

**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



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

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Introduction

The Irish Human Rights and Equality Commission ('the Commission') exercises a dual capacity as the "A" Status National Human Rights Institution ('NHRI') and the National Equality Body for Ireland. Under the *Irish Human Rights and Equality Commission Act 2014*, the Commission is mandated 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 Commission welcomes the opportunity to contribute to the Committee's deliberations on the subject of the adequacy of the State's legislative framework to respond to the COVID-19 Pandemic and potential future national emergencies. The Commission is at the disposal of the Committee to engage further on the topics outlined below.

The Commission is initiating a review that aims to identify and analysis the human rights and equality issues raised by the emergency powers adopted in response to COVID-19, specifically the nature of the powers adopted; the process of their adoption; and the enforcement, in practice, of emergency powers through policing and other measures.¹

To date the Commission has raised a range of specific human rights and equality concerns arising from the State's legislative and policy responses to the COVID-19 pandemic (*see* Appendix 1)

The pandemic has exposed gaps in the State's legislative framework notably the non-commencement and delayed reform of enacted legislation, for example the *Assisted Capacity Decision Making Act 2014*, and the *Mental Health Act 2001*. Further, outstanding legislation, if enacted would see the State better equipped for future responses for example the *Inspection of Places of Detention Bill*, which would ratify the Optional Protocol to the Convention Against Torture (OPCAT) and establish the National Preventative Mechanism; and the *Disability (Miscellaneous Provisions) Bill*, which would establish the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities (CRPD).^[1] Additionally, legislation is required to ratify the CRPD Optional Protocol.

Adequacy of the State's Legislative Framework in its Response to the COVID-19 Pandemic

The Government has introduced a range of emergency powers in response to the COVID-19 pandemic that have restricted certain human rights that would not be lawfully permissible under ordinary circumstances. While the Commission acknowledges that certain human rights can be limited on grounds of protection of public health these restrictions must nonetheless meet certain

¹ The review will comment on the extent to which relevant human rights and equality obligations were addressed in the elaboration, adoption and enforcement of the emergency powers; analyse whether the State fulfilled its obligations under Constitutional, national, regional and international law; comment on the differential impact of the emergency powers and their enforcement with regard to equality grounds and geographical location, and to the extent that this is currently understood; and, arising from this analysis, discuss the necessary improvements to the process of adoption and enforcement of emergency legislation in the event that further such measures are necessary in the future.

<https://www.ihrec.ie/covid-committee-told-significant-gaps-and-vulnerabilities-in-policy-and-services-have-resulted-in-a-disproportionate-impact-on-people-with-disabilities/>

minimum requirements – legality, necessity, proportionality and non-discrimination - and human rights and equality principles must inform their implementation.² Guidance can be drawn from international human rights standards, which clearly state that measures adopted in response to a national emergency and that limit certain human right must adhere to specific minimum requirements. These requirements state that emergency measures must only be used in limited and exceptional circumstances and also that such measures must be interpreted strictly and in favour of the right(s) at issue and must not go beyond the extent strictly required by the exigencies of the situation.³

Non-Derogable rights

Certain rights can never be limited, no matter the national emergency. The Commission recommends that any proposed legislative or procedural framework clearly reflect this to ensure that certain rights, such as for example, the right to life, the prohibition from torture, prohibition from slavery and no punishment without law and the principle of non-discrimination can never be limited or, derogated even during a national emergency.⁴

Oversight Mechanism

The Commission is of the view that there must be an effective oversight mechanism built into the framework that will ensure that the introduction of emergency powers are compatible with human rights law. The Commission has previously called for the establishment of a mechanism to provide close parliamentary oversight of the implementation of emergency legislation introduced in response to COVID-19, and the equality and human rights implications of COVID-19.

