

# Briefing

## MANDATORY RECORD KEEPING FOR CONTACT TRACING PURPOSES AND FACE COVERINGS


To: Hon Chris Hipkins  
Minister for COVID-19 Response

Date	2/07/2021	Priority	Urgent
Deadline	5/07/2021	Briefing Number	DPMC-2020/21-1174

### Purpose

This briefing outlines a set of options to mandate record keeping for contact tracing purposes and the use of face coverings.

### Recommendations

1. **Note** Ministers have requested advice that considers options to mandate record keeping for contact tracing purposes and face coverings, in light of the increasing prevalence of the more transmissible Delta variant.
2. **Note** DPMC officials have received feedback from agencies raising concerns relating to the implementation, compliance and enforcement, privacy, social licence, complexity and proportionality of the proposed changes in the paper.
3. **Note** that based on interim public health advice, the Ministry of Health disagrees with the proposals in relation to both record keeping for contact tracing purposes and face coverings.
4. Section 9(2)(h)  

5. **Agree** to discuss the set of options outlined in this briefing with your Cabinet colleagues on Monday, 5 July 2021 (a table of proposed options and talking points are provided as Attachments A and B).

YES  NO

6. **Note** further work is required on implementation and enforcement to mitigate the concerns and risks outlined in this paper and that officials will progress work on these issues and report back to you by Friday, 9 July 2021.
7. **Direct** officials to prepare a Cabinet paper to reflect your decisions on preferred settings in this briefing, for discussion at Cabinet on Monday, 12 July 2021. YES / NO

*Mandatory record keeping for contact tracing purposes*

8. **Note** mandating record keeping for contact tracing purposes (by either or both individuals and businesses, with QR code scanning using the COVID-19 Tracer App being one record keeping method) could support faster notification of contacts during any community outbreak, helping to ensure contacts are aware they need to isolate and be tested.
9. **Agree** in principle to make record keeping for contact tracing purposes compulsory, subject to final public health advice and further work mentioned in recommendation 6. YES / NO
10. **Agree** in principle that individuals will be required to make a record for contact tracing purposes by using the COVID-19 Tracer App to scan a QR code or an alternative contact tracing record (in the event that they do not have the App or it is not reasonably practicable for them to use it). YES / NO
11. **Agree** in principle that businesses be required to have systems and processes to ensure so far as is reasonably practicable that a contact tracing record is created. YES / NO
12. **Agree** in principle that record keeping for contact tracing purposes is required at either:
- 12.1. all Alert Levels (**recommended**); YES / NO
- OR**
- 12.2. only at Alert Level 2 and above. YES / NO

13. **Agree** in principle, that record keeping for contact tracing purposes is required for either:

**EITHER (recommended)**

- |  |          |
|--|----------|
| 13.1. visitors or customers at aged care and healthcare facilities;  | YES / NO |
| 13.2. indoor event facilities (cinemas, theatres, concert venues, casinos);  | YES / NO |
| 13.3. retail businesses (supermarkets, shopping malls, indoor marketplaces, takeaway food stores);   | YES / NO |
| 13.4. customers at massage parlours, beauticians, barbers, hairdressers;   | YES / NO |
| 13.5. indoor public facilities (libraries, museums, swimming pools);   | YES / NO |
| 13.6. public facing staff and visitors to courts and tribunals (except in courtrooms where judicial officers should exercise judicial discretion regarding use of face coverings), local and central Government agencies, and social service providers with customer service counters; | YES / NO |
| 13.7. social gatherings (weddings, funerals, faith based services), and  | YES / NO |
| 13.8. customers at hospitality venues (cafes, restaurants, bars/nightclubs);   | YES / NO |

**OR**

- |  |          |
|--|----------|
| 13.9. when a person attends any location required to display a QR code.  | YES / NO |
| 14. <b>Agree</b> that the current requirement for transport operators, including airports and terminals, to display QR codes compatible with the NZ COVID Tracer App will not be extended to require them to provide an alternative record keeping system because of the practical difficulties. | YES / NO |
| 15. <b>Agree</b> that, because of the existing record keeping systems in place, the current exemption from the requirement to display a QR code will continue for:   |          |
| 15.1. public transport services that require all passengers to provide their name and a contact telephone number (in order to use the service), such as air passenger services, some interregional bus services, and some interregional passenger train services;                                | YES / NO |
| 15.2. school buses (meaning dedicated school services contracted by: the Ministry of Education, local Authorities, school boards or Auckland Transport); and   |          |
| 15.3. car sharing or carpooling services (e.g. app-based systems like Uber).   |          |

16. **Agree** that any mandatory record keeping for contact tracing purposes settings be reviewed in November 2021 to ensure they remain fit-for-purpose. YES / NO

*Face coverings at Alert Level 2*

17. **Note** the use of face coverings in higher risk situations may help to prevent COVID-19 spreading in the community (depending on type, how they are worn, and where they are worn), and possibly prevent a shift to a higher Alert Level (which would further restrict social and economic activity).
18. **Note** DPMC officials have categorised activities and places by the level of risk of spread of COVID-19, factors that could contribute to higher spread of COVID-19, and the practicality of wearing a face covering.
19. **Note** higher risk situations include poorly ventilated, crowded indoor settings where there is difficulty physically distancing, potential contact with a higher number of unknown people, higher proportions of people vulnerable to the impact of COVID-19 (particularly before they are vaccinated), and behaviour that could lead to greater risk of airborne transmission.
20. **Agree** in principle to make the wearing of face coverings in specific settings compulsory, subject to final public health advice and further work mentioned in recommendation 6. YES / NO
21. **Note** in all cases where a face covering requirement is proposed, the existing exemptions should remain in place based on the existing rationale for these exemptions.
22. **Agree** in principle to mandating the use of face coverings for all people (except those exempt) at Alert Levels 2 or higher, where it is practical to do so, at the following high-risk locations:
- 22.1. any indoor or outdoor point of departure for any public transport service (airports, train stations, bus stops); YES / NO
- 22.2. retail businesses (including supermarkets, shopping malls, indoor marketplaces and takeaway food stores); and YES / NO
- 22.3. indoor public facilities (libraries and museums). YES / NO

23. **Agree** in principle to mandating the use of face coverings for people at Alert Levels 2 or higher where it is practical to do so, for individuals who are in the following high-risk situations:
- 23.1. visitors in aged residential care and healthcare facilities (not including patients); YES / NO
- 23.2. public facing staff and visitors to courts and tribunals (except in courtrooms where judicial officers should exercise judicial discretion regarding use of face coverings), local and central Government agencies, and social service providers with customer service counters; YES / NO
- 23.3. staff at close contact businesses such as massage parlours, beauticians, barbers and hairdressers; and YES / NO
- 23.4. public facing staff in hospitality venues. YES / NO
24. **Agree** that although the following may be high-risk locations and settings, for practicality reasons, the use of face coverings will not be required at:
- 24.1. social gatherings (including weddings, funerals, faith-based services); YES / NO
- 24.2. passengers of taxi/ride share; YES / NO
- 24.3. customers at hospitality venues (cafes, restaurants, bars/nightclubs); YES / NO
- 24.4. schools and education entities; YES / NO
- 24.5. other controlled access facilities and businesses (including gyms, office workplaces and factories); and YES / NO
- 24.6. indoor event facilities (cinemas, theatres, concert venues, casinos) and swimming pools. YES / NO
25. **Agree** with regard to existing settings for face coverings at Alert Level 1, to either:
- 25.1. retain all existing settings; YES / NO
- OR**
- 25.2. remove mandated use of face coverings on public transport services at Alert Level 1 but retain them on domestic air transport services (**recommended**). YES / NO

*Enforcement*

26. **Note** further work is needed on enforcement mechanisms including creating infringement offences.

27. **Note** that public health considerations form a critical part of justifying the application of a criminal offence for breaching an Alert Level requirement.
28. **Note** Police have advised they will continue to employ the "4 Es" approach (Engage, Encourage, Educate, Enforce) to any non-compliance with health orders.
29. **Agree** that this briefing is proactively released, with any appropriate redactions where information would have been withheld under the Official Information Act 1982 at the same time as any resulting Cabinet Paper is released.

YES / NO



Ruth Fairhall  
Head of Strategy and Policy

27  
...../...../2021

Hon Chris Hipkins  
Minister for COVID-19 Response

...../...../2021

Proactively Released

**Contact for telephone discussion if required:**

Name	Position	Telephone	1st contact
Ruth Fairhall	Head of Strategy & Policy, COVID-19 Group	Section 9(2)(a)	✓
Ben White	Manager, Strategy & Policy, COVID-19 Group	Section 9(2)(a)	

**Minister's office comments:**

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

Proactively Released

# MANDATORY RECORD KEEPING FOR CONTACT TRACING PURPOSES AND FACE COVERINGS

## Executive Summary

---

1. The increasing prevalence of the Delta variant around the world, which is understood to be significantly more transmissible than previous variants of COVID-19 has, in part, prompted Ministers to request advice that considers options to mandate record keeping for contact tracing purposes and face coverings in New Zealand.
2. The settings outlined in this briefing provide options to mandate these actions (record keeping and use of face coverings), while seeking to balance transmission risk against infringement on an individual's freedoms, convenience and comfort. In general, we have not recommended mandating either action where individuals can easily maintain their bubbles through distancing (i.e. lower risk locations). However, where it is difficult to maintain separate bubbles it is recommended that face coverings should be mandated, unless their wearing is impractical (e.g. where food and drink is consumed). In such cases other protective measures should be put in place (e.g. being seated at a table), and if a form of record keeping does not already exist, one is required.
3. DPMC considers that requiring face coverings and record keeping for contact tracing purposes in specific settings would bolster the "prepare for it" pillar of the Elimination Strategy by reducing the spread of an outbreak before it is detected, and work alongside other approaches to "keep it out" (e.g. pausing QFT and introducing PDT for all QFT travellers). The proposals would also strengthen the "stamp it out" pillar by reducing the likelihood of a nascent outbreak becoming widespread and resulting shift up Alert Levels. While it is hard to judge the overall level of risk reduction, the negative impacts on individual freedoms would be significantly less than those associated with Alert Level 3 restrictions.
4. Further work is required to address the concerns raised by agencies relating to the effectiveness (both scientific evidence and how effective the proposal is in practice given implementation challenges), compliance and enforcement, privacy, social licence, complexity and proportionality (including costs to business) of the proposed measures. However, the more complex we make settings to address concerns about effectiveness and proportionality, the more difficult it becomes to communicate, understand and enforce.

### *Record keeping for contact tracing purposes*

5. Good record keeping is essential to support efficient contact tracing in response to a COVID-19 outbreak, but it is only currently required in limited scenarios for businesses (as far as is reasonably practicable) at Alert Level 3 in New Zealand. Partly due to high public complacency, use of the COVID-19 Tracer App (the App) is consistently low which slows down notification of contacts when community transmission appears to be present.
6. Mandating record keeping would work alongside existing non-regulatory approaches to promote and encourage improved record keeping, including current or planned government educational initiatives, communications, engagement, guidance and physical resources. While these non-regulatory approaches have had limited success in driving increased or consistent record keeping, they will continue as one of the ways to influence positive record keeping behaviours.



7. Options are provided about on whom, where, how, and for how long a record keeping requirement would apply. The suite of possible options outlined limit the requirement's application in different ways, with it being recommended that the App is specified as the primary record keeping method across the options (with alternative methods provided, subject to exemptions). For example, whether the requirement applies at all Alert Levels, or only Alert Level 2 or higher; at all locations or only at more risky locations; only to businesses (to have systems and processes to ensure a record is kept) or also on individuals (make a record). The different limits incorporated in the options seek to balance the stated benefits of mandating against interference with rights, privacy and legal risks, as well as maintenance of social licence and the legality of the Alert Level Framework overall. Section 9(2)(h)
8. Changing the rules will not necessarily influence all New Zealanders' record keeping behaviour. Research indicates that mandating record keeping behaviours may increase the occurrence of the behaviour overall but reduce the behaviour among some key groups (e.g. due to perceived inequity or unfairness). It is anticipated that some non-compliance will persist.
9. The Ministry of Pacific Peoples, the Privacy Commissioner and the Government Chief Privacy Officer do not support the record keeping proposals as set out in this briefing. The Ministry of Health does not presently support the proposals but will be providing further advice on these matters.

#### *Face coverings at Alert Level 2*

10. Experimental and epidemiological data support community face covering wearing to reduce the spread of infectious diseases, like SARS-CoV-2. The prevention benefit of face coverings (when worn effectively while there is community transmission) is derived from the combination of source control and wearer protection for the person wearing the face covering. Face coverings may help to reinforce physical distancing behaviours, without replacing them.
11. Most Australian states and territories now have rules around the use of face coverings in a range of indoor settings. All states mandate the use of face coverings for people while inside State Government controlled airport terminals and during commercial flights.
12. DPMC officials have completed a face covering risk assessment by categorising activities and places by overall risk level and assessing this against the potential impact of spread to vulnerable populations. We have then assessed any mitigating factors and practical implications in order to recommend whether the use of face coverings should be mandated in each distinct setting. The current definition of face coverings and exemptions has been retained.
13. Based on this risk assessment, we recommend mandating the use of face coverings for all people at Alert Levels 2 or higher, where it is practical to do so, at the indoor or outdoor point of departure for any public transport, retail businesses, and indoor public facilities. We are recommending the use of face coverings at the outdoor point of departure for public transport due to the risk of individuals not maintaining physical distancing while waiting to depart, particularly for buses.
14. Further, we recommend mandating the use of face coverings for people at Alert Levels 2 or higher where it is practical to do so, for individuals who are visitors to aged residential care and healthcare facilities, staff at massage parlours, beauticians, barbers, hairdressers, public facing staff and visitors to courts and tribunals (except in courtrooms where judicial officers should exercise judicial discretion regarding use of face coverings),

local and central Government agencies, and social service providers with customer service counters, and public facing staff in hospitality venues.

15. Considering the intent and practicality of measures, we do not recommend mandating the use of face coverings at social gatherings (including weddings, funerals, faith-based services), customers at hospitality venues, schools and education entities, other controlled access facilities and businesses (gyms, office workplaces, factories), passengers of taxi/ride share services, indoor event facilities (cinemas, theatres, concert venues, casinos) and swimming pools.
16. The Ministries of Health and Pacific Peoples do not support the face coverings proposals as set out in this briefing. The Ministry of Health will provide further advice on this matter.

#### *Enforcement mechanisms*

17. Monitoring compliance and enforcement of these requirements will be challenging. Further work is required on what mechanisms should be available to enforce non-compliance with any requirement for mandatory scanning (e.g. whether an infringement offence is created and how non-compliance might be monitored, or an obligation imposed in a way that breaches Google and Apple's terms of service).

### **Mandatory record keeping for contact tracing purposes**

---

18. Our ability to slow or stop the spread of COVID-19 relies heavily on the pace and efficiency of contact tracing. Currently, record keeping for contact tracing purposes (including through the use of the App for QR code scanning) is strongly encouraged in New Zealand but is only required in limited scenarios for businesses (so far as reasonably practicable) at Alert Level 3.<sup>1</sup>
19. Uptake and use of the App is currently low and inconsistent, with the number of QR poster scans typically fluctuating between 400,000 and 1 million scans per day.<sup>2</sup> With the emergence of new, likely more transmissible, variants of COVID-19 there is arguably a more pronounced need for improved record keeping behaviours, especially while the majority of New Zealanders are unvaccinated.
20. Making record keeping for contact tracing purposes compulsory could support faster notification of contacts (e.g. through push notifications in the App) during a community outbreak of COVID-19. This will help to limit any outbreak by ensuring close and casual contacts are aware that they need to isolate and get tested (noting that contacts will still need to act on this information), and may help to prevent shifts to higher Alert Levels.
21. The Strategic COVID-19 Public Health Advisory Group's 24 June 2021 report to Minister Verrall echoed this sentiment in the context of Reconnecting New Zealand, recommending enhanced contact tracing (including through mandated QR code scanning at some venues) to assist in "stamping out" any clusters of COVID-19. Compulsory record keeping in New Zealand would also increase assurance for QFT-purposes and make it easier for people to understand what is expected of them in both countries, considering use of check-in apps is now mandated in most Australian states and territories.<sup>3</sup>

<sup>1</sup> Clauses 24(1)(f)(ii) and 24(1)(g)(iii) of the (now revoked) COVID-19 Public Health Response (Alert Level Requirements) Order (No 4) 2021 outline the limited scenarios referred to. These provisions are part of our Alert Level 3 Template Order.

<sup>2</sup> DPMC commissioned TRA to undertake research in May 2021 to understand how NZ COVID-19 Tracer app behaviours could be influenced by targeted communications. 60% of TRA's sample (n = 1,921) reported that they were not scanning consistently. Only 38% stated that it was important to use the NZ COVID Tracer app wherever they went.

