
HUMAN RIGHTS IN A PANDEMIC

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19

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MAY 2021



ICCL wishes to acknowledge and thank The Community Foundation for Ireland for their support.
This report is funded by a Community Foundation for Ireland Donor Advised Grant.

Foreword

We are emerging from the deepest crisis in living memory, which has had and continues to have a profound effect on Irish society and on the wider world. The emergence of Covid-19 as a dangerous and highly contagious disease has caused widespread disruption to all aspects of our society. Many people have lost their lives and many families have been bereaved. Our healthcare and social services have been strained to breaking point – and, in some countries, beyond. Huge sections of our economy have been shut down with deep impacts on income, public services, and quality of life.

Human rights provide a framework to protect people, even in the most difficult of times. That framework helps us to see who needs most support, and when. In emergencies, human rights tell us which individual rights can be restricted to protect the rights of society at large. They guide us in deciding how long those restrictions can last, and how severe they can be.

The duty of the State to protect our rights to life and health has been the primary focus of national authorities. As well as demanding drastic economic and administrative efforts, this duty has also led to severe restrictions on a wide range of other rights. We have all been confined to our homes for extended periods of time. We have been prohibited under threat of criminal sanctions from meeting family or friends, from working together, and from participating in essential elements of community life.

We must continually remember just how far reaching these restrictions have been. They go to the heart of our democratic society, bringing the State and

the Gardaí into the regulation of ordinary life. This unprecedented situation has given us a glimpse into the experience of other regions of the world where police checkpoints, curfews and criminalisation of community activity are commonplace. At ICCL, we believe that this experience has also made us appreciate how precious our civil liberties are – the ability to move freely about our country without ‘reasonable excuse’ and without restrictions as to who we might meet now means a great deal more to us all.

It is important to recognise that, in many respects, our society and our State have shown their best qualities over the past year. The Irish people have accepted short term suspension of their rights as an act of solidarity to protect the most vulnerable in our community. The vast majority of people have supported the public health effort because they trust our State structures and, in general, they understand and trust the information that they have been presented with by Government. State supports have sustained those who have lost their jobs. Our public services and public servants have gone to extraordinary lengths to protect us. Healthcare workers, Gardaí, and essential workers have done trojan work. Our community and voluntary organisations have sheltered and stood up for those most affected.

But our democracy has been strained. While the Government and Oireachtas did not move to entirely suspend rights (as some other States did), the Minister for Health was given incredibly broad powers to restrict human rights. In particular, the two Ministers over the pandemic period introduced an extraordinary range of regulations criminalising aspects of daily life.

"In this report, we set out our analysis of the pandemic response from a human rights perspective. From the outset, ICCL recognised that all aspects of our human rights would be impacted by the disease and by the State's response."

An Garda Síochána deserve credit for the moderation and common sense by which they have applied these powers in general, and the Policing Authority also must be commended for holding them to account in the policing of the various regulations.

Nevertheless, the precedent of policing public health measures with fines and criminal convictions is of enormous significance to our democracy and deserves careful analysis and scrutiny.

In this report, we set out our analysis of the pandemic response from a human rights perspective. From the outset, ICCL recognised that all aspects of our human rights would be impacted by the disease and by the State's response. We immediately engaged with Government, the Oireachtas, and all relevant stakeholders to make the case for strong human rights protections at every stage of the response. We believed then, and we believe now, that strong protection of human rights is essential to an effective public health effort. We made recommendations on the content of laws and regulations. We made the case publicly for the protection of rights whenever new restrictions were contemplated. We advised State agencies on how to safeguard privacy within measures such as the Covid Tracker App. We persistently called for transparency and democratic accountability over these restrictions.

We present this analysis now to inform an essential review of the legal and policy framework for this emergency, and to identify how we might respond more effectively to any future crisis. Our view is that some of the more significant impacts on human rights

might have been mitigated if different approaches had been taken; if there had been wider consultation with rights holders; and stronger systems of democratic oversight of Government action. It is clear to ICCL that Covid-19 has also exposed deep structural inequalities in our society and these must be tackled head on as a fundamental task in our recovery. It is essential that we learn from the challenges and build on the resilience that has emerged to strengthen our democracy, guard our rights and ensure equality and fairness for everyone into the future. The blueprint is already there. It's in human rights.



Liam Herrick
Executive Director
ICCL



Acknowledgments

The authors of this report are ICCL staff members. We wish to thank our colleagues Sinéad Nolan and Luna Lara Liboni for their review and helpful comments and suggestions. We also thank ICCL's many colleagues across civil society for their work on the issues covered in the report, which we have drawn on throughout.

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Executive Summary

When the Taoiseach announced the first country wide shut down on 12 March 2020 as an attempt to combat the transmission of Covid-19, the Irish Council for Civil Liberties (ICCL) immediately identified the need for a public health response that incorporated fundamental human rights and rule of law principles.

Human rights are designed to protect and to empower people. In emergencies, some individual rights can be limited to protect other rights, including the right to life and the right to health. The human rights law framework recognised explicitly that protecting public health is a valid reason for placing limits on individual rights.

However, the same framework requires that every restriction a Government imposes to protect public health must meet certain tests: it must have a legislative basis; respond to an evidence-based need; be in pursuit of a legitimate aim; and every restriction must be the most minimal possible to meet that aim. Restrictions imposed in an emergency must be temporary.

Ensuring interferences with rights are proportionate requires a careful balancing of numerous factors: scientific evidence and analysis of the nature of the threat to public health; careful analysis of what measures are needed to respond appropriately to that threat; what impact these measures will have on rights and how to keep interferences with rights to a minimum; and how best to protect the most at risk and prevent discrimination.

ICCL has monitored and campaigned for a human

rights-based approach to the Covid-19 response from March 2020. This report summarises the work we have done, analyses particular rights issues, and makes recommendations to Government and to other relevant public actors. Our rights analysis is informed by Ireland's human rights obligations under the Irish Constitution, the European Convention on Human Rights (ECHR) and the range of international human rights treaties that Ireland has ratified.

The report focuses on the key areas we monitored and campaigned on over the past fifteen months: the Emergency Legislation and the making of regulations; the policing response; the impact of Covid-19 restrictions on fundamental rights, such as the right to protest and the right to privacy; and the effect of both Covid-19 and the restrictions on at-risk communities. We identify several problematic developments such as continually expanding police powers and the use of spit hoods as part of the Garda response. We summarise the work we did to ensure that new measures that would infringe on rights, from the Covid Tracker App to vaccine passports, were rigorously interrogated from a rights perspective. We identify where we think the Government could have better protected our rights. We make recommendations for immediate action and for what measures should be taken to ensure a better human rights compliant response in any future emergencies.

The report is not a comprehensive analysis of all human rights issues in the Government's response. Other issues such as rights in prisons, the right to education, or the need for a comprehensive analysis of the impact of Covid-19 and restrictions on particular groups are

"Human rights are designed to protect and to empower people. In emergencies, some individual rights can be limited to protect other rights, like the right to life and the right to health. But every restriction a Government imposes to protect public health must meet certain tests."

beyond the scope of this report. We identify the work of partner organisations who have produced in-depth and important reports on some of these issues.

In the first section, we outline six principles we believe should be taken into account when restricting rights in an emergency. We analyse the central piece of Emergency Legislation that permitted all subsequent regulations that restricted rights – the Health (Preservation and Protection and Other Measures in the Public Interest) Act 2020- in light of these principles. We identify specific ways it should be amended if it is renewed again on 9 June 2021. We recommend a rigorous Oireachtas review before renewal with sufficient time for robust debate. We identify areas for improvement in the drafting of emergency regulations, including better scrutiny, clearer communication and more transparency in decision-making.

We address how access to justice has been affected by the pandemic, calling for more resources to address the backlog in cases. We explore the expanded policing powers given to An Garda Síochána, documenting what we consider an over reliance on criminal justice to ensure compliance with public health guidelines where better communication and supports may have been more effective, in line with research from behavioural psychologists. We call for better data collection on the use of new police powers. We reiterate our concern that spit hoods may constitute inhuman or degrading treatment or punishment and we call for an immediate end to their use.

In the second section, we examine several rights in focus such as the right to protest. Over the past year we repeatedly called for an exception to the general restrictions on public gatherings for small, pandemic-safe protests that comply with public health guidelines. We argue that the right to protest takes on an even greater importance in a democracy during a time when decisions are being made that have such a huge impact on lives and livelihoods. We express concern at the criminalisation of protest,

highlighting Garda investigations into protest organisers, threats of prosecution, and a failure by Government to provide clarity around what was and was not permitted. This led to inconsistent policing, a chilling effect on protest, and ongoing confusion about whether protests are allowed under the public health restrictions. We repeat our call for small, pandemic-safe protests to be explicitly provided for in the Covid-19 regulations.

We examine the impact of the restrictions on a number of other rights too, including the right to manifest religion or belief, the right to private and family life, and the right to privacy. We consider that the blanket ban under the highest restrictions on all gatherings may have been disproportionate. We recommend that all households should have been permitted to pair with another household when restrictions were at their low to moderate levels. We address freedom of liberty and movement, questioning whether restrictions on movement were always proportionate, and criticising the lack of clarity in Government communication.

We address the controversy around the proposed introduction of ‘Covid passports’, emphasising that the use of domestic passports to access goods and services would have been discriminatory and disproportionately infringed rights to private and family life. On the introduction of mandatory hotel quarantine (MHQ), given that it constitutes a form of State detention, we explore what would be required to ensure that such quarantine constitutes a necessary and proportionate interference with the right to liberty. We identify a failure in the review and appeal process, as well as problematic and potentially arbitrary and discriminatory approaches to identifying what States are on the MHQ list. We call for an end to the system as soon as possible.

We summarise the work we did calling for Government to ensure the tech response to the pandemic conformed with human rights principles of necessity and proportionality and we repeat our call for proof that the technology introduced, including the Covid Tracker App, is effective. Without proof

of effectiveness, we argue that such technology cannot be a proportionate interference with our rights to privacy and data protection. We examine the controversial cutting of social welfare payments in the summer of 2020. We identify as yet unanswered questions about who authorised the inspections in Dublin Airport or the cuts to social welfare and we call for answers and accountability.

It is clear that both Covid-19 and the restrictions have affected some communities more than others. People living in congregated settings such as in Direct Provision Centres, Traveller halting sites and prisons have been more at risk than others. The number of outbreaks and devastating death toll in Nursing Homes has been a national and international scandal. Older people have been cocooned and cut off from family and key supports. Women have borne much of the care burden, lost jobs and, constituting the majority of healthcare workers, have been more exposed to the virus. Domestic violence has risen. We examine the impact of Covid-19 on a number of at-risk communities and make recommendations on how these groups could be better protected in future.

The final section summarises our recommendations addressing both short term actions necessary to protect human rights now, and long term actions that we believe could ensure a more robust human

rights compliant response from Government to similar emergencies in the future. We address recommendations to Government, An Garda Síochána, the Courts Services, the Data Protection Commissioner and the Director of Public Prosecutions.

Looking to the future, ICCL looks forward to a time when society can come back together in full enjoyment of our human rights. We echo the global call for Governments to 'build back better' where structural inequalities are addressed, and entrenched societal problems are solved. We have seen how existing inequalities were exacerbated during the pandemic and how, when some are at risk, we are all at risk. The pandemic has shown us how interconnected we are nationally and internationally and how reliant we are on each other for our health and wellbeing. As we restore the rights and freedoms restricted during the pandemic, we must restore them on an equal basis for everyone.

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Introduction

The Irish Council for Civil Liberties (ICCL) has been monitoring the Government's response to the outbreak of Covid-19 in Ireland since March 2020. We recognised the grave threat Covid-19 poses to the right to life and the right to health and understood the need for a comprehensive public health response that would include necessary and proportionate restrictions on the exercise of other rights, given the highly contagious nature of the disease and the urgent need to stem its transmission.

ICCL believes that a human rights framework provides protection for everyone at all times. It ensures that every action the Government takes responds to a real need and that measures taken to protect the right to life and public health don't go too far in restricting other rights to the extent that they lose their essence. Human rights require that the protection of vulnerable populations is prioritised, particularly during emergencies. For these reasons, it's vital that the Government applies a rights-based framework in its response.

ICCL has consistently campaigned for a human rights-based approach to all restrictions on rights during the pandemic, calling for a demonstration by Government that each restriction was prescribed by law, necessary in a democratic society, and proportionate to a legitimate aim; as well as time bound to the duration

of the emergency. We have repeatedly called for an approach informed by fundamental human rights principles including prioritising protection and support for those most at-risk and ensuring no measure could lead to discrimination. We have also called for a human rights impact assessment of both Covid-19 and the restrictions to inform all legal and policy responses.

A human rights-based approach to the pandemic has been called for by a range of other actors too. Early in the pandemic, the World Health Organisation (WHO) Director stated that: *"All countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights"*¹. The United Nations Secretary-General and the UN High Commissioner for Human Rights have urged States to conform with human rights law and standards throughout the pandemic.² The Trinity College Dublin (TCD) Covid-19 Law and Human Rights Observatory has been a consistent source of detailed legal analysis on the impact of the pandemic response on constitutional rights.³ The Irish Human Rights and Equality Commission has also made important contributions on key issues, most significantly through its recent report on Ireland's emergency powers during the pandemic, produced in conjunction with the TCD Observatory.⁴

"A human rights framework provides protection for everyone at all times. It ensures that every action the Government takes responds to a real need and that measures taken to protect the right to life and public health don't go too far in restricting other rights."

¹ WHO Director General, *Media Briefing*, 11 March 2020.

² UN Secretary-General, *We are all in this together: UNSG delivers policy brief on Covid-19 and human rights*, 23 April 2020, and see *Statement by Michelle Bachelet*, UN High Commissioner for Human Rights on *Human Rights Impact of Covid-19*, 45th Session of the Human Rights Council, September 2020 and see range of work at <https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx>.

³ See *Trinity College Dublin, Covid-19 Law and Human Rights Observatory*.

⁴ Conor Casey, Oran Doyle, David Kenny and Donna Lyons, *Ireland's Emergency Powers during the Covid-19 Pandemic*, Report prepared for The Irish Human Rights and Equality Commission by The COVID-19 Law and Human Rights Observatory, (Hereinafter IHREC, *Ireland's Emergency Powers during the Covid-19 Pandemic*).

This report examines the Government's response to the pandemic through a human rights lens from March 2020 up to May 2021. Our analysis is informed by Ireland's human rights obligations under the Irish Constitution, the European Convention for Human Rights (ECHR), and international human rights treaties.

The report is limited in scope and should not be considered a comprehensive analysis of all human rights impacted by Covid-19 or the Government's response. In general, we have focused on issues that are in line with our ongoing work such as policing, protest and privacy. Other issues such as rights in prisons and the right to education are, while of equal importance, beyond the scope of this report. While we identify key rights issues affecting some communities and groups, the report does not provide a comprehensive analysis of the impact of Covid-19 and restrictions on particular groups. We identify the work of other civil society organisations who have produced important reports on some of these issues.

The report is divided into two main parts. Part 1 highlights and discusses the legal framework underpinning the Covid-19 response and policing responses in the Covid-19 pandemic. Part 2 examines

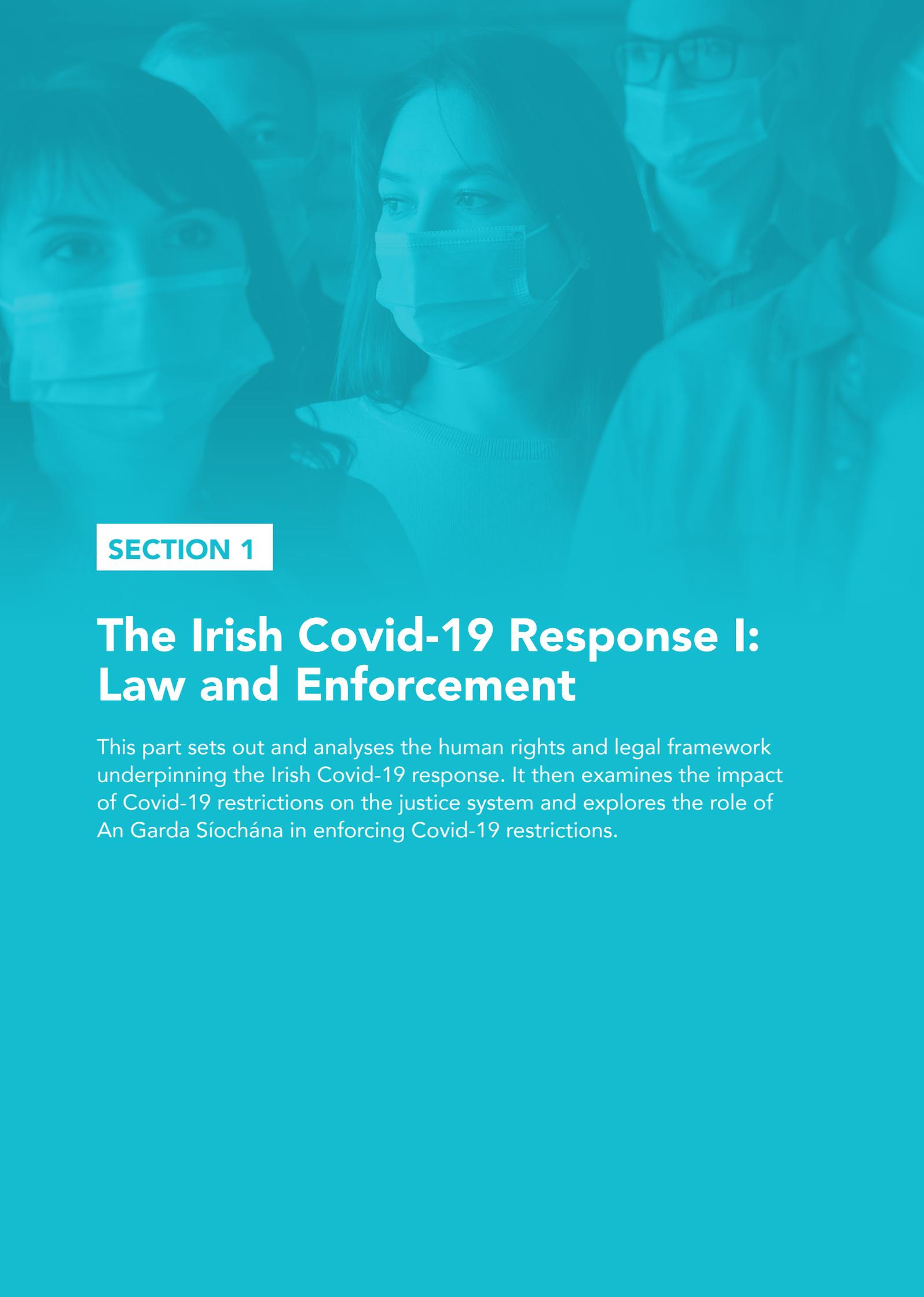
the impact of Covid-19 restrictions on some key human rights, including the right to protest, the right to liberty, the right to privacy, and the impact of both Covid-19 and restrictions on at-risk communities.

We make recommendations for immediate action and we make recommendations on what measures should be taken to ensure a better human rights compliant response in future emergencies.

We hope the report contributes to a broader review of the Government's response to Covid-19 and that it assists in informing a greater focus on protecting human rights in future emergencies.



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SECTION 1

The Irish Covid-19 Response I: Law and Enforcement

This part sets out and analyses the human rights and legal framework underpinning the Irish Covid-19 response. It then examines the impact of Covid-19 restrictions on the justice system and explores the role of An Garda Síochána in enforcing Covid-19 restrictions.

1

LEGAL FRAMEWORK

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



1. Legal Framework

1.1 Human rights in an emergency

There are two ways States can lawfully restrict rights in an emergency. The first is to make a declaration of derogation – or exemption – from specific rights, as provided for in international treaties, including the European Convention on Human Rights (ECHR). This is not possible for all rights. For example, the prohibition of torture and cruel, inhuman or degrading treatment and the rule that there shall be no punishment without law are absolute and non-derogable, meaning that no limits can be placed upon them, even in emergency contexts.⁵

The second is to limit rights within the permitted framework of human rights law. This requires Government to take only those measures that are necessary, proportionate and consistent with their national and international legal obligations.⁶ This is discussed in detail below.

The Irish Constitution provides that constitutional human rights norms may be limited in the event of an emergency caused by a war or armed rebellion.⁷ Absent these circumstances, the Irish Courts have made clear that all restrictions on Constitutional rights must be proportionate.⁸

(i) Human Rights Principles guiding ICCL's work

Human rights law and ordinary rule of law principles place further requirements on Government when providing for limitations on rights in law. We consider, based on well-established human rights and rule of law principles, that the Government's approach to restricting rights in an emergency should always incorporate the following six principles. We have used these principles to inform our analysis throughout this report.

PRINCIPLE 1: Without a derogation, rights can be limited but not suspended

The State must either make a declaration of derogation (where possible) or ensure that all limits on qualified rights conform with the human rights framework. This requires Government to take only those measures that are necessary, proportionate and consistent with their national and international legal obligations.⁹

PRINCIPLE 2: Legislation should be subject to scrutiny, consultation and oversight by Parliament

Parliamentary scrutiny by the Oireachtas is an essential protective mechanism against abuse of executive power in a democracy. Laws should be scrutinised, debated and approved by Parliament. Where measures are developed in a robust and transparent manner, they are more likely to withstand challenge and they are more likely to retain public trust.

PRINCIPLE 3: Legislation should be demonstrably compatible with human rights law.

Legislation should be compatible with all of Ireland's human rights obligations under international human rights law, including the European Convention on Human Rights. Section 42 of the Human Rights and Equality Commission Act 2014 places a clear obligation on Government to equality and human rights proof legislation, meaning it must be scrutinised in terms of its impact on civil, political, economic, social and cultural rights.¹⁰

PRINCIPLE 4: Law must be clear, precise and accessible and must be communicated clearly to the public.

A fundamental rule of law principle is that laws must be clear, precise and accessible. People must know what behaviour is legal and what is not legal and therefore must be able to access laws in good time before they are in force. Where criminal sanctions are concerned, the obligation on the State to set out clearly the nature of any legal obligations is greater. This requires the publishing of laws before they enter into force, clear communication of their content, and clear drafting.

PRINCIPLE 5: Evolving responses to the emergency must be demonstrably connected to evidence of effectiveness and need.

Laws and policies should be drafted on the basis of demonstrable need rooted in high quality evidence. Data collection to inform decision-making is a key human rights principle. Government should conduct a human rights impact assessment of all restrictions on rights to ensure laws and policies respond to real needs, discrimination is avoided, and differential impacts are minimised and mitigated by key supports.

⁵ European Court of Human Rights, *Guide on Article 15 ECHR*, April 2020

⁶ See report of the *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, HRC A/HRC/37/52, March 2018

⁷ Constitution of Ireland, Article 28.

⁸ This test emanated first from the case of *Heaney v. Ireland* [1994] 3 IR 593.

⁹ See report of the *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, HRC A/HRC/37/52, March 2018.

¹⁰ IHREC, *Guidance Note on Covid-19 and the Public Sector Equality and Human Rights Duty*.

PRINCIPLE 6: Access to justice and accountability must be maintained.

Access to justice is a key check on Government power and takes on a special importance during a period of significant and extensive human rights interferences. Government must ensure access to the Courts is protected to the greatest extent possible.

(ii) Permissible Limitations or Derogations?

This sub-section describes Principle 1 in more detail, examining the permissible limitations to human rights under the Constitution and human rights law in an emergency.

Irish Constitution: All legislation in Ireland must be compatible with the rights protected by the Irish Constitution unless an official emergency is declared. The Constitution allows for an official emergency to be declared only in times of war or armed rebellion “for the purpose of securing the public safety and the preservation of the State”.¹¹ The Constitution therefore does not empower the Government to suspend constitutional rights during a public health emergency.

Absent a State of emergency, the Irish Courts require restrictions on constitutional rights to meet four criteria. Restrictions must meet an important objective that is pressing and substantial in a free and democratic society; the means must be rationally connected to the aim; the interference must impair rights as little as possible; and the interference must be proportionate.¹²

Human rights law: International human rights law, including the ECHR, cannot be suspended in times of emergency unless a declaration of derogation relating to a specific right is made. Certain rights such as the right to life and the right not to be subjected to torture or inhuman or degrading treatment or punishment can never be derogated from.

