

Inquiry into the COVID-19 Public Health Response Act 2020

June 2020

**Submission of the
Human Rights Commission**



**NZ
Human
Rights.**

Human Rights Commission
Te Kāhui Tika Tangata

Submission of the Human Rights Commission to the Finance and Expenditure Committee

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Introduction

1. The Human Rights Commission welcomes the opportunity to provide the Finance and Expenditure Committee with this submission on the Inquiry into the operation of the COVID-19 Public Health Response Act 2020 (“the Act”).
2. The Commission strongly commends the Government’s courageous, prompt and effective response to the COVID-19 pandemic. Pursuant to the Commission’s statutory functions, we have supported and scrutinised the Government’s response to COVID-19, particularly as it relates to the balance that must be struck between the right to health and other human rights.
3. This has included the publication of *Human Rights and Te Tiriti o Waitangi: COVID-19 and Alert Level 4 in Aotearoa New Zealand* which provided a series of snapshots of specific human rights issues that arose during the most acute phase of New Zealand’s COVID-19 response. While recognising that there is much to commend about New Zealand’s response to COVID-19, the Commission observed that Te Tiriti and human rights have not been consistently integrated across the response to the pandemic.¹ A copy of the report is included with this submission for the Committee’s reference.
4. More generally, the Commission has advocated that the Government incorporate a Te Tiriti o Waitangi and human rights-based approach into the measures it has taken to prevent and limit the spread of the virus. Now that New Zealand is entering a recovery phase and faces considerable economic and social challenges, we consider that a Te Tiriti and human rights based approach remains a matter of urgency and importance.
5. The purpose of the Act itself is to support “a public health response to COVID-19” that prevents and limits “the risk of, the outbreak or spread of COVID-19” in a way that is “co-ordinated, orderly, and proportionate.” To meet its purpose, the Act provides that the Minister of Health or Director-General of Health may issue “section 11 orders”, which place significant restrictions on individual liberties in order to contain COVID-19. The Act also provides for enforcement of such orders, including new powers that enable police and enforcement officers to enter property, including marae, without a warrant.
6. Given the significant human rights restrictions that the Act provides for, the Commission wishes to reiterate our concern at the haste at which it was passed. While we understand there was a need to enact the legislation quickly, we do not consider that the circumstances justified bypassing the usual democratic processes of public and Select Committee scrutiny. We also note the extremely short period of time given to the Commission and others to provide comment on the COVID-19 Public Health Response Exposure Draft Bill.
7. We therefore welcome the scrutiny this Committee will provide to the operation of the Act. In our comments on the draft Bill, we expressed concern at the original duration set out in clause 3. We recommended that the duration of the Bill be much shorter and that it be subject to select committee review. We therefore are pleased by the introduction of the 90-day renewal period under s 3(2), with an eventual sunset after two years.

Structure of this submission

8. This submission is set out in two parts:
 - **Part one** provides an overview of the applicable human rights and Te Tiriti obligations that should be applied to COVID-19 legislation and policy responses.

¹ *Human Rights and Te Tiriti o Waitangi: COVID-19 and Alert Level 4 in Aotearoa New Zealand*, p 4

- **Part two** examines the human rights implications arising from the operational aspects of the Act, including non-discrimination, limits on freedom of assembly and association, the use of discretion by decision makers, and accountability mechanisms under the Act.
9. A summary of our recommendations is annexed to this submission for the Committee’s reference.

PART ONE: AN OVERVIEW OF HUMAN RIGHTS AND TE TIRITI

Human rights approach

10. Human rights standards and principles provide a framework for lawful restrictions that can be placed on human rights in a public emergency. Human rights embody values - the importance of partnership, participation, protection, safety, dignity, decency, fairness, freedom, equality, respect, wellbeing, community and responsibility - which provide a compass for responding to COVID-19. They also bring attention to people often left behind at times of crisis, such as disabled people, indigenous peoples, minorities, migrants, refugees, and older people.
11. The Government has human rights duties towards individuals in a public health crisis. Under the International Covenant on Economic, Social and Cultural Rights, everyone has the right to “the highest attainable standard of physical and mental health.”² Governments are obligated to take effective steps for the “prevention, treatment and control of epidemic, endemic, occupational and other diseases.”³
12. However, the right to health must be balanced with other rights. The United Nations Committee on Economic, Social and Cultural Rights, which monitors state compliance with the covenant, has stated that:⁴

The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

13. Human rights recognise that to protect the right to health, particularly in a public emergency, other rights may have to be limited. The global COVID-19 pandemic would fall within an exceptional situation potentially affecting the life of all New Zealanders in which rights can be limited. In most cases rights can be limited by “permissible restrictions” which don’t require States to derogate from their human rights commitments. Professor Martin Scheinin, Professor of International Law at the European University Institute, and a former UN Special Rapporteur and member of the UN Human Rights Committee has commented, in respect of the COVID-19 crisis that States should adhere to the *principle of normalcy*⁵, by which he means:

“to handle the crisis through normally applicable powers and procedures and insist on full compliance with human rights”... “One can insist on the principle of normalcy and on full respect for human rights. What can be done under the framework of permissible restrictions, should be preferred.”

