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*One of the challenges of a democratic government is making sure that even in the midst of emergencies and passions, we make sure that rule of law and the basic precepts of justice and liberty prevail.<sup>1</sup>*

**Barack Obama**

## 1. Introduction

Several legal scholars have raised concerns about the legality of the emergency powers during the Covid-19 crisis exercised by Government officials – specifically, the Director General of Health, Dr Ashley Bloomfield’s orders under the Health Act 1956 sending the country into lockdown on 25 March.<sup>2</sup>

The courts will decide the lawfulness of Bloomfield’s actions now that they have been challenged by former Parliamentary Counsel (and legal textbook author) Andrew Borrowdale (the Borrowdale proceedings).<sup>3</sup> Yet the Twittersphere is asking why any of this matters, with many statements like: “So Jacinda Ardern saved my life illegally. Like I should care.”

They should care. Questions about the lawfulness of government action raise a fundamental constitutional concept called the “rule of law.”

The rule of law forms a significant part of New Zealand’s unwritten constitution. Any power exercised by the Government must be based on legal authority. It means everyone is subject to the law: both the public and politicians alike.

Arguing about the rule of law might seem a little abstract, but the rule of law matters. To quote US president Dwight D Eisenhower, “The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.”

In New Zealand, the term is typically used to contrast New Zealand’s Westminster-style democracy with the political system that allowed English kings to rule by royal prerogative (the divine right of kings).

Leaving talk of kings aside, Kiwis should be concerned if the Government exercised its powers to fight Covid-19 unlawfully. First, if the Ardern Government acted unlawfully this sets a dangerous precedent. If one Government side-steps the law, what will stop the next one? And, unfortunately, the motives of future Governments might not be so benign. Continuing with the US President theme, President Barack Obama’s unprecedented use of executive orders paved the way for President Donald Trump to do likewise.<sup>4</sup> Were it not for

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<sup>1</sup> <https://obamawhitehouse.archives.gov/the-press-office/2016/07/22/remarks-president-obama-and-president-pena-nieto-mexico-joint-press>

<sup>2</sup> See, for example, <https://ukconstitutionalaw.org/2020/04/27/andrew-geddis-and-claudia-geiringer-is-new-zealands-covid-19-lockdown-lawful/>

<sup>3</sup> <https://twitter.com/drdeanknight/status/1257980116895854594>

<sup>4</sup> [https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?\\_r=0](https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?_r=0)  
<https://fortune.com/2017/01/18/obama-trump-abuse-executive-powers-presidency/>

Obama's precedent, Trump may have felt more constrained in relying on executive orders to bypass Congress. A bad precedent paves the way for the abuse of power by others.

The extraordinary nature of the powers exercised by the Government during the lockdown is also worrying. The Alert Level orders – particularly at Alert Level 4 – deprived all Kiwis of their most fundamental freedoms to visit friends and family (including those unwell or dying), to swim or surf at the beach and to perform paid work.

These restrictions caused immeasurable hardship. While they also avoided great suffering, Kiwis should be able to rely on the Government to restrict their freedoms lawfully.

## 2. Extraordinary powers for Alert Level 3 and 4 lockdowns

Other countries, including the United Kingdom, passed new laws to enable their Covid-19 lockdowns.<sup>5</sup> For New Zealand's Alert Level 3 and 4 lockdowns, the Government relied on existing legislation, namely, the Health Act 1956. Only later did Parliament pass new powers to enforce the lockdown rules for Alert Level 2.<sup>6</sup>

Section 70(1) of the Health Act gives medical officers of health, including the Director General of Health, wide ranging powers to help prevent the outbreak or spread of infectious diseases. The powers are set out in subparagraphs (a) – (n) of section 70(1), and include the powers:

- to require persons or places to be “isolated, quarantined or disinfected” (subparagraph (f)); and
- to make an order (that must be published or broadcasted) closing all premises of “any stated kind or description” and/or forbidding people from congregating in outdoor places of amusement or recreation “of any stated kind or description” (subparagraph (m)).

These powers only come into force if the Minister of Health says so, in a state of emergency or while an epidemic notice has been issued under the Epidemic Preparedness Act 2006.

Under section 72 of the Health Act, failure to comply with a section 70(1) notice is an offence punishable on conviction to imprisonment and Police can enforce compliance.

