

Lockdown by Press Conference? Comparing the COVID-19 Lockdowns in Austria and New Zealand

V 363/2020 and Borrowdale v Director-General of Health [2020] NZHC 2090

Pepeha



Kia ora tātou
Ko Tangi-te-keo te māunga
Ko Manawatu te awa
Nō Whāngarei ahau
Ko Graz tōku kainga
Ko Upperton tōku whānau
Ko Tess tōku ingoa
Kia ora!



Lockdown by Press Conference? Comparing the COVID-19 Lockdowns in Austria and New Zealand [working title]

Tess Upperton / Thomas Buocz / Iris Eisenberger

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2020-485-194
[2020] NZHC 2090

UNDER the Judicial Review Procedure Act 2016

IN THE MATTER of an application for judicial review

BETWEEN ANDREW BORROWDALE
Applicant

AND DIRECTOR-GENERAL OF HEALTH
First Respondent

ATTORNEY-GENERAL
Second Respondent

NEW ZEALAND LAW SOCIETY
Intervener

Hearing: 27–29 July 2020

Court: Thomas, Venning and Ellis JJ

Counsel: T Mijatov for Applicant
V E Casey QC, V McCall and E M Jamieson for Respondents
T C Stephens, J B Orpin-Dowell and M R G van Alphen Fyfe for Intervener

Judgment: 19 August 2020

JUDGMENT OF THE COURT

VERFASSUNGSGERICHTSHOF
V 363/2020-25
14. Juli 2020

IM NAMEN DER REPUBLIK!

Der Verfassungsgerichtshof hat unter dem Vorsitz des Präsidenten
DDr. Christoph GRABENWARTER,

in Anwesenheit der Vizepräsidentin
Dr. Verena MADNER

und der Mitglieder
Dr. Markus ACHATZ,
Dr. Wolfgang BRANDSTETTER,
Dr. Sieglinde GAHLÉITNER,
Dr. Andreas HAUER,
Dr. Christoph HERBST,
Dr. Michael HOLOUBEK,
Dr. Helmut HÖRTENHUBER,
Dr. Claudia KAHR,
Dr. Georg LIENBACHER,
Dr. Michael RAMI,
Dr. Johannes SCHNIZER und
Dr. Ingrid SIESS-SCHERZ

als Stimmführer, im Beisein der verfassungsrechtlichen Mitarbeiterin
Dr. Hannah GRAFL, LL.M.
als Schriftführerin,



1. Wider legal context
2. Background to judgments
 - a. Statutory bases for lockdowns
 - b. Executive actions
 - c. Press conferences/public statements
3. Judicial reviews
4. Comparative conclusions



Common law

„Unwritten“ constitution (incl BORA)

Judicial review of executive action

Director-General of Health (Ashley Bloomfield)



Foto: © New Zealand Government,
Office of the Governor-General



Civil law

Written supreme constitution

Judicial review of statutes and executive action

Federal Minister of Health (Rudolf Anschober)



Foto: © BKA / Andy Wenzel

Tess Upperton BA/LLB (Hons)



Statutory bases



Health Act 1956

- Congregation in **outdoor places of any stated kind/description**
 - Persons to be isolated or quarantined

COVID-19 Maßnahmengesetz / Epidemiegesetz 1950

- Entry into **defined places**
 - Persons to be isolated



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Executive orders/regulations

Health Act Orders

- 25 March: No congregation in **all outdoor places**
- 3 April: All persons must be isolated at their place of residence

Maßnahmenverordnung-98

- Entry into **public places** is forbidden
 - Where public places are entered alone, 1m distance (?)



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Press conferences

„Everyone must stay home“

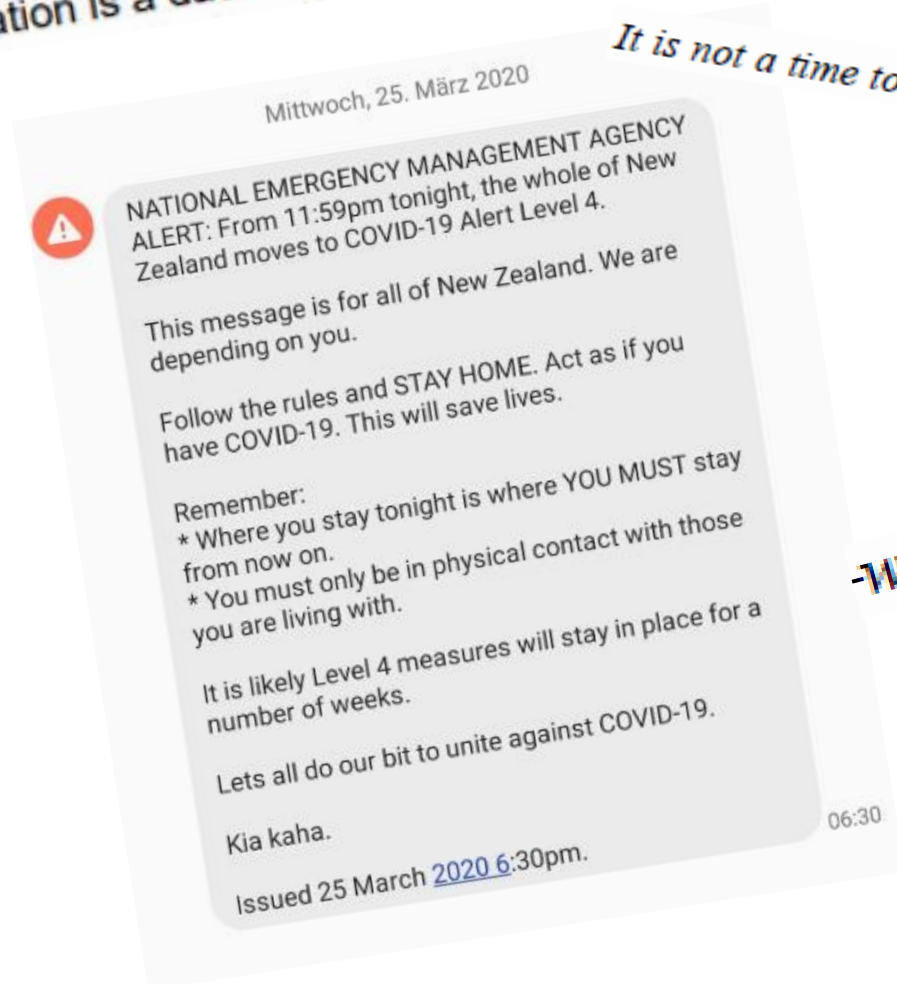
„Everyone must stay home“

23 March – 2 April: Announcements in NZ from PM, Police Commissioner, govt websites, Tess's mum



To be absolutely clear: we are now asking all New Zealanders who are outside essential services to stay at home and to stop all interaction with others outside of those in your household. I understand that self-isolation is a daunting prospect, so we are being practical.

„The Prime Minister is telling us to, so it must be the law!“



It is not a time to bend the rules. This is a time to stay at home

-we will play the role of enforcer.

14 March – 15 April: Announcements in Austria from Chancellor, President, govt websites



Es gibt nur drei Gründe, hinauszugehen: die Arbeit oder der unaufschiebbare Dienst, für Gesundheitspersonal, Polizistinnen und Polizisten, Personen, die in Lebensmittelgeschäften arbeiten etwa. Zweitens: notwendige Besorgungen. Und drittens: andere Menschen zu unterstützen, die sich nicht mehr selbst helfen können. Bei allem darüber hinaus gibt es keinen Grund, das Haus zu verlassen.



Alexander Van der Bellen
18. März · 🌐

Folgen Sie auch weiterhin dem Aufruf der Bundesregierung. Es gibt nur vier Gründe, hinauszugehen. Unaufschiebbare berufliche Tätigkeiten, dringend notwendige Besorgungen wie Lebensmittel, Hilfe für Mitmenschen oder die Allgemeinheit und Bewegung im Freien alleine oder mit Mitbewohnern - mit einem Mindestabstand von einem Meter zu allen anderen. #schauaufdich

Bleib weiterhin zu Hause!