<sup>3</sup> Western Australia, which has a population of 2.67 million, mandated the use of the contract registration in December 2020. The state government COVID-19 check-in app "SafeWA" registered an approximate 1.9 million daily average scans in May. Following the Sydney Northern Beaches outbreak over the December-January period, NSW, which has a population of 8.2 million,

22. Any strengthened new measures related to the Alert Level framework, which impinge on individual freedoms and rights, need to be proportionate. The mandatory requirement will have a greater impact on people who are not able to use the App, because alternative means of record keeping are generally more inconvenient and less privacy protective. The privacy implications of complying with, and enforcing, mandatory record keeping on individuals are significant regardless of the method of information sharing used (e.g. implications apply for both electronic and paper-based information sharing systems).
23. Options are available in the settings (discussed more below) to ensure proportionality relative to the public health risk and to help to mitigate the risks and concerns that relate to this proposal, as set out in this paper. Notwithstanding the benefits outlined above, we are also aware that any new requirements on businesses create compliance costs and Section 9(2)(h) [redacted] The Ministry of Health will provide further advice on the public health risks.

#### *Proposed settings*

24. The following options seek to balance the previously stated benefits of mandatory record keeping against interference with rights and later discussed privacy and legal risks. On balance, DPMC believes that mandating record keeping may be justifiable, by limiting where, how and to whom the settings would apply. The following options differ in the broadness of their application and associated risk profile. If your preference is for a suite of narrow options (e.g. only applying the requirement at Alert Levels 2 and above, only in the narrowest categorisation of locations and only on businesses), the legal risk will be lower. Broader options carry significantly higher risk.
25. In terms of who the requirement applies to, a section 11 order under the COVID-19 Public Health Response Act 2020 could be used to make record keeping for contact tracing purposes compulsory, by requiring:
- specified businesses and services to have systems and processes to ensure that, so far as is reasonably practicable, a contact tracing record is created;<sup>4</sup> AND/OR
  - individuals to make a contact tracing record.
26. If an individual fails to comply with the requirements of any order created by section 11 could be subject to criminal prosecution.<sup>5</sup> A business or service that failed to comply would be subject to possible prosecution. Enforcement is discussed below in paragraphs 57 to 64.
27. Record keeping could be required at all Alert Levels, or only at higher alert levels when community transmission is present or more likely. We propose two options for this setting, which would complement current communications strategies to influence record keeping behaviour:
- Requiring record keeping at all Alert Levels (recommended). Record keeping for contact tracing purposes is something that we want to encourage New Zealanders to do at all times, especially at lower Alert Levels. From a public health perspective, being

---

recorded 66 million Service NSW app check-ins. This dropped to 54.4 million for the month of February. By April there were 48.3 million a month with the data for May showing similar levels of app usage.

<sup>4</sup> Note that a person in control of a workplace (with exceptions) is currently required to display a QR code at all alert levels (section 9 of the COVID-19 Public Health Response (Alert Level Requirements) Order (No 7) 2021 refers). At alert level 2, there is also a requirement to have other record-keeping systems and processes in place (with certain exceptions).

<sup>5</sup> Section 26 of the COVID-19 Public Health Response Act 2020 refers.

able to rapidly contact trace early in an outbreak/positive case of COVID-19 is critical. Good record keeping may mitigate the need to change Alert Levels.

- b) Requiring record keeping at Alert Levels 2, 3 and 4 only, with record keeping for contact tracing purposes still only strongly encouraged at Alert Level 1. Having different requirements at different Alert Levels may be problematic from a compliance perspective, as it may be confusing when individuals do and do not need to make a record of their movements. However, this option may go some way to preserving social licence for scanning and the Alert Level framework more generally while the country is at the lowest Alert Level.

28. The locations where record keeping for contact tracing purposes is mandatory is also flexible. We propose two options:

- a) Adopting a risk-based approach, requiring record keeping for visitors or customers at: visitors to aged care and healthcare facilities, indoor event facilities (cinemas, theatres, concert venues, casinos), retail businesses (supermarkets, shopping malls, indoor marketplaces, takeaway food stores), customers at massage parlours, beauticians, barbers, hairdressers, indoor public facilities (libraries, museums, swimming pools), public facing staff and visitors to courts (but excluding judiciary and legal counsel), tribunals, local and central government agencies, and social service providers with customer service counters, social gatherings (weddings, funerals, faith based services), and customers at hospitality venues (cafes, restaurants, bars/nightclubs). This approach would support prompt notification of contacts following an instance of a positive COVID-19 case attending one of these gatherings, and at other venues where physical distancing is not always practical. However, under this option drafting will be complex and it may be difficult for some individuals to easily identify when and where they should be making a record of their movements.

OR

- b) Requiring record keeping for contact tracing purposes everywhere that a QR code is currently required to be displayed (not recommended as we consider that it has the highest likelihood of undermining social licence).

29. DPMC officials would recommend social gatherings are exempt from this requirement at Alert Level 1, due to the risk of adding complexity where there are currently no other legal requirements on gatherings. Hosts of social gatherings would continue to be encouraged to keep a record for gatherings held at Alert Level 1 but this would not be a legal requirement.

30. DPMC officials recommend that the App is specified as the preferred method of record keeping, acknowledging that businesses will need to be required to provide alternative record keeping methods for those who do not, or cannot, use the App (with some exceptions). For example, enabling businesses to electronically register contact details on a patron's behalf or updating the App to enable a single app user to check in multiple people.

31. Practical limitations mean it will be unfeasible for some businesses and service providers to have alternative systems in place, such as public transport providers and in transport terminals (e.g. airports, and bus stations). Transport operators are currently required to display QR codes for their transport assets. This includes on buses and trains, and throughout terminals and stations. Because of the number of assets and size and number of access points at terminals for example, requiring alternative contact tracing systems to be in place, other than QR codes, will not be practicable. We recommend that public

transport operators (and associated facilities) not be required to provide an alternative record keeping system.

