

# Government Authority and the Covid-19 Lockdown

## Abstract

During the national lockdown, Cabinet exercised extraordinary authority in response to the Covid-19 pandemic. This article summarises the circumstances leading up to the adjournment of Parliament in late March, and the decision-making processes in place during the lockdown. This includes the national security system and all-of-government response to the crisis, as well as the key legislative triggers for the government's response: the Epidemic Preparedness Act 2006 (and the epidemic notice) and the Civil Defence Emergency Management Act 2002 (and the state of national emergency). It also discusses decision making by the Covid-19 Ministerial Group and the Epidemic Response Committee while Parliament was adjourned. It argues that Cabinet exercised appropriate authority in response to the crisis and did not make significant, permanent or constitutional change.

**Keywords** Cabinet, all-of-government, epidemic notice, Covid-19 Ministerial Group, Parliament, Epidemic Response Committee

Under normal circumstances, the New Zealand Parliament exercises extensive authority to make and amend legislation. That is to say, Cabinet, as the government of the day with a majority in the House, faces very few checks and balances in implementing its policy agenda. The Covid-19 pandemic derailed business as usual for Parliament,

and society in general. For a period of several months during the height of the crisis, Cabinet exercised extraordinary authority, even by New Zealand standards. In some nations there has been pushback from sectors of society against the increased authority of government over people's lives. In New Zealand, despite criticism from some quarters (Dunne,

2020; Roy, 2020), public polling showed that trust in the government and the public sector increased during the lockdown, and that the vast majority of New Zealanders supported the government's actions. Whether or not we support the decisions governments make during a crisis, it is important that we understand, and reflect on, the degree of authority the government exercises in doing so. Here, I summarise the circumstances leading up to the adjournment of Parliament in late March, and the decision-making processes in place during the national lockdown.

But first, what is an emergency and what degree of government authority is appropriate in response? An emergency is any 'happening' which causes or may cause loss of life, injury, illness or distress which cannot be dealt with by emergency services (Civil Defence Emergency Management Act 2002, s4). During a state of emergency, governments draw on extraordinary authority that, under normal circumstances, would be considered unreasonable, even undemocratic. A government may suspend certain rules temporarily in order to protect the core of its authority, and to protect the institutions required for public safety, good governance and prosperity (Department of the Prime Minister and Cabinet, 2016, p.6). A government's response to an emergency should be proportional to the state of the emergency. The response should be temporary, with restrictions lifted as soon as possible. Most importantly, during an emergency a government should

use its extraordinary authority only to address the crisis at hand, not to make broader, permanent constitutional change.<sup>1</sup>

In 2001 the New Zealand government adopted an expansive 'all hazards—all risks' approach to national security. In a crisis, this approach aims to: ensure public safety; preserve sovereignty and territorial integrity; protect lines of communication; strengthen international order to promote security; sustain economic prosperity; maintain democratic institutions and national values; and protect the natural environment (*ibid.*, p.8). A national security system was developed to provide a coordinated government response, run by the Department of the Prime Minister and Cabinet (DPMC) National Security Group. During a crisis the system operates at three levels to provide strategic decision making: (1) the prime minister leads the Cabinet National Security Committee, which includes ministers of the Crown; (2) the DPMC chief executive leads the Officials' Committee for Domestic and External Security Coordination (ODESC); and (3) the DPMC deputy chief executive (security and intelligence) leads the senior and other officials' committees, working groups and watch groups. A lead agency is identified according to the nature of the emergency in order to clarify responsibilities, leadership, communication and coordination. Although responsibility remains with chief executives and ministers, the national security system aims to coordinate agency work across complex problems (*ibid.*).

Covid-19 presented New Zealand with an unprecedented level of threat to health and economic and social stability. As a result, the scale and complexity of the government response to the pandemic was unprecedented in New Zealand's history. A national security system response was established in late January as the Covid-19 threat to New Zealand became apparent. The first watch group meeting among relevant officials to monitor the developing crisis was called on 27 January. Although a watch group may be enough to achieve cross-agency coordination in response to an event, in this case the response was quickly escalated and the first ODESC meeting of chief executives was held four days later on 31 January. These discussions

identified the risks Covid-19 presented in relation to New Zealand's pandemic plan (Ministry of Health, 2017). The Ministry of Health was identified as the lead agency to provide independent advice to the prime minister and Cabinet on the national-level health response, while district health boards provided the regional lead. The director-general of health, Ashley Bloomfield, was responsible under the Health Act 1956 for overseeing this public health response and for ensuring that health information and advice from the ministry reached all relevant officials (Ombler, 2020). A range of government agencies engaged in the watch group and

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ODESC meetings and took the lead in their specific areas in support of the Ministry of Health. The DPMC played a key role in coordinating policy advice and government action (Department of the Prime Minister and Cabinet, 2016, p.21).