² Article 12.1

³ Article 12.1(c)

⁴ CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (11 August 2000) <https://www.refworld.org/pdfid/4538838d0.pdf>

⁵ M Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, 6 April 2020, *OpinioJuris*

14. In certain circumstances, however, international human rights law enables a formal process for a States to derogate from its human rights commitments. Specifically, Article 4 of the International Covenant for Civil and Political Rights (ICCPR) provides that some rights can be derogated from in times of public emergency that threatens the life of the nation.
15. However, such limitations must meet certain principles that States have agreed to under international human rights law. The Siracusa Principles, adopted by the UN Economic and Social Council in 1984, provides authoritative legal guidance on government responses that restrict human rights for reasons of public health or national emergency under Article 4 of the ICCPR.⁶ The Principles state that restrictions on rights should, at a minimum, be:
- a. *provided for and carried out in accordance with the law;*
 - b. *directed toward a legitimate objective of general interest;*
 - c. *strictly necessary in a democratic society to achieve the objective;*
 - d. *the least intrusive and restrictive available to reach the objective;*
 - e. *based on scientific evidence and neither arbitrary nor discriminatory in application; and*
 - f. *of limited duration, respectful of human dignity, and subject to review.*⁷
16. Some of the rights set out in the ICCPR can never be derogated from, including the right to life, the prohibition against torture and to cruel, inhuman or degrading treatment or punishment, freedom of expression, and due process rights in criminal proceedings. States Parties to the ICCPR are required to notify the UN Secretary-General of any derogations.⁸ To date, around six states have made such a notification. Neither New Zealand, nor any other country in the Asia-Pacific region, have done so.
17. Irrespective of whether circumstances are so grave as to warrant such a notification, the Siracusa Principles provide an authoritative interpretative source when considering whether the COVID-19 response measures can be legally justified, including when considering the application of the interpretative and substantive provisions of the New Zealand Bill of Rights Act 1990 to the government's decisions and actions.
18. The United Nations Office of the High Commissioner for Human Rights (OHCHR) has published a guide on the use of emergency powers and COVID-19. The guidance highlights the need for emergency powers to "be used within the parameters provided by international human rights law, particularly the International Covenant on Civil and Political Rights, which acknowledges that States may need additional powers to address exceptional situations." The OHCHR reiterates that the following principles should be applied by Governments when placing restriction on human rights during the COVID-19 pandemic:
- a. *Legality: The restriction must be "provided by law". This means that the limitation must be contained in a national law of general application, which is in force at the time the limitation is applied. The law must not be arbitrary or unreasonable, and it must be clear and accessible to the public.*
 - b. *Necessity: The restriction must be necessary for the protection of one of the permissible grounds stated in the ICCPR, which include public health, and must respond to a pressing social need.*

⁶ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, [E/CN.4/1985/4](#); Clauses 25 and 26 of the Siracusa Principles provide: 25. *Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.* 26. *Due regard shall be had to the international health regulations of the World Health Organization.*

⁷ *ibid*

⁸ Article 4.3

- c. *Proportionality. The restriction must be proportionate to the interest at stake, i.e. it must be appropriate to achieve its protective function; and it must be the least intrusive option among those that might achieve the desired result.*
- d. *Non-discrimination. No restriction shall discriminate contrary to the provisions of international human rights law.*
- e. *All limitations should be interpreted strictly and in favour of the right at issue. No limitation can be applied in an arbitrary manner.*
- f. *The authorities have the burden of justifying restrictions upon rights.*

19. More specifically, in relation to legislation passed in response to the COVID-19 pandemic, the OHCHR provides that such laws should be:

- a. *Strictly temporary in scope,*
- b. *The least intrusive to achieve the stated public health goals, and*
- c. *Include safeguards such as sunset or review clauses, in order to ensure return to ordinary laws as soon as the emergency situation is over.*

A state of emergency should be guided by human rights principles, including transparency. *A state of emergency should not be used for any purpose other than the public necessity for which it is declared, in this case to respond to the COVID-19 pandemic. It should not be used to stifle dissent. Transparency and the right to information during a state of emergency require that media freedom is protected, as journalism serves a crucial function during the emergency.*

Supervision of the exercise emergency powers is essential give substance to democracy and the rule of law. Emergency measures, including derogation or suspension of certain rights, should be subject to periodic and independent review by the legislature. Any emergency legislation introduced under a state of emergency should be subjected to adequate legislative scrutiny. There should also be meaningful judicial oversight of exceptional measures or a state of emergency to ensure that they comply with the limitations described above.⁹

20. The OHCHR’s statement that “a state of emergency should be guided by human rights principles” is particularly significant when considering this Act and the Government’s other legislative and policy responses to the COVID-19 crisis. As noted in the introduction to this submission, this has been a central concern of the Commission from the outset of the Government’s COVID-19 response.

21. Consistent with this position, on 13 May 2020, the Commission wrote to the Attorney-General and recommended that the purpose clause of the COVID-19 Public Health Response Bill (Section 4 of the current Act) is amended to state that a purpose of the legislation is to ensure that the public health response to COVID-19 is one that is “...consistent with New Zealand’s domestic and international human rights obligations and commitments and consistent with the Crown’s duties under Te Tiriti o Waitangi.”

