Balancing Rights and Civic Freedoms with Effective Pandemic Governance:

The Aotearoa New Zealand Experience

PUBLISHED: AUGUST 2024

ICNL
INTERNATIONAL CENTER
FOR NOT-FOR-PROFIT LAW

Balancing Rights and Civic Freedoms with Effective Pandemic Governance:

The Aotearoa New Zealand Experience

Authors:

Jane Calderwood Norton
Faculty of Law, Waipapa Taumata Rau – University of Auckland

Dean R Knight
Faculty of Law, Te Herenga Waka – Victoria University of Wellington

Published in August 2024

Table of Contents

Executive Summary

Aotearoa New Zealand's response to the Covid-19 pandemic has been identified as an example of good governance, where the country was able to promote public health while also protecting civic freedoms and democratic processes. The country's response managed to eliminate and then control the virus until most of the population was vaccinated; as a result, New Zealand has one of the lowest Covid-19 death rates in the world.

Many government measures – accompanied by generous social licence and public compliance particularly in the first half of the pandemic – contributed to these extraordinary health outcomes: a strict nationwide lockdown in the early months; similar periodic regional lockdowns in later stages; rigorous ongoing testing and contact tracing; mandatory face coverings and capacity limits in certain premises; a border quarantine system for all international arrivals; and later on, an extensive vaccination program and range of vaccine requirements for high-risk professions, workplaces and premises.

These public health measures inevitably limited – sometimes significantly – a range of rights and freedoms, including the rights to work, refuse medical treatment, religion, assembly and movement. However, the government consistently sought to strike a proportionate balance between those rights and the rights to life and health – along with other societal objectives. It also worked to ensure that democratic processes and other accountability mechanisms were maintained.

This report examines the New Zealand government's response to the Covid-19 pandemic, and what it revealed about a rights-orientated approach to public health. It also analyses how democratic processes were maintained and the role that accountability mechanisms played in ensuring rights consistency.

Our analysis has identified the following features and lessons:

- New Zealand enacted new primary legislation – the Covid-19 Public Health Response Act 2020 (Covid-19 Act) – to respond to the pandemic (after a short period of using slightly ill-fitting existing infectious disease powers), rather than amending

> The government consistently sought to strike a proportionate balance between those rights and the rights to life and health – along with other societal objectives. It also worked to ensure that democratic processes and other accountability mechanisms were maintained.

existing public health laws. The Covid-19 Act empowered the making of directive orders for very broad purposes. These executive-made rules were the key legal mechanisms used for much of the Covid-19 pandemic response.

- The Covid-19 Act contained mechanisms for protecting human rights and democracy, and otherwise ensuring the broad powers were not misused. These included the following:
  - The Covid-19 Act was subject to a (renewable) sunset provision.
  - Covid-19 orders could only be made if general emergency or specific epidemic settings were triggered.
  - The process for making Covid-19 orders included numerous deliberative requirements for the responsible minister (or Director-General of Health, the senior health official, for urgent orders) when making Covid-19 orders.
  - The responsible minister was required to consider advice from the Director-General of Health about the risks associated with the virus and the appropriateness of public health measures.
  - The responsible minister was required to not only consider the human rights implications of Covid-19 orders but be satisfied that orders did not limit or were a justified limit on the right and freedoms in the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).
- The Covid-19 Act also provided other safeguards:
  - orders needed to be publicly promulgated at least 48 hours before they came into force, except when urgency was required;
  - orders needed to be confirmed by Parliament within relatively short, prescribed periods or else they lapsed;
  - orders were disallowable instruments, exposing them to usual parliamentary scrutiny by the Regulations Review committee and, if needed, consequential disallowance by Parliament;
  - orders needed to be kept under review by the responsible minister to ensure there continued to be sufficient justification for any rights-limiting measures; and
  - orders were not immune from judicial scrutiny and, as secondary legislation, could be invalidated by the courts if they were contrary to the Act's requirements or the Bill of Rights Act.

- On the whole, the Covid-19 Act proved to be robust legislation, supporting the health response to the virus through generous powers while also imposing a system of constraints and checks and balances to ensure the powers were not misused.
- Much legislation dealing with public health measures was expedited, either through urgency motions or with cross-party agreement. While expedited law-making was used to respond to the rapidly evolving health crisis, the extensive use of urgency and other expedition of bills was concerning, especially where it circumvented select committee scrutiny and public submission.
- Democratic institutions – Parliament, executive government, courts and other integrity bodies – and associated accountability processes continued to operate during the pandemic, albeit with some adjustments to accommodate public health measures. This enabled government actions to be scrutinised, and for people to pursue their concerns about public health measures both politically and legally.
- Government decision-making was evidence-based with scientists and other public health experts – in particular the Director-General of Health (himself a medical officer) – given a central role in advising government. Orders were kept under review and revisited where there was new evidence to indicate that a less rights-restricting measure might be available.
- Overall, protection of human rights and freedoms was an integral part of the government's public health response. Public health measures were assessed – both when made and afterwards, by various institutions, including the executive, legislature, courts and other integrity bodies, using an established rights-respecting methodology.
- Select committees played a crucial role in holding the government to account, providing scrutiny of the response to the pandemic and adding to the transparency of the decision-making and justifications for public health measures.
- Judicial scrutiny of the health measures was detailed and rigorous, and continued well after many of restrictions had been lifted. In some instances, government decisions were successfully challenged.
- Free and fair elections were held during the pandemic, allowing the public to express their view on the government's public health response.
- Documents relating to key government decision-making – such as memoranda, reports, minutes, briefings, aide-memoire, and other pieces of advice – were often released proactively to the public.

- Heavy emphasis was placed on transparency and public justification of health measures. This was critical in promoting trust in government and generating high levels of social licence for public health measures, especially during the first 18 months. For the most part, government provided timely, regular and accessible communications to the public about the virus, what to expect in the coming period (such as the nature of public health measures and their duration), and reasons for decisions.
- Civil society and indigenous groups contributed to the country's pandemic response through collaboration with government. These groups were also a significant mechanism for emphasising the human rights aspects of governmental decision-making and promoting compliance with rights, on occasion challenging the government in court. Government regularly consulted affected groups before imposing new public health measures, although the nature and degree of engagement was sometimes criticised, especially in relation to consultation with Māori.
- Government mostly did not censor or criminally sanction false or misleading communications about the virus or vaccine, instead countering them through transparency and education, and by working to ensure public trust. Where protests occurred in violation of health restrictions, the police tended to use a light touch, including adopting an 'education first' approach providing guidance to organisers prior to the events that reminded them of their obligations. If non-compliance nonetheless occurred, only leaders who repeatedly violated warnings were criminally charged. A relatively lengthy protest occupation of Parliament grounds was ultimately met with significant force by the police, after attempts to remove protestors and then build trust and de-escalate; an independent review found the police had acted appropriately.

Our analysis shows how New Zealand's pandemic response was a complex system of deliberative and accountability processes that sought to promote rights consistency. Our general assessment is that, overall, New Zealand was able to deliver an effective public health response, with comparatively successful outcomes, while generally (with some exceptions) maintaining and respecting human rights and civic freedoms.

1. Introduction

Aotearoa New Zealand's response to the Covid-19 pandemic has been identified as an example of good governance that managed to promote public health while also protecting civic freedoms and democratic processes. Adopting an elimination strategy meant that the virus was largely kept at bay until most of the population had been vaccinated. Case numbers and deaths were kept at comparatively very low levels and the country enjoyed extended periods free from any virus in the community. This enabled New Zealanders to avoid the serious health impacts seen in many other countries. From late 2021, with the availability of a vaccine, and the new variant Omicron widespread in the community, New Zealand moved from an elimination to an active suppression strategy and incrementally lifted its health restrictions. It managed to control the virus until most of its population was vaccinated and, as a result, New Zealand has one of the lowest Covid-19 death rates in the OECD.[1]

Many government measures – accompanied by generous social licence and public compliance – contributed to these extraordinary health outcomes, including a strict nationwide lockdown in the early months; similar periodic regional lockdowns in later stages; rigorous ongoing testing and contact tracing; mandatory face coverings and capacity limits in certain premises; and border quarantine for all international arrivals. Once a vaccine became available, New Zealand implemented an extensive vaccination program and combined this with a range of vaccination requirements for high-risk professions, workplaces and premises. The result was a highly vaccinated population with over 90% of those eligible having received both doses of the vaccine.[2]

These public health measures were imposed through a network of executive-made orders, many issued under powers activated by emergency declarations, with the bespoke Covid-19 Public Health Response Act 2020 (Covid-19 Act) ultimately being the main legislative framework.[3]

Some rights and freedoms were inevitably limited, including the rights to work, refuse medical treatment, religion, assembly and movement, sometimes significantly; however, the government sought to strike a proportionate balance between those rights and the rights to life and health – along with other societal objectives. In some instances, these limitations were very burdensome; for example, residents in the largest city (Auckland) were subject to lockdown and required to stay at home for several months; non-vaccinated people could face dismissal from employment and denial of access to some high-risk premises; and those wishing to return home from abroad faced mandatory quarantine for international arrivals, with sometimes limited availability. While

1 See Part 2.2 below.

2 Ministry of Health, 'Covid-19: Protecting Aotearoa New Zealand', <health.govt.nz>; P Hunt and S Bradwell-Pollack, 'Access to Vaccines and New Zealand's Distinctive Response to Covid-19' (2022) 24(2) *Health and Human Rights Journal* 215 at 216.

3 See Part 2.3 below.

there were some periods of very heavy restrictions, especially during lockdowns, stricter measures were adopted elsewhere (such as in China and, in certain respects, Australia). During much of the first 18 months when health outcomes were very positive, a high degree of social licence and support for the public health measures existed despite some rights being limited. However, social licence waned in the second half of the response and social tensions became more evident, in part due to controversial public health measures such as vaccination requirements being introduced and more lethargic justification of the response by the government. While these tensions had parallels across the world, the New Zealand government also had an obligation to give effect to te Tiriti o Waitangi / the Treaty of Waitangi (the treaty signed between the British Crown and Māori leaders in 1840) and to actively protect its indigenous population, an obligation which factored in the adoption of an aggressive and precautionary strategy.[4]

This report examines the New Zealand government's response to the Covid-19 pandemic from a human rights and civic freedoms perspective, especially the key sites of contest (such as workplaces, religious venues, and border/mobility restrictions).[5] It focuses on the relationship between these health measures and safeguarding human rights and civic freedoms, and what New Zealand's experience reveals about a rights-orientated approach to public health in practice. This includes considering how human rights were protected during a pandemic, and the role human rights played in setting the parameters of the public health measures adopted. It also analyses the democratic processes and accountability mechanisms adopted by the government and that were crucial to a rights-respecting culture. The role of civil society and public participation in these processes is also referenced. Throughout the report, we identify instances of good practice, especially practices that could be replicated in other countries to ensure a rights-respecting approach to pandemic governance.

Throughout the report, we identify instances of good practice, especially practices that could be replicated in other countries to ensure a rights-respecting approach to pandemic governance.

4 For context see Melissa McLeod and others, 'COVID-19: we must not forget about Indigenous health and equity' (2020) 44 *Aust NZ J Public Health* 253.

5 The period covered in this report is predominantly when an epidemic notice was in force, ie March 2020 to October 2022: Epidemic Preparedness (Covid-19) Notice 2020 (24 March 2020) (declaring an epidemic); (Epidemic Preparedness (Covid-19) Notice 2020 Renewal Notice (No 3) 2022 (12 September 2022) (expiring on 20 October 2022)).

2. The Pandemic in New Zealand: An Overview

2.1 PATH OF THE VIRUS AND DIFFERENT PHASES OF THE PUBLIC HEALTH RESPONSE

The path of the Covid-19 pandemic in New Zealand, along with the nature of the associated public health measures, had at least two distinctive phases:[6]

- the first half of the pandemic, where the government adopted an elimination strategy; and
- the second half of the pandemic, where the government adopted an active protection strategy and eventually moved towards business as usual.

A. Elimination strategy: 'go hard; go early' and 'keep it out; stamp it out'

The virus arrived comparatively late to New Zealand at the end of February 2020. The government was able to learn from overseas experience and, bolstered by the country's advantages as an island nation with low population density, it adopted aggressive measures to minimise the onset of the virus ('go hard; go early').[7] These measures quickly became an official elimination strategy ('keep it out; stamp it out'). New Zealand was mostly successful in achieving its elimination goals at least for the first 18 months of the pandemic and was recognised internationally as a model of best practice.[8]

An extra-legal 'alert level framework' was adopted in late March 2020, with graduated restrictions based on the prevalence of the virus in the community. A 7½-week strict lockdown was then quickly imposed; people were directed to stay-at-home in their household 'bubbles' except for very limited essential movement, premises were closed other than for a handful of essential businesses, and public congregation was prohibited.

International borders were closed and entry into the country was tightly managed. People arriving in the country – returning New Zealanders and those with special permis-

6 This narrative is adapted from DR Knight, 'Legal Accountability and Judicial Review During the Covid-19 Pandemic in Aotearoa New Zealand' (2024) 58 *Georgia Law Review* 1243 and draws on more detailed explanations elsewhere of the path of the pandemic and key public health measures: see eg DR Knight 'National Legal Responses to Covid-19: New Zealand' in J King and O Ferraz (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (OUP, 2021); DR Knight, 'Stamping out Covid-19 in New Zealand' [2021] *Public Law* 241; G McLay and DR Knight 'New Zealand courts and Covid-19' in A Ming-Zhi Gao (ed), *Judicial Review in the pandemic* (Konrad-Adenauer-Stiftung, 2022) 116; DR Knight 'Accountability through Dialogue' in J Grogan and A Donald (eds), *Routledge Handbook on Law and the Covid-19 Pandemic* (Routledge, 2022) 31; DR Knight, 'Government expression and the Covid-19 pandemic' (2020) 31 *Public Law Review* 391; DR Knight, 'New Zealand, Covid-19 and the constitution' in JM Serna de la Garza (ed), *Covid-19 and Constitutional Law* (Universidad Nacional Autónoma de México, 2020) 233; DR Knight and JC Norton, 'New Zealand's pandemic border fortress' (2022) 33 *Public Law Review* 186. Also see generally L Delaney, *Covid and the Law in Aotearoa New Zealand* (Thomson Reuters, 2021); McGuinness Institute, Covid-19 Nation Dates (2023); Department of Prime Minister and Cabinet, 'Timeline of Aotearoa New Zealand's significant events and key all-of-government activities', <www.dpmc.govt.nz>.

7 D Skegg, 'The Covid-19 Pandemic: lessons for our future' (2021) 17 *Policy Quarterly* 3 at 5

8 Hunt and Bradwell-Pollack (n 2) at 215.

sion – were required to quarantine for up to a fortnight in the government-run system of 'managed isolation and quarantine' (MIQ).

