zealand. Our interim report pointed out that, as at November 2021, we had written to the Director-General on eight occasions describing our concerns with the section 70 orders.<sup>82</sup> We identified the following particular concerns:

- Several section 70 orders contained unclear end points for the required period of isolation or quarantine. Legislation that encroaches on fundamental rights must do so in clear and unambiguous language. The omission of any criteria in the order for how a medical officer of health should decide to end an isolation period left considerable uncertainty for people who were subject to that isolation. We considered that leaving the end point for isolation and quarantine to be determined according to unspecified criteria unduly trespassed on rights and liberties in terms of Standing Order 327(2)(b). We appreciate that the need for flexibility requires scope for the decision-makers to exercise their professional judgement. However, that need is not incompatible with the constitutional principle that the law must be certain. Setting the parameters of those decisions in legislation can be done in a manner that enables the professional judgement of the health practitioners to be applied flexibly in individual circumstances. Not setting the parameters of those decisions in legislation risks the requirements being an undue trespass on rights. We recommended to the Government that it encourage the Director-General of Health to ensure that future section 70 orders requiring periods of isolation and quarantine specify criteria to guide decisions about when those periods must end.
- Some section 70 orders used undefined jargon such as “close contact” or “casual contact” without giving the meaning of those expressions to allow persons who were subject to them to understand what requirements applied to them.
- Some section 70 orders referred to information on the Ministry of Health website that was not there or was difficult to find, or that conflicted with the order.
- Some section 70 orders used imprecise language, such as:
  - the word “guidance” in relation to binding legal rules, breach of which could support a conviction. It was misleading to refer to them as “guidance”, which implies that they are recommended but not compulsory
  - the word “should”, a word that usually indicates something is not compulsory, in relation to a mandatory requirement to do something.
- Lack of publication of some orders on any government website. At some point, the Ministry stopped publishing revoked or expired orders and earlier versions of orders still in force.<sup>83</sup> This is problematic because it makes it difficult to provide scrutiny and accountability for that earlier legislation. The Director-General declined to follow our recommendation that revoked and expired orders, together with previous versions of current orders, be published on a government website. We found the Director-General’s response that such orders can be requested under the Official Information Act 1981 unsatisfactory. It is essential that historical legislation remain published even after it has been revoked, to allow proper scrutiny of the legislation by the public and Parliament. It

is possible to publish non-current orders on a website in manner that would not confuse the public (as is done on the New Zealand Legislation website).

Our November 2021 report concluded that more recent section 70 orders were clearer than those from the beginning of 2021, but that the Director-General still did not fully appreciate his responsibility to make law in accordance with constitutional norms. To that end, we recommended to the Government that it provide additional drafting support to the Director-General of Health.

## **What are the standards and principles against which the Regulations Review Committee examines secondary legislation?**

### **Review of secondary legislation against Standing Order 327 grounds**

The Regulations Review Committee examines secondary legislation against the grounds in Standing Order 327. We also use the constitutional principles for good legislative design as outlined in the *Legislation Guidelines* (2021), many of which overlap with Standing Order 327, to inform our consideration of good legislative design.

We have considered COVID-19 secondary legislation against the grounds for drawing a regulation to the special attention of the House in Standing Order 327(2), namely where the regulation:

- is not in accordance with the general objects and intentions of the enactment under which it is made<sup>84</sup>
- trespasses unduly on personal rights and liberties<sup>85</sup>
- appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made<sup>86</sup>
- unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal
- excludes the jurisdiction of the courts without explicit authorisation in the enactment under which it is made
- contains matter more appropriate for parliamentary enactment<sup>87</sup>
- is retrospective where this is not expressly authorised by the enactment under which it is made
- was not made in compliance with particular notice and consultation procedures prescribed by applicable enactments
- for any other reason concerning its form or purport, calls for elucidation.<sup>88</sup>

### **Review of secondary legislation against constitutional principles for good legislative design**

We have also examined COVID-19 secondary legislation and empowering provisions against the constitutional principles for good legislative design as outlined in the *Legislation Guidelines* (2021). These principles were collated in Appendix C of our November 2021 briefing on section 70 Health Act orders.<sup>89</sup> To a large extent, these principles overlap with the grounds in Standing Order 327.

These principles include consideration of whether the matter was appropriate for secondary legislation or was more appropriate for an Act. Generally, Parliament should set the broad policy and scope of the law in Acts, leaving matters of detail and implementation to be determined by secondary legislation.<sup>90</sup>

### **The law must be certain and clear**

In our review of the COVID-19 orders, we asked: does the empowering provision clearly and precisely define the permitted subject matter of the secondary legislation and the purpose for which it may be made?

Respect for the rule of law requires, amongst other things, that the law is easily understood.<sup>91</sup> Structural clarity and accessibility of secondary legislation is critical.

We expressed particular concerns about the increasing complexity and inaccessibility of the Protection Framework Order, undermining the goals of transparency and accountability.<sup>92</sup> In our view, the Protection Framework Order was like a puzzle that required the reader to know to start in the middle of the schedules and use clause numbers to decipher which restrictions applied to them. When we raised our concerns with the Minister, he accepted our suggestion to consider how the structure of the principal Order served the principle of accessibility. He promised that changes would be made to improve accessibility where possible.

Latent or inactive provisions in secondary legislation can result in the legislation being unclear. We expressed concerns about the thirty provisions in the Protection Framework Order that were not given effect in the COVID-19 response schedules and were thus inactive.<sup>93</sup> We pointed out that this greatly increased the length of the Order and created potential for confusion about whether these provisions were in effect or not. We considered that this had the potential to make the Order inaccessible.<sup>94</sup>

A related concern arose in relation to the country categories used in the COVID-19 Public Health Response (Air Border) Order 2021 (SL 2021/427), which lacked explanation of what the categorisation meant or how a country was to be categorised.<sup>95</sup> We recommended that the Minister consider amending the Order to clarify the meaning of these country groups. We recommended that the Order explain the purpose of the groups and why a country would be placed in one group or another.

The Minister's response emphasised the need for flexibility and ease of amendment. However, we maintained that the Order should be amended, at least to articulate a description of the categories to improve accessibility. Setting out criteria for how countries are classified into the various categories in a way that left room for flexibility would also help. Explaining the criteria for the addition of new categories, if and when needed, would also provide clarity about the categories.

The standard of certainty and clarity expected for law is higher than for other forms of communication. Entities making secondary legislation should test their instruments with a variety of appropriate readers to ensure that their requirements are easily understood.

For example, the stated purpose of secondary legislation should reflect its actual purpose.<sup>96</sup> As well, commencement provisions in secondary legislation should be specific and certain. COVID-19 orders usually state particular dates and times of commencement. It is especially

important that these types of orders are clear in their application. People should be able to know whether the order is in force simply by looking at the order.<sup>97</sup>

The need for secondary legislation to be certain and clear also extends to the relationship of different provisions to each other, for example to make clear if a hierarchical relationship between provisions is intended.<sup>98</sup> For example, where specific prescribed means of transport for essential permitted movement of a COVID-19 case (by private transport alone or with a fellow resident only, or by walking alone) were followed by a catch-all category: “by any other means of transport”, we sought clarification from the Minister as to whether a ranking of alternatives was intended. Without such a ranking, the catch-all provision rendered the specific means of transport redundant.<sup>99</sup>

It is particularly important to make sure that offence provisions are clear so that people can know the circumstances in which an offence is committed and by whom.<sup>100</sup>

Likewise, it is critical that provisions with significant rights implications be precisely drafted to avoid doubts arising as to the scope of their application.<sup>101</sup>

For example, provisions imposing requirements on people to isolate or restrict their movements because they are close contacts of a person who has tested positive for COVID-19 needed to be carefully drafted to ensure people would know if they are affected. The practical effect of such requirements needed to be carefully thought through to ensure they could be clearly understood and are practicable. The implications of inability to comply with the requirements also needed to be worked through.<sup>102</sup>

It is not sufficient to issue guidance material to enable those affected by the secondary legislation to understand it. Guidance material is merely an interpretation of the law. The law itself must be clear enough to be understood by the target audience. Any communications or guidance material accompanying the secondary legislation should be clearly distinguished from the secondary legislation.

### **Secondary legislation must use clear language**

Terms and phrases should be used consistently throughout secondary legislation.<sup>103</sup> New terms or phrases should not be invented if there is a term or phrase already used in related legislation that will suffice.

If a term or phrase is used in a way that does not have its natural meaning or its meaning is not inherently clear (for example, jargon), the term or phrase should be defined or the place where the meaning can be found should be identified. And archaic language should be avoided.

### **The law must distinguish between what is mandatory and what is merely recommended**

Aspects of the policy that are mandatory and those that are merely recommended need to be kept distinct, from the outset of the policy process. These should not be mixed in the same instrument or, if they are, they need to be clearly differentiated (by format and language used), for example by:

- keeping mandatory matters and recommended matters in different sections

- using headings to clearly identify what is mandatory from what is recommended
- using “must” for matters that are mandatory
- reserving “may” for matters that are merely permitted
- avoiding using “should” for mandatory matters and reserve its use for guidance only
- not using “shall” because it is not always clear that it imposes an obligation
- using “rules” or “requirements” for sets of matters that are mandatory
- reserving “guidance” for sets of matters that are merely recommended.

### **Appropriate safeguards must be in place**

In addition to the safeguards already identified, appropriate safeguards for secondary legislation relating to COVID-19 include:

- an appropriate level of scrutiny
- a good process
- review
- ensuring that it is clear whether instruments are disallowable instruments that must be presented to the House<sup>104</sup>
- publication requirements. For example:
  - The power to make secondary legislation will usually prescribe the manner in which it must be published and notified. If it does not, at the minimum the secondary legislation should be notified in the *Gazette* and published on the maker’s website.
  - To ensure that legal requirements are knowable in advance of them becoming the law, there is a general rule that COVID-19 orders be published at least 48 hours before they come into force, unless the order needs to come into force urgently to prevent or contain the outbreak or spread of COVID-19, or the effect of the order is only to remove or reduce requirements imposed by a COVID-19 order.<sup>105</sup>
  - It is important that revoked and expired secondary legislation can also be found on the maker’s website for a reasonable period of time including making it clear that it is no longer in force). This is so that the public and Parliament can compare the current legislation to what has gone before. It is not sufficient merely to keep a record of the law that has been made.
  - Similarly, when an existing instrument is amended, it must be clear to an ordinary reader how the amendments change the instrument. Many entities simplify this process by repealing the previous version and replacing it with a completely new version. Other entities publish instruments that describe only how the principal instrument is amended. This method has the advantage of highlighting how the principal instrument has changed. However, its disadvantage is that it cannot be understood as a standalone document. This method is acceptable so long as the principal instrument remains accessible and the description is clear. At the point when understanding the content of the instrument becomes difficult (perhaps after multiple such amendments), it may be time to replace the entire instrument. Some entities publish unofficial consolidations of instruments that have been amended several times. Those unofficial consolidations may assist the audience to

understand their obligations, but they are not the law. The law, in those cases, is the principal instrument and all the amendments.

- Other publication techniques to assist certainty, clarity, and scrutiny of secondary legislation include giving it a title that clearly identifies its content and the context in which it is made; and including the date it was made, the title of the entity that made it, and a reference to the power under which it was made.

### **Secondary legislation must be consistent with human rights**

Under Standing Order 327(2)(b), we have considered whether COVID-19 secondary legislation was consistent with human rights.

The power to make secondary legislation must not be exercised inconsistently with fundamental human rights without Parliament's clear permission.<sup>106</sup> It follows that subordinate legislation that is inconsistent with the Bill of Rights Act cannot be made in the absence of an express provision in the empowering legislation that allows it.<sup>107</sup> Otherwise the empowering provision will be interpreted as providing that no order can be made that is inconsistent with the New Zealand Bill of Rights Act 1990.<sup>108</sup>

Thus, our scrutiny of secondary legislation to assess its consistency with human rights does not involve second-guessing the policy reasoning of the maker of the legislation. Rather, it involves the committee exercising an independent constitutional scrutiny function in respect of the legislation itself.

This approach reflects the principle of legality—that fundamental rights cannot be overridden by general or ambiguous words. In the absence of express language or necessary implication to the contrary, even the most general words were intended by Parliament to be subject to the basic rights of the individual.<sup>109</sup>

It also reflects the interpretive approach required in respect of rights affirmed in the Bill of Rights Act.<sup>110</sup>

We consider whether secondary legislation can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights. If so, such a meaning “shall be preferred to any other meaning”.<sup>111</sup> This involves consideration of whether any limitation on those rights and freedoms is justified under section 5.<sup>112</sup> Both the relevant right or freedom, and any reasonable and demonstrable justification for the limitation, bear on the interpretation of legislation using section 6.<sup>113</sup>

If a limit in secondary legislation is reasonable, prescribed by law, and demonstrably justified in a free and democratic society under section 5, then that is the end of the inquiry and no further examination of the empowering provision is needed.<sup>114</sup>

The assessment of whether secondary legislation is consistent with human rights can take into account circumstances and evidence that were not before the maker of the secondary legislation and that post-date the decision implementing the measure. There is a legislative intention to monitor the justifications for COVID-19 orders in light of changing circumstances.<sup>115</sup>

When regulations impose a limit on rights and privileges under the Bill of Rights Act, the Crown is required to demonstrate that this limit is justified in a free and democratic society.<sup>116</sup>

If it is necessary for secondary legislation to limit rights to achieve the public interest objective of the legislation:

- That reason should be clearly described in an explanatory note to the instrument.
- The impact must be limited as much as possible while still achieving the public interest objective.

