

23 November 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: COVID-19 (Vaccinations) Legislation Bill

Purpose

1. We have considered whether the COVID-19 (Vaccinations) Legislation Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 24238/9.5). This advice has been prepared in an extremely short timeframe due to late receipt of the Bill that was not in compliance with Cabinet Office Guidance. We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with:
 - a. section 11 (right to refuse to undergo medical treatment);
 - b. section 14 (freedom of expression);
 - c. section 16 (freedom of peaceful assembly);
 - d. section 17 (freedom of association);
 - e. section 18 (freedom of movement);
 - f. section 19 (freedom from discrimination);
 - g. section 21 (right to be free from unreasonable search and seizure);
 - h. section 25(c) (right to be presumed innocent until proven guilty).
4. Our analysis is set out below.

The Bill

5. The Bill is an Omnibus Bill that amends the COVID-19 Public Health Response Act 2020 (CPHR Act) and the Employment Relations Act 2000 (ERA).
6. The CPHR Act created a bespoke legal framework for managing the public health risks associated with COVID-19. The CPHR Act currently allows the Minister for COVID-19 Response (or the Director-General of Health in specified circumstances) to make orders as part of New Zealand's public health response to COVID-19. The Bill makes amendments to make vaccination a more apparent part of New Zealand's COVID-19

response framework, in particular in imposing, allowing or prohibiting vaccination requirements to enter certain places and in relation to vaccination requirements in the workplace.

7. Clause 6 of the Bill amends section 11 of the CPHR Act, which provides for COVID-19 Orders to be made. In particular:
 - a. providing further examples of orders that may be made requiring a person to stay in, or refrain from going to, permit entry to, or travel to or from, any specified areas, places, or premises (new s11(1)(b)(i), (ia) and (iv));¹
 - b. enabling orders requiring persons to permit customers or clients to access workplaces or services whether or not they are vaccinated, (new ss11(1)(h));
 - c. specifying the evidence that may be required, and to whom it may be required to be produced, to demonstrate compliance with a specified measure in an order (new s 11(1)(i));
 - d. specifying which COVID-19 vaccines (or combinations) may be used for COVID-19 vaccination purposes (new s11(1)(j));
 - e. enabling orders relating to the application for, and issue of, COVID-10 vaccine certificates (CVCs) (new s 11(1)(k)).²
8. Clause 7 inserts new ss 11AA and 11AB which provide for the Minister for Workplace Relations and Safety to make COVID-19 Orders in relation to 'specified work', being work that may only be carried out by a vaccinated person, an exempt person or an authorised person. A person who is employed to carry out specified work is defined as an 'affected worker'.³
9. New section 11AA requires that before an order can be made, the Minister:
 - a. must be satisfied that the order does not limit, or is a justified limit on, the rights and freedoms in the Bill of Rights Act;
 - b. must have consulted the Prime Minister, the Minister for COVID-19 Response, the Minister of Justice, and the Minister of Health and may consult any other Minister that the Minister thinks fit or the Director-General of Health; and
 - c. must be satisfied that the order is in the 'public interest' and appropriate to achieve the purposes of the Act.⁴

¹ Clause 4 amends section 5 CPHR Act to include definitions for 'vaccinated' and 'exempt person'.

² Clause 4 provides that 'COVID-19 vaccination certificate' or 'CVC' means a certificate that is issued to a person by the Director-General in accordance with a COVID-19 order made under section 11 certifying that the person is—

- (a) vaccinated; or
- (b) an exempt person.

³ see clause 4, amended s 5.

⁴ 'Public interest' is defined in new s 11AA to include:

- (a) Ensuring continuity of services that are essential for public safety, national defence or crisis response:

10. Clause 13 provides for a risk assessment tool to be prescribed in regulations that a PCBU⁵ may use to assess whether workers should be vaccinated or required to undergo examination or testing in order to carry out work. A PCBU may conduct a risk assessment using this framework (although it does not have to use this framework).
11. The Bill also:
 - a. imposes duties on PCBUs and workers in relation to specified work, including infringement offences for failure to comply with some of those duties (clause 9);
 - b. provides a power for enforcement officers to require evidence from people to demonstrate their compliance with measure specified in COVID-19 orders (clause 12).
12. Part 2 of the Bill amends the ERA to include a new Schedule 3A, which provides for:
 - a. paid time off to be vaccinated (cl 2, new Sch 3A); and
 - b. certain minimum notice requirements (cl 3, new Sch 3A) in the event that an employee's employment is terminated because either:
 - i. an order made by the Minister requires their work to be carried out by only persons who are vaccinated, have undergone medical examination or testing for COVID-19 or are otherwise able to perform the work under an order; or
 - ii. their employer has determined they must be vaccinated to carry out their specific role.⁶

Consistency of the Bill with the Bill of Rights Act

Section 11 – Right to refuse medical treatment

13. Section 11 of the Bill of Rights Act affirms that everyone has the right to refuse to undergo medical treatment. The right to refuse to undergo medical treatment protects the concept of personal autonomy and bodily integrity, specifically the idea that individuals have the right to determine for themselves what they do or do not do to their own body, free from restraint or coercion.⁷

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- (b) supporting the continued provision of lifeline utilities or other essential services;
 - (c) maintaining trust in public services;
 - (d) maintaining access to overseas markets.

⁵ 'PCBU' has the meaning in s 17 of the Health and Safety at Work Act 2015.

⁶ 'Employee' is defined in s 6 of the ERA. These notice requirements do not apply in respect of persons who are not employees, for example contractors or other people who are explicitly excluded in s 6 of the ERA.

⁷ *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [52].

14. Clause 6 of the Bill amends s 11 of the CPHR Act to provide the ability for orders to be made that require persons to be vaccinated in order to enter places or receive services.⁸
15. Clause 7 of the Bill contains new ss 11AA and 11AB. Under new s 11AB, the Minister for Workplace Relations and Safety may make orders to specify work or classes of work that may only be carried out by workers who are vaccinated, who are exempt persons or who are authorised persons.⁹ The Minister may also make orders to require affected workers for specified work to undergo medical examination, and/or impose certain other duties or requirements. Under s 11AA the Minister must be satisfied of certain matters before making an order, including that the order does not limit or is a justified limit on the rights and freedoms affirmed in the Bill of Rights Act.
16. Clause 13 of the Bill introduces new s 33AA, which sets out the power to make regulations prescribing a risk assessment tool that a PCBU may use to assess whether workers may not carry out work unless they:
 - a. are vaccinated; or
 - b. are required to undergo medical examination or testing for COVID-19.
17. The risk assessment tool to be set in regulations and the ability for the Minister for Workplace Relations and Safety to make orders under new s 11AB are mechanisms for requiring workers to be vaccinated.
18. Requirements to be vaccinated to undertake work *prima facie* engage s 11 of the Bill of Rights Act (right to refuse to undergo medical treatment). While people are not forced to receive vaccination through these mechanisms, they may face losing their jobs if they do not comply with requirements to be vaccinated (and reasonable alternatives cannot be found).
19. Orders that may provide that only vaccinated (or exempt) people may access certain places or services also *prima facie* engage s 11, as these orders could impact the ability of non-vaccinated people to fully participate in all aspects of life.
20. A provision that is found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act.
21. The s 5 inquiry may be approached as follows:
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?

⁸ In practice we understand that these orders are likely to relate to COVID-19 vaccination certificates or CVCs, which will certify that a person is either vaccinated or an exempt person.

⁹ 'Exempt person' is defined as someone who has been granted a COVID-19 vaccination exemption. 'Authorised person' in this context is a person who is authorised by a COVID-19 order to carry out work despite being unvaccinated.

- ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
- iii. is the limit in due proportion to the importance of the objective?¹⁰

Orders relating to specified work s 11AB

22. The Minister may only make an order in relation to specified work when satisfied that the order is in the public interest and appropriate to achieve the purpose of the CPHR Act (new s 11AA(1)(c)(ii)). The purpose of the CPHR Act is set out in s 4 of that Act. The overarching purpose is to support a public health response to COVID-19.
23. We are satisfied that supporting the public health response to COVID-19, combined with a public interest requirement is a sufficiently important objective. Public health in particular has been held to be a sufficiently important objective to justify a limit on the right to refuse medical treatment.¹¹
24. Vaccination has been shown to substantially reduce transmission of COVID-19 as well as severity of symptoms. Medical examinations may also be linked to a public health response. We consider that the ability to make orders is rationally connected to the objective. With regard to proportionality of the limit on the right, we note that the public interest requirement in new s 11AA limits potential orders to certain areas of work where the risk of an outbreak of COVID-19, or the consequence of non-vaccination in the workforce, may have a significant impact. The public health response to COVID-19 is shifting to focus on minimisation and protection, and an outbreak of COVID-19 amongst certain workforces could still have consequences for public health and wellbeing.

Risk assessment framework

25. In relation to the risk assessment tool, regulations would also need to be consistent with the CPHR Act's purpose of supporting a public health response to COVID-19. We consider this to be a sufficiently important objective.
26. We expect the regulations creating the risk assessment tool will relate to the risks of transmission of COVID-19 by certain types of work. We consider regulations of this nature would be rationally connected to the objective. We also understand that the intention is that each PCBU must carry out the risk assessment in relation to the types of work undertaken by workers, rather than a single risk assessment for an entire workplace, where not all roles will present the same risk factors.
27. Schedule 4 of the Bill contains amendments to the ERA that also explicitly require employers to try and find alternatives for those employees¹² who do not meet vaccination requirements either under an order or a PCBU determination before terminating their employment. The PCBU must also comply with the requirements to provide specified minimum periods of paid notice. If alternatives are available that do not require

¹⁰ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

¹¹ *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [86].

¹² 'Employee' is defined in section 6 ERA. Contractors would not have the same protection.

vaccination, employees may be able to be redeployed. With these safeguards in place we consider that the limit is proportionate and justified.

Orders regarding entry to places or receipt of services

28. Orders regarding entry to places or receipt of services are intended to inform part of the Government's ongoing public health response to COVID-19. As above, we consider that public health is a sufficiently important objective.
29. Limiting the potential for the spread of COVID-19 through requiring vaccination in certain settings is rationally connected to the public health objective of minimising and protecting against the spread of COVID-19.
30. With regard to proportionality, we understand that there will also be certain services and places all persons will remain able to access including necessities such as medical care and supermarkets (although we note this will all be achieved through orders). Orders may put in place different settings for different places and services (for example an order might require that people must be vaccinated to attend mass gatherings such as concerts). The Minister for COVID-19 response will be required to be satisfied that each order either does not limit or is a justified limit on the Bill of Rights Act.
31. We therefore consider that any limit in this Bill on s 11 of the Bill of Rights Act is proportionate and justified.

Section 14 – Freedom of expression

32. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹³
33. Clause 9 of the Bill inserts new s 17E, which puts a duty on an affected worker who performs work specified in an order under new s 11AB, to produce evidence to the relevant PCBU that verifies they are vaccinated, as soon as practicable after being vaccinated. The consequence of not complying with this measure is that the worker may be treated as unvaccinated. New s 17F puts a duty on an affected worker to update information provided to the PCBU as soon as practicable after it changes. For example, the worker's exemption may expire or they may receive a booster vaccination. These requirements *prima facie* engage the right to freedom of expression. A limit on the right to freedom of expression may be justified under s 5 of the Bill of Rights.
34. Requiring an affected worker to provide their vaccination status to their employer advances the public health objectives of preventing or reducing the spread of COVID-19. The provisions only apply to workers whose work is subject to an order under new s 11AB, for example, that requires workers of a specified class to be vaccinated. New s 11AA includes a number of safeguards related to making such orders including that the Minister must be satisfied that the order is justified under the Bill of Rights Act. The provision ensures that any evidence in written form must be immediately returned to the worker, after inspecting and taking copies that are reasonably required to verify that the

¹³ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

worker is vaccinated. The consequence of non-compliance is confined to employment consequences and additional criminal penalties do not apply.