32. Requiring people to download and use a specific app contravenes Apple and Google's terms of service and would likely result in the App being removed from both platforms. This issue can be avoided by making a broader record keeping requirement (as is proposed), where the App is the preferred method of record keeping for contact tracing purposes, but still only one of several record keeping options available to a person. Meeting the requirement would not be dependent on a person downloading and using the App. However, further complications arise over the how compliance with any mandatory record keeping obligation would be monitored and enforced. If there was a proposal for the App to store record keeping data in order to monitor compliance, Google and Apple would need to be consulted and may disable the Bluetooth functionality on the App. We will consider this as part of further advice on enforcement and implementation.
33. Some services are currently exempted from the requirement to display a QR code and, based on the existing rationale for these exemptions, we recommend they continue, including for:
  - a) public transport services that require all passengers to provide their name and a contact telephone number (in order to use the service), such as air passenger services and some interregional train and bus services;
  - b) school buses (dedicated school services contracted by the Ministry of Education, local authority, school board or Auckland Transport); and
  - c) car sharing services and carpooling services.
34. Another way to limit this proposal would be to review any mandatory record keeping for contact tracing purposes settings in November 2021 to ensure they remain fit-for-purpose, once more New Zealanders are vaccinated (we are reviewing the Alert Level settings framework in general in the coming months).

*The effectiveness of this option in improving record keeping is not guaranteed*

35. Changing a rule does not always change behaviour; mandating record keeping for contact tracing purposes will not guarantee effective record keeping by all New Zealanders. For example, some individuals may hold their phone up to a QR code without scanning to appear compliant. November 2020 research carried out by PWC indicated that mandating some public health activities (such as scanning using the App) may make some people less willing to carry out that activity, and there is also a high risk that it will diminish social licence and erode adherence with future lockdowns.<sup>6</sup> There is also a risk that people will see their civil liberties being reduced without an end point in sight, resulting in low public acceptance of the requirement.
36. Research indicates that mandating record keeping behaviours may increase the occurrence of the behaviour overall, but reduce the behaviour among some key groups, due to perceived inequity and unfairness. It is anticipated that some non-compliance will persist.<sup>7</sup>
37. There are also possible unintended consequences of mandating record keeping. Someone who visited a location of interest but did not record this movement may be more

<sup>6</sup> *Applying behavioural science techniques to increase NZ COVID Tracer app adoptions*, PWC, November 2020.

<sup>7</sup> *Applying behavioural science techniques to increase NZ COVID Tracer app adoptions*, PWC, November 2020 refers. An example of a possible inequity is an individual who has English as a second language and does not have a smart phone, who may feel uncomfortable (or who may be unable to) write down their details on a paper-based register.

hesitant to get a COVID-19 test for fear of revealing their non-compliance. A person may refuse to share their movement records with contact tracers because they have not complied with the requirement to make a record of their movement, which would frustrate contact tracing efforts.

38. A new Unite Against COVID-19 (UAC) Tracer App campaign in July aims to encourage New Zealanders to download the App, turn on Bluetooth tracing and scan QR codes. The campaign repositions the scanning messaging from scanning being an activity to stop the virus, to scanning being something we need to do to protect the things we love. It also includes engagement with businesses to make it easier to encourage patrons to scan, including developing messaging and resources for them to use.

## Face coverings at Alert Level 2

---

### *Current evidence*

39. Experimental and epidemiological data support community masking to reduce the spread of infectious diseases, like SARS-CoV-2. Face coverings can help prevent transmission in certain situations (e.g. when there is wide-spread transmission of COVID-19 and proper use of face coverings) by:
  - a) reducing the emission of virus-laden particles (“source control”); and
  - b) reducing inhalation of these particles by the wearer (“wearer protection”).
40. These two effects combine to provide the overall community benefit, aiding other existing public health efforts to “stamp it out” through reducing the number of transmissions in the first place.
41. Face coverings can (depending on the type of covering) block most large droplets and can also block the exhalation of fine droplets and particles (also often referred to as aerosols), which increase in number with the volume of speech. Studies have shown that face coverings can block fine droplets and particles and limit the range of particles that are not captured.
42. Some studies also demonstrate that face coverings can reduce wearers’ exposure to infectious droplets through filtration, including filtration of fine droplets and particles. However, the relative filtration effectiveness of various face coverings has varied widely across studies, in large part due to variation in experimental design and particle sizes analysed. Use of face coverings has been found to be safe and is not associated with clinically significant negative impacts, for instance on respiration.

### *Current settings*

43. At all Alert Levels the wearing of face coverings is mandatory on public transport and domestic flights and is recommended when people use taxis or rideshare services (it is mandatory for drivers of these services), or if they cannot maintain physical distancing in crowded indoor places [CAB-21-MIN-0031 refers]. UAC’s “cover for each other” campaign is strategically placed in public transport hubs and on public transport, in places where face coverings are currently mandated.
44. We consider the current definition of face coverings and exemptions related to the wearing of them should remain the same. The definition would not be prescriptive, with people able to use either medical grade or non-medical-grade face coverings, which can be either single-use or reusable, and can be made from other kinds of covering, like a bandana, scarf or t-shirt to cover the mouth and nose. High use of medical-grade masks may

inadvertently create supply issues, along with equity issues if people could not afford them.

45. The current exemptions for wearing face coverings would continue to apply (based on the existing rationale for the exemptions), and expectations around proof of exemption would not change. This means the following would not be required to wear a face covering:
- a) children under 12;
  - b) passengers on a small passenger service vehicle;
  - c) on ferry services carrying passengers between the North and South Islands;
  - d) on charter or group tours, or private flights;
  - e) drivers, pilots, staff or crew of the service if they are in a space completely separated from passengers, for example pilots in a cockpit or train drivers in a train cab;
  - f) on ships with no enclosed spaces for passengers (e.g. water taxis);
  - g) school transport services; and
  - h) pre-booked public transport services provided by bus or rail that operate only within Alert Level 1 areas.
46. People also do not need to wear face coverings if (non-exhaustive list):
- a) it is unsafe, or if you have a physical or mental health illness or condition or disability that makes wearing a face covering unsuitable
  - b) there is an emergency;
  - c) you need to prove your identity;
  - d) if visibility of the mouth or face is required for communication e.g. you need to communicate with someone who is deaf or hard of hearing, or to effectively communicate in courts and tribunals;
  - e) you need to eat, drink or take medicine; or
  - f) if wearing a face covering could make it unsafe to operate a vehicle (e.g. wearing a face covering means drivers or staff are unable to properly communicate, or it causes the eyeglasses of a driver to fog).

