



## **ICCL Submission on the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020**

**18 March 2020**

The Irish Council for Civil Liberties (ICCL) is Ireland's foremost human rights NGO with a remit to promote and protect human rights in Ireland. Our analysis is underpinned by the human rights law and standards contained within the Irish Constitution, the European Convention for Human Rights (ECHR) and the international human rights treaties that Ireland has ratified.

ICCL supports the need for extraordinary governmental measures in these extraordinary times. The Covid-19 virus, a global pandemic posing a widespread and serious threat to public health and to the right to life, requires an appropriate governmental response in order to limit the spread of the virus and to protect the lives of as many people as possible.

Human rights law still applies in times of emergency and human rights instruments provide a framework for limiting rights where necessary and proportionate in such times. This submission outlines general principles that must be taken into account where legislation or regulations are passed that curtail rights. We have identified specific areas within the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020, (the Bill), which should be tightened to ensure conformity with the Constitution and the ECHR.

We address the duration of the legislation and subsequent orders for extending the emergency powers to make regulations, the powers created to curtail the rights to freedom of assembly and association and the powers created to detain individuals. We suggest adding additional safeguards to the powers that are created by the Bill to ensure the least amount of interference with rights possible while taking necessary measures to protect public health.

We believe the key human rights principles of necessity, proportionality and non-discrimination should be introduced into the Long Title as framing principles for the Bill. We also urge the Government to explicitly include reference to these principles throughout the Bill where powers are created to curtail rights.

The powers to curtail the rights to freedom of movement and assembly that are created by s.10 of Part Three of this Bill are truly extraordinary from a rights perspective. The Bill must state more explicitly that these powers cannot extend beyond the period of emergency and must be regularly reviewed within that period. Specific concerns with the current draft language are outlined below.

The power created for a medical officer to detain individuals in s.11 of Part Three is equally extraordinary from a rights perspective. Detention should always be a measure of last resort and the power to detain should be subject to rigorous accountability mechanisms. The Bill in its current form must define this power more clearly and narrowly and additional safeguards should be introduced.

## **1. General principles**

### ***Proportionality***

The government continues to be bound by the Irish Constitution and the provisions of the European Convention on Human Rights, in accordance with international law and the European Convention on Human Rights Act 2003, during periods of emergencies. These instruments make provision for periods of time where rights may need to be significantly curtailed. However, rights cannot be dispensed with entirely. The Irish Constitution only provides for its own suspension during periods of war or armed rebellion. Rights under the ECHR must continue to be protected subject to proportionate limitations unless the Government makes a declaration of derogation. The curtailment of rights therefore must still meet the proportionality requirements of both the Irish Constitution and the ECHR.

The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020 foresees a range of extraordinary measures required to protect and vindicate the right to life and bodily integrity during the health crisis caused by the spread of the Covid-19 virus. The Irish Courts have made clear on numerous occasions that the requirement to vindicate one right will not cancel out the others. A balancing act is required. It is clear in the extraordinary circumstances of the inexorable spread of Covid 19 through human interaction and the attending risk to life that provision must be made for curtailing certain rights such as the right to freedom of assembly and association. However, these limitations must remain proportionate and necessary in order to achieve the aim of protecting life and bodily integrity.

ICCL recommends introducing language acknowledging that limits on rights must still be proportionate and necessary in the Long Title of the Bill and in Part Three of the Bill as regards amendments to the Public Health Act 1947.

### ***Non-Discrimination***

The government is required under the Constitution and the ECHR to ensure that measures taken do not discriminate against any section of the population. ICCL recommends that language on non-discrimination is introduced into the Long Title and into s.10 of the Act, (amending the Public Health Act 1947), in particular by introducing a non-discrimination clause into s.31A(2). This section lists the factors that the Minister must have regard to when taking measures to prevent the spread of the virus.

