

24 August 2020

Hon Chris Hipkins
Minister of Health
Parliament Buildings
WELLINGTON

By email

Tēnā koe Minister,

We write to you regarding human rights matters relevant to the Government's COVID-19 response that have arisen in light of the judgment of the High Court in *Borrowdale v Director-General of Health* and the 13 August 2020 announcement of the Director-General of Health regarding managed isolation and quarantine of persons who test positive for COVID-19. We have provided a copy of this letter to the Director-General of Health and the Minister of Justice for their reference.

The Borrowdale judgment

It is notable that, in its judgment, the High Court referred to a statement issued by the UN Human Rights Committee on derogations under the International Covenant on Civil and Political Rights (ICCPR) in connection with the COVID-19 pandemic. The statement sets out human rights requirements and conditions that States must observe when exercising emergency powers. This includes, where possible, that the attainment of public health objectives should be achieved by states restricting rights in a permissible way rather than by way of derogation under Article 4 of the ICCPR.¹

The UN Human Rights Committee has held that there are three grounds upon which a restriction on rights is permissible. These grounds are proportionality, necessity and legality² and are, to a large extent, reflected in New Zealand domestic human rights jurisprudence. It is notable that the Court found that the first cause of action concerning the Level 4 announcements between 26 March 2020 and 3 April 2020 partially succeeded on the basis that while the restrictions on rights that were announced at the time were necessary and proportionate, they were not legal.³

While this temporary lapse can be forgiven due to the extraordinary circumstances of the time, the Commission considers the Court's judgment on this issue is instructive. It underlines the

¹ *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [47]

² For example, see UN Human Rights Committee *General Comment No 27 on Freedom of Movement* at [11]

³ *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [292]

importance of ensuring that public health measures to address COVID-19 that restrict rights have a legal basis and that this legal basis is clear, transparent and accessible.

The Director-General's announcement of 13 August 2020

This brings us to the announcement made by the Director-General of Health on 13 August 2020 that he had directed medical officers of health that all confirmed cases of COVID-19 are to be managed in a quarantine facility.⁴ Such a measure has obvious human rights implications. On its face, it is the most restrictive measure yet for people living in New Zealand who contract the virus.

Despite this, the legal basis for the announced measure does not appear to have been made clear to the public. The Commission understands that such directions are made under the Health Act 1956, rather than the bespoke COVID-19 Public Health Response Act. However, there appears to be no obvious publication of this. We would be grateful for any clarification you can provide on this measure, its current use and the publication of it. In particular, please indicate whether the measure is applied on a case-by-case basis that requires informed consent or involves the compulsory, non-discretionary removal and placing of people into managed facilities.

The Commission is not seeking to question the legal basis of the measure itself. However, we do wish to point out the importance of ensuring that legal measures that restrict rights are made transparent and accessible to the public. This is essential for gaining and maintaining public trust and confidence. For the most part, during the COVID-19 emergency, the Government has done a commendable job in this respect.

The announcement has caused some concern in the community that the measure will have a disproportionate impact on Māori and Pacific people, due to the geographic location of the outbreak. There has also been concern expressed at the disproportionate impact the measure may have on disabled people, specifically whether appropriate accommodations for disabled people are available in quarantine facilities. We would therefore be grateful if you could please inform us of any consultation processes the Ministry undertook with Māori and Pacific communities and with disabled people's organisations prior to announcing the measure.

Please note that we have contacted the Ministry regarding the impact on disabled people and have been advised that the current approach involves an assessment process that places an emphasis on the needs of the individual. We understand it does not presume the removal of a disabled person into a managed quarantine facility if isolation, infection management and security requirements can be met in their current environment. We look forward to this approach being communicated to the general public.

Finally, the Commission understands that rest homes moved to a temporary level 4 standing following the shift in alert levels on 12 August 2020. We are concerned at the long-term implications of this type of differential response in rest homes and residential care environments which restricts the rights of residents to receive visits from family and loved ones, among other things. Is the government currently working on a strategy or policy regarding this particular matter?

Thank you for your consideration of the issues we raise in the letter. The Commission welcomes the opportunity to have an ongoing dialogue with you and the Ministry on the complex human rights challenges that have emerged from the COVID-19 emergency. The Commission's Chief

⁴ As reported in Select Committee News, *Notes on COVID-19 Press Conference*, 13 August 2020, p 2

Legal Adviser, John Hancock, can be contacted for further information on the human rights law matters outlined above.

We look forward to your response,

Nāku noa, nā



Saunoamaali'i Dr Karanina Sumeo
EEO Commissioner



Paula Tesoriero MNZM
Disability Rights Commissioner

cc. Dr Ashley Bloomfield, Director-General of Health
Hon Andrew Little, Minister of Justice