

Ireland's Emergency Powers During the Covid-19 Pandemic

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and Equality Commission
by The COVID-19 Law and
Human Rights Observatory

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David Kenny and Donna Lyons

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.
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The authors of this Report are all members of the COVID-19 Law and Human Rights Observatory at Trinity College Dublin.¹ The Observatory was established in June 2020, with the support of the Trinity College Dublin COVID Response Fund, to engage in research across the full range of Ireland’s legal response to COVID-19, with the aim both to inform the public and to provoke public debate. The Observatory maintains the only consolidation of the regulations introduced by the Minister for Health, a catalogue of official statements and documents related to the pandemic response, and a blog that has addressed many issues, including all those mentioned in the Introduction that have fallen outside the scope of this Report. On 10 December, we published ‘*Law and Policy Responses to COVID-19 in Ireland: Supporting Individuals, Communities, Business, and the Economy*’. Further reports will be published in the coming months.

We wish to record our thanks to all other members of the Observatory whose work over the past six months has formed the basis for this Report, and in particular to Mark Bell, Mel Cousins and Andrea Mulligan who commented on earlier drafts. We were hugely fortunate to benefit from the excellent research assistance of Daniel Gilligan, Kate Heffernan and Cian Henry. We are grateful to the Commissioners and staff at the Irish Human Rights and Equality Commission for their support, advice and expertise. This partnership has enabled us to produce a Report that will both inform the public and—we hope—provoke debate on our response to one of the greatest challenges Ireland has ever faced.

¹ <https://www.tcd.ie/law/tricon/covidobservatory/index.php>.

Foreword

I am delighted to present this report by the Trinity College Dublin COVID-19 Law and Human Rights Observatory, which we commissioned in autumn 2020. We did so in order to take stock of, and to better understand, the human rights and equality implications of the emergency measures undertaken since March 2020 to tackle the COVID-19 pandemic.

The pandemic has posed an unprecedented and complex set of challenges to both State and society. Thousands of people have lost their lives and many more have experienced severe illness, while hundreds of thousands have seen their livelihoods affected. Many more have seen essential services, support mechanisms and community structures, on which they rely, stripped away and severely curtailed by the pandemic, and by the measures put in place to tackle it.

COVID-19 is more than a public health crisis. It is arguably the most significant set of human rights and equality challenges Ireland has ever faced. The way in which state and society meet these challenges, and adapt and improve as lessons are learned, will be a measure of how durable Ireland’s commitment is to human rights and equality, and how much we need to strengthen our efforts.

From the outset of the pandemic, and from the earliest introduction of legal and policy measures to address it, the Commission has stressed the need for the State to have regard to the human rights and equality impacts of its emergency decision-making. The COVID-19 crisis presented an unprecedented challenge to the State, and its obligation to protect the rights to life and health. However, it remains essential, and is in the public interest, that human rights and equality norms are upheld to the greatest extent possible. This adherence to the principles of human rights and equality is not only important to protect people in times of crisis, it is also about protecting against erosion of our values, our democracy, and the rights and equality we all deserve.

In particular, the Commission stressed the importance of ensuring clarity, transparency and adequate scrutiny of the regulations arising from the emergency legislation enacted in the early days of the pandemic, as well as transparency in the exercise of new powers by An Garda Síochána and other agents of the State. The Commission has also communicated to Government and the Oireachtas that the lessons learned thus far during this crisis must be brought to bear on how we continue to address the pandemic, as well as on how we meet the challenges of any potential future national emergency.

This is the context in which we commissioned this report from the Trinity College Dublin COVID-19 Law and Human Rights Observatory. The report provides a clear overview of the human rights and equality obligations that must inform the state’s deployment of emergency powers in response to COVID-19. It also demonstrates the crucial relevance of the Public Sector Human Rights and Equality Duty and its function in informing decision-making on all aspects of law and policy. The report

provides an insightful account of the manner in which emergency measures and regulations are being decided and introduced, including where there appear to be concerning gaps in transparency and in our systems of democratic scrutiny.

While, in the main, such measures can be justified by the obligation on the State to protect public health, the report identifies some areas of particular concern shared by the Commission.

These include:

- » The blurring of the boundary between legal requirements and public health guidance – something which is fundamentally out of step with the principle of the rule of law;
- » The potential for emergency measures and their enforcement to disproportionately affect certain disadvantaged and more vulnerable groups, including the significant effect of indirect enforcement. Of particular and urgent concern is the relaxation of procedural safeguards for detention on mental health grounds; and
- » The lack of human rights and equality expertise in the decision-making structures put in place to tackle the pandemic, or in the systems that implement and scrutinise these decisions. This also encompasses a notable lack of consultation with groups likely to be particularly impacted.

The Commission also welcomes the authors call for greater scrutiny and human rights proofing of regulations, including through the establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity – something for which we have long advocated. The authors’ focus on the importance of adequate collection of disaggregated data – fundamental to understanding the differentiated impact of the emergency measures on different groups – is also welcomed.

We hope this report will make a contribution in identifying some of the core areas where we can enhance protections of human rights, equality and the rule of law when adopting and implementing emergency powers, both as we continue to grapple with the current pandemic, and in potential future national emergencies.

A report such as this, however, can only begin to document the human rights and equality challenges presented by COVID-19.

COVID-19 has both exposed and exacerbated existing inequality in Ireland, and has intensified the challenges we all face to tackle it. Over the course of the pandemic, this inequality is evidenced in the sharp divergence in the experience of different groups in our society and, at times, a divergence in rights.

One significant disparity in rights is reflected in the treatment of people with

disabilities. A sudden and novel public health crisis presents an enormous challenge to any State, and its services. However, as the pandemic has progressed, there has been little evidence in the policy response that the need to balance the requirement to protect health and life, and other rights and freedoms, has reflected the particular rights and freedoms of people with disabilities.

Intersecting with the experience of people with disabilities during the pandemic, is that of older people, many of whom have age-related disabilities and live in congregated settings such as nursing homes where the impact of the virus has been particularly severe. Due to their particular vulnerability to the virus, and to public health measures such as ‘cocooning’, older people have experienced a significant level of isolation and dislocation from their families, and prolonged disconnection from social supports.

A second clear divergence has been along socio-economic lines, with certain people, including children without access to technology or space for remote learning; people living in overcrowded accommodation, including Direct Provision centres, Travellers and Roma; as well as those in precarious employment, experiencing the impact of the pandemic more acutely.

A third clear trend has been in the divergence of the experience of women and men, specifically with reference to a dramatic increase in reported domestic violence, and the impact of school and childcare closures on working mothers.

The Commission is committed to continuing its work to independently scrutinise the State’s approach to the pandemic.

Many, if not most fundamental societal challenges laid bare by the pandemic – systemic inequality, the strains on our social harmony, the serious gaps in democratic scrutiny and accountability – will not fade away as the virus does. However, our collective experience of the pandemic, our renewed appreciation of community and solidarity, and this magnification of our most fundamental societal challenges can inform a more equal and just society for our future.

Sinéad Gibney
Chief Commissioner

February 2021

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Executive Summary

Since March 2020, the Oireachtas has enacted four statutes and the Minister for Health has made 67 sets of regulations to respond to the COVID-19 pandemic. These have provided for a wide range of emergency restrictions on the everyday lives of ordinary people, enforceable through various mechanisms. These restrictions and their enforcement, while addressed to the management of an unprecedented public health crisis, raise significant human rights and equality concerns.

The Irish Human Rights and Equality Commission (IHREC) commissioned this Report as part of its remit to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality. The Report has been written by four members of the COVID-19 Law and Human Rights Observatory at Trinity College Dublin: Dr Conor Casey, Prof Oran Doyle, Prof David Kenny, and Dr Donna Lyons.

The Report identifies the human rights and equality obligations, in both national and international law, that control the State's response to COVID-19. In particular, the Report identifies how section 42 of the *Irish Human Rights and Equality Act 2014* obliges the Department of Health, the Health Service Executive (HSE), the Chief Medical Officer, National Public Health Emergency Team (NPHE), and An Garda Síochána to have regard to the need to eliminate discrimination when performing their functions.

The Report concludes that the principal measures introduced to control the pandemic—restrictions on movement and home gatherings, obligations to wear face coverings—are justified by the obligation on the State to protect public health. The Report, however, concludes that the erosion of procedural safeguards in respect of mental health detention effected by Part V of the *Emergency Measures in the Public Interest (Covid-19) Act 2020* is no longer justified, and therefore recommends its immediate repeal.

Even though the principal measures introduced to control the pandemic are justified, there remain significant human rights and equality concerns in two separate but related respects.

First, the State has repeatedly blurred the boundary between legal requirements and public health guidance, generating widespread confusion about the extent of people's legal obligations. This offends the rule of law, disrespects people's autonomy and, in several specific respects, breaches standards of national and international law.

Second, the restrictions and their enforcement have disproportionately affected vulnerable and disadvantaged groups, protected by various national and international legal instruments. Members of some of these already vulnerable groups are also the most at risk of uncertainty about their legal obligations when they interact with Gardaí in enforcement contexts.

The Government has also targeted vulnerable groups for indirect enforcement of public health advice through presenting it as effectively mandatory—most notably in April-May by telling older people that they must 'cocoon'—and by relying on other statutory schemes to enforce compliance with health advice—most notably in relation to social welfare recipients leaving the country.

The Report recommends that the Government should at all times maintain a clear distinction between measures that are legally obligatory and public health advice. In particular, the Government should not present public health advice as if were criminally enforceable.

It is likely to be the case—based on the nature of the restrictions, media reports of individual instances, and prior experiences of policing—that the enforcement powers are exercised by the Gardaí in a way that disproportionately affects groups such as young people, ethnic and racial minorities, and Travellers and Roma. But this cannot be ascertained because An Garda Síochána does not maintain disaggregated data that track how enforcement powers are exercised against particular groups. This has become even more pressing as use of new powers to fine those travelling outside their home has become commonplace. The Report joins both IHREC and the Policing Authority in recommending that the Garda Commissioner take steps to ensure that disaggregated data is obtained on the exercise of all enforcement powers, tracking all prohibited grounds of discrimination under the *Equal Status Acts 2000-2015*. Failure to do so is itself a breach of international human rights standards.

The Report traces many of these difficulties to the failure to have regard to human rights and equality standards in the law-making process. Although Members of the Oireachtas were attuned to these concerns, they were hampered by the lack of any structure in the Oireachtas for formal engagement with human rights and equality norms. More fundamentally, the fact that most restrictions are introduced by the Minister for Health through regulations makes it difficult to maintain effective democratic oversight.

“

...the Government should at all times maintain a clear distinction between measures that are legally obligatory and public health advice. In particular, the Government should not present public health advice as if were criminally enforceable.

Problems in the law-making process are exacerbated by the relationship between NPHE and Government. While the contours of this relationship have shifted over time, NPHE remains a powerful actor in the decision-making process in a way that diminishes attention to human rights and equality concerns. NPHE lacks the expertise to grapple with human rights and equality standards and indeed

abolished its subgroup that had some expertise on these issues. Yet once NPHEt's recommendations have been made, there is little time—even if there were willingness—to engage in human rights and equality scrutiny at Government level.

The Report makes several recommendations to address these defects in the law-making process, the most important of which are the following:

- » The establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity, (a) to review all primary legislation adopted as part of the COVID-19 response and (b) to report to the Houses of the Oireachtas on all Ministerial regulations;
- » All statutes adopted as part of the COVID-19 response should be subject to sunset clauses that allow for time-limited extensions of three months, by resolution of both Houses of the Oireachtas;
- » NPHEt should (a) establish a sub-group with the relevant expertise to address ethical, human rights, and equality concerns and (b) include such expertise within NPHEt itself;
- » The Government oversight committee that filters NPHEt recommendations should have representation from the Department of Children, Equality, Disability, Integration and Youth;
- » The Minister for Health should publish a human rights and equality analysis of the proportionality of each set of regulations within 48 hours of them being made; and
- » Section 31A of the *Health Act 1947* should provide that all regulations made by the Minister for Health will lapse within 10 sitting days if not positively endorsed by resolution of each House of the Oireachtas.

Introduction

On 12 March 2020, then Taoiseach Leo Varadkar announced restrictions—from the closure of schools and universities to advised limits on mass gatherings—in order to slow the spread of COVID-19.² These restrictions were not legally enforceable, but the Oireachtas has since enacted four statutes and the Minister for Health has made 67 sets of regulations. These regulations respond to an unprecedented public health crisis and have had an unprecedented impact on the ordinary, everyday life of all who live in Ireland.

This Report provides a human rights and equality analysis of the emergency powers adopted by the State to respond to COVID-19. It was commissioned by the Irish Human Rights and Equality Commission (IHREC). IHREC is Ireland's national human rights and equality institution. It is an independent public body that accounts to the Oireachtas, with a mandate established under the *Irish Human Rights and Equality Commission Act 2014*. On 25 March 2020, IHREC wrote to the Taoiseach emphasising the need to ensure emergency legislation in response to COVID-19 was necessary, proportionate and fair, and that it was implemented in line with human rights and equality principles.³ IHREC has made numerous public contributions on specific issues arising from the pandemic. In September 2020, IHREC commissioned this Report as part of its remit to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality.

This Report seeks to undertake a detailed examination of the core measures taken by the State in response to the COVID-19 pandemic that touch upon rights and equality concerns. The Report concludes that, in broad terms, the core pandemic measures that have been taken, though restricting rights in various respects, are generally proportionate and justified in light of the scale of the public health emergency facing the State. However, several major problems exist: a potentially unconstitutional restriction of rights of those in mental health detention; a series of issues around the drawing up and presentation of legal rules and public health advice that raise rule of law concerns; a disparate impact of pandemic measures on vulnerable groups, exacerbated by a lack of information about enforcement; and a failure in political oversight of pandemic response measures that would better ensure human rights compliance.

Chapters 1-3 of the Report outline the most salient human rights and equality standards, the statutory framework introduced by the Oireachtas, and the most relevant legal restrictions introduced by the Minister for Health. Chapters 1-3 pay particular attention to the Public Sector Equality and Human Rights Duty—contained in section 42 of the *Irish Human Rights and Equality Commission Act 2014* and applicable to the Department of Health, the HSE, the Chief Medical Officer, the National Public Health Emergency Team, and An Garda Síochána—to have regard to the need to eliminate discrimination when performing their functions. They

² 'Taoiseach's full statement: "I need to speak to you about coronavirus"', *RTE.ie* (12 March 2020).

³ IHREC, '[Letter to An Taoiseach in relation to the COVID-19 Pandemic](#)', (25 March 2020)

also outline the legal restrictions and enforcement powers introduced during the pandemic, covering the period April–November 2020.

Chapters 4–7 analyse the law-making process. They assess the extent to which human rights and equality concerns have been addressed in both the legislative process within the Oireachtas and the regulation-making process. They track the relationship between NPHET and Government over the course of the pandemic and identify the points at which human rights and equality concerns could be addressed. They also explore how the law has been presented and described by Government in ways that tend to overstate the restrictions on people’s behaviour and to blur the important boundary between legal regulation and public health advice.

Chapters 8–9 undertake a human rights and equality analysis of the most relevant restrictions, and of how they have been enforced. They pay particular attention to the vague formulation of criminal standards, the effect of the restrictions on disadvantaged groups protected in national and international law, and the possibly disproportionate exercises of enforcement powers. In this regard, they examine an apparent failure of An Garda Síochána to maintain disaggregated data on the exercise of enforcement powers. This is something that has become even more pressing in early 2021, with new powers used to issue 1,500 fines on those travelling outside their home over a period of two weeks in January.⁴

The Report seeks to contribute to public debate, both by making its own recommendations in chapter 10 and by providing a body of research and analysis to inform further contributions by IHREC and others. This is relevant not only in respect of the current pandemic but also more generally for the adequacy of the state’s framework to respond to future emergencies.⁵ Core recommendations include the establishment of a parliamentary committee on diversity, human rights and equality (or similar body) to provide oversight of rights concerns in the law-making process; a series of specific oversight measures, such as rigorous sunset and parliamentary validation of all core COVID-19-response regulations; and new structures to ensure rights are robustly considered in the making of these regulations.

Two limitations of the Report’s scope should be noted, one temporal and one of subject matter.

The primary research conducted for this Report was carried out between September and November 2020. It thus deals with the law and practice as it was on 30 November 2020. There have been some significant subsequent developments between then and the Report’s publication, some of which develop further the

⁴ <https://www.irishexaminer.com/news/arid-40213823.html>

⁵ IHREC, ‘Submission to the Special Committee on COVID-19 Response Regarding the Adequacy of the State’s Legislative Framework to Respond to COVID-19 Pandemic and Potential Future National Emergencies’ (September 2020).

substantial rights concerns identified prior to December 2020. The most notable of these are the mooted introduction of mandatory quarantine for those travelling into Ireland; the introduction in practice of on-the-spot fines as a primary method of enforcement; the rollout of a nationwide vaccination programme; and the closing of schools, including special educational provision, for an extended period in January and February 2021, leading to the initiation of High Court proceedings.⁶ These and other developments of this sort are referenced in the footnotes in this Report, but are not comprehensively addressed in the main text. Nevertheless, the analysis in the main text assists in both identifying such issues and suggesting appropriate responses.

In addition, the need to provide a coherent and concise analysis, that can meaningfully contribute to public debate, has led us to focus on those measures adopted to control the spread of COVID-19 that have impacted most directly on individuals in their ordinary, everyday lives. Although human rights and equality concerns are at their most acute in this domain, this focus excludes a number of related areas that raise significant human rights and equality concerns. We wish to recognise these expressly here, lest their exclusion from the Report be interpreted as a lack of concern on the part of the authors, or IHREC itself.

First, it has been well documented that the pandemic itself has a differential impact on particular groups—especially racial and ethnic minorities,⁷ older people,⁸ women and mothers, and those in prison. IHREC has drawn attention to how inadequate conditions on Traveller halting sites, such as the lack of running water, makes Travellers particularly vulnerable to the pandemic.⁹ These differential impacts require focused policy responses that take into account human rights and equality concerns.

Second, other state policies—for instance the system of direct provision for asylum seekers—have intensified the effect of COVID-19 for disadvantaged groups.¹⁰ The pandemic has increased the urgency of implementing the recommendation of the United Nations Committee on the Elimination of Racial Discrimination (CERD) to Ireland that it develop an alternative reception model for people seeking asylum, and should take concrete steps to phase out the Direct Provision system. Relatedly, IHREC has drawn attention to the challenges for those living in congregated settings, whether people with disabilities, older people, or

⁶ <https://www.rte.ie/news/2021/0127/1192369-education-court-challenge/>

⁷ In the US context, see [Center for Diseases Control and Prevention, ‘Health Equity Considerations and Racial and Ethnic Minority Groups’](#) (2020) (visited 27 November 2020).

⁸ Hernandez et al, ‘High-risk categories for COVID-19 and their distribution by county in Republic of Ireland—evidence from the TILDA study’ (2020).

⁹ IHREC, [Comments on Ireland’s 17th National Report on the Implementation of the European Social Charter](#), (June 2020).

¹⁰ IHREC, ‘Statement from the Irish Human Rights and Equality Commission In Respect of Direct Provision’, (8 May 2020); IHREC, ‘Statement from the Irish Human Rights and Equality Commission In Respect of Direct Provision’ (19 August 2020).

those in prisons and mental health detention facilities.¹¹

Third, the restrictions introduced to control the pandemic themselves introduce socioeconomic hardship, to which the State has responded through a series of measures. IHREC has already drawn attention to some concerns about the distributional effect of these measures.¹² This response is addressed in a report recently published by the Observatory,¹³ but further analysis from a human rights and equality perspective would be highly desirable.

Finally, even within the regulations on which this Report focuses, there are many other restrictions on businesses, restaurants, pubs, sport training, and events in general. The Report does not focus on these for two related reasons. On the one hand, the legal measures are so complex and frequently changing that it would have considerably lengthened an already lengthy Report to present them accurately. On the other hand, the human rights and equality concerns, while still real, become less pressing the more one moves away from interpersonal relationships, particularly those within the home, towards commercial activity. In broad terms, the public health justification for measures that impose significant limitations on personal freedom are even more likely to justify restrictions on business activities; the rule of law concerns should remain the same; and businesses do not receive the same protection in national or international human rights and equality law as do individuals.¹⁴

11 IHREC, [‘The Impact of COVID-19 on People with Disabilities: Submission by the Irish Human Rights and Equality Commission to the Oireachtas Special Committee on COVID-19 Response’](#) (June 2020).

12 On the legality of the Wage Subsidy Scheme insofar as it related to employees returning from maternity leave, see IHREC, [‘Letter to Minister for Finance & Public Expenditure and Reform, Paschal Donohoe TD’](#) (28 May 2020). On the legality of the exclusion of certain persons living in Direct Provision from the Pandemic Unemployment Payment, see IHREC, [‘Letter to Minister for Employment Affairs and Social Protection, Regina Doherty TD’](#) (29 May 2020)

13 COVID-19 Law and Human Rights Observatory, ‘Law and Policy Responses to COVID-19 in Ireland: Supporting Individuals, Communities, Business, and the Economy’ (10 December 2020).

14 For readers who wish to explore these issues further, the [Observatory Blog](#) has addressed them on a number of occasions.

Chapter 1

Overview of Human Rights and Equality Guarantees

Introduction

Ireland, like nearly every country in the world, has imposed significant restrictions on ordinary everyday life in order to limit and control the spread of COVID-19. Few would question the entitlement of—and even the obligation on—the State to adopt measures of this type to protect its citizens. But those measures raise human rights and equality concerns, in particular in relation to disadvantaged and vulnerable groups. In this chapter, we outline the human rights and equality standards against which we will assess the adoption, import, and enforcement of the measures in later chapters. Although we refer to legal instruments and court decisions, our purpose is not to identify grounds of legal challenge to the measures. Rather, we seek to identify human rights and equality concerns so that these may be more successfully addressed by policymakers as the pandemic continues and in any future public health emergencies.

In this chapter, we outline the relevant human rights and equality standards, and later in the Report we will engage in more detailed analysis where appropriate in the context of particular infringements. The following legal instruments are particularly relevant to our analysis: the *Constitution of Ireland 1937* (the Constitution), the *Equal Status Acts 2000-2015* (ESA), the *Employment Equality Acts 2000-2015* (EEA), the *Irish Human Rights and Equality Commission Act 2014*, the *European Convention on Human Rights 1951* (ECHR), the *International Covenant on Civil and Political Rights* (ICCPR) 1966, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966, the *Convention on the Elimination of all forms of Racial Discrimination* (CERD) 1965, the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) 1979, the *Convention on the Rights of the Child* (CRC) 1989, and the *Convention on the Rights of Persons with Disabilities* (CRPD) 2006.

These legal instruments have varying degrees of enforceability. The obligations in the Constitution directly control the State in all respects. The obligations in the ECHR are indirectly incorporated at a sub-constitutional level through the *European Convention on Human Rights Act 2003*, while individuals can bring the State to the European Court of Human Rights for alleged breaches of the ECHR having exhausted domestic remedies. The ESA cannot control statutes passed by the Oireachtas and probably also cannot control regulations adopted by Government Ministers.¹⁵ Although Ireland is a party to the ICCPR, ICESCR, and other UN treaties mentioned above, it has not incorporated these treaties into national law.¹⁶ They are therefore not directly enforceable in the same way as the

¹⁵ *G v The Department of Social Protection* [2015] IEHC 419, [2015] 4 IR 167 [142].

¹⁶ It should be noted that there are a variety of enforcement mechanisms at the international level vis-à-vis the international human rights treaties to which Ireland is a state party. In relation to international oversight of Ireland's obligations under the ICESCR specifically, see Donna Lyons, 'Ratification of the Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights* Particularly Pressing in Pandemic Context' COVID-19 Law and Human Rights Observatory [Blog](#) (29 June 2020).