Es gibt nur 4 Gründe, das Haus zu verlassen:

1. Um zur Arbeit zu gehen
2. Um anderen Menschen zu helfen
3. Für Sport im Freien oder um frische Luft zu schnappen
4. Um einkaufen zu gehen

Judicial reviews: key aspects



At issue: whether Health Act Orders exceeded legal authorisation



At issue: whether COVID-19 Maßnahmenverordnung-98 exceeded legal authorisation

Judicial reviews: key aspects



At issue: whether Health Act Orders exceeded legal authorisation

Applicant accepted that rights infringements were necessary, reasonable and proportionate



At issue: whether COVID-19 Maßnahmenverordnung-98 exceeded legal authorisation

Applicant claimed that rights infringements were disproportionate

Judicial reviews: key aspects



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Statute **not** subject to review



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Judicial reviews: key aspects



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Statute **not** subject to review

Press conferences and other statements subject to review



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Applicant claimed that rights infringements were disproportionate

Statute subject to review

Press conferences and other statements **not** subject to review



debated. But even as this country returns to a state of semi-lockdown, there is one thing on which most commentators are agreed. The decisions taken by the New Zealand government in March this year to “go hard and go early” were the right ones.

[36] Another key contextual consideration is the international legal framework dealing with the protection of public health.

Early international engagement with public health issues

[37] The idea of a united international effort to combat infectious diseases can be traced back (at least) to the International Sanitary Conferences of the 19th century. In 1920, the work of these conferences was then largely absorbed into the Health Organization of the League of Nations.

[48] Next, we consider the domestic legal context.¹⁵ New Zealand's legal framework for dealing with infectious diseases also dates back to the mid-19th century.

Excerpts from NZ judgment: approach to statutory interpretation



[103] All of this is important for the purposive interpretive exercise required by s 5 of the Interpretation Act 1999. It is, of course, important to acknowledge that the exercise of the s 70 powers may well limit NZBORA rights and freedoms. But while that might, ordinarily, dictate a more narrow and literal approach to the text, we think the matters just mentioned all point in the other direction. A fair, liberal, and remedial construction better recognises the fact that the powers are exercisable only in an emergency of a kind that, as a matter of international law, justifies restrictions on individual rights. And the internal restrictions and temporal limits on the exercise of the powers gives further assurance that it is safe to adopt such a construction, by limiting the potential for abuse.

Excerpts from NZ judgment: effect of press conferences



[187] And then, it was in her address at the press conference on 25 March that she gave “one simple message” to New Zealanders: “stay at home” ... “Breaking the rules could kill someone close to you”. That address – and those statements – carried with them the full authority of her office and the State.

[191] In short, we have no doubt that the Statements conveyed that there was a legal obligation on New Zealanders to comply: to stay home and remain in their bubble.

interpreted them before we could draw that conclusion.⁸⁴ The Statements created the overwhelming impression that compliance was required by law – indeed, that is how we interpreted them at the time.

Judicial reviews: findings



Health Act Orders were within statutory limits (context, purpose)



COVID-19 Maßnahmenverordnung-98 exceeded statutory limits (most rights-consistent interpretation)



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Press conferences to „stay home“ during 9-day gap = commands without lawful basis
→ BORA breach



Statute was not unconstitutional

Judicial reviews: findings



Health Act Orders were within statutory limits (context, purpose)



COVID-19 Maßnahmenverordnung-98 exceeded statutory limits (most rights-consistent interpretation)



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Statute was not unconstitutional



Relief: declaration of inconsistency



Relief: declaration that COVID-19 Maßnahmenverordnung-98 was unlawful

Context: adoption,
lockdown, communications

Scope: Executive orders
+ press conferences



Scope: Executive
orders + statute



Outcome:
declaratory relief

Dankeschön!



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