

A NATIONAL EMERGENCY OR A PUBLIC HEALTH CRISIS? REFLECTING ON THE 2020 AND 2021 MANX RESPONSES TO THE GLOBAL PANDEMIC

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Abstract

The Isle of Man, a self-governing Crown Dependency, developed its own response to the global pandemic, including strict border controls and periods of lockdown. In 2020, this was given legal effect through the declaration of a formal State of Emergency, while, in 2021, similar measures were implemented under public health legislation without a State of Emergency. Framing the 2021 lockdowns as a public health crisis led to a more tightly focused response than the 2020 framing as a national emergency. Within this narrower range, however, the structure of the public health legislation as implemented provided less democratic accountability than the emergency powers legislation and reduced the emphasis given to the rules as laws, leading to a decrease in formality in relation to both creation and publication of these legal rules, and exacerbating a blurring between law and advice. These disadvantages were not, however, intrinsic to the public health legislation itself, and if corrected the public health response is to be preferred.

Keywords: pandemic; State of Emergency; public health, Isle of Man.

[A] INTRODUCTION

The Isle of Man is a Crown Dependency which constitutes a distinct jurisdiction and is largely autonomous in relation to internal affairs. Before the 20th century, emergencies were dealt with by a mix of prerogative powers and emergency legislation by the Manx legislature, the Tynwald. In the 20th century, emergencies in the form of warfare were handled not as a Manx issue, but as an imperial concern dealt with primarily by imperial laws, including emergency provisions. Below the imperial level, the influenza pandemic of 1918–1920, and

later recurrences throughout the 1920s and 1930s, were dealt with as a local health issue.

In 2020, after a very brief period treating the pandemic under the specific provisions of the Public Health Act 1990 (PHA), the Isle of Man responded to the coronavirus pandemic with the declaration of a State of Emergency under the Emergency Powers Act 1936 (EPA) and exceptional governance of the Isle of Man under a regime of emergency powers regulations (EPRs). This was the first time the Isle of Man had responded to a national emergency at a national level. The State of Emergency lasted from 16 March to 26 June 2020. There then followed an unusual, and potentially unlawful, period of managing the crisis in a post-State of Emergency continuation period. Even proponents of this continuation period recognized that it would end six months after the State of Emergency, and so it was replaced by amendments to public health legislation. In late December 2020, but primarily through January 2021, this different legal regime was used to implement a second national lockdown through public health regulations (PHRs) and government circulars (GCs) made under the PHA, followed by a third national lockdown in March and April 2021.

The Manx response to the global pandemic was shaped by a specifically Manx geographical, constitutional and historical context—in particular, by the Manx status as a democratic small island Dependency (Edge 2021). It also made use of specifically Manx institutions, of which the most important are Tynwald and the Council of Ministers (CoMin). Tynwald consists of 24 directly elected Members of the House of Keys (MHKs), from whom the equivalent of the UK Cabinet, CoMin, is drawn; and a second chamber, the Legislative Council (LC), which consists of eight members appointed by the House of Keys (HK), the Lord Bishop of Sodor and Man, the (non-voting) Attorney General and the President of Tynwald. Unusually, as the only surviving tricameral legislature, there are occasions when the two Branches of Tynwald sit together as a third chamber, Tynwald Court (TC)—most significantly for our purposes during the consideration of secondary legislation (Edge 1997: 12-38, 134-142; Lisvane 2016: 15-22).

Of more general interest, however, the change in the legal regime between the two sets of lockdowns—from national Emergency in 2020 to public health crisis in 2021—provides an opportunity to compare the two forms of response within a single jurisdiction. Comparing the two within the same jurisdiction reveals some significant differences. I argue that framing the 2021 lockdowns as a public health crisis led to a more

tightly focused response than the 2020 framing as a national emergency. A very much smaller range of issues was covered, in part because of a recognition by CoMin and Tynwald that the PHA provided less freedom of action than a State of Emergency. Within this narrower range, however, the structure of the PHA provided less democratic accountability than the EPA. The decision to rely upon GCs made under PHRs, rather than PHRs themselves, for the principal provisions of the lockdowns led to less emphasis on the rules as laws: leading to a decrease in formality in relation to both creation and publication of these legal rules, and exacerbating a blurring between law and advice. These disadvantages of the PHA response were not, however, intrinsic to the PHA itself; but instead can be traced back to the decision to use GCs rather than PHRs to create the content of generally applicable legal rules.

This brief article begins by mapping out the legal structures underpinning the EPA lockdown in 2020, then does the same for the PHA lockdowns in 2021. I then draw out the differences between a pandemic response framed as a national emergency and one framed as a public health crisis.