ECHR. That said, international standards to which the State has committed itself may be employed as interpretative tools in both policy-formation and decision-making. All these instruments—irrespective of their precise legal status—reflect human rights and equality standards to which the State has committed. They are therefore of fundamental importance in framing the analysis presented in this Report.

The *EU Charter of Fundamental Rights 2000*, in principle, only applies to Member States when they are implementing EU law.¹⁷ That said, the Court of Justice of the European Union has been relatively liberal in its interpretation of the Charter, extending it to a broader range of measures falling within the scope of application of EU law. We limit our consideration of the Charter to the obligations on international passengers arriving in the State, in chapter 8, as EU rights of free movement might be engaged in that context.

Human rights

Life, health, and bodily integrity

Human rights are not simply about protecting citizens from state action. Article 40.3 of the Constitution obliges the State to respect, defend, and vindicate the personal rights of the citizen, including their life and person. The courts have also recognised a right to bodily integrity.¹⁸ In some cases, the courts have suggested that limited positive obligations might derive from these rights.¹⁹ Article 2 of the ECHR, Article 6 of the ICCPR, Article 6 of the CRC, and Article 10 of the CRPD protect the right to life. Article 12 of the ICESCR recognises the right of everyone to the ‘enjoyment of the highest attainable standard of physical and mental health’ which includes the prevention, treatment, and control of epidemic diseases.²⁰ The right to physical and mental health is also identifiable in Article 12 CEDAW, Article 5(e)(iv) of CERD, Article 24 of the CRC, and Article 25 of the CRPD.

Although this Report largely focuses on circumstances in which the State has restricted rights, the State’s response to the pandemic has also been an attempt to protect important rights. This is a relevant factor in considering whether certain rights-restrictions are justified.

¹⁷ *Charter of Fundamental Rights of the European Union*, [2000] OJ C364/01, art 51. It should be noted that the European Union Agency for Fundamental Rights (the FRA) is the recognised body for promoting and assisting with implementation of the rights outlined in the *Charter of Fundamental Rights* throughout the EU.

¹⁸ *Ryan v Attorney General* [1965] IR 219.

¹⁹ *State (C) v Frawley* [1976] IR 365; *O'Donnell v South Dublin County Council* [2015] IESC 28.

²⁰ Article 12 has been interpreted and elaborated upon by the Committee on Economic, Social and Cultural Rights (the oversight mechanism for the ICESCR) in its *General Comment No. 14* (2000) UN Doc E/C.12/2000/4.

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Although this Report largely focuses on circumstances in which the state has restricted rights, the state’s response to the pandemic has also been an attempt to protect important rights. This is a relevant factor in considering whether certain rights-restrictions are justified.

Privacy, family life, and the dwelling

The courts have held that Article 40.3 of the Constitution protects a right to privacy against the State.²¹ Article 41 protects the family in its constitution and authority. Article 40.5 provides that ‘the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.’ While the case law traditionally focused on the need for proper authorisation for intrusions into the dwelling,²² in recent years the courts have identified circumstances in which Article 40.5 might be infringed without anyone entering the dwelling.²³ Article 8 of the ECHR provides that everyone has the right to respect for ‘his private and family life, his home and his correspondence’. Article 17 of the ICCPR guarantees freedom from interference with privacy, family, home or correspondence. Other international human rights relating to private and family life are identifiable in Article 23(1) of the ICCPR, Article 10(1) of the ICESCR, Article 16 of the CRC, and Articles 22 and 23 of the CRPD. In this Report, we pay particular attention to measures that interfere with physical spaces that are normally the reserve of private and family life, principally the dwelling.

Autonomy and personal liberty

The constitutional protection of privacy and the person, as well as the equivalent protections in the ECHR and ICCPR, demonstrate a concern for personal autonomy. Individuals are entitled to make decisions about their own lives for themselves, at least to the extent that they do not interfere with other people or offend other competing values.²⁴ In this Report, we pay particular attention to measures that require people to make decisions about their own life that they ordinarily might not need to make.

Article 40.4 of the Constitution guarantees that no person shall be deprived of his liberty, save in accordance with law. Where the State deprives a person of his or

²¹ *Kennedy v Ireland* [1987] IR 587.

²² *Damache v DPP* [2012] IESC 11; [2012] 2 IR 266.

²³ *Sullivan v Boylan & Ors (No 2)* [2013] IEHC 104.

²⁴ *Fleming v Ireland* [2013] IESC 19, [2013] 2 IR 417.

her liberty on health grounds, the Court of Appeal has held that there must be an independent review of the deprivation of liberty.²⁵ Article 5 of the ECHR protects the rights to liberty and security of person, and states that no one should be deprived of liberty save in accordance with law. Article 5(1)(e) of the ECHR permits such a denial of liberty in the case of 'the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind...'. The right to liberty and security is also identifiable in Article 9(1) of the ICCPR, and Article 14 of the CRPD.

The UN *Convention on the Rights of Persons with Disabilities* (UNCRPD) outlines various rights for those with physical, mental, intellectual, and sensory disabilities.²⁶ Article 14(1) of the UNCRPD provides that State's Parties shall ensure the right to liberty and security of people with disabilities. This also means ensuring that people with disabilities 'are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.'²⁷ Article 14(2) of the UNCRPD notes that where people with disabilities are deprived of liberty through any process, that they are 'on an equal basis with others, entitled to guarantees in accordance with international human rights law'.²⁸

The UN Report of the CRPD has noted that involuntary commitment of persons with disabilities on health-care grounds 'contradicts the absolute ban on deprivation of liberty on the basis of impairment'²⁹ and the principle of free and informed consent.

The Committee has repeatedly stated that *States parties should repeal provisions that allow for the involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairment. Involuntary commitment in mental health facilities carries with it the denial of the person's legal capacity to decide about care, treatment and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.*³⁰

Freedom of movement and travel

The courts have recognised an unenumerated right to travel.³¹ Article 2(1) of

²⁵ *AB v Clinical Director of St Loman's Hospital* [2018] IECA 123, [2018] 3 IR 710.

²⁶ UN *Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106 (UNCRPD), art 1.

²⁷ *ibid* art 14(1)(b).

²⁸ *ibid* art 14(2).

²⁹ United Nations Report of the Committee on the Rights of Persons with Disabilities (UN Doc. A/72/55) at Annex para 10.

³⁰ *ibid*. Emphasis added.

³¹ *State (M) v Attorney General* [1979] IR 73.

Protocol No. 4 to the ECHR provides that everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose their residence. Article 12 of the ICCPR guarantees liberty of movement. The right to free movement is also identifiable in Article 5(d)(i) of CERD and Article 18 of the CRPD. In this Report, we pay particular attention to measures that confine people to their homes or their county of residence, as well as to measures that make it more difficult for people to leave or enter the State.³²

Education

Article 42 of the Constitution guarantees a number of educational rights and imposes an obligation on the State to provide for free primary education. Importantly, this includes a right to an education appropriate to a child's needs and is not limited to a traditional, scholastic education. Article 42A guarantees the natural and imprescriptible rights of the child. Article 2 of Protocol 1 to the ECHR provides that no person shall be denied the right to education. Article 13 of the ICESR, Article 10 of CEDAW, Article 5(e)(v) of CERD, Articles 28 and 29 of the CRC, and Article 24 CRPD provide for a right to education. In this Report, we pay particular attention to how movement restrictions in the early stages of the pandemic interfered with children's education.³³

Freedom of religious practice

Article 44.2.1° of the Constitution protects the free profession and practice of religion. Article 9 of the ECHR and Article 18 of the ICCPR protect freedom of thought, conscience and religion. The right is also identifiable in Article 5(d)(vii) of CERD, Article 14 of the CRC, and Article 21 of the CRPD. In this Report, we pay particular attention to how restrictions on movement and on the holding of events have affected religious practice.

Criminal process rights and the rule of law

Article 38.1 of the Constitution guarantees the right to trial in due course of law. This has been held to preclude vague criminal offences; in other words, criminal offences must be formulated sufficiently clearly to allow people know whether their actions would break the criminal law.³⁴ Reflecting the same concern for the

³² We note that at the time of finalising this Report in late January 2021, the Government was considering introducing mandatory quarantine for travellers arriving into the State. No such proposals had been finalised or enacted.

³³ The closure of schools in early 2021, and the failure of Government to agree with teachers' unions a plan to reopen school for those with special educational needs, presents important issues for further analysis.

³⁴ *Dokie v DPP* [2010] IEHC 110, [2011] 1 IR 805.

rule of law, Article 15.5 of the Constitution prohibits the imposition of retroactive penal sanctions. International human rights law contains similar prohibitions. Article 7 of the ECHR and Article 15 of the ICCPR both provide that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. The European Court of Human Rights has interpreted this to include a prohibition on vague criminal offences. The Court has thus stated that vague criminal laws are contrary to the principle of legality in the ECHR and that criminal laws must meet the tests of clarity and foreseeability in order to be permissible under the Convention.³⁵

The rule of law is a core value in a liberal democracy. In essence, it requires first that those who are subject to the law can know what the law is so that they can guide their behaviour accordingly; and second, that state officials exercise their powers in accordance with the law. Laws should be published before they come into force; they should be clear and non-contradictory.

In this Report, we pay particular attention to criminal process provisions as well as to several ways in which the State's response to the COVID-19 pandemic has been unclear, raising rule of law concerns.



The rule of law is a core value in a liberal democracy. In essence, it requires first that those who are subject to the law can know what the law is so that they can guide their behaviour accordingly

Equality and vulnerable groups

Constitutional and international equality standards

A range of legal instruments, in both national and international law, contain equality standards. Article 40.1 of the Constitution protects the equality of citizens before the law, while allowing enactments to have due regard to differences of capacity and moral function. However, this right has not been very strongly protected, particularly in what are perceived to be socially difficult situations.³⁶ The courts have also not yet applied Art 40.1 to prohibit indirect discrimination.³⁷

³⁵ *Livik v Estonia* App no 12157/05 (ECtHR, 25 June 2009).

³⁶ *D (M) (A Minor) v Ireland AG & DPP* [2012] IESC 10; [2012] 1 IR 697. For discussion, see

³⁷ For recent discussion, see Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2019) ch14.

Article 14 of the ECHR prevents discrimination in the enjoyment of rights and freedoms 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' This is also captured in Articles 2(1), 14, and 26 of the ICCPR, Article 2(2) of the ICESCR, Article 1 of CEDAW, Article 1 of CERD, Article 2 of the CRC, and Articles 5 and 12 of the CRPD. The European Court of Human Rights has held that Article 14 also prohibits indirect discrimination, understood as the disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, has a particular discriminatory effect on a particular group.³⁸ The ECHR has also recognised the following grounds of discrimination as falling within the ambit of Article 14: age, health and disability, parental status, immigration status. As we shall see below, international treaties mandate a principle of non-discrimination when rights are being infringed, even in an emergency context.

Direct and indirect discrimination on various grounds are prohibited in a range of European Directives but limited to specified contexts such as employment and service provision that are not directly relevant to the subject-matter of this Report. The EU Charter for Fundamental Rights, albeit within the limited scope noted above, guarantees that everyone is equal before the law.³⁹ It also prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.⁴⁰

The public body equality obligation

Section 42 of the *Irish Human Rights and Equality Commission Act 2014* imposes an obligation on public bodies, in the performance of their functions, to have regard to the need to eliminate discrimination. 'Public body' is broadly defined, and includes Departments of State (e.g. the Department of Health), the HSE, any person, body or organisation established by or under an enactment (e.g. An Garda Síochána, the Chief Medical Officer, and NPHET).⁴¹ 'Discrimination' is not defined, but section 2 of the Act provides that 'discriminate' and 'discriminatory grounds' track the meanings of those terms in the EEA and the ESA. The obligation on public bodies to have regard to the need to eliminate discrimination therefore includes both direct and indirect discrimination on the nine grounds proscribed by those Acts, but not limited to the contexts covered by those Acts (employment and service provision).

Section 3 of the ESA prohibits both direct and indirect discrimination on proscribed grounds in certain contexts.⁴² Direct discrimination consists of treating one

³⁸ *DH v Czech Republic* (2008) 47 EHRR 3.

³⁹ *Charter of Fundamental Rights of the European Union*, Art 20.

⁴⁰ *Ibid*, Art 21.

⁴¹ *Irish Human Rights and Equality Commission Act*, s 2.

⁴² *Equal Status Acts 2000-2015*, s 3. In relation to accommodation, a further proscribed ground of

person less favourably than another person in a comparable situation. Indirect discrimination occurs where an apparently neutral provision would put a person at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The proscribed grounds of discrimination are the following: gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community.

In our view, the content of the public body equality obligation is also informed by the constitutional, European and international law standards considered in the previous section, even in contexts where those standards could not be directly invoked by an individual or group against the public body in question.

The following sections outline the relevant international human rights standards applicable to particular disadvantaged and vulnerable groups in Irish society in the context of the pandemic. The impact of the emergency legislation on these categories of persons will be examined later in the Report.

Ethnic, racial, religious, and cultural minorities

The rights of ethnic, racial, religious, and cultural minorities are outlined in Article 27 of the ICCPR, Articles 2-5 of CERD,⁴³ and Article 30 of the CRC. Article 14 of the ECHR outlines a general prohibition on discrimination on several named grounds, including 'race', 'religion', 'national or social origin', and 'association with a national minority'. This general prohibition is reaffirmed in Article 1 of Protocol 12 to the ECHR. In addition, the EU 'Race Directive' provides for the principle of equal treatment between persons irrespective of their racial or ethnic origin.⁴⁴

Younger and older People

Children's rights are specifically referred to in Article 24 of the ICCPR, Article 10(3) of the ICESCR, Article 7 of the CRPD, and throughout the CRC. The rights of older persons can be identified throughout the CRPD. In addition, Article 21(1) of the *Charter of Fundamental Rights* expressly prohibits discrimination on basis of age, and the rights of older persons to social security and social assistance are provided for in Article 34 of the Charter.

discrimination is that one person is in receipt of social welfare payments to support accommodation and the other is not. The [Programme for Government 2020](#) commits the Government to examine the introduction of a new ground of discrimination based on socio-economic disadvantaged status.

43 The Committee on the Elimination of Racial Discrimination recently released its *General Recommendation No. 36: Preventing and Combatting Racial Profiling by Law Enforcement Officials* (CERD/C/GC/36) (24 November 2020).

44 Directive 2000/43/EC of 29 June 2000.

Gender

Gender equality is emphasised in Article 5 of the ECHR, Article 3 of the ICCPR, Article 3 of the ICESCR, Article 6 of the CRPD, and throughout CEDAW. Rights specific to maternity are outlined in Article 10(2) of the ICESCR, Article 11 of CEDAW, the EU 'Recast Directive'⁴⁵, and the EU 'Equal Treatment in Goods and Services Directive'.⁴⁶

People with disabilities

The rights of persons with disabilities are emphasised throughout the CRPD, in Article 23 of the CRC, and in Article 15 of the European Social Charter.

People living below the poverty line

The right to social security is highlighted in Article 9 of the ICESCR, Article 5(e)(iv) of CERD, Article 26 of the CRC, and Article 28 of the CRPD. The European Social Charter also provides for the right to social security in Articles 8, 12, and 27, as well as outlining a general provision regarding protection against poverty in Article 30.

Conclusion

In this Report, we consider whether the emergency restrictions breach any applicable national or international legal standard. But we also consider whether various public bodies charged with formulating, implementing and enforcing these restrictions have satisfied the Public Sector Equality and Human Rights Duty to have regard to the need to eliminate discrimination. We rely on all the legal standards cited in this section—in particular the concept of indirect discrimination the full range of proscribed grounds identified in various legal instruments, and the disadvantaged or vulnerable groups protected by particular instruments—to inform the content of that obligation.

Derogations, limitations, and the principle of legality

Ireland has neither declared a state of emergency nor sought to derogate from any international human rights to which it is a party. The measures considered in this Report must therefore be assessed against the standard criteria of justification for restrictions of rights.

45 Directive 2006/54/EC of 5 July 2006.

46 Directive 2004/113/EC of 13 December 2004.

Rights in the Irish constitutional order are not absolute and, even if engaged, can be found to be justifiably limited by a statute, regulation or other state action. Although the constitutional text often authorises limitations in specific terms, the precise formula used is not critical. With a small number of exceptions, rights limitations under the Irish Constitution are assessed by means of the proportionality test.⁴⁷ This test asks if measures limiting rights have a legitimate objective; if the means of pursuing that objective are rationally connected to that objective; if the measures impair rights as little as possible; and if the effects on rights are proportionate to the public good achieved by the measure. Where a law restricts rights to *protect* another right, the courts require only that the Oireachtas has reasonably and fairly balanced the constitutional rights.⁴⁸ As many measures considered in this Report seek to vindicate citizens' positive rights to life, health, and bodily integrity, they are relatively easy to justify.

The Council of Europe has emphasised that where a state is not formally entering a derogation from the ECHR, but instead restricting rights to pursue a policy of public health during a health emergency, respect for the rule of law and democratic principles will continue to be paramount. This includes (a) adherence to the principle of legality, which requires that states adopt measures in accordance with the law.⁴⁹ It also requires that (b) emergency measures adopted must be of limited duration, the State returning to a situation of normalcy as swiftly as possible.⁵⁰ The scope of emergency legislation must be (c) limited, proportionate, and the measures must be necessary. States should attempt to achieve their objectives with a 'minimal alteration of the normal rules and procedures of democratic decision-making'.⁵¹ Finally, there must be (d) checks on executive action throughout the situation of emergency. In practice, this means that parliament must continue to possess the power to control executive action, 'in particular by verifying, at reasonable intervals, whether the emergency powers are still justified', and judges should remain in a position to examine the most serious limitations of human rights in emergency legislation.⁵²

Where a state is not in the midst of a public emergency, limitations on many rights contained within the ICCPR are still permissible. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), such restrictions must meet a number of important requirements. First, they must adhere to the principle of (a) legality. That is, the restriction must be provided by law. It must not be arbitrary or unreasonable and it must be clear and accessible to the general public.⁵³

47 *Heaney v Ireland* [1994] 3 IR 593.

48 *Tuohy v Courtney* [1994] 3 IR 1.

49 Council of Europe, '[Respecting Democracy, Rule of Law and Human Rights in the Framework of the Covid-19 Sanitary Crisis](#)' SG/Inf (2020) 11 (7 April 2020), 3.

50 *ibid* 3.

51 *ibid* 4.

52 *ibid*.

53 Office of the High Commissioner for Human Rights, '[Topics in Focus|Emergency Measures and COVID-19: Guidance](#)' (OHCHR 27 April 2020), 1.

The second requirement is that of (b) necessity, meaning that the restriction must be 'necessary for the protection of one of the permissible grounds stated in the ICCPR, which include public health, and must respond to a pressing social need'.⁵⁴ The restriction must be (c) proportionate to the objective, that is, 'it must be appropriate to achieve its protective function' and 'it must be the least intrusive option among those that might achieve the desired result'.⁵⁵ Moreover, the limitation must be (d) non-discriminatory. Additionally, limitations should be interpreted strictly and in favour of the right at issue, and no limitation may be applied arbitrarily.⁵⁶ Finally, 'the authorities have the burden of justifying restrictions upon rights'.⁵⁷

Article 4 of the ICESCR provides that states may place limitations on Covenant rights 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

Even if a state is formally entering a derogation under an international human rights treaty, certain core rights and obligations are 'non-derogable', including the right to life, the prohibitions on torture and slavery, freedom of thought, conscience and religion, and the principle of legality in the criminal law.⁵⁸

We saw above that indirect discrimination occurs where an apparently neutral provision would put one person, identified by a proscribed ground, at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This ground of justification is broadly similar to the grounds for justifying legislative restrictions of rights in the Constitution, the ECHR, the ICCPR, and the ICESCR. Similarly, under the ECHR, discrimination may be permitted where it is objectively justified, in the sense of pursuing a legitimate aim and employing means that are reasonably proportionate to that aim.

Conclusion ★

This analysis establishes the following framework for our later human rights and equality analysis. In Part II of the Report, we assess the extent to which these human rights and equality standards have been considered in the formulation of the State's response to COVID-19. This is relevant to all actors, but particularly to those—such as the HSE, the Department of Health, the Chief Medical Officer and NPHE—who are subject to the Public Sector Equality and Human Rights Duty.

54 *ibid* 1.

55 *ibid*.

56 *ibid* 2.

57 *ibid*.

58 For example, non-derogable rights in the context of the ICCPR are outlined in Article 4(2) of that Covenant.

In Part III of the Report, we consider whether the restrictions and their enforcement illegitimately interfere with any of the protected rights identified in this chapter. In many cases, the obligation on the State to protect public health provides a broad justification. Our analysis does not conclude at that point. We separately consider whether the State's response respects the rule of law. Finally, given the various equality obligations considered above as well as the principle in international human rights law that the principle of non-discrimination applies to rights limitations, we assess whether the restrictions or their enforcement disproportionately affect disadvantaged and vulnerable groups, as identified either by proscribed grounds of discrimination or by sectoral international human rights treaties to which Ireland has committed.

Chapter 2

Primary Legislative Framework

Introduction

Although Ireland did not declare a formal state of emergency to respond to COVID-19—public health not being a stated reason for invoking the emergency powers in Article 28 of the Constitution—its response bears some of the hallmarks of emergency thinking, with a heavy reliance on Government action. Specifically, Ireland’s response to COVID-19 has largely been implemented through secondary legislation made by the Minister for Health, underpinned by four primary statutes. At the start of the pandemic in March, the Oireachtas enacted the *Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (Health Preservation Act)*. Ancillary enforcement measures were authorised in the *Criminal Justice (Enforcement Powers) (Covid-19) Act 2020 (Enforcement Powers Act)* (September), and the *Health (Amendment) Act 2020 (Health Amendment Act)* (October). Also in March, the Oireachtas enacted the *Emergency Measures in the Public Interest (Covid-19) Act 2020 (Emergency Measures Act)* which provided broad statutory powers to deal with the harsh economic and social effects of the pandemic, as well as changing the procedures for authorising detention under the *Mental Health Act 2001*.

In this chapter, we first outline how the *Health Preservation Act* grants powers to the Minister for Health to make regulations to respond to COVID-19. We then outline the enforcement powers contained in the statutes. This lays the groundwork for chapter 3, in which we outline the restrictions that have actually been imposed and how they can be enforced. We then consider two discrete powers for the deprivation of liberty. We conclude with a consideration of sunset clauses and the manner in which the statutes have been extended.

Grant of legislative power

The preamble to the *Health Preservation Act* acknowledges that it provides for ‘extraordinary measures and safeguards to prevent, minimise, limit or slow the risk of persons being infected’ and linked its necessity to the ‘constitutional duty of the State to respect and, as far as practicable, by its laws to defend and vindicate the rights of citizens to life and to bodily integrity’.

Part III amended the *Health Act 1947* to confer on the Minister for Health powers to make regulations ‘for preventing, limiting, minimising or slowing the spread of Covid-19’ and ‘where otherwise necessary, to deal with public health risks arising from the spread of Covid-19’.⁵⁹ The Act gives a long but non-exhaustive list of what may be covered by such regulations, including the following:

- » restrictions on travel to, from or within the State;

⁵⁹ *Health Act 1947*, [s 31A\(1\)](#).

- » requiring people to remain in their homes;
- » prohibiting events;
- » requiring safeguards to be put in place by event organisers;
- » requiring safeguards to be put in place by the owners or occupiers of premises or places, including temporary closures;
- » requiring safeguards to be put in place by the managers of schools, childcare facilities and universities; and
- » any other measures that the Minister considers necessary in order to prevent, limit, minimise or slow the spread of COVID-19.