The elimination strategy proved successful and 'zero Covid' was achieved in mid-2020; that is, no active cases in the community and any incoming cases intercepted on arrival by the border quarantine regime. Public health measures then evolved to reflect the risk settings and were eased progressively. They included gathering restrictions, physical distancing, mask requirements, mandated registers for contact tracing purposes, and mandatory isolation for those infected and their close contacts. Long periods of normality returned, briefly interrupted by elevated public measures deployed to stamp out occasional incursions of the virus, including a lockdown of Auckland for the last 3 weeks of August 2020.

The government started slowly rolling out a vaccination programme early in 2021, targeting health workers and those staffing the border quarantine regime; vaccination of the general population would follow, sequenced on the risk profile of different age, ethnic and regional groupings.

B. Active suppression: accelerated vaccination drive and vaccination-conditioned restrictions

The government shifted to an active suppression ('minimise and protect') strategy in the second half of 2021 when the virus – and more infectious variants – began to take hold in the community. Vaccination efforts were accelerated.

A significant border breach occurred in Auckland in mid-August 2021 when the virus re-entered the community and was too difficult to stamp out. Lockdown and stay-at-home orders returned: nationwide, for 3 weeks; for Auckland and some surrounding regions, much longer. Initially, the nationwide bubble became bifurcated: those regions where the virus had taken hold such as Auckland continued to be subject to aggressive restrictions, albeit now only in the name of active suppression, not elimination. However, an elimination approach continued to apply to rest of the country, where no active cases allowed lesser restrictions (until a new nationwide strategy was adopted in December 2021).

Meanwhile, catalysed by the outbreak, vaccination of the general population ramped up. High vaccination coverage was achieved, although vaccination rates were lower amongst indigenous Māori. Employees working in certain essential and high-risk sectors (such as teaching, healthcare, border security, police and army) were legally required to be vaccinated to continue their work. Legislation also gave similar powers to private employers to impose such requirements to access their premises after conducting a health and safety assessment.

In December 2021, the government formally changed its nationwide strategy to active suppression, reflecting the strategy that applied during the outbreak in Auckland. A

new set of restrictions – deployed under a new Covid-19 protection framework, styled in the form of 'traffic lights' – were adopted where different levels of public health restrictions applied based on the prevalence of the virus and vaccination levels in different regions. This enabled lockdown and heavy mobility restrictions applying in Auckland to be lifted. The restrictions under the traffic light system included regional travel restrictions, gathering limits, physical distancing requirements and restrictions on operation of certain types of business and activities; initially the mobility and gathering restrictions depended on whether people were vaccinated or not. Vaccine status was never used, however, for access to essential public services such as hospitals and transport.

The border quarantine regime began to strain, especially in this latter part of 2021, due to capacity constraints. Controversially, a randomised lottery, together with parsimonious management of exceptional circumstances requests, was adopted to allocate spaces. A phased re-opening of the border began from February 2022.

In February and March 2022, protestors opposed to vaccination requirements and other public health measures occupied parliamentary grounds and surrounding streets partly inspired by similar convoy protests in North America.[9] The occupation lasted for just under a month and attracted, at its peak, approximately 1,000 people, before being forcibly dispersed by police.

C. Towards business as usual: rationalisation of public health restrictions

The traffic light system operated only for a few months and then steadily wound down. From April 2022, most vaccination requirements were removed. Gathering limits were, depending on the traffic light setting, relaxed or removed; contact tracing requirements were abolished. Mask wearing and an obligation to self-isolate if infected continued. Remaining vaccination requirements were phased out in July and September 2022. Border restrictions were progressively wound down with the border fully re-opening in July 2022.

Near the end of 2022, most emergency settings were removed and pandemic powers rationalised.[10] The epidemic notice expired in October 2022, signalling the end of the government's emergency response.[11] The last restrictions – mask use in some high-risk health services and self-isolation when infected – were removed in mid-August 2023.[12]

9 T O'Brien and N Huntington, '"Vaccine passports equal apartheid': Covid-19 and parliamentary occupation in Aotearoa New Zealand' (2022) *Social Movement Studies* 1.

10 C Hipkins, 'Extraordinary Covid-19 powers to be wound down' (8 October 2022).

11 Epidemic Preparedness (Covid-19) Notice 2020 Renewal Notice (No 3) 2022 (12 September 2022) (expiring on 20 October 2022)

12 Covid-19 Public Health Response (Revocations) Order 2023 (14 August 2023).

2.2 EFFICACY AND EFFECTS OF PUBLIC HEALTH MEASURES

The effectiveness of New Zealand's health measures is clear. During the global peak of the virus, New Zealand experienced nowhere near the same mortality rate or strain on its health care system as other countries. Moreover, once the first lockdown ended and until the arrival of the Delta variant in August 2021, residents were able to live a relatively normal life without the virus circulating in the community.

When the epidemic notice finally lapsed in late October 2022, there were 1,811,522 detected cases (about 355,000 cases per million people) and only 2,095 reported deaths from the virus (410 deaths per million).[13] Over the first half of the pandemic, prior to the Omicron variant arriving in January 2022, New Zealand had approximately 2.5 confirmed community cases per 1000 people and 0.01 Covid-19 deaths per 1000 people.[14] These were extraordinarily low numbers compared to other countries. Moreover, while most other countries had decreased life expectancy during this period, New Zealand did not. Instead, the all-age excess mortality rate for 2020 and 2021 combined was negative.[15] Overall, New Zealand has one of the lowest Covid-19 death rates in the OECD.[16]

New Zealand's elimination strategy in 2020 and 2021, combined with its vaccination requirements at later stages of the pandemic, also meant the virus was held off until most of the population could be vaccinated.[17] New Zealand's high vaccination rate greatly reduced the health impact of the virus.[18]

13 DR Knight, 'Legal accountability and judicial review during the Covid-19 pandemic in Aotearoa New Zealand' (2024) 58 *Georgia Law Review 1243* at 1255-1256.

14 S Datta and others, 'The impact of Covid-19 vaccination in Aotearoa New Zealand: a modelling study' (2024) *Vaccine* 1383 at 1389.

15 A Schumacher and others, 'Global age-sex-specific mortality, life expectancy, and population estimates in 204 countries and territories and 811 subnational locations, 1950–2021, and the impact of the Covid-19 pandemic' *The Lancet* (11 March 2024).

16 World Health Organisation, 'Number of Covid-19 deaths reported to WHO (cumulative total)' <data.who.int>. For more recent data see Ministry of Health, 'Covid-19: Protecting Aotearoa New Zealand', <www.health.govt.nz> ("We also have one of the OECD's lowest Covid-19 death rates, at 558 deaths per million people, compared with Australia (791), Singapore (305), South Korea (669), and the United Kingdom (3,345)."). See also Hunt and Bradwell-Pollock (n 8) at 215; Barrett and Poot (n 2) at 684.

17 77% of the population (90% of those aged over 12 years) had received at least two doses of the vaccine: Datta and others at 1383. See also Barrett and Poot (n 2) at 216.

18 It is estimated that between January 2022 and June 2023 vaccines saved 6650 lives, and prevented 74500 years of life lost and 45100 hospitalisations. The number is even higher if the benefit of antiviral medications is not accounted for with the estimated number of lives saved increasing to 7604: Datta and others (n 14) at 1387.

2.3 REGULATORY FRAMEWORK FOR THE PUBLIC HEALTH RESPONSE

New Zealand used executive-made rules, in the form of directive orders and secondary legislation, as the key legal mechanisms to underpin and shape the public health measures.[19] Government messaging supplemented the formal legal rules.

A. Emergency declarations and powers

Emergency settings were declared under two different regimes: first, an epidemic notice was issued under the Epidemic Preparedness Act 2006 declaring the outbreak of a virus,[20] secondly, a state of national emergency was declared under the Civil Defence Emergency Management Act 2002.[21] These declarations activated various emergency powers, enlivened numerous dormant provisions in administrative and welfare statutes, and authorised the use of a Henry VIII power to relax requirements or restrictions in primary legislation (although this power was only used infrequently).[22] Although these emergency regimes were activated, ultimately most of the public health response was effected by powers under general and bespoke health legislation.

B. Existing infectious disease powers

Long standing directive powers vested in medical officers of health to combat infectious diseases in the Health Act 1956 were unlocked by the epidemic notice. These special powers included the power to direct people 'to report themselves or submit themselves for medical examination', to require persons, places and various other things to be 'isolated, quarantined, or disinfected', to close 'all premises … of any stated kind or description' and to 'forbid people to congregate in outdoor places

> These directions (later known as health orders) were generally made by the Director-General of Health – who, importantly, was himself a medical officer of health.

19 Some of this narrative is adapted from Knight, 'Legal Accountability and Judicial Review' (n 6); Knight, 'Stamping out Covid-19' (n 6).

20 Epidemic Preparedness (Covid-19) Notice 2020 (24 March 2020); and Epidemic Preparedness (Covid-19) Notice 2020 Renewal Notice (No 3) 2022 (12 September 2022) (expiring on 20 October 2022). The novel coronavirus and Covid-19 were added as a qualifying 'quarantinable diseases', as set out in the Health Act 1956, by the Infectious and Notifiable Diseases Order 2020 and Infectious and Notifiable Diseases Order (No 2) 2020.

21 P Henare, 'Declaration of State of National Emergency by Minister of Civil Defence' (25 March 2020).

22 *Idea Services Ltd v Attorney-General* [2022] NZCA 470 (modification of the statutory rules governing collective employment negotiations by ministerial order, later successfully challenged).

of amusement or recreation' (s 70(1)). Some of these powers originated in public health legislation passed over 100 years ago.[23]

These directions (later known as health orders) were generally made by the Director-General of Health – who, importantly, was himself a medical officer of health – on a country-wide basis. Although the power to make health orders was reposed in and formally exercised by the senior health official, he acted in harmony with ministers and Cabinet about key public health measures throughout this period. The delicate nature of their respective authority was masked by the extra-legal alert level framework curated by Cabinet; key decisions about alert levels and the general nature of public health measures were taken by Cabinet on advice of the Director-General and publicly announced by the Prime Minister, with the Director-General then formally issuing the consequential orders.

These infectious disease powers were used to provide population-wide restrictions during the first weeks of the pandemic, until bespoke Covid-19 legislation was enacted. The powers continued to be occasionally used on a case-by-case basis to address some outbreaks. The infectious disease powers were very blunt and ill-fitting for the Covid-19 pandemic, especially because significant power was vested in a non-elected (albeit medically qualified) official. The lack of natural checks and balances or explicit connection to democratic processes was also concerning (although the government pragmatically did its best to ensure the powers were carefully used and subject to democratic scrutiny).[24] Some of the concerns about how these infectious disease powers were used on a population-wide basis led to the first nationwide lockdown being challenged – sometime after the lockdown had been lifted – in the courts. The High Court and Court of Appeal ruled that this use of these powers was lawful.[25] Despite its lawfulness, however, using these powers beyond the initial emergency was widely viewed as being inappropriate and ineffective.[26]

C. Bespoke Covid-19 legislation

Bespoke legislation, the Covid-19 Public Health Response Act 2020 (Covid-19 Act), was also enacted to authorise Covid-19 orders to combat the virus.[27] This legislation was passed in May 2020, before the first nationwide lockdown was lifted, and became the key authority for public health measures for most of the pandemic. Numerous Covid-19 orders – executive-made secondary legislation – were made supporting a wide range of public health measures. Orders were often amended, substituted or revoked as risk set-

23 See *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [51]-[54] for a discussion of the Health Act 1900, including its origins in the Bubonic Plague Prevention Act 1900.

24 Knight, 'Stamping out Covid-19' (n 6).

25 *Borrowdale* (HC) (n 23); *Borrowdale v Director-General of Health* [2021] NZCA 520. See also Appendix 1.

26 J McLean, *The Legal Framework for Emergencies in Aotearoa New Zealand* (NZLC SP23, 2022).

27 Knight, 'Stamping out Covid-19' (n 6); Claudia Geiringer, 'The Covid-19 Public Health Response Act 2020' [2020] *New Zealand Law Journal* 159; and McLean, *Legal Framework for Emergencies* (n 26).

tings and the response evolved. The Covid-19 Act was occasionally amended to add or extend (and, ultimately, remove) what could be addressed by these Covid-19 orders. It is due to expire on 26 November 2024.

During the height of the pandemic, Covid-19 orders could be used for very broad purposes, such as requiring people to take or refrain from 'any specified actions' or comply with 'any measures' to prevent the risk of the outbreak or spread of the virus (s 11); public health measures instanced, without limiting the general power, included isolation, quarantine, restricted movement, physical distancing, medical testing, restriction of business activities and contact tracing. From late 2021, the list of public measures was amended to include restrictions on being in specified places in specified circumstances 'unless in compliance with specified measures', with production of a vaccination certificate (demonstrating vaccination status or exemption) given as an example.[28] Specific powers were also added to authorise orders providing for workplace vaccination requirements and other restrictions.[29] The early imposition of some vaccination requirements by relying on more general language that did not specifically mention vaccination was criticised by the courts, although ruled to be legally effective.[30]

The power to issue Covid-19 orders was reposed in ministers, initially the Minister of Health and later the Minister for Covid-19 Response.[31] The Director-General of Health had the power to make urgent and geographically limited orders.[32]

The power to make Covid-19 orders was heavily conditioned and subject to numerous checks and balances.

The power to make Covid-19 orders was heavily conditioned and subject to numerous checks and balances. ... The Covid-19 Act was subject to a (renewable) sunset provision.

28 Covid-19 Act, s 11, as amended by the Covid-19 Response (Vaccinations) Legislation Act 2021.

29 Covid-19 Act, ss 11AA and AB, as introduced by the Covid-19 Response (Vaccinations) Legislation Act 2021.

30 See *Four Aviation Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012; *Four Midwives v Minister for Covid-19 Response* [2021] NZHC 3064. See also Appendix 1.

31 Covid-19 Act, s 5 ('relevant Minister'; 'Minister').

32 Covid-19 Act, ss 10 and 12(2)(b).

First, several prerequisites had to be met before orders could be made:

- The Covid-19 Act was subject to a (renewable) sunset provision and the Act still needed to be operative.[33]
- Orders could only be made if general emergency or specific epidemic settings were triggered (either by an epidemic notice, state of emergency or other specific authorisation by the Prime Minister to make Covid-19 orders).[34]

Secondly, the responsible minister (or Director-General of Health, for urgent orders) needed to comply with numerous procedural deliberative requirements before making a Covid-19 order:

- The minister was required to consider advice from the Director-General of Health on the risks of the outbreak or spread of the virus and appropriateness of voluntary and enforceable measures to address those risks.[35]
- The minister was required to be satisfied the Covid-19 order was appropriate to achieve the purpose of the Covid-19 Act (which included the requirement that the public health response be 'proportionate').[36]
- The minister was able to consider other decisions by government about the level of public health measures that were appropriate, thereby linking Covid-19 orders to the alert level and Covid-19 protection frameworks.[37]
- The minister was required to be satisfied that the order did not limit or otherwise was a justified limit on the rights and freedoms in the Bill of Rights Act.[38]
- The minister was required to consult the Prime Minister and Minister of Justice, along with any other ministerial colleagues they considered appropriate.[39]

In addition, for workplace vaccination requirements, the Minister for Workplace Relations was treated as the responsible minister for making Covid-19 orders and a similar set of deliberative requirements applied, including the minister being satisfied such orders were in the public interest.[40]

33 See Part 4.2(a) below.

34 Covid-19 Act, s 8.

35 Covid-19 Act, s 9(1)(a).

36 Covid-19 Act, s 9(1)(d).

37 Covid-19 Act, s 9(1)(b).

38 Covid-19 Act, s 9(1)(ba); this required was codified in statute in August 2020, but was previously implicit due to the cognate obligation to only make Covid-19 orders that, in substance, complied with the Bill of Rights Act (s 13(2)).

