



Health (Amendment) (No. 3) Bill 2021

Health and Criminal Justice (Covid-19) (Amendment) (No. 2) Bill 2021

ICCL Briefing Note

2 December 2021

## Introduction

The Irish Council for Civil Liberties (ICCL) recognises the important and urgent imperative of reducing transmission of Covid-19 and slowing the spread of new strains of the disease within the State. However, we are once again deeply concerned at the rushed Oireachtas scrutiny of Health Bills designed to combat Covid-19.

ICCL has four primary concerns with these two Bills:

1. The rushing of these Bill through the Oireachtas once again undermines proper democratic processes. These Bills contain provisions for significant interferences with fundamental rights by extending emergency legislation on restrictions and providing for mandatory hotel quarantine (MHQ). Legislation which impacts rights should undergo additional parliamentary scrutiny, not less.
2. Sunset clauses in emergency legislation are meaningless if they are renewed with no detailed review of the legislation's effectiveness and impact on rights. All future extensions of legislation must provide for robust analysis and in-depth scrutiny.
3. All restrictions on rights need to be grounded in strong evidence proving they are necessary, proportionate and constitute the most minimal interference with rights possible.
4. MHQ raises discrimination, equality and ill-treatment concerns and should be only reintroduced if there is evidence that it is effective and that sufficient safeguards are introduced to ensure human rights are protected.

If these Bills pass, we urge Government to ensure that the legislature is given the opportunity to carefully scrutinise any regulations made pursuant to these Bills.

Should regulations reintroducing restrictions on rights to liberty, movement, association and assembly be made, we call for government to consult the Irish Human Rights and Equality Commission (IHREC) on each set of regulations. We again urge Government to conduct a human rights impact assessment for each response that impacts rights. This should be required by legislation.

We recommend that the Oireachtas Special Committee on Covid-19 response is reintroduced and we echo IHREC's longstanding recommendation that a Joint Oireachtas Committee on human rights, equality and diversity should be set up to scrutinise legislation with such a significant impact on rights.<sup>1</sup>

### **1. Undermining democratic processes**

ICCL is deeply concerned at the lack of opportunity for in depth scrutiny of the emergency Covid-19 Bills. While the first emergency Health Bill had to be passed urgently, each extension of these powers subsequently should have had proper democratic scrutiny including proper oversight by Oireachtas committees. ICCL is particularly concerned that the Bills are reintroducing the potential for extensive restrictions on a range of rights and public life, including criminal penalties and the possibility of detention (both in the form of MHQ and as a measure under s.11 of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020). Such serious infringements on rights need careful consideration by the government and the Oireachtas.

The Minister for Health has had the power to make regulations restricting rights under emergency legislation without Oireachtas scrutiny since March 2020. This is not acceptable. ICCL considers the process for making these regulations could be significantly improved. We have called for mandatory consultation with the Minister for Justice and with IHREC before regulations are made; pre or immediate post legislative scrutiny by the Oireachtas of regulations; and sufficient time for meaningful public and parliamentary debate before sunset clauses are extended.

Thorough, effective scrutiny is necessary for a valid proportionality assessment, as required under Bunreacht na hÉireann and human rights law for any laws that actually or potentially restrict rights. Government must demonstrate that such measures are necessary and proportionate to a specific legitimate aim, and that they constitute the most minimal interference with rights possible in the situation. Rushing the Bill through the Oireachtas deprives the people in Ireland of a key safeguard against a disproportionate interference with our rights and the opportunity to understand the Bills and the government's aims.

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<sup>1</sup> IHREC, "[Ireland's Emergency Powers During the COVID-19 Pandemic](#)", 24 February 2021.

ICCL is concerned that there has not been time for adequate public debate on the reintroduction of this legislation. ICCL considers that the government has not communicated the aim of reintroducing the possibility to make regulations restricting rights adequately and that there has been very little public engagement to explain what we see as another rushed process of law making.

Clarity of messaging is crucial in order to instil public confidence in and understanding of new laws.

We urge the Oireachtas to demand that on the expiry of this legislation in three months from date of commencement, (if passed), sufficient time is given to members to scrutinise and debate its contents before it is renewed, if that is proposed, including a consideration of the human rights impact of its operation.