### **Subdelegation of legislative power must be authorised**

We have also considered whether COVID-19 secondary legislation contained any unauthorised subdelegation of legislative power.<sup>117</sup>

Applying this rule is not as straightforward as it sounds because there is a subtle distinction between a power to make the law (a legislative power) and a power to apply the law (an administrative power). Whether a power is legislative or administrative is determined by the specific circumstances.<sup>118</sup>

As a general rule, secondary legislation is probably granting a power to make law if it:

- grants a power to do something that would affect the rights or obligations of a broad class of people; or
- grants a power that could affect the overall operation of the secondary legislation, rather than just its application in a particular instance.

However, secondary legislation is probably merely granting an administrative power if it:

- only affects one person or one narrow group of people; or
- sets out clear criteria for making a decision, so that the discretion remaining is quite limited.

### **The criteria for exemptions must be precisely described**

When secondary legislation contains a power to grant exemptions, it must precisely describe what obligations the people or things are being exempted from. An exemption is not a power to grant permission to do something. It must not create new rights.<sup>119</sup>

Exemptions that cover classes of people or things have the potential to change the policy of the empowering Act so must be created strictly within the intention of Parliament as it is expressed in the Act. For example, if the empowering Act relates to all vehicle owners, an exemption covering all owners of trucks would be altering the scope of the Act and so would only be appropriate if it was potentially envisaged by Parliament (that is, the power to grant exemptions extends to making class exemptions that could cover truck owners).

Likewise, an exemption power within secondary legislation must be consistent with the purpose of the secondary legislation,<sup>120</sup> and it must be subject to proper safeguards.<sup>121</sup>

Two submissions to our inquiry raised particular concerns about the use of exemptions in COVID-19 secondary legislation:

- The Chief Ombudsman submitted that:

- The Vaccinations Act added a “curious” power for the Director-General to issue a notice prescribing criteria for exemptions from vaccination requirements into section 5 of the COVID-19 Public Health Response Act (the interpretation section). The Chief Ombudsman submitted this power should be in its own section and it should specify criteria or a consultation process before notices are issued.
- The COVID-19 Public Health Response Act should contain a power for people to seek exemptions from any COVID-19 order in humanitarian circumstances, or where it is otherwise in the interests of justice. Alternatively, any order made under the COVID-19 Public Health Response Act should contain appropriate powers of exemption.
- The criteria for exercising the exemption power in clause 105(2)(a) of the Protection Framework Order were overly complex. The Director-General needed to ascertain whether “the exemption [was] necessary or desirable in order to promote the purposes of the Act or the purposes of this order”. A further power to grant exemptions should have been included based on exceptional humanitarian grounds, or where an exemption was otherwise in the interests of justice. If properly defined, this would provide a safety valve for exceptional cases without creating undue operational complexity.
- The Human Rights Commission submitted that:
  - The criteria for exemptions from the Protection Framework Order (including for vaccination exemptions) were difficult to find.
  - The classes of exemptions (and what is required for a person to be considered part of this class) were not set out clearly in Ministry of Health guidance.
  - The criteria for exemptions from face-covering were unclear.
  - The Protection Framework Order was difficult to understand and navigate, including for anyone wanting to know the law relating to exemptions.
  - The system to obtain exemptions and any associated documentation must be accessible, equitable, and efficient.
  - The power to grant exemptions should have been subject to an appeal or review process.

### **Incorporation of other documents by reference must be clear and certain**

Incorporation of other material into legislation merely by referring to it is controlled by specific rules designed to ensure that the law is certain and clear.<sup>122</sup> It is difficult to incorporate material that is frequently amended, such as information on a website, in a way that enables the law to be clear.

It is important to note that, as a general rule, amendments to material incorporated by reference do not automatically become part of the secondary legislation. The amendments must also be specifically incorporated. This rule helps to prevent the law being made by another entity without the normal safeguards that apply to making legislation.

## Particular concerns identified in our routine scrutiny of COVID-19 Orders

To summarise, in our routine scrutiny of COVID-19 orders, and that carried out by the Regulations Review Committee of the previous (52<sup>nd</sup>) Parliament, we have identified concerns about:

- unauthorised subdelegation of the power to make secondary legislation (see above at pages 16, 18, 19, below at page 26 and at endnotes 78, 117)
- unauthorised retrospectivity (see above at page 16)
- legislation that was drafted as guidance rather than rules (see above at pages 16, 17, 20)
- instrument titles that did not identify the instrument's COVID-19 purpose (see above at page 16)
- whether Henry VIII provisions in empowering legislation were necessary (see above, page 17)
- the quality of drafting of section 70 Health Act orders and inadequacies in publication of historical instruments (see above at page 20, 21)
- lack of certainty and clarity in secondary legislation (see above at pages 16, 20, 22–23), including in relation to the Protection Framework Order (see above at page 22)
- measures being implemented in secondary legislation that would be more suitable for Parliamentary enactment, such as the Protection Framework Order (see endnote 87)
- latent/inactive provisions in the Protection Framework Order (see above at page 22)
- the stated purpose of secondary legislation not matching its actual purpose (see endnote 96)
- the need for clarity in identifying whether people are affected by secondary legislation (see endnote 92)
- secondary legislation containing potentially unjustified limits on human rights (see endnotes 85, 87)
- vagueness in the framing of infringement offences<sup>123</sup> (for an infringement offence to be appropriate, the offence must be one that involves actions or omissions that can be assessed as a straightforward question of fact)<sup>124</sup>
- open-ended timeframes for legislation that has a significant effect on personal rights and liberties<sup>125</sup>
- overly complicated definitions and requirements<sup>126</sup>
- impossibility of compliance with requirements.<sup>127</sup>

## Matters identified in submissions on this inquiry

We sought submissions from selected individuals and organisations to inform scrutiny and held hearings on 9 and 16 March 2022 at which they spoke to their submissions.<sup>128</sup>

### **Submissions in relation to the Vaccinations Act or the COVID-19 Public Health Response Act**

Submitters raised several policy and process concerns relating to the Vaccinations Act and the COVID-19 Public Health Response Act which lie outside our jurisdiction, including the following:

- the lack of any obligation to take into account the principles of the Treaty of Waitangi in making orders<sup>129</sup>
- the lack of engagement and adequate consultation with Māori during the Vaccination Act's development<sup>130</sup>
- insufficient Parliamentary debate and scrutiny, undermining the legitimacy and transparency of the law
- the Government should have published an exposure draft of the Vaccination Legislation Bill.<sup>131</sup>

### **Submissions in relation to the Protection Framework Order**

The following matters within our jurisdiction were identified by submitters as being of concern in relation to the Protection Framework Order:

- Caitlin Rutherford, Gretchen Keer-Keer, and Professor Andrew Geddis of the University of Otago expressed concerns about the 30 redundant provisions in the Protection Framework Order, making the Order longer and increasing the risk of misinterpretation. They suggested amending clause 16 to explain why the redundant provisions were included in the Order. Alternatively, they suggested that three different orders could have been made to correspond to the different traffic light levels.

When we raised this concern with the Minister, he explained that these provisions remained in place so that the Government retained the tools to implement localised lockdowns, if needed. The Minister told us that he would work to clarify the arrangement of these provisions in the Order. The Minister also recognised that the purpose of these provisions could be clearer, to avoid confusion and maintain accessibility.

- Ms Rutherford, Ms Keer-Keer, and Professor Geddis also made the point in their submission that it may be justifiable to allow very broad secondary legislation-making powers in extreme situations. However, the accountability mechanisms that exist do not make up for the lack of open debate and scrutiny through the parliamentary law-making process.
- Associate Professor Dean Knight of Te Herenga Waka—Victoria University of Wellington also submitted that the pandemic had sometimes necessitated swift and expedited decisions through delegation of flexible emergency powers. However, the vaccinations regime did not justify this approach.
- The Human Rights Commission submitted that the Protection Framework Order was not easily understood without reference to detailed guidance published by the Government. Moreover, significant aspects of its content were inaccessible even with this guidance.

### Concerns about the balance between primary and secondary legislation

Several submitters to our inquiry focused on the proper balance between primary and secondary legislation in respect of COVID-19.

Caitlin Rutherford, Gretchen Keer-Keer, and Professor Geddis submitted that measures forcing businesses to close and rules permitting people to go places only if vaccinated were more appropriate for primary legislation. They thought that the accountability mechanisms for secondary legislation do not make up for the lack of open debate and scrutiny through the parliamentary law-making process. This undermines the legitimacy and transparency of the law, as New Zealand had been living under the pandemic response for more than two years. After that time, there was arguably less need for the legal response to COVID-19 to be quickly decided and imposed by the executive branch.

Dr Dean Knight looked at the same issue from a different perspective. He submitted that the rights implications and overall sting of the protection framework (including vaccination requirements) turned on definitional matters, exceptions, and other parameters not evident until the Protection Framework Order was made.

As a result, in Dr Knight's view, "Parliament failed to feel the 'heat' for legislative design, key policy settings and rights implications". Nor was the design of the framework given "the necessary time to breathe or evolve in light of feedback and concerns". This was because the key policy settings and details were not available to inform democratic debates about the virtue or otherwise of the regime.

Dr Knight thought this may have been because the Government failed to adequately recognise the significance of the Vaccinations Act. The COVID-19 protection framework represents significant policy settings that ought to have been more clearly spelt out in empowering legislation and subject to more extensive parliamentary debate. In his view, this was the most important legislation passed in 2021 and the traffic light regime should have been spelt out in primary legislation as a road map for users.

Dr Knight noted that the Regulations Review Committee has previously reinforced the need for primary legislation to set out policy, leaving (only) detail for secondary legislation. In terms of community-wide vaccination mandates, he thought the Vaccinations Act fell outside this dichotomy. While the pandemic sometimes necessitated swift and expedited decisions through delegation of flexible emergency powers, the vaccinations regime was not one of them. Key aspects of the regime should, in his view, have been spelt out in primary legislation – rather than being left for later ministerial determination. Dr Knight concluded that the failure to do so represented a key weakness and matter of some constitutional concern.

The Legislation Design and Advisory Committee (LDAC) observed that matters affecting fundamental human rights are typically matters of significant policy that should be decided by Parliament.

The Chief Ombudsman submitted that there is a strong argument that the matters primarily dealt with under the Protection Framework Order fall within the class of matters that the *Legislation Guidelines* (2021) anticipate should be dealt with under primary legislation.

The Protection Framework Order dealt with matters of significant policy affecting fundamental human rights. For example, it impacted on the movement of people, access to certain places on certain grounds, distancing from and association with other people, gatherings of people, and restrictions based on vaccination status.

Te Hunga Rōia Māori o Aotearoa—Māori Law Society also considered some aspects of the Protection Framework Order may have been more appropriate for primary legislation.

The Human Rights Commission submitted that, given the implications that the matters covered by the Protection Framework Order have for human rights, they should not have been mandated through use of executive power. Use of executive power allows fundamental rights to be restricted in a manner that bypasses the human rights safeguarding processes that apply to primary legislation.

## **Review of COVID-19 legislation against recommendations in the Regulations Review Committee's 2016 report**

In 2014, the House of Representatives referred an inquiry to the Regulations Review Committee following the earthquakes that hit Christchurch in 2010 and 2011. The inquiry identified the constitutional principles for the arrangement and delegation of recovery powers in the event of a national emergency. The Regulations Review Committee reported in December 2016 after receiving 32 written submissions and hearing oral evidence from 17 submitters in Wellington and Christchurch. It made 11 recommendations to the Government.

