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CC Jim Breslin, Secretary General, Department of Health  
CC Taoiseach Leo Varadkar  
CC Minister for Justice Charlie Flanagan  
CC Minister for Expenditure and Public Reform Paschal Donohue  
CC Michael McNamara TD, Chair Oireachtas Special Committee on Covid19 Response  
CC Laurence Bond, Director IHREC  
CC Garda Commissioner Drew Harris  
CC Policing Authority Chairman Bob Collins

20 May 2020

Dear Minister,

The Irish Council for Civil Liberties (ICCL) wishes to raise a number of concerns with regard to the Health Act 1947 (Section 31a - Temporary Restrictions) (Covid-19) Regulations 2020 (the Regulations), made under the Health (Preservation and Protection of Life and Other Matters in Public Interest) Act 2020.

As you are aware, any Regulations which interfere with rights must meet the tests of lawfulness, necessity and proportionality required by constitutional and human rights law. It is essential that not only must these legal tests be met with regard to any legislation which interferes with human rights, but the process by which this compliance is assessed must also be transparent. It is concerning that no such process has been demonstrated with regard to the various Regulations introduced by you as Minister for Health under the Act – namely the Regulations of 7 April, 11 April, 2 May and 17 May. It is essential that such a process should now be initiated ahead of the next phase of re-opening, and ahead of any consideration of additional regulations regarding quarantine or other future measures that may interfere with rights.

I wish to make clear at the outset that ICCL supports the Government's response to Covid-19, and that we do not question the public health advice underpinning the various phases of the re-opening. We do however call for a clear consideration of questions of necessity and proportionality regarding the continuing use of statutory powers of enforcement during the various phases of that response. The Regulations introduced contain unprecedented interferences with a wide range of constitutional rights and rights under the European Convention on Human Rights – including the right to liberty, the right to privacy and family

life, freedom of movement, freedom of assembly, and rights associated with the right to work or to earn a livelihood. In introducing any statutory interference with such rights, the State must demonstrate that any restrictions are lawful, necessary and proportionate. We set out below observations on the process and substance of how those matters might be evaluated.

### *Consideration of Human Rights*

Given the serious interference with human rights presented by the Regulations, it is essential that all potential human rights impacts of these Regulations be comprehensively considered in advance. Several avenues are open to the Government in this regard.

- i. Firstly, in our letter to the Taoiseach (copied to you) dated 22 April, ICCL and other civil society organisations suggested that the Government should carry out a Human Rights Impact Assessment ahead of the introduction of any Regulations. The outcome of such an assessment would assist not just in ensuring targeted and appropriate support is provided to those most affected by the disease and the restrictions, but should also feed into a proper proportionality assessment as to any restrictions on rights.
- ii. Secondly, under section 10 (2) (c) of the Irish Human Rights and Equality Commission Act 2014, that Commission has a specific statutory function with regard to providing observations to Government on the compatibility of any legislation with human rights obligations.
- iii. Thirdly, the terms of reference of the Oireachtas Special Committee on Covid-19 Response include provision for a role for that Committee in pre-legislative scrutiny.

Any of these methods or any combination of these methods are available to the Government to interrogate questions of lawfulness, necessity and proportionality. We welcomed the opportunity for consultation with the Department of Justice and Equality with regard to the first set of Regulations; however we find it regrettable that on the four occasions when regulations under the Act have been introduced to date none of the three options identified above for testing human rights compliance were taken (we recognise that the Special Committee has only recently been established). We understand that time was of the essence in introducing legal measures in the early phase of the crisis, but at this point there can be no justification for failing to prioritise rights concerns.

### *Prescribed by Law*

It is a fundamental legal principle that for a legal instrument to meet the standard of lawfulness it must be accessible to those who are subject to that law. We note that with regard to the most recent regulations signed by you on 17 May, once again the text of the regulations was not widely available to the public in advance of their purported commencement, and then it appeared only on the website [www.assets.gov.ie](http://www.assets.gov.ie) – not in Iris Oifigiúil, IrishStatuteBook.ie or on the Department of Health website which is the primary source of information for the public with matters regarding Covid-19.

This pattern of unavailability of Regulations under the Act at the point of commencement goes back to the first set of regulations signed on 7 April but not available to the public until after midday on 8 April. It is wholly unacceptable that the public should learn about the content of laws of such far-reaching effect from media reports and after their purported commencement.

