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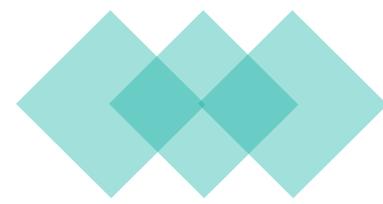
Te Kāhui Tika Tangata
Human Rights Commission

He huarahi tika tangata me Te Tiriti o Waitangi ki te Anga Tiaki Covid-19 e tūtohu ana mō Aotearoa

A human rights and Te Tiriti o Waitangi approach to Aotearoa New Zealand's proposed Covid-19 Protection Framework

Background Briefing

November 2021



Overview

Introduction

Covid-19's emergence across the world has clearly demonstrated how important it is for governments to develop a robust, scientific and evidence-based public health response. However, COVID-19 does not exist in a science and health vacuum, and the Human Rights Commission's job is to take a broader view when assessing the Government's response. Human rights and Te Tiriti o Waitangi are essential in building an inclusive and legitimate response to national crises. Inextricably linked to human rights and Te Tiriti, the goal of social cohesion should inform any approach towards the threat presented by the virus.¹

Limiting and balancing rights

Most rights are not absolute and may require short-term limitations, for example, during a public health emergency. Additionally, competing rights have to be balanced, for example the rights to privacy and information. In the context of COVID-19 a balance has to be struck between the rights to life, healthcare and health protection, on the one hand, and the rights to work, assembly and movement, on the other. The human rights approach requires careful consideration of limitations and balances, and they must be reasonable, proportionate and based on clear, accessible law.²

The Government's alert-level system and the laws that sit beneath it reflect this approach. Until the emergence of Delta, the alert-level system was successful in eliminating Covid-19 from Aotearoa and enabled the full lifting of restrictions for long periods of time compared with other countries. The proposed Covid-19 Protection Framework requires a fresh assessment.

Te Tiriti

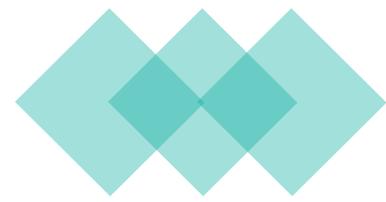
Experience shows that when Crown authority (kāwanatanga) and iwi, hapū and whānau tino rangatiratanga authority co-exist and work in partnership, effective responses can be rolled out that protect all of us, including our most vulnerable communities. This has been evident through joint partnership arrangements between the Government and iwi in relation to the police, local government and civil defence. However, the application of this principle has not always been consistent. It was notably absent in the Ministry of Health's refusal to share Māori vaccination data with the Whānau Ora Commissioning Agency. The High Court found the Ministry did not give adequate regard to Te Tiriti and its principles, as informed by tikanga, when exercising this decision³. The High Court declared that the Ministry's powers, in the context of the COVID-19 vaccination programme, must be exercised in accordance with Te Tiriti o Waitangi / Treaty of Waitangi and its principles.⁴

¹ The Royal Commission of Inquiry into the terrorist attacks on the Christchurch masjidain specifically recommended measures to improve social cohesion in Aotearoa, and this recommendation has been taken up by the Government. See <https://christchurchattack.royalcommission.nz/the-report/findings-and-recommendations/chapter-5/> and <https://www.beehive.govt.nz/release/social-cohesion-programme-address-incitement-hatred-and-discrimination>

² See Human Rights Commission, Balancing and Limiting Rights, Kōrero Whakamaūhara: Hate Speech, December 2019 at p8

³ *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942 at [134]

⁴ *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942 at [135]. Note: the Court used the term 'Te Tiriti o Waitangi / Treaty of Waitangi'.



This reinforces that Te Tiriti o Waitangi requires Māori leadership and partnership decision making in relation to our collective health. It also requires a COVID-19 strategy based on trust, focused and highly coordinated, that enables Māori tino rangatiratanga, and in which the guidance of senior Māori clinicians and community leaders is heeded from the outset.

Social cohesion

Social cohesion plays a critical role in the effectiveness of any response to the pandemic. It rests on shared values, enabling people to have a sense that they are engaged in a common enterprise and facing shared challenges as members of the same community. At best it sparks willingness among members of society to cooperate with each other in order to survive and prosper. Its absence may result in divisiveness and civil disruption, as evident in the stigmatization of those exempt from wearing face-coverings, and the behaviour of some of the anti-vaccination mandate protesters, some threatening violence, who gathered in Wellington and across Aotearoa on 9th November 2021.

