IN THE HIGH COURT OF NEW ZEALAND **CIV-2020-485-194**
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review
BETWEEN	**ANDREW BORROWDALE**
	Applicant
AND THE	**DIRECTOR-GENERAL OF HEALTH**
	First Respondent
AND THE	**ATTORNEY-GENERAL**
	Second Respondent

SUBMISSIONS ON BEHALF OF NEW ZEALAND LAW SOCIETY | TE KĀHUI TURE O AOTEAROA AS INTERVENOR

Judicial officers: **Thomas, Venning & Ellis JJ**

Next event date: **27–29 July 2020 (Hearing)**

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MAY IT PLEASE THE COURT:

A. Introduction

1. This application for judicial review addresses the question of whether certain orders made by the Director-General of Health (**Director-General**) under the Health Act 1956 in response to the COVID-19 pandemic were a lawful exercise of his powers.

2. The orders in question are:

   (a) an order under s 70(1)(m) of the Health Act made on 25 March 2020 (**Order 1**);

   (b) an order under s 70(1)(f) issued on 3 April 2020 (**Order 2**); and

   (c) the Health Act (COVID-19 Alert Level 3) Order 2020 issued on 24 April 2020 pursuant to ss 70(1)(f) and (m) (**Order 3**).

3. Dr Borrowdale's statement of claim raises three causes of action, containing the following challenges to the New Zealand Government's response to COVID-19:

   (a) Certain statements made by the Prime Minister and other government officials amounted to restrictions that were not prescribed by law. Therefore, the statements stipulated unlawful limits to various rights under the New Zealand Bill of Rights Act 1990 (**Bill of Rights**), and purported to suspend those rights.

   (b) The Orders were ultra vires because they go beyond the powers conferred by ss 70(1)(f) and 70(1)(m) of the Health Act.

   (c) The Orders unlawfully delegated decision-making to the Ministry of Business, Innovation and Employment (**MBIE**).

4. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) was granted leave to participate in this proceeding as an intervenor. The Law Society is grateful for the opportunity to do so.

5. The Law Society submits in respect of the first cause of action that there was a disjunct between the Government's public communications and the formal restrictions imposed by Order 1. The disjunct did not affect the validity of Order 1. The failings were in relation to the public communications about the Order, not the extent of the restrictions that Order 1 imposed. To that extent, however, the Government's communications were in conflict with the rule of law.

6. The primary focus of these submissions is the second cause of action. At the heart of this case is the question of how Health Act powers of an emergency character are properly interpreted in the context of a global pandemic—in a way that balances the rights of the individual, the democratic foundation of our constitution, and the rule of law.

7. In summary, the Law Society's submissions on these matters of interpretation are as follows:

   (a) The Orders in the present case placed limitations on various fundamental rights and freedoms. These include some rights and freedoms which are affirmed by the Bill of Rights. As such, both the principle of legality and ss 4–6 of the Bill of Rights are engaged.

   (b) However, central to the interpretative exercise remains the text, purpose and context of the Health Act. When these matters are considered together, the scheme of the Health Act as it relates to infectious diseases, the purpose of the scheme, and its constitutional context, overcome presumptions that would read down statutory provisions that limit rights and freedoms.

   (c) In light of their purpose and context, the s 70 powers at issue are necessarily wide. They are designed to cater for a range of emergency situations of uncertain character, where medical experts need to determine an urgent course of action. Although the s 70 powers are broad, there are a number of constraints imposed by the Health Act and related legislation. These act as safeguards on the exercise of the powers.

   (d) In addition to these textual constraints, there is also a temporal constraint. The s 70 powers are intended to facilitate an immediate short-term response to a public health crisis. They are not intended to provide the framework for a response over the longer term. An ongoing public health crisis requires the making of difficult policy decisions, in which there are trade-offs between health objectives and wider social and economic considerations. Parliament cannot have intended those trade-offs to be made solely by medical officers of health under the s 70 powers in the mid- to long-term.

   (e) The democratic nature of our constitution means that there comes a point in the management of an ongoing crisis where it is incumbent on Parliament to pass bespoke legislation in order to ensure that critical policy decisions are made in accordance with ordinary Cabinet decision-making. In New Zealand, Parliament can ordinarily be expected to meet that responsibility. Parliament did meet that responsibility in this case, with the enactment of the COVID-19 Public Health Response Act 2020 (**COVID Act**).

8. In terms of the three principal questions of construction raised by Dr Borrowdale in the second cause of action, in summary the Law Society submits:

   (a) Properly interpreted, the Health Act allows for s 70 powers to be exercised nationally.

(b) The powers in s 70(1)(m)—to require the closure of premises and prohibit congregating in outdoor places of amusement or recreation—may be exercised in respect of all premises and places of amusement and recreation.

(c) The powers in s 70(1)(f) allow for orders requiring all persons in New Zealand to isolate or quarantine if that it is necessary to prevent the outbreak or spread of any infectious disease.

9. The Law Society's perspective on the third cause of action is that the definition of essential services was of critical importance to the Government's strategy adopted under the Orders. The definition, through its reference to the list on the covid19.govt.nz website, changed frequently as the list was updated. There does not appear to have been a clear indication of how, when or why the list was changed. This opacity did not conform with the rule of law in that, so far as possible, the law should be ascertainable, intelligible, clear and predictable.

B. Background

10. At the close of 2019 and beginning of 2020, the world faced the emergence of a novel coronavirus, now known as SARS-CoV-2, which causes the disease COVID-19 in humans. The spread of the virus from the original outbreak in Wuhan, China, to 18 other countries led the World Health Organization on 30 January 2020 to declare it an "unprecedented outbreak" and a public health emergency of international concern.[1]

11. The New Zealand Government took a range of steps to mitigate the risk to New Zealanders. On 30 January 2020, novel coronavirus was added to the schedule of notifiable infectious diseases under the Health Act.[2] On 11 March, COVID-19 was also added to the schedule of notifiable infectious diseases, and both COVID-19 and novel coronavirus were added to the schedule of quarantinable infectious diseases.[3]

12. On 16 March 2020, an order was made under s 70(1)(f) and (h) of the Health Act requiring persons arriving in New Zealand to be isolated or quarantined for 14 days, and the government advised that events of over 500 people ought to be

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1 Tedros Adhanom Ghebreyesus "WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)" (30 January 2020).

2 Infectious and Notifiable Diseases Order 2020, cl 3; adding "Novel coronavirus capable of causing severe respiratory illness" to the Health Act 1956, sch 1, pt 1, s B "Infectious diseases notifiable to medical officer of health".

3 Infectious and Notifiable Diseases Order (No 2) 2020, cl 3; adding "COIVD-19" to the Health Act 1956, sch 1, pt 1, s B "Infectious diseases notifiable to medical officer of health", and adding "COVID-19" and "Novel coronavirus capable of causing severe respiratory illness" to the Health Act 1956, sch 1, pt 3: "Quarantinable infectious diseases".

cancelled. Two days later, the Government advised that anyone who had arrived in the country in the last two weeks should self-isolate.

13. On 21 March, the Government announced a non-statutory four-level "COVID-19 alert system". The country was immediately placed in "Alert Level 2 – Reduce Contact". On 23 March, the Government announced the country was in "Alert Level 3 – Restrict", and would enter "Alert Level 4 – Eliminate" at midnight on 25 March, initially for a period of four weeks.

14. On 25 March 2020, Parliament debated and passed under urgency, through all stages in a single day, three COVID-19 related Bills.[4] It then adjourned for four and a half weeks until 28 April 2020, in light of the move to Alert Level 4.[5]

15. A number of relevant events occurred on 25 March. An epidemic notice issued under s 5 of the Epidemic Preparedness Act 2006 the previous day took effect. A state of national emergency was declared under s 66 of the Civil Defence Emergency Management Act 2002 (**CDEMA**).[6]

Order 1

16. Also on 25 March, the Director-General issued an order under s 70(1)(m) of the Health Act—Order 1—stating that, from 11.59 pm that day:

    (a) He required to be closed "all premises within all districts of New Zealand" except those listed in an appendix, which included premises necessary for the performance or delivery of essential businesses. The term "essential businesses" was defined by reference to a list maintained on the Government's covid19.govt.nz website.

    (b) He forbade people to "congregate in outdoor places of amusement or recreation of any kind or description (whether public or private) in all districts of New Zealand until further notice".

17. Order 1 stated it was to remain in place until further notice.[7]

18. On 31 March, the national emergency was extended and another order was made under s 70(1)(f) and (h) of the Health Act, requiring persons arriving into New Zealand after 1am on 16 March 2020 to be isolated or quarantined for 14 days.

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4 Imprest Supply (Third for 2019/20) Bill 2020 (235–1); COVID-19 Response (Taxation and Social Assistance Urgent Measures) Bill 2020 (237–1); and COVID-19 Response (Urgent Management) Legislation Bill 2020 (239–1).

5 (23 March 2020) 745 NZPD 17322–12324.

6 The state of emergency was for a period of seven days. It was renewed weekly until 13 May, when it was replaced by a national transition period under the Civil Defence Emergency Management Act 2002, s 94A. The transition period ended on 8 June 2020.

7 An order was made amending Order 1 on 21 April 2020. It expired on 27 April 2020.

Order 2

19. On 3 April, the Director-General issued an order under s 70(1)(f) of the Health Act—Order 2—stating that from 6pm that day he required "all persons within all districts of New Zealand to be isolated or quarantined as follows":

    a. to remain at their current place of residence … except as permitted for essential personal movement; and

    b. to maintain physical distancing, except–

        i. from fellow residents; or

        ii. to the extent necessary to access or provide an essential business; and

    c. if their residence is mobile, to keep that residence in the same general location, except to the extent they would be permitted (if it were not mobile) to leave the residence as essential personal movement.

20. Order 2 defined what was permitted for "essential personal movement", namely, accessing or providing essential businesses, recreation purposes, shared bubble arrangements, emergencies, court orders, and authorised travel.

21. Order 2 also defined certain terms, including:

    (a) essential business (having the same definition as that in Order 1);

    (b) physical distancing (remaining 2 metres away from other people or, if closer than 2 metres, being there for less than 15 minutes); and

    (c) place of residence (including caravans, vehicles, temporary structures, prisons, hospitals, and other detention facilities).

22. Order 2 also requested, under s 71A, the assistance of constables in ensuring compliance, including:

    (a) helping a medical officer of health in the performance of their functions;

    (b) preventing persons from obstructing or hindering a medical officer of health; and

    (c) compelling, enforcing, or ensuring compliance with a requirement of a medical officer of health.

23. Order 2 stated it was to remain in place until 22 April unless otherwise revoked or extended.[8]

Order 3

24. On 24 April 2020, the Director-General issued the Health Act (COVID-19 Alert Level 3) Order 2020—Order 3—under ss 70(1)(m) and (f) of the Health Act. Order 3

8 An order was made amending and extending Order 2 on 21 April 2020. It expired on 27 April 2020.

came into force on 27 April 2020, the same day that New Zealand moved to Alert Level 3.