These broad powers have equipped the Minister to respond to the pandemic and improved knowledge about how COVID-19 is spread. While most of the restrictions—as we shall see in chapter 3—were contemplated at the time of enactment, the statutory grant of power was sufficiently broad to allow the introduction of obligations to wear face coverings, a step not apparently envisaged in March 2020.

When making regulations, the Minister is required to consider the general public health situation, the need to act expeditiously, the resources of the health system, the financial resources of the State, and the advice of the Chief Medical Officer of the Department of Health.⁶⁰ The Minister may have regard to any relevant guidance issued by bodies such as the World Health Organisation (WHO) and the European Centre for Disease Prevention and Control.⁶¹ The Minister must also consult other Ministers of the Government who hold relevant functions, and may consult any other person he considers appropriate.⁶²

Delegation of legislative power is only constitutionally permissible where the statute deals with matters of principle and policy, leaving matters of detail to the secondary legislator—in this case the Minister for Health—although the courts do not apply this test strictly.⁶³ Although the powers delegated by the *Health Preservation Act* are extensive, the Act—in our view—identifies sufficient principles and policies to amount to a constitutional delegation of legislative power.

60 *ibid* s 31A(2)(a).

61 *Health Act 1947*, s 31A(2)(b).

62 *ibid* s 31A(3).

63 For the courts' approach to the delegation of legislative power, see Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd ed, Clarus Press 2019), chapter 8.

Enforcement powers – penal provisions

When the Minister makes regulations under the Health Act, he or she may deem particular provisions to be 'penal provisions'.⁶⁴ These provisions can then be criminally enforced in the following ways.

Breach of a penal provision is a criminal offence, punishable by a fine of up to €2,500 and/or up to six months' imprisonment.⁶⁵ The *Health Amendment Act* has adjusted these penalties as of 26 October 2020. For a first or second offence, the punishment is limited to a fine of up to €1,000 or €1,500 and/or up to one month's or three months' imprisonment respectively. However, a court can impose the full penalty—even for a first or second offence—if there are aggravating circumstances. In determining this, the court must have regard to the number of people attending the event (if relevant), the degree of danger to public health, and the extent to which the defendant refused to comply with lawful directions or requests of a Garda.

A Garda who suspects, with reasonable cause, that a person is contravening or has contravened a penal provision may direct the person to take such steps as the Garda considers necessary to comply with the provision.⁶⁶ A person who, without lawful authority or reasonable excuse, fails to comply with a Garda's direction shall be guilty of an offence.⁶⁷ A Garda may arrest, without warrant, a person who they have reasonable cause for believing is failing or has failed to comply with such a direction.⁶⁸

Enforcement powers – providing name and address

If a Garda has reasonable grounds for believing that a person is committing or has committed an offence, the Garda may require the person to state their name and address.⁶⁹ It is an offence to fail to provide a name and address or to provide a false name or address.⁷⁰ A Garda may arrest without warrant a person whom they have reasonable cause for believing is committing or has committed this offence.⁷¹

Enforcement powers – relevant persons

The Minister may designate people as 'relevant persons' for the purposes of

64 *Health Act 1947*, s 31A(6).

65 *ibid* s 31A(12).

66 *Health Act 1947*, s 31A(7).

67 *ibid* s 31A(8)(a).

68 *ibid* s 31A(8)(b).

69 *ibid* s 31A(9).

70 *ibid* s 31A(10).

71 *ibid* s 31A(11).

implementing and enforcing the regulations.⁷² The relevant person may require a Garda to assist him or her in exercising a power or performing a function under the Act.⁷³ This assistance could involve detaining a person, bringing a person to a particular place, or breaking open a premises. The Act provides an illustrative list of officials who could be designated as relevant persons, including an officer of the Minister for Justice and Equality and a medical officer of health.

Enforcement powers – pubs

The *Enforcement Powers Act* introduced a wide range of enforcement powers in respect of premises where intoxicating liquor is sold or supplied for consumption on the premises.⁷⁴ These powers essentially allow the Gardaí to inspect such premises without a warrant, issue immediate closure orders, and/or seek closure orders from the District Court. These powers lie beyond the scope of this Report, given our focus—as explained in the introduction—on measures that directly affect individuals in their everyday lives as distinct from measures that affect commercial interests.

Enforcement powers – fixed penalty provisions

The *Health Amendment Act* allows the Minister for Health to designate penal provisions as fixed penalty provisions.⁷⁵ Regulations to this effect came into force on 22 November 2020. If a Garda has reasonable grounds for believing that a person has contravened a fixed penalty provision, he or she may serve a fixed penalty notice on the person. If the person pays the penalty, which cannot be more than €500, within 28 days, no prosecution will proceed.

Enforcement powers – dwelling event provisions

The *Health Amendment Act* allows the Minister for Health to designate penal provisions as dwelling event provisions.⁷⁶ Regulations to this effect came into force on 22 November 2020. This designation generates two important enforcement powers. First, if a Garda has reasonable grounds for believing that a person is in a public place with an intent to, or is about to, or is attempting to enter a dwelling in contravention of a dwelling provision, he or she can issue a direction to the person leave the place and vicinity. Second, if a Garda has

⁷² *ibid* s 31A(13).

⁷³ *ibid* s 31A(14).

⁷⁴ *Health Act 1947*, section 31A(6A).

⁷⁵ *ibid* s 31C.

⁷⁶ *ibid* s 31D.

reasonable grounds for believing that an event is taking place in contravention of a dwelling provision, he or she can direct the occupier to cause everyone attending the event to leave the dwelling and the vicinity, other than those who live there. The Garda is permitted to attend at the main entrance to the dwelling and to require the occupier to provide his or her name. It is an offence to fail to comply with a direction of a Garda, without reasonable excuse. This criminal offence is punishable by a fine of up to €1,000 and/or imprisonment of up to one month.

Deprivation of Liberty

Mental health detention

Part 5 of the *Emergency Measures Act* made amendments to the *Mental Health Act 2001*. It permits the Mental Health Commission to request an independent psychiatric report about an involuntary patient from any consultant psychiatrist who is not treating the patient, and not just those on its designated panel as would usually occur. This independent examination may occur ‘in person’, ‘by other appropriate means’, or even, ‘due to the exigencies of the public health emergency’, not occur at all, once this is explained in the resultant report. The *Emergency Measures Act 2020* Act permits the Mental Health Commission to, if necessary, appoint tribunals ‘consisting of one member who shall be a practising barrister or solicitor’. Such a tribunal shall, if possible, consult with a consultant psychiatrist if the reports from the independent psychiatrist and treating psychiatrist conflict or if it is otherwise ‘necessary in the interest of the patient’. A tribunal can extend an involuntary order by a second period of 14 days ‘of its own motion if the tribunal, having due regard to the interest of the patient, is satisfied that it is necessary’.

Detention and isolation for disease control

The *Health Preservation Act* allows for the detention and isolation of persons in order to prevent, limit, minimise or slow the spread of COVID-19.⁷⁷ Several conditions must be satisfied before this power can be exercised, including that the person be both a potential source of infection and risk to public health, and that they cannot be effectively isolated or refuse to remain / appear unlikely to remain in their home. We are unaware of these powers being exercised and therefore do not consider them further in this Report.⁷⁸

⁷⁷ *Health Act 1947*, s 38A.

⁷⁸ It should be noted that, as of the end of January 2021, there is no current legal basis for instituting mandatory quarantine for those entering Ireland. Should the Government seek to implement this policy, it will almost certainly require new primary legislation. The deprivation of liberty involved here would be acute, and

Sunset provisions

Overview

'Sunsetting' ensures that the legal effect of a statutory provision will expire or 'sunset' at a certain point in time. A variation is that the legal effect will expire unless a specified actor is satisfied that certain conditions are satisfied and extends the provision. As noted in chapter 1, the principle of legality in international human rights law favours the use of sunset clauses where extraordinary powers are adopted to respond to an emergency situation. Such provisions ensure that exceptional powers are not retained indefinitely, but only for the circumstances they were introduced to tackle in the first place. The pandemic legislation, given its unusual nature, extraordinary scope, and the very significant discretion given to Ministers, requires robust sunsetting provisions that are taken seriously by the Government.



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The relevant powers in the *Health Preservation Act*, *Emergency Powers Act* and *Enforcement Powers Act* were all provided to remain in force until 9 November 2020, unless, before that date, a resolution approving its continuation had been passed by both Houses of the Oireachtas.⁷⁹ A motion to renew the powers in the *Health Preservation Act* was laid before the Dáil on 22 October 2020.⁸⁰ There was some controversy when it was planned to allot only 45 minutes of Oireachtas time to debate on this motion.⁸¹ Even when given a somewhat longer period, deputies complained of inadequate time.⁸² The motion also extended the powers for a significant period, until 9 June 2021, which several TDs objected to, suggesting shorter extensions.⁸³ In the end, the motion passed with 92 votes in favour and 53 against. The relevant powers in the *Emergency Measures Act* and the *Enforcement*

merit detailed scrutiny for its proportionality.

79 *Health Preservation Act*, s2, *Emergency Powers Act*, s1(3), *Enforcement Powers Act*, s17(3).

80 Dáil Order Paper [22 October 2020](#), vol 60, no 585. See 'Motion re Extension of Sunset Clause for Part 3 of the *Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020*'.

81 Jack Horgan-Jones, '[Extra day to Dáil debate on extending State's powers during pandemic](#)', *The Irish Times* (Dublin, 20 October 2020).

82 Dáil Deb [22 October 2020](#), vol 999, no 7. See comments of Michael McNamara TD and Mattie McGrath TD. As the former put it, at p.881, 'giving Deputies 50 seconds each to debate what is the most fundamental set of restrictions to rights in this State in its history is not democracy'.

83 *ibid* see comments of Alan Kelly TD (at p. 832) and David Cullinane TD (at p.843).

Powers Act were similarly extended until 9 June 2021. An amendment to limit the extension to February 2021 in the latter case was moved but failed to pass. The powers under the *Health Amendment Act*, adopted in late October 2020, extend until 9 June 2021.⁸⁴ Powers under all Acts can then be extended again by resolutions of both Houses of the Oireachtas.

Sunsetting is a crucial measure, required under international human rights law, for ensuring that rights restrictions adopted in an emergency do not extend for longer than is warranted. We shall see in chapter 4 that these concerns were to the fore among legislators when initially delegating significant powers to the Minister for Health to make regulations responding to the pandemic. However, these sunset provisions have not imposed significant constraints. The Government, supported by a clear majority in both Houses, has been able to secure lengthy extensions to all powers. It would be better if shorter extensions had been sought—opposition calls for initial extension to February rather than June 2021 seem sensible—rather than very lengthy extensions of this sort. The legislation itself would ideally specify the maximum length of any extension: three months would be a reasonable period that would balance the Government's need to plan with the imperative of democratic oversight.

Conclusion ★

In this chapter, we have identified three aspects of the State's statutory response to COVID-19. First, we identified the statutory provisions that enable the Minister for Health to make regulations restricting and prohibiting certain activities. Second, we identified the statutory provisions that establish a set of enforcement mechanisms for those restrictions and prohibitions. Third, we identified the statutory provisions that directly authorise deprivation of liberty, most notably those that allow for detention on mental health grounds. In the next chapter, we identify the prohibitions and restrictions that the Minister for Health has introduced by regulation, as well as the enforcement powers applied in respect of each of them.

84 *Health Amendment Act*, s6.

Chapter 3

The Restrictions and their Enforcement

Introduction

In this chapter, we outline the restrictions on ordinary life that have been introduced to control the spread of the virus, and how these restrictions can be enforced. We first consider the stable restrictions that apply in respect of international passengers and face coverings. We then examine the considerably more complicated and frequently changing restrictions that apply to personal movement, gatherings, events, etc. We conclude by drawing together an analysis of how enforcement powers apply in relation to the restrictions. The aim is not to provide a legally comprehensive account of the restrictions that have applied at any particular time. Rather, we present a picture of those restrictions that are most salient from a human rights and equality perspective.

International arrivals

There were no restrictions on international arrivals during the early stages of the pandemic. The COVID-19 Passenger Locator Form Regulations were made by the Minister for Health on 24 May 2020.⁸⁵ The initial expiry date for the regulations was 18 June 2020, but they have been extended on several occasions and are currently in force until 9 June 2021. These have been accompanied and supplemented by more wide-ranging advice, an issue that we address later in chapter 8.⁸⁶

The core obligations in the regulations are for international passengers (with some exceptions), on or before their arrival to the State, to complete the COVID-19 Passenger Locator Form (PLF) in respect of themselves or any children.⁸⁷ Originally paper-based, since 26 August 2020 the obligation has been to show an electronic 'PLF receipt' to an immigration officer.⁸⁸ The form seeks information about how international passengers arrived in the State and details of their place of residence for the following 14 days. If they change their place of residence or contact details, they must make reasonable efforts to provide this updated information in writing.⁸⁹ They must comply with any request from an immigration officer or member of the HSE COVID-19 Contact Management Programme to provide information or documentation to verify and clarify the particulars in the form or, after their arrival, to confirm where they are actually residing.⁹⁰

⁸⁵ *Health Act 1947* (Section 31A – Temporary Requirements) (Covid-19 Passenger Locator Form) Regulations 2020, [SI 181/2020](#).

⁸⁶ We note that requirements for international travel changed after the initial writing of this Report was concluded: flights from the UK were stopped for a period of time; negative PCR tests were required from travellers entering from certain countries ([SI 11/2021](#)); and broader restrictions, such as mandatory quarantine, are under discussion.

⁸⁷ *ibid* [reg 5](#).

⁸⁸ *Health Act 1947* (Section 31A – Temporary Requirements) (Covid-19 Passenger Locator Form) (Amendment) (No. 6) Regulations 2020, [SI 314/2020, reg 8](#).

⁸⁹ [SI 181/2020, reg 6\(5\)](#).

⁹⁰ *ibid* [reg 6](#).

Face covering requirements

The requirement to wear face coverings on public transport was introduced on 13 July 2020.⁹¹ Originally scheduled to last until 5 October 2020, this has been extended to 9 June 2021.⁹² The core obligation is not to travel on public transport without wearing a face covering, unless one has a reasonable excuse.⁹³ There is a non-exhaustive list of reasonable excuses, including an inability to wear a face covering due to illness.⁹⁴ The obligation does not apply to children under the age of 13, or to drivers in their own compartment or separated by screens.⁹⁵

Officers, employees and agents of public transport operators and the National Transport Agency are deemed to be ‘relevant persons’.⁹⁶ This means that, under the Health Act, they may require Gardaí to provide them with assistance, including by detaining a person.⁹⁷ Under the regulations, they may request a passenger to wear a face covering, refuse the passenger entry, or request the passenger to alight. Before doing so, they must give the passenger an opportunity to provide a reasonable excuse, if necessary, supported by documentation. Any failure by a passenger to comply with a request or refusal is a criminal offence (penal provision). Since 22 November 2020, a fixed penalty notice of €80 may be issued for an alleged breach of this provision.⁹⁸

An equivalent obligation in relation to certain businesses and premises came into effect on 10 August 2020, originally scheduled to last until 5 October but now extended to 9 June 2021.⁹⁹ The premises in which you must wear face coverings include shops, libraries, and hairdressers.¹⁰⁰ The obligation does not apply to restaurants, nor to medical and dental services.¹⁰¹ The core obligation is the same as applies in respect of public transport: not to enter or remain in one of the specified premises without wearing a face covering unless you have a reasonable excuse.¹⁰² However, in this context, the failure to wear a face covering is itself a penal provision.¹⁰³ Since 22 November 2020, a fixed penalty notice of €80 may be

91 *Health Act 1947* (Section 31A –Temporary Restrictions) (Covid-19) (Face Coverings on Public Transport) Regulations 2020, [SI 244/2020](#).

92 We note that additional requirements for face covering were introduced after the initial writing of this Report was concluded, with post offices, credit unions, and banks now included in premises requiring such coverings ([SI 20/2021](#)), as well as bus stations and rail stations ([SI 21/2021](#)).

93 *ibid* [reg 5\(1\)](#).

94 *ibid* [reg 6](#).

95 *ibid* [reg 5\(2\)](#).

96 *ibid* [reg 4](#).

97 *Health Act 1947*, [s 31A \(13\)-\(14\)](#). See discussion in chapter 2.

98 *SI 536/2020* Fixed Payment Notice and Dwelling Event Regulations 2020, [reg 3 and sch1, para 1](#).

99 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) (Face Coverings in Certain Premises and Businesses) Regulations 2020, [SI 296/2020](#).

100 *ibid* [reg 3 and Part A of the Schedule](#).

101 *ibid* [reg 3\(c\)](#).

102 *ibid* [reg 4\(1\)](#).

103 *ibid* [reg 4\(3\)](#).

issued for an alleged breach of this provision.¹⁰⁴ There is also an obligation on the occupier, manager, or person in charge to take reasonable steps to inform those entering the premises of their obligations and to encourage compliance.¹⁰⁵

Restrictions on ordinary life – overview

The Government has used the powers granted by the *Health Preservation Act* to impose significant restrictions on ordinary life. These restrictions can, thus far, be divided into six stages, which we label A-F:

- » Stage A—Total Lockdown: 8 April 2020 to 8 June 2020;
- » Stage B—Easing Lockdown: 8 June 2020 to 29 June 2020;
- » Stage C—Eased Lockdown: 29 June 2020 to 31 August 2020, although not in every county;
- » Stage D—Modified Lockdown: 31 August 2020 to 7 October, although not in every county;
- » Stage E—Tightened Lockdown: 7 October to 22 October, although Kildare, Laois, Offaly, Dublin and Donegal were in this stage earlier; and
- » Stage F—Renewed Lockdown—7 October 2020 to 30 November 2020.¹⁰⁶

We adopt this labelling rather than the Government’s phases and levels for two reasons. First, the Government’s labels have not applied over the entirety of the pandemic response. Second, the change in phases or levels for the Government has been as much about changing public health advice as changing the law. For this Report, it is the change in legal measures that is critically important.

“

Because the list of reasonable excuses was non-exhaustive, it was possible to leave your home for other reasons as well, but there was considerable uncertainty as to what those reasons might be.

104 *SI 536/2020* Fixed Payment Notice and Dwelling Event Regulations 2020, [reg 3 and sch1, para 2](#).

105 *ibid* [reg 4\(4\)](#).

106 The measures adopted since 30 November 2020 have broadly replicated these stages. The relaxation in December, which saw hospitality and retail reopen and eventually visits to homes around Christmas, resembled stages D and E. Shortly after Christmas, a renewed lockdown was once again introduced, resembling Stage F. With the additional closure of schools, the situation in January has most closely resembled Stage A, but with some differences.

Stage A – total lockdown

During Stage A, it was a criminal offence to leave your home without a reasonable excuse.¹⁰⁷ A non-exhaustive list of reasonable excuses included going to an essential retail outlet,¹⁰⁸ and obtaining money for yourself or a vulnerable person,¹⁰⁹ Some classes of reasonable excuse were broadened during this period. For instance, it was initially permitted to leave your home to exercise only within a 2 kilometre radius and only with other residents in your home.¹¹⁰ This was ultimately extended to allow exercise within a 5 kilometre radius with others from your home or up to three others from outside your home.¹¹¹ Because the list of reasonable excuses was non-exhaustive, it was possible to leave your home for other reasons as well, but there was considerable uncertainty as to what those reasons might be.¹¹²

Stage B – easing lockdown

In Stage B, it was generally permissible to leave your house and move around the country. However, if you were leaving your house solely for social or recreational purposes, including leisure or holiday purposes, there were limitations, although they were not criminally enforceable. You could do so within 20 kilometres of your home or within the county in which your home was situated.¹¹³ Exercise had to be outdoors; social and recreational activities could take place indoors. Outdoor activities could involve no more than 15 people; indoor activities no more than six people.¹¹⁴ You were also allowed to visit the residence of a vulnerable person for social or recreational purposes, but subject again to a limit of 6 people.¹¹⁵

Stage C – eased lockdown

From the end of June until the end of August 2020, there were restrictions on events and on businesses that sold intoxicating liquor for consumption on the premises.¹¹⁶ There were no direct restrictions on the activities of individuals.

107 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2020, [SI 121/2020, reg 4](#).

108 *ibid* [reg 4\(2\)\(c\)](#).

109 *ibid* [reg 4\(2\)\(d\)](#).

110 *ibid* [4\(2\)\(i\)](#).

111 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) (Amendment) (No. 3) Regulations 2020, [SI 174/2020, reg 5\(c\)](#).

112 Chapters 8 and 9 address the implications of this vagueness from a human rights and equality perspective.

113 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) (No. 2) Regulations 2020, [SI 206/2020, reg 5](#).

114 *ibid* [reg 6](#).

115 *ibid* [reg 6\(3\)](#).

116 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) (No. 3) Regulations 2020, [SI 234/2020, reg 5](#).

Stage D – modified eased lockdown

At the end of August 2020, restrictions were imposed on events in private dwellings, with no more than six people from no more than three households allowed to attend.¹¹⁷ These were not penal provisions. Stricter number limits than before were applied to indoor and outdoor events.¹¹⁸ 50 people were allowed to attend wedding receptions.¹¹⁹ Detailed rules regulated the activities of businesses that sold intoxicating liquor, although on 21 September 2020, wet pubs were removed from the list of premises to which access was prohibited outside Dublin.¹²⁰ On the same day, the Minister for Health applied the enforcement powers in the *Enforcement Powers Act* to the provisions of the regulations that controlled activities in licensed premises and clubs.¹²¹

Stage E – tightened lockdown

Stage E began with county-specific lockdowns: Kildare, Laois, and Offaly in August; Dublin and Donegal in September 2020. Somewhat different approaches were followed in August and September, reflecting changes in the background country-wide restrictions. Common to both was a prohibition on entering or leaving a lockdown county, without a reasonable excuse. The enumerated reasonable excuses were broadly similar to those that permitted you to leave your home during Stage A Total Lockdown. But these were not penal provisions. In August, events and funerals were limited to six people indoors and 25 people outdoors. Limitations were also imposed on the number of people who could gather indoors or outdoors for social or recreational purposes. Access to a wide range of businesses and premises was prohibited.

Dublin and Donegal entered Stage E at different points in September, followed by the rest of the country at the start of October 2020. The most significant restrictions were as follows, with penal provisions specifically identified:

- » A prohibition on leaving one's county of residence or the State without reasonable excuse;¹²²
- » Initially, only six persons from one other household could attend an

117 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) (No.4) Regulations 2020, [SI 326/2020, reg 5](#).

118 *ibid* [reg 6](#).

119 *ibid* [reg 8](#).

120 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) (No. 5) (Amendment) Regulations 2020, [SI 353/2020](#).

121 *Health Act 1947* (Section 31A(6A)) (Covid-19) Regulations 2020, [SI 354/2020](#).