Article 15 of the ECHR provides for derogations in “time of war or other public emergency threatening

the life of the nation”. In *Lawless v. Ireland*,¹³ the European Commission on Human Rights defined a “public emergency” as “a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes [the] State in question.”¹⁴ In the Greek Case¹⁵, the Commission identified four characteristics of a “public emergency” under Article 15 of the European Convention: it must be actual or imminent; its effects must involve the whole nation; the continuance of the organised life of the community must be threatened; and the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

The UN Human Rights Committee has made it clear that derogations should only be invoked to the International Covenant on Civil and Political Rights, (ICCPR) where a State cannot obtain its objectives within the existing limitations foreseen by the Convention in each article.¹⁶

Some commentators have argued that the correct approach to limiting rights during the pandemic would have been to make a declaration of derogation.¹⁷ Given the exceptional and temporary nature of derogations, they argue that a short, sharp suspension is better than long term and ongoing limitations. A small number of other States derogated from a number of rights for a limited period of time during the Covid-19 pandemic.¹⁸ The Irish Government, however, did not make a declaration of derogation for any rights during the Covid-19 pandemic.

ICCL considers that a declaration of derogation at the outset of the pandemic would not necessarily have been appropriate for any rights given the unknown nature of the virus, in particular in terms of how long limitations on rights would have to be in place. In keeping with the fourth limb of the EHCR test above for derogations, normal restrictions permitted by the ECHR for the maintenance of public health were

¹¹ Constitution of Ireland, Article 28.3.3.

¹² This test emanated first from the case of *Heaney v. Ireland* [1994] 3 IR 593.

¹³ See European Court of Human Rights, *Lawless v. Ireland*, application No. 332/57 (A/3), judgment of 1 July 1961, affirmed in *A and Others v. the United Kingdom*, Application No. 3455/05, judgment of 19 February 2009, para. 176.

¹⁴ See *Lawless v. Ireland*, para. 90.

¹⁵ See European Commission of Human Rights, *The Greek Case*, application Nos. 3321–3323 and 3344/67, Report of the Commission (1969).

¹⁶ General comment No. 29 (2001) on derogations from provisions of the Covenant during a State of emergency, para. 5. See also CCPR/C/128/2, para. 2(c).

¹⁷ See for example Alan Greene, *Emergency Powers in a Time of Pandemic*, Bristol University Press, 2020

¹⁸ See *Derogations by States Parties*, Laws on the Right of Assembly Worldwide, a repository of legal information managed by the University of Pretoria.

likely sufficient to meet Government's need to impose measures to fight transmission of Covid-19.

As the Irish Government did not declare a state of emergency or make a declaration of derogation, all restrictions on rights that can be limited (known as 'qualified rights') had to meet the requirements of ordinary human rights law. This means each restriction had to be provided for by law, had to be necessary in a democratic society to meet a pressing need and had to be proportionate to a legitimate aim. The Office of the UN High Commissioner for Human Rights issued a guidance note to governments on the Covid-19 response in April 2020 which clarified that in addition to that three-limb test, "all limitations should be interpreted strictly and in favour of the right at issue. No limitation can be applied in an arbitrary manner...[T]he authorities have the burden of justifying restrictions upon rights"¹⁹

The UN Special Rapporteur on protecting human rights and fundamental freedoms while countering terrorism has emphasised the importance of protecting the essence of rights even when limiting them, saying:

*"Limitations are prudent measures designed to protect [the public good] and the rights of others without undermining essential human rights that provide the foundation for a dignity-based society."*²⁰

Whether some Government measures went too far in placing limits on fundamental rights during the pandemic is arguable and is discussed throughout this report.

1.2 National legal response to Covid-19

Principle 2 above provides that laws should be scrutinised, debated and approved by our representatives. This principle arguably takes on an even greater importance during a pandemic where public trust in Government is vital to ensure compliance with public health advice. Principle 3 provides that legislation should be demonstrably compatible with human rights law. This section examines the emergency legislation passed by Government in response to Covid-19 in light of these two principles.

(i) The First Emergency Health Act

The Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020, amending the Health Act 1947, (the Emergency Legislation) is the bedrock legislation that most subsequent regulations restricting rights were, and continue to be, based on. It was debated in the Oireachtas between 18 and 20 March 2020 and signed into law on 20 March 2020. The Act grants the Minister for Health the power to make legal regulations restricting people's movement, travel, gatherings and events as well as "any other measures that the Minister considers necessary in order to prevent, limit, minimise or slow the spread of Covid-19".²¹ It also expands the right of medical officers to detain those who are a "potential source of infection", and removed some safeguards for those detained on that basis. The same Act provides for various social welfare measures, which we briefly examine in the chapter on equality.

ICCL did not oppose the Emergency Legislation. Placing restrictions on rights on a legal footing is required to meet the first criteria of the human rights framework- ensuring restrictions are 'prescribed by law'. We understood that the urgency of the situation, in addition to the many unknowns about the virus or how it would spread, required immediate action to protect the rights to life and health.

However, ICCL made a comprehensive submission²² to members of the Oireachtas once the first draft of the Emergency Health Bill was published on 18 March 2020 outlining some key concerns with the draft Bill. We published a briefing note²³ on the human rights implications of the law and we campaigned for Government to use the human rights framework in its response.²⁴ We called for a clear human rights test to be included in the making of all regulations, better safeguards for people who may be detained, consultation with relevant stakeholders, oversight by Parliament and a sunset clause to ensure the legislation would not apply beyond the emergency. We noted the power conferred on the Minister to create new criminal offences and the expansion of garda powers of arrest; and we called for any law creating new criminal offences to be drafted clearly and narrowly and for overbroad discretionary police powers to be avoided.

¹⁹ *Emergency Measures and Covid-19: Guidance Note*, Office of the UN High Commissioner for Human Rights, April 2020.

²⁰ Report of the *Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, HRC A/HRC/37/52, March 2018.

²¹ s.31A(1)(h).

²² *ICCL Submission on the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020*, March 18, 2020.

²³ *ICCL Briefing on Covid-19 Emergency Legislation*, March 2020.

²⁴ See eg Doireann Ansbro, *Our human rights cannot be sacrificed in fight against Covid-19*, Irish Examiner, 23 March 2021.

The fact that the legislation was rushed through both houses of the Oireachtas in three days prevented proper in-depth scrutiny of the Bill. A number of TDs and Senators proposed amendments addressing some of ICCL's concerns but when they were rejected by Government, they stated that they would not push for them given the urgency of the situation.²⁵

One amendment was proposed by government - a sunset clause of 9 November 2020, which ICCL welcomed.²⁶ As that date approached, ICCL called for a proper parliamentary debate, in-depth scrutiny of the law and an opportunity to improve the legislation based on lessons from the previous eight months. The date for renewal offered the Oireachtas the opportunity to reopen some of the issues that were put aside during the debate in March. However, ICCL was disappointed to learn two weeks before the date for renewal that the legislation was due to be debated for 45 minutes. Following advocacy by ICCL and others underlining the importance of sufficient time for debate this was extended, but ultimately only lasted two hours.²⁷ We call on Government to ensure meaningful, robust Oireachtas debate, as well as a review of the use of powers within emergency legislation every time renewal is proposed. To disallow sufficient debate after a significant period of learning would undermine a key pillar of our democracy - Oireachtas scrutiny of law, as well as the need to ensure law responds appropriately to proven need.

(ii) Other Primary Legislation in response to Covid-19

Other primary legislation introduced by the Government expanded Garda powers further in a variety of ways. The Criminal Justice (Enforcement Powers) (Covid-19) Act 2020²⁸ allowed for the inspection of premises without a warrant, and closure of premises orders by Gardaí. ICCL expressed concern at the wide discretion afforded to Gardaí under the Act and questioned the feasibility and necessity of the Act, given the provisions relating to some premises appeared impossible to enforce, such as the so called 'pub grub regulations' requiring people to order a meal costing a minimum of €9 when ordering drinks in a pub. We also expressed concern that the powers of inspection and intervention afforded to An Garda Síochána may affect community relations. We echoed these concerns when the Health (Amendment) Act

2021²⁹ was introduced, which provided for fixed penalty notices (fines) for breaches of many of the restrictions. This Act significantly changed the enforcement landscape given that prior to this Act, a person could only be punished for breaching the Covid-19 restrictions after a decision by the DPP to pursue the case and a criminal trial.

These issues are considered in more detail in the section below on policing.

If Government intends to renew the Emergency Legislation we call for the following amendments to better meet principles 2 and 3 outlined above - that law must be subject to scrutiny and must be compatible with human rights:

- **Need for a meaningful proportionality test:** A requirement that Government would carry out a meaningful proportionality test when restricting rights, including by ensuring all limits on rights were the least restrictive possible to achieve the aim of protecting public health.
- **Better Consultation:** A requirement for consultation with the Irish Human Rights and Equality Commission whenever regulations are made that severely impact rights.
- **Better Scrutiny:** A requirement that the Oireachtas has pre-legislative scrutiny over each set of regulations unless the particular exigency of the public health situation requires an urgent response.
- **Oireachtas Approval:** The Oireachtas should be required to approve regulations within a certain period of time.
- **Non-discrimination clauses:**
 - A non-discrimination clause in s.31A(2) of the Health Act 1947, as amended by s.10 of the Emergency Legislation. This section lists the factors that the Minister must have regard to when taking measures to prevent the spread of the virus.
 - A similar non-discrimination clause in s.11 which amends the Public Health Act 1947 with the introduction of s.38A. This section gives broad powers to medical officers to detain individuals. Section 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.

²⁵ See for example <https://www.kildarestreet.com/debates/?id=2020-03-19a.89&s=preservation+and+protection+and+other+emergency+measures+2020-03-18..2020-03-20>

²⁶ See ICCL, *Monitoring Human Rights during the Pandemic, Update 1*, 13-20 March 2020.

²⁷ Jack Horgan Jones, *Extra Day to Dáil debate on extending State's powers during pandemic*, The Irish Times, 20 October 2020.

²⁸ *Criminal Justice (Enforcement Powers) (Covid-19) Act 2020*.

²⁹ *Health (Amendment) Act 2021*.

- **Limits on Broad Powers:**

- Section 31A(1)(h) of the Health Act 1947, as amended by s.10 of the Emergency Legislation, gives the Minister for Health the power to make regulations that allow him to take “any other measures that the Minister considers necessary in order to prevent, limit, minimise or slow the spread of Covid-19”. The creation of this broad power requires explicit limitations such as a requirement to be ‘urgent, necessary and proportionate’.
- Section 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 infringe on rights. Expediency can never be a factor that alone can be used to justify rights infringements.
- **Regular review:** A requirement for a substantive review of the exercise of emergency powers both by the Minister for Health and by An Garda Síochána should be included.
- **Human Rights Impact Assessment:** A requirement to carry out a human rights impact assessment should be included.

(iii) Regulations made under the Emergency Legislation

The fourth principle above requires that laws must be clear, precise and accessible.

Since the Minister for Health signed the first set of regulations made under the Emergency Legislation in April 2020, ICCL has monitored and analysed key provisions that infringed rights.³⁰ In particular we called for proportionate sanctions, including the removal of criminal penalties for the exercise of rights and for an explicit exception to the regulations on events involving the safe exercise of the right to protest.

We called for better processes including greater transparency in decision-making; better consultation with key stakeholders; Oireachtas scrutiny; publication of regulations before they took on the force of law; and better and clearer messaging to the public.³¹

In the first weeks of the pandemic, it was understandable that regulations would be drafted and published quickly to ensure Government could respond to the uncertain and worsening public health situation. However, as the pandemic wore on, ICCL considers that the process for drafting, publishing, and communicating the content of regulations could have been much improved. In our submission to the Oireachtas in September 2020, we noted that there was a general sense of confusion around what was in each set of regulations and we called for much greater clarity. We note the observation in the Irish Human Rights and Equality Commission (IHREC) report on the exercise of the Covid-19 emergency powers that:

“The Government’s making and presentation of regulations raises serious rule of law concerns. Regulations have applied retroactively, are frequently not published for several days after they are made, are misleadingly described in official communications, and are inadequately distinguished from public health advice.”³²

We support IHREC’s strong recommendation that the Government “should at all times and in all communications maintain a clear distinction between measures that are legally obligatory and public health advice. In particular, the Government should not present public health advice as if it were criminally enforceable.”³³

We recognise that in the last few months there has been a marked improvement in publishing new regulations before they come into force but the issues of prior scrutiny, consultation, and better, targeted communication of their contents remain unresolved. We also support the recommendation made in October 2020 by the Special Oireachtas Committee on Covid-19 Response that:

“All sectoral committees should review the relevant Covid-19 legislation which is regulating activity in their sectors and every proposal to extend regulations after 9 November 2020 should require approval by the Houses of the Oireachtas or the relevant joint committee.”³⁴

Penal Provisions: The Emergency Legislation created the power for the Minister to make regulations restricting the rights to freedom of movement, assembly and association. The legislation gave the

³⁰ ICCL, Monitoring Rights During the Pandemic, <https://www.iccl.ie/iccl-monitoring-rights-during-the-pandemic/>.

³¹ Jack Power, *Civil liberties group concerned at how Covid-19 laws being drawn up*, 29 August 2020, <https://www.irishtimes.com/news/ireland/irish-news/civil-liberties-group-concerned-at-how-covid-19-laws-being-drawn-up-1.4342090>

³² IHREC, *Ireland’s Emergency Powers during the Covid-19 pandemic* February 2021. P.104

³³ IHREC, *Ireland’s Emergency Powers during the Covid-19 pandemic* February 2021. P.104

³⁴ Houses of the Oireachtas, *Special Committee on Covid-19 Response*, Final Report, 6 October 2020.

Minister the power to classify particular restrictions as 'penal provisions'. Any penal provision could attract up to six months in prison or a €2,500 fine following prosecution.³⁵ Subsequent regulations and primary legislation have created the power for Gardaí to impose on-the-spot fines for breach of Covid-19 Regulations.³⁶ This is explored in more depth in the policing section later in this report.

ICCL voiced concerns from the outset that enforcement of public health guidance should be primarily education and advice-based. We understand that at the very beginning of the crisis – when there was great uncertainty and anxiety about how the disease would affect the country and protecting lives was paramount – ensuring the population's behaviour through enforceable rules appeared necessary. However, ICCL considered that 6 months in prison and a €2,500 fine were disproportionate criminal sanctions for breaching rules requiring people to i) stay at home and ii) not to move outside 2km from their home. We highlighted the following principles that should always apply to the creation of criminal sanctions:

- i. Criminal sanctions should always be a measure of last resort.
- ii. New criminal offences must be drafted clearly and narrowly to ensure they are easily understood and not subject to overbroad discretionary police powers.
- ii. Where alternative enforcement measures can be appropriately implemented they should be considered before criminal sanctions.

The first ten days of the policing operation that sought to enforce the guidelines were done without regulations underpinning the public health advice. It is significant that An Garda Síochána reported widespread compliance with the restrictions before criminal penalties were introduced. ICCL considers that this suggests criminal sanctions are not necessary to ensure the general population follows public health guidelines when their content and rationale are clearly communicated.

During 2020, we noted behavioural science research that strongly suggested the best way of ensuring

compliance with public health guidelines was through positive reinforcement of messaging, targeted communication and the provision of key supports or "capability, opportunity and motivation."³⁷ In light of this research, ICCL has consistently called on the Government to use criminal law in a sparing manner *and only* where clear public health advice grounded in scientific medical evidence is communicated effectively *and* efforts to ensure compliance through consent have demonstrably failed. We see this as a key area of improvement for the future.

Affected Areas and end dates: The primary legislation gave the Minister the power to designate a particular geographic area as an '**affected area**' where there was "*sustained transmission*" of the virus.³⁸ Regulations under the Act cannot impose restrictions in an area unless it is designated as an affected area. The Minister chose to designate the whole country as an 'affected area' so each set of regulations applied to the entire country. Except for a brief period during summer 2020, this remained the case even as it became clear that the numbers affected by the virus were very different in different regions of the country. ICCL considers the potential to designate different areas of the country as an 'affected area' is a tool that can be used to respond in a more targeted manner to the behaviour of the virus and may assist with ensuring restrictions are proportionate.

The fact that each set of regulations had a **specific time frame** was positive. However, communication about the end date of some regulations was lacking and certain regulations were extended without proper advance notice. There has been consistent and obvious confusion among the public about what regulations were in force and when.

(iv) Need for evidence-based and transparent decision making

Laws and policies should be developed on the basis of demonstrable need rooted in high quality evidence. Research and data collection are vital to provide the evidence that must inform decision making. This is a key human rights principle. The public must have confidence that decisions are being made in a considered manner and are grounded in strong and clear processes.

³⁵ Health Act 1947, s.31A(12).

³⁶ Health Act 1947, s. 31A(6C).

³⁷ *NUI Galway global Covid-19 study finds strong link between health messaging and behaviour*, NUIG News and Events Page, 5 October 2020. Claire O'Connell, *Encouraging health behaviours to tackle the pandemic*, The Irish Times, 28 May 2020; Pete Lunn, *Much of what we think about Covid-19 is wrong. We need to change the conversation*, The Irish Times, 10 October 2020; Molly Byrne, *Behaviour is best Covid-19 vaccine available*, The Irish Times, 26 October 2020.

³⁸ Section 31B, Health Act 1947 as amended by s.10 of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020.

ICCL has repeatedly called on Government to conduct a human rights impact assessment of all restrictions on rights to ensure laws and policies respond to real needs, discrimination is avoided, and differential impacts are minimised and mitigated by key supports.³⁹

ICCL expressed concern on a number of occasions that there was a lack of transparency in relation to the processes and grounds for the decisions that led to the different levels of restrictions on rights.⁴⁰ ICCL supports the essential work of NPHE and we believe it is vital to ensure that its actual and perceived independence and integrity as an expert advisory body is protected. We believe that the composition and procedures of any expert body advising the Government must ensure a full range of public health and social perspectives and must be adequately resourced.

In our submission to the Oireachtas Covid Committee in September 2020, we highlighted the need for more transparency as well as the approach in other jurisdictions where a range of experts sat on Government's health advisory boards during the pandemic.⁴¹ We believe that the composition of NPHE could be improved by adding a broader range of experts such as mental health experts, sociologists and a human rights expert who can give a broader view on the impact of restrictions on public health and on rights.

At least some NPHE meetings should be held in public. The Government should also ensure that NPHE has sufficient resources to support its work, transparency of its decision making, and broader composition.

Critically, we believe that there must be clear lines of separation between NPHE's formal advice to Government, the medical science upon which they are basing that advice, the Government's interpretation of that advice (including where it is accepting or rejecting that advice); and guidelines or legal requirements which Government chooses to introduce on foot of that advice, which are then demonstrated to be in line with the State's human rights obligations.

We note that IHREC has highlighted that the Public Sector Equality and Human Rights Duty applies to all public sector actors, including the HSE, the Department of Health, the Chief Medical Officer and NPHE.⁴² This means there is a clear duty on all of these actors to promote equality, combat discrimination and protect the human rights of all those who use their services.⁴³ In the context of Covid-19, IHREC has stated that in order to fulfil this duty, public bodies must:

*"carry out an assessment of the equality and human rights issues relevant to their function and purpose; develop policies, plans and actions to address these issues; and report annually on progress and achievements. As public bodies move towards recovery and longer term planning, this provides an important framework to systematically consider and reflect the particular needs of staff and service users at risk of inequality, discrimination or disproportionate impact, and helps to mitigate and avoid unintended consequences."*⁴⁴

ICCL would welcome a public commitment to fulfilling this duty from all relevant public bodies in the context of decision making that leads to restrictions on rights.

"Laws and policies should be developed on the basis of demonstrable need rooted in high quality evidence. Research and data collection are vital to provide the evidence that must inform decision making. This is a key human rights principle."

³⁹ ICCL, *Monitoring Rights During the Pandemic, Update 21* 1-7 August 2020.

⁴⁰ See for example ICCL, *Submission to Oireachtas Covid-19 Committee*, September 2020.

⁴¹ ICCL, *Submission to Oireachtas Covid-19 Committee*, September 2020.

⁴² IHREC, *Covid-19 and the Exercise of Emergency Powers*, p.18.

⁴³ See IHREC, *Implementing the Public Sector Equality and Human Rights Duty*, March 2019.

⁴⁴ IHREC, *Guidance Note on Covid-19 and the Public Sector Equality and Human Rights Duty*.

1.3 Recommendations

FOR GOVERNMENT	
1.	Where emergency situations require a response that restricts the exercise of rights, the following six principles should be taken into account:
	PRINCIPLE 1: Rights can be limited but not suspended without a derogation.
	PRINCIPLE 2: Legislation should be subject to scrutiny, consultation and oversight by the Oireachtas.
	PRINCIPLE 3: Legislation should be demonstrably compatible with human rights law.
	PRINCIPLE 4: Law must be clear, precise and accessible and must be communicated clearly to the public.
	PRINCIPLE 5: Evolving responses to the emergency must be demonstrably connected to evidence of effectiveness and need.
	PRINCIPLE 6: Access to justice and accountability must be maintained.

2.	When legislating for emergency measures in the future and if the Government is to renew the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020, include the following:
i.	Sunset clause: Ensure all emergency legislation has a sunset clause and, when legislation is due to be renewed, ensure sufficient time for meaningful Oireachtas debate and a human rights review.
ii.	Need for a meaningful proportionality test: Establish a statutory requirement that Government would carry out a meaningful proportionality test when restricting rights, including by making best efforts to ensure all limits on rights are the least restrictive possible to achieve their objectives.
iii.	Better Consultation: Establish a statutory requirement for consultation with the Irish Human Rights and Equality Commission whenever regulations are made that severely impact rights.
iv.	Better Scrutiny: Establish a statutory requirement that the Oireachtas has pre-legislative scrutiny over each set of regulations unless the exigency of the public health situation requires an urgent response.
v.	Oireachtas Approval: The Oireachtas should be required to approve regulations within a set period of time.
vi.	<p>Non-discrimination clauses. Include a broad non-discrimination clause in all emergency legislation to ensure government avoids potential discriminatory impacts of the law. Amend the current Emergency Legislation as follows:</p> <ul style="list-style-type: none"> (i) Introduce a non-discrimination clause in s.31A(2) of the Health Act 1947, as amended by s.10 of the Emergency Legislation. This section lists the factors that the Minister must have regard to when taking measures to prevent the spread of the virus. (ii) A similar non-discrimination clause in s.11 which amends the Public Health Act 1947 with the introduction of s.38A. This section gives broad powers to medical officers to detain individuals. S.38A(2) lists factors a health worker must have regard to when making a decision to detain an individual.

vii.	<p>Limits on Broad Powers: Ensure emergency legislation does not create overly broad powers for any State actor. Amend the current Emergency Legislation as follows:</p> <p>(i) S.31A(1)(h) of the Health Act 1947, as amended by s.10 of the Emergency Legislation gives the Minister for Health 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”. This broad power requires explicit limitations such as a requirement to be ‘urgent, necessary and proportionate’.</p> <p>(ii) 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 infringe on rights. Expediency can never be a factor that alone can be used to justify rights infringements.</p>
viii.	<p>Regular review: Establish a statutory requirement for a substantive review of the exercise of emergency powers.</p>
ix.	<p>Human Rights Impact Assessment: Establish a requirement to carry out a human rights impact assessment of the legislation should be included.</p>

3.	When drafting regulations under emergency legislation that restrict rights:
i.	Publish emergency regulations before they enter into force.
ii.	Consult with the Irish Human Rights and Equality Commission where laws infringe rights.
iii.	Demonstrate that every restriction on rights has been subject to a proportionality assessment.
iv.	Enable pre-legislative scrutiny and oversight by the Oireachtas.
v.	Ensure targeted, timely communication of restrictions on rights ensuring there is no blurring of lines between law and guidance.
vi.	Focus on ensuring compliance with public health advice through positive reinforcement of messaging, targeted communication and the provision of key supports.
vii.	Use criminal law as a means of enforcement in a sparing manner and only where clear public health advice grounded in scientific medical evidence is communicated effectively <i>and</i> efforts to ensure compliance through consent have demonstrably failed.
viii.	Utilise the ‘affected areas’ provision in the Emergency Legislation to ensure a targeted approach to rights restrictions.

4.	For all decision making in an emergency that results in restrictions on rights:
i.	Gather data, including by conducting a human rights impact assessment, on all restrictions on rights to inform decision making and to ensure laws and policies respond to real needs, discrimination is avoided, and differential impacts are minimised and mitigated by key supports.
ii.	Ensure transparency and effective communication of decision-making processes so the public understands the grounds for decisions that lead to different levels of restrictions on rights.
iii.	Improve composition of expert advisory teams, including the current team- NPHET, by adding a broader range of experts beyond public health specialists, including a human rights expert.
iv.	Ensure public sector actors understand and fulfil the public sector human rights and equality duty required under s.42 of the Irish Human Rights and Equality Commission Act 2014.

