

Privacy Commissioner's Submission to the Finance and Expenditure Select Committee on the Inquiry into the operation of the COVID-19 Public Health Response Act 2020

Introduction

1. I am pleased to provide a submission on the COVID-19 Public Health Response Act 2020 (the Act).
2. The Act creates a framework for managing the public health risks posed by COVID-19 and will be repealed if no resolution is passed by the House to continue the Act every 90 days. The Act's framework is broadly based on the powers in sections 70 and 92I of the Health Act 1956 and creates the ability for the Minister of Health (and the Director-General of Health, in more limited circumstances) to make enforceable public health orders in respect of people, business and activities, and the provision of information for contact tracing purposes.
3. A fast and effective contact tracing regime is one of the most critical components of New Zealand's public health response to the COVID-19 pandemic. Public trust and confidence are critical to the safe and effective use of personal information for this purpose. Given the urgent circumstances limiting consultation prior to the Bill being enacted, my comments on the Act before it was passed were limited solely to a gap that my Office identified with the contact tracing framework.
4. As there has not been the standard robust consultation period and subsequent analysis, I consider that in this rare case it is appropriate that Parliament reconsider the legal framework for contact tracing entirely afresh. Any review of the Act should be informed by the principles contained in the Health Act that information sharing must serve the public health objective, must put the individual at the centre, and should enable voluntary provision of information and informed consent. Mandatory requirements should only be used if non-coercive measures are not available or effective to meet the public health objective.
5. My comments relate to:
 - The Health Act scheme of contact tracing and the desirability for all contact tracing provisions to be consolidated in one statute;
 - The breadth of section 11(1)(ix) of the Act;
 - The importance of a statutory restriction on re-use and disclosure of contact tracing information to foster trust and confidence in the contact tracing system; and
 - The powers of entry under section 20 of the Act.
6. My advice to the Select Committee is that the current COVID-19 contact tracing legislative arrangements need to be amended. I discuss two possible ways forward.

7. My first, and much preferred approach, is that contact tracing law be consolidated in the Health Act and improved to address some current gaps. I consider that a robust, future-proofed contact tracing system requires a clear, consolidated law that is not contingent on a state of national emergency, an Epidemic Notice, or a Prime Ministerial gazette notice.
8. Should the Select Committee choose not to recommend a consolidated contact tracing framework, I consider that the order-making power in section 11 of the Act requires significant amendment as it is an overly broad, delegated power with respect to personal information.

Recommendations

9. I propose that the Select Committee consider recommending **either**:

A. Consolidating and improving the contact tracing framework in the Health Act (preferred) by:

- I.* Repealing section 11(1)(ix) of the Act;
- II.* Amending section 92ZZF of the Health Act to include the ability for contact tracers to obtain information from public sector departments for a period of two years to bolster contact tracing provisions for COVID-19, after which its utility could be reviewed; and
- III.* Amending section 92ZZG(2) of the Health Act to apply to any agency that collects personal information for the purposes of contact tracing as it currently only applies to contact tracers.

Or

B. Amending the section 11 order-making power with respect to the use of personal information by:

- I.* Requiring that the only personal information that can be the subject of an order made under section 11(1)(ix) of the Act are contact details and location information;
- II.* Inserting additional sections into the Act:
 - Restricting agencies that are subject to orders made under the Act from collecting more personal information than is required for the purposes of contact tracing;
 - Preventing the re-use or disclosure of personal information that has been collected for contact tracing purposes; and
 - Creating an infringement offence for breaches of the two new restrictions described above; and
- III.* Requiring the Minister of Health or the Director-General of Health to consult with my Office prior to making an order which includes the mandatory collection, use, retention or disclosure of personal information.

And

C. Amending either the Health Act or the Act so that breaches of any statutory restriction are deemed an interference with the privacy of an individual under section 66 of the Privacy Act

10. I further propose that the Select Committee consider:

D. Amending section 20 of the Act to require constables to first request consent to enter a private dwelling before exercising their power of entry; and

E. Engaging with Māori to develop a bespoke regime for marae to manage compliance with section 11 orders made under this Act.

Contact Tracing Issues and Proposed Remedies*History of the Act*

11. I was first consulted on this Act at 6 pm the evening before the Act was passed. At that time, no provision had been made within the Act to deal with contact tracing. I identified in my brief comment the need to ensure there is adequate authority to obtain personal information for contact tracing and that the Act should provide for this. The gap had been identified through conversations with Health officials about the pending lapse of the Civil Defence National Emergencies (Information Sharing) Code 2013. It was apparent to me that, given the vital importance of contact tracing to control COVID-19, supplementary authority to the Health Act contact tracing provisions may be necessary.

