

BRIEFING NOTE

Legal and Ethical Considerations for Public Health and Social Measures

Purpose

This briefing note outlines the legal and ethical considerations that must be taken into account before and during implementation of public health and social measures (PHSMs). This document helps public health authorities implement PHSMs in a legal and ethical manner to improve results and avoid unintended consequences.

Background

COVID-19 is an infectious disease that causes respiratory illness, with symptoms including cough, fever, and in more severe cases, difficulty breathing, pneumonia, and even death. As of April 2020, there were more than 2 million cases worldwide, with confirmed cases in nearly every country. Roughly one in five people infected requires hospitalization, with higher rates of severe illness in people over 60 and those with underlying conditions. Because COVID-19 is transmitted by droplets that require humans to be closer than 1.5 meters, improved hygiene practices and physical distancing measures, known as “public health and social measures (PHSMs),” can slow the spread of disease and save lives. In the absence of effective treatment or a vaccine, PHSMs are the only available tool for governments to reduce deaths from COVID-19. But PHSMs can cause devastating social and economic disruption. They must be managed carefully and adapted for local contexts, and paired with relief measures such as fiscal stimulus to reduce damage to social and economic systems.

Aggressive application of PHSMs has successfully slowed the spread of COVID-19 in a number of countries, including China and South Korea. However, these measures can cause devastating social and economic disruption. They must be managed carefully, using evidence to drive decisions and balancing public health benefits with potential erosion of social and economic systems.

What ethical and legal dimensions should be considered?

Before any PHSM is enacted, public health officials should determine that the intervention is: (a) likely to be effective; (b) proportional to the threat; (c) necessary for effective control of the disease; and (d) implemented with minimum infringement on individual liberties. In addition, officials must clearly and publicly justify the measures, especially to affected communities.¹

Ethical and legal components of isolation and quarantine

Isolation and quarantine have distinct meanings and goals. Isolation of a person who is known to have, or suspected of having, a disease is meant to keep that person from infecting anyone else. Quarantine refers to ensuring that people who have been exposed to a known or suspected case are kept separate from others until they can be diagnosed. Isolation and quarantine must be designed to be as minimally restrictive as possible to achieve the objective of containing the disease. Governments must ensure people in quarantine and isolation have the means to comply, including shelter, health care, medication, food, water, and sanitation. Alternative child care or elder care arrangements may be needed as well.^{2,3}

Quarantine and isolation place a burden on individuals for the collective benefit; the concept of reciprocity requires society to provide support for those burdened by the quarantine or isolation. If society does not reciprocate to support those burdened by restrictive measures, the restrictive measures are considered unethical.⁴

Considering the ethical and legal principles discussed above, the application of quarantine and isolation should be: as minimally burdensome as possible to achieve the required public health objective; narrowly targeted with clear guidelines; and implemented with sufficient provisions for daily needs, including food, medical and psychosocial support. When applying a quarantine or isolation policy, leaders must be transparent, protect civil liberties, and be subject to accountability.⁵

Temporary infringements of human rights

Public compliance with PHSMs will be higher where governments prioritize respect for human rights and the dignity of all people. The International Health Regulations (2005) require countries to apply health measures in a transparent and nondiscriminatory manner and respect the dignity, human rights and fundamental freedoms of persons.⁶ Although international human rights law instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, allow for some limitations and exemptions in response to public health emergencies, measures that restrict liberty should meet the criteria outlined below. Except for temporary and limited restrictions on the freedom of movement, PHSMs can and should be implemented without infringing on other rights.

1 Upshur R. The ethics of quarantine. *Virtual Mentor* 2003;5.

2 Rothstein MA. From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine. *Indiana Health Law Rev* 2015;12:227-80.

3 Parmet WE, Sinha MS. COVID-19 — The Law and Limits of Quarantine. *N Engl J Med* 2020.

4 Silva DC, Maxwell J. Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles. *Health & Human Rights* 2015;17:52-7.

5 Stern AM, Markel H. Influenza Pandemic. In: Crowley M, ed. *Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*. Garrison, NY: The Hastings Center; 2008:89-92.