35. For these reasons the limits new ss 17E and 17F place on s 14 of the Bill of Rights Act appear to be justified under s 5 of the Bill of Rights Act.

Sections 16, 17 and 18 – Freedom of peaceful assembly, freedom of association and freedom of movement

36. Section 16 of the Bill of Rights Act provides that everyone has the right to freedom of peaceful assembly, s 17 that everyone has the right to freedom of association, and s 18(1) that everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

37. These rights are closely connected, and protect core aspects of civil life in New Zealand, enabling people to freely go about their daily lives.

38. Clause 6 amends s 11 of the CPHR Act to allow orders to be made that relate to the ability to access places, or services. The clause:

- a. extends the examples of orders that can be made under section 11 to clarify that an order may require a person to:
 - i. stay in, refrain from going to, any specified area, place, premises, or refrain from going to any specified area, place, or premises in specified circumstances or unless in compliance with specified measures (new s 11(1)(b)(i));
 - ii. permit entry to any areas, places, or premises only in specified circumstances or in compliance with specified measures (new s 11(1)(b)(ia)); or
 - iii. refrain from travelling to or from a specified area or place, or refrain from travelling to or from a specified area or place in specified circumstances or unless in compliance with specified measures (new s 11(1)(b)(iv));
- b. requires persons to permit individuals to enter a place or receive a service whether or not they are vaccinated, have a CVC, or evidence of their vaccination status (new s 11(1)(h));
- c. specifies evidence that may be required, and to whom it may be required to be produced, to demonstrate compliance with a specific measure (e.g. providing a CVC to enter a premise) (new s 11(1)(i)).

39. These appear to engage the rights set out in ss 16, 17 and 18 of the Bill of Rights Act by limiting the ability to assemble, associate or move freely through New Zealand based on their vaccination status.

40. However, in the context of a global pandemic, these powers reflect the significant risk that COVID-19 poses to the public health and wellbeing of individuals in New Zealand. The limitation on freedom of association, assembly and movement for a limited period is in due proportion to the public health response. The CPHR Act already provides for a number of significant safeguards to ensure that when orders are made consideration is given to the public health concerns, rights and freedoms affected, and wider social

interests. Orders may only be made where a risk of transmission remains and must be kept under review. These safeguards ensure that powers are used transparently and are subject to public and parliamentary scrutiny.

41. For these reasons, the limits that clause 6 may place on the rights and freedoms of movement, peaceful assembly and association are justified under s 5 of the Bill of Rights Act.

Section 19 – Freedom from discrimination

42. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the prohibited grounds listed in s 21 of the Human Rights Act 1993 (HRA).
43. Discrimination under s 19 of the Bill of Rights Act arises where:¹⁴
 - a. there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination; and
 - b. that treatment has a discriminatory impact (i.e. it imposes a material disadvantage on the person or group differentiated against).

Does the Bill differentiate on a prohibited ground of discrimination?

44. The Bill creates a framework that enables orders to be made which require specified work to only be carried out by vaccinated persons. The Bill also enables the development of a tool in regulations to assist PCBUs to undertake a risk assessment regarding which types of work should only be undertaken by vaccinated workers.
45. We do not think the existence of the power to make orders or the ability to make regulations directly engages s 19 in the Bill. But there is the possibility that the orders and risk assessment tool could lead to differential treatment between persons based on vaccination status. A person's vaccination status does not itself fall within the prohibited grounds of discrimination in s 21 HRA.
46. There are some persons who may not be vaccinated for reasons protected under s 21 of the HRA, for example, medical reasons preventing vaccination would likely fall within the definition of 'disability' in s 21 HRA. Persons who are unvaccinated for this reason may be treated differently from vaccinated persons in relevant orders. There is therefore the potential for s 19 of the Bill of Rights Act to be engaged by these orders.
47. If those persons who were unable to be vaccinated based on a prohibited ground of discrimination were disadvantaged (for example by losing their jobs), this would have a discriminatory impact. However, it is not clear that this impact would necessarily result.
48. There is an ability for exemptions to be included in relation to orders. New s 11AC allows the Minister to make orders that work can be carried out by vaccinated, exempt or authorised persons. Clause 4 includes a new s 5(3), which provides that the Director-General of Health may specify criteria for a COVID-19 vaccination

¹⁴ *Ministry of Health v Atkinson* [2021] NZCA 184, [2012] 3 NZLR 456 CA at [55].

exemption.¹⁵ The ability to set criteria for exemptions is not limited to medical reasons alone. If people who are not vaccinated have reasons for non-vaccination that are clearly related to a prohibited ground in s 21 HRA, then it is open to the Director-General of Health to reflect this in criteria for exemptions.

49. The risk assessment tool will be set in regulations. While there is no explicit mention of 'exemptions' in the provisions empowering PCBUs to use the risk assessment tool to determine workers must be vaccinated, they will still need to consult workers and comply with other relevant obligations under the ERA and HRA.
50. In relation to termination, schedule 4 of the Bill (new sch 3A ERA) requires employers to exhaust all other reasonable alternatives that would not lead to termination, before they terminate an employee's employment (cl 3(4) in new sch 3A). The employee also has the right to bring a personal grievance or legal proceeding in respect of dismissal (cl 3(7) in new sch 3A). Where workers are contractors, provisions of the HRA will apply if relevant.
51. We consider that the Bill itself does not engage s 19 of the Bill of Rights Act. While there is the risk of unintended discriminatory outcomes arising from orders and regulations made under the Bill, we consider that safeguards in Bill should protect against this.

Section 21 – Unreasonable search and seizure

52. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, their property or correspondence, or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹⁶ The touchstone of this section is a reasonable expectation of privacy.

Orders requiring medical examination or testing

53. New s 11AB(1)(b) allows the Minister to make an order which requires affected workers to report for and undergo medical examination or testing for COVID-19 at any place or time.
54. It has been well established by the courts that physical searches of a person and removal of bodily samples engages s 21 of the Bill of Rights Act.¹⁷
55. In order for a statutory power to be consistent with s 21, the intrusion into the values noted above must be justified by a sufficiently compelling public interest. The intrusion must be proportional to that interest and be accompanied by adequate safeguards to ensure it will not be exercised unreasonably. The Supreme Court has held that, logically, an unreasonable search or seizure cannot be demonstrably justified with reference to s 5 of the Bill of Rights Act.¹⁰ Rather, the assessment to be undertaken is first, whether

¹⁵ A COVID-19 vaccination exemption is "an exemption granted by the Director-General [of Health] under a COVID-19 order made under s11 or 11AB on the ground that the person meets the specified COVID-19 vaccination exemption criteria (see clause 4)."

¹⁶ *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

¹⁷ *Hamed v R* [2012] 2 NZLR 305; *Reekie v Attorney-General* [2009] NZCA 598

what occurs is a search or seizure, and if so, whether that search or seizure is reasonable.