#### *Approach to face coverings in Australia*

47. Australian states have differing approaches to face coverings depending on their particular circumstances (see summary in Attachment 1). Some states have strengthened their requirements in the last few weeks in response to outbreaks to mandate face coverings while others recommend use in some lower risk locations.
48. All states have mandated the use of face coverings for people while inside State Government controlled airport terminals and during commercial flights at all Alert Levels. Some states have further requirements related to travel at different Alert Level settings. In Tasmania, mandatory face coverings extend to the state's maritime port and terminal, and in Western Australia extends to people transporting a person subject to a quarantine

direction (e.g. in a personal vehicle, private car, hired car, ride-share vehicle or taxi). Exemptions are generally consistent with those in New Zealand.

49. In New South Wales (NSW) and Victoria there are additional legal requirements mandating face coverings:
50. Since 17 June 2021, in regional Victoria, face coverings must be carried at all times and worn inside (except at private residences) and outside if people cannot maintain physical distancing. In metropolitan Melbourne, people must wear a face covering indoors and outdoors (except at private residences), unless an exemption applies. Face coverings are also strongly recommended outdoors where physical distancing cannot be maintained.
51. From 21 June 2021, NSW requires face coverings both when waiting for and using all forms of public transport. In Greater Sydney, people must also wear them at an extensive range of indoor areas (which are non-residential premises), including workplaces, and at COVID-safe outdoor gatherings or controlled outdoor public gatherings.

*Options for wider use of face coverings at Alert Level 2*

52. Face coverings can help to reinforce physical distancing behaviours but do not replace them. Extending the mandatory use of them in specified settings may provide an additional layer of protection if individuals do not get a false sense of security and stop exercising other public health actions. As we are proposing they only apply at Alert Level 2 and above, by definition, there will be a greater level of risk present in the community. If effective in reducing transmission, these measures (in conjunction with others) may reduce the likelihood of moving to higher Alert Levels.
53. DPMC officials have completed a risk assessment. While reviewed by the Ministry of Health, it does not include detailed public health input. The Ministry of Health intends to do further work around specific settings where face coverings should and should not be used and advise that this will take time.
54. We categorised activities and places by overall risk level, based on whether the venue is indoor or outdoor, the number of potential contacts, whether riskier behaviour is likely (in terms of projecting more aerosolised droplets), and the level of physical distancing. We have also assessed the potential impact of spread to vulnerable populations. In general we have assumed that the highest risk factors are whether the activity is indoors or outdoors, and whether there is riskier behaviour present (in terms of speaking, singing, or shouting) that would likely lead to more spread, or could lead to super spreading.
55. There are some settings in which we do not recommend mandating face coverings due to significant mitigating factors and/or practical considerations (detail below). The intent of the proposed settings is to reduce the number of environments in which COVID-19 could easily spread.
56. The Ministry of Health's interim public health advice does not support the proposals in this paper, but their general view is that any mandatory requirement should be as simple as possible so that people are aware of what is required of them (e.g. wear face coverings in enclosed spaces where it is not possible to physically distance). However, we think that, while such an approach works well for guidance, it creates compliance issues if we are creating legal requirements as it would be hard for people to know exactly when they are required to wear a face covering.
57. DPMC officials recommend mandating the use of face coverings for all people at Alert Levels 2 or higher, in:



- a) any indoor or outdoor point of departure for any public transport service (airports, train stations, bus stops);
  - b) retail businesses (including supermarkets, shopping malls, indoor marketplaces and takeaway food stores); and
  - c) indoor public facilities (libraries, museums)
58. In some situations it is not practical for people to use face coverings. DPMC therefore recommend the use of face coverings for select groups at Alert Levels 2 or higher for:
- a) visitors to aged residential care and healthcare facilities (not patients);
  - b) public facing staff and visitors to courts and tribunals (except in courtrooms where judicial officers should exercise judicial discretion regarding use of face coverings), local and central Government agencies, and social service providers with customer service counters
  - c) staff at massage parlours, beauticians, barbers and hairdressers; and
  - d) public facing staff in hospitality venues.
59. There are some situations and settings that could be considered higher risk, but on balance DPMC officials do not recommend mandating face coverings due to significant risk mitigating factors (including physical distancing and limits on gathering sizes) and/or practical considerations. Examples include:
- a) social gatherings (including weddings, funerals, faith based services);
  - b) customers at hospitality venues (cafes, restaurants, bars/nightclubs);
  - c) schools and education entities;
  - d) other controlled access facilities and businesses (gyms, office workplaces, factories);
  - e) passengers of taxi/rideshare services; and
  - f) indoor event facilities (cinemas, theatres, concert venues, casinos) and swimming pools.
60. Increased respiratory exertion, typical in gyms and some indoor sports can facilitate the spread of COVID-19 through increased particle spread, especially where patrons are spending prolonged time with others in a poorly ventilated area. Gyms and some indoor physical activities have been linked to significant transmission events in other countries. However, this increased exertion also makes it impractical to enforce face covering wearing during physical activity that occurs in a gym. Further, gyms (alongside several other indoor settings) are required to enforce physical distancing at Alert Level 2, and often have good contact tracing records through gym memberships and scanning of membership cards.
61. The other situations in which it is not proposed face coverings are mandatory mostly relate to consumption of food and drink, where there is good contact tracing mechanisms (e.g. attendance rolls) and where they would create barriers to communication and learning at education entities. Further, indoor event facilities could present as high risk due to them being large indoor settings with potentially high traffic areas, however these settings usually have ticketing mechanisms and seating requirements to mitigate some risk. In addition, we note that at social gatherings on marae, face coverings would not be required.

However, iwi and hapū are able to require people on marae to wear face coverings if they consider it appropriate.