Role

In the context of Covid-19, the Human Rights Commission has essentially three roles:

1. **Advisory:** Since the emergence of COVID-19 we have been and continue to be involved in forums and discussions with Ministers and government agencies to ensure that human rights and Te Tiriti are at the forefront of decision-making, and that the impacts on people at-risk and the most marginalised are taken into account. We have written to the Prime Minister and other Ministers regarding the human rights issues that have arisen, and have offered advice to a range of agencies, for example, the Department of the Prime Minister and Cabinet (DPMC), the Ministry of Health, and the Ministry of Education. We are providing input into some key decisions and will continue to do so.

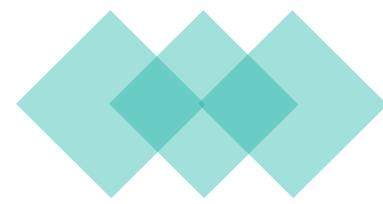
2. **Community:** This is about us staying connected with our people and communities. We are connected with iwi leadership at the national level and our most marginalised communities. We provide as much support as possible to disadvantaged individuals and communities.
3. **Accountability:** While the Government works hard to protect its citizens, there is always the risk of mistakes and over-reach. That's why we have a role ensuring that the decisions made, and their implementation, adhere to human rights and Te Tiriti and are proportionate, necessary and legal. As we have done since March 2019, over the next few days, weeks and months, as various decisions are implemented, we will apply a human rights lens on what is happening and, where appropriate, raise concerns and make suggestions.

Purpose

The Human Rights Commission will be releasing a series of Briefings to address the Government's proposed new Covid-19 Protection Framework – also referred to as the "Traffic Light System". The Protection Framework incorporates multiple elements, and the initial Briefings assess the human rights and Te Tiriti implications, provide general recommendations, and assess the implementation of vaccination certificates.

Further statements will be released on specific issues over the coming weeks and months, both before and after the Protection Framework is implemented.

These statements are intended to aid public understanding about the impact on their human rights, presented in a simple and accessible format. They are also published as guidance for policy-makers and parliamentarians as legislation to support the new Covid-19 Protection Framework is tabled and implemented.



The information has been drawn from an analysis of recent complaints to the Human Rights Commission, which have more than doubled since the appearance of the Delta variant three months ago. The Briefings also come after careful assessment of all arguments in terms of the respective issues, and after seeking advice from outside the Commission on specific issues.

At the most fundamental level, wellbeing, human rights and Te Tiriti o Waitangi must lie at the heart of the policies and laws that establish and govern the Government's response to Covid-19. The International Bill of Human Rights and the UN Declaration on the Rights of Indigenous Peoples underpin this approach.⁵ Recognition that efforts to address health and other disparities affecting Māori are unlikely to be effective if they are not real partnerships upholding Māori tino rangatiratanga, are clearly vital to any response to Covid-19.

Human rights in a public health emergency

Under human rights law some rights can be limited by public health measures which respond to the outbreak of a disease posing a serious threat to the health of a population.⁶ Also, balances have to be struck between competing

human rights. In the context of COVID-19, for example, a balance has to be struck between the rights to life, healthcare and health protection, on the one hand, and the rights to work, assembly and movement, on the other.

International human rights law principles set out when and how public health measures may limit rights.⁷ Such measures must be specifically aimed at preventing disease. They must also be provided for, and carried out in accordance with, the law and be strictly necessary in a democratic society to achieve their objective. They must be proportionate, reasonable, non-discriminatory, and subject to independent review. There must be no less intrusive and restrictive means available to reach the public health objectives. They must also be based on scientific evidence.⁸ Additionally, public health resources must be mobilised in the most equitable manner and should prioritise the needs of marginalised or vulnerable groups.⁹

These principles provide a check on limitations imposed on human rights. They also provide guidance on assessing whether balances between competing rights are fair and reasonable.

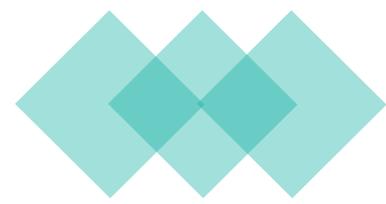
⁵ The International Bill of Rights is the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

⁶ Our own domestic human rights law enables rights to be limited under the provisions of the New Zealand Bill of Rights Act 1990. Also see Footnote 2 above: *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012 at [24] and [143].

