**COVID-19 Public Health Response Bill**

**Comments on Exposure Draft**

**11 May 2020**

Instructions for filling out table feedback:

- Please provide comments on provisions in the order they appear in the Bill (first couple of clauses completed for example).
- Please also identify the clause reference by number and title.
- Please include in the yellow box who the comments are made by.

New Zealand Council for Civil Liberties Comments on COVID-19 Public Health Response Bill
Exposure Draft

| Clause Reference | Comment |
|---|---|
| 3 – Repeal of this Act | In paragraph (a) substitute '6 months' for '2 years'. There will be a general election later this year, and whatever Government is formed after that should have to commit itself afresh to the serious powers and constraints on liberties contained in this legislation. In addition, this would provide for proper select committee scrutiny of any legislation seeking to renew the provisions of this Bill. |
| 8 – Prerequisites for all section 11 orders | In paragraph (c) insert a requirement for the Prime Minister to make a statement to the House of Representatives, just as an epidemic notice or state of emergency notice must be. |
| 8 – Prerequisites for all section 11 orders | After paragraph (c) add a new paragraph (d) requiring that the Attorney General must lay before the House of Representatives a report on each section 11 order, identifying any provisions which, prima facie, are inconsistent with the provisions of the New Zealand Bill of Rights Act 1990, and on whether any inconsistencies are proportional and demonstrably justified in a free and democratic society.<br><br>[Note, we recognise this is stronger than s. 7(b) of the NZ Bill of Rights Act, but so too are the powers sought by the Government in this Bill. Exceptional powers require exceptional transparency and accountability.] |
| 9 – Minister may make section 11 orders | After paragraph (c) insert a paragraph requiring the Minister to consult, and receive written advice from, the Attorney General on the NZ Bill of Rights Act issues the order may give rise to. |

| | |
|---|---|
| 11 – Orders that can be made under this Act | In paragraph 1(a) delete '(without limitation)'. There is no need to give such an unlimited definition to what may be required of people under section 11 orders. The Government has shown itself willing and able to legislate at speed if it feels necessary to do so, and so any further additions to the provisions in clause 11(1)(a)(i)-(viii) should be a matter of legislation. Not to do so permits dangerous additions without public debate, such as mandating people to install a smartphone app or carry a card transmitting and receiving data from others, or to carry some form of officially designated identity document. If the Government wants to mandate identity cards or similar, it must be prepared to have the public debate first. |
| 11 – Orders that can be made under this Act | We note that sub-paragraphs 1(a)(i), (ii), (ii), (iv), (v) and (vii) could all be used to prohibit people gathering to listen to speeches, march, or protest for or against a matter of public concern. We understand the health concerns motivating these provisions, but note also the proposal for this legislation to last for two years, and the absence of any limit in clause 14 on duration for a section 11 order made by the Minister. Given the offence provisions in this Bill, these orders are likely to represent a serious departure from the freedom of peaceful assembly and freedom of association in sections 16 and 17 of the NZ Bill of Rights Act. We strongly urge the Government to consider drafting provisions which would restrict section 11 orders under this Bill from having this effect when the purpose of any assembly or association is to protest – while physically distanced from other people as envisaged in clause 11(1)(a)(iii) – a matter of public interest. |
| 11 – Orders that can be made under this Act | In relation to sub-paragraph 1(a)(viii) (report for medical examination or testing) this comes dangerously close to, if not actually overstepping, the protections in sections 10 and 11 of the NZ Bill of Rights Act. While we would want to encourage people to be tested or examined if medically necessary, people should retain their right to refuse, while understanding what the implications may be – a period of quarantine for example. The Bill must have a provision added to it specifying that the offence provision in section 25 cannot apply to non-compliance with a request to report for medical examination or testing, and that instead the person may be quarantined for a specified period under sections 70(1)(f) or 97(2) of the Health Act 1956. The provisions of clause 12(1)(c) and 12(1)(d) do not provide sufficient comfort on this matter, and it should be addressed in an amendment to this Bill, rather than leaving matters to the discretion of officials or Ministers drafting or reviewing any draft section 11 orders. |
| 11 – Orders that can be made under this Act | In paragraph 1(b) delete '(without limitation)'. There is no need to give such an unlimited definition to what may be required of places, premises, crafts, vehicles, animals or other things under section 11 orders. |
| 11 – Orders that can be made under this Act | In relation to sub-paragraph 1(b)(iii) see our concerns (above, re: clause 11(1)(a)) about freedom of assembly and association. |