22. As noted in the letter, this type of purposive clause is used in other legislation that involves the balancing and limiting of rights. A good example in recent years was the inclusion of the human rights commitments in section 3 of the Intelligence and Security Act 2017 to balance the expanded surveillance powers that the legislation introduced.

23. The inclusion of the above wording in the Act, or in any replacement legislation, would not be an obstacle to the government’s sound, effective and reasonable measures. Instead it would help to ensure those measures are fair, non-discriminatory and proportionate and ensure that the Government continues to retain the trust and confidence of Māori and the wider public. It would also ensure that the legislation and its implementation is consistent with the applicable international human rights standards.

⁹ OHCHR, Emergency Measures and COVID-19 Guidance

The Commission recommends that the Committee:

- assesses the Act's operation with New Zealand's international human rights obligations as outlined in paragraphs 10-20 of this submission; and
- addresses the Commission's recommendation that the purpose statement in section 4 of the Act provide that the public health response to COVID-19 is one that is "...consistent with New Zealand's domestic and international human rights obligations and commitments and consistent with the Crown's duties under Te Tiriti o Waitangi."

Te Tiriti o Waitangi

24. It is crucial that all COVID-19 responses are Tiriti and human rights-based, including that:
- a. Māori as Tiriti-partners are part of decision-making;
 - b. Māori are able and supported to exercise self-determination and lead solutions; and
 - c. Equity for Māori is central to responses.
25. To ensure this, Te Tiriti and the United National Declaration on the Rights of Indigenous Peoples should be central to all planning and decision-making.
26. Te Tiriti provides the foundational source of legitimacy for co-existing systems of governance and law in Aotearoa New Zealand.¹⁰ This type of shared governance arrangement operates in numerous overseas jurisdictions with indigenous populations (eg, Canada, USA), and has long been discussed in the NZ Tiriti context.¹¹ As the Waitangi Tribunal has stated on numerous occasions, striking a practical balance requires a process of negotiation and agreement between the Tiriti partners:¹²
- The Treaty exchange of kāwanatanga for rangatiratanga establishes the rights of the Crown and Māori to exercise authority in their respective spheres. Where they overlap, striking a practical balance between the Crown's authority and the authority of Māori should be a matter for negotiation, conducted in the spirit of cooperation and tailored to the circumstances. It is from this need to strike a balance that the principle of partnership is derived.*
27. It is the Commission's observation, that with a few exceptions, and despite some efforts in this direction, this process of discussion, negotiation and agreement between Tiriti partners has been lacking in much of the COVID-19 decision-making. At this critical time, Crown relationships must be elevated from sporadic engagement to substantive partnership and equitably shared decision-making.
28. The importance of Māori participation in decision making, both at an early stage and throughout the process is particularly critical where decisions impact so significantly on tikanga Māori and on the exercise of rangatiratanga.
29. Through the process of passing this Act under urgency, initial references to warrantless entry into marae created immense concern amongst Māori communities. While changes were subsequently made to the bill, these have not necessarily addressed the issue, and the situation may have been

¹⁰ This position is discussed at length in the Commission's 2013 submission to the Constitutional Advisory Panel, available at: <https://www.hrc.co.nz/our-work/indigenous-rights/our-work/review-new-zealands-constitutional-arrangements/>

¹¹ Recent scholarship on this topic includes two articles by legal academics, Kerensa Johnstone and Claire Charters: K Johnstone, 'Whose land is it anyway?', 19 April 2020, at: <https://e-tangata.co.nz/comment-and-analysis/whose-land-is-it-anyway/>. C Charters, 'The relevance of te Tiriti o Waitangi in the Covid-19 era', 22 April, Newsroom: <https://www.newsroom.co.nz/ideasroom/2020/04/19/1133089/auckland-op-ed-on-ti-tiriti-by-april-22>

¹² Waitangi Tribunal, (2015), *Whāia te Mana Motuhake: Report on the Māori Community Development Act Claim*, Wai 2417, at p 26.

avoided if the provisions had been discussed fully between Tiriti partners before the drafting of the bill, rather than rushed through under urgency. The operational issues around the power of enforcement officers to enter marae without a warrant will be discussed in part two of this submission.

30. Given the shortcomings in terms of Tiriti partnership in the way that the legislation was enacted, and its impacts on the exercise of rangatiratanga (eg, in marae settings) the legislation should at the very least include a strong Tiriti clause to guide its implementation. The Commission reiterates its recommendation on the exposure draft bill that Te Tiriti be explicitly referenced in order to provide a reference point for decisions.

United Nations Declaration on the Rights of Indigenous Peoples

31. Domestic Tiriti obligations regarding partnership and Rangatiratanga are supported by international human rights standards, including under the UN Declaration on Rights of Indigenous Peoples (the Declaration). These international human rights stress the fundamental importance of the right to self-determination to the enjoyment of all rights by Indigenous peoples; the right to participation in decision-making; and obligations of free, prior and informed consent.
32. The principle of free, prior and informed consent operates as a safeguard for the collective rights of indigenous peoples.¹³ It is also an aspect of the right of indigenous peoples to self-determination. It therefore links closely to Te Tiriti guarantee of tino rangatiratanga. UN human rights bodies have highlighted the need for special protection of Indigenous communities and urged States to work in partnership with Indigenous Peoples.
33. For example, the UN Special Rapporteur on the Rights of Indigenous Peoples has highlighted the interrelatedness of rights, and the importance of a holistic approach. He has expressed concern that some emergency responses “are exacerbating the marginalisation of indigenous communities” and that environmental protections and consultation mechanisms were being “abruptly suspended in order to force through megaprojects.”¹⁴

Now, more than ever, Governments worldwide should support indigenous peoples to implement their own plans to protect their communities and participate in the elaboration of nationwide initiatives to ensure these do not discriminate against them.

34. The Chair of the UN Permanent Forum on Indigenous Issues has also noted the need to both take steps to protect and prioritise Indigenous Peoples, as well as to recognise their contributions and leadership.¹⁵
35. The UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has noted the likelihood of COVID-19 to “exacerbate an already critical situation ... where inequalities and discrimination already abound” and has called on States to ground responses in the Declaration and to work in

¹³ Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/39/62, (10 August 2018) at [13].

¹⁴ UN Special Rapporteur on the Rights of Indigenous Peoples, “COVID-19 is devastating indigenous communities worldwide, and it’s not only about health” – UN expert warns’, 18 May 2020. Accessible at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25893&LangID=E>.

¹⁵ Statement by the Chair of the United Nations Permanent Forum on Indigenous Issues, April 2020, accessible here: https://www.un.org/development/desa/indigenous-peoples-es/wp-content/uploads/sites/34/2020/04/UNPFII-Chair-statement_COVID19.pdf

partnership with Indigenous peoples.¹⁶ The EMRIP further noted that: “As with the adoption of any measures that may affect indigenous peoples, their free, prior and informed consent, grounded in the right to self-determination, should be sought.”

36. The EMRIP has provided further guidance on how the obligations of free, prior and informed consent are to be applied in practice.¹⁷ This includes: ensuring that consent is the object of discussions, and that consultations should start at the planning phase – so that indigenous peoples are able to influence any final decisions – and occur throughout the evolution of the project or measure.¹⁸ The engagement should include “constant communication between the parties”, and should be distinct from regular public consultation processes.¹⁹ States should ensure that all information, including about the potential impact of the project or measure, is provided to indigenous peoples and is presented in a manner and form that is understandable.²⁰ The EMRIP further highlights that a critical element is the need to build trust, good faith and the overall respect for indigenous peoples’ rights.²¹
37. In a statement on the impacts of COVID-19 on Indigenous Peoples, the UN Special Rapporteur on the Rights of Indigenous Peoples has stressed the holistic nature of rights, the need to respect and balance all rights, and the importance of community responsibilities, noting:²²

The pandemic is teaching us that we need to change: we need to value the collective over the individual and build inclusive societies that respect and protect everyone. It is not only about protecting our health.

The Commission recommends that the Committee gives careful consideration to Māori concerns about the lack of discussion, negotiation and agreement between Tiriti partners in drafting the Act. We further recommend that the Committee assess the Act’s consistency with the obligations regarding partnership and Rangatiratanga to support the right to self-determination, the right to participation in decision-making, and obligations of free, prior and informed consent, as found in the United Nations Declaration on the Rights of Indigenous Peoples.

PART TWO: HUMAN RIGHTS IMPLICATIONS ARISING FROM THE ACT’S OPERATION

Non-discrimination

38. The restrictive measures permitted by the Act’s section 11 orders are designed primarily with the protection of public health in mind. While this is a necessary and legitimate objective, they have significant implications for human rights in New Zealand. This includes the potentially disproportionate impact that section 11 orders and the enforcement of such orders, may have on groups who are already disadvantaged in other ways.
39. Article 19 of the BORA states that “Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.” This means that the Act should not be

¹⁶ EMRIP (2020), ‘COVID-19 yet another challenge for indigenous peoples’, 6 April 2020. Accessible at: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2020/04/EMPRIP-English.pdf>

¹⁷ Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/39/62, (10 August 2018).

¹⁸ *Ibid.*, at para 6.

¹⁹ *Ibid.*

²⁰ *Ibid.*, at para 7.

²¹ *Ibid.*, at para 5.

²² UN Special Rapporteur on the Rights of Indigenous Peoples, “COVID-19 is devastating indigenous communities worldwide, and it’s not only about health” – UN expert warns’, 18 May 2020. Accessible at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25893&LangID=E>

operationalised in a way that disproportionately impacts one group of people as compared to another. Section 13(2) of the Act provides a backstop of sorts in this respect, providing that section 11 orders do not limit the application of the BORA.

40. The Ministry of Justice’s review of the Bill for its consistency with BORA recognised, “that there is scope for orders under this Bill to have disproportionate impacts on certain groups protected from discrimination under section 21 of the Human Rights Act 1993.” The Ministry noted that it “would expect decision-makers under the Bill to take these impacts into account when considering whether an order is a necessary and proportionate measure to further the public health response.”
41. The United Nations High Commissioner for Human Rights has highlighted the disproportionate impact COVID-19 measures are already having on some groups:

. . . There is, for example, already substantial data in some countries showing that the pandemic is having a disproportionate impact on racial and ethnic minorities, and on migrant workers. People with disabilities, and people with existing underlying health issues, are at heightened risk due to the prevalence of other risk factors. Some indigenous peoples face extreme risks.