39 Covid-19 Act, s 9(1)(c).

40 Covid-19 Act, ss 11AA and 11AB.

Thirdly, orders had to be publicly promulgated at least 48 hours before they came into force, except when urgency was required.[41]

Fourthly, and importantly, Covid-19 orders needed to be consistent with the Bill of Rights Act and not unjustifiably limit protected rights and freedoms.[42] Covid-19 orders were secondary legislation and the Covid-19 Act deemed (unusually) that the orders prevailed over other legislation; however, the legislation specifically carved out the Bill of Rights Act, meaning any orders inconsistent with the Bill of Rights Act could be invalidated if they unjustifiably breached rights and freedoms.

Fifthly, the regime built in institutional oversight:

- Orders needed to be confirmed by the House of Representatives within relatively short, prescribed periods or they lapsed.[43]
- Orders were disallowable instruments, exposing them to usual parliamentary scrutiny by the Regulations Review committee and, if needed, consequential disallowance by the House.[44]
- Orders were not immune from judicial scrutiny; as secondary legislation, Covid-19 orders were able to be invalidated if they were contrary to the Act's requirements or inconsistent with the Bill of Rights Act.[45]

Finally, responsible ministers were specifically directed to keep Covid-19 orders under review.[46]

The Covid-19 Act was generally a sound legislative framework, enabling effective public health measures, on the one hand, while also providing processes to ensure the maintenance of democratic processes and respect for human rights, on the other. The use of delegated executive powers in times of emergency, especially when a rapid response is needed in uncertain

> While the scope of the executive rule-making powers was cast very broadly, the breadth of powers was ameliorated by deliberative processes and democratic systems to ensure the powers were not abused, used excessively or used in ways that would unjustifiably breach human rights.

41 Covid-19 Act, s 14.

42 See Part 3.1 below.

43 Covid-19 Act, s 13(2).

44 Covid-19 Act, ss 11(8) and 17. See also Part 4.2(d) below.

45 See Parts 3.1 and 3.4 below.

46 Covid-19 Act, s 14(5).

circumstances, is generally seen as being justified; however, controls are needed to prevent discretion being misused.[47] Our view is that, while the scope of the executive rule-making powers was cast very broadly, the breadth of powers was ameliorated by deliberative processes and democratic systems to ensure the powers were not abused, used excessively or used in ways that would unjustifiably breach human rights. In particular, the Covid-19 Act was a marked improvement on the relatively bare infectious disease emergency powers in the Health Act.

D. Government messaging and advice

Legal measures were heavily supplemented by government messaging.[48] Vivid frameworks were employed to explain otherwise complex legal settings. Initially, the extra-legal 'alert level framework', with four different alert levels, publicly signalled the prevailing pandemic conditions and expected restrictions on day-to-day life.[49] Later, the 'Covid-19 protection framework', in the form of traffic lights with three different sets of conditions, was used to explain the vaccination-conditioned settings and was explicitly referenced in the legal rules set out in the governing Covid-19 order.[50]

Some unfortunate blurring occurred at times between non-obligatory advice and mandatory legal rules, especially in the early days of the first nationwide lockdown;[51] however, greater care was taken to properly differentiate between guidance and rules as the pandemic progressed.

47 McLean, *Legal Framework for Emergencies* (n 26) at [1.44] ('[g]etting the balance of rules as opposed to discretion right is an important and difficult task that requires thought and deliberation').

48 Knight, 'Government expression and the Covid-19 pandemic' (n 6) 6.

49 New Zealand Government, 'Alert system overview' <www.Covid-19.govt.nz>, announced by J Ardern, 'PM Address – Covid-19 Update' (21 March 2020) <www.beehive.govt.nz>.

50 Covid-19 Public Health Response (Protection Framework) Order 2021; D Parker, 'The legal and constitutional implications of New Zealand's fight against Covid' (Speech to New Zealand Centre for Public Law, December 2021).

51 See *Borrowdale* (HC) (n 23) for a judicial ruling that such messaging was unlawful because it limited rights and freedoms without being prescribed by law. See also Appendix 1.

3. Protection of Human Rights and Freedoms

Protection of human rights and freedoms was treated as an integral part of the government's public health response:

- The legal powers and frameworks required that all public health measures comply with the Bill of Rights Act and not unjustifiably limit rights and freedoms (see Part 3.1).
- An established rights-respecting methodology was applied, based on a familiar proportionality appraisal of aims and means, but coloured by the context of the pandemic; in particular, this focused attention on the scope of rights and freedoms, the nature and definition of the public health objectives being pursued and the reasonable necessity of the measures used to pursue those objectives (see Part 3.2).
- The government's deliberations about public health measures generally accorded with this framework and sought to strike balances based on expert opinion and available evidence (and, when information was lacking, to adopt a precautionary approach) (see Part 3.3).
- Democratic processes provided opportunities for the rights consistency of public health measures to be appraised and for the government to be held accountable for its decisions (see Part 3.4).

The government's broad strategy was to maximise health outcomes by eliminating and then, in the later stages, actively suppressing the virus. It grounded its approach to the pandemic in the rights to life and health, specifically the state's obligations in domestic and international law to preserve the highest attainable standard of public health – which includes preventing, treating and controlling epidemics – and the importance of minimising the impact on the country's universal health care system.[52] It also sought to protect the health and lives of indigenous Māori, to whom it had a duty to protect under te Tiriti o Waitangi /the Treaty of Waitangi (a duty brought in sharp focus because Māori had been disproportionality affected by an influenza epidemic in the early 20th century).[53] The government did not see public health as competing with civic freedoms and other human rights. Instead, it aimed to maximise freedom by enabling people to live free of the serious impact of a deadly disease.[54] To this end, the right to health took priority in the immediate term – with strict, short-term public health measures imposed – because this enabled people to enjoy greater freedom (including without other

52 As contained, for example, in the International Covenant on Economic, Social and Cultural Rights, art 12.

53 GW Rice, 'Remembering 1918: Why did Māori suffer more than seven times the death rate of non-Māori New Zealanders in the 1918 influenza pandemic?' (2019) 53 *New Zealand Journal of History* 90.

54 Government submissions in *Grounded Kiwis Group Inc v Minister of Health*, at [7] (submissions on file with authors).

health measures such as lockdowns and social distancing) in the longer term. In simple terms, good health is needed to enjoy civic freedoms.

While the measures imposed to achieve these health objectives were largely effective, they placed significant limitations on a range of fundamental rights and freedoms. Limitations of some sort were mostly unavoidable due to the exigencies of a global pandemic. All public health measures – no matter how strict or permissive – have human rights implications. Under the New Zealand Bill of Rights Act 1990 – the statutory instrument that affirms the country's commitment to the International Covenant on Civil and Political Rights – reasonable limitations can be placed on most rights.[55] These limitations must be justified, however, through a clearly structured methodology and supported by evidence. A proportionality assessment is central to this inquiry.[56] In other words, there must be a legitimate objective for the limitation, a rational connection between the limitation and the objective, and the limitation must go no further than is necessary to achieve that objective and be proportional to the objective. Balancing rights with other community objectives may also involve giving some latitude to the legislature and executive depending on the matter at hand. Where the decision involves a policy choice with serious consequences – such as a public health decision informed by expert advice – it is seen as appropriate for the final say to be left to the body that is politically accountable through the democratic process.

The justification methodology under the Bill of Rights Act is stated at a high level of generality. It is not a rigid test and is highly dependent on the particular right engaged and the context. For example, the three major examples of restrictions – national and regional lockdowns, border closure, and vaccination requirements – each had a broad objective of public health

Limitations [on rights] must be justified, however, through a clearly structured methodology and supported by evidence. A proportionality assessment is central to this inquiry.

55 New Zealand Bill of Rights Act 1990. This approach is also consistent with international human rights law. The International Covenant on Civil and Political Rights (art 4) specifically allows for the derogation of certain rights in exceptional circumstances, including times of public emergency such as a pandemic. See also Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984) (in particular clauses 25 and 26) and the UN Human Rights Committee Statement on derogations from the Covenant in connection with the Covid-19 pandemic, CCPR/C/128/2 (24 April 2020).

56 See, eg, *Hansen v R* [2007] NZSC 7.

but engaged different rights and used vastly different means to achieve that objective. The vaccination requirement itself was highly nuanced, subject to a range of variations, and depended on the profession or setting involved.

As already explained, this justification process and analysis was expressly required under the empowering primary legislation and weaved throughout government deliberations. The government undertook this analysis prior to making any public health decisions that limited rights and – with some notable exceptions – these decisions were upheld by the courts. The analysis included not only the government's own assessment but independent review by the courts as secondary reviewers (including well after many restrictions were lifted), expert peer review, and scrutiny by other government bodies in the 'integrity' or fourth branch (eg, Human Rights Commission; Ombuds; and Privacy Commissioner). Civil society also played a role in both informing those government decisions that limited rights and challenging them. The experience in New Zealand shows that rights limitation by government was generally transparent, conscientious, and subject to scrutiny and review.

3.1 RIGHTS PROTECTION WAS REQUIRED BY PRIMARY LEGISLATION

The Covid-19 Act explicitly mandated that public health measures made through executive orders must comply with the Bill of Rights Act and not unjustifiably limit rights and freedoms. Earlier health orders made under the Health Act, as a form of secondary legislation made by the executive, also needed to be consistent with the Bill of Rights Act.[57] With both Covid-19 and health orders, it followed that they were open to appraisal by the courts and could be quashed if they breached the Bill of Rights Act by unjustifiably limiting rights and freedoms.[58] These protections were particularly important because, as explained earlier, the legislation envisaged almost any manner of health measures being ordered for very broad purposes.

The Covid-19 Act also explicitly required the government to consider the rights implications of its decisions. The responsi-

Civil society also played a role in both informing those government decisions that limited rights and challenging them. The experience in New Zealand shows that rights limitation by government was generally transparent, conscientious, and subject to scrutiny and review.

57 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

58 For an extensive survey of how the judiciary held the government to account see Knight, 'Legal accountability and judicial review' (n 6).

ble minister needed not only to consider rights but *be satisfied* any order did not limit, or was a justified limit on, the rights and freedoms in the Bill of Rights Act. A failure to do so was a basis for invalidating a Covid-19 order.

In addition, the Covid-19 Act set out what the minister must consider before making an order, including advice from the Director-General of Health. This advice directly informed the proportionality inquiry because it addressed whether the nature and extent of health measures were appropriate to address the risks of the outbreak or spread of Covid-19.

3.2 ESTABLISHED RIGHTS-RESPECTING METHODOLOGY APPLIED, COLOURED BY CONTEXT OF THE PANDEMIC

The framework for determining and appraising public health measures used an established rights-respecting methodology, based on the proportionality of aims and means. The scope of the rights implicated were viewed generously, a pandemic was recognised as a legitimate (and very important) objective for limiting rights, and care was taken to ensure the means adopted to achieve that objective did not restrict rights more than reasonably necessary.

A. Scope of rights interpreted generously

Public health measures imposed during the pandemic engaged a broad range of rights recognised in both international law and New Zealand's domestic human rights law. These rights were engaged directly and indirectly. The measures implemented to protect the rights to life and health placed limitations on the rights to freedom of expression, assembly, movement, religion and, in the later stages of the pandemic when vaccination requirements were introduced, the right to refuse medical treatment and the right to work. The vaccine requirements had clear human rights implications because unvaccinated people were treated differently from those who were vaccinated and had greater limitations placed on their rights. This approach differed from the alert level system where, for the most part, restrictions were applied equally to everyone in a defined geographical area.

Consistent with existing rights jurisprudence, the scope of these rights was viewed expansively by the courts. This meant that analysis on the limitation of rights mostly took place when these rights were balanced against other objectives in the proportionality inquiry.

Three major examples of public health restrictions limiting rights were the national and regional lockdowns, border restrictions, and vaccination requirements.

First, the 7½-week strict lockdown imposed on the entire country from March 2020 until May 2020, and the various regional lockdowns (with the largest city, Auckland, most affected) at later stages – which required people to stay at home in their 'bubbles'

except for very limited essential movement – were recognised as engaging not just freedom of movement but freedom of religion, assembly, and association. When, at various stages of the public health response, the government imposed gathering capacity limits – including a lower limit where even just one attendee was unvaccinated – the court recognised that physically gathering together for worship was a matter of religious obligation, and that these restrictions limited religious freedom.[59]

Secondly, the right of citizens to re-enter New Zealand was engaged when, although not strictly prohibited from returning home, they were required to quarantine in state-managed facilities on arrival. Even decisions about how capacity in these facilities was allocated engaged this right, albeit indirectly.[60]

Thirdly, vaccination requirements engaged the right to refuse medical treatment, even though no-one was directly compelled to be vaccinated; it was sufficient that adverse consequences flowing from being unvaccinated affected people's choice about whether to be vaccinated or not. An obligation to be vaccinated to undertake certain work was also accepted as limiting a person's manifestation of religion in the form of observance, practice, or teaching.[61]

B. Pandemic provided a legitimate (and generous) objective for limiting rights

While the scope of rights may be broad, it can also be subject to reasonable limitations. For a rights-limiting objective to be legitimate, it must be pressing and substantial. Preventing and mitigating the impact of a serious disease on a population and its health care system was accepted as a legitimate objective.

In the early stages of the virus, when a nationwide lockdown was imposed to eliminate the virus, the courts gave a generous interpretation to rights-limiting powers in legislation accepting that an individual's freedom of movement, assembly and association could, in times of emergency, need to be temporarily suspended for the greater good of public health.

More specific public health measures adopted as the pandemic progressed had correspondingly more specific objectives. Courts tended to grant significant latitude to the government to determine what these objectives were.[62] Preventing any virus in the community – and avoiding the substantial socio-economic impacts of community public health measures – was a legitimate objective to justify quarantine restrictions at the border and the corresponding limit on the right to return. Greater movement at the border would increase the risk of community outbreaks and importation of new variants. This

59 *Free to Be Church Trust v Minister for Covid-19 Response* [2024] NZCA 81. See also Appendix 1.

60 *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832 at [208]. See also Appendix 1.

61 *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [49] and *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17 at [95]. See also Appendix 1.

