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2 December 2024

s 9(2)(a)

Ref: H2024055347

Tēnā koe s 9(2)(a)

### Response to your request for official information

Thank you for your request under the Official Information Act 1982 (the Act), which was transferred from Health New Zealand – Te Whatu Ora to the Ministry of Health – Manatū Hauora (the Ministry) on 6 November 2024 for information regarding the COVID-19 Public Health Response Act 2020 (COVID-19 Act). Please find a response to each part of your request below.

*Please provide any legal opinions, reviews, or memos evaluating how the penalties imposed under the COVID-19 Public Health Response Act 2020:*

- *Align with the fundamental rights protected by the New Zealand Bill of Rights Act.*
- *Contradict fundamental rights protected by the New Zealand Bill of Rights Act.*

*Documents assessing how penalties (e.g., fines or arrests for non-compliance with mask mandates, gathering restrictions, or lockdowns) were reconciled with the right to freedom of movement and freedom of expression under the NZBORA.*

*Any specific assessments or evaluations addressing whether these penalties were proportionate, given the context of the public health emergency.*

*Provide any internal reviews, reports, or evaluations scrutinizing the penalties enforced under the COVID-19 response legislation.*

*This includes:*

*Whether these penalties were challenged internally or externally for potentially infringing on the NZBORA 1990 or ICCPR 1966.*

*The criteria and justifications used to determine that these penalties were both necessary and proportionate under the emergency health powers granted.*

*Please provide any documentation, reports, or reviews that discuss how the penalties under the COVID-19 response affected the civil liberties of New Zealand nationals.*

*Specifically:*

*Any assessments or studies conducted by government bodies on the broader impact of enforcing these penalties on individual freedoms.*

*Communications with human rights bodies or legal oversight agencies (domestic or international) regarding concerns about the effects of these penalties on civil liberties.*

*Provide any discussions, memos, or reports considering whether less restrictive measures than penalties, such as warnings or public health advisories, were explored or implemented before resorting to financial penalties and arrests.*

*This includes:*

*Internal considerations on how to balance public health protection with the preservation of individual rights.*

*Discussions on whether punitive measures were necessary for public compliance or whether alternative approaches were evaluated as potentially effective but less invasive to personal freedoms.*

The COVID-19 Act allowed for orders to be made that established legal requirements and associated offences and infringement fees for breaching those requirements. The COVID-19 Act required that before such an order could be made, the Minister of Health must be satisfied that the order does not limit or is a justified limit on the rights and freedoms under section 9(2)(1)(ba) of the New Zealand Bill of Rights Act 1990 (NZBORA).

The effect of this is that every requirement and associated offence included in an order was considered to ensure it was compliant with NZBORA. In practice this involved the Ministry consulting with the Ministry of Justice, Crown Law, or both, on the NZBORA implications.

Recognising the considerable public interest in this, the Ministry has published some of this information, which can be found at the following links:

- Proposed COVID-19 Public Health Response Amendment Bill: [www.health.govt.nz/system/files/2022-03/cabinet\\_paper\\_proposed\\_covid-19\\_public\\_health\\_response\\_act\\_amendment\\_bill.pdf](http://www.health.govt.nz/system/files/2022-03/cabinet_paper_proposed_covid-19_public_health_response_act_amendment_bill.pdf).
- Minute of Decision: COVID-19 Public Health Response Act Amendment Bill: Policy Approvals: [www.health.govt.nz/system/files/2022-03/swc-21-min-0067\\_minute.pdf](http://www.health.govt.nz/system/files/2022-03/swc-21-min-0067_minute.pdf).
- Management of police checkpoints during restricted movements under COVID-19 Response: [www.health.govt.nz/system/files/2022-03/cabinet\\_paper\\_management\\_of\\_police\\_checkpoints\\_during\\_restricted\\_movements\\_under\\_covid-19\\_response.pdf](http://www.health.govt.nz/system/files/2022-03/cabinet_paper_management_of_police_checkpoints_during_restricted_movements_under_covid-19_response.pdf).
- Minutes of Decision: Management of police checkpoints during restricted movements under COVID-19 Response: [www.health.govt.nz/system/files/2022-03/swc-21-min-0100.01\\_minute.pdf](http://www.health.govt.nz/system/files/2022-03/swc-21-min-0100.01_minute.pdf).
- Further policy decisions for COVID-19 Public Health Response Amendment Bill: increasing penalties for criminal offences and proposed revocation of Order in Council recommendation: [www.health.govt.nz/system/files/2022-12/20211586\\_briefing.pdf](http://www.health.govt.nz/system/files/2022-12/20211586_briefing.pdf).
- Options for progressing of the COVID-19 Public Health Response Amendment Bill: [www.health.govt.nz/system/files/2022-12/20211742\\_briefing.pdf](http://www.health.govt.nz/system/files/2022-12/20211742_briefing.pdf).
- Updated COVID-19 Public Health Response Amendment Bill for Ministerial consultation: [www.health.govt.nz/system/files/2022-12/20211985\\_briefing.pdf](http://www.health.govt.nz/system/files/2022-12/20211985_briefing.pdf).
- COVID-19 Public Health Response Amendment Bill (No2): [www.health.govt.nz/information-releases/covid-19-public-health-response-amendment-bill-no-2](http://www.health.govt.nz/information-releases/covid-19-public-health-response-amendment-bill-no-2).
- COVID-19 Public Health Response Amendment Bill: Further policy approvals and approvals for introduction: [www.health.govt.nz/system/files/2022-03/cabinet\\_paper\\_covid-19\\_public\\_health\\_response\\_bill\\_further\\_policy\\_approvals\\_and\\_approval\\_for\\_introduction.pdf](http://www.health.govt.nz/system/files/2022-03/cabinet_paper_covid-19_public_health_response_bill_further_policy_approvals_and_approval_for_introduction.pdf).
- Minutes of Decision: COVID-19 Public Health Response Amendment Bill: Further policy approvals and approvals for introduction: [https://www.health.govt.nz/system/files/2022-03/cbc-21-min-0102\\_minute\\_0.pdf](https://www.health.govt.nz/system/files/2022-03/cbc-21-min-0102_minute_0.pdf).
- COVID-19 Public Health Response (Infringement Offences) Regulations 2021 for Ministerial consultation: [www.health.govt.nz/system/files/2022-12/20212405\\_briefing.pdf](http://www.health.govt.nz/system/files/2022-12/20212405_briefing.pdf).

- COVID-19 Public Health Response (Extension of Act and Reduction of Powers) Amendment Bill: Approval for introduction: [www.health.govt.nz/information-releases/covid-19-public-health-response-extension-of-act-and-reduction-of-powers-amendment-bill-approval-for](http://www.health.govt.nz/information-releases/covid-19-public-health-response-extension-of-act-and-reduction-of-powers-amendment-bill-approval-for).
- COVID-19 Public Health Response (Infringement Offences) Regulations 2021 for Ministerial consultation: [www.health.govt.nz/system/files/2022-12/20212405\\_briefing.pdf](http://www.health.govt.nz/system/files/2022-12/20212405_briefing.pdf).
- Future of the COVID-19 Public Health Response Act 2020: [www.health.govt.nz/information-releases/future-of-the-covid-19-public-health-response-act-2020](http://www.health.govt.nz/information-releases/future-of-the-covid-19-public-health-response-act-2020).
- Policy decisions: secondary legislation for COVID-19 infringement offence penalties: [www.health.govt.nz/system/files/2022-12/20212156\\_briefing.pdf](http://www.health.govt.nz/system/files/2022-12/20212156_briefing.pdf).