6 WHO. *International Health Regulations (2005) 3rd Edition*. Geneva, Switzerland: World Health Organization; 2016.

Enforcement tactics

PHSMs have the most impact and generate the least friction when they are designed and implemented in a way that respects and relies on individual autonomy, and that appeals to civic duty and community care. Leaders should consider encouraging voluntary measures, which may have the same health impact as mandatory measures without the risk to community trust and burden on the legal system.⁷

If enforcement is strictly necessary to improve compliance, the enforcement tactics should respect the principles of the PHSMs, including physical distancing, respiratory hygiene, and minimal contact. Arrests and imprisonment are counterproductive to these public health goals. Even nominal fines may create distrust among vulnerable people who violate the provisions because they do not understand the rules or lack the means to comply. Law enforcement should be encouraged to educate and warn people, or to guide them to other government support services. Fines and imprisonment should only be used as a last resort. If someone must be taken into government custody, the government must take all steps to protect their health and the health of others.

Legal and ethical criteria for implementation of PHSMs

Public health officials should assess the legal framework—that is, the existing laws and regulations that underpin the measure being considered—before implementing PHSMs. This will help determine which government officials or bodies have authority to enact the chosen PHSMs, and how to implement them. The legal framework may also explain what legal and ethical limitations restrict the chosen interventions. **SEE TABLE 1 FOR EXAMPLES OF LEGAL CONSIDERATIONS RELEVANT TO COMMON PHSMs.**

PHSMs should be ordered by the appropriate officials using the appropriate procedure

Public health officials should work with lawyers to identify relevant legislation that provides authority to issue PHSMs, whether the public health official is granted that authority or not, and to understand the proper legal mechanism for implementing the chosen measure, such as a ministerial order or presidential emergency decree. In so doing, public health officials must consider if the legal instruments:

- authorize the relevant authority to enact and implement PHSMs;
- empower the relevant authority to make regulations, rules or other subsidiary legislation with respect to infectious disease prevention and control;
- allow the relevant authority to delegate its power to local officials, medical officers, border health officials, etc.; and
- define the circumstances and conditions in which the relevant authority can enact and implement PHSMs.

⁷ Jacobs LA. Rights and Quarantine during the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto. *Law & Society Review* 2007;41:511-51.

When enacting PHSMs, governments should use proper legal procedures, citing their constitutional and statutory authority to do so. Issuing orders without proper authority or procedure may lead to or exacerbate public perception that government is exploiting the COVID-19 crisis for ulterior purposes.

Limit PHSMs' interference with fundamental freedoms wherever possible

A temporary and limited infringement on human rights and fundamental freedoms can be justified by a legitimate public health objective. However, such infringement should be:

- provided for and carried out in accordance with national law;
- in furtherance of a legitimate public health objective;
- strictly necessary;
- the least intrusive and restrictive available;
- based on scientific evidence;
- neither arbitrary nor discriminatory in application; and
- of limited duration and subject to review.

While PHSMs must be implemented quickly and decisively as soon as they are needed, policymakers should institute safeguards and other procedures to ensure each measure satisfies the above requirements.

Respect the dignity of all people

PHSMs can cause distress when people face unclear information and communication during a disease outbreak. Governments should minimize any discomfort or distress associated with such interventions. Public health officials must:

- treat all individuals with courtesy and respect;
- take into consideration people's gender, sociocultural, ethnic or religious concerns;
- provide or arrange for adequate food and water, appropriate accommodation and clothing, protection for property, appropriate medical care, means of necessary communication, and other appropriate assistance; and
- offer clear information and complete explanations to people in accessible language.

Provide adequate facilities, equipment and trainings

PHSMs are aimed at reducing the transmission of a disease within the community. It is therefore crucial that all measures are taken for limiting such risk in quarantine or isolation facilities. In particular, public health officials must:

- adopt adequate infection prevention and control measures;
- separate healthy individuals and clean goods from people who are ill;

- equip and train health care workers;
- provide health monitoring throughout. People who develop symptoms while in quarantine should be separated from others and provided appropriate care.

