

Submission to the Oireachtas Special Committee on Covid-19 Response

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Introduction

The [COVID-19 Law and Human Rights Observatory](#) was established in June 2020 by the Law School in Trinity College Dublin. The Observatory researches and analyses Ireland's legal response to COVID-19 in order to inform public debate. We maintain the only consolidation of the emergency response Regulations alongside a subject-coded database of over 1,500 public documents. 40 blogposts analyse that response from different perspectives; a number of public policy reports will present recommendations to inform the State's response in the future. While this submission focuses on the emergency measures that have restricted personal liberty, the Observatory also analyses the measures designed to support ordinary personal, family, and business life, such as [social welfare payments](#), employment protection when [working from home](#), and [virtual AGMs](#) for companies.

[Comparative analysis](#) published by the Observatory praised the early stages of Ireland's response as placing it within the 'effective rationalist' category: general respect for rule of law, reliance on public health expertise, and clear government communication. Comparative analysis shows that no state has responded perfectly. As with public health responses to the virus itself, the objective is not perfection but rather to act quickly and effectively, while being willing to revise our responses in light of experience. [Public trust, transparency, and accountability](#) are essential to respond effectively and ethically to pandemics. These must be renewed at every step.

In this submission, we draw on our previously published analysis to make the following recommendations:

1. The Oireachtas should resume its normal schedule of business through remote and/or hybrid sittings.
2. The Oireachtas Committee system should be re-established to allow, among other things, review of the State's COVID response across several domains, while retaining

a Special Committee for oversight of the restrictions on liberty entailed by the COVID response.

3. The Health Act and the Emergency Act should be amended so that extensions are (a) by positive resolution of both Houses of the Oireachtas and (b) for limited periods specified in the Acts themselves.
4. Regulations should lapse if not positively affirmed by each House of the Oireachtas within 10 sitting days of being made.
5. Regulations should be published when made, and ordinarily at least 48 hours before coming into force.
6. Regulations should not deploy a catch-all category of 'reasonable excuse' in relation to criminal offences.
7. All Government communications should distinguish clearly between legal requirements and public health advice.

These recommendations seek to improve the effectiveness of the COVID response, while enhancing democratic accountability and respect for the rule of law. We first discuss Oireachtas sittings and the operation of the Committee system. We then explore whether the Constitution inhibited the response, before exploring concerns that arise in relation to the delegation of legislative power to Ministers: adequacy of guidance, breadth of powers, and Oireachtas oversight. We then identify several aspects of the Ministerial regulations that raise rule of law concerns: non-timely publication of the regulations, misleading descriptions of the law, the concept of 'reasonable excuse', and the blurring of law and guidance.

Oireachtas sittings

Covid-19 safety measures make it difficult for parliaments to meet and function. Many countries facilitated or extended electronic sittings and voting in parliament. The [European Parliament](#) held its first remote plenary session in March 2020 when it met to debate and vote on legislative proposals of the European Commission to tackle the pandemic. [Many other countries](#) such as [Latvia](#), Poland, Romania, Estonia and [Lithuania](#) adopted similar measures. The United Kingdom's House of Commons moved to a [hybrid system](#), though it has been criticised for later [moving backwards](#).

In Ireland, however, the Business Committee of the Oireachtas [reported in April](#) that virtual sittings could not take place as it had received legal advice that remote meetings would not be permitted by the Constitution. The full advice has not been disclosed, but it apparently maintains that a virtual sitting would breach Article 15 of the Constitution because the Oireachtas must meet in a physical ‘place’, members must be ‘present’ to vote, and/or they must be within the ‘House’ to enjoy privilege.¹

This legal position seems to us to be wrong, or at least without clear foundation in the Constitution. Members of the [observatory](#) and [several](#) other [commentators](#) have strongly argued against it. It is inappropriately based on a historical reading of the terms ‘place’ and ‘presence’ in the Constitution. Read in any purposive or functional way, there is no objection: the location provision requires the Dáil to meet in known and accessible places so that members and the public are aware of sittings and can access them. The presence requirement for voting sets the threshold for matters to be passed (a simple rather than absolute majority); ‘digital’ presence is consistent with this. Similarly there is no reason to think that privilege would not apply in a remotely located ‘House’ of the Oireachtas. In our view, there is no constitutional impediment to the Oireachtas conducting remote or hybrid sittings, where some members attend in Leinster House while others join remotely.