## **2. Sunset clauses**

ICCL welcomes the fact that sunset clauses have been included in these Bills. Sunset clauses are necessary for emergency legislation to ensure that an extraordinary response to an emergency does not become the norm. However, ICCL is concerned that these sunset clauses are being inserted into legislation without their spirit being respected. Legislation should not be renewed beyond its sunset clause without proper scrutiny and an assessment of the law's effectiveness. ICCL calls on Government to respect sunset clauses and to only renew legislation following a review of the legislation prior to its expiration. Such a review should include a meaningful proportionality assessment, a human rights impact assessment and consultation with IHREC.

## **3. Evidence-based policies and laws**

ICCL recognises the important and urgent imperative of reducing transmission of Covid-19 and slowing the spread of new strains of the disease within the State. However, public policy responses to public health threats must be grounded in evidence. Earlier in the pandemic when less was known about Covid-19 and when the majority of the population was yet to be vaccinated there were stronger grounds for imposing restrictions. ICCL questions whether reintroducing the same restrictions and MHQ would now meet the high threshold required to meet the proportionality test for restrictions on rights. Effectiveness is a key requirement of a proportionate interference with rights as is the requirement that actions taken to achieve a particular aim must interfere with rights as minimally as possible in the circumstances.

ICCL considers that sufficient evidence has not been presented that mandatory hotel quarantine was more effective in the prevention of the spread of Covid-19 than quarantining in a place of residence and testing and tracing. Before reintroducing

MHQ, Government should present the Oireachtas and the public with data accompanied with a comprehensive analysis to demonstrate that MHQ was effective as a public health measure and proportionate in terms of its impacts on human rights.

The focus should remain on actions that can achieve the same outcome of reducing the spread of the disease but constitute far less of an infringement on rights. As WHO spokesperson Christian Lindmeier has said in response to travel bans to African countries, “we need to use the measures that we know work,... mask-wearing...ventilating a room if possible, as often as possible, keeping the normal hand and body hygiene...We know these measures work.”<sup>2</sup>

#### 4. Mandatory hotel quarantine (MHQ) must respect rights

ICCL considers that reintroducing MHQ into Ireland in the same manner as previously introduced would constitute a disproportionate interference with the right to liberty.

The control of infectious disease is a legitimate aim under human rights law that permits deprivation of liberty, under strict circumstances.<sup>3</sup> Safeguards must be in place. This includes a clear prohibition on discrimination, timely and effective appeals, fair procedures, a high standard of conditions and care. ICCL considers that these safeguards were not properly introduced in the previous system and, other than a commitment to strengthen the appeals process, is not convinced that a new system would meet the threshold required by human rights law for detention on the basis of public health. If MHQ is introduced, we call for more effective and timely appeals, release on negative test, better conditions and regular inspections with a human rights focus to ensure adequate conditions.<sup>4</sup>

We note that the European Commission criticised the previous MHQ system as potentially being in breach of EU law and flying in the face of fundamental principles of EU law including proportionality, non-discrimination and the free movement of persons.<sup>5</sup>

ICCL is particularly concerned at the addition in the new Bill on MHQ allowing for *expedient* measures.<sup>6</sup> ICCL appreciates the time sensitive nature of a Covid-19 response, but all responses should be demonstrably necessary, proportionate and

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<sup>2</sup> United Nations, [COVID-19: WHO's Tedros criticizes 'blunt' Omicron measures](#), 30 November 2021.

<sup>3</sup> Article 5, European Convention on Human Rights.

<sup>4</sup> See further ICCL, [Briefing Note: Legal issues arising from Mandatory Hotel Quarantine](#), April 2021, ICCL, [Briefing note on the Health \(Amendment\) Bill 2021](#), 25 February 2021.

<sup>5</sup> Naomi O'Leary, '[European Commission contacts Ireland on 'concerns' over hotel quarantine](#)' *The Irish Times*, 15 April 2021.

<sup>6</sup> See for example, the Health (Amendment) (No.3) Bill 2021, s. 38S(1)(o) and 38S(3).

effective. Expediency is far too low a threshold for protecting rights and this language should be removed.