[B] THE 2020 LOCKDOWN: THE EPA IN ACTION

The EPA was based on the United Kingdom's (UK) Emergency Powers Act 1920. Attempts by the Manx Government (Isle of Man Government (IOMG)) to introduce legislation based on this 1920 Act had failed during the 1920s. Part of the failure was due to a focus on 'lightning strikes that interfere with the life or health of the community' (The Lieutenant-Governor, LC 11 February 1921 at 38) which led members of Tynwald associated with the labour movement to see it as 'a piece of class legislation' (Mr Shimmin, HK 3 May 1921 at 720). A substantial further factor was the link to the deeper constitutional struggle between Tynwald, which included elected MHKs, and the Crown-appointed Lieutenant-Governor over control over executive government. The Manx Constitution of the 1920s decisively put executive power in the hands of the Lieutenant-Governor acting alone, and many MHKs were loath to accede to government requests to add to this even during an emergency (see more broadly Rooney 2019: 4-6). In June 1935, however, there had been a substantial and effective strike by the Transport and General Workers Union, and, as a direct result of this acrimonious dispute, Tynwald returned to the 1920 Act. Disingenuously, at times IOMG described the Bill as one that did not 'primarily deal with labour disputes or any particular occasion of emergency' (The Attorney

General, LC 1 November 1935 at 54). The EPA was, however, limited to man-made emergencies, section 3 requiring action ‘taken or ... immediately threatened by any person or body of persons’. Although this was changed with the adoption in 1964 of a UK provision widening the 1920 Act, the only times before 2020 that IOMG seems to have considered a State of Emergency were all related to industrial disputes: the National Union of Seamen Strike in 1966 (The Attorney General, TC 17 May 1966 at 1512), a postal strike in 1971 (The Speaker, TC 19 January 1971 at T324), and the disputes between seamen and the Manx ferry companies in 1985 (Mr Cannan, HK 3 May 2006 at 1056 K123) and 1986 (The Chief Minister, TC 16 February 1988 at T730).

On 16 March 2020, the Lieutenant-Governor, acting on the binding advice of CoMin, proclaimed a State of Emergency on the basis that ‘there is a pandemic of Coronavirus ... it appears that there is a threat of that disease affecting the Island and causing serious damage to human health on, and the economic well-being of the Island’. Such a proclamation was limited to one month, but was repeatedly renewed until the ending of the Emergency on 26 June 2020.

The proclamation of an Emergency is a declaration that ‘the government is too constrained by existing institutions to efficiently deal with the shock’ of the crisis confronting it (Fisunoglu & Rooney 2020: 1). In the Manx system, the Emergency Proclamation allowed the Governor-in-Council—again, the Governor acting on the binding advice of CoMin—to make EPRs with a tremendously wide reach. Such EPRs could be backed with criminal sanctions, including serious fines and imprisonment for up to three months. Although created by the executive, and coming into effect immediately, there was an element of democratic control. EPRs had to be laid before Tynwald within seven days of being made, and if not approved by Tynwald ceased to have effect seven days thereafter.

Eighty-six EPRs were made during the Emergency. We can identify three central pillars to the Manx response to the pandemic.

First, border control. An early Regulation allowing control of ports of entry (Port Operations Regulations 2020) was quickly supplemented by the Entry Restrictions Regulations 2020, which prohibited entry to the Isle of Man for both residents and non-residents, with exceptions for persons vital to critical national infrastructure, essential medical experts, persons returning to the Island after essential medical treatment, and individuals specified by the Council of Ministers. Repeatedly amended, these regulations were entirely replaced with the Entry Restrictions (No 2) Regulations 2020 in May 2020. A key controversy during the Emergency

was the stringency of border control, and the position of residents seeking to return to the Island from overseas (including the UK). Border controls remained in place after the Emergency ended: initially through the continuation EPR, later through an amendment to the PHA.

Second, control of internal movement and interaction. Restrictions on movement of persons who were potentially infected, including those who had recently come to the Isle of Man from a territory such as the UK, were included in the first EPR, the Potentially Infectious Persons Regulations 2020. Of much broader reach were the Prohibition on Movement Regulations 2020, which introduced a general prohibition on leaving a residence, subject to a number of detailed exemptions. The details of these exemptions was an area of considerable activity, with no less than six EPRs passed to amend these regulations. These restrictions were not in effect at the end of the Emergency and were not continued.