The Commission believes that the most appropriate mechanism is an Oireachtas Committee on Human Rights, Equality and Diversity, which would have the requisite cross-departmental mandate to examine the legal, social and economic rights implications of COVID-19. The establishment of a dedicated Oireachtas Committee on Human Rights, Equality and Diversity has been recommended by the Commission since 2016.⁵

Enforcement

The Commission is also of the view that the enforcement of emergency powers should be exercised in a manner that is compatible with, and has regard to, Ireland's human rights and equality

² IHREC, [Letter to An Taoiseach in relation to the COVID-19 Pandemic](#), 25/03/2020.

³ Although the State has not declared a state of emergency, guidance can nonetheless be drawn from Article 15 of the ECHR – see for guidance purposes Council of Europe, Guide on the European Convention of Human Rights, Derogation in times of Emergency, updated on 31 December 2019. Also, guidance can be drawn in similar terms from Article 4 of the ICCPR - see United Nations, [General comment no. 29 – States of emergency \(article 4\)](#) (31 August 2001). Also see Office of the High Commissioner for Human Rights, [Emergency Measures and Covid-19: Guidance](#), 27/04/2020.

⁴ Ibid. Also see Human Rights Commission, [The Irish Human Rights Commission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights](#), 06/2014.

⁵ IHREC, [Statement from the Irish Human Rights and Equality Commission on COVID-19 Oversight in Respect of Human Rights and Equality](#), 27/04/2020.

obligations. In particular, the Commission has previously raised concerns that the COVID 19 crisis is already impacting, and will continue to impact, different people more acutely than others, including older people, people with disabilities, residents in Direct Provision, members of the Traveller community, people living in homelessness, people experiencing domestic violence, and people in precarious employment. Accordingly, it is important that our collective response to the acute challenge of COVID 19 takes account of the particular needs of vulnerable groups.

In addition, the Commission, noting the extensive and additional powers afforded to An Garda Síochána in the regulations⁶ signed under the *Health (Preservation and Protection and other Emergency Measures in the Public Interest Act) 2020* has raised the need for more detailed, disaggregated data and information on the implementation of these emergency powers is required to ensure the powers are being exercised in a transparent manner and in line with human rights and equality principles, including proportionality.

Overview of Statutory Frameworks in other Jurisdictions

By the 30 April 2020, several EU member states had declared a state of emergency under their constitutions,⁷ 10 EU member states had declared states of emergency under Article 15 of the ECHR,⁸ and the majority of the remaining EU member states had responded to the COVID-19 emergency through their ordinary legislative framework.⁹ Similarly, and from a preliminary review of common law jurisdictions, the responses have been diverse, with certain countries, such as New Zealand, relying on pre-existing legislation to deal with the COVID-19 pandemic and whilst others, such as the United Kingdom, responding in similar terms to Ireland. (See Appendix 2 for Table illustrating examples from different jurisdictions).

⁶ There are five powers afforded to Gardaí under the emergency legislation, which expires on the 07 November: direct a person to comply with the Regulations; arrest for failure to comply with such a direction; demand a person's name and address; arrest for failure to comply with the demand for name and address; and arrest for failure to comply with the Regulations. Policing Authority, [Policing Performance by the Garda Síochána in Relation to Covid-19 Regulations](#) (06/05/2020).

⁷ Bulgaria, Cyprus, Czech Republic, Finland, Greece, Hungary, Lithuania, Luxembourg, Portugal, Romania, Slovakia, and Spain.

⁸ Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino, and Serbia. See Council of Europe, [Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic](#).

⁹ See Council of Europe, [Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states](#), 08/04/2020, pp.3-4. Also see the European Parliamentary Research Service who have prepared a set of four briefings to offer a comparative overview of the institutional responses adopted in different EU Member States, in the light of: i) the constitutional framework for the state of emergency or legitimisation of the emergency legislation ii) the specific measures adopted, iii) the extent of the parliamentary oversight exercised over the measures adopted. European Parliamentary Research Service, [States of emergency in response to the coronavirus crisis: Situation in certain Member States](#), [States of emergency in response to the coronavirus crisis: Situation in certain Member States II](#), [States of emergency in response to the coronavirus crisis: Situation in certain Member States III](#), [States of emergency in response to the coronavirus crisis: Situation in certain Member States IV](#) (05/2020 and 06/2020).