2

IMPACT OF THE COVID-19 RESPONSE ON THE JUSTICE SYSTEM

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



2. Impact of the Covid-19 response on the justice system

2.1 Impact of restrictions on access to a lawyer

The right of access to a lawyer has been negatively affected by Covid-19 restrictions. In May 2020, a solicitors' firm, Shalom Binchy Solicitors, conducted an online survey to learn more about the experiences of criminal defence solicitors in providing legal advice to persons detained in Garda stations during the initial stage of the Covid-19 pandemic (March to May 2020).⁴⁵ The findings highlight that *"there is no comprehensive or consistent approach being taken to protect the right to legal advice of suspects in Garda stations."*⁴⁶ This included differences between Garda stations in how social distancing and PPE guidelines were complied with and no provision for remote access to a lawyer during police questioning. ICCL research indicates that there have been limited changes to the system since that survey. While the use of PPE may have improved, there is still no provision for remote access to a lawyer during police questioning. ICCL highlights that all means should be provided to lawyers to facilitate proper consultations that comply with public health guidelines.

2.2 Impact of restrictions on criminal court hearings

In March 2020, the Courts Service announced that the courts would temporarily suspend all business after the Irish Government announced that the country would enter a period of temporary restrictions on gatherings, events and movement.⁴⁷ Initially, only emergency applications were heard by the Courts but contingency plans were established in mid-March which have been reviewed periodically. The Supreme Court and Court of Appeal have operated remotely since 20 April 2020 and have been the least affected by the country-wide shut down⁴⁸.

The Criminal Courts have placed different limits on

what cases could be heard at different times during the pandemic. This has resulted in lengthy delays and a backlog of cases.⁴⁹ Initially, only applications which were urgent, such as new arrests, domestic violence matters and those involving persons in custody, could be heard in the District Court. This expanded over time and the District Court is, as of April 2021, hearing matters which exclusively involve State witnesses, i.e. road traffic or public order matters where the only witnesses are Gardaí, or those involving domestic violence, with other matters being automatically put back to a date in the future.⁵⁰ Although attempts have been made to safely proceed with criminal matters over the last year, the current position requires improvement.

Trials are now being listed for summer of 2023 due to the severe backlog of cases⁵¹. This means that accused persons must now wait for a significant period of time before they can expect to be tried. Aside from the difficulties that can be faced in trying matters a number of years after they have occurred, accused persons may also opt to enter a guilty plea simply to get matters over with. ICCL recommends that additional judges be allocated to the criminal courts to deal with the growing backlog of cases.

Other matters, such as sentencing and arraignments, have proceeded and staggered lists have been introduced to attempt to adhere to COVID-19 guidelines. Staggered lists means that cases are given a 10–15-minute time slot in which they are allocated to be heard. This is a positive development and should be retained beyond the pandemic.

ICCL would underline the importance of retaining access to the Courts to the greatest degree possible with resources devoted to ensuring public health guidelines, such as mask wearing and social distancing, are implemented to facilitate wider access. Where cases are being limited, we would stress the need to prioritise access for at-risk individuals. We note that retaining access to the courts for domestic violence victims was positive and we commend proposals to expand remote hearings for domestic violence victims seeking protection orders.⁵²

⁴⁵ Aine Bhreathnach and Shalom Binchy, *The Experiences of Criminal Defence Solicitors in Garda stations during Covid-19*, 2020, p. 10. The findings are limited as the 25 respondents self-selected to participate in the survey, however, they provide a unique "narrative snapshot" of the experiences of criminal defence solicitors during the onset of the pandemic.

⁴⁶ Aine Bhreathnach and Shalom Binchy, *The Experiences of Criminal Defence Solicitors in Garda stations during Covid-19*, 2020, p. 10.

⁴⁷ See *Courts Service announcement*, dated 13 March 2020.

⁴⁸ Courts Service, *"Virtual Remote Courts Piloted in Ireland this morning"*, 20 April 2020.

⁴⁹ *'Jury trials may resume by end of March as backlog extends to two years'*, *Irish Times*, 25 February 2021.

⁵⁰ *'New Measures in the District Court 7th Jan to 1st Mar 2021'*, 6 January 2021.

⁵¹ See reference to backlog in *'Almost 5,000 facing court prosecution for non-payment of Covid-19 fines'*, *Irish Times*, 2 April 2021.

⁵² See for example, Conor Gallagher, *Domestic abuse victims to be allowed seek barring orders remotely*, *The Irish Times*, 28 December 2020.

Challenges posed by jury trials: One of the main challenges for the criminal courts is the requirement for jury trials. It is the constitutional right of all accused persons, save those before the Special Criminal Court, to be tried by a jury of their peers⁵³. The Courts have continuously struggled to balance adherence with COVID-19 guidelines and regulations with the right of accused persons to be tried without delay by a jury. In the Circuit Court and the Central Criminal Court, jury trials were suspended for the most part, except during August 2020 and mid-November to December 2020⁵⁴.

Jury trials in all courts resumed on 12 April 2021, however, due to limited spaces suited to holding socially distanced trials as well as the significant backlog of cases, progress has been slow and limited matters are being heard. A number of steps have been taken by the Courts Service to attempt to tackle these challenges, such as securing alternative venues⁵⁵. ICCL recommends that the Courts Service continue to seek out potential venues which can be allocated to the hearing of criminal trials safely. ICCL considers jury trials should be maintained as far as possible with appropriate resources and facilities provided to the Courts to ensure public health guidelines, including social distancing, can be maintained.

Possibility of remote hearings: In December 2020, a new law was passed allowing for persons in custody to “attend court” via videolink.⁵⁶ The Courts have issued frequent communications to keep the public and legal professionals updated as to the continuing changes in procedure in the Courts.⁵⁷

ICCL considers that jury trials should proceed by invoking additional safeguards such as staggered witness times and the use of videolink. Witnesses can be sufficiently staggered to ensure that the number of persons in Court remains at an appropriate level. Legislation should also be introduced to allow jurors to hear matters via videolink from socially distanced and safe venues. This would assist with the current backlog and reduce waiting times for matters to get on for hearing.

ICCL considers that District Court hearings should

be resumed by invoking additional safeguards such as staggered hearing times and the use of videolink. District Court hearings should be prioritised and proceed with staggered hearing times and the use of videolink for witnesses where possible. Although the District Court would be operating below their usual capacity, this would be preferable to the present situation of block remands (adjournments) for the majority of hearings.

Finally, although videolink has been introduced as a partial solution to the issue of in-person hearings, remote hearings cannot be invoked in the same widespread manner as in civil law. This was recognised by Chief Justice Clarke in a Statement on the 8 May 2020 where he stated: “*The presidents have always made clear that there are many types of cases for which remote hearings are not suitable. That continues to be the case*”⁵⁸.

Delays before sentencing: In criminal matters, accused persons are spending additional time in custody while they await sentencing. Barristers have told the ICCL that these wait times are now often extended by delays in obtaining reports from the Probation Service and other relevant services. Due to the limited availability of videolink consultations with accused persons who are in custody, further delays are being experienced in taking instructions. ICCL recommends the availability of videolink consultation for prisoners be expanded. This would allow accused persons to consult with their lawyers and the Probation Service or other relevant services, e.g. psychiatric assessments, and will thereby reduce the waiting time for sentencing.

Alternatives to prosecution: Given the growing backlog and the fact that remote hearings are not appropriate for criminal trials, alternatives to prosecution should be considered. The Director of Public Prosecutions should consider alternatives to prosecution in appropriate cases. Minor offences or prosecutions which do not have a strong prospect of success should not be pursued. The Director and her officers should proactively engage with Defence counsel to ensure that limited court resources are being prioritised for serious cases.

⁵³ Article 38.5 of the Irish Constitution.

⁵⁴ See various Courts Service announcements such as <https://www.courts.ie/news/covid-19-position-criminal-courts-justice-friday-13th-march>; <https://courts.ie/news/circuit-court-notice-court-business-during-level-5-restrictions>; <https://www.courts.ie/news/notice-circuit-court-criminal-jury-trials-will-recommence-12th-april>.

⁵⁵ ‘Courts Service to use Croke Park to hear criminal trials’, RTE News, 14 April 2021; ‘Supreme Court relocates to dining hall to hear appeal’, RTE News, 22 June 2020; ‘Peace Activists Colm Roddy and Dave Donnellan on Trial - Report from Days 1 & 2 in Court’, Shannonwatch.

⁵⁶ Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, s. 23(3), (14).

⁵⁷ See the Courts website, [COVID-19 updates section](#).

⁵⁸ [General Statement of the Chief Justice](#), 8 May 2020.

Reducing the prison population: ICCL recommends that the Minister for Justice consider applications for enhanced remission and temporary release as a means to reduce the prison population. This is important given the particularly challenging conditions that imprisonment presents in a pandemic. ICCL welcomed the early efforts to reduce the prison population as part of its pandemic response⁵⁹. The Irish Penal Reform Trust in their report on COVID-19, outline that the prison population was reduced by approximately 10% at the start of the pandemic in the space of one month.⁶⁰ However, given the lengthy delays that persons in custody are currently experiencing, the Minister for Justice should consider suitable applications for enhanced remission and temporary release in light of these difficulties and as a mechanism to relieve prison overcrowding. There should also be encouragement of suitable prisoners to apply for such schemes of early release. Finally, the IPRT have called for the Minister for Justice to implement the Parole Act 2019 as a means by which to reduce the prison population in a consistent and effective manner.⁶¹

Coroner's System: The Coroner's system in Ireland has been severely impacted by Covid-19. Most inquests requiring a jury were suspended during 2020, though a small number of hearings took place through videolink.⁶² This has created significant backlog and delay. According to senior coroner for the Kildare District, "*their absence had greater affected those who lost people through road crashes, suicide, and workplace accidents.*"⁶³ ICCL has recently published a report that contains a comprehensive analysis of the Coroner's system and calls for urgent reforms to ensure the Government meets its Article 2 ECHR obligations to effectively investigate certain deaths.⁶⁴ We note delay was already a significant problem which has now been compounded by the Covid-19 backlog. We reiterate the call for urgent reforms, in particular the need for a better resourced system with fully trained coroners operating throughout the country on a full-time basis, underpinned by standards that place support, information and answers for families front and centre.

2.3 Recommendations

FOR AN GARDA SÍOCHÁNA:

1. Facilitate remote access between solicitors and suspects by videolink for private consultations and during police interviews.

FOR THE DEPARTMENT OF JUSTICE AND MINISTER FOR JUSTICE:

2. Enact amendments to the Garda Station Legal Advice Scheme to enable payment for remote consultations and advice during interviews.
3. Allocate additional judges to the criminal courts to mitigate the severe backlog of cases.
4. Consider suitable applications for enhanced remission and temporary release as a means to reduce prison overcrowding.
5. Adequately resource and prioritise reforms to the Coroner's System that would address the backlog in inquests caused by Covid-19 and transform it into a full-time professional service.

FOR THE COURTS SERVICE:

6. Continue to seek out potential venues which can be allocated to the hearing of criminal trials safely.
7. Jury trials should proceed by invoking additional safeguards such as staggered witness times and the use of videolink.
8. District Court hearings should resume by invoking additional safeguards such as staggered hearing times and the use of videolink for witnesses.
9. Expand the availability of videolink consultation for prisoners.

FOR THE DPP:

10. Consider alternatives to prosecution in appropriate cases.

⁵⁹ *Report: Covid-19 measures led to better standards in Irish prisons*, Irish Examiner, 26 January 2021. See also, IPRT Report, *Irish Prisons And Covid-19: One Year On*.

⁶⁰ IPRT, *Irish Prisons And Covid-19: One Year On*, p. 2.

⁶¹ IPRT, *Irish Prisons And Covid-19: One Year On*.

⁶² Sarah Slater, *Coroners nationwide facing backlog of inquests due to Covid-19 restrictions*, The Irish Times, 2 December 2020.

⁶³ David Kearns, *COVID-19: Nursing and residential homes "borne the brunt" of pandemic*, UCD News and Media, 14 April 2021.

⁶⁴ Phil Scraton and Gillian McNaul, *Death Investigation, Coroners' Inquests and the Rights of the Bereaved*, Irish Council for Civil Liberties, April 2021.

3

ROLE OF AN GARDA SÍOCHÁNA IN THE COVID-19 RESPONSE

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



3. Role of An Garda Síochána in the Covid-19 response

This section presents an overview of the role of An Garda Síochána (AGS) in the State's Covid-19 response and, in particular, in enforcing the emergency law and regulations. We examine three key areas: the response of AGS in light of the ongoing reform process; the introduction and exercise of expanded enforcement powers in relation to breaches of Covid-19-related regulations; and a number of concerning policing practices from a human rights perspective.

3.1 Reform and Community Policing

The Irish Government began a policing reform process in 2019, following its endorsement of the Commission on the Future of Policing in Ireland's (CFP) report and recommendations.⁶⁵ The CFP report proposes a new framework for policing, security, and community safety and makes key recommendations relating to integrating human rights in policing and community-based policing. The implementation of some recommendations has been delayed due to Covid-19.⁶⁶ However, in April 2021 the Government published the General Scheme of the Policing, Security and Community Safety Bill, which according to the Department of Justice was developed on the basis of the CFP recommendations.⁶⁷ ICCL welcomes the Government's commitment to implement the CFP recommendations and is preparing an in-depth analysis of the Bill.

Many of the CFP recommendations, particularly in relation to the proposed transformation of AGS to a human rights-based and community-based police service, are relevant when considering policing in the

context of Covid-19. Much of the policing response was welcomed, particularly where AGS played a role in supporting at-risk communities.⁶⁸

However, ICCL is concerned about the expansion of powers accorded to AGS to enforce Covid-19 regulations, especially given the potential of over-policing, to disrupt the transition of AGS from a police force to a community-focused police service, as recommended by the CFP.

3.2 Enforcement powers

AGS has played a central role in responding to the Covid-19 pandemic. This sub-section explores the enforcement powers accorded to AGS and their use. The Policing Authority⁶⁹ is monitoring whether AGS are using Covid-19 enforcement powers "as appropriately and sparingly as possible."⁷⁰ To date, the Policing Authority has published thirteen reports examining policing performance in relation to Covid-19 regulations.⁷¹ ICCL welcomed this monitoring work and has engaged with the Policing Authority throughout the Covid-19 pandemic on human rights-related policing concerns.⁷² In May 2020, Policing Authority chairperson Bob Collins' stated that "this is a health emergency. It is not a policing... or crime emergency".⁷³ For us, this demonstrated the need to end or at least significantly reduce the emergency enforcement powers conferred on AGS.⁷⁴ Instead, these enforcement powers have significantly expanded.

AGS have taken a graduated approach in relation to the Covid-19 regulations, known as the four 'Es' approach of engage, explain, encourage and enforce.⁷⁵ AGS use the first three Es in respect of non-penal restrictions in the regulations – those which do not carry a fine or prison sentence – while they use all four Es in respect of restrictions which carry criminal sanctions.⁷⁶

⁶⁵ Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland*, 18 September 2018.

⁶⁶ Government of Ireland, 'A Policing Service for the Future' *Implementing the Report of the Commission on the Future of Policing in Ireland*, 2018. The first two phases 'Building Blocks' and 'Launching phase' were to be completed between January-December 2019, the third 'Scaling phase' was planned for January 2020-June 2021 and the final 'Consolidation phase' was planned for July 2021-December 2022. However, as of March 2021, the first two phases have been completed. The third phase commenced in October 2020. See Dail Eireann Debate, Cian O'Callaghan, *Parliamentary Question on Garda Reform*, 2021.

⁶⁷ Department of Justice, *Minister McEntee publishes General Scheme of landmark Policing, Security and Community Safety Bill*, 27 April 2021.

⁶⁸ See eg Policing Authority, *Assessment of Policing Performance*, 2020.

⁶⁹ The *Policing Authority* is an independent statutory body tasked with overseeing the performance of the Garda Síochána, in relation to policing services in Ireland.

⁷⁰ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 6 May 2020, p. 3.

⁷¹ Policing Authority, *Reports*, 13 May 2021.

⁷² ICCL, *Monitoring rights during the pandemic 4-10 April 2020*, April 2020.

⁷³ Policing Authority Report, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, May 2020, p. 2; ICCL, *Monitoring rights during the pandemic 9-15 May 2020*, May 2020.

⁷⁴ ICCL, *Monitoring rights during the pandemic 9-15 May 2020*, May 2020.

⁷⁵ Policing Authority Report, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, May 2020, p. 11.

⁷⁶ An Garda Síochána, *Coronavirus (Covid-19)*, 2021.

As outlined in section one of this report, the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 inserted section 31A into the Health Act 1947 in March 2020. This section provides that the Minister for Health may make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19. These may include restrictions on travel, the prohibition of events, different safeguards, and some restrictions can be classified as penal provisions.⁷⁷ Additional legislation has also provided for enforcement measures.⁷⁸

From 20 March until 8 April 2020, AGS only had recourse to the first 3 Es in respect of Covid-19 restrictions. ICCL welcomed the AGS community policing approach based on the first 3 Es, urging for it to continue when the regulations carrying criminal sanctions for breach of restrictions were introduced.⁷⁹ ICCL noted that during this period, the Gardaí had “managed successfully without recourse to criminal sanctions, indicating perhaps that there is no need for these regulations.”⁸⁰

(i) Introduction of enforcement powers

The Minister for Health published the first set of Covid-19 regulations on 8 April 2020, which granted the AGS powers to enforce compliance with Government restrictions on movement and events. The five powers under the relevant legislation are to:

- Direct a person to comply with the regulations⁸¹

- Arrest without warrant for failure to comply with such a direction⁸²
- Demand a person’s name and address⁸³
- Arrest without warrant for failure to comply with the demand for name and address⁸⁴
- Arrest without warrant for failure to comply with the regulations.⁸⁵

A key action underpinning the pandemic response should be an ongoing human rights impact assessment. ICCL has repeatedly called for this, including in relation to the establishment and exercise of enforcement powers. In April 2020, ICCL called on the Government and AGS to “carry out a human rights audit before any new extension of the powers is announced. This audit should determine whether all measures meet the necessity and proportionality requirements to restrict fundamental human rights.”⁸⁶ Unfortunately, despite repeated calls, no audit has taken place to date.

ICCL has repeatedly called for the removal of the extraordinary police powers.⁸⁷ The nature of the expansion of police powers over a variety of areas, including inspection and enforcement, combined with poor communication on each set of new regulations and laws, has made it difficult for the public to follow what precise powers have been expanded. ICCL has summarised the main change in police powers below in relation to four areas: penal provisions, pubs, fixed penalty provisions, and dwelling event provisions.

"ICCL has repeatedly called for the removal of the extraordinary police powers. The nature of the expansion of police powers over a variety of areas, including inspection and enforcement, combined with poor communication on each set of new regulations and laws, has made it difficult for the public to follow what precise powers have been expanded."

⁷⁷ Health Act 1947, s.31A.

⁷⁸ Criminal Justice (Enforcement Powers) (Covid-19) Act 2020; Health (Amendment) Act 2020; Health (Amendment) Act 2021.

⁷⁹ ICCL, *Extraordinary police powers should not be used*, 8 April 2020.

⁸⁰ ICCL, *Extraordinary police powers should not be used*, 8 April 2020.

⁸¹ Health Act 1947, s. 32A(7).

⁸² Health Act 1947, s. 31A(8).

⁸³ Health Act 1947, s. 31A(9).

⁸⁴ Health Act 1947, s. 31A(11).

⁸⁵ Health Act 1947, s. 31A(11) and associated regulations.

⁸⁶ ICCL, *Monitoring rights during the pandemic 4-10 April 2020*, April 2020.

⁸⁷ ICCL, *Monitoring rights during the pandemic 9-15 May 2020*, May 2020.

Penal provisions

The regulations have introduced different penal provisions, such as for leaving your place of residence without reasonable excuse⁸⁸, non-compliance with passenger locator form requirements for international passengers⁸⁹, and organising events.⁹⁰ The breach of a penal provision is a criminal offence.⁹¹ From 20 March 2020 to 25 October 2020, this was punishable by a fine of up to €2500 and/or up to six months imprisonment.⁹² The Health (Amendment) Act 2020 amended this to provide for graduated penalties depending on whether it is a person's first offence (fine up to €1000 and/or up to 1 month imprisonment), second offence (fine up to €1500 and/or up to 3 months imprisonment), or third or subsequent offence (fine of up to €2500 and/or up to six months imprisonment).⁹³ However, a court may impose the maximum penalty regardless of whether it is a person's first or second offence if it determines that there were aggravating circumstances, such as the refusal to comply with directions of a Garda and the degree of danger to public health occasioned by the offence.⁹⁴

Pubs and clubs

The Criminal Justice (Enforcement Powers) (Covid-19) Act 2020 introduced additional enforcement powers in respect of premises where intoxicating liquor is sold or supplied for consumption on the premises (pubs and clubs).⁹⁵ This includes the power to enter and inspect a premises without a warrant,⁹⁶ issue immediate closure orders for failure or refusal to comply with directions,⁹⁷ and apply for emergency closure orders from the District Court.⁹⁸

Fixed penalty provisions

The Health (Amendment) Act 2020 provides that the Minister for Health may make regulations prescribing penal provisions to be fixed penalty provisions.⁹⁹ Regulations providing for fixed penalty provisions came into operation on 22 November 2020.¹⁰⁰ Fixed penalty provisions were initially provided for the following offences: non-compliance with a request to wear a face covering on public transport (€80), leaving one's place of residence without a reasonable excuse (€100), and organising an event for social or recreational reasons in a dwelling other than in specific circumstances (€500).¹⁰¹

These regulations changed on 30 November 2020¹⁰². The provision requiring individuals to not leave their place of residence was amended to not travel from one's county of residence without reasonable excuse.¹⁰³ Additional fixed penalty provisions came into operation on 18 December 2020.¹⁰⁴ These included that a person shall not, without reasonable excuse, use or travel by a public service vehicle without wearing a face covering and that a worker in a relevant premises shall not, without reasonable excuse, prepare or service food or beverages for consumption on the premises without a face covering.¹⁰⁵ The regulations were again amended on 23 and 30 December 2020 to correspond with the updated main regulations.¹⁰⁶

An additional fixed penalty provision providing that a person shall not leave their place of residence to go to an airport or port for the purpose of leaving the State without reasonable excuse came into operation on 1 February 2021.¹⁰⁷ This carried a fine of €500.¹⁰⁸

⁸⁸ [SI No. 121 of 2020, reg. 4.](#)

⁸⁹ [SI No. 181 of 2020, reg. 5.](#)

⁹⁰ [SI No. 234 of 2020, reg. 5.](#)

⁹¹ Health Act 1947, s.31A(6).

⁹² Health Act 1947, s.31A(12).

⁹³ Health Act 1947, s.31A(12)(a).

⁹⁴ Health Act 1947, s.31A(12)(b).

⁹⁵ Criminal Justice (Enforcement Powers) (Covid-19) Act 2020, ss. 3, 4.

⁹⁶ Criminal Justice (Enforcement Powers) (Covid-19) Act 2020, s. 3.

⁹⁷ Criminal Justice (Enforcement Powers) (Covid-19) Act 2020, s. 4.

⁹⁸ Criminal Justice (Enforcement Powers) (Covid-19) Act 2020, s. 5.

⁹⁹ Health Act 1947, s. 31A(6C).

¹⁰⁰ [SI No. 536 of 2020](#) (Health Act 1947 (Fixed Payment Notice and Dwelling Event Provisions) Covid-19 Regulations 2020).

¹⁰¹ [SI No. 536 of 2020](#) (Health Act 1947 (Fixed Payment Notice and Dwelling Event Provisions) Covid-19 Regulations 2020), Schedule 1.

¹⁰² [SI No. 562 of 2020](#) (Health Act 1947 (Fixed Payment Notice and Dwelling Event Provisions) Covid-19 (Amendment) Regulations 2020).

¹⁰³ [SI No. 562 of 2020](#), reg. 2.

¹⁰⁴ [SI No. 652 of 2020.](#)

¹⁰⁵ [SI No. 652 of 2020](#), reg. 2.

¹⁰⁶ [SI No. 697 of 2020](#); [SI No. 703 of 2020.](#)

¹⁰⁷ [SI No. 29 of 2021](#), reg. 4(A)(1).

¹⁰⁸ [SI No. 30 of 2021.](#)

"We note once again our firm and ongoing opposition to all of these provisions, and we have repeatedly called on Government to heed advice from behavioural scientists that say communication and encouragement lead to better results than punishment."

