

## NEW ZEALAND, COVID-19 AND THE CONSTITUTION: AN EFFECTIVE LOCKDOWN AND MUTED RULE OF LAW CONCERNS

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*SUMMARY: I. Introduction. II. The lockdown and health orders: authority, clarity and enforcement. III. Bespoke legal framework: raw and sweeping powers? IV. Nationwide Covid-free bubble but with severe border restrictions. V. Parliamentary workarounds and some judicial disruption. VI. Treaty of Waitangi: stifled relationship with Māori. VII. Conclusion.*

### I. INTRODUCTION

New Zealand has been relatively successful in dodging the clutches of Covid-19. The country was locked down in household bubbles for 7 weeks and subject to low-level gathering restrictions for a further 3½ weeks. This tactic of ‘going hard and early’, as the Prime Minister put it, has rid the community of the virus. At the date of writing, the only Covid cases recorded since late May are those of returning New Zealanders, caught at the border by strict quarantine arrangements. Domestic life has pretty much returned to normal, without ongoing legal restriction other than at the border.

The success of this elimination strategy was no doubt due to a mix of favourable conditions, decisive leadership, strong communications, a cooperative community and uncomplicated institutional arrangements (unitary Westminster democracy, with Cabinet-led government and unicameral legislature). But an elimination strategy may still prove challenging, with many unknowns reintegrating a nationwide Covid-free bubble with the virus ravaged rest of the world.

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While the Covid response was pretty effective, New Zealand did not manage to dodge constitutional issues in its emergency response. Perennial issues arose: rule-of-law concerns, restrictions on rights, institutional decision-making challenges, enforcement discretion and so forth. However, the depth of concern about these issues was much more muted than in other countries – especially as the country quickly emerged from significant and ongoing restriction. And parliamentary and judicial processes, while attenuated for a period, continued provide oversight over the government’s response to the virus.

## II. THE LOCKDOWN AND HEALTH ORDERS: AUTHORITY, CLARITY AND ENFORCEMENT

The high-point of the response was a state-mandated lockdown, requiring people to stay isolated within their household bubbles.<sup>1</sup> The legal implementation of the lockdown was not straightforward, even if strong messaging from the Prime Minister and Director-General of Health generated powerful expectations and strong social licence for the lockdown.

The emergency power relied on was an existing and long-standing provision giving medical officers of health the power to address infectious diseases.<sup>2</sup> The Director-General, acting as medical officer of health for the entire country, issued a number of health orders. The first order closed business premises other than those essential and prohibited congregation in public without physical distancing. A second order, issued 9 days later, was more comprehensive: all people were ordered to remain at their current home or place of residence, except as permitted for (prescribed) essential personal movement. Nearly 5 weeks later the lockdown was eased slightly when a third order was issued, allowing more businesses to operate and increasing permissible personal movement. These health orders were directly enforceable by the police, with powers of arrest and prosecution for breaches.<sup>3</sup> In addition, civil defence emergency legislation gave the police a directive power, where people’s actions might contribute to the pandemic emergency – failure to do so amounting to an offence.<sup>4</sup>

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<sup>1</sup> Dean R Knight, ‘Lockdown Bubbles through Layers of Law, Discretion and Nudges’ *VerfBlog* (7 April and 3 May 2020) <[www.verfassungsblog.de](http://www.verfassungsblog.de)>.

<sup>2</sup> Health Act 1956, s 70(1).

<sup>3</sup> Health Act 1956, s 71A and 72.

<sup>4</sup> Civil Defence Emergency Management Act 2002, s 91.

This regime threw up a number of legal, institutional and constitutional issues. First, there was an ostensible gap between the government's messages about the lockdown and the hard legal rules relied on to implement them, most acutely in the first 9 days of lockdown. The behaviour expected of the community was greater than the legal rules contained in the health orders, giving rise to rule of law concerns about whether the full extent of the lockdown was legally authorised. In other words, some were worried that the government was legislating by press conference, arguing the expressive conduct – strong 'nudges' and urging of the public – breached section 1 of the Bill of Rights 1688 by suspending laws without parliamentary consent. Concern was especially heightened due to the analogue with New Zealand's most famous constitutional case, where the prime minister was chastised for suspending a superannuation scheme by press release.<sup>5</sup> However, these concerns were arguably ameliorated by their broader context and way the lockdown was enforced. If the specific rules were read in the context of the broader civil defence emergency powers then much of the gap was filled, albeit by discretionary directive powers of medical officers of health and police. As it turned out, police were quite circumspect in the early days of lockdown, using their coercive and prosecution powers sparingly (only a handful of people were prosecuted in the first 9 days, seemingly for clear breaches of the health orders). Regardless, there remains a question mark about whether the government is legally entitled to encourage certain community behaviour other than through legislation, where the expectations amount to significant restrictions on people's rights. Many, but not all, of these concerns fell away though once the more comprehensive second order was issued.

