



FEATS, FLOPS, AND FREE LESSONS FROM NZ'S RESPONSE TO THE COVID-19 PANDEMIC

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ABSTRACT

Beginning from the first reports of COVID-19 out of China, this article provides a commentary on the actions taken by the Government of New Zealand in terms of nine themes—a national response with an elimination goal, speed, and comprehensiveness of the initial response; an evidence-based, science-led approach, prioritised on protecting lives; effective communication; leadership style which appealed to collective responsibility and attempted to de-politicise the Government's response to the virus; flexibility of response characterised by 'learning as you go'; oversight of coercive state powers, including a pragmatic response which attempted to defuse conflict and reserved use of 'hard power' to a last resort; deployment of public health interventions, and health system adaptations; the impact on Māori and marginalised communities; and economic protection and stimulus—to identify factors that might help explain why New Zealand's pandemic response was successful and those which could have been managed better. The partially successful legal challenge brought to the four-and-a half week lockdown, the most stringent in the world, in *Borrowdale v Director-General of Health*, is also considered.

KEYWORDS: COVID-19 pandemic, Elimination goal, Health system adaptations, Judicial review of lawfulness of lockdown, Lessons for other comparable countries, New Zealand Government's management of pandemic

I. INTRODUCTION

New Zealand's (NZ) first case of COVID-19, a woman in her 60s returning from Iran, was confirmed on 28 February 2020.¹ Twenty days later, on 19 March, with 28 cases,

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1 Ministry of Health, 'Single Case of COVID-19 Confirmed in New Zealand' media release 28 February 2020. The Ministry of Health's media releases can be found at <<https://www.health.govt.nz/news-media/media-releases>> (accessed 16 July 2021).

all linked to overseas travel, the border was closed for the first time ever to all except returning New Zealanders (NZers), who were thereafter subject to mandatory testing and 14 days' managed isolation/quarantine (MIQ). A week before the country went into full lockdown, the first economic package of NZ\$12.1 billion, including an important wage subsidy scheme, was announced. By 23 March, the number of cases exceeded 100, with 36 new cases confirmed that day and the first cases of community transmission detected. Around the same time, NZers were seeing televised images of temporary outdoor morgues and field hospitals being assembled in New York City.² There was, said the NZ Prime Minister (PM) Jacinda Ardern, a 'small window of opportunity' to get ahead of the virus. That day, she gave 48 hours' notice before the whole country would move into full national lockdown for four weeks in a 'go hard, go early' response to the virus.³ This was a switch from a 'mitigation' strategy to one of elimination, and introduced some of the toughest restrictions in the world.⁴ Without these measures, modelling indicated that tens of thousands of NZers could die of the virus.

During the first wave there were 16 reported clusters of 10 or more cases. Daily new cases at first rose exponentially, peaking at 89 on 5 April before starting to fall. On 28 April, after five weeks in strict lockdown and just a single new community case the day before, NZ dropped to Level 3. People got haircuts and queued for takeaways. On 8 June, Ardern announced that it had been 40 days since the last case of community transmission and that the virus had all but been 'eliminated' from the community.⁵ All restrictions, except at the border, would be lifted the next day. By then, 22 NZers had lost their lives to the virus and there had been 1,549 confirmed and probable cases. Life returned to near-normal for most: employees returned to work; children to school; and indoor concerts, live sports, social gatherings and conferences could go ahead. NZ had a head-start on its economic recovery. For 102 days until a second wave in early August 2020 required fresh restrictions, NZ's economy was one of the most open in the world, with many parts operating at pre-COVID levels.⁶

Most of the new cases in the second wave occurred in Auckland, in what was called the 'Auckland August cluster'. It quickly grew to become NZ's single largest cluster with 179 cases and three additional deaths.⁷ The Government reimposed Level 3

2 B Gringas et al, 'For the First Time since 9/11, NYC has Set Up Makeshift Morgues. This time, it's in Anticipation of Coronavirus Deaths' CNN, 26 March 2020.

3 Post-Cabinet press conference, 23 March 2020. All of Ardern's press conferences can be found on her Facebook page: <https://www.facebook.com/pg/jacindaardern/posts/?ref=page_internal> (accessed 16 July 2021). All of the Government Ministers' and officials' press conferences and statements can be found on the Government's Unite Against COVID-19 website: <https://covid19.govt.nz/alert-levels-and-updates/latest-updates/> (accessed 16 July 2021).

4 NZ's stringency index, measuring the stringency of governmental restrictions out of 100, was 96.36 during Level 4 (26 March–27 April 2020), exceeded for a shorter period only by India (100): Oxford COVID-19 Government Response Tracker, 'COVID-19 Government Response Stringency Index', 25 March 2020: <<https://ourworldindata.org/grapher/COVID-stringency-index?year=2020-03-24>> (accessed 16 July 2021).

5 'Elimination' refers to the reduction of the incidence of a disease to zero within a defined geographical area, see M Baker, A Kvalsvig and A Verrall, 'New Zealand's COVID-19 Elimination Strategy' (2020) 213 MJA 198.

6 According to the Oxford stringency measure, NZ was 22.2 out of 100 for the period of Level 1 (8 June–11 August 2020): (n 4).

7 See Ardern, press conference, 5 October 2020; press release 23 June 2021 (n 3).

restrictions on the greater Auckland region for nearly three weeks, with the rest of the country in Level 2. Apart from two further short Level 3 lockdowns in Auckland in February 2021 and Level 2 restrictions in Wellington in June 2021 after new cases emerged or were feared,⁸ further restrictions have not been required.

NZers have been able to enjoy more freedoms for longer periods than most of the rest of the world. The border, however, still remains sealed, apart from ‘travel bubbles’ opening with Australia and the Cook Islands.⁹ From 1 May 2021, the Government required all workers in MIQ facilities and Government agencies at the border to be vaccinated, reducing the risk of a border system failure.¹⁰

As at 30 May 2021, NZ has had 2,673 cases and 26 deaths from COVID-19.¹¹ NZ’s mortality rate of 5 per million population (pmp) is the lowest in the Organization for Economic Co-operation and Development (OECD), compared with countries such as Belgium (2,145 pmp), the US (1,832 pmp), the UK (1,873 pmp), and Australia (35 pmp), and the world average (457.4 pmp). Had NZ experienced the Belgian mortality rate, some 10,700 people would have died, and either the US or UK rates would have resulted in over 9,000 deaths. NZ is the only OECD country to have achieved sustained elimination for a significant period.¹² But a few non-OECD countries have done as well or better, despite being close to the epicentre in Wuhan, China. Vietnam has reported a significantly lower mortality rate (0.5 pmp), despite grappling with a rise in infections since late April 2021 and detecting a new variant.¹³ Taiwan was the top performer with a mortality rate of only 0.3 pmp until mid-May 2021, when a dramatic rise in infections saw its mortality rate rise to equal that of NZ (5 pmp). It too had achieved elimination by April/May 2020, but it did so without ever needing a lockdown.¹⁴

How did NZ achieve this comparative success? What have been the key challenges? Claiming victory over COVID-19 when the world is still in its grip is premature. The virus has mutated into new, more contagious variants.¹⁵ Few effective pharmaceutical treatments are scientifically proven.¹⁶ And while the UK, EU countries,

8 See Media Conference, 14 February 2021; Media Conference, 27 February 2021: (n 3).

9 The Trans-Tasman ‘bubble’ with Australia started on 17 April 2021, see Press Release, 6 April 2021. Quarantine-free travel opened with the Cook Islands on 17 May 2021, see Press Release, 3 May 2021: (n 3).

10 COVID-19 Public Health Response (Vaccinations) Order 2021. By 1 May 2021, 95% of border workers were vaccinated: B Strang, ‘Managed Isolation Escape Attempts Dropping after Police Decision to Prosecute’, Radio NZ, 3 June 2021.

11 Statistics in the text from World Health Organisation (WHO), WHO Coronavirus disease (COVID-19) dashboard 2021 (last sighted 1 June 2021) available at: <<https://www.worldometers.info/coronavirus/#countries>>.

12 See DJ Summers et al, ‘Potential Lessons from the Taiwan and New Zealand Health Responses to the COVID-19 pandemic,’ (2020) 4 *The Lancet Regional Health – Western Pacific* 100044.

13 A France-Press, ‘Vietnam says New COVID Variant is Hybrid of India and UK Strains’, *The Guardian*, 30 May 2021.

14 Summers et al (n 12).

15 As at 1 June 2021, the WHO had identified four variants of concern, the Alpha, (formerly Kent, B.1.1.7), Beta (formerly South Africa, B.1.351), Gamma (formerly Brazil, P.1), and Delta (formerly India, B.1.617.2): <<https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/>> (accessed 1 June 2021).

16 For information about potential treatments, see the results from the UK’s national RECOVERY trial: <<https://www.recoverytrial.net>> (accessed 16 July 2021).

and the USA have vaccinated large percentages of their populations, global shortages and vaccine hoarding have meant that vaccination has been slow in others, including NZ.¹⁷ Experts have said that we will need years to properly assess the effect of the global pandemic and governments' responses to it, to determine accurately why some countries did so badly in terms of protecting lives and/or livelihoods, while others did better. Thus, assessments here are impressionistic and, in many respects, non-scientific.

Natural factors confer undoubted advantages on NZ: it is an isolated, island country in the South Pacific, with a small population (approximately 5 million), and few densely populated urban areas and mass transit systems. An island border can be sealed more quickly and is easier to control than a land border. Yet other island nations, such as Ireland, have had more cases and deaths,¹⁸ while others with land borders, such as Vietnam, have had fewer.¹⁹ And there is no underestimating the part played by luck. For example, despite eight separate border control failures from early August 2020 to the end of 2020, equivalent to one every two weeks, only one resulted in a large outbreak (the Auckland August cluster).²⁰ NZ was also lucky to escape the devastating loss of life among the elderly in care homes, compared to the UK in early 2020 and Melbourne, Australia in August 2020,²¹ although the outcomes were devastating when it did.²²

In this commentary on NZ's response to the pandemic, I identify nine themes which I suggest have played a role in NZ's results, before concluding with some suggestions from NZ's COVID-19 experience of factors, both positive and negative, which are worthy of consideration in the policies of other comparable countries.

II. NZ'S RESPONSE: NINE THEMES

A. A National Response with An Elimination Goal: Speed and Comprehensiveness of the Initial Response

As a former British colony, NZ (like Australia) inherited the Westminster model of responsible parliamentary government. But, unlike Australia, it is a unitary state with power highly centralised in the national government. The PM and Cabinet do not have to contend with state or local governments with substantial responsibilities for overlapping portfolios. Thus, a centralised, 'top-down', command and control

17 See E Mathieu et al, 'A Global Database of COVID-19 Vaccinations', *Natural Human Behaviour* (2021): <<https://ourworldindata.org/COVID-vaccinations>> (accessed 3 June 2021).

18 As at 1 June 2021, Ireland's mortality rate stood at 990 pmp: (n 11).

19 Despite a long border with China and a population of 97 million, Vietnam has had only 49 deaths (0.5 pmp) as at 1 June 2021: (n 11).

20 N Wilson et al, 'Time to Stop Dodging Bullets? NZ's Eight Recent Border Control Failures', *Public Health Expert* (blog), 16 November 2020.

21 During July and August 2020, a second wave had taken hold in Victoria, Australia. Dozens of aged care facilities experienced outbreaks, with 1,221 infections and 189 deaths among residents: Royal Commission into Aged Care Quality & Safety, *Aged Care and COVID-19: A Special Report* (Commonwealth of Australia, 30 September 2020): <<https://agedcare.royalcommission.gov.au/sites/default/files/2020-10/aged-care-and-covid-19-a-special-report.pdf>> (accessed 16 July 2021)..