In this section of our report, we assess the legislative response to the COVID-19 outbreak against the recommendations in the Regulations Review Committee's 2016 report. In doing so, we acknowledge the significant differences in the type of emergency that led to the 2016 recommendations, compared to the COVID-19 pandemic.<sup>132</sup> Subject to those differences, we agree that the committee's 2016 recommendations remain relevant and appropriate, and we do not intend to modify them.

| <b>Regulations Review Committee's 2016 recommendations</b>                                                                                                                           | <b>Our review of COVID-19 legislation against these recommendations</b>                                                                                                                                                                                                                |
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| <b>Theme one:</b> executive powers to override enactments should extend only as far as is necessary to deal with the emergency itself, and should only be exercised for that purpose |                                                                                                                                                                                                                                                                                        |
| 1. Emergency legislation should be tailored for each national emergency and confer powers only as necessary                                                                          | The legislative response to the outbreak of COVID-19 was consistent with this recommendation. Initially, the Government relied on existing powers in relation to the outbreak of an epidemic and then, two months later, passed legislation specifically for the current outbreak. The |

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| to each situation. Generic national emergency legislation should not be passed in advance.                                                                            | legislation was appropriately limited with a strong set of safeguards. It is appropriate that the legislation applies only to the current outbreak of COVID-19, required regular resolutions of the House to prevent its repeal (this safeguard has since been removed), and has a definite date of repeal (which has twice since been extended).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 2. As much time as possible in the circumstances should be allowed for select committee consideration of emergency legislation.                                       | The COVID-19 Public Health Response Bill, the COVID-19 Response (Vaccinations) Legislation Bill, and the COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill were not referred to a select committee before enactment. In respect of the first two of these bills, we acknowledge that the Government needed to move quickly because the country was facing a significant crisis. But the downsides of this process were the loss of opportunities for the public to participate in the development of the legislation and for the committee to recommend improvements to the legislation for consideration in the Committee of the whole House. We endorse the referral of the COVID-19 Public Health Response Act to the Finance and Expenditure Committee for post-enactment review in 2020. However, in respect of the COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill, we consider that public input through the select committee process ought to have been restored. We are uncertain why this bill needed to be passed through all stages in a single day on 22 November 2022, or why some form of post-enactment review, public engagement, and any necessary revision were not implemented. |
| 3. Existing select committees should consider emergency legislation.                                                                                                  | We agree that existing select committees, in particular the Regulations Review Committee, Health Committee, and Finance and Expenditure Committee were capable of carrying out scrutiny work in respect of COVID-19 emergency legislation and that a dedicated committee did not need to be established for that task.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 4. Emergency legislation should take the form of primary legislation wherever reasonably possible, rather than relying on broad powers to make delegated legislation. | We agree with the 2016 recommendation that primary legislation should be used as far as can reasonably be predicted for the purposes of addressing emergency measures. One of the consequences of promoting the use of primary legislation is to require those preparing the emergency legislation to take more time to carefully consider the underlying policy, including what additional powers are needed to deal with the emergency.<br><br>We broadly agree with submissions that aspects of the Protection Framework Order should have been in primary,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

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|                                                                                                                                          | rather than secondary, legislation, in particular the broad policy settings for the traffic light regime and rules relating to the vaccine mandates.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 5. Powers to override enactments by Order in Council should provide a “positive list” of the specific enactments that can be overridden. | The effect of section 13 of the COVID-19 Public Health Response Act is that COVID-19 orders prevail over other enactments, apart from the Bill of Rights Act. Contrary to the 2016 committee’s fifth recommendation, a positive list of enactments that can be overridden was not included.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <b>Theme two:</b> emergency legislation should incorporate safeguards                                                                    | <p>The COVID-19 Public Health Response Act is consistent with this theme. In particular:</p> <ul style="list-style-type: none"> <li>• there are clear criteria for when the Minister (or the Director-General) may make orders</li> <li>• orders made by the Minister are automatically revoked 10 sitting days or 60 days (whichever is later) after the order is made, unless it is first approved by the House of Representatives (section 16)</li> <li>• orders must be published on a government website and be notified in the <i>Gazette</i> 48 hours before they come into force</li> <li>• orders are disallowable instruments and must be presented to the House</li> <li>• orders must be kept under review by the Minister or Director-General<sup>133</sup></li> <li>• section 14 requires that, unless urgent, a section 11 order must be published on a government internet site and notified in the <i>Gazette</i> at least 48 hours before it comes into force.</li> </ul> |
| 6. Orders in Council should be subject to scrutiny before and after they are made.                                                       | The COVID-19 Public Health Response Act does not provide for scrutiny before Orders in Council are made. While we accept there was a need to act quickly in the circumstances, we agree with Dr Dean Knight’s criticism that post-promulgation control and accountability mechanisms move too slowly to be meaningful for a regime taking heavy and immediate effect. We consider that where an order prioritised a novel approach or led to a substantive restriction on rights, its draft could have been referred to the committee (either under Standing Order 326(2) as part of the committee’s existing functions or according to a specific requirement in future emergency legislation).                                                                                                                                                                                                                                                                                            |
| 7. The right to seek judicial review of Orders in Council made under                                                                     | The right to challenge COVID-19 secondary legislation in court was maintained. A summary of court challenges to COVID-19 secondary legislation is at Appendix C.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

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| emergency legislation should be preserved and upheld.                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 8. Legislation for national emergencies should have regard to international norms and benchmarks.                                      | <p>The international norms and benchmarks referred to in the committee's 2016 report relate to natural disasters, rather than pandemics. International human rights norms are incorporated through the express requirement that COVID-19 orders comply with the Bill of Rights Act, in section 9(1)(ba) of the COVID-19 Public Health Response Act. New Zealand is bound without reservation to the World Health Organization International Health Regulations 2005. The International Health Regulations have been referred to in the government's influenza pandemic plan and national civil defence emergency management plan but were not directly relied on in COVID-19 legislation or otherwise referenced in official guidance.<sup>134</sup></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 9. Bespoke emergency powers should be in force only for as long as is reasonably necessary and should have built-in sunset provisions. | <p>The COVID-19 Public Health Response Act originally provided for it to lapse within two years of its commencement (13 May 2022). This was extended to three years (13 May 2023). Then, on 25 November 2022, section 3 was amended to provide that the Act be repealed on 25 November 2024. In addition, COVID-19 orders must be kept under review.<sup>135</sup> This obligation implies a legislative intention to monitor the justifications for orders in light of changing circumstances.<sup>136</sup> It is an "appropriate place" for reassessment of orders given the fast-changing nature of the pandemic and the need to respond to it with prompt action.<sup>137</sup></p> <p>A significant difference between the COVID-19 pandemic and the Canterbury earthquake sequence was the lack of a definitive end-date for the COVID-19 pandemic. More than three years since cases were first reported, the pandemic remained an acute global emergency.<sup>138</sup> The Government has now recognised that "it's time to safely turn the page on our COVID-19 management, and live without the extraordinary measures we have previously used."<sup>139</sup> On 5 May 2023, the World Health Organization Director-General determined that COVID-19 is now an established and ongoing health issue which no longer constitutes a public health emergency of international concern.<sup>140</sup></p> <p>We recognise that sunset provisions need to be appropriate to the conditions in which they apply and subject to appropriate parliamentary scrutiny.</p> |

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|                                                                                                                                                                                 | Sunset provisions should at a minimum ensure that emergency legislation is subject to parliamentary scrutiny at least once a term.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Theme three:</b> any legislative response to a national emergency should be designed to ensure that recovery from the emergency begins on day one                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 10. Legislation must reflect the principle that recovery from a national emergency starts on day one.                                                                           | <p>This recommendation focuses on ensuring that emergency legislation facilitates the return to normality of laws and institutions as soon as reasonably possible.</p> <p>The majority of the COVID-19 secondary legislation made under existing general empowering provisions was consistent with this recommendation. For the most part, secondary legislation was focused on making specific and temporary changes to existing regulatory regimes to reflect the emergency circumstances. It was designed to disrupt normal business as little as possible for as short a period as possible.</p> <p>However, COVID-19 secondary legislation has also involved some very significant powers, particularly those involving isolation, quarantine, physical distancing, limits on gatherings, and closing premises. The creation of the four Alert Levels as an administration and communication tool helped to ensure that the impact of those powers reflects the severity of the circumstances.</p> <p>There is a risk that emergency powers which are rolled over repeatedly due to the continuing effect of the emergency may become normalised.</p> <p>However, broad powers that have such significant impacts on the lives of New Zealanders are not normal. It is important that there continues to be effective scrutiny of those laws from Parliament, the media, and the public generally.</p> |
| 11. The responsible Minister should formally report, annually, to the House on the exercise of powers under the emergency legislation and on progress with the recovery effort. | The Canterbury Earthquake Recovery Act 2011 required the Minister for Canterbury Earthquake Recovery to carry out annual reviews of the operation and effectiveness of the Act, make any recommendations for amendments, and report to the House of Representatives as soon as possible after the review has been completed. The Minister was also required to make quarterly reports to the House on the operation of the Act, including the powers                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

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|  | <p>exercised by, or on behalf of, the Chief Executive of the Canterbury Earthquake Recovery Authority (CERA).</p> <p>No similar obligations exist in the COVID-19 Public Health Response Act.</p> |
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## Dismantling COVID-19 emergency legislation

On 12 September 2022, the Government announced the COVID-19 Protection Framework would end at 11:59pm. At that time, the Protection Framework Order was revoked and replaced with new mask rules that are only applicable to health service premises.<sup>141</sup> Self-isolation requirements for household contacts were removed, with only COVID-19 positive individuals required to isolate for seven days.<sup>142</sup> Vaccination requirements were removed for all incoming travellers and aircrew.<sup>143</sup> And all Government vaccination mandates ended on 26 September 2022.<sup>144</sup>

The Government has begun to relinquish law-making functions in respect of this emergency legislation back to the New Zealand Parliament. As already mentioned, amendments have now been made to the COVID-19 Public Health Response Act, significantly narrowing the scope of COVID-19 orders that can be made. We agree with the observations of Dr Dean Knight that, while this amendment was “substantively benign”, the usual opportunities for public input through the select committee process ought to have been restored.<sup>145</sup> We are uncertain why the bill needed to be passed through all parliamentary stages in a single day, or why some form of post-enactment review, public engagement, and any necessary revision were not implemented.

Questions also remain about how and when the Government intends to further transition away from using the extraordinary powers adopted in the COVID-19 Public Health Response Act to make secondary legislation to respond to the pandemic, and what legislative approach will be adopted for the long-term regulation needed to manage COVID-19.

## Our findings and recommendations

Returning to the terms of reference, we make the following findings and recommendations.

1. The Regulations Review Committee, in this and the 52nd Parliament, has evaluated all COVID-19 secondary legislation and its associated empowering provisions against the constitutional principles for good legislative design and the grounds in Standing Order 327. Where we have had concerns about the legislation, we have referred our concerns to the Minister and have reported to the House. See pages 4–5, 21–26 above.
2. The appropriate balance was struck between primary and secondary legislation by the COVID-19 Public Health Response Act. However, we consider that the Vaccinations Act should ideally have been stand-alone legislation which clearly set out the parameters of the vaccination mandate regime. Likewise, we agree with submissions that the broad parameters of the protection framework (traffic light regime) should have been set out in primary legislation, with the precise detail of the regime set out in secondary legislation.

This would have allowed the Protection Framework Order to carry less of the load and would have allowed it to contain active provisions only. See pages 30–32 above.

3. Generally, we consider that there have been appropriate safeguards for the making of COVID-19 secondary legislation. However, the obligation in section 14(4) of the COVID-19 Public Health Response Act to keep COVID-19 orders under review is poorly defined and it is unclear exactly what the Minister and the Director-General are required to do to meet this requirement. It would have been better to specify exactly what this requirement means, including the frequency of review and a requirement to publish each review. Moreover, we think improvements need to be made to the safeguards applicable to orders made under section 70 of the Health Act 1956, including to improve the way they are drafted and to align publication requirements with COVID-19 Public Health Response Act orders (particularly to ensure expired orders remain accessible). See pages 12–13, 24–25 above.
4. Parliament, including the Regulations Review Committee, has capably performed its role to scrutinise secondary emergency legislation. We think that it is preferable to make use of an existing select committee to review emergency secondary legislation rather than develop a new external scrutiny body, such as the Review Panel that operated in respect of the Canterbury earthquake orders.<sup>146</sup> However, an advantage of that Review Panel was that it reviewed draft orders before they were made and thus had the opportunity to make recommendations in advance, whereas all our reviews have been after the fact. We also note that the Minister was required by the Kaikōura earthquakes legislation to provide a draft order to the committee and have regard to its recommendations on the draft order.<sup>147</sup> Standing Order 326(2) provides that a Minister may refer draft regulations to the committee for consideration and the committee may report on the draft regulations to the Minister. Although we appreciate the tight time constraints operating, we think it would have been preferable if the Minister exercised this option, where practicable and useful, to refer draft COVID-19 orders to the Regulations Review Committee. This would have provided a useful pre-enactment safeguard which would have helped improve the quality of COVID-19 secondary legislation. We acknowledge that referral of draft orders to the committee will not always be practicable. But we recommend that, for future emergencies, consideration be given to referring certain orders in draft to the committee (either under Standing Order 326(2) as part of the committee's existing functions or according to a specific requirement in future emergency legislation). This could be appropriate where the order prioritised a novel approach or led to a substantive restriction on rights. Consideration could also be given to the Regulations Review Committee appointing independent advisers to assist with its review and scrutiny functions.<sup>148</sup> See pages 14–18 above.
5. We agree that some of the COVID-19 secondary legislation was difficult to navigate and inaccessible. This was particularly acute in relation to the Protection Framework Order and its use of non-active provisions. One of the principles of good legislative design is that the law itself must be clear enough to be understood by the target audience. There has been criticism of the Protection Framework Order for not being sufficiently clear. To some extent, it is understandable that clarity and accessibility suffer in an emergency,

when flexibility and basic operability get prioritised over clear expression and structure in the interests of getting the job done as quickly as necessary. But, as submitters pointed out, the Protection Framework Order arose nearly two years into the pandemic at a time when the urgency had arguably diminished. As events in 2021 and early 2022 have demonstrated, public tolerance can be sorely tested if restraints are prolonged.<sup>149</sup> The longer an emergency goes on, the more important it becomes for legislators to continue to bring the public along with them by making the secondary legislation as clear as possible. See pages 22–23, 29–30 above.

6. The committee's recommendations from 2016 remain relevant and appropriate, although the extent to which each of them applies depends on the nature of the particular emergency. Even three years after the COVID-19 pandemic began, the World Health Organization considered it remained an acute global emergency.<sup>150</sup> The ongoing nature of the underlying health emergency means that response and recovery may need to proceed in tandem for some time, rather than be seen as separate phases of the emergency.<sup>151</sup> See pages 31–36 above.
7. We do not intend to modify the committee's 2016 recommendations. However, we note that recommendation 6 from the 2016 report (Orders in Council should be subject to scrutiny before and after they are made) was made against the background of the separate Review Panel for that purpose under the Canterbury Earthquake Recovery Act 2011. We consider that it may be more useful to refer draft emergency secondary legislation to the Regulations Review Committee, under Standing Order 326(2), and allow the Minister to take into account the committee's recommendations, rather than to create a separate review panel for that purpose. See page 32 above.
8. All emergency secondary legislation should be drafted by Parliamentary Counsel and subject to publication and disallowance. See pages 11, 19–21, 24–25 above.
9. We also endorse and repeat the recommendation of the Regulations Review Committee of the 52nd Parliament that the Government should facilitate an all-of-government examination of COVID-19 secondary legislation (and powers to make that legislation) to seek ways of improving the quality of secondary legislation in future emergencies. This could be achieved by a cross-departmental review initiated by the Public Service Commission under the Public Service Act 2020 and implemented through an interdepartmental venture under section 33 or a joint operational agreement under section 39 of that Act. Although the terms of reference for the Royal Commission of Inquiry into Lessons Learned from Aotearoa New Zealand's Response to COVID-19 include consideration of legislative settings, we consider an all-of-government review that is specifically focused on examining secondary legislation would be beneficial as well. That is because we think this is an area where those who were involved in making the legislation are likely to have particular insights into what worked well and what could have been improved. A collaborative review by the Government departments that were in the engine room of the legislative response to the pandemic will generate ideas for specific and detailed improvements that can be applied to secondary legislation

necessary for a future emergency. These will complement the Royal Commission's findings.

10. We recommend a hybrid approach as set out on page 7 should be used in future emergencies if possible.
11. We recommend that sunset provisions are subject to appropriate parliamentary scrutiny and that scrutiny of emergency legislation should occur at least once a term, consistent with parliamentary democracy.

## Appendix A: Committee procedure

### Committee procedure

We met between 15 December 2021 and 7 June 2023 to consider this briefing. We heard oral evidence from Professor Andrew Geddis, Caitlin Rutherford, and Gretchen Keer-Keer from the University of Otago; Dr Dean Knight, the Legislation Design and Advisory Committee, and the Human Rights Commission.

We received advice and substantial assistance in drafting this report from Jason McHerron, barrister.

### Committee members

Hon Judith Collins (Chairperson) (from 19 October 2022)  
Chris Penk (Chairperson until 19 October 2022)  
Rachel Brooking (until 8 February 2023)  
Camilla Belich (from 23 August 2022 until 8 February 2023)  
Steph Lewis (until 23 August 2022, and from 8 February 2023)  
Joseph Mooney (until 3 August 2022)  
Hon Eugenie Sage  
Toni Severin  
Sam Uffindell (from 3 August 2022)  
Vanushi Walters  
Helen White (from 8 February 2023)

### Advice and evidence received

We received documents from the following individuals and organisations as evidence for this briefing. They are available on the [Parliament website](#). Recordings of the oral submissions are available to view on our [Facebook page](#).

- Professor Andrew Geddis, Caitlin Rutherford, and Gretchen Keer-Keer
- Dr Dean Knight
- Human Rights Commission
- Legislation Design and Advisory Committee
- Office of the Ombudsman
- Te Hunga Rōia Māori o Aotearoa—Māori Law Society

## Appendix B: Timeline of initial secondary legislation responding to COVID-19

In December 2019, a novel coronavirus (SARS-CoV-2) was identified from an outbreak in Wuhan, China. Attempts to contain it there failed and it spread within China, then globally. Since the first death was reported on 11 January 2020, the disease resulting from this virus, later named COVID-19, has so far led to nearly 7 million confirmed deaths worldwide,<sup>152</sup> although actual mortality is likely to be much higher.<sup>153</sup> It is one of the deadliest pandemics in history.

New Zealand's response to this health emergency was rapid and effective, as the following timeline shows:

- On 30 January 2020, the Infectious and Notifiable Diseases Order 2020 came into force.<sup>154</sup> It amended the Health Act 1956 by adding the novel coronavirus to the list of infectious diseases notifiable to a medical officer of health.<sup>155</sup>
- On 1 February 2020, the Cabinet gave powers to the Prime Minister and a group of Ministers allowing them to determine New Zealand's COVID-19 response.
- From 3 February 2020, foreign travellers leaving from or transiting through China were refused entry to New Zealand.
- Travel warnings were issued and repatriation flights from China, India, and other countries occurred for returning citizens, residents, and their families.
- The first New Zealand case of COVID-19 was confirmed on 28 February 2020. By then, the World Health Organization had raised its COVID-19 risk assessment to the highest level.
- On 2 March 2020, the Prime Minister established an *ad hoc* Cabinet Committee to respond to COVID-19. The committee determined that the Government should follow a "suppression" response: "Go hard, go early", which involved border restrictions, intense testing, aggressive contact tracing, and stringent self-isolation and quarantine.
- On 19 March 2020, New Zealand's border was closed to all but citizens and permanent residents.
- On 21 March 2020, the Government announced the four tier alert level framework.
- On 25 March 2020, New Zealand was placed into level 4 lockdown, which allowed only essential services to operate. Everyone else was required to stay at home.<sup>156</sup>
- An epidemic notice issued under the Epidemic Preparedness Act 2006 also took effect from 25 March 2020 and remained in force until it was left to expire on 20 October 2022.<sup>157</sup> It declared that the effects of COVID-19 were likely to disrupt essential governmental and business activity in New Zealand significantly.
- A state of national emergency was also declared on 25 March 2020 under section 66 of the Civil Defence Emergency Management Act 2002,<sup>158</sup> the second time this had happened.<sup>159</sup>

- On 25 March 2020 the Director-General of Health issued an order under section 70 of the Health Act 1956 requiring all premises to be closed, except (among other things) private dwelling houses, and prohibiting people from congregating in outdoor places of amusement or recreation.
- Statements made by the Prime Minister and other officials at press conferences, on Government websites, and in the media urged all New Zealanders to stay home and avoid interactions outside their immediate household or “bubble” or else enforcement action would be taken against them. The High Court later held that, for the first nine days of the lockdown, these statements had no legal underpinning as there were no legal instruments prescribing the requirements and sanctions for non-compliance.<sup>160</sup>
- The Director-General of Health issued a further order under section 70 of the Health Act on 3 April 2020, requiring all persons to be isolated or quarantined by remaining at their current place of residence, except as permitted for essential personal movement, and to maintain physical distancing.

## Appendix C: Summary of Court challenges to COVID-19 secondary legislation

- *Nottingham v Ardern* [2020] NZHC 796, [2020] 2 NZLR 197. This was an unsuccessful application for a writ of habeas corpus in respect of the isolation and quarantine requirements in the Director-General of Health's order under section 70(1)(f) of the Health Act 1956 dated 3 April 2020. The High Court held that these requirements were not "detention" for the purposes of habeas corpus, but in any event any detention had been lawful. The Court of Appeal dismissed an appeal from the High Court's decision: *A v Ardern* [2020] NZCA 144, [2020] 2 NZLR 207. It held that the restrictions on movement imposed by the COVID-19 Alert Level 3 order did not involve restrictions on liberty/detention for the purposes of the Habeas Corpus Act 2001. Habeas corpus was not the appropriate procedure for the challenge. The Court of Appeal cited a letter from the then Chair of the Regulations Review Committee (Alistair Scott MP) to the Director-General of Health, referring to "unresolved questions about the lawfulness of the notices issued under section 70 of the Health Act", but the Court held that judicial review would be a more appropriate process for challenge.
- *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864. A full Court of the High Court rejected Dr Borrowdale's challenge to orders made under section 70(1) of the Health Act 1956 on 25 March, 3 April and 27 April 2020. However, the Court held that announcements by the Government between 26 March and 3 April 2020 stated or implied that all New Zealanders were required by law to stay at home and in their "bubbles" when there was no such requirement in law. These announcements had the effect of limiting certain rights and freedoms affirmed by the Bill of Rights Act, including the rights to freedom of movement, peaceful assembly, and association. Although the Court agreed that these limits were a necessary, reasonable, and proportionate response to the COVID-19 crisis, they were not prescribed by law and were therefore contrary to the Bill of Rights Act. Dr Borrowdale's appeal was dismissed: [2021] NZCA 520, [2022] 2 NZLR 356. The Court of Appeal held that orders under section 70(1)(f) of the Health Act could apply to multiple people without limitation. The Court also held there was no unlawful delegation in the way a list of essential businesses was promulgated. However, without making any specific finding, the Court observed that some exemption decisions may have been ultra vires if they were made by Ministers without the approval of the Director-General.
- *Ngā Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107. This was an unsuccessful challenge to the provisional approval of the Pfizer vaccine under section 23 of the Medicines Act 1981. The Court accepted that the requirement of section 23 that a provisional approval be for a "limited number of patients" did not appear to be satisfied, as the vaccine was being rolled out for all eligible adults. But Ellis J nevertheless declined interim relief including because the vaccination programme was a key part of the country's plan to deal with COVID-19. Shortly after the Court gave its judgment, Parliament passed validating legislation.<sup>161</sup>

- *GF v Minister of COVID-19 Response* [2021] NZHC 2526, [2022] NZLR 1. This was an unsuccessful application for judicial review of the COVID-19 Public Health Response (Vaccinations) Order 2021 by a port worker for the New Zealand Customs Service, whose employment was terminated as a result of the Order. The Court held that the Order was neither ultra vires the COVID-19 Public Health Response Act, nor irrational. While employees' rights under section 11 of the Bill of Rights Act (right to refuse to undergo medical treatment) were engaged, the limitation was proportional and justified.
- *Four Aviation Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26; (leave to appeal directly to Supreme Court declined [2021] NZSC 163). This was an unsuccessful application for judicial review of the COVID-19 Public Health Response (Vaccinations) Order 2021. This Order prevented persons in certain work sectors from working unless they were either vaccinated or exempt from vaccination. The application was brought by employees who did not want to be vaccinated and were dismissed from employment as a consequence. The applicants' arguments that the Order was ultra vires, and that it improperly delegated duties, failed. The Court concluded that the Minister had asked himself the right questions, took into account the right considerations, and focused on the key question of whether vaccination materially contributed to reducing the risk of transmission. However, the Court expressed surprise that the Order was made under section 11(1)(a)(v) which, at that time, made no express reference to vaccination.<sup>162</sup> The High Court held that the rights not to be deprived of life, of freedom of thought, conscience and religion, and not to be subject to medical or scientific experimentation, under sections 8, 10, 13 and 14 of the Bill of Rights Act, were not limited by the Order. However, the Court accepted that the applicants' right under section 11 (right to refuse to undergo medical treatment) was limited. The Court also thought section 19 (right to freedom from discrimination, in particular on grounds of illness, disability or religious beliefs) may be engaged but this had not been argued. However, the Court held that the Order was demonstrably justified and accordingly not invalid for being inconsistent with the Bill of Rights Act.
- *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 (leave to appeal directly to Supreme Court declined [2021] NZSC 163). This was an unsuccessful application for judicial review of the COVID-19 Public Health Response (Vaccinations) Order 2021 and the COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021, which brought workers in the health and disability sector and certain affected education services within the scope of the original Vaccinations Order. Applicants (groups of midwives, doctors, dentists, pharmacists, teachers, principals, and members of boards of trustees) argued that the COVID-19 Public Health Response Act did not explicitly authorise placing a limit on their right to undergo any medical treatment.
- *MKD v Minister of Health* [2022] NZHC 67 (interim orders) and [2022] NZHC 1997. This was an unsuccessful challenge to the provisional approval of the Pfizer paediatric vaccine under section 23 of the Medicines Act 1981 and the roll out of vaccinations for that age group.
- *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 13 HRNZ 109. This was a successful challenge to the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 by three Police and Defence Force workers who did not want to be vaccinated and faced termination of their employment. The

