



## Irish Council for Civil Liberties

Monitoring rights during the pandemic  
5-11 September

### COVID-19-RELATED ADVOCACY WORK

#### **Oireachtas Special Committee on COVID-19 response- human rights and civil liberties considerations**

We received an invitation to attend the 9 September session on human rights and civil liberties considerations and made a [comprehensive submission](#) on the topic.

On the morning of 9 September, our appearance before the Committee was covered in [The Irish Examiner](#), [The Journal](#) and [The Irish Times](#). Senior Research & Policy Officer Doireann Ansbro delivered our [opening statement](#) and then took questions with Executive Director Liam Herrick from Committee members.

Please find below a **full report** on our appearance before the Committee. Esteemed colleagues from the Irish Human Rights & Equality Commission (IHREC) and the Free Legal Advice Centre (FLAC) also made valuable submissions and contributions to this Committee session.

After the Committee session, Executive Director Liam Herrick spoke on current affairs programme the Hard Shoulder on [Newstalk](#) that evening and to LMFM radio the following morning (10 September). Our appearance before the Committee was also covered by [RTE](#) and [breakingnews.ie](#).

#### **Debenhams Protesters arrested**

We have [questioned](#) the powers used by gardaí in the arrest of Debenhams protesters on 9 September.

#### **Spit hoods**

Our campaign opposing the use of spit hoods by gardaí is the subject of this [article](#) in the Sunday Business Post.

#### **Special Oireachtas Committee on Covid-19 response (9 September 2020) Session: Human rights & civil liberties considerations**

On 9 September, the ICCL attended the Human Rights & Civil Liberties Considerations session on the invitation of the Special Oireachtas Committee on Covid-19 response. Our Senior Policy & Research Officer Doireann Ansbro delivered our [opening statement](#) based on our comprehensive [submission](#) to the Committee. Our [submission](#) provides an overview of the human rights framework in Ireland and our work since the outbreak of the pandemic. Our work during the pandemic consists of a wide range of comprehensive

submissions to and engagement with various statutory actors as well as extensive monitoring of the impact of the virus and of the measures introduced to limit its spread on human rights. Our submission also includes an analysis of Ireland's Covid-19 Statutory Framework based on human rights law and principles, examples of legislative approaches in other jurisdictions and recommendations for an improved framework in the future.

Executive Director Liam Herrick and Senior Policy & Research Officer Doireann Ansbro then took questions from Committee members (please note the wording of the questions has been paraphrased in the interest of brevity. A full transcript is available [here](#)).

### **Level of engagement with Government and Departments (Louise O'Reilly TD SF)-**

*It is fair to say consultation has varied over the period. The first set of regulations were introduced on 7 April and we had significant consultation through the Department of Justice and Equality about the content. That level of engagement has not carried through, however, and part of that is probably due to the volume of work being undertaken by the Department of Health and time pressures. It is far from ideal.*

*With regard to the most recent proposals for regulations relating to social gatherings in the home, as well as the fact there was no engagement that we are aware of with any organisations in the civil society or human rights sector, the deeper problem is how we are moving from advice in the public health sphere from an expert independent body such as the National Public Health Emergency Team, NPHE, which is communicated relatively clearly, to how the Government considers that while weighing human rights concerns and showing the public that those principles are being considered before engaging with the Oireachtas around that. None of that happened in this case. If there had been consultation with the Oireachtas or human rights organisations, the obvious difficulties with that proposal could have been identified and we all could have been of assistance to the Government in plotting a better course.*

*We recommended to the Government as far back as May that there should be consultation with the Oireachtas and the Irish Human Rights and Equality Commission on all regulations that have an impact on people's rights. Beyond that, we are also available to support and assist in any way we can. We can all accept that in the early phases of trying to respond to a growing crisis, it might have been necessary to introduce regulations in a very short period. We do not believe it is justified at this point that regulations would be introduced without engaging with the Oireachtas and wider civil society in the statutory sector.*

*We note that this committee wrote to offer its assistance to the Department of Health a number of months ago and that offer has not been taken up. That is regrettable. I hope at this point, when we are undertaking a review of how we go about responding to the Covid-19 pandemic, it is a good opportunity to try to put in place better processes (Executive Director Liam Herrick).*