⁷ The [Siracusa Principles 1984](#) in particular clauses 25 and 26; see also the UN Human Rights Committee *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, CCPR/C/128/2 (24 April 2020)

⁸ The Siracusa Principles as summarised by the [World Health Organisation](#), see also *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* by the Committee on Economic, Social and Cultural Rights, E/C.12/2020/1 (6 April 2020) at 10-12

⁹ *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* by the Committee on Economic, Social and Cultural Rights, E/C.12/2020/1 (6 April 2020) at 14



The Protection Framework

The Covid-19 Protection Framework is a wide-ranging new public health response to manage the threat to life and health presented by the pandemic and is due to replace the Alert Level System which has operated since the onset of the virus in Aotearoa in March 2020. It is being instituted in response to the appearance on the motu of the more virulent Delta variant of Covid-19 in August 2021, the subsequent inability to extinguish it, and a concurrent rising trend in case numbers. It is designed to manage Covid in the community.

The Protection Framework also comes alongside the Government's shift from elimination to suppression as an overarching strategy to manage the Covid-19 outbreak, with vaccinations identified as the key tool in suppression. District Health Boards were initially set a target vaccination rate of 90% before the Protection Framework would come into force across Aotearoa. However, the Government has since indicated those outside Auckland may move into the Protection Framework once Auckland reaches the target. This is expected to occur before the end of November and Cabinet will meet to decide on 29th November. A move to the new Protection Framework is anticipated to occur shortly afterwards. The vaccination roll-out programme has consequently been given prime attention in the last few months, with broad rates increasing exponentially. However, the uptake has been highly uneven, with Māori rates significantly lower than other population groups.

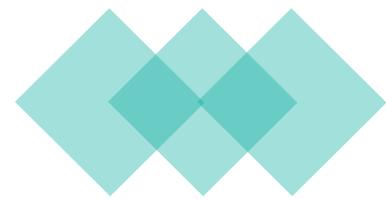
The rights to life, healthcare and health protection

The stated objective is to increase vaccination rates to as high as possible, as required by the Government's human rights responsibilities. At the most basic level, the Government has a binding legal obligation to take all reasonable measures to protect the rights to life, health care, and health protection. This has been recognised by the courts, which have upheld the safety, efficacy, and utility of the vaccine, particularly regarding its impact in protecting the rights to healthcare and protection.¹⁰

Given the scientific advice provided to the Government, it has a clear human rights obligation to vaccinate the population and it is endeavouring to discharge that responsibility. Vaccination rates are a key consideration when assessing the Government's response to Covid-19.

Vaccinations save lives, reduce sickness, improve public health, and help to maintain the capacity of the health system to respond to Covid-19 and deliver other urgent and non-urgent healthcare services. They also keep people safe at work. A high vaccination rate enables restrictive public health measures, such as travel restrictions, to be lessened and removed. In this sense, vaccinations help to protect our freedoms.

¹⁰ . The High Court recently held that the COVID-19 Public Health Response (Vaccination) Order 2021, requiring the vaccination of border workers, complies with the Bill of Rights and is demonstrably justified in a free and democratic society. The Court held that the vaccine is safe and effective, significantly beneficial in preventing COVID19 significantly reduces serious illness, hospitalisation and death and is likely to materially assist in preventing the risk of an outbreak or the spread of COVID-19. However, the Court also affirmed the importance of protecting rights and enabling access to justice to those who consider their rights have been breached by such measures. See *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012 at [24] and [143]. See <https://www.courtsofnz.govt.nz/assets/cases/2021/2021-NZHC-3012.pdf>



Human rights embody our values

We have assessed the issues with regard to human rights law, principles and practice, and the key values which it is our responsibility to uphold. Values shape lives, communities, and the future. They also shape human rights.

In Aotearoa, our values encompass Te Ao Māori and the worldviews of other communities, including tauīwi. These values include whakapapa, whanaungatanga, kaitiakitanga and mana, they also include manaakitanga (respect), dignity, decency, fairness, equality, freedom, wellbeing, safety, autonomy, participation, partnership,

community, and responsibility. These values are embodied in the rights to life, health care, and health protection.

Crucially, the Government's response to Covid-19 should be driven by these values and human rights grounded on Te Tiriti, and they should lie at the centre of legislation, strategies, policies, programmes and all other health-related initiatives.



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