Oireachtas committees

We understand that Oireachtas committees will not generally meet until October 2020, though it seems the Public Accounts Committee and Budgetary Oversight Committee will meet shortly after the end of the recess. Committee oversight is therefore lacking. This compounds the problems caused for the other oversight mechanisms of ministerial questions, legislative debates etc. This is particularly unfortunate given the important and far-reaching character of the extraordinary pandemic measures.

This Committee provides a vital oversight role in monitoring all aspects of the State’s response to Covid-19. But its brief is vast, overseeing the actions of NPHET, the HSE and the Department

¹ Article 15.1.3° provides: ‘The Houses of the Oireachtas shall sit in or near the City of Dublin or in such other place as they may from time to time determine.’ Article 15.8.1° requires that: ‘Sittings of each House of the Oireachtas shall be public.’ Article 15.11.1° states: ‘All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member.’ Parliamentary privilege for ‘utterances made in either House’ is protected in Article 15.12.

of Health in their response to the crisis, alongside such important and diverse matters as travel restrictions, returning to school, WHO public health advice, the impact on SMEs, the hospitality sector, and more. The manner in which the Committee has shouldered this burden is commendable. But the impact of the crisis is so broad, and the use of legal powers so significant, that oversight could only be enhanced by utilising the more traditional Committee structure while retaining a Special Committee to oversee the restrictions on personal liberty in the COVID response.

Legislation in a time of emergency

Ireland's legislative response to Covid-19 was not based on constitutional emergency powers, as Ireland's constitutional emergency powers regime is limited to times of war or armed rebellion.² Despite this, both the Health Preservation and Protection and other Emergency Measures in the Public Interest Act 2020 (Health Act) and the Emergency Measures in the Public Interest (Covid-19) Act 2020 (Emergency Act) have been broadly adequate. The Acts created powers to enable swift and decisive reaction to the changing circumstances of a pandemic, to mitigate both the public health and social and economic impact. The Acts have been broadly effective. We do not share the [view](#) of some commentators that Ireland should review its framework for emergency laws. Constitutional limitations have been mentioned in relation to two issues, but it is unclear that the Constitution actually imposes any restriction. First, one limitation of the Emergency Act is that its Emergency period could only be extended in light of, amongst other things, 'the need to restrict the movement of persons in order to prevent the spread of the disease among the population'. This was said to make the extension on the evictions moratorium under the Emergency Act passed on 1 August 2020 [legally impossible](#) because, at that point, movement restrictions were largely lifted. (This problem had been [highlighted](#) by the Observatory in June.) This might be considered a failing of the legislation, as [it might have been desirable](#) to allow the period to continue when movement was tentatively allowed but when the threat of resurgence was high. However, when introducing legislation to replace this eviction moratorium, the government very significantly reduced legal protection around evictions. It seems—though it is not possible to tell due to unclear communication—that this was motivated by concerns that the property rights of

² See Article 28.3 of the Constitution.

landlords could not be restricted with a continuation of the broader moratorium.³ This legal advice, if such it was, fails in our view to take account of the wide restrictions on property rights [permitted by the courts](#). Nevertheless, this shows at least a *perceived* constitutional limit on legislative action to address the pandemic.

Secondly, powers for Gardaí to enter private dwellings to break up large gatherings have been mooted, but ‘legal complications’ have been [cited](#). Again, it is not entirely clear, but it appears that the government may have feared that such powers [would be unconstitutional](#). Without any comment on the desirability of such powers from a political, social, or health perspective, our view is that, if the public rationale is sufficient, such powers [could probably be introduced](#).

Time limitations on emergency provisions

The emergency legislation includes certain time limitations. For example, the power to issue regulations under Part III of the Health Act is time limited, and the Act includes a ‘sunset clause’, limiting its lifespan. Part III only remains in force until 9 November 2020, unless, before that date, a resolution approving its continuation has been passed by both Houses of the Oireachtas. Part II of the same Act was due to expire on 9 May 2020 but can be extended by Order if government thinks in public interest. An Order to extend these powers must be laid before each House of the Oireachtas, either of which can annul the Order within 21 days. The Emergency Act is subject to a similar set of mechanisms for its different parts. Individual measures in regulations have also been subject to time limits, which have been frequently extended.

