Pandemic lockdown challenged

By **Frana Divich,** partner Heaney and Partners.

Our team of five million did an amazing job of eliminating the Covid-19 virus. With the move to L1 last month we now have one of the most open economies in the world.

However, the lockdowns and the economic fallout it created is having a profound impact on the income of councils (due to a reduction in rates and other non-rates revenue) the effects of which are likely to linger for several years.

Against this backdrop is a challenge to the legality of the lockdown by Andrew Borrowdale, a former parliamentary law drafter. His judicial review application came after questions by academics, lawyers and from within the Police, over whether the restrictions and subsequent enforcement actions taken was legal, under the legislation used.

The lockdown is over, so why does this matter?

It is important because the powers used were some of the most coercive powers exercised in this country's history. We live in a democracy and, as such, these types of powers should be exercised by our elected Parliament and we need to understand where the powers come from and what our rights and responsibilities are.

It is important to those who were sanctioned by the state for breaching lockdown – if the lockdown was illegal so too was any sanction. For those businesses deemed non-essential it is important because their closure likely resulted in a loss of income.

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The decisions to move our country to Alert Level Four lockdown on 26 March and to alert level three on 27 April were not made by Parliament, but by the Director General of Health, Dr Ashley Bloomfield, under the Health Act 1956.

The legal challenge alleges that three lockdown orders made by the Director General were ultra vires. Borrowdale argues that the Director General exceeded the powers given to him to make quarantine, isolation, non association and closure orders and he has asked the High Court to quash them.

The Attorney General has defended the actions of the Director General saying the government considers that the orders were made lawfully. However, before the move to alert level two, the government introduced new legislation which puts in place a fresh legal framework to respond to the Covid-19 Public Health Response Act 2020 (the new Act).

History can be instructive.

In 1976 there was a challenge made to the legality of the prime ministerial suspension of the New Zealand superannuation scheme. The court found against the government. There was no appeal.

The government instead went to Parliament and obtained retrospective legislation, essentially making what was unlawful, lawful. What is interesting is that the new Act is not intended to act retrospectively and includes a clause that provides that "nothing in this Act affects any proceedings commenced before the commencement of this Act, and those proceedings must be decided as if this Act had not been enacted".

The lockdown had wide-spread public support. The necessity of the orders is not challenged, rather the legality. Deep rule of law considerations are at play – such strict coercive powers have to have a clear, certain basis in law and be imposed through a transparent and accountable process.

We cannot have the State take control outside the law. If Borrowdale succeeds with his legal challenge the Government has two choices: appeal or seek assistance from Parliament to pass legislation declaring the orders to be valid. The latter will raise awkward constitutional issues, but is not without precedent. **LG**