22 It infiltrated two care homes in April 2020. Of the 22 deaths to 13 May 2020, the mean age of those who died was 81.5 years and 16 (73%) lived in aged care facilities: S Jefferies et al, 'COVID-19 in New Zealand and the Impact of the National Response: A Descriptive Epidemiological Study' (2020) 5 *Lancet Public Health* e612.

response is both expected and accepted.²³ But such concentrated executive power makes unavailable any strategy of shedding responsibility onto states for blame avoidance purposes in the event of perceived failure, such as that undertaken by the Trump administration in the US.²⁴

COVID-19 arrived in NZ a few crucial weeks later than to the USA, UK, and Europe, partly due to the border restrictions from 3 February and its closure on 19 March 2020. This gave it a critical few weeks to observe the virus's behaviour, as well as the impact of different types of control measures adopted by various countries, including China's strict lockdown, and to begin to prepare for its inevitable arrival. By March, the Government and its advisors had realised that the threat was unprecedented and that if the virus became established in NZ, the impact on society, the health system and the economy would be catastrophic.

On Saturday 21 March, with a total of 53 cases, Ardern announced the Alert Level system,^{25,26} and placed NZ in Level 2 for 14 days. But over that weekend, the first cases of community transmission were detected. By Monday cases had jumped by 50 percent to 102. Until then, the Government had been applying its pandemic plan, which was directed entirely at pandemic influenza and oriented towards a 'mitigation' strategy designed to 'flatten the curve'.²⁷ Ministry of Health officials briefed Cabinet on an Imperial College, London paper, published on 16 March 2020, modelling different outcomes for transmission, health system demand, and mortality for the UK and the USA, depending on whether a 'mitigation' or a 'suppression' (equivalent to an elimination) strategy was pursued.²⁸ It showed that mitigation would likely result in hundreds of thousands of deaths in those two countries, and that health systems would be overwhelmed many times over. The findings confirmed NZ-based modelling received a few days earlier, which indicated that uncontrolled spread could result in the loss of between 8,100 and 11,000 lives.²⁹ These findings were 'critical' to the Cabinet accepting officials' recommendation that 'suppression' was the preferred

23 See N Bromfield, A McConnell, 'Two routes to precarious success: Australia, New Zealand, COVID-19 and the politics of crisis governance' *International Review of Administrative Sciences*. Online first article, first pub December 2020. doi:10.1177/0020852320972465 accessed 16 July 2021.

24 M Shear, N Welland, E Lipton, M Haberman & D Sanger, 'Inside Trump's failure: The rush to abandon leadership role on the virus' *New York Times*, 18 July 2020, updated 15 September 2020: <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirusresponse-failure-leadership.html>

25 NZ's Alert Level system was developed in mid-March 2020 to succinctly describe the public health measures that would be required, either nationally or regionally, in response to the level of risk posed by the virus. The threat levels range from 1 to 4, with 4 being the most severe: Level 1—Prepare (COVID-19 uncontrolled overseas, risk contained in NZ); Level 2—Reduce (disease contained but risk of community transmission via single or isolated cluster outbreaks); Level 3—Restrict (disease not contained, high risk of community transmission); Level 4—Eliminate (disease likely not contained and community transmission with widespread outbreaks and new clusters), see <<https://covid19.govt.nz/assets/resources/tables/COVID-19-alert-levels-summary.pdf>> (accessed 14 July 2021).

26 See N Ferguson et al, 'Report 9: Impact of Non-Pharmaceutical Interventions to Reduce COVID-19 Mortality and Healthcare Demand' 16 March 2020: <<https://spiral.imperial.ac.uk:8443/bitstream/10044/1/77482/14/2020-03-16-COVID19-Report-9.pdf>> (accessed 14 July 2021).

27 Baker et al (n 5).

28 Affidavit of Dr Ashley Robin Bloomfield, Director-General of Health, 13 July 2020, filed in *Borrowdale v Director-General of Health* [2020] NZHC 2090, paras 182–85 (on file with author).

29 *ibid* paras 176–87.

policy and public health option.³⁰ The question remained, however, whether it was a viable long-term option, given that intermittent intensive interventions and border closure may have to be maintained until a vaccine became available.

On Monday 23 March, Ardern announced a national lockdown to the nation, giving only 48 hours' notice before it would come into effect. The aim was for a short, but intense lockdown to act as a 'circuit-breaker' to extinguish all active community clusters. The four-and-a-half-week lockdown was the most stringent in the world. Everyone was confined to their household 'bubbles', except for maintaining physical distancing and limited local recreation. All businesses, schools and educational facilities were closed, except for essential workers and essential businesses (notably supermarkets and pharmacies) and their supply chains.

Ardern has described the Government's precautionary approach of taking strong, pre-emptive action, deployed rapidly, as 'NZ's philosophy of going hard and going early'.³¹ Its success in achieving elimination is likely because intense restrictions, coupled with border closure, were imposed rapidly while numbers were still low.³² In contrast, restrictions were usually lifted cautiously *only after* clear evidence supported doing so, when sometimes a popular expectation might have developed that they would be lifted sooner. For example, after Level 4 was lifted on 28 April, restrictions remained in place for a further five weeks until there had been no active cases for 40 days, despite significant political pressure from a coalition partner and the opposition to ease restrictions sooner on the ground that businesses were unduly suffering.³³

When shutting down the country so completely on 23 March 2020 to prevent the intolerable loss of life forecast and to protect the health system, the Government could not have known that ultimately its response would not necessitate a trade-off between health and the economy. But that did, indeed, prove to be the case. Early elimination of the virus saved both lives and livelihoods as, after 75 days in some form of lockdown, the economy, although temporarily devastated, could almost fully reopen, except for the border.

A report in April 2021 from a European think tank compared NZ, Australia, and South Korea, which all pursued elimination or 'Zero COVID', with eleven G10 countries, for which data was available, which had pursued a mitigation/suppression strategy.³⁴ The authors considered data on mortality, economic growth and mobility, and concluded:

The countries that minimised the spread of the virus by means of a Zero COVID strategy are coming out of it the best. They are seeing significantly fewer deaths, their economies are performing more strongly and their people

30 D Cheng, 'COVID-19 Coronavirus: Prime Minister Jacinda Ardern - NZ to Maintain Current Lockdown Settings for 12 More Days', NZ Herald, 14 August 2020.

31 Jefferies (n 22); A Robert, 'Lessons from New Zealand's COVID-19 Outbreak Response' (2020) 5 *Lancet Public Health* e569.

32 C Graham-McLay, 'New Zealand Deputy PM Breaks Ranks to Urge Ardern to Lift COVID-19 Lockdown', *The Guardian*, 27 May 2020.

33 C Philippe and N Marques, 'The Zero COVID Strategy Protects People and Economies More Effectively' (Paris-Bruxelles: Institut Économique Molinari, April 2021): <<https://www.institutmolinari.org/2021/04/03/the-zero-COVID-strategy-protects-people-and-economies-more-effectively/>> (accessed 16 July 2021). The G10 countries were Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, UK, and USA.

34 *ibid* 19.

are not held back to the same degree by mobility restrictions, whether voluntary or mandatory. Nor have they had to cancel other medical treatment. They are in a position to institute gradual and well organised vaccination campaigns, they have held the number of people showing long-term symptoms (long COVID) to a minimum, they can keep schools open without compromising the health of children or their teachers and, with little contamination, they are minimising the risk that variants will appear, with higher levels of transmission, lethality, and immunity evasion.^{35,36}

B. An Evidence-Based, Science-Led Approach, Prioritised on Protecting Lives

The NZ Government pursued a science-led, evidence-based approach to COVID-19. Given the elimination goal, its response relied heavily on current, accurate epidemiological, and modelling evidence. ‘Expertise on pandemic-related policy and strategy located close to the center of power’ has been identified as critical to a country’s success in staving off economic losses and saving lives.³⁷ The Government’s strategy was strongly informed by epidemiology, infectious disease, genomics, and immunology expertise.³⁸ It relied on extensive mathematical modelling, including to inform the decision to impose a full lockdown from 25 March 2020, as well as the timing of relaxation of alert levels.³⁹

The public debate has been dominated by experts, with the hitherto publicly unknown Director-General of Health (D-G), Dr Ashley Bloomfield, second only to the PM in leading the national effort. Fortuitously, Bloomfield is a public health physician (not a pre-requisite for the job). The lead epidemiologist on the Ministry of Health’s COVID-19 Technical Advisory Group,⁴⁰ Professor Michael Baker, made frequent public statements in support of the elimination goal and the national effort.⁴¹ A consensus among epidemiologists that elimination was the right goal for NZ helped the Government stay the course, despite questions initially about the economic sustainability of ‘bouncing in and out of’ lockdowns and pressure from some sceptics to change NZ’s strategy from ‘suppressing it to zero’ to learning to live with the virus.⁴²

At key points in the national debate, epidemiologists were critical of the Government’s public health measures and pressed for a stronger response; for example,

35 See G Wilensky, ‘Policy Lessons from our COVID Experience’ (2020) 282 *NEJM Med* e96.

36 See J Geoghegan et al, ‘New Zealand’s Science-led Response to the SARS-CoV2 Pandemic’ (2021) 22 *Nature Immunology* 262.

37 S Hendy et al, ‘Mathematical Modelling to Inform New Zealand’s COVID-19 Response’ (2021) 51 *Sup 1 Journal of the Royal Society of New Zealand* S86-S106.

38 (or TAG). A group of 13 experts established to advise the Minister and Ministry of Health about COVID-19: <<https://www.health.govt.nz/about-ministry/leadership-ministry/expert-groups/COVID-19-technical-advisory-group>> (accessed 16 July 2021).

39 See Baker et al (n 5).

40 ‘COVID 19 Coronavirus: 62 University of Auckland Health Researchers Back Govt’s Lockdown Plan’, *NZ Herald*, 16 April 2020; COVID Plan B Press release, ‘Oxford Professor Criticises NZ Suppression Strategy’, *Scoop Politics*, 21 July 2020.

41 See A Kvalsvig et al, ‘Mass Masking: An Alternative to a Second Lockdown in Aotearoa’ (2020) 133 *N Z Med J* 8.

42 See, for eg, ‘COVID-19: Experts Warn Against Complacency Ahead of Labour Day Weekend’, *RNZ Newsroom* 23 October 2020.

to adopt mandatory mask-wearing.⁴³ They repeatedly warned against complacency after elimination had been achieved.⁴⁴ After Labour's landslide victory in the NZ election in October 2020, to which NZers' appreciation of the Government's successful pandemic response seems likely to have contributed, epidemiologists pushed for a re-examination of the whole border containment strategy to minimise jeopardising millions of dollars in future lockdowns.⁴⁵ Sometimes the Government implemented their recommendations, sometimes they compromised, factoring in other, for example, economic considerations. Their independent voice, pushing the case for scientific risk-management, performed an invaluable role, assisted by an apparently relatively high level of trust NZers have in scientific expertise.