Though positive, these provisions could be more robust. First, there is no limitation to how long the renewal periods may be. Secondly, greater oversight and scrutiny would be achieved if renewal depended on positive resolutions of each House of the Oireachtas.

³ See comments of minister at the 2nd Stage Debate. ‘The recitals at the start of the Bill set out the policy context in which the temporary and limited restrictions on landlords’ constitutionally protected property rights are framed, in Part 2 and section 12, for the social common good... We also recognise that some landlords also find themselves on the wrong side of Covid-19, and we recognise constitutionally protected property rights. That is the reason this Bill balances the need to protect those worse affected by Covid-19 with the need to respect property rights and the legitimate interests of landlords’. <https://www.oireachtas.ie/en/debates/debate/dail/2020-07-28/4/>

Controlling COVID by Ministerial regulation

Secondary law-making by Government Ministers has been the central feature of Ireland's COVID response. Article 15.2.1 of the Constitution allows the Oireachtas to delegate power to Ministers to make secondary legislation, provided that the primary legislation deals with matters of principle and policy.⁴ In our view, the two pieces of emergency legislation provide constitutionally sufficient principles and policies to guide the use of their delegated legislative powers. For example, many sections which give the Minister broad powers contain detailed lists of factors to which the Minister *must* have regard,⁵ as well as factors to which the Minister *may* have.⁶

Commentators have differed on whether the legislative powers conferred on Government Ministers are too broad. [Casey](#) was relatively sanguine, noting that the pandemic provided a 'stark reminder of the fact the common good demands a body like the executive be perpetually available to act to protect the State and its citizens'. [Grogan](#) was more concerned about the 'unprecedented' scale of the powers and their 'lack of detail.' In our view, the scope of the powers is not unconstitutionally broad, given the extensive principles and policies prescribed in the Act.

Oireachtas oversight of Ministerial regulation

Under the Health Act, the Minister has made four main types of Regulation: the [general temporary restrictions regulations](#), replaced and amended several times since April; the [passenger locator form regulations](#); the [facemask regulations](#); and the [localised temporary restrictions regulations](#).

The Observatory has identified several problems in relation to the Regulations, such as the [apparently accidental removal](#) of all legal prohibitions on religious events—indoors or outdoors—in early June 2020, contrary to the Government's plan for a phased easing of the lockdown. Such mistakes are less likely to be made if the Regulations are subject to detailed

⁴ See Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (Bloomsbury Professional, 2018) [4.2.23]-[4.2.51].

⁵ See for example the eight factors the Minister must have regard to in making orders under s 10(2) of the Health Act.

⁶ In making regulations under s 10 of the Health Act, the Minister *may* have regard to 'any relevant guidance (including, in particular, any guidance relating to the risk assessment for, and case definition relating to, Covid-19) provided by the World Health Organisation, the European Centre for Disease Prevention and Control, the Health Protection Surveillance Centre of the Health Service Executive and other persons with relevant medical and scientific expertise.'

oversight by the Oireachtas. This would allow input from legislators but also from other individuals and organisations with expertise. For instance, under [s 16 of New Zealand's COVID-19 Public Health Response Act 2020](#), regulations automatically lapse unless the House of Representatives affirms them within 10 sitting days (and no more than 60 days in total from the date of the order). This ensures that the Government cannot extend regulations without providing an opportunity for scrutiny.

Publication of regulations

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. But two problems remain. First, where criminal prohibitions are being loosened rather than tightened—as when we moved through the phases of easing the lockdown—people may wrongly think that certain behaviour is still prohibited. Second, if Iris Oifigiúil is published late in the day, there may be a gap in criminal liability. Take, for instance, [SI 294/2020](#) which extended the Passenger Locator Form Regulations to 17 August 2020. [SI 304/2020](#) subsequently extended this until 31 August 2020. SI 304/2020 was made on 15 August but not notified in Iris Oifigiúil until sometime late in the afternoon of 18 August. It follows that no criminal proceedings could have been taken against people arriving in Ireland earlier that day for breach of the Regulations.

These are not the most serious problems but they are striking because they could be fixed simply by publishing the Regulations online once made.

