

5 April 2020

Prime Minister, Rt Hon Jacinda Ardern  
Parliament Office  
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Wellington

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Dear Prime Minister,

### **LAWFULNESS OF SOME FEATURES OF LOCKDOWN RESTRICTIONS**

1. We have clients who want our urgent advice on the lawfulness of some features of the lockdown restrictions.
2. The questions are various, but they can be simplified. Essentially they ask whether the authorities can infringe New Zealand Bill of Rights Act freedoms and common law liberties of the subject on the basis of deemed 'essentiality' of activity. In our opinion that test may have been given a role that is not justified according to the statutory purposes that must govern your exercise of emergency powers. Other criteria would more clearly and directly relate to the necessary risk of contagion associated with an activity, or the effect of the activity on ending the emergency.
3. We recognise that 'essentiality' might be a relevant criterion in the design of lockdown regulation, in the sense that essential functions may be permitted even if they carry inherent risk of conduct that facilitates transmission of the virus – so it is a sensible basis for conditional and controlled exceptions to prohibitions or constraints that are otherwise desirable and lawful. But it appears to have become a primary disqualifier.

### **Evidence of anti-contagion necessity and efficiency of prohibitions on outdoor work and small number outdoor activity**

4. We write to ask for the evidence presumably relied on to conclude that prohibiting business activity deemed non-essential, and exercise at a distance from home, is necessary or justified on a cost/benefit basis. Many such activities can be carried out with straightforward hygiene and physical separation precautions that would preserve the participants' respective bubbles. It appears to us that the lockdown controls and announcements assume cause/effect connections and relative costs, risks and benefits that are necessary for some aspects of them to be lawful. What are the assumptions? Have they been established?
5. Study of the Orders, Ministerial and Police pronouncements, and reports of Police behaviour, suggests that the Executive (including for this purpose the Police) may have been misled by the pressure of events into elision of the critical statutory purposes that should govern the isolation and stay home orders. The purpose is safety from infection and transmission of infection. Stay home (stay local, stay inside, do not work) were means (among many) to an end. In the absence of evidence to the contrary confinement seems to have become instead its own purpose for enforcement activity. If so, that is expending essential official energy, and social enforcement capital that should be focused on distancing, hygiene and non-contact outside the bubble.

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6. We write to ask for the evidence and reasoning that establish the connection of the 'stay home' tactical objectives with the lawful purposes of the epidemic response, and their rationality in cost/benefit terms. The proper purposes of extraordinary government power are carefully recorded in empowering legislation. As you know they are expressed variously in different statutes, and in different sections within them. They enable interference with core freedoms if the measures are "for the purpose of preventing the outbreak or spread of any infectious disease" (Health Act s 70(1)) or in the Civil Defence Emergency Management Act - "necessary for the preservation of human life", or needed "to prevent or limit the extent of the emergency" or "to stop any activity that may cause or substantially contribute to an emergency".
7. But pertinent legislation and common law also require Ministers prudently to consider benefits, alternatives and costs. Section 65 of the Civil Defence Emergency Management Act 2002 is a good example. It is not enough for a measure to be well intended with a view to limiting contagion. It must under that section be both necessary and the most appropriate means to achieve that purpose, having regard to efficiency and effectiveness relative to other means.
8. We observe that other statutes are similarly reflective of the proportionality and efficiency tests that a court would apply in judicial review. Part 3A of the Health Act 1956 is supposed to govern the Management of Infectious Diseases, though it appears that you have concluded it is not apt for epidemic control. But it shows the importance Parliament attaches to explanations and reasonableness when draconian powers are being exercised in a health emergency. That Part was extensively considered by Parliament when it was passed in 2016. Sections 92A to 92H are an admirable guide, though we recognise that you have chosen to apply other legislation

#### **Essential activity test**

9. Recent government actions seem characterised by determination to make the lockdown universal and to stamp out "non-essential" activity. In our opinion a court considering the reasonableness of the 3 April Order under s 70(10(f) would want to know whether and how the decision-makers assessed the real contagion risks presented by activity outside the residence. For example, how does outdoor solo work where social distancing can be maintained at all times, rate in risk terms against the costs accumulated from banning it. Especially in comparison with other activities that are not being effectively controlled, or are expressly permitted. We think a court would take into account any evidence about the effects on community trust and support for measures that require overwhelming majority compliance to be effective and worthwhile. A court could want to know what other avenues were considered for establishing and reinforcing the social distance and hygiene regime that could be at least equally effective. They will presumably be critical as the lockdown is lifted or relaxed (as it must be in time to avoid economic collapse and serious social and political disorder).
10. In the absence of the evidence requested we expect to advise our clients that significant elements of your current regime are probably unlawful. Of course that is a mixed question of fact and law. If there was good evidence that home confinement and cessation of activities deemed non-essential were necessary and efficient requirements (taking account of available alternatives) our current opinion would not be correct. We recognise that there may be practical public messaging or categorisation problems to support some otherwise irrational prohibitions even if most individuals could conduct their specified outdoor activities safely. But on current information it appears that your prohibitions on a lot of "non-essential" activity are outside the law.
11. If you have the evidence to support the prohibitions, we strongly recommend that it be made public. In particular there should be compelling scientific/medical evidence of the reasonable necessity for the "essential" test. Without it, whether or not there is a court challenge, government authority will erode, and with it community resolve and cohesion. We think that "essentiality" has come to trump

