

New Zealand: Rendering Account During the COVID-19 Pandemic

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Introduction

Just over a year since the first outbreak in New Zealand, we cast our eye back and reflect on the government's response to the Covid-19 pandemic. Without question, the response is a study in the wonders of modern government, given the magnitude of the threat, the different dimensions of community wellbeing at stake and different parts of government involved in the response. Public health guidance, clinical health care, economic support and stimulus, social welfare and support, border security and surveillance. The list goes on. While trying to achieve the best outcomes for communities in these relatively unfamiliar emergency settings, the government has also been expected to honour the usual civic expectations: constitutionality, legality, legitimacy, fairness – and kindness. And rightly so. It follows, too, that the government was expected to explain its actions and be judged accordingly. It is that phenomenon of rendering account, in a time of crisis, that I focus on in this note.

Strategy

New Zealand's success so far in stamping out the virus is well-known, although its ongoing elimination strategy is not without challenges (see, generally, [Knight \(2020\)](#); [Knight \(2021\)](#)). The country has managed to keep the number of diagnosed cases at just over 2,000 and number of deaths to 25. Much of that is attributed to the government's 'go hard, go early' response. An aggressive nationwide lockdown of 7 weeks from late-March to mid-May 2020 broke the chain of community transmission. A border fortress was constructed, with mandatory state-managed quarantine for 14 days on entry. Within this nationwide bubble, the country has been blessed with long virus-free periods – interspersed with small outbreaks arising from border breaches. That is to be expected under the elimination strategy, which contemplates a sophisticated form of 'whack-a-mole' if the virus re-emerges. Short-sharp regional lockdowns, temporary elevation of other precautions, super-charged contact tracing and testing, and forensic examination of transmission are all used to dampen down any flare-ups. New Zealand's success so far can probably be explained by a mix of factors: late onset of the virus, early and aggressive lockdown, favourable geographical settings, effective leadership, coherent communication and community cooperation – as well as a good sprinkling of luck.

Framework

These outcomes were achieved using a multi-layered and evolving framework of emergency legal powers. The main legal tool used was the power to issue health orders and directions. Originally, these health orders were issued by the director-general of health under the long-standing special powers in the [Health Act 1956](#) to combat infectious diseases. In mid-2020, a more nuanced and sophisticated legal regime, the [Covid-19 Public Health Response Act 2020](#) was passed, transferring the primary power to make health orders (now Covid-19 orders) to a minister and wrapping the emergency directive powers with additional checks-and-balances and safeguards. Notably, neither the original health orders nor the new Covid-19 orders are immunised against the force of the [New Zealand Bill of Rights Act 1990](#): if they unjustifiably breach human rights, they can be invalidated.

More generic emergency directive powers were also available under the [Civil Defence Emergency Management Act 2002](#), activated by a state of national emergency in place from late-March 2020 to mid-May 2020. The [Epidemic Preparedness Act 2006](#) triggered these emergency powers, through a declaration – still in force – of an epidemic; this declaration also enlivened dormant provisions throughout the statute book alleviating administrative hurdles and unlocked a (barely used) Henry VIII power to modify primary legislation.

At a community-wide level, health and Covid-19 orders reflected alert levels set by Cabinet under an extra-legal [alert level framework](#). The system of four alert levels – exhorting the general nature of risk and commensurate restrictions – stood at the heart of an extremely powerful and effective communications strategy. On the ground, more surgical directive orders were also issued by health officials to particular people and communities, especially to manage small flare-ups after the virus occasionally broke through the border fortress.

Accountability

So, to what extent was the government held to account for the decisions it made under this framework of emergency powers? To answer this, we might think about accountability as a relational concept, where a government actor is obligated to explain what's gone on to a particular forum, where the forum questions and passes judgement, and where consequences (whether formal or informal) may flow from that judgement ([Bovens \(2007\)](#)). In other words, accountability is a series of conversations which appraise the government's actions. Those conversations were many and varied during the pandemic. Accountability conversations are also coloured by the standards against which the actor will be judged by the forum. Broadly speaking, some of those conversations take on a political hue, some are framed in legal terms, and others focus on continuous improvement and efficacy – the democratic, constitutional, and learning perspectives of accountability.

Democratic

Democratic accountability, both formal and informal, has been the most prominent means by which the government's actions have been judged.

Parliamentary proceedings were barely disrupted. The House of Representatives only adjourned for just over a month during the nationwide level 4 lockdown in March and April 2020. When the House resumed its usual operations, interrogating the efficacy of the government's response dominated its proceedings – in parliamentary questions, general and specific debates, and debates on pandemic-related legislation. Resort to special logistical arrangements (reduced quorum, adjustments to proxy voting, physical distancing, etc) were not needed, other than for a couple of weeks in total.

The [Epidemic Response select committee](#) served as our 'Parliament-in-miniature', while the House was adjourned and for a little time after. Chaired by the leader of the opposition and with an opposition majority, this specially-constituted committee was quite effective in interrogating ministers, officials and experts on all aspects of the government's response and played an important agenda-setting role in political discourse. Other select committees kept up their work and oversight of government as well. Especially notable – and quietly effective – was the scrutiny of health and Covid-19 orders by the [Regulations Review committee](#) in accordance with their standard remit over secondary legislation. So, too, the Finance and Expenditure committee and its post-enactment [inquiry into the operation of the Covid-19 Public Health Response Act 2020](#). The inquiry was mandated, based on suggestions from scholars, after the draft legislation was rushed through without the usual select committee and public scrutiny (the particular committee chosen for its cross-party expert membership, not particular subject alignment). The scrutiny work of subject-based select committees continues but the diminishing sense of crisis has sometimes seen partisan politics creep back in; for example, backbench government MPs were recently criticised for [stonewalling the questioning of key officials](#) – earning a rebuke from the Speaker.

More broadly, the government rendered account direct to the community – kanohi ki te kanohi (face to face). Daily media briefings, watched religiously by a large swathe of the public, saw the government interrogated deeply about all aspects of the pandemic and response. Those briefings continue today, although less frequently. The prime minister, director-general and others supplemented official briefings with live updates on social media (including the attorney-general who took to [Facebook Live to give a detailed explanation of the legal basis for the lockdown](#) when question marks had been raised). A whole-of-government website – '[Unite Against Covid-19](#)' – stocked information on every aspect of the pandemic and response. All [Cabinet papers and minutes](#) during the pandemic were released month-by-month, with only minor redactions (apparently unprecedented amongst comparable jurisdictions, although a routine practice that preceded the pandemic). Despite occasional protestations that the government was evading responsibility or concern that briefings were unduly stage-managed, the reality is that the pandemic supercharged a direct accountability conversation between government and public like never before.

And the people's judgement was a positive one. A [general election](#) – the ultimate political test – was held in October 2020 (slightly delayed due to a minor outbreak of the virus). Understandably framed as the Covid-19 election, the government's track-record in combating the virus was the hot topic on the hustings. Prime Minister Jacinda Ardern and her Labour party was returned to power, increasing their support from 36.9% to 50.0% — the first time a single party has achieved an outright majority in over two decades of proportional representation. One of her minor coalition partners (NZ First) didn't fare so well, missing out on re-election; another confidence-and-supply partner (Greens) increased their support and re-joined Labour in government.

Constitutional

Constitutional accountability played a notable, but relatively minor, role during the pandemic. Most of the legal focus was directed at the legal authority for the nationwide lockdown. Some questions have also bubbled up about the border fortress, especially the effect on citizens' right to return, but the legal implications have not yet been litigated. The lack of resort to the courts to contest the government's actions perhaps says something about New Zealand's constitutional culture – a high degree of trust in government and instinct to contest policy through political means.

In the main challenge, *Borrowdale v Director-General* [\[2020\] NZHC 2090](#); [\[2020\] 2 NZLR 865](#), the High Court rejected a claim that health orders mandating the nationwide lockdown were ultra vires but accepted that some early messages to stay at home lacked the necessary legal underpinning (see [Rodriguez Ferrere \(2020\)](#); [Geiringer and Geddis \(2020\)](#); [Knight \(2020\)](#); [Knight \(2021\)](#)). The nationwide lockdown was implemented though: (a) a health order closing premises, other than essential businesses, and prohibiting public congregation; and (b) another health order, issued 9 days into the lockdown, formally requiring everyone in the country to isolate at home in their household bubbles, subject to narrow exceptions. The main argument in *Borrowdale* was about whether the power in section 70(1)(f) of the Health Act 1956 to 'require persons ...to be isolated [or] quarantined' could be used to require the entire country to stay at home. Was it a narrow individualised power, only to be used on a case-by-case basis to isolate or quarantine those infected or suspected of being infected? Or was it a broad power able to be used, as it was, universally over the entire community? The Court accepted the latter interpretation was open, especially given the power's emergency purpose, context and history. Significantly, the Court rejected an argument that statutory recognition of the principle of legality in section 6 of Bill of Rights Act dictated a narrow, rights-consistent reading. But, while rights-demands did not narrow the gateway for accessing the emergency powers, the Court rightly acknowledged that the *exercise* of those powers must be rights-consistent. And the Court went on to observe the lockdown was 'a necessary, reasonable and proportionate response to the Covid-19 crisis at that time' (even though the point wasn't contested in the judicial review proceedings). Other quibbles with the terms of the health orders were also dismissed.

The Court, however, found that the government's messages to stay at home during the first 9 days of lockdown – before the health order formally requiring

isolation was issued – were unlawful. Urging people to stay at home in media briefings and speeches, the Court ruled, limited their mobility rights under the Bill of Rights Act without the necessary legal mandate. In constitutional terms, the limitation on people’s freedom of movement was not *prescribed by law*, as it needed to be if it was to operate as a justified limitation on protected rights (even though, in substantive terms, the limitation was justified). Central to this ruling was the crucial finding that the words of the prime minister, director-general and police commissioner came with normative force; in other words, the messages were ‘replete with commands’, ‘conveyed that there was a legal obligation on New Zealanders to comply’, and were not merely advisory statements counselling voluntary compliance. Only a declaration was issued and it is not expected that the finding has significant knock-on consequences; the police were not aggressively enforcing the lockdown in the early days and the handful of prosecutions appear to have been for breaches of other legally authentic requirements, not the generic stay-at-home message.

The *Borrowdale* case required the government to explain its theory of the legal underpinnings of the lockdown. The government was successful in defending and justifying most of its actions; only a bit of the legal foundation in the early days proved fragile. Thus, the government was able shrug off the adverse appraisal – forgivable action during the early hectic days of lockdown and unlawfulness long since remedied. *Borrowdale* has since appealed to the Court of Appeal, with a hearing still months away.

A couple of other cases, *Christiansen v Director-General of Health* [2020] NZHC 887; [2020] 2 NZLR 566 and *Hattie v Attorney-General* (CIV-2019-404-303), called on the government to explain refusals to grant compassionate exemptions to family members to visit dying relatives. The government’s actions were criticised by the courts – both in terms of legality and basic fairness – and led to the government reviewing and improving its decision-making processes.

Learning

Learning accountability – systematic improvement through ongoing feedback loops – is tricky to quantify. But there’s reason to believe this form of accountability was especially rich throughout the pandemic. The government’s actions were often described, to borrow a rugby term, a ‘rolling maul’: the response continually evolved and morphed – in the light of reflexive self-appraisal, external quibbles and suggestions, and improved appreciation of health risks and efficacy of precautions. Some of this change was no doubt also nudged along by the other forms of accountability, such as the political and the legal.

We can point to, as examples, several formal reviews, addressing matters such as personal protective equipment, management of managed isolation and roll-out of border testing. Just recently, a [standing advisory body of experts](#) was commissioned to scrutinise the response on an ongoing basis. More subtle were conversations with departments taking place beyond the public gaze and their role in improving government actions. The list of essential businesses allowed to operate during the nationwide lockdown was often updated to reflect anomalies pointed out. The

shape of alert level rules were revised to address concerns raised by businesses, community groups and scholars. MPs were given a hotline to pursue problems raised by their constituents directly with mid-level departmental officials.

In short, incremental improvement was common – and continues. Systemic improvement has not always been flawless though; for example, [sentinel testing of border workers](#) did not roll out as swiftly and comprehensively as slated, even after deficiencies were identified. But accountability through learning has been a key feature of the government’s response.

Conclusion

We often worry that emergency conditions inevitably erode the accountability of government. Yet, it’s striking that accountability was not dodged or evaded in New Zealand. The government worked hard to render account about its actions; there remained many and varied opportunities for its response to be interrogated and judged. Sure, beneath this rough sketch of the chorus of accountability, inevitably, there were particular instances where accountability didn’t bite in the way that we might have hoped. But, in general terms, accountability was preserved and enhanced.

My suspicion, too, is that this openness to responsibility was crucial in fortifying the social licence for the extreme measures the government took. In other words, the government bred legitimacy for its response through its open attitude to accountability. This speaks, I think, to an aspect of constitutional culture in New Zealand – a sense of civic virtue that predates the pandemic but one that has been rarefied throughout it.