122 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) (No.6) Regulations 2020, [SI 413/2020, reg 5](#).

event in a private dwelling;¹²³ later, events were limited to those living in the dwelling;¹²⁴

- » Social, recreational, exercise, cultural, entertainment or community events could only be organised outdoors, with a limit of 15 people.¹²⁵ This was a penal provision;
- » Wedding receptions were limited to 25 people;¹²⁶ and
- » Funerals were limited to 25 people.¹²⁷

On 19 October 2020, the counties of Cavan, Donegal and Monaghan were placed on a slightly higher level of restrictions.¹²⁸

Stage F – renewed lockdown

On 22 October 2020, Ireland returned to a lockdown similar to that which had been in place during Stage A.¹²⁹ It was again a criminal offence to leave one's home without a reasonable excuse, with a non-exhaustive list of reasonable excuses provided, for example exercise within a 5 kilometre radius of the home.¹³⁰ Although in similar terms to the list applicable during Stage A, some new excuses were added, such as attending school or university,¹³¹ and accessing childcare.¹³² Since 22 November 2020, a fixed penalty notice of €100 may be issued for an alleged breach of this provision.¹³³

During Stage F, events in dwellings were not permitted to include persons from outside the dwelling. This was not initially deemed to be a penal provision.¹³⁴ However, a new innovation was the 'paired household', which allowed a household with at least one vulnerable person and no more than one non-vulnerable person to pair with another household, thereby allowing members of each household to

123 *ibid* [reg 6](#)

124 *Health Act 1947* (Section 31A - Temporary Restrictions) (Covid-19) (No. 7) Regulations 2020, [SI 442/2020, reg 6](#).

125 Child Care (Placement of Children with Relatives) (Emergency Measures in the Public Interest - Covid-19) (Amendment) (No.1) Regulations 2020, [SI 313/2020, reg 7](#).

126 [SI 413/2020, reg 8](#).

127 [SI 313/2020, reg 7](#).

128 [SI 442/2020](#).

129 *Health Act 1947* (Section 31A - Temporary Restrictions) (Covid-19) (No. 8) Regulations 2020, [SI 448/2020](#).

130 *ibid* [reg 5](#).

131 *ibid* [reg 5\(2\)\(d\)](#).

132 *ibid* [reg 5\(2\)\(f\)](#).

133 *SI 536/2020 Fixed Payment Notice and Dwelling Event Regulations 2020*, [reg 3 and sch1, para 3](#).

134 *SI 448/2020*, [reg 6](#).

attend events in the other home.¹³⁵ On 22 November 2020, a series of changes were made to allow greater enforcement of these provisions. The organisation of an event in a dwelling was made a criminal offence,¹³⁶ with a fixed penalty notice of €500 attached.¹³⁷ A separate prohibition was introduced on attending an event in a dwelling,¹³⁸ with a fixed penalty notice of €150 attached.¹³⁹ The dwelling event provisions were also applied to these prohibitions on 22 November 2020.¹⁴⁰

Beyond this, events were only permitted where outdoors and where attended by persons from no more than two households.¹⁴¹ The organisation of, but not participation in, events which did not meet the foregoing exception was criminalised.¹⁴² Since 22 November 2020, a fixed penalty notice of €500 may be issued for an alleged breach of this provision.¹⁴³ Funerals and wedding receptions fell into a different category, with 25 people permitted to attend these events.¹⁴⁴

Although the legal regulation of shopping was the same in Stage F as Stage A, it became the subject of public debate in Stage F. It was a reasonable excuse to leave one's home to go to an essential retail outlet for 'the purpose of obtaining items (including food, beverages, fuel, medicinal products, medical devices or appliances, other medical or health supplies or products, essential items for the health and welfare of animals, or supplies for the essential upkeep and functioning of the person's place of residence)'.¹⁴⁵ This was mirrored by an obligation on shop-owners only to allow members of the public access to that part of a shop that 'is operating solely as an essential retail outlet'.¹⁴⁶ Although the list of items was again non-exhaustive, shop owners were unlikely to leave themselves open to criminal sanction by allowing customers to purchase items other than those listed.

Religious practice

During stages B-E, there were no legal restrictions on religious practice. During stages A and F, it was a reasonable excuse to leave one's home to attend certain funerals.¹⁴⁷ Priests were permitted to leave their homes to lead religious services

135 *ibid* [reg 7](#). For the definition of 'relevant household', see [reg 4](#).

136 *SI 535/2020 Health Act 1947* (Section 31A - Temporary Restrictions) (Covid-19) (No. 8) (Amendment) Regulations 2020, [reg 2](#).

137 *SI 536/2020 Fixed Payment Notice and Dwelling Event Regulations 2020*, [reg 3 and sch1, para 5](#).

138 *SI 535/2020 Health Act 1947* (Section 31A - Temporary Restrictions) (Covid-19) (No. 8) (Amendment) Regulations 2020, [reg 2](#).

139 *SI 536/2020 Fixed Payment Notice and Dwelling Event Regulations 2020*, [reg 3 and sch1, para 4](#).

140 *ibid* [reg 4](#).

141 *SI 448/2020*, [reg 8](#).

142 *ibid* [reg 8\(4\)](#).

143 *SI 536/2020 Fixed Payment Notice and Dwelling Event Regulations 2020*, [reg 3 and sch1, para 6](#).

144 *SI 448/2020*, [reg 8\(3\)](#) and [reg 9](#) respectively.

145 *ibid* [reg 5\(2\)\(t\)](#).

146 *ibid* [reg 12\(2\)](#).

147 *SI 121/2020*, [reg 4\(2\)\(k\)](#) and *SI 448/2020* [reg 5\(2\)\(l\)](#).

remotely.¹⁴⁸ These strongly implied that it would have been a criminal offence to leave one's home to attend any other form of religious service, although the principle that criminal liability must be clear may count against such an interpretation. During Stage F, however, religious services did not fall within the category of prohibited events.¹⁴⁹ The Department of Health expressed the view that this meant that priests could not be criminally sanctioned for saying Mass.¹⁵⁰ This would lend support for the view that it would be a reasonable excuse to leave one's home to attend Mass, given that Mass is not criminally prohibited. Despite the Department of Health's (correct) statement that it is not a criminal offence to hold a religious service, it has been reported in the media that the Gardaí continue to threaten priests with criminal prosecution for saying Mass.¹⁵¹ We return to this issue as an instance of indirect enforcement in chapter 9.

Overview of enforcement powers

Penal provisions have generally not applied to private individuals. In Stage A, most prohibitions were deemed to be penal provisions. In Stage F, the obligation not to leave one's home without a reasonable excuse is a penal provision, but the prohibition on home events only became a penal provision on 22 November 2020. On the same date, the attendance of events in dwellings became a criminal offence, fixed penalty notices were applied to both, and the dwelling event provisions were brought into force. The failure to wear a face covering on public transport is not a criminal offence, but failure to comply with requests from relevant persons is a penal provision. Also, the employee or officer of the public transport company or the National Transport Authority can require the Gardaí to assist in enforcing the requirements. Failure to wear a face covering in a shop, in contrast, is a penal provision. Fixed penalty notice provisions range from €80 for face covering provisions to €100 for leaving one's home without a reasonable excuse, to €150 for attending an event in a dwelling, to €500 for organising a prohibited event in a dwelling or outdoors.

Conclusion ★

In this Report, our primary concern is with those regulations that raise human rights and equality concerns. In particular, we are concerned with regulations that restrict personal liberty, infringe on the dwelling place, or disproportionately affect groups identified by proscribed grounds of discrimination under the *Equal Status*

148 SI 121/2020, [reg 4\(2\)\(o\)](#) and SI 448/2020, [reg 5\(2\)\(o\)](#).

149 SI 448/2020, [reg 8](#).

150 Ceimin Burke, '[Department of Health says priests can't be jailed for holding mass during coronavirus restrictions](#)', *thejournal.ie*, (6 November 2020).

151 Marese McDonagh, '[Gardaí give "last warning" to parish priest over "open door" Mass](#)', *The Irish Times* (19 November 2020).

Acts 2000-2015.

The following restrictions are therefore of the most importance for the purposes of this Report:

- » Restrictions on leaving one's home;
- » Restrictions on shopping;
- » Movement restrictions;
- » Restrictions on events or gatherings in one's home;
- » Restrictions on education;
- » Obligations to wear face coverings;
- » Obligations on international passengers arriving into Ireland; and
- » Restrictions on religious practice.

We now turn to the question of how these measures were introduced, and in particular the consideration given to human rights and the interests of vulnerable groups.

Chapter 4

Oireachtas

Consideration of Human Rights and Equality Concerns

Introduction

In considering the *Health Preservation Act*, the *Emergency Powers Act*, the *Enforcement Powers Act*, and the *Health Amendment Act*, members of the Oireachtas have had regard to rights and equality concerns in various ways. They have tended not to use rights language. In our cataloguing of Oireachtas debates, we have not identified any references to international human rights instruments. Nevertheless, as we shall see, they have addressed the sort of concerns that underly those human rights instruments.

The Health Preservation Act

Many Dáil Deputies and Senators highlighted the potential for the rights restrictions in this legislation but nearly all accepted that the Government required extensive statutory powers to address the crisis. Instead, the main concern was ensuring the Government's new powers were time-limited, that any extension of their duration should be subject to Oireachtas approval, and that Dáil scrutiny would be ongoing during the crisis.

For example, the leader of Sinn Féin, Mary-Lou McDonald, TD, stated that the 'legislation before us affords the Minister extraordinary and far-reaching powers; these are extraordinary powers for an extraordinary time. People want to know that these powers will be used to protect them... Orderly and decisive action will bring about calm and reassurance.'¹⁵² Other TDs expressed concern at the scope of the statutory delegation but accepted their necessity and were reluctant to oppose them. Co-leader of the Social Democrats, Catherine Murphy, TD, did not dispute the necessity of the legislation but stated that it had to include a sunset clause as it 'is not that this legislation is not being brought in in good faith and is not being deemed to be needed but one never knows where abuse might happen.'¹⁵³ Richard Boyd Barrett, TD of Solidarity-People Before Profit argued that the Oireachtas would have to decide whether to extend the powers beyond 9 May 2020; it could not simply be a question of laying an order before the Dáil.¹⁵⁴

One of the few deputies to oppose the bill was Mick Barry, TD of the Socialist Party. While supportive of much of the Bill, he felt it was too much of a risk:

Governments in this country have a long tradition of using repressive legislation for purposes other than its intended use.... I am particularly concerned about the establishment of a full-time Garda public order unit, with one of its responsibilities, according to the RTÉ website, being to 'deal with protests'. In France and other countries, Covid-19-related emergency legislation has been already used to repress dissent but that must not happen here.¹⁵⁵

152 Dáil Deb [19 March 2020](#), vol 992, no 3, p. 183.

153 *ibid* 234.

154 *ibid* 197.

155 *ibid* 199.

The Emergency Measures Act

Catherine Connolly, Independent TD wished to:

[H]ighlight the serious implications for human rights in both this and the previous legislation, and particularly in this legislation with regard to mental health...which are extremely worrying... What we have been forced to do because of this virus is extraordinary.¹⁵⁶

Deputy Connolly added that she had: 'the most serious concerns about [Part] 5 ... I see that there is a sunset clause, which I welcome, and that the legislation will come back before the Dáil for discussion.' She observed, 'the extraordinary length of time it took to bring human rights into the mental health area and with the stroke of a pen we have now taken it away for a period of eight months.'

Brid Smith, TD of Solidarity-PBP stated that she found it 'an extraordinarily draconian measure that a one-person tribunal, made up of a barrister whose profession is to deal with legal issues, would make a determination on somebody whose mental health was challenged and who was taken against his or her will into a mental health institution. I find this really draconian and upsetting.'¹⁵⁷

Louise O'Reilly, TD of Sinn Féin also raised concerns, stating that:

To detain someone involuntarily is a very serious undertaking.... The fact that a person will not get a review outside of the normal six-month review so that when this is over, he or she does not have an automatic entitlement to a review is also concerning because the detention could last for six months. I do not think there should be any case where a tribunal is allowed to go ahead without the presence either remotely or otherwise of a consultant psychiatrist or a person who is clinically trained to that level.¹⁵⁸

Then Minister for Health, Simon Harris, TD opposed an amendment proposed by Sinn Féin to the effect that Mental Health Tribunals must consist of two-persons—comprising the chair being a solicitor or barrister and a consultant psychiatrist or a registered clinical nurse specialist in psychiatry. The amendment was opposed for logistical reasons, as the Minister for Health argued that:

The Commission policy decision to adopt a cascading approach to tribunals was taken because both the HSE and the commission did express very serious concerns over the expected lack of availability of consultant psychiatrists due to Covid-19 and my concern is that the two-person tribunal would not do anything to alleviate those pressures. I do need to say that in

156 Dáil Deb [26 March 2020](#), vol 992, no 4, p. 262.

157 *ibid* 289.

158 *ibid* 348.

the case of one-person tribunals—this is really important and I want to say it on the record of this House—clinical input would still be given both by the treating psychiatrist and an independent consultant psychiatrist and where they differ in their opinion, by another psychiatrist. I do need to make that clear.¹⁵⁹

The Enforcement Powers Act

The *Enforcement Powers Act*, as we saw in chapter 2, provides various powers for the Gardaí to enforce the public health regulations in respect of licenses premises, which lies outside the scope of this Report.

Health Amendment Act

As we saw in chapter 2, the *Health Amendment Act* introduced graduated criminal sanctions, gave the Gardaí some powers to disrupt household events, without giving them the power to enter homes, and provided for fixed penalty notices. Minister for Health Stephen Donnelly, TD, introducing the Bill, said the rationale for the Bill was that he did 'not believe that the current penal provision of up to €2,500 and six months in prison is proportionate for most of the violations of the regulations and that it is too harsh.'¹⁶⁰ He also described the Bill as giving 'the ability to intervene in house parties where there is a public health risk and where it is proportionate to do so.'¹⁶¹

Concerns about the Bill focused on a lack of legislative scrutiny over the broad power to make regulations given to the Minister for Health and the impact on civil liberties, which some felt would be unevenly enforced on socio-economic or geographic grounds. Brendan Howlin, TD expressed reservations about the lack of Oireachtas oversight of the Minister's power to make regulations, saying that the:

160 Deputies have been trusted by the people to be their watchdogs, the protectors of their rights and interests. We must not only do that, but be seen to do it. People must trust what we decide and the processes we use to decide. That is not happening with this legislation. It is not good enough. The notion that we have legislation that, in essence, simply transfers power to the Minister to make regulations is not good.¹⁶²

Alan Kelly, TD Leader of the Labour Party said he was:

159 *ibid* 349.

160 Dáil Deb [23 October 2020](#), vol 999, no 8, p.990-991.

161 *ibid* 991.

162 *ibid* 1001.

[P]leased that An Garda Síochána will not be given the power to enter houses. Even though we support the public health efforts, we would not support this Bill if that was the case. Gardaí will have the power to knock on the door, ask to speak to the organiser and take his or her details as necessary. Given the difficult circumstances we are in, this is the right approach. It is balanced between civil liberties and the need to enforce the regulation, which gives the gardaí the ability to make their presence known without intruding into a person's home.¹⁶³

Brid Smith, TD of Solidarity-People before Profit said:

We are totally opposed to imposing fines on people. In fact, they do not work. The Irish Council for Civil Liberties has done some good research on this. When we used to jail people for not paying their television licence fees, the jails were full of mainly single mothers who could not afford to pay their television licence fine and would go to jail for a day or two instead. The Minister may find that this will happen. This approach does not work and is ineffective but, most important, it sends out the signal that we are not all in this together.¹⁶⁴

Independent Thomas Pringle, TD voted against the bill, asking:

What data are being collected on the locations being policed? What is the socio-economic status of those being stopped and questioned by gardaí? The public has been rightly sceptical about the Government's focus on house parties and personal responsibility, while ignoring the grave problems in meat processing plants and direct provision centres.¹⁶⁵

“
Concerns about the Bill focused on a lack of legislative scrutiny over the broad power to make regulations given to the Minister for Health and the impact on civil liberties, which some felt would be unevenly enforced on socio-economic or geographic grounds.

163 *ibid* 999.

164 *ibid* 1011.

165 *ibid* 1030.

Conclusion ★

The members of the Oireachtas, while accepting the public health rationale for the statutes, were concerned about the human rights and equality implications. There was a nuanced engagement with the complex trade-offs between protecting public health and respecting individual liberties, rights, and the need for Oireachtas oversight. Proportionality, whether expressly or implicitly, was given repeated consideration in these debates. These implications were not articulated in the language of the legal instruments that we identified in chapter 1. This is not problematic in itself: such language is technical, legal and stylised. Elected politicians should be able to speak in political terms, not legal terms. Nevertheless, formal consideration of human rights and equality concerns as an input into the legislative process would be welcome. This may have been difficult at the start of the pandemic when the *Health Preservation Act* and the *Emergency Powers Act* were enacted. However, for the more recent statutes—the *Enforcement Powers Act* and the *Health Amendment Act*—this could have been possible.

Though there are many ways that human rights scrutiny might be provided, in our view, the best way to ensure such scrutiny would be the establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity. IHREC has recommended such a body since 2016, and has raised this issue specifically in the context of the COVID-19 crisis.¹⁶⁶ This Committee would be adequately resourced to allow members engage properly with the full range of relevant standards, including but not limited to those identified in chapter 1 of this report. Only in such a way can structured, cross-departmental analysis of the legislation be brought to bear. All Bills related to the control of the pandemic would be referred to that committee, but we recommend further roles for the Committee in subsequent chapters.

It is striking—although it should not be surprising—that human rights and equality concerns were expressed far more systematically in relation to the statutes that made legislative choices—whether by providing enforcement powers or adjusting the procedures for detention of people believed to be mentally ill—than for legislation that delegated legislative power to the Minister for Health. In the debates on the enactment of the statute, human rights and equality concerns could not easily be raised about the substance of restrictions because it was, at best, unclear what those restrictions would be. For that legislation, members of the Oireachtas could only advance procedural concerns about the need for continuing parliamentary oversight. As we shall see in subsequent chapters, however, continuing scrutiny by the Houses of the Oireachtas has not been particularly effective. Additional debate and scrutiny on several of these points took place in the Special Committee on COVID-19 Response and were highlighted

166 IHREC, 'Statement from the Irish Human Rights and Equality Commission on COVID-19 Oversight in Respect of Human Rights and Equality' (27 April 2020).

in its report.¹⁶⁷ However, there is little sign as yet that this report is informing the Government's approach.

This highlights clearly the potential risk of broad delegations of law-making power in this context. There are three ways of mitigating this risk. We have already seen in chapter 2 that the sunset clauses have not meaningfully constrained the Government's ability to secure lengthy extensions to its own powers. In the next two chapters, we evaluate the success of two further mitigation mechanisms: Oireachtas oversight of the secondary legislation; consideration of human rights and equality concerns during the secondary law-making process itself.

167 Special Committee on Covid-19 Response, '[Final Report](#)', (Houses of the Oireachtas, October 2020).

Chapter 5

Oireachtas Oversight of Law-Making by the Minister for Health

Introduction

In order to ensure that human rights and equality concerns are addressed, it is essential that there be Oireachtas oversight of the secondary law-making process. This provides crucial public oversight and accountability for the rules made, and it can help inform public understanding and debate around the propriety of the use of these powers. This is not only desirable, but also demanded by the principle of legality under international human rights law. Even in situations of national emergency, the ECHR requires that measures be effected 'in accordance with a procedure prescribed by law'.¹⁶⁸ The Venice Commission has repeatedly emphasised the need for parliamentary oversight of declarations and prolongations of states of emergency.¹⁶⁹ The Council of Europe has reaffirmed that parliaments must 'keep the power to control executive action' even if this means 'intervening on an *ad hoc* basis to modify or annul the decisions of the executive'.¹⁷⁰ In addition, General Comment No. 29, elaborating on the requirements of Article 4 of the *International Covenant on Civil and Political Rights* provides that '[s]afeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole'.¹⁷¹ Article 4 further requires that, during public emergencies, state organs 'shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies'.¹⁷²

Legal constraints on the Minister's use of delegated legislation

The Minister is not entirely at large as to what regulations he can make, but is guided and limited by the principles and policies contained in the Act itself. That said, the powers delegated by the *Health Preservation Act* are sweeping in respect of the conduct that may be prohibited by the Minister by regulation, and the effect on rights is potentially vast. As White points out, the powers were ultimately used to mandate face coverings be worn on public transport, something never discussed during the passage of the legislation.¹⁷³ In our view, the face covering regulations do fall within the broad legislative power delegated to the Minister.

168 *Alparslan Altan v Turkey* App no 12778/17 (ECtHR, 16 April 2019) paras 117-119; *Mehmet Hasan Altan v Turkey* App no 13237/17 (ECtHR, 20 March 2018) paras 140 and 213.

169 Venice Commission: European Commission for Democracy through Law, *Compilation of Venice Commission Opinions and Reports on States of Emergency* (CDL-PI(2020)003, 16 April 2020) 14 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)003-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e) accessed 19 November 2020.

170 Council of Europe, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis* (SG/Info(2020)11, 7 April 2020) 4.

171 United Nations, *General Comment No. 29: States of Emergency* (2001) UN Doc. CCPR/C/21/Rev.1/Add.11 31, para 16.

172 United Nations Economic and Social Council, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (UN Doc. E/CN.4/1984/4, 28 September 1984) para 24.

173 Conor White, '[The Oireachtas and Mandatory Face Coverings](#)' *COVID-19 Law and Human Rights Observatory* (13 July 2020).

Nevertheless, the fact that such a pervasive, if not particularly intrusive, restriction on personal liberty as the requirement to cover one's face could be introduced by the Minister despite never having been considered by the members of the Oireachtas illustrates the importance of ongoing Oireachtas oversight.

Oireachtas oversight

Unfortunately, parliamentary oversight of the rulemaking process and its outputs in Ireland has been lacking in several respects. There was general difficulty in convening the Houses of Oireachtas, due to (potentially incorrect) legal advice that suggested that the Houses could not hold remote sittings due to constitutional impediments. This meant that no ordinary committees sat between January and October of 2020, when some of the most important legislative and regulatory decisions were made. A Special Committee on COVID-19 Response sat on 29 days between 6 May 2020 and 30 September 2020. The Committee investigated many matters and published a comprehensive report on these matters on 6 October 2020, making some important recommendations.¹⁷⁴ Nevertheless, its brief was too wide to realistically be able to devote significant attention to all relevant measures. Moreover, having to look at so many sectoral concerns, its ability to examine the legislative and regulatory measures in detail was very limited.



Unfortunately, parliamentary oversight of the rulemaking process and its outputs in Ireland has been lacking in several respects.

Most importantly, the *Health Act 1947* provides only limited scope for Oireachtas oversight of secondary legislation made by the Minister for Health. There is no scope for pre-enactment consultation with or scrutiny by any committee of the Houses for regulations introduced. This is unsurprising, as these regulations have been drawn up in very short timeframes to respond to rapidly changing circumstances. However, the scope for ex-post scrutiny—which is more realistic to carry out—is limited. Section 5 of the *Health Act 1947* requires regulations to be laid before each House of the Oireachtas as soon as may be after being made. Either House may annul the Regulation by resolution within the next 21 days.¹⁷⁵

Such powers of annulment are almost never used. To take an example, the week of 11 May 2020 saw SI 174/2020,¹⁷⁶ one of the most significant sets of regulations made by

174 Special Committee on Covid-19 Response, 'Final Report', (Houses of the Oireachtas, October 2020).

175 *Health Act 1947*, s 5.

176 *Health Act 1947* (Section 31A – Temporary Restrictions) (Covid-19) (Amendment) (No. 3) Regulations 2020, SI 174/2020.

the Minister for Health, laid before the Dáil. That week, an additional 26 documents were laid before the House, including 13 other sets of annulable regulations.¹⁷⁷ None of these was even debated. On one occasion, a deputy unsuccessfully moved to annul a set of COVID-19 regulations. Though the proposer of the motion focused more on economic grounds for opposition, several deputies who voted against the regulations did cite civil liberties concerns over penal measures in a detailed debate.¹⁷⁸

Conclusion ★

Greater political scrutiny of pandemic measures that raise human rights and equality concerns is desirable. It has been called for in several Dáil debates.¹⁷⁹ The Special Committee on COVID-19 Response in its report made several recommendations that all legislation and regulations made pursuant to the pandemic should be scrutinised *ex post* by the sectoral Committees of the House.¹⁸⁰ While this recommendation has merit, we suggest a different approach in respect of restrictions introduced by the Minister for Health under the *Health Preservation Act*. In chapter 4, building on earlier work of IHREC, we recommended the establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity. As well as reviewing Bills, this Committee should scrutinise *ex post* the regulations made by the Minister for Health. It would swiftly issue a report on the impact of each new set of regulations.