Trends and Challenges

The Commission is the Chair of the European Network of National Human Rights Institutions (ENNHRI), which recently published a report on COVID- 19 and the Rule of Law.¹⁰ The report identifies a number of trends and challenges that might assist the Committee in its deliberations of these issues. Specifically, the report raises the following trends and challenges in relation to the way emergency powers were adopted by relevant member states:

- use of accelerated legislative procedures;
- adoption of legislation that has weakened control of parliament and courts;
- limited consultation and unclear legal mandates supporting the adoption of certain decisions;
- lack of clarity and predictability of measures adopted;
- improper use of the derogation clause under Article 15 of the ECHR; and
- lack of transparency and consultation and limited access to information.

Also, the European Union Agency for Fundamental Rights (FRA) have documented some of the measures that EU members states have adopted to protect public health during the COVID-19 pandemic which illustrates how these measures may impact on specific fundamental rights under the EU Charter on Fundamental Rights. FRA have focused on how the rights specific groups have been impacted, including children, older persons, persons with disabilities, members of the Roma and Traveller communities, persons living in homelessness, those institutional settings, victims of domestic violence and ethnic and racial groups.¹¹

Communication of statutory instruments and regulations

The Commission does not currently have access to data or commentary other than that which is in the public domain on the effectiveness of measures taken to provide accessible information on statutory instruments or regulations relating to the COVID-19 emergency response. More broadly, the Commission notes from the onset of the pandemic, public health advice has been addressed by a whole-of-government communications approach to ensure maximum dissemination of information. The Commission further notes that cross-government communications have been supported by radio and press (national and regional), as well as digital platforms, including the following campaigns *In this together*¹², *Still Here*¹³ and *Community Call*.¹⁴

¹⁰ ENNHRI, [State of the rule of law in Europe: Reports from National Human Rights Institutions](#), 29/06/2020.

¹¹ FRA, [Coronavirus pandemic in the EU – Fundamental Rights Implications, Bulletin #1](#), [Coronavirus pandemic in the EU – Fundamental Rights Implications: With a focus on contact-tracing apps, Bulletin #2](#), [Coronavirus pandemic in the EU – Fundamental Rights Implications: With a focus on older people, Bulletin #3](#), [Coronavirus pandemic in the EU – Fundamental Rights Implications, Bulletin #4](#), 04-07/2020.

¹² The HSE have run campaign for the public to provide advice and support to the public on mental wellbeing, staying active and connected during the COVID-19 pandemic.

¹³ The Department of Justice and Equality have run public awareness campaign on domestic abuse during the COVID-19 pandemic.

¹⁴ The Department of Rural and Community Development in collaboration with local authorities have established a COVID-19 Community Call forums, which work with State agencies and community and voluntary groups to provide supports or services to any vulnerable person who needs them.

Accessibility

The Commission recently highlighted the impacts of inadequate communication for persons with disabilities in its submission to the Oireachtas Special Committee on the COVID-19 response in July 2020. The Commission is of the view that active early engagement with disabled people through their representative Disabled Persons Organisations (DPOs) as is required under Article 4(3) UNCRPD, would have helped to identify such issues and alleviate risk. Similarly, the Commission is of the view that active and early engagement should extend to other marginalised and at risk groups, including older people, residents in Direct Provision, members of the Traveller community, people living in homelessness, people experiencing domestic violence, and people in precarious employment.