*Please provide internal discussions, communications, or any guidance sought regarding whether the penalties applied under the COVID-19 Public Health Response Act—such as penalties for being outside, attending gatherings, or not wearing masks—could amount to a de facto derogation of rights.*

The Ministry has identified two further documents within scope of your request. These documents are itemised in Appendix 1 and copies of the documents are enclosed. Where information is withheld under section 9 of the Act, the Ministry has considered the countervailing public interest in release in making this decision and considers that it does not outweigh the need to withhold at this time.

Further information is available in two previous Ministry OIA responses, which can be found at the following links:

- [www.health.govt.nz/system/files/2022-10/h2022009285\\_response.pdf](http://www.health.govt.nz/system/files/2022-10/h2022009285_response.pdf).
- [www.health.govt.nz/system/files/2022-06/h202117382\\_response.pdf](http://www.health.govt.nz/system/files/2022-06/h202117382_response.pdf).

*Any communications discussing whether penalties imposed during this period would typically require a formal notification of derogation under Article 4 of the ICCPR. Legal discussions on why New Zealand did not formally notify the United Nations Secretary-General of any derogation, despite restrictions on rights such as freedom of assembly and movement.*

*Please provide copies of any legal advice or internal communications received by the New Zealand Government or its agents regarding the decision not to declare a formal derogation under Article 4 of the International Covenant on Civil and Political Rights (ICCPR) during the COVID-19 pandemic.*

*This includes any documentation outlining why the government believed it was not required to notify the United Nations Secretary-General of a derogation despite significant restrictions on civil liberties.*

*Provide any documents, emails, or meeting minutes discussing compliance with New Zealand's obligations under the ICCPR, particularly Articles 12 (Freedom of Movement), 21 (Freedom of Assembly), and 19 (Freedom of Expression), in the context of COVID-19 response measures such as lockdowns, quarantine, and vaccine mandates.*

*Provide copies of any documents or communications justifying the restrictions imposed under the COVID-19 Public Health Response Act 2020, despite the absence of a formal ICCPR derogation. I am seeking clarification on the legal rationale for restricting these rights under domestic law without corresponding international notification.*

*Please provide any internal reviews or evaluations conducted within the New Zealand Government regarding the proportionality and necessity of the measures taken under the COVID-19 Public Health Response Act, particularly in relation to New Zealand's ICCPR obligations.*

*I am requesting all communications between the New Zealand Government and the United Nations, or its agents, regarding any discussions of New Zealand's COVID-19 response and the ICCPR, particularly regarding whether a derogation under Article 4 should have been declared.*

*Provide any assessments, reviews, or reports evaluating how the COVID-19 response measures impacted the rights of New Zealand nationals, particularly in relation to the ICCPR. This includes any documents addressing concerns raised about potential breaches of international obligations.*

Information relating to these parts of your request is refused under section 18(e) of the Act, as the requested documents do not exist. The COVID-19 Act was made by the New Zealand Parliament with royal assent. The United Nations had no role in the process of making the legislation or its lawfulness.

If you wish to discuss any aspect of your request with us, including this decision, please feel free to contact the OIA Services Team on: [oiagr@health.govt.nz](mailto:oiagr@health.govt.nz).

Under section 28(3) of the Act, you have the right to ask the Ombudsman to review any decisions made under this request. The Ombudsman may be contacted by email at: [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or by calling 0800 802 602.

Please note that this response, with your personal details removed, may be published on the Manatū Hauora website at: [www.health.govt.nz/about-ministry/information-releases/responses-official-information-act-requests](http://www.health.govt.nz/about-ministry/information-releases/responses-official-information-act-requests).

Nāku noa, nā



Dr Andrew Old  
**Deputy Director-General**  
**Public Health Agency | Te Pou Hauora Tūmatanui**

## Appendix 1: List of documents for release

#	Date	Document details	Decision on release
1	8 July 2021	Memo: Infringement Penalty Regulations fortnightly progress report	Some information has been deemed out of scope of your request.
2	1 March 2022	Email correspondence: Checking penalty for face mask HR	Some information withheld under section 9(2)(h) of the Act, to maintain legal professional privilege.