New Zealand offers a compelling model, where relevant regulations are disallowable: that is, they cease to have effect unless they are positively affirmed by the legislature within 10 sitting days of their passage.¹⁸¹ This would actively direct the attention of each House of the Oireachtas to the contents of the regulations, and compel the Government to defend their necessity and propriety. This in turn might inform public debate in general about the regulations. Given that more regular sittings of the Houses is now possible, it should be possible to give effect to such a mechanism. This would also conform with the recommendation of the Venice Commission:

A solution which combines respect for the supremacy of the legislature with the need for speed and decisive action is to provide that all government ordinances issued under delegated powers are speedily (or within a specified period of days) put before the legislature either for approval, or to give it

177 Houses of the Oireachtas, *Documents Laid List* (Week beginning 11 May 2020).

178 Dáil Deb 9 Sep 2020, vol 997, no 1. The motion was moved by Mattie McGrath TD, whose focus in putting forward the motion was the economic effect of the *Health Act 1947* (Section 31A - Temporary Restrictions) (Covid-19) (No. 4) Regulations 2020, SI 326/2020.

179 During debate on the recent Health (Amendment) Bill 2020, this point was made by representatives of Sinn Féin, Labour, and the Social Democrats.

180 Houses of the Oireachtas, *Special Committee on COVID-19 Response: Final Report* (6 October 2020) para 172.

181 COVID-19 Public Health Response Act 2020 (NZ), s 17; Legislation Act 2012 (NZ), s 37 et seq.

an opportunity to disapprove these. Such a parliamentary power must be framed to allow it not to approve, or disapprove of, specific provisions of an ordinance, rather than an 'all or nothing' approach to the ordinance as a whole. This in turn means that the parliament must obviously continue to sit: dissolution of the parliament should not be possible during the state of emergency.¹⁸²

¹⁸² Council of Europe: European Commission for Democracy through Law, *Respect for Democracy, Human Rights and the Rule of Law during States of Emergency – Reflections* (CDL-PI(2020)005rev, 26 May 2020) paras 70-71.

Chapter 6

The Consideration of Human Rights and Equality Concerns in Delegated Law-Making

Introduction

The most significant rights restrictions have been implemented through delegated legislation made by the Minister for Health. In approving the *Health Preservation Act*, members of the Oireachtas were only aware of the powers granted to the Minister for Health, not precisely how those powers would be exercised. The sunset provision in the *Health Amendment Act* itself did not lead to any significant scrutiny prior to its extension to 9 June 2021. The capacity for the Oireachtas to annul regulations has never come close to being exercised. It is therefore critical that the process through which the Minister for Health makes regulations involves consideration of human rights and equality concerns. In this chapter, we explore the process through which secondary legislation is made. We first identify the parameters that apply, both from the primary statute and from general practice. We then identify the very specific role of NPHE and how this has evolved over time. Finally, we explore how human rights and equality considerations may feature in this process.

The making of secondary regulations

As we saw in chapter 2, when making regulations, the Minister is required to consider the general public health situation, the need to act expeditiously, the resources of the health system, the financial resources of the State, and the advice of the Chief Medical Officer (CMO) of the Department of Health. The Minister may have regard to any relevant guidance issued by bodies such as the WHO and the European Centre for Disease Prevention and Control. The Minister must also consult other Ministers of the Government who hold relevant functions, and may consult any other person he considers appropriate.

Although the Minister has the sole legal power to make the regulations, under the Constitution, the Cabinet is collectively responsible for the Departments of State, administered by members of the Government. It is unsurprising that the policy decisions ultimately reflected in the regulations have been made by the Cabinet as a whole, whether at virtual or in-person cabinet meetings, rather than by the Minister for Health in isolation. The Government's role is probably to approve the broad policy direction later reflected in regulations, as well as any particularly contentious matters. We can infer from many public statements on the matter that Government adopts a holistic view of the need for these measures, including various public health factors, economic consequences, consequences for individuals and groups, which would include various rights considerations and concerns about the vulnerable. As with consideration by the Oireachtas, however, there is little or no evidence to suggest that the Government engages in a formal human rights or equality scrutiny of the regulations.

It is likely that the Department of Health takes the lead in drafting the regulations, although the Office of the Attorney General may well provide both drafting and

advisory assistance.¹⁸³ Whether located in the Office of the Attorney General or the Department of Health, the ability of civil servants to take into account human rights and equality concerns in drafting laws that meet the Government's policy objectives would be affected by time pressure.

Significant new regulations are usually preceded by a Regulatory Impact Analysis (RIA),¹⁸⁴ which must include consideration of the proposed impact of the regulation on 'the rights of the citizen/human rights'.¹⁸⁵ Officials should consider this and conduct a 'high level of analysis' where significant rights impacts are identified.¹⁸⁶ Consideration should be given to 'the personal rights defined in the Irish Constitution as well as to international agreements to which Ireland is a party. These include United Nations Treaties such as the *Universal Declaration of Human Rights* and Council of Europe Treaties like the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁸⁷ A RIA would also examine the impact on 'socially excluded or vulnerable groups including gender equality, poverty, people with disabilities and rural communities'.¹⁸⁸ No RIAs in respect of any of the COVID regulations have been published. Given the extraordinary speed with which they have had to be drawn up, it would be surprising if RIAs had been prepared. As understandable as this is, it does remove a crucial stage from the normal legislative process.

The role of NPHE

As noted above, the Minister for Health must consider the advice of the CMO when making the regulations. This rightly puts public health to the forefront of legislation, helping to vindicate positive rights to life, health, and bodily integrity. The CMO leads NPHE for COVID-19, set up on 27 January 2020. It is composed of members of various state bodies, including the Department of Health, HSE, Health Protection Surveillance Centre (HPSC), Health Information and Quality Authority (HIQA), Health Products Regulatory Authority (HPRA) and others with 'relevant experience in health and/or other matters'. Importantly, all of these are public bodies within the meaning of the *Irish Human Rights and Equality Commission Act 2014*. They are therefore subject to the obligation in section 42 to have regard to the need to eliminate discrimination in the performance of their functions.

The composition of NPHE has been criticised for not including various viewpoints

183 Although Parliamentary counsel in the Attorney General's Office draft all Bills, their role in relation to statutory instruments may be limited to settling them. See http://www.attorneygeneral.ie/pc/pc_do.html visited 29 November 2020.

184 Department of the Taoiseach, *Cabinet Handbook (December 2006) Appendix 3. Typically this involves a screening RIA and a full RIA if significant costs or impacts are identified.*

185 Department of the Taoiseach, *Cabinet Handbook (December 2006) 62-64.*

186 Department of the Taoiseach, *Revised RIA Guidelines (June 2009) para 4.57.*

187 Department of the Taoiseach, *Revised RIA Guidelines (June 2009) para 4.58.*

188 Department of the Taoiseach, *Cabinet Handbook (December 2006) 62.*

from key stakeholders, such as children with autism and their parents and nursing home operators.¹⁸⁹ In response, the Government has said that NPHE is not supposed to be a representative body.¹⁹⁰ Some have queried whether NPHE includes a sufficient diversity of medical and scientific opinion.¹⁹¹

Among NPHE's terms of reference are the responsibility to 'oversee and provide direction, guidance, support and expert advice across the health service and the wider public service, for the overall national response to Coronavirus, including national and regional and other outbreak control arrangements.'¹⁹² In addition to the core NPHE, there was an Expert Advisory Group and various subgroups, including an Acute Hospital Preparedness Subgroup, a Behavioural Change Subgroup, an Irish Epidemiological Modelling Advisory Group, and a Vulnerable People Subgroup. In November 2020, it was reported that almost all of the NPHE subgroups, including its Expert Advisory Group, had been wound down over the summer and their functions incorporated into the Department of Health. The Modelling Advisory group is the only one that remains.¹⁹³ The winding down of these sub-groups has deprived NPHE of access to wider expertise that might be relevant to human rights and equality concerns. We are not aware of any public statement of the rationale for these changes.

NPHE makes its decisions and recommendations by consensus and on a collective basis.¹⁹⁴ It communicates its recommendations to the Minister for Health directly after its meetings.¹⁹⁵ NPHE states that it is committed to transparency, and will communicate its decisions publicly and provide media briefings. However, particularly early in the pandemic, there were extensive delays in the publication of minutes.¹⁹⁶ In mid-September, the Government announced the creation of a new oversight group to act as a filter for the recommendations of NPHE.¹⁹⁷ Chaired by the Secretary General to the Government, it would meet weekly, usually following the issuance of advice by NPHE.

189 Catherine Connolly, Dáil Deb [6 May 2020](#), vol 992, no 9; [21 May 2020](#), vol 993, no 4; [10 June 2020](#), vol 993, no 9; [8 July 2020](#), vol 994, no 6.

190 Leo Varadkar, Dáil Deb [7 May 2020](#), vol 992, no 10.

191 Diarmaid Ferriter, '[We must consider NPHE may be wrong](#)' *The Irish Times* (11 September 2020).

192 Department of Health, 'National Public Health Emergency Team (NPHE) for COVID-19: Terms of Reference' (11 February 2020) <https://www.gov.ie/en/collection/691330-national-public-health-emergency-team-covid-19-coronavirus/> accessed 19 November 2020.

193 Paul Cullen, '[Covid advisory groups shut as work "realigned" into departments](#)' *The Irish Times* (4 November 2020).

194 Department of Health, 'National Public Health Emergency Team (NPHE) for COVID-19: Governance Structures' (26 June 2020) 5 <https://www.gov.ie/en/publication/de1c30-national-public-health-emergency-team-nphet-for-covid-19-governance-/> accessed 19 November 2020.

195 *ibid* 5.

196 '[Holohan says delay in publishing NPHE meeting minutes is due to "workload issue"](#)', *Journal.ie* (27 April 2020).

197 Harry McGee, '[New Covid-19 oversight group to filter advice from NPHE to Cabinet](#)' *The Irish Times* (15 September 2020).

The relationship between NPHET and the Government

The accountability trap

The interaction of Cabinet decision-making and NPHET's expert advice has the potential to create an accountability trap, particularly important for human rights and equality considerations. The members of NPHET have expertise in health matters, but little expertise in other areas, including but not limited to human rights and equality (particularly following the dissolution of the sub-groups). There is a risk that expert advice, limited to public health, captures the whole decision-making process, such that the advice becomes the decision. This may happen due to the force of the advice, the publicity associated with it, or a desire on the part of elected politicians to avoid accountability for decisions. This would be problematic both because important decisions should be made by democratically accountable actors and because NPHET has no particular expertise in human rights and equality.

The relationship between Government and NPHET is challenging to map, making it difficult to ascertain if the accountability trap has arisen.¹⁹⁸ Although the formal relationship is one in which NPHET advises the Government, NPHET's advice has at times appeared to carry determinative or close to determinative weight. In this section of the Report, we examine the public record, including media reports, to attempt to identify the precise role played by NPHET. We do so, not out of idle speculation, but rather because this is the only way in which to ascertain the consideration being given to human rights and equality considerations in the secondary law-making process. The available evidence suggests that NPHET has played three different roles at different times or in respect of different issues: *de facto* decisionmaker, collaborator, advisor.

NPHET as *de facto* decisionmaker

The Government has frequently stressed its reliance on expert advice from NPHET, particularly in the early days of the pandemic. This has, on occasion, veered towards the Government suggesting that the advice is determinative, or that there was little scope to depart from the advice or act in the absence of advice. There are several examples ranging from testing priorities,¹⁹⁹ to face coverings,²⁰⁰ to

198 Concerns about the unclear nature of the relationship have been raised in the Dáil on several occasions. See Alan Kelly and Seán Sherlock, Dáil Deb [23 April 2020](#), vol 992, no 7; Ossian Smyth, Dáil Deb [30 April 2020](#), vol 992, no 8.

199 See the comments of Simon Harris in the Dáil that testing priorities would be 'decided by public health experts and NPHET' and that these would 'not be political decisions'. Dáil Deb [7 May 2020](#), vol 992, no 10.

200 See the comment of Leo Varadkar that 'we have to be guided by the CMO and NPHET on something that is purely a matter of public health advice.' Dáil Deb [21 May 2020](#), vol 993, no 4. Similarly, Shane Ross

additional restrictions in nursing homes.²⁰¹ Some opposition deputies accused the Government of letting 'the tail wag the dog'²⁰² in being so deferential to NPHET.

NPHET as collaborator

There have been several instances where NPHET and the Government appear to have disagreed but reached a form of amiable consensus by means of persuasion or discussion. For example, in April, the Government reportedly wished to allow child minders to go to the homes of healthcare workers, but was not implementing this because of NPHET's unhappiness with the proposal.²⁰³ On the other hand, as restrictions were being eased in June, Cabinet decided—with NPHET apparently endorsing or at least acquiescing in the decision—that the movement restrictions should be loosened to allow a 20 kilometre radius, and that shopping centres should be allowed to reopen, both of these being more significant relaxations than NPHET had recommended.²⁰⁴ These examples suggested a process of negotiation as to what the advice should be, producing advice which the Government would then be able to follow. This undermines accountability because it becomes unclear who is formulating the expert advice and who is deciding whether to accept that advice.

NPHET as advisor

There are several instances where the Government has not adopted NPHET's advice. The biggest disagreement, of course, concerned NPHET's recommendation for a second lockdown in October 2020. On 4 October, NPHET recommended to the Government that the country be placed on Level 5 lockdown for four weeks.²⁰⁵ This advice was said to have taken the Government by surprise. The Government very publicly and directly declined to follow this advice, and instead moved the country to Level 3. When explaining this decision, Minister for Health Stephen Donnelly pointed out that NPHET had written a letter on the Thursday, three days before their Level 5 recommendation, advising that a move to Level 3 was necessary. The Minister said that the Government did not believe the data had changed sufficiently in those three days to warrant Level 5. The

claimed he could not make masks mandatory on public transport in the absence of NPHET advice. Dáil Deb 3 June 2020, vol 993, no 7.

201 Dáil Deb [16 April 2020](#), vol 992, no 6.

202 Jack Quann, '[Alan Kelly: "The tail is wagging the dog" when it comes to NPHET and the Government](#)' *Newstalk* (4 June 2020).

203 Michelle Hennessy, '[Who's calling the shots? - The role of Ireland's public health emergency team and its key players](#)' *The Journal* (25 April 2020).

204 Fiach Kelly, '[Ministers happy to be part of plan to lift restrictions](#)' *The Irish Times* (6 June 2020). The Government said that they were able to get around the need to close shopping centres, for example, by implementing better guidelines on social distancing.

205 '[Letter from CMO to Minister for Health re COVID-19 \(Coronavirus\)](#)' (4 October 2020).

Minister stressed that it was NPHEt's role to advise the Government on 'what they believe is required from a public health perspective to suppress this virus', but the Government 'has a different job'.²⁰⁶

The high profile and very public nature of this disagreement highlighted that the Government always retained the formal power to reject NPHEt's advice. Nevertheless, political factors may lead a reversion to a collaborator or decision-maker role for NPHEt. Less than two weeks later, indeed, in the context of a further increase in cases, NPHEt again recommended a Level 5 lockdown to the Government on 15 October 2020, this time for six weeks rather than four.²⁰⁷ On 19 October 2020, the Government decided to follow this recommendation.²⁰⁸ Later again, however, in its decision to ease the lockdown on 1 December,²⁰⁹ the Government went further than recommended by NPHEt in relation to easing restrictions on hospitality, in particular at the same time as easing the rules on household visiting.²¹⁰

The consideration of human rights and equality concerns by NPHEt and Government

This shifting relationship between NPHEt and the Government makes it difficult to ascertain where, if at all, human rights and equality concerns are addressed. It does appear that NPHEt, notwithstanding its lack of expertise, considers human rights and equality concerns. In a document, prepared by one of the dissolved subgroups, entitled 'Ethical framework for decision-making in a pandemic', NPHEt outlines seven 'key ethical principles that should inform the pandemic planning process and decision-making during a pandemic':

- » minimising harm;
- » proportionality;
- » solidarity;
- » fairness;
- » duty to provide care;

206 Órla Ryan, 'Tánaiste stands over NPHEt criticisms while Taoiseach's spokesperson says Varadkar is "entitled to his opinion"', *The Journal* (6 October 2020).

207 'Letter from CMO to Minister for Health re COVID-19 (Coronavirus)' (15 October 2020).

208 'Ireland placed on Level 5 of the Plan for Living with COVID-19' (Government Press Release, 19 October 2020).

209 'Ireland placed on Level 3 of the Plan for Living with COVID-19 - with special measures for a safe Christmas' (Government Press Release, 27 November 2020).

210 'Letter from CMO to Minister for Health re COVID-19 (Coronavirus)' (26 October 2020).

- » reciprocity; and
- » privacy.²¹¹

NPHEt acknowledges that 'Many of the issues encountered in planning and responding to a pandemic involve balancing rights, interests and values.'²¹² It is also aware that there is an acute need to accord to these principles in any 'decision taken to restrict the liberty of individuals':

Decisions to limit individual liberty should be introduced only if the best available scientific evidence indicates that the measure(s) considered will achieve the intended goal; that the limitation(s) planned is proportionate to the anticipated benefit; that no less restrictive measure would be effective; and that failure to implement the measure would result in significant harm. Restrictions should apply without unfair discrimination, and the need for measures which limit individual liberty should be continually reviewed and assessed in light of emerging evidence.²¹³

In another document entitled 'Public Health Framework Approach in providing advice to Government', NPHEt outlines several factors it would regard in offering advice to the Government.²¹⁴ Noting the 'indirect effects' of its recommendations being adopted on the economic, societal and other health factors, it advocates a 'proportionate and practical' approach which balances overall risk with 'a hierarchy of benefits in terms of population health and wellbeing understanding, feasibility, acceptance and adherence to support ongoing restrictions, economic and social factors, human rights, ethical principles and other considerations'.²¹⁵

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This shifting relationship between NPHEt and the Government makes it difficult to ascertain where, if at all, human rights and equality concerns are addressed.

211 Department of Health, 'Ethical framework for decision-making in a pandemic' (24 September 2020) 5-7 <https://www.gov.ie/en/publication/dbf3fb-ethical-framework-for-decision-making-in-a-pandemic/> accessed 19 November 2020. It also has a set of 5 procedural values that it seeks to abide by in its processes; see Department of Health, 'Procedural Values for Decision-making in a Pandemic' <https://assets.gov.ie/79563/edee4d9e-b48b-4fb4-bff5-10db991107bd.pdf> accessed 19 November 2020.

212 *ibid* 3.

213 *ibid* 13. At the same page, it is further noted that 'the potential tension between individual rights and the collective good, and require consideration of how justifiable it is to restrict individual rights and freedoms in order to achieve certain public health goals.'

214 NPHEt, 'Public Health Framework Approach in providing advice to Government in relation to reducing social distancing measures introduced in response to COVID-19' (1 May 2020) <https://assets.gov.ie/73787/c904068ef79e4595b85b9e4d3321d013.pdf> accessed 19 November 2020.

215 *ibid* 7.

From these documents, we can see that, though not engaging in detailed or expert rights analysis, NPHEt is committed in its process to have regard to concerns other than public health calculation, including concerns about rights and personal liberties. It also places at the centre of its articulated decision-making process a procedure that bears a close resemblance to the proportionality balancing analysis that we see in constitutional and human rights analysis. It remains the case, however, that NPHEt has no expertise in carrying out such assessments. Moreover, as noted by IHREC in May 2020, the guidance did not specifically consider relevant domestic or international equality and human rights law and standards, and there is no discussion of the legal and human rights requirements which clinicians need to follow in making decisions about patients. Further, there appeared to have been limited or no consultation with those groups most likely to be affected.²¹⁶

In addition, it is concerning that NPHEt does not routinely engage with the recommendations of the World Health Organisation, a specialised agency of the United Nations responsible for public health.

NPHEt's consideration of human rights and equality concerns can provide an important preliminary check in the formulation of public health advice, establishing a tolerable baseline of rights protection below which the ultimate legislation should not fall, but it does not displace the Government's responsibility. Given the unclear and shifting relationship between NPHEt and Government, however, and the need for Government to make decisions quickly in response to NPHEt advice, there is a risk that this will become the sole point at which human rights and equality concerns are considered. This would be deeply problematic, particularly given the lack of relevant expertise in NPHEt and the failure to formulate the human rights and equality standards with reference to national and international law.

Conclusion ★

Restrictions on everyday life are critical to the State's response to COVID-19. These are, in principle, a legitimate exercise of state power designed to secure public health and indeed to vindicate positive rights to life, health, and bodily integrity. But draconian restrictions can interfere with human rights and affect the most vulnerable groups in society. It is therefore important that human rights and equality concerns be carefully addressed as such regulations are drafted and adopted. The extent to and manner in which this occurs at present is, however, far from clear. The policy impetus for new restrictions comes from NPHEt. NPHEt itself gives some consideration to the sort of concerns that are reflected in human rights and equality guarantees, but has neither legal expertise in these matters nor direct insight into the experiences of those who would be affected. While the

²¹⁶ IHREC, '[Letter to the Minister for Health](#)' (18 May 2020).

Government is not bound to follow NPHEt's advice, shifting political dynamics may leave the Government with little alternative. Also, there is frequently very little time between NPHEt's recommendation and new regulations being adopted. This suggests that by the time NPHEt makes its recommendation, it is often too late for any meaningful consideration to be given to human rights and equality concerns.

There are two critical points at which human rights and equality considerations need to be addressed: (a) in the formulation of NPHEt's advice; and (b) in the formulation of policy proposals for Government in response to NPHEt's advice. We therefore recommend the re-establishment of a NPHEt sub-group with the relevant expertise to address ethical, human rights, and equality concerns. In addition, to avoid relegation of these concerns to peripheral groups, NPHEt itself should have members with expertise on ethical, human rights, and equality concerns. We also recommend that the Government oversight committee that filters NPHEt recommendations should have representation from the Department of Children, Equality, Disability, Integration and Youth. Finally, we recommend that the Minister for Health should publish a human rights and equality analysis of the proportionality of each set of regulations within 48 hours of their being made. This would inform the work of the Joint Oireachtas Committee recommended in previous chapters.

Synthesising the analysis of the last three chapters, it is difficult to avoid the conclusion that the delegation of legislative power to the Minister for Health has resulted in a black hole for the consideration of human rights and equality concerns. Members of the Oireachtas could not meaningfully raise such concerns because it was unclear precisely what restrictions would be introduced. The sunset provisions and procedures allowing the Oireachtas to annul measures have had little, if any, purchase. The interaction between NPHEt and the Government in approving the policy direction and preparing legislation may allow for some consideration of human rights and equality concerns. However, this is largely done by those with neither expertise, nor insight into the needs of disadvantaged groups, nor democratic accountability. Such consideration, if it occurs, is not available for public scrutiny. This is a significant defect in Ireland's COVID-19 response, breaching international law norms relating to the rule of law.²¹⁷

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...it is difficult to avoid the conclusion that the delegation of legislative power to the Minister for Health has resulted in a black hole for the consideration of human rights and equality concerns.

²¹⁷ Council of Europe, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis* (SG/Info(2020)11, 7 April 2020) 4.