12. As a result of my submission, the Attorney General's supplementary order paper that was released the next morning added section 11(1)(ix) to the Bill to give the Minister or the Director-General of Health the power to make orders in respect of information necessary for contact tracing. That provision was enacted that day.

13. I consider that section 11(1)(ix) is an unnecessarily broad power to make orders in respect of personal information. While I am pleased that the Act is constrained by section 3 to self-repeal if no positive action is taken, and only applies in respect of the COVID-19 pandemic, I consider that section 11(1)(ix) should be repealed and replaced instead with an amendment to the Health Act. If this is not desirable, I consider that the order-making power in section 11 should be constrained.

The existing contact tracing process under the Health Act

14. Part 3, subpart 5 of the Health Act contains empowering provisions for contact tracing, including information gathering provisions. The Health Act regime is privacy-enhancing as it centres on the individual, their voluntary compliance, and ensures the individual is the first source of information about themselves.

15. Information can be collected from certain third-party sources for the purposes of contact tracing under section 92ZZF. I understand there is some ambiguity about the scope of section 92ZZF and whether it can extend to allow contact tracers to obtain information from public sector departments.
16. The Health Act regime does not require businesses to keep registers for the purposes of contact tracing. It does, however, allow contact tracers to obtain information from businesses, educational institutions, employers, and event co-ordinators for the purposes of contact tracing. As it stands, it cannot be used to require businesses to keep records for the purposes of contact tracing, unlike the Act.

Identified issues with the contact tracing process

17. I consider that there are two key issues with the contact tracing process: one being that there would have been a gap in authority once the Civil Defence National Emergencies (Information Sharing) Privacy Code 2013 lapses, and the other being that contact tracers have found it difficult to obtain up-to-date contact details for identified close contacts of people who have tested positive for COVID-19.
18. The Code of Practice provides useful and necessary authority where information sharing is required to respond to the epidemic, including for contact tracing purposes. The Code permits disclosures of personal information by any agency (public or private sector) for emergency related purposes and in an epidemic provides supplementary authority to the contact tracing provisions in subpart 5 of Part 3(5) of the Health Act 1956.
19. The Code of Practice only applies during the state of national emergency (and for a further 20 working days until 11 June 2020). As I identified in my submission on the Act before it passed, this limited period gives rise to a pending gap in authority and reduced certainty about the basis for sharing personal details in certain circumstances to respond to the epidemic, beyond the circumstances laid out in section 92ZZF of the Health Act.
20. Second, Ministry of Health officials advised me that a key difficulty within the contact tracing system is obtaining up-to-date contact details for close contacts of individuals who have tested positive for COVID-19. Being able to obtain up-to-date contact details for these individuals from public sector departments would assist contact tracers. I understand that section 92ZZF has not been relied upon to seek contact details for identified close contacts from government departments.

Recommendation A: consolidate all provisions within the Health Act for a resilient contact tracing process

21. I consider it is desirable to integrate all contact tracing provisions within the existing subpart 5 of Part 3 of the Health Act. Keeping all contact tracing provisions within the Health Act reinforces the importance of voluntary provision of information where possible and ensures that the autonomy of the individual is central within the legislative framework.

22. Integrating the provisions together also ensures they are read and applied within the same statutory context, improves public accessibility and fosters public trust as the public can readily ascertain why information needs to be collected within one piece of law. It would remove ambiguity and ensure there are no gaps in the legislative framework.¹
23. Keeping all contact tracing provisions within the Health Act would also ensure that offence provisions for failing to comply with contact tracing are consistent, rather than having differing consequences in the Health Act and under section 11 orders.²
24. To deal with the issue that contact tracers cannot easily obtain up-to-date contact details for identified close contacts of individuals who have tested positive, I consider that contact tracers should be able to obtain contact information from government departments for the purposes of contact tracing.
25. One advantage of this Act as an omnibus piece of legislation is that it limits the authority to the COVID-19 pandemic. However, I consider that a resilient contact tracing framework is required that endures past temporary states of emergency or Epidemic Notices. Consolidating all provisions within the Health Act also has the benefit of ensuring that the contact tracing process is resilient across alert levels 1-4. The Order in place under the Act only applied to alert level 2.
26. I note a further amendment to section 92ZZF could allow iwi organisations to disclose contact details in response to a request from contact tracers. This would require appropriate consultation with iwi groups and the Ministry of Health.
27. I **recommend** that section 11(1)(ix) of the Act should be repealed. I **recommend** that section 92ZZF of the Health Act should be amended as follows:

Contact tracer may require certain persons to provide information

- (1) For the purpose of identifying *and contacting* the contacts of an individual who has been given a direction under [section 92ZZC](#), a contact tracer may approach a person specified in subsection (2) and require that person to provide the contact tracer with the names, ~~and~~ addresses *and other contact details* of the contacts of the individual that are known to the person.
- (2) The persons are—
- a. The employer of the individual
 - b. An educational institution attended by the individual
 - c. Any business or other attended by the individual
 - d. An event co-ordinator or other person likely to have a list of persons attending an event

¹ Legislation Design and Advisory Committee, *Legislation Guidelines, 2018 Edition*, at chapter 3.

<http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-3/>

² Individuals convicted of offences under section 26 of the Act can be liable to imprisonment for up to 6 months in prison or a fine not exceeding \$4000. Individuals convicted of offences under s 92ZZH of the Health Act for failing to comply with a direction to provide information are liable to a fine not exceeding \$2000 and cannot be sentenced to imprisonment.

- e. *Any government agency who may hold contact details for the individual*
- (2A) *In this section, government agency means:*
- (a) *The Ministry of Social Development*
 - (b) *Inland Revenue Department*
 - (c) *Department of Internal Affairs*
 - (d) *Ministry of Business, Innovation and Employment*
 - (e) *Ministry of Education*
 - (f) *Any other government agency listed in Schedule 1 of the State Sector Act included by Order in Council*
- (3) A person referred to in subsection (2) must provide information in response to a request made under subsection (1) despite anything in the [Privacy Act 1993](#).
- (4) Despite anything in the [Privacy Act 1993](#), if a person requires another person to provide information under this section,—
- a. the person required to provide the information must comply with the requirement and be advised that the information must be provided for the effective management of infectious diseases; and
 - b. nothing in this section limits the right of an individual to access or disclose information about him or her under that Act or any other Act.

28. I further **recommend** that this amendment be time-limited for a period of two years to bolster contact tracing provisions for COVID-19. This amendment could then be reviewed after two years to assess its utility and consider whether such an amendment should be made permanent.

Recommendation B: amend the order-making power in section 11

29. As a result of my Office identifying a gap within the contact tracing framework, section 11(1)(ix) in the Act was inserted via supplementary order paper. Section 11(1)(ix) allows the Minister or the Director-General of Health to make a mandatory order requiring any person to provide, in specified circumstances or in any specified way, any information necessary for the purpose of contact tracing. Failure to comply with an order is an offence.³ There are no constraints on the kind of information that can be collected, the circumstances in which the information can be compelled, or the manner in which information must be provided.

30. The COVID-19 Public Health Response (Alert Level 2) Order 2020, made in accordance with sections 9 and 11 of the Act, requires the collection and retention of personal information for the purposes of contact tracing by certain businesses and agencies.

31. This Order will assist contact tracers to identify potential close contacts in situations where an individual goes to a public place or business and does not know the identity of those who were nearby. The requirement for businesses to retain records does not rectify the issue identified to me by Ministry officials where contact tracers do not have access to good contact details for already-identified close contacts of individuals.

³ COVID-19 Public Health Response Act, s 26.

32. The requirement to collect and retain records in this way is an intrusive collection of information. For individuals to access many services in person, they are required to provide contact details each time they enter and leave the premises. This is a charter for surveillance by proxy. It also has the effect of resulting social exclusion for individuals who do not feel safe or comfortable providing their details to every business that they interact with. I consider that encouraging individuals to voluntarily record and control their own records of who they are in contact with and where they go is a much more privacy protective mechanism than requiring most businesses to keep records of their customers, which can be easily misused.
33. While privacy trade-offs are necessary to deal with a global pandemic, trade-offs must only be made for solutions that will give effect to the required public health benefits. I consider that the order-making power under section 11 of the Act is overly broad, and it has resulted in an unnecessarily broad Order that does not address the issue identified to me by Ministry officials.
34. In the event that recommendation **A** is not agreed to, I **recommend** that section 11(1)(ix) be amended so that the only personal information that can be the subject of an order made under the Act is contact details and location information.
35. I also **recommend** requiring the Minister of Health or the Director-General of Health to consult with my Office prior to making an order which includes mandatory collection, use, retention or disclosure of personal information.
36. Section 11 could be amended to read as follows:

11 Orders that can be made under this Act

- (1) An order made by the Minister or the Director-General (as the case may be) under this section may be made for one of the following purposes:
- a. To require persons to refrain from taking any specified actions that contribute or are likely to contribute to the risk of the outbreak or spread of COVID-19, or require persons to take any specified actions, or comply with any specified measures, that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19, including (without limitation) requiring persons to do any of the following:
 - i. Stay in any specified place or refrain from going to any specified place:
 - ii. Refrain from associating with specified persons:
 - iii. Stay physically distant from any persons in any specified way:
 - iv. Refrain from travelling to or from any specified area:
 - v. Refrain from carrying out specified activities (for example, business activities involving close personal contact) or require specified activities to be carried out only in any specified way or in compliance with specified measures:
 - vi. Be isolated or quarantine in any specified place or in any specified way:
 - vii. Refrain from participating in gatherings of any specified kind, in any specified place, or in specified circumstances:
 - viii. Report for medical examination or testing in any specified way or in any specified circumstances:

ix. Provide, in specified circumstances or in any specified way, *contact or location* information necessary for the purposes of contact tracing

ab. Prior to making an order under section 11(1)(ix), the Minister or the Director-General must:

- (i) have regard to the proportionality of requiring personal information required by the order; and*
- (ii) Consult with the Privacy Commissioner*
[...]

Any contact tracing provisions should restrict the collection, re-use and disclosure of personal information

37. In order for New Zealanders to have trust and confidence in a robust contact tracing system, they must be confident that when sharing their information, it will not be misused. A high level of public trust is required to achieve high levels of participation and compliance with contact tracing efforts. To this end, I consider that a statutory restriction to prevent use of the information for any purpose other than contact tracing is necessary and appropriate.

38. A restriction that information can only be used for contact tracing is consistent with other jurisdictions. Use of data from Australia’s COVIDSafe app has been limited by the Privacy Amendment (Public Health Contact Information) Act 2020 to contact tracing and ensuring the proper functioning, integrity and security of the system.⁴ The European Data Protection Board recommend that the purposes for processing data from COVID-19 contact tracing apps “must be specific enough to exclude further processing unrelated to the management of the COVID-19 health crisis (e.g. commercial or law enforcement purposes)”.⁵

39. Given the proliferation of contact tracing solutions already on the market, it is vital that this restriction applies not only to contact tracing solutions developed by Government, but also those by industry, regardless of whether or not the solutions are created to enable businesses to comply with a mandatory order.

⁴ Privacy Amendment (Public Health Contact Information) Act 2020, Schedule 1.

⁵ European Data Protection Board: “Guidelines 04/20 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak”, accessed from https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf at [25].

40. If recommendation **A** is agreed to, I **recommend** that section 92ZZG(2) of the Health Act should be amended to apply to any agency that collects personal information for the purposes of contact tracing, including any information collected under any order made under the Act. Section 92ZZG currently only applies to contact tracers. This section could read as follows:

92ZZG Duty of confidentiality

- (1) A contact tracer who approaches a contact under this Part or approaches a person under section 92ZZF must not, as far as practicable, disclose to the contact or that person the identity of the individual who may have –
 - a. Transmitted the infectious disease to the contact; or
 - b. Exposed the contact to the risk of contracting the infectious disease
- (2) Despite anything in the Privacy Act 1993, information provided or obtained by a contact tracer under this Part, *or collected or disclosed by any other person for the purpose of contact tracing* may not be used or disclosed by anyone except for the effective management of infectious diseases, but nothing in this section limited the right of an individual to access or disclose information about him or her under that Act or any other Act.

41. If recommendation **A** is not agreed to, or if recommendation **B** is preferred, I **recommend** the following additional sections should be added to the Act to:

- a. restrict agencies that are subject to orders made under the Act from collecting more information than is required for the purposes of contact tracing,
- b. prevent the re-use or disclosure of personal information that has been collected for contact tracing purposes, and
- c. create an infringement offence for breaches of the two new sections described above.