62 See, for example, *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832.

would result in needing to impose more frequent, enduring and stringent public health measures to attempt to suppress transmission (e.g., social distancing, lockdowns, and school and business closures) or not applying domestic public health measures, and the country accepting the inevitable significant harm to public health and socio-economic impacts.[63] The government chose to maintain the quarantine restrictions. A challenge to these restrictions was mostly unsuccessful with the court finding that the purposes of the restrictions were 'sufficiently important to justify the curtailment of citizens' right to return'.[64]

Later, when vaccination requirements were imposed as a condition of entry to venues, their objectives were recognised as important because they were aimed at preventing outbreaks in crowded settings ('superspreader events'), protecting people (including vulnerable populations) from the virus, incentivising vaccine uptake, and enabling public spaces and businesses to open and people to move more freely by reducing risk of disease transmission.

C. Less intrusive and restrictive means must be unavailable

Under existing law, a limitation on a right will only be justified if it is rationally connected to the objective, impairs the right no more than reasonably necessary, and is proportionate. Crucially, no less intrusive and restrictive means must be reasonably available to reach the objective. If a measure involving less interference with people's rights could achieve the objective, it ought to be used. Limitations must be in place for no longer than necessary.

Given the health emergency facing the country, some latitude was given to government regarding whether a restriction was the least rights-impairing option available particularly in the early days of the pandemic. For example, statutory powers were interpreted generously by the courts to give effect to the emergency purposes of those powers. A narrower interpretation was rejected because it would have thwarted a government's ability to take urgent and decisive action. This meant that a challenge to the nationwide restrictions on mobility, gatherings and opening of premises during the first lockdown was unsuccessful.[65]

At times during the second half of the pandemic, restrictions on civic freedoms – including ability to travel and gather – depended on whether a person was vaccinated or not. However, only one major judicial challenge was brought, and it was unsuccessful.[66] A group of churches and mosques argued that an order prescribing gathering limits – which varied depending on the prevalence of the virus in the community and vaccina-

63 Government submissions in *Grounded Kiwis Group Inc v Minister of Health* at [10].

64 *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832 at [254]. See also Appendix 1.

65 *Borrowdale v Director-General of Health* [2021] NZCA 520. See also Appendix 1.

66 *Free to Be Church Trust v Minister for Covid-19 Response* [2024] NZCA 81. See also Appendix 1.

tion status of attendees – unjustifiably limited their right to manifest their religion. The courts rejected the challenge, accepting that no equally effective alternative methods existed for achieving the important public health objectives of minimising death, serious illness and impact on the public health system.[67]

These vaccine-related restrictions were progressively relaxed and then removed after only a few months in operation.[68] Therefore they lasted no longer than necessary.

Demonstrating that the border quarantine regime was consistent with the Bill of Rights Act was more difficult, especially in the second half of the pandemic when demand for places often exceeded supply and the circumstances of the virus proved volatile. An advocacy group of offshore New Zealanders incorporated for this purpose – Grounded Kiwis – challenged the restrictions in court arguing that alternatives, such as a more tailored quarantine requirement, shorter isolation periods, and enhanced testing protocols were available and that this meant the quarantine regime was not justified.[69] They were unsuccessful on this line of argument because a less effective alternative was not a 'reasonable' alternative. The policy objective of the border quarantine regime was to reduce the risk of an infected traveller arriving in New Zealand seeding an outbreak of Covid-19 (or a new variant of concern) in the community.[70] The Court found that alternatives to border quarantine – such as those that allowed greater movement at the border – were not equally effective in preventing such outbreaks.[71] Moreover, all options had human rights limiting implications given that greater movement at the border would lead to poorer health outcomes and require greater restrictions on movement within the country.

Grounded Kiwis' challenge to the booking system used to allocate quarantine spaces, however, was more successful. Here the Court found that this randomised system (not the quarantine requirement itself) was an unjustified limitation on the right of free movement in some instances. The government had not discharged the burden of demonstrating that there was no reasonable alternative that was less rights impairing than this allocation system. This is despite the government evidencing an extensive policy process that grappled with alternative options before concluding that a randomised lottery was the best (or least bad) option available. The court's view was that better alternatives must have been available.[72] On a more general level, though, the border restrictions were seen as a legitimate public health measure that did not unjustifiably limit the mobility rights of citizens.

67 *Free to Be Church Trust v Minister for Covid-19 Response* [2024] NZCA 81 at [138]-[139].

68 From April 2022 most restrictions were removed: Covid-19 Public Health Response (Protection Framework and Vaccinations) Amendment Order 2022 (4 April 2022). Remaining sectoral vaccine requirements were phrased out in July and September 2022.

69 *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832.

70 The border quarantine regime stopped more than 4,600 cases of Covid-19 at the border where just one case in the community would have compromised the government's elimination strategy: Ministry for Business, Innovation and Employment, 'Briefing for the Incoming Minister for Covid-19 Response: Managed Isolation and Quarantine (MIQ)' (June 2022).

71 *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832 at [300].

72 See generally Knight and Norton, 'Pandemic border fortress' (n 6).

D. Precautionary principle was central to decision-making

The precautionary principle often played a central role in the government's rights-limitation analysis. In a rapidly evolving health emergency without scientific certainty – such as the Covid-19 pandemic – it was accepted by the courts that decision-makers are entitled to act cautiously and take a precautionary approach to risk, particularly where any error can have significant negative impact on public health. This meant the government was justified in having a low risk-tolerance and moving swiftly to impose restrictions or slowly to lift them. Therefore, and as the Court found in the challenge to the border restrictions, the precautionary principle can justify limitations on rights where it is argued that they are lasting longer than reasonably necessary.[73]

3.3 DELIBERATIONS ABOUT PUBLIC HEALTH MEASURES GENERALLY ACCORDED WITH RIGHTS-RESPECTING METHODOLOGY

A. Government showed consistent concern for rights

Rights consciousness was woven through government deliberations, anchored by the rights-respecting expectations in the Covid-19 frameworks. Government documents relating to key decision-making were often released proactively to the public.[74] These documents show that the government recognised where rights were being limited, and then assessed whether these limitations were justified and proportionate by reference to the relevant health objectives, available scientific data, and expert advice.

For example, in March 2022 when the Omicron variant was taking hold in the community and gathering capacity limits and use of vaccine certificates were being reviewed, a briefing paper from officials to the Director-General shows officials were mindful of the changing dynamics of the proportionality assessment, especially the need for limits on rights associated with each measure to be proportionate to the public health goals:[75]

> To ensure public health measures remain proportionate, they should be reviewed regularly. Furthermore, rights should be restored as soon as safely and reasonably possible, consistent with response objectives. Finally, consideration is always given to whether measures that limit rights less can be applied to achieve a similar outcome.

Ministerial decisions were also regularly reviewed to identify any unjustifiable constraints on rights.

73 *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832 at [302].

74 See Part 4.2(b) below.

75 This paper was referenced in *Free to Be Church Trust v Minister for Covid-19 Response* [2024] NZCA 81 at [32].

B. Decisions based in evidence and advice from experts

The government's response was evidence-based with scientists and other public health experts given a central role in government decision-making.

At a high level, the government followed advice from the World Health Organisation and other international medical bodies including, for example, on border testing and quarantine periods. Locally, experts in infectious diseases and other healthcare experts provided advice on the particular risk the virus posed to the country, including on its under-resourced healthcare system and vulnerable populations.

The Minister and Cabinet were advised by the Director-General of Health. The Director-General would also receive advice from other experts and officials including the Director of Public Health. Advisory groups within the Ministry of Health were established, comprising external medical and scientific experts (such as immunologists and epidemiologists) who provided advice to the Director-General. On significant issues – such as those related to border restrictions – the Director-General had advice he received peer reviewed. For example, he sent a public health risk assessment provided to him by the Director of Public Health in relation to the border restrictions to two independent experts for review.

Another layer of independent advice was provided by groups who advised Ministers directly. Notably, the Minister for Covid-19 response established the Strategic Covid-19 Public Health Advisory Group – its membership drawn from senior scientists with expertise in epidemiology, infectious diseases, public health, and modelling – to provide independent advice on the country's Covid-19 response. However, some Māori expressed dissatisfaction with the nature and extent of the government's engagement, especially inadequate engagement with Māori in relation to key decisions taken during the pandemic.[76]

> The government's response was evidence-based with scientists and other public health experts given a central role in government decision-making.

76 Waitangi Tribunal, *Haumaru: the Covid-19 priority report* (Wai 2575, 2021); Māmari Stephens and others, 'Panel discussion: Māori experience of law and justice in Aotearoa New Zealand through the Covid-19 pandemic' (Nov 2020) Māori Law Review; DR Knight, 'New Zealand, Covid-19 and the Constitution' in S de la Garza and J María (eds), *Covid-19 and Constitutional Law* (Universidad Nacional Autónoma de México) 233.

Overall, expertise played a role when determining whether rights limitations were justified. In particular, the government relied on expert advice when assessing whether alternative, less limiting measures were available to achieve the same health objective. Orders were kept under review and revisited where there was new evidence to indicate that a less rights-restricting measure might be available. For example, in November 2021, the government followed advice from experts and reduced the border quarantine period from 14 days to ten days to reflect emerging evidence about transmission and detection of the virus, the dominance of the Delta variant (which meant other variants could be discounted), the social cost given capacity constraints, and an increased risk tolerance for outbreaks in the community. Similarly, when the Omicron variant appeared in the country in early 2022, the Minister sought advice from experts regarding the continuing efficacy of vaccination requirements and gathering capacity limits. Following advice, and as the Omicron peak subsidised, these limits were progressively removed and by 4 April 2022, the vaccination-based gathering restrictions were no longer in place.[77]

C. Civil society supported government

Trust of government and large social capital were crucial to the success of the pandemic response. The country's collective approach was apparent in the Prime Minister's regular reference to the 'Team of 5 million', meaning the ordinary New Zealanders who made many personal sacrifices for the greater good of the country.

Civil society, along with indigenous groups, supported the country's pandemic response through collaboration with government. In the initial phase of the pandemic, for example, charities assisted with housing homeless people and delivering food and other essential supplies. The nationwide 'student volunteer army' – which began as a response to the Canterbury earthquakes – coordinated with other groups and businesses to help people self-isolating or struggling with loneliness due to social distancing. When the highly transmissible Omicron variant took hold and many health protections were eased, disability organisations and networks helped to share information and provide support where those at risk needed to self-isolate and government services were disrupted.[78]

Some efforts from non-governmental groups were more controversial. When domestic border restrictions were lifted permitting travel from Auckland to other regions in December 2021, Māori iwi set up checkpoints in partnership with police to help protect their vulnerable communities.[79] Previously roadblocks and checkpoints had operated outside the law, but a legislative amendment gave the Police Commissioner power to

77 For a full account of this timeline see *Free to Be Church Trust v Minister for COVID Response* [2024] NZCA 81.

78 The New Zealand Human Rights Commission undertook an inquiry that criticised this phase of the government's response: *Inquiry into the Support of Disabled People and Whānau During Omicron* (Wellington, 2022).

79 M Bargh and L Fitzmaurice, *Stepping Up: Covid-19 Checkpoints and Rangatiratanga* (Huia Publishers, 2021).

appoint a Māori warden, a nominated representative of an iwi organisation, a Pasifika warden, or a community patroller to stop motorists to monitor compliance with health measures (proof of vaccination status or a negative Covid-19 test).

During the vaccination rollout phase, civil society also collaborated with government. The government attempted to provide equitable access to vaccines through various community-based initiatives, including working with a broad range of groups representing indigenous Māori, Pacific peoples, disabled people, and migrants and refugees. The government took an 'all of society' approach to uptake of the vaccine, drawing on businesses (large and small) and community groups to engage with vaccine education initiatives for their own staff, promotions, prizes and marketing to push vaccination rates as high as possible in their communities.

Māori vaccination training and rural initiatives took place, including working with Māori health providers to vaccinate shearing gangs in rural and remote areas. The Ministry of Health also funded community-based disability groups to support vaccination amongst their people, including by providing travel support to and from vaccine centres.[80] Nonetheless, and despite these efforts, vaccination rates for Māori were lower than the national average and criticisms have been made that access to vaccines was inequitable.[81] Collaboration with Māori was also not free from concerns. A Māori organisation successfully challenged the government's refusal to share vaccination data with them.[82]

3.4 APPRAISAL OF RIGHTS CONSISTENCY AND ACCOUNTABILITY FOR PUBLIC HEALTH MEASURES

Accountability processes required the government to justify limits imposed on people's rights and freedoms and explain its response more generally; judicial scrutiny continued, allowing the courts to call out and invalidate measures they considered unjustifiably breached rights and freedoms. These processes are explained in detail in Part 4.

3.5 PUBLIC HEALTH MEASURES GENERALLY RIGHTS-CONSISTENT OR JUSTIFIED LIMITS ON RIGHTS, WITH A HANDFUL OF EXCEPTIONS

Individual appraisal of every public health measure used during the pandemic is beyond the scope of this report. Overall, however, our view is that the rights-respecting framework and accountability processes meant the public health measures were generally rights-consistent or imposed justifiable limitations. This does not mean there were

80 For an overview of New Zealand's Covid-19 vaccination programme, see letter from A Bloomfield L McAviney (15 November 2021) <www.health.govt.nz>. See also Hunt and Bradwell-Pollock (n 8).

81 Hunt and Bradwell-Pollock (n 8) at 216. See also *Waitangi Tribunal, Haumaru: The Covid-19 Priority Report* (WAI 2575) (December 2021).

82 *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 3319. See also Part 4.2(g) below.

no instances where measures were inconsistent with the Bill of Rights Act, either by imposing unjustified limits on rights or keeping measures in place longer than was necessary. Indeed, given the complex and rapidly evolving nature of the public health crisis, it was perhaps inevitable that some rights limitations would be unjustified at points. Three measures, for example, may not have been justified for the entire time they operated. First, the extensive lockdown of Auckland – lasting over three months – in August 2021 probably continued longer than necessary. Secondly, consistent with the judicial finding, the randomised booking system for border quarantine was not without problems (although we are not convinced there were plausible alternatives without similar rights implications, other than perhaps a more generous but resource-intensive individualised exemption process). Thirdly, again consistent with some judicial findings, the vaccination requirements – especially those briefly operating on a population-wide basis – implicated liberty and dignity more than may have been anticipated, thereby affecting their justifiability. These reflections on the substantive rights consistency of these public health measures are, however, general impressions rather than particularised findings.

4. Democracy and Accountability

In addition to its rights protection, the pandemic response in New Zealand is notable for how it preserved – and, in some cases, enhanced – democratic and accountability processes. When, at times, the pandemic prevented existing processes from operating, alternatives were often developed to ensure appropriate democratic oversight. We consider the maintenance of democratic processes and accountability mechanisms – allowing the public and civil society to participate in, and hold the government to account for, decisions about public health and other measures – crucial to the rights-respecting culture adopted by the government, especially during the first half of the pandemic.

We suggest, in general terms, that the government's approach to democratic and accountability processes was stronger in the first half of the pandemic while an elimination strategy applied. A strong culture of justification and responsiveness existed during this period and, as a result, strong social licence for powerful government action was maintained. We identify several instances of democratic best practice. It is also fair to say the culture of justification and responsiveness dropped during the second half of the pandemic – as the country transitioned from an elimination strategy to active suppression and beyond. While some the accountability structures and practices remained, the government was somewhat more democratically lethargic and, correspondingly, social licence for public health measures frayed.