Order was made under section 11AA of the COVID-19 Public Health Response Act. The Court held that the Order limited the right to be free to refuse medical treatment recognised by section 11 of the Bill of Rights Act. The Court also held that the Order limited the right to manifest religious beliefs under section 15 for those who declined to be vaccinated because the vaccine had been tested on cells derived from a human foetus, contrary to the applicants' religious beliefs. The Court set the Order aside on the grounds that it did not involve a reasonable limit on the applicants' rights that could be demonstrably justified in a free and democratic society and was unlawful. In essence, the vaccination mandate in the Order was imposed to ensure the continuity of the public services, and to promote public confidence in those services, rather than to stop the spread of COVID-19. Indeed, health advice provided to the Government was that further mandates were not required to restrict the spread of COVID-19. However, the Court was not satisfied that continuity of these services was materially advanced by the Order. The Court also drew attention to the mismatch between the stated purpose of the Order in clause 3 and the Minister's evidence that addressed the threat to the continuity of Police and Defence Force services arising from absenteeism caused by COVID-19, rather than to limit the spread of it.<sup>163</sup>

- *Idea Services Ltd v Attorney-General* [2022] NZCA 470. The Court of Appeal declared invalid clause 8 of the Epidemic Preparedness (Employment Relations Act 2000—Collective Bargaining) Immediate Modification Order 2020 (the IMO). Clause 8 purported to extend the 12-month negotiation period prescribed by section 53(3) of the Employment Relations Act 2000 for bargaining to replace an expired collective agreement. The purported extension was for as long as the Epidemic Preparedness (COVID-19) Notice 2020 (Epidemic Notice) was in force. Because section 15(1) of the Epidemic Preparedness Act is a Henry VIII power (a power authorising the Executive to amend, by secondary legislation, an Act of Parliament), the Court of Appeal adopted a strict construction. The Court held that section 53(3) of the Employment Relations Act did not impose a requirement or restriction needing to be complied with. Rather, it merely extended a document that otherwise expired. As section 15(1) only empowers the making of an IMO to modify a requirement or restriction, the Court held that it did not empower the making of clause 8. The Court noted that it is important that a power to amend primary legislation by subordinate legislation is only exercised within its carefully defined scope. Where there is a purported exercise of the power that goes beyond that scope, the court's role is to declare that to be so. The Court's decision had the effect that the collective agreement ended 12 months after it was due to expire, in accordance with section 53(3) as unmodified by the IMO. In the decision under appeal, the High Court had concluded that the IMO was flawed because it lacked a review provision. While the Epidemic Notice itself required a review of current circumstances every three months, it was held that the IMO needed to contain its own requirement to review its ongoing necessity. The Court of Appeal expressed its general agreement with this conclusion.
- *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716. (2022) 13 HRNZ 296. This was stage two of the *Four Aviation Services Employees/Four Midwives* challenges (above) focusing on the claim that the COVID-19 Public Health Response (Vaccinations) Order 2021 was not a reasonable and demonstrably justified limit of rights under the Bill of Rights Act. The challenge focused on the extension of the original Order through the COVID-19 Public Health Response (Vaccination) Amendment Order

(No 3) 2021 (2021/325) which extended the vaccine mandates applicable to border workers to health, disability, and education sector workers. The Court rejected the argument that section 11 of the Bill of Rights Act could not be subject to any demonstrably justified limits. The Court held that when the mandates were put into effect in October 2021 they were demonstrably justified for both sectors. At that stage, there was clear evidence that vaccination both protected vaccinated people from more serious illness, and that it materially reduced rates of community transmission. The Court did not accept that there were unanticipated safety concerns, or that the adverse impacts of the mandates were more significant than the public benefits to be obtained. The Court considered circumstances had changed since the mandates were put into effect (vaccination was less effective against the Omicron variant; the extent of community transmission was higher). Ultimately, the Court was not in a position to evaluate whether these limits were no longer justified (especially given the Prime Minister's announcement that the mandates would be removed for the education sector, and potentially narrowed for the health and disability sector). The Court also dismissed a challenge to the exemption criteria in the Order.

- *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832, [2022] NZHC 1407, [2022] 3 NZLR 19. In this case, the High Court held that between 1 September 2021 and 17 December 2021, requirements imposed under the COVID-19 Public Health Response Act, the COVID-19 Public Health Response (Air Border) Order (No 2) 2020, and the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 operated as unjustified limits on the right of New Zealand citizens to enter their country in respect of the combination of the virtual lobby and the emergency allocation system. These systems did not allow New Zealand citizens facing unreasonable delays to be considered and prioritised where necessary.
- *Orewa Community Church v Minister for COVID-19 Response* [2022] NZHC 2026, [2022] 3 NZLR 475. This was an unsuccessful challenge to gathering limits and requirements for COVID-19 vaccine certificates under the COVID-19 Public Health Response (Protection Framework) Order 2021 made under the COVID-19 Public Health Response Act, on the grounds those measures breached the right to manifest religion under section 15 of the Bill of Rights Act. The Court held that the measures were a justified limit on that right, both when introduced and after the Omicron variant was circulating.
- *Wright v Minister for COVID-19 Response* [2023] NZHC 480. In this case the High Court held that the Minister did not have the necessary public health advice when including family carers in the COVID-19 (Vaccinations Order) 2021, the Minister's decision was made without regard to relevant considerations and was invalid. However, the Court declined to declare that Vaccinations Order had not applied to Family Carers. That would not be consistent with the language of the Vaccinations Order or with evidence of the Minister's intentions at the time.

## Appendix D: End notes

- <sup>1</sup> Where these questions have been previously addressed by the Regulations Review Committee and other committees, this report draws from that earlier work, rather than repeating it.
- <sup>2</sup> *Regulations Review Committee, Inquiry into Parliament's legislative response to future national emergencies* (I.16B), December 2016; and in response to the outbreak of COVID-19: Briefing to review secondary legislation made in response to Covid-19 (final report), August 2020.
- <sup>3</sup> We also considered amendments to the regulation-making powers in the COVID-19 Public Health Response Amendment Act (No 2) 2021, which amended the COVID-19 Public Health Response Act 2020. Our submissions were referred to in the November 2021 final report of the Health Committee on the COVID-19 Public Health Response Amendment Bill (No 2), November 2021. The final report of the 52nd Parliament's Regulations Review Committee on its briefing to review secondary legislation made in response to COVID-19 covered, amongst other types of secondary legislation, orders made under section 70 of the Health Act 1956 by medical officers of health (section 70 orders).
- <sup>4</sup> The *Legislation Guidelines* (2021), particularly chapters 14 to 17, outline some of those constitutional principles in relation to secondary legislation.
- <sup>5</sup> Epidemic Preparedness Act 2006, section 5.
- <sup>6</sup> Sections 11–15.
- <sup>7</sup> Section 24, which provides for modifications in “any particular case”. Section 24A was inserted on 3 November 2021 to allow for heads of bench to make modifications to court rules in “any category of proceedings”. No modifications were made under section 24A while the COVID-19 epidemic notice was in force.
- <sup>8</sup> As explained by the High Court in *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [62] and [65], originally it was Parts 3 (Infectious Diseases) and 4 (Quarantine) that, collectively, contained provisions potentially relevant to managing an epidemic or pandemic. In 2016, the Health Act 1956 was amended by the insertion of Part 3A, entitled “Management of Infectious Diseases”. It seems that Part 3A was designed to respond to situations where an individual has an infectious disease and does not voluntarily comply with measures meant to limit the risk to the community. The Court considered that Part 3A is designed to operate in “ordinary” times rather than during a public health emergency, when the more historic powers contained in Part 3 (including section 70) come into play. At the first reading of the Health Protection Amendment Bill, the Minister of Health, Hon Dr Jonathan Coleman, discussed the relationship between Part 3A and the existing special powers under Part 3, describing the special powers in Part 3 as “the Act’s emergency powers”.
- <sup>9</sup> Under the Civil Defence and Emergency Management Act 2002.
- <sup>10</sup> Health Act 1956, section 70.
- <sup>11</sup> Extensive regulation-making powers exist in section 117 of the Health Act 1956. These were not deployed in the legislative response to the pandemic. This is, at least in part, because section 117 was not thought to empower the making of rules requiring people to stay home in their “bubbles”, limiting private gatherings, or mandating closure of all but essential services, as discussed in *Te Aka Matua o te Ture—Law Commission, The Legal Framework for Emergencies in Aotearoa New Zealand*, NZLC SP23, November 2022 at [3.49].
- <sup>12</sup> Regulations Review Committee, *Inquiry into Parliament's legislative response to future national emergencies* (I.16B), December 2016 at 26.
- <sup>13</sup> *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [102].
- <sup>14</sup> In *Idea Services Ltd v Attorney-General* [2022] NZHC 308, the High Court criticised the balance that was struck between existing and bespoke emergency legislation in respect of prospective/immediate modification orders under the Epidemic Preparedness Act 2006. The Court of Appeal overturned this decision in *Idea Services Ltd v Attorney-General* [2022] NZCA 470 but did not comment on this criticism by Isac J in the Court below.

- 15 Including the Social Security (COVID-19 Income Relief Payment to be Income) Amendment Act 2020; Remuneration Authority (COVID-19 Measures) Amendment Act 2020; Overseas Investment (Urgent Measures) Amendment Act 2020; Imprest Supply (Third for 2019/20) Act 2020; COVID-19 Response (Taxation and Social Assistance Urgent Measures) Act 2020; COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020. For an up-to-date list, see <http://www.pco.govt.nz/covid-19-legislation/>. See further Maisy Bentley “Expediting democratic, Civil and Political Rights: Covid-19 and an Improved Model of Expedited Law-Making” LLB(Hons) Research Paper, at 10–13.
- 16 Dean Knight, ‘New Zealand: Legal Response to COVID-19’, in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to COVID-19* (OUP 2021) at [21].
- 17 The power for the Director-General to make orders was removed on 25 November 2022: COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Act 2022.
- 18 COVID-19 Public Health Response Act, section 20. The Finance and Expenditure Committee thought that there should be more certainty around who the enforcement officers would be, and what the nature of their role is.
- 19 COVID-19 Public Health Response Amendment Act 2021.
- 20 Hon David Parker, “The legal and constitutional implications of New Zealand’s fight against COVID”, 2 December 2022, available at <https://www.beehive.govt.nz/speech/legal-and-constitutional-implications-new-zealand%E2%80%99s-fight-against-covid>.
- 21 The High Court upheld a challenge to the orders implementing these vaccine mandates in *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 13 HRNZ 109.
- 22 COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Act 2022.
- 23 COVID-19 Public Health Response (Masks) Order 2022, clause 11.
- 24 COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Act 2022.
- 25 Royal Commission of Inquiry (COVID-19 Lessons) Order 2022, Schedule, clause 4.
- 26 COVID-19 Public Health Response Act, section 8 also permits the making of a COVID-19 order while a state of emergency or transition period in respect of COVID-19 under the Civil Defence Emergency Management Act 2002 is in force or if the Prime Minister by notice in the *Gazette*, after being satisfied that there is a risk of an outbreak or the spread of COVID-19, has authorised the use of COVID-19 orders (either generally or specifically) and the authorisation is in force. Apart from the period between 25 March 2020 and 8 June 2020, when a state of emergency or transition period was in force, it is the existence of the epidemic notice which has provided the necessary prerequisite for almost all of the COVID-19 orders, as neither of the other two possible prerequisites existed.
- 27 Epidemic Preparedness Act 2006, sections 5, 7.
- 28 Section 6.
- 29 Section 9(2).
- 30 Section 9(1).
- 31 Section 15.
- 32 Te Aka Matua o te Ture—Law Commission, *The Legal Framework for Emergencies in Aotearoa New Zealand*, NZLC SP23, November 2022 at 3.73. And see *Idea Services Ltd v Attorney-General* [2022] NZCA 470.
- 33 Epidemic Preparedness Act 2006, section 14(2). Only two s 14 IMOs were made, the Epidemic Preparedness (Medicines Act 1981—COVID-19) Immediate Modification Order 2021 and the Epidemic Preparedness (Medicines Act 1981—COVID-19) Immediate Modification Order 2022.
- 34 Epidemic Preparedness Act 2006, section 15(2).
- 35 Section 15(3)(a) and (b).
- 36 Section 15(3)(c): the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicial Review Procedure Act 2016, the Bill of Rights Act, or the Parliamentary Privilege Act 2014.
- 37 Section 70(1A).
- 38 A transitional exemption applies under Schedule 1 of the Legislation Act 2019.
- 39 COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Act 2022.

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- <sup>40</sup> COVID-19 Public Health Response Act, section 9(1)(d).
- <sup>41</sup> The purpose initially focused on public health factors and supporting a COVID-19 response that is “co-ordinated, orderly and proportionate”. In response to a comment by the Finance and Expenditure Committee in its June 2020 report, the section 4 purpose section was amended in August 2020 to allow social, economic, and other factors to be taken into account where it is relevant to do so and that is economically sustainable and allows for the recovery of Managed Isolation and Quarantine (MIQF) costs. In *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [23] the Court rejected an argument that a measure under the Act must further each and every purpose listed in s 4. The Court held that the purpose statement in section 4 should itself be read broadly and purposively.
- <sup>42</sup> All have been confirmed.
- <sup>43</sup> *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 at [65] citing *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [46] and Philip Joseph, *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1188.
- <sup>44</sup> COVID-19 Public Health Response Act, subsection 9(1)(ba) (added on 6 August 2020), 9(1)(d), 10(d) (repealed), 13(2).
- <sup>45</sup> COVID-19 Public Health Response Act, s 9(1)(ba); *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 at [39].
- <sup>46</sup> COVID-19 Public Health Response Act, section 13(1). However, this provision does not limit or affect the Bill of Rights Act: section 13(2).
- <sup>47</sup> Section 14(5).
- <sup>48</sup> *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 13 HRNZ 291 at [80].
- <sup>49</sup> *NZDSOS Inc and NZTSOS v Minister for COVID-19 Response* [2022] NZHC 716 at [135](c).
- <sup>50</sup> COVID-19 Public Health Response Act, section 11AA(1)(c)(ii) (repealed).
- <sup>51</sup> Section 11AA(2) (repealed).
- <sup>52</sup> COVID-19 Public Health Response Act, section 13(3).
- <sup>53</sup> Report of the Finance and Expenditure Committee, *Inquiry into the operation of the COVID-19 Public Health Response Act 2020*, July 2020.
- <sup>54</sup> Sessional orders (53rd Parliament) as at 10 May 2023, Legislative Procedures COVID-19 Public Health Response Act 2020, rule 4.
- <sup>55</sup> Report of the Health Committee Notice of motion on the continuation of the COVID-19 Public Health Response Act 2020, March 2021, report of the Health Committee Notice of motion (No 2) on the continuation of the COVID-19 Public Health Response Act 2020, November 2021, report of the Health Committee Continuation of the COVID-19 Public Health Response Act 2020, May 2022. Report of the Health Committee Continuation of the COVID-19 Public Health Response Act 2020, November 2022.
- <sup>56</sup> Final report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, August 2020 at 11.
- <sup>57</sup> Sessional orders (53rd Parliament) as at 10 May 2023, Legislative Procedures COVID-19 Public Health Response Act 2020, rule 2.
- <sup>58</sup> Regulations Review Committee, Briefing to review secondary legislation made in response to Covid-19 (Four interim reports, May–August 2020; Regulations Review Committee, Final report (August 2020).
- <sup>59</sup> See Regulations Review Committee, ‘Notices issued under section 70 of the Health Act 1956’ (20 April 2020) (letter to Ashley Bloomfield).
- <sup>60</sup> Health Act (Covid-19 Alert Level 3) Order 2020 (LI2020/69) (14 May 2020).
- <sup>61</sup> First interim report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, May 2020.
- <sup>62</sup> Second interim report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, June 2020.

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- <sup>63</sup> See also *Orewa Community Church v Minister for COVID-19 Response* [2022] NZHC 2026. In this case, the High Court held that gathering limits and requirements for COVID-19 vaccine certificates under the COVID-19 Public Health Response (Protection Framework) Order 2021 were a justified limit on the right to manifest religion under section 15 of Bill of Rights Act, both when introduced and after the Omicron variant was circulating.
- <sup>64</sup> Fourth interim report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, August 2020.
- <sup>65</sup> Final report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, August 2020.
- <sup>66</sup> Clause 27 allowed regulations to specify additional projects that may be referred to the Expert Panel beyond those listed in Schedule 2 of the bill. Referral to the Expert Panel triggers the fast-tracked consent processes. Clause 34 allowed regulations to add an agency and certain activities carried out by that agency to the list of agencies and activities that may be undertaken as permitted activities.
- <sup>67</sup> Final report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, August 2020, Appendix C, referring to Social Security (COVID-19—Temporary Additional Support and Expiry and Regrant of Benefits) Amendment Regulations 2020; Immigration (Visa, Entry Permission, and Related Matters) Amendment Regulations 2020; Education (Early Childhood Services) Amendment Regulations 2020; Land Transport Rule: COVID-19 Response (No 1) 2020.
- <sup>68</sup> This ground is that the regulation is not in accordance with the general objects and intentions of the enactment under which it is made.
- <sup>69</sup> This ground is that the regulation appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made.
- <sup>70</sup> Final report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, August 2020, Appendix C, p 61.
- <sup>71</sup> At p 11.
- <sup>72</sup> At pp 8–9.
- <sup>73</sup> Epidemic management notices activate provisions that sit dormant on the statute book until activated in the event of an epidemic. The provisions alter the operation of other provisions in their Acts.
- <sup>74</sup> Immediate modification orders can modify any requirement or restriction imposed by almost any Act or secondary legislation. Before making an IMO, the Minister must be satisfied that the effects of the relevant quarantinable disease are such that the requirement or restriction is impossible or impracticable to comply with and that the modifications go no further than is reasonably necessary in the circumstances.
- <sup>75</sup> Final report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, August 2020 at p 2.
- <sup>76</sup> They were not required to be presented to the House of Representatives under section 41 of the Legislation Act 2012. However, that changed when the Legislation Act 2019 came into force on 28 October 2021. Section 70 orders are now required to be presented under section 114(1) of that Act.
- <sup>77</sup> Final report of the Regulations Review Committee, Briefing to review secondary legislation made in response to COVID-19, August 2020, at p 9. None of these concerns were upheld by the High Court in *Borrowdale v Director of Health*.
- <sup>78</sup> As in respect of the report on 18 February 2021 that clause 4 of the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order 2021 was an unauthorised subdelegation.
- <sup>79</sup> As in the case of the amendments made to the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 in response to the Committee's 10 February 2022 report. The Committee has regularly pointed out drafting errors, which the Minister has been willing to correct, as in the Committee's report dated 7 March 2022 relating to the COVID-19 Public Health Response (Vaccinations) Amendment Order (No 5) 2021.
- <sup>80</sup> Such as in relation to the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 2) 2021, about which the Committee expressed concerns in respect of its

open ended suspension of travel. To the Committee's concerns, the Minister responded that the order was to be revoked at the appropriate time once the risk has receded. The Minister noted that this approach is consistent with other COVID-19 orders which are revoked when no longer needed.

- <sup>81</sup> For example, in our report in relation to the COVID-19 Public Health Response (Isolation and Quarantine) Amendment Order 2021 on 14 July 2021, and in our report dated 27 September 2021 on the COVID-19 Public Health Response (Alert Level Requirements) Order (No 10) Amendment Order 2021, and in our report on 25 November 2021 in relation to apparent inconsistency in testing requirements in the COVID-19 Public Health Response (Required Testing) Amendment Order (No 5) 2021.
- <sup>82</sup> Interim report of the Regulations Review Committee, Briefing about orders made under section 70 of the Health Act 1956, November 2021. Appendix B contains a full list of the section 70 orders scrutinised by the Regulations Review Committee.
- <sup>83</sup> See <https://www.health.govt.nz/covid-19-novel-coronavirus/covid-19-response-planning/covid-19-epidemic-notice-and-orders#hlthact> (no Health Act section 70 orders appear at this site as at 10 December 2022).
- <sup>84</sup> For example, see interim report of the Regulations Review Committee, Examination of COVID-19 order presented on 31 May 2022–23 June 2022, in which we expressed concerns regarding the COVID-19 Public Health Response (Protection Framework) Amendment Order (No 9) 2022 (SL 2022/165); in particular the use of non-infringement offences for misuse of a face-covering exemption pass. We were concerned that the use of non-infringement offences was out of keeping with the scheme of the COVID-19 Public Health Response Act and also disproportionate to the mischief in this case. We also sought further information about the offences associated with breaches of clause 106A(7). That provision prohibits a person from providing information they know is false or misleading when applying for an exemption pass. These offences could be further specified. We wrote to the Minister to find out whether the Minister considers that the offences applying to breaches of the new exemption pass provisions are consistent with the Framework Order as a whole (noting that infringement offences have been used previously). The Minister's response was summarised in the Regulations Review Committee's final report of 12 August 2022. The Minister confirmed that breaches of the provisions in clauses 106A(7) and 106C were intended to be enforced under section 26 of the COVID-19 Public Health Response Act. The Minister stated that this was consistent with breaches of provisions related to vaccine passes under the previous COVID-19 Public Health Response (COVID-19 Vaccination Certificate) Order 2021. The Minister stated that she expected enforcement provisions to be exercised only when face-covering exemption passes were misused in organised, systemic, or serious cases.
- <sup>85</sup> See, for example, our concerns in relation to the open ended restriction of travel in the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 2) 2021 as expressed in our report of 6 May 2021. Final report of the Regulations Review Committee, Examination of COVID-19 orders presented between 10 and 21 September 2021 in the context of the COVID-19 Public Health Response (Alert Level Requirements) Order (No 11), clause 19A(3) of which required a person to produce evidence of a COVID-19 test (or a medical certificate) when requested by an enforcement officer. We pointed out that this was an example of compelled expression, potentially contrary to the right to freedom of expression in section 14 of the Bill of Rights Act. We accepted the Minister's explanation of the purpose of this requirement (to ensure that COVID-19 is picked up quickly if it exists in the population of workers crossing the border) as a justified limit on the right.

Interim report of the Regulations Review Committee, Examination of COVID-19 orders presented between 13 and 20 June 2022 in relation to the COVID-19 Public Health Response (Air Border) Amendment Order (No 5) 2022 (SL 2022/194) in which we expressed concerns that much of the content of the Self-isolation Requirements and Permitted Work (SRPW) Order seems overly restrictive and unsuitable for a voluntary admittance situation. We have written to the Minister suggesting it might be more appropriate to set out a separate scheme with tailored requirements and restrictions for persons voluntarily isolating in an MIQF, rather than using provisions from the SRPW order. The Minister's response was summarised in our final report on 22 August 2022. The Minister acknowledged our concerns that the limits on personal freedoms applied by clause 10A may not be appropriate for a voluntary scheme. She told us that the drafting of clause 10A will be

revisited at the next available opportunity, while still noting that this may not be necessary due to the disestablishment of MIQF.

- <sup>86</sup> See, for example, our concerns (expressed in our report dated 12 August 2021) about cl 12(4) of the COVID-19 Public Health Response (Vaccinations) Amendment Order 2021, which appeared to require disclosure for purposes beyond non-compliance with that order.

Interim report of the Regulations Review Committee, Examination of COVID-19 orders presented between 5 and 18 October 2021, 28 October 2021. At p 7 we referred to its concerns about cl 16A of the COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) Amendment Order (No 7) 2021, which criminalised a person moving to a second home after an announcement of an alert level change and before the change came into force. While acknowledging there is limited time for the law to be drafted and accepting that the urgency of the situation means that announcements of alert level changes must come before the order is ready to be signed, we were concerned the oral elements of the obligation were too uncertain to form the basis of a criminal offence and may make some unusual or unexpected use of the powers conferred by the enactment under which it is made. We wrote to the Minister and recommended the prohibition in clause 16A be amended to ensure that the elements that make up the criminal offence are more certain than can be achieved by way of an oral announcement.

- <sup>87</sup> For example, in the report of the Regulations Review Committee, Examination of COVID-19 orders presented between 30 November and 3 December 2021–7 March 2022, we expressed concerns that the order implementing the traffic light system, the COVID-19 Public Health Response (Protection Framework) Order 2021, might be more suitable for parliamentary enactment. We note that many of the COVID-19 provisions in Part 2 are matters that have a significant impact on rights. Many of them were part of the alert level requirement orders and have been refined over time as part of that regime. Under normal circumstances, we would expect to see such restrictions implemented by Parliament, rather than by secondary legislation. Because the protection framework is intended to apply in the longer term, we indicated that it may be more appropriate for the restrictions to be provided for in the COVID-19 Public Health Response Act. The Minister disagreed with our opinion that some of the COVID-19 provisions in this Order may be more appropriate for parliamentary enactment. The Minister noted that the regulations are likely to change over time in the near term, and thus would be difficult to settle into primary legislation. He agreed, however, to keep this under review.

Report of the Regulations Review Committee on Examination of COVID-19 orders presented between 23 and 28 February 2022 – 22 March 2022, in which we expressed our concerns about the COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Order 2022 (SL 2022/46), in which clause 29 placed additional requirements on those isolating under the Order because their own accommodation was unsuitable. We were concerned that the Order assumed a person was an ongoing higher transmission risk because of the lack of suitability of their accommodation. It did so without making any clear link between the suitability of accommodation and a person's underlying risk profile. It was not clear to us why someone would be a higher transmission risk despite having completed the same isolation requirements. The follow-on effect of this was that the person isolating in a secure facility faced a potentially longer isolation period. The only reasons the Order provided for this was that their residence was not suitable for isolation. We considered that clause 29 could constitute an undue limit on the rights and freedoms of certain people required to isolate under the isolation and quarantine order. Persons who were unable to self-isolate due to the suitability of their accommodation should not have been subjected to a comparably stronger power restricting their freedom of movement when there was not a sufficient connection between the risk posed by that person and the ability to extend their time in a MIQF. On this occasion, the Minister's response did not allay our concerns.

