

Executive Summary

1. The dedication, hard work and professionalism of those managing and policing the response to the COVID-19 and protecting public safety is deserving of commendation in the highest terms.
2. Whilst this paper questions the legality of the curfew measures imposed, nothing in it is intended to detract from the fact that they remain the law in the Cayman Islands and the law must be complied with.
3. For the 'hard curfew' to be lawful under the Police Law and Constitution the Commissioner of Police must have *reasonable grounds* to believe it *necessary* in the interest of *public safety or public order* and he must obtain the *written permission of the Governor*.
4. Where these requirements are satisfied a curfew may be imposed for up to 48 hours. The question of the status of the current curfew which has been in place since late March extended periodically in 2 week blocks needs to be addressed.
5. Even if the requirements of the Police Law are satisfied that is not an end of the matter. It is very strongly arguable, based on the ECHR case law, that a significant restriction such as that created by the combination of the hard and soft curfews in Cayman, backed with criminal sanctions of up to 12 months in prison, is likely to engage the right to liberty as well as the right to freedom of movement (and several other rights) under the Constitution.
6. The Constitutional exemptions allowing for the restriction of rights in the interests protecting public health must be "*in accordance with a procedure prescribed by law*" (see 3 & 4 above).
7. These restrictions must also be *reasonably justifiable* (or necessary) in a democratic society to achieve a *legitimate aim* and must be a *proportionate* method by which that aim can be achieved.
8. The 24 hour lockdown has not been properly justified when analysed against these tests and is open to serious challenge under the Constitution and ECHR.
9. The beach/marine ban has not been properly justified when analysed against these tests and is also open to serious challenge.
10. The Constitution requires: "*Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act*". The following should be provided immediately:
 - a) Copies of the written permissions from the Governor to the Commissioner of Police to grant a curfew under s.49 of the Police Law.
 - b) Explicit identification of the legal basis on which it is contended that a curfew can be imposed for more than 48 hours in the face of the restriction in s.49(6) of the Police Law.
 - c) Detailed reasons why the 24 hour lockdown and ban on beach and marine activity remain necessary, how they achieve their objective of protecting public health, and why they are the least restrictive means by which that aim can be achieved.

Introduction

For over 6 weeks now the residents of the Cayman Islands have been subject to unprecedented restrictions on their liberty – some of the most restrictive globally. Whilst it is quite clear that the threat caused by the COVID-19 virus is also unprecedented it is also right that there be legal scrutiny of the measures imposed by the authorities. Legal and academic scrutiny of legislation is a hallmark of democratic society and the foundation of the rule of law.

This paper is intended to provide a very brief introduction to the legal concerns engaged by the some of the current restrictions. It does not purport to begin to provide a full analysis of all the issues raised which would require a very lengthy paper. More importantly, whilst it questions the legality of the measures

imposed, nothing in it is intended to detract from the fact that they remain the law in the Cayman Islands and breach of them constitutes a criminal offence with the potential for imprisonment. The law must be complied with.

Further, as is obvious, no personal criticism of those managing and policing the response to the COVID-19 is intended – quite the reverse, their dedication, hard work and professionalism in protecting public safety in these most challenging times is deserving of commendation in the highest terms.

The Law

The current restrictions fall into two categories: The ‘hard curfew’, which currently operates from 8 pm – 5 am from Monday to Saturday and for 24 hours on Sundays. Entering the beach and any marine activities are completely restricted at any time. The ‘soft curfew’ which operates 5am to 8pm Monday to Saturday and prevents residents from leaving their place of residence except for ‘essential outings’, exercise (once for up to 1 ½ hours a day) or when in danger. Public gatherings are banned save for limited exemptions.

Given the limitations of space this paper addresses in the main the more draconian ‘hard curfew’ imposed by the Commissioner of Police. It should not be inferred from this that the author regards the ‘soft curfew’ as above criticism, on the contrary, there are significant human rights concerns raised by it and its legality is far from clear.

The Police Law 2017 (Revision)

Section 49(1) of the Police Law (2017 Revision) (“**the Police Law**”) permits the Commissioner of Police to impose a curfew where “*there are reasonable grounds to believe that in the interest of public safety or public order it is necessary so to do...with the written permission of the Governor*”. Significantly, the Police Law continues at subsection 6: “*Where a curfew is imposed, the curfew shall, unless revoked...endure for a period not exceeding forty-eight hours*”. Accordingly, amongst the other requirements of the Police Law, in order to comply with it the Commissioner must have reasonable grounds to believe it necessary in the interest of public safety or public order and he must obtain the written permission of the Governor.

Assuming these requirements are satisfied a curfew may be imposed for up to 48 hours. The question of the status of the current curfew which has been in place since late March extended periodically in 2 week blocks needs to be addressed.

The Constitution and the European Convention on Human Rights

Even if the requirements of the Police Law are satisfied that is not an end of the matter. The Police Law is subject to the Bill of Rights in the Constitution of the Cayman Islands which mirrors the rights provided under the European Convention of Human Rights (“**the ECHR**”). A number of rights are engaged in the current situation. Significantly, under section 5 of the Constitution no person may be deprived of their liberty and under section 13 freedom of movement is guaranteed. Whether a curfew constitutes a deprivation of liberty or, less seriously, a restriction of movement will be a matter of fact and degree – the latter being more easily demonstrated than the former. However, it is very strongly arguable, based on the ECHR case law, that a significant restriction such as that created by the combination of the hard and soft curfews in Cayman, backed with criminal sanctions of up to 12 months in prison, is likely to engage the more serious section 5.

