



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

Simon Harris T.D.  
Minister for Health  
Department of Health  
Block 1, Miesian Plaza  
50 – 58 Lower Baggot Street  
Dublin 2

18 May 2020

Dear Minister Harris,

I write on behalf of the Irish Human Rights and Equality Commission, in pursuance of the Commission's mandate to keep the law and practice of the State as it relates to equality and human rights under review.

The COVID-19 pandemic, its impact, and the response, raises a number of profound issues of social, economic, and civil rights. How we, as a society, balance those rights to protect the health and wellbeing of our population is an ongoing challenge – of which you are acutely aware. However, this difficult balance serves to underscore the importance of keeping the principles of human rights and equality to the forefront in considering how public administration and legislators respond to COVID-19. The choices we make in a crisis have far-reaching implications for our society in the aftermath. Therefore, it is more important than ever that we adhere to clear human rights and equality values in our deliberations and decision-making.

It is in this context that the Commission has made its observations (att.) on the guidance on prioritisation in access to critical care set out in the Department of Health's recently published documents: '*Ethical Framework for Decision Making in a Pandemic*' published on 27 March (the *Framework*); '*Ethical considerations relating to critical care in the context of COVID-19*' published on 3 April (the *Considerations*); and '*Ethical considerations relating to critical care in the context of COVID-19 – Supplementary Information*' published on 1 May (the *Supplementary Information*).

This guidance anticipates that in the COVID-19 pandemic a situation could arise where the numbers of people who, under normal circumstances, might be considered for admission to an ICU is significantly greater than the number of ICU places available. The Commission commends the Government, your Department, and the HSE for the actions taken to mitigate this risk through public health measures and a significant increase in critical care capacity.

We understand that anticipating a situation where demand for critical care may exceed supply is part of pre-emptive planning in advance of a pandemic. However, the Commission has a number of



concerns about the guidance for healthcare decision-makers – and as such a statement of public policy – which has been published to date.

From the outset, it is important and welcome that the Framework specifies that “*It is not appropriate to prioritise [access to critical care] based on social status or other social value considerations e.g. income, ethnicity, gender*” (p. 17). It also states that “*Categorical exclusion e.g. on the basis of age should be avoided as this can imply that some groups are worth saving more than others and creates a perception of unfairness*” (p. 17).

However, this document, and the subsequent *Considerations* document and *Supplemental Information* are, in fact, ambiguous about how exactly age and disability, for example, are to be treated in a critical care triage process. Further, an emphasis on “long-term functional status” in these guidance documents would infer that a decision has been made in how critical care is to be prioritised in the population, albeit without public scrutiny or debate.

The Commission is not seeking to encroach on the ethical relationship between a treating clinician and their patient. However, even strictly clinical factors may disproportionately impact on certain groups, such as older people, some groups of disabled people, and possibly other vulnerable groups. Crucially, any disproportionate impact on these groups will most likely be greater where factors such as quality of life, or duration of survival, are factored into the prioritisation. It is therefore worrying that the current guidance appears to have adopted views on what – and thereby who – is to be prioritised in a critical care triage process, without explicitly addressing the potentially profound implications for these vulnerable groups.

We recognise that these documents were developed at a moment of acute crisis, when it was difficult to predict if the COVID-19 virus could be suppressed and contained. However, the issues raised are too profound not to be open to further consideration and public scrutiny. For example, we note that none of the guidance published to date specifically considers 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 appears to have been limited or no consultation with those groups most likely to be affected.

It is now clear that we are going to be living with the threat posed by COVID-19 for the foreseeable future. The Commission strongly recommends that a participative consultation process, which engages with relevant rights holders or their representatives, and draws on human rights and equality expertise, be initiated as soon as possible to further refine the guidance documents produced to date. Indeed, the *Ethical Framework* itself argues that the procedural value of ‘inclusiveness’ requires that “stakeholders are consulted (to the greatest extent possible in the circumstances), views are taken into account, and any disproportionate impact on particular groups is considered” (p.9).



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As a Commission we know that there are no easy answers to the questions posed by a need to prioritise access to critical care. However, as a society, we can protect and uphold our values by explicitly considering such fundamental decisions through the prism of human rights and the equal dignity of each person.

The Commission's observations on the Ethical Framework and associated documents are enclosed with this letter. We appreciate that these are unprecedented times, and that the COVID-19 pandemic creates any number of competing pressures. However, in order to be adequately prepared in the event of a resurgence of the virus in the community, we believe that it is important to proceed to refine this guidance as a matter of priority. As such, I look forward to your response at your earliest convenience. As ever, the Commission stands ready to offer any practical assistance it can to you and your Department in considering the issues raised, and how they might be addressed.

Yours sincerely,

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Tony Geoghegan  
Acting Chief Commissioner  
Irish Human Rights and Equality Commission