Report of the Regulations Review Committee on the Examination of COVID-19 orders presented between 23 and 28 February 2022–22 March 2022, in which we expressed concerns about clause 21 of the COVID-19 Public Health Response (Isolation and Quarantine and Other Matters) Amendment Order 2021 Amendment Order 2022 (SL 2022/48): "No person should spend longer in isolation or quarantine than they may have originally expected to, for what we consider an administrative purpose."

<sup>88</sup> For example, interim report of the Regulations Review Committee, Examination of COVID-19 orders presented between 5 and 18 October 2021, 28 October 2021. We were concerned about the COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) Amendment Order (No 6) 2021, which referred to a map described as “LG-01-2019-Con-1”. We were concerned that this reference was “jargon and appears to refer to a map reference used for the identification of territorial authorities, but it is not readily accessible” and that it called for elucidation under Standing Order 327(2)(i), as the exact location of the southern boundary is important for those aspects of the requirements limiting travel between the Northland and Auckland parts of the alert level 3 boundary. We referred to the Minister’s response at p 4 of our final report of November 2021. The Minister told us that, when a decision is made to move an area to a higher alert level after community transmission of COVID-19 is discovered, it is important to do so quickly. He said that relying on local government boundaries makes it possible to draft the relevant section 11 order rapidly. He noted that the Parliamentary Counsel Office, which drafts COVID-19 orders, typically only has a couple of hours to do so. We acknowledged the considerable urgency and that the legal description of the boundary was supported by guidance material on the COVID-19 website. However, we concluded that, generally, referring to specific maps is not an adequate method of describing a boundary.

<sup>89</sup> Interim report of the Regulations Review Committee, Briefing about orders made under section 70 of the Health Act 1956, November 2021, Appendix C.

<sup>90</sup> Standing Order 327(2)(f).

<sup>91</sup> See, for example, our concern in our 21 May 2021 report about the COVID-19 Public Health Response (Vaccinations) Order 2021, which in clause 11 used the term “vaccination status”. We recommended that this be amended to use the narrower expression “whether the worker has been vaccinated” to make it clear what information could be accessed. Our recommendation in our 10 February 2022 report on the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021, that its purpose should be more accurately described in the Order to differentiate it from the COVID-19 Public Health Response (Vaccinations) Order 2021.

See also *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 in which the High Court set the Order aside as it did not involve a reasonable limit on the applicants’ rights that could be demonstrably justified in a free and democratic society and is therefore unlawful. However, the Court also drew attention to the mismatch between the stated purpose of the Order in clause 3 and the Minister’s evidence addressing the threat to the continuity of Police and Defence Force services arising from absenteeism caused by COVID-19, rather than to limit the spread of it. The Court was not satisfied that continuity of these services was materially advanced by the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021.

In our interim report of June 2022 in relation to the COVID-19 Public Health Response (Air Border) Amendment Order (No 5) 2022 (SL 2022/194) we expressed concern about clause 10A(4) being contradictory and unclear and sought the Minister’s comment on whether the drafting of clause 5 could be improved to clarify how parts of the COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Order 2022 (SRPW order) apply and make the order more accessible. The Minister’s response was summarised in the committee’s final report on 22 August 2022. The Minister acknowledged the committee’s concerns about the unclear drafting of clause 10A(4). She told us that when the Air Border Order was next amended officials would look at amending clause 10A(4)(b) to clearly state which clauses of the SRPW order do not apply.

<sup>92</sup> See report of the Regulations Review Committee, Examination of COVID-19 orders presented between 9 and 21 December 2021–10 February 2022. See also report of the Regulations Review Committee, Examination of COVID-19 orders presented between 23 and 28 February 2022 – 22 March 2022 (also referred to in Examination of COVID-19 orders presented between 21 December 2021 and 1 February 2022–25 March 2022) in which we repeated concerns about the drafting style and navigability of the COVID-19 Public Health Response (Air Border) Order 2021. To determine which provisions apply to them, a person had to navigate a non-linear order with a large number of cross-referenced schedules and provisions. This meant that there was no ability to find in one, clearly identified place the rules that may apply to a particular arrival. We noted that this Order did not create an accessible scheme where a traveller can determine clearly which rules apply to them. Instead, the Order needed to be read in its entirety before returning to specific provisions. We wrote to the Minister and stated that there may be other, clearer, ways to design

and structure these orders. For example, all the operative clauses applying to each category of arrival could be identified in a separate schedule or part. This would ensure that the restrictions and consequences of not complying were in one place. The Minister's response to our concerns was that the design of the Order delivered clarity and served the principle of accessibility. He also noted that the Order intentionally reflected the approach taken in the Protection Framework Order, as the aim was to have a consistent approach across the two orders. He considered that this allowed users to apply their knowledge of the operation of one order to the other more easily. The Minister noted that the Order's design made it easier to amend, and less susceptible to future errors and inconsistencies. The Minister considered that the design used for the Order has significant operational and legal benefits. This design responded to the experiences of the previous two years, when border settings frequently needed to be amended at pace.

In our final report, Examination of COVID-19 orders presented between 16 and 29 March 2022–19 May 2022, we raised a further concern about the Air Border Order, namely that modifications were being used (in Schedule 12) to create standalone obligations relating to testing. We considered that a modification should not create a standalone obligation. Moreover, it was unclear whether the requirement to undergo testing was a condition in order to avoid isolation or quarantine, or a separate requirement. The Minister indicated he agreed with our concerns and would amend the Order. Schedule 12 was revoked on 12 September 2022.

<sup>93</sup> Report of the Regulations Review Committee, Examination of COVID-19 orders presented between 30 November and 3 December 2021–7 March 2022.

<sup>94</sup> The Minister acknowledged our concerns about the currently inoperative provisions. He explained that these provisions remained in place so that the Government retained the tools to implement localised lockdowns, if needed. The Minister told us that he would work to clarify the arrangement of these provisions in the order. The Minister also recognised that the purpose of these provisions could be clearer, to avoid confusion and maintain accessibility.

<sup>95</sup> Report of the Regulations Review Committee, Examination of COVID-19 orders presented between 21 December 2021 and 1 February 2022–25 March 2022.

<sup>96</sup> For example, in the report of the Regulations Review Committee on Examination of COVID-19 orders presented between 23 and 28 February 2022 – 22 March 2022 we expressed concern that the purpose of the COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Order 2022 (SL 2022/46) was broader than its stated purpose. We suggested amending the purpose clause to acknowledge that it also aimed to mitigate the effects of the spread of COVID-19, rather than limit spread exclusively.

<sup>97</sup> See our final report, Examination of COVID-19 Orders presented on 27 June 2022 – 28 July 2022, in which we criticised clause 2 of the COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Amendment Order (No 5) 2022 (SL 2022/196) and the COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Amendment Order (No 4) 2022 (SL 2022/195) which state that "This order comes into force at 11.59pm on the second day after the date of its notification in the Gazette". We wrote to the minister to recommend that the Minister consider using specific dates and times for the commencement of orders in future. The Minister said that, where possible, future orders would contain a specific time and date in the commencement provision.

<sup>98</sup> For example, in our 10 February 2022 report, we referred to a lack of clarity as to the intended relationship between orders made under section 11 of the COVID-19 Public Health Response Act and orders made under s 11AB of the same Act. We considered that, reading section 11AB(4) and section 17A(2) together, and having regard to the public health purpose of section 11 orders, that an order made under section 11AB (such as the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021) could not override the application of a section 11 order, such as the COVID-19 Public Health Response (Vaccinations) Order 2021. Nevertheless, we thought that clause 2 of Part 1 of Schedule 1 of the Specified Work Vaccinations Order created ambiguity and should be revoked. The whole Order has since been revoked.

<sup>99</sup> Interim report of the Regulations Review Committee, Examination of COVID-19 Order presented on 16 December 2022 – COVID-19 Public Health Response (Self-isolation Requirements) Amendment Order (No 2) 2022 (SL 2022/339), February 2023 at p 3.

- <sup>100</sup> For example, in our final report, Examination of COVID-19 orders presented between 30 November and 3 December 2021–7 March 2022, we expressed concern about cl 24(4) of the COVID-19 Public Health Response (Infringement Offences) Amendment Order 2021 which permitted an enforcement officer to require a ship to remain at least a specified distance away from any other ship. The amendment to cl 29A provided that it was an offence not to comply with clause 24(4)—but it was unclear who would commit the offence. We raised this concern with the Minister who agreed and said he was considering options for clarification. This offence provision has since been revoked.
- <sup>101</sup> For example, in our final report, Examination of COVID-19 orders presented between 16 and 20 February 2022–10 March 2022, we expressed concerns about whether the COVID-19 Public Health Response (Isolation and Quarantine and Maritime Border) Amendment Order 2022 (SL 2022/16) permitted an extension to a person's stay in MIQF or in isolation on a ship. The Minister did not agree that the Order could reasonably have been interpreted as authorising an extended stay. However, a subsequent order included a limit on a person being required to stay longer than was required at the time they entered isolation. See also our interim report, Examination of COVID-19 orders presented between 16 and 29 March 2022 – April 2022, in which we expressed concern about the COVID-19 Public Health Response (Air Border) Amendment Order (No 2) 2022 (SL 2022/75), which introduced a testing requirement indirectly by modifying schedules to the principal Order. We wrote to the Minister to recommend an amendment of the Order so that the requirement to be tested is clearly characterised as either a requirement or a condition in each instance.
- <sup>102</sup> See our final report, Examination of COVID-19 orders presented between 21 and 23 February 2022 (17 March 2022), in relation to the COVID-19 Public Health Response (Requirements for Close Contacts) Order 2022 (SL 2022/19). We also had concerns about the successor to this Order, the COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Order 2022 (SL 2022/46), which we expressed in our report on Examination of COVID-19 orders presented between 23 and 28 February 2022 to 22 March 2022. In particular, we were concerned that (in relation to clause 9) no provision was made to ensure people could access mobile phone coverage, a landline, or access to the internet when self-isolating. The Order also required that a person who was self-isolating have access to a government-approved place for testing.
- <sup>103</sup> For example, the COVID-19 Public Health Response (Isolation and Quarantine and Other Matters) Amendment Order 2021 Amendment Order 2022 (SL 2022/48) had two different definitions of the same term: contactless delivery. In our report Examination of COVID-19 orders presented between 23 and 28 February 2022 to 22 March 2022, we said that this Order could be improved by using the definition of contactless delivery from the self-isolation and permitted work order.
- <sup>104</sup> For example, as identified by the committee in our 9 September 2021 report in relation to the COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021, class exemptions should be described as disallowable instruments that must be presented to the House.
- <sup>105</sup> COVID-19 Public Health Response Act, sections 14(2), 14(3).
- <sup>106</sup> *Four Aviation Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [40], [55] citing *Drew v Attorney-General* [2002] 1 NZLR 58 (CA); *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289; *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745; and *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [294]–[297].
- <sup>107</sup> *NZDSOS Inc and NZTSOS v Minister for COVID-19 Response* [2022] NZHC 716 at [58].
- <sup>108</sup> *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [56].
- <sup>109</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131 per Lord Hoffmann. See also *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2 [2021] 1 NZLR 213; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.
- <sup>110</sup> See *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 at [64]: “If a statutory provision, interpreted according to its text and in light of its purpose and context, limits rights in a way which is reasonable and demonstrably justified in a free and democratic society under s 5 of the Bill of Rights, the principle of legality does not require a different interpretation.”

