

# Lockdown Bubbles through Layers of Law, Discretion and Nudges – New Zealand

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2020-04-07T09:00:00

## Introduction

New Zealand's governmental response to Covid-19 has been, so far, dramatic and legally curious. As a South Pacific island nation, Covid-19 was late to infiltrate New Zealand, allowing the government time to shape its response in the light of experiences elsewhere. At the first sign of community transmission, the government moved to lockdown the country – shutting the border, keeping people in their household 'bubbles' and closing businesses other than those deemed essential. To effect the lockdown, the government relied on some ordinary legal powers and a handful of reserve emergency powers, supplemented by strong messaging from a charismatic prime minister. While providing a stopgap solution for the sudden move, the current legal framework is bit soft and fragile in places. It seems likely the government will move to sharpen and fortify the legal basis for the lockdown and put in place a more bespoke and enduring solution. [See Postscript for developments]

## COVID-19: A Quickly Escalating Response

The early phases of the response involved a number of specific travel restrictions, self-isolation for arrivals and cancellation of a number of public events. The borders were then soon closed, except for returning citizens and permanent residents. Importantly, the government then rolled out a [framework of alert levels](#) – non-statutory guidance on the range of escalating measures that could be expected for different risk levels (prepare, reduce, restrict or eliminate). In a rare direct address to the nation, the Prime Minister, Jacinda Ardern, announced the framework on a Saturday, placing the country at level 2 (eg gatherings banned; high risk over 70s told to self-isolate; people asked to avoid non-essential travel). At that point there were just over 50 diagnosed cases of Covid-19, all then related to international travel. But, on the following Monday, following identification of the first instance of community transmission, the Prime Minister raised the risk level to level 3 (eg schools, universities and public facilities closed; businesses asked to work from home). She also announced that a level 4 lockdown would apply within 48 hrs, as from midnight on 25 March 2020. People were instructed to stay at home in their household bubble, other than for matters essential. New Zealand remains at that level, in an effort to contain and eliminate the virus.

# The Lockdown: Interwoven Layers of Law, Discretion and Nudges

The level 4 lockdown was a sudden and emphatic move. And it was effected by interwoven layers of various ordinary and emergency powers.

An *epidemic notice* was issued under the [Epidemic Preparedness Act 2006](#). This declaration of an epidemic has a number of consequences: (a) medical officers of health and constables are empowered to use various special emergency powers; (b) ministers can activate (and have activated) a number of specific dormant emergency provisions dotted throughout social security, immigration, penal and parole legislation; and (c) ministers may issue notices to ‘modify’ (viz relax) requirements or restrictions in legislation (a Henry VIII power so far only invoked once, perhaps understandably given a tradition wary of their use, to make a [minor modification](#) to a social security application process).

A *state of national emergency* under the [Civil Defence Emergency Management Act 2002](#) has been declared. This allows the civil defence director to coordinate the national response, as well as allowing her to deploy various emergency direction and requisition powers (as yet barely used). This state of emergency condition needs to be renewed every 7 days but has been renewed once already and is expected to be rolled over repeatedly for a significant period.

The heart of the lockdown itself was effected by an old-fashioned power vested in medical officers of health under the *public health legislation*: a broad power to order various actions to combat infectious diseases. The director-general of health, acting as the medical officer of health for all regions in the country, issued an [order under section 70\(1\)\(m\)](#) of the [Health Act 1956](#) closing premises and prohibiting congregation. But the order contained express exceptions. Dwelling-houses, premises used for [essential businesses \(as per an evolving list specified on a department’s website\)](#) and key civic institutions like the courts are excluded. So, too, was the ban on congregation glossed – only congregation without ‘physical distancing’ (as per health advice, being at least 2 metres away or being within 2 metres for less than 15 minutes) is prohibited. Thus, while promulgating wide-ranging bans, the order did not purport to impose the full lockdown; the hard legal rules, enforceable by arrest and prosecution, only provided one layer of the level 4 lockdown.

