

High Court
Wellington Registry
CIV 2020-485-00194

under the Judicial Review Procedure Act 2016
in the matter of an application for judicial review

between

ANDREW BORROWDALE
law drafter of 7 Mariri Road, Wellington
Applicant

and

DIRECTOR-GENERAL OF HEALTH
of 133 Molewsorth Street, Wellington
Respondent

STATEMENT OF CLAIM

APPLICANT:
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STATEMENT OF CLAIM

Parties

- 1 The applicant is Andrew Borrowdale, a law drafter of Wellington and former Parliamentary Counsel.
- 2 The respondent (Dr Ashley Bloomfield) is the Director-General of Health being the chief executive of the Ministry of Health.

Background

- 3 On 25 March 2020 the New Zealand Government declared a State of National Emergency under the Civil Defence Emergency Management Act 2002.
- 4 On 24 March the Prime Minister, acting under section 5 of the Epidemic Preparedness Act 2006, gave a notice (the Epidemic Preparedness (COVID-19) Notice 2020 or “the epidemic notice”) declaring that “the effects of the outbreak of COVID-19 are likely to disrupt or continue to disrupt essential governmental and business activity in New Zealand significantly”.
- 5 Both the State of National Emergency and the epidemic notice continue in force.
- 6 Beginning on Monday 23 March 2020, the Government by public announcements by the Prime Minister, the Commissioner of Police and the Director of Civil Defence Emergency Management, among others, and through the press and the Internet purported to impose on the population of New Zealand a lockdown at Alert Level 4.
- 7 Alert Level 4 required all people in New Zealand to remain at the place at which they were at 11.59pm on Wednesday 25 March 2020, with limited exceptions for those providing essential services and with allowance for obtaining food, medicines and brief outdoor exercise.
- 8 There was no express statutory authority for imposing the lockdown and the sole enforcement power legally available to the Government was section 91(1) of the Civil Defence Emergency Act 2002 which provides:

“While a state of emergency is in force, a Controller or a constable, or any person acting under the authority of a Controller or constable, may—
(a) direct any person to stop any activity that may cause or substantially contribute to an emergency;
(b) request any person, either verbally or in writing, to take any action to prevent or limit the extent of the emergency.”
- 9 Subsequently the Government made public the advice given by the Crown Law Office to the New Zealand Police to the effect that the power of a police officer to give a

direction under section 91(1) was confined to giving a direction only to a person whom the police officer believed to be infected with the COVID-19 virus.

- 10 By a letter dated 1 April 2020 and copied to the Solicitor-General, the applicant wrote to the Attorney-General outlining his concerns that the Government was acting unlawfully in imposing a national lockdown.
- 11 Other than an acknowledgment for the office of the Attorney-General, the applicant has received no response to that letter.

Health Act 1956 notices

- 12 Acting under section 70 of the Health Act 1956, Dr Bloomfield has purported to issue a number of “orders”:
 - 12.1 Section 70(1)(m) Health Act Order, dated 25 March 2020 and which purported to come into force at 11.59pm on that date (referred to in this statement of claim as “Order 1” and available to be read here:
https://www.health.govt.nz/system/files/documents/pages/covid-19-section_701m_order_25_march_2020.pdf
 - 12.2 Section 70(1)(f) Health Act Order, dated 3 April 2020 and which purported to have effect from 18.00 hours on that date (referred to in this statement of claim as “Order 2” and available to be read here:
<https://www.health.govt.nz/system/files/documents/pages/covid-19-section-701f-notice-to-all-persons-in-new-zealand-3-april-2020-v2.pdf>
 - 12.3 Health Act (COVID-19 Alert Level 3) Order 2020, dated 24 April 2020 and which purported to come into force at 11.59pm on 27 April 2002 (referred to in this statement of claim as Order 3 and available to be read here:
http://www.legislation.govt.nz/regulation/public/2020/0069/latest/LMS339017.html?search=ts_act%40bill%40regulation%40deemedreg_Covid_resel_25_a&p=1
 - 12.4 various “orders” amending or extending Orders 1, 2 and 3.
- 13 Clause 13 of Order 3 revoked Orders 1 and 2.
- 14 In summary:
 - 14.1 under Order 1 Dr Bloomfield required all premises in all districts of New Zealand to be closed except those listed in the appendix to the order which included “essential businesses” as defined in the appendix;
 - 14.2 under Order 2 Dr Bloomfield required all persons in all districts of New Zealand to be isolated or quarantined by remaining at their current place of residence, with limited exceptions for “essential personal movement”;

14.3 under Order 3 Dr Bloomfield required:

- (a) all persons within all regions in New Zealand to be isolated or quarantined by remaining at their current home or place of residence, with exceptions for essential personal movement; and
- (b) the closure of premises of the kinds to which infection control measures applied unless those measures were operating.