56. We consider that the ability for the Minister to make an order requiring affected workers who carry out specified work to report for testing for COVID-19 at any place or time constitutes a search and seizure for the purposes of s 21.
57. The purpose of the new s 11AB(1)(b) is to ensure that appropriate control measures can be put in place to enable early detection of the existence of spread of COVID-19 in affected workers who carry out specified work.
58. As noted above, the Minister may only make an order in relation to specified work when satisfied that the order is in the public interest and appropriate to achieve the purpose of the CPHR Act. We understand classes of work specified in the order will be those where, due to the nature of the work, there is a heightened risk of transmission of the disease between workers and/or customers and clients, or where the impact of an outbreak of COVID-19 in that workforce may have significant impact (for example in the continued provision of lifeline utilities or essential services).
59. There is a public health rationale in ensuring that any COVID-19 transmission in these areas is identified early so that measures can be put in place to mitigate the spread of COVID-19 where there may be more severe impacts.

Risk assessment tool

60. New s 33AA gives the Governor-General the power to make regulations prescribing an assessment tool that a PCBU may use to determine whether workers of the PCBU can be prohibited from carrying out work unless vaccinated or required to undergo medical examination or testing for COVID-19.
61. We consider that there is a risk the regulations (combined with the PCBU's ability to use the tool for the purpose of ensuring compliance with the Health and Safety at Work Act 2015 (new s 33AB)), could enable a PCBU to make a decision which is inconsistent with the right to be free from search and seizure. In saying that, consistency with the Bill of Rights Act must be considered when making the regulations, and we are satisfied that the empowering provision in new s 33AA is not in itself inconsistent. We note that PCBUs may already have the power to require workers to undergo COVID-19 testing as a matter of health and safety. We understand the intent of the assessment tool is to provide PCBUs with some guidance when making any decisions to require testing.

Power to direct a person to produce evidence

62. Clause 12 of the Bill includes a new section 23A, which gives an enforcement officer the power to direct a person to produce evidence (either in written form or electronic form on a device) of a specified measure where a COVID-19 order permits a person to do anything or go anywhere only if one or more specified measures are complied with. Section 23A(3) makes it clear an enforcement officer may take a copy of evidence provided to them.
63. A person who intentionally fails to comply with such a direction by an enforcement officer, commits an offence and is liable upon conviction to imprisonment for a term not exceeding six months or a fine not exceeding \$12,000 (s 27(4) of the CPHR Act).

64. Requiring an individual to produce evidence that they comply with one or more specified measures advances the public health objective of preventing or reducing the spread of COVID-19 by ensuring compliance with COVID-19 orders which have been enacted for that purpose.
65. An enforcement officer is defined in the CPHR Act as a limited class of persons, being the Director General, a medical officer of health, a constable or a person authorised by the Director General under s 18 to perform a specific function or power. Authorisation given to an individual under s 18 must be specific as to the functions and power authorised and the term of the authorisation. An enforcement officer must provide evidence of identity and their appointment as an enforcement officer when exercising any power (s 19 CPHR Act). We consider these controls sufficiently narrow the class of persons who could be exercising the power of search and seizure under s 23A.
66. The enforcement officer may only take copies of the evidence where that may be reasonably required for enforcing the specified measure and must immediately return it to the individual after having done so. As specified measures are identified in a COVID-19 order, which must be consistent with the purpose of the CPHR Act, copies may only be taken to support a public health objective.
67. For these reasons we consider that the limitations on s 21 of the Bill of Rights Act are justified.

Section 25(c) – right to be presumed innocent until proven guilty

68. Section 25(c) affirms the right to be presumed innocent until proven guilty. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.¹⁸
69. In order to give full recognition to this right, a fundamental principle of criminal law, the legal burden of proving every element of an offence to the required standard of proof, and the onus for disproving any potentially available defence, must remain on the prosecution.
70. Clause 9 of the Bill creates three new infringement offences:
 - a. failure by a PCBU to keep vaccination records for each affected worker that carries out specified work for the relevant PCBU (new s 17B);
 - b. failure by a PCBU to comply with the duty to prevent an affected worker from carrying out specified work unless vaccinated, an exempt person or an authorised person (new s 17C);
 - c. failure by an affected worker to comply with the prohibition on carrying out specified work unless vaccinated, exempt or authorised (new s 17D).
71. Section 26(4) of the CPHR Act, which will come into force by Order in Council¹⁹, will provide that a person who commits an infringement offence is liable for:

¹⁸ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

¹⁹ See ss 2 and 13 COVID-19 Public Health Amendment Act 2021.