Another key principle for legality is that laws must be clear so that individuals can understand what behaviour is lawful or unlawful. We believe that the increasing complexity of the concept of “reasonable excuse”, “essential work” and “essential retail” will make the task of interpreting and enforcing these provisions increasingly onerous and impractical. As the various phases of re-opening commence it is difficult for members of public to know precisely what are and are not reasonable excuses for travel. Similarly, we believe it will become increasingly difficult for members of An Garda Síochána to apply these Regulations consistently.

We believe the lack of public access to the regulations and the lack of clarity around concepts within the regulations has led to confusion regarding what elements of the public health advice are legal obligations or otherwise.

### *Necessity and Proportionality*

ICCL recognises that the public health situation is changing at pace. The circumstances in which the first, second or third versions of regulations were introduced are different from the present position. Given that each set of regulations constitutes a significant interference with constitutional and human rights, each measure must be demonstrably necessary in order to comply with human rights law in its own right. This means there must be a demonstrated pressing need for any penal provisions, penalties and powers of arrest, and any such provision must be introduced for the minimum period which might be justified by that demonstrated need.

ICCL does not question the public health advice provided by NPHE or the Chief Medical Officer. However, the consideration and translation of that advice into decisions around regulations must include a consideration of whether public health advice within an uncertain and changing situation requires legal enforcement. We recall that it was the position of the Government that it was possible to apply public health restrictions without regulations or legal powers of enforcement between 27 March and 7 April. We now have a significant body of information from An Garda Síochána and the Policing Authority on the actual use of the Covid regulations, which has been minimal, and we know that compliance with health advice was widespread during the period when gardaí applied a community policing approach based solely on advice and guidance. We also know that issues have emerged during the process of enforcement which may merit amendment to the Regulations, such as the challenge of facilitating the right to protest.

We would welcome clarification regarding on what basis was it determined that enforceable regulations are required from 17 May, rather than guidance and advice, as was the Government strategy between 27 March and 7 April? Furthermore, what consideration was given for amending the Regulations to provide for additional ‘reasonable excuses’ for movement, including to ensure protection for the right to protest?

### *“Affected Area”*

We note that the present regulations of 17 May retain penal provisions for a wide range of activities concerning the right to liberty and freedom of movement within the State. In order for this interference to comply with the human rights law, each measure must be not only necessary but also proportionate to a legitimate aim. We know of course the aim in this situation is stemming the spread of Covid-19. But each measure that interferes with our rights must be the most minimal possible to achieve that aim.

The level of risk of the spread of Covid-19 has to be taken into account in a proportionality assessment. This is recognized by the requirement within the enabling legislation for an “Affected Area” to be designated by the Minister of Health in order for regulations to be applicable within that area. An affected area is defined within the legislation as an area where there is:

*“known or thought to be sustained human transmission of Covid-19 or from which there is a high risk of importation of infection or contamination with Covid-19 by travel from that area”*

Currently, we understand that you, as Minister of Health, have designated the entire country an affected area. We note the comments of the Chief Medical Officer at the Oireachtas Special Committee yesterday (19 May) where he stated that community transmission was now “effectively wiped out”. In light of those comments we question whether defining the entire country as an “affected area” is still appropriate or necessary within the terms of the legislation. We must also question whether, in light of the Chief Medical Officer’s comments, the significant and wide ranging interference with our rights at this stage can be considered proportionate to the aim of protecting public health.

#### *Further Regulations in relation to Quarantine*

Finally, we are concerned at media reports and your own statements in media interviews that you intend to introduce further regulations regarding the enforcement of quarantine. As already set out in our letter of 19 May 2020, we believe that any regulations in this area would also engage serious issues of human rights. In this context, the tests of lawfulness, necessity and proportionality are also required in order to comply with the relevant law. We would also note that all of the above named avenues for considering these questions are available to the Minister.

ICCL understands that the grave risk posed by Covid-19 has created an extraordinary situation that has necessitated and will continue to necessitate some interference with our rights. We support the Government’s efforts to protect public health and to meet the great challenges presented by Covid-19 and we continue to encourage you to make use of the human rights framework that exists to protect our freedom and our democracy, even in times of such challenges. We believe that meeting the Government’s human rights obligations, and demonstrating compliance with constitutional and human rights standards will greatly bolster public support for the difficult decisions that you and the Government must take in all of our interests at this time.

Yours sincerely,



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Liam Herrick  
Executive Directors  
Irish Council for Civil Liberties