“safety” and cost considerations. It seems to be applied without even getting to the more pertinent question – whether available hygiene and separation methods and behaviours associated with non-essential activity that could similarly limit virus transmission at far less personal and community cost.

12. Let us offer an illustrative non-business case. Surfing, many forms of fishing, hunting, mountain biking and running are activities in which the chances of viral transmission are extremely low. The 25 March Health Act Order stated expressly, “Staying 2 metres away from others is an effective measure [to protect you and others from COVID -19]”. We could envisage concern about participants travelling together to venues with people from outside their bubble. Or congregating without observing the disciplines before, during and after the activity. But those risks are readily dealt with under the same enforcement regime as applies to the permitted activities of supermarket and other shopping, and local walking.
13. In the 3 April Order we see crystallised (in clause 2(e)(iii)) the claim previously asserted by officials, that the injury risk of some sports activity is sufficient to ban it. If the argument is pertinent to the statutory requirement, it must be an argument that the likelihood of needing rescue or medical attention is high enough to represent a competition for scarce medical or other resources that it could impede the prevention of the spread of COVID-19.
14. With respect, that claim has the appearance of a rhetorical straw to justify an official position adopted under time pressure and without evidence. We have seen no attempt to quantify the alleged risks with the benefit of data on accident rates, rescue rates and risks. It seems to take no account of countervailing benefits. It disregards the presumptions in favour of the NZ Bill of Rights Act fundamental freedom of movement. It is a serious matter if the claim is spurious, when extended to assert a material enhancement of contagion or epidemic risk, or impediment to containing the infection. Essential liberties and the economic survival of many New Zealanders are at stake. Our government should be seen to be diligent and careful to respect human rights. All authorities should wish to enhance the agency and ability of our communities to understand and play their part in stopping transmission. They should not be patronised with assertions given a patina of medical necessity and science. Active solo sport seems from our understanding of figures to be no more likely to consume vital hospital resources to the detriment of dealing with COVID -19 treatment, than, for example, drinking alcohol at home, or continuing to smoke tobacco. Both are likely to result in predictable demand for medical attention. Especially as smokers will be more likely to need scarce respiration assistance. As you know the supply of those substances has been deemed essential.
15. On current public information it looks as if many business people and workers are expected to be obedient to the confinement orders when their activities mentioned can occur outdoors or otherwise where the transmission risks are extremely low in any event. Many of those people, rationally weighing risks and costs to them, would renounce any expectation of rescue, or already carry on their activities where rescue is a remote benefit if the inherent dangers materialise.
16. But you may have better analysis. If so, we strongly suggest that it be made generally available. Because the current approach to ‘stay home’ is losing public support, from what our clients report. The demise of household name journals last week under an activity ban that took no account of the ability to produce them without risk of promoting contagion has discredited the essentiality test, and focused attention on the lawfulness of your claimed powers.

**Carefully examining activities against the statutory tests could be a rational way to progressive exit from lock down.**

17. Our clients have been sympathetic to your position. They recognised the pressures you are under. They accept that it is unfair to expect early emergency measures to be finely calibrated to relative

costs, risks and benefits. They understand that some measures may be driven by needs to facilitate enforcement, where blanket rules can simplify a complex task. But you have had time to drop some damaging and unnecessary aspects. The 3 April Order instead doubles down on what appears to us to be illogic and consequently illegality.

18. If hostile sentiment becomes embedded it will complicate or frustrate your administration of the lockdown and ongoing measures. We are sure some affected clients would be happy to work with officials to develop codes and protocols, including for community enforcement support in their sectors, to minimise any infection risks from refinement and removal of the unjustified activity bans.
19. If you do not have better reasons than have been given, for confinement of the law-abiding and compliant, community collaboration to evade controls will become normal. Particularly if there is widespread doubt about Police claims to be rigorous and even-handed in enforcing isolation and hygiene and distance requirements.
20. We look forward to hearing from someone with the necessary information.

Yours faithfully,  
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