Chapter 7

Rule of Law Concerns in Making the Regulations

Introduction

In this chapter, we outline rule of law concerns that have arisen in relation to the way in which regulations are presented. Laws should be published in advance, be clear, and be non-contradictory. These requirements protect all who are subject to the law but are particularly important to those from disadvantaged groups that may have a problematic relationship with law enforcement authorities. These groups have most to fear from legally uncontrolled enforcement powers. We return to that concern in chapter 9. There are three rule of law concerns related to the presentation of regulations. First, they have frequently not been published before they have come into force. Second, official Government statements have provided misleading accounts of what the law requires. Third, official Government statements have tended to blur the distinction between the regulations and public health advice, making the content of the law very unclear in people's minds.²¹⁸

Promulgation

Regulations have routinely entered into force before they were published. Typically, several days elapse between the Minister for Health making new regulations and their being notified in *Iris Oifigiúil* and published on the Irish Statute Book. The *Statutory Instruments Act 1947* ensures that people cannot be criminally prosecuted for breaching the provisions during this period.²¹⁹ But where criminal prohibitions are being loosened rather than tightened—as was the case from Stage A to Stages B and C—people may wrongly think that certain behaviour is still prohibited.

The regulations that moved the State into Stage F came into force on Thursday 22 October.²²⁰ The Minister for Health is reported to have signed the regulations into law at 11.50pm that night.²²¹ Notice of making the regulations was published in *Iris Oifigiúil* on Friday 23 October. There is no obvious reason why the Minister could not have made the regulations come into force 10 minutes after he signed them, rather than 23 hours and 50 minutes before he signed them. His failure to do so suggests a lack of concern for the rule of law. It is both retroactive legislation, since the regulations applied to events that occurred earlier in the day before the law was made, and a failure of notice.

While contemporaneous publication would be helpful, the Department of Health should go further. In New Zealand, the COVID-19 regulations must—absent some

²¹⁸ In chapter 8, we consider a separate rule of law concern that the 'reasonable excuse' exception to many of the restrictions on people's liberty renders the laws unacceptably vague.

²¹⁹ [Section 3](#).

²²⁰ *Health Act 1947* (Section 31A - Temporary Restrictions) (Covid-19) (No. 8) Regulations 2020, [SI 448/2020](#).

²²¹ See *Seanad Debate* 23 October 2020, contribution of Senator Ivana Bacik.

urgent public health need—be published 48 hours before they take effect.²²² This allows people and businesses take steps to ensure that they will comply with the law. This should be possible in most circumstances.

Misleading descriptions of the law

Regulations can be difficult to understand. The Department of Health website sometimes carries a lay person's description of what the regulations do, but these can misdescribe the actual legal obligations people are under. For example, at the start of Stage B a new set of movement restrictions was introduced.²²³ The website stated:

We can travel within a 20 kilometre radius of our homes or anywhere within our county for social and recreational purposes. This includes travel and leisure.

We can gather for social or recreational purposes in other people's homes, subject to a maximum of 6 people at such a gathering.

We can exercise outdoors with others or gather outdoors with others for social and recreational purposes, subject to a maximum of 15 people.

People may travel outside of these geographical limits for visits to vulnerable persons.²²⁴

A casual reader might have gleaned from this guide that the key movement restriction in the regulations is the distance limit: you may travel 20km or within your own county if it is for social or recreational purposes, but further travel is permitted only to visit a vulnerable person. Such a reading would have been incorrect, however. The 20km limit only applied to movement for social or recreational purposes. If you were travelling for any other purposes—work, shopping, politics, religion, protest, educational, cultural, etc.—no distance limits applied.

Law versus guidance

The pandemic response has properly relied on both law and public health guidance. However, there has been a strong tendency to blur the distinction between the two. During the most extreme phase of the lockdown, over-70s were advised to

²²² COVID-19 Public Health Response Act 2020 (NZ), [s 14](#).

²²³ *Health Act 1947* (Section 31A - Temporary Restrictions) (Covid-19) (No. 2) Regulations 2020, [SI 206/2020](#), reg 5. See discussion in chapter 3.

²²⁴ Department of Health, '[Statutory Instruments related to the COVID-19 pandemic](#)'.

self-isolate but there was never any legal requirement to this effect. But official guidance used language to suggest that cocooning was mandatory: 'you need to cocoon',²²⁵ 'you cannot have visitors to your home'.²²⁶

The only legal obligations on international passengers have been to provide, confirm, and update information about where they will be or are residing.²²⁷ There has never been *any* legal obligation to restrict movements. The Government's own website correctly reflected this, stating that passengers were 'asked to restrict their movements for 14 days'.²²⁸ The Department of Foreign Affairs website, however, stated 'the Irish authorities require anyone coming into Ireland ... to restrict their movement for 14 days'.²²⁹ In *Ryanair v An Taoiseach*, the High Court rejected a challenge by Ryanair to the Government's travel advice, partly on the basis that the DFA website, which after Ryanair instituted proceedings was changed from that just quoted, clearly presented the Government position as non-mandatory.

In chapter 3, we drew attention to the confusion over whether religious services were prohibited, particularly during Stage F. On the one hand, the Department of Health in its official statements insisted (correctly) that there was no legal prohibition on holding religious services. On the other hand, the Gardaí threatened clerics with prosecution for holding religious services.

Across these three areas—'cocooning', international travel, and religious services—we see a common trend. When challenged, whether through the Oireachtas or in the courts, the Government falls back on the correct legal position that there is no prohibition. Away from challenges by the politically powerful or well resourced, the Government is quite prepared to allow ordinary people believe they are subject to much greater restrictions than is in fact the case. Clearly the Government is not responsible for prosecution decisions made by individual Gardaí, but it is responsible for creating such confusion that Gardaí could believe that religious services were criminally prohibited one week after the Government had issued a statement to clarify that this was not the case. The more charitable interpretation is that the Government has been wilfully indifferent to whether it is possible for citizens and law enforcement authorities to understand their legal obligations. The less charitable interpretation is that the Government has deliberately encouraged citizens to misunderstand the extent of their legal obligations in order to allow the Government to achieve policy goals that might

²²⁵ HSE, 'Cocooning' (18 May 2020). This was removed from the HSE website but the Observatory retains a PDF of the webpage as of 2 June 2020.

²²⁶ HSE, 'COVID-19 Cocooning Public Health Advice' <https://www.hse.ie/eng/services/news/newsfeatures/covid19-updates/partner-resources/a-guide-to-cocooning-easy-read-.pdf> accessed 18 November 2020.

²²⁷ See discussion in chapter 3.

²²⁸ Department of the Taoiseach, 'COVID-19 Passenger Locator Form' (31 August 2020) <https://www.gov.ie/en/publication/ab900-covid-19-passenger-locator-form/> accessed 18 November 2020.

²²⁹ The Department of Foreign Affairs later removed this from its website, but the Observatory retains a screenshot of the webpage from 27 July 2020.

not achieve political support in the Oireachtas or that could be vulnerable to legal challenge.

Either way, the outcome is unacceptable from the perspective in the rule of law. In the *Ryanair* case, Simons J succinctly characterised the problem:

It would seem to be a logical extension of this case law to say that the courts should also intervene where a government has, by way of unequivocal statements, created the false impression that there is legislation in force which regulates certain activities when, in truth, there is no such legislation. Were this to happen, then the executive branch would be able to achieve a result which is similar in effect to legislation, i.e. members of the public might well be coerced into complying with the government's guidance in the mistaken belief that it is legally enforceable. This is especially so in the context of the coronavirus pandemic. The very fact that the government's guidance—to use a neutral term—on the measures to be taken to restrict the spread of coronavirus is, of necessity, constantly changing means that members of the public will rely heavily on official sources, such as government websites, to obtain information on what are the current requirements. It is unrealistic to expect that a member of the public will wade through reams of statutory instruments in order to determine what the precise legal requirements are at any given moment.²³⁰

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The Government has allowed—and most probably encouraged—people to believe that they are subject to much broader legal restrictions than is in fact the case. This is problematic from a human rights perspective.

International human rights dimensions

The rule of law concerns expressed above are contrary, both to domestic legal principles, as well as foundational principles of international human rights law. The Office of the High Commissioner for Human Rights has noted that while the situation may require extraordinary measures, '[e]ven in a public emergency, these steps need to be based on the rule of law'.²³¹ Rights limitations must adhere to principle of legality: that is, the restriction must be 'provided by law', which means that 'the limitation must be contained in a national law of general application, which is in force at the time the limitation is applied. The law must not be arbitrary

230 [2020] IESC 461 [38].

231 Office of the High Commissioner for Human Rights, *Emergency Measures and COVID-19: Guidance* (27 April 2020) 1.

or unreasonable, and it must be clear and accessible to the public'.²³² Article 15(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'.

It is not, in our view, an adequate response to these concerns to maintain that the public health guidance has no legal effect. The Government has allowed—and most probably encouraged—people to believe that they are subject to much broader legal restrictions than is in fact the case. This is problematic from a human rights perspective. We shall return to these concerns in the enforcement context in chapter 9.

Conclusion ★

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The blurring of law and guidance allows for the targeting of measures at disadvantaged and vulnerable groups that would not survive scrutiny if effected through a law. It also creates a real risk of the uneven application of enforcement powers by the Gardaí.

The Government's making and presentation of regulations raises serious rule of law concerns. Regulations have applied retroactively, are frequently not published for several days after they are made, are misleadingly described in official communications, and are inadequately distinguished from public health advice. The issues of promulgation and notice can be easily addressed. We recommend that regulations should be published online 48 hours before they come into force. The blurring of law and guidance, however, is a more deep-seated problem. If this is a communications problem, the recommendation of the Joint Oireachtas Committee on the COVID Response has merit and we endorse it: all sectoral committees should review the communication strategy of their Departments to ensure that the information relating to COVID-19, and on COVID-19 restrictions in particular, is clear and transparent. If, however, the blurring of law and guidance is a deliberate strategy on the part of the Government, then little is served by any recommendations we can make. The Government should of course maintain a clear distinction between measures that are legally obligatory and public health advice. The Government should not present public health advice as if it were criminally enforceable. These are such basic tenets of a liberal democracy committed to the rule of law, however, that there should be no need to formulate

232 *ibid* 1.

them as recommendations. Nor are these abstract concerns. The blurring of law and guidance allows for the targeting of measures at disadvantaged and vulnerable groups that would not survive scrutiny if effected through a law. It also creates a real risk of the uneven application of enforcement powers by the Gardai. We return to these critical concerns in chapter 9.

Chapter 8

The Restrictions: Equality and Human Rights Analysis

Introduction

In this chapter, we consider the extent to which the State's legal responses to COVID-19 infringes personal rights protected under the Constitution and international human rights law. We then explore a rule of law concern that arises from the way in which, for many offences, criminal liability does not arise if one has a 'reasonable excuse'. Finally, we assess the extent to which the various restrictions may affect disadvantaged groups, in particular as identified by grounds proscribed in national and international law as well as by international treaties with a concern for particular groups.

Restrictions on movement

In Stages A and F, it was a criminal offence to leave one's home without a reasonable excuse. There was a broad but non-exhaustive list of reasonable excuses, including to shop for essential items. In Stage E, it was prohibited, although not a criminal offence, to leave or enter a locked down county, or the State without a reasonable excuse. We do not consider that these restrictions interfere with personal liberty: there are so many permitted reasons to leave one's dwelling that nobody could be said to be confined to their homes *as a result of the regulations*. In chapter 9, however, we assess the *advice* to older people not to leave their homes during Stage A.

These restrictions may, however, all be characterised as *prima facie* infringements of rights of movement and travel protected by the Constitution and international human rights law. Nonetheless, in our view, they meet the standards of justification laid down in these legal instruments. They serve the legitimate objective of protecting public health and are proportionate to that aim: it is clear that COVID-19 spreads through human contact; measures to reduce human contact are permissible for as long as the virus remains a serious threat. Indeed, these measures can be seen as a vindication of individuals' positive rights to life, health, and bodily integrity.

On or before their arrival in the State, international passengers (with some exceptions) must complete the COVID-19 Passenger Locator Form in respect of themselves and any children.²³³ If they change their address within 14 days, they must inform the HSE. They must answer questions posed by immigration officers and HSE officials. In our view, this obligation is so minimal as not to interfere with any protected rights, including the right of citizens of EU to move freely within the EU under Art 45 of the *Charter of Fundamental Rights* of the European Union.

²³³ We note possible new requirements to undertake mandatory quarantine in a hotel or the home for 14 days after entry into the country, which would be a significant restriction on movement. At the time of finalising the report, no such measures had been agreed.

Restrictions on personal liberty

As we saw in chapter 2, the *Emergency Powers Act* removes several of the procedural safeguards that apply to the involuntary detention of persons on mental health grounds. There is greater flexibility in the independent examination procedure, which need not take place in person. Also, single-member tribunals can make detention decisions. In our view, these measures have the potential to infringe the requirement for an independent hearing, identified by the High Court and Court of Appeal.²³⁴ The courts have stressed that the Oireachtas must be particularly careful in depriving those with mental illness of their liberty, and strong safeguards are necessary. The *Emergency Powers Act* includes the removal of several safeguards that are of concern: the possibility of patients' detention being reviewed by any consultant psychiatrist rather than a designated one; the possibility of this examination by a consultant happening remotely, or in exigent circumstances, not taking place at all; the possible exclusion of the patient's treating physician from this review, compensated for by a written report; and the ability of the Mental Health Commission to appoint a single lawyer to act as the tribunal for such determinations. These are extraordinary measures that, taken together, have the potential to significantly curtail the procedural rights of vulnerable patients. The existence of judicial review may not be a remedy for such failings.²³⁵ The constitutionality of these measures can only be determined in an individual case, where much would depend on precisely what had occurred. Nevertheless, there are serious constitutional questions about these measures.



The courts have stressed that the Oireachtas must be particularly careful in depriving those with mental illness of their liberty, and strong safeguards are necessary. The Emergency Powers Act includes the removal of several safeguards that are of concern

The constitutionality of the measures may be aided by the exigent circumstances of the pandemic. But restrictions this significant could only be justified by a compelling case for necessity. Whatever about the need for flexibility of this sort in March 2020, the extension of these provisions until June 2021 is highly questionable. While the pandemic remains a serious threat, important services are able to function. It is settled in constitutional law that legislation, even if constitutional at the moment of enactment, can become unconstitutional due to

²³⁴ *RT v Director of the Central Mental Hospital* [1995] 2 IR 65; *AB v Clinical Director of St Loman's Hospital* [2018] IECA 123, [2018] 3 IR 710.

²³⁵ See *AB v Clinical Director of St Loman's Hospital* [2018] IECA 123, [2018] 3 IR 710.

a change in the underlying circumstances.²³⁶ While such changes have tended to occur over extended periods of time, there is no reason why this principle should not apply to swift changes in people's ability to work during the pandemic, given the importance of the right at stake.

The position is even more stark under international human rights law. The permissibility of involuntary detention under the *Mental Health Act 2001* is already in contravention of Article 14 of the CRPD. Part 5 of the *Emergency Measures Act*, extending the means by which a person with mental health difficulties may be detained involuntarily, and reducing the stringency of the review process, serves to contravene both Article 14 and the overall spirit of the CRPD to an even greater degree. For these reasons, we recommend that Part 5 of the *Emergency Measures in the Public Interest (COVID-19) Act 2020* be repealed as a matter of urgency.

Restrictions on home gatherings and events

In Stage B, it was unlawful to gather in a household for recreational purposes, unless this was within 20km of your home or within your own county and no more than six people were present. In Stage D, gatherings in private homes of more than six people from more than three households were made unlawful, although not a criminal offence. In Stage E, this was tightened to no more than six people from one other household. And in Stage F, all household visiting was made unlawful unless the two households were paired. These prohibitions were not originally designated as criminal offences. On 22 November 2020, however, they were designated as criminal offences, new enforcement powers for dwelling events were applied, and fixed penalty notice provisions were activated.

It is arguable that these restrictions interfere with private and family life, as well as with the dwelling place. The restrictions significantly limit one's freedom to invite other people into one's household but do not interfere with people's living arrangements: there is no control on who may form a household. For the same reasons as above, we consider that they meet the standards of justification laid down in the Constitution and international human rights law.

Mandatory face coverings

Face coverings must be worn on public transport and when in certain businesses and premises, unless one has a reasonable excuse. This requirement is an interference with personal autonomy, but a trivial one. The burden imposed is minimal and the public health justification is overwhelming; the specified 'reasonable excuses' avoid difficulties that would attend a blanket ban. For the

²³⁶ *Blake v Attorney General* [1981] IESC 1.

same reasons as above, we conclude that they meet the standards of justification laid down in the Constitution and international human rights law.

Rule of law concerns: the vagueness of 'reasonable excuse'

The restrictions on leaving one's home and on movement, as well as the obligation to wear face coverings, and the new offence in Stage F of attending a prohibited dwelling event do not apply where one has a reasonable excuse. While many reasonable excuses are specified, there remains a general category of reasonable excuse. If it is unclear whether you have a reasonable excuse, it is unclear whether you may lawfully leave your home or your county, or refuse to wear a face covering. In some circumstances, this leaves it uncertain whether you are committing a criminal offence, which in turn raises doubts about the enforcement powers held by Gardaí—an issue to which we return in chapter 9.

The vagueness of 'reasonable excuse' raises human rights concerns under both Irish constitutional law and international human rights law. The key concern here is that reading the law should enable to people know whether their future conduct might break the law. If the law itself is vague, they cannot anticipate whether they might be criminally punished. In *Dokie v DPP*, the High Court declared s 12 of the Immigration Act 2004 unconstitutional by reason of vagueness.²³⁷ This section required a non-national to produce their identification documents on demand 'unless he or she gives a satisfactory explanation of the circumstances which prevent him or her from so doing.'²³⁸ Kearns P commented that 'reasonable excuse' would be a preferable standard to 'satisfactory explanation.'²³⁹ However, Kearns P, contrasting a similar provision in UK law, also indicated that it would be preferable to provide for 'reasonable excuse' as a defence, rather than making it part of the action that constitutes the offence itself.²⁴⁰ In short, the use of 'reasonable excuse' in the restrictions on free movement is better in one respect than the law struck down in *Dokie*, but as bad as that law in another respect.

The European Court of Human Rights has made it clear that vague criminal laws are contrary to the principle of legality in the European Convention on Human Rights. For example, the case of *Liivik v Estonia*²⁴¹ concerned Article 161 of the Estonian Criminal Code relating to an offence of 'misuse of official position'. The offence had been inherited from the previous Soviet legal system and the national law shaping the offence had developed within a wholly different legal system. It was held as follows:

237 *Dokie v DPP* [2010] IEHC 110, [2011] 1 IR 805.

238 *ibid* para 20.

239 *ibid* para 61.

240 *ibid* para 59.

241 *Liivik v Estonia* App no 12157/05 (ECtHR, 25 June 2009).

The Court finds on the whole that the interpretation and application of Article 161 in the present case involved *the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects.*²⁴²

The Human Rights Committee, interpreting Article 15 of the ICCPR,²⁴³ has similarly been critical of the retroactive application of the criminal law as tantamount to *nullem crimen sine lege*,²⁴⁴ though jurisprudence on the question of vagueness has not arisen frequently.

In our view, there is a real doubt as to whether the 'reasonable excuse' provision in Irish law in relation to leaving one's home and movement generally conforms to the requirements of the Constitution and international human rights law. We recommend instead that the regulations should retain the list of enumerated excuses for leaving one's dwelling, or one's county, or the State, while separately providing that a person may leave their home, or county, or the State for urgent and compelling reasons. This would provide greater guidance by limiting the flexibility to truly exceptional cases and conceptually separating those cases from the enumerated list of everyday excuses.

The reasonable excuse provision in relation to face coverings may, in practice, be less problematic. The listed reasonable excuses all clearly identify circumstances in which it would be problematic for the individual involved to wear a face covering. These are different from the movement restrictions, where the reasonable excuses attempt to balance a range of competing factors, resulting in somewhat arbitrarily defined compromises (such as the 5km limit on exercise). In the case of face coverings, it is therefore easier to extrapolate from the list of reasonable excuses to other unlisted examples.

Effects on disadvantaged groups

In this section, we explore the ways in which groups identified by prohibited grounds of discrimination and international treaties may be disproportionately affected by these restrictions. It has been well documented that the pandemic itself has a differential impact on particular groups—especially racial and ethnic

242 *ibid* para 101. Emphasis added.

243 Article 15(1) of the ICCPR provides that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.'

244 For example, *Kivenmaa v Finland* (Human Rights Committee, Communication No. 412/1990).

minorities,²⁴⁵ older people,²⁴⁶ people with disabilities,²⁴⁷ women and mothers, and prisoners.²⁴⁸ IHREC has drawn attention to how inadequate conditions on Traveller halting sites, such as the lack of running water, makes Travellers particularly vulnerable to the pandemic.²⁴⁹ These differential impacts require focused policy responses that take into account human rights and equality concerns. But they are not the direct concern of this Report. Here we focus on disproportionate effects on disadvantaged groups caused by the legal measures themselves, as distinct from the underlying pandemic.

As we saw in chapter 1, indirect discrimination occurs where an apparently neutral provision would put a person at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Given our view that the restrictions considered above meet the standards of justification under the Constitution and international human rights law, it probably also follows that they meet the justification component in the definition of indirect discrimination. Nevertheless, it is particularly important for policy-makers to be cognisant of measures that restrict protected rights in a way that particularly disadvantages vulnerable groups.

The family status, gender, and disability grounds

Making it a criminal offence to leave one's own home without a reasonable excuse—and in particular the proliferation of home-working—disproportionately affects those with caring responsibilities in the home, with particular effects on mothers. The family status ground covers whether you are the parent or person responsible for a child under 18, or the main carer or parent of a person with a disability who needs ongoing care. The National Women's Council of Ireland (NWC) found that 85% of women had increased care responsibilities during the pandemic, showing that the gender ground is implicated here alongside the family status ground.²⁵⁰ In addition, the Economic and Social Research Institute (ESRI) has identified that extra care burdens impact particularly harshly on essential workers (i.e. those who could not work at home), 70% of whom were women.²⁵¹ This is borne out by Central Statistics Office research that showed

245 In the US context, see Center for Diseases Control and Prevention, 'Health Equity Considerations and Racial and Ethnic Minority Groups' (2020) available at <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> (visited 27 November 2020).

246 Hernandez et al, 'High-risk categories for COVID-19 and their distribution by county in Republic of Ireland-evidence from the TILDA study' (2020).

247 <https://www.inclusion-europe.eu/disability-rights-affected-coronavirus-pandemic/>

248 <https://www.tasc.ie/blog/2020/07/14/gender-impacts-of-covid19/>

249 IHREC, [Comments on Ireland's 17th National Report on the Implementation of the European Social Charter](#), (June 2020).

250 NWC, 'NWC survey findings show 85% of women have increased care responsibilities since COVID-19' (23 June 2020).

251 ESRI, *The Implications of the COVID-19 pandemic for policy in relation to children and young people* (July

the pandemic had a much greater negative impact on the life satisfaction of women than men in April 2020.²⁵² By the same token, lone-parent families were disproportionately affected, in terms of caring obligations, isolation and loneliness.²⁵³

The listed reasonable excuses have always allowed carers to take the same steps in respect of vulnerable people as they could for themselves, i.e. leave the home to go to an essential retail outlet, etc. In particular, it is a reasonable excuse for leaving the home to attend to vital family matters, including to provide care to a vulnerable person. This would probably allow a parent to leave her or his home with an autistic child, subject to no distance limits—a point of concern that had been raised during Stage A.²⁵⁴ In turn, this probably ensures that the regulations do not disproportionately affect those with physical disabilities. However, for those with difficulties relating to mental health or intellectual capacity, the restrictions on social contact—particularly during Stages A and F—have taken a particular toll. Children with special needs have suffered from the disruption to their routine.²⁵⁵ Adults with intellectual disabilities have been left without carers.²⁵⁶ More generally, disruption to education has been particularly problematic for those with mental and intellectual disabilities. It is important to emphasise here that, whatever about the effect of the regulations, the pandemic itself has had a marked disproportionate effect on both adults and children with disabilities.²⁵⁷ IHREC Commission Member Frank Conaty has drawn attention to the danger of the pandemic leading to an even more unfair society for people with disabilities.²⁵⁸ In this regard, we support the recommendation of IHREC that the Joint Oireachtas Committee on Disability Matters review the impact of COVID-19 and the State's response on the rights of disabled people.²⁵⁹

The limitations in the definition of essential retail outlets may amount to indirect discrimination on the family status ground, insofar as it is families who face the most time-sensitive needs to buy clothes for growing children. We therefore recommend that the definition of essential retail outlets deployed in Stages A and F be extended to include providing for family essentials.