In addition to enforcing the section 70 order, the police also possess *independent constabulary powers* under the Health Act (s 71A) and Civil Defence Emergency Management Act (s 91) to assist, request and direct. Importantly, constables can direct people to ‘stop any activity that may cause or substantially contribute to an emergency’ or ‘request any person ... to take any action to prevent or limit the extent of the emergency’ (the former, at least, being enforceable by arrest and prosecution). The effect of these powers is to charge the front-line constabulary with significant official discretion to police the level 4 lockdown, by directing and encouraging individuals and groups to desist from doing things in public places that may increase the virus’ risk of transmission. How this has played out in practice

is unclear. It is suspected that constables are using the (non-statutory) guidance from the Prime Minister and other officials about acceptable activities to colour this discretion, at least when using their request power and, perhaps, their direction power. However, it is understood that guidance to constables has counselled against use of the direction power unless there is a heightened and direct risk. And efforts to get clarity about the police operational instructions and practice have so far failed.

The final layer in the lockdown regime – and perhaps the most important one – is a non-legal one. Beyond the few hard rules and front-line constabulary discretionary power, much of the force of the lockdown has come from the *Prime Minister's strong signals, guidance and nudges*. In other words, the Prime Minister, Jacinda Ardern, has been repeatedly urging the public to do the right thing and to stay in their bubbles, reinforced by key emergency officials. In doing so, she has generated strong social norms of behaviour, reverberating throughout the community – on official channels such as the government [Covid-19 website](#), a WhatsApp channel, television and radio broadcasts and informal interactions between folk in the community. As a measure of the force of expectation amongst the community, when a police webform allowing concerns about people breaching the lockdown was launched, over 4,000 complaints were lodged within the first 24 hours.

These interwoven layers seem (just) adequate to effect the lockdown but, as explained below, are not without some difficulties and challenges.

## **Civic Institutions: Swift and Pragmatic Reconfiguration**

At the same time the country was transitioning to level 4 lockdown, Parliament moved quickly to pass some response measures and to preserve its ability to support and scrutinise the executive's response. Just before the lockdown, parliamentarians moved quickly to pass – unanimously, in only a couple of hours – a number of immediate measures: (a) [a business and welfare support package](#) of \$12B; (b) [an imprest supply bill](#) authorising additional government spending of \$52B; and (c) a handful of modest amendments to other legislation (tenancy, local government, education and official information regimes) in order to address some pressing issues caused by Covid-19 disruption. It also introduced some [sessional orders](#), mainly providing for necessary electronic administration and liberalising the proxy voting rule in order to reduce the number of members of Parliament needed in the House when sitting. Then the House of Representatives adjourned for just over a month.

Select committees and other parliamentary processes continue. Most significantly, an [Epidemic Response committee](#) was established to scrutinise the government's action in lieu of the House's usual accountability mechanisms. The select committee meets by Zoom (broadcast publicly), is chaired by the leader of the opposition and has an opposition majority amongst its 11 members. It is charged with plenary powers to inquire into the government's response to Covid-19; it has already questioned key ministers and officials, as well as hearing from experts. While just

kicking off its business, this committee looks to be a pragmatic and constructive way to ensure accountability in the absence of the House sitting. One concern that remains, though, is the inability of the committee to trigger the disallowance of delegated legislation and instruments with significant legislative effect – without the House being recalled by the Speaker on advice of the Prime Minister – should that prove necessary.

The judiciary continues to operate, with the [Chief Justice reiterating their essential role](#) in upholding the rule of law, fair trial rights and civil liberties. Remote hearings are now the predominate means of hearing, although in-person attendance may still be required in some cases. During the level 4 lockdown, only priority proceedings (those affecting the liberty, personal safety or wellbeing of individuals, along with other time-critical proceedings) are being heard.

## **Issues, Challenges and Possible Future Developments**

New Zealand is in the early days of its response – culminating in the recent swift move to lockdown the country in their household bubbles, save for essential business and chores. But the lockdown and use of layers of law, discretion and nudges raises a number of issues.

First, there is an inevitable question about the legality and legitimacy of a lockdown that curtails the liberty and freedoms of the public, especially given the various rights protected by the [New Zealand Bill of Rights Act 1990](#) (a statutory human rights instrument without superior constitutional status). To date, this question only has limited traction in public discourse – concerns are more about the mode of implementation rather than the lockdown per se. In principle, the dramatic lockdown is probably justifiable – even though an extreme curtailment of civil liberties – on the basis that it is a proportionate response to a grave risk. That calculus depends, of course, on a complex assessment of factual matters, risk assessment, viable alternatives and so forth – but it is sobering that the Prime Minister announced that modelling of experts suggested tens of thousands of New Zealanders could die if the virus was not contained.