Plans to lift lockdowns should include specific measures to address groups such as these. Again, monitoring and reporting -- using disaggregated data -- will be key to identifying disproportionate impacts on particular groups. Other specific steps that need to be taken to safeguard at-risk groups include prioritized testing, and provision of easily accessible health care – and in some cases specialized care.²³

42. On 15 April 2020, the Special Rapporteur on the rights of persons with disabilities highlighted the disproportionate impact COVID-19 measures were having on disabled people:

I am deeply concerned, in particular, by the immense challenges that persons with disabilities are experiencing due to emergency measures, which have resulted in the disruption of support networks essential for their survival; the rise of discriminatory triage protocols that restrict access to health care and life-saving measures, including ventilators; and their isolation in institutions, nursing homes, psychiatric and other facilities that have become hotspots of the pandemic, where 40 to 50 per cent of the fatalities take place.

43. To help States in effectively addressing these concerns, the Special Rapporteur has worked with the World Health Organization, other United Nations entities and organizations of persons with disabilities to develop two practical guidance documents to address the rights of persons with disabilities in the context of national responses to COVID-19. These are:

- a. WHO Disability considerations during the COVID-19, a guidance for action by persons with disabilities, governments, healthcare workers, disability service providers, the community, as well as actions to be taken in institutional settings.²⁴
- b. Disability inclusive social protection response to COVID-19 crisis, with concrete suggestions to make the most of social protection measures to reduce the impact of the pandemic on persons with disabilities.²⁵

44. On 17 May 2020, a group of United Nations and international human rights experts called on States and other stakeholders to urgently take into account the impact of COVID-19 on lesbian, gay,

²³ Press Conference with ACANU Geneva, 14 May 2020, Opening remarks by High Commissioner for Human Rights Michelle Bachelet <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25886&LangID=E>

²⁴ https://www.ohchr.org/Documents/Issues/Disability/Letter_all_PM_CRPD_COVID19.pdf

²⁵ https://www.ohchr.org/Documents/Issues/Disability/Leaflet_CRPD_COVID19.pdf

bisexual, transgender and gender diverse (LGBT) persons when designing, implementing and evaluating the measures to combat the pandemic:²⁶

Governments worldwide must ensure COVID-19 emergency measures do not worsen inequalities or structural barriers faced by people with diverse sexual orientations and gender identities, or lead to increased violence and discrimination against them.

45. Independent Expert on sexual orientation and gender identity, Madrigal-Borloz, said that States should ensure that pandemic-related measures are not discriminatory and are designed with the participation of LGBT communities, and ensure accountability for arbitrariness and abuse.²⁷
46. The Commission's report *Human Rights and Te Tiriti o Waitangi: COVID-19 and Alert Level 4 in Aotearoa New Zealand* provides an overview of the impact the COVID-19 crisis has had on many vulnerable groups in Aotearoa New Zealand at the Level 4 stage. However, by bypassing the usual scrutiny and public input accorded prior to enactment, the Act and its implementation has overlooked any prospective discriminatory impact that it may have had.

The Commission accordingly recommends that, given the observations made by the Ministry of Justice in its assessment of the legislation, the Committee inquires with the Ministry of Health and the Police as to any steps they have taken to assess whether measures and actions they have taken under the Act have had a disproportionate impact on certain groups, including data collection.

Rights restricted by orders

Freedom of association, assembly and movement

47. Section 11(1)(a)(i)-(vii) of the Act sets out the requirements that can be imposed by an order which can, among other things, restrict who a person associates with, how they move and where they assemble, and can require a person to stay in a particular place, including in quarantine.
48. As the Ministry of Justice analysis of the Act found, the Act places significant restrictions on rights set out in the BORA. However, applying section 5 of the BORA which provides that the rights can "be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", the Ministry found that the restrictions on rights as set out in the Act were justified.
49. The Commission would highlight that the Government is also required to consider international human rights law and principles when passing laws in a public emergency. This includes when the Government assesses how the interpretative provisions of the BORA, such as section 5, must be

²⁶ COVID-19: The suffering and resilience of LGBT persons must be visible and inform the actions of States Statement by human rights experts on the International Day against Homophobia, Transphobia and Biphobia (17 May 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25884&LangID=E>

²⁷ 'States must include LGBT community in COVID-19 response': The how and why from a UN expert, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25889&LangID=E>

applied.²⁸ The ICCPR sets out the rights such as to freedom of movement,²⁹ freedom of assembly³⁰, and freedom of association.³¹ The Covenant also sets out when restrictions can be placed on these rights – they must be provided by law, necessary to protect national security or public order, health or morals and to protect the rights of others.³²

50. The ICCPR General Comment on freedom of movement states that it “is an indispensable condition for the free development of a person.”³³ Any laws authorising restrictions should “use precise criteria and may not confer unfettered discretion on those charged with their execution.”³⁴ With regards to the principles of proportionality it “has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.”³⁵

51. The Special Rapporteur on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule, has made the following comments regarding limitations on these rights during the COVID-19 pandemic:

*Laws limiting public gatherings, as well as freedom of movement, have been passed in many States. Restrictions based on public health concerns are justified, where they are necessary and proportionate in light of the circumstances. Regrettably, civil society organizations have rarely been consulted in the process of designing or reviewing appropriate measures of response, and in several cases the processes through which such laws and regulations have been passed have been questionable. In addition, those laws and regulations have often been broad and vague, and little has been done to ensure the timely and widespread dissemination of clear information concerning these new laws, nor to ensure that the penalties imposed are proportionate, or that their implications have been fully considered. In many cases, it appears these measures are being enforced in a discriminatory manner, with opposition figures and groups, together with vulnerable communities, constituting prime targets.*³⁶

52. Proportionality is therefore critical to both the legal framing of a section 11 order and the decision-making that guides its implementation. International human rights experts have observed that determining proportionality requires a value judgement and must balance the nature and the extent

²⁸ It is a settled matter of New Zealand public law jurisprudence that the Courts will interpret legislation consistently with international human rights treaty obligations. [add cites]

²⁹ Article 12 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.

³⁰ Article 21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

³¹ Article 22 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right

³² Article 12.3, Article 12, Article 22.2

³³ CCPR General Comment No. 27: Article 12 (Freedom of Movement) (2 November 1999) para. 1

³⁴ Ibid., para. 13

³⁵ Ibid., Para. 15

³⁶ “States responses to Covid 19 threat should not halt freedoms of assembly and association” – UN expert on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E>

of the interference with rights against the reason for interfering – “if the former outweighs the latter, the restriction is disproportionate and thus not permissible.”³⁷

53. Of course, section 4 of the Act provides that one of its purposes is to support a public health response that is proportionate, among other things. However, it is notable that this particular objective is not expressly or implicitly reflected in section 11, or in section 12, which provides the framework under which section 11 orders are formulated and applied.
54. Take section 11(1)(a)(vi) for example, which allows for an order to be passed requiring a person to “isolate or quarantined in any specified place or in a specified way.” Quarantine involves an order by a public health official for a person to be separated from other people, restricted in their movement and kept in a restricted area because the person risks becoming infectious. Quarantine raises concerns not only about rights to physical liberty but also mental health, reputation, and social stigma. The Commission is also aware that children aged under 16 have been held in quarantine in separation from their parents, which raises concerns as to the consistency of practices with the Government’s obligations under the Convention on the Rights of the Child.
55. Despite their human rights implications, there is no provision in s 11 or s 12 that directs either the issuer of a section 11 order, or the person implementing it, to consider whether the restriction is indeed proportionate given the circumstances of the person subject to the quarantine order. Nor is there a provision that would appear to provide any direct consideration of the rights of persons under quarantine, such as the right to communicate with family or have access to information in languages and formats that they can understand.
56. Further in the case of *Christiansen v Director-General of Health*³⁸, which regarded a quarantine order under the Health Act, the High Court emphasised that COVID-19 related emergency public health measures that limit human rights must be proportionate:

“I have also considered the question of the appropriate deference to the expertise of the decision makers in a time of unprecedented public crisis. No matter how necessary or demonstrably justified the COVID-19 response, decisions must have a clear and certain basis. They must be proportionate to the justified objective of protecting New Zealand bearing in mind the fundamental civil rights at issue – freedom of movement and of assembly in accordance with the New Zealand Bill of Rights Act 1990.”

The Commission recommends that the Committee assess the extent to which the Act enables proportionate, human rights-consistent decision-making that appropriately balances of the rights to freedom of movement, association and assembly with the measures necessary to protect the health of people in New Zealand.

Exercise of discretion

57. *Christiansen v Director-General of Health* also affirmed that decision-makers utilising emergency public health powers during COVID-19 must use discretion and avoid a rigid, inflexible approach to decision-making. Walker J held:³⁹

*A decision-making public body entrusted with a decision **must not adopt rigid rules that disable it from exercising discretion in individual cases.** Decision-makers cannot rely on fixed frameworks which “close [their] mind to the possibility that special circumstances may exist outside those categories”, particularly when the law in question gives the decision-maker some flexibility.*

³⁷ Human Rights Committee, *General comment No. 37, Article 21: right of peaceful assembly*, revised draft prepared by the Rapporteur, Mr. Christof Heyns, paragraph 46, <https://ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>

³⁸ *Christiansen v Director-General of Health* [2020] NZHV 887, 4 May 2020

³⁹ [2020] NZHV 887, 4 May 2020 at [47]

58. As regards the exercise of discretion itself, her Honour held at paragraph 50:

Where a person has made a submission to a decision-maker on a discretionary relevant factor, it becomes mandatory for the decision-maker to consider that factor.

59. The Act provides that discretionary decision-making may occur under its ambit. Furthermore, section 13(1) provides that a section 11 order may not be held invalid because “it confers any discretion on, or allows any matter to be determined, approved, or exempted by any person.” However, the Act does not expressly affirm or guarantee the exercise of discretion. Section 12(1)(d) provides that that section 11 orders “may” authorise persons or classes of persons to grant exemptions or authorise activities that would otherwise be prohibited by a section 11 order. However, the Act does not expressly confer general discretion upon decision-makers in of itself outside the framework provided under a section 11 order.