The Government then announced its intention to increase the amount of fines from €500 to €2000 as there was a sense, expressed in the national media, that €500 was "not a sufficient disincentive to travel abroad."¹⁰⁹ However, section 31A of the Health Act 1947, amended by the Health (Amendment) Act 2020, provided that the maximum amount a Minister may set for a fixed payment notice was €500. In light of this, the Government passed new legislation, the Health (Amendment) Act 2021, in order to allow for higher fines: up to €4000 for the first offence, €4500 for the second offence, and €5000 for a third or subsequent offence. The current prohibition of travel to a port or airport without reasonable excuse, introduced on 10 May 2021, constitutes a fixed penalty provision, carrying a fine of up to €2000.¹¹⁰

Dwelling event provisions

The Health (Amendment) Act 2020 provides that the Minister for Health may make regulations making certain dwelling event provisions penal provisions.¹¹¹ It provides for extensive powers for Gardaí to direct a person to immediately leave the place and vicinity if the Gardaí suspect, with reasonable cause, that the person intends to, are about to, or are attempting to, enter a dwelling in contravention of a dwelling event provision.¹¹² Further, a Garda may direct the occupier of a dwelling to require and cause all persons attending the event to immediately leave if they suspect, with reasonable cause, that an event in contravention of a dwelling event provision is taking place.¹¹³ In order to carry out giving a direction, a Garda may wait at the main entrance of a dwelling and require the occupier to provide the member with

their name.¹¹⁴ It is an offence to fail to comply with a direction given by a Garda, without reasonable excuse, which is punishable by a fine of up to €1000 and/or imprisonment of up to one month. Regulations providing for dwelling event provisions came into operation on 22 November 2020.¹¹⁵

We note once again our firm and ongoing opposition to all of these provisions, and we have repeatedly called on Government to heed advice from behavioural scientists that say communication and encouragement lead to better results than punishment.

In August 2020, there were media reports that the Government intended to confer additional powers to AGS to enforce public health guidelines, including by potentially entering a dwelling house without consent.¹¹⁶ ICCL successfully opposed the introduction of such legislative measures as it would have had far-reaching implications for different human rights, including the right to respect for family and private life.¹¹⁷ This legislation was ultimately not introduced.

The proposal of further legislative powers for AGS demonstrated that the Government's response to an increase in Covid-19 cases relied on a criminal justice strategy. However, as ICCL pointed out at the time, the surge in cases was linked to outbreaks in congregated settings and we consider the priority should have been to take targeted action to address this issue.¹¹⁸ ICCL has repeatedly called for the enforcement of public health advice by consent and cooperation, rather than by criminal law. We advocate a return to policing by consent, which we consider was effective at the onset of the pandemic.¹¹⁹

¹⁰⁹ Tommy Meskill, *Plans to increase international travel fine to €2000*, RTE, 10 February 2021.

¹¹⁰ *SI No. 217 of 2021; SI No. 219 of 2021.*

¹¹¹ Health Act 1947, S.31A(6)(D).

¹¹² Health Act 1947, S. 31(D)(1).

¹¹³ Health Act 1947, S. 31(D)(2).

¹¹⁴ Health Act 1947, S. 31(D)(3).

¹¹⁵ *SI No. 536 of 2020* (Health Act 1947 (Fixed Payment Notice and Dwelling Event Provisions) Covid-19 Regulations 2020).

¹¹⁶ ICCL, *Monitoring rights during the pandemic 22-28 August 2020*, 2020.

¹¹⁷ ICCL, *Monitoring rights during the pandemic 22-28 August 2020*, 2020.

¹¹⁸ ICCL, *Monitoring rights during the pandemic, 22-28 August 2020*, 2020.

¹¹⁹ ICCL, *Garda powers are unworkable and must be ended*, 4 June 2020.

(ii) Exercise of enforcement powers and coercive practices

The Health (Amendment) Act 2021 provided for fixed penalty notices (fines) for breaches of many of the restrictions. The Act initially provided for fines of up to €500 but was later amended to allow for on the spot fines of up to €2000. This significantly changed the enforcement landscape given that prior to this Act a person could only be punished for breaching the Covid-19 restrictions after a decision by the DPP to pursue the case to a criminal trial. ICCL questioned the necessity or effectiveness of introducing on the spot fines. We also noted the opposition to the introduction of fines from the Garda Commissioner who raised civil liberty concerns related to the introduction of fines and defined such an approach as “authoritarian and draconian”.¹²⁰ The Commissioner also emphasised to the Policing Authority in September 2020 “the importance of maintaining a positive relationship with the public and of adhering to the approach of engaging, educating and encouraging, with enforcement as a last resort.”¹²¹ The introduction and imposition of fines by AGS is explored in more detail in the section below on policing in a pandemic.

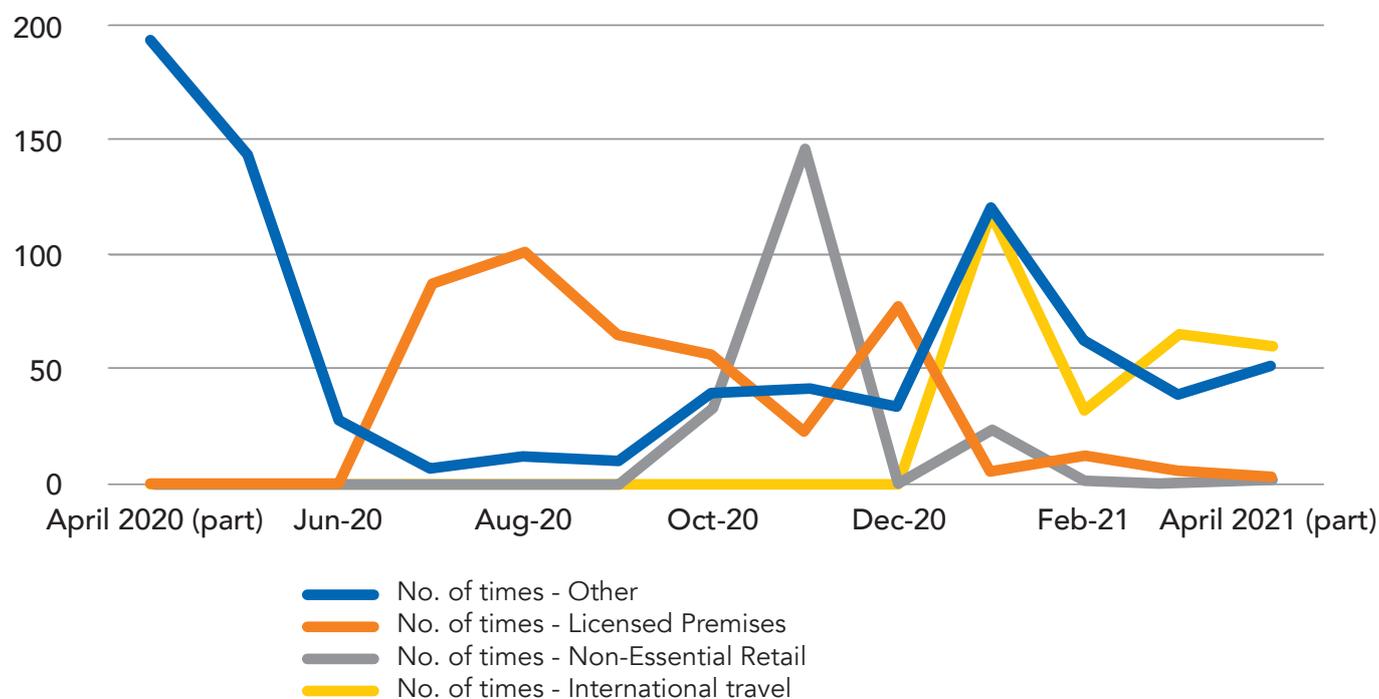
After significant campaigning by ICCL in August 2020,

proposals to allow Gardaí to enter homes without the consent of the owner in order to break up parties were ultimately dropped. These raised significant concerns about privacy and family life and the constitutional protection of the home.

ICCL expressed particular concern at the designation of the ‘dwelling event provisions’ as penal provisions by the Health Amendment Act. This Act empowered Gardaí to issue directions to people they believed were on their way to a house party to leave the area. Gardaí are empowered to stand at a door of a home if they believe a gathering is taking place within the home and direct the occupier to cause everyone attending the event to leave. Failure to comply with a direction of a Garda, without reasonable excuse, is a criminal offence punishable by a fine of up to €1,000 and/or imprisonment of up to one month. ICCL expressed concern that policing at or around dwellings may constitute a disproportionate interference with the constitutional protections of the home.

AGS has regularly reported the amount of times enforcement powers were used to the Policing Authority, for example see Figure 1. In 2021, as of 19 April 2021, the emergency powers were used in 602 incidents.¹²²

FIGURE 1: Number of times powers under the Covid Regulations (excluding fines) were used per month from 8 April 2020 to 10 April 2021, as reported by the Policing Authority¹²³



¹²⁰ *Mixed Garda Reaction to Fines Plan for Covid-19 Breaches, Irish Examiner, 13 October 2020*

¹²¹ *Minutes of Meeting of Policing Authority, 30 September 2020.*

¹²² Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 19 April 2021, p. 6.

¹²³ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 19 April 2021, p. 7.

2021 saw a sharp increase in the use of enforcement powers. For example, in January 2021, there were 207 incidents where non-fine related enforcement powers were used. This is higher than the previous peak in April 2020, when the enforcement powers were used 193 times.¹²⁴ In addition, a huge number of fines - 20,242 as of 15 April 2021 - have been issued in 2021.¹²⁵

This increase of enforcement reflects the view of AGS that *“for certain offences, a point has been reached where the first three “E’s” are no longer considered as effective in preventing certain behaviours which present a public health risk.”*¹²⁶ ICCL would question this view. We have expressed concern that the shift in emphasis to punishment by Government can be seen as an attempt to deflect from the real issues that need to be tackled and are perhaps more of a sign of a political system running out of ideas and seeking targets to blame.¹²⁷

We also note the Policing Authority’s concern that *“Greater levels of enforcement have the capacity to change the nature of the relationship between the Garda Síochána and the public which up to now has been very positive.”*¹²⁸

Since their introduction, ICCL has called for fines to be issued as a last resort and sparingly. As we highlighted in September 2020, *“fines are not only expensive to administer but are also discriminatory as they disproportionately penalise people who cannot afford them.”*¹²⁹ A key problem with this power is the degree to which AGS is required to exercise discretion. The list of ‘reasonable excuses’ in each set of regulations is non-exhaustive, affording discretion to Gardaí in assessing whether an excuse can be considered ‘reasonable’. ICCL considers that this affords overly wide discretion to individual Gardaí and potentially contravenes the requirement of certainty and foreseeability in criminal law.

As noted in the first section of this report, in our view, the confusion around which rules people are legally required to follow and which rules people are advised

to follow has led to inconsistent policing. At the same time, we recognise that there has been a lack of clarity around the restrictions throughout the Government response, which makes enforcing them more difficult. Of particular note is the application of a 5km (earlier 2km) limit to the pursuit of exercise. This was generally understood as applying to all activity but in fact there was no geographical limit to obtaining essential goods and services. As the Policing Authority noted *“the changing character of the regulatory framework, the wide set of exemptions and the sometimes subtle changes can mean that there are comparatively few who have a comprehensive sense of what is lawful and what is precluded.”*¹³⁰

ICCL also expressed concern about the removal of a key safeguard when fixed penalty notices were introduced. When punishment required prosecution, there was a public interest test applied to the decision to prosecute as applied by the DPP. Fixed penalty notices removed this requirement of the public interest test by the DPP and appears to have led to a much wider punishment and enforcement policy, as can be seen in the widespread use of fines since their introduction.

Since the introduction of fines, ICCL has consistently advocated for a policy of enforcement based on clear communication, positive encouragement, and the provision of supports rather than fines.¹³¹ The risk of inconsistent policing and over policing of certain populations has been and continues to be high in Covid-19 policing and is borne out by the fact that up to the 15 April 2021, the majority of fines have been issued to males (75%) and those aged 18 to 25 (53%).¹³²

3.3 Policing practices of concern from a human rights perspective

ICCL raised concerns about a number of specific policing practices during the Covid-19 response from a human rights perspective. These include the introduction and use of spit hoods and reports of inconsistent policing.

¹²⁴ Operation Navigation is the policing operation on licensed premises which are in breach of Covid-19 regulations and Operation Treoraim is the policing operation on retail premises which are trading non-essential items in breach of Covid-19 regulations. Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 19 April 2021, p. 7.

¹²⁵ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 19 April 2021, p. 3.

¹²⁶ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 18 February 2021, p. 10.

¹²⁷ Liam Herrick, *Covid Strategy Needs More Carrot and Less Stick*, *Irish Examiner*, 16 February 2021.

¹²⁸ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 18 February 2021, p. 10.

¹²⁹ ICCL, *Monitoring rights during the pandemic, 3-9 October 2020*, 2020.

¹³⁰ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 19 April 2021, p. i.

¹³¹ ICCL, *Monitoring rights during the pandemic*, 2021.

¹³² Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 15 March 2021, p. 4; Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 19 April 2021, p. 5.

(i) Use of spit hoods¹³³

AGS ordered 16,000 spit hoods in March 2020 for use by members of the AGS against individuals during policing operations.¹³⁴ Spit hoods are full mesh hoods used to cover the entire head and neck of a person. They were ostensibly introduced to prevent transmission of disease, though there is no good evidence that they do so.¹³⁵ In fact, AGS are using the same model of spit hoods as the PSNI, which the manufacturer described as “not an effective means to prevent Covid-19.”¹³⁶

ICCL immediately raised concerns about the human rights impact of the use of spit hoods in a letter sent to the Garda Commissioner in March 2020. In particular we identified the risk that their use could constitute inhuman or degrading treatment or punishment.¹³⁷ In a second letter to the Garda Commissioner in April 2020, we cited the risk of serious injuries and repeated our concern that their use may constitute inhuman or degrading treatment.¹³⁸ ICCL has continued to reiterate its opposition to spit hoods,¹³⁹ including through further letters to the Garda Commissioner,¹⁴⁰ other actors,¹⁴¹ and press releases calling for an end to their use, including with the Children’s Rights Alliance.¹⁴²

AGS first deployed a spit hood against a person on 13 April 2020. In April 2020, the Policing Authority

highlighted a lack of clarity on their use, particularly in relation children aged 12 and over.¹⁴³ Since April 2020, AGS has provided detailed reporting to the Policing Authority on each case where a spit hood is used.¹⁴⁴ As of April 2021, spit hoods had been used in 134 incidents.¹⁴⁵

AGS commenced an evaluation of the use and management of spit hoods in September 2020. ICCL made a submission to this evaluation, highlighting its opposition to the use of spit hoods at any time and urging AGS to discontinue their use.¹⁴⁶ The status of this evaluation has not been distributed publicly as of May 2021. We have repeatedly called for this review to be made public. The Policing Authority reported in April 2021 that the evaluation’s findings did not clearly State whether spit hoods had been effective or if they should be retained.¹⁴⁷

There are key concerns in relation to the disproportionate use of spit hoods on particular groups and on vulnerable individuals. For example, in March 2020, Daniel Prude, a Black man with mental health issues, died after a spit hood was used on him in the USA.¹⁴⁸

In Ireland, in the majority of cases, spit hoods have been used on males between the ages of 18-44.¹⁴⁹ There have been cases where a spit hood has been used on those under 18 and a significant number of

"ICCL is completely opposed to the use of spit hoods at any time and urges An Garda Síochána to discontinue their use."

¹³³ ICCL adopts the term spit hood as it reflects that the device is a restraining device and believes that the use of the term “anti-spit guard” is misleading as it gives the false impression that a spit hood is a piece of PPE equipment. See, ICCL, *Monitoring rights during the pandemic, 29 August-4 September 2020*, 2020.

¹³⁴ Stephen McDermott, *Gardai to use ‘spit hoods’ on suspects to protect force from coronavirus*, The Journal, 26 March 2020; Conor Gallagher, *Coronavirus: Gardai to receive controversial ‘spit hoods’ during crisis*, The Irish Times, 25 March 2020.

¹³⁵ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 11 September 2020, p. 8. The Policing Authority highlighted how AGS are using the same model of spit hoods as the PSNI, which the manufacturer described as “not an effective means to prevent Covid-19.” The Policing Authority contacted the distributors directly, who stated that they “have not been tested for their capacity to prevent airborne or respiratory droplets which spread Covid-19.”

¹³⁶ Ibid

¹³⁷ ICCL, *Letter to the Garda Commissioner re Spit Hoods on 30 March 2020*, 2020.

¹³⁸ ICCL, *Letter to the Garda Commissioner on 27 April 2020*, 2020.

¹³⁹ ICCL, *Monitoring rights during the pandemic, 9-15 May 2020*, 2020.

¹⁴⁰ ICCL, *Monitoring rights during the pandemic, 20-26 June 2020*, 2020.

¹⁴¹ ICCL, *Monitoring rights during the pandemic, 22-28 August 2020*, 2020.

¹⁴² ICCL, *Monitoring rights during the pandemic, 12-18 September 2020*, 2020.

¹⁴³ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 20 April

¹⁴⁴ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 6 May 2020, p. 11.

¹⁴⁵ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 19 April 2021, p. 16.

¹⁴⁶ ICCL, *ICCL Submission to AGS re Spit Hoods*, 26 August 2020, p.1.

¹⁴⁷ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 19 April 2021, p. 16.

¹⁴⁸ Associated Press, *Daniel Prude: police officers suspended after death of Black man in spit hood*, The Guardian, 3 September 2020.

¹⁴⁹ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 25 June 2020, p. 15.

uses on people where there were signs of a mental health issue.¹⁵⁰ In both these instances, one case is one too many. The Policing Authority has raised concerns about the reporting of the use of spit hoods, as the possibility of learning difficulties, medical assistance, and length of time the hood remained in place were not always specified.¹⁵¹

ICCL is completely opposed to the use of spit hoods at any time and urges AGS to discontinue their use. Hooding has long been considered by human rights bodies as a form of cruel, inhuman and degrading treatment or punishment, and, when other factors are present such as sensory deprivation are present, a form of torture. ICCL is concerned that spit hoods are being used without any sound evidential base that they are necessary, effective or proportionate to the stated aims outlined by police forces here and in other jurisdictions.

The function of police is to protect people. AGS has a statutory obligation to ensure all of its policing practices and policies conform with human rights law and policies.¹⁵² In this context, any new kit should be subject to a human rights assessment before it is rolled out. If it does not meet human rights standards, it should not be introduced.

(ii) Need for further data on policing

The Policing Authority has highlighted the need for further data to examine the reach and impact of the policing response, including the use of enforcement powers. AGS has not provided breakdowns of which of the specific enforcement powers was used in a given incident.¹⁵³ The Policing Authority has consistently requested this information but to date it has not been provided.¹⁵⁴ They noted their *“concern in relation to an inability of the Garda Síochána to proactively anticipate and communicate why certain data and information will be needed to transparently inform good stewardship, governance and accountability. It also suggests that there may be a gap in the planning for operations through a human*

*rights lens from the outset.”*¹⁵⁵ From the outset of the pandemic, ICCL has also requested information on the policing of the Covid-19 response and the use of the different enforcement powers and recommended that disaggregated data must be collected and published.¹⁵⁶

There is also a need for further data about the impact of the policing response on different groups, in particular the need for information regarding policing of different ethnic groups.¹⁵⁷ IHREC and the Policing Authority have previously recommended that the Garda Commissioner take steps to ensure that disaggregated data is collected on the exercise of all enforcement powers on the basis of prohibited grounds of discrimination under the Equal Status Acts 2000-2015, which includes race.¹⁵⁸ The Policing Authority has advocated for the recording of ethnicity of those who have interactions with the police, including in relation to the use of spit hoods. However, as of May 2021, this information has not been recorded and shared publicly.

Prior to the Covid-19 pandemic, there were reports of the over-policing of certain groups in Ireland. For example, in 2019, the UN Committee on the Elimination of Racial Discrimination highlighted its concerns *“about the reportedly high incidence of racial profiling by the Irish police (Garda) targeted at people of African descent, Travellers and Roma, and the disproportionately high representation of these ethnic minority groups in the prison system.”*¹⁵⁹ The lack of disaggregated data on the use of Covid-19 related enforcement powers makes it extremely difficult to assess whether they have been used proportionately or consistently.

ICCL has raised other concerns about worrying practices by members of AGS. In the first months of the pandemic response, we received complaints from members of the public about invasive stop and searches beyond the new powers, including searches of shopping bags; we received complaints that individuals were being asked for ID with no legal basis

¹⁵⁰ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 11 September 2020, p. 8; Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 9 October 2020, p.8; Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 15 March 2021, pp. 14-15.

¹⁵¹ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 25 June 2020, p. 15.

¹⁵² *Garda Síochána Act 2005*, s. 7; *Irish Human Rights and Equality Commission Act 2014*, s. 42; *European Convention on Human Rights Act 2003*, s. 3.

¹⁵³ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 20 May 2020, p. 13.

¹⁵⁴ See e.g. Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 20 May 2020, p. 13.

¹⁵⁵ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 20 May 2020, pp. 13, 14.

¹⁵⁶ ICCL, *Letter to Garda Commissioner*, 27 April 2020.

¹⁵⁷ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 6 May 2020, p. 9.

¹⁵⁸ IHREC, *Ireland's Emergency Powers during the Covid-19 Pandemic*, 2021, p. ix.

¹⁵⁹ UN Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined fifth to ninth reports of Ireland*, 23 January 2020, CERD/C/IRL/CO/5-9, para. 15.

and we received reports from concerned citizens about the deployment of armed Gardaí at Covid checkpoints. ICCL wrote to the Garda Commissioner highlighting these concerns and requesting further information on the use of these enforcement measures in April 2020 but we did not receive detailed data in response.¹⁶⁰

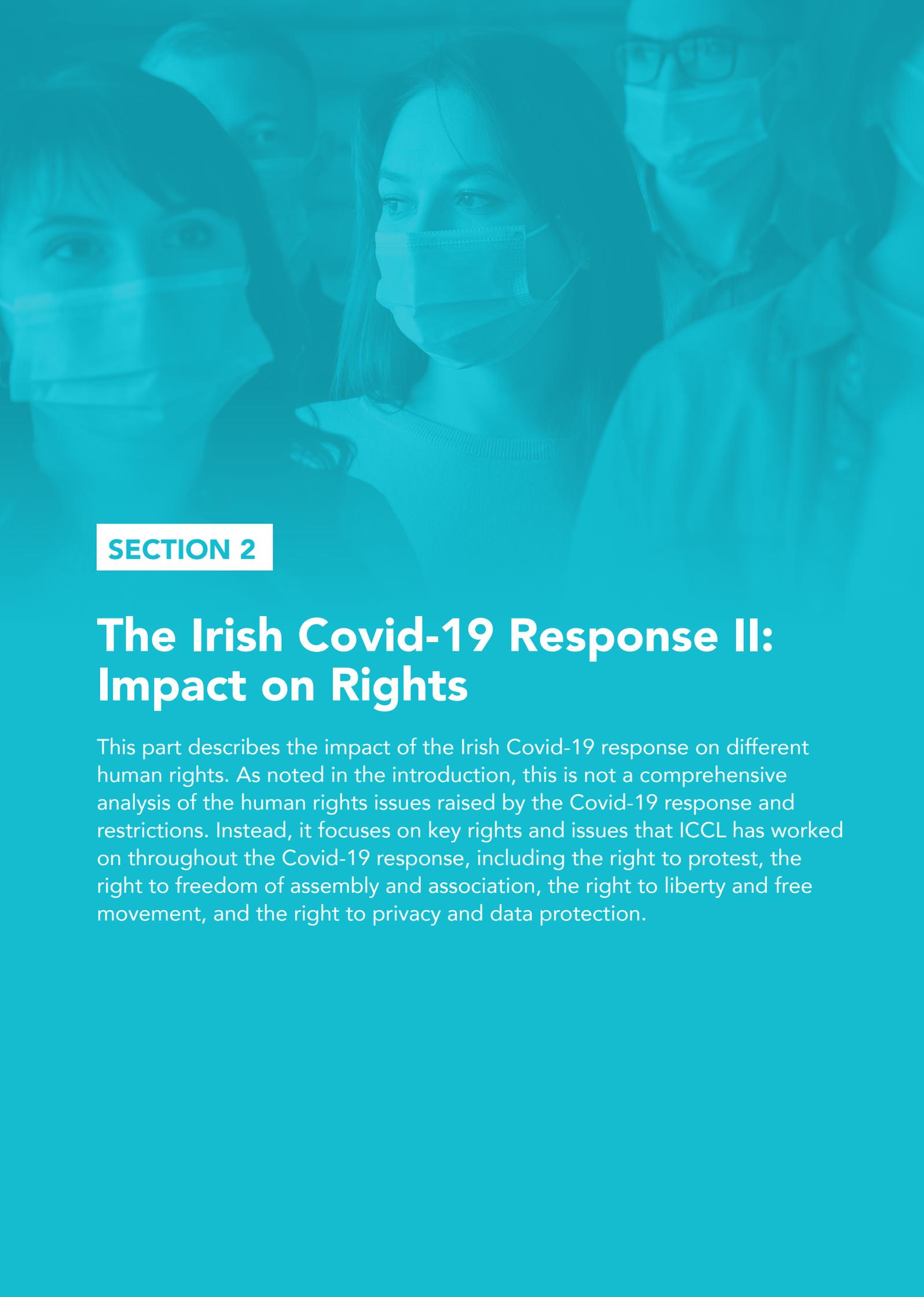
In June 2020, the Policing Authority highlighted that for children and young people, policing during Covid-19 is experienced as an “*instrument of control rather than an instrument of care.*”¹⁶¹ More recently, available data indicates that young men are the main recipients of fixed penalty notices which raises underlying concerns about inconsistency in policing.

3.4 Recommendations

FOR AGS:	
1.	Prioritise a community-based policing approach to enforcing Emergency Regulations and only use coercive measures, such as issuing fines or referral to the DPP, as a last resort. Apply a high threshold to non-compliance such as flagrant, repeated breaches of the penal provisions within the Regulations.
2.	Immediately end the use of spit hoods, which potentially violate the absolute right not to be tortured or subjected to inhuman or degrading treatment or punishment.
3.	Record the use of enforcement powers and publish disaggregated data on all policing encounters in the context of enforcing the Emergency Regulations.
4.	Publish detailed guidelines on how it is approaching all policing operations related to enforcing the Emergency Regulations, including inspections, checkpoints, issuing fines and referrals to the DPP.

¹⁶⁰ ICCL, *Letter to Garda Commissioner, 27 April 2020*, 2020.

¹⁶¹ Policing Authority, *Report on the Policing Performance by the Garda Síochána in relation to Covid-19 regulations*, 25 June 2020, p. 11.



SECTION 2

The Irish Covid-19 Response II: Impact on Rights

This part describes the impact of the Irish Covid-19 response on different human rights. As noted in the introduction, this is not a comprehensive analysis of the human rights issues raised by the Covid-19 response and restrictions. Instead, it focuses on key rights and issues that ICCL has worked on throughout the Covid-19 response, including the right to protest, the right to freedom of assembly and association, the right to liberty and free movement, and the right to privacy and data protection.

4

IMPACT OF THE COVID-19 RESPONSE ON THE RIGHT TO PROTEST

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



4. Impact of Covid-19 response on the right to protest

4.1 Legal framework – Right to protest

A particular focus of ICCL advocacy over the past year has been the right to protest, given its fundamental importance to democracy, including in emergencies. The pandemic and the Government's response have seen ordinary lives impacted in a range of ways: people have lost jobs, sometimes with little or no notice; families have been separated and bereaved; and social events and occasions that give meaning to our lives have been highly restricted and, at times, banned.

In a democracy, people have the right to express their views, peacefully protest against decisions, and gather together in public to do so. This is fundamental to the freedoms that lie at the heart of democracy. Numerous human rights bodies have confirmed that States have a duty to facilitate protest, as well as the importance of this right to a functioning, democratic society.¹⁶² The UN Special Rapporteur on Freedom of Assembly and Association has noted that:

“The right to freedom of peaceful assembly is an essential tool through which individuals and groups can make known their views to those governing them, in order to shape public policies and decisions affecting society as a whole. It provides those in Government with a barometer that can assist them to calibrate and adjust their policies and decisions.”¹⁶³

The right to protest is protected by the Constitution, the ECHR, the Charter of Fundamental Rights of the European Union (ECFR) and the ICCPR through the rights to freedom of assembly, freedom of expression and freedom of association.¹⁶⁴ Other

rights that are relevant to protest include the right to non-discrimination, the right to freedom of thought, conscience and belief and, when force is used to suppress protest, the right to life and the right not to be subjected to ill treatment. Where protesters are subject to police surveillance, the right to privacy also takes on particular importance.

4.2 Impact of the restrictions on the right to protest

These rights can be limited in a proportionate manner to protect public health. ICCL recognised that large gatherings of people during a pandemic placed public health at risk and restrictions on large protests were necessary. However, given the fundamental importance of the right, ICCL consistently called on the Government to include small, safe protest as a reasonable excuse in the Emergency Health regulations with clear guidelines on how people could exercise their right to protest in a pandemic-safe manner.¹⁶⁵ Despite some support for this proposal expressed by senior Government ministers in meetings with ICCL, protest was not included as an exception to the general restrictions on events at any level.

This is of concern not just because of the importance of respecting the right but also because of the inconsistent policing of protests caused by the lack of clarity on what was permissible. The absence of a clear, publicly available AGS policy on policing protest during the pandemic was noteworthy and likely hindered a consistent approach.

It is likely that the apparent blanket ban on protest at times during the past fourteen months was a disproportionate interference with the right to protest. Constitutional courts in other jurisdictions subject to the ECHR, such as Germany,¹⁶⁶ found that a blanket ban on protest during the pandemic was unconstitutional and directed that guidelines on small, safe protests should be issued by relevant public bodies.¹⁶⁷

¹⁶² See European Court of Human Rights, *Guide to Article 11, Freedom of Assembly and Association*, updated December 2020. For the scope of the right to protest, see also UN Human Rights Committee, *General Comment 37 on article 21 Right of Peaceful Assembly*, 23 July 2020, CCPR/C/GC/37

¹⁶³ *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association to the Human Rights Council*, July 2018, A/HRC/38/34, para. 39.

¹⁶⁴ The European Court of Human Rights has stressed the close symbiotic link between the Article 10 and 11 ECHR freedom of expression and freedom of assembly protections. Peaceful political protests are constitutionally protected pursuant to the *Article 40.6.1* The Irish Constitution guarantees to freedom of expression and assembly “It is quite clear that persons who assemble peacefully on the public highway [to protest] are prima facie entitled to the benefit of the constitutional guarantee” – *Francis Hyland v. Dundalk Racing* [2014] IEHC 60 at para. 76. per Hogan J. see also: *The People (DPP) v. Kehoe* [1983] I.R. 136, 139 per McCarthy J.

¹⁶⁵ ICCL, *ICCL calls on Government to respect rights to protest, worship and family life*, 29 March 2021.

¹⁶⁶ See for example, Joseph Nasr, *Germans have right to protest during coronavirus pandemic: court*, 16 April 2020.

¹⁶⁷ For more on the right to protest in a pandemic see for example, ECNL, *Protest in a time of pandemic*, 2020; INCLO, *Protesting during a pandemic: State responses during Covid-19*, April 2021.

ICCL is concerned at reports that a number of protest organisers are being investigated and prosecuted for breach of Covid-19 Regulations.¹⁶⁸ UN human rights experts have strongly advocated against the criminalisation of peaceful protesters.¹⁶⁹

Protest and Policing

Gardaí appear to have interpreted the restrictions relating to events in the Emergency Regulations as applicable to protests. Each set of regulations has put limits on indoor and outdoor gatherings. Under the most stringent restrictions, no events, outside a list of prescribed activities, were permitted.¹⁷⁰ At lower levels of restrictions, up to 100 participants could gather together for an event outdoors.¹⁷¹ The 2020 regulations made organisers of events criminally liable but not participants. This situation changed in April 2021 when the Minister for Health signed regulations specifically criminalising attendance at an event beyond specified exemptions, including for work, education and to obtain services.¹⁷²

Gardaí have investigated organisers of protests for breaches of Covid-19 regulations and have passed files to the DPP for potential prosecution.¹⁷³ The Dublin City Joint Policing Committee were informed that the DPP have recommended some prosecutions of protest organisers and, as of March 2021 “some proceedings have begun”.¹⁷⁴ However, it is unclear what protest organisers have been investigated and prosecuted and on what basis.

ICCL believes that protests should not be considered on the same footing as other ‘events’ given that protesters are exercising a fundamental right protected

by law. We consider that prosecutions for exercising a fundamental right should never take place.

In any event, decisions by Gardaí to investigate protest organisers do not seem to have taken place on a consistent basis or in accordance with a clear and public decision-making framework. ICCL has identified clear differences in the policing of protest during the pandemic and much uncertainty among protest organisers as to what was and was not legal at different times, including at the time of writing.

A number of examples of what ICCL views as inconsistent policing of protests are examined below.

Dingle protests: Early in the pandemic, demonstrations by fishermen protesting incoming trawlers in Dingle were permitted by Gardaí who tolerated the protests while encouraging protesters to maintain social distancing and mask wearing.¹⁷⁵ ICCL considered that this was an example of a positive approach to policing protest in a pandemic.

Debenhams Workers’ Protests: In April 2020, Debenhams workers received notice that stores closed for the pandemic would never reopen. Workers held protests in response and have been protesting around the country outside Debenhams stores regularly since then. ICCL has noted a marked inconsistency in approach by Gardaí to the policing of these protests. Early protests held in Cork were monitored by Gardaí but were not dispersed.¹⁷⁶ These protests were, in fact, attended by the Lord Mayor Councillor of Cork to express solidarity.¹⁷⁷ The same week, Debenhams workers in Dublin who also wore masks and observed social distancing had their names taken by Gardaí,

"UN human rights experts have strongly advocated against the criminalisation of peaceful protesters."

¹⁶⁸ Conor Gallagher, *Gardaí investigate organisers of 38 Dublin protests so far this year*, Irish Times, 23 March 2021 and see Robin Schiller, *DPP directs prosecutions in relation to some of the 259 protests that have taken place in Dublin since start of pandemic*, Irish Independent, 26 January 2021.

¹⁶⁹ See eg *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association to the Human Rights Council*, July 2018, A/HRC/38/34, para. 39.

¹⁷⁰ SI No. 121 of 2020, reg. 5.

¹⁷¹ SI No. 352 of 2020, reg. 5.

¹⁷² SI No. 168 of 2020, reg. 10A as amended by SI No. 171 of 2021, reg. 2. Attendance at a dwelling event for ‘social or recreational purposes’ attracted a criminal penalty from 31 December 2020. See SI No. 701 of 2020, reg. 7.

¹⁷³ Conor Gallagher, *DPP to consider charges against protest organisers*, The Irish Times, 7 October 2020.

¹⁷⁴ Conor Gallagher, *Gardaí investigate organisers of 38 Dublin protests so far this year*, Irish Times, 23 March 2021; Robin Schiller, *DPP directs prosecutions in relation to some of the 259 protests that have taken place in Dublin since start of pandemic*, Irish Independent, 26 January 2021.

¹⁷⁵ Ralph Riegel, *Protests block Spanish and French trawlers from unloading their catch over virus fears*, Irish Independent, 24 March 2020; Seán Mac an tSithigh, *Blockade prevents fishing trawler landing catch at Dingle*, RTE, 20 April 2020; Dominic McGrath, *Dingle protesters stop Spanish trawler from landing at harbour, citing Covid-19 fears*, 20 April 2020.

¹⁷⁶ Sarah O’Dwyer, *‘Deplorable’ treatment: Strong support for Debenhams staff as they protest outside Cork stores*, Echolive, 21 April 2020.

¹⁷⁷ Sarah O’Dwyer, *‘Deplorable’ treatment: Strong support for Debenhams staff as they protest outside Cork stores*, Echolive, 21 April 2020.

were told to disperse, and in some instances were accompanied to public transport to ensure they went home.¹⁷⁸ ICCL expressed concern at the dispersal of protesters. We considered this a disproportionate interference with the right to protest given the small number of participants in attendance, all of whom were clearly making efforts to comply with public health guidelines.¹⁷⁹

More recently, reports that a picket line outside Debenhams in Waterford were forcibly broken up by Gardaí indicates that Gardaí may be taking a more interventionist approach.¹⁸⁰ ICCL notes that the Special Rapporteur on Freedom of Assembly and Association has urged States to “facilitate and protect peaceful assemblies, including through negotiation and mediation. Wherever possible, law enforcement authorities should not resort to force during peaceful assemblies”. ICCL considers any use of force by Gardaí against protesters highly concerning.

Black Lives Matter protests: Later in the summer of 2020, Black Lives Matter protests took place in Dublin and across the country.¹⁸¹ The level of solidarity and outpouring of emotion around the issue of racism in response to the protests occurring internationally was striking. Despite clear efforts at following the public health guidelines, Gardaí sought to disperse the protest and later reported that it was investigating organisers and sending a file to the DPP though ICCL now understands that the DPP has said no one from these particular protests will be prosecuted.¹⁸² In ICCL’s view threatening protest organisers with criminal sanctions was inappropriate. The organisers, according to media reports, had intended the protest to be small¹⁸³ and compliant with public guidelines but, unexpectedly, thousands took to the streets. The threat and use of criminal sanctions against protesters during the pandemic have been documented and severely criticised by numerous human rights advocates globally.¹⁸⁴

IPSC Protests: In May 2021, the Ireland Palestine Solidarity Campaign sought clarity from Gardaí as

to whether organisers of a socially distanced protest requiring all participants to wear masks in Dublin would be prosecuted. Gardaí explicitly stated that the Covid-19 Regulations permitted events of up to 15 people and anyone organising an event larger than that would be prosecuted. The organisers cancelled the protest as a result of this communication. ICCL expressed concern that the right to protest was not being protected in line with human rights law, which requires State actors to facilitate protest and demands that limits are demonstrably necessary and proportionate. We again called on Government to treat protests as a separate category to social or recreational events in the Covid-19 regulations and to issue clear guidelines on what could be considered “pandemic safe protests”.¹⁸⁵ While Gardaí have a certain amount of discretion under the current regulations in deciding how to police events, they do not now, nor have they ever had the power to either permit or prohibit peaceful protests.

Anti-lockdown protests: As the pandemic wore on, we saw growing protests by people opposed to the restrictions and expressing alternative scientific or conspiracy theories about the degree of the threat to public health posed by Covid-19. Many people condemned these protests because of the risk they posed to public health - very few participants wore masks and there seemed to be no efforts at social distancing. Others condemned the protests because of the ‘alternative facts’ they were propounding and because of reports that they were organised or heavily influenced by far-right elements in Ireland.

At first the Garda response was to try and stop the protests from happening. For example, when a protest was planned at Phoenix Park, the Gardaí closed the gates to prevent the gathering. Other anti-lockdown protests were allowed to go ahead, however, for example in Mayo.¹⁸⁶ Again we saw inconsistency in policing.

As these protests became a regular feature outside the GPO on a Saturday and then moved to Custom

¹⁷⁸ Kitty Holland and Barry Roche, *Debenhams workers protest ahead of consultation closing on Monday*, The Irish Times, 15 May 2020; Trevor Quinn, *Sacked Debenhams staff to protest outside Bank of Ireland branches across the country*, Dublin Live, 27 May 2020.

¹⁷⁹ Colin Gleeson, *Rights group wants protests to be permitted under Covid-19 laws*, The Irish Times, 24 April 2020.

¹⁸⁰ Eoghan Dalton, *Former Debenhams workers removed from blockade after 4-hour standoff*, The Examiner, 11 May 2020.

¹⁸¹ Micheál Ó Scannáil, *Gardaí investigating if Dublin Black Lives Matter solidarity protest breached lockdown restrictions*, Irish Independent, 2 June 2020; Jack Beresford, *Gardaí investigating potential lockdown rules breach at Dublin Black Lives Matter protest*, Irish Post, 3 June 2020.

¹⁸² Conor Lally, *Gardaí investigate Dublin Black Lives Matter protest over Covid-19 rule breach*, The Irish Times, 2 June 2020. Conor Lally, *Black Lives Matter protest organisers will not face prosecution*, The Irish Times, 19 May 2021.

¹⁸³ Conor Lally, *Why is there a criminal investigation into the Black Lives Matter Dublin protest?* The Irish Times, 3 June 2020.

¹⁸⁴ INCLO, *Protesting during a pandemic: State responses during Covid-19*, April 2021.

¹⁸⁵ Ronan Duffy, *Calls for facilitation of ‘peaceful protest’ as Dublin ‘Rally for Palestine’ is cancelled after garda advice*, The Journal, 13 May 2021

¹⁸⁶ *Anti-lockdown protest staged in Mayo*, Connaught Telegraph, 16 May 2020.

House Quay, Gardaí were present and monitoring but only intervened when violent clashes emerged between protesters and counter protesters. Some expressed concern directly to ICCL that the Gardaí used a far more heavy-handed approach against the counter protests than the main protests. Human rights bodies have made it abundantly clear that the duty on the State to facilitate protest extends to protecting counter protest.¹⁸⁷ Media reports indicate that Gardaí made the decision to investigate the organisers of anti-lockdown protests for a breach of the Covid-19 regulations and files were to be passed to the DPP.¹⁸⁸ While we know the DPP has decided to pursue some prosecutions of protest organisers, it is unclear who these prosecutions are against.

ICCL has been firm in our support for the right to protest throughout the pandemic. We believe small, pandemic-safe protests that make best efforts to comply with public health guidelines should be facilitated.

Whether Gardaí should have a greater role to play in policing protests that so flagrantly breached public health guidelines is an important question that could be addressed through clear Government guidelines for small, safe protests and through a differentiated approach to protest depending on the level of restrictions in place.

The inconsistency in the policing of protest exposes the lack of clarity and a degree of incoherence in the emergency regulations. On the one hand, since it was not expressly prohibited, we could say the constitutional right to protest was still protected. However, on a strict reading of the regulations, if protests are interpreted as an event, at times they were entirely banned and at other times they were severely restricted. Of note, however, is the fact that up until April 2021¹⁸⁹ the regulations only provided

criminal sanctions for organisers of events rather than for participants. So, arguably, participating in a protest was not banned until that point.

4.3 Recommendations

FOR GOVERNMENT:	
1.	Include small, safe protests as a reasonable excuse to organise and participate in an event.
2.	Issue guidelines to protest organisers and participants on how to organise and participate in a small, safe protest.

FOR AGS:	
3.	Develop and publish guidelines on how protests are policed during a pandemic to ensure transparency, consistency and a human rights compliant approach.

"ICCL has been firm in our support for the right to protest throughout the pandemic. We believe small, pandemic-safe protests that make best efforts to comply with public health guidelines should be facilitated."

¹⁸⁷ See European Court of Human Rights, *Guide to Article 11, Freedom of Assembly and Association*, updated December 2020. For the scope of the right to protest, see also UN Human Rights Committee, *General Comment 37 on article 21 Right of Peaceful Assembly*, 23 July 2020, CCPR/C/GC/37.

¹⁸⁸ Robin Schiller, *DPP directs prosecutions in relation to some of the 259 protests that have taken place in Dublin since the start of pandemic*, Irish Independent, 26 January 2021; Mark O'Brien and Robbie Kane, *Gardaí launch investigation into organisers of Dublin anti-lockdown protest*, *Dublinlive*, 2 May 2021.

¹⁸⁹ SI No. 168 of 2020, reg. 10A as amended by *SI No. 171 of 2021*, reg. 2 prohibits attendance at an event. Attendance at a dwelling event for 'social or recreational purposes' attracted a criminal penalty from 31 December 2020. See SI No. 701 of 2020, reg. 7.

5

IMPACT OF THE COVID-19 RESPONSE ON EVENTS AND GATHERINGS

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



5. Impact of Covid-19 response on events and gatherings

Covid-19 restrictions on events and gatherings have had a significant impact on a range of other human rights, in addition to the right to protest, including rights to freedom of assembly and association, the right to manifest one's religion or beliefs, and the right to respect for private and family life.

5.1 Legal framework – Right to religious freedom and right to respect for private and family life

The right to freedom of thought, conscience and religion is protected by the Irish Constitution,¹⁹⁰ Article 9 of the ECHR and other international human rights treaties.¹⁹¹ Article 9(2) protects the freedom to manifest one's religion or belief. While the right to hold religious or other beliefs can never be infringed upon, the right to manifest those beliefs can be restricted for a range of reasons. These reasons include public health, but, as emphasised throughout this report, those restrictions must be prescribed by law, and must be necessary and proportionate.

The right to respect for private and family life, home and correspondence is protected by Article 8 of the ECHR and other international human rights treaties.¹⁹² State interference with private life must be kept to an absolute minimum. However, similar to the right to manifest belief, this right can be restricted where those restrictions are necessary and proportionate. The Irish Constitution contains protections for the family and¹⁹³ outlines that *"the dwelling of every citizen is inviolable."*¹⁹⁴ The right to privacy has been recognised as an unenumerated constitutional right.¹⁹⁵

A comprehensive human rights analysis of the impact of Covid-19 restrictions on events, including artistic and cultural events, is beyond the scope of this report. However, a number of important developments, including court challenges to restrictions and a changing approach in the regulations, are highlighted and analysed, and we make several recommendations for the future.

5.2 Impact of restrictions on religious events and gatherings

As noted above, restrictions on events and gatherings have been a hallmark of the Government's response to the pandemic since the first set of Covid-19 related regulations in April 2020. This is in line with health advice and understandable given human transmission of the disease and the potential for significant transmission where large numbers of people gather together. Given this, it is likely that restrictions on large gatherings in general can be considered proportionate interferences with the relevant rights. However, each set of restrictions must be demonstrably connected to evidence that they are necessary and that they are the most minimal interference with rights possible to achieve that aim.

ICCL notes in particular that the Covid-19 restrictions have had a significant impact on the freedom to manifest religion or belief, despite exceptions for funerals and weddings. Initially, in April 2020, a person could only attend the funeral of a close family member or if they had lived in the same residence as the deceased person at the time of their death¹⁹⁶. However, this was recognised as too restrictive and was later expanded¹⁹⁷. This could be described as a recognition that the initial restrictions were disproportionate.

The numbers of people who can attend funerals have ranged from 6¹⁹⁸, 10¹⁹⁹, 25²⁰⁰ to 50²⁰¹ since

"ICCL notes in particular that the Covid-19 restrictions have had a significant impact on the freedom to manifest religion or belief, despite exceptions for funerals and weddings."

¹⁹⁰ Constitution of Ireland, Article 44.2.1°.

¹⁹¹ ICCPR, Article 18; CRC, Article 14; CRPD, Article 21.

¹⁹² ICCPR, Article 17; CRC, Article 16.

¹⁹³ Constitution of Ireland, Article 41.

¹⁹⁴ Constitution of Ireland, Article 40.5.

¹⁹⁵ Kennedy v. Ireland [1987] I.R. 587.

¹⁹⁶ [SI No. 121 of 2020](#)

¹⁹⁷ [SI No. 174 of 2020](#)

¹⁹⁸ [SI No. 295 of 2020](#)

¹⁹⁹ [SI No. 701 of 2020](#); [SI No. 168 of 2021](#)

²⁰⁰ [SI No. 352 of 2020](#); [SI No. 413 of 2020](#); [SI No. 442 of 2020](#)

²⁰¹ [SI No. 217 of 2021](#).

April 2020. Specific provisions in relation to wedding receptions emerged at the end of August 2020 when the maximum number of attendees was capped at 50 persons.²⁰² This number was later reduced to 25 persons and to 6 persons in specific counties and from specific dates.²⁰³

There have been no other specific exceptions to the ban or severe limitations on numbers for events in relation to other religious events or gatherings. Events that were prohibited or “relevant events” in the regulations were defined as events held or to be held, “for social, recreational, exercise, cultural, entertainment or community reasons.”²⁰⁴ It did not include events for religious reasons. This led to debate in the Oireachtas and in the media in November 2020 over whether a priest holding a religious service would be breaching restrictions and could face criminal sanction.²⁰⁵ The Department of Health stated that “There is no penalty attached to religious events because they are not included in the definition of ‘relevant event.’”²⁰⁶ Despite this clarification, there were media reports that AGS threatened priests with prosecution if they celebrate Mass with people in church.²⁰⁷ IHREC have also highlighted this confusion over whether religious services were prohibited by the regulations and how it “creates a real risk of the uneven application of enforcement powers by the Gardai.”²⁰⁸ ICCL has consistently called for greater clarity in communication of what the Covid-19 Regulations contained and for more consistent policing.

In November 2020, an individual sought leave to bring judicial review proceedings against the Minister for Health, arguing that Covid-19 restrictions which do not allow people to attend religious services, other than weddings and funerals, breached the constitutional right to religious freedom.²⁰⁹ This case is ongoing and has highlighted the lack of clarity over the regulations and potential restrictions in relation to religious gatherings.

In March 2021, the High Court directed the applicant to write to the State to clarify whether there is a legal ban on leaving your home to attend a religious service. The Court stated that the State would have

two weeks to respond and adjourned the case to 13 April 2021. On 12 April 2021, further restrictions were introduced providing that a person can only attend a specified event in certain prescribed circumstances, including in order to work, participate in education, access an essential service, and in the case of a minister of religion or priest, to lead workshop or services remotely or minister to the sick.²¹⁰ A specified event was defined as an event other than a wedding reception, sporting event, training event, or funeral. Attending an event not in these prescribed circumstances constituted a penal offence. The Government thus confirmed to the High Court that attendance at a public mass, other than a funeral or wedding mass, was a criminal offence.²¹¹

The new regulations were criticised by religious leaders. The Archbishop of Armagh called them “draconian” and highlighted the fact that they were introduced in a “clandestine” manner, as they were made on 12 April 2021, came into operation on 13 April 2021, and were published on 16 April 2021. This rushed approach to the making of, and poor communication of the content of, regulations has long been criticised by ICCL.

There is a need for further clarity on the status of religious gatherings under Covid-19 regulations. As of 10 May 2021, the regulations have eased in relation to holding and attending events, however, they do not explicitly provide for religious gatherings other than for funerals or wedding receptions²¹². Despite the lack of explicit provision in the law, the Taoiseach announced that from 10 May 2021, places of worship can recommence in-person services with a maximum of 50 attendees.²¹³

As with protest, we consider a blanket ban on religious services, except for weddings and funerals, could be a disproportionate measure and we believe Government should provide for small, safe religious gatherings when the public health situation permits, given the clear protections in human rights law for the right to manifest belief.

²⁰² SI No. 326 of 2020

²⁰³ SI No. 442 of 2020; SI No. 701 of 2020.

²⁰⁴ SI No. 448 of 2020, reg. 4.

²⁰⁵ SI No. 448 of 2020.

²⁰⁶ Ceimín Burke, *Department of Health says priests can't be jailed for holding mass during coronavirus restrictions*, The Journal, 6 November 2020.

²⁰⁷ Marese McDonagh, *Gardai give 'last warning' to parish priest over 'open-door' Mass*, The Irish Times, 19 November 2020.

²⁰⁸ IHREC, *Ireland's Emergency Powers during the Covid-19 pandemic*, 24 February 2021, p. 68.

²⁰⁹ Aodhan O'Faolain, *Ganley takes legal challenge to Level 5 ban on attending Mass*, The Irish Times, 6 November 2020.

²¹⁰ SI No. 217 of 2021.

²¹¹ Mary Carolan, *Attending Mass a criminal offence under Covid-19 regulations, court hears*, The Irish Times, 14 April 2021.

²¹² SI No. 217 of 2021.

²¹³ Orla Dwyer, *50 people to be allowed at religious services from 10 May – but no communions or confirmations*, The Journal, 29 April 2021.

5.3 Restrictions on other events

Restrictions on events have also infringed on the rights to family and private life and freedom of assembly and association. Since 31 August 2020, the regulations have provided for differing levels of restrictions on events in private dwellings,²¹⁴ including limiting persons attending a home for social or recreational purposes to 6 persons from no more than 3 different households²¹⁵ and, under the most severe restrictions, limiting household gatherings to persons who reside in the private dwelling.²¹⁶ These restrictions infringed on the right to family, private life and the home and were particularly challenging for people who lived alone and persons in need of a wide range of supports for health or other reasons.

Where there has been a blanket ban on gatherings in households, that may constitute a disproportionate interference with the right to private and family life. In October 2020, the regulations introduced the possibility of a support bubble²¹⁷ or “paired households”.²¹⁸ A paired household can be made up of a household and a relevant household, which is one that consists of a person who lives alone, one or more vulnerable people who live together, or one or more vulnerable people and one other person all of whom live together. People in a paired household can visit the other household. This was an important measure which Ireland was slow to introduce in comparison to other countries.²¹⁹ New Zealand introduced support bubbles in its initial lockdown in March 2020 and England introduced them in June 2020.²²⁰ ICCL considers that this measure should have been introduced sooner and we consider that, like in New Zealand, at lower levels of restrictions every household should have been allowed to pair with one other household where necessary to keep people “safe and well”.²²¹

Childcare pairing arrangements were provided for in the regulations in April 2021.²²² This was a positive development but given the significant challenges around childcare while parents were working from home, this measure should have been introduced sooner and should be retained in any future lockdown. The disproportionate and gendered impact that the pandemic and related restrictions have had on caregivers, especially single parents, have been highlighted throughout the pandemic.²²³

Effects of the lockdown(s) have included increased isolation, higher stress, loss of key supports and neglect of health needs.²²⁴ The Government must consider how to provide better support for caregivers and those at risk of isolation in future, including through conducting a human rights impact assessment at early and regular stages of restrictions.²²⁵

5.4 Recommendations

FOR THE GOVERNMENT:	
1.	Refrain from blanket bans on gatherings
2.	Ensure that restrictions on private and family life are proportionate and any disproportionate negative impact on certain groups, such as people living alone, vulnerable people, and caregivers, is addressed, such as through providing for support bubbles and childcare pairing arrangements.

²¹⁴ [SI No. 326 of 2020.](#)

²¹⁵ [SI No. 352 of 2020.](#)

²¹⁶ [SI No. 442 of 2020.](#)

²¹⁷ Department of the Taoiseach, *Support bubbles*, 19 October 2020.

²¹⁸ [SI No. 448 of 2020.](#)

²¹⁹ Jennifer O’Connell, *Covid-19 Level 5 support bubbles: Everything you need to know*, The Irish Times, 20 October 2020.

²²⁰ Nick Long, *New Zealand did ‘support bubbles’ first. Here’s what England can learn from them*, The Guardian, 12 June 2020; Cillian Sherlock, *Explained: What is a support bubble?* RTE, 20 October 2020.

²²¹ Nick Long, *New Zealand did ‘support bubbles’ first. Here’s what England can learn from them*, The Guardian, 12 June 2020.

²²² [SI No. 168 of 2021.](#)

²²³ See for example, Suzanne Cahill, *Burned-out families: Restore care services for vulnerable elderly people now*, The Irish Times, 17 November 2020.

²²⁴ See for example, Tina Kilaberia et al., *Impact of the Covid-19 pandemic on family caregivers*, 2020 Innov. Aging 4 (Suppl. 1), 950 (“Caregivers at particular risk were those facing multiple demands and experiencing compromised resources under the pandemic, such as closure of adult day care”).

²²⁵ We note some attempts to identify the social implications of Covid-19 but would urge Government to conduct such an assessment within a human rights framework, see for example, Department of Taoiseach, *Report on the Social Implications of COVID-19 in Ireland*, 5 June 2020.

6

IMPACT OF THE COVID-19 RESPONSE ON THE RIGHT TO FREE MOVEMENT

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



6. Impact of Covid-19 response on the right to free movement

6.1 Legal framework- Right to free movement

The right to free movement is a fundamental right that is connected to the right to liberty. The requirement to stay at home and, at different periods, to stay within a specific geographical location, (such as within our county), during the pandemic can be considered a significant infringement on one of our most basic freedoms. The right to free movement is protected by ECHR²²⁶ and international human rights treaties.²²⁷ Both right to travel within the country and the right to travel abroad have been recognised as constitutional rights.²²⁸ European Union (EU) treaty law also protects the right to free movement across the EU.²²⁹

Covid-19 restrictions requiring the population to stay in one place infringed the right to liberty and freedom of movement but, as with many other rights, human rights law permits limitations on this right where such limitations are prescribed by law and are necessary and proportionate. The law must also be clear and accessible.

6.2 Impact of the restrictions on the right to free movement

The extent to which Covid-19 regulations restricted movement and travel varied between April 2020 and May 2021. In the first set of Covid-19 regulations, a person was not allowed to leave their place of residence without a reasonable excuse and a 2km geographical perimeter was imposed for exercise. This was a penal provision.²³⁰ ICCL campaigned to remove criminal sanctions for breach of provisions restricting movement. We welcomed the decriminalisation of the restrictions on movement in June 2020.²³¹

However, restrictions on movement introduced in October 2020 were redesignated as penal provisions, which ICCL noted “marked a concerning departure from the [previous] change in approach to enforcing regulations.”²³²

Limits on movement continued to change depending on what level of restrictions were imposed. Other restrictions on movement and travel have included restricting travel to within a person’s county or within 20km of one’s place of residence for exercise, social or recreational purposes²³³ and restrictions on inter-county travel without a reasonable excuse.²³⁴ From 31 December 2020 to April 2021, a geographical limit of 5km for exercise was imposed.²³⁵ ICCL noted some public confusion around whether this geographical limit on movement was limited to exercise or applied to movement in general.

These interferences with the right to movement, as with all interferences with rights, have to be demonstrably necessary and proportionate. ICCL understands that limits on movement were put in place in an attempt to isolate transmission of Covid-19 to particular areas. However, we consider that the prolonged interference with the right to liberty such as that imposed from 30 December 2020 to April 2021 may have been disproportionate given the blanket application of this limit to all areas of the country, which was not necessarily linked to numbers of cases of Covid-19. The Emergency Legislation gave the Minister for Health the power to make ‘Affected Area Orders’ where restrictions would apply to some areas of the country and not to others.

This approach appeared to be applied in August 2020 when particular restrictions were applied to certain counties and not to others.²³⁶ ICCL considers that where there are geographical restrictions to the right to movement, a targeted approach linked with numbers of cases should be applied to ensure that the interference with the right to movement is the most minimal possible and the interference is

²²⁶ Protocol 4 to the ECHR, Article 2.

²²⁷ ICCPR, Article 12 (“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country”). The same right is protected under Article 2(1) Protocol No. 4 ECHR (ratified by Ireland in 1968).

²²⁸ State (Ryan) v. Attorney General [1965] I.R. 294; State (M) v. Attorney General [1979] I.R. 73.

²²⁹ An in-depth look at EU Treaty rights is beyond the scope of this report but the right to free movement across the EU is protected by the Treaty on the Functioning of the European Community, article 45; the Maastricht Treaty 1992 and [EU Directive 2004/38/EC](#).

²³⁰ [SI No. 121 of 2020](#).

²³¹ ICCL, [ICCL welcomes decriminalisation of restriction on movement and return to policing by consent](#), 8 June 2020.

²³² ICCL, [Monitoring rights during the pandemic](#), 2020.

²³³ [SI No. 206 of 2020](#).

²³⁴ [SI No. 413 of 2020](#).

²³⁵ [SI No. 701 of 2020](#).

²³⁶ [SI No. 295 of 2020](#).

demonstrably necessary and proportionate to the aim of protecting public health.

The inclusion of a non-exhaustive list of ‘reasonable excuses’ within the regulations to allow for movement beyond the geographical limitation (or at times requirement to stay at home) included access to goods and services, access to health care, essential work and vital family matters. ICCL considers that what constituted a ‘reasonable excuse’ was not well communicated and there remained confusion among the population as to when they could or could not leave home or leave the geographical perimeter imposed by the regulations. Allowing for some degree of discretion in such a list is positive, particularly where restrictions are defined as penal provisions. However, ICCL considers that the combination of a lack of clear communication as to what constituted a reasonable excuse along with an unclear basis for exercising this discretion led to confusion.

In its report on the exercise of the emergency powers, IHREC recommended that the regulations should have contained a complete list of reasonable excuses with a separate provision providing that “a person may leave their home, or county, or the State for urgent and compelling reasons.” IHREC considered that such an approach would have provided “greater guidance by limiting the flexibility to truly exceptional cases” and by separating the complete list of excuses from exceptional situations.²³⁷

ICCL agrees that much greater clarity on what precisely constitutes a reasonable excuse to leave one’s home or to travel beyond a geographical restriction is necessary both within regulations and in terms of Government communication on the content of regulations. We consider a degree of discretion should be included but the parameters of that discretion need to be more clearly defined. ICCL supports IHREC’s suggestion of a separate provision allowing travel for urgent and compelling cases.

Travel to an airport or port: Restrictions on leaving one’s place of residence to travel to an airport or port for the purpose of leaving the State without a reasonable excuse were introduced in 2021.²³⁸ This was a penal provision, carrying fines. As discussed in the section on legal framework and enforcement above, ICCL has consistently expressed its opposition to an over reliance on criminal enforcement of public health restrictions, calling instead for a response in line with recommendations by behavioural psychologists

that included clearer and targeted communication and better supports for those struggling to comply with restrictions.

6.3 Recommendations

FOR THE GOVERNMENT:	
1.	Ensure that restrictions on human rights, especially penal provisions, are defined with sufficient clarity, such as in relation to the use of the term “reasonable excuse”.
2.	Ensure that where restrictions impinge on rights, the Government takes particular care to communicate the precise scope of these restrictions, in particular in relation to restrictions on free movement.
3.	Where there are geographical restrictions to the right to movement, a targeted approach linked with numbers of cases should be applied to ensure that the interference with the right to movement is the most minimal possible and the interference is demonstrably necessary and proportionate to the aim of protecting public health.
4.	Ensure that any penalties for breach of restrictions that constitute an interference with rights, especially fixed penalty provisions, are proportionate to the aim of protecting public health and to the harm caused by the particular breach.

²³⁷ IHREC, *Ireland’s Emergency Powers during the Covid-19 pandemic*, 24 February 2021, p. 76.

²³⁸ SI No. 29 of 2021.

7

IMPACT OF THE COVID-19 RESPONSE ON THE RIGHT TO LIBERTY

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



7. Impact of Covid-19 response on the right to liberty

7.1 Legal framework – Right to liberty

The right to liberty is an essential human right, key to the rule of law. The right to liberty and freedom from arbitrary detention is enshrined in the Irish Constitution²³⁹ and protected by the ECHR²⁴⁰ and the EU Charter of Fundamental Rights.²⁴¹

Constitutional and human rights law highlight that detention must be lawful, “in accordance with a procedure prescribed by law.”²⁴² The right to liberty encompasses the right of someone deprived of their liberty to bring proceedings before a court in order to challenge the legality of their detention.²⁴³ The European Court of Human Rights have previously stated that “where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.”²⁴⁴ The Irish courts have also found that where involuntary detention arises outside of the context of serving a period of imprisonment, “there must be available a speedy, effective and periodic system of review...Fair procedures must be observed.”²⁴⁵

7.2 Impact of the Covid-19 response on the right to liberty

Covid-19 restrictions have had an impact on the right to liberty. This sub-section focuses on detention on mental health grounds and on mandatory hotel quarantine, as these are areas in which ICCL has conducted advocacy.

(i) Detention on mental health grounds

The Mental Health Act 2001 was amended in March 2020 to provide for emergency measures in response to Covid-19.²⁴⁶ The amendments are outlined in Part

5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 and allowed for changes to the process for reviewing detention by a Mental Health Tribunal.

It permits an independent examination by any consultant psychiatrist who is not treating the patient and not just those on its designated panel. The independent consultant psychiatrist may examine a patient “in person”, “by other appropriate means”, or if they are “unable, due to the exigencies of the public health emergency, to carry out an examination” they should set out the reasons for this in their report.²⁴⁷ It also permits the appointment of a Mental Health Tribunal consisting of one member who must be a practising barrister or solicitor with at least 7 years’ experience if necessary, instead of the usual three person Tribunal.²⁴⁸ IHREC has highlighted how:

*“these measures have the potential to infringe the requirement for an independent hearing highlighted by the High Court and Court of Appeal. The courts have stressed that the Oireachtas must be particularly careful in depriving those with mental illness of their liberty, and strong safeguards are necessary.”*²⁴⁹

The amendments also remove other key procedural safeguards. The revised Act allows a Tribunal to receive submissions in writing as opposed to having the patient present at a live hearing.²⁵⁰ Ordinarily, the person detained has the right to be present at a Tribunal hearing and to make representations including through a legal representative.²⁵¹ A Tribunal must make a decision within 21 days of the admission or renewal order. This period can be extended for 14 days on the Tribunal or the patient’s request and for a further 14 days beyond that on the patient’s request.²⁵² However, the amendments enable the Tribunal to extend an involuntary order by a second 14 day period if the Tribunal “having due regard to the interest of the patient, is satisfied that it is necessary due to the exigencies of the public health emergency”.²⁵³

²³⁹ Constitution of Ireland, article 40.4.1 (“No citizen shall be deprived of his personal liberty save in accordance with law”).

²⁴⁰ ECHR, Article 5.

²⁴¹ Charter of Fundamental Rights of the European Union, Article 9.

²⁴² ECHR, Article 5(1).

²⁴³ UN General Assembly, *Report of the Working Group on Arbitrary Detention*, 24 December 2012, A/HRC/22/44, para. 47.

²⁴⁴ *Benham v. United Kingdom* (1996) 22 E.H.R.R. 293, para. 61.

²⁴⁵ *AM v. Health Service Executive* [2019] IESC 3 (MacMenamin J.).

²⁴⁶ *Emergency Measures in the Public Interest (Covid-19) Act 2020 (Act 2 of 2020)*.

²⁴⁷ Mental Health Act 2001, s. 17.

²⁴⁸ Mental Health Act 2001, s. 48.

²⁴⁹ IHREC, *Ireland’s Emergency Powers during the Covid-19 Pandemic*, 2021, p. 73.

²⁵⁰ Mental Health Act 2001, s. 49.

²⁵¹ Mental Health Act 2001, s. 49.

²⁵² Mental Health Act 2001, s. 18(4).

²⁵³ Mental Health Act 2001, s. 18.

ICCL understands the need for adjustments in practice to minimise the spread of Covid-19 and to account for the availability of consultant psychiatrists, especially given the re-assignment of health workers to working on the Covid-19 response. However, ICCL has consistently raised concerns about these amendments as they have eroded key procedural safeguards relating to the detention of patients, as described above.²⁵⁴

Further, while there was an initial sunset clause of 9 November 2020 applicable to these amendments to the Mental Health Act, the Oireachtas approved an extension, following a controversial process, until 9 June 2021.²⁵⁵

IHREC has also raised concerns about these amendments and measures and highlighted they may be unconstitutional, in addition to violating human rights law.²⁵⁶ ICCL recommends the immediate repeal of Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020.²⁵⁷

(ii) Mandatory hotel quarantine

From early in the pandemic, public health guidelines required all those travelling into Ireland to self-isolate for 14 days. The requirement was not based in law though in June 2020 a legal requirement that all travellers must fill out a Passenger Locator Form was introduced. It became an offence not to fill out a form or to fill it out with incorrect details. ICCL called for clear data protection safeguards for information gathered.²⁵⁸

ICCL opposed the introduction of mandatory hotel quarantine when it was first proposed in the summer of 2020. However, in January 2021, at a time when Covid-19 cases seemed to be rising exponentially and serious concerns about the introduction of new strains were raised by many, ICCL contacted members of the Oireachtas to call for the highest standard of human rights protections should mandatory hotel quarantine be introduced.²⁵⁹ We identified mandatory quarantine as a form of detention and called for robust safeguards if any such system was introduced, including inspections, review and appeals.

On 26 March 2021, mandatory hotel quarantine

became a legal requirement for those entering Ireland from so-called “designated States”. Persons travelling into Ireland from designated States are required to pre-book a place in a designated facility, must remain there for 14 days (unless they receive a negative COVID-19 test after 10 days) and must also pay for their stay in the facility, costing €1875 for a single adult.²⁶⁰

Designated States are to be decided by the Minister for Health. The criteria for designating States is “where there is known to be sustained human transmission of COVID-19 or any variant of concern or from which there is a high risk of importation of infection or contamination with Covid-19 or any variant of concern by travel from that State.”²⁶¹ As discussed further below, ICCL has written to Government expressing concern that this criteria is not being applied consistently.

Mandatory hotel quarantine amounts to detention:

Mandatory hotel quarantine constitutes a form of deprivation of liberty and is a form of State detention. Persons who travel into Ireland from designated States must make a booking to stay in a designated facility before their arrival; failure to do so is a criminal offence. Upon arrival into the country, persons are escorted by the Gardaí, Army or other authorised person to their designated facility. They are not permitted to leave this facility, except for a number of defined reasons which are set out in the Act, such as where a medical emergency arises. In cases where a person is authorised to leave, they must return within a specified period of time. Failing to return to the designated facility or leaving for any other reason will result in contact being made with the Gardaí. The Gardaí are then empowered to locate the person, detain them and return them to the facility.

Given that mandatory hotel quarantine is a form of detention, the State must meet the highest standards of care for those within quarantine. There must be a rigorous review, appeals process and inspections. ICCL is concerned that the current system does not meet these standards and may constitute a disproportionate interference with the right to liberty.

²⁵⁴ ICCL, *Explanatory Note on the Emergency Measures in the Public Interest Bill 2020*, 2020. ICCL, *Monitoring human rights during the pandemic, Update 2*.

²⁵⁵ Emergency Measures in the Public Interest (Covid-19) Act 2020 s. 1(3). See IHREC, *Ireland's Emergency Powers during the Covid-19 Pandemic*, 2021, p. 27.

²⁵⁶ IHREC, *Ireland's Emergency Powers during the Covid-19 Pandemic*, 2021, pp. 73-74.

²⁵⁷ IHREC, *Ireland's Emergency Powers during the Covid-19 Pandemic*, 2021, p. 74.

²⁵⁸ Vivienne Clarke, *Irish Council for Civil Liberties calls for safeguards in mandatory location forms*, Irish Examiner, 28 May 2020.

²⁵⁹ ICCL *Briefing on Health (Amendment) Bill*, 25 February 2021.

²⁶⁰ Department of Health, *Mandatory hotel quarantine: your questions answered*, 23 March 2021.

²⁶¹ Health Act 1947, s. 38E.

We have called for the system to end unless these rights standards are met.²⁶²

Proportionality: Mandatory quarantine must be proportionate to the aim of protecting public health. A proportionality assessment takes on particular importance in the context of detention. Any form of detention must impinge on the right to liberty as little as possible. ICCL considers that requiring *all* persons (with limited exemptions) travelling in from designated States to submit to mandatory hotel quarantine may be disproportionate to the aim of protecting the right to life and health of the public. Government should consider further, clearer categories of exemptions and, as discussed further below, must strengthen the system's review and appeals process. Clear data connecting mandatory hotel quarantine with the public health situation must be regularly published.

The State must always ensure that detention is a last resort and that no other measures would satisfy the aim sought to be achieved by detention.²⁶³ It is not clear that the Government exhausted all options before adopting mandatory hotel quarantine into Irish law, for example, implementing a more robust system of testing and tracing of contacts and regular checks on individuals quarantining in their place of residence, as have been introduced in jurisdictions such as the UK.²⁶⁴

The Act requires those travelling from non-designated States to provide evidence of a negative PCR test on arrival. Those travelling from non-designated States who do not have such evidence can be detained in a designated facility, however, the crucial difference is that these individuals are then assessed by a medical officer who will determine whether or not that person can effectively self-isolate from home. This individualised approach is far more proportionate than that prescribed for those travelling from non-designated States.

The Act also lacks proportionality by virtue of the period of designated mandatory hotel quarantine being prescribed as 14 days. The ECDC have recommended that a PCR test from individuals

prior to departure and upon arrival coupled with a COVID-19 test 5-7 days after arrival is the most effective way to tackle the spread of COVID-19 whilst also reducing the period of time for quarantine from 14 days to 5-7 days²⁶⁵. The Government has adopted the strictest approach to the quarantine period. This may be disproportionate and is unlikely to satisfy the requirement to infringe on personal rights and the right to liberty as minimally as possible.

Insufficient appeals process: The appeals process provided for in the Health Act is a paper-based review which must fall into one of the grounds in the Act, including (a) medical or other exceptional reasons, including the necessity of providing care for any vulnerable person or (b) urgent humanitarian grounds.²⁶⁶

Persons who appeal their detention are not entitled to legal representation or an oral hearing at which they can contest their detention. Moreover, it is clear that the appeals process is deeply flawed and applications are not being assessed in accordance with the criteria contained within the Act. For example, a man who flew in from Israel to be with his dying father (who was in intensive care and was expected to die shortly) was denied two appeals for an exemption on humanitarian grounds.²⁶⁷ There have been a number of similar instances where the review process has insufficiently taken account of humanitarian grounds, such as the case of one woman who, whilst being detained in a hotel, received a call to say her father had died suddenly in Argentina. Her appeal to fly back to Argentina urgently for the funeral and to care for her mother was refused.²⁶⁸

Arbitrary and unclear designation of States:

It is a fundamental requirement of human rights law that detention must never be arbitrary. The manner in which States have been designated as requiring mandatory hotel quarantine raises concerns as to arbitrariness and lack of clarity.

First, although the Act sets out clear criteria for the Minister for Health in designating a State for

²⁶² ICCL Press Release, *ICCL calls for end to mandatory quarantine if rights issues not addressed*, 19 April 2021.

²⁶³ *McCann v. Monaghan District Judge* [2009] 4 I.R. 200, para. 70.