25. Order 3 is different in form from Orders 1 and 2. It is akin to Regulations and Orders in Council. It has a title and commencement clauses, as well as extensive background and purpose clauses, and a schedule of definitions.

26. The purpose provision states that the purpose of Order 3 is to prevent the outbreak or spread of COVID-19 by limiting movement and contact between people in New Zealand "in aggregate", while:

> (a) ensuring the provision of services that are needed to respond to COVID-19, ensure the necessities of life for people in New Zealand, and maintain public health, safety, and security; and
>
> (b) enabling some movement and contact in particular—
>
> (i) for the purposes of education, work, accessing services, and limited recreation; and
>
> (ii) where public health measures such as good hygiene and cleaning measures, physical distancing, contact tracing, and minimising interactions in groups apply (whether under this order, other health and safety requirements, or guidance).

27. Order 3 explained that "guidance" includes:

> public health guidance issued by the Ministry of Health, workplace guidance issued by WorkSafe, maritime guidance issued by Maritime New Zealand, and guidance issued to education entities by the Ministry of Education.

28. Order 3 revoked all previous orders and relevantly provided, in cl 6, that all persons in all regions must be isolated or quarantined as follows:

> (a) to remain at their current home or place of residence, except for essential personal movement; and
>
> (b) to maintain physical distancing, except—
>
> (i) from any fellow resident; or
>
> (ii) to the extent necessary to access, or provide, a business or service to which physical distancing infection control measures apply under clause 10; and
>
> (c) if their home or place of residence is mobile, to keep that home or place of residence in the same general location, except to the extent they would be permitted (if it were not mobile) to leave the home or place of residence as essential personal movement.

29. Clause 7 provided that essential personal movement was permitted for:

> (a) accessing business or services that have infection control measures in operation and are in the same region;

(b) attending education facilities that have infection control measures in place and are in the same or adjacent region;

(c) providing a business or service that has infection control measures in place and is in the same, adjacent, or another region;

(d) limited recreation purposes;

(e) limited Māori customary purposes;

(f) controlled gatherings (defined as no more than 10 people and for the purpose of funerals, tangihanga, weddings or civil union services) in the same or adjacent region, or in another region for funerals or tangihanga;

(g) accessing medical services, hospitals, and courts; and

(h) certain travel by those arriving in or leaving New Zealand.

30. Clause 7 also provided for personal movement in the case of extended bubble and shared caregiving arrangements, relocating a home or business, and compassionate grounds for urgent child care or supporting a person in a critical or terminal condition.

31. Clauses 9 and 10 restricted the use of premises. Clause 9 required the closure of restricted premises where infection measures required by cl 10 were not operating. It also required the closure of all other restricted premises. Exceptions were made, for example, for maintaining the condition of the premises, plant or goods.

32. Clause 11 prohibited congregating in outdoor places of amusement or recreation, but not venues used for gathering where infection control measures were operating.

33. Unlike Order, 2, Order 3 did not contain a sunset clause. It was revoked by the COVID-19 Public Health Response (Alert Level 2) Order 2020 on 14 May 2020.

COVID-19 Public Health Response Act 2020

34. On 28 April, Parliament resumed sitting.[9] The COVID-19 Public Health Response Bill was introduced on 12 May. It was enacted and came into effect the next day. The framework established by this Act is addressed below at [97]–[103].

9 (28 April 2020) 745 NZPD 17325.

C. First cause of action

Overview of the Law Society's position

35. When Order 1 was made, there was a disjunct between the Government's public communications and the formal restrictions imposed by Order 1. This disjunct was corrected when Order 2 was issued, but it was not acknowledged in communications accompanying Order 2 at the time. Rather, Order 2 was presented as simply providing "greater clarity" and "additional guidance".

36. An important component of the Government's response to COVID-19 was a communications strategy asking New Zealanders to take collective action to "unite against COVID-19". In doing so, it was open to the Government to encourage the public to take additional steps voluntarily beyond those required under Order 1.

37. However, in taking this approach, it is submitted that the rule of law required the Government to clearly distinguish between:

    (a) activities that were legally impermissible, that is, contrary to law; and

    (b) activities that, though lawful, were socially undesirable and discouraged by the Government.

38. Communications by Government officials did not clearly draw this distinction. Instead, they left the impression that the legal requirements of Order 1 were significantly wider than they actually were.

39. This resulted in public confusion about people's rights and obligations.[10] This confusion was compounded by the fact that:

    (a) Order 1 was apparently in force before it was available to the public; and

    (b) when it was made available, it was not done so prominently. Order 1 was not published on legislation.govt.nz. Rather, it was published on the Ministry of Health's website under the heading "COVID-19 – Epidemic Notice". The webpage did not explain that Order 1 was the legal basis of the lockdown.

40. The rule of law requires that the law is accessible and, so far as possible, intelligible, clear and predictable. As Lord Bingham has explained extrajudicially, if individuals are "liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty".[11]

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10 As the Law Society observed at the time: see exhibit BAJ-1 to the affidavit of Bronwyn Jones in support of the Law Society's application to intervene (10 June 2020), being a letter sent on 4 April 2020 to the chair of the Epidemic Response Select Committee.

11 Tom Bingham *The Rule of Law* (Penguin, London, 2010) at 37.

41. If a government decides to take steps only to prohibit certain activities but voluntarily discourage others, individuals are entitled to understand that distinction and make an informed choice about whether to comply with the voluntarily restrictions.

42. The Law Society acknowledges that the disjunct did not affect the validity of Order 1. The failings were in relation to the public communications about, and publication of, the Order, not the extent of the restrictions it imposed. They were, however, unsatisfactory in terms of the rule of law.

The restrictions imposed by Order 1

43. By its terms, Order 1:

    (a) required to be closed, until further notice, "all premises within all districts of New Zealand except those listed in the Appendix"; and

    (b) forbade people to "congregate in outdoor places of amusement or recreation of any kind or description (whether public or private) in all districts of New Zealand until further notice".

44. Congregate was defined to exclude "people maintaining at all times physical distancing", in turn defined as "remaining two (2) metres away from other people, or if you are closer than two (2) metres, being there for less than 15 minutes".

45. Order 1 did not impose the type of "lockdown" restrictions subsequently imposed by Order 2. Unlike Order 2, it did not require all persons to "remain at their current place of residence … except as permitted for essential personal movement". There was no formal prohibition, for instance, on people:

    (a) visiting others in private homes;

    (b) meeting others in public spaces if they maintained physical distancing;

    (c) travelling any distance to exercise; or

    (d) engaging in outdoor recreational activities in public spaces if they maintained physical distancing.

Order 1 was not published until after it purported to take effect

46. Order 1 was signed by the Director-General on 25 March 2020,[12] to take effect from 11.59 pm. It does not, however, appear to have been published that day.

47. The respondents' evidence does not indicate when the Order was first published. The making of the Order was not mentioned by the Director-General during the daily All of Government press conference on either 25 or 26 March.[13] In fact, when

12 Affidavit of Dr Ashley Bloomfield dated 13 July 2020 at [250].

13 Bundle of Documents at 301.0421–301.0428 and 301.0526–301.0534 respectively.

the Commissioner of Police was asked on 26 March about the basis on which people could be charged with breaching "the lockdown", he responded that the "major legislation" was the Health Act—without making any mention of the fact that orders had been made under it—before referring to the CDEMA and the Summary Offences Act 1981.[14]

48. Order 1 was first mentioned at the daily press conference on 27 March, when Dr Bloomfield said:[15]

> Three days ago, on the 24th of March, the Prime Minister, with the agreement of the Minister of Health, issued an epidemic notice under the Epidemic Preparedness Act 2006. Now, that notice unlocks the use of special powers by medical officers of health under the Health Act 1956 to prevent the outbreak and spread of COVID-19. That's the legal underpinning for the lockdown. And, in addition to that, I've issued a national notice to activate section 70 of the Health Act 1956, and since Wednesday night that has prohibited large gatherings and required premises to be closed, with the exception, of course, of our essential businesses. There is more information on this on the Ministry's website, and more special powers may be used as the situation progresses. The page on our website will be updated when they are.

49. When Order 1 was published, it was published on the Ministry of Health's website. The Order does not appear to have ever been published on legislation.govt.nz.

Government communications overstated the extent of legal restrictions

50. Public communications from Government officials likely left most New Zealanders with the impression that many lawful activities were unlawful, when they were not in fact proscribed by Order 1.

51. For instance, on 25 March 2020, the Prime Minister told the country that:[16]

> I have one simple message for New Zealanders today as we head into the next four weeks: stay at home. … If people do not stay home, other than to go to the supermarket or the GP or to get some fresh air close to your home, then you risk both spreading the virus to others and you risk getting it yourself. Breaking the rules could kill someone close to you …

And:[17]

> If someone is outside and has no explanation, [Police] will remind them of their obligations, and if they believe they need to, they can take other enforcement actions.

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14 Bundle of Documents at 301.0529.

15 Bundle of Documents at 301.0622.

16 Bundle of Documents at 301.0429.

17 Bundle of Documents at 301.0431.

52. Similarly, on 25 March 2020:

    (a) The Commissioner of Police advised New Zealanders that people were not permitted to drive to a local beach or go to a local park:[18]

        > You only get in your vehicle if you need to go and get essential food supplies, essential medical supplies or medical treatment. Otherwise, please stay at home.

    (b) The Director of Civil Defence and Emergency Management told the public that from 11.59 pm "everyone must stay home".[19]

53. This messaging continued in the coming days. On 26 March 2020, the Government's covid19.govt.nz website advised that the country was in Alert Level 4. It advised that "enforcement measures may be used to ensure everyone acts together". It advised that Alert Level 4 meant, among other things:[20]

    (a) "Everyone must now stay home, except those providing essential services."

    (b) If people went out for a walk, run or bike ride they "must be solitary, or with those [they] live with".

    (c) "People are expected to stay local when leaving the home."

    (d) "Do not go hunting or hiking, and not on overnight trips."

54. The same day, the Commissioner of Police advised that, if people breached the "requirement to stay home", they would be warned. If they refused to comply, Police would "take them to our place, and put them somewhere that will allow them to contemplate the impact of their decisions". Serious breaches, he said, would be prosecuted.[21]

55. On 27 March 2020, the Director of Civil Defence and Emergency Management advised that the public were only allowed to drive for the purpose of exercising if they stayed "local", and did not undertake activities like surfing where they may need to be rescued.[22]

Communications about Order 2 did not fix matters

56. When Order 2 was made, it significantly extended the scope of legal restrictions on New Zealanders' daily lives from those that had been stipulated by Order 1. Importantly, Order 2 required people to remain at their current place of residence except for essential personal movement. By contrast, Order 1 had closed premises

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18 Bundle of Documents at 301.0471.
19 Bundle of Documents at 301.0422.
20 Bundle of Documents at 301.0519.
21 Bundle of Documents at 301.0529.
22 Bundle of Documents at 301.0626.

and forbidden people to congregate, but it did not in its terms impose a "lockdown".