60. In the Commission’s view, the Act itself ought to provide an explicit basis for discretion to be authorised in individual cases, in line with the tenor of Walker J’s judgment in *Christiansen v Director-General of Health*. We understand that the Police exercised general discretion not to enforce the crowd limit requirements of the COVID-19 Public Health Response (Alert Level 2) Order 2020 when policing the rallies in Auckland in memory of George Floyd, despite this event not falling within the list of exempted activities in the Order.⁴⁰

The Commission recommends that the Committee considers assesses the Act for its consistency with the findings of the High Court in *Christiansen v Director-General of Health*; and considers whether the Act requires amendment by way of a general provision that provides that decision makers may exercise discretion in individual cases.

Powers of entry

Warrantless entry onto Marae

61. As referred to in the Tiriti section in part one, the Commission is concerned with the power given to enforcement officers under section 20(1) of the Act to enter marae without a warrant if they have reasonable grounds to believe that a person is failing to comply with any aspect of a section 11 order.

62. The Commission recognises that the original Bill was amended to remove any different treatment for marae in relation to powers of entry, as well as a new requirement for enforcement officers to report to the relevant marae committee if the power is use. We understand that this was in response to concerns from the Māori Council and others following consultation with them.

63. We have already highlighted our disappointment that the draft exposure bill was provided for comment by stakeholders at the last minute. Our understanding is that Māori groups too were only given short notice, which is even more concerning given that Māori are in a unique situation, not only because of Te Tiriti partnership, but also the history in New Zealand of coercive powers being used against Māori.

64. In the spirit of Te Tiriti partnership, Māori should have been involved with the decisions before the drafting of the Act. The Commission understands that the power to enter marae without a warrant has created immense concern amongst Māori communities. Unlike the approach taken to Iwi and Hapū-led checkpoints, this aspect of the law was passed without recognition of Māori as Tiriti-partners who should be part of decision-making. And given the opportunity to exercise self-determination and to lead the solutions.

⁴⁰ See clause 22

65. The dissatisfaction among Tangata Whenua of the powers given to enforcement officers reflects the Government's failure to take account of collective responsibility of Māori communities and respect for Māori to implement their own plans and initiatives to protect their communities. Like the issues of Tangihanga, the situation may have been avoided if Tiriti partners were meaningfully involved in these decisions from the outset. This is particularly critical where decisions impact so significantly on tikanga Māori. Decisions about tikanga are decisions for Tangata Whenua to make.

The Commission recommends that the Committee consider the revocation of the s 20(1) power authorising warrantless entry to marae, or alternatively, to its suspension while additional protocols are developed in partnership with Māori. More generally, where laws directly impact tangata whenua and the exercise of rangatiratanga to the extent that the present Act does, such as through its warrantless entry of enforcement officers onto marae to enforce section 11 orders, these steps should not be imposed in the absence of partnership decision-making and free, prior and informed consent. It is essential that such steps are discussed and negotiated between the Government and Māori.

Warrantless entry into private dwelling house

74. Section 20(1) of the Act also gives police a new power to enter a private dwelling without a warrant if they have reasonable grounds to believe that people have gathered there in contravention of a section 11 order and entry is necessary for the purposes of giving a direction. Police can issue an infringement notice and must report on the use of this power under the Act.
75. The Commission is concerned that a provision of this nature, which expands police powers, was passed into law under urgency without select committee and public scrutiny. The Commission notes that there are other circumstances under which police may enter property without a warrant. However, such powers are usually invoked in exceptional circumstances, must be prescribed by statute and, given their human rights implications, must be carefully considered by Parliament and the general public.
76. Such powers invariably carry with them wider implications. This includes an inherent risk of misuse, including discrimination. The Commission has already raised concerns about the potential discriminatory impacts of the Act, and this extends to the risk that police powers may be disproportionate used against Māori. Māori are already disproportionately targeted by police and the criminal justice sector, with Māori almost eight times more likely than Pākehā to be subjected to police force.⁴¹ Police data during the lockdown period indicated that 40% of police proceedings during the lockdown period were directed at Māori.⁴²

The Commission recommends that police powers under s 20(1) are subject to close monitoring through periodic, independent, publicly available reviews of s 20(7) reports filed by the police; and that all reports issued under s 20(7) record ethnicity data of persons whose property has been subject to warrantless entry by police and of any person subsequently issued with an infringement offence, or any other offence.

⁴¹ 312 per 100,000 population for Maori; 41 per 100,000 population for European. In New Zealand Police Tactical Options Research Report #7 (2018) <https://www.police.govt.nz/sites/default/files/publications/annual-tactical-options-research-report-7.pdf>

⁴² <https://www.police.govt.nz/about-us/publications-statistics/data-and-statistics/policedatanz/proceedings-offender-demographics>; Reported 3 June 2020; <https://www.newsroom.co.nz/2020/06/03/1216951/maori-overrepresented-in-lockdown-police-proceedings>

Accountability and complaints mechanisms

74. The Act currently provides for a limited range of accountability mechanisms. Section 11 orders are judicially reviewable and do not limit the application of the BORA. Furthermore, sections 20(5)-(7) provides that police and enforcement officers who exercise a warrantless entry power have to provide a written report. The report must summarise the circumstances and reasons for the exercise of the power and a description of any other action undertaken.
75. While Police are subject to the Independent Police Conduct Authority (IPCA), the Commission is concerned at the lack of any independent accountability mechanism in place in respect of “enforcement officers”, given the significant amount of power accorded to them under the Act. These include the power to direct a business or undertaking that they have reasonable grounds to believe is not complying with a section 11 order to shut down for up to 24 hours.⁴³ Such a direction may just be given verbally or in writing.⁴⁴ The only avenue for a business-owner to dispute that direction is to the District Court.⁴⁵
76. While these enforcement officers are required to report to the Director-General of Health or a designate, the Commission is concerned that no independent complaint or accountability mechanism exists for people who may wish to complain about the conduct of these enforcement officers.

