

COVID-19 and the law in Aotearoa NZ

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Health and emergency laws have played a critical role in this country's successful elimination of community transmission of the COVID-19 pandemic. This blog details key aspects of the legislation and comments on issues around testing, payments by incoming travellers for quarantine costs, and mask use.

The implementation of law relating to COVID-19 has meant that public health law has become real in daily life in Aotearoa New Zealand (NZ). But not all of us are quite sure what the law allows, and what it doesn't.

NZ's legal framework for infectious disease management and public health emergencies has existed for over 150 years, with various modifications over this time. The Health Act passed in 1956 did not radically change this framework but largely continued previous health law provisions, including amendments made in response to the 1918-19 influenza pandemic.

Then from 2006 several significant changes were made, including new strategies for dealing with emergencies, and for more general issues relating to management of infectious disease. The Epidemic Preparedness Act 2006, precipitated by concerns relating to avian influenza, was enacted following a review of gaps in the Crown's statutory powers under the Health Act. At the same time some minor revisions were made both to the emergency powers in the Health Act (called in that Act 'special powers'), and also quarantine provisions in the Health Act.

In 2013 major amendments were made to the Health Act in relation to communicable disease management. Amongst other things, the amendments included a comprehensive framework for contact tracing – up until then there had been next to no legal mandate for contact tracing in our law.

This, in summary, was NZ's legal framework available for responding to COVID-19 in early 2020, along with the Civil Defence Emergency Management Act 2002 and the Immigration Act 2009.

Our legal framework has successfully provided a very solid basis for government action, but inevitably COVID-19's scale, nature, and impacts have highlighted specific issues for which existing law was not specifically designed, as discussed in an early commentary from Dean Knight [1]. Hence, since February 2020, government legal drafters have been busy framing, and Government passing, a raft of new Acts (around 11); orders (around 41); amendments to regulations, rules, and sundry Gazette notices (for a list, see <http://www.pco.govt.nz/covid-19-legislation/>). There will need to be a more comprehensive review of our legislative framework on emergencies at some point (perhaps part of an official inquiry [2]) to assess what more long-term improvements could be made.

Among the many new laws in our COVID-19 framework is the COVID-19 Public Health Response (CPHR) Act 2020. This includes powers for a range of orders aimed at mitigating risks posed by COVID-19 (section 11). The powers in the CPHR Act are very similar to those in the existing Health Act 1956 (section 70) but with some changes, given specific COVID-19 circumstances. For example, the enforcement provisions are more elaborate than those in the Health Act. The CPHR Act is explicitly time-limited and will expire at some point between 90 days, or at maximum 2 years, after the Act came into effect on 13 May 2020.

There is now a fairly complex set of COVID-19 law provisions, comprising the Health Act 1956, the COVID-19 Acts, and dozens of orders. Within these provisions, there are concrete answers to the many questions under public discussion. However, it is not always straightforward to tease these out: law is not easy to read at the best of times, and many of the provisions intersect in some way.

Some topical questions relating to testing, charging for costs, and mask-wearing are discussed below:

Does a person entering NZ from overseas have to comply with testing?

Under Section 7 of the COVID-19 Public Health Response (Air Border) Order 2020 (subordinate legislation made in accordance with the CPHR Act) every person arriving in NZ by air must submit to medical examination and testing, and be isolated or quarantined, for the required period. The 'required period' is 14 days or a longer period up to 28 days. A person who does not comply within 14 days is likely to have their period of isolation/quarantine extended up to 28 days.

This order has been in force since 23 June 2020. It replaced an earlier order and has largely the same effect as its predecessor, but has more details. For example, it specifically addresses the question of personal protective equipment (a person in quarantine/isolation must, if directly required, wear personal protective equipment). The new order is also very specific on what medical examination/testing may involve for COVID-19. More details on some of these issues are discussed by the legal scholar Prof Alexander Gillespie.

Can physical force be used if a person refuses testing?

Neither the Health Act, nor the COVID-19 Act, nor the COVID-19 Public Health Response (Air Border) Order, specifically addresses the question of physical force in relation to COVID-19 testing. Traditionally, such an option in relation to communicable disease (but not for mental disorders), is regarded with a degree of horror in NZ law and tradition. There is mention of mandatory treatment in the Health Act for individuals in extreme cases, but this would require meeting a threshold that is difficult to envisage in the COVID-19 context.



Photo by **Anna Shvets** from **Pexels**

Hence if a person arrives in NZ from overseas and refuses to be tested, they can be held longer in quarantine/isolation than the 14 day period, ie, up to 28 days. This period should be enough to ensure that the person is not infected at the time of release. Non-compliance also means, in theory, prosecution is possible – with a penalty of imprisonment or a fine.