57. However, in Government communications, Order 2 was not portrayed as representing any kind of meaningful change. For instance:

    (a) Dr Bloomfield said on 4 April that the "purpose of issuing this notice [was] to provide greater clarity for everyone about what the expectations are around self-isolation as we are in alert level 4".[23]

    (b) A Ministry of Health media release from the same day described the Order as providing "greater clarity around self-isolation for the public and also greater clarity for police around enforcement".[24]

    (c) A joint Ministry of Health and Police media release described the Order as providing "additional guidance".[25] The Commissioner of Police was quoted as saying that as a result of the Order the "public should not notice any significant change to policing".[26]

Relief in respect of the first cause of action

58. It is submitted that the disjunct between the Government's public communications and the formal restrictions imposed by Order 1 was in conflict with the rule of law. The Government should not have directed the public in mandatory terms to behave in certain ways, when those directions were not backed by the force of law.

59. The Law Society considers that the rule of law will be vindicated if the Court's reasons for judgment were to affirm that:

    (a) the rule of law requires clarity in Government communications regarding activities that are legally prohibited on the one hand, and activities, though lawful, are discouraged on the other; and

    (b) this did not occur in relation to Government communications about Order 1.

60. In the presumably unlikely event that anyone were to face a criminal charge for conduct said to be unlawful by the Government, but which was not in fact prohibited by Order 1, they would have a defence to that charge. But that is a matter that would need to be addressed in the criminal proceedings, if they were to occur.

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23 Bundle of Documents at 302.1050.

24 Bundle of Documents at 302.1063.

25 Bundle of Documents at 302.1066.

26 Bundle of Documents at 302.1067.

D. Second cause of action

Overview of the Law Society's position

61. The core issue in this proceeding is the proper interpretation of the powers conferred by s 70 of Health Act, set against the backdrop of a global pandemic.

62. The principal questions of construction raised by the second cause of action are:

    (a) Does the Health Act allow the Director-General to exercise s 70 powers nationally?[27]

    (b) Can the powers in s 70(1)(m)—to require the closure of premises and prohibit congregating in outdoor places of amusement or recreation—be exercised in respect of all premises and places of amusement and recreation, subject to exceptions, or can they only be exercised in respect of premises of an expressly referred to or stated kind or description?[28]

    (c) Do the powers in s 70(1)(f) allow for orders requiring all persons in New Zealand to stay at home, subject to exceptions, or are they limited to requiring "specified individuals to be isolated, quarantined or disinfected"?[29]

63. Underlying these three questions are important matters of interpretative principle and policy that lie at the heart of our constitutional system. The Orders in question in this proceeding involved extensive constraints on the daily lives of New Zealanders. However, they arose in an emergency context involving the Government's response to a global pandemic, and they were in place for a relatively short time before Parliament responded with bespoke legislation specifically for the COVID-19 crisis.

64. Because the Orders placed significant limitations on various fundamental rights, the principle of legality and the Bill of Rights are engaged. However, central to the interpretative exercise remains the text and purpose of the Health Act. Importantly, in addition, the meaning of an enactment must also be ascertained from its context—including the constitutional context—which can either expand or constrain the apparent meaning of a statutory provision.

65. When these matters are carefully considered together in the current case, the Law Society submits that the scheme of the Health Act as it relates to infectious diseases, the purpose of the scheme, and its constitutional context, overcome presumptions that would read down statutory provisions that limit rights and freedoms.

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27 Third Amended Statement of Claim dated 1 July 2020 at [26].

28 Third Amended Statement of Claim at [23(a)] and [25(b)].

29 Third Amended Statement of Claim at [24(b)] and [25(a)].

The principle of legality, the Bill of Rights, and necessary implication

66. The Orders placed limitations on various fundamental rights and freedoms. These include some affirmed by the Bill of Rights, namely the rights to freedom of assembly, movement and association,[30] and the right to manifest religion and belief.[31] As such, both the principle of legality and ss 4–6 of the Bill of Rights are engaged.

The principle of legality

67. At common law, the principle of legality operates as a presumption when reading general or ambiguous words in a statute that might, on their face, impact on basic rights and freedoms. In *R v Secretary of State for the Home Department, ex parte Simms*, Lord Hoffman described the principle in these terms:[32]

> Fundamental rights cannot be overridden by general or ambiguous words. … In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

68. His Lordship noted the rationale behind the principle: that if Parliament chooses to legislate contrary to fundamental rights, it must "squarely confront" that decision and "accept the political cost". Otherwise, his Lordship suggested, there was "too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process". In this way, although the courts of the United Kingdom acknowledge of the sovereignty of Parliament, they "apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document".[33]

69. The principle of legality has been recognised by the New Zealand courts. For example:

    (a) In *Cropp v Judicial Committee*, Blanchard J writing for the Court of Appeal cited *Simms* and Bennion's *Statutory Interpretation* to state "the courts should be slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out".[34]

    (b) In *R v Pora*, Elias CJ (writing for herself and Tipping J) endorsed an approach requiring that "Parliament must speak clearly if it wishes to

30 New Zealand Bill of Rights Act 1990, ss 16, 17 and 18, respectively.

31 Section 15. The Law Society does not consider that the right not to be arbitrarily detained (s 22) is necessarily engaged.

32 *R v Secretary of State for the Home Department, ex parte Simms* [1998] AC 539 (HL) at 131 per Lord Hoffmann.

33 At 131 per Lord Hoffmann.

34 *Cropp v Judicial Committee* [2008] 3 NZLR 774 (CA) at [26]–[27].

trench upon fundamental rights",[35] and that "it is improbable where human rights are affected that Parliament would do by a side wind what it has not done explicitly.[36]

70. The principle has not, however, been applied consistently in New Zealand. Moreover, its operation in this country is complicated by ss 4, 5, and 6 of the Bill of Rights.

Sections 4–6 of the Bill of Rights

71. Sections 4–6 form part of the interpretation exercise in relation to the rights affirmed in the Bill of Rights. To take them in reverse order, in effect, they require:

    (a) where a meaning can be given that is consistent with rights and freedoms, that meaning shall be preferred;

    (b) rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society; and

    (c) enactments shall apply despite any inconsistency with rights and freedoms.

72. Precisely how ss 4–6 are deployed, and whether or how the principle of legality is included within that deployment, is the subject of differing judicial approaches.

73. For instance, in *Ministry of Transport v Noort* Cooke P suggested the rule of interpretation laid down by s 6 may be of greater importance than the principle of legality.[37] Gault J in *Baigent's Case*, however, put it in terms that ss 4 to 6 "probably go little further than the common law presumption".[38] Many judgments dealing with the Bill of Rights do not expressly consider the relationship with the principle of legality at all.

74. The frequently cited test for the application of ss 4–6 is that put forward by Tipping J in *R v Hansen*.[39] His Honour summarised the appropriate approach—at least in the context of distinct competing conceptual meanings—as follows:[40]

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35 *R v Pora* [2001] 2 NZLR 37 (CA) at [52].

36 At [51].

37 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272.

38 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) at 712.

39 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [88]–[94].

40 At [92] per Tipping J. At [190]–[192], McGrath J concurred in substance, saying that this approach to ss 5 and 6 would "usually be appropriate". Blanchard J also largely concurred in substance and, at [58]–[60], stated only meanings that unjustifiability limited rights would be subject to s 6, otherwise s 5 would not be given appropriate effect.

Step 1. Ascertain Parliament's intended meaning.

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.

Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

75. In this test, Tipping J held the meaning allowed by s 6 is one that is "reasonably possible", "tenable", and does not "defeat Parliament's purpose".[41]

76. Tipping J's approach has subsequently been adopted in a number of decisions.[42] It is important to note, however, that neither Tipping J, nor the judges that agreed with his Honour's reasons, mandated a single approach to the application of ss 4–6.[43]

77. Nor has Tipping J's approach been universally followed. For example, Elias CJ advocated a different method, both in *R v Hansen* and subsequent decisions—particularly her dissenting judgment in *New Health New Zealand Inc v South Taranaki District Council*. Her Honour considered s 6 is the statutory

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41 At [157]–[158] and n 191, per Tipping J, and [289] per Anderson J. At [61], Blanchard J stated s 6 allowed only a meaning "genuinely open in light of both its text and its purpose". At [237], McGrath J considered there was no authority to go beyond what the language would bear. See also *Noort*, above n 37, at 272 per Cooke P; and *Police v Smith* [1994] 2 NZLR 306 at 313 per Cooke P.

42 See for example *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [102] per O'Regan and Ellen France JJ.

43 As Professor Geiringer points out, in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 decided just months after *Hansen*, those same judges did not themselves explicitly apply their approach as set out in *Hansen*: Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: a critical examination of *R v Hansen*" (2008) 6 NZJPIL 59 at 85, n 144. In addition, a different approach is taken, for instance, where the right involved itself either includes an internal limitation or cannot be abrogated, such that s 5 need not apply: see *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

embodiment of the principle of legality,[44] and should therefore be part of step 1—ascertaining the intended meaning.[45] It does not require an inconsistency or textual ambiguity before it operates.[46] Moreover, s 6 allows the courts to adopt meanings that may "linguistically appear strained",[47] but nonetheless must be "tenable on the text and in light of the purpose".[48]

78. Elias CJ's approach to s 6 has also been adopted in several decisions. In *Attorney-General v Spencer*, for example, Harrison J writing for the Court of Appeal endorsed Lord Steyn's observation in *Simms* that the principle of legality does not require ambiguity, and Elias CJ's view in *Pora* in that s 6 reflects the principle of legality.[49] The Court was, therefore, "reluctant to adopt an interpretation that Parliament has deliberately denied a party access to the courts",[50] and held that a savings provision could not operate to extinguish rights of joinder.[51]

Necessary implication

79. Irrespective of the approach taken under the Bill of Rights and the principle of legality, it is clear that a statute may achieve the abrogation of rights by necessary implication.

80. As a matter of general principle in statutory interpretation, a power may be "fairly … regarded as incidental to, or consequential upon" the powers Parliament has authorised.[52]

81. However, where the abrogation of rights is involved, the implication cannot be merely "reasonable" or "sensible"—it must be necessary.[53] The presumption against infringement of rights can be displaced only by "strong textual and contextual indications that the implication is necessary to fulfil functions unmistakably conferred".[54]

82. In *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax*, Lord Hobhouse put it this way:[55]

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44 *Ngati Apa ki te Waipounamu v R* [2000] 2 NZLR 659 (CA) at [82]. On this point Elias CJ is joined by Tipping J: see *Pora*, above n 35, at [53]; and by McGrath J: see *Hansen*, above n 39, at [251].

