

Submission to Independent Commission on UK Public Health Emergency Powers

March 2023

Introduction

1. The Committee on the Administration of Justice ('CAJ') is an independent human rights organisation with cross community membership in Northern Ireland (NI) and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law. CAJ is affiliated to the International Federation of Human Rights (FIDH).
2. CAJ welcomes the opportunity to respond to the call for evidence¹ to the *Independent Commission on UK Public Health Emergency Powers*,² which is supported by the Bingham Centre for the Rule of Law.
3. The Independent Commission is providing a legal and constitutional analysis of emergency public health laws in the UK; parliamentary oversight of emergency public health powers; and the ways in which emergency laws and public health guidance were made, scrutinised, utilised and disseminated during the Covid-19 pandemic.
4. CAJ engaged extensively with the emergency legislation put into effect in this jurisdiction, scrutinising compatibility with the ECHR and other human rights standards. This included engagement with NI Executive Departments, Police Service of Northern Ireland (PSNI), public health and oversight bodies, and with our partners in the Equality Coalition (the network of 100+ NGOs and trade unions co-convened by CAJ and UNISON in Northern Ireland (NI)).³
5. This submission focuses on the following areas:
 - Restrictions on gatherings, legal certainty and consistency.
 - The Coronavirus Regulations and the Northern Ireland Assembly.
 - Northern Ireland specific travel regulations
 - NI Restrictions on vaccine eligibility.
6. The key issues in each are summarised in the material below with links to more detailed submissions on each issue. CAJ is happy to elaborate in oral evidence on the points highlighted should this be of interest to the Independent Commission.

¹ [Call for Evidence, Independent Commission on UK Public Health Emergency Powers](#)

² <https://binghamcentre.biicl.org/independent-commission-on-uk-public-health-emergency-powers>

³ <https://www.equalitycoalition.net/>

7. For completeness, not least to counter the misrepresentation of human rights standards by 'anti-vax' and libertarian groups largely opposed to any restrictions to protect the right of others, CAJ produced a public 'FAQ' on Coronavirus and human rights standards focusing on the areas of facemasks, vaccines and vaccine passes.⁴

Restrictions on gatherings, legal certainty and consistency

8. In light of controversies and issues of proportionality, legal certainty and non-discrimination CAJ produced a specific briefing in mid-2021 summarising the impact of NI coronavirus regulations on the right to protest.⁵
9. CAJ and Amnesty worked with Black Lives Matter (BLM) protestors in relation to concerns regarding both late amendments to the regulations and the policing operation against socially distanced BLM protests in June 2020.
10. The 'first generation' NI Regulations were in force from 28 March 2020 and were amended 11 times. Public gatherings were largely restricted to two persons, until late May when 'outdoor gatherings' of up to six persons were provided for.⁶ There was also a qualified 'stay at home' rule ('*restrictions on movement*'). There was no express provision for protests, no definition of 'gathering' and, as recorded in a Police Ombudsman investigation,⁷ an inconsistent approach in practice as to whether socially distanced protests (or other gatherings) were counted as *one* or *separate* gatherings. Acting outside the regulations was only an offence if you did not have a 'reasonable excuse' for doing so.
11. It was under these Regulations that the June 2020 BLM protests in Belfast and Derry/Londonderry occurred, albeit enforcement powers over 'six person' gatherings had only been both extended and brought into force *the night before*.⁸
12. Despite efforts to ensure social distancing at the protest, around 70 fines or Community Resolution Notices (CRNs) were issued to anti-racism protestors, mostly at the Derry protest, with PSNI officers expressly citing breaches of regulations over 'gatherings' of more than six persons. Contrast was also drawn with a counter-

⁴ <https://caj.org.uk/latest/coronavirus-and-human-rights-faq-facemasks-vaccines-and-vaccine-passes/>

⁵ [The Right to Protest and NI Coronavirus regulations](#) CAJ Briefing Note June 2021

⁶ The first-generation regulations were the: *Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020*. Regulation 6 restricted gatherings in a public place to two persons (with some limited exemptions) and were subject to enforcement powers under Regulation 7 and breaches constituted an offence under Regulation 8 (subject to a 'reasonable excuse' defence).