The importance of ensuring that information is accessible to marginalised groups was also highlighted by the World Health Organisation (WHO) who warned that not paying explicit attention to the needs and vulnerabilities faced by certain groups subjects them to a higher risk of infection and undermines the broader COVID-19 response, and causes unintended difficulties and consequences.¹⁵

The United Nations Office of the High Commissioner for Human Rights (OHCHR) published a guidance document on COVID-19 and the rights of persons with disabilities, in which it outlines that public information on COVID-19 measures is not systematically communicated nor disseminated in accessible formats and means to reach all persons with disabilities (e.g. sign language interpretation, captioning, Easy to Read format, etc.).¹⁶ This results in a disproportionate impact on persons with disabilities, as outreach and accessible communications are essential for persons with disabilities to benefit from emergency responses during the COVID-19 pandemic. The OHCHR has identified New Zealand as an example of good practice in this regard, referencing that the New Zealand Ministry of Health dedicated a section of its website to providing information in accessible formats, including sign language and easy to read text.¹⁷

The Public Sector Equality and Human Rights Duty

In August 2020, with the aim of assisting public bodies in applying an equality and human rights lens in the design, planning, implementation and review of initiatives and responses, the Commission published a Guidance Note on the implementation of Public Sector Equality and Human Rights Duty (the 'Duty') during the Covid-19 pandemic. The Commission underlined communication as an essential component to implementing the Duty and maintained that all aspects of society must have access to the necessary information as regards public responses to COVID-19, and that measures must be taken to target certain audiences, including children and persons with disabilities.¹⁸

¹⁵ World Health Organization, [Addressing human rights as key to the COVID-19: response](#), 21/04/2020.

¹⁶ OHCHR, [COVID-19 and the rights of persons with disabilities: Guidance](#), 29/04/2020.

¹⁷ See New Zealand Ministry of Health, [Information on COVID-19 \(novel coronavirus\) in New Zealand Sign Language \(NZSL\)](#).

¹⁸ IHREC, [COVID-19 and the Public Sector Equality and Human Rights Duty](#), 04/08/2020.

Appendix 1

To date, the Commission has raised a range of specific human rights and equality concerns arising from the State's legislative and policy responses to the COVID-19 pandemic, including:

- The need to ensure emergency legislation in response to COVID-19 is necessary, proportionate and fair, and that it is implemented in line with human rights and equality principles.¹⁹
- The requirement for greater parliamentary oversight of the implications of COVID-19 for vulnerable groups, and of the human rights and equality impact of the pandemic and its response.²⁰
- The particular issues arising in relation to the management of health and wellbeing of residents of Direct Provision Centres.²¹
- The protection of the rights of people with disabilities.²²
- Recommendations in relation to the planned system of school-based calculated grades, which will replace the Leaving Certificate this year.²³
- The legality of the Temporary Wage Subsidy Scheme insofar as it relates to employees returning from maternity leave.²⁴
- The legality of the exclusion of certain persons living in Direct Provision from the Pandemic Unemployment Payment.²⁵
- The need for disaggregated data in relation to the use of new emergency powers by An Garda Síochána.²⁶

¹⁹ IHREC, [Letter to An Taoiseach in relation to the COVID-19 Pandemic](#), 25/03/2020.

²⁰ IHREC, [Statement from the Irish Human Rights and Equality Commission on COVID-19 Oversight in Respect of Human Rights and Equality](#), 27/04/2020.

²¹ IHREC, [Statement from the Irish Human Rights and Equality Commission In Respect of Direct Provision](#), 08/05/2020

²² Frank Conaty, [No going back to reduced rights for people with disabilities](#), *Irish Examiner*, 13/05/2020.

²³ IHREC, [Statement on Calculated Grades from the Irish Human Rights and Equality Commission](#), 28/05/2020; IHREC, [Letter to Minister for Education and Skills, Joe McHugh T.D. on Calculated Grade System](#),

²⁴ IHREC, [Letter to Minister for Finance & Public Expenditure and Reform, Paschal Donohoe T.D.](#), 28/05/2020.