45 See, for example *Hansen*, above n 39, at [11]; and *New Health*, above n 42, at [221] and [294]

46 *New Health*, above n 42, at [300], n 344; and *Hansen*, above n 39, at [13].

47 *Hansen*, above n 39, at [12] per Elias CJ.

48 At [25] per Elias CJ.

49 *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449 at [73]–[75].

50 At [90].

51 At [91].

52 *New Health*, above n 42, at [283] per Elias CJ, citing *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 (HL) at 487 per Lord Selbome LC.

53 At [283].

54 At [303] and [305]–[306].

55 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45] (emphasis in the original). This passage was subsequently adopted in New Zealand in *Cropp*, above n 34, at [26].

> A necessary implication is not the same as a reasonable implication … . A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

83. The higher threshold for the implication of powers that abrogate rights reflects Lord Hoffman's rationale for the principle of legality—that there is otherwise "too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process".[56]

84. As these submissions turn to explain, whichever approach is adopted to ss 4–6 and the principle of legality—that of Tipping J in *Hansen* or Elias CJ in *New Health*—the result for the second cause of action is the same. It is submitted that the text, purpose and constitutional context of the s 70 powers all point to the vires of the Orders that were made as a matter of necessary implication.

Text, purpose, context, and the constitutional frame

85. The protection of individual rights through the principle of legality and a Bill of Rights analysis is an important aspect of the statutory interpretation exercise in the present context. They are not, however, the only principles that are engaged in the process.

86. Section 5 of the Interpretation Act 1999 makes text and purpose the focus of statutory interpretation. Central to the interpretative exercise is examination of the text of s 70, the scheme of the Health Act as it relates to infectious diseases, and the purpose of the provision and that scheme.

87. However, in addition to the statutory directive to ascertain meaning from the text and in light of its purpose, the meaning of an enactment must also be ascertained from its context. In *Agnew v Pardington*, the Court of Appeal noted that while reference to context was not included in the Interpretation Act, there is "no doubt that the text of a provision must be interpreted having regard to the Act as a whole and the legal system generally".[57] In the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*, Tipping J considered

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56 *Simms*, above n 32, at 131 per Lord Hoffmann. An example of necessary implication in the context of emergency powers can be found in *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57. In that case, a broad power to "suspend, amend or revoke" planning instruments (if used for proper purposes) was held to have the effect of ending appeals already on foot against the planning instruments so revoked. It was "simply the consequence" of a legitimate exercise of the power (at [146]).

57 *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [32].

that when determining purpose "the Court must obviously have regard to both the immediate and the general legislative context".[58] The Law Commission noted in its 1990 report for a new interpretation act that "context" can either expand or constrain the apparent meaning of a statute.[59]

88. The requirement to consider context has recently been affirmed in s 10 of the Legislation Act 2019. That Act is not yet in force, but the change was made on the basis that including the reference to "context" did not reflect a substantive change to the law. It merely aligns s 5 of the Interpretation Act with existing law and practice.[60]

The constitutional context

89. Context that informs interpretation includes the fundamental values of the legal system,[61] which includes New Zealand's constitutional arrangements. The "underlying principle" of our constitutional arrangements, as Sir Kenneth Keith has explained, is democracy and our most important constitutional conventions arise from the "democratic character of our constitution".[62] Although this aspect of our constitution has not been codified, the United Kingdom Supreme Court has recently stated "the courts have the responsibility of upholding the values and principles of our constitution and making them effective".[63]

90. In the present case, it is submitted that there are two features of the democratic character of our constitution that assume particular importance.

91. First, a core responsibility of government in a democratic society—sometimes described as the "first responsibility"—is to protect and safeguard the lives of its citizens in the public interest.[64] This responsibility in the context of public health is reflected in the preamble to the World Health Organization's Constitution.[65] Importantly, this responsibility is also recognised in the International Covenant

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58 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

59 New Zealand Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R 17, 1990) at [72].

60 Legislative Bill 2017 (275-1) (explanatory note) at 6–7.

61 See for example *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [206]; and *New Health*, above n 42, at [292] and [293] per Elias CJ.

62 Cabinet Office *Cabinet Manual 2017*, introduction by Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current form of Government" (1990, updated 2008 and 2017) at 2 and 3.

63 *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [39]. In *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [35] Cooke J recently affirmed this passage as "accurately describ[ing] the operation of the New Zealand constitution".

64 *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL) at [99] per Lord Hope of Craighead.

65 Constitution of the World Health Organization 14 UNTS 185 (opened for signature 22 July 1946, entered into force 7 April 1948), preamble: "Governments have a responsibility for the health of their peoples" and the "health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States".

on Civil and Political Rights.[66] Article 4(1) provides that in a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" states may "take measures derogating from [certain of] their obligations" under the Convention "to the extent strictly required by the exigencies of the situation".[67] Derogation from some rights is not permitted—for example, the rights to life and religion, and to be free from torture and slavery.[68]

92. Protecting and safeguarding the lives of citizens has to be balanced against the protection and safeguarding of the rights of individual. Nevertheless, when Parliament legislates in advance of any particular emergency to provide for general emergency response powers, it may properly intend to confer wide powers on the Executive in order to enable an immediate response to a particular emergency, the precise nature of which is unknown when the legislation is passed. A feature of public emergencies that threaten public safety is that swift responsive actions may be needed before Parliament has time to act in a targeted way to the crisis at hand.

93. Secondly, the duty to safeguard and protect the lives of citizens must be balanced against the foundational democratic principle. As Sir Kenneth Keith explains, the "responsibility and power to take decisions" in our system of responsible government "results from the electoral process and the political contest".[69]

94. One manifestation of the democratic principle is that important policy decisions should generally be taken by Parliament and not delegated to the Executive.[70] The Legislation and Advisory Design Guidelines—endorsed by Cabinet as the government's key point of reference for assessing whether legislation conforms to accepted constitutional and legal principles[71]—record that "[i]mportant policy content should be a matter for Parliament to determine in the Act through an open democratic process".[72] Too much delegation, or delegated powers that are too broad or uncontrolled, undermine the transparency and legitimacy of the

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66 The New Zealand Bill of Rights Act 1990 was enacted to affirm New Zealand's commitment to the Covenant: long title, para (b). New Zealand ratified the Covenant, subject to certain reservations, on 28 December 1978.

67 Article 4(3) requires states that derogate to inform other states by notifying the Secretary-General. A number of states have notified the Secretary-General of derogations from the Convention for the purposes of curbing the spread of COVID-19: United Nations Human Rights Committee "Statement on derogations from the Covenant in connection with the COVID-19 pandemic" (CCPR/C/128/2, 24 April 2020) at [1]. New Zealand does not appear to have notified any derogations in relation to its response to COVID-19.

68 Article 4(2).

69 Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current form of Government", above n 62, at 3.

70 *Cabinet Office Manual 2017*, above n 62, at [7.82].

71 At [7.38]. See also Cabinet Office "Legislation guidelines—Cabinet requirements and expectations" (CO(18)1, 20 July 2018) at [1] and [12].

72 Legislation Design and Advisory Committee *Legislation Guidelines* (2018 ed) at 65.

law.[73] Where power to make secondary legislation is delegated, the more significant the power the more likely it should be exercised by the Governor-General in Council, and the greater the degree of political accountability required in relation to that exercise.[74]

The need for a timely bespoke response

95. The tension between the core responsibility of government in an emergency, on the one hand, and the need to protect the foundational democratic principle, on the other, is illustrated by the current crisis. So, too, is the appropriate solution—the need to transition from generic emergency powers to a bespoke legislative response. This approach can be seen historically in several crisis mitigation and recovery periods, including the Bubonic Plague Prevention Act 1900 and, more recently, the various recovery Acts following the Canterbury earthquakes.[75]

96. In its 1991 report on emergencies, the Law Commission set out a series of safeguards which ought to apply to emergency powers.[76] For example: such powers ought to have time and geographical limits,[77] and be should be only those necessary to address the type of emergency envisaged;[78] adequate notice and information on their use should be given to the public;[79] the House of Representatives should be informed and, where appropriate, ought to have special controls;[80] and exercise of the powers ought to be reviewable by the courts.[81]

97. The Law Commission's approach is reflected in the COVID Act. Like the Bubonic Plague Prevention Act over one hundred years ago, the COVID Act provides a legislative scheme specifically designed for managing the response to the circumstances of a particular pandemic.

98. The purpose of the COVID Act is to support a public health response that:

    (a) prevents the outbreak or spread of COVID-19 (taking into account the specific risks associated with that disease);

    (b) avoids, mitigates, or remedies actual or potential adverse effects of the outbreak, whether direct or indirect;

    (c) is co-ordinated, orderly, and proportionate; and

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73 At 65.

74 At 68.

75 Canterbury Earthquake Response and Recovery Act 2010; Canterbury Earthquake Recovery Act 2011; and Greater Christchurch Regeneration Act 2016.

76 New Zealand Law Commission *Final Report on Emergencies* (NZLC R 22, 1991) generally at ch 5.

77 At [5.33]–[5.40].

78 At [5.64]–[5.90].

79 At [5.57]–[5.61].

80 At [5.62]–[5.63] and [5.100].

81 At [5.105]–[5.123]

(d) has enforceable measures, in addition to other measures.

99. The same preconditions as apply to s 70 of the Health Act apply to s 11 orders under the COVID Act—there must be authorisation from the Prime Minister, an epidemic notice, or a CDEMA notice in force.[82]

100. However, instead of the Director-General alone exercising s 70 powers, both the Minster of Health and the Director-General may make orders under s 11 of the COVID Act. If the Minister makes a s 11 order, the Minister must have regard to the Director-General's advice and Government decisions on appropriate measures, and must consult with the Prime Minister, the Minister of Justice, and any other Minister they think fit. The Minister must also be satisfied that an order is appropriate to achieve the purpose of the COVID Act.

101. The Director-General's s 11 orders are limited by two factors—an order can only apply within one territorial authority district, and can only be issued if it is both urgently needed and the most appropriate way of addressing the matter.

102. The types of orders allowed are limited to those in s 11 itself. Orders made by the Director-General last for one month, and may be revoked by the Director-General or the Minister. Orders made by the Minister are revoked if not brought before Parliament within specified times. All s 11 orders are disallowable instruments, meaning democratic oversight is retained throughout.

103. These matters show how the COVID Act addresses a number of rule of law concerns that would arise with the continued use of s 70 to manage the response to COVID-19 in the longer term. The COVID Act removes decision-making power from medical officers of health, who are poorly equipped (and are not empowered by s 70) to weigh health issues together with wider socio-economic factors in an ongoing pandemic response. Rule of law concerns are also addressed by providing time and geographical and other limits, formalising offences and enforcement powers, and providing special controls and oversight to Parliament and elected officials.

Interpreting s 70

104. The Law Society apprehends that this proceeding was motivated by a concern about whether s 70 provides a sufficient legal basis for the far-reaching orders that were made and, if it does, where the limits of s 70 lie.[83] It is therefore helpful, in order to address the questions raised by the application, to consider the scope of, and constraints that apply to, s 70 when interpreted according to its text in light of its purpose and context.

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82 COVID-19 Public Health Response Act 2020, s 8.

83 These questions have also been raised publicly by Professors Geddis and Geiringer: Andrew Geddis and Claudia Geiringer "Is New Zealand's COVID-19 lockdown lawful?" (27 April 2020) UK Const L Blog <unconstitutional law.org>.

Text

105. The Health Act is a substantial and general one. Its long title states the Act is to "consolidate and amend the law relating to public health". Public health is defined as "the health of all of (a) the people of New Zealand or (b) a community or section of such people".[84] It may be contrasted with "personal health", being "the health of an individual".[85] The Health Act covers a range of public health matters, from setting out the functions of the Ministry of Health and local authorities, to regulating drinking water and cervical screening.

106. The Health Act also contains, in s 70, "special powers" of a medical officer of health, to be exercised only in certain circumstances and for particular purposes. Section 70(1) relevantly provides:

> **70 Special powers of medical officer of health**
>
> (1) For the purpose of preventing the outbreak or spread of any infectious disease, the medical officer of health may from time to time, if authorised to do so by the Minister or if a state of emergency has been declared under the Civil Defence Emergency Management Act 2002 or while an epidemic notice is in force,—
>
> …
>
> (f) require persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit:
>
> …
>
> (m) by order published in a newspaper circulating in the health district or by announcement broadcast by a television channel or radio station that can be received by most households in the health district, do any of the following:
>
> (i) require to be closed, until further order or for a fixed period, all premises within the district (or a stated area of the district) of any stated kind or description:
>
> …
>
> (iii) forbid people to congregate in outdoor places of amusement or recreation of any stated kind or description (whether public or private) within the district (or a stated area of the district):
>
> …
>
> (1C) If the medical officer of health publishes an order under subsection (1)(m) in a newspaper circulating in the health

84 Health Act 1956, s 2(1); and New Zealand Public Health and Disability Act 2000, s 6(1).

85 Health Act 1956, s 2(1); and New Zealand Public Health and Disability Act 2000, s 6(1).

district, he or she must also make reasonable efforts to have the contents or gist of the order published by announcement broadcast by a television channel or radio station that can be received by most households in the health district.

(1D) The medical officer of health may publish in any other manner he or she thinks appropriate an order under paragraph (la) or (m) of subsection (1) or its gist.

107. The specified actions that may be taken under paras (a)–(m) of subs (1) are particularised, but broad, and cover a wide range of steps that may be needed to deal with a variety of situations. Nonetheless, the exercise of those powers is constrained by a series of safeguards—arising from the Health Act and related legislation—that apply to their exercise.

108. First, the power may only be exercised in relation to an "infectious disease" as that term is defined in the Health Act. To fall within that definition, a disease must be included in pt 1 or 2 of the schedule of infectious diseases.[86] This is achieved via the Governor-General amending the schedule by Order in Council.[87] An Order in Council is a disallowable instrument,[88] meaning it must be presented to and may be disallowed by the House of Representatives.[89] The Order in Council could also be reviewed by the Regulations Review Committee.

109. Second, the power must be exercised for "the purpose of preventing the outbreak or spread of an infectious disease".

110. Third, the power resides with technical experts, medical officers of health. Medical officers of health:

(a) are appointed by the Director-General,[90] who must determine the health district or districts within which their powers and duties may be exercised or performed;[91] and

(b) must be medical practitioners suitably qualified and experienced in public health medicine.[92]

111. Fourth, although the power resides with technical experts—medical officers of health—they cannot act unless:

(a) they have prior authorisation by the Minister of Health;

(b) a state of emergency has been declared under the CDEMA; or

86 Health Act 1956, ss 2().
87 Sections 2(3) and 3.
88 Legislation Act 2020, s 38; and Legislation Act 2012, s 4.
89 Legislation Act 2012, ss 41, 42 and 45.
90 Health Act 1956, s 7A(1).
91 Section 7A(3).
92 Section 7A(2).

(c) an epidemic notice is in force under the Epidemic Preparedness Act 2006.

112. There are no apparent formalities with respect to authorisation by the Minister. The remaining alternative preconditions, however, illustrate the magnitude of events that are likely to be required before s 70 powers may be exercised, and the democratic controls on those preconditions that further legitimise the use of s 70 powers.

113. For the purpose of the CDEMA, an emergency means a situation caused by specified events that causes or may cause loss of life, injury, illness or distress, or endangers the safety of the public or property, and cannot be dealt with by emergency services or requires a coordinated response. A state of local emergency may be declared over part of New Zealand by the Minister or by specified persons under s 68 of the CDEMA.[93] A state of emergency over the whole or part of New Zealand may be declared by the Minister under s 66. It may be declared only if an emergency has or may occur that:[94]

> is, or is likely to be, of such extent, magnitude, or severity that the civil defence emergency management necessary or desirable in respect of it is, or is likely to be, beyond the resources of the Civil Defence Emergency Management Groups whose areas may be affected by the emergency.

114. Once a state of national emergency is declared, Parliament must meet within seven days.[95]

115. The steps required for an epidemic notice are similarly robust. The Prime Minister may declare, by giving notice in the *Gazette*, they are satisfied that the effects of an outbreak of a "quarantinable disease" are "likely to disrupt or continue to disrupt essential governmental and business activity in New Zealand (or stated parts of New Zealand) significantly".[96] The Prime Minister must do so only with the agreement of the Minister of Health, and after considering the recommendation of the Director-General.[97]

116. As with the CDEMA, Parliament must meet within seven days of the giving of such notice.[98]

117. The notice must be revoked if the Prime Minister is no longer satisfied that the effects of the outbreak concerned are likely to disrupt or continue to disrupt essential governmental and business activity in New Zealand (or the parts of New Zealand concerned) significantly.[99]

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93 Civil Defence Emergency Management Act 2002, s 68.

94 Section 66(1)(b), and see s 4 definition of "emergency".

95 Section 67(1).

96 Epidemic Preparedness Act 2006, s 5(1).

97 Sections 5(1) and (4).

98 Section 6.

99 Section 9(2).

118. Fifth, the s 70(1)(la) and (m) powers to close premises cannot be used to close: private dwelling houses; the premises within the parliamentary precincts; premises used as a courtroom, judges' chambers, or court registry; premises that are, or are part of, a prison.[100]

119. Sixth, like any statutory power conferring a public function, the powers under s 70 must be exercised by medical officers of health consistently with the Bill of Rights.[101] The limits on affirmed rights imposed by the exercise of the powers must be demonstrably justified in a free and democratic society. In the present case, Dr Borrowdale has conceded that the limits on rights were so justified.[102]

120. Seventh, orders that have significant legislative effect—including those in issue in this proceeding—will be disallowable instruments that may be disallowed by Parliament.[103]

Purpose

121. The purpose of the s 70 powers is, as the section makes explicit, to prevent the "outbreak or spread of any infectious disease". They are special powers intended to respond to a public health emergency of a magnitude that:

    (a) causes or may cause loss of life, injury, illness or distress, or endangers the safety of the public or property, and cannot be dealt with by emergency services or requires a coordinated response (in order for a state of emergency to be declared); or

    (b) is likely to significantly disrupt or continue to disrupt essential governmental and business activity in New Zealand or stated parts of New Zealand (in order for an epidemic notice to be in force).

122. As the current pandemic illustrates, responding to a public health emergency of that magnitude may require swift action of a nature that may, in advance of the crisis, be hard to imagine. That is particularly so in a highly interconnected world where the frequent movement of people across international borders and between domestic regions quickly allows for the spread of infectious diseases.

123. These issues, however, are not new. New Zealand has faced previous public health crises where precursor provisions to s 70 were used to make far-reaching orders. Orders closing buildings, schools and prohibiting public meetings were made during the 1918 influenza pandemic. In 1925, a quasi-national quarantine was imposed in an attempt to control the polio epidemic: all theatres, schools and sports grounds were closed to school children, who were also prohibited from travelling between the North and South Island. Similar steps were taken in

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100 Health Act 1956, s 70(1A).

101 New Zealand Bill of Rights Act 1990, s 3.

102 Third Amended Statement of Claim at [17(a)].

103 Legislation Act 2012, ss 38 and 39.

relation to polio in 1947. The legislative history of the provisions and their exercise is described in more detail in the appendix to these submissions. It provides confirmation that, at the time Parliament enacted s 70, it understood that responding to a public health crisis could require restricting the movement and activities of large portions of the population.

Text and context also point to a temporal dimension

124. The Health Act's text, read in light of its purpose and history, indicates that it was intended to enable a timely response to the outbreak or spread of an infectious disease by giving powers to technical experts without having to wait for Parliament to respond. For instance, the Health Act may be amended to cover a new infectious disease by Order in Council. Once that is done, the powers may be exercised as a result of ministerial action in the form of authorisation by the Health Minister, the Minister of Civil Defence declaring a state of emergency, or the Prime Minister giving an epidemic notice.

125. But there are also a series of textual indications that the powers are intended to facilitate the immediate short-term response to a public health crisis, rather than providing the framework for a response over the mid- to long-term. The management of an ongoing public health crisis will require the making of difficult policy decisions, where there are trade-offs between health objectives and wider social and economic considerations. Those trade-offs are likely to become more pronounced as the severity of restrictions imposed increases and the longer a health crisis lasts.

126. It is submitted that the text and structure of the Health Act make it clear that the s 70 powers are not intended to provide the necessary framework to resolve those questions on an ongoing basis. Decisions about the exercise of the s 70 powers are made by health experts, who are appointed for their expertise in public health. There is no decision-making role for elected officials. The powers must be exercised for the purpose of "preventing the outbreak of spread of any infectious disease". They do not provide a sufficient framework for the balancing of other interests.

127. In this respect, the provisions of the Health Act are quite unlike the COVID Act, which provides a bespoke regime for an ongoing response over the mid- to long-term and mediates the trade-offs implicit in balancing the competing health, social and economic considerations. The COVID Act does this by:

    (a) having as one of its purposes supporting a health response that is "co-ordinated, orderly, and *proportionate*";[104]

104 COVID-19 Public Health Response Act 2020, s 4(c) (emphasis added). Before making an order, the Minister must be satisfied that the order is appropriate to achieve the purpose of the Act: s 9(1)(d).

(b) giving the power to make decisions primarily to the Minister of Health, having regard to advice from the Director-General;[105] and

(c) expressly allowing the Minister to have regard to a decision by the Government on the level of public health measures appropriate to COVID-19 taking into account non-health factors, specifically "any social, economic, or other factors".[106]

128. In the Law Society's submission, there is a temporal limit on how long the s 70 powers may be exercised in an ongoing crisis before the purpose of the power is exhausted and bespoke legislation is required. That limit, implicit in the structure of the Health Act, may be reached in a number of ways.