C. Effective Communication: The Clarity and Transparency of the Message Coming from a Single Source

Ardern's approach to the pandemic showed an awareness that the tool of science is useless without public confidence in scientific expertise and the public's preparedness to adhere to its findings. A key role of political leaders is to back sound science through clear messaging and convincing explanations based on credible evidence.⁴⁶ A woman,⁴⁷ a millennial, a digital native with a degree in communications, Ardern is a gifted communicator who understands the importance of effective messaging and the power and reach of social media.⁴⁸

At virtually every lunchtime during all lockdowns, the PM and Bloomfield briefed the nation on live TV on the number of new cases and deaths, testing and contact tracing undertaken, announced changes in Alert Levels, and advised NZers on what they needed to do to keep themselves and others safe. Typically, Bloomfield would first present the daily statistics,⁴⁹ before handing over (usually) to Ardern or another minister to announce any new measures considered necessary. They presented a united front and underlined the science-led approach. The daily briefings became 'must-see' TV. They were supported by other communication avenues: the Government's dedicated website (Unite against COVID-19)⁵⁰ and Ardern's Facebook page.⁵¹ Thus, the Government established itself as the predominant source of clear, consistent, and trusted information and advice on the pandemic.

43 C Graham-McLay, 'Ardern Urged to Review New Zealand COVID Measures after Election Landslide', *The Guardian*, 22 October 2020.

44 See L Gostin, 'Science, Leadership and Public Trust in the COVID-19 Pandemic', *Milbank Quarterly* Opinion, 28 September 2020: <<https://www.milbank.org/quarterly/opinions/science-leadership-and-public-trust-in-the-covid-19-pandemic/>> (accessed 16 July 2021).

45 J Henley, 'Female-led Countries Handled Coronavirus Better, Study Suggests', *The Guardian*, 18 August 2020.

46 S Wilson, 'Pandemic Leadership: Lessons from New Zealand's Approach to COVID-19' (2020) 16 *Leadership* 279.

47 Leading to Bloomfield being dubbed the man who 'delivers the stats like no other': E Ainge Roy, "'Delivers the Stats like no Other': New Zealand's COVID-19 Crush on Health Chief", *The Guardian*, 10 April 2020.

48 See <<https://covid19.govt.nz/>> (accessed 16 July 2021).

49 For her preferred social media medium (Facebook), see: <<https://www.facebook.com/jacindaardern/>> (accessed 16 July 2021).

50 D Satherley "'We will Always Fix it': Jacinda Ardern's Promise to NZ over COVID-19 Mistakes', *NewsHub*, 31 August 2020.

51 Press conference, 16 August 2020: (n 3).

Ardern developed a practice of signalling in advance when key decisions, such as a change in alert level, would be made, reiterating the decision criteria, and outlining ‘what life would look like’ under the new alert level. She would share a summary of the evidence, reasoning, and strategy for decisions, especially if finely balanced or likely to be unpopular. The approach treated the public as autonomous adults capable of understanding the rational basis for decisions, even if they did not themselves agree with the Government’s risk assessment on specific decisions.

Ardern took responsibility for mistakes and indicated what would be done to fix them. For example, there was a disastrous error in August 2020, when the Government’s official social media channels and website urged everyone in south and west Auckland to get a test, whether symptomatic or not. Thousands of Aucklanders jumped into cars and joined long queues. The next day Ardern apologised for the mistake at the 1 pm stand-up, and pledged:

We will be accountable. We will never shy away from standing in front of you and answering the questions, and equally - the most important thing - we will always fix it.^{52,53}

On 16 August 2020, after damaging misinformation went viral on social media, then Minister of Health, Hon Chris Hipkins pleaded with NZers:

Please take your information from official sources, such as this 1 p.m. briefing. Behind the scenes, from early on every morning, there are dozens of dedicated people tracking down, cross-referencing, and checking every bit of information in preparation for these media conferences. That means that the information here is verified. The information that we share . . . is information that you can trust. If a mistake is made, it is quickly corrected.⁵⁴

Over 90 percent of people in three surveys from March to July 2020 considered that the Government’s communication about the pandemic had been good, and 37 percent considered it to be the most trusted source of reliable information about the pandemic, compared to an average of 13 percent in the G7.⁵⁵

On the face of it, Ardern and Bloomfield appeared generally frank about mistakes and challenges, such as in relation to the initial lack of capacity for contact tracing. The release of advice from the Government was often comprehensive and speedy while decisions were fresh. For example, on 2 May 2020 Dr Ayesha Verrall had completed a review of the Ministry of Health’s progress implementing recommendations in her initial rapid audit of contract tracing. On the bottom of his letter replying to

52 See Colmar Brunton, *COVID Times* (8 April, 25 April and 3 July 2020): <<https://www.colmarbrunton.co.nz/latest-thinking/news/covid-times/>> (accessed 16 July 2021).

53 Available at: <<https://www.health.govt.nz/publication/rapid-audit-contact-tracing-covid-19-new-zealand>> (accessed 16 July 2021).

54 Media Update, 20 August 2020: (n 3).

55 M Morrah, ‘COVID-19: NewsHub Investigation Reveals Authorities were Close to Losing Control during August Coronavirus Outbreak’, *NewsHub*, 10 December 2020.

her on 7 May, Bloomfield handwrote 'Thanks again Ayesha. I will publish your letter and this response tomorrow'.⁵⁶

Yet, this standard was not always met. The media revealed months later that the Minister of Health, Hon Chris Hipkins, and Bloomfield had painted an unduly rosy picture to the public of how well the contact tracing system coped with the Auckland August outbreak,⁵⁷ when behind the scenes health authorities on the ground were close to losing control.⁵⁸ In another politically driven manoeuvre, Hipkins received a critical review indicating that there had been a failure to roll out regular border testing prior to the Auckland August outbreak,⁵⁹ but did not release it publicly for nearly three months. By then, he could announce that implementation of the review's recommendations was well underway, and that the Cabinet had agreed an additional \$1.12 billion funding for testing and contact tracing and \$1.74 billion for MIQ facilities.⁶⁰

D. Leadership Style, which Appealed to Shared Values and Solidarity and Attempted to De-politicise Government's Response to the Virus

If you could hand-pick a leader for the challenge posed by Covid-19, Ardern would be it. Prior to the pandemic, her leadership had been tested by two crises involving large-scale loss of life, during which her intuitive and empathetic leadership style had been widely praised.⁶¹ A decision was made early on that the seriousness of the crisis demanded that the PM front the Government's response and that she be seen as 'comforter in chief'. On 25 March 2020, the first day of the lockdown, Ardern stated: 'You are not alone, you will see us and hear us daily, as we guide NZ through this period'.⁶² In tune with her aspiration from the start of her premiership to 'bring back kindness' in political life,⁶³ NZers were exhorted to check on their neighbours and to 'Be calm, be kind and stay at home'.⁶⁴

Ardern and Bloomfield set the moral tone. They repeatedly emphasised that 'the enemy is the virus, people are not the problem', that there would be no tolerance for

56 See H Simpson and B Roche, Report of Advisory Committee to Oversee the Implementation of the New Zealand COVID-19 Surveillance Plan and Testing Strategy (28 September 2020): <https://covid19.govt.nz/assets/Review-of-Surveillance-Plan-and-Testing-Strategy/Final_Report-of-Advisory-Committee-to-Oversee-the-Implementation-of-the-....pdf> (accessed 16 July 2021).

57 See Media updates: 'Extending Support for the COVID-19 Elimination Strategy to June 2022', 18 December 2020: (n 3).

58 A year before, in response to the Christchurch mosque massacre of 15 March 2019, her statement 'You are us' emphasised solidarity with the Muslim victims and their families: 'UN chief praises New Zealand premier's "admirable" response to Christchurch attacks' UN News, 12 May 2019; 'Power of Women: Christiane Amanpour praises Prime Minister Jacinda Ardern at New York event' NZ Herald, 6 April 2019. See also her response to the Whakaari/White Island volcanic eruption, in which 22 people died: 'White Island eruption: "How good is Ardern" - World praises PM for disaster response', NZ Herald, 10 December 2019.

59 J Ardern, Press Conference, 25 March 2020: (n 3).

60 'I want the government to . . . bring kindness back', RNZ Newsroom, Checkpoint, 26 October 2017.

61 J Ardern, Press Conference, 25 March 2020: (n 3).

62 See J Ardern, Press Conference, 21 August 2020: (n 3).

63 E Ainge Roy, 'New Zealand Health Minister David Clark Quits over Handling of COVID-19 Outbreak', *The Guardian*, 2 July 2020; H Farrell, 'Boris Johnson doesn't Dare Sack his Chief Adviser', *Washington Post*, 25 May 2020.

64 DH Fischer, *Fairness and Freedom, A History of Two Open Societies: New Zealand and the United States* (OUP 2012), 478.

vilification or stigmatisation of victims, ethnic groups, or health workers thought to present a greater risk of transmitting the virus:

Vilifying those who have caught the virus, or those who helped keep us safe by getting tested is something that I simply will not tolerate. It is those who shame others, those who seek to blame, they are the dangerous ones. They are the ones who cause people to hesitate before getting a test, they are the ones who make people feel afraid. There is no room for division when it comes to fighting COVID.⁶⁵

In July 2020, then Minister of Health, David Clark, was forced to resign for breaching the rules during lockdown, reinforcing that the rules applied equally to all—in stark contrast to the Dominic Cummings scandal in the UK.⁶⁶

David Hackett Fisher concluded from his comparison of the ‘vernacular ideas’ or ‘habits of the heart’ of NZers and Americans, that:

The ideal of a free society is America’s North Star, the great Polaris by which political navigators have steered their courses through four centuries. The ethics of fairness and natural justice are New Zealand’s Southern Cross, a constellation of fundamental values that have been at the center of public discourse for many generations.⁶⁷

Ardern’s repeated summoning of ‘the team of 5 million’ into the battle against COVID was a deliberate appeal to NZers’ sense of solidarity.⁶⁸ As Bloomfield stated:

Once we got into lockdown on 26 March it was all on the population of New Zealand to make this work: we were doing our best to inform and support everyone, but we knew very well that this would only work if the entire population of New Zealand committed to the lockdown and collectively did the right thing. The ‘team of 5 million’ was not just words: we all had to do this together or we would fail.⁶⁹

When restrictions were relaxed in August 2020 during the Auckland August outbreak, Ardern exhorted everyone to play their part: ‘We need the team of 5 million to help us get back where we need to be. Our system is only as good as our people, and our people are amazing. If anyone can do this, New Zealand can’.⁷⁰

65 See generally, S Wilson (n 44). Ardern, her ministers and public sector Chief Executive Officers announced a voluntary 20 percent pay cut for six months as a sign of solidarity: L Wiltshire, ‘Jacinda Ardern takes 20 Per Cent Pay Cut Alongside all her Ministers and Public Sector Bosses - even Ashley Bloomfield’, *Stuff*, 15 April 2020.

66 Bloomfield affidavit (n 26) para 30.

67 Press conference, 29 August 2020: (n 3).

68 By 17 April, data showed a 90% reduction in retail and recreation, 81% in parks, 87% in transit stations, and 72% in workplaces compared with baseline: Google, *COVID-19 Community Mobility Report: New Zealand*, 17 April 2020: <<https://www.google.com/covid19/mobility/>> (accessed 16 July 2021).