Thirdly, closure of businesses. The first EPR closing business premises, the Closure of Premises Regulations 2020, was created on 22 March, closing restaurants and bars, and a range of leisure destinations such as museums and galleries. This was supplemented by the Schools Regulations 2020 allowing the closure of schools. The two sets were consolidated in the Closure of Businesses and Other Premises Regulations 2020, which created three categories of premises—those which were required to close, those which could remain open for particular purposes and under particular conditions related to their sector, and those which could remain open. The extremely detailed provisions of this regulation were repeatedly amended, the final ninth amending regulation being created on 22 May, before being replaced by a revised, very much narrower, restriction at the end of the Emergency. These regulations were not continued after the end of the Emergency.

These three pillars together constituted 45 of the 86 EPRs, so a majority but not an overwhelming one. The remainder dealt with simplifying administration (15), protecting public sector capacity (12), transport (5), housing (3), elections (2), economic intervention (2) and general provisions such as the introduction of fixed penalty notices as an alternative to criminal prosecution (2). Together, these categories dealt with a very wide range of issues, from prohibiting certain classes of employee from leaving the Island, through implementing virtual meetings of public bodies, to allowing MHKs with medical and nursing qualifications to take up offices of profit without automatically losing their seat.

Not every EPR was backed by criminal sanctions, but a very significant number were, including the three central planks of the response

discussed above. The penalties were not merely theoretical, as the Manx courts showed throughout the pandemic. For instance, between March and June 2020, 96 people had been arrested under the EPRs, and 26 had been jailed (Minister for Home Affairs, HK 2 June 2020 at 875-878 K137). High-profile punishments included penalties such as 35 days for being absent from home, 35 days for instigating a gathering, and 30 days for drinking at a friend's house. One which drew international attention was Dale McLaughlan, who crossed to the Isle of Man from Scotland on a jetski to visit his girlfriend, having been refused an entry permit, and was imprisoned for four weeks (BBC News 2020).

The End of the Emergency and the Continuation EPR Period

After 7 June 2020 no active cases of coronavirus were recorded on the Island (IOMG 2020). The Government had already lost, for the first time, a motion to have Tynwald approve an EPR, a loss described as indicative of 'a new spirit abroad in this Honourable Court now' (Mr Robertshaw, TC 26 May 2020 at 2059 T137). One theme from critics was that the regulations were 'unnecessary at this time ... clearly not proportionate to the current emergency' (Mrs Caine, TC 26 May 2020 at 2056 T137) and the situation would be better addressed by normal legislative means. There was also scepticism about the continued need for an emergency powers regime (Mrs Lord Brennan, TC 26 May 2020 at 2057 T137). One of the votes against in the Keys was from a minister, Chris Thomas, who was dismissed as a result. Mr Thomas later moved a number of motions to define the end of the Emergency period, which were not debated as CoMin moved speedily in the same direction. Only two further EPRs were approved by Tynwald: the Closure of Businesses and Other Premises (Amendment No 9) Regulations 2020, and the Continuation (No 2) Regulations 2020. One EPR, the Educational Institutions (Amendment) Regulations 2020, was lost, while seven were not moved for approval, including a key regulation addressing both internal movement and closure of businesses—the People, Places and Activities Regulations 2020—which I will return to below.

The Emergency ended at 18.00 on 26 June 2020. During the Emergency, it was recognized that some EPRs might need to continue past the end of the State of Emergency. The EPA, as amended in 2020, allowed for the creation of Continuation Regulations which could last up to six months after the ending of the Emergency. The Continuation Regulations as passed during the Emergency were surprisingly expansive. All EPRs were continued for the same period, the maximum allowed under the primary

legislation; and the majority of extant EPRs were continued with or without modification. This last point should not be overemphasized. Key features of the Emergency period EPRs had already been repealed during the Emergency. Nonetheless, the continuation EPR does not suggest that the continued existence of each provision of each EPR was seen as an anomaly which needed to be justified and, even where justified, retained for as short a period as practical.

Most controversially, on 17 July 2020 the Lieutenant-Governor purported to create a new EPR, amending the Continuation Regulations. The Attorney General indicated to Tynwald, which approved the measure, that:

Although the original regulations were required to be made during the period of an emergency proclamation, given the purpose for which continuation regulations are authorised to be made under section 4A, namely to secure the intended effect of the regulations during the 6 month period, there is implied within the section a power to amend them during that period in the light of changing circumstances (Attorney General 2020).

The lawfulness of EPRs made other than during a State of Emergency is, however, contested (Edge 2021). One consequence of emergency powers exercisable other than during an emergency is the erosion of the crucial distinction between a State of Emergency—a constitutional enormity which allocates legal powers exceptionally—and the post-Emergency continuation period, and so normalizing these exceptional powers (de Wilde 2015).

Although the EPR was passed by Tynwald, a query was raised by Mr Chris Thomas MHK as to the basis for the power to create EPRs during the continuation period. The Government remained confident of its power to do so, purporting to create a total of seven amending EPRs after the end of the Emergency. The continuation period EPRs, doubts as to their legality aside, were subject to less democratic oversight than normal EPRs. A normal EPR, as discussed above, had to be considered by Tynwald within seven days and, if not approved, ceased to be of effect within seven days thereafter. Continuation EPRs, on the other hand, were not required to be placed before Tynwald within a set period, but rather ‘as soon as practicable’ (Legislation Act 2015, section 31). This was used to allow a continuation EPR made, and taking effect, on 10 August 2020 to be laid before Tynwald on 20 October 2020.

[C] THE 2021 LOCKDOWNS: THE PHA IN ACTION

Even with this expansive understanding of the continuation EPRs, a legal regime based on the EPA could not be sustained beyond the end of December 2020, six months after the end of the Emergency. For the longer term, Tynwald returned to the PHA.

It will be recalled that the 1918–1920 pandemic was dealt with as a local health crisis. It was addressed under very specific legislation, the Local Government Consolidation Act 1916, section 195, which allowed the creation of regulations, mostly based on what we would now describe as ‘reactive social distancing’ (D’Onofrio & Ors 2007), with a view to preventing, mitigating and guarding against the spreading of epidemic disease. Regulations under this 1916 Act were made 23 times between 1918 and 1973, principally concerning influenza. The 1916 Act was replaced by the PHA. This Act was the legal basis for the first emergency regulations in the 2020 crisis, the Health Protection (Coronavirus) Regulations 2020, made on 26 February, and ceasing to have effect on 24 March 2020. From 24 March, EPRs under the EPA were instead the primary tool for dealing with the first stage of the pandemic.

As the EPR continuation period neared its end, CoMin and Tynwald sought to amend the PHA to ensure that it provided a suitable tool for dealing with the need for further restrictions as the global pandemic continued. Longer-term reflections on the EPA were moved up the policy agenda, but not sufficiently urgently to fit with the (statutory) end of the continuation period, with consultation on a Civil Contingencies Bill based on the UK Civil Contingencies Act 2004 not currently resulting in legislation or a Bill before Tynwald (Cabinet Office 2020).

Tynwald amended the PHA by the Courts, Tribunals and Local Authority Procedures and Miscellaneous Provisions Act 2020. The key section for current purposes is Part IIA—Public Health Protection, in particular sections 51B–51F. In contrast to the EPA, this does not require a formal State of Emergency to be declared—but neither is it usable in as wide a range of emergencies, nor does it have any application beyond threats to public health.

This Part gives the power to the Council of Ministers to make regulations controlling international travel (section 51B), and ‘preventing, protecting against, controlling or providing a public health response to the incidence, spread or effect of infection or contamination in the Island’ (section 51C), which can include ‘imposing or enabling the imposition of restrictions or

requirements on or in relation to persons, things or premises’ (section 51C(3)(c)). The latter is most important for non-travellers and is subject to some specific restrictions: it must not be considered disproportionate by the authority imposing the restriction (section 51D(2)) and must be imposed in response to a serious and imminent threat to public health (section 51D(4)). This section cannot be used to order an individual to submit to medical examination, to be removed or detained in a hospital, or to be kept in isolation or quarantine—the power to do these things is instead vested in a judicial officer (section 51(G)(2)(a)-(d)). Neither power may be used to require a person to undergo medical treatment, including vaccination (section 51E).

These two powers may be used to create health protection regulations (PHRs), with very broad effect (section 51F(2)), including amending primary legislation (section 51F(3)). This can include creating criminal offences punishable by a fine equivalent to four times level 5 (as of today, £40,000), custody for a term not exceeding three months, and a further fine of up to £100 per day for continued default after conviction (section 51F(5)). Compared with the EPA, there is no provision for forfeiture of property as a punishment, a similar maximum prison sentence, a sharply increased maximum fine, and the possibility of a penalty continuing to accrue so long as the defendant remains in default. PHR offences are triable summarily. Regulations can also create fixed penalty notices (section 51F(2)(i)).