New Zealand's Alert Level 4 lockdown, introduced on 26 March, was implemented by the Government both declaring a state of emergency and issuing an epidemic notice, and by the Director General of Health exercising – or at least purporting to exercise – his powers under section 70(1) of the Health Act.<sup>7</sup>

The Director General's first notice on March 25 relied on section 70(1)(m) to:

- a) close all non-residential premises except for those expressly exempted; and
- b) to forbid people to congregate “in outdoor places of amusement or recreation of any kind or description” unless they maintained physical distancing of two metres from each other.

The “exempted premises” included Government offices, courtrooms and prisons along with any space occupied by “essential” businesses. Rather than specify the essential businesses, the notice referred to the “Essential Services” list on the Government's covid19.govt.nz website run by the Ministry of Business, Innovation and Employment.<sup>8</sup>

<sup>5</sup> The Coronavirus Act 2020. <http://www.legislation.gov.uk/ukpga/2020/7/contents>

<sup>6</sup> Public Health Response Act 2020.

<sup>7</sup> [https://www.health.govt.nz/system/files/documents/pages/covid-19-section\\_701m\\_order\\_25\\_march\\_2020.pdf](https://www.health.govt.nz/system/files/documents/pages/covid-19-section_701m_order_25_march_2020.pdf)

<sup>8</sup> <https://covid19.govt.nz/businesses-and-employees/businesses-and-services/essential-businesses-and-services/>

While the first notice was extremely broad and applied to all premises and all persons throughout New Zealand, the Government's statements about the restrictions applying at Alert Level 4 were expressed even more broadly. These restrictions were presented in the first instance by the Prime Minister and then set out on the Government's covid19.govt.nz website. The restrictions directed New Zealanders to "stay at home in their bubbles" and:

- not to visit others or receive visitors;
- to go outside only for only limited purposes; and
- not to travel beyond their immediate neighbourhoods except for essential services.<sup>9</sup>

None of these restrictions even arguably falls within the first notice's terms prohibiting non-essential premises from opening or people "congregating."

Because of these shortcomings, a week later on 3 April the Director General introduced a second notice, this time relying on subparagraph (f) of section 70(1) of the Health Act.<sup>10</sup> This new notice required all New Zealanders "to be isolated or quarantined" at their homes except as permitted for "essential personal movement." Essential personal movement included:

- accessing an essential business;
- providing an essential business; and
- leaving home for exercise or recreation in an outdoor place close to home – but not water-based activities like swimming or surfing, or hunting or camping activities that might expose participants to danger.

These two notices became the basis for Police enforcement of the Alert Level 4 lockdown.<sup>11</sup>

### 3. What is wrong with the notices?

Critics of the Government's actions identified a surprising number of flaws with the notices.

#### ***Scope of the first notice***

The first and most obvious legal criticism, at least for the first week of the lockdown, was the insufficient scope of the first health notice to support the breadth of the restrictions announced by the Prime Minister on 24 March. The restrictions went far beyond the first notice's orders, closing businesses and stopping people from grouping together.

#### ***Legality of the first notice closing premises and prohibiting congregation***

Legal academics and the Borrowdale proceedings also question the legality of the first notice under several principal grounds:

- a) First, although section 70(1)(m) permits a medical officer to close "all premises ... of any stated kind or description," this does not permit the Director General to close all premises of every description (except those necessary for essential business).<sup>12</sup>

<sup>9</sup> <https://www.beehive.govt.nz/speech/prime-minister%E2%80%99s-statement-state-national-emergency-and-epidemic-notice> and <https://covid19.govt.nz/latest-updates/update-from-prime-minister-jacinda-ardern-240320/transcript-of-prime-ministers-media-update-24-march-2020/>

<sup>10</sup> <https://covid19.govt.nz/assets/resources/legislation-and-key-documents/COVID-19-Section-701f-Notice-to-all-persons-in-New-Zealand-3-April-2020.PDF>

<sup>11</sup> <https://www.police.govt.nz/sites/default/files/publications/operational-policing-guidelines-04-04-2020.pdf>

<sup>12</sup> <https://ukconstitutionalaw.org/2020/04/27/andrew-geddis-and-claudia-geiringer-is-new-zealands-covid-19-lockdown-lawful/> and <https://twitter.com/drdeanknight/status/1257980116895854594> paragraph 17.1(a).

- b) Second, in defining “essential businesses” by referring to an MBIE list, they claim the Director General unlawfully delegated the power to determine what premises were required by the notice to close.<sup>13</sup>
- c) Third, they claim that although section 70(1)(m) permits a medical officer to forbid people from congregating in “outdoor places of amusement of recreation ... of any stated kind or description,” this did not permit the Director General to stop people from gathering in all outdoor places of amusement of recreation.<sup>14</sup>

### ***Legality of the second notice quarantining or isolating the entire population***

The alleged grounds of illegality of the second notice are similar, though perhaps stronger. While section 70(1)(f) permits a medical officer to require “any persons ... to be isolated, quarantined or disinfected,” it does not permit an order isolating and quarantining all persons.