⁷ <https://www.policeombudsman.org/Media-Releases/2020/Discrimination-concerns-are-justified,-but-not-on->

⁸ Regulation 6A was then inserted into the Regulations on the 19 May 2020 (Reg. 6A inserted (19.5.2020 at 11.00 p.m.) by *The Health Protection (Coronavirus, Restrictions) (Amendment No. 3) Regulations (Northern Ireland) 2020 (S.R. 2020/84), regs. 1, 2(5) (with reg. 3)*. It permitted participation in an 'outdoor gatherings' of up to six persons who are not members of the same household, or any number of persons who are members of the same household. Consequential amendments were also made to Regulation 5 (the stay-at-home regulations) which added 'outdoor activities' and 'outdoor gatherings' in accordance with Regulation 6A to the list of explicit 'reasonable excuses' for permitting persons to leave their homes. However, no amendment was made to Regulations 7 or 8 which would have made breaches of Regulation 6A on outdoor gatherings an offence/subject to enforcement powers. Such an amendment was made controversially on Friday 5 June coming into force at 11pm that same night on the eve of the BLM protests. (*The Health Protection (Coronavirus, Restrictions) (Amendment No. 5) Regulations (Northern Ireland) 2020, regulation 1(3)*.)

protest to the BLM anti-racism protests the following Saturday (13 June 2020, the 'protect our monuments' protest) where no fines or CRNs were issued.⁹

13. A subsequent Public Prosecution Service (PPS) decision *not* to prosecute BLM organisers was grounded in having a 'reasonable excuse' defence– given 1) the need to interpret the Regulations and defence compatibility with ECHR rights to protest 2) the protests having been organised in a way to minimise Covid transmission risks (social distancing etc.) 3) the lack of legal clarity in the regulations over definitions of 'gathering' and 'outdoor activity' and 4) the proportionality and inconsistency of the PSNI approach.¹⁰
14. There was further criticism of the Regulations and the BLM policing operation in the Policing Board Human Rights Advisors report into in the Boards Thematic Review of Covid-19 policing.¹¹
15. A Police Ombudsman investigation also identified differential and discriminatory treatment of the BLM protests.¹² The Police Ombudsman more recently in a separate investigation into the policing of the 'protect our monuments' protests also contrasted and criticised the lack of consistency in which the two protests were treated, raising concerns this would impact in confidence in policing within minority ethnic communities.¹³
16. In late July 2020 in the context of easing of lockdown 'second generation' NI Coronavirus Regulations were introduced.¹⁴ These removed the 'stay at home' rule, defined 'gathering'¹⁵ and generally permitted outdoor gatherings of up to 30 persons. They also permitted larger outdoor gatherings for a number of permitted purposes (including 'political purposes' which would include protests) provided that organisers had undertaken and implemented a risk assessment (e.g., to ensure steps for social distancing.)¹⁶

⁹ See Holder, Daniel CAJ 'From special powers to legislating the lockdown: the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020' Northern Ireland Legal Quarterly [Vol. 71 No. 4 \(2020\): Winter](https://nilq.qub.ac.uk/index.php/nilq/article/view/915) <https://nilq.qub.ac.uk/index.php/nilq/article/view/915> p548.

¹⁰ <https://www.ppsni.gov.uk/news-centre/no-prosecutions-relation-2020-black-lives-matter-protests>

¹¹ Among the recommendations are that "*All laws, especially those having a significant effect on peoples' lives or creating crimes, should be accessible and written in a way that they are easy to understand;*" and "*Such Regulations and laws should include human rights principles and any guidance should make issues of overlap or contradictions with human rights clear and there should be an accompanying human rights assessment document;*" <https://www.nipolicingboard.org.uk/thematic-review-policing-response-covid-19>

¹² <https://www.policeombudsman.org/Media-Releases/2020/Discrimination-concerns-are-justified,-but-not-on->

¹³ <https://www.policeombudsman.org/Media-Releases/2023/Police-Ombudsman-Investigation-Into-%E2%80%98Protect-Our-M>

¹⁴ The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020

¹⁵ "There is a gathering when two or more persons are present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other."