Constitutional context

15 It is axiomatic that liberty of the individual must not be infringed except by clear, express statutory authority. The freedoms of movement and association are fundamental human rights to which the Bill of Rights 1990 Act applies.

Grounds of review: ultra vires

16 It is the essence of the applicant's case that Dr Bloomfield in making Orders 1, 2 and 3 exceeded his powers as detailed in the following paragraphs and to that extent the orders were and are ultra vires.

Order 1: 25 March 2020

17 Order 1 was defective in the following respects:

17.1 it exceeded the power under section 70(1)(m)(i) of the Health Act 1956 to require closure of "all premises within the district ... of any stated kind or description" by:

- (a) failing to refer to premises of a stated kind or description; and
- (b) purporting to define premises negatively by reference to all premises other than those necessary for carrying on an essential business;

17.2 the definition of "essential businesses" amounted to an unlawful delegation to unnamed MBIE officials of the power to decide which premises should be closed;

17.3 by defining the meaning of "congregate", the order in effect purported to vary or amend the meaning of the term as used in the Health Act 1956;

17.4 by failing to state the kind or description of outdoor places of amusement or recreation, the order in forbidding people to congregate in outdoor places of amusement or recreation "of any kind or description" exceeded the power in section 70(i)(m)(ii) of the Health Act 1956 which permits forbidding

congregation in “outdoor places of amusement or recreation of any stated kind or description” (emphasis added).

Order 2: 3 April 2020

18 On a proper interpretation of section 70(1)(f) of the Health Act 1956, Dr Bloomfield had no clear, express power to make an order confining the entire population of New Zealand to their places of residence, for the following reasons:

- 18.1 section 70(1)(f) does not provide for any power to make an order;
- 18.2 by contrast with section 70(1)(m), section 70(1)(f) does not provide for any means of notifying the public of the existence of the requirement to isolate etc;
- 18.3 by contrast with section 70(1)(m)(i) and (ii) (which are intended to apply to the public at large and hence the requirement for public notice), section 70(1)(f) refers to “persons” as opposed to “people”;
- 18.4 section 70(1)(f) must be read in a manner that is consistent with all the terms expressing the power, that is, to require persons “to be isolated, quarantined or disinfected” (emphasis added): interpreting the provision as empowering a medical officer of health to require the entire population to be disinfected is an absurdity;
- 18.5 the proper interpretation of section 70(1)(f) is that it empowers a medical officer of health to require specified individuals to be isolated, quarantined or disinfected, and this is consistent with the use of the terms in the Influenza Pandemic Plan at p 108 in the reference to compulsory measures such as “quarantining or isolating people (that is, removing symptomatic or non-symptomatic people to a quarantine or treatment facility or prohibiting them from leaving a particular facility)”.

Order 3: 24 March 2020

19 For the reasons set out in relation to Order 2, Dr Bloomfield had no clear express power to make Order 3.

Orders 1, 2 and 3

20 In purporting to make Orders 1, 2 and 3, Dr Bloomfield purported to be “acting nationally” in reliance on section 22(1) of the Health Act 1956 which provides:

“Every person who holds the office of Director-General of Health shall, if that person is a medical practitioner suitably experienced and qualified in public health medicine, have all the functions of a medical officer of health, and may exercise those functions in any part of New Zealand.”

- 21 Dr Bloomfield exceeded his powers by purporting to act nationally in exercising the functions of each medical officer of health in their respective health districts without considering the needs of each health district separately.

Claim for relief

The applicant claims:

- (a) a declaration that Orders 1, 2 and 3 were and are ultra vires and that nothing done in pursuance of those notices had or has any legal effect;
- (b) an order quashing Orders 1, 2 and 3;
- (c) such further or other relief as the Court considers just;
- (d) costs.