2020) 19.

252 'Social Impact of COVID-19 on Women and Men, April 2020' (CSO Statistical Release, 19 May 2020).

253 NWC et al, *Supporting One Parent Families During and After the COVID-19 Crisis* (Joint NGO Submission to the Special Committee on the COVID-19 Response, September 2020).

254 Michael McNiffe, 'Coronavirus Ireland: Gardai say anyone caught travelling more than 2km will be told to go home' *Irish Mirror* (8 April 2020).

255 Carol Barron, 'How has Covid-19 affected children with special needs?' *RTÉ Brainstorm* (23 June 2020).

256 Inclusion Ireland, *The Experiences of Adults with Intellectual Disabilities in Ireland During the Covid-19 Crisis* (September 2020) 8.

257 We noted that these problems have been exacerbated for children with disabilities by virtue of a failure to reopen schools for special education in early 2021.

258 Frank Conaty, 'No Going back to Reduced Rights for People with Disabilities', *The Irish Examiner* (13 May 2020).

259 IHREC, [Consultation on Terms of Reference and Work Programme for the Joint Oireachtas Committee on Disability Matters Submission by the Irish Human Rights and Equality Commission](#) (November 2020).

Apart from gendered caring obligations, women have been disproportionately affected by the spike in domestic violence during lockdown.²⁶⁰ The pandemic has led to what has been characterised as a ‘shadow pandemic’ of domestic violence.²⁶¹ While it would unquestionably be a reasonable excuse for a woman to leave her home to escape from an abusive partner, the lockdowns have exacerbated a situation in which women are deprived of economic independence and trapped in circumstances of coercive control and violence.

According to NWCI, in many cases, ‘women gave birth without a partner or loved one present, and faced into motherhood without family or professional support.’²⁶²

The religion ground

As we saw in chapter 3, it is difficult to ascertain whether in-person religious services were prohibited during Stage A and (particularly) Stage F. To the extent that they were, this disproportionately affected those with religious beliefs as well as interfering with guarantees of the free practice of religion, protected by both the Constitution and international human rights law. In keeping with our conclusions above, the public health imperative probably provides sufficient justification for these measures. Nevertheless, the interference with rights and the particular impact on a group identified by proscribed grounds under several national and international legal instruments, in addition to the contravention of the principle of non-discrimination under international human rights law, should be a significant concern for policy-makers.

The age ground: older people, younger people, and education

The pandemic itself has disproportionately affected older people. Moreover, very serious concerns arise in relation to the advice on ‘cocooning’ given to older people during Stage A—both for its effect and because of the way in which the advice was presented as being close to mandatory. We address this as a troublesome instance of indirect enforcement in chapter 9. The legal restrictions, however, have never directly discriminated on the basis of age, and—as noted above—have been careful to allow for care of vulnerable people. The later provisions of paired households go even further in this regard, allowing one household of parents and children to be paired with one household of grandparents. In our view, therefore,

260 Cate McCurry, ‘[Coronavirus in Ireland: Thousands more women call domestic violence services over lockdown](#)’, *The Sunday Times* (10 November 2020); Oxfam Ireland, ‘Women bearing the burden in the fight against Coronavirus’ <https://www.oxfamireland.org/blog/women-bearing-burden-fight-against-coronavirus> accessed 19 November 2020.

261 Mary Murphy, ‘[Gender Impacts of Covid-19: Towards a Gender Sensitive Recovery](#)’ (14 July 2020).

262 NWCI, ‘[NWCI calls for a one-off extension to maternity leave and pay](#)’ (7 July 2020).

older people have not been disproportionately affected by the direct legal effects of the regulations.

During Stage A, attending education was not a reasonable excuse for leaving home. The provision of education remotely raised a number of concerns, especially for students with special educational needs for whom interruptions to education pose particular problems. As noted in chapter 1, the right to primary education guaranteed under the Constitution is a right to appropriate education to the child’s needs. It may be more difficult, therefore, to justify the provision of education remotely for those with special needs.

Remote education is particularly challenging for those with unreliable broadband connections—whether for financial reasons or because they live in rural areas. During Stage F, attending education was a reasonable excuse for leaving home, although it is only permitted for post-secondary education to the extent that it is necessary for educational reasons to attend in person. This was a welcome vindication of both the right to education and the rights of the child.²⁶³

The age ground does not ordinarily apply in respect of people under the age of 18, so the exclusion of children from primary and secondary education would not appear to be captured. Nevertheless, the adverse consequences on this age-group are numerous and well-documented, encompassing school closures, lack of social interaction, extended isolation.²⁶⁴ These also may amount to infringements on the right to education.

It is also worth noting that the *UN Convention on the Rights of the Child*, which applies to individuals under the age of 18, has four primary principles which are of relevance here: the principle of non-discrimination (Article 2), the best interests of the child (Article 3), the right to life, survival and development (Article 6), and the right of the child to participate and to be heard (Article 12). In addition, the issue of intersectional discrimination must be borne in mind, for example, relating to children with disabilities or children living in direct provision who are also deprived of their right to education. In the case of young people over the age of 18, the general move to online rather than in-person activities—whether in third level education or in employment—disproportionately affects younger people since relationship-forming is essential to personal development at this stage in their lives. The restrictions on children’s education during Stage A were particularly experienced by those in socioeconomic disadvantaged families, a point raised by IHREC in its submission to the UN Committee on the Rights of the Child.²⁶⁵ This submission also drew attention to other important impacts of the pandemic on

263 The return to remote education in January 2021 has seen these issues resurface.

264 ESRI, *The Implications of the COVID-19 pandemic for policy in relation to children and young people* (July 2020).

265 IHREC, ‘[Submission to the UN Committee on the Rights of the Child on the List of Issues Prior to Reporting for the fourth periodic examination of Ireland](#)’ (July 2020).

children that lie somewhat beyond the scope of this Report, including violence against children and children in care.

Race, nationality, or ethnic background

During Stage E, people were legally prohibited from leaving their locked down county or the State, without a reasonable excuse. During Stage F, a person who is ordinarily not resident in the State has a reasonable excuse for leaving their home for the purposes of leaving the State. This implies that non-nationals resident in the State do not have such a reasonable excuse. However, they could fall under another reasonable excuse, such as leaving home to care for a vulnerable person in another State. These provisions disproportionately affect non-nationals as they have greater reason to leave the State. However, for the same reason as above, we consider that such an infringement is proportionate in the interests of counteracting the pandemic. People who leave the State are likely to return to the State, thereby risking the reintroduction of the virus.

Residents of direct provision centres have been disproportionately affected by the pandemic.²⁶⁶ The main driver here, however, is not so much the regulations but the problematic character of direct provision itself.²⁶⁷

The educational impacts of the pandemic may also be more acutely felt by the children of immigrants for various reasons, such as being perhaps more likely to lack access to fast and reliable internet, or to have a parent whose first language is English who can assist with supplementing online tuition or conduct a form of home schooling.²⁶⁸

Anecdotal evidence has pointed to the fact that restrictions may be having a disproportionate psychological effect on migrants who are unable to access support networks across international borders.²⁶⁹ This has prompted the initiation of a study by academics from Mary Immaculate College (MIC) in Limerick and Nottingham Trent University which aims to examine how COVID-19 restrictions have affected the lives of people who travelled regularly between Britain and Ireland. Dr Marc Scully, lecturer in psychology at MIC and principal investigator on the study, said the required 14-day quarantine period for those who travel to

²⁶⁶ Irish Refugee Council, 'Powerless': Experiences of Direct Provision during the Covid-19 Pandemic (10 August 2020).

²⁶⁷ See IHREC, 'Statement from the Irish Human Rights and Equality Commission In Respect of Direct Provision,' (8 May 2020); IHREC, 'Statement from the Irish Human Rights and Equality Commission In Respect of Direct Provision' (19 August 2020).

²⁶⁸ <https://www.irishtimes.com/news/education/many-migrant-children-did-not-attend-online-classes-during-last-lockdown-study-1.4456728>; <https://www.nesc.ie/news-events/press-releases/the-impacts-of-covid-19-on-ethnic-minority-and-migrant-groups-in-ireland-new-paper-from-nesc-secretariat/>

²⁶⁹ Sorcha Pollak, 'Study to review impact of travel restraints on families between Ireland and Britain', *The Irish Times* (9 November 2020).

Ireland had caused 'significant disruption' to the lives of those who previously lived 'transnational lives' and regularly travelled between the jurisdictions.

The Organisation for Economic Co-operation and Development (OECD) has also reported that the coronavirus disproportionately affects migrants.²⁷⁰ The OECD even noted Ireland as one region where migrants have been particularly affected. It was stated that in general children of migrants have been disproportionately affected by school closures and the subsequent transition to home schooling. This was because, on average, these children were less likely to benefit from parental help with lessons due to language barriers (noting that 40% of native-born children of immigrants do not speak the host-country language at home) and were less likely to have access to a home computer. Children were also often at a disadvantage because of lack of space at home.

²⁷⁰ [OECD, 'What is the impact of the COVID-19 pandemic on immigrants and their children?', \(19 October 2020\).](#)

Conclusion ★

The regulations impose significant restrictions on several rights protected by the Constitution and international human rights law. Nevertheless, we consider that the public health threat posed by the pandemic is sufficient to provide a justification for these restrictions. That said, the restrictions have been implemented in ways that breach the rule of law and that disproportionately affect disadvantaged and vulnerable groups identified by proscribed grounds of discrimination and international human rights treaties. We make the following recommendations to address these issues.

Rather than have a general category of 'reasonable excuses', we recommend that regulations should relieve people of criminal liability where there are urgent and compelling reasons for their action. We recommend the immediate repeal of Part V of the *Emergency Provisions Act* to reverse the relaxation in safeguards on detention for mental health grounds. We recommend that the definition of 'essential retail services' deployed in Stages A and F be amended to cover all family necessities. We recommend that the Joint Oireachtas Committee on Disability Matters review the impact of COVID-19 and the State's response on the rights of disabled people. Consistent with the public body equality obligation, we recommend that greater consideration be given by both NPHET and Government to the needs of those with caring responsibilities (the family status ground), women and mothers, those with difficulties relating to mental health and intellectual capacity, older people, children, people with disabilities, non-nationals, prisoners, those from racial and ethnic minorities, and those living below the poverty line.

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...the restrictions have been implemented in ways that breach the rule of law and that disproportionately affect disadvantaged and vulnerable groups identified by proscribed grounds of discrimination and international human rights treaties.

Chapter 9

Human Rights and Equality Analysis of Enforcement Powers

Introduction

In chapter 8, we conducted a human rights and equality analysis of the restrictions introduced as part of Ireland's COVID-19 response. In this chapter, we turn to a separate but related topic: the powers for the enforcement of those restrictions. We provide a human rights and equality analysis of these powers, both what they mean in the abstract and how they have been applied in practice.

Abstract analysis of enforcement powers

Criminal sanctions for breach of penal provisions

For the most part, provisions have only been deemed to be 'penal provisions' where they apply to commercial or public activities, such as the occupiers of business premises and the organisers of events outside the home. This is not a direct concern of this Report. In Stage A and Stage F, however, the prohibition on leaving one's home without a reasonable excuse is a penal provision. Since 22 November 2020, it has also been a criminal offence to organise or attend a prohibited event in a dwelling. While there are differing views on the wisdom of this approach, we do not consider that it offends any provision of the Constitution or international human rights law. In chapter 8, we concluded that these restrictions on movement were permissible. We reach the same conclusion in relation to the criminal sanctions prescribed in Stages A and F: the sanctions are low, with further gradations introduced by the *Health Amendment Act* to respect proportionality.

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...police questioning of people as to why they have left their home marks a significant change in the traditional relationship between Gardaí and members of the public.

Garda directions to ensure compliance with penal provisions

Because the prohibition on leaving one's home is qualified by so many 'reasonable excuses', it functions effectively as a requirement that people not be moving about for impermissible reasons or for excessive distances. These prohibitions are primarily enforced by Gardaí stopping people to inquire as to why they have left their home and directing them to return to their home if they have left for an impermissible reason. On the one hand, it would seem that if criminal sanctions may be imposed in these circumstances, there can be no objection to the far lesser consequence of being directed to return home. On the other hand, police questioning of people as to why they have left their home marks a significant change

in the traditional relationship between Gardaí and members of the public. Our view is that this enforcement power is, in principle, legitimate. However, there are very real concerns as to how it might be exercised in practice, to which we turn below.

Powers of 'relevant persons'

The Minister may designate people as 'relevant persons' for the purposes of implementing and enforcing the regulations. The relevant person may require a Garda to assist him or her in exercising a power or performing a function under the Act. This assistance could involve detaining a person, bringing a person to a particular place, or breaking open a premises. At the time of writing, the 'relevant persons' under the regulations include employees and agents of public transport operators (under the regulations relating to face coverings) and immigration officials / members of the HSE contact tracing team (under the regulations relating to tracking international passengers). It is, in our view, inappropriate for transport employees and HSE contact tracers to have the power to *require* Gardaí to detain people or break open premises. We are not aware of these powers being exercised but, in our view, they may offend protections in both the Constitution and international human rights law for liberty and the dwelling. We therefore recommend that the *Health Preservation Act* be amended so that 'relevant persons' can only *request* Garda enforcement, not *require* Garda enforcement.

Fixed-penalty notices

The *Health Amendment Act* introduced provisions, activated on 22 November, to allow a Garda, if he or she has reasonable grounds for believing that a person has contravened a fixed penalty provision, to serve a fixed penalty notice on the person. If the person pays the penalty, which can range from €80 to €500 depending on the offence, within 28 days, no prosecution will proceed. In principle, we consider that it is permissible to designate penal provisions as fixed-penalty notices. In the road traffic context, the High Court has held unconstitutional provisions that prevented an accused person from arguing that he had not received the fixed penalty notice.²⁷¹ This reasoning would also apply in respect of fixed-penalty notices in the COVID-19 context, but it does not undermine our view that fixed-penalty notices are themselves permissible. There is a concerning ambiguity in the *Health Amendment Act*, however, in that it does not specify who can determine the level of the fixed-penalty notice. The principle of legality requires, we suggest, that the Minister for Health must specify the penalty-level(s) in regulations if he activates this power. The Minister has specified the penalty in the relevant regulations, but we recommend that the *Health Amendment Act* be amended to clarify that this is a requirement.²⁷²

271 *O'Byrne v Director of Public Prosecutions* [2019] IEHC 715.

272 Further scrutiny will be necessary on the use in practice of these fixed penalty notices as they have

Dwelling provisions

The dwelling receives particular protection under the Irish Constitution and is also protected as the locus of private and family life in international human rights law. As we saw in chapter 8, there is no restriction on activities within the dwelling, other than that—in stages A and F—non-members of the household cannot enter the dwelling. Since 22 November 2020, it is an offence both to organise and attend a prohibited event in a dwelling. The dwelling event enforcement provisions apply. These allow a Garda (a) to direct a person to leave the place and vicinity of a dwelling, (b) direct the occupier of a dwelling to cause everyone attending an event to leave, other than those who live there, and (c) to attend at the main entrance to the dwelling and to require the occupier to provide his or her name. In our view, these provisions do not offend the various protections under the Constitution and international human rights law. They do not unreasonably restrict what can occur in the dwelling, nor do they permit Gardaí to enter the dwelling. Again, however, they do allow for a more intrusive approach to policing than traditional and significant concerns could arise about how these powers may be exercised in practice.²⁷³

The exercise of enforcement powers

Applicable principles

Irish constitutional law does not directly speak to the practice of law enforcement, generally allowing a wide discretion to enforcement authorities. International human rights law, however, does address this subject. The ICCPR and those sources of law interpreting the ICCPR provide guidance on penalties for violations of extraordinary measures adopted during a state of emergency. In short, measures should be enforced in a humane manner, in accordance with the principle of proportionality, and penalties should not be imposed arbitrarily or discriminatorily. Deprivation of liberty should be considered as a last resort, in accordance with the law and observing procedural safeguards. Deprivation of liberty must also be reasonable, necessary and proportionate.²⁷⁴ In addition, attention must be paid to potential overcrowding in detention centres and the risk of spreading and contracting COVID-19 in such a context.²⁷⁵ Moreover, fines should be commensurate to the seriousness of the offence, with particular regard for potential gender-specific impacts and the implications for those who are unemployed.

become more prevalent as a feature of enforcement in early 2021.

273 Further concerns about the integrity of the dwelling may arise in respect of enforcement of mandatory quarantine for international passengers if this is done in the home.

274 Office of the High Commissioner for Human Rights, '[Topics in Focus|Emergency Measures and COVID-19: Guidance](#)' (OHCHR 27 April 2020), 4. Additional guidance on the right to liberty and security of the person is available in the UN Human Rights Committee's, '[General Comment No. 35](#)' (2014), UN Doc CCPR/C/GC/35.

275 OHCHR, '[Topics in Focus|Emergency Measures and COVID-19: Guidance](#)', 4.

With respect to law enforcement of extraordinary measures, the OHCHR notes that officials 'may use force only when strictly necessary and to the extent required for the performance of their duty and only when less harmful measures have proven to be clearly ineffective'.²⁷⁶ In addition, allegations of human rights violations by law enforcement and military personnel, must be effectively and promptly investigated and perpetrators brought to justice. 'This is particularly important in light of the extensive powers given to law enforcement and military personnel in many areas during the Covid-19 pandemic.'²⁷⁷

As we note above, the enforcement powers introduced during the pandemic are permissible in principle. But they do greatly increase the number of enforcement contexts in which Gardaí may interact with people, from holding events in their homes to simply leaving their homes. Any concern that Gardaí exercise enforcement powers unevenly is exacerbated by the significant increase in the number of enforcement contexts. Prior to the pandemic, there were such concerns. In 2019, the CSO reported that while only 1.7% of people reported experiencing discrimination when in contact with the Gardaí, the number was significantly higher in the 18-24 age group (3.9%) and among unemployed people (6.9%).²⁷⁸ The type of interactions most cited in relation to discrimination were being stopped in a vehicle and being stopped on the street, the sort of enforcement contexts that are significantly increased during the pandemic. Coincidentally, during the COVID-19 response, an internal Garda survey on attitudes of its members to various ethnic groups suggested negative attitudes towards members of the Traveller and Roma communities. Opinions of other ethnic minorities were somewhat better. However, significant proportions of frontline Gardaí still had negative views of Indian and Pakistani people (21 per cent), Arabs (30 per cent) and Black African people (30 per cent).²⁷⁹ This is consistent with data cited by Pavee Point, compiled before the pandemic recording evidence of discrimination and ethnic profiling experienced by Travellers and Roma.²⁸⁰ It is in this context that we must approach the exercise of enforcement powers during the pandemic.

Data on the exercise of enforcement powers

Having adequate data on use of enforcement powers is absolutely essential to understand the use of these powers and whether they comply with relevant human rights standards. Proportionality, the core test for measuring rights restrictions, looks at rights restrictions in practice, at their actual impact; to best assess proportionality, we need to understand how these measures have been put into

276 *ibid.*, 4.

277 *ibid.*, 5.

278 Central Statistics Office, 'Equality and Discrimination 2019' (CSO Statistical Release, 4 July 2019).

279 See, Conor Gallagher, 'Gardaí have negative view of Travellers, survey finds', *The Irish Times* (Dublin, 20 August 2020).

280 See Pavee Point, 'Submission to the Department of Justice and Equality: Towards the Development of a Strategy for the Criminal Justice System' (August, 2020).

practice. In April 2020, the Minister for Justice and Equality requested the Garda Commissioner to compile and publish weekly data on the use of COVID-related policing powers, with a view to ensuring transparency. The Garda reports are available to view online.²⁸¹ In addition, the Policing Authority has published nine reports during the COVID crisis which have assessed policing performance by the Gardaí in relation to the COVID-19 regulations.²⁸² These reports came about as a result of a request on 16 April 2020 by the Minister for Justice and Equality, asking the Policing Authority to report on its own oversight activities, to assess the application of the COVID-19 regulations by the Gardaí and to reflect on the consistency of their application with specific reference to vulnerable groups. The Policing Authority also published other relevant reports including a submission to the Garda Commissioner regarding the use of anti-spit hoods during the COVID-19 crisis.

The Policing Authority has stated that it 'remains in continuing contact with the Garda Commissioner and his colleagues to ensure that policing responses and any use of new powers are necessary, proportionate and carried out in a manner that respects human rights'.²⁸³ In a number of reports, the Policing Authority expressed concern that the data which the Gardaí are reporting in relation to their use of COVID-related powers is insufficient and does not allow the Authority to adequately assess whether the powers are being exercised in a manner which is 'reasonable, necessary and proportionate'. In the Authority's second report of 6 May 2020, it raised concerns in relation to the lack of disaggregated data.²⁸⁴ IHREC has repeatedly called for such disaggregated data to be provided.²⁸⁵

In the subsequent report of 20 May 2020, the Authority reported that the Gardaí had failed to provide the requested disaggregation as to how each of the emergency powers had been used:

The Garda Síochána committed to providing this breakdown [...] It is therefore a source of disappointment to report that the Garda Síochána have failed to deliver this information again. Given the infringement these powers represent on an individual's human rights, it is concerning that these powers have not been recorded adequately and that there is insufficient data to inform both internal and external oversight.²⁸⁶

281 Department of Justice, 'Use of Covid-19 related powers by An Garda Síochána', <http://www.justice.ie/en/JELR/Pages/Use_of_Covid-19_related_powers_by_An_Garda_S%C3%ADoch%C3%A1na> accessed 19 November 2020.

282 Policing Authority, 'Oversight of COVID 19 Policing', <<https://www.policingauthority.ie/en/about-us/detail/oversight-of-covid-19-policing>> accessed 19 November 2020.

283 *ibid.*

284 Policing Authority, 'Policing Performance by the Garda Síochána in Relation to COVID-19 Regulations', (6 May 2020), 11.

285 IHREC, 'Letter to Garda Commissioner on COVID Powers Policing' (28 April 2020); IHREC, 'Commission's Call for Additional Data from An Garda Síochána on COVID Policing Restated in Policing Authority Report' (22 May 2020).