¹⁶ In general gatherings were restricted to 30 persons (outdoor and indoor, save for private dwellings which had stricter rules). This 30-person rule was conditionally disapplied for "gathering which is organised or operated for cultural, entertainment, recreational, outdoor sports, social, community, educational, work, legal, religious or political purposes and which fulfils the conditions". The conditions exempting the above 30-person rule however are that organisers: 1) undertake a health and safety risk assessment (see <https://www.hseni.gov.uk/articles/risk-assessment>); 2: take "all reasonable measures to limit the risk of

17. The enforcement powers remained vague and uncodified (as in the previous Regulations) and reminiscent of the Special Powers Act “*A relevant person may take such action as is necessary to enforce any requirement*” etc. This risked a precedent being set that such powers included police powers that are normally expressly provided for in legislation implicitly written into them (e.g., powers of entry to premises in relation to indoor gatherings).
18. Around Christmas 2020 in the context of the second wave, restrictions were tightened with a new ‘stay at home’ rule. The above conditional exemption providing for protests was removed. It was not reinstated despite other express exemptions on gathering restrictions being added (e.g., for worship, education).
19. In April 2021 the ‘third generation’ regulations were introduced.¹⁷ The ‘stay at home’ rule was dropped. Public outdoor gatherings were restricted to a maximum of 10 persons from two households. There were six qualified¹⁸ exemptions to this, but none related to protests.¹⁹ This list was subsequently extended to include matters such as outdoor band practice²⁰ but not protest, with the exception of trade union pickets (from the 20th May 2021).
20. On the 24 May 2021 the regulations were changed to permit an ‘outdoor gathering’ of up to 500 persons (dependent on a risk assessment). The changes also stipulated that ‘spectators’ attending any outdoor event were to be treated as a separate gathering to those in the event itself. The numbers for (most) outdoor gatherings not requiring a risk assessment were increased to 15.
21. At this stage CAJ in our 2021 briefing²¹ raised the following issues:
 - The risk that any future tightening of the Regulations will result in no express provisions for safe protests, re-creating a legal lacuna.
 - There was still a lack of clarity as to whether socially distanced groups of protestors are to be considered separate gatherings.
 - The regulations permitted protests of up to 15 persons without conditions. From 15-500 persons required an approved and applied risk assessment. Such a process will be familiar to some organisations but not all who organise (static) protests (for which in normal times there are usually no administrative requirements)²² yet there appeared to be no Guidance or outreach on this issue.
 - It was unclear the extent to which the concept within the third-generation regulations of ‘spectators’ is to apply to protests.

transmission of the coronavirus.” This was binding on organisers, including of protests relying on the exemption, it includes implementing measures from the risk assessment and following official guidance.

¹⁷ Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021

¹⁸ Exemptions were qualified by the need to conduct and implement a risk assessment.

¹⁹ <https://www.legislation.gov.uk/nisr/2021/93/regulation/9/2021-04-09>

²⁰ <https://www.legislation.gov.uk/nisr/2021/93/regulation/9>

²¹ See footnote 5.

²² In NI there are prior notification requirements for almost all parades (public processions) and counter protests to such parades, but not for other static demonstrations (see Public Processions NI Act 1998 and <https://www.paradescommission.org/>)

- Enforcement powers throughout regulations remained vague, uncodified and reminiscent of the special powers acts.
22. In response to the CAJ briefing, the Health Minister Robin Swann MLA set out the following in correspondence to the Health Committee of the NI Assembly:
- Affirmed that the PSNI or any other public authority enforcing the Regulations must do so in a manner compatible with the ECHR, regardless of whether protest is expressly accommodated in the Regulations.
 - Committed in future regulations to ensuring the right to protest with appropriate mitigations to prevent virus transmission were accommodated.
 - Deferred the question of whether distanced protests should be considered as one or separate gatherings to those enforcing Regulations.
 - Concurred that protest organisers do not organise spectators and any duties on a risk assessment of spectator should not arise where the gathering is a protest.
 - Contested that enforcement powers were vague and uncodified.²³