69 Colmar Brunton, *COVID Times* (6 April 2020): (n 50).

70 Colmar Brunton, *COVID Times* (24 April 2020): (n 50).

This call for a collective response to achieve common ends is likely to have resonated deeply with a generally compliant, law-abiding populace with high trust in the government and experts, and a basic national value of fairness. Google tracking data showed that NZers adhered to the restrictions.⁷¹ At the height of the first lockdown, a survey showed a huge surge in public trust in the Government: 88 percent trusted it to make the right decisions on COVID-19, well above the G7 average of 59 percent.⁷² As the success of the lockdown became more apparent during April 2020, surveys showed an upsurge in feelings of national unity and community spirit in neighbourhoods.⁷³

Government attempted to strike a difficult balance between keeping political imperatives out of its management of the pandemic as far as possible, while at the same time expecting to be held to account and welcoming constructive criticism.⁷⁴ In response to the claim of the Leader of the Opposition that the relaxation of restrictions in Auckland in August 2020 was politically motivated, Ardern declared:

Never, ever have we made a political decision in the management of COVID-19. We have made health-based decisions and evidence-based decisions because that's the best way we support our economy and I'm going to stick with that model of decision-making.⁷⁵

Given the Auckland August outbreak, Ardern took a decision considered by most to be against her own party's interests to postpone the election by a month to allow agencies to prepare for safe in-person voting and greater use of postal voting.⁷⁶ Completely de-politicising a government's management of a global pandemic is both impossible and, in any event, completely unacceptable in a democracy. But the benefit of avoiding the extreme politicisation seen in the USA during 2020, where even 'wearing a mask was a political statement',⁷⁷ cannot be over-emphasised.

E. A Flexible Response Characterised by 'Learning As You Go'

As has often been said, there is no playbook for this virus. Everything, its behaviour, treatments/vaccines, how best to prevent its spread and to support lives and livelihoods, was unprecedented and had to be learned progressively. As the information base grew, the toolkit for fighting the virus expanded and strategies could be modified. An example is mask-wearing by the general public. It was not initially supported by the World Health Organization (WHO), because of the lack of evidence and also to ensure adequate supplies of personal protective equipment (PPE) for frontline health

71 Z Small, 'Jacinda Ardern calls for Politics to be taken "Out of the COVID-19 Response" in Clash with Judith Collins', *Newshub*, 18 August 2020.

72 Z Small, "'Not at all" a Political Decision: Jacinda Ardern Explains Auckland's Move to Level 2.5 Despite New COVID-19 Cases', *Newshub*, 31 August 2020.

73 'Prime Minister Jacinda Ardern Changes Election Date to 17 October', RNZ Newsroom, 17 August 2020.

74 L Aratani, 'How did Face Masks become a Political Issue in America?', *The Guardian*, 29 June 2020.

75 See WHO, *Rational Use of Personal Protective Equipment for Coronavirus Disease (COVID-19) and Considerations during Severe Shortages: Interim Guidance* (6 April 2020).

76 WHO, *Advice on the Use of Masks in the Context of COVID-19 Interim Guidance* (5 June 2020).

77 A Kvalsvig and M Baker, 'How Aotearoa New Zealand Rapidly Revised its COVID-19 Response Strategy: Lessons for the Next Pandemic' (2021) 51 *Journal of the Royal Society of New Zealand* S143 at S159.

workers.⁷⁸ It was not, therefore, incorporated into the March–April 2020 lockdown. But by August, the WHO had updated its guidance to encourage the public to wear masks in specific situations based on a risk-assessment approach.⁷⁹ And so, after two people caught the virus on buses during the Auckland August outbreak, the compulsory use of masks on all public transport in Auckland in Level 2 and above was incorporated into restrictions. Although starting from a platform of elimination clearly helped, this change, together with greatly expanded contact tracing and genomic sequencing, explains why the Government was able to manage the outbreak without needing to trigger a Level 4 lockdown.⁸⁰ This illustrates the importance of countries being prepared to adapt as new evidence emerges, under conditions of constant change and fluctuating levels of public support.

Establishing a secure and competently run border system as NZ's first line of defence has probably been the steepest learning curve over the pandemic. The border has been the source of repeated incursions of the virus into the community. Since August 2020, there have been 76 breaches of the rules in MIQ facilities⁸¹ and at least eight border control failures up to December 2020, one which led to the Auckland August outbreak.⁸² In respect of the latter, there was the politically embarrassing revelation that testing of border and hotel isolation workers in Auckland was voluntary and self-initiated, and that 63.5 percent had never been tested.⁸³ This caught the Government by surprise, because it had announced a new testing strategy in late June which included 'regular health checks and asymptomatic testing of all border facing workers'.⁸⁴ In November 2020, a returnee who had worked for a UK company which provided PPE for frontline workers in hospitals globally and had just himself completed quarantine, went public with his opinion that border workers in NZ MIQ facilities had some of the lowest levels of PPE in the developed world.⁸⁵

The usual response to such errors and challenges has been to commission expert audits, make the results public, make funding available and push systems hard to implement the recommendations, and follow up with a review of progress. For example, there were no less than five audits, reports and reviews of the contact tracing

78 D Cheng, 'COVID 19 Coronavirus: Chafing under the Rules – 76 Bubble Breaches in Four Months', *NZ Herald*, 28 November 2020.

79 Wilson (n 20).

80 M Morrah, 'Coronavirus: Nearly Two-thirds of Auckland's COVID-19 Border, Isolation Staff had never been Tested a Week Ago', *NewsHub*, 13 August 2020.

81 R Quinn, 'COVID-19: Man in Managed Isolation "Blown Away" by Border Workers' Low Level of PPE', *NewsHub*, 10 November 2020.

82 See the NZ+ COVID-19 Surveillance Plan (May 2020; H Simpson and B Roche, n 54; Aotearoa New Zealand's COVID-19 Surveillance Strategy (Jan 2021): <<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-response-planning/covid-19-surveillance-strategy>> (accessed 16 July 2021); M Jack and K Corich, *Rapid Assessment of MIQ: Final Report* (9 April 2021): <<https://miq.govt.nz/assets/MIQ-documents/rapid-assessment-miq-final-report.pdf>> (accessed 15 July 2021).

83 **M Morrah, 'Coronavirus: Nearly two-thirds of Auckland's COVID-19 border, isolation staff had never been tested a week ago' NewsHub, 13 August 2020.**

84 Bloomfield's affidavit (n 26) paras 28–29 and 187.

85 D Parker, 'COVID-19 Response: New Legal Framework as move to Alert Level 2 Considered' (press release, 7 May 2020): <<https://www.beehive.govt.nz/release/covid-19-response-new-legal-framework-move-alert-level-2-considered>> (accessed 15 July 2021).

system between April and August 2020, described in section G below. As for border security, the MIQ system, which now comprises 32 hotels throughout NZ, was established under urgency, with hours to stand up facilities before arrivals landed. It has been necessary to 'build the plane as it is flying' in a rapidly changing environment. Just as one system error would be found and remedied, another would appear, to be met with a fresh round of audits, recommendations and new iterations of plans and strategies.⁸⁶

F. Legal Oversight of Coercive State Powers; A Pragmatic Response Which Attempted to Defuse Conflict

Given that reliable information about the virus was evolving, the Government was forced to make hard calls in the face of uncertainty in the 'heat of the battle'. The clearest example was the decision taken on Monday 23 March 2020 to put the country into full lockdown 48 hours later. Bloomfield later described the context:

Then came a tipping point around the weekend of 21–22 March: modelling coming in from experts . . . was showing that once community transmission took hold, we would lose our window to stamp out the virus, that there would only be one shot at this. At the same time, we were getting our first confirmed community transmission cases. We realised that 'go early' had changed to 'go right now', and there was no time left. What we thought could be done in two weeks or two days had to happen now: it was quite literally now or never. Hard decisions were required, and we made them, as it was now clear that this was the best – in fact the only – way to protect the health and well-being of New Zealanders, prevent our health system being overwhelmed, and avoid prolonged damage to our economy. The absolute priority was to get the lockdown in place and that drove every aspect of what we did over that period: we needed to move, and had no time to sort out the exact details. Some things would have to get sorted out later.⁸⁷

The extent of any doubt in the Government about whether current statute law provided a sufficient legal basis for a total national shutdown has never been revealed. When speculation arose in late April and May 2020, the PM stated that 'There has been no gap in the legal underpinning or in the enforcement powers under the notices that have been issued under Level 3 and Level 4'.⁸⁸ Even had the advice been that there was significant legal uncertainty, it was quite simply too late for Parliament to pass bespoke legislation unequivocally granting the necessary authority, if the best chance to stamp out community transmission before it took hold was to be seized. And so, the Government made the pragmatic decision to plunge ahead regardless,

86 See D Parker, 'New Zealand's COVID-19 Response - Legal Underpinnings and Legal Privilege' (Facebook Live Speech, 8 May 2020).

87 See, generally, Andrew Geddis and Claudia Geiringer, 'Is New Zealand's COVID-19 Lockdown Lawful?' UK Constitutional Law Association Blog (27 April 2020): <<https://ukconstitutionallaw.org/>>; D Knight, 'Lockdown Bubbles through Layers of Law, Discretion and Nudges – New Zealand', *Verfassungsblog*, 7 April and 3 May 2020: <<https://verfassungsblog.de/>> (accessed 16 July 2021).

88 Knight, *ibid*.

with the legal basis for the lockdown one of those ‘details’ that, as Bloomfield indicated, might have to ‘get sorted out later’.

When NZ went into Level 4, Parliament was adjourned. In an interesting innovation, the Government established a parliamentary select committee, the COVID-19 Epidemic Response Committee, with the then leader of the largest opposition party as chair and a majority of opposition members, to hold the Government to account for its pandemic response. This was seen as ‘a signal by the Government of its willingness to allow scrutiny at a time the House could not sit’.⁸⁹ The Committee made full use of the opportunity, summoning a stream of Government officials and experts to explain and critique the Government’s management. The Committee was disbanded by resolution of the House on 26 May 2020, when NZ dropped to Level 2 and Parliament resumed sitting.

Once in place, there was initial doubt about whether the police had the necessary legal powers to enforce some of the lockdown restrictions, such as that people stay at home in their bubbles, or leave home only for limited personal movement.⁹⁰ These doubts were removed nine days later when the first Order implementing the lockdown was replaced with a second which clearly conferred the necessary powers. But until then, there was behind-the-scenes agreement that police should not use arrest powers in the absence of heightened risk, and that they should limit coercion where possible and rely instead on ‘nudges’ and an ‘educative approach’.⁹¹

Just over three weeks into lockdown, in April 2020, its legality was first questioned in the courts in habeas corpus proceedings. In *A v Ardern*, a litigant in person challenged the *vires* of the three orders made by the D-G under the Health Act 1956, which put in place the restrictions.⁹² The High Court held that lockdown restrictions did not require a person to be ‘held in close custody’ as required for ‘detention’ for habeas corpus purposes. If, however, the applicant and his family were detained, the Court was satisfied that the detention was lawful.⁹³

Then, a retired Parliamentary counsel, Andrew Borrowdale, brought a judicial review action against the D-G, challenging the legality of three matters relating to the Government’s early COVID-19 response.⁹⁴ Bloomfield had made three successive Orders pursuant to his emergency powers under section 70(1) of the Health Act 1956. Order 1, which was made under section 70(1)(m), applied only to the first nine

89 [2020] NZHC 796.

90 The Court of Appeal upheld the High Court’s decision on appeal on the ‘detention’ point, but declined to consider the lawfulness of the Orders as being inappropriate in a habeas corpus procedure, see *Nottingham v Ardern* [2020] NZCA 144. A (Nottingham) lost his name suppression in the Court of Appeal.

91 [2020] NZHC 2090.

92 See Director-General of Health, *Section 70(1)(m) Order to close premises and forbidding congregation in outdoor places of amusement or recreation 25 March 2020* (Order 1): <<https://covid19.govt.nz/alert-levels-and-updates/legislation-and-key-documents/>> (accessed 16 July 2021).

93 See Director-General of Health, *Section 70(1)(f) Notice to All Persons in New Zealand – 3 April 2020* (Order 2): <<https://covid19.govt.nz/alert-levels-and-updates/legislation-and-key-documents/>> (accessed 16 July 2021).

94 See Director-General of Health, *Health Act (COVID-19 Alert Level 3) Order, 24 April 2020* (Order 3): <<https://covid19.govt.nz/alert-levels-and-updates/legislation-and-key-documents/>> (accessed 16 July 2021).

days of the Level 4 lockdown.⁹⁵ When the Government became aware of the possibility that section 70(1)(m) (and hence Order 1) did not confer the necessary power to confine the population to their homes, it replaced it on 3 April with Order 2 made under a different provision (section 70(1)(f)).⁹⁶ On 24 April, Order 2 was superseded by Order 3.⁹⁷

Borrowdale's first cause of action alleged that the Government's public announcements of the lockdown, to the extent that they required the population to 'stay at home in their bubbles', lacked a lawful basis, because they went beyond the terms of both Order 1 and section 70(1)(m) under which it had been made. Hence, the restrictions were not 'prescribed by law' in terms of section 5 of the New Zealand Bill of Rights Act 1990 (NZBORA) and so the limits on affirmed rights imposed by the lockdown (for example, to free assembly (section 16), freedom of association (section 17) and of movement (section 18)) could not be justified.⁹⁸ The second cause of action alleged that Orders 2 and 3, made under section 70(1)(f), were *ultra vires* on the ground that the power each conferred to quarantine 'persons' was restricted to specific individuals and could not be used to quarantine or isolate the whole nation. The third cause of action attacked the D-G's definition in Order 1 of 'essential services' as involving an unlawful delegation of his power to determine what was an 'essential business' to officials in the Ministry of Business, Innovation, and Employment. In a dramatic outcome, the Full Court of the High Court upheld the first cause of action, dismissed the other two,⁹⁹ and declared that the first nine days of the Level 4 lockdown were, indeed, unlawful.

My focus is on the first cause of action. Order 1 required all premises to be closed and prohibited congregating outdoors in places of amusement or recreation except where physical distancing was in place. It exempted private dwellinghouses, because section 70(1A) stated that orders made under section 70(1)(m) did not apply to 'premises . . . used solely as a private dwelling house'. Thus, Order 1 could not lawfully and its terms did not require people to stay at home. Yet, in the press conference announcing the lockdown on 23 March 2020 the PM (and later other members of the Executive branch) announced that everyone must 'stay at home in their bubbles'.¹⁰⁰ While section 70(1)(f)

95 *Borrowdale* (n 88) paras 174–75. The New Zealand Bill of Rights Act 1990, s 5 states: 'Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits *prescribed by law* as can be demonstrably justified in a free and democratic society' (emphasis added).

96 Given the legislative history to the section 70(1) powers, which includes the 'Spanish' flu epidemics of 1918 and 1923, the Court had no doubt that Parliament endorsed their potential use by Medical Officers of Health to isolate and quarantine the whole nation, not just regionally: *Borrowdale* (n 88) para 129. The definition of 'essential businesses' in Order 1 was 'businesses that are essential to the provision of the necessities of life and those businesses that support them, as described on the Essential Services list on the COVID19.govt.nz internet site maintained by the New Zealand government'. The Court rejected the unlawful delegation argument, holding that the D-G had properly exercised the section 70(1)(m) power by setting the core parameters around which businesses were essential (paras 134–35). *Borrowdale* has appealed the decision in respect of the second and third causes of action: *Borrowdale v Director-General of Health* [2021] NZCA 33. The appeal has not yet been set down for hearing.

97 *Borrowdale* (n 88) para 148.

98 *ibid* para 215.

99 *ibid* para 216.

100 *ibid* para 148 (emphasis added).

would have authorised such an order,¹⁰¹ the D-G did not invoke nor purport to make Order 1 under that provision. Indeed, Order 2 was made under that subsection, once the legal deficiency with Order 1 had been identified. The Court held that the rule of law required the unequivocal exercise of the section 70(1)(f) power.¹⁰² Regardless, the Government argued that even if Order 1 lacked a lawful basis, people voluntarily complied with the stay-at-home restriction. The Court rejected any such suggestion as being at odds with the PM's statements when announcing the lockdown, such as this:

Failure of anyone to play their part in coming days will put the lives of others at risk, and there will be no tolerance for that. We will not hesitate to use our enforcement powers if needed . . . [W] will play the role of enforcer. . . .¹⁰³

Thus, the effect of the PM's statements was that NZers believed that they were required by law to stay home in their bubbles when, for the nine-day period, that was not the case. As encapsulated by public lawyer Edward Willis, it was 'public proclamation with no legal foundation at all'.¹⁰⁴ The Court did, however, repeatedly emphasise that, given the state of emergency at the time, the Government's decisions to 'go hard and go early' and to confine everyone to their bubbles were 'a necessary, reasonable, and proportionate response to the COVID-19 crisis at the time'.¹⁰⁵ It even declared that the decisions were 'the right ones'.¹⁰⁶ The Court's willingness to grant the Government a moral, though not a legal victory, reflected its anxiety not to undermine the Government's ongoing actions to contain the virus.

The Court had to strike a careful balance between upholding the rule of law as a fundamental constitutional norm and marking the violation of some fundamental rights, while recognising that other rights (notably to life) were also profoundly engaged. The Court came fearfully close to endorsing a view that 'the ends justified the means', but in the final analysis its decision, though 'finely balanced',¹⁰⁷ to grant a declaration that first nine days of lockdown were unlawful provided appropriate vindication of the rule of law:

Although the state of crisis during those nine days goes some way to explaining what happened, it is equally so that in times of emergency the courts' constitutional role in keeping a weather eye on the rule of law assumes particular importance.¹⁰⁸

101 E Willis, 'The *Borrowdale* case and Executive Power' [2020] NZLJ 397 at 397.

102 *Borrowdale* (n 88) paras 1, 97, 290, 292.

103 *ibid* para 1.

104 (n 88) para 290.

105 *ibid* para 291.

106 H Wilberg, 'Lockdowns, the Principle of Legality, and Reasonable Limits on Liberty', UK Constitutional Law Association Blog (23 July 2020): <<https://ukconstitutionallaw.org/>> (accessed 16 July 2021).

107 *Borrowdale v Director-General of Health*, High Court Media Release, 19 August 2020:<<https://www.courtsofnz.govt.nz/assets/cases/Borrowdale-v-D-G-of-Health-Media-Release-19.8.20.pdf>> (accessed 16 July 2021)

108 For example, business owners who shuttered their businesses, so as to comply with an illegal Order, could claim damages for their financial losses. Arguably, evidence that the Government was acting in a perceived emergency and relied on Crown Law advice, even if that advice proved in retrospect to have been wrong, points to 'the extreme unlikelihood of a breach of duty being established', let alone that Government owed a duty of care. See *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC), 710 *per* Lord Keith of Kinkel.

The rule of law cannot be an absolute value, I suggest, any more than NZBORA rights themselves can be. Some academic public lawyers argue that the principle of legality itself should similarly be injected with some sense of reasonable limits.¹⁰⁹ Surely, there is a good argument that, had the Government delayed the lockdown in order, for example, to enact legally sufficient powers, the right to life in section 8 of the NZBORA would have been invoked, even though Government might thereby have complied with the rule of law. It is suggested that, provided the government pays a price for doing so, in terms of a declaration, lost prosecutions, and a proportionate remedy, an appropriate balance between two inconsistent norms—one part of the *raison d'être* of government (protecting the lives and health of citizens) and the other constitutional bedrock (the rule of law) is struck.

The theme of pragmatism is further illustrated by the political and public response to *Borrowdale*; essentially, a deafening silence. People appeared to understand the utilitarian trade-off between the rule of law and lives and health. Had the lockdown not been as successful, the response may well have been more vociferous. The finding of illegality could have affected charges laid for breaching the lockdown during those first nine days, but it appeared that few, if any, prosecutions would be affected, the Court said.¹¹⁰ No civil actions in negligence have been brought based on the D-G's unlawful order.¹¹¹

After *Borrowdale* was filed but before the Court's decision, the Government moved to put the restrictions on a firmer footing and to authorise future ones, passing the COVID-19 Public Response Act 2020 on 13 May under urgency.¹¹² Stating itself confident that the lockdown was lawful, the Government declared that the Act did not need to be retrospective.¹¹³ The Act declared that legal proceedings commenced before the Act 'must be decided as if the Act had not been enacted'.¹¹⁴ The Act applies only to COVID-19 and expires after 90 days if not renewed each time by Parliament or after a maximum of two years.¹¹⁵ The authority to make COVID-19 orders putting in place restrictions applicable to the whole country, is now conferred only on the Minister appointed by the PM to be responsible for the administration of the Act. Thus, an elected official accountable to Parliament must approve such orders,¹¹⁶ rather than a non-elected civil servant. This reflects acceptance that power of this magnitude should be subject to high levels of political accountability. The D-G's power to make orders is now restricted to a single territorial district. The Act's purpose is explicitly 'to support a public health response to COVID-19', but, reflecting the fact that lockdowns are not based solely on health considerations, one that both 'allows social, economic and other factors to be taken into account' and 'is economically sustainable'.¹¹⁷

109 As a result, the usual Select Committee stage where submissions are received and there is scrutiny of the Bill was omitted.

110 Parker (n 83).

111 COVID-19 Public Health Response Act 2020, Schedule 1, cl 3 and cl 1(2).

112 *ibid* s 3.

113 *ibid* s 16.

114 *ibid* s 4.

115 See C Geiringer, 'The COVID-19 Public Health Response Act' [2020] NZLJ 159.

116 See *Inquiry into the operation of the COVID-19 Public Health Response Act 2020: Report of the Finance and Expenditure Committee* (July 2020).

117 *ibid* 4.

Given criticisms of its rushed enactment, which bypassed normal select committee processes, the Government commendably acceded to calls from human rights groups, academics and others to send the Act to a select committee for post-enactment scrutiny.¹¹⁸ The Finance and Expenditure Committee met for over two months and considered over 1,300 submissions before reporting on 24 July 2020.¹¹⁹ While a majority concluded that there was no need for urgent amendments to the Act, the Committee's key recommendation, not to date implemented, was that the Government replace it with enduring health emergency response legislation to respond to future public health emergencies and not just to COVID-19.¹²⁰

G. The Public Health System's Adaptations to the Pandemic: Non-Pharmaceutical Interventions

In this section, I describe challenges faced by NZ's public health system and its adaptations and the public health tools deployed in response to the pandemic. The Government's ability to pursue an elimination goal so effectively was due, in significant part, to the existence of a public health system under which everyone is eligible for free hospital treatment in the event of serious infection, as well as to free or subsidised primary care, free testing, and laboratory analysis of tests. While private treatment is permitted,¹²¹ the public system is the only health provider in emergency situations, as only it has both Intensive Care Units (ICUs) and ventilators. All patients who suffered serious COVID-19 complications were treated in public hospitals.

Twenty geographically defined District Health Boards (DHBs) are charged with planning, purchasing, and providing health services at a local level. Nevertheless, the health system continues to be strongly hierarchical, with DHBs subject to strong central control. This is a clear advantage in a global pandemic as it enables the structure to be highly responsive to central government dictates. For example, the Ministry of Health was able to implement a decision in March 2020 virtually overnight postpone up to 30,000 public hospital elective surgeries nationally during lockdown to protect the health system's capacity and to allow anaesthetists to work in ICUs if they became overwhelmed, virtually overnight.¹²² While this resulted in many people living for longer in pain and hospitals workers

118 About a third of the population has private insurance, but its share of total health expenditure is minor (approximately 5 percent): OECD, Health Statistics 2020, available at <<https://www.oecd.org/health/health-data.htm>> (accessed 16 July 2021).

119 R Quinn, 'COVID-19 Coronavirus: Up to 30,000 Surgeries Called Off during Lockdown', *NZ Herald*, 20 April 2020.

120 In May 2020, Government announced a one-off NZ\$282.5 million catch-up campaign for elective surgeries partly to compensate for the impact, see C Coughlan, 'DHBs get NZ\$3.9 billion in extra funding from Budget 2020' Stuff, 12 May 2020. By the end of July 2020, the number of cancer cases diagnosed was just 2.5% below that of a normal year: J Dann, 'The Lockdown Stamped Out a Deadly Virus. Its Health Impact did not Stop there', *The Spinoff*, 26 October 2020.

121 Press release - Hon G Robertson, 'NZ\$12.1 Billion Support for New Zealanders and Business' (17 March 2020): <https://www.beehive.govt.nz/release/121-billion-support-new-zealanders-and-business> (accessed 16 July 2021).

122 Bloomfield affidavit (n 26) para 168.

later working overtime to catch up,¹²³ the system braced itself for a wave of cases that never came due to the lockdown's success.

In an immediate response, the Government announced a NZ\$12.1 billion Economic Response Package on 17 March 2020. From this, an initial boost of NZ\$500 million (0.2 percent of GDP) was allocated to the health sector to meet COVID-19-related costs.¹²⁴ The funds went to nearly double the resources for Public Health Units to increase their capacity for contact tracing. NZ\$32 million was earmarked for extra intensive care capacity and equipment in hospitals, and NZ\$50 million to support GPs and primary care.¹²⁵

During the early stages of NZ's response, there were questions whether PPE was getting to where it was needed when it was needed. Because lockdown was successful and cases dropped, the system for the procurement, management, and distribution of PPE was never tested. It is now clear that it would not have coped. In a Global Health Security Index of October 2020, NZ was ranked 77th out of 195 countries in terms of the 'infection control practices and availability of equipment' in the event of a pandemic.¹²⁶ A national reserve had been established after the 2005 H5N1 bird flu epidemic to ensure access to critical supplies during a pandemic, but an audit of the Ministry of Health's management of PPE by the Auditor-General in April 2020 showed that it had received no attention since then and was inadequate.¹²⁷ There was no central oversight of the national reserve, nor reliable information about what it consisted of, how much would be needed, what proportion had expired, and how it should be distributed. The report made a series of recommendations, including implementing a centralised oversight system and periodic stocktakes, all accepted by the Government.¹²⁸

In March 2020, there was rising concern about NZ's relatively low number per capita of ICU-beds equipped with a ventilator—only 4.7 per 100,000 people, compared for example, with 35 per 100,000 in the US and 29 per 100,000 in Germany.¹²⁹ Had elimination failed, modelling indicated that NZ may have had between 770 patients, at best, and 4,000 patients, at worst, requiring a ventilator. But, at the time, there were only 868 ventilators and anaesthetic machines that could be converted to ventilators in hospitals.¹³⁰ There were only 358 ICU beds, significantly fewer per head of population compared to other OECD nations.¹³¹ In September 2020, in a NZ\$76 million

123 M Boyd, 'New Zealand's Poor Pandemic Preparedness According to the Global Health Security Index', Public Health Expert, 11 November 2019

124 Auditor-General, *Ministry of Health: Management of personal protective equipment in response to COVID-19* (June 2020).

125 Letter from A Bloomfield to J Ryan, 'Response to the Auditor-General Report on Personal Protective Equipment', 22 July 2020: <https://www.health.govt.nz/system/files/documents/pages/response_to_auditor-general_-_signed_letter_22.07.20.pdf> (accessed 16 July 2021)

126 E Russell, 'COVID 19 Coronavirus: Hundreds of ICU-Ventilators have Arrived to "Future-Proof" New Zealand', *NZ Herald*, 9 September 2020.

127 Ministry of Health, *Ventilators and ICU Bed Capacity*, 11 May 2020; M Sharpe, 'Worst Case would have seen 4000 People Needing NZ's 868 Ventilators', *Stuff*, 10 May 2020.

128 Ministry of Health, *ibid.*

129 Russell (n 123).

130 See B Strang, 'COVID-19: Ministry of Health Reveals Increased Stock of PPE, More Ventilators Available', *RNZ Newsroom*, 1 February 2021.

131 Ministry of Health (n 125).

investment, more than 100 ventilators arrived to help ‘future-proof’ NZ’s COVID-19 response.¹³² By December 2020, there were 692 ICU-capable ventilators available without the need to repurpose anaesthetic machines.¹³³ The Government also sought to urgently triple ICU bed capacity across NZ, with DHBs projected to have 552 ICU-capable beds available for service by July 2020.¹³⁴

When COVID-19 struck, the capacity of NZ’s public (population) health services, was unequal to the task of undertaking public health measures on anywhere near the scale needed. Always the ‘poorer cousin’ to personal health services, there had been under-investment in public health for more than a decade, despite repeated warnings that the service was at risk of failing.¹³⁵ NZ did have a pandemic plan, but it was for influenza and did not match a coronavirus pandemic.¹³⁶ It had no dedicated public health agency, such as a US-style Centers for Disease Control and Prevention, having closed its Public Health Commission in 1992. Instead, there were 12 regional Public Health Units (PHUs) based in DHBs to undertake public health functions, but these were unprepared to upscale for wide-scale contact tracing. A rapid audit by Dr Verrall a few weeks into Level 4, found that they were overrun and urgently needed to expand rapidly from a regional to a national system.¹³⁷ The report recommended urgent adoption of a set of measurable performance indicators to drive improvement. The Government adopted the report’s recommendations in full and allocated NZ\$55 million to achieving them.

Rapid improvements in testing capacity and case management were reported by late April, with decreasing average times to notification and isolation and increasing population testing targeted at higher-risk groups.¹³⁸ On 6 May 2020, the Contact Tracing Assurance Committee was appointed to advise on the Ministry’s improvements to the system as recommended by Verrall. Its *Final Report* in July found that all of Verrall’s recommendations had been addressed.¹³⁹ By the end of July 2020, it was expected that a surge capacity would be in place to enable PHUs to scale up to 500 cases per day within three to four days, with a plan to surge further to tracing the contacts of up to 1,000 cases per day. Nevertheless, the media revealed that when the Auckland August outbreak occurred on 11 August 2020, the Auckland DHB, despite having months to prepare, was underprepared and had come close to losing control.

132 In November 2019, NZ scored poorly (54/100) on the Global Security Scale on an assessment of its pandemic preparedness, notably because of its underfunded public health infrastructure and poorly developed epidemiology workforce: Boyd (n 120).

133 Ministry of Health, *New Zealand Influenza Pandemic Plan: A Framework for Action* (2nd ed Ministry of Health 2017); Kavlsvig and Baker, (n 75).

134 Dr A Verrall, *Rapid Audit of Contact Tracing for COVID-19 in New Zealand* (University of Otago, 10 April 2020): <health.govt.nz/publication/rapid-audit-contact-tracing-covid-19-new-zealand> (accessed 16 July 2021).

135 Jefferies (n 22).

136 Contact Tracing Assurance Committee, *Final Report on the Contact Tracing System* (16 July 2020); Contact Tracing Assurance Committee, *Interim Report on the Contact Tracing System* (12 June 2020).

137 Simpson and Roche (n 65).

138 All of Government Press Conference, 25 August 2020 (n 3).

139 N Wilson, “NZ’s Team of 5 Million” has Achieved the Lowest COVID-19 Death Rate in the OECD — but there are still Gaps in our Pandemic Response’, *The Public Health Expert* (blog, 22 July 2020); K and A Prendergast, “Download the App, then Use it” Leaves too many of us out of Contact Tracing Efforts’, *The Spinoff*, 20 August 2020.

It was struggling with understaffing and untrained staff, even though they were dealing with a maximum caseload of only 14 new cases per day. A subsequent Review confirmed the accuracy of the reports, identified shortcomings in the rollout of the strategy and concluded that the system for contact tracing was still not fit for purpose.¹⁴⁰

Work by the Ministry of Health and local developers to build the smartphone app (the NZ COVID-19 Tracer app) began in April 2020. It was first released on 20 May, with a second release three weeks later. It had significant uptake. By 25 August, around 45 percent (1.8 million) of the adult population were registered and had scanned over one million daily QR codes in the eight days prior to that date.¹⁴¹ Nevertheless, experts sharply criticised the app because its uptake was problematic, and it needed to be simplified and made more useable.¹⁴² Until December 2020, the app was a manual system, which required the user to remember and be motivated to scan repeatedly. Belatedly, in December it was updated to include Bluetooth tracing technology, even though countries like Singapore had been using Bluetooth-enabled contact tracing since March.¹⁴³

One success story was the rapid development by laboratories and academic scientists of tests for the virus, with testing available from 31 January 2020.¹⁴⁴ Four laboratories were undertaking testing in mid-March and there were twelve by mid-May. Processing went from 0.015 tests per thousand per people per day in early March, to 1.15 by the second week of May, peaking in mid-August at 4.15 during the Auckland August outbreak. Data from genomic sequencing also played a major role in the public health response.¹⁴⁵ The results were used to help identify the source of infections and illuminate cluster membership during outbreaks, as well as link community cases to people in quarantine. The Ministry of Health used the results to direct and assess public health interventions, such as to identify transmission hotspots and superspreading events and target community testing. Pop-up mobile and drive-through testing units were set up temporarily during outbreaks, for which there were often long queues.¹⁴⁶ Given the elimination goal and the fact that positive cases are detected daily in MIQ facilities, ongoing genomic surveillance to monitor any re-emergence of the virus remains a key part of NZ's response to COVID-19.

Laboratory tests are ordered by GPs. If a patient's clinical indications fit within the 'case definition' set by the Ministry to take account of resource constraints, testing and analysis are free, apart from (in normal times) GP-related co-payments. Because it did not want cost to be a barrier, the Ministry agreed to meet GP-related costs. It rapidly authorised testing for both symptomatic and non-symptomatic, high risk people. Testing was encouraged. Bloomfield's consistent message was 'If you are offered a

140 'COVID-19 Contact Tracing App gets Bluetooth Upgrade', *RNZ Newsroom*, 10 December 2020.

141 Geoghegan, (n 34).

142 See, generally, J Geoghegan et al, 'Genomic Epidemiology Reveals Transmission Patterns and Dynamics of SARS-CoV-2 in Aotearoa New Zealand' (2020) 11 *Nature Communications* 6351.

143 'COVID 19 Coronavirus: Ministry of Health Random Testing in Country's "Hotspots"' *NZ Herald*, 17 April 2020.

144 Ministry of Health, Media Release, 7 August 2020 (n 1).

145 Bloomfield affidavit (n 26) para 172.

146 In 2013, the life expectancy gap between Māori and non-Māori NZers was 7.3 years for males and 6.8 years for females: Ministry of Health, *Tatau Kahukura: Māori Health Chart Book 2015* (2015, 3rd edn); Ministry of Health, *Wai 2575 Māori Health Trends Report* (Ministry of Health 2019).

test, please take it'.¹⁴⁷ The Ministry of Health continued to expand the case definition, which in turn led to increased testing.¹⁴⁸

H. The Pandemic, Māori and Underserved Communities

In a familiar story in post-colonial countries, Māori, NZ's indigenous people, and its more recent migrant Pacific peoples have higher rates of premature death at all ages and carry a higher burden of disease.¹⁴⁹ There is also inequity in terms of unmet health need, reflecting structural biases and racism within the healthcare system.¹⁵⁰ Māori have historical and current differential experiences of transmission of and treatment for infectious diseases. For example, during the 1918 Spanish flu epidemic, Māori died at more than eight times the rate of Pākeha (European) New Zealanders.¹⁵¹ And in the 2009 H1N1 swine flu epidemic, Māori infections were twice as likely as Pākeha and of increased severity.¹⁵²

As Eichler and Mehta have stated, 'In countries with widespread transmission of the virus, it isn't hard to find evidence that, while the virus does not discriminate, the societies that it infects certainly do'.¹⁵³ For example, marginalised ethnic populations in the USA have borne a disproportionate health burden from COVID-19 in terms of infections, severe illness and death. The aged-adjusted COVID-19 mortality rate for Indigenous peoples is 3.3 times higher than that for white Americans, for Pacific peoples 2.6 times higher, for Latinos 2.4 times higher, and for Black Americans twice as high.¹⁵⁴ Similar evidence from the UK shows that black, Asian and ethnic minorities (BAME) are twice as likely to die of COVID-19 as those of white ethnicity.¹⁵⁵ The disparity is replicated among health and social care workers with disproportionately high numbers of BAME doctors and other healthcare workers in the NHS dying from COVID-19.¹⁵⁶ Research shows that across the world the most fundamental determinants of the transmission of and death from COVID-19 are environments,

147 Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (WAI 2575, Waitangi Tribunal Report, Legislation Direct, Lower Hutt, 2019).

148 G Rice and L Bryder, *Black November: The 1918 Influenza Pandemic in New Zealand* (2nd edn Canterbury UP 2005).

149 N Wilson et al, 'Differential Mortality by Ethnicity in 3 Influenza Pandemics over a Century' (2012) 18 *Emerging Infectious Diseases* 71; A Verrall et al, 'Hospitalisations for Pandemic (H1N1) 2009 among Māori and Pacific Islanders' (2010) 16 *Emerging Infectious Diseases* 100..

150 N Eichler and S Mehta, 'How to COVID-Proof a Country', *The Spinoff*, 27 October 2020.

151 APM Research Lab, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the US*. Data to 2 March 2021 (sighted 17 June 2021), <<https://www.apmresearchlab.org/covid/>> accessed 17 June 2021.

152 E Williamson et al, 'Factors Associated with COVID-19-related Death using OpenSAFELY' (2020) 584 *Nature* 430.

153 T Cook, E Kursumovic and S Lennane, 'Exclusive: Deaths of NHS Staff from COVID-19 Analysed' 22 April 2020 HSJ: [hsj.co.uk/exclusive-deaths-of-nhs-staff-from-Covid-19-analysed/7027471.article](https://www.hsj.co.uk/exclusive-deaths-of-nhs-staff-from-Covid-19-analysed/7027471.article) (accessed 16 July 2021)

154 M Cevik et al, 'SARS-CoV-2 Transmission Dynamics Should Inform Policy' (14 September 2020), SSRN: <<https://ssrn.com/abstract=3692807>> (accessed 16 July 2021); Eichler and Mehta (n 147 above); N Steyn et al, 'Estimated Inequities in COVID-19 Infection Fatality Rates by Ethnicity for Aotearoa New Zealand' (2020) 133 (1521) *NZ Med J* 28.

155 J Gurney, J Stanley, D Sarfati, 'The inequity of morbidity: Disparities in the prevalence of morbidity between ethnic groups in New Zealand' *J Comorb.* 2020 Nov 10; doi: 10.1177/2235042X20971168 ; Ministry of Health (2019), (n 143).

156 Jefferies (n 22); Steyn et al (n 151).

socioeconomic deprivation, and structural racism.¹⁵⁷ These overlapping risk factors affect Māori and Pacific people by comparison with Pākehā NZers.¹⁵⁸

These determinants have been less important in leading to inequities in COVID-19 infections and fatalities in NZ to date, because of rapid suppression of community transmission and the success in maintaining it. While Māori did not appear disproportionately affected in the first wave, older people and those with co-morbidities, residents in care homes, and Asian and Pacific peoples were at higher risk of severe outcomes.¹⁵⁹ And during the Auckland August outbreak, the virus ripped through marginalised Māori and Pacific communities, spreading particularly through churches in lower socioeconomic Auckland neighbourhoods.¹⁶⁰ Strong responses by churches,¹⁶¹ iwi (a tribe in Māori society), and other community groups, closely cooperating with the Government, were instrumental in quickly containing the outbreak. Steyn and colleagues have, however, estimated that in the event of a future incursion that leads to widespread community transmission, the COVID-19 infection fatality rate would be at least 50 percent higher for Māori than for non-Māori and would have a devastating impact on Māori and Pacific communities.¹⁶²

Some steps were taken which can be seen as Government attempts to honour its special relationship with Māori. The modern principles governing the relationship between Māori and the state, derived from the founding Treaty of Waitangi,¹⁶³ are 'partnership', 'participation', and 'protection', all clearly invoked, I suggest, during the pandemic. Māori were left out of planning specifically for them in March 2020, such that health experts set up their own Māori pandemic group to provide public health advice to Māori and to work with the Government to develop responses by Māori for Māori.¹⁶⁴ By 13 April 2020, the Ministry of Health had developed an initial COVID-19 Māori Response Action Plan as a framework to protect the health and wellbeing of Māori during the pandemic and to guide health system action throughout the response.¹⁶⁵ It was updated in

157 As at 13 September 2020, 62% of confirmed cases of the August-Auckland cluster were Pacific peoples and 22% Māori: J Weeks, 'Coronavirus: Mt Roskill Evangelical Fellowship Leader Speaks about Church at Centre of Auckland COVID-19 Cluster', *Stuff*, 13 September 2020.

158 The Mt Roskill Evangelical Church experienced a sub-cluster of 48 cases in September 2020. Church leaders co-operated with the Ministry of Health to actively encourage all members of the congregation to be tested, and within days, that had been achieved: Eichler and Mehta (n 147).

159 Steyn et al (n 151).

160 The Treaty of Waitangi was a political compact signed in 1840 between the British Crown and more than 500 Māori chiefs to found a nation state and build a government in NZ. It resulted in the declaration of British sovereignty over NZ, and is considered is NZ's founding document.

161 C Parahi, 'Coronavirus: New Pandemic Group says Māori 'Left Out' of Planning', *Stuff*, 20 March 2020.

162 Ministry of Health, *Initial COVID-19 Māori Response Action Plan* (Ministry of Health April 2020): <<https://www.health.govt.nz/publication/initial-COVID-19-maori-response-action-plan>> (accessed 16 July 2021).

163 Ministry of Health, *Updated Covid-19 Māori Health Response Plan* (July 2020): <<https://www.health.govt.nz/publication/updated-COVID-19-maori-response-action-plan>> (accessed 16 July 2021).

164 Minister for Māori Crown Relations, Minister of Māori Development & Minister of Whānau Ora, Release: 'Māori Support Package Delivers for Whānau' (18 April 2020): <https://www.beehive.govt.nz/release/m%C4%81ori-support-package-delivers-wh%C4%81nau> (accessed 16 July 2021).

165 Press release, 'Police Position on COVID-19 Checkpoints', 23 April 2020: <<https://www.police.govt.nz/news/release/police-position-COVID-19-checkpoints>> (accessed 16 July 2021).

July 2020 after consultation.¹⁶⁶ Of the initial NZ\$500 million allocated to Health on 22 March 2020, NZ\$6 million was earmarked as a specific Māori Response Package to be spent on Māori communities guided by the Action Plan.¹⁶⁷

Soon after lockdown some iwi, citing the devastating impact of the 1918 Spanish flu on their people, set up ‘community checkpoints’ on public roads, at which locals would attempt to ask drivers about their travel intentions. The practice encountered some resistance, as the checkpoints lacked any lawful basis and drivers were not obliged to stop. The police announced, however, that they would work with local communities to ensure that, while not encouraged, where ‘checkpoints for vulnerable communities [were] deemed necessary’, they would be operated by district police alongside community members in a safe manner and not restrict ‘people’s lawful use of the road.’¹⁶⁸ As a leading NZ public lawyer observed:

That pragmatic response is also capable of being interpreted as an application of ‘the principles of the Treaty of Waitangi’ — a measure of *de facto* local autonomy for Māori *iwi* (tribes), accommodating a community’s concerns about a life-threatening peril within the parameters of New Zealand law.¹⁶⁹

I. Economic Response

There were four guiding principles for the Government’s economic response: it had to be timely, fiscally sustainable, targeted at those who needed it, and proportionate to the level of the economic shock.¹⁷⁰ By September 2020, the Government had announced spending of NZ\$62.1 billion (19.3 percent of GDP) in total through 2023–24. This was made up of an initial NZ\$12.1 billion announced on 17 March 2020, together with a further NZ\$50 billion in a COVID-19 Response and Recovery Fund (CRRF)¹⁷¹ in the May budget.¹⁷² This was ‘the most significant financial commitment by a New Zealand government in modern history’ in a ‘once in a generation budget’.¹⁷³ Overall, the fiscal commitment constituted almost half the Government’s 2019 budget expenditure.

166 P Rishworth, ‘New Zealand’s RESPONSE to the COVID-19 Pandemic’, Bill of Health: Harvard Law Petrie Flom Center (blog), 26 May 2020: <<https://blog.petrieflom.law.harvard.edu/2020/05/26/new-zealand-global-responses-COVID19/>> (accessed 16 July 2021).

167 Hon G Robertson, ‘NZ\$12.1 Billion Support for New Zealanders and Business’, Press Statement 17 March 2020: <https://www.beehive.govt.nz/release/121-billion-support-new-zealanders-and-business> (accessed 16 July 2021).

168 The CRRF was a funding envelope for budget management purposes.

169 Hon G Robertson, Budget speech 14 May 2020: <<https://www.treasury.govt.nz/publications/budget-speech/budget-speech-2020>>.

170 *ibid.*

171 Work and Income, *COVID-19 Wage Subsidy* (March 2021): <https://www.workandincome.govt.nz/covid-19/wage-subsidy/index.html> (accessed 16 July 2021).

172 Ministry of Social Development, *Income Support and Wage Subsidy Weekly Update: Week ending 23 October 2020*: <<https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/statistics/benefit/2020/income-support-and-wage-subsidy-weekly-update/income-support-and-wage-subsidy-weekly-update-23-october-2020.pdf>> (accessed 16 July 2021).

173 C Young, ‘Wage Subsidy Complaints Soar, Including Employer Fraud - Labour Inspectorate’, *RNZ Newsroom*, 17 April 2020.

The first priority was to protect jobs. The Government put in place the Wage Subsidy scheme on 17 March 2020, providing workers and businesses with financial reassurance a week before the lockdown went into effect. Eligible employers, sole traders and the self-employed, who had suffered an actual or predicted decline in revenue of at least 30 percent compared to the previous year, received a flat rate of NZ\$585.80 per week for a full time employee or NZ\$350.00 for a part time employee for 12 weeks. Employers had to undertake that they would make their best efforts to retain the affected employees at a minimum of 80 percent of their income for the subsidy period.¹⁷⁴ The total cost of the scheme was NZ\$14.8 billion (5.1 percent of GDP). Over 70 percent of all businesses received support under the scheme, and at its peak at the end of May nearly 1.7 million jobs were being supported by the subsidy.¹⁷⁵ It was extended for eight weeks, with a tighter criterion (a minimum 40 percent decline in revenue), finishing at the end of August. The scheme functioned with a minimum of bureaucracy. There was a one-page online form and a guarantee, generally honoured, that the money would arrive in bank accounts within two days of approval.

The scheme was, however, open to fraud and abuse. Complaints soared of employers pocketing the money intended for employees, forcing them to take annual or sick leave, or making them redundant while still taking the subsidy.¹⁷⁶ By the end of September 2020, the Government had completed only 10,000 audits from among the 759,000 applicants to have received payments from the scheme. It still did not know how many had abused the scheme, nor had it brought a single criminal prosecution (reserved for serious cases of deliberate fraud). Only about 16,000 had voluntarily repaid money for which they had been ineligible.¹⁷⁷ A differently designed scheme could have helped to minimise abuses. For example, the US's Paycheck Protection Program was a government-guaranteed loan forgiven on proof that the subsidy was properly paid to employees.¹⁷⁸

The COVID-19 Leave Support Scheme also played a part in keeping employers afloat, as well as removing any financial disincentives for employees not to take a test, disclose, or to self-isolate after a positive result, or to return to work while still sick.¹⁷⁹ Other CRRF measures for businesses included the Small Business Cash Flow Loan

174 'Businesses Receiving Wage Subsidy being Audited by MSD', *RNZ Newsroom*, 3 October 2020; S Edmunds, 'Big Law Firms Repay Millions of Dollars in Wage Subsidies', *Stuff*, 6 May 2020.

175 The Paycheck Protection Program was a loan program that originated from the CARES Act 2020, which provided American small businesses with eight weeks of cash-flow assistance through 100% federally guaranteed loans. The loan would be forgiven provided that at least 60% of the loan was used to fund payroll and employee benefits costs. The remaining 40% could be spent on mortgage interest payments, rent and lease payments, and utilities.

176 The employer had to endeavour to pay the employee at least 80% of their usual income for four weeks, but if unable to do so, they were paid at the same rate as the Wage Subsidy.

177 The Government-provided interest-free (if repaid within a year) or low interest loans of up to NZ\$100,000 with repayments delayed for two years for small businesses (n 166).

178 The Government took on the default risk of up to 80% of bank loans up to NZ\$5 million (without personal guarantees) of businesses with revenue up to \$200 million. Tax changes, including a temporary tax loss carry-back scheme (NZ\$3.1 billion or 1.1% of GDP), were also made to help businesses, *ibid*.

179 Designed to provide insolvency relief, it allowed businesses to place their existing debts on hold for up to seven months until they were able to start trading again, *ibid*.

Scheme,¹⁸⁰ the Business Finance Guarantee scheme,¹⁸¹ and the Business Debt Hibernation Scheme.¹⁸² A NZ\$400 million Tourism Recovery Fund (0.1 percent of GDP) was also announced in May 2020.¹⁸³

From March to October 2020, the Covid-19 Income Relief Payment provided up to 12 weeks of tax-free payments of NZ\$50 per week (NZ\$250 if part-time), after a sudden job loss for employees and the self-employed looking for work. In most situations, former full-time employees would be financially better off on the Payment than on a usual benefit. In March, the Government imposed a residential rent increase freeze until 25 September and restrictions against tenancy terminations applied until 25 June 2020. The March package also included a NZ\$2.8 billion increase in payments of NZ\$25 per week in core benefit payments. The CRRF included a NZ\$1.6 billion fund for increasing trades and apprenticeship training with the aim of retraining about 10,000 hospitality and aviation sector workers.

The Reserve Bank of NZ provided monetary stimulus throughout the crisis, including reducing the official cash rate by 75 basis points to 0.25 percent on 17 March for 12 months. It reduced banks' core funding ratio requirement from 75 to 50 percent to help them make credit available, removed mortgage loan-to-value ratio restrictions from 1 May 2020 for 12 months, and agreed six-month mortgage holidays to support small and medium-sized businesses and homeowners.¹⁸⁴

The impact of the restrictions, especially the April lockdown, was devastating for the economy.¹⁸⁵ The critical economic impact was felt in the second quarter, which encompassed most of the lockdown, when real GDP fell a record 11 percent,¹⁸⁶ compared to an OECD average of 10.6 percent.¹⁸⁷ But initial fears of a near 24 percent decline did not eventuate.¹⁸⁸ For 2020 overall, GDP dropped 2.9 percent, the largest annual fall ever,¹⁸⁹ compared to an OECD average of 4.7 percent.¹⁹⁰

While the Wage Subsidy helped protect jobs, the unemployment rate rose to 5.3 percent in the September 2020 quarter, the largest ever quarterly increase.¹⁹¹ The impact was most severe for the low-paid work force; in particular, for Māori and minority ethnic communities. The consequences were felt more heavily by some sectors than others. For example, international tourism, the country's largest export earner responsible for 20 percent of total exports and 5.5 percent of GDP and employing

180 Funding for advice and support for either pivoting a business towards the domestic and Australian market, hibernating a firm, and for a programme to identify and protect strategic tourism assets so they would not be lost.

181 See *Reserve Bank of New Zealand: Annual Report 2019-2020* (October 2020).

182 T Stannard et al, *Economic Impacts of COVID-19 Containment Measures* (Reserve Bank Analytical Notes AN 2020/4, May 2020): <<https://www.rbnz.govt.nz/research-and-publications/analytical-notes/2020/an2020-04>> (accessed 16 July 2021).

183 *ibid.*

184 OECD, *Data: Quarterly GDP 2020*: data.oecd.org/gdp/quarterly-gdp.htm (accessed 16 July 2021).

185 See NZ Treasury, *Weekly Economic Update – 25 September 2020*.

186 StatsNZ: <<https://www.stats.govt.nz/indicators/gross-domestic-product-gdp>> (accessed 16 July 2021).

187 OECD, *Data: Quarterly GDP 2020*: data.oecd.org/gdp/quarterly-gdp.htm (accessed 16 July 2021)

188 NZ Treasury, *Weekly Economic Update – 6 November 2020*.

189 See Tourism New Zealand, *About the Tourism Industry* (2019): <www.tourismnewzealand.com/about/about-the-tourism-industry/> (accessed 16 July 2021).

190 See Statista: [statista.com/statistics/375266/unemployment-rate-in-new-zealand](https://www.statista.com/statistics/375266/unemployment-rate-in-new-zealand) (accessed 16 July 2021)

191 Falling to 4.7% in the March 2021 quarter, see NZ Treasury, *Weekly Economic Update – 7 May 2021*.

around 8.4 percent of the workforce in 2019, disappeared virtually overnight, although the impact was partially mitigated by increased domestic tourism.¹⁹² The unemployment rate fell to 4.9 percent in the December quarter of 2020, so that the overall rate for 2020 (4.01 percent) was less than 1 percent above that in 2019 (4.07 percent).¹⁹³ It has continued to fall since, with the number of unemployed (135,000) around 20,000 more than pre-COVID levels at the end of March 2021.¹⁹⁴ The OECD projects NZ's economic growth to pick up gradually from the second half of 2021, boosted by the progressive reopening of the border, reaching 3.5 percent in 2021 and 3.8 percent in 2022.¹⁹⁵

III. CONCLUDING COMMENTS

NZ's response to the pandemic has so far been demonstrably successful in protecting lives, jobs, and the economy. Why were NZ's policies largely successful in health and economic terms? Some factors, such as being a remote, less populous island nation and the fortuity of having a charismatic leader skilled in communication and honed in political crisis management, are non-reproducible. There are, however, some points from NZ's COVID-19 experience, which are worth considering by other countries in comparative policy terms.

A key decision was its early adoption of a science-led, evidence-based approach in pursuit of an explicitly articulated elimination strategy, which prioritised lives over short-term economic considerations.¹⁹⁶ To achieve this goal, NZ took early, decisive steps, which crucially included border controls (the earlier and the more aggressive, the more successful) and an intense national lockdown implemented rapidly when case numbers were still low. The price has been, however, the need for ongoing surveillance and resurgence preparedness, and border closure since March 2020 at the cost of international tourism and ability to travel.

In times of crisis, transparent, effective and consistent communication that appeals to solidarity and personal sacrifice for the common good from a single, trusted source of authority close to the centre of power appears important. Flexibility is integral in the context of a new pathogen with as yet unknown properties. NZ benefited from an iterative, pragmatic policy approach characterised by 'learning as you go', which committed to fixing inevitable mistakes and systemic errors as they arose through expert review and implementation of evidence-based recommendations. A publicly funded health system, with coverage not tied to employment, confers a massive public health advantage.

192 OECD, *New Zealand OECD Economic Outlook, vol 1, issue 1* (May 2021): https://www.oecd-ilibrary.org/economics/oecd-economic-outlook/volume-2021/issue-1_edfbca02-en (accessed 16 July 2021).

193 M Baker, N Wilson and T Blakely, 'Elimination could be the Optimal Response Strategy for Covid-19 and other Emerging Pandemic Diseases' (2020) 371 *BMJ* m507; Kvalsvig (n 75); Jefferies (n 22), Summers (n 12).

194 But see criticism of Taiwan's 'inadequate' response to a major outbreak in mid-April 2021, see H Davidson, 'A Victim of its Own Success: How Taiwan Failed to Plan for a Major Covid Outbreak', *The Guardian*, 7 June 2021.

195 See J Summers (n 12); N Wilson et al, 'NZ's COVID-19 Response Compared to Selected other Jurisdictions: Australia, Taiwan and the United States', *Public Health Expert* (blog), 26 August 2020.

196 M Daalder, 'Public Health Agency "the Legacy of the Pandemic"', *Newsroom*, 22 April 2021.

Contestation is the lifeblood of healthy democracies. Creative processes, such as those NZ experimented with during lockdown, for example the COVID-19 Epidemic Response Committee, to preserve the ability for debate and input from interested parties are worthy of consideration amid restrictions on individual liberties. But, in a difficult balance to strike, approaches which minimise the impact of short-term political considerations and attempt to find pragmatic solutions to defuse conflict, rather than rely on 'hard power', are helpful. In common with many other nations, NZ's fiscal response was the most significant financial commitment by a NZ government in modern history. An economic stimulus package deployed before the economic pain of lockdown hit prioritised maintaining existing employment relationships and supporting businesses.

What could it have done better? Lessons from Taiwan's initial management of the pandemic point to aspects of NZ's response that could have been more effectively managed.¹⁹⁷ Taiwan was much better prepared than NZ, which put it in a relatively better position to respond effectively and quickly to COVID-19. It had a strong, standing public health infrastructure developed after the SARS pandemic in 2003. This featured a dedicated national public health agency, with an embedded pandemic plan flexible enough to be adapted to new pathogens. It had more vigorous border controls early on, introduced mass masking from the outset, and was well ahead of NZ in its use of digital technologies for contact tracing and MIQ enforcement. There is some indication that NZ's Government has taken onboard some of these lessons. It has committed to establishing a dedicated national public health agency by July 2022 and to launching an official inquiry into NZ's response so that lessons can be learned, once the unparalleled global tragedy of COVID-19 is, hopefully soon, behind us all.

197 K Williams, 'Covid-19: Public Health Experts Call for Inquiry into New Zealand's Coronavirus Response', *Stuff*, 22 October 2020.