Before exercising these powers, CoMin must consult the Department of Health and Social Care and such other persons as appear to it to be appropriate if practicable to do so (section 51PA). PHRs, unlike EPRs, do not generally come into operation until approved by Tynwald (section 51Q(2)). A PHR may come into effect prior to Tynwald approval if it is declared, by the person making it, ‘that, by reason of urgency, it is necessary for it to come into operation before it is approved’ (section 51Q(3)). In that case it must be laid before Tynwald and approved by Tynwald within 14 days (section 51Q(5)), or cease to have effect. There is a little more leeway than under the EPA: the EPA required approval within seven days (although the expiry period was the same) and had no provision in case it proved impossible for the President to summon Tynwald within the period (contained in section 51Q(5A-5C)).

The first PHR, the Public Health Protection (Coronavirus) Regulations 2020, created as it was to deal with the expiration of the continuation period, did not come into effect until after consideration by Tynwald. This

created the framework for post-EPA responses to the pandemic, with an emphasis on border control, self-isolation and testing.

Further action was needed in the wake of the UK crisis at the end of 2020 and an outbreak of cases in the Isle of Man over the Christmas period. Border control was amended in late December, by the Public Health Protection (Coronavirus) (Amendment) Regulations 2020, which came into effect before approval by Tynwald. In early January, the Public Health Protection (Coronavirus) (Amendment) Regulations 2021, while further modifying border control, created important new restrictions around internal movement, events and gatherings, and the operation of businesses, again before approval by Tynwald.

Thus, at 00:01 on 7 January 2021, the Isle of Man entered a second lockdown, this time based on the PHA rather than the EPA; but based on the same foundations of border control, control of internal movement and closure of businesses. The second lockdown was shorter, ending on 1 February 2021.

Unfortunately, having experienced virtual freedom from internal restrictions for more than six months between the first and second lockdowns, the Isle of Man entered a third lockdown on 3 March 2021. The need for a third lockdown was much more politically charged than in the preceding cases, as a very substantial number of cases in the Manx community followed coverage of possible failings in the border control mechanisms around mariners employed by state-owned Isle of Man Steam Packet (IOMSPC). The government response to criticism of this element of border control, and confusion over the workings of control in relation to the IOMSPC was itself criticized, leading to the commissioning of a formal independent review (Hind 2021).

This political controversy flowed into criticism of a short—but perhaps significant—initial delay in establishing a third lockdown. One of the reasons at times suggested by the Chief Minister for the initial delay in creating the third lockdown was the time taken to prepare necessary legislation. The PHA and PHR remained in effect, and when the lockdown was given effect by GCs, the legislation was very similar—certainly the two PHA lockdowns are much closer in content than different stages of the EPA regime. Accordingly, I will consider the PHA response for the second and third lockdowns together.

One significant difference between the first and second PHA lockdowns is, however, worth highlighting. The first PHA lockdown had a closure of schools and childcare facilities similar to that of England—they were

physically closed for the majority of children, but vulnerable children and children of key workers could still attend a hub school. The surge leading to the second PHA lockdown was significantly associated with school-age children. Controversially, therefore, during this lockdown schools and childcare facilities were closed even to these children (under, for instance, GC 2020/0039).

[D] COMPARING EMERGENCY POWERS AND PUBLIC HEALTH RESPONSES

The PHA Response Covered a Narrower Range of Issues

The foundations of the EPA and the PHA lockdowns were measures around border control, restriction of movement and closure of premises. Measures predominantly concerned with these three topics constituted 45 of the 86 EPRs made during the EPA period (excluding the continuation period). The remaining 48% of the EPRs, however, addressed civil administration, public sector capacity, transport, housing, elections, economics and pervasive issues across multiple EPRs (for instance fixed penalty notice terms)—topics not dealt with under the PHA. Every one of the PHRs, and the GCs made under them, dealt with these three central topics.

How can this tighter focus be explained? One explanation may be that lessons were learnt about what measures were needed to deal with the pandemic during the first, EPA, lockdown; and so some measures were simply not seen as proportionate on policy grounds by 2021. Another, and one with some support from the public record, is that the PHA was seen as intrinsically narrower than the EPA, and so not everything that could be done under the EPA was possible under the PHA.

In some cases, issues which had been seen as significant enough to warrant legal intervention in the 2020 lockdown were not covered at all. For instance, special restrictions on the ability of particular classes of employees to leave the Isle of Man were not introduced. In other cases, issues which had been dealt with under the EPA were addressed, but by different legal mechanisms. The best example concerns local elections. Under the EPA, local by-elections had been postponed by an EPR, the Local Government Regulations 2020. On 9 March 2021, Tynwald members voted to support a government plan to delay local authority elections. The relevant minister cited the absence of EPA powers, ‘without those powers this time, we will need to push ahead with bespoke changes

to primary legislation’ (Mr Baker, TC 9 March 2021 at 1704-1710). The Speaker queried the need for this, suggesting that bringing into effect a section of the House of Keys and Local Authorities Act 2020 would allow the postponement. A number of members strongly favoured bespoke legislation—whether primary or secondary—over triggering a State of Emergency to deal with this particular problem. Primary legislation, the Elections and Meetings (Local Authorities) Act 2021, rather than a special regulation was passed to deal with the issue.

The PHA Response made Significant Use of Government Circulars

The tighter focus of the PHR response may be part of the explanation for a sharp difference in the number of regulations made under the two regimes. Against the 86 EPRs made other than in the continuation period, we have 15 amending PHRs across both lockdowns. The better explanation, however, is the reliance upon GCs, discussed more fully below, to provide the detail for every aspect of the regime. Including the GCs, we have 82 documents across both PHR lockdowns, as compared to the 86 under the EPA.

These GCs were used to provide the substantive rules of the PHA lockdowns. This may be illustrated by reference to one of the three foundations—that of restrictions on freedom of movement. These are dealt with under four clauses, which had the effect of allowing CoMin to issue a GC prohibiting persons from leaving their homes for any purpose, such GC being ‘general or specific’ (Public Health Regulations 2020, section 26C(2)(a)). The first GC made under this provision, GC 2021/0004, ran to five pages, the second to seven, the third to ten.

I discuss two significant drawbacks to this change of direction below. A great advantage of this approach, however, is that these GCs were drafted with a view to being accessed by the general public, and thought was put into making them as accessible as possible. For instance, a single active GC was kept for each of the key areas of regulation and, even for quite small amendments, the entire preceding GC was removed. Almost invariably, the GCs were drafted to be self-contained and not require experience of legal analysis to parse. As documents aimed at the general public, needing to be assimilated and acted upon swiftly, this was a real improvement.

The PHA Response was Better Drafted and more Clearly Communicated

Perhaps as a result of the tighter focus and the ability to draw on the experience of the 2020 lockdown, drafting showed notably fewer errors; even in the more numerous GCs. One example was permitting individuals to leave their homes in order to access dog daycare and grooming, when such services were required to be closed (GC 2021/004, Schedule paragraph 3(i)). Another, corrected within hours and before the PHR was published, imposed less serious masking requirements on persons who were required to self-isolate as a contact of a coronavirus-positive person than on persons sharing the traced person's household (Public Health (Amendment) (No 9) Regulations, corrected by Public Health (Amendment) (No 10) Regulations).

This improvement in drafting is striking since a number of features which posed a challenge to high-quality drafting were present under both the EPA and the PHA. Given the close similarity between UK and Manx drafting styles, there is no intrinsic reason why a Manx law should take any less professional time to draft than one in the larger jurisdiction, with a larger team of legislative draftspersons (Cain 1990; Hewagama 2010). There were limits in both sets of lockdowns to how far the Manx capacity for drafting could be stretched. Part of the stress on Manx drafting capacity was caused by the fast-moving nature of the pandemic, and the need for a very high volume of legislation. It was exacerbated, however, by the choice to allow these laws to come into effect before scrutiny by Tynwald.

EPRs, and then the overwhelming majority of PHRs, were created by the executive and became law when signed and were only later subjected to scrutiny by the members of the legislature. Legislators frequently identified drafting errors both within and outside the legislative chamber, however, and in some cases voted in favour of an EPR only on the basis that an error would be speedily addressed, or upon receiving an assurance that issues raised in debate would be dealt with by 'further legislation' (The Chief Minister, TC 27 March 2020 at 1497 T137). GCs were not subject to formal scrutiny by Tynwald at all.

The PHA Response Blurred the Distinction between Law and Guidance more than the EPA Response

In the first Manx lockdown, the EPA allowed EPRs, which themselves occasionally referred to guidance on the Manx government website for legal content. In the PHA lockdowns, another layer was added.

The PHA allowed PHRs, but the principal effect of these PHRs was to allow the creation of Directions (published as GCs), which themselves frequently referred to guidance on the government website. For instance, permission to leave home became dependent upon a PHA (approved by the legislature), allowing a PHR (created by the executive but approved by the legislature), which permitted the creation of Directions (created by the executive), which made permission to leave subject to complying with ‘guidance published on www.gov.im’ (GC 2021/0014).

The shift down in formality and constitutional process through each level may have contributed to casualness around the publication of legal documents. There are numerous examples of GCs coming into effect before they were publicly available, although none were signed to have retrospective effect. One extreme example concerns closures of schools and childcare providers to all children. The two GCs doing so were not published until after they had been replaced by new GCs covering the same topics (GC 2020/2036, replaced by GC 2021/0040; GC 2021/0037, replaced by GC 2021/0039).

The incorporation of guidance into law exacerbates the blurring, found elsewhere during the pandemic, between binding law and government guidance. The most striking example of this occurred towards the end of the second lockdown. The closure of business premises included a provision allowing the operators to return to closed premises in order to ‘prepare the business for re-opening in line with any Government directions’ (GC 2021/0011, paragraph 6(f)). Just ahead of the weekend before premises were to be permitted to open, the Chief Minister tweeted: ‘Ahead of possible lifting of measures from 1 February, we recognize some businesses may want to prepare over the weekend. This is OK as long as social distancing and other measures are respected. We are almost there. Let’s continue making the right decisions. #isleofman’.¹ No government Direction, nor even guidance on the IOMG website, was created to give effect to this.

The PHA Responses were Less Closely Subject to Democratic Oversight

As will be recalled, EPRs came into effect when made, but had to be confirmed by Tynwald within seven days or lapse. PHRs, too, were subject to confirmation by Tynwald. In a minority of cases this was before they came into effect, but the majority came into effect subject to confirmation.

¹ See twitter.com/HowardQuayleMHK/status/1354782949930110977 1.26pm, 28 January 2021.

Confirmation was required within 14, rather than seven, days. I have argued elsewhere that, given modern technology, seven days under the EPA was already too long (Edge 2021).

More significantly, however, the overwhelming majority of the detail of the PHR lockdowns was given effect by GCs, not PHRs. Unlike EPRs and PHRs, the GCs, as noted above, provided the detail of the restrictions on much of Manx life during the PHA lockdowns. For instance, in relation to restrictions on gatherings, although there are some specific limits on the power due to interpretation and savings in the PHR itself, regulation 33C of the PHR provides ‘The Council of Ministers may give a direction notice prohibiting an event or gathering’, and such a direction notice may be general, and apply to the entire Island. Changes to the PHR were subject to democratic oversight by Tynwald. Changes to GCs, on the other hand, were not.

GCs were not required to be affirmed by Tynwald. Instead, they were laid before Tynwald as items ‘subject to no procedure’, typically in batches; for instance ten being laid before Tynwald on 20 January 2021. Such documents do not require approval by Tynwald before coming into effect, or approval by Tynwald if they are to continue in effect (Legislation Act 2015, sections 30-32). Instead, the only obligation is to lay the document before Tynwald ‘as soon as practicable after it is made’ (Legislation Act 2015, section 34, 36). A failure to meet even this minimal obligation does not affect validity (Legislation Act 2015, section 36). Although GCs were regularly tabled throughout the two PHA lockdowns, no GC was at any point subject to debate, or a vote.

Towards the end of the EPA lockdown, CoMin intended to replace much of the EPR regime with the People, Places and Activities Regulation 2020 which would cover prohibition on movement, closure of businesses, and events and gatherings. This EPR would have empowered the executive to detail restrictions similar to the GCs in the PHR regime, subject only to laying before Tynwald as soon as practicable after it was made. Although coming into effect before consideration by Tynwald, this EPR was criticized as an enabling measure which reduced democratic oversight too much and was not tabled for approval by CoMin at the next Tynwald—and so did not become law. My understanding is that the decision not to table the EPR was because CoMin had received substantial criticism of the measure from members of Tynwald, and were not confident that it would receive support.

The different shape of EPA and PHA powers may explain why Tynwald was more relaxed over the introduction of GCs under the PHR. The

tighter focus of PHRs was well-recognized in Tynwald, and was being taken account of by CoMin. It may also be that, as the Isle of Man became used to the shape of pandemic restrictions, concerns over excessive use of executive rulemaking powers reduced. Nonetheless, it is the case that major changes to criminal liability for breach of pandemic rules were made without requiring approval by Tynwald. In the areas covered by both regimes, they were not significantly less onerous under the PHA than the EPA. The shift to GCs which did not require Tynwald approval—not an inevitable feature of the PHA by any means—shifted rulemaking power away from the democratically elected Tynwald to CoMin, the responsible Government.

[E] CONCLUSIONS

The first lockdown was under the provisions of the EPA—a significant disruption to the normal constitutional order. The Emergency lasted for some considerable time, and the decision of the Manx Government to interpret the power to make EPRs as extending beyond the Emergency meant that these powers were available for much of 2020. The same dynamics which had led to the end of the Emergency, however, made it imperative to shift continued management of Manx borders, and the possibility of further lockdowns, out of the EPA regime.