# Memo

<b>Date:</b>	8 July 2021
<b>To:</b>	COVID-19 Public Health Response Amendment Bill Working Group: Victoria Nicholson (MoH), Delia Cormack (MBIE), Harry Harknett (MBIE)
<b>From:</b>	Jessie McMath Price (Infringement Regulations Workstream Lead)
<b>Subject:</b>	Infringement Penalty Regulations fortnightly progress report
<b>For your:</b>	Information

## Background

In May 2021, Cabinet supported making changes to the COVID-19 Public Health Response Act 2020 (the Act). Among others, these changes include:

- increasing infringement penalties to deter non-compliance with Orders;
- introducing a fee for body corporates; and
- enabling secondary legislation to create a graduated penalty approach reflective of individual breach circumstances.

Regulations will be used to define the fee/fine to be applied in different circumstances depending on the gravity of the infringement offence, within the maximum penalty amount allowed for individuals and body corporates respectively in the Act.

The process to develop the supporting regulations will run concurrent to the COVID-19 Public Health Response Amendment Bill (the Bill). A working group was established in early July 2021 to support development of the graduated infringement penalty regime.

## Summary

The following table provides a progress update of key items required to develop these regulations.

Key work plan item	Status	Update
Out of Scope		

Out of Scope

Policy development	Scheduled	The first design sprint workshop is scheduled for 14 July in Wellington. This will include: <ul style="list-style-type: none"><li>• grouping types of infringements into classes based on key indicators such as possibility of spreading COVID-19 and providing rationale for positioning of these and differentiation between classes.</li><li>• design ideas for corresponding penalties</li><li>• critiquing against principles (in ToR) and comparable infringement regimes.</li></ul>
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**Action**

Note the contents of this progress report.

Sent by:  
Bruce.Asher@health.govt.nz

To: Kirsty.Shepherd@health.govt.nz  
cc: Jessie.McMath-Price@health.govt.nz, Annie.Hindle@health.govt.nz  
bcc:

01/03/2022 09:36 AM

Subject: Checking penalty for face mask HR

Document 2

Hi Kirsty,

I think we have to differentiate between offence provisions and enforcement of those provisions.

The intended policy is that people with mask exemptions have protected entry to premises and access to goods and services. That protection has to be put in the Order. I would've thought it follows that there has to be some sort of sanction for breach. Therefore, the question Jessie raises is whether it is better to use the general offence provision in s 26 of the Act or create a low-level infringement offence.

As for enforcement, I think the paper has to strike a balance. On one hand, enforcement resources will be limited, and we shouldn't create unrealistic expectations of a rigorous enforcement regime. However, I don't think we should go to the other extreme and indicate that the new provisions will never be enforced. As a comparator, although Police currently take a light handed approach to enforcing mask wearing, they have advised that over 70 infringements have been issued for that offence.

Ngā mihi,

Bruce

Bruce Asher


Principal Advisor Covid-19 Policy

System, Strategy and Policy

Ministry of Health

Email: bruce.asher@health.govt.nz

S9(2)(h)





Document 2

Any advice contained in this message is tendered in confidence to and for the Ministry of Health and is legally privileged.

**From:** Bruce Asher <[Bruce.Asher@health.govt.nz](mailto:Bruce.Asher@health.govt.nz)>  
**Sent:** Tuesday, 1 March 2022 8:49 am  
**To:** Jessie McMath Price <[Jessie.McMath-Price@health.govt.nz](mailto:Jessie.McMath-Price@health.govt.nz)>  
**Cc:** Kirsty Shepherd <[Kirsty.Shepherd@health.govt.nz](mailto:Kirsty.Shepherd@health.govt.nz)>  
**Subject:** RE: Checking penalty for face mask HR

Hi Jessie,

This is a tricky one, and hopefully Kirsty can chip in too.