42. These sections could read as follows:

12A Additional provisions relating to contact tracing

- (1) *A business or service required to comply with an order made under section 11(1)(ix) of this Act is only permitted to collect the information specified in the order for the purposes of contact tracing.*
- (2) *Despite anything in the Privacy Act 1993, any information collected in accordance with an order made under section 11(1)(ix) of this Act by a business or service must not be used or disclosed by anyone for any purpose other than contact tracing.*
- (3) *A person commits an infringement offence if the person fails to comply with subsections (1) or (2).*

Recommendation C: non-compliance with statutory restrictions should be deemed an interference with individual privacy

43. I further **recommend** that breaches of this statutory restriction should be a deemed interference with the privacy of an individual under section 66 of the Privacy Act and affected individuals should be entitled to complain to my Office.
44. There are a number of legislative examples where an action is deemed to be an interference with the privacy of the individual, such as section 204X of the Electoral Act 1993, section 308 of the Building Act 2004 and section 29 of the Charities Act 2005.

Recommendation D: powers of entry should only be used after consent from individuals has been sought

45. Given the urgency with which consultation was conducted, my submission on the Act before it was passed only dealt with the contact tracing regime. Having had the opportunity to fully consider the Act, I briefly refer to one other aspect of the Act which warrants further consideration.
46. A person's home is an area that attracts the highest expectations of privacy⁶ and an essential element of privacy is the right or interest to be let alone in your home.⁷
47. These significant privacy interests mean that the public can expect a high level of justification for entry into their homes and robust safeguards against unreasonable search and seizure, particularly when using unwarranted powers. Police are empowered to undertake warrantless searches under Part 2 of the Search and Surveillance Act 2012 in urgent situations such as apprehending an offender who is unlawfully at large⁸ and the prevention of serious crimes and the protection of life.⁹ They can also be used to avoid the imminent loss of evidential material in relation to serious crimes,¹⁰ and in relation to certain arms, drug and espionage offences.¹¹
48. However, before COVID- 19, it was unprecedented to permit unwarranted entry by Police into homes to give directions for public health purposes and to enforce infringement offences as section 20 allows.¹²

⁶ See *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [113].

⁷ See, for instance, *Brooker v Police* [2007] 3 NZLR 91 (SC) at [256] – [257] per Thomas J.

⁸ Search and Surveillance Act 2012, s 7.

⁹ Search and Surveillance Act 2012, s 14.

¹⁰ Search and Surveillance Act 2012, ss 15 – 17.

¹¹ Search and Surveillance Act 2012, ss 18 – 25.

¹² Section 26(3) of the Act allows the Minister to determine whether failing to follow a section 11 order will be an offence or an infringement offence. Clauses 16(5) and 17(4) of the COVID-19 Public Health Response (Level 2) Order 2020 state that failing to comply with rules in place for social gatherings will be an infringement offence.

49. Section 20 of the Act provides enforcement officers (in the case of business premises and marae) and Police (in the case of private dwellings) a power of entry where they have reasonable grounds to believe that a section 11 order is not being complied with. Additionally, Police can only enter a private dwelling where that is necessary for the purpose of giving a direction under section 21 (such as directing them to break up a gathering that is in contravention of a section 11 order).
50. While mitigating public health risks is vital, significant safeguards are required to ensure that the exceptional entry power within the Act is proportionate. Appropriate safeguards and limitations on use of the entry power will give public confidence that the powers are being exercised solely to support the public health outcomes and reassurance that it complies with the New Zealand Bill of Rights Act 1990.
51. I **recommend** amending section 20 of the Act to require constables to first request consent to enter a private dwelling before exercising their power of entry. This would allow people greater control over the areas in which Police can enter the dwelling, which in turn assists in ensuring that entry is limited only to what is necessary to confirm whether or not those gathered are complying with a section 11 order and issue a direction if necessary.

Recommendation E: develop a bespoke regime for marae in consultation with Māori

52. Marae ordinarily enjoy the same protections against intrusion in the search and surveillance context as private homes. However, the Act treats marae as a business premises and allows enforcement officers (who can be Health officials or people appointed by the Director-General of Health under section 18) to enter without warrant using a lower threshold. If this occurs, a report of the entry must be sent to the committee of the relevant marae under section 20(8).
53. In order to safeguard these privacy interests and te kawa o te marae, I **recommend** the Committee engage with Māori to develop a bespoke regime for marae to manage compliance with section 11 orders made under this Act.

Conclusion

54. I trust my comments are of use to the Committee. I look forward to speaking to my submission in front of the Committee.



John Edwards
Privacy Commissioner

09 June 2020