| | |
|---|---|
| 14 – Form, publication, and duration of section 11 orders | Insert after paragraph 14(3) a new paragraph (4) stating: 'A section 11 order made by the Minister expires 3 months after the date on which it comes into force, unless it is sooner revoked or extended.' It is completely unacceptable that a section 11 order made by the Minister may have duration for the two full years envisaged as the duration of this law by clause 3(a). The experience with COVID-19 to date is that the situation has changed rapidly and so has the required response. The science is still rapidly evolving. Given the truly extraordinary powers sought by the Government in this Bill – while at the same time trying to move away from being in a state of emergency – the duration of section 11 orders should be tightly constrained. The fact that clause 15 permits their extension means that they can be rolled over if the circumstances require it, but Parliament should be given not less than quarterly opportunities to review the necessity for these orders. We note that Epidemic Notices last 3 months, so this period is already well understood within government. |
| 14 – Form, publication, and duration of section 11 orders | Paragraph 14(5) is too vague. 'Under review' is meaningless unless there is an obligation to publish a report of such reviews. We suggest adding a new paragraph after this provision requiring the Minister and Director-General to publish a report on any section 11 orders they have made every month, specifying too that the detailed requirements for such reports must be laid out in regulations made under clause 32 of the Bill. Holding exceptional powers requires higher levels of transparency and accountability than a vague obligation to keep matters 'under review'. |
| 15 – Amendment or extension of section 11 orders | In clause 15(1) insert 'by up to 3 months on each occasion' after 'made by the Minister'. This amendment parallels the proposal above to add a new paragraph to clause 14 limiting the duration of section 11 orders made by the Minister. |
| 19 – Evidence of identity | Given the requirements of section 129 of the Search and Surveillance Act 2012 (Duty to provide information), we see no reason for the exclusion of Police constables from the obligation to provide evidence of their identity when exercising their powers. Police constables should be required to provide people with their name or unique identifier (see s. 129(a) of the 2012 Act). |
| 20 – Powers of entry | We are deeply concerned by the breadth of clauses 20(1) and 20(3), to enter land, buildings, craft, vehicles, places, a house, or a marae without a warrant. It is wide open to abuse and discriminatory application. Further, given the significant number of calls to the Police about people allegedly not complying with previous Alert Level requirements, it is quite likely that we will see this provision being used in response to false and malicious allegations from people involved in neighbour disputes or acting on their prejudices and misguided assumptions. We suggest consideration be given to an offence of maliciously alleging infringement of a section 11 order. |

| | |
|---|---|
| 20 – Powers of entry | Clause 20(7) is too vague and does not require the capture, recording and reporting of data which will enable people to ascertain patterns of discriminatory action by the Police or enforcement officers. We already have strong concerns about the Police failure to capture and report on data about the use of tasers, dogs, and armed response teams that enable such analysis, and this Bill is an opportunity to begin to rectify that problem. We strongly urge an amendment to clause 20(7) to delete the full stop at the end of paragraph (b) and add the following:<br><br>'; and<br>(c) the age, gender and ethnicity of the people against whom the powers were exercised; and<br>(d) such geographic and other information as may be specified in regulations made under **section 32**.' |
| 20 – Powers of entry | There is no point in requiring the provision of written reports under clauses 20(5) and 20(6) if such data is not published to facilitate scrutiny, analysis and accountability. How is the Independent Policy Conduct Authority (in relation to constables), or the Ombudsman (in relation enforcement officers) meant to have any data on which to make an assessment of whether to use their powers to initiate an investigation if no data or reports are required to be published? How are civil society organisations such as the NZ Council for Civil Liberties meant to draw concerns to the attention of Members of Parliament or the media if no data or reports required to be published. Again, with such extraordinary powers, there need to be strong duties of publication of the data gathered in the exercise of them. We urge the addition after clause 20(7) of a new paragraph (8) as follows:<br><br>'(8) The Commissioner of Police in relation to the reports referred to in **subsection (5)**, and the Director-General in relation to the reports referred to in **subsection (6)**, must publish on a website every month a report on the exercise of the powers described in this section, which includes the verbatim information provided to them as described in **subsection (7)** as well as numerical data relating to the age, gender and ethnicity of the people against whom the powers were exercised.' |

| | |
|---|---|
| 23 – Power to direct person to provide identifying information | This power is far too broad, going beyond the powers of the Police in sections 32 and 33 of the Policing Act 2008. Similarly the duty to destroy the information gathered set out in section 34 of the Policing Act is not mirrored here. Given the breadth of section 11 orders under this Bill, it is effectively license for an enforcement officer to snoop on anyone they feel like. We already know that some Police officers misuse their access to such information for personal gain or other reasons. There's not even any inclusion in clause 23 of the Bill of a duty to keep the information confidential and only to use it for the purposes for which it was gathered. Yes, someone might be able to make a complaint under the Privacy Act, but it is unlikely that this is sufficient deterrent to prevent misuse of these extraordinary powers. Sections 105A and 105B of the Crimes Act apply to corrupt use of official information to gain an advantage or pecuniary gain, not to misuse of personal information for things like stalking someone.<br><br>We recommend the amendment of clause 23 so that it mirrors sections 32 and 33 of the Policing Act. We also recommend a specific offence of using the information gathered under clause 23 for any other purpose than to exercise the powers in this subpart of the of the Bill. |
| 29 – Infringement offences | There is no obligation to collect data or publish statistics on the people served with infringement notices under this clause. This should be rectified to as to enable greater transparency and accountability about this aspect of the Bill's operation. We recommend adding after paragraph (4):<br><br>'(5) Where an enforcement officer issues an infringement notice to a person, the enforcement officer must retain a copy of it and report to the Commissioner of Police or Director-General on<br>(a) the age, gender and ethnicity of the people to whom the notice was issued; and<br>(b) such geographic and other information as may be specified in regulations made under **section 32**.<br>(6) The Commissioner of Police in relation to the reports supplied by a constable, and the Director-General in relation to the reports supplied by any enforcement officer (other than a constable) under **subsection (5)**, must publish on a website every month a statistical report on the data supplied.' |