On balance, I'd favour making this a low-risk infringement offence.

Points in favour are:

- In essence, the offence is similar to breaching s 44 of the Human Rights Act, i.e. unlawful discrimination in the provision of goods and services. I don't have in-depth knowledge of that Act, but my understanding is that it provides for civil remedies rather than criminal sanctions. If you can't be imprisoned for breaching the Human Rights Act, arguably imprisonment shouldn't be an option for the new offence.
- An infringement fee regime enables speedy resolution.
- Establishing the offence would be relatively simple if an enforcement officer was on the spot. They would be able to see that (a) the person had an exemption card, (b) no reason to suspect the card isn't genuine or doesn't belong to the person, (c) the business refused to admit the person and/or provide goods and services.
- **S9(2)(h)**

Points against are:

- The penalties may be regarded as too light, and we couldn't really get around that by making it a "medium risk infringement offence", because the offence doesn't involve heightened risk of transmission.
- More detailed investigation might be required where the offence is reported after the event – Police would have to interview the retail staff member(s) involved to get their side of the story.

Nga mihi,

Bruce

Bruce Asher  
Principal Advisor Covid-19 Policy  
System, Strategy and Policy  
Ministry of Health  
Email: [bruce.asher@health.govt.nz](mailto:bruce.asher@health.govt.nz)

**From:** Jessie McMath Price <[Jessie.McMath-Price@health.govt.nz](mailto:Jessie.McMath-Price@health.govt.nz)>  
**Sent:** Tuesday, 1 March 2022 7:35 am  
**To:** Kirsty Shepherd <[Kirsty.Shepherd@health.govt.nz](mailto:Kirsty.Shepherd@health.govt.nz)>; Bruce Asher <[Bruce.Asher@health.govt.nz](mailto:Bruce.Asher@health.govt.nz)>  
**Subject:** Checking penalty for face mask HR  
**Importance:** High

Hi both

I know whether to introduce an infringement fee for the following enforcement scenario has been looked at. Please can you confirm whether the following approach is suitable? My reasoning being that this scenario would likely involve an element of investigation, thereby not making it suitable for an infringement offence.

Scenario	Enforcement pathway	Potential penalty
Business not allowing a person with an exemption pass (that matches their ID) to enter.	Report via <a href="https://covid19.govt.nz/news-and-data/report-a-breach/">https://covid19.govt.nz/news-and-data/report-a-breach/</a> or WorkSafe	Under section 26 of the COVID-19 Public Health Response Act, a person commits an offence if they intentionally fail to comply with a COVID-19 order. Upon conviction, an individual committing this offence can be sentenced to up to 6 months imprisonment or a fine of up to \$12,000 for an individual or \$15,000 for a business.

Note earlier commentary from Bruce proposed an alternative as:

An alternative would be to make this a specific infringement offence. Clause 5 of the COVID-19 Public Health Response (Infringement Offence) Regulations specifies three classes of infringement offences, based on the level of risk of COVID-19 transmission arising from breaches. For consistency with that regime, an offence of denying a mask-exempt person entry to premises or access to goods and services would have to be classified as a low risk infringement offence, because it does not increase risk of transmitting COVID-19. Therefore the penalty would be an infringement fee of \$500 for an individual or \$1500 for a business, or if the matter went to court, a fine of up to \$1500 for an individual or up to \$4500 for a business.

Be great if you could get to me by **10am** when I send the draft out!

Ngā mihi

Jessie

**Jessie McMath Price** ([she/her](#))

Senior Policy Analyst, COVID-19 Policy Response, System Strategy & Policy

Ministry of Health

[Jessie.McMath-Price@health.govt.nz](mailto:Jessie.McMath-Price@health.govt.nz)

***I work Monday, Tuesday, Thursday and Friday***