62. These exceptions weaken the justification for mandatory face coverings on health grounds if the requirement to wear a face covering applies to some “high risk” locations, but not others. We consider that the proposal balances the need to reduce at least some risk while not being disproportionate or reducing social licence by going too far.
63. To prevent further erosion of social licence, we also recommend removing mandated use of face coverings in all existing settings (excluding on aircraft) at Alert Level 1. The proposal outlined in this paper provide an opportunity to reset face covering settings and reducing restrictions on rights as far as possible at Alert Level 1 will maintain social licence and may encourage compliance with requirements at higher Alert Levels. DPMC considers this is consistent with the current public health advice on use of face coverings.
64. These changes will add an additional layer of complexity to the Alert Level Orders because the face covering requirements do not always apply to the same groups as the physical distancing requirements. This may create confusion and compliance implications for individuals and business, and expectations might be difficult to communicate clearly.

#### *Implementation considerations*

65. Further work is required on whether there are any health and safety impacts for staff, e.g. as a result of having to wear face coverings for long periods of time, or as a result of needing to dispose of discarded face coverings left by patrons or passengers.

### **Compliance and enforcement considerations in relation to record keeping and face coverings**

---

66. As noted throughout this paper, there are several outstanding monitoring, compliance and enforcement issues that will need to be worked through prior to any of the requirements proposed could come into effect.

#### *Mandatory record keeping for contact tracing purposes*

67. Under current Alert Level settings (at all levels), the onus with regard to record keeping measures falls to businesses and people responsible for social gatherings, rather than to individuals. The approach to enforcement is calibrated accordingly. For example, WorkSafe’s inspectors have been utilised to ensure that businesses comply with relevant Alert Level settings. As has been identified by WorkSafe, this comes at the cost of limited resources being applied to other work of such agencies.
68. Placing the onus on businesses with regard to record keeping measures would avoid many of the privacy, compliance and legal risks identified in this paper. However, the retail sector has indicated concerns with any further obligations being placed on businesses because of the potential for negative public response.
69. Monitoring in a meaningful way for enforcement purposes will be problematic because it will not be outwardly evident when an individual has complied with the requirement. In particular, the scanning of QR codes is an activity that occurs up to 2.5 million times per day during a response (with fewer than 1 million scans per day more typical when there is no community transmission).
70. If non-compliance were identified, there are limited enforcement options available to address this (e.g. there is currently no infringement offence for failing to make a record for contact tracing purposes). Further work is required on what enforcement mechanisms

should be made available to enforcement officers to address any non-compliance; specifically, whether an infringement office should be created so that infringement notices can be issued to non-compliers.

#### *Mandatory face coverings at Alert 2 and above*

71. Face coverings are currently required on public transport at all alert levels and there is an associated infringement offence for failing to comply with the order that gives effect to this requirement. Public messaging and the agreed policy approach have been that it is not expected that drivers and transport operators will stop people without face coverings from boarding public transport and that, where possible, drivers will encourage passengers to wear a face covering.
72. A number of enforcement issues need to be worked through for face coverings, including the appropriateness of denying entry to a courthouse for non-compliance with this requirement resulting in non-compliance with a court summons or the colour of the face covering (e.g. gang colours) prompting security incidents or intimidation at the courthouse.
73. Consideration must be given to the extent that compliance with new Alert Level settings is expected to be enforced and by whom. Officials propose to retain the current approach with respect to what is not expected of business owners, operators, staff and drivers. Their role is to educate and encourage compliance with any requirements agreed to. There is no expectation that these individuals would be expected or required to assume the role of an enforcement officer (including because doing so may be counter-intuitive for businesses due to it resulting in reduced revenue).
74. Following the decisions arising from this briefing, officials will work with agencies to determine the most appropriate approach to setting the obligations for the respective adjusted settings, including which agencies will be responsible for monitoring such compliance. That advice will be provided to the Minister for COVID-19 Response in conjunction with any orders giving effect to changes to Alert Level settings.
75. Consistency and proportionality of enforcement and active enforcement of non-compliance will be challenging. If Ministers require greater assurance of improvement in compliance as a result of these proposed measures, agencies would need to redeploy significant resources to accommodate active monitoring and enforcement of both record keeping for contact tracing purposes and face coverings.
76. Where the Police are required to become involved in the enforcement of these requirements, Police advise that they intend to continue with its current "4 Es" approach – Engage, Encourage, Educate, Enforce.

### **Legal implications of record keeping and face coverings**

---

#### *Bill of Rights Act 1990 (BORA) considerations*

##### **Section 9(2)(h)**

77.



78. Section 9(2)(h)

79.

80.

*Privacy implications – record keeping for contact tracing record keeping*

81. The Privacy Commissioner has clearly stated that requiring individuals to record their movements would represent a significant intrusion into individual privacy rights, when using the App or any other method of making this record. He has provided you with separate advice.
82. The Ministry of Justice have signalled that the lack of evidence on the effectiveness of mandating record keeping for contact tracing purposes may mean the limit on an individual's right to privacy is not justified or proportionate. Unsecured personal information exposes people to unwelcome contact, fraud or even identity theft. Records of who has been somewhere and with whom can be sensitive and disclosing personal information can be sensitive in and of itself in some circumstances (e.g. in family violence situations).
83. The Ministry of Justice suggested that additional privacy protections for record keeping could be introduced to mitigate this risk, increase public trust and uptake. For example, additional protections about information retention, destruction and use. Officials would need to work through what, and how, additional protections could be introduced.

*Restriction on autonomy – face coverings only*

84. Section 9(2)(h)

85.

Section 9(2)(h)

*Threshold to make an order under the COVID-19 Public Health Response Act 2020*

86. Section 9(2)(h)

87.