### **A survey indicates that 70% of the social welfare inspections taking place in Dublin Airport related to flights to eastern Europe, specifically Romania and Moldova (Louise O'Reilly TD SF)**

*We very much agree with the analysis of FLAC that the power, as we understand it, requires a reasonable suspicion that a person is breaking the law before he or she can be approached and powers of inspection exercised. So far, we know the totality of people on a particular flight were being asked for their personal public service numbers or other details. To us that would not seem to be compatible with such reasonable suspicion. From the information available through the freedom of information process at this point, as mentioned by Ms Barry, it appears a decision was made by senior officials within the Department of*

*Employment Affairs and Social Protection that specific flights to specific destinations would be singled out. We do not know what was the basis for that selection but it certainly gives rise to serious concern that individuals of a certain nationality were being targeted. That is certainly a concern.*

*Data protection issues also arise around how information about travel was received or processed. We have had reports of individuals who claimed they were cut off where they never even travelled, merely booked travel, which gives rise to other concerns. Much more needs to come out in this regard but the information available gives us cause for concern around the potential profiling of particular nationalities (Executive Director Liam Herrick).*

### **Limiting the right to protest to curtail spread of the virus (Brendan Durkan TD FF)-**

*I will respond to two of the Deputy's questions on proportionality and protest. I completely agree with what the Irish Human Rights and Equality Commission has said. We agree that the courts are the ultimate arbiter for a proportionality assessment however I will share some observations we have made in recent months on the obligation on the Government to do that proportionality assessment. On whether the measures were necessary and proportionate, that will require a much deeper review in time.*

*There have been different responses and different regulations, and they have addressed different issues. We have expressed concerns at each stage on different elements of those. The first regulations impacted very significantly on the rights of people, in particular in their movement. The regulations at that time required people not to leave their homes without a reasonable excuse or not to go beyond 2 km from their home. They were introduced as guidelines and An Garda Síochána began an operation assisting with the enforcement of those guidelines, without criminal sanctions. The Garda Commissioner reported at the time widespread compliance with those guidelines without those criminal sanctions. Once those guidelines were put into law in the first set of regulations and underpinned by criminal sanctions of up to six months in prison and a €2,500 fine, which was allowed for in the primary legislation, we expressed the view that they were potentially disproportionate and unnecessary and that, therefore, there was a risk that they did not meet those human rights tests of necessity and proportionality.*

*In terms of the restrictions on events, nobody would disagree that restrictions were necessary given the human transmission of the disease. We did not express a very clear view whether they were necessary and proportionate. It is likely that they were. Our concerns around those regulations tended to be about communication in terms of what exactly was allowed and when, what the end date of each regulation was, when were they renewed, and what was allowed inside and outside. There was a lack of clarity, and when there is that lack of clarity, it raises issues about necessity, again because we do not know if what is precisely being provided for in law is responding to what is actually happening on the ground.*

*In terms of some recent proposals, in particular whether there was going to be criminal sanctions attached to gatherings in homes, we expressed a view that that would be disproportionate, particularly because we had not seen the evidence linking a rise in cases to house parties. We know that there were some cases linked to gatherings, but a gathering in a home could just be the gathering of a family of seven who live together. We considered that to be very questionable in terms of meeting that requirement of necessity.*

*On a final point on proportionality, to prove that laws are necessary, and when we have seen that guidelines can be followed without the criminal sanctions before regulations are introduced, it needs to be proven that education, consent and compliance are not working.*

*When the communication and compliance and not working we have proper communication and education, that is probably when we need to be bringing in regulations with laws and criminal sanctions.*

*The ICCL has done a lot of work around the right to protest in Ireland. We have had many protestors come to us over recent months asking for advice on what has and has not been legal. We have directed them to the regulations and have done our best. We cannot offer actual legal advice because we do not have practising lawyers on our team, but we do our best to point them to where the law is. It has been difficult at times. The right to protest, as I said in our opening statement, takes on a fundamental importance during a time when so many decisions are being made affecting people's lives in so many different ways. We believe that there was a real need for clarity around what is allowed and what is not. There was a real opportunity for the Government to issue guidelines or to include within the regulations themselves what is allowed and what is not. Whether it is about limiting the size of protests, requiring masks during protests, or requiring social distancing, we think there is definitely potential to have much greater clarity around protests (Senior Research & Policy Officer Doireann Ansbro).*

**The human rights implications of mandatory regular testing (Chair Michael McNamara TD Independent)-**

*Any proposal to compel people to undertake testing or any medical treatment would give rise to very serious legal questions which would need to be considered in detail.*

*There would need to be careful deliberation and consultation in advance of them. It is a further example of one of the very complex issues we are trying to deal with at the moment. I do not think it is helpful to talk about introducing measures that are mandatory and compulsory for a particular section of the community without a proper exploration of the legal issues that might arise (Executive Director Liam Herrick).*

**Does Mr. Herrick agree that somebody could not be prosecuted for breaching a regulation in circumstances where it had not been published? Does he have any concerns about the manner in which regulations were published or not published? ((Chair Michael McNamara TD Independent)-**

*In our submission, we set out very detailed recommendations for how we feel the system of developing regulations could be improved. This builds on detailed submissions we made to the Department of Health in May. All the bodies presenting to the committee today had the benefit of listening to contributions this morning, and we are all approaching this in a constructive way, trying to make helpful suggestions as to how we can all do things a little better in future.*

*With regulations, we must ensure that first there is clarity about which specific set of public health advice is inspiring the Government to consider that it needs regulations. The Government must make its case as to why communications are not sufficient and regulations are required. There should then be a process of engagement with the Oireachtas, in the first instance, and then others to ensure that any regulations are balanced, necessary and proportionate. If that requires more resources and time for NPHE in explaining its advice, the Department of Health or any other Government body in developing legislation, or the Oireachtas, it should be provided as the stakes are so high.*

*There is a broad consensus in the views of all the bodies presenting before the committee that there are clear and concrete examples from other jurisdictions of how we can improve*



*the implementation of regulations. This is not just an abstract legal or technical point. This is about ensuring a higher level of transparency so the public understands, co-operates and trusts what is happening. In our experience over the past number of months, the vast majority of members of the public who have contacted us want to comply with the law and guidance but they are just asking for more information and clarity. It behoves the Government to provide such clarity (Executive Director Liam Herrick).*

**The Impact of the crisis on prisons (Chair Michael McNamara TD Independent)-**

*Certainly direct provision has been identified as one of the grave areas of concern over the past months. It is an interesting contrast with the Irish Prison Service where there was considerable success from the point of view of controlling the disease, although there were significant consequences for prisoners and their families in terms of their access. In respect of direct provision, the State does not exercise direct control and there are not clear lines of accountability or responsibility, and we have had ongoing concerns. If there is a criticism to be made here, while we have got very assertive action by the State in some areas of private life where there is no clear evidence of a high risk or problem at the moment, we have seen less action than we would have expected in areas where there is a demonstrable high risk. Specifically we are talking about the ongoing problems in direct provision where people are continuing to live in dangerous situations, and the fact that we have factories operating in some sections of the economy where there is a clear risk as well. This is one of the problems for the public perception of the Government response. It is difficult for the public to see the coherence of criminal sanctions and assertive action around some areas of private activity along with an absence of action where there is a clear risk (Executive Director Liam Herrick).*

**The use of spit hoods by An Garda Síochána (Paul Murphy TD PBP)**

*We have been campaigning against spit hoods since their introduction at the end of March. At the time we were told that this was required to protect gardaí from spitting and the transmission of Covid-19. Obviously, we fully support the need for gardaí to have personal protective equipment. However, we find the classification of spit hoods as PEE highly problematic because a spit hood is a full hood that goes over another person's head. From a human rights perspective, hoods have long been defined as inhuman or degrading treatment. We are concerned that using these kinds of hoods goes clearly against the Garda's human rights obligations. We cannot answer how they were introduced without a human rights impact assessment but we would certainly agree that there should have been such an assessment, and there has not been one.*

*They are currently being reviewed by the Garda. We have put in a comprehensive submission explaining our human rights concerns around the use of spit hoods. A number of points are important to make. The first is that a manufacturer of spit hoods came out in July and said they do not provide effective protection against Covid-19. That initial justification for introducing them to this jurisdiction is simply not accurate. We have called on the Garda to explain precisely why the force is using them and why it considers they are necessary. If they are being used as a method of restraint, can it be a proportionate use of force? Our view is that given the considerable human rights concerns that their use raises, it would be difficult to justify their use as human-rights compliant. We have been calling for their removal from Garda kit as soon as possible (Senior Research & Policy Officer Doireann Ansbro).*