We also recommend introducing a similar non-discrimination clause into s.11 which also amends the Public Health Act 1947 with the introduction of s.38A. This section gives broad powers to medical officers to detain individuals suspected of carrying the Covid-19 virus. S.38A(2) lists factors a health worker must have regard to when making a decision to detain an individual and non-discrimination would be an appropriate factor to add.

### ***Positive obligations***

ICCL would also emphasise that the Government has positive obligations to provide for sections of the population who may be in particularly vulnerable situations, whether socially, economically or in terms of their general health or housing situations. Specific measures will be needed for homeless people who cannot self-isolate, as well as for women and others whose homes may be a place they suffer violations of rights on a daily basis, such as victims of domestic violence. ICCL encourages the Government to be cognisant of this and, where possible, ensure that protecting the most vulnerable is a key factor in decision making when responding to the spread of and risk to life posed by Covid-19. This may mean providing safe places for those who do not have them.

Provision of essential healthcare should not be dependent on economic status during this crisis, or ever. Any facility that can provide healthcare during a time of national crisis should provide it to those most in need, not on the basis of those with the deepest pockets.

### ***Criminal sanctions as a last resort***

ICCL notes the creation of a range of new criminal offences by this Bill, including criminal sanctions for those who refuse to self-isolate. The Constitution and the ECHR require that the following principles are taken into account when new criminal offences are created:

- Criminal sanctions should always be a measure of last resort.
- The law creating new criminal offences must be drafted clearly and narrowly to ensure it is easily understood and not subject to overbroad discretionary police powers.
- Where enforcement measures through civil remedies such as fines can be appropriately implemented they should be considered before criminal sanctions.
- Fundamental human rights principles designed to protect individuals from unfair or disproportionate punishments must be upheld. These include:
  - No retrospective criminal offences can be created.
  - The right to the presumption of innocence and the right to a fair trial must be protected. Procedural safeguards must be in place to allow for individuals to challenge decisions that may lead to sanctions or imprisonment.
  - Individuals must have a right of appeal.

## ***2. Sunset Clause***

The extraordinary powers created by this emergency legislation must be clearly time bound and subject to the requirements of necessity and proportionality. ICCL highlights the potential for the misuse of emergency legislation to curtail rights beyond the period of emergency, given that this has happened in the past in this country and elsewhere.

ICCL recommends amending S. 2(4) of the legislation, which provides that the Government may extend the extraordinary powers beyond 9 May 2020. This section states “the Minister for Health, with the consent of the Minister for Public Expenditure and Reform, may, where they are satisfied that it is in the public interest to do so, from time to time, by order declare

that all or any of the amendments effected by part 3 shall continue in operation for such period or periods as may be specified in the order concerned.”

ICCL considers this a significantly overbroad power of extension in light of the proportionality requirements of human rights law and standards. In addition to being satisfied that it is ‘in the public interest’, ICCL considers that language should be added requiring any order of extension to be clearly necessary and proportionate to meet the legitimate aim of protecting public health and vindicating the right to life. The Bill should specify a specific time frame for each extension, such as one month.

We recommend that it would be clearly preferable that the Oireachtas should have primary role in approving any extension to the extraordinary powers under the Bill. This would provide a robust safeguard against executive power, and a stronger protection of human rights than is currently proposed where the Oireachtas would only have a negative power to annul an extension once it has been granted.

The Government could also consider providing for an independent review by an appropriate independent body of any requests for orders of extension beyond a certain period of time. An external review body with judicial participation could be created for this purpose.<sup>1</sup>

In any event, the exercise of emergency powers should always be subject to judicial review.

### **3. *Restrictions on Freedom of Assembly and Association***

Part Three provides for amendments to the Public Health Act 1947 and creates extraordinary powers to restrict the rights to freedom of assembly and freedom of association in Ireland. Under the Irish Constitution and the ECHR, all individuals have the right to gather together and to gather in public. Limitations to these rights must be proportionate, even in times of public emergency. This requires that not only must these powers be time bound but each time they are used a proportionality assessment must be required. This should be clarified in the Bill.

