

# Covid 19 coronavirus: Grant Illingworth - The need for legal clarity in a pandemic world

By Grant Illingworth

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## COMMENT:

In an article published recently in the Times, eminent UK jurist Lord Sumption served a warning about the dangers of rule by executive fiat in the social chaos of the current coronavirus pandemic. This echoes the dissent of Lord Atkin in the 1941 case of *Liversidge v Anderson* where he famously said that, even "amidst the clash of arms" in wartime, the laws are not silent and judges should protect us from encroachments on our liberty, "alert to see that any coercive action is justified in law".

The idea that coercive action must always be justified in law is now accepted as a fundamental principle in most legal systems, being part of the modern theory known as "the rule of law". Lord Atkin's dissenting opinion has thus become the orthodox view. And in the upheaval of a worldwide pandemic, the rule of law should still prevail.

Many people will treat the rule of law as irrelevant nonsense in circumstances where multitudes of lives are at serious risk and all that

seems to matter is finding pragmatic solutions to practical problems like staying healthy, paying the bills and getting access to essential goods.

Why should we care about the technicalities of the law when all that matters is survival? But many of the questions currently troubling us can be answered only by reference to the rules of our legal system. For example:

- Is it legal for me to drive to the beach so I can go for a walk in the fresh air?
- Can police arrest me if I go for a drive, in my own bubble, harming no-one?
- How can I make a new will if I am not allowed to meet with witnesses?
- How can they force my butcher to close while the dairy stays open?

These are obviously legal questions. Instead of concluding that law has become irrelevant, we might start thinking the line between rights and wrongs has become even more significant in the post-Covid world than it was before everything was turned upside down.

One view is that the antidote to coronavirus confusion is to "go with the flow". The Government knows what's safe, so we shouldn't worry about the distinction between rules and recommendations. If we follow their recommendations, we won't break the rules. At least we won't get into trouble. In most situations going with the flow will be the safest course; it makes perfect sense not to rebel when it is obvious the PM and her team are trying their hardest to do what's best for our whole community.

But there is a shortage of official information about what is legally permitted and what is not. If we turn to the official Government website for answers ([www.covid-19.govt.nz](http://www.covid-19.govt.nz)), we find numerous grey areas and it's hard to tell the difference between rules and recommendations. Most people know ignorance of the law is no excuse; but if we can't find out what laws apply to us, that seems unfair. So where do we look to find the answers?

Under our legal system, we all have certain rights upon which we are entitled to rely. Since 1990, most of those rights have been affirmed in the Bill of Rights Act. Our rights include freedom of movement within New Zealand, freedom of association, freedom of peaceful assembly, the right of citizens to enter New Zealand, the right for everyone to leave the country and the right not to be arbitrarily arrested or detained. But those rights are subject to certain limitations.

They can be restricted by other Acts of Parliament and also through discretionary powers exercised by government officials. Those decisions must be consistent, though, with the principle that restrictions on rights must be "prescribed by law" and can be "demonstrably justified in a free and democratic society". So how are our current restrictions prescribed by law, and demonstrably justifiable?

Most of the special powers being relied on by government in the current crisis can be found in the Health Act 1956, the Civil Defence Emergency Management Act 2002 and the Epidemic Preparedness Act 2006. The civil defence legislation empowered our Government to declare a state of emergency in New Zealand on March 25. Other powers then came into force, including a suite of special powers under the Health Act. Our government is not pretending to have authority to make arbitrary decisions about our basic rights. Decisions by officials are based on statutes enacted into law long before the current health crisis developed.

In circumstances where ordinary folk need to understand their rights, and where people can be punished for disobedience, it is important for government agencies not to gloss over the distinction between rules and recommendations. At present, the public have no easy way to distinguish them. In circumstances where lives are at stake, and where economic survival may soon become a pressing issue, it is important for the Covid-19 website to be updated to provide greater clarity on the powers of the state in a time of unprecedented crisis.

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