4.1 CONTINUING OPERATION OF DEMOCRATIC INSTITUTIONS, PROCESSES AND ACTIVITY

Democratic institutions – Parliament, executive government, courts and other integrity bodies – and associated processes continued to operate during the pandemic, despite the heightened public health measures including restrictions on movement and gathering.[83] Institutions adjusted their operating processes to ensure continuity, especially for urgent matters. The continuing operation of these institutions provided ways for government to justify public health measures and for its

When, at times, the pandemic prevented existing processes from operating, alternatives were often developed to ensure appropriate democratic oversight.

83 Some of this analysis is adapted from Knight, 'National Responses' (n 6).

actions to be scrutinised, as well as enabling people to pursue their concerns and grievances about public health measures politically and legally. Elections were also held during the pandemic, allowing the public to express their view on the government's stewardship throughout the pandemic. The public were also generally able to continue democratic expression and protest, subject to relatively minimal interference.

A. Legislature (Parliament and the House of Representatives)

Parliament – made up of a single House of Representatives of 120 or so MPs – played a central role in the public health response, both in its legislative and accountability capacity. The proceedings of Parliament were not significantly interrupted during the pandemic, although standing orders and other protocols were amended to maintain proceedings and accommodate necessary health precautions.[84] Changes to standing orders and other protocols were adopted on a multi-party basis through the business committee: a cross-party committee of senior members working on a cooperative basis.[85] Sittings of the House were only suspended for just over a month in early 2020 while the country was subject to the first nationwide lockdown; during this time, the Epidemic Response Committee was constituted and acted as 'Parliament-in-miniature'.[86] The House then resumed for three weeks while the rest of the country was in lockdown to pass the Covid-19 Act and other legislation, operating with limited numbers of MPs and relaxed protocols for the casting of proxy votes by each party.[87] Heightened public health precautions, such as physical distancing, also applied within the House after elevated health restrictions associated with the outbreak in August 2021; remote participation arrangements, where MPs could attend House debates by video, were also adopted in early 2022.[88] Otherwise, the House was generally able to operate as usual.

Parliament continued to legislate during the pandemic. The laws made tended to reflect the different circumstances of the pandemic. Numerous pieces of legislation, including the Covid-19 Act were passed to support the public health response and other consequences of the pandemic, when elevated public health measures applied. In times of zero-Covid where normal life continued, the House returned to pass other legislation within the government's regular legislative programme. Throughout, the House and its committees spent a lot of their time scrutinising the government's response to the pandemic.[89] We discuss in more detail below the parliamentary law-making and accountability processes, including examples of good and poor practice.

84 See DR Knight, 'Law-making and accountability in responding to Covid-19: the case of New Zealand' in 'Melbourne Forum: Representation in Democracies During Emergencies' (2020).

85 D Wilson, 'How the New Zealand Parliament responded' in Study of Parliament Group (ed), *Parliaments and the Pandemic* (2021) 187 at 193 ('new arrangements for House sittings and committee meetings were able to be considered and put in place rapidly').

86 See Part 4.2(d) below.

87 Knight, 'Stamping out Covid-19' (n 6).

88 New Zealand Parliament, 'Sessional Orders' (February 2022).

89 G Hellyer, 'Assessing Parliament's Response to the Covid-19 Pandemic' (2021) 17 *Policy Quarterly 20*.

The process of law-making also often reflected the emergency settings. Much legislation dealing with public health measures was expedited, either through urgency motions or with cross-party agreement.[90] The extensive use of urgency and other expedition of bills circumvented select committee scrutiny and public submission.[91] However, an immediate select committee inquiry into one Act passed under urgency, largely in response to criticism of the process, is to be commended as a way of partially ameliorating the absence of pre-enactment scrutiny and consultation.[91] The speed of law-making also increased the risk of errors. For example, in one instance the wrong version of a bill (dealing with small business loans) was passed under urgency.[92]

Overall, being both responsive and maintaining good process and legislative quality when legislating in times of emergency is 'a tricky balance'.[93] On the whole, New Zealand's experience demonstrates both good and poor practice, with some instances of quality legislation on the one hand but some concerns about the deliberative and consultative processes used to pass legislation on the other.

Parliament's processes also supported ongoing scrutiny of the government's response to the pandemic, including:

- confirmation of Covid-19 orders (see Part 4.2(a));
- questions and debates in the House (see Part 4.2(c)); and
- Covid-19 select committee oversight (see Part 4.2(d)).

B. Executive (ministers, Cabinet and departments)

New Zealand's system of Cabinet governance[94] continued to operate throughout the pandemic, with collective decision-making processes adjusted to accommodate the style of decision-making that the pandemic required. Key decisions during the pandemic continued to be made by Cabinet as a collective; a group of ministers – the Covid-19 Ministerial Group – was also delegated power to coordinate and direct the government's response.[95] When pandemic settings were heightened, arrangements were made for Cabinet meetings to reflect public health precautions, such as physical distancing and virtual or hybrid

90 M Bentley, 'Covid-19 and an Improved Model of Expedited Law-Making' (2022) 13 *New Zealand Journal of Public and International Law* 1.

91 D Parker, 'Covid-19 Public Health Response Act 2020: Finance and Expenditure Committee Inquiry – Referral' (14 May 2020) 748 NZPD 17902. Disappointingly, however, the recommendations were not acted on; it would be preferable for parliamentary processes to ensure such recommendations returned the House for consideration, as if they were made by a select committee prior to a bill's second reading.

92 Hellyer (n 89) at 22 (the failure to pick up the error 'was a direct consequence of truncating normal procedures').

93 Hellyer (n 89) at 21.

94 Cabinet is the engine room of executive governance, where a group of 20 or so ministers take decisions collectively on behalf of the government, usually without any need for a vote; ministers are then individually responsible for implementing those decisions within their portfolios through their departments.

95 M Webster, 'Government decision making during a crisis' (2021) 17 *Policy Quarterly* 11 at 13.

attendance.[96] The compressed decision-making timeframe led to some procedural innovations; for example, the Director-General of Health attended Cabinet on occasion to ensure ministers were provided the most up-to-date advice (usually officials do not attend Cabinet, only Cabinet committees when requested).[97] Departments and agencies continued to operate and, for example, were generally exempt from lockdown restrictions.

C. Judiciary

Courts continued to operate throughout the pandemic, adopting a series of protocols, practice notes and guidelines setting out special arrangements during lockdown and elevated alert levels. The Chief Justice recorded that courts were 'an essential service' and 'must continue to uphold the rule of law and to ensure that fair trial rights, the right to natural justice and rights under the New Zealand Bill of Rights Act are upheld'.[98] During periods of lockdown, 'priority' and 'urgent' proceedings continued to be heard, such as those dealing with the liberty of individuals, personal safety and wellbeing, and other time-critical matters; jury trials were suspended.[99] Generally, the courts operated as much as possible with virtual proceedings and remote hearings, as well as physical distancing protocols for in-person hearings; some concerns were raised about the appropriateness of the arrangements for remote hearings, including the adequacy of the technology adopted.[100] Rules governing court proceedings were modified to take account of the pandemic and associated disruption. Emergency provisions allowed judges to modify any rule of court to account for the effects of a quarantinable disease, when necessary, in the interests of justice.[101]

Generally, the courts operated as much as possible with virtual proceedings and remote hearings, as well as physical distancing protocols for in-person hearings.

96 Webster (n 95) at 14 ('longstanding principles of best practice decision making, as set out in the Cabinet Manual, were effectively combined with modern technology, the adaptation of systems and processes, and a dash of Kiwi pragmatism, to deliver a decision-making approach that supported Ministers to respond to one of the most significant crises New Zealand has ever faced').

97 D Seymour, 'Government captured by Ministry of Health' (14 June 2022).

98 H Winkelmann, 'Covid-19: court operations at alert level 4' (25 March 2020).

99 See Knight, 'National Responses' (n 6).

100 An existing regime (Courts (Remote Participation) Act 2010) allowed remote participation and the courts made heavy use of virtual hearings during lockdowns and other heightened public health restrictions. For concerns about remote participation, see Y Tinsley and N Lynch, 'Remote justice? Criminal proceedings in a pandemic' *Newsroom* (21 May 2020); D Morris, 'The onesie-wearing future of a virtual court' *Stuff* (27 May 2020).

101 Epidemic Preparedness Act 2006, s 24. See eg *White v New Zealand Police* [2020] NZHC 684; *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2020] NZHC 704; *Re Logan* [2020] NZHC 870.

The courts heard challenges to action taken by government during the pandemic (see Part 4.1(c) and Appendix 1).

D. Other integrity bodies

Key integrity bodies, such as the Ombuds, Auditor-General, Police Complaints Authority, Human Rights Commission and Privacy Commissioner, continued to operate during the pandemic paying particular attention to aspects of the government's response within their specific jurisdictions or that generated complaints. Examples of their work are discussed below at Part 4.2(f).

NGOs, other stakeholders, and independent government agencies also contributed to oversight around Covid-19 legislation and orders conducted by parliamentary select committees; however, the frequent use of urgency when passing primary legislation, circumventing the usual public consultation via select committee processes, meant comments were not often able to be provided before these bills were enacted.

E. Elections

A general election took place in mid-October 2020. It was originally scheduled for late September 2020 but was delayed by four weeks due to an outbreak of the virus and consequential regional lockdown.[102] The outbreak occurred just before the dissolution of Parliament and commencement of the electoral processes; thus, the Prime Minister was able to slightly defer the election date (otherwise any decision about deferral would have fallen on electoral officials). Opposition parties were consulted and most agreed with the deferral.

When the general election eventually took place, the regional lockdown and other heightened restrictions had been lifted. However, election logistics still reflected the need for health precautions. A health order was promulgated providing for contact tracing and physical distancing at polling booths, as well as overriding any travel and gathering restrictions in any other health orders (although none in fact applied on polling day).[103] The chief electoral officer's existing emergency power to delay polling for short periods was kept in reserve in case of

> Despite the pandemic, voter turnout was not adversely affected; almost 82% of the voting population voted (a record high in the last two decades).

102 DR Knight, '2020 general election – not an ordinary election, not an ordinary time' [2021] *Public Law* 439.

103 Covid-19 Public Health Response (Election and Referendums) Order 2020.

further disruption.[104] Despite the pandemic, voter turnout was not adversely affected; almost 82% of the voting population voted (a record high in the last two decades).

A general election also took place in October 2023, sometime after pandemic conditions had been lifted.

F. Civic expression and protest

The public's ability to engage in civic expression and protest (protected by the freedoms of expression, association, assembly and movement) was affected by public health restrictions – especially gathering, mobility and physical distancing restrictions – in different ways and at different times during the pandemic.

Nonetheless, protests did occur in violation of these restrictions, with police taking very little action to prevent or disperse them. Memorable protests included Black Lives Matter protests in June 2020 with some 10,000 people attending, and relatively small anti-lockdown protests from August 2020 – organised and attended by churches, very minor political parties, a group against 5G and other fringe movements and individuals – and then with (sometimes weekly) regularity when the government introduced the vaccination requirements. An anti-vaccine advocacy group (Voices for Freedom) and other anti-vaccine and anti-government 'sovereign citizen' groups were formed. While these protests were typically in public parks, they also occurred outside hospitals, politicians' offices, and media stations. The police had an 'education first' approach and, as occurred with the Black Lives Matter protest, provided guidance to organisers prior to the events and reminded them of their obligations under Covid-19 restrictions. This guidance was typically not complied with but, for the most part, the police took little further action.

The vaccine requirements probably caused the most significant grievances amongst some. These grievances led not only to judicial challenges but a series of protests across the country – themselves in violation of public health restrictions – that grew in momentum as time went on. While the protests were mostly dealt with by police using light touch – only the leaders who repeatedly violated warnings were criminally charged and remanded in custody – they increased in intensity and culminated in a major occupation of parliamentary grounds in early February 2022. Residents from bordering neighbourhoods needed to be relocated and multiple breaches of the peace occurred. Police made unsuccessful initial efforts to remove protestors by arresting them, and then attempted to contain them and maintain law and order by building trust and de-escalating.[105] A final operation in early March to remove the protestors encountered strong resistance. It ultimately deteriorated into a riot with the remaining protestors lighting fires, violently attacking the police, and the police needed to use significant force to end the occupation.[106]

104 Electoral Act 1993, s 195A.

105 Independent Police Conduct Authority, 'The Review: Policing of the Protest and Occupation at Parliament 2022' (20 April 2023) at [26].

106 For a fuller account, see O'Brien and Huntington (n 9) at 1.

While 38 arrests were made, many of the charges against the protestors were ultimately withdrawn. A review of the policing of the parliamentary protests and occupation conducted by the Independent Police Conduct Authority found the police had acted appropriately.[107] Smaller, mostly peaceful protests and marches continued for months afterwards until the vaccine requirements were lifted. The right to peaceful protest was generally well-respected in New Zealand, unlike many other countries which violated free assembly standards by protest crackdowns during the pandemic.[108]

Like every country, inaccurate and misleading information was shared about the seriousness of the virus and the safety of the vaccine, particularly on social media. Often these inaccuracies were harmful to public health and affected vaccination efforts. Some of these inaccuracies arose through lack of information or proper understanding, while others were the result of coordinated and deceptive disinformation campaigns. Much of this disinformation was spread online, but pamphlet and poster campaigns also occurred.

Any attempt by government to restrict this information engages the right to freedom of expression. For the most part, however, the government did not censor or criminally sanction these communications. Instead, it sought to counter them through transparency and education. It also worked to ensure that the public trusted government and its medical experts as the authoritative source of information about the virus and its treatment. The daily media briefings by ministers and health officials (including the Director-General) included updates about current state of scientific knowledge. The briefings were accompanied by question-and-answer sessions where concerns and rumours could be responded to. The 'open, honest and straightforward communication' in these briefings built trust with the audience.[109] A media campaign also directed citizens to government websites – including its bespoke Covid-19 website – and official sources for accurate information and warned about false or misleading information. Guidance was provided to school communities about how to respond to this information and any concerns about the vaccine. The government's official pandemic campaign – Unite Against Covid-19 – created an accessible animated short film about misinformation and circulated it on platforms such as YouTube.

In addition, government agencies researched and reported on misinformation. The Broadcasting Standards Authority – the agency responsible for determining complaints about broadcasting standards – also upheld several complaints about the accuracy of television and radio coverage of Covid-19.[110] An anti-vaccine advocacy group

107 Independent Police Conduct Authority (n 106).

108 See, e.g., https://www.icnl.org/Covid-19tracker/?location=&issue=2,9&date=&type=, for examples of inappropriate limitations and repression of peaceful protests.

109 Beattie and R Priestley, 'Fighting Covid-19 with the team of 5 million' (2021) 4 Social Sciences & Humanities Open 100209 at 3; however, for some cultural groups, particularly indigenous Māori due to the country's colonial history, their existing distrust of government continued (at 7).