²⁶⁴ Department of Health and Social Care, *Government to introduce tougher measures and enforcement rules for quarantined passengers*, 9 February 2021.

²⁶⁵ ECDC, *'Guidance for COVID-19 quarantine and testing of travellers'*, 12 March 2021.

²⁶⁶ Health Act 1947, s. 38E(16).

²⁶⁷ Orla O'Donnell, *Son of dying man released from hotel quarantine*, RTE, 11 April 2021.

²⁶⁸ Amy Molloy, *'I am so broken' – woman whose father died on day she entered hotel quarantine refused permission to travel home to Argentina*, Irish Independent, 26 April 2021.

mandatory hotel quarantine, the Act also provides that the Minister shall consult with the Minister for Foreign Affairs and other Government ministers²⁶⁹. This blurs the lines between clear scientific criteria and political considerations.

Second, the current process for designation of States lacks sufficient clarity and transparency. The Minister for Health has on numerous occasions been advised by the Expert Advisory Group on Travel to place certain countries into the “designated States” category and has failed to do so without any clear reason as to why²⁷⁰. The arbitrary nature can be demonstrated by the placing of Israel onto the list of designated States on 5 April 2021. At that time, Israel’s 14-day incidence rate per 100,000 was 58. The equivalent incidence rate in Ireland on the same date was 157.1. Countries such as France and the USA were recommended by the Expert Advisory Group to be categorised as designated States at the end of March and again at the beginning of April²⁷¹. They were not categorised as designated States until the 15 April 2020.²⁷²

Finally, certain countries which have higher incidence rates of COVID-19 than Ireland and/or have variants of concern have still not been placed on the list of designated States²⁷³. There is inconsistency in the approach taken to designate certain States for mandatory hotel quarantine. For example, recent data from the ECDC indicates that the Netherlands and Lithuania have a higher incidence rate of COVID-19 than Belgium and France, yet Belgium and France are on the list of designated States and Netherlands and Lithuania are not²⁷⁴. Similarly, the UK has consistently been named by the ECDC as being a country with variants of concern and variants of interest, however the UK is not now and has not previously been designated as a State requiring mandatory hotel quarantine²⁷⁵.

If the designation of States is arbitrary, then it follows that the detention of individuals arriving from these arbitrarily designated States may also be arbitrary.

Ireland has strong constitutional protections for individual liberty, in addition to the protections in the ECHR and international human rights treaties. The detention of persons by the State must adhere to very strict rules in order not to fall foul of these protections. In its current form, ICCL considers that mandatory hotel quarantine fails to meet these standards and encroaches unnecessarily on the right to liberty.

Exemptions to mandatory hotel quarantine:

Following pressure from civil society groups including ICCL, as well as a number of High Court challenges and significant adverse media coverage, the Government introduced two further categories of people who are now exempt from mandatory hotel quarantine; those who are fully vaccinated and those who have travelled abroad for “unavoidable, imperative and time-sensitive medical reasons.” ICCL considers that humanitarian exemptions, which are provided for in the legislation, should be applied in a more expansive and compassionate manner.

The exemption for fully vaccinated people is limited to those who have received an EU-approved vaccine, those being the Pfizer, Moderna, Astra-Zeneca or Johnson & Johnson vaccines. This raises concern from a discrimination perspective given the limited availability of these vaccines worldwide.

²⁶⁹ Health Act 1947 (as amended), s.38E(3)(c)

²⁷⁰ Christina Finn and Daragh Brophy, *Government advised to add US, France, Germany and Italy to hotel quarantine list*, The Journal, 30 March 2021; Stephen McDermott, *Hotel quarantine: Why is Austria on Ireland’s list of ‘designated countries’ but not France and Germany?*, 7 April 2021.

²⁷¹ Christina Finn and Daragh Brophy, *Government advised to add US, France, Germany and Italy to hotel quarantine list*, The Journal, 30 March 2021; Stephen McDermott, *Hotel quarantine: Why is Austria on Ireland’s list of ‘designated countries’ but not France and Germany?*, 7 April 2021.

²⁷² *US, France, Italy, Canada and 12 other countries added to hotel quarantine list*, Breaking News, 9 April 2021

²⁷³ See ECDC, *COVID-19 Country Overviews*, published weekly. As can be seen from data dated 16 May 2021, a number of countries in the EU have far higher incidence rates than Ireland but have still not been placed on the list of designated states for MHQ.

²⁷⁴ ECDC, *COVID-19 Country Overviews*, weekly report, last accessed 16 May 2021.

²⁷⁵ ECDC, *COVID-19 Country Overviews*, weekly report, last accessed 16 May 2021.

7.3 Recommendations

FOR THE GOVERNMENT REGARDING THE MENTAL HEALTH ACT:	
1.	Repeal Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020.
2.	If Part 5 is not immediately repealed, ensure that patients are assisted in making written submissions, where that is the form of patient representations to the Tribunal, including by a legal representative.
3.	Ensure that more than one member of the Tribunal is sitting and hears these cases and Tribunals do not resort to a one person Tribunal, except in the most exceptional cases and where there is a clear need for the Tribunal to operate in this manner.

FOR THE GOVERNMENT REGARDING MANDATORY HOTEL QUARANTINE:	
4.	End mandatory hotel quarantine in Ireland as soon as public health advice permits, ensuring that the requirement to quarantine is directly connected to scientific data on cases of Covid-19.
5.	Ensure legislation on mandatory hotel quarantine is reviewed extensively with a focus on ensuring its compatibility with human rights law, if it is to be renewed beyond its current sunset clause.
6.	While mandatory hotel quarantine remains in place: <ol style="list-style-type: none">Ensure that all people entering mandatory hotel quarantine are given a physical and mental health medical review and all necessary medical treatments, supports or interventions are provided.Implement a system of effective and transparent review before people must enter mandatory hotel quarantine.Implement an effective and transparent appeal process for all people subject to mandatory quarantine, including the right to an oral hearing with legal representation.Ensure all places of mandatory hotel quarantine are subject to regular inspections to ensure conditions meet the standards for detention.Ensure the designation of States is based on non-discriminatory, objective, transparent and foreseeable criteria that is based on up-to-date medical necessity.

8

IMPACT OF THE COVID-19 RESPONSE ON THE RIGHT TO PRIVACY AND DATA PROTECTION

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



8. Impact of Covid-19 response on the right to privacy and data protection

8.1 Legal framework – Right to privacy and data protection

Privacy is a fundamental human right protected by the Irish Constitution²⁷⁶ and the ECHR²⁷⁷. It is central to the maintenance of democratic societies and it reinforces other rights, such as freedom of expression²⁷⁸, the right to send and receive information²⁷⁹, data protection rights,²⁸⁰ the right to freedom of association²⁸¹ and the right to freedom of thought, conscience and belief.²⁸² It is known as a bedrock right, because so many other rights depend on it.

Tracking technologies raise significant human rights concerns, in particular regarding the right to privacy and data protection. Where the Government seeks to use technology in response to the pandemic, it must ensure that any interference with the right to privacy is *necessary* and *proportionate* to the aim of protecting public health. Crucially, they must also show such tools are *effective* in order to pass the tests of necessity and proportionality.

8.2 Impact of tracking technologies on the right to privacy and data protection

Since the beginning of the pandemic, new tracking technologies with sweeping surveillance capabilities have been rolled out in different jurisdictions across the world, including Ireland. These include contact-

tracing apps,²⁸³ quarantine apps with facial recognition technology,²⁸⁴ drones²⁸⁵ and electronic bracelets²⁸⁶.

This sub-section discusses the CovidTracker app, airport checks and the pandemic unemployment payment, and Covid-19 passports/vaccine certificates.

(i) CovidTracker app

In late March 2020, it emerged in media reports that the Health Service Executive (HSE) was planning to roll out a Covid-19 “tracking and tracing” app to assist contact-tracing in Ireland.²⁸⁷ ICCL advocated for an app that would respect the rule of law and human rights norms and successfully lobbied for Ireland’s app to be a decentralised app. A decentralised approach is more preferable than a centralised approach as it means less data is collected in one place, and the app therefore potentially poses less of an interference to privacy.

ICCL and other privacy campaigners called on the Irish health authorities to publish the app’s Data Protection Impact Assessment.²⁸⁸ We also called on the health authorities to follow international best practice and to publish the app’s design specifications and source code ahead of its launch to allow for independent scrutiny. We created a principled framework for the Government and legislators intent on deploying any tech solution as part of a public policy.²⁸⁹ The Department of Health later told the Special Committee on Covid-19 that it was confident these principles had been observed²⁹⁰.

ICCL eventually gave the app a C+ for transparency and privacy. However, our colleagues, Dr Stephen Farrell and Professor Doug Leith at TCD, raised concerns about its potential effectiveness²⁹¹ and we gave it a D on this issue. This is significant for the Government as it

²⁷⁶ Constitution of Ireland, Article 40.3.1.

²⁷⁷ ECHR, article 8 ((1) “Everyone has the right to respect for his private and family life, his home and his correspondence. (2) “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

²⁷⁸ Constitution of Ireland, article 40.6.1.i (“The right of the citizens to express freely their convictions and opinions”).

²⁷⁹ ECHR, article 10 (Includes the right “to receive and impart information and ideas without interference by public authority and regardless of frontiers”).

²⁸⁰ European Charter of Fundamental Rights of the European Union, Article 8.

²⁸¹ European Charter of Fundamental Rights of the European Union, Article 12.

²⁸² European Charter of Fundamental Rights of the European Union, Article 10.

²⁸³ MIT Technology Review, *Why some countries suspended, replaced, or relaunched their covid apps*, 23 December, 2020.

²⁸⁴ *Home Quarantine System*, Hungary, Google Play.

²⁸⁵ *Westport Police to test ‘pandemic drone’ that can sense fevers, coughing*, NBC Connecticut, 23 April 2020.

²⁸⁶ Lonely Planet, *Travelers arriving in Abu Dhabi must now wear quarantine tracking bracelets*, 21 September 2020.

²⁸⁷ Business Post, *Phone tracking app set to be used as next step to fight Covid-19*, 29 March 2020.

²⁸⁸ Irish Council for Civil Liberties, *HSE app: experts and public need to see details*, 29 April 2020.

²⁸⁹ Irish Council for Civil Liberties, *Principles for legislators on the implementation of new technologies*, 3 June 2020.

²⁹⁰ Special Committee on Covid-19 Response debate, *Covid-19 Testing and Tracing*, June 25, 2020. See also, Irish Council for Civil Liberties and Digital Rights Ireland, *Submission to the Special Committee on COVID-19 Response on the HSE/ Department of Health’s COVID-19 contact-tracing/symptom-tracking app and contact tracing*, 16 June 2020.

²⁹¹ Dr Stephen Farrell and Professor Doug Leith, *Submission to the Special Committee on Covid-19 Response on the topic of Covid-19 Testing and Contact Tracing*, 16 June 2020.

"ICCL eventually gave the app a C+ for transparency and privacy."

has to prove that any infringements on privacy actually achieve the goal they aim to achieve. ICCL, along with Dr Farrell and Professor Leith, later raised serious concerns for Android users of the app as they must have Google Play Services turned on for the app to work and Google Play Services sends highly sensitive personal data to Google in order for the app to work.

According to the app itself, there are currently 1.3million active users. At the time of writing, the app also states 15,473 users who have tested positive have uploaded their Random IDs; and this has led to 24,164 users getting a close contact alert. It is not known how many people who got a close contact alert subsequently tested positive. Neither is it known if the people who later tested positive could have been traced by any other means and/or if they were traced more quickly by the app than by human contact-tracing. The app's false positive figure is also unknown. ICCL has sought statistics and figures about the efficacy of the app. Efficacy is crucial when one considers the human rights implications of any technological tool in a public health context because the necessity and proportionality of a technological tool is contingent on its effectiveness.

We have ongoing concerns about the efficacy of the app; without evidence that the app is effective, the project fails the rights test of necessity and proportionality. The encroachment on our privacy may be disproportionate or unnecessary. The authorities must urgently publish data on the app's efficacy and how and when it will be wound up. The use of the contact-tracing elements of the app should be discontinued if their efficacy cannot be proven. Minutes of the App Advisory Committee tasked with overseeing the app should be made public to increase transparency on the operation and functioning of the app.

(ii) Covid-19 Pandemic Unemployment Payments and airport checks

From March 2020, Government made provision for an additional social welfare payment, known as the

Pandemic Unemployment Payment, (PUP), to be made available for those who could not work due to the pandemic.²⁹² There was no requirement that recipients needed to be seeking work in order to claim this payment.

During the summer of 2020, it emerged that some people's social welfare payments had been stopped or paused without a clear legal basis. It later appeared that the Department of Social Protection had been carrying out checks on whether particular individuals due to travel abroad were claiming the PUP. The revelations raised serious questions about the transfer of personal data between Government departments and agencies; and infringements on people's right to privacy, data protection rights, and the right to non-discrimination.²⁹³

Discriminatory punishment for travel:

These legally suspect checks on individuals raised serious questions about racial profiling. The Department of Social Welfare airport checks were primarily focused on flights to eastern Europe. At the time of writing, it is still unclear what the purported legal basis was for the questioning of certain people and the subsequent cuts to social welfare payments.

On 26 July 2020, it emerged that over the previous two weeks 104 people²⁹⁴ had their PUP stopped "because they were found to be boarding a flight abroad in breach of rules", while another 44 people had "other social welfare payments such as jobseeker's allowance cut off" due to airport checks. At the time, people were advised against "all non-essential overseas travel". In effect, the State introduced penalties for going abroad for one cohort of the population, but not others. ICCL highlighted the discriminatory nature of this punishment, which particularly affected immigrants.²⁹⁵

Questions about lawfulness: It only then emerged that the Minister for Social Protection, Heather Humphreys, had signed a statutory instrument on 10 July 2020 which meant that anyone in receipt of the PUP who went abroad would only be able to continue receiving the payment if they followed the Government's travel advice.²⁹⁶ There was no public announcement made about this change so it is unclear

²⁹² Department of Social Protection, *Covid-19 Pandemic Unemployment Payment*, 2020.

²⁹³ Charter of Fundamental Rights of the European Union, Article 21.

²⁹⁴ Business Post, *Unemployed to lose payments if caught travelling abroad*, 26 July 2020.

²⁹⁵ ICCL, *'Serious Privacy and Data Harvesting Concerns about Technology Underlying HSE App'* 21 July 2020.

²⁹⁶ Garreth McNamee, *The Journal*, 104 people have had their Pandemic Unemployment Payment stopped because of travel, July 26, 2021.

how members of the public could have accessed this information.

ICCL questioned the lawfulness of these actions.²⁹⁷ If a minister introduces a statutory instrument, they have to prove it is within the principles of a primary piece of legislation. There was no primary legislation concerning the Government's travel advice given it was advice not law.

Questions about information sharing: A number of people contacted ICCL directly because their PUP had been cancelled or stopped, including one person who was booked to go abroad but never actually left the country. Following Tánaiste Leo Varadkar's comments that airports provide information to the Department, and the Dublin Airport Authority's consistent denial of sharing such information, ICCL raised serious questions: Where had this information come from? How was it lawfully obtained? How was it lawfully shared with the Department? Later, the Data Protection Commission released a statement saying it had serious doubts about the lawfulness of the collection and processing of personal data in the above context and that it was following the matter up with the Department.²⁹⁸

Law cannot be applied retrospectively: On 28 July 2020, the Social Welfare (Covid-19) (Amendment) Bill 2020²⁹⁹ was passed, obliging people in receipt of the PUP to be "genuinely seeking" employment in order to receive it.³⁰⁰ On the same day, Minister Humphries told the Dáil that since 13 March 2020, the DEASP had stopped payments to 2,500 recipients of the PUP, 2000 of which related to Dublin Airport and 500 to other ports and airports.³⁰¹ However, the legislation could only affect payments on a prospective basis, i.e. from the date it was signed into law. Therefore, anyone who had their payment stopped on an administrative basis, because they travelled abroad before the

legislation was signed into law could challenge that decision.³⁰²

The Minister subsequently announced that people could travel to green-listed countries if they were on the PUP, or other forms of unemployment assistance such as Jobseeker's Benefit or Jobseeker's Payment. However, anyone going to a non-green list country for non-essential reasons would still lose it.³⁰³ No equivalent penalties were introduced for people who were not in receipt of State supports. It has since emerged that a number of legal challenges have been brought by Irish-resident EU citizens after their PUP was cut as a result of them leaving the jurisdiction, some for family emergencies. Those proceedings were settled out of Court³⁰⁴.

The events concerning the Covid-19 PUP and the manner in which some recipients' pay was cut raised, and continues to raise, serious concerns about infringements on people's right to privacy, data protection, and non-discrimination.

(iii) Covid-19 passports/certificates

Any system which requires a person to be vaccinated before they can access services raises concerns about the right to privacy, bodily integrity, data protection, movement, and equality. Such systems would bestow an inherent unfair advantage on those who have a vaccine over those who do not. At a time when the world does not have universal, equitable and affordable access to vaccines for all, such a system could be regarded as discriminatory on a global scale. At a domestic level, it would create an inherently divisive two-tier society. It would raise profound questions about what is ethically acceptable when some people are awaiting a vaccine, or cannot have one for medical or other reasons, or are yet to be convinced of its benefits. Any such system would also

The events concerning the Covid-19 PUP and the manner in which some recipients' pay was cut raised, and continues to raise, serious concerns about infringements on people's right to privacy, data protection, and non-discrimination.

²⁹⁷ Liam Herrick, *We should all be worried about the Government's Social Welfare Travel Ban*, Sunday Business Post, 28 July 2020. See also *ICCL Your Rights in a Pandemic, Update 20, 25-30 July*.

²⁹⁸ Jack Horgan-Jones, *Data watchdog: 'Doubts' over whether welfare inspections at airports were lawful*, July 30, 2021.

²⁹⁹ *Social Welfare (Covid-19) (Amendment) Act 2020*.

³⁰⁰ *SI No. 242 of 2020*.

³⁰¹ Dáil Debates, *'Social Welfare (Covid-19) (Amendment) Bill 2020: Second Stage'*, 28 July 2020.

³⁰² The Journal, *Department Says 85 People Who Had Their PUP Stopped May be Entitled to It*, 29 July 2020.

³⁰³ Sean Murray, The Journal, *Department Says 85 People who had their PUP cut may be entitled to it*, 29 July 2020.

³⁰⁴ Irish Examiner, *EU national who travelled home challenges State's decision to stop PUP payments*, February 8, 2021.

raise concerns about the sharing of health data with third parties and the development of digital identity systems.

ICCL wrote to the Minister for Foreign Affairs and Minister for Health³⁰⁵ to raise concerns about vaccination passport systems, specifically raising these concerns. We suggested that there was a risk that such systems would lead to mandatory vaccination by the backdoor. From ICCL's perspective, this would fundamentally reverse established Irish policy on voluntary vaccination and breach the HSE's own Consent for Vaccination for Covid-19: Guiding Principles.³⁰⁶ We called for any use of such a system to be banned within Ireland.³⁰⁷

ICCL's concerns about a domestic passport system were heightened after the Tánaiste said that the Government would introduce "more freedoms for those who have been vaccinated"³⁰⁸ and reports they would be used for sports events.³⁰⁹ However, the Government has since indicated that there would be no introduction of Covid passports at a domestic level.

At the time of writing, the Irish Government is currently working on implementing the European Commission's proposed 'Digital Green Certificate', renamed the EU Covid-19 Certificate, to facilitate free movement in the European Union. The certificates are planned to indicate whether a person has been (i) vaccinated, (ii) tested negative, and/or (iii) recovered from Covid. The commission proposes that the certificate would not be a precondition for travel and free movement, a fundamental right in the EU.³¹⁰

Although it is welcome that these optional certificates are not just concerned with vaccinations, it is unclear whether a certificate holder will be treated differently to a person who would rather present their vaccination card, a negative test result, or another means to show they have recovered from Covid-19. ICCL also supports key recommendations made by the Ada Lovelace Institute³¹¹ in respect of proposed certification systems including that certificates or passports should not be rolled out until there is scientific agreement about how they represent

'lower risk'. They should have a clear, specific and delimited purpose. There should be clear, legal guidance on the permitted and restricted uses of the certificates, and mechanisms to support rights and redress and to tackle illegal use. Measures must be taken to safeguard against future risks and mitigation strategies for global harms such as the normalisation of individualised health risk scoring.

ICCL welcomes the Government's clarification in correspondence with ICCL, and in public, that Ireland's version of the EU Covid-19 Certificate will only be issued to those who want it and that there are no plans for any domestic vaccination certificate system³¹². However, ICCL notes that the European Data Protection Board and European Data Protection Supervisor have raised data protection concerns in respect of the European Commission's proposal.³¹³

8.3 Recommendations

FOR THE HSE AND THE DEPARTMENT OF HEALTH:

- | | |
|----|---|
| 1. | Be transparent in all aspects of the continued roll out of the Covid app; |
| 2. | Publish all available data related to the efficacy of the symptom tracker part of the app and outline research methodology related to this data collection; |
| 3. | Publish details relating to the figures for the 14 metrics that the app has, reportedly, been collecting on both a daily and cumulative basis to date; |
| 4. | Regularly publish the minutes of the meetings of the App Advisory Committee; |
| 5. | Publish details relating to how and when use of the app will end. |

³⁰⁵ ICCL, *Letter to Minister for Foreign Affairs Simon Coveney and the Minister for Health Stephen Donnelly*, March 18, 2021.

³⁰⁶ One principle is: for informed consent to be valid, the person must not be acting under duress. HSE, *Consent for Vaccination for Covid-19: Guiding Principles*.

³⁰⁷ ICCL, *Call for Government to ban vaccine passports within Ireland*, 18 March, 2021.

³⁰⁸ *Vaccinated will be offered additional freedoms, says Varadkar*, The Irish Times, April 6, 2021.

³⁰⁹ Louise Byrne *Vaccine certs being considered by Government for sports fans*, Prime Time, RTE, April 9, 2021.

³¹⁰ Treaty on European Union (TEU), Article 3(2); Treaty on the Functioning of the European Union (TFEU), Article 21; Charter of Fundamental Rights of the European Union, Article 45.

³¹¹ Ada Lovelace Institute, *Checkpoints for vaccine passports*, 10 May 2021.

³¹² Twitter, *Minister of State with responsibility for Public Procurement eGovernment Ossian Smyth TD*, 9 May, 2021.

³¹³ European Data Protection Board, *EU data protection authorities adopt joint opinion on the Digital Green Certificate proposals, EDPD and EDPS*, April 6, 2021.

FOR THE DEPARTMENT OF SOCIAL PROTECTION:

1. Commission an independent review of the activities of social welfare inspectors at Ireland's ports and airports to ascertain if they were carried out lawfully.
 - a. The review should establish how many claims for social welfare payments were suspended due to the airport checks in a manner in which the claimants' rights to fair procedures were breached.
 - b. It should outline how the Department selected particular flights and passengers.
 - c. It should also be completely transparent about how data is/was shared.

FOR THE DATA PROTECTION COMMISSIONER:

1. Closely monitor the impact on data protection rights of proposed technological solutions to emergency situations.
2. Publish a note on its investigation into the activities of social welfare inspectors at Ireland's ports and airports to ascertain if they were carried out lawfully.