In late January, Covid-19 was listed as a notifiable infectious disease under the Health Act 1956, in recognition of the potential threat it posed. It was quickly apparent that the scale of the crisis New Zealand was facing required a more expansive model for working across government than the national security system response anticipated. The DPMC chief executive and ODESC chair, Brook Barrington, took significant steps to strengthen the government and public sector response. First, to support the Ministry of Health, Barrington initiated an enhanced all-of-government response in February to coordinate decision making across relevant agencies and officials. Peter

Crabtree from the Ministry of Business, Innovation and Employment provided and led the all-of-government strategic policy coordination and provided support to the Ministry of Health. There was also a strong effort to ensure a unique, integrated all-of-government public communications response led by the Ministry for Primary Industry's John Walsh to provide a clear, positive communications strategy with the New Zealand public (Ombler, 2020).

On 11 March, Covid-19 was declared a notifiable, infectious and quarantinable disease under the Health Act 1956. This declaration made a range of powers available under the Health Act, and meant that, if required, the prime minister could issue an epidemic notice in response to the pandemic under the Epidemic Preparedness Act 2006. On 16 March Barrington activated the National Crisis Management Centre to ensure effective coordination across agencies, including communications, operations, logistics, welfare, planning, policy and intelligence. The National Crisis Management Centre continued to grow in size as different agencies volunteered staff to support the response. Barrington engaged the services of experienced senior public servant John Ombler as the all-of-government controller under the Civil Defence Emergency Management Act 2002. Ombler was responsible for providing strategic direction and coordination for the all-of-government response. He acted as the 'pivot point' between the national security system and the operational response to ensure a consistent and coordinated approach (Ombler, 2020). Ombler was joined in the leadership team by the director-general of health and the director of civil defence emergency management, Sarah Stuart-Black, who have statutory powers under the Health Act and the Civil Defence and Emergency Management Act respectively. The team also included Mike Bush (the police commissioner until early April), who led and coordinated the operational response, and the Ministry of Business, Innovation and Employment's Peter Crabtree, who provided oversight and coordination of the all-of-government strategy and policy advice.

Under different circumstances, it might have been possible for this all-of-

government response to function within the usual parliamentary decision-making and legislative processes for the duration of the crisis. However, throughout March the number of Covid-19 cases in New Zealand escalated and there was evidence of community transmission of the virus. The government took the policy decision to 'go early and go hard' on the spread of the virus. It established a Covid-19 alert level system and moved the country to level 3 on 23 March. The minister of civil defence took advice on 24 March from the director of civil defence emergency management and declared a state of national (as opposed to local) emergency under the Civil Defence Emergency Management Act 2002 (s66). This declaration enabled resources to be coordinated at the national level and also ensured local and regional level compliance with the instructions being issued. It allowed food, fuel and essential supplies to be provided as required, and allowed officials to regulate land, water and air traffic, to close roads and public places and to evacuate premises. This was only the second time a state of national emergency has been declared in New Zealand; the first time was on 23 February 2011 following the 6.3 magnitude earthquake in Christchurch.

Although it was not scheduled to sit between 20 and 30 March, Parliament was required to meet after the state of emergency was declared. Therefore, the House sat on 25 March, and it proved a busy and extraordinary day. The prime minister announced that, effective from 11.59pm that day, the country would move to alert level 4 and there would be a nationwide lockdown. Significant steps were taken to give effect to the lockdown. On the recommendation of the director-general of health, and with the agreement of the minister of health, the prime minister issued an epidemic notice under section 5 of the Epidemic Preparedness Act 2006. This ensured the continuity of essential government business in the face of the unprecedented effects of Covid-19, which, in the prime minister's words, was likely to 'significantly disrupt essential governmental and business activity in New Zealand' (Ardern, 2020).

The epidemic notice unlocked provisions in the Corrections Act 2004, the

Electoral Act 1993, the Epidemic Preparedness Act 2006 and the Health Act 1956, to be used as and when required. It also allowed epidemic management notices to be made across a range of areas and services, including local government, immigration and social services (under section 8 of the Epidemic Preparedness Act) if the prime minister was satisfied that the effects of Covid-19 made it necessary to do so. The prime minister justified this additional authority to change specific parts of legislation as a 'common-sense and pragmatic way to keep our systems working in a time of shutdown and get rid of particular requirements that are impractical'

## Covid-19 presented an unprecedented level of threat to New Zealand society ...

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(*ibid.*). She announced two such changes on 25 March, effective immediately. First, visas were automatically extended for temporary visa holders for the duration of the epidemic management notice (plus an additional three months), thereby taking the load off immigration officials who would otherwise manually process those applications. Second, emergency benefits were granted to those otherwise not entitled or eligible under the existing provisions of the Social Security Act 2018. (An epidemic management notice was also made in relation to sentencing and parole later in March.)

The epidemic notice also enabled modification orders (under sections 14 and 15 of the Epidemic Preparedness Act) to make targeted modifications to some legislative provisions. Modification orders can be made on a minister's recommendation (in consultation with Cabinet) to the governor-general. These modification orders are in place only as long as the epidemic notice is in force and they cannot extensively 'rewrite' the law. Changes cannot be made to (amongst

other things) the Bill of Rights Act 1990, the Constitution Act 1986 and the Electoral Act 1993. The minister must be satisfied that Covid-19 made it impossible to comply with the current enactment, described as 'a high bar – but appropriately so' given that the order would modify legislation enacted by Parliament (Ministry of Health, 2020). Although the prime minister did not announce any modification orders on 25 March, some were subsequently issued, as discussed below.