110 *Clark & Sallee and Apna Television Limited* [2021] NZBSA 172 (20 December 2021); *Burne-Field and NZME Radio Ltd* [2020] NZBSA 72 (14 September 2020).

was found by the advertising watchdog – the Advertising Standards Authority – to have breached advertising regulations for their irresponsible and untruthful billboards against the government's vaccine efforts and the billboards were ordered to be removed.[111]

The government also encouraged the public to report Covid-19 misinformation through a central coordination point – CERT NZ – with a phone number and online form established for this purpose. These reports were then referred to the relevant government departments for them to address.

The government's focus on Covid-19 misinformation culminated in the Department of the Prime Minister and Cabinet commissioning a survey report providing insights and recommendations.[112] The government continues to encourage people to report any online misinformation to the internet safety non-profit organisation Netsafe.

Civil society organisations also monitored and provided advice to the public on addressing false information. For example, the independent and nongovernmental research group – the Disinformation Project – was founded at the beginning of the pandemic to understand the causes and impact of Covid-19 disinformation in New Zealand. A research organization consisting mainly of academics – the Workshop – provided resources to assist with combatting disinformation about the virus and vaccine. This included guidance for media. During the pandemic, InternetNZ – a non-profit charity – conducted a series of online discussions ('NetHuis') to collaborate on addressing COVID misinformation. Other independent experts provided a range of accessible guidance on countering vaccine misinformation in the healthcare sector. In some instances, professional regulators (such as medical and nursing councils) laid disciplinary charges against their members for spreading misinformation.[113]

Civil society organisations also monitored and provided advice to the public on addressing false information.

111 *Voices for Freedom* [2022] NZASA 41 (22 March 2022); *Voices for Freedom* [2022] NZASA 42 (22 March 2022); *Voices for Freedom* [2022] NZASA 107 (10 May 2022); *Voices for Freedom* [2022] NZASA 136 (22 July 2022); *Voices for Freedom, Pandemic of the Unvaccinated, Billboard (Appeal)* [2022] NZASA 10710 (18 August 2022); *Voices for Freedom* [2022] NZASA 275 (26 October 2022). Facebook, a private company, also took down the same group's page because it contained false claims and harmful information.

112 Kantar Public, 'Unite Against the Covid-19 Infodemic' (September 2022).

113 *Professional Conduct Committee v Tepou* 1331/Nur22/556P (7 September 2023).

4.2 CHECKS AND BALANCES ON PUBLIC HEALTH MEASURES AND OTHER ACCOUNTABILITY PROCESSES

New Zealand's pandemic response contained a complex system of checks and balances on public health measures and Covid-19 orders made by the executive, along with the democratic processes that held the government to account.[114] Here we especially focus on the processes that allowed scrutiny of the rights consistency of the public health measures. In doing so, we are attentive to both formal and informal processes where the government was required to render account and explain its actions to an institution or group , where the explanation was able to be scrutinised and appraised, where a judgement was made about the propriety of the explanation, and where consequences might have flowed from that judgement.[115] These accountability processes vary: some take on a political hue, some are framed in legal terms, and others focus on continuous improvement and efficacy. Some of these checks and balances applied during the process of deliberating on public health measures and Covid-19 orders; others provided an opportunity after public health measures were implemented for their appropriateness and rights consistency to be appraised.

Overall, government accountability during the pandemic was maintained and, during the first half of the pandemic especially, perhaps even enhanced. Sometimes processes were adjusted to reflect pandemic conditions. The government's response was repeatedly and generally rigorously scrutinised through a wide range of processes, with both positive and negative consequences resulting from that appraisal. Importantly, while some groups in New Zealand society saw the government as acting in an authoritarian manner and did not think it was held to account for its response, much of this discontent arose from disagreement about the substance of the decisions taken, especially because an analysis generally shows the ongoing maintenance of democratic and accountability processes.

A. Deliberative processes for making orders in practice

The power to impose public health restrictions through health and Covid-19 orders was reposed in particular individuals, but decisions were still taken within a Cabinet context, bringing collective discipline to bear.

In the first few months of the pandemic, including when the first nationwide lockdown was imposed, public health measures were formally imposed by the Director-General of Health, acting as a medical officer for the entire country, through orders under the Health Act 1961.[116] As it was undesirable for such decisions to be taken solely by an unelected official, pragmatic arrangements were developed to recognise the legal site

114 Some of this analysis is adapted from Knight, ' Accountability through Dialogue' (n 5).

115 M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447.

116 Knight, 'Stamping out Covid-19' (n 5).

of powers but also to acknowledge the need for democratic decision-making and political leadership. Thus, the policy direction for the response to the virus was set by the Prime Minister and Cabinet, through the extra-legal alert level framework; however, decisions on the nature and content of health orders were formally reserved to the Director-General himself, in the light of the Cabinet's decision on alert level. While these pragmatic arrangements did not cause undue complications during the early months in which they applied, it was democratically undesirable for emergency power to be allocated in this way; as a result, the Covid-19 Act recast the responsibility for imposing public health restrictions.

The power to issue Covid-19 orders under the Covid-19 Act was vested in ministers. While formally the decision fell to the responsible minister to impose public health restrictions through Covid-19 orders, those decisions continued to be taken in a collective context.

First, in accordance with usual constitutional principles, ministers took proposed decisions on significant matters to Cabinet for discussion with their ministerial colleagues; while formally the decision remained with the responsible minister and the proposed decision was only provided to Cabinet 'to note', collective input was thus still provided.[117] Notably, the Attorney-General, who has particular responsibility for monitoring human rights, is a member of Cabinet and played a key role in promoting rights consistency.

Secondly, Cabinet continued to make decisions about alert levels and other headline settings. The Covid-19 Act then allowed the responsible minister to have regard to 'any decision by the Government on the level of public health measures'.[118] The responsible minister was also required to consult with the Prime Minister and the Minister of Justice, along with any other ministers they considered appropriate.[119]

Decisions on Covid-19 orders were also significantly structured by the legislation; in other words, specific directions were given to the responsible minister about the matters they ought to consider when imposing public health restrictions (see Part 2.3(c) above). These deliberative procedural requirements were designed to ameliorate the breadth of the power to make Covid-19 orders, while also preserving flexibility to address unknowns.

Finally, the responsible minister was required to keep any order under review.[120] As noted earlier, while changeable pandemic settings made this difficult, generally ministers were continuously reviewing orders, especially assessing whether the justification for limiting rights changed and dissipated.[121]

117 MSR Palmer and DR Knight, *The Constitution of New Zealand* (Hart Pub, 2022) at 80.

118 Covid-19 Act, s 9(1)(c).

119 Covid-19 Act, s 9(1)(b).

120 Covid-19 Act, s 14(5).

121 See, eg, *Free to be Church Trust v Minister for Covid-19 Response* [2024] NZCA 81 and *NZTSOS Inc v Minister for Covid-19 Response* [2024] NZCA 74 for cases where the timeliness of review was implications. See also Appendix 1.

B. Transparency and public justification of public health measures

The government's approach to the pandemic heavily emphasised transparency and public justification of health measures. This transparency, along with political leadership, was critical in promoting high levels of social licence, especially during the first half of the pandemic.

Central to the communications strategy were public health restrictions built around simple but vivid frameworks: the alert level framework (March 2020 to December 2021) and the Covid Protection Framework (used December 2021 to September 2022). Both extra-legal frameworks publicly signalled the prevailing pandemic conditions and expected restrictions on day-to-day life.[122] The alert level framework comprised 4 levels: levels 3 and 4 anticipated lockdown or stay-at-home restrictions, with varying degrees of permissible movement; level 2 represented some restrictions on comingling, especially the size of gatherings, and some other low-level restrictions; level 1 would be restriction-free (other than border controls). The Covid-19 protection framework, styled in the form of red, orange and green traffic lights, identified different levels of public health restrictions based on the prevalence of the virus and vaccination levels in different regions.[123]

Regular – often daily – media briefings by the Prime Minister or the Minister for Covid-19 Response, along with the Director-General of Health or Director of Public Health, are enduring memories of the pandemic particularly in the first 18 months. Public health restrictions were presaged by major speeches by the Prime Minister, Jacinda Ardern. The briefings, watched by a large swathe of the public, provided updates on the path and profile of the virus, explanations of existing or forthcoming public health restrictions and other contemporary issues in the stewardship of the response. Ministers and officials were vigorously questioned by a large press gallery.

Ministers and officials were vigorously questioned by a large press gallery. Recordings and transcripts were made publicly available. Briefings were simultaneously interpreted into New Zealand Sign Language.

122 New Zealand Government, 'Alert system overview' <www.Covid-19.govt.nz>, announced by Rt Hon Jacinda Ardern, 'PM Address: Covid-19 Update' (21 March 2020) <www.beehive.govt.nz>.

123 Covid-19 Public Health Response (Protection Framework) Order 2021 (SL 2021/386); J Ardern, 'Covid-19: Confirming a Strategy for a Highly Vaccinated New Zealand', Cabinet Minute, CAB-21-SUB-0422 (Oct. 18, 2021); Cabinet, 'Review of Covid-19 Protection Framework Settings for New Zealand', Cabinet Minute, CAB-21-MIN-0509 (29 November 2021).

Recordings and transcripts were made publicly available. Briefings were simultaneously interpreted into New Zealand Sign Language. Later in the pandemic, these briefings were reduced to twice weekly and then weekly until they eventually ceased. Also notable was a detailed public explanation by the Attorney-General, via Facebook live, of the legal underpinnings of the first nationwide lockdown, after some question marks had been raised about its legality.[124] Public briefings by ministers and officials were accompanied by a major communications and public advertising effort.[125]

Parliamentary scrutiny also provided lots of opportunities for the government to render account, information and data to be made publicly available and for decisions to be publicly appraised (see Part 4.2(c)).

The government engaged in a large programme of proactive disclosure of policy and operational material relating to the response. A whole-of-government website stocked information on every aspect of the pandemic and response.[126] All Cabinet papers and minutes during the pandemic were released month-by-month, with only minor redactions (apparently unprecedented amongst comparable jurisdictions, although a routine practice that preceded the pandemic).[127] During the latter part of the pandemic, the centralised website was decommissioned. Information, along with Cabinet papers and minutes, continued to be pro-actively released on individual departmental websites.

C. Government accountability in the House

Various House processes exposed the government to accountability for its response to the pandemic. The procedural requirements embedded in the Covid-19 Act generated numerous debates in the House on the government's response to the pandemic. For example:

- Debates were held on motions to approve Covid-19 orders, as required by the Covid-19 Act.[128] These parliamentary debates were substantive and not perfunctory. They followed the scrutiny of the Covid-19 orders by the Regulations Review committee, providing an opportunity in debates for matters of concern to the committee to be highlighted.

124 D Parker, 'Legal and procedural issues arising out of Covid-19' <www.facebook.com/davidparkermp>.

125 See Knight, 'Government expression' (n 6); Beattie and Priestley (n 110).

126 'United Against Covid-19' <www.Covid-19.govt.nz>.

127 Originally Unite Against Covid-19, 'Proactive Release', <www.Covid-19.govt.nz>; now found at Department of Prime Minister and Cabinet, 'Covid-19 Proactive Releases' <www.dpmc.govt.nz>.

128 Covid-19 Act, s 16 (order revoked unless approved by the House, within 10 sitting days, 60 days or another period specified the House (whichever was longer)). See eg 'Covid-19 orders: approval' 754 NZPD (10 August 2021).

- Debates were held to extend the operation of the Covid-19 Act under its sunset clause.[129] A process was eventually adopted requiring proposed continuance of the Act to be first considered by a select committee, which provided additional scrutiny and ensured the debate was enriched by the committee's appraisal of the operation of the Act.

Existing accountability processes within the House allowed the government's response to be interrogated and debated at length. This included regular oral questions, written questions, ministerial statements and associated questioning, general debates, debates on pandemic related bills.[130] As might have been expected, these accountability processes were dominated by matters relating to the pandemic and the government's response, especially during heightened circumstances.

D. Scrutiny of the response by select committees

Select committees played an especially crucial role scrutinising the government's response to the pandemic, notably the Regulations Review and Epidemic Response committees.

The Regulations Review committee scrutinised health and Covid-19 orders in accordance with their standard remit over secondary legislation and particular legislated duties under the Covid-19 Act. Under existing Standing Orders, the committee routinely reviews all secondary legislation and hears complaints from the public.[131] It may draw matters of concern to the House, including whether the secondary legislation 'trespasses unduly on personal rights and liberties'.[132] Committee members may also prompt a House process for the disallowance of secondary legislation (although rarely necessary).[133] In addition, where secondary legislation must be approved by the House (as occurred with Covid-19 orders), Standing Orders directed that it must first be considered by the committee; rules in sessional orders were adopted in late 2020 to streamline the committee's consideration of Covid-19 orders.[134] The committee was also directed to consider any motion to extend the operation of the Covid-19 Act before the motion was debated in the House.

The committee's work was notable for its thoroughness. It reviewed all the health and Covid-19 orders made during that pandemic, appraising them against the usual

129 Covid-19 Act, s 3. As originally enacted, the Act expired unless the House passed a resolution continuing its operation within 90 days of enactment or most recent continuance resolution (or other period specified by the House); and the Act was scheduled to be repealed automatically within 2 years of commencement. The sunset clause was amended in late 2022 to remove the need for periodic continuance and to set the final date of repeal as 25 November 2024. See eg 'Covid-19 Public Health Response Act 2020: Continuation' 749 NZPD (8 December 2020).

130 Hellyer (n 89) at 22.

131 Standing Orders of the House of Representatives (2020), SOs 326-329.

132 Standing Orders of the House of Representatives (2020), SO 327(2)(b).

133 Standing Orders of the House of Representatives (2020), SOs 326-329; see generally DR Knight and E Clark (eds), *Regulations Review Committee Digest* (2016).

134 Standing Orders of the House of Representatives (2020), SO 330.

requirements for secondary legislation set out in standing orders, along with constitutional principles for good legislative design.[135] The quality of the orders made was generally high; however, the committee raised concerns about some orders. Common themes included lack of certainty or clarity; orders drafted as guidance not rules; unauthorised sub-delegation; potentially unjustified limits on human rights; and impossible compliance. In many cases, the committee's concerns were addressed in amendments or subsequent versions of the orders; in some other cases, the committee accepted the minister's explanation for the matter giving rise to the concern.[136] Some of the concerns related to historic orders; other concerns were not addressed. The committee's appraisal of the orders and its identification of concerns were also sometimes picked up in debates in the House on pandemic matters, with active participation by committee members in those debates.

The committee also reviewed provisions in bills empowering health and Covid-19 orders to ensure powers were appropriately delegated and constrained. In addition, the committee formally convened ongoing inquiries into Covid-19 legislation.[137] After the pandemic ended, the committee used one of these inquiries to record the nature of concerns it raised and to make several general recommendations about legislative responses to emergencies (building on an earlier set of recommendations following the Canterbury earthquakes).[138]

In the early days of the pandemic, an Epidemic Response committee was established to scrutinise the government's response to the pandemic, especially while the House could not sit due to the then nationwide lockdown.[139] The committee was chaired by the leader of the opposition and operated with an opposition majority. As noted earlier, this innovative committee effectively became New Zealand's 'Parliament-in-miniature' during the lockdown. It met three mornings a week – questioning key ministers and officials, as well as hearing from experts and those adversely affected. The committee was generally well-regarded, constructive in its scrutiny and overall quite effective, especially in its first few weeks of operation.[140] It ceased operating once usual parliamentary procedures fully resumed in late-May 2020. The Health committee took over scrutiny of the public health response to the pandemic, with the Regulations Review committee continuing its scrutiny of the health and Covid-19 orders.