Secondly, the legal and other measures to instigate the lockdown remain a work-in-progress. The interwoven layers seem (just) adequate to effect the lockdown but are beset by tensions and softness that could be exposed the longer the lockdown continues. The paucity of formally-mandated rules and heavy reliance on constabulary discretion raises particular and powerful rule of law concerns. These concerns are especially acute in the light of patterns of racial bias in policing. However, to date, the police seem not to be adopting a wholesale, coercive approach – instead favouring education and encouragement. So far, only a handful of people have been arrested for breaching lockdown rules. But that might be, too, a symptom of the rules–guidance–enforcement connections being a bit flimsy.

Thirdly, the signals and propaganda coming from the Prime Minister and key officials have been instrumental in the lockdown but are not without problems. Prime Minister

Ardern is renowned for her leadership, communication and compassion in times of crisis. Her repeated pleas – ‘be kind, stay home, save lives’ – resonate amongst the public and help with the success of the lockdown. However, there is real risk that her messages (including quite specific pronouncements about behaviour and activities that acceptable or not) are perceived by both the public and constables as amounting to ‘rules’ – and rules capable of being legally enforced. This gap between moral-suasion rules and coercive rules is troubling. There is no difficulty, on one view, with the authority of a government agent to give guidance and advice. But it is deeply concerning if that guidance crystallises as de facto legal requirements, enforced by others as rules. This looseness may also compromise the requirement in the Bill of Rights Act that limits on rights be ‘prescribed by law’, perhaps affecting the justifiability of the lockdown in human rights terms.

Fourthly, there are potential fishhooks in the specification of ‘essential business’ that may continue to operate. As mentioned, this class of businesses is specified on a department website and continues to evolve in the light of development (and contestation). While this key definitional gateway has yet to be litigated, there are obvious challenges arising from its rough-and-ready and evolving character. A simple permitting regime, with in-built right of review, would seem to be much more durable, if a discretionary and dynamic approach is desired.

Finally, there is a real issue about whether the suite of emergency legislation is fit-for-purpose for an epidemic of this kind. While the civil defence legislation is designed to address ‘all hazards’, much of its character contemplates emergencies of a natural disaster kind, such as earthquakes and floods regularly encountered in New Zealand. So too the health legislation which was drafted in an earlier era for infectious diseases with profiles different to Covid-19. Thus, it seems likely the current legal response is a stopgap only – it is expected that the government will soon move to sharpen the rules and fortify the basis for the lockdown. And that would be welcomed. This crisis demands a legal regime that squarely addresses the types of risk in play and fairly navigates the rights and liberties engaged by a lockdown. The immediate question is whether the next phase of legal response is best developed by the executive through emergency powers, such as through regulations or Henry VIII modifications of primary legislation, or whether it might be better for the House of Representatives is recalled to allow for the passing of a bespoke legal regime to supplement or replace the current emergency powers. There are obvious advantages in adopting the latter, if any new regime is to have the legitimacy – and perhaps durability – it needs.

## **Conclusion**

The interwoven layers forming the basis for the lockdown and heavy reliance on pleas for people to do the right thing says something about the legal and civic culture in New Zealand. Legal minimalism and pragmatism, building on familiar mechanisms. High trust in those governing, complemented by a strong belief by those governors in the need for institutional legitimacy and democratic accountability. And a tight-knit sense of community and solidarity by the citizenry.

DK (3 April 2020)

## Postscript

After 10 days in level 4 lockdown, the director-general of health moved to fortify the rules by issuing an [additional section 70 order](#). The order requires all people to isolate themselves in their household bubbles, as well as prescribing permissible essential movement (for essential business, limited recreation, shared bubble arrangements, etc). Thus, this new order addresses many of the concerns discussed above and allows constables to directly enforce these sharpened rules; the newly-appointed police commissioner also released updated [police operational instructions](#).  
DK (5 April 2020)

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