

PUBLIC HEALTH LAW REFORM: SOME QUESTIONS AND ANSWERS

Te Marae Ora Cook Islands Ministry of Health is reforming our public health laws. This will involve replacing the Public Health Act 2004 with a new Act, better able to respond to the needs of Cook Islanders now and for many decades into the future. It is hoped that the 12 questions and answers set out in this document will help people understand the need for reform and provide details of the structure and scope of the proposed new Public Health Act.

Why does the Cook Islands need a new Public Health Act?

The *Public Health Act 2004* reflects an outdated approach that is not able to address current and future public health challenges in the Cook Islands. Its approach to public health risks is 'backwards looking', addressing well-recognised and historical public health threats but unable to respond to new and emerging public health threats such as those posed by climate change, anti-microbial resistance or the threats of non-communicable diseases.

The COVID-19 pandemic demonstrated that the Act cannot support the strategies necessary to protect and promote the health of Cook Islanders in an emergency. A temporary law, the *COVID-19 Act 2020*, had to be passed to provide the necessary powers and safeguards that the Public Health Act was unable to provide.

The Act also lacks effective governance arrangements, and does not set out clear objects or guiding principles, or provide a clear administrative structure that should, among other things, set out the responsibilities and powers of the Minister and the Secretary of Health. It also fails to provide for the whole-of-society partnerships and coordination necessary to promote and protect public health.

What are the key features of the new Public Health Act?

The new Act will have 5 key features.

1. Improved governance with clear objectives and responsibilities. The new Act will establish clear responsibilities for the administration of public health, guided by specified objectives and principles. Recognising that public health is a whole-of-government and whole-of-society effort, it will clarify responsibilities and promote cooperation across sectors and encourage community participation in public health planning and its implementation.
2. A modern risk-based approach to public health. The new Act will respond to the range of public health threats, both those currently recognised and those that are new and emerging through the operation of both a general duty to protect public health and an approach that focuses on the risk that a threat to public health might present.
3. Flexible powers to control risks that can be scaled up to emergencies. The lessons learned from the COVID-19 pandemic will be drawn on by the new

Act which will expand the powers available to respond to pandemics and other serious threats. It will contain emergency powers such as quarantine, isolation and restrictions on movement and social activities as well as the more general requirements around notification, testing and vaccination. Guiding principles will assist TMO and others when making orders that have the effect of restricting the rights and liberties of individuals.

4. Address non-communicable diseases (NCDs). The Act's objects will be expanded beyond the traditional domains of public health to include NCDs, a significant and rising public health challenge in the Cook Islands. New powers will be available to warn consumers about unhealthy products and set standards and practices to address risk factors.
5. Respond to new and emerging issues. The Act will better equip the Cook Islands to respond to new and emerging issues in public health such as climate change and anti-microbial resistance. Despite these being urgent issues, they are rarely covered in the traditional approach to public health laws.

Why will the new Act include Objectives and Guiding Principles?

Most modern public health laws include a set of objectives and principles. The objectives (usually set out at the beginning of an act) offer a short summary of the things it is seeking to achieve. These will make it clear that the scope of the new Act will be a broad one. Beyond protecting public health, it will also aim to help 'create and sustain a healthy environment' since that is essential for health and wellbeing. In protecting communities from public health risks, the Act will require that particular consideration be directed to vulnerable communities and focus on the range of inequalities that place some people more at risk than others. A set of objectives will also be provided for the Health Promotion provisions of the Act.

Guiding principles will also be included, both generally and for the application of the Notifiable Communicable Diseases and Emergency parts of the Act and are designed to assist in its administration. For example, when making a decision whether or not to impose an order, authorised officers will consider the precautionary principle, or will be aware that any requirement imposed by them must be in proportion to the risk the order is seeking to address. Similarly, where persons are quarantined or are isolating in order to protect the community from the risk of wider infection, there will be a corresponding obligation on the community to ensure that they are properly cared for during that time and the Principles will require that.

Objectives and principles should not be seen as platitudes or merely as vague aspirations. They are important statements that bring together many of the beliefs and values in public health practice. To emphasise this point the Act will contain a requirement that when the Secretary and others are involved in administering the Act, they must have regard to the Objectives and Principles, must take them seriously and in the cases where they are relevant to a particular issue, seek to apply them in practice.

How will the new Public Health Act be administered?

The new Act will expand the existing administrative arrangements for public health most significantly by recognising the importance of a whole of government and a whole-of-society approach to protecting and promoting the health and wellbeing of Cook Islanders.