The Commission recommends that the Committee consider the case for the establishment of an independent complaints and accountability mechanism with jurisdiction over the actions of enforcement officers. We also recommend that all directions under section 24 of the Act be provided by way of written notice.

77. Penalties for violations of any exceptional measures, such as those prescribed by this Act, should be proportionate and ensure that penalties are not imposed in an arbitrary or discriminatory way. The Commission is concerned that the maximum penalties imposed under the Act appear inordinately high. Under section 26, if a person intentionally fails to comply with a section 11 order is liable to imprisonment for a term not exceeding 6 months, or a fine not exceeding \$3,000. The same penalty applies to persons who do not comply with, or hinders the efforts, of an enforcement officer. These penalties are much higher than the equivalent penalties under the Health Act 1956, where offences for non-compliance carry a maximum fine of \$2000 and do not carry imprisonment sanctions, but for non-compliance with quarantine which carry a maximum penalty of 3 months imprisonment.
78. The Commission notes that a lesser infringement offence may be imposed if a person specified as an infringement offence in the section 11 order leading to an infringement fee of \$300 or a fine imposed by the court not exceeding \$1,000. There is little rationale provided in the legislation for the disparity of penalties. We are also concerned at the potentially severe impact sections 26 or 27 sanctions may have on vulnerable persons who may be unable to comply with a section 11 orders, due to disability or due to family violence for example.

The Commission recommends that the Committee inquire into the use of penalties under the Act, including their frequency and the demographic data of those subject to them. The Commission also recommends that section 26 and 27 penalties are lowered so they are in line with current non-compliance penalties in the Health Act 1956. The Commission also recommends that the Act expressly provides that persons who have been unable to comply with a section 11 order due to family violence or disability are exempt from liability under sections 26 and 27.

⁴³ Section 24

⁴⁴ Section 25

⁴⁵ Section 24(2)

Summary of recommendations

- a. The Commission recommends that the Committee:
 - assesses the Act's operation with New Zealand's international human rights obligations as outlined in paragraphs 10-20 of this submission; and
 - addresses the Commission's recommendation that the purpose statement in section 4 of the Act provide that the public health response to COVID-19 is one that is "...consistent with New Zealand's domestic and international human rights obligations and commitments and consistent with the Crown's duties under Te Tiriti o Waitangi."
- b. The Commission recommends that the Committee gives careful consideration to Māori concerns about the lack of discussion, negotiation and agreement between Tiriti partners in drafting the Act. We further recommend that the Committee assess the Act's consistency with the obligations regarding partnership and Rangatiratanga to support the right to self-determination, the right to participation in decision-making, and obligations of free, prior and informed consent, as found in the United Nations Declaration on the Rights of Indigenous Peoples.
- c. The Commission recommends that, given the observations made by the Ministry of Justice in its assessment of the legislation, the Committee inquires with the Ministry of Health and the Police as to any steps they have taken to assess whether measures and actions they have taken under the Act have had a disproportionate impact on certain groups, including data collection.
- d. The Commission recommends that the Committee assess the extent to which the Act enables proportionate, human rights-consistent decision-making that appropriately balances of the rights to freedom of movement, association and assembly with the measures necessary to protect the health of people in New Zealand.
- e. The Commission recommends that the Committee assesses the Act for its consistency with the findings of the High Court in *Christiansen v Director-General of Health*; and considers whether the Act requires amendment by way of a general provision that provides that decision makers may exercise discretion in individual cases.
- f. The Commission recommends that the Committee consider the revocation of the s 20(1) power authorising warrantless entry to marae, or alternatively, to its suspension while additional protocols are developed in partnership with Māori.
- g. The Commission recommends police powers under s 20(1) are subject to close monitoring, through periodic, independent, publicly available reviews of s 20(7) reports filed by the police and that all reports issued under s 20(7) record ethnicity data of persons whose property has been subject to warrantless entry by police and of any person subsequently issued with an infringement offence, or any other offence.
- h. The Commission recommends that the Committee consider the case for the establishment of an independent complaints and accountability mechanism with jurisdiction over the actions of enforcement officers. We also recommend that all directions under section 24 of the Act be provided by way of written notice.
- i. The Commission recommends that the Committee inquire into the use of penalties under the Act, including their frequency and the demographic data of those subject to them. The Commission also recommends that section 26 and 27 penalties are lowered so they are in line with current non-compliance penalties in the Health Act 1956. The Commission also recommends that the Act expressly provides that persons who have been unable to comply with a section 11 order due to family violence or disability are exempt from liability under sections 26 and 27.