Mitigate social and economic impacts

PHSMs can lead to social and economic hardships, especially for those who are dependent on daily income. School closures might have secondary economic and social impacts as parents or guardians will stay home to care for and educate their children. People living alone might be at increased risk if isolated or quarantined at home. Equally, parents are unlikely to allow for their children to be isolated alone, thereby increasing risk of household transmission. The government should alleviate the unequal burdens placed on different people by providing financial and other support. Public health officials must:

- assess social and economic impacts of identified PHSMs on different individuals and communities;
- protect workers who comply with PHSMs against loss of job or income;
- consider vulnerable groups' needs; and
- offer financial compensation and other services to protect affected people and businesses.

Conclusion

PHSMs are the most effective tools we have to slow the spread of COVID-19 until treatment or cure becomes available. Attention to legal and ethical considerations will help strengthen the effectiveness of these measures by avoiding unintended consequences and garnering community support.

Resolve to Save Lives' COVID-19 PHSMs program

Resolve to Save Lives has partnered with the Africa Centres for Disease Control and Prevention, World Economic Forum, and leading market research firm Ipsos to support decision-makers in countries in Africa to implement PHSMs effectively by providing real-time data and guidance about PHSMs impact on social and economic indicators. A team of researchers will collate and analyze big data from several sources, including social and traditional media, country-based polls, mobile phone movement, and indicators of economic and social unrest. Resolve to Save Lives will produce specific guidance and distribute its recommendations through a variety of channels to stakeholders including civil society, policy- and decision-makers, and business leaders. As the pandemic progresses, more detailed support and guidance will be provided to high-risk countries or countries with a high prevalence of disease.