²⁵ IHREC, [Letter to Minister for Employment Affairs and Social Protection, Regina Doherty T.D.](#), 29/05/2020

²⁶ IHREC, [Commission's Call for Additional Data from An Garda Síochána on COVID Policing Restated in Policing Authority Report](#), 22/05/2020; IHREC, [Letter to Garda Commissioner on COVID Powers Policing](#), 28/04/2020.

Appendix 2

Table illustrating examples from different jurisdictions

Country	Legislative Framework
France	A state of emergency may be declared in the event of imminent danger resulting from serious breaches of public order, or in the case of events that by their nature and gravity endanger the public order under Law No 55-385 of 1955. A state of health emergency was declared 23 March 2020. ²⁷ Under the law both the French National Assembly and the Senate must be informed of the measures taken by the government and may request further information at any time, and due to the limits on fundamental rights and liberties there is the possibility to appeal against the measures before the administrative court.
Germany	The German Constitution does not provide for a state of emergency in the case of pandemics and public health emergencies. Articles 35 and 91 of the German Constitution provide for a state of emergency to be declared in the event of a natural catastrophe or other kind of grave disaster, as well as in response to an event threatening public security or the democratic order. The German government did not declare a nation-wide state of emergency. The regional executives have primarily led the response.
Italy	Article 78 of the Italian Constitution provides for the declaration of a state of war with permits the attribution of the necessary powers to the government. Article 77 provides that the government may adopt 'decree-laws' with the same legal standing as ordinary laws, if an extraordinary situation of urgency and necessity calls for it. These decree-laws must be submitted to the Parliament within sixty days, or they are voided. On 31 January 2020, the Council of Ministers declared a state of emergency for a period of six months. The Government has used decree-law, prime ministerial decrees, and ministerial orders in the response to the pandemic.
Spain	Article 116 of the Spanish Constitution provides for a declaration of emergency in three different states of emergency: a state of alarm, a state of emergency and a state of siege. Article 4 of Organic Law 4/1981 allows the government to declare a state of alarm under very specific circumstances, essentially, in cases of natural disasters, health crises, when public essential services are paralysed and certain requirements are met, or when there is shortage of goods of primary necessity. The Spanish government declared a state of alarm on 14 March 2020. Article 86 of the Constitution permits the government to adopt decree-laws in urgent situations. In other common law countries, there have been differing responses
Canada	Under the <i>Emergencies Act 1965</i> , the Government can declare an emergency when there is a real or imminent risk of disease in human. The Canadian government has not declared a public welfare emergency, however all the provinces of Canada have declared states of emergency on the basis of provincial laws and adopted measures under their legislation. The federal government has acted under the <i>Quarantine Act 2005</i> , which grants it wide emergency powers to order individuals to quarantine.

²⁷ [LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de COVID-19 \(1\)](#).

New Zealand	In March 2020 the New Zealand government ordered an epidemic notice under the Epidemic Preparedness Act 2006 and a declaration of emergency under the Civil Defence Emergency Management Act 2002. The issuance of these permitted the Director-General of Health to act under Section s 70(1) of the Health Act to close businesses and prohibit congregation.
United Kingdom	The UK Government can declare a state of emergency under the Civil Contingencies Act 2004 in situations, which threatens serious damage to human welfare in a place in the United Kingdom. This act gives ministers wide-ranging powers to make regulations. In response to the COVID-19 pandemic, the UK Government has relied on the Public Health (Control of Disease) Act 1984 (as amended by the Health Protection Act 2008). The Government has used this legislation to pass the Health Protection Regulations 2020 to restrict movement. On 25 March 2020, the Coronavirus Act 2020 became law which granted the government emergency powers to restrict or prohibit public gatherings, order business to close, detain people suspected of having COVID-19. The Act also contains provisions in areas such as the NHS, public transport, childcare, schools, court system, and tenancy agreements.



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