Secondly, and relatedly, there were rule of law concerns about the clarity of the precise legal obligations during the early days of lockdown. This was fuelled in part by overreliance on statements at press conferences and the sparse rules in the early days. Again, many of these concerns fell away when sharper and more comprehensive rules were issued in the second health orders, although rule ambiguity was impossible to fully shake.

Thirdly, there were doubts about whether the Director-General could legally invoke the special powers in the Health Act to implement the lockdown.<sup>6</sup> In particular, concerns were eventually raised about whether the power to 'isolate or quarantine' people could properly be used at large in

<sup>5</sup> *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

<sup>6</sup> Andrew Geddis and Claudia Geiringer, 'Is New Zealand's COVID-19 lockdown lawful?' UK Const L Blog (27 April 2020) <[www.ukconstitutionallaw.org](http://www.ukconstitutionallaw.org)>; compare Knight

relation to the entire community or whether it should be read as an individualised power. So too the power to close all premises. The government was adamant the power could be relied on but others argued the power should be read narrowly in a way that preserved individual freedoms.

After a misguided habeas corpus challenge failed,<sup>7</sup> a former legislative drafter lodged judicial review proceedings to test the legality of the lockdown, especially the power to isolate and lack of legal rules in the early days.<sup>8</sup> However, that challenge will not be determined until well after the lockdown itself has been lifted.

Fourthly, reliance on these Health Act powers raised an institutional quirk or, in the eyes of some, a constitutional conundrum. The special powers for infectious diseases were vested in medical officers of health. In this instance, the Director-General of Health – the senior health official – exercised those powers over the entire country. But the lockdown was not a creation merely of the officials; the Prime Minister and Cabinet were obviously intricately involved in its genesis, deployment and evolution – as the vast suite of proactively disclosed Cabinet papers testifies.<sup>9</sup> Significantly, before lockdown, the Prime Minister outlined an extra-legal ‘alert level framework’ which signalled to the public the prevailing pandemic conditions and associated suite of expected restrictions on day-to-day life.<sup>10</sup> The language of these four alert levels were quickly embraced by the public, adding to the lockdown’s social acceptance and degree of compliance. But, while the lockdown restrictions imposed by the Director-General reflected the Cabinet’s wishes, the power to issue health orders remained with the Director-General, not ministers. This created a some difficulties. The Director-General’s powers were legally his and direction by Cabinet would probably have been unlawful. However, Cabinet’s decision-making processes about lockdown restrictions were clearly preferable – cloaked with the democratic legitimacy that a technocratic official lacked. Hence, Cabinet and the Director-General engaged in an elaborate and delicate tango to ensure symmetry in decisions made. This virtuous charade seemed to mask what was a problematic misallocation of authority but things could easily have been different.

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and McLay, Dean R Knight and Geoff McLay, ‘Is New Zealand’s Covid-19 lockdown lawful? – an alternative view’ UK Const L Blog (11 May 2020) <[www.ukconstitutionallaw.org](http://www.ukconstitutionallaw.org)>.

<sup>7</sup> *Nottingham v Ardern* [2020] NZCA 144.

<sup>8</sup> *Borrowdale v Director-General of Health* (CIV-2020-485-194; heard 27-29 July 2020).

<sup>9</sup> New Zealand Government, ‘Unite Against Covid-19: Proactive release’ <[www.covid19.govt.nz](http://www.covid19.govt.nz)>.

<sup>10</sup> New Zealand Government, ‘Unite Against Covid-19: Alert system overview’ <[www.covid19.govt.nz](http://www.covid19.govt.nz)>.

Fifthly, it goes without saying that the lockdown came with deep human rights implications. But, as subordinate instruments, health orders could be quashed if they unduly restricted rights. The orders *prima facie* restricted the rights to movement and association.<sup>11</sup> However, the government took the view that such restrictions were proportionate – and thus were justified and lawful restrictions.<sup>12</sup> There was no widespread or serious momentum to second guess that broad assessment, although some rights dimensions are in play in the judicial review proceedings mentioned earlier. However, some restrictions on the fringes of the lockdown regime, such as restrictions on outdoor activities due to high risk of accident, might have been vulnerable if tested.

Finally, the even-handedness and fairness of police enforcement continued to be a lurking concern. The universal nature of the restrictions and heavy reliance on front-line police discretion creates obvious conditions for discriminatory enforcement. Māori especially have been subject to heavy and undue police attention for years; early data suggests that during the lockdown Māori were again exposed to more frequent coercive powers than others but the extent of this is yet to be unpicked.

### III. BESPOKE LEGAL FRAMEWORK: RAW AND SWEEPING POWERS?

The lockdown was lifted in mid-May. A bespoke legal framework for managing the virus and imposing ongoing restrictions was then passed by Parliament: the Covid-19 Public Health Measures Act 2020. While restrictions continued to be implemented via subordinate health orders, the new regime is much improved, more sophisticated and more democratic than its Health Act predecessor. Authority to issue the health orders was vested in the Minister of Health but after taking into account views of other ministers and expert officials, and subject to a detailed and constraining purpose statement. Post-issue oversight is also layered on to ameliorate potential abuse or overreach in the issue of health orders (confirmation by Parliament; provision for parliamentary disallowance; exposure to invalidity for inconsistency with Bill of Rights Act). The bespoke legislation is also subject to a sunset provision, albeit renewable by resolution of Parliament (every 90 days, up to two years).

Despite all this, the emergency powers still look ugly – raw and potentially sweeping. In order to prevent the risk of the outbreak or spread of

<sup>11</sup> New Zealand Bill of Rights Act 1990, ss 18 and 19.

<sup>12</sup> New Zealand Bill of Rights Act 1990, s 5 (justified limitations).

the virus, orders can require persons to refrain from or take ‘any specified actions’ or comply with ‘any measures’.<sup>13</sup> This includes, without limitation, isolation, quarantine, restricted movement, physical distancing, medical testing, restricted business activities and contact tracing. Spelt out in this way, and against the backdrop of a diminishing threat from the virus, greater public nervousness about the emergency powers was evident. This was not helped by the rushed enactment of the legislation – passed in two days, with no select committee scrutiny or public consultation.

Once passed, a new alert level 2 health order was quickly issued to succeed the lockdown restrictions. The new order encouraged physical distancing, restricted the size of gatherings (initially up to 10 people comingling but subsequently relaxed to 100 people) and mandated contact tracing measures for hospitality businesses. But otherwise day-to-day activities resumed. The gathering-size restrictions caused some concern, especially for churches – some of which complained their right to worship was unduly fettered.<sup>14</sup>

#### IV. NATIONWIDE COVID-FREE BUBBLE BUT WITH SEVERE BORDER RESTRICTIONS

In early June, as the then last active case of the virus recovered, the country moved to alert level 1 – with all day-to-day restrictions lifted. With a nationwide virus-free bubble, attention moved back to the border. Since the middle of March, only citizens and permanent residents were allowed to return to New Zealand, along with a handful others granted special permission. Health orders initially required returnees to self-isolate. However, that was ramped up to require quarantine for a fortnight at state-managed facilities (ie, otherwise empty hotels), along with requirements for medical testing. Some provision was made for compassionate exemptions for those with dying relatives or family funerals. The numbers of returnees proved hefty and logistically tricky. The number in quarantine quickly rose to the size of a small town and the hotels are now full. The government, together with airlines, are managing incoming passenger loads to ensure quarantine capacity is matched.

The administration of people in quarantine has not been trouble-free. A few momentarily escaped and some on compassionate exemptions failed

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<sup>13</sup> Covid-19 Public Health Measures Act 2020, s 11.

<sup>14</sup> New Zealand Bill of Rights Act 1990, s 15.

to comply with agreed safety plans. The government's response was heavier restriction, increased policing and temporary suspension of compassionate exemptions. Facing a spiralling accommodation bill, a cost-recovery framework has been proposed. However, charges are expected to only apply to those making temporary trips abroad or returning for short visits; citizens and permanent residents relocating back to New Zealand or with compassionate circumstances will not.

The quarantine regime has provided to be a moving feast, throwing up a number of legal and constitutional issues. First, some decision-making about exemptions was poor. Early on officials were chastised by a judge for applying criteria other than those required in the health order and refusing exemptions.<sup>15</sup> Later, when exemptions were suspended, another judge warned officials that a blanket suspension amounted to abdication of discretions.<sup>16</sup> More robust processes have now been implemented.