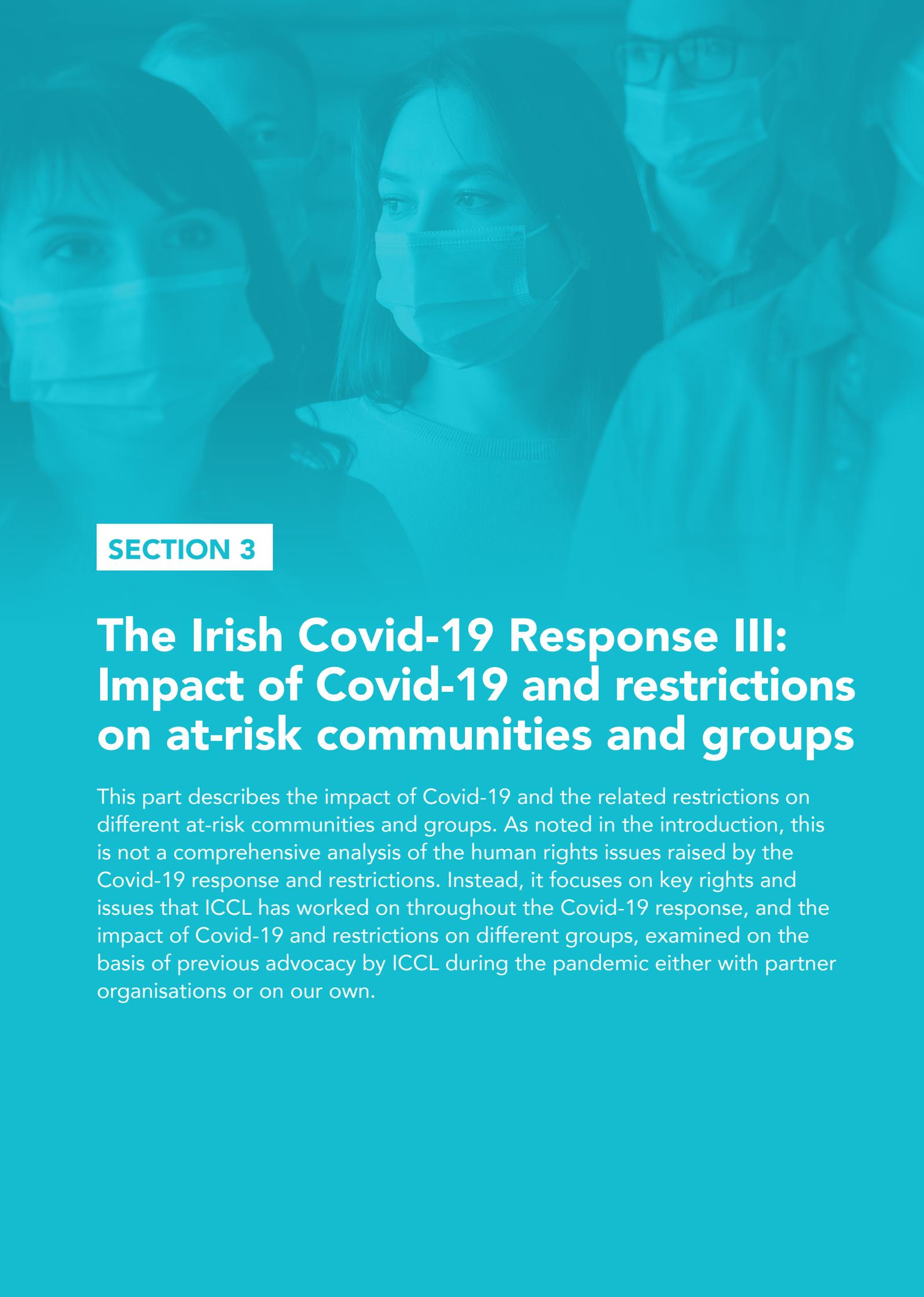
FOR THE AGS:

1. Commission a review into its role in the activities of social welfare inspectors at Ireland's ports and airports

ICCL WOULD URGE THAT IN RELATION TO ANY OR ALL SYSTEMS RELATED TO THE EU COVID-19 CERTIFICATE:

1. The system's specifications must be published to allow for independent scrutiny.
2. The system's Data Protection Impact Assessment must be published.
3. The certificates must not conflict in any way with the GDPR.

4. Principles of effectiveness, necessity, proportionality, non-discrimination, and purpose limitation must guide their creation and these principles must be continuously reviewed.
5. The Irish authorities must carry out a fundamental rights impact assessment before the system is launched and afterward to measure their impact. ICCL notes that the European Commission had not carried out an impact assessment to identify the impact of these measures and to assess the effectiveness of existing, less intrusive measures.
6. Certificates should have a limited amount of personal data.
7. Data obtained when verifying the certificates should not be retained.
8. A central database (of any data obtained) should not be established.
9. A clear review process and 12-month sunset clause must be set down.
10. From then, there would be no justification in requiring citizens to present health documents to exercise their right to free movement.
11. Purpose of the certificates must be clearly defined.
12. A mechanism for how they will be monitored must be provided.
13. Use of any data after the pandemic must be forbidden
14. There must also be no future use of the certificates once disbanded.
15. Irish authorities must provide universal, accessible, timely and free of charge testing for those who wish to use the certification system.
16. Any entity or third party that will process and receive data via these certificates should be made public so citizens can exercise their GDPR rights.



SECTION 3

The Irish Covid-19 Response III: Impact of Covid-19 and restrictions on at-risk communities and groups

This part describes the impact of Covid-19 and the related restrictions on different at-risk communities and groups. As noted in the introduction, this is not a comprehensive analysis of the human rights issues raised by the Covid-19 response and restrictions. Instead, it focuses on key rights and issues that ICCL has worked on throughout the Covid-19 response, and the impact of Covid-19 and restrictions on different groups, examined on the basis of previous advocacy by ICCL during the pandemic either with partner organisations or on our own.

9

IMPACT OF COVID-19 AND RESTRICTIONS ON THE RIGHT TO EQUALITY AND AT-RISK GROUPS

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



9. Impact of Covid-19 and restrictions on the right to equality and at-risk groups

9.1 Legal framework – Right to equality and non-discrimination

The right to equality and non-discrimination is guaranteed by a wide range of national, regional and international standards³¹⁴. Public bodies in Ireland have a statutory duty to promote equality, eliminate discrimination, and protect the human rights of members, staff, and the persons to whom they provide services.³¹⁵ A fundamental human rights principle in responding to emergencies, underpinned by the principle of equality and non-discrimination, is the need to prioritise the protection of the most vulnerable.

State responses to Covid-19 raise equality and non-discrimination concerns, especially in relation to vulnerable or disadvantaged groups. The UN's policy briefing on human rights and Covid-19 highlights that: *"States have a responsibility to ensure that everyone is protected from this virus and its impact. This may require special measures and protection for particular groups most at risk or disproportionately impacted"*.³¹⁶

9.2 Need to address the disproportionate impact of Covid-19 and Covid-19 regulations

From the outset of the pandemic, ICCL has called for safeguards to be put in place to identify and protect society's most at-risk communities.³¹⁷ In our submission

to the Oireachtas in March 2020, ICCL identified the need to prioritise measures that would protect the most vulnerable populations from Covid-19, including those living in congregated settings such as nursing homes, Direct Provision Centres and halting sites, and those who may not have adequate access to safe sanitation such as people experiencing homelessness.³¹⁸

We emphasised the Government's obligations to protect all those in vulnerable situations, whether socially, economically or in terms of their general health or housing situation. We called for specific measures for people who could not self-isolate, as well as for women and children who may be victims of domestic violence. We emphasised that provision of essential healthcare should not be dependent on economic status during this crisis, or ever, and called on Government to ensure that any facility that can provide healthcare during a time of national crisis should provide it on the basis of those most in need.

In April 2020, ICCL joined other civil society organisations in sending a joint submission to the Government advocating a legislative and policy response to the Covid-19 crisis based on social justice and human rights, a collective approach and community empowerment, and participation.³¹⁹ This submission made recommendations for measures to address the disproportionate impact on at-risk groups.³²⁰ In June 2020, ICCL met with the Minister for Health and, along with highlighting a range of human rights issues, emphasised the need to collect and publish disaggregated data on those most affected by the pandemic and by the regulations.³²¹ We continue to call for a human rights impact assessment involving all stakeholders to help identify groups that are disproportionately impacted by

"ICCL identified the need to prioritise measures that would protect the most vulnerable populations from Covid-19, including those living in congregated settings such as nursing homes, Direct Provision Centres and halting sites, and those who may not have adequate access to safe sanitation such as people experiencing homelessness."

³¹⁴ See for example, Constitution of Ireland, Article 40.1; ECHR, Article 14; ICCPR Article 26; CRC, Article 2.

³¹⁵ Irish Human Rights and Equality Commission Act 2014, s. 42.

³¹⁶ United Nations, *COVID-19 and Human Rights: We are all in this together*, April 2020, p. 10.

³¹⁷ ICCL, *Monitoring rights during the pandemic, 11-17 April 2020*, 2020.

³¹⁸ ICCL, *Monitoring rights during the pandemic, 11-17 April 2020*, 2020.

³¹⁹ ICCL, *Monitoring rights during the pandemic, 18-24 April 2020*, 2020.

³²⁰ Covid-19 NGO Group, *Marginalised Groups and Promoting Equality, Inclusion and Human Rights in the Covid Crisis – A Joint Submission*, 2020.

³²¹ ICCL, *Monitoring rights during the pandemic, 13-19 June 2020*, 2020.

"It is now clear that Covid-19 has had a worse impact on certain groups, including older people, those with pre-existing chronic conditions, and those living and/or working in congregated settings."

Covid-19 and the restrictions to ensure that more proportionate and targeted measures are used in the public health effort.³²² Such an assessment has not been carried out, making it difficult to understand from a comprehensive human rights perspective the different impacts of Covid-19 and the restrictions felt by various groups.

Government and other public sector actors have taken some positive steps to protect at-risk communities from Covid-19. The moratorium on evictions and rent freeze introduced in March 2020 reduced the numbers of people becoming homeless.³²³ Health professionals reported positive outcomes from interventions designed to protect the most vulnerable people experiencing homelessness, including provision of housing for the elderly and important supports for drug using populations.³²⁴ Remote access for a first consultation on termination of pregnancy services was also introduced.³²⁵ Government also ensured, in the first months of the pandemic, that private healthcare facilities would be made available to all residents in Ireland should public hospitals exceed their capacity.³²⁶ These steps in addressing two of Ireland's most persistent crises of equality – health and housing – were viewed by many as a demonstration that political will and focus were the key remedies required to resolve them.³²⁷ ICCL calls for the same political will and focus on resolving structural societal inequality to be included as part of Ireland's recovery plan so we can truly 'build back better'. However, Government ended its takeover of

private hospitals in 2020³²⁸ and the ban on evictions from rented properties ended in April 2021, amidst fears of a rise in homelessness.³²⁹

It is now clear that Covid-19 has had a worse impact on certain groups, including older people, those with pre-existing chronic conditions, and those living and/or working in congregated settings. For example, workers in congregated settings, such as meat processing factories have been disproportionately affected. There have been significant outbreaks of Covid-19 in such settings. The majority of workers in the meat processing sector are migrant workers from a range of EU and non-EU countries.³³⁰ Migrant Rights Centre Ireland (MRCI) highlighted how workers in this sector were "some of the hardest hit by Covid-19 outbreaks, with over 10% of the workforce contracting the virus."³³¹ The pandemic has also shone a spotlight on the challenging working conditions and lack of regulation of this sector. While there is limited data on workers' experiences in this sector, available data shows that working conditions in this sector are "difficult and dangerous."³³² Covid-19 has revealed the failure of State institutions to protect certain workers and a gap in regulations around working conditions.³³³

Restrictions introduced to combat Covid-19 have disproportionately affected certain communities and exacerbated pre-existing social inequalities. As highlighted by the Council of Europe Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI), "the crisis has not affected all

³²² ICCL, *Monitoring rights during the pandemic, 18-24 April 2020*, 2020.

³²³ Focus Ireland, *Homeless Figures and the impact of Covid-19*, 2020.

³²⁴ Austin O'Carroll et al., *Harm reduction in the time of Covid-19: Case study of homelessness and drug use in Dublin, Ireland*, *The International Journal on Drug Policy*, vol. 87, 2021.

³²⁵ Hugh O'Connell, *Call for remote abortion consultations to continue*, *Irish Independent*, 4 April 2021.

³²⁶ Orla Ryan, *Private hospitals will be made public for duration of coronavirus pandemic*, *The Journal*, 24 March 2020.

³²⁷ Deirdre Ahern and Suryapratim Roy, *Law and policy responses to Covid-19 in Ireland: Supporting individuals, communities, businesses and the economy*, Covid-19 Legal Observatory, 2020; Austin O'Carroll et al., *Harm reduction in the time of Covid-19: Case study of homelessness and drug use in Dublin, Ireland*, *The International Journal on Drug Policy*, vol. 87, 2021.

³²⁸ However, a year-long deal was struck in January 2021 that would see private hospitals provide space to public patients if Covid-19 cases reached a certain threshold. See Orla Dwyer, *New deal: Private hospitals agree to provide 30% capacity as 1,180 people hospitalised with Covid-19*, *The Journal*, 8 January 2021.

³²⁹ Cormac McQuinn and Sarah Burns, *Evictions from rental properties to resume amid homelessness fears*, *The Irish Times*, 23 April 2021.

³³⁰ Special Committee on Covid-19 Response, *Congregated Settings: Meat Plants*, 10 July 2020.

³³¹ Migrant Rights Centre Ireland, *Working to the Bone: The Experiences of Migrant Workers in the Meat Sector in Ireland*, 2020, p. 3.

³³² Special Committee on Covid-19 Response, *Congregated Settings: Meat Plants*, 10 July 2020.

³³³ Migrant Rights Centre Ireland, *Working to the Bone: The Experiences of Migrant Workers in the Meat Sector in Ireland*, 2020, p. 6.

minority groups in the same way but rather has had an asymmetric impact, with groups that were already marginalised before the crisis becoming even more disenfranchised.”³³⁴

The disproportionate impact of Covid-19 restrictions has been acknowledged by the Government. Its 2021 Covid-19 Resilience and Recovery Plan recognised how the Covid-19 pandemic has “magnified the inequalities experienced by many vulnerable and disadvantaged communities such as the Irish Traveller community, the Roma community, migrants, those who are homeless, those living in Direct Provision and those struggling with addiction.”³³⁵ IHREC examined the extent to which Covid-19 related restrictions have affected disadvantaged groups and concluded that “the restrictions have been implemented in ways that breach the rule of law and that disproportionately affect disadvantaged and vulnerable groups identified by proscribed groups of discrimination and international human rights treaties.”³³⁶

Further, the need to “build back better” has been recognised internationally and nationally. As the UN Secretary-General stated, “Everything we do during and after this crisis must be with a strong focus on more equal, inclusive, and sustainable economies and societies that are more resilient in the face of pandemics, climate change, and the many other global challenges we face.”³³⁷ The UN High Commissioner for Human Rights has emphasised that “to learn from what went right, we must look at what went wrong. Today’s multifaceted crisis has unmasked the strong link between race, ethnicity, socioeconomic status and health outcomes. Pre-existing inequalities should be contextualized within historical, political, social and economic spaces, and be effectively addressed to build back better with equality and quality.”³³⁸ Irish stakeholders, such as Pavee Point, have similarly advocated for a just recovery which would “build on achieving equality and fulfilling human rights” and “promote an intercultural and anti-racist society.”³³⁹

9.3 Brief examination of the disproportionate impact on different groups

While recognising the importance of an intersectional approach to understanding inequalities and that discrimination can be exacerbated on multiple grounds, this report examines the impact of Covid-19 and Covid-19 related restrictions in relation to different groups separately.

This section examines the impact of Covid-19 and related restrictions on the basis of: age, gender, race, ethnicity, disability, migrant status, sexual orientation and gender identity. We include groups on the basis of previous advocacy by ICCL during the pandemic either with partner organisations or on our own. This list of groups does not purport to represent all of the groups disproportionately affected by the pandemic, nor does it include all of the potential grounds of discrimination. This section seeks to highlight some key issues and make concrete recommendations for action, rather than comprehensively analyse the human rights issues affecting at-risk groups.

(i) Age

Older people: Covid-19 has had a disproportionate impact on older people.³⁴⁰ The Government has categorised people over 60 as at high risk and people over 70 as extremely vulnerable (very high risk) from Covid-19.³⁴¹ Older people living in nursing homes have been severely affected.³⁴² As of February 2021, more than 1500 people have died with Covid-19 in nursing homes.³⁴³

Further, older people living in congregated settings, such as nursing homes, have been identified as particularly at risk from Covid-19. In April 2020, ICCL expressed concern about the disproportionate impact of Covid-19 on people in care homes and reiterated our call for safeguards to be put in place to identify and protect society’s most vulnerable.³⁴⁴

³³⁴ Council of Europe Steering Committee on Anti-Discrimination, Diversity and Inclusion, *COVID-19: An analysis of the anti-discrimination, diversity and inclusion dimensions in Council of Europe member States*, November 2020, p. 25.

³³⁵ Department of the Taoiseach, *Covid-19 Resilience and Recovery 2021 – The Path Ahead*, 23 February 2021, p. 19.

³³⁶ IHREC, *Ireland’s Emergency Powers during the Covid-19 Pandemic*, 2021, p. 83.

³³⁷ UNICEF, *Reimagining our future: Building back better from Covid-19*, 2020, p. 1.

³³⁸ UN High Commissioner to Human Rights, *Oral update on the human rights impact of the COVID-19 pandemic*, 45th session of the Human Rights Council, 14 September 2020.

³³⁹ Pavee Point, *Covid-19 and Irish Travellers: Interim Responses, Reflections and Recommendations*, 2020, p. 18.

³⁴⁰ TILDA, *High-risk categories for Covid-19 and their distribution by county in Republic of Ireland-evidence from the TILDA study*, 2020; Trinity College Dublin, *Documenting the toll of Covid-19 on Ireland’s older people*, 29 June 2020.

³⁴¹ Department of the Taoiseach, *Report on Social Implications of Covid-19 in Ireland: Preliminary Assessment*, 15 May 2020, p. 6.

³⁴² Department of Health, *Covid-19 Nursing Homes Expert Panel: Final Report*, 19 August 2020.

³⁴³ TheJournal.ie, *Covid death toll in nursing homes passes 1500, with 369 in January alone*, 2 February 2021.

³⁴⁴ ICCL, *Monitoring rights during the pandemic, 11-17 April 2020*, 2020.

"In April 2020, ICCL expressed concern about the disproportionate impact of Covid-19 on people in care homes and reiterated our call for safeguards to be put in place to identify and protect society's most vulnerable."

There are approximately 576 registered nursing homes in Ireland, the majority of which are privately owned and run.³⁴⁵ Different measures have been put in place in nursing homes to address Covid-19. For example, there have been visitor restrictions on nursing homes visits since March 2020.³⁴⁶ The Health Information and Quality Authority (HIQA) is the independent regulatory body for nursing homes in Ireland. In March 2020, HIQA temporarily suspended all routine regulatory and monitoring inspections in nursing homes, residential disability services, and certain children's services to prevent further spread of Covid-19.³⁴⁷ They undertook other regulatory initiatives, including phoning all nursing homes on a fortnightly basis and setting up an 'Infection Prevention and Control Hub' support service to provide advice and support on Covid-19 outbreak prevention and management.³⁴⁸

However, given the high numbers of people diagnosed with Covid-19 and death rates of people with Covid-19 in nursing homes, there were claims in the media that nursing homes were "abandoned" at the outbreak of Covid-19.³⁴⁹ A number of stakeholders have raised concerns about the lack of national clinical oversight of care provided in nursing homes, particularly how they are not integrated into the framework of public health and social care.³⁵⁰

In May 2020, the Minister for Health appointed an Expert Panel on Nursing Homes, *inter alia*, to assess measures adopted to safeguard residents in nursing homes in light of Covid-19.³⁵¹ The Expert Panel stated that "systematic reform is needed in the way nursing

*home care and older persons care is delivered."*³⁵² They made a range of important recommendations relating to public health measures, infection protection and control, outbreak management, future admissions to nursing homes, nursing home management, data analysis, community support teams, general practitioner lead roles on community support teams and in nursing homes, nursing home staffing, training programmes, palliative care, visitors to nursing homes, communications, regulatory recommendations, and a broader range of statutory care supports for older people.³⁵³ ICCL considers that more should have been done to protect people in nursing homes from Covid-19 at an earlier stage.

Covid-19 related restrictions have had a negative impact on older people in non-institutional settings. Restrictions have increased the risk of loneliness and social isolation among older people, which entails negative consequences for their physical and mental health.³⁵⁴ ICCL has highlighted these concerns and the need to address this issue in congregated settings, including in nursing homes.³⁵⁵

ICCL has repeatedly called for the ratification and implementation of the Optional Protocol to the UN Convention against Torture, (OPCAT), including through the launch of a campaign in 2020.³⁵⁶ OPCAT requires States to establish an independent, human rights-focused inspection and monitoring system of all places where people are deprived of their liberty, including nursing homes. It is positive that one of the objectives of the Government's Department of Justice's 2021-2023 Statement of Strategy is to

³⁴⁵ HIQA, *The impact of Covid-19 on nursing homes in Ireland*, July 2020, p. 10.

³⁴⁶ HIQA, *The impact of Covid-19 on nursing homes in Ireland*, July 2020, p. 12.

³⁴⁷ HIQA, *The impact of Covid-19 on nursing homes in Ireland*, July 2020, p. 10.

³⁴⁸ HIQA, *The impact of Covid-19 on nursing homes in Ireland*, July 2020, pp. 10-11.

³⁴⁹ The Journal, *Almost 1 in 5 nursing home residents diagnosed with Covid-19, Oireachtas Committee hears*, 18 June 2020.

³⁵⁰ ICCL and partners, *Universal Periodic Review Ireland*, 25 March 2021, p. 6. See for example, recommendation by the Special Oireachtas Committee on COVID-19 that 'the lack of statutory clinical oversight of care for residents in the private nursing home sector is one of the biggest weaknesses exposed by Covid-19. See Special Committee on Covid-19 (July 2020) *Interim Report on Covid-19 in Nursing Homes Response*.

³⁵¹ Department of Health, *Covid-19 Nursing Homes Expert Panel: Final Report*, 19 August 2020, p. 1.

³⁵² Department of Health, *Covid-19 Nursing Homes Expert Panel: Final Report*, 19 August 2020, p. 6.

³⁵³ Department of Health, *Covid-19 Nursing Homes Expert Panel: Final Report*, 19 August 2020, pp.101-113.

³⁵⁴ TILDA, *Altered lives in a time of crisis: The impact of the Covid-19 pandemic on the lives of older adults in Ireland*, 2021, pp. 3-4.

³⁵⁵ ICCL, *Monitoring rights during the pandemic, 15-21 August 2020*, 2020.

³⁵⁶ ICCL, *Work on OPCAT*.

publish the legislation to implement OPCAT by the end of 2021.³⁵⁷ This is an urgent measure to take and its importance has been highlighted by the impact of Covid-19 in these settings.

Children: The Covid-19 restrictions have also had a negative impact on children, who have been particularly affected by the closure of schools and childcare facilities. The ISPCC has reported an increase in calls to their Childline service during the Covid-19 pandemic, particularly during high levels of restrictions.³⁵⁸

Child abuse: The Covid-19 pandemic and restrictions have increased the risk of child abuse.³⁵⁹ The Child Care Law Reporting Project identified ‘instances of severe neglect’ of children during the pandemic.³⁶⁰ This raised “the question as to whether the prolonged closure of schools meant that teachers, often at the front line of protecting such children, were cut off from them and the neglect went unnoticed for far too long.”³⁶¹ Further, as discussed below, there has been an increase in children seeking support from domestic violence services.³⁶²

Education: There have been differing restrictions on educational institutions throughout the Covid-19 pandemic, including school closures. These restrictions have had a disproportionate impact on disadvantaged children, children of ethnic minorities and migrants, and children with mental and intellectual disabilities.³⁶³ This has been acknowledged by Government, which has stated that Traveller and Roma children are “more severely impacted by school closures as lack of access to broadband and technology make engagement with online teaching difficult.”³⁶⁴ These restrictions clearly impact the right to education, however, an in-depth analysis of this is beyond the scope of this report. In 2021, leading children’s charities launched the Children’s Future Ireland campaign focusing

on children’s right to an adequate education. ICCL endorses their recommendations.

(ii) Gender

The Covid-19 response is increasing and exacerbating existing gender inequalities across every sphere, from health to the economy, security and social protection.³⁶⁵ The restrictions have affected women differently.³⁶⁶ Women are more at risk of domestic violence; more likely to work in frontline healthcare and service roles; and experience a disproportionate burden of caring responsibilities. Further, there is a lack of participation and representation of women in Covid-19 related policymaking.³⁶⁷ This was starkly illustrated when Ireland entered its second level-5 lockdown in October 2020 and ten men – representatives from NPHET, the Government and the HSE - made the announcement to the public.³⁶⁸ As stressed in a study requested by the FEMM committee of the European parliament, “it is not the virus itself that causes socio-economic impacts on women, but rather the mechanisms introduced by administrations to mitigate against disease transmission which cause the downstream effects which have disproportionately affected women.”³⁶⁹

Domestic violence: There has been an increase in the numbers of women and children seeking support from domestic violence agencies during the Covid-19 pandemic.³⁷⁰ For example, AGS reported a 25% increase in calls relating to domestic violence in April/May 2020 compared to April/May 2019.³⁷¹ Different measures have been taken to address the rise in domestic violence, including an awareness campaign, increased funding for domestic violence organisations, a specific AGS operation to support victims of domestic violence, and the prioritisation of domestic violence and childcare cases by the Courts Service and Legal Aid Board.³⁷² However, leading

³⁵⁷ Department of Justice, *Statement of Strategy, 2021-2023*, 2021.

³⁵⁸ ISPCC, *Childline answered over 70,000 contacts from children during peak Covid-19 restrictions*