The Coronavirus Regulations and the Northern Ireland Assembly

23. Northern Ireland is no stranger to emergency legislation. The 1922-1972 Stormont Parliament maintained the notorious ‘Special Powers Acts’²⁴ throughout its duration before their replacement by Troubles-era emergency powers.
24. The (UK) Coronavirus Act 2020 contained NI-specific provision and temporarily inserted a new section in the existing Stormont-era Public Health Act (Northern Ireland) 1967, augmenting wide regulation-making powers. It was this modified Act that enabled the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 which constituted the principal emergency provisions in this jurisdiction introduced in response to COVID-19. The first NI COVID-19 Regulations were made, laid before the Assembly and came into force on 28 March 2020.
25. Whilst this may have marked the novel situation whereby there was broad political consensus in NI for the introduction of emergency laws, it should be noted that this consensus was not to last. It then faced an added layer of complexity due to the provisions on power-sharing particular to NI. Elements of the 1998 Belfast/Good Friday Agreement arrangements had been restructured by provisions in the 2006 St Andrews Agreement, with a new veto sought by the DUP, over individual ministerial decisions deemed ‘controversial’ or ‘significant’. This ‘St Andrews veto’ meant determinations on such ministerial decisions had to be instead taken by the full NI Executive. Furthermore, three ministers can require the vote to also require agreement of both unionist and nationalist ministers, granting the two larger parties the ability to veto decisions by other ministers on their own. It was the use of this

²³ Correspondence to Chair, Committee of Health, from Health Minister Robin Swann MLA, 18 August 2021, reference CORR 2128/2021.

²⁴ The Civil Authorities (Special Powers) Act (Northern Ireland) 1922. For analysis on its operation see: Laura K Donohue, ‘Regulating Northern Ireland: the Special Powers Acts 1922–1972’ (1999) 41(4) *Historical Journal* 1089–1120.

veto by DUP ministers, in late 2020, over the extension of coronavirus regulations proposed by the Health Minister that brought concerns about the use of such a largely unqualified veto to public prominence. The ensuing outcry led to a reversal of the decision, yet the episode posed significant questions regarding the constitutional arrangements in NI and their ability to deliver effective health protections if opposed by a major party. The narrative of this episode is set out detailed in a briefing paper produced by the (CAJ-UNISON) Equality Coalition.²⁵

26. A procedural question regarding the making of Coronavirus regulations in NI was the continued use of an ‘emergency procedure’ to make amendments to the Regulations, ‘by reason of urgency.’ This was despite the existence of a standard procedure requiring *prior* NI Assembly scrutiny of changes. As recorded in analysis in Northern Ireland Legal Quarterly in 2020 all amendments to the NI COVID-19 Regulations at that time had relied on the ‘section 25Q’ emergency procedure that allowed the regulations to be made without a draft being laid and approved. Whilst this raised less of an issue when amendments were *easing* restrictions, the use of this procedure was brought into focus when it extended criminal offences on the eve of the BLM protests. The NILQ piece, which provides a broader narrative on the procedure, argues in this instance *“It is at best questionable whether this was necessary ‘by reason of urgency’ in advance of anti-racism protests, in a context whereby powers to enforce regulation 6A had not been available for several weeks since its introduction and other large gatherings had taken place.”*²⁶
27. The Thematic Review of the Policing Response to Covid 19 by the Human Rights Advisor to the NI Policing Board was critical of this change arguing “the lack of any democratic process, transparency, consultation or publicity for this changing of the criminal law cannot really be justified.”²⁷

NI Specific Travel Regulations

28. The geographical context and divergent approaches to passenger quarantine from the British and Irish governments raised particular issues for Northern Ireland.
29. A CAJ briefing in June 2020²⁸ records the main difference in initial approaches were the Irish government drawing its passenger boundary around the Island of Ireland, and the British government seeking to draw the boundary around the whole Common Travel Area (CTA).²⁹ The position of the Irish government (whose passenger restrictions were introduced earlier than the UKs’ on 24 April 2020) was taken in the context of the very high number of COVID-19 cases in Great Britain at the time.³⁰

²⁵ [STORMONT'S VETOES IN THE CONTEXT OF A PANDEMIC – AN EQUALITY COALITION BRIEFING NOTE November 2020.](#)

²⁶ Holder, Daniel CAJ ‘From special powers to legislating the lockdown: the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020’ Northern Ireland Legal Quarterly [Vol. 71 No. 4 \(2020\): Winter](#) p549-51

²⁷ <https://www.nipolicingboard.org.uk/publication/report-thematic-review-policing-response-covid-19> p 56.

²⁸ [Protection \(Coronavirus, International Travel\) Regulations \(Northern. Ireland\) 2020. CAJ Briefing Note No 2, June 2020.](#)

²⁹ The CTA consists of the UK, Ireland, Isle of Man and Channel Islands.

³⁰ [Protection \(Coronavirus, International Travel\) Regulations \(Northern. Ireland\) 2020. CAJ Briefing Note No 2, June 2020.](#) See also Holder, Daniel CAJ ‘From special powers to legislating the lockdown: the Health Protection

30. As public health measures the quarantine restrictions were contained in regulations passed by the devolved NI Department of Health, first in June 2020.³¹ One issue with these regulations is that they had sense of being overly copied and pasted from their English equivalents- to the extent of the oddity of including self-isolation exemptions for Channel tunnel train crews.³² Whilst this may have been inconsequential more problematic however was the failure to duly consider the geographical context of Northern Ireland. This was exacerbated by the lack of opportunity for public scrutiny that could have highlighted deficiencies before commencement of the NI regulations -despite them having been under consideration for some time.
31. A number of issues were raised in our briefing³³ regarding the particular impact of the regulations in NI including:
- **NI returnees over the land border:** there was a particular problem for NI-residents landing in Dublin airport and returning home by land to NI. Rather than a reciprocal arrangement with the Irish government's passenger form, the regulations obliged the UK Passenger Locator Form to be completed and provided 'on arrival' in NI. Whilst the form can be completed online incoming passengers into Dublin may likely be unaware of this obligation; there was no one to provide it to 'on arrival' over the land border in NI, yet not doing so constituted a criminal offence (subject to a reasonable excuse defence).
 - **Transit passengers and the Donegal question:** the NI regulations obliged a passenger landing in Dublin Airport and returning over land to Donegal (also in the Republic but with all reasonable routes overland passing through NI) to complete the UK form *and self-isolate* in NI on crossing the land border.
 - **Dublin loophole:** there was also a question of what had been termed in the UK press the 'Dublin loophole' whereby UK resident incoming passengers could evade UK self-isolation rules by travelling home via Dublin airport. The NI (and English) Regulations closed this off cover this by obliging self-isolation in NI for passengers who had travelled outside the Common Travel Area (CTA) in the last 14 days.
 - **Belfast loophole:** the NI regulations did not close the 'Belfast loophole' whereby residents of Great Britain could evade the Irish government's self-isolation requirements by diverting their journey through NI.

Restrictions on vaccine eligibility

32. A further specific regulatory issue particular to Northern Ireland were processes introduced to restrict in practice (despite legal entitlements in early coronavirus regulations) access to Covid vaccines on the basis of residency status.
33. This did not happen elsewhere in the UK or Ireland. It appears to have been grounded in the contention that for a very brief period the UK vaccine programme

(Coronavirus, Restrictions) Regulations (Northern Ireland) 2020' Northern Ireland Legal Quarterly Vol. 71 No. 4 (2020): Winter p552-5.

³¹ The Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020 were made on the 5th June 2020 and came into force on the 8th June 2020.

³² Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2020, SRNI 2020/90, schedule 2, paragraph 12.

³³ [Protection \(Coronavirus, International Travel\) Regulations \(Northern. Ireland\) 2020. CAJ Briefing Note No 2, June 2020.](#)

started ahead of its Irish/EU equivalents and was made to deter persons in border areas from traveling to NI for the vaccine. The outworking of this measure was however to make it more difficult for persons in NI who were not permanent residents (ordinarily resident- using the proxy of GP registration) from accessing vaccines they were entitled to. This had an adverse impact on persons in NI who were temporary residents.

34. The issue is covered in detail a specific CAJ briefing of June 2021.³⁴ In response to this issue being raised a number of changes and positive action measures were taken to mitigate the impact on migrants and other temporary residents access to vaccines.

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³⁴ CAJ Briefing note on vaccine eligibility and residency status, June 2021.