While there is a compelling case for imposing restrictions on freedom of assembly and association during an intense public health emergency, strong safeguards to prevent a future government retaining the power to ban or restrict public meetings, events, or demonstrations outside of such an emergency must be provided. The proposed new Article 31A in the Public Health Act 1947 (inserted by S.10 of the Bill), would give the Minister extremely broad powers to ban and impose restrictions on events. ICCL is concerned that the fact that these restrictions must be necessary and proportionate is not explicit within the Bill. We urge the Government to amend this section to ensure the powers created are clearly and narrowly defined, as far as possible.

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<sup>1</sup> See for example Paul Daly, referencing House of Lords, Constitution Committee: Fifteenth Report, “Fast-Track Legislation: Constitutional Implications and Safeguards” HL 116-1 Session 2008-9 at

<https://www.administrativelawmatters.com/blog/2020/03/15/some-notes-on-emergency-legislation/>

For example, Article 31A should contain an exhaustive list of measures the Minister may take. Any measures beyond those specified should be subject to a higher threshold of exigency; in other words measures beyond those specified by the Bill must be clearly and urgently necessary and must always be proportionate.

Language that can safeguard rights must be introduced wherever possible. For example, in S.31A(1)(c)(i) the power to confine individuals to their homes is outlined. This is an extreme measure that must be qualified with a 'reasonable excuse' clause, such as to obtain basic necessities or medical assistance.

Similarly in the proposed s.31A(1)(h), which gives the Minister the power to make regulations that allows him to take "any other measures that the Minister considers necessary in order to prevent, limit, minimise or slow the spread of Covid-19". Again the language here should require a higher threshold for the introduction of measures that would impact rights, such as necessary, proportionate and required by the emergency situation.

S.31A(1)(j) provides that the Minister may make Regulations on "such additional, incidental, consequential or supplemental matters as the Minister considers necessary or expedient for the purposes of giving full effect to the regulations." The word "expedient" should be removed as this creates too low a threshold for the passing of measures that so significantly impact on rights. Expediency can never be a factor that alone can be used to justify rights infringements.

#### **4. Powers of Detention**

S.11 which inserts s.38A into the Public Health Act 1947 gives an overbroad power to a single 'medical officer of health' to detain an individual. ICCL recognises that in certain limited circumstances where an individual poses a significant risk to the population as a whole detention may be necessary but it should only be used as a last resort where no other measures are possible.

In particular, ICCL is concerned that:

- i. 'A medical officer of health' has not yet been appropriately defined.
- ii. A 'good faith' belief is not a high enough threshold to detain an individual. A decision to detain must be subject to a requirement of 'reasonable belief'; this is analogous to reasonable suspicion required of the Gardaí to exercise the powers of arrest.
- iii. Regarding authorisation for detention, S.38A(1) should be more narrowly defined. The fact that a medical officer believes 'in good faith' someone is a source of infection and "appears unlikely" to remain in their home is a very low threshold for authorising detention. S.38 of the unamended Public Health Act 1947 provides that an order for detention must be made by a Chief Medical Officer. This requirement of signing off on such an order by a senior medical officer should be included in the emergency legislation.

As an additional safeguard, ICCL would also suggest an order for detention should be made by a minimum of two medical officers, one of a certain minimum level of seniority who should be required to approve of the order.

- iv. A regular review of the reasons for detention should be built into the legislation and the first review should take place within a specific timeframe.
- v. S.38A(2) should be amended to require the Medical Officer to have regard to the requirement that any detention is an interference with the right to liberty and therefore they must consider such detention necessary and proportionate to the aim of protecting public health and vindicating the right to life before detaining an individual.
- vi. S.38A(2) should also be amended to ensure that any person detained under this section should qualify for priority testing above other individuals who are not detained and no later than 48 hours after their detention. Fourteen days is a clearly disproportionate length of time to detain someone who has not yet tested positive for the virus.