129. First, the ongoing management of a public health crisis in the mid- to long-term is likely to require exercising powers for purposes other than those for which they were granted.

130. The Supreme Court in *Unison Networks Ltd v Commerce Commission* stated that powers granted for a particular purpose must be used for that purpose.[107] The Court noted an exercise of such a power would not be invalid if the statutory purpose was pursued alongside other purposes, as long as the statutory purpose itself was not compromised.[108] However, importantly, *Unison* concerned the exercise of a broadly-framed discretion by an expert body, designed to achieve expansive economic goals. It was that feature that led the Court to reason that, in granting a broad discretion, Parliament contemplated that wider policy considerations could be taken into account.[109]

131. The situation under the Health Act is different. The purpose of s 70 is narrowly framed and expressly stated in subs (1): the power must be exercised "for the purpose of preventing the outbreak or spread of any infectious disease". This envisages a targeted health purpose. It does not reflect a provision designed to confer powers to address a complex balancing of health against socio-economic and other issues.

132. By limiting the purpose and policy considerations in this way, the Health Act allows rapid solutions to be applied in emergencies. The decisions of medical officers of health can quickly be activated when needed. Section 70 is not, however, designed to allow for ongoing management in the mid- to long-term, as this would require taking into account a broad range of social and economic factors, overstepping the purpose for which the powers are given.

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105 Section 9. Compare the Director-General's more limited power to make orders in s 10.

106 Section 9(1)(b).

107 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

108 At [53].

109 At [55].

133. Second, the foundational democratic principle would be undermined if powers conferred by s 70 were able to be exercised to allow unelected health officials to control and manage substantial aspects of New Zealanders' lives on a long-term basis. Powers in the nature of s 70 are necessary in the short term to allow a timely public health response to exogenous events like the COVID-19 global pandemic. But the relevant decisions required necessarily involve consideration and balancing of a wide range of health and non-health factors. The longer those decisions rest solely with health officials under generic legislation like the Health Act, rather than being exercised with some formal decision-making role for elected officials under bespoke legislation, the greater the risk that "responsible government may be replaced by unaccountable government: the antithesis of the democratic model".[110]

134. The implication of the democratic nature of our constitution is that there comes a point in the management of an ongoing crisis where it is incumbent on Parliament to pass legislation in order to ensure that critical policy decisions are made in accordance with ordinary Cabinet decision-making. In New Zealand, Parliament can ordinarily be expected to meet that responsibility and, it is submitted, Parliament did meet that responsibility with the enactment of the COVID Act.

135. In the unlikely event that Parliament did not respond in a timely and bespoke manner, it is submitted that there would come a point at which the ongoing exercise of the s 70 powers by unelected officials is so incompatible with foundational democratic principles that further exercise of the power would be ultra vires either for that reason—or because the powers were no longer being exercised for their proper purposes.

136. The Law Society submits that recognising the temporal limits on the exercise of the s 70 powers appropriately balances:

    (a) the purpose of the powers and the need for rapid solutions in emergencies; with

    (b) the constitutional concerns that arise from ongoing restrictions being imposed in the mid- to longer-term by medical officers of health under the Health Act framework.

110 *R (Miller) v Prime Minister*, above n 63, at [48].

The three questions

137. Against that backdrop, these submissions now turn to the principal questions raised by the second cause of action.

Does the Act allow the Director-General to act nationally?

138. It is submitted that properly interpreted the Health Act allows for, and contemplates, that the s 70 powers may be exercised nationally.

139. The description of some of the powers in s 70(1)—in particular those in paras (g)–(j), (la), and (m)—make a reference to "the health district", and medical officers of health are appointed on a district basis.

140. However, the scheme of the Health Act makes it clear the s 70 powers are not limited to being exercised on a health district basis. The powers may be exercised across health districts in the following ways:

    (a) When appointing a medical officer of health, the Director-General may determine the person should exercise or perform their powers and duties within multiple health districts.[111]

    (b) If the Director-General is a medical practitioner suitably experienced and qualified in public health medicine, they shall have all the functions of a medical officer of health and may exercise those functions in any part of New Zealand.[112] If the Director-General is not so qualified, they may designate a medical practitioner or practitioners employed by the Ministry who are so qualified to exercise those functions in any part of New Zealand.[113]

    (c) If satisfied it is desirable in the circumstances to do so, the Director-General may authorise medical officers of health to operate in a stated area outside their district.[114]

141. It is not surprising that the Health Act contemplates the powers being exercised across health districts given that:

    (a) the general subject matter of the Health Act is to make provision for public health, defined as "the health of all of the people of New Zealand or a community or section of such people"; and

    (b) the purpose of s 70 is to allow a public health response to prevent the outbreak or spread of infectious diseases, which by their nature do not respect district health board boundaries.

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111 Health Act 1956, s 7A(3).

112 Section 22(1).

113 Section 22(2).

114 Section 70(4).

142. Reading down the Health Act so that the s 70 powers could not be exercised nationally would thwart the powers' purpose to prevent the outbreak or spread of infectious diseases. It would compromise the ability of designated experts to exercise their power to fulfil the Government's responsibility to safeguard its citizens.

Can the powers in s 70(1)(m) be exercised in respect of all premises and places of amusement and recreation?

143. The Law Society apprehends Dr Borrowdale's position is that the powers in s 70(1)(m)—to require the closure of premises and prohibit congregating in outdoor places of amusement or recreation—may not be exercised in respect of all premises and places of amusement and recreation, subject to exceptions, but can only be exercised in respect of premises of an expressly referred to or stated kind or description.

144. The text of s 70(1)(m) provides a power to:

    (a) require to be closed "all premises within the district (or a stated area of the district) of any stated kind or description"; and

    (b) forbid people to congregate "in outdoor places of amusement or recreation of any stated kind or description (whether public or private)".

145. In the Law Society's submission, textual, purposive, and contextual factors tell against Dr Borrowdale's position.

146. First, the word "all" qualifies "premises", and "any" qualifies "stated kind or description". These operate to expand, rather than contract, its meaning. The terms of s 70(1)(m) can be contrasted with that of s 70(1)(la). Under s 70(1)(la), particular premises may be closed by written order to the person appearing to be in charge. By comparison, s 70(1)(m) affords a much broader scope.

147. This is reinforced by the way in which order must or may be promulgated—by publication in a newspaper, radio and television, such that it may be "received by most households in the health district". The need to state a kind or description and to publish the order widely is to ensure the public are informed and have clarity regarding which premises are closed, and where they may or may not congregate.

148. Secondly, it is submitted that there are strong purposive and contextual indications that overcome the presumption to read down the provision in light of the rights at stake, and provide the basis for a necessary implication.

149. A narrow reading would be required if a limitation of rights was not clearly contemplated by the provision. But here that contemplation is manifest—the provision provides for limitations on rights of freedom of association and movement by allowing premises to be closed—it is a necessary consequence of its operation.

150. A narrow reading might still be required in accordance with the principle of legality if it were not clear that the power was intended to be used as broadly as it has been. In the present case, the rights of every person were limited in pursuit of safeguarding lives and protecting health in an emergency. It is submitted that protecting rights in this context—as distinct from protecting an individual's rights as a counter-majoritarian check—are likely to be best served not by reading down the provision via the principle of legality, but by ensuring the appropriate balance between effective emergency powers and the democratic principle is met.

151. The ability to take urgent and decisive action is thwarted if medical officers of health must always specify each and every kind of premises, or place of amusement or recreation, in a s 70(1)(m) order. The ability to define premises by a list of exceptions is not merely incidental or reasonable, but necessary to ensure the relevant premises are closed for the purpose of preventing the outbreak or spread of an infectious disease. The term "any stated kind or description" cannot, in the context of powers conferred to cater to an emergency, preclude a description that encompasses all premises with specified exceptions.

152. In the Law Society's submission, this is not a case where the principle of legality requires judicial intervention because of the risk that Parliament was not alive to the full implications of an unqualified meaning. As already explained and detailed further in the appendix to these submissions, the use of previous iterations of s 70 powers has included closing significant numbers of buildings and places, with varying degrees of specificity. Although the nature of the exercise of the powers is coloured by the statutory provisions in force at the time, it is notable that the approach to describing the types of premises taken under Order 1 is reflected in actions taken, for example, in Christchurch in 1918.[115]

Do the powers in s 70(1)(f) allow for orders requiring all persons in New Zealand to isolate or quarantine?

153. The Law Society apprehends Dr Borrowdale's position is that the power in s 70(1)(f)—to require persons to be isolated or quarantined—may not be exercised in respect of all persons across all districts, because it may only be used to require specified individuals to isolate or quarantine.

154. Again, several textual, purposive, and contextual factors point away from that position. Within subpara (f) itself, the word person is used in its plural form, and the extent of isolation or quarantine required is left to the discretion of the medical officer of health, as they think fit. In the broader scheme of the Health Act, the powers of medical officers of health in s 70 play a very different role to

115 See the appendix to these submissions at [182(a)], n 140. The Public Health Act 1908, s 18 did not have an equivalent of s 70(1)(m). The District Health Officer may have relied on ss 18(a) and/or 18(f)—the equivalent of ss 70(1)(a) and (f) of the Health Act 1956.

those in pt 3A—the latter being specifically designed to apply to specific "individuals" (not persons) with infectious diseases who pose a public health risk.[116] These textual factors indicate a meaning wider than that suggested by Dr Borrowdale. Moreover, they clearly contemplate the limitation of rights to freedom of movement and association—at least on an individual level—given the incompatibility of those rights with the concept of isolation and quarantine.

155. The meaning of isolation and quarantine are also relevant. Those terms are not defined in the Health Act. However, two factors militate against a narrow construction of these words. First, the measures are those thought fit by a medical officer of health. The reason for that discretion is that such officers have the necessary expertise to determine the type or form that the isolation or quarantine ought to take. The second, related to the first, is that diseases have unknown infectious qualities. The nature of isolation and quarantine are expressly at the discretion of medical officers of health because they are best placed to determine how those devices ought to be used to prevent the outbreak or spread of a particular disease.

156. The fact that s 70(1)(f), in contrast to s 70(1)(m), does not provide for the making of "orders" arguably points to a narrow construction. However, the closing of premises under s 70(1)(m) inevitably affects others who ought to be notified of that closure. It follows that the express requirement of publishing an order attaches to the exercise of the power. Section 70(1)(f) can apply across a greater spectrum—either at a small or large scale. At the small scale, publicity of an isolation or quarantine requirements is not required to inform those who need to follow those requirements.[117] But at a large scale, the most effective way to inform those affected that they are required to isolate or quarantine is wide publication of the requirement. Whether it is called an order or not is inconsequential to the question of whether the lack of a requirement for an order within s 70(1)(f) indicates the provision ought to apply only to individuals.

157. As with s 70(1)(m), it is submitted that there are strong purposive and contextual indications that overcome the application of the presumption to read down the powers and provide a basis for a necessary implication limiting rights.