It is also theoretically possible that provisions additional to those in the COVID-19 Act and order could apply, that is, medical examination orders under section 92ZH Health Act. These could extend beyond 28 days. However, for this section to apply the Court would have to agree that the person ‘may have an infectious disease’.

In addition, section 92ZA of the Health Act empowers, amongst other things, detention – for up to 6 months, extendable. Again there is a major threshold which must be satisfied, ie, the section applies to those *who pose risk*. A District Court order for detention may only be granted if the court thinks an order is *necessary* to prevent or minimise the public health risk posed by the individual. The word ‘necessary’ would be interpreted strictly.

Charging for border management

The COVID-19-related Acts, Orders and Regulations do not refer to the question of whether people may be 'charged' or made to pay a fee if detained under quarantine or isolation to protect the public from risk. Health law has always included powers of detention for 'last resort' situations, but the very few people affected (only two ever under the Health Act) or the now-revoked Tuberculosis Act 1948, were not charged any costs. If any consideration is to be given for charging in relation to COVID-19, legal clarification would be required.

Can a person be made to wear a mask?

The answer to this depends on whether the person has just arrived in NZ or is already here.

1. If the person is coming into NZ from overseas they are subject to the COVID-19 Public Health Response (Air Border) Order 2020 and can be required to wear a mask. As noted above, clause 7(1)(d) of this Order states that the arriving person must wear personal protective equipment if so directed by a Medical Officer of Health or a Health Protection Officer.
2. If the person is already in NZ, and the issue of mask wearing arises in a community context such as public transport (not border management), the clearest mandate for mask requirements would seem to depend on whether an order is made under section 11 of the CPHR Act 2020 (the COVID-19 Public Health Response (Air Border) Order 2020 would not apply in such situations). Section 11 of CPHR Act 2020 provides that an order may, amongst other things, be made to require 'persons to take 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'. The section goes on to list a number of actions which may be the subject of orders. These include staying physically distant from any persons in any specified way; and requiring specified activities to be carried out only in any specified way or in compliance with specified measures. The order would be made for all people, or a class of people (eg, those in public transport).

CPHR Act Section 11 orders (for mask wearing or other matters) may only be made if specified prerequisites are met (sections 8 and 9). In particular, an order may only be made while an epidemic notice under section 5 of the Epidemic Preparedness Act 2006 is in force for COVID-19; or a state of emergency under the Civil Defence Emergency Management Act 2002 is in force, or the Prime Minister authorises the use of section 11 orders. In addition, as already noted, the CPHR Act 2020 itself is time-limited.

The categories of orders are not limited to those specified. Offences are specified for non-compliance with section 11 orders (Section 26).

Other ways the law might help if NZ suffers an outbreak from COVID-19 arising from a border control failure

The probability of border control failures leading to outbreaks in NZ may be low at present, *if* the border control systems work as intended [3]. But this risk might increase if there are both higher volumes of arrivals, and if they are coming from places where the pandemic is particularly out-of-control.

So if outbreaks occur, additional laws could help free-up needed hospital capacity by reducing road crashes and injuries from alcohol misuse (as argued previously [4]). That is,

such temporary law could, for a period of weeks to months: lower speed limits, raise speed camera fines, drop the permitted blood alcohol level for drivers to zero, increase alcohol taxes, and reduce sales hours for alcohol.

References

1. Knight DR. COVID 19 and States of Emergency: Lockdown Bubbles through Layers of Law, Discretion and Nudges – New Zealand (April 7, 2020). Verfassungsblog, 2020. Available at SSRN: <https://ssrn.com/abstract=3566873>. Verfassungsblog. 2020.
2. Wilson N, Summers J, Thomson G, Kvalsvig A, Boyd M, Baker M. Five Key Reasons why NZ Should have an Official Inquiry into the Response to the COVID-19 Pandemic. Public Health Expert (Blog) 2020;(11 June). <https://blogs.otago.ac.nz/pubhealthexpert/2020/06/11/five-key-reasons-why-nz-should-have-an-official-inquiry-into-the-response-to-the-covid-19-pandemic/>
3. Wilson N, Baker M, Eichner M. Estimating the impact of control measures to prevent outbreaks of COVID-19 associated with air travel into a COVID-19-free country: A simulation modelling study. medRxiv 2020;(17 June). <https://www.medrxiv.org/content/10.1101/2020.06.10.20127977v3>.
4. Thomson G, Delany L, Wilson N. Avoidable hospitalisations: Helping our health system get through COVID-19. Public Health Expert (Blog). (25 March). 2020; <https://blogs.otago.ac.nz/pubhealthexpert/2020/03/25/avoidable-hospitalisations-helping-our-health-system-get-through-covid-19/>.

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