The epidemic notice also triggered provisions in the Health Act relating to the special powers of medical officers of health. Specifically, section 70(1)f empowered the director-general of health for 'the purpose of preventing the outbreak or spread of any infectious disease' to 'require persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit', including closing premises and forbidding people to congregate. This authority underpinned the requirements at each alert level, notably the directive on 25 March that New Zealanders must go home and stay home (with very few exceptions) for the duration of the national lockdown.

In anticipation of Parliament being adjourned during lockdown, the leader of the House, Chris Hipkins, moved to establish a special select committee, the Epidemic Response Committee, to take up the essential roles of scrutinising the government's decision making in response to the pandemic and reporting to the House. Under normal circumstances, select committee membership broadly reflects the proportions of party membership in the House. In a break from tradition, Hipkins announced that the committee was to be chaired by the leader of the opposition with an opposition majority, to ensure effective scrutiny of the government's actions. The committee included ten further members: four National Party MPs, one ACT MP, three Labour MPs and one MP each from the Green Party and New Zealand First. It could request and receive information about how the government was exercising its powers and it had the power to require people to appear before it (although not physically). Finally, the leader of the House

moved that the House be adjourned until 28 April in keeping with the requirement for everyone (except essential services) to comply with the lockdown.

As the nation went into lockdown, Cabinet transitioned into a new phase to keep pace with fast-changing events. Cabinet committees stopped meeting, including the ad hoc Cabinet Committee on Covid-19 Response which had been meeting since early March. In its place, Cabinet established the Covid-19 Ministerial Group Cabinet Committee to coordinate and direct the government's response to the pandemic. Cabinet authorised the committee with 'power to act' and take final decisions on behalf of Cabinet (Department of the Prime Minister and Cabinet, 2019). This committee was chaired by the prime minister and comprised seven ministers from Labour, New Zealand First and the Green Party. It was supported by a range of experts from inside and outside government. It met almost every day (including weekends) during alert levels 3 and 4 and it functioned at speed in order to respond as events unfolded.

During the lockdown, some immediate modification orders were issued to temporarily change provisions in legislation which were made impossible or impractical during the lockdown, largely relating to physical distancing requirements. The orders ensured, for example, that wills and oaths were not required to be signed and sworn in person; that the police and health officials were not made available for alcohol licence applications and renewals; that declarations for new local authority members did not need to be witnessed in person; that enduring powers of attorney could be created with the required

signatories in different places; that applications to extend benefits for existing beneficiaries would not require an additional form to be completed; and that modified the collective bargaining requirements while the epidemic notice was in force.

The Epidemic Response Committee began its work of 27 March and met digitally, with many of its meetings available for the public to view through the Parliament website. While Parliament was adjourned, the committee led an inquiry into the government's response to Covid-19, hearing evidence from a wide range of individuals and officials who appeared before it over 25 meetings. After Parliament resumed on 28 April, the committee reported to the House on the Covid-19 Response (Further Management Measures) Legislation Bill, an omnibus bill amending 45 pieces of legislation to respond to the wide-ranging effects of Covid-19. It also reported on the Immigration (Covid-19 Response) Amendment Bill, which was introduced to the House on 5 May. The bill sought to provide additional flexibility to the immigration system, to be automatically repealed after 12 months. In both cases the committee recommended that the bills be passed, subject to amendments.

When the country moved back to alert level 3 on 27 April, Parliament resumed sitting (under urgency) and the ad-hoc Covid-19 Ministerial Group Cabinet Committee became defunct. The state of national emergency, which had been extended six times, was lifted on 12 May, and the temporary powers afforded to officials lapsed. The Epidemic Response Committee was disbanded on 26 May. The epidemic notice issued on 25 March was valid for three months; any modification

orders made under the Epidemic Response Act lapse once the epidemic notice is lifted. As these more extreme measures were ratcheted down, the all-of-government response continued to support the Ministry of Health and relevant ministries for as long as required.

Covid-19 presented an unprecedented level of threat to New Zealand society, and the government and public sector responded with an unprecedented expansion of authority. Was the response to the crisis proportional to the crisis threat? Did the government use this authority appropriately? These preliminary observations highlight a number of important features to consider. New Zealand's existing national security response system adapted as the circumstances demanded. Many of the key decisions triggering legal provisions were made on the basis of advice from officials (not politicians), such as the DPMC chief executive, the director-general of health and the director of civil defence. At the height of the crisis, Cabinet moved at speed to keep pace with events and exercised the 'power to act' relatively sparingly; its authority was temporary, as were the pragmatic changes made to legislation. The authority extended to Cabinet even at the height of the crisis did not empower it to make significant, permanent legislative or constitutional change. Nevertheless, this network of decisions and actions had an unprecedented impact on society and questions will, and should, continue to be raised about all aspects of this extraordinary phase of New Zealand politics.

<sup>1</sup> For further discussion see Joel Colon-Rios in Faculty of Law, 2020.

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