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- <sup>111</sup> New Zealand Bill of Rights Act 1990, section 6.
- <sup>112</sup> The rigour that this requires was recently explained in *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 at [51]-[53] (the decision of Court of Appeal has since been reversed but the Supreme did not depart from the Court of Appeal's reasoning on this aspect: *Make It 16 Inc v Attorney-General* [2022] NZSC 134), cited in *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [63]-[65]: "The approach usually applied to assessing the justification for the limit on rights is that set out by the Supreme Court in *R v Hansen*, which in turn adopted the approach of the Supreme Court of Canada in *R v Oakes*. Tipping J described the approach as involving a number of steps, although it should be remembered that this is not a rigid test, but rather a framework for the Court to ultimately address the question of justification." (Footnotes omitted.)
- <sup>113</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (per majority, Elias CJ dissenting). This approach was upheld by the Supreme Court in *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948. In *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 at [50] – [51] Palmer J said application of s 6 "requires reference to both the relevant right or freedom and to whether the limit is justified...It is consistent with bringing the full, balanced effect of the Bill of Rights to bear holistically on the interpretation of legislation. Applying section 6 to interpret the meaning of legislation to uphold a right or freedom, irrespective of whether Parliament intended the right or freedom to be subject to a limit that is reasonable and demonstrably justified in a free and democratic society, would involve applying only half of the Bill of Rights to interpretation. It would involve requiring that legislation which, interpreted according to its text and in light of its purpose and context, empowers decisions to limit rights in a way which is reasonable and demonstrably justified in a free and democratic society, must be read down to invalidate those decisions." Conventionally, this section 5 analysis involves application of the test set out by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103, subsequently adopted in New Zealand by the Supreme Court in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 and applied in other cases. However, the authorities agree that application of the six-step *Hansen* methodology is not essential.
- <sup>114</sup> Section 6 does not require the usual purposive interpretation of the empowering provisions to be narrowed to mean the order is outside its scope: *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3063, [2022] 2 NZLR 65 at [50]–[51].
- <sup>115</sup> COVID-19 Public Health Response Act, section 14(5); *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [80], (2022) 13 HRNZ 109; *NZDSOS Inc and NZTSOS v Minister for COVID-19 Response* [2022] NZHC 716 at [62]-[63]; COVID-19 Public Health Response Act 2020 section 14(5).
- <sup>116</sup> *Make It 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 at [53] citing *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91]. The decision of the Court of Appeal has since been reversed, but the Supreme Court did not depart from the Court of Appeal's reasoning on this aspect: *Make It 16 Inc v Attorney-General* [2022] NZSC 134, (2022) 14 HRNZ 782.
- <sup>117</sup> Contrary to Standing Order 327(2)(a) (not in accordance with the general objects and intentions of the enactment under which it is made). For example, in our reports on the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order 2021 (18 February 2021 interim report; 9 April 2021 final report), we concluded that the definition of "specified place" in clause 4 as a country or region that the Director-General has specified in a notice in the *Gazette* and on a publicly accessible website maintained by the Government, was an unauthorised subdelegation. See also our report dated 10 February 2022 on the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021, in which we concluded there was an unauthorised delegation of power to authorise activities otherwise prohibited by a COVID-19 order to those officers in clause 8 and a drafting error in clause 11(4). The Minister responded by amending the order, which addressed both concerns.
- <sup>118</sup> For example, in our report of 7 March 2022, we expressed concerns that the COVID-19 Public Health Response (COVID-19 Vaccination Certificate) Order 2021 gave the power to make decisions about applications for a COVID-19 vaccination certificate (CVC) to an automated electronic system (AES) without specifying who is accountable for those decisions. We considered that this may not have been Parliament's intention. The Minister responded that it is the Director-

- General of Health who is accountable for the issuing of CVCs and thus is responsible for the purely administrative functions of the AES. The Minister told us that he would explore whether the Director-General's accountability for the system could be clarified in the Order.
- <sup>119</sup> See, for example, our concern expressed in our 9 September 2021 report in relation to the exemption power in the COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) Amendment Order 2021 as to whether it was limited to activities related to parliamentary purposes. The Minister clarified that the equivalent exemption in the COVID-19 Public Health Response (Alert Level Requirements) Order (No 10) 2021 applied to parliamentary staff or officers of Parliament, only in relation to parliamentary business, or to Parliament.
- <sup>120</sup> For example, see the final report of the Regulations Review Committee, *Examination of COVID-19 orders presented between 1 March and 7 March 2022*, April 2022, in which we expressed concerns that clause 27A of the COVID-19 Public Health Response (Self-isolation Requirements and Permitted Work) Amendment Order 2022 (SL 2022/53), which authorised the Director-General to exempt any COVID-19 case or class of COVID-19 cases from self-isolation requirements did not fit within the order's sole purpose to limit the spread of COVID-19. We were also concerned that it did not balance that purpose against the implied purpose of mitigating the negative effects of an outbreak of COVID-19. See also *NZDSOS Inc and NZTSOS v Minister for COVID-19 Response* [2022] NZHC 716 at [145]–[154] in which the Court dismissed a challenge to the exemption criteria in the COVID-19 Public Health Response (Vaccinations) Order 2021.
- <sup>121</sup> For example, as identified by the committee in its 9 September 2021 report in relation to the COVID-19 Public Health Response (Alert Level Requirements) Order (No 9) 2021, class exemptions should be described as disallowable instruments that must be presented to the House. The committee also recommended that the Government require those class exemptions to include the reasons for them being made.
- <sup>122</sup> Legislation Act 2019, sections 63–66 and schedule 2. Some Acts set out specific rules that override these rules. For example, New Zealand Standards are commonly incorporated by reference but are subject to specific rules set out in the Standards and Accreditation Act 2015, sections 29–32.
- <sup>123</sup> For example, clauses 21(5), 21(7) of the COVID-19 Public Health Response (Alert Level Requirements) Order 2021, which we reported on 10 March 2021 in our *Examination of COVID-19 orders presented between 16 February and 2 March 2021*.
- <sup>124</sup> For example, on 8 April 2021, we reported our concerns about the COVID-19 Public Health Response (Alert Level Requirements) Order (No 6) 2021, in particular that it is inappropriate for passengers to be responsible for determining whether the ship service they are on is exempt from the requirement to wear face coverings.
- <sup>125</sup> For example, in the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 2) 2021, which contained an open-ended restriction on travel—see *Examination of COVID-19 orders presented between 9 April and 13 April 2021 to 6 May 2021*.
- <sup>126</sup> For example, as the Committee said in its report of 12 August 2021, in the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 7), where the concept of a “QFT flight” in new clause 8B(1AAA) was so complicated that it was impractical for people who are subject to it to know whether a flight is a QFT flight. And, as the Committee said in its report of 31 August 2021, there was a lack of clarity as to the saliva testing requirements in the COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021.
- <sup>127</sup> For example, as the committee said in its report of 12 August 2021, in the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 7), where it is only possible to ascertain whether someone is a QFT (quarantine free travel) person once they arrive in New Zealand. This makes it impossible to comply with the requirement not to arrive in New Zealand on a QFT flight unless you are a QFT person.
- <sup>128</sup> <https://www.facebook.com/regulationsreviewnz/videos/inquiry-into-the-regulation-making-powers-in-the-covid-19-response-vaccinations-/980573455924070/> and <https://www.facebook.com/regulationsreviewnz/videos/994143444540611/>. The submissions themselves can be found at [https://www.parliament.nz/en/pb/sc/submissions-and-advice/all?custom=INQ\\_118276](https://www.parliament.nz/en/pb/sc/submissions-and-advice/all?custom=INQ_118276).
- <sup>129</sup> Caitlin Rutherford, Gretchen Keer-Keer, and Professor Andrew Geddis, University of Otago.
- <sup>130</sup> Te Hunga Rōia Māori o Aotearoa—Māori Law Society.

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- <sup>131</sup> Legislation Design Advisory Committee.
- <sup>132</sup> We acknowledge that the Regulations Review Committee of the 52<sup>nd</sup> Parliament carried out the same exercise in its final report on its briefing to review secondary legislation made in response to COVID-19 (August 2020). We have reached broadly the same conclusions as our predecessor committee did.
- <sup>133</sup> The High Court referred to this safeguard in *Four Aviation Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26 at [128]. In that case, the Court upheld the COVID-19 Public Health Response (Vaccinations) Order 2021 as a justified limit on section 11 of the Bill of Rights Act. However, the Court observed that whether the challenged measure would remain demonstrably justified once the virus had become endemic in at least parts of New Zealand was an open question. See also report of the Finance and Expenditure Committee, Inquiry into the operation of the COVID-19 Public Health Response Act 2020, July 2020, at 16, in which the committee concluded that the COVID-19 Public Health Response Act included sufficient safeguards but that, were enduring health emergency legislation to be developed, an equivalent provision should be sufficiently clear about what is meant by keeping orders “under review”. For example, this could include mandating proactive publication of the reviews.
- <sup>134</sup> Dean Knight, ‘New Zealand: Legal Response to COVID-19’, in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to COVID-19* (OUP 2021) at [12].
- <sup>135</sup> Section 14(5).
- <sup>136</sup> *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 13 HRNZ 291 at [80].
- <sup>137</sup> *NZDSOS Inc and NZTSOS v Minister for COVID-19 Response* [2022] NZHC 716 at [135](c).
- <sup>138</sup> World Health Organization “WHO Policy Brief: Clinical Management of COVID-19”, 14 September 2022.
- <sup>139</sup> Rt Hon Jacinda Ardern “COVID-19 Protection Framework retired—NZ moves forward with certainty”, 12 September 2022.
- <sup>140</sup> World Health Organization, statement on the fifteenth meeting of the IHR (2005) Emergency Committee on the COVID-19 pandemic, 5 May 2023.
- <sup>141</sup> COVID-19 Public Health Response (Masks) Order 2022.
- <sup>142</sup> COVID-19 Public Health Response (Self-isolation Requirements) Amendment Order 2022.
- <sup>143</sup> COVID-19 Public Health Response (Air Border) Amendment Order (No 6) 2022.
- <sup>144</sup> COVID-19 Public Health Response (Revocations) Order 2022, clause 3(2).
- <sup>145</sup> Dr Dean Knight (@drdeanknight) “For what it’s worth, I don’t buy any need for urgency.” <https://twitter.com/drdeanknight/status/1595202124240986113>.
- <sup>146</sup> We note that the Severe Weather Emergency Recovery Legislation Act 2023 provides for the appointment of a Review Panel to review draft orders and provide advice to the relevant Minister in relation to orders that may be required for the purposes of that Act.
- <sup>147</sup> Hurunui/Kaikōura Earthquakes Recovery Act 2016, s 8(1)(c) and (d).
- <sup>148</sup> Under Standing Order 215.
- <sup>149</sup> Emeritus Professor John Burrows QC, “The Courts, Emergency and Unrest”, in John Burrows and Jeremy Finn (eds) *Challenge and Change, Judging in Aotearoa New Zealand* LexisNexis NZ Limited, Wellington, 2022, at 167.
- <sup>150</sup> World Health Organization “WHO Policy Brief: Clinical Management of COVID-19”, 14 September 2022.
- <sup>151</sup> Te Aka Matua o te Ture—Law Commission, *The Legal Framework for Emergencies in Aotearoa New Zealand*, NZLC SP23, November 2022 at [9], [2.59].
- <sup>152</sup> The WHO Coronavirus (COVID-19) Dashboard (<https://covid19.who.int/>) recorded that globally, as of 6:07pm CEST, 31 May 2023, there have been 767,364,883 confirmed cases of COVID-19, including 6,938,353 deaths, reported to WHO.
- <sup>153</sup> The World Health Organisation’s estimate of global excess mortality associated with COVID-19 between 1 January 2020 and 31 December 2021 was nearly 15 million deaths: <https://www.who.int/data/stories/global-excess-deaths-associated-with-covid-19-january-2020-december-2021>.

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- <sup>154</sup> This was the same day as the World Health Organization declared the outbreak of the novel coronavirus to be a Public Health Emergency of International Concern.
- <sup>155</sup> This Order was later amended to include the new name for the coronavirus, COVID-19, and to add both diseases to the list of quarantinable infectious diseases in the Health Act 1956: Infectious and Notifiable Diseases Order (No 2) 2020 (LI 2020/31) 9 March 2020.
- <sup>156</sup> The Director-General issued the Health Act (COVID-19 Alert Level 3) Order 2020 which moved the country down to Alert Level 3 from 11.59 pm on 27 April 2020.
- <sup>157</sup> This Notice was renewed several times three-monthly and, most recently, monthly, by the Epidemic Preparedness (COVID-19) Notice 2020 Renewal Notice (No 3) 2022, which expired on 20 October 2022.
- <sup>158</sup> This declaration was renewed six times before finally expiring on 13 May 2020. Subsequently, a period of national transition was implemented until 8 June 2020.
- <sup>159</sup> The first time was on 23 February 2011 following the 6.3 magnitude earthquake in Christchurch. A third state of national emergency was declared on 14 February 2023, to assist in the response to Cyclone Gabrielle.
- <sup>160</sup> In *Borrowdale v Director-General of Health* [2020] 2 NZLR 864 a Full Court of the High Court declared that these Restrictive Measures were not prescribed by law until 3 April 2020 and were therefore contrary to the Bill of Rights Act. Every other aspect of Dr Borrowdale's challenge to the legality of the Government's COVID-19 response was dismissed. The Government did not seek Parliament's retrospective validation of the unlawful actions during the first nine days of the lockdown. Nor did the Crown cross-appeal that aspect of the High Court's judgment when Dr Borrowdale unsuccessfully appealed to the Court of Appeal: *Borrowdale v Director-General of Health* [2021] NZCA 520; [2022] 2 NZLR 356 at [11]. As United Kingdom barrister Adam Wagner has recently noted, then Prime Minister Boris Johnson's 23 March 2020 instruction to the British people that "you must stay at home" and that if they did not follow the rules "the police will have the powers to enforce them" lacked legal underpinning until 26 March 2020: *Emergency State*, Vintage, Kindle ed, 2022, p 2.
- <sup>161</sup> Medicines Amendment Act 2021, section 32(1)
- <sup>162</sup> At [77] and [129]. Palmer J concurred with this observation in *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 at [75].
- <sup>163</sup> The Court noted at footnote 8 that this mismatch was also identified in the Regulation Review Committee's report Examination of COVID-19 orders presented between 9 and 21 December 2021 (February 2022).