**Are we giving too many powers under regulation? (Colm Burke TD FG)**

*The point made by Deputy Burke is precisely the point made by the ICCL in its submission to the Oireachtas in March in regard to the Health Act 1947, namely, that the powers that were given to the Minister in this particular context to introduce regulations was unusually broad. We appreciate that the Oireachtas was considering the legislation in a very compressed timeframe but that is an ongoing challenge. That legislation and the power to introduce regulations expires on 9 November 2020. It is essential that the Oireachtas has adequate time to consider those powers before they expire if it was to be proposed that they be introduced again in the future in a different form (Executive Director Liam Herrick).*

**Should we be more careful that in passing legislation we are not undermining the role of the Oireachtas by passing powers to the Executive which it can use by way of regulation? (Colm Burke TD FG)**

The second question, notwithstanding that the power is place for the Minister to introduce regulations, is that there is nothing to preclude any Minister consulting the Oireachtas on regulations and matters therein before they are introduced. It is regrettable that the Minister for Health has chosen not to avail of that opportunity, particularly when many of the regulations that are being proposed now concern matters that have been under consideration in the Department for four, five or six months, including, for example, public houses or movement. The powers are too broad but notwithstanding that the Oireachtas can still be consulted and it should be consulted (Executive Director Liam Herrick).

**During early summer, large numbers of young people were congregating in parties in houses which was causing a problem for adjoining households. The residents had to take this matter to the courts. Accepting the need for checks and balances in regard to the powers of An Garda Síochána, are appropriate powers in place to deal with a situation where lives are being put at risk in real terms because large numbers of people are congregating? (Colm Burke TD FG)**

*I am very familiar with the area and the problem to which the Deputy refers. The law must be precise. It must be predictable and clear. It was suggested that over the summer months there was a particular problem with very large gatherings in rented accommodation, of up to 100 people, and that this might present a public order and nuisance problem and might also potentially present a public health problem. There might be a range of ways in which that could be dealt with. It was not demonstrated that Garda powers under the public order Act were inadequate to deal with that particular problem. The proposal that ultimately came forward was to criminalise gatherings of more than six people in a private setting, which was a completely different problem. This did undermine the clarity and coherence of the overall approach (Executive Director Liam Herrick).*

**There was a particular challenge where the residents in the area in question had to take civil proceedings. Does Mr. Herrick believe there could have been a mechanism in place that required them to go down the civil route of bringing the matter to the attention of the courts?(Colm Burke TD FG)**

*There may be a question about whether the criminal law was inadequate to deal with what would seem to be, on the face of it, a significant nuisance and public order problem. We would need to have a better explanation of why individual Garda units took the view that there was not a sufficient legal basis to go forward. A civil remedy was available in that particular instance. Of course, we are confusing nuisance, public order and public health matters. We have a clear view that public health matters should be dealt with by health agencies to the greatest extent possible. For example, the Health and Safety Authority could perform certain functions as opposed to involving the Garda in areas that are really inappropriate for community policing.*

*With regard to the role of the Garda particularly, I pay tribute to the remarkable job that An Garda Síochána has done in supporting the public health effort and being a front-line agency since March. The strategy around the use of penal provisions and criminal sanctions by An Garda Síochána is that these measures are to be sparing and minimised. Very good decisions were made not to involve the Garda in the policing of private homes and holiday homes or around the policing of quarantine. These were good decisions which we support. Against that background, the proposal to introduce a role for An Garda Síochána in policing private gatherings of six people in people's gardens flew completely in the face of the strong approach that had been there before. It was a mistake and we are glad that that proposal was withdrawn.*

*The same applies in the context of expanding the role of An Garda Síochána with regard to public houses. For example, there are highly sensitive questions about the police, as a community service, and putting them in a position of potential conflict with members of the public going about their ordinary lives. The approach we have had up to now has been good. We should be careful about introducing new criminal penalties and new roles for An Garda Síochána that would criminalise matters that are properly public health matters (Executive Director Liam Herrick).*

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**Overall, does Mr. Herrick believe that the Garda has sufficient mechanisms in place to deal with this issue without going down the route of prosecuting people? Does the force have sufficient powers to deal with an issue like this? (Colm Burke TD FG)**