The two key people currently involved in the administration of public health, the Minister for Health and the Secretary of Health, will be given expanded responsibilities and functions. For example, the Minister will be formally responsible for strategies to protect and promote health and also for ensuring that the Cook Islands' international responsibilities (such as for the *International Health Regulations 2005*) are adhered to. The Secretary will have general powers and responsibilities to administer the new Act and to advise the Minister on matters of public health. Consistent with the broadening of the scope of the Act, the Secretary will be given additional functions such as undertaking Health Impact Assessments. The Minister will also be able to appoint a skilled and experienced Public Health Advisor (not necessarily based in the Cook Islands) to assist Te Marae Ora in the case where it would be an advantage to obtain additional help and expertise

The new Act will establish a National Public Health Committee with representatives from both the community and government ensuring that the Minister and Te Marae Ora will get the benefit of a wide range of inputs and viewpoints. It will also provide opportunities to strengthen the role of Island Governments in public health administration.

The day-to-day operation of the new Act will generally be undertaken by public health officers who will be authorised to exercise specific functions such as vector control, contact tracing, testing and sampling and imposing orders. In the case of emergencies and pandemics the Police will also have specific and carefully defined roles.

To summarise, the new arrangements will set out the responsibilities and functions of the people involved in its administration and in doing so will broaden its scope and recognise the importance of including a variety of views from all sectors: the community, local government and central government all directed to the one goal of improving and safeguarding the health and wellbeing of Cook Islanders.

How will the community be involved in the administration of the new Public Health Act?

The Cook Islands comprises many communities and it is important that the development of future policy and planning in public health gets the benefits of ideas and contributions from the people affected by it. Greater involvement also empowers communities to take control of their health and develop local strategies. The new Act will aim to encourage wide participation in public health.

Firstly, it will establish a National Public Health Committee, comprising a range of members from both government entities and community

groups. The committee's role will be to advise the Minister and the Secretary of Health on the broad range of public health policy issues and practice covered by the Act and act as a forum for coordinating multisectoral strategies.

Secondly, the new Act will require the development of public health plans, both at the national and a local (Island Government) level. The community will be given the opportunity to be involved in their development.

How will the provisions that relate to communicable diseases and public health emergencies and serious incidents work?

The provisions that relate to communicable diseases and emergencies in the Cook Islands are spread across a number of laws. These are the *Public Health Act 2004*, (parts 9, 10, 11, 13 and 14), the *Health (International Health Regulations Compliance) Regulations 2014*, made under the *Ministry of Health Act 2013* and most recently the *COVID-19 Act 2020*, a temporary law necessary to ensure that an effective and complete response to the pandemic could be mounted.

The new Act will consolidate communicable disease and emergency powers and, as with the current arrangements, will be based on a list of known 'notifiable conditions' with the additional power to rapidly list newly emerging threats. The law will provide for notification, testing and, where necessary, allow the Secretary to impose orders restricting a range of behaviours that might place others at risk. These powers will be crafted so that their application can be 'staged' and wherever possible the least restrictive option consistent with protecting public health will be given priority. Both the contact tracing and emergency provisions will be strengthened with the COVID-19 experience in mind. The *Health (International Health Regulations Compliance) Regulations* will be remade under the new Act.

The Minister and the Secretary will be given a suite of powers to respond to the public health consequences of emergencies (events with extensive, widescale and prolonged impacts, such as the current COVID-19 pandemic or a devastating cyclone) and in these cases will be able to link in with the *Disaster Risk Management Act 2007* to ensure an effective response across the whole of government as necessary. The new Act will also contain power to respond to 'serious incidents' (an event with major impacts but within a local area, such as a spill of toxic material). In these cases, the Secretary will have wide powers to do whatever is reasonably necessary to respond to the incident.

The imminent threats that emergencies bring and the risks of infections spreading across communities, will sometimes require substantial restrictions on personal liberties and freedoms. Even in these cases, restrictions should be applied in accordance with the set of principles that the new Act will adopt in order to respect the rights of individuals as much as is possible under the circumstances though subject to the need to protect the community at large.

What changes will be made to vaccination requirements?

Vaccination for preventable conditions will remain a key component of public health protection and the current requirements in Part 10 will be incorporated into the new Act. The new Act will aim to maximise the rate of childhood vaccination by a range of strategies including arrangements with the Ministry of Education, facilitating school-based requirements such as vaccination records, and allowing for the closure of schools and/or the temporary exclusion of unvaccinated children in the event of an outbreak of a vaccine-preventable condition. Public health officials will also be able to contact and counsel the parents or guardians of unvaccinated children. Since vaccination rates are also dependent on the availability of services, the Act will require the Minister to ensure that compulsory vaccines are accessible and available to all Cook Islanders without charge (as is currently the case).

The capacity to seek a court order requiring a child receives a compulsory vaccine in the event that a parent/guardian refuses will be retained. It should be noted that this power is a last resort and is rarely required. Exemptions will apply for sound medical reasons.

How will the new Public Health Act respond to existing and emerging public health threats?

The object of the reform process is to create a new Public Health Act that can support the work of Te Marae Ora, other agencies and the community to safeguard the health and wellbeing of Cook Islanders over the coming decades. The new Act will be designed to satisfy the following requirements.