135 Regulations Review committee, 'Inquiry into Covid-19 Secondary Legislation' (15 June 2023) at 21 (referring to the Legislation Design and Advisory Committee, *Legislation Guidelines* (2021)).

136 Regulations Review committee, 'Inquiry into Covid-19 Secondary Legislation' (15 June 2023) at 19.

137 Regulations Review committee, 'Briefing to review secondary legislation made in response to Covid-19'; 'Final report of the Regulations Review Committee' (August 2020); 'Inquiry into Covid-19 Secondary Legislation' (June 2023).

138 'Inquiry into Covid-19 Secondary Legislation' (June 2023).

139 New Zealand Parliament, 'Epidemic Response Committee: Covid-19 2020' <www.parliament.nz>; Knight, 'Stamping out Covid-19' (n 6); Hellyer (n 89) at 23.

140 Hellyer (n 89) at 23 and 24 (the committee 'was a highly effective adaptation of Parliament's scrutiny function' and 'was a resounding, if not uncomplicated, success').

Other select committees scrutinised government and other legislative work (including, notably, the Finance and Expenditure committee's post-enactment scrutiny of the Covid-19 Act), meeting electronically and in-person when alert levels allowed.

Overall, select committees played a crucial role in holding government to account, providing scrutiny of the pandemic response and adding to the transparency of decision-making and justifications for public health measures. The different nature of exchanges in select committees means scrutiny took on a different – often more constructive – character, and generally complemented the more political exchanges in the House. The intensity and efficacy of scrutiny by select committees tended to ebb and flow, with the fluctuation of public health policies.[141] The work of the Regulations Review committee was especially valuable. Its appraisal of the orders and recommendations significantly improved their nature and quality, including ensuring appropriate balances between public health objectives and other human rights. The general lessons identified by the committee are also helpful in legislating for, and during, future emergencies.[142]

E. Judicial scrutiny of public health measures

The courts heard a range of key challenges against public health measures.[143] These included challenges to the first nationwide lockdown, the operation of border quarantine, decisions refusing applications for immigration visas, decisions refusing personalised requests to self-isolate at home when returning from abroad, decisions approving Covid-19 vaccinations, a Covid-19 order setting gathering restrictions for faith-based worship, and various vaccination requirements. Brief summaries of key challenges are set out in Appendix 1.

> Judicial scrutiny of health measures was detailed and rigorous – and in some instances government decisions were successfully challenged; many of the cases continued well after many of the restrictions had been lifted.

141 For example, there were a couple of instances where opposition MPs felt they were not getting a fair opportunity to question officials and government, something later addressed by the Speaker: Thomas Manch, 'Labour reprimanded for treatment of National MP Chris Bishop at testy parliamentary committee' (15 April 2021).

142 With hindsight, we wonder if the Epidemic Response committee should have continued during the life of the pandemic; while scrutiny continued across committees, there would have been virtue in a single committee, chaired by an opposition member and with an opposition majority, continuing to be the centrepiece committee for scrutiny of the government's response.

143 Knight, 'Legal Accountability and Judicial Review' (n 6); McLay and Knight (n 6).

Judicial scrutiny of health measures was detailed and rigorous – and in some instances government decisions were successfully challenged; many of the cases continued well after many of the restrictions had been lifted. This enabled wider accountability and provided guidance for future exercises of pandemic powers.

F. Other integrity bodies

Integrity bodies, as mentioned earlier, scrutinised the government's response to the pandemic, addressing complaints and providing best practice guidance. Examples include:

- The Ombuds investigated and ruled on numerous maladministration complaints about decisions taken by departments and officials, including lack of consultation about use of an apartment hotel for border quarantine, decisions on exemptions to mobility restrictions and advice tended to ministers about the booking system for the border quarantine system (albeit well after it had been disbanded and after the High Court had already ruled on its legality).[144] The Ombuds also inspected prisons, aged care facilities, mental health and addiction facilities, and managed isolation and quarantine facilities under its role monitoring the treatment of people in health and disability places of detention under the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[145]
- The Controller and Auditor-General continued to monitor government spending, procurement and associated systems, including undertaking inquiries into the wage subsidy scheme and the nationwide rollout of vaccination.[146]
- The Independent Police Complaints Authority inquired into enforcement action taken by the police, including in relation to the policing of the parliamentary occupation.[147]
- The Human Rights Commission responded to complaints about alleged human rights violations and reported to international human rights monitoring bodies. It also made submissions to government on the country's

144 Ombudsman, 'Consultation on health and safety plans for Managed Isolation Facility' (Case 530273; October 2020); 'Cancellation of access between mother and son due to Covid Alert Level 4 lockdown' (Case 524040; June 2020); 'Managed isolation allocation system' (December 2022).

145 See, eg, Ombudsman, 'Report on inspections of prisons' (June 2020); 'Report on inspections of mental health facilities under the Crimes of Torture Act 1989' (June 2020); 'Report on inspections of aged care facilities' (June 2020); 'Report on inspections of mental health facilities' (June 2020); 'Thematic report on inspections of managed isolation and quarantine facilities' (August 2021).

146 See, eg, Auditor-General 'Management of the Wage Subsidy Scheme' (May 2021).

147 See, eg, Independent Police Complaints Authority, 'The Review: Policing of the Protest and Occupation at Parliament 2022' (April 2023).

Covid-19 response, met with protest groups occupying Parliament, and conducted an inquiry into the support of disabled people. In addition, it provided accessible guidance to the public on their human rights particularly with regards to mask-wearing and vaccination requirements.

- The Privacy Commissioner provided guidance around the collection, disclosure and use of personal information such as vaccination status for contact tracing purposes.[148]

G. Civil society

Civil society and non-state actors served as a significant mechanism for emphasizing the human rights aspects of governmental decision-making and ensuring compliance with rights. Some saw the limitations on human rights as unjustifiable and aggressively opposed them, including through the courts. On occasion, civil society groups were successful. At the very least, they put pressure on government to justify any restrictions. While this relationship could be adversarial, government also consulted these groups and was responsive to feedback resulting in some policy changes. For example, Grounded Kiwis – an advocacy group – used media and other channels to put constant pressure on governmental decision-making regarding the border quarantine. It is likely that this pressure enabled certain high-profile cases to be treated more compassionately, and contributed to the government revisiting its restrictive approach to allocation of emergency places at points.

Significant challenges to government policy – mostly through the courts – also came from religious groups and those distrustful of the vaccine. These challenges were important beyond the named claimants – and arguably had wider public interest concerns – given restrictions were applied either universally or to a class of persons identified by occupation or location.[149] Gathering capacity limits were challenged by a collective of churches and mosques, and vaccination requirements were challenged by incorporated societies formed by associations of education and health sector workers. Both had little success.[150] However, non-governmental indigenous Māori organisations wishing to target individuals for vaccination successfully challenged the government's refusal to share data with them. The Court found that health officials had failed to give due regard to the government's obligations under its treaty with Māori to enable these providers to deliver vaccinations in their 'for Māori, by Māori' way.[151]

148 See, eg, Privacy Commissioner, 'Privacy and Covid-19' <www.privacy.org.nz>.

149 Knight, 'Legal accountability and judicial review' (n 6) at 1274.

150 *Free to Be Church Trust v Minister for Covid-19 Response* [2024] NZCA 81 and *NZTSOS Inc v Minister for Covid-19 Response* [2024] NZCA 74.

151 *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 3319.

H. Executive responsiveness and informal continuous improvement

The government's response continually evolved and morphed – in light of reflexive self-appraisal, external concerns and suggestions, informal feedback, and improved understanding of health risks and efficacy of precautions.[152] Some of this change was no doubt nudged along by matters raised in other checks and balances and accountability processes.

I. Representative democracy and accountability via elections

The ability for the public to vote in elections and express their approval or disapproval of the government's stewardship during the pandemic was preserved, with the timing and logistics adjusted to address any potential interference from the virus. Regular popular elections are a key aspect of democratic accountability, and the maintenance and conduct of scheduled elections during the pandemic is to be commended (see Part 4.1(e)).

The governing Labour party was returned to power in the 2020 general election, with Labour securing 50% of the votes – the first single-party majority in over two decades of elections under proportional representation. The result has been widely interpreted as a strong endorsement of the government's response to the pandemic.[153]

The Labour-led government was defeated in the 2023 general election, with a National-led coalition assuming power. The result was interpreted partly as disapproval of the government's response over the latter part of the pandemic, especially the extended lockdown in Auckland and the controversial vaccination requirements.[154]

J. Royal Commission

A Royal Commission was appointed in December 2020 and charged with reporting on the lessons learned from the government's response to the pandemic to be applied in a future pandemic.[155] The Royal Commission is set to report by November 2024.

After a change of government in 2023, a second phase to the inquiry was announced and charged with investigating historic aspects of the response, including use of vaccines, social and economic disruption, and the extended lockdowns.[156] A new set of commissioners is to be appointed and the Royal Commission will report on this second phase by February 2026.

---

152 Knight, 'Accountability through Dialogue' (n 5), at 40.

153 Richard Shaw and others, 'Jacinda Ardern and Labour return in a landslide – 5 experts on a historic New Zealand election' *The Conversation* (17 October 2020) <www.theconversation.com>.

154 D Cheng, 'Election 2023 result: Anatomy of Labour's collapse, from unprecedented support to devastating loss in three years' *NZ Herald* (17 October 2023).

155 Royal Commission of Inquiry (Covid-19 Lessons) Order 2022 (SL 2022/323).

156 B Van Velden, 'Next phase of the Royal Commission into Covid-19' <www.beehive.govt.nz> (25 June 2024).

5. Conclusion

The response to the Covid-19 pandemic in Aotearoa New Zealand was initially grounded in an elimination strategy and then a strategy of active protection. The dynamic nature of the pandemic and government response meant a wide range of public health measures were deployed, including significant lockdowns, mobility and gathering restrictions, border quarantine and vaccination requirements.

These public health measures, including some with significant impact on people's lives and freedoms, were implemented through executive-made orders, mandated briefly by long-standing infectious disease powers and for the most part a bespoke Covid-19 Act with broad executive power. However, central to the legal framework and government's response was the expectation that all public health measures would be consistent with the Bill of Rights Act; in other words, any limits imposed on people's rights and freedoms needed to be prescribed by law and demonstrably justified in a free and democratic society.

A complex system of deliberative and accountability processes sought to promote rights consistency. The appraisal of measures for rights consistency focused especially on generous framing of implicated rights, careful definition of (powerful) public health objectives and assessment of whether the means employed to achieve those objectives limited rights no more than reasonably necessary. Accountability processes insisted the government explain its response and justify limits imposed on people's rights and freedoms; judicial scrutiny continued, allowing the courts to call out and invalidate measures they considered unjustifiably breached rights and freedoms. Democratic processes and civic activity continued too, despite the public health measures, sometimes modified to take account of heightened precautions.

Overall, Aotearoa New Zealand was able to deliver an effective public health response, with comparative successful outcomes, while generally maintaining and respecting human rights and civic freedoms.

> Accountability processes insisted the government explain its response and justify limits imposed on people's rights and freedoms; judicial scrutiny continued, allowing the courts to call out and invalidate measures they considered unjustifiably breached rights and freedoms.

Appendix 1: Summary of Key Judicial Challenges

Key judicial challenges to public health measures included the following:

- A challenge to the first nationwide lockdown largely failed in *Borrowdale v Director-General of Health*.[157] The Court ruled the power to 'isolate and quarantine' in section 70 of the Health Act 1956, properly interpreted, was broad enough to be used to effect stay-at-home orders on a population-wide basis through a health order. However, early messaging from ministers and officials directing people to stay at home – for 10 days, before a health order mandating isolation was issued – was unlawful because the messages limited people's mobility rights without being authorised by law. A challenge to a health order closing premises and prohibition congregation in public also failed, as did a challenge to the system designating 'essential businesses' able to continue to operate.
- The operation of a state-run regime of border quarantine was challenged by a representative group of diaspora in *Grounded Kiwis v Minister of Health*.[158] The operation of border quarantine – including the obligation to obtain a valid booking before arrival – did not in itself amount to an unjustified limitation of citizens' right to return, especially in light of the government's elimination strategy and the precautionary principle. However, the booking system used to secure places (a randomised booking system and a miserly system of emergency allocations) was ruled unlawful, because it was not a proportionate limit on the right of return – as least in the last few months of 2021, when demand for bookings significantly exceeded supply.
- Various ministerial decisions taken under immigration legislation suspending or terminating the processing of applications for temporary visas and permanent residency, in order to fortify the border controls and reduce the stream of people wishing to enter, were challenged with mixed success. In *Afghan Nationals v Minister of Immigration*, refugees fleeing Afghanistan successfully challenged the suspension of the applications for residency; officials misunderstood and misapplied the test for humanitarian circumstances that operated as an exception to the suspension of applications.[159] In *Higgs*

157 *Borrowdale v Director-General of Health* [2020] NZHC 2090; and *Borrowdale v Director-General of Health* [2021] NZCA 520. See generally MB Rodriguez Ferrere, '*Borrowdale v Director-General of Health*' (2020) 31 *Public Law Review* 234; Knight, 'Government expression'; Knight, 'Stamping out Covid-19'; C Geiringer and A Geddis, 'Judicial Deference and Emergency Power' (2020) 31 *Public Law Review* 376; 'H Wilberg, 'Interpreting pandemic powers' (2021) 31 *Public Law Review* 370.

158 *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832; see generally Knight and Norton, 'New Zealand's pandemic border fortress'.

159 *Afghan Refugees v Minister of Immigration* [2021] NZHC 3154.

v Minister of Immigration, New Zealand citizens with partners abroad unsuccessfully challenged the suspension of temporary visas for their partners; the suspension of procession was ruled to be lawful and not discriminatory.[160]

- The refusal of personalised requests to self-isolate at home, rather than in managed isolation and quarantine hotels, was challenged. A businessman and his partner successfully challenged the refusal in *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment*.[161] The High Court ruled that officials had too narrowly interpreted the exemption power under the relevant Covid-19 order and had failed to properly balance the health risks of self-isolation with his mobility rights. A similar challenge failed in *Broadbent v Chief Executive of the Ministry of Health* because a habeas corpus challenge was not suitable to address the substantive challenge to the refusal (although the judge noted the challenge itself was not wholly without merit).[162]
- Challenges to the approval of vaccines failed.[163] An attempt to stop the vaccination programme on the basis that the Pfizer vaccine was provisionally approved on a population-wise basis failed, although the Court noted the challenge could have some merit; as a result, the government moved swiftly to amend the legislations and deem the approval of the vaccine valid. A later challenge to the provisional consent for the paediatric vaccine and associated programme failed, with the Court rejecting a challenge to the cost-benefit analysis undertaken by the government.
- A challenge to maximum attendee limits for faith-based gatherings failed in *Orewa Community Church v Minister for Covid-19 Response.*[164] A group of churches and mosques argued a Covid-19 order prescribing gathering limits – varying depending on declared risk settings and, for some time, whether attendees were vaccinated – unjustifiability limited their right to manifest their religion under the Bill of Rights Act. The Court of Appeal ruled that, when the order was the originally made, the limits on rights were proportionate and justified under the Bill of Rights Act; when circumstances changed the applicant had not demonstrated that minister took an unreasonable amount of time to review and modify the order to ensure it remained proportionate and justified in the light of those changed circumstances.