286 Policing Authority, 'Policing Performance by the Garda Síochána in Relation to COVID-19 Regulations',

IHREC has also expressed concerns regarding the need for An Garda Síochána to provide disaggregated data on extraordinary policing activity during the pandemic, highlighting in particular that ‘while numbers are provided on the number of times powers were used, further anonymised data is not provided in relation to the gender, ethnicity or age of people engaged with.’²⁸⁷

In its report of 9 November 2020, the Authority reported that, at present, community groups are generally satisfied that COVID-19 powers are being used only as necessary and in a proportionate manner.²⁸⁸ However, the Authority emphasised that such groups remain ‘keenly alert’ to the ‘potential for discriminatory use or the perception of discriminatory use of the powers’. The Authority acknowledged that ‘in many instances [the belief in the potential discriminatory use of powers] is premised on the relationships that existed between groups in the community and the Garda Síochána pre COVID-19.’ The Authority acknowledged that for many of these groups, ‘if the perception exists that a cohort within the community is typically treated differently to the general public, then the expectation exists that this will also be the case in terms of policing of the COVID-19 restrictions.’²⁸⁹

Groups experiencing disadvantage or discrimination

The Office of the High Commissioner for Human Rights has made it clear that emergency legislation passed to address the COVID-19 crisis ‘should not be used as a basis to target particular individuals or groups, including minorities’.²⁹⁰

Measures taken must not involve prohibited discrimination on any grounds such as race, colour, sex, sexual orientation and gender, identity, disability, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁹¹

Moreover, the Committee on the Elimination of Racial Discrimination has recently published a General Recommendation on racial profiling by law enforcement officials, noting that:

(20 May 2020), 4.

287 Irish Human Rights and Equality Commission, ‘[Commission’s Call for Additional Data from An Garda Síochána on COVID Policing Restated in Policing Authority Report](#)’ (22 May 2020).

288 Policing Authority, ‘[Report on Policing Performance by the Garda Síochána during COVID-19](#)’ (9 November 2020), 9.

289 The very large number of fixed penalty notices issued in January makes it even more acutely necessary to have disaggregated data on enforcement as suggested in this section.

290 Office of the High Commissioner for Human Rights, ‘[Topics in Focus|Emergency Measures and COVID-19: Guidance](#)’ (OHCHR 27 April 2020), 2.

291 Office of the High Commissioner for Human Rights, ‘[Topics in Focus|Emergency Measures and COVID-19: Guidance](#)’ (OHCHR 27 April 2020), 2.

Racial profiling is linked to stereotypes and biases, which can be conscious or unconscious, individual, or institutional and structural. Stereotyping becomes a violation of international human rights law when stereotypical assumptions are put into practice to undermine the enjoyment of human rights.²⁹²

The lack of disaggregated data makes it difficult to be sure whether these attitudes manifest themselves in the exercise of the COVID-19 enforcement powers. But some anecdotal evidence does point to inconsistent patterns of enforcement. In addition, there is anecdotal evidence that students and young people have been subjected to more stringent policing during this time.

The Policing Authority noted that they had engaged with young people and students on the question of discriminatory use of enforcement powers.²⁹³ This group expressed to the Policing Authority that they expected they would be more stringently policed during the pandemic. There is some evidence that this has been the case. There have been reports that in situations where Gardaí suspected students to be in breach of COVID-19 measures, such students were subjected to an apparently unique policing measure involving the confiscation of student IDs which were then handed over to university authorities. One such incident which was reported in the media,²⁹⁴ involved the Gardaí entering a house, apparently without a warrant, where a student house party had taken place and confiscating student IDs of students at University College Cork (UCC). These student IDs were then passed onto authorities at UCC. The Policing Authority made reference to this practice in its most recent report and noted that a college or university can ‘typically commence a disciplinary procedure with the student involved, which can result in a fine’.²⁹⁵ The Irish Council for Civil Liberties (ICCL) also called the legality of these measures into question.²⁹⁶ The Policing Authority also noted other measures taken in the policing of students, such as having Gardaí present on campuses. The Authority stated that students were seeking greater clarity on these measures:

Reference was made to the need for clarity and better communication with students as to the arrangements that exist between the Garda Síochána and some third level institutions. These relate to the garda presence on campus but also arrangements with some third level institutions in relation to the confiscation of student cards by the Garda Síochána who then hand these cards over to the college authorities. The college or university can typically commence

292 The Committee on the Elimination of Racial Discrimination recently released its *General Recommendation No. 36: Preventing and Combatting Racial Profiling by Law Enforcement Officials* (CERD/C/GC/36) (24 November 2020) at para 20.

293 Policing Authority, ‘[Report on Policing Performance by the Garda Síochána during COVID-19](#)’ (9 November 2020), 9.

294 Conor Pope, ‘[Civil rights group concerned as gardaí search students after house party](#)’, *The Irish Times* (Dublin, 3 October 2020)

295 Policing Authority, ‘[Report on Policing Performance by the Garda Síochána during COVID-19](#)’ (9 November 2020), 9-10.

296 ICCL, ‘[Monitoring rights during the pandemic](#)’ (October 2020) 1.

a disciplinary procedure with the student involved, which can result in a fine. Such agreements are not uniform across the country and media narratives and a lack of clarity for students as to whether their institution is party to such an arrangement and how that process works, was reported as not helpful. Examples of positive engagement between student groups and local Gardaí were given and the positive impact of visible policing as an effective deterrent was emphasised.²⁹⁷

Anti-spit hoods

In September 2020, the Policing Authority noted a number of human rights concerns regarding the use of anti-spit hoods:

[T]here are a number of incidents internationally in which anti-spit hoods were deployed in cases where people died. More generally, hooding (which is a form of sensory deprivation) is widely considered to be a form of ill-treatment which can in some circumstances amount to torture...

As an instrument of force, the application of anti-spit hoods by Garda members has the potential to breach fundamental human rights including the right to human dignity, the right to life, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, and the right to respect for private and family life, home and correspondence which encompasses the right to physical, moral and psychological integrity.²⁹⁸

The Authority noted that it 'is particularly concerned by the application of anti-spit hoods on children to date and wishes to restate its fundamental opposition to the use of the devices on those under the age of 18'.²⁹⁹ IHREC has also raised concerns with An Garda Síochána about the use of anti-spit hoods.³⁰⁰

In its report of 9 November 2020, the Authority published a breakdown of certain characteristics of persons (such as sex, age and disability) who were subjected to the use of anti-spit hoods, revealing that spit hoods have been used on children and people with obvious intellectual disabilities.³⁰¹ This confirmed earlier media reports from September 2020:

At least 14 per cent of spit-hood deployments by gardaí since the start of the

Covid-19 pandemic have involved people with obvious mental illnesses. And a spit hood was used on at least one person with an obvious learning disability and on five children, including one who was 14 years old.³⁰²

The Authority also contended that there was a lack of scientific evidence as to the effectiveness of anti-spit guards in preventing the transmission of COVID-19. It stated that it had 'contacted the manufacturer and distributor of the anti-spit hood device used by the Garda Síochána. They stated that the device is designed to prevent spitting into the face of a police officer. It cannot be guaranteed to prevent the transmission of other aerosols and has not been tested against airborne or respiratory droplets of COVID-19'.³⁰³ Finally, the Authority expressed concern as to the limited training provided prior to the use of anti-spit hoods and indicated that it considers the current training of viewing a short online video to be inadequate.³⁰⁴

Requirements for data collection

The UN has stated that authorities should be open and transparent in their decision-making:

The free flow of timely, accurate, factual information and disaggregated data, including by sex, is essential, so those seeking to scrutinize or critique the effectiveness of government actions must be able to play their part.³⁰⁵

The UN Human Rights Council has also noted that governments and international actors, should start, as soon as possible, gathering adequate data on the impact of the COVID-19 crisis:

Data should be disaggregated at least by gender, age, disability, income, race and ethnicity. Such disaggregated data is needed to accurately assess the situation, to make inequalities visible, and to identify those who have been left behind.³⁰⁶

Further:

[T]he international response to Covid-19 needs global and national statistical systems to collaborate to provide the data and statistical evidence to understand the scope of the pandemic, including disaggregated data to

297 Policing Authority, '[Report on Policing Performance by the Garda Síochána during COVID-19](#)' (9 November 2020), 10.

298 Policing Authority, '[Evaluation of Management and Use of Anti-Spit Guards](#)' (10 September 2020) 4-5.

299 *ibid* 6.

300 IHREC, '[Letter to Assistant Commissioner Dublin Metropolitan Region re Use of Anti-Spit Guards by An Garda Síochána](#)' (22 September 2020).

301 Policing Authority, '[Report on Policing Performance by the Garda Síochána during COVID-19](#)' (9 November 2020), 8.

302 Conor Gallagher, '[Teenager \(14\) one of five children placed in spit-hoods by gardaí](#)' *The Irish Times* (22 September 2020).

303 Policing Authority, '[Evaluation of Management and Use of Anti-Spit Guards](#)' (10 September 2020) 3.

304 *ibid* 6.

305 United Nations, *COVID-19 and Human Rights: We Are All in This Together* (April 2020) 13.

306 United Nations Human Rights Council, "'Leave No One Behind': Don't Forget Your Commitments in Your Response to the COVID-19 Crisis, UN Expert Urges States' (9 April 2020) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25786&LangID=E> accessed 15 November 2020.

monitor disproportional impacts.³⁰⁷

In a recent publication, Praia City Group, created by the UN Statistical Commission, emphasised the importance of obtaining accurate government data in ensuring that COVID-19 responses are in line with principles of equality and human rights.³⁰⁸

Now more than ever, official statistics on governance have a crucial role to play to ensure that major, life-changing decisions are based on the best available information. Policymakers who are looking for ways to apply the principles of equality, accountability and participation to their COVID-19 response need timely and sound data to know how well they are succeeding in doing so... Reliable and trustworthy governance statistics can play a vital role in informing a well-calibrated response to the pandemic and in detecting and mitigating potential 'secondary impacts'.³⁰⁹

Not only are governance statistics essential for policy-making, but they are also crucial for those seeking to hold government to account in the enforcement of COVID-19 measures:

They can be used to hold the government to account on its response plan and recovery strategy, at a time when many normal oversight and accountability processes (such as elections, meetings of parliament and other political activities) have been severely disrupted over safety concerns.³¹⁰

The failure to maintain disaggregated data not merely runs the risk of concealing human rights violations; it is itself a significant breach of international human rights law.³¹¹ The Garda Commissioner should therefore take steps to ensure that disaggregated data is obtained on the exercise of all enforcement powers.

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³⁰⁷ United Nations, *COVID-19 and Human Rights: We Are All in This Together* (April 2020) 19.

³⁰⁸ Praia City Group, *Governance Statistics in the COVID-19 Era* (Praia City Group Guidance Note, September 2020).

³⁰⁹ *Ibid* at 2.

³¹⁰ *Ibid*.

³¹¹ This point has been emphasised by IHREC on numerous occasions, including in its recent submission to the CERD Committee: Irish Human Rights and Equality Commission, *Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report* (October 2019) at 7, 22.

Indirect enforcement

The rule of law requires that the application of law must be congruent with the law as written. Only state action authorised *in advance* by law is legitimate. It is highly problematic, therefore, if the Government encourages or allows a general misunderstanding to take hold to the effect that a particular activity is legally prohibited. Such an approach may also offend the principle of legality outlined in international human rights law most vividly through Articles 7 and 15 of the ECHR and the ICCPR respectively. The European Court of Human Rights has repeatedly emphasised that people are entitled to know, insofar as this is reasonable in the circumstances, what the legal implications of their actions are. The consequences of behaviour, according to the Court, must be 'foreseeable'.³¹² In other words, a law must be sufficiently accessible and precise so as to permit an individual to regulate his or her conduct on the basis of that law. If the principle of legality requires specificity, certainty, foreseeability, and non-retroactivity, it is arguable that it also prohibits governments from encouraging citizens to believe that they are legally prohibited from actions that are in fact legally permitted. Public health advice is an important and legitimate component of the State's response to COVID-19, but it should not be presented as if it were mandatory.

“
In our view, the Government's communication strategy attempted to secure the quasi-legal enforcement of public health advice, in a manner that may infringe the principle of legality.

We have already raised this rule of law concern in chapter 7 in relation to several issues. The most problematic of these, because it directly targets a vulnerable group protected in both national and international human rights law, was the 'cocooning' of elderly people. It is clear that many people over the age of 70 believed during Stage A that they were legally required not to leave their houses. This was not the case. In our view, the Government's communication strategy attempted to secure the quasi-legal enforcement of public health advice, in a manner that may infringe the principle of legality.

In another dimension of the COVID-19 response, it seems the Government went further in seeking to use the enforcement powers of the State to control alleged breaches of public health guidance. As we saw from chapters 3 and 7, there has never been any legal obligation on persons arriving in the State to quarantine although different arms of the Government have implied in their communications that this is the case. In July 2020, a controversy arose about the denial, by the

³¹² *Liivik v Estonia* App no 12157/05 (25 June 2009); *Alimuçaj v Albania* App no 20134/05 (7 February 2012); *Vyerentsov v Ukraine* App no 20372/11 (11 April 2013).

Department of Social Protection (DSP), of the Pandemic Unemployment Payment (PUP) and other welfare benefits to those travelling abroad for holidays during the COVID-19 pandemic.³¹³ Reports indicated that the DSP had sanctioned over 100 persons in receipt of the PUP who took holidays abroad.³¹⁴ A spokesperson for DSP stated that the PUP is 'not paid to people who go on holidays abroad or when they are going through their subsequent 14 day quarantine [sic] period'³¹⁵ and the then Minister for Social Protection stated that the rationale for this approach was that the State should not subsidise people who are in breach of public health advice.³¹⁶

In previous years, jobseekers in receipt of social welfare unemployment payments were allowed to take 2 weeks holidays abroad. This was set out in the *Social Welfare (Consolidated Claims, Payments and Control Provisions) Regulations 2007*³¹⁷ in the case of jobseeker's benefit and on an administrative basis in the case of jobseeker's allowance.

However, on 30 June 2020, as Free Legal Advice Centres (FLAC) has shown, DSP issued a circular on the issue which purported to suspend travel abroad and to say that people who returned from such travel could not be considered to be genuinely seeking work (GSW) during the period of two weeks self-isolation.³¹⁸ There were several problems with this. First, the circular purported to 'suspend' the provisions of SI 142 of 2007. Of course, a circular cannot amend a Ministerial Regulation. In addition, the question of whether somebody is GSW is a question of fact. Given the prevalence of online job-searching, applications and Zoom interviews, it is perfectly possible for a person to be GSW even if self-isolating so the circular appeared to attempt to unlawfully fetter the discretion of deciding officers.

On 10 July, Minister Humphreys amended the regulations by introduction of the *Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Absence from the State) Regulations 2020*.³¹⁹ These regulations provided that jobseeker's benefit would only be payable where the claimant is on holidays in accordance with 'the COVID-19 General Travel Advisory in operation by the Department of Foreign Affairs'.³²⁰ At that time, DFA was advising against all non-essential travel abroad but this, of course, changed with the introduction of the Green List allowing travel to certain countries which was followed, more recently, by the EU 'traffic lights' approach.³²¹

313 Jack Horgan-Jones and Marie O'Halloran, 'Eighty five people who had Covid payment cut for leaving Ireland may get it back' *The Irish Times* (28 July 2020).

314 Garreth MacNamee, '104 people have had their Covid unemployment payment stopped due to international travel' *The Journal* (26 July 2020).

315 *ibid.*

316 Heather Humphreys, Dáil Deb [28 July 2020](#), vol 996, no 1.

317 [SI 142/2007](#).

318 FLAC, 'Departmental Circular No. 35/20 and entitlement to certain Social Welfare Payments while abroad' (28 July 2020).

319 [SI 242/2020](#).

320 *ibid.*, [reg 2](#).

321 Sorcha Pollak, 'State joins EU traffic-light system for international travel' *The Irish Times* (8 November

2020). When the issue broke in the media in July, the Government and Department obfuscated for a number of days failing to explain what it was doing, why it was doing so or what the legal basis was. It then introduced legislation to put PUP on a statutory basis, which is a welcome measure.³²² In the course of Oireachtas debates on this Act, the Minister now stated that PUP was a supplementary welfare allowance payment under s. 202 of the *Social Welfare Acts* which allows payments in urgent cases.³²³ Ultimately the Government did accept that payment of unemployment payments could be made to persons travelling abroad in accordance with the COVID-19 General Travel Advisory.

However, a further issue (which affects all those in receipt of unemployment welfare payments leaving the country) is the basis on which DSP obtains information as to their departure. This appears to be from social welfare inspectors questioning people in Dublin airport and other ports. The basis for this is s. 250(16B) of the *Social Welfare Acts* but, as several commentators have noted, this requires the inspector to have 'reasonable grounds to believe that there has been a contravention of this Act'.³²⁴ This would seem to rule out a general 'stop and question' of persons travelling through Dublin airport or boarding specific flights. The Data Protection Commission has now expressed 'serious doubts' over the lawfulness of the collection of personal data in this manner.³²⁵

This episode was a questionable use of powers under the *Social Welfare Acts* in order to apply legal sanctions to people for breaching public health guidance.

Conclusion ★

The enforcement powers conferred by the Acts are, in principle, permissible under both the Constitution and international human rights law. However, there is a reasonable basis—accepted by the Policing Authority—for concern about the manner in which these enforcement powers are exercised. The lack of disaggregated data precludes an assessment of whether enforcement powers are being exercised disproportionately against vulnerable groups identified by grounds in the *Equal Status Acts* or protected in international human rights law. This lack of disaggregated data is itself a breach of international human rights law. In addition, anecdotal evidence suggests that inconsistent enforcement has occurred.

Discriminatory use of enforcement powers is always a risk. But this risk is exacerbated by the features of the COVID-19 response to which we have drawn

2020).

322 [Social Welfare \(Covid-19\) \(Amendment\) Act 2020](#).

323 Heather Humphreys, Dáil Deb [28 July 2020](#), vol 996, no 1.

324 As inserted by the Social Welfare and Pensions Act 2012, [s 17](#).

325 Jack Horgan-Jones, 'Data watchdog: "Doubts" over whether welfare inspections at airports were lawful', *The Irish Times* (30 July 2020).

attention in earlier chapters. The late publication of regulations, the misleading official descriptions of regulations, and the blurring of the boundary between law and advice all contribute to uncertainty about what people's legal obligations are. These are further exacerbated by the 'reasonable excuse' exception to the movement restrictions. This makes it very difficult to know whether enforcement powers can be exercised against people. This can be problematic for Gardaí themselves, in the front line of managing an unprecedented public health emergency. The confident citizen may be reassured by this vagueness and flexibility. However, if you come from a group with a history of bad relations with the Gardaí, these features are problematic. You either put yourself at the risk of untrammelled discretion by particular Gardaí, or you may restrict your movements far more than other members of the public are required to do. Each outcome raises human rights and equality concerns.

This blurring of law and guidance has also contributed to indirect enforcement of public health guidance as if it were the law, whether through elderly people believing themselves to be legally required to remain in their homes, or social welfare enforcement powers being turned on those who had left the country.

We recommend two statutory amendments to clarify enforcement powers: first, that relevant persons should only be authorised to request rather than require Garda enforcement actions; second, that only the Minister for Health can specify the fixed penalty to be attached to different penal provisions. We join both IHREC and the Policing Authority in recommending that An Garda Síochána maintain disaggregated data to allow scrutiny of how enforcement powers are exercised. We also reiterate the recommendations from chapter 8 regarding the need to draw a clear distinction in all Government communications between public health advice and legal obligations.

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This blurring of law and guidance has also contributed to indirect enforcement of public health guidance as if it were the law, whether through elderly people believing themselves to be legally required to remain in their homes, or social welfare enforcement powers being turned on those who had left the country.

Chapter 10

Recommendations

Consideration of human rights and equality concerns in the law-making process

During the pandemic, Members of the Oireachtas have engaged with important human rights and equality concerns but their capacity has been limited in two respects. First, they do not have access to expert analysis of human rights and equality standards at a national and international level. Second, they have unsurprisingly found it difficult to engage with human rights and equality issues where statutes delegate to the Minister for Health the power to make regulations. This difficulty is compounded because the process through which these regulations are prepared is an opaque one, involving a complicated and shifting interaction between the Minister and NPHE, in which it is difficult to pinpoint when, if at all, consideration is given to human rights and equality considerations. We make the following recommendations to improve this situation:

1. We recommend the establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity. This would be adequately resourced to assist Members review all primary legislation adopted as part of the COVID-19 response. It would also exercise an oversight function in relation to all secondary legislation.
2. We recommend that all statutes adopted as part of the COVID-19 response should be subject to sunset clauses that allow for time-limited extensions of three months, by resolution of both Houses of the Oireachtas.
3. We recommend the re-establishment of a NPHE sub-group with the relevant expertise to address ethical, human rights, and equality concerns.
4. We recommend that NPHE itself should have members with expertise on ethical, human rights, and equality concerns.
5. We recommend that the Government oversight committee that filters NPHE recommendations should have representation from the Department of Children, Equality, Disability, Integration and Youth.
6. We recommend that the Minister for Health should publish a human rights and equality analysis of the proportionality of each set of regulations within 48 hours of their being made.
7. We recommend amendments to section 31A of the *Health Act 1947* to provide that all regulations made by the Minister for Health will lapse within 10 sitting days if not positively endorsed by a resolution of each House of the Oireachtas.
8. We recommend that the Joint Oireachtas Committee on Equality, Human Rights and Diversity scrutinise *ex post* the regulations made by the Minister for Health. It would swiftly issue a report on the impact of each new set of regulations.



We recommend the establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity. This would be adequately resourced to assist Members review all primary legislation adopted as part of the COVID-19 response.

Presentation of the law

In chapter 7, we identified how laws have been made retroactively and frequently are not made public until several days after they have been made. We make the following recommendation to address this issue:

1. We recommend that all regulations should be published at least 48 hours prior to coming into force, unless there is an urgent public health reason not to do so.

A more deep-seated problem is the way in which the Government has provided misleading descriptions of the law and allowed or encouraged a confused blurring of law and guidance such that it is close to impossible for conscientious citizens to identify the extent of their legal obligations. These are such fundamental tenets of a liberal democracy committed to the rule of law that there should be no need to make recommendations about them.. Nevertheless, we make the following recommendations:

1. We recommend that the Government should at all times and in all communications maintain a clear distinction between measures that are legally obligatory and public health advice. In particular, the Government should not present public health advice as if it were criminally enforceable.
2. We recommend that all sectoral committees should review the communication strategy of their Departments to ensure that the information relating to COVID-19, and on COVID-19 restrictions in particular, is clear and transparent.

Enforcement issues

In chapter 9, we identified several problems in relation to the enforcement of the regulations. Some of these are rather technical issues that arise because of the way in which the statutes are drafted. Others relate to the vague concept of 'reasonable excuse', deployed across the penal provisions. And finally there are problems with how the restrictions have been enforced in practice, significantly aggravated by a failure on the part of An Garda Síochána to maintain disaggregated data. We make the following recommendations to address these issues.

1. We recommend that the 'relevant person' provision in section 31A of the *Health Act 1947* should be amended to ensure that relevant persons can only request and not require members of An Garda Síochána to take enforcement steps.
2. We recommend that the *Health (Amendment) Act 2020* should be amended to clarify that the Minister for Health must set the levels of penalties for fixed penalty notices.
3. We recommend that regulations should not make criminal liability subject to a general 'reasonable excuse' provision but should instead have a general exception for 'urgent and compelling reasons'.
4. We recommend that the Garda Commissioner should take steps to ensure that the principle of non-discrimination is to the fore in all enforcement actions.
5. We recommend that the Garda Commissioner should take steps to ensure that disaggregated data is obtained on the exercise of all enforcement powers, tracking all prohibited grounds of discrimination under the *Equal Status Acts 2000-2015*.
6. We recommend that the Government should not indirectly enforce public health advice through reliance on other statutory regimes.

Detention on mental health grounds

We saw in chapter 8 that the relaxation of procedural safeguards for detention on mental health grounds is problematic as a matter of Irish constitutional law and international human rights law. We make the following recommendation to address this issue:

1. We recommend that Part V of the *Emergency Measures in the Public Interest (COVID-19) Act 2020* should be repealed as a matter of urgency.



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

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