- a. a \$4,000 fee and \$12,000 fine for an individual or any lesser or equal amount prescribed in regulations, or
 - b. a \$12,000 fee and \$15,000 fine for any other person or any lesser or equal amount prescribed in regulations.²⁰
72. Section 33 of the CPHR Act provides that regulations may be made by the Governor-General prescribing fees and fines for infringement offences that are no more than the maximum amount specified in s 26. However, it is not a requirement for regulations to be made. If these regulations are not made, or until such time that they are made, the default penalties set out above will apply.
73. Because infringement offences are strict liability offences, they *prima facie* limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.
74. Although infringement offences do not result in a criminal conviction,²¹ the Court of Appeal in *Henderson v Director, Land Transport New Zealand* held that the rights in ss 24 and 25 of the Bill of Rights Act apply to minor offences dealt with under the infringement notice regime.²²
75. Strict liability offences may nevertheless be a justifiable limit on rights under section 5 of the Bill of Rights Act.
76. The infringement offences in ss 17B and 17D arise when individuals who are not vaccinated, exempt or authorised persons, carry out specified work. As previously noted, work may only be identified as specified work in an order where the Minister is satisfied that it is in the public interest, and appropriate to achieve the purpose of the CPHR Act to limit the work to those who are vaccinated, exempt or authorised. The primary purpose of the CPHR Act is to support the public health response for COVID-19. An infringement offence for workers who carry out specified work, or PCBUs who allow their workers to carry out specified work, in contravention of the requirements in these orders is directly connected to the public health objective.
77. The infringement offence in s 17C arises when a PCBU fails to keep records of the vaccination status of affected workers who carry out work for the PCBU. The keeping of vaccination records is critical to ensuring that only those affected workers who are vaccinated, exempt or authorised persons are carrying out specified work. PCBU's are responsible for the health and safety of persons who carry out work for them, and the logical entity to be collecting and recording vaccination status. As records are required

²⁰ Existing s 26(4) provides for a \$300 fee and \$1,000 fine for an infringement offence. We have considered these offences against the amended penalty for completeness.

²¹ Section 375(1)(a) of the Criminal Procedure Act 2011.

²² [2006] NZAR 629 (CA).

to ensure those carrying out specified work are doing so in accordance with the relevant orders, the infringement offence for failing to collect records is also rationally connected to the public health objective.

78. The penalties in s 26(4) CPHR Act, once amended by Order in Council, are higher than those generally recommended for infringement offences. The Legislation Guidelines set out that, in general, infringement fees should not exceed \$1,000.²³ However, there are exceptions to this rule and there are infringement provisions in New Zealand legislation that impose penalties in excess of \$1,000.²⁴
79. On balance, we consider the offences represent a justifiable limit on s 25(c) because:
- a. the offences are in the nature of public welfare regulatory offences and do not result in a criminal conviction;
 - b. the defendant is in the best position to justify their apparent failure to comply with the law; and
 - c. the penalty for the offences is proportionate to the importance of the Bill's objective.²⁵
80. We are therefore satisfied that the infringement offences in the Bill are a justified limitation on s 25(c) of the Bill of Rights Act.

Conclusion

81. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

²³ Legislation Guidelines (18th edition) at 25.2.

²⁴ Legislation Guidelines (18th edition) Chapter 25. The guidelines make it clear that these are exceptions to the general principle and should not operate as precedents for new infringement offence regimes.

²⁵ The penalty for infringement offences under new s27(4) of the CPHR Act was considered in the *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the COVID-19 Public Health Response Amendment Bill*, 14 September 2021.