## Next Steps

---

88. We recommend you discuss the options outlined in this briefing with your colleagues at Cabinet on Monday 5 July 2021. The attached table of current and proposed settings and talking points (Attachments A and B) are provided to support this discussion.
89. Following this Cabinet discussion, we propose you advise DPMC of your preferred settings from the options outlined in this briefing. DPMC will work with agencies to prepare a paper for you to take to Cabinet on Monday 12 July 2021 seeking agreement to your preferred options.
90. Officials will undertake the further work required on enforcement mechanisms for both proposals and will report back to you on recommended options by Friday 9 July 2021. This will include consideration of who bears the obligation for record keeping for contact tracing purposes – the individual or businesses and services, and any issues with Google and Apple's terms of service.
91. An update on readiness to implement any adjusted settings agreed to following these conversations will be provided to you at the same that any draft amended template Alert Level Order and/or amended Alert Level Order is provided to you for approval or signature, respectively. Further specificity about QR code location, quality and quantity (e.g. requiring multiple posters to avoid any increased transmission risk from people queuing to scan a QR code poster at a shop entrance) will also be provided as part of this update, and reflected in the amended template Order.
92. Subject to Cabinet decisions, drafting instructions will be issued to the Parliamentary Counsel Office (PCO) to draft the requirements. PCO estimates that, after instructions are provided, it will take up to five days to finalise the drafting for the full suite of changes, due to the likely complexity involved. However, the record keeping requirements could be completed sooner if they needed to be progressed separately.
93. Depending on which Alert Level(s) applies when the drafting is completed, the new requirements will be:

- a) prepared as a new section 11 Order for you to sign into force (following consultation with relevant Ministers); or
  - b) included in the template Alert Level Orders and provided to you for approval (and relevant Ministers for consultation), so that the requirements are ready to use if the Alert Level is increased in future.
94. Officials will engage with the business community on how the proposals are likely to impact them and whether the Government can support them to facilitate record keeping for contact tracing purposes or provide additional guidance to support any new face covering requirements. Officials also intend to consult Apple and Google on these proposals.

## Consultation

---

95. The following agencies were consulted on this briefing: Ministry for Pacific Peoples, Ministry of Social Development, Ministry of Health, Ministry of Justice, Ministry of Transport, Ministry of Education, Oranga Tamariki: Ministry for Children, Ministry of Business, Innovation and Employment, Department of Internal Affairs, Crown Law Office, Parliamentary Counsel Office, Office of the Privacy Commissioner, New Zealand Police and New Zealand Customs Service, Public Service Commission, Ministry for Primary Industries, Ministry for Women, and Te Puni Kōkiri.
96. The following agencies and officers expressly stated they do not support the proposals as set out in this paper:
- a) Ministry of Health (record keeping and face coverings – they will provide further advice)
  - b) Ministry for Pacific Peoples (record keeping and face coverings)
  - c) Privacy Commissioner (record keeping)
  - d) Government Chief Privacy Officer (record keeping).
97. Based on interim public health advice, the Ministry of Health do not support the proposals for the following reasons:
- a) Making record keeping for contact tracing purposes using the App risks the App being removed from Apple and Google platforms, there are enforcement challenges and equity issues. The Ministry of Health also questions the proportionality of this proposal and believe that there is insufficient evidence about the effectiveness of mandatory record keeping for contact tracing purposes to justify the proposal. The Ministry of Health also believe other options to increase scanning should be analysed and presented in this advice. (It should be noted, however, that the proposals relate to record keeping generally, not just scanning.)
  - b) The Ministry of Health are not convinced that extending the mandatory use of face coverings to the proposed settings would be effective, given there are other tools available to mitigate risk of transmission at Alert Level 2 – e.g. banning or limiting the size of gatherings. They have concerns about the proportionality of the proposed approach, and do not agree that mandating face coverings at Alert Level 2 for the places in this proposal is a proportionate response to the presenting risks and may undermine compliance with other measures (e.g. staying at home if you are unwell).

98. We understand you will receive updated public health advice from the Director-General on these proposals.
99. The Ministry for Pacific Peoples do not support mandatory record keeping for contact tracing purposes or use of face coverings, for the same reasons as outlined by the Ministry of Health as well as the BORA analysis provided by Crown Law. In relation to face coverings, Ministry for Pacific Peoples' opposition is mainly due to the possible requirement applying to social gatherings such as places of worship, and the disproportionate impact this requirement would therefore have on cultures who place significant importance on faith and spirituality from a cultural and social perspective. (We note it is not proposed to require face coverings at social gatherings). Ministry for Pacific Peoples is concerned that other options (other than mandatory action) to meet the overarching protection objective have not been explored and analysed in this advice.
100. The Privacy Commissioner does not support compulsory record keeping for contact tracing purposes. Imposing a mandatory requirement on individuals to record their movements would represent a significant intrusion into individual privacy rights. The Privacy Commissioner considers that the privacy implications are significant regardless of whether the individual uses the App, or provides their personal details to the business, as any compliance and enforcement action would necessarily be intrusive. The Commissioner considers there is insufficient evidence to justify this incursion.
101. The Government Chief Privacy Officer (GCPO) agrees with and supports both the Ministry of Health's and the Office of the Privacy Commissioner's opposition to the proposal on mandatory record keeping for the reasons that each party has described in this paper. The GCPO notes that there is significant risk that social licence will be eroded by enforcement actions required for mandatory use and disclosure of personal information and would support further work to look at options to improve record keeping while maintaining social licence and privacy.
102. Section 9(2)(h)

## Communications

---

103. Pending decisions on this work (this briefing and subsequent papers), clear public messaging on the new record keeping and face coverings requirements, including what is expected of individuals, will be communicated to the public and key stakeholders via official Unite Against COVID-19 channels. Communications will be tailored to specific audiences (e.g. translation of materials into nine core Pacific languages, as is currently done with UAC content) and guidance will also be provided where appropriate.
104. In addition to these general communications, the Public Service Commission will, depending on Ministerial decisions, prepare implementation guidance for public service employers that will be informed by public health guidance. This is due to the significant number of front line and public facing public service roles.