The shift to the PHA has, generally, been positive. The PHRs have been notably more narrowly focused than the EPRs, with a recognition that some issues addressed by EPRs should not be addressed by PHRs. Perhaps as a result of previous experience, and the availability of previous models, drafting of the PHRs and their associated GCs has been more consistently strong than drafting of EPRs. Determining the law—issues around the timely dissemination of the law to the general public aside—has been made quicker and easier by the drafting decisions.

This has, however, not been without cost. The creation of laws very substantially burdening the everyday life of Manx residents was less subject to democratic oversight in the PHA lockdowns than the EPA lockdown. This is because of the decision to move these burdens into GCs, which are not subject to the control of Tynwald. The ease of making laws has continued the move away from formality in law-making, with an adverse impact on a key aspect of the rule of law—the ability of those who will be required to obey a law to have access to it in advance.

In sharp contrast to the major emergencies of the 20th century, this 21st-century emergency was responded to with Manx resources—political

leadership, technical drafting and legislative scrutiny of executive action. The extent to which exceptional powers have been exercised by Manx political figures is unique in Manx history. It would be optimistic to assume that similar powers will not need to be exercised in the future. In the 1920s and 1930s, for instance, the public health restrictions on influenza became routinized in the Isle of Man. There is some evidence of a movement in the same direction in the modern Manx context through the three lockdowns. How can the advantages of the PHR/GC response be retained for future lockdowns, while minimizing the damage to democracy and the rule of law?

The first harm requires, in the Manx context, the return to active involvement by Tynwald in the creation of pandemic law. Tynwald had a crucial role to play in the first lockdown, but the extent to which GCs dominated the shape of the later lockdowns means that it was much less substantially involved in the second and third. Requiring some form of active engagement by Tynwald with every GC would reintroduce an element of democratic accountability into the process. If the EPA requirement of positive approval within seven days is unacceptable, one possibility would be the negative resolution process. Where a statutory document is noted in authorizing legislation as using this process:

(2) The responsible authority for the document must cause the document to be laid before Tynwald as soon as practicable after it is made; (3) If Tynwald at the sitting at which it is laid or the next subsequent sitting resolves that the document is to be annulled it ceases to have effect (Legislation Act 2015, section 32).

The second requires that pandemic laws be easily available to the public and, ideally, understandable by those required to act in accordance with them. Laws should not come into effect before they are publicly available. Ideally, they should be drafted so as to minimize the burden on members of the public in learning of them and understanding them, as opposed to complying with them. Keeping up with the changes to the Manx pandemic laws throughout the first lockdown in particular was not easy. Well-drafted laws, made available in a timely fashion before they come into effect, take time to create; and each iteration takes time to understand.

One way to combine these two suggestions would be the creation of a standardized framework for responding to future pandemics. We have already begun to see this in relation to border controls, but the concept could be extended to the restrictions on the internal life of the Isle of Man. The PHR lockdown response to the coronavirus pandemic was, fundamentally, intended to reduce the interaction of individuals in circumstances where infection was a significant risk. When coronavirus

was not in the Manx community, this was achieved by tight restrictions on those entering the Isle of Man and those interacting with them in their households. When it was in, or feared to be in, the community, this was achieved by varying levels of restrictions on interaction—from interacting at events, through workplaces, schools, and ultimately preventing leaving home unnecessarily. Regulations to give effect to these restrictions could be drafted, debated and subject to democratic approval before they are needed, and brought into effect as necessary; with that decision itself being subject to democratic oversight.

If we should face a period similar to the two decades following the 1918 pandemic, then governance would benefit from some element of standardization. The laws used to deal with the 1918 pandemic saw regular use through a long lifetime. Regulations to deal with influenza were completely routine during the 1920s and 1930s, albeit much less intrusive than the 1919 set and rarely subject to scrutiny or query in Tynwald. Mr Crellin, moving approval of one set in 1933, constituted the entire discussion of the motion: ‘This is rather important, and it won’t take a minute. I beg to move this resolution. The regulations are the usual regulations issued when there is an influenza epidemic in the Island.’ (TC 27 January 1933) The danger of exceptional restrictions to deal with exceptional threats, of course, is that the restrictions become routinized too. As the Lord Bishop noted in discussion of exceptional control of the Manx economy in 1973, ‘it is quite right that emergency powers should not turn into regular powers’ (LC 12 June 1973 at C244). The usual regulations issued when facing infectious disease similar to the 2020–2021 pandemic need to respect democracy and the rule of law.

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