While contemporaneous publication would be helpful, the Department should go further. In [New Zealand](#), the COVID-19 Regulations must—absent some urgent public health need—be published 48 hours before they take effect. This allows people and businesses take steps to ensure that they will comply with the law. This should be possible in most circumstances. At the time of drafting this submission, 13 days have elapsed since [the Taoiseach announced](#) that more restrictive measures would be reintroduced to help slow the spread of the virus without this being reflected in law. If there can be such a delay between announcing of the

measures and making the law, 48 hours between publication of the law and its coming into effect could scarcely be critical.

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, [SI 209/2020](#) made some amendments to the Phase 2 restrictions. 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.

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. It is impossible to know whether the imprecision in the description was accidental or designed to encourage people to believe that legal restrictions were wider than was in fact the case.

Reasonable excuses

The concept of 'reasonable excuse' has been central to the state's Covid-19 response at various stages. In the early stages of the lockdown and in the recent localised lockdown, people were prohibited from leaving their home without a reasonable excuse. The Facemask Regulations require people over the age of 12 to wear a facemask on [public transport](#) and in

[shops](#), unless they have a reasonable excuse. In each case, a non-exhaustive list of reasonable excuses is provided. While this gives some certainty—you knew that it was permissible to leave your home for the purpose of exercise within 2km, for instance—it still leaves a wide zone of behaviour where it was uncertain whether you were complying with the law or not. Where criminal liability depends on the interpretation of ‘reasonable excuse’—which was the case in the early lockdown regulations—such legislation is [vulnerable](#) to constitutional challenge. A preferable approach would retain the list of enumerated excuses for leaving your dwelling, while separately providing that a person may leave their home 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. While more restrictive of freedom in one sense; this would enhance our autonomy by making it easier for us to know when we are at risk of criminal punishment for leaving our homes.

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 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](#), you [cannot have visitors to your home](#).

In relation to international arrivals, the [only legal obligations](#) on international passengers have been to provide, confirm, and update information about where they will be or are residing. 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’. The HSE website was much more strongly worded, stating that if you arrived into Ireland from a location that is not on the green list you would ‘have to restrict your movements for 14 days’ or—on another page of the website—that people arriving from overseas would ‘need to restrict their movements for 14 days’. The Department of Foreign Affairs website went furthest, stating ‘the Irish authorities require anyone coming into Ireland ... to restrict their movement for 14 days.’

In relation to religious services—both indoors and outdoors—all legal prohibitions were removed on 8 June 2020. However, throughout the month of June, the media continued to report religious organisations [arguing](#) for restrictions to be relaxed and NPHEC [resisting](#) such relaxation. The intensity of this debate was curious since the religious institutions could have followed a less strict approach—for instance allowing more worshippers in larger churches—if they wished.

The importance of the rule of law

At its core, the rule of law requires (a) that those subject to the law can know what it is so that they can comply with it, and (b) that the state acts in accordance with the law. This is a foundational value for any democratic legal system. It ensures that, even where there are restrictions on liberty, citizens know what they are permitted to do and not permitted to do. The preceding sections have provided examples of how the rule of law has not been respected in Ireland's COVID-19 response. These are not exceptional; they are, rather, illustrative of a general willingness to allow—and perhaps to encourage—people to believe that their legal obligations are more extensive than is in fact the case.

Might these infringements of the rule of law be warranted in order to respond effectively to the pandemic? Some have suggested that this was in fact a good communication strategy, ensuring a greater collective effort. While this may have been true in the short-term, it is damaging in the medium to long term. The response to 'golfgate' has shown how public trust can be damaged by any appearance of double standards. Some of those involved could plausibly claim that they were only breaching guidance or that they had a non-listed 'reasonable excuse' for their actions. But these distinctions may have come as news to citizens who had thought that Government statements such as 'the Irish authorities require you to restrict your movements' described legal obligations. Over time, the presentation of public health advice as mandatory makes it difficult to maintain a coherent account of what is expected of citizens, because this presentation cannot withstand detailed scrutiny in contested cases. This undermines public trust and damages the pandemic to the pandemic. In our view, compliance with the rule of law would enhance the public health message: trust and clarity would assist voluntary public buy-in to public health measures that are not mandatory.