

The impact of Covid-19 emergency powers on fundamental rights

ICCL opening statement to the Oireachtas Joint Committee on Health

25 May 2021

1. The powers created by the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 – and by the other Covid-19 emergency legislation – are extraordinary. They permit the Minister for Health to make Regulations that impose significant limitations on a range of fundamental rights from the right to liberty to the right to respect for private and family life.
2. The powers supersede the ordinary role of the Oireachtas to scrutinise and debate laws. The Health Act powers allow the Minister to designate public health regulations as ‘penal provisions’, providing for criminal sanctions and Garda enforcement in relation to types of behaviours that in normal times would be considered simply daily life.
3. The Minister for Health and his predecessor have used this power to introduce a wide range of far-reaching regulations over the past 14 months. On many occasions the Minister has signed into law such regulations without publishing them in advance. ICCL, as well as the Irish Human Rights and Equality Commission and the Trinity College Covid Observatory have also identified occasions where the Government has implied that matters were contained in regulations when they were in fact simply advisory.
4. While many of the regulations served a clear and understandable purpose, in the absence of any human rights impact assessment, ICCL believes that some regulations have presented disproportionate interferences with human rights – such as the failure to adequately respect the right to protest and worship.
5. When these extraordinary ministerial powers were introduced in March 2020, the Government originally proposed that the Minister for Health would be able to extend the period during which these powers might be exercised. However, ICCL submitted that it would be essential that the Oireachtas retain ultimate power over the duration of the emergency period and the Oireachtas voted to include a ‘sunset clause’ of 9 November 2020 in the Act.
6. In October 2020, when the ministerial power was then renewed until 9 June 2021, ICCL expressed concern that there was no proper review or substantive debate. We are now in a situation where Government is now proposing once again to extend the legislation for another five months, and also to allow further indefinite extensions in three-month increments of the Act by way of resolutions of both Houses of the Oireachtas.

ICCL is concerned at this proposal for three reasons.

7. First, the situation now is vastly different to the situation in March 2020 when it comes to the question of whether Government or the Oireachtas should have the primary role in making laws concerning fundamental rights. At this point in time, the Oireachtas is functioning effectively and there is no suggestion that it will be suspended again.
8. If the Government asserts that extraordinary ministerial powers are required, the Minister should present substantive evidence to that effect. The ICCL recommends, at the very least, that a thorough review of the ne-

cessity of the powers and a technical report should be laid before the Oireachtas outlining why an extension is necessary at this stage, and why the primary law-making role of the Oireachtas cannot be re-established at this time.

9. Secondly, even it is accepted that the Minister should retain power to introduce regulations, it is essential that we learn from the experience of the past 14 months and modify those ministerial powers. Deficiencies in how regulations have been made and overseen have been identified previously by ICCL, by the Oireachtas Special Committee on Covid Response, by the Irish Human Rights and Equality Commission and by the Trinity College Covid Observatory - all of whom have made constructive suggestions to the Oireachtas and to the Minister on how procedures and safeguards should be put in place to ensure democratic oversight of these extraordinary executive powers.
10. We must see better oversight through consultation as regulations are being drafted; greater Oireachtas scrutiny of regulations; a positive role for the Oireachtas in approving of each set of regulations; and a requirement on the Minister that he has undertaken a proportionality test for each restriction on rights. At this point in the pandemic, we would also call for a removal of the power to designate restrictions on fundamental rights as penal provisions.
11. Thirdly, the proposed renewal and sunset clause proposals beg the question, when does a temporary measure cease to be temporary? As the vaccine programme is being successfully rolled out and restrictions are lifted, we need to see an ultimate sunset clause introduced by which date Government is committing to take this legislation off the statute books. If the health situation requires further measures in the future, Government should start again with a new Bill that takes into account all of the learning of the previous emergency period.
12. The mechanism proposed for further extension of ministerial powers risks further weakening the role of the Oireachtas. This Bill proposes the possibility of indefinite extensions without debate. Any renewal by resolution should require Oireachtas debate to allow for proper scrutiny and oversight by our representatives. At a minimum, there must be a requirement that a technical report setting out the human rights impact of these powers should be laid before the Oireachtas before the main Act can be renewed.
13. ICCL considers the upcoming end date for the emergency legislation is a moment requiring extensive review of its operation. Another renewal without review is an affront to democratic oversight and a missed opportunity to ensure interferences with our rights never go too far. To extend these extraordinary ministerial powers in this manner risks weakening the role of the Oireachtas. At a minimum, we must learn from the experience of the past 14 months, and re-establish the primary law-making function of the Oireachtas on matters of fundamental rights.

About ICCL

The Irish Council for Civil Liberties (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights.