

# **Law and Covid-19 Webinar Series:** The Lawfulness of the New Zealand Government's Lockdown

## **Unanswered Questions**

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**Q:** *At what point does the governments right to enforcement at any level become redundant when the global evidence for Covid-19 shows that the virus is not as dangerous as initial predictions first thought?*

**A:** From a strict legal standpoint, the right to enforce the law remains precisely the same. If this sort of scenario does play out, and there is a wide-spread public perception that continued enforcement is redundant, then the government may suffer political consequences (ie a reduction in electoral support).

**Q:** *My understanding is that when the Bill of rights conflicts with another act, there is a requirement to interpret the other act as consistently as is possible with the Bill of Rights.*

**A:** Yes, this is correct. Strictly, the obligation arises when there are two or more possible interpretations. In that case, the court is instructed to prefer the interpretation that is more consistent with NZBORA rights. This will certainly be a feature of the arguments in the Borrowdale case.

**Q:** *How does the process of passing legislation currently relate to the rule of law?*

**A:** At a general level, for law to be “law” and do the sorts of things that we would describe as being benefits of the rule of law, a structured, public process for determining and announcing the law is necessary. Legislation fulfils this role in our system of government. The way we do legislation specifically also has some rule of law benefits. For example, Parliament is a deliberative institution, which in theory leads to more moderate and effective legislation, and our system of democracy is very representative, which means we all get a say (through our representatives) about the law that affects us.

**Q:** *What are your views on the timeliness of the various orders and rules being released - eg could Govt have done a better job in getting exposure drafts out if they are putting laws through under urgency?*

**A:** I can only comment on the outside. I imagine that the internal processes of government are under a lot of pressure at the moment, so I don't want to judge too harshly. It seems plausible from the outside at least that better use of exposure drafts could have been possible. Urgency is not a desirable way to make high-quality law, and so some sort of after the fact checking might be another way of trying to secure higher-quality legislation.

**Q:** *What about the timing aspect - the Health Act regulations were not invoked until early April, so this potentially means the first week or so of the lockdown was lacking in legal basis?*

**A:** Yes, this is not an issue that I planned to discuss, but it is certainly an issue. Most academic commentators have been magnanimous enough to cut the government some slack on this, given how quickly things moved. Ideally the timing would have matched up better than it did. I am not sure whether there will be any legal challenge on this point, but we will see.

**Q:** *What are the consequences of a HC finding that the government's actions were ultra vires - given that lockdown may have ended by the time of the HC decision is issued?*

**A:** Perhaps not much. The Government may enact validating legislation with retrospective effect if a finding of ultra vires is made. It may be a moot point by the time of any decision, but some people will still be facing charges for breaching the lockdown rules. For those people, this will matter a great deal.

**Q:** *How likely are these challenges going to affect public confidence in the government's response to covid 19? do you think it's a strong factor against an 'unlawful' finding?*

**A:** My instinct is that the public doesn't mind the strict legality of the government's actions. Most of the public debate I have seen tends to suggest that people either support or oppose the substantive steps the government has taken. A well-functioning opposition party might be able to leverage a finding of unlawfulness to score political points against the government. We can read that as cynical party politics or more generously as the system of government accountability working. I would be very surprised if a finding of unlawfulness did not force the government to spend at least some political capital, but how much is a question of politics which I'm not qualified to answer.

**Q:** *My question is this: recently the government announced various institutions can open to large numbers of people provided everyone who goes stays in groups of 10. However places of worship were explicitly excluded from this, they must only have 10 people at all? Is that lawful, seeing freedom of worship is a right can the government place a stricter application of these powers to worship than it does to other activities*

**A:** Without commenting on the merits of this policy, the broad law on this point is that any restriction on the freedom of a person to manifest their religion can be overridden by contrary legislation (which would be a technical breach of NZBORA) or where any limitation on the right is both reasonable and demonstrably justified in a free and democratic society (which amounts to a lawful limitation of the right, ie there is no breach as a matter of law). It would be hoped that the government considered this important right carefully before imposing any restrictions, and worked to make sure that any restrictions were the absolute minimum necessary. It could be that the failure to carry out this process of consideration amounts to a breach of the law.

**Q:** *Ullo! What's your take on the effect (if any) on our constitutional practice and convention, of the way the various iwi rahui have been handled? Some tolerance and support from the arms of the State e.g. police & nzta, without endorsing tino rangatiratanga / mana motuhake language ... Will this shift our normal practice?*

**A:** This is not my area of expertise, but there is to be both recognition of the right of individuals and communities to protect themselves, and the right to self-determination of mana whenua. I think this tolerance is a manifestation of a broader shift that recognises, as a political reality, that there are multiple sites of governmental authority (although at the crunch orthodox sovereignty theory still tends to win out).

**Q:** *Comment on the relevance of context: certainly where rights issues are concerned, the emergency and public health justification for the lockdown are entirely relevant, because justified limits are lawful.*

**A:** I think I answered this in the recording. Both the rights and emergency context will play a factor, and the court will have to weigh which is more important. I am inclined, in light of the controlling statute and the broader context, to prefer an interpretation that allows for broad emergency powers, but the Court might decide the other way.