158. The ability to confine all people in New Zealand to their homes with certain exceptions is an extraordinary use of the power in s 70(1)(f). However, to suggest the power ought to be narrowed to specified individuals is to thwart the intention of the provision that is clearly conveyed by the words, purpose and context. If the circumstances are such that the preconditions for the exercise of the power in the statute are met, and all people should isolate or quarantine for the relevant

116 See in particular Health Act 1956, ss 92A–92U.

117 See the affidavit of Philip Knipe dated 13 July 2020 at [10]–[11] and [15] for examples of s 70(1)(f) used to require the isolation or quarantine of particular individuals.

purpose, s 70(1)(f) would be rendered ineffective in the precise circumstances that Parliament intended for it to operate to safeguard citizens.

159. Finally, this is also not a case where Parliament was not alive to the full implications of an unqualified meaning. This most recent use of s 70 is unprecedented in scale. However, as detailed in the appendix below, precursors to s 70 have been used to similar effect over large portions of the country in at least three epidemics.

160. In the influenza and polio epidemics, similar powers were used not to isolate or quarantine individuals, but entire populations of school children specified only by district.[118] In enacting the Health Act, Parliament can therefore be taken to have intended that the powers conferred the ability to isolate or quarantine the entire population of New Zealand, if that were necessary for the prevention of the outbreak or spread of infectious disease.

E. Third cause of action

161. Order 1 required to be closed, until further notice, "all premises within all districts of New Zealand except those listed in the Appendix". The Appendix listed a number of specific exceptions, including "any premises necessary for the performance or delivery of essential businesses". The Appendix defined essential businesses as:

> businesses that are essential to the provision of the necessities of life and those businesses that support them, as described on the Essential Services list on the covid19.govt.nz internet site maintained by the New Zealand government.

162. The initial list on the covid19.govt.nz website was prepared by MBIE officials, agreed by the All of Government group (including the Director-General) and approved by Cabinet.[119] MBIE had a central role in updating the list, and fielding queries from Government sector agencies and the general public.[120] The Deputy Chief Executive of MBIE describes the role of MBIE as "providing guidance", rather than exercising delegated authority to define the scope of essential services.[121]

163. However, the definition of essential services under Order 1 included the list maintained and updated by MBIE on the covid19.govt.nz website. Identifying and modifying the scope of that list had the effect of identifying and modifying the definition of essential services in the Order.

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118 See the appendix to these submissions at [186], n 160 and 161.

119 See affidavit of Dr Ashley Bloomfield at [226], [240], [252] and [254]; affidavit of Paul Stocks dated 13 July 2020 at [7]–[8], [16], [18] ; and Common Bundle of Documents at 201.0344, 201.0376, and 201.0411.

120 Affidavit of Paul Stocks at [30], [35], [45], and [47].

121 At [49].

164. To the extent that such actions were taken under a delegated authority that did not comply with s 41 of the State Sector Act, it is submitted that the delegation may have nonetheless been lawfully made under the provisions of the Health Act.

165. In this regard, s 7A(5) of the Health Act provides the Director-General may, notwithstanding any other enactment and as he or she sees fit, designate a person to be an officer with functions under the Act. Under s 7A(6), the designation may be made on terms and conditions the Director-General considers appropriate, and must be exercised in accordance with any directions the Director-General gives.

166. In light of the purpose of the s 70 special powers, and in the context of an urgent and nationwide application of those powers in this instance, s 7A may be sufficient to grant the Director-General the ability to delegate a specific task to persons within other state agencies. Whether such delegation was made is unclear from the evidence and is a factual question for the parties.

167. Irrespective of whether or not a proper delegation was made, the Law Society considers that a significant issue remains. The definition of essential services was of critical importance to the Government's strategy adopted under the Orders. The definition, through its reference to the list maintained by MBIE on the covid19.govt.nz website, changed frequently as the list was updated. There does not appear to have been a clear indication of how, when or why the list was changed.

168. This left the law inaccessible and opaque as to whether a certain business could lawfully operate during Alert Levels 3 and 4. It also means that now, after the event, it is difficult to ascertain what the list contained at any particular point in time in order to understand whether particular conduct was or was not permitted.

169. As with the matters underlying the first cause of action, this state of opacity did not conform to the rule of law in that, so far as possible, the law should be accessible, intelligible, clear, and predictable.

F. Relief in relation to the second and third causes of action

170. In the event that the Court were to conclude that all or any of the Orders were ultra vires, either in whole or in part, the Law Society respectfully submits that the appropriate course of action would be to reserve the issue of relief for a further hearing in light of the Court's reasons for judgment.

171. It is submitted that doing so would be appropriate, given that:

    (a) The appropriate relief will depend on the particular aspect, or aspects, of Dr Borrowdale's application that succeeds. The parties are not presently able to make submissions on that targeted basis.

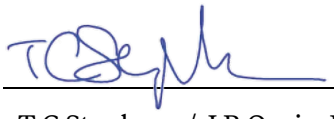
(b) During their currency, there was widespread community reliance on the validity of the Orders, which will need to be carefully assessed. Given reliance by parties not represented before the Court, it may be appropriate for the Court to receive further evidence or hear from other intervenors on the question of relief.

(c) If Dr Borrowdale succeeds, it may be that Parliament would pass legislation retrospectively validating one or more of the Orders. In *Fitzgerald v Muldoon*, this Court held that the prospect of Parliament passing retrospective validating legislation was a matter that was relevant to the discretion to grant relief.[122]

(d) There will be no prejudice to Dr Borrowdale from reserving the issue of relief, given that all three Orders have expired. Similarly, doing so would not interfere with the Government's ongoing ability to manage the response to COVID-19, given that the statutory framework for the response is now provided by the COVID-19 Public Health Response Act.

Date: 20th July 2020

Signature:



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122 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (HC) at 623.

APPENDIX

Legislative history and the use of special powers for infectious diseases

172. Executive powers to prevent the introduction and spread of infectious diseases in New Zealand in the mid-19th century were initially focused on ad hoc maritime quarantine at ports, and the making of related regulations.[123] The first legislative tools that enabled measures to be taken beyond maritime quarantine appear to have emerged in the Public Health Act 1872.

173. Under s 19 of the 1872 Act, the Governor could order by notification in the *Gazette* that certain other provisions were in force—in particular, s 21. Section 21 gave the Central Board of Health the power to issue directions and regulations as it saw fit for the "prevention as far as possible, or mitigation, of epidemic endemic or contagious disease". The directions and regulations could include provision for a variety of specific matters, such as the "cleansing" of streets, regulating the number of occupants of a building, and speedy interment of the dead. Importantly, they could also include provision for the general matter of "preventing or mitigating such epidemic endemic or contagious diseases in such manner as to such Central Board may seem expedient". Directions and regulations were required to be published in the *Gazette*, and could extend to the places indicated by the Governor in the s 19 order. The s 19 order would remain in force for a maximum of six months, but could be renewed.

174. The 1872 Act was replaced in 1876, following the abolition of the Provinces. In respect of infectious diseases, s 20 of the Public Health Act 1876 provided the Governor in Council could, by Proclamation in the *Gazette*, declare a disease infectious. The Central Board's powers, also in s 20, remained largely the same as the 1872 Act: when "any part of New Zealand appears to be threatened with or is affected by any formidable epidemic endemic or infectious disease", the Board could make, alter, and revoke regulations for specified purposes, including for "guarding against the spread of disease". Section 21 required the regulations to be published in the *Gazette*.

175. In early 1900, bubonic plague had made its way from China to the South Pacific, including New South Wales. This prompted two pieces of legislation: the Bubonic Plague Prevention Act 1900; and a new Public Health Act. The former was bespoke legislation, which was enacted under urgency in June 1900. It is an example of wide, highly concentrated, and non-reviewable emergency powers, granted on a temporary basis in the face of a specific threat. Section 2(1) provided the Act was to have operation only in the "cities, boroughs, counties, town

123 See Regulation of Harbours Ordinance 1842 7 Vict 15, cl 3–6. This approach adapted the strategy of *cordon sanitaire*—total isolation of an infected community—used since the response to bubonic plague in the 1300s: N Howard-Jones "Origins of International Health Work" [1950] Br Med J 1032 at 1032–1035; and David P Fidler *International Law and Infectious Diseases* (Oxford University Press, Oxford, 1999) at 26.

districts, and other local governing areas" that that Governor declared, by notice in the *Gazette*, were subject to the Act. The Governor could assume all powers of local authorities and Local Boards of Health. Section 4(1) provided that the Governor could direct, require and enforce the isolation, quarantining, and curative treatment of persons, premises, and things. The Governor also had "absolute discretion" to direct, require or enforce any other matter thought expedient to promptly and effectively deal with the plague.[124] The Governor's decisions were unable to be questioned by the Court.[125] The Act had a sunset clause and was deemed repealed at the end of the parliamentary session,[126] while the legislature proceeded with permanent legislation.

176. The Public Health Act 1900, enacted in October, was set against the background of the fear of the plague. Importantly, however, it was driven by the need for reform of public health management. To that end, it established a Minister of Health and associated Department, a Chief Health Officer, and District Health Officers for six districts—following similar lines as the now defunct Provinces—Auckland, Hawkes Bay, Wellington, Westland, Canterbury, and Otago. In the first report of the Department of Public Health under the 1900 Act, the Chief Health Officer noted:[127]

> While, of course, the centering of such power in the hands of His Excellency, the Minister of Public Health, the Chief Health Officer, and the District Health Officers might be open to grave complaint if unfairly used, I feel certain that so far it has enabled us to effect reforms which otherwise would have been impossible, without in any way detracting from the powers or lessening the influence of the various bodies whose duty it is to look after such matters.

177. In respect of infectious disease, the 1900 Act retained some of the Governor's powers. For instance, the Governor was responsible for issuing notice in the *Gazette* declaring a disease to be infectious or dangerously infectious for the purposes of the Act,[128] and for making regulations for the purpose of preventing and checking the spread of disease, which were to be published in the *Gazette* and brought to the House of Representatives within 14 days.[129]

178. However, s 18 located powers in "cases of special emergency" in District Health Officers, who were the "sole judge" of whether a case of special emergency existed, but who could act only with the approval of the Minister. The Officer could perform any function or power of a local authority for the purpose of

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124 Bubonic Plague Prevention Act 1900, s 4(8).

125 Section 5.

126 Section 10.

127 Chief Health Officer "Report of the Department of Public Health" [1901] II AJHR H31 at 2.

128 Public Health Act 1900, s 13.

129 Sections 14 and 15.

"doing anything to prevent or check the spread of any dangerous infectious disease".