160 *Higgs v Minister of Immigration* [2022] NZHC 1333.

161 *Bolton v Chief Executive of Ministry of Business*, Innovation and Employment [2021] NZHC 2897.

162 *Broadbent v Chief Executive of Ministry of Health* [2022] NZHC 159.

163 *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107; *MKD v Minister of Health* [2022] NZHC 1997.

164 *Orewa Community Church v Minister For Covid-19 Response* [2022] NZHC 2026; *Free to be Church Trust v Minister for Covid-19 Response* [2024] NZCA 81.

- A series of challenges were made to workplace vaccination requirements, with mixed success. In *Four Aviation Security Service Employees* and *Four Midwives*, the High Court ruled that the general powers to adopt measures to combat the virus provided sufficient authorisation for vaccination requirements, even though the controversial measure was not explicitly identified in the legislative text (although judges expressed some unease about the failure of the legislature to spell out a clear intention for vaccination requirements).[165] The human rights appraisal of vaccination requirements differed depending on the circumstances. The mandates were found to be proportionate and justified in *GF v Minister of Covid-19 Response* (customs workers),[166] and *NZDSOS Inc v Minister for Covid-19 Response* (health practitioners),[167] *NZTSOS Inc v Minister for Covid-19 Response* (education sector).[168] The mandates were ruled to be unjustified and unlawful in *Yardley v Minister for Workplace Relations and Safety* (police and defence force) because the statutory objective of ensuring continuity in these public services was not materially advanced by the mandates, given that so many employees were already voluntarily vaccinated;[169] and in *Wright v Minister for Covid-19 Response* (family carers) because the minister did not have sufficient information before him about why public health advice regarding the need for such a mandate had changed.[170] In addition, in *Four Members of the Armed Forces v Chief of Defence Force*, a vaccination mandate – imposed as part of individual readiness requirements under defence legislation – was ruled to be justified and lawful per se; however, prescriptive and stringent consequences for failing to comply were not justified because the defence force had failed to demonstrate a flexible approach to sanctions would not achieve the readiness objective.[171]

165 *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012; *Four Midwives v Minister for Covid-19 Response* [2021] NZHC 3064. See also *GF v Minister of Covid-19 Response* [2021] NZHC 2526.

166 *GF v Minister of Covid-19 Response* [2021] NZHC 2526.

167 *NZDSOS Inc v Minister for Covid-19 Response* [2022] NZHC 716.

168 *NZTSOS Inc v Minister for Covid-19 Response* [2024] NZCA 74.

169 *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.

170 *Wright v. Minister for Covid-19 Response* [2023] NZHC 480.

171 *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17. Leave to appeal has been granted by the Supreme Court: *Chief of Defence Force v Four Members of the Armed Forces* [2024] NZSC 75.

Appendix 2: Selected Bibliography

LEGISLATION

- Civil Defence Emergency Management Act 2002
- Covid-19 Public Health Response Act 2020 and associated regulations and orders
- Covid-19 Public Health Response (Vaccinations) Order 2021
- Covid-19 Public Health Response (Protection Framework) Order 2021
- Epidemic Preparedness Act 2006
- Health Act 1956
- Human Rights Act 1993
- New Zealand Bill of Rights Act 1990

GOVERNMENT MATERIAL

- Regulations Review Committee, *Inquiry into Covid-19 Secondary Legislation* (15 June 2023)
- Independent Police Conduct Authority, *The Review: Policing of the Protest and Occupation at Parliament 2022* (20 April 2023)
- Ombudsman, *Final Opinion on Managed Isolation Allocation System* (12 December 2022)
- Waitangi Tribunal, *Haumaru: The Covid-19 Priority Report* (WAI 2575) (December 2021)
- Human Rights Commission, *Inquiry into the Support of Disabled People and Whānau During Omicron* (20 April 2022)

CASE LAW

- *A v Ardern* [2020] NZHC 796.
- *Bolton v Chief Executive of the Ministry of Business, Innovation and Employment* [2021] NZHC 2897.
- *Borrowdale v Director-General of Health* [2021] NZCA 520.
- *Borrowdale v Director-General of Health* [2020] NZHC 2090.
- *Broadbent v Chief Executive of the Ministry of Health* [2022] NZHC 159.

- *Christiansen v Director-General of Health* [2020] NZHC 887.
- *Four Aviation Security Service Employees v Minister of Covid-19 Response* [2021] NZHC 3012.
- *Four Members of the Armed Forces v Chief of Defence Force* [2024] NZCA 17.
- *Four Midwives, NZDSOS Inc and NZTSOS Inc v Minister for Covid-19 Response* [2021] NZHC 3064.
- *Free to Be Church Trust v Minister for Covid-19 Response* [2024] NZCA 81.
- *GF v Minister for Covid-19 Response* [2021] NZHC 2526.
- *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832; *Grounded Kiwis Group Inc v Minister of Health (No 2)* [2022] NZHC 1407.
- *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.
- *Hattie v AG* (CIV-2019-404-303, High Court Auckland, 8 July 2020).
- *Higgs v Minister of Immigration* [2022] NZHC 1333.
- *Idea Services Ltd v Attorney-General* [2022] NZHC 308.
- *MKD v Minister of Health*]2022] NZHC 1997.
- *Nga Kaitiaki Tuku Iho Medical Action Society v Minister of Health* [2021] NZHC 1107.
- *Nottingham v Ardern* [2020] NZCA 144.
- *NZDSOS Inc v Minister for Covid-19 Response* [2022] NZHC 716.
- *NZTSOS Inc v Minister for Covid-19 Response* [2024] NZCA 74.
- *Orewa Community Church v Minister for Covid-19 Response* [2022] NZHC 2026.
- *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 3319.
- *Wright v Minister for Covid-19 Response* [2023] NZHC 480.
- *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291.

SECONDARY SOURCES

- Barrett, Patrick and Jacques Poot 'Islands, remoteness and effective policy making: Aotearoa New Zealand during the Covid-19 pandemic' (2023) 15(3) *Reg Sci Policy Prac* 682.
- Beattie, Alex and Rebecca Priestley 'Fighting Covid-19 with the team of 5 millions: Aotearoa New Zealand government communication during the 2020 lockdown' (2021) 4 *Science Direct 100209.*

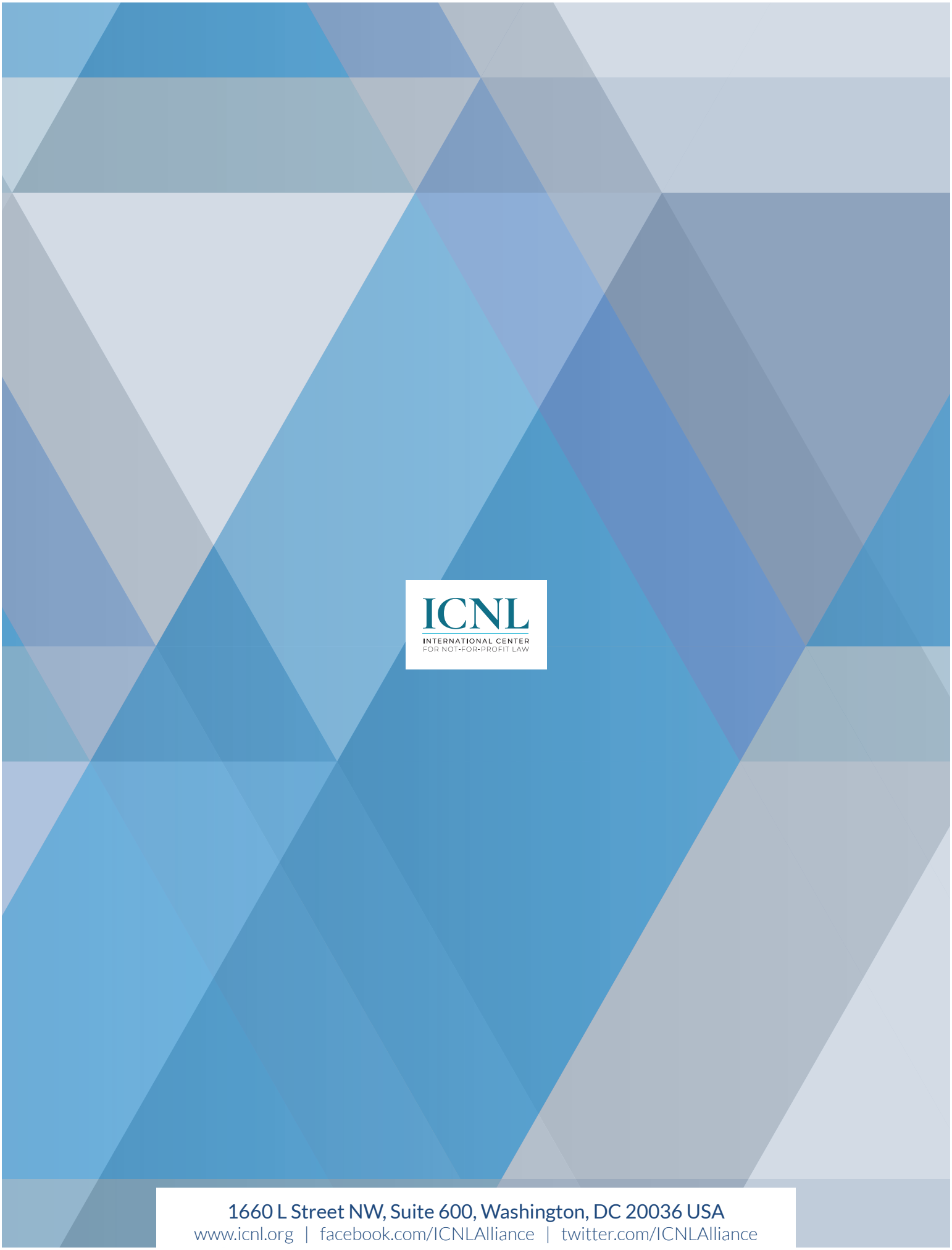
- Bentley, Maisy 'Covid-19 and an Improved Model of Expedited Law-Making' (2022) 13 *NZ Jnl of Pub & Int Law* 1.
- Cameron, Blair 'Captaining a Team of 5 Million: New Zealand Beats Back Covid-19, March – June 2020' in *Global Challenges Covid-19* (Princeton 2020).
- Cumming, Jacqueline 'Going Hard and Early: Aotearoa New Zealand's Response to Covid-19' (2022) 17 *Heath Economics, Policy and Law* 107.
- Datta, Samik and others 'The impact of Covid-19 vaccination in Aotearoa New Zealand: A modelling study' (2024) *Vaccine* 1383.
- Delany, Louise *Covid and the Law in Aotearoa New Zealand* (Thomson Reuters, 2021).
- Geiringer, Claudia 'The Covid-19 Public Health Response Act 2020' [2020] *NZ Law Journal* 159.
- Hellyer, Gabor 'Assessing Parliament's Response to the Covid-19 Pandemic' (2021) 17 *Policy Quarterly* 20.
- Hunt, Paul and Sophie Bradwell-Pollack 'Access to Vaccines and New Zealand's Distinctive Response to Covid-19' (2022) 24(2) *Health and Human Rights Journal* 215.
- King, Jeff and Octávio Luiz Motta Ferraz *Legal, Constitutional, and Ethical Principles for Mandatory Vaccination Requirements for Covid-19* (November 2021).
- Knight, Dean R 'Legal Accountability and Judicial Review During the Covid-19 Pandemic in Aotearoa New Zealand' (2024) *Georgia LR* 1243.
- Knight, Dean R 'New Zealand' in J King and O Ferraz (eds), *Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press, 2021).
- Knight, Dean R 'Stamping out Covid-19 in New Zealand' [2021] *Public Law* 241.
- Knight, Dean R 'New Zealand, Covid-19 and the constitution: an effective lockdown and muted rule of law concerns' in JM Serna de la Garza (eds), *Covid-19 and Constitutional Law* (Universidad Nacional Autónoma de México 2020).
- Knight, Dean R and Jane Calderwood Norton 'New Zealand's pandemic border fortress: community health and wellbeing versus citizens' right to return' (2022) 33 Public LR 186.
- McLay, Geoff and Dean R Knight 'New Zealand Courts and Covid-19: Navigating the Tensions Between Necessity, Legality and the Rule of Law' in An-

ton Ming-Zhi Gao (ed), *Judicial Review in the pandemic: the Role of Courts in the SARS-CoV-2 pandemic in Asia and the Pacific* (2022).

- McLean, Janet and others 'Legality in times of emergency: assessing NZ's response to Covid-19' (2021) *Journal of the Royal Society of New Zealand* 197.
- McLean, Janet *The Legal Framework for Emergencies in Aotearoa New Zealand* (SP23, November 2022, NZ Law Commission).
- McLeod M and others 'Covid-19: we must not forget about Indigenous health and equity' (2020) *44 Aust NZ J Public Health* 253.
- O'Brien, Thomas and Nicholas Huntington '"Vaccine Passports Equal Apartheid": Covid-19 and Parliamentary Occupation in Aotearoa New Zealand' (2022) *Soc Movt St* 1.
- Rodriguez Ferrere, Marcelo '*Borrowdale v Director-General of Health*: An unlawful but justified national lockdown' (2020) 31 *Public LR* 234.
- Skegg, David 'The Covid-19 Pandemic: lessons for our future' (2021) 17 *Policy Quarterly* 3.
- Webster, Michael 'Government decision making during a crisis: the New Zealand experience during the Covid-19 pandemic' (2021) 17 *Policy Quarterly* 11.
- Vowles, Jack 'Authoritarianism and Mass Political Preferences in Times of Covid-19: The 2020 New Zealand General Election' (2022) 4 *Frontiers in Political Science* 1.

OTHER MATERIAL

- Department of the Prime Minister and Cabinet, 'Covid-19 proactive releases' <www.dpmc.govt.nz>.
- Department of Prime Minister and Cabinet, 'Timeline of significant events and key government activities' <www.dpmc.govt.nz>.
- Ministry of Business, Immigration and Enterprise, 'Managed Isolation and Quarantine timeline' <www.mbie.govt.nz>.



1660 L Street NW, Suite 600, Washington, DC 20036 USA
www.icnl.org | facebook.com/ICNLAlliance | twitter.com/ICNLAlliance