- The public health risks that are addressed by the current Act must also be able to be properly addressed in the new Act; the object of the reform process is to extend the capacity of the Act to respond to public health risks, *not* to reduce it.
- The new Act must also ensure that new and emerging public health issues and threats, the ones we might anticipate over coming decades, can also be properly covered through the modern outcomes-based approach.
- To support this, decisions made under the new Act will be made from a consistent basis that will focus on the *outcome* of an action and the risk to public health produced by that outcome.
- In cases where established activities carry well-recognised risks to public health (such as operating a public swimming pool), guidelines can be prepared to set out the specific information necessary to help persons undertaking these activities comply with their general duty to safeguard public health.

How will the 'general duty to protect public health' be applied?

The prescriptive approach taken in the *Public Health Act 2004* sets out a list of issues, such as the types of activities that might amount to a nuisance set out in s54 or the list of offensive trades set out in Schedule 1. This approach is not forward thinking and cannot deal with novel public health threats that fall outside of the list. The new Act will take a different approach and focus on the outcome of an activity and ask – does it present a risk to public health? This approach will be expressed as a general duty in the following terms;

a person engaged in an activity must comply with any applicable standard or requirement established under this Act and take all *reasonable and practical precautions* necessary to avoid or minimise any resulting risk to public health.

A failure to comply with the general duty will not be an offence. Rather it will be enforced by a compliance notice, which will give the person the opportunity to rectify the matter. Before any notice can be issued, the Secretary or an authorised officer must be satisfied that the risk to public health resulting from the activity is unreasonable under the circumstance and that the action required in the compliance notice is proportionate to the risk being addressed and is appropriate in the circumstances.

What is Te Marae Ora's role in relation to Health Promotion?

Generally public health acts do not cover issues relating to health promotion. Yet non-communicable diseases (NCDs) present a substantial and growing public health risk to the populations of most countries, including the Cook Islands.

Health promotion will be an important component of the new Act and will give the Secretary both general responsibilities to deal with NCDs and specific powers. The general responsibilities will be expressed in the following series of objectives:

- to optimise the physical, spiritual and mental wellbeing of Cook Islanders;
- to promote health equitably across its population (taking into account vulnerable populations and communities); and
- to create an environment where healthier choices are easier choices.

The Secretary will also have specific powers to issue warning statements where the Secretary believes that an activity or product 'presents a potential risk to public health.' This might be a dangerous consumer product or procedure or a suspect batch of food following on from a food poisoning incident.

The objective of promoting an environment where 'healthier choices are easier choices' will be expressed in a provision that gives the Minister the power to issue Codes of Practice designed to address specific issues that contribute to the burden of NCDs. The Minister will also report publicly on the extent to which a Code is being complied with.

How will the Codes of Practice and Guidelines work?

It is anticipated that a range of Codes of Practice and Guidelines will be developed under the new Act. Both kinds of documents can provide important details in particular areas where the Act, being a general set of obligations, is not able to. They are extensively used internationally to add specificity and detail to general requirements and obligations.

Codes of Practice will be used in a number of ways. Under the Health Promotion provisions, they can be developed to help reduce the incidence of non-communicable diseases (NCDs) by creating specific expectations on for example, commercial entities in relation to the

marketing of unhealthy products to children. Alternatively, the Codes developed by international organisations or bodies can be adopted by regulations made under the Act and used for the purposes of administering the public health laws.

Guidelines will in many cases be developed by Te Marae Ora and are intended to assist people to comply with the Act. For example, they can usefully set out the general ways in which a person conducting a certain activity (operating as a pest controller for example) can conduct their business without creating a risk to public health. In other cases, they can help authorised officers or Te Marae Ora when administering the Act, for example when having regard to the general principles.

The legal status of Codes and Guidelines made under the Act will be made very clear in the drafting. The provisions of a Code of Practice may be mandatory if it is incorporated as part of a regulation. But where it is prepared a 'stand-alone document' such as a Ministerial Code to address specific NCDs it will not be. Guidelines will always be advisory documents designed to assist persons by providing the details and advice relevant to their particular industry and to provide reassurance that compliance with the Guidelines will mean that they are complying with their general duty.

How will the new Act support better compliance and enforcement?

The object of any act, and the test of whether it is operating successfully, is the level of compliance. There are many ways in which compliance can be obtained of which the long-established process of taking people to court is but one of them. The current Act relies heavily on prosecution through the courts as its main method of enforcement and also on the issuing of 'abatement' (or compliance) notices, imposed under Part 12.

Prosecutions can be lengthy, expensive for everyone involved and are a very cumbersome way of securing enforcement. It is proposed that 'spot fines' will be introduced as an alternative to prosecution for most offences. However, in rare cases where a person has caused serious harm to public health through a careless or reckless act, it will still be appropriate to prosecute, and the Act will include a new offence to allow this.

Finally, as with most laws, enforcement will generally be 'low key' consisting mainly of warnings or advice designed to help persons conduct their activities safely, though in some cases a formal notice will be issued requiring a person to comply with the general duty. If so, the Act will clearly spell out the reasons why the notice has been issued and the steps that need to be taken by the person receiving it.