Indeed, unlike subsection (m), subsection (f) does not even refer to the making of an “order.” Instead it says a medical officer of health may “require” persons to be isolated, quarantined, etc. The claim is that the section permits the isolation, quarantining or disinfecting of potentially infected persons from the rest of the population – not of the entire population.

### ***Questions about the role of Cabinet***

Most New Zealanders will be under the impression that the decisions to send the country into lockdown – and to take it out – were political decisions made by the Prime Minister and her Cabinet. Yet, the Health Act clearly shows these powers may only be exercised by medical officers of health, not the Cabinet.

While the Health Act notices were in fact issued by the “chief” medical officer of health – the Director-General – if he was acting on the instruction of Cabinet he would have been acting unlawfully. The powers are his to exercise, not the politicians’.

Though the Borrowdale proceedings do not raise this point, Andrew Geddis and Claudia Geiringer question if Cabinet’s involvement in the Alert Level process exposes the Director-General to claims he acted unlawfully under the dictation of Cabinet in making his various orders.<sup>15</sup>

## **4. Do the Government’s actions raise rule of law concerns?**

What should be made of all of this? Especially when:

- a) The Alert Level 4 lockdown had enormous public support and at the time of writing appears to have successfully eradicated the coronavirus; and
- b) Academics such as Auckland Law School’s Edward Willis present contrary views to those challenging the lawfulness of the Government’s actions.<sup>16</sup> These academics point to the plain meaning of the statutory language in the Health Act referring to “isolating or quarantining “persons,” which is what the notices did (or at least the second of them).

<sup>13</sup> <https://ukconstitutionallaw.org/2020/04/27/andrew-geddis-and-claudia-geiringer-is-new-zealands-covid-19-lockdown-lawful/> 4 and <https://twitter.com/drdeanknight/status/1257980116895854594> paragraph 17.2.

<sup>14</sup> <https://ukconstitutionallaw.org/2020/04/27/andrew-geddis-and-claudia-geiringer-is-new-zealands-covid-19-lockdown-lawful/> 4 and <https://twitter.com/drdeanknight/status/1257980116895854594> paragraph 17.4.

<sup>15</sup> <https://ukconstitutionallaw.org/2020/04/27/andrew-geddis-and-claudia-geiringer-is-new-zealands-covid-19-lockdown-lawful/> 4

<sup>16</sup> <https://twitter.com/edwardmwillis/status/1258980814617862149>

Not unexpectedly, Attorney General David Parker has also responded to the various allegations of unlawfulness when, in effect, he interviewed himself on the topic in a speech broadcast on Facebook on 8 May entitled “New Zealand’s Covid-19 response – legal underpinnings and legal privilege.”<sup>17</sup>

Parker’s use of the term “legal privilege” relates to attempts by Parliament’s Epidemic Response Committee to see the Crown’s legal advice on the lawfulness of the lockdown. Whether the Attorney General should provide this advice is beyond the scope of this note. But Parker’s comments affirm the issues raised about the lockdown’s legal validity and about the rule of law are relevant.

Parker prefaced his comments saying:

*“I emphasise at the outset that I am satisfied the Director-General’s orders were lawfully made. Further, there has always been a lawful basis for enforcement action by Police, under both the Health Act and Civil Defence Emergency Management Act 2002.”*<sup>18</sup>

A court will determine whether Parker is justified in his view that the two notices issued by the Director-General were lawfully made – and more on this shortly.

But regardless of the validity of the notices, the second sentence of quotation from Parker’s speech is too broad. It is clear that the scope of the first notice was not wide enough to support the conditions of the Alert Level 4 lockdown. The second notice issued a week later suggests the Government must have recognised this.

This means that during the first week of Alert Level 4 there was no “lawful basis for enforcement action by the Police” – at least not against folk who did things prohibited by the Alert Level 4 rules announced by the Prime Minister, but not by the first Health Act notice. These activities included outdoor recreational pursuits that did not involve congregating, including swimming or surfing at the beach, hunting, or visiting individual friends or relatives.

As Attorney General, Parker is tasked with ensuring the Government complies with the rule of law.<sup>19</sup> Indeed, the fundamental responsibility of the Attorney-General, when acting as Law Officer, is to act in the public interest.<sup>20</sup> His refusal to acknowledge the shortcomings of the first notice harms public confidence in the rule of law and the administration of justice far more than admitting the Government had not lined up all its ducks before pulling the trigger on the Alert Level 4 restrictions.

Returning to the broader doubts hanging over the validity of the Government’s actions noted above, it is at least clear that the legal basis on which the Government proceeded was messy. When Alert Level 4 was introduced, New Zealanders were subjected to vague requirements backed up by the threat of enforcement without a clear legal underpinning. In the words of former Attorney General Christopher Finlayson:<sup>21</sup>

*“How many of us were ever really sure of the precise requirements of “staying local”? How many of us knew that, when we were told we could travel within our regions for recreation at level three, the destination also had to be “reasonably accessible” from our houses? How many of us knew at any point what the Police could or could not ask us to do?”*

*“Many restrictions imposed on New Zealanders were announced by the Prime Minister in press conferences and were often inconsistently communicated across the government and*

<sup>17</sup> <https://www.beehive.govt.nz/minister/hon-david-parker>

<sup>18</sup> <https://www.beehive.govt.nz/minister/hon-david-parker> 3.

<sup>19</sup> Cabinet Office, *Cabinet Manual 2017* [4.3].

<sup>20</sup> Crown Law Office, *Briefing to the incoming Attorney-General*, Wellington, October 2017, 3. <https://www.crownlaw.govt.nz/assets/Uploads/BIM-2017.pdf>

<sup>21</sup> <https://www.stuff.co.nz/national/health/coronavirus/121510599/coronavirus-lockdown-was-vague-and-threatening-says-former-attorneygeneral>

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*Police. If New Zealanders wanted to find the actual legal authority for many of these rules – particularly in the early days of level four – they would have been searching for a long time.”*

Of course, the Government can be forgiven for not having all its i's dotted and t's crossed in an emergency. Yet, if a court rules the legal basis for the lockdown was flawed, the country should not be too forgiving. This emergency did not spring up unannounced. Other nations had enforced lockdowns long before 26 March.<sup>22</sup> The Government had time to get its legal house in order by passing special legislation to deal with the particular restrictions to combat Covid-19.

Unsurprisingly, that is precisely what the Government did last week before downgrading from Alert Level 3 to Alert Level 2. On 13 May, Parliament passed the Covid-19 Public Health Act 2020 (C19 Act).<sup>23</sup> The C19 Act permits a range of orders to restrict both business operations and how people may interact at Alert Level 2 – and how to enforce them. The Act also returns the decision-making powers to politicians ensuring the person exercising the powers is directly accountable to the electorate.

The C19 Act comes with a new set of concerns – including the haste with which it was introduced, the breadth of the powers it confers on the police and other enforcement officers and its extended duration. However, the C19 Act at least provides a solid legal foundation for the extraordinary restrictions all New Zealanders continue to face, even at Alert Level 2.

Given that the Government has a high level of public support for its lockdown, perhaps ordinary Kiwis will not be troubled by all this.

However, public support and lawfulness are not the same thing. New Zealanders should be concerned if the Government may have acted unlawfully. It should make no difference that the Government has popular support. Indeed, popular (and populist) governments often have strong public support. This makes it more important that legal institutions, including the Attorney General, are dispassionate in ensuring the Government complies with the rule of law.

For at least the first week of the Alert Level 4 lockdown, the Government lacked the legal powers to enforce compliance with its restrictions. A future court – or Royal Commission – may yet find the entire lockdown was illegal. These concerns and risks could have been avoided if the Government had introduced its special Alert Level 2 legislation far earlier.

The Covid-19 restrictions doubtless saved many lives, possibly even thousands. But it should matter to all New Zealanders if the Government did act illegally. Next time a future government's motives might not be so pure. Indeed, this Government is showing signs it may be getting used to taking shortcuts – passing legislation under urgency and truncating the time for public submissions (as with both the C19 Act and the Overseas Investment (Urgent Measures) Amendment Bill 2020).

It would be a shame if the kind-hearted Ardern Government creates a precedent for future unlawful conduct.

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<sup>22</sup> China from 23 January 2020 and Italy from 21 February 2020.

<sup>23</sup> <http://www.legislation.govt.nz/act/public/2020/0012/latest/LMS344134.html>

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## **ABOUT THE INITIATIVE**

The New Zealand Initiative is an independent public policy think tank supported by chief executives of major New Zealand businesses. We believe in evidence-based policy and are committed to developing policies that work for all New Zealanders.

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