179. In addition, s 19 provided that, when authorised by the Governor, District Health Officers could use "special powers" for the general purpose of "more effectually checking or preventing the spread of any dangerous infectious disease". It is these powers that more closely reflect those now contained in s 70. For instance, s 19(6) included the ability to "require persons, places, buildings, ships, animals, and things to be isolated, quarantined, or disinfected as he thinks fit". And s 19(15) included the ability to exercise "any other power" conferred by the Governor. District Health Officers could exercise their s 19 powers over their district or any part thereof,[130] and the Chief Health Officer could exercise the same powers over any part of New Zealand.[131]

180. The provisions in the 1900 Act were largely replicated in the Public Health Act 1908. Section 17 reflected the "cases of special emergency", and s 18 provided the "special powers" of District Health Officers. Section 10 provided that the Chief Health Officer could exercise the same functions. It was these 1908 Act powers that were exercised in the influenza epidemic in 1918.[132]

181. Influenza was notified in the *Gazette* as a dangerous infectious disease by the Governor-General, under s 12 of the 1908 Act, on 6 November 1918.[133] Publication of that notice authorised District Health Officers in Auckland, Wellington, Christchurch and Dunedin to exercise their s 18 powers. In a further *Gazette Extraordinary*, the Governor-General conferred on District Health Officers the power to close hotels, bars, or other places.[134] Both the Chief Health Officer and the various District Health Officers issued multiple notices of the exercise of such powers between November 1918 and April 1919.

182. Some notices published by the Health Officers could be characterised as guidance or instructions.[135] For example, on 16 November, the acting Chief Health Officer (together with the Minister), notified that every local authority was required to take steps to secure sanitary conditions and "inform" the public not to travel beyond their locality.[136] Others are clearly orders. For example, on

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130 Section 19.

131 Section 11.

132 This was supplemented the Public Health Amendment Act 1918, which was passed with urgency in December 1918. Its main purpose was to establish a Board of Health to which each district would report. It does not contain provisions of particular significance to the present proceeding, except that local authorities were required to follow directions from the District Officer of Health in relation to public conveniences (s 18).

133 "Influenza declared to be an infectious disease" and "Influenza declared to be a dangerous infectious disease" (6 November 1918) 146 *New Zealand Gazette* 3693.

134 "Special Powers conferred on District Health Officers under the Public Health Act" (13 November 1918) *New Zealand Gazette Extraordinary*.

135 See "Public Notices" *Sun* (20 November 1918).

136 See "Important Urgent Public Notice" *Taihape Daily Times* (16 November 1918).

7 November, the acting Chief Health Officer ordered a one-week closure of "all places of indoor public congregation" in Auckland.[137] Subsequently, the acting Chief and District Health Officers variously ordered, amongst other things:

(a) the closure of all shops in a city;[138] the closure of all places and buildings within the Canterbury-Westland area in accordance with a scheduled list of building purposes, including "any place not included in the above schedule which is, or may be used for public meetings or gatherings";[139] and the closure of all buildings in a metropolitan area, save for a specified list including chemists and newspaper printing offices;[140]

(b) the closure of all places of amusement,[141] churches for internal services,[142] schools,[143] and trotting clubs;[144]

(c) requests that the Court not schedule jury trials;[145]

(d) the prohibition on the sale of alcohol,[146] or closing of licenced premises;[147] and

(e) the prohibition of public meetings.[148]

183. The orders were amended and eventually revoked by each District Health Officer.[149] The approach overall was haphazard and highly criticised, with multiple bodies (local authorities, the Education Boards, and so on) having competing or overlapping powers. Amongst the Influenza Epidemic Commission's recommendations made in 1919 was an urgent need to reform the powers and duties of the Department of Public Health and all other authorities, as the powers were ill-defined and able to be exercised by more than one authority.[150] On the back of these recommendations and the work of the Board of

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137 See "Drastic Action: All Public Places Closed" *Auckland Star* (8 November 1918).

138 See "Public Notices" *Press* (15 November 1918); "Public Notices" *Sun* (16 November 1918); and "Public Notices" *Star* (16 November 1918).

139 See "Public Notices" *Press* (18 November 1918).

140 See "Public Notices" *Press* (18 November 1918).

141 See "Closing Places of Amusement" *Oamaru Mail* (19 November 1918); "Public Notices" *Grey River Argus* (18 November 1918); "Public Notices" *Otago Daily Times* (14 November 1918).

142 See "Influenza Epidemic: All Churches Closed" *Sun* (13 November 1918).

143 See "Influenza Precautions" *Otago Daily Times* (22 November 1918).

144 See "Public Notices" *Sun* (20 November 1918); and "Public Notices" *Press* (18 November 1918).

145 See "Supreme Court Closed: Civil Sessions Postponed" *Press* (14 November 1918).

146 See "Influenza Epidemic" *Dominion* (22 November 1918); and "Notice Prohibiting Sale of Alcoholic Liquors" *Rangitikei Advocate* (22 November 1918).

147 See "Influenza Precautions" *Otago Daily Times* (22 November 1918); "Notice Prohibiting Sale of Alcoholic Liquor" *Dominion* (22 November 1918); and "Public Notices" *Press* (18 November 1918).

148 See "Notice Re Prohibiting Public Meetings" *Dominion* (22 November 1918); and "Government Notices" *Southland Times* (18 November 1918).

149 See "Influenza" *Hawera & Normandy Star* (9 December 1918).

150 "Report of the Influenza Epidemic Commission" [1919] II AJHR H31A at 37.

Health, and in light of the additional outbreaks of smallpox, polio, and diphtheria in the preceding decade, new legislation was drafted.

184. The following year, the Health Act 1920 was enacted. The Chief Health Officer was replaced with the Director-General of Health,[151] and District Health Officers with Medical Officers of Health.[152] The Director-General retained the functions of Medical Officers.[153] In respect of special powers to deal with infectious diseases, s 76 of the 1920 Act has a lot in common with the current s 70. The powers that a Medical Officer of Health may, if authorised by the Minister, use for the "purpose of preventing the outbreak or spread of any infectious disease" are specified in a list that is largely reflected in s 70. Indeed, s 76(1)(f) of the 1920 Act is replicated in the current s 70(1)(f). Section 76(1)(m), however, is in different terms.

185. Section 76 was most notably used during the polio epidemics, particularly in the mid-1920s and late-1940s. The response to the polio epidemic in 1925 has been described as the "first major attempt" to control the movement of large sections of the population in response to an epidemic, and the first time something approaching a nationwide quarantine had been imposed, rather than imposing isolation and quarantine on specific buildings and people.[154] In terms of s 76, on 13 January 1925 the Director-General of Health closed theatres, schools and sports grounds to children, initially in Wellington, Hawkes Bay, Patea, and Nelson.[155] He extended that order to the whole of the North Island on 16 January, and prohibited children from crossing the Cook Strait.[156] A Medical Officer of Health extended it to Christchurch on 27 January.[157]

186. In 1947, the powers were again used in a similar fashion—the Director General of Health closed schools in the North island in November 1947,[158] and in the South Island on 8 December.[159] Children were prohibited from travelling the Cook Strait after 13 December,[160] and a 14-day quarantine period applied to children who interacted anyone who was hospitalised with the disease.[161] Most schools were

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151 Health Act 1920, s 5.

152 Section 16.

153 Section 19.

154 Jean C Ross "A History of Poliomyelitis in New Zealand" (PhD thesis, University of Canterbury, 1993) at 28–29.

155 See "Health Department's Order" *Evening Post* (14 January 1925); and "Order Under Section 76 of the Health Act 1920" *Nelson Evening Mail* (24 January 1925); and Ross, above n 154, at 29.

156 See "Protection of Children" *Evening Post* (16 January 1925); and Ross, above n 154, at 29.

157 See "Public Notices" *Press* (29 January 1925); and Ross, above n 154, at 29.

158 See "Primary Schools Closed" *Otago Daily Times* (29 November 1947).

159 See "All Schools Closed" *Otago Daily Times* (9 December 1947).

160 See "Health Order" *Otago Daily Times* (11 December 1947); and "Order Under Section 76 of the Health Act, 1920, to Shipping Companies and the Public generally" (24 August 2001) 73 *New Zealand Gazette* 1879 at 1886.

161 Ross, above n 154, at 64.

closed until March 1948.[162] Due to the continued prevalence of the disease in Auckland, those schools remained closed until 19 April.[163]

187. The 1920 Act was replaced by the Health Act 1956. The Explanatory Note to the 1956 Bill states the relevant clauses reacted the existing provisions with only minor amendments.[164] Section 70 in fact replicated s 76, but has since been subject to several amendments. Two suites of amendments are of note.

188. First, in 1964, s 70(1) was amended to include reference to a "state of national major disaster declared under the Civil Defence Act 1962" as an alternative precondition to the use of s 70.[165] In 2002, pursuant to the CDEMA, an updated reference to a state of emergency under the CDEMA was included in s 70(1).

189. Secondly, and most pertinently, s 70 was amended in 2006, via the Health Amendment Act 2006, which stemmed from the Law Reform (Epidemic Preparedness) Bill 2006. This legislation was part of a much wider domestic and international law reform project responding to vulnerabilities highlighted by the SARS epidemic.[166] Relevant to these proceedings, the 2006 amendments included:

    (a) inserting reference to an epidemic notice into s 70(1) as another alternative precondition to the use of s 70;[167]

    (b) inserting the current ss 70(1)(ea) and (fa) for requiring submission to testing;[168]

    (c) amending s 70(1)(f), (g) and (i) from "ships, animals, and things" to "ships, vehicles, aircraft, animals, or things";[169]

    (d) amending s 70(1)(h) from "forbid persons to leave" to "require people to remain in";[170]

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162 See "Schools to reopen on March 1" *Bay of Plenty Times* (21 February 1948).

163 See "Infantile Paralysis" *Otago Daily Times* (10 April 1948).

164 Health Bill 1956 (36–1) at v. At i, the explanatory note also states the Bill made "no substantial changes" to the law, except in reconstituting the Board of Health, rewriting the provisions on maritime quarantine to be in line with the requirements of WHO's International Sanitary Regulations, and including provisions on air pollution.

165 Health Amendment Act 1964, s 3. This was later updated to refer to various states of emergency under the Civil Defence Act 1983.

166 The Law Reform (Epidemic Preparedness) Bill 2006 led to amendments in a wide range of statutes, including the Immigration Act 1987, Resource Management Act 1991, Parole Act 2002, Sentencing Act 2002, Income Tax Act 2004. Internationally, WHO promulgated the International Health Regulations 2005, which conferred a range of emergency powers on WHO, and provided a range of obligations on States to prepare for outbreaks of infectious disease.

167 Health Amendment Act 2006, s 5(1).

168 Sections 5(2) and (4).

169 Sections 5(3) and (5).

170 Section 5(6).

(e) repealing ss 70(1)(m)–(o) and replacing them with the current ss 70(1)(la) and (m) with respect to orders for closing premises;[171] and

(f) inserting the current s 70(1A) providing that ss 70(1)(la) and (m) do not apply to private dwellinghouses, the parliamentary precinct, the courts, or prisons, and that reasonable endeavours to publish orders on television or radio must be made.[172]

171 Section 5(7).

172 Section 5(8).