*We have no reason to believe that the powers are inadequate. If there is a need to review particular issues in respect of people presenting a significant nuisance, as some of the instances in Cork seem to suggest, then that is a separate matter. In any event, it should not be dealt with in a public health context (Executive Director Liam Herrick)..*

**Are there positive examples from other jurisdictions? (Cormac Devlin TD FF)**

*We have included a section on other jurisdictions in our submission to the committee. It is important to say that there is no golden example of another jurisdiction that has done everything right. Overall, Ireland has done a very good job. However, other jurisdictions have approached things in different ways. We can identify parts of those approaches as positive and ways in which we can improve our response in future. We addressed the approaches in France, Germany, New Zealand, Australia and the UK. I have no wish to take up too much time, but one or two things can be taken out of each of those responses, which, we believe, were a little more compliant with a human rights and rule-of law approach.*

*If committee members have our submission before them, they will see the reference to France on page 10, at paragraph 41. We know one of the ways France dealt with the pandemic. Rather than having large criminal sanctions, as we did from the outset, those responsible had a graduated response. A breach of regulations attracted a small fine first of €135. It rose to €200 on a second breach of the regulations. It went up far higher following a third breach. We believe having such a graduated response is potentially more proportionate than the provision for six months in prison and a €2,500 fine that we saw in our legislation. I will continue with an example from each country.*

*Many other countries' national human rights institutions were asked for or volunteered observations on legislation. Plenty has been done by the Irish Human Rights and Equality Commission, IHREC, but we have been calling for this practice to be made mandatory so that the Government is required to consult with IHREC where legislation has such an impact on rights. That could start today and apply to all future regulations.*

*We would also welcome wider civil society consultation. Advisory groups in some other jurisdictions had wider memberships than ours. Rather than just health experts, of which the National Public Health Emergency Team, NPHE, is mainly composed, the French advisory body also included an anthropologist, a sociologist and members of civil society. Having a broader membership may be a positive way to ensure that other concerns are taken into account. Previous witnesses have spoken about New Zealand. That jurisdiction did two very noteworthy things. First, each new set of orders or regulations received wider parliamentary pre-legislative scrutiny. Secondly, a very high level of transparency was maintained. Meetings of the epidemic response committee which scrutinised the Government's actions were broadcast to the public. That could be a very useful way of communicating the precise evidence used to formulate both scientific advice and Government decisions. Some decisions must be private, but there is room for more discussions to be held in public. That would be a very positive contribution to public trust as well as the rule of law, transparency, communication, accessibility etc.*

*We would particularly highlight the requirement for UK legislation to be certified as compatible with human rights obligations, particularly those arising from the European Convention on Human Rights. In requiring that certification the British Act that implemented the European Convention on Human Rights, the Human Rights Act 1998, goes further than our own European Convention on Human Rights Act 2003. That could be introduced as a general requirement, but emergency legislation especially should be certified as compliant with human rights obligations (Senior Research & Policy Officer Doireann Ansbro).*

*With regard to how we might do things going forward, I think it is a very good time to be asking those questions. Today's session is very well timed. We understand the Government is to announce changes to the overall infrastructure and approach next week. The emergency legislation expires shortly, so we will be looking at a review there as well. First, I think we should review the operation and composition of NPHE at this particular point in time. It has served us very well, particularly in the early phases, but now we might look at examples that Ms Ansbro has referred to of other jurisdictions that have broader expertise, because the decisions now, and the areas and questions it is considering, are not just about arresting the spread of a disease. They are about much more complex considerations and we should review that. We should look at whether we can strengthen its independence in terms of how its role is clearly separated from giving independent expertise and advice, and the deliberations that Government must undertake, subsequently, to weigh up that and translate it into executive action. We need better and clearer communications from Government.*



*In the legislative process, which the committee has heard a lot about today, we need to have better consultation and greater transparency. If that requires more resources going to those drafting the legislation, which I think it may, we need to look at that, and certainly to put a central role back to the Oireachtas.*

*The Oireachtas was not sitting and functioning properly for a period of time. That is no longer the case and the Oireachtas is back now. It should be front and centre in considering any legislation, including regulations. If all those things happen, we can have a stronger level of public support and co-operation, which will help everybody (Executive Director Liam Herrick).*