Secondly, questions have been raised about whether the requirement for medical testing, as part of the quarantine requirement, might breach the right to refuse medical treatment.<sup>17</sup> The question is complicated by the way the right is framed (treatment vs examination) and the obvious public benefit in any justificatory calculus. The instinct of medical officials has been to not push the point. Refusal has been met by extending the time of quarantine, not coercion, even though court orders seem possible under the existing infectious diseases regime.<sup>18</sup>

Thirdly, the management of quarantine capacity – including charging those quarantined for the cost of accommodation – has raised as yet unsolved human rights questions. New Zealand citizens have a cherished and fundamental right to enter New Zealand.<sup>19</sup> The various border measures place an indirect burden on the ability of citizens to return and there is a question about whether the measures are legal. The operation of a general system of quarantine is undoubtedly justified in the light of the response to the virus and thus lawful; however, the management of passenger flows and charges raise trickier questions about whether they burden the right too much and whether the logistical and fiscal considerations justify such burdens. Right-consistency of these aspects may depend more on matters of design and operation.

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<sup>15</sup> *Christiansen v Director-General of Health* [2020] NZHC 887.

<sup>16</sup> *Hattie v Attorney-General* (CIV-2020-404-303; Minute of Muir J; 8 July 2020).

<sup>17</sup> New Zealand Bill of Rights Act 1990, s 11.

<sup>18</sup> Health Act 1956, Part 3A.

<sup>19</sup> New Zealand Bill of Rights Act, s 18(2) and Immigration Act, s 13(1).

## V. PARLIAMENTARY WORKAROUNDS AND SOME JUDICIAL DISRUPTION

The impact of the virus and lockdown on the operation of Parliament was relatively modest and disruption of court business temporary.

Parliament adjourned for just over a month during the level 4 lockdown. However, select committees and other parliamentary processes continued, through Zoom and other electronic means. Most significantly, an Epidemic Response committee was established to scrutinise the government's action. In many respects, this committee became New Zealand's 'parliament-in-miniature' during the lockdown. Chaired by the leader of the opposition and with an opposition majority, it was given plenary powers to inquire into the government's response to Covid-19. During the lockdown, it met three mornings a week – questioning key ministers and officials, as well as hearing from experts and those adversely affected. The committee was pretty effective, especially in its first few weeks of operation during the lockdown. It pressed on many of the operational challenges and soft points of the lockdown, playing an important agenda-setting role in political discourse. But its proceedings eventually became more partisan and little less constructive once the height of the emergency passed.

When Parliament returned, proxy voting was relaxed, reducing the number of MPs when sitting and voting. Parliament initially operated with limited attendance (about a fifth of MPs present) and physical distancing. After a couple of weeks, usual attendance and operation resumed. With the return of Parliament's usual accountability proceedings, the Epidemic Response committee was also wound up.

Parliament passed a number of Covid-related measures but not without the odd hiccup. The need for swift action placed pressure on the policy- and law-making processes. For example, in one instance, an incorrect version of a bill was passed into law, through all three readings in one day, before anyone noticed. The passing of the Covid-19 Public Health Response Act 2020 in two days, without select committee scrutiny and public consultation, was also rightly criticised. However, in a novel and welcome first, the Act was immediately sent to select committee for post-enactment review in order to ameliorate the lack during its passage.<sup>20</sup>

The business of the courts was severely during the lockdown and the consequential backlog continues to be a concern. The courts did their best

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<sup>20</sup> Finance and Expenditure Committee, *Inquiry into the operation of the COVID-19 Public Health Response Act 2020* (July 2020).



to continue to operate during lockdown, using remote audio-visual hearings and occasional in-person hearings. During the level 4 lockdown, only priority proceedings (those affecting the liberty, personal safety or wellbeing of individuals, along with other time-critical proceedings) were heard; as restrictions loosened, more proceedings were able to take place. Jury trials were suspended once lockdown kicked in – and have only recently recommenced 4½ months on. The backlog of jury cases is causing concerning delays.

#### VI. TREATY OF WAITANGI: STIFLED RELATIONSHIP WITH MĀORI

The story of New Zealand's response to Covid, while effective, lacked an important indigenous thread and voice, especially concerning because the nation was founded on the premise of an ongoing relationship between the government and Māori under the Treaty of Waitangi. There was little obvious engagement with Māori on the emergency response – even though the government expressed worries about the likely disproportionate effect of the virus on Māori and their health. Some particular flashpoints were symptomatic (propriety of Māori-managed roadblocks preventing entry into tribal areas; gathering restrictions affecting tangihanga (funerals); police entry powers onto marae). However, more concerning was Māori felt shut out of the design of health and lockdown measures – raising constitutional questions about compliance with partnership obligations under the Treaty of Waitangi.

#### VII. CONCLUSION

New Zealand's response to Covid-19 has proved relatively effective, so far eliminating the virus. Constitutional concerns have not been absent but been pretty muted, especially relative to problems elsewhere in the world. The short-and-sharp period of lockdown and restrictions has meant normal day-to-day life has returned. However, ongoing management of the border will no doubt continue to be challenging.