TABLE 1: LEGAL CONSIDERATIONS AND EXAMPLES OF VARIOUS PUBLIC HEALTH AND SOCIAL MEASURES

| Public Health and Social Measure | Legal Considerations | Other Factors for Success | Implementation Examples |
|--|---|---|--|
| Promote hand and respiratory hygiene | <ul style="list-style-type: none"> Ban price gouging or hoarding of soap, hand sanitizers, face masks, cleaning products, etc. Establish and supply hand-washing stations in public spaces, such as government buildings, hospitals, utility companies and public housing. For people without access to water and soap, procure and distribute free (or subsidized) appropriate hand sanitizers. Establish clear authority for officials to allocate limited supplies of masks in an equitable, nondiscriminatory, and evidence-based manner. Encourage respiratory hygiene, but do not criminalize failure to perform it. | <ul style="list-style-type: none"> Broad public education to ensure that the public consistently and correctly washes hands, follows cough etiquette and cleans surfaces Sufficient access to soap, water, hand sanitizers and cleaning products Alcohol-based hand sanitizer available in jurisdictions that prohibit alcohol for religious and other reasons Involve business owners and corporations in the dissemination of key messages, including through distribution of ready-to-use communication materials for shops and other public places. | <p>During the 2014-16 West Africa Ebola outbreak, pharmacists in Liberia and Guinea locally produced and delivered more than 8,000 100 ml bottles of hand rub sanitizer to hospitals.</p> <p>In France, the minister of economy capped for three months the selling price of alcohol-based gels used to clean hands.</p> |
| Stay at home if unwell | <ul style="list-style-type: none"> Financial and employment protections for people in quarantine, such as paid sick days, rent/mortgage waivers, utility bill waivers, or food and tax subsidies Social support to household, such as ensuring delivery of food, medicine, clothing and cleaning supplies | <ul style="list-style-type: none"> Quick and accurate identification of the first person in the family to be sick Voluntary compliance with quarantine by household members of people who are sick Providing simple, clear information about when and where to go for medical care and how to safely take care of sick people at home | <p>In order to limit the spread of COVID-19, France provided a daily subsistence allowance to employees who are unable to work due to isolation or home quarantine measures.</p> |
| Rapid identification, testing, and isolation of cases | <ul style="list-style-type: none"> Confirm proper authority to investigate cases and contacts. Safeguard data protection and right to privacy of individuals. Financial and employment protections for people in isolation, such as paid sick days, rent/mortgage waivers, utility bill waivers, or food and tax subsidies Social support to isolated individuals such as ensuring delivery of food, medicine, clothing and cleaning supplies Additional financial and other support to people who live alone, and for families with ill caretakers Isolation should be voluntary to the greatest extent possible. However, laws should be in place that allow the government to enforce isolation if it becomes necessary. | <ul style="list-style-type: none"> Quickly identify the person who is sick. Provide simple, clear information to those who are sick—and their family members—about when and where to go for medical care and how to safely take care of sick people at home. Health data is sensitive. Avoid publishing information about exposed individuals to avoid stigmatization and risk. Particular attention should be given to individuals who are already in positions of vulnerability or marginalization in society. | <p>In adopting the SARS Assistance and Recovery Strategy Act in 2003, the Ontario government protected individuals from being fired because of compliance with a control measure related to SARS.</p> <p>Germany guarantees compensation for those who suffer a loss of earnings due to infectious disease control measures.</p> <p>In the United Kingdom, the state must have due regard to the well-being of individuals detained or kept in isolation in relation to COVID-19.</p> <p>In order to protect children from abuse during the COVID-19 pandemic, the local government of Greenland banned the sale of alcohol.</p> |
| Voluntary quarantine of contacts | <ul style="list-style-type: none"> Mandatory imposition of measures will be nearly impossible to enforce and may backfire as people lose trust in health officials. Quarantine and home isolation should be voluntary to the greatest extent possible. However, laws should be in place that allow the government to enforce quarantine or isolation if it becomes necessary. If mandatory measures must be enforced, complaint and redress mechanisms should be put in place and publicized. Confirm authority to issue quarantine, isolation, or shielding instructions to individuals or communities. | <ul style="list-style-type: none"> Adopt a clear definition of “contact” that is based on science and uniformly applied by public health officials. Consider and provide for the needs of those dependent on quarantined or isolated people. Consider isolation in nonhospital settings such as holiday resorts or hotels. Isolation of cases in crowded households can result in household transmission, which can be either mitigated by identifying areas within the household (e.g., separate room), house-swapping, or assuming all household members are contacts, which would imply voluntary quarantine of the household. | |
| Home isolation of all mild and moderate cases | | | |
| Shielding—social distancing of vulnerable populations | | | |

| Public Health and Social Measure | Legal Considerations | Other Factors for Success | Implementation Examples |
|--|--|---|---|
| Cancellation or adaptation of mass gatherings | <ul style="list-style-type: none"> • Clear evidence-based rules (such as 50-person maximum regardless of building capacity, or no more than one person per 4 square meters) • Implementation in an equitable, nondiscriminatory, and evidence-based manner with particular care for inequitable application on minorities or other vulnerable groups. For example, if authorities cut prohibit a religious gathering, but allow a similarly sized sports event or secular concert to continue, this would be considered discriminatory. Particular care should be taken before restricting attendance at culturally sensitive gatherings, such as religious services or funerals. • Develop evidence-based strategies to maintain essential services, such as food markets, medical facilities and pharmacies, public transportation vehicles and facilities, government offices including legislatures and courts, and voting or election services. Rather than closing entirely, such services may need more intensive distancing requirements and cleaning procedures. | <ul style="list-style-type: none"> • Consider the social and health impact on special populations, including elderly people, people with special needs, psychiatric patients, homeless people, prisoners, and others living in long-term congregate facilities. • Develop a nonviolent, nonconfrontational plan for the public safety sector to assist, if necessary, in the enforcement of this intervention. | |
| School closures | <ul style="list-style-type: none"> • Appropriate authority should issue restrictions, as appropriate, to child care, preschool, kindergarten, primary, secondary, colleges and universities—whether public or private. • Legislation should clarify who makes the decision to close schools, and what factors should be considered prior to closing. • School closures should be applied consistently across each jurisdiction in an equitable, nondiscriminatory, and evidence-based manner. • Livelihood support and employment protections should guarantee that children who are usually fed at school still get enough food at home and that parents can stay home to provide child care. | <ul style="list-style-type: none"> • Provide child care solutions for health care workers and other essential workers. • Attempt to recover lost normal school time and monitor school returns when schools reopen. • Provide alternative options for education, including home schooling, access to books, online learning if available. • Mitigate disproportionate effects on children with barriers to education or vulnerable groups. • Discourage gatherings of children outside schools. Communicate to parents that when schools close children must stay home and limit their contacts with others to the greatest degree possible. Allowing children to play together or congregate socially outside will counteract the effect of closing the schools. • Maximum proper notice of cancellation, so caretakers can make alternative child care and other arrangements | <p>Spanish families with children receiving school meals are entitled to financial aid or the direct provision of food distribution during COVID-19 related school closures.</p> <p>During the SARS epidemic in 2003, Hong Kong allowed students to take public school examinations, which are viewed as extremely important events in Hong Kong's school system. All candidates for these exams had their body temperatures monitored. However, if their temperature was over 38 degrees Celsius, the candidates were not denied access to the exam, but merely required to write the exam in another room nearby.</p> |
| Closure of nonessential workplaces | <ul style="list-style-type: none"> • Set maximum capacity limits for work and public places. • An appropriate authority should issue clear rules on which measures are required or encouraged for employers. • Provide a clear definition of essential services and/or which employees are exempted from requirements. | <ul style="list-style-type: none"> • Set maximum capacity by square meters rather than by workplace to ensure nondiscriminatory application. • Encourage teleworking or differential hours to limit risk of transmission when possible. • Seek commitment of employers and employees. • Financial and other incentives for employers, such as tax waivers or other subsidies | <p>In light of the economic impact of COVID-19, the U.S. government instituted paycheck protection, loans and debt relief measures for small businesses.</p> |

| Public Health and Social Measure | Legal Considerations | Other Factors for Success | Implementation Examples |
|--|---|--|--|
| International travel restrictions and entry screening | <ul style="list-style-type: none"> Freedom of movement entails the right of everyone to enter their own country of nationality. Restrictions can only be imposed by law, for a legitimate purpose, and when the restrictions are proportionate considering their impact. Public health measures implemented at points of entry must be the least intrusive and invasive that would achieve the public health objective of preventing the international spread of disease. Border closures should not have the effect of denying individuals their right to seek asylum or causing them to be returned to where they face persecution or torture. | <ul style="list-style-type: none"> Collect required information on travelers' itinerary and destination to ensure contact tracing if required. Provide travelers with disease and contact information for testing and isolation if needed. | When necessary to prevent the spread of a communicable disease, the Swiss authorities may require persons entering or leaving Switzerland to: make their identity, contact details and itinerary known; present a certificate attesting to vaccination or other prophylaxis; provide information on their state of health; present a medical certificate; or undergo a medical examination. Conveyance operators are also required to collaborate in providing information to public health authorities. |
| Internal travel restrictions or "cordon sanitaire" | <ul style="list-style-type: none"> Freedom of movement traditionally entails the right to move freely in the whole territory of the country. Restrictions can only be imposed by law, for a legitimate purpose, and when the restrictions are proportionate considering their impact. Implementation in an equitable, nondiscriminatory and evidence-based manner with particular care for inequitable application on minorities or other vulnerable groups Ensure availability of basic necessities including food, water, medicine, sanitation supplies, and functioning utilities. Ensure access to health and safety services for the population within the "cordon sanitaire," so appropriate measures are taken to protect the population and decrease transmission. Need to frequently revisit rationale. | <ul style="list-style-type: none"> Ensure support of political leaders and the general public. Time the announcement to minimize the number of people seeking to escape before enforcement. Consider which categories of activities and individuals could be exempted from restrictions. Mitigate economic impact on region within the "cordon sanitaire." | |