The rights under section 5 are not absolute and there are exemptions. Significantly for present purposes subsection 5(g) makes it clear that liberty may be restricted *“in accordance with a procedure prescribed by law...for the purpose of preventing the spread of an infectious or contagious disease”*. Similarly, section 13 and the rights to freedom of assembly (s.11), private and family life (s.9), protection of religion (s.10) property (s.15) and education (s.20), all of which are also engaged, all include similar public health exemptions. Most obviously, the exemption must be *“in accordance with a procedure prescribed by law”* in this case that will be the Police Law, the requirements of which are dealt with above.

But even identifying these public health exemptions to the Constitutional rights is not the end of the matter. The Constitution is explicit in section 19: *“All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair”*. One of the most important (and commonly breached) rights in the Constitution, simplified for present purposes that means that to be compliant with the Constitution (and the ECHR) the hard curfew must be *in accordance with the Police Law*, and *reasonably justifiable* (or necessary) in a democratic society to achieve a *legitimate aim* and must be a *proportionate* method by which that aim can be achieved.

It is uncontroversial that the prevention of the spread of COVID-19 is a legitimate aim, whether the interferences with all the rights outlined above by the imposition of the hard curfew can be properly linked to that aim and are proportionate are more difficult questions.

For good reasons the case law on restriction of liberty gives the state a wide margin of appreciation in taking steps to prevent the spread of infectious diseases, but it is also clear curfews and movement bans should be measures of absolute last resort and only imposed where no other methods would be sufficient to meet the risk. They must be no more extensive in scope and duration than is absolutely necessary.

The 24 hour Lockdown

The 24 hour lockdown faces serious questions when analysed against this legal framework. Against a background where the authorities accept that travel outside one’s residence from Monday to Saturday is permissible (including for exercise) it is extremely difficult to justify why on Sunday it becomes “necessary” to prevent the spread of COVID-19 that the population should be locked down for 24 hours. It has been suggested that the need for the 24 hour lockdown is to give law enforcement officers a rest. This ‘justification’ is problematic. Lifting the 24 hour lockdown would still leave the ‘soft curfew’ in place and the public only able to leave their residence for 90 minutes and not permit any vehicular traffic. The Commissioner has indicated that crime remains low in the Islands (presumably lower than usual due to the current restrictions) the extent of additional policing resources engaged would seem to be limited and should be identified; if they cannot be the ‘justification’ would fail the rationality and proportionality tests. But even were this ‘justification’ made out, it has long been accepted by the courts that a lack of resources is not a permissible basis for the denial of fundamental rights. The 24 hour lockdown and ban on Sunday exercise is open to serious challenge under the Constitution and ECHR.

The Beach/Marine Ban

The anger in the community directed at those who flouted social distancing guidelines and led the authorities to believe that a total ban on marine and beach activity was necessary was well-founded – their actions were not only *prima facie* unlawful; they were the very definition of selfishness. Nevertheless, that does not exempt the beach/marine ban from scrutiny under the Constitution and the ECHR.

Again, the basis for the ban has not been formally articulated other than in generalised references to the claim that resources do not enable the RCIPS properly to monitor and enforce social distancing on the beach/at sea. Such generalised references do not meet the requirements of clarity under the Police Law or the Constitution.

The same considerations identified in analysing the legality of the 24 hour lockdown apply. In particular, in respect of marine activity, it may be thought that significant breaches of social distancing requirements on watercraft are relatively easily identifiable and susceptible to monitoring by the police. Certainly they are more so than other activities which are currently permitted and open to potential abuse such as travel in motor vehicles or group exercise by individuals claiming to be part of a household. If this is not the position it should be explained why. Again, and in any event, a lack of resources will not be regarded as a good reason for the denial of fundamental rights.

As discussed above, the lawfulness of a measure will depend amongst other things on its duration. It may be thought that the widespread community anger against those who abused the social distancing guidelines previously and the increased public awareness of the risks associated with COVID-19 would have a powerful deterrent effect at this stage. Whether the ban can still be justified as both necessary and the least restrictive measure that could be adopted five weeks after it was originally imposed is very much open to question.

Conclusions

During a press conference last month the Premier stated that the current restrictions were not intended to be fair; they were intended to save lives. This is a powerful soundbite and it is also difficult to criticise the laudable objective it reflects. However, as the Premier himself noted, he is now a politician not a lawyer – were that statement to reflect the actual thinking of the authorities it would be an explicit admission that the measures were unlawful under the Constitution.

The Constitution states: *“Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act”*. The current restrictions engage this right. The public is entitled to be given, in clear terms, the reasons for the continued imposition of the hard curfew. In addressing this Constitutional requirement the following should be provided:

- Copies of the written permissions from the Governor to the Commissioner of Police to grant a curfew under s.49 of the Police Law (apparently this was recently requested by the press but not provided).
- Explicit identification of the legal basis on which it is contended that a curfew can be imposed for more than 48 hours in the face of the restriction in s.49(6) of the Police Law.
- Detailed reasons why the 24 hour lockdown and ban on beach and marine activity remain necessary, how they achieve their objective of protecting public health, and why they are the least restrictive means by which that aim can be achieved.

No one doubts the good intentions of the authorities; as stated at the outset of this paper they are deserving not only of our gratitude but also our commendation. However, this does not absolve the restrictions they have imposed of scrutiny or detract from the fact that serious consideration must now be given to whether the Sunday lockdown and beach/marine ban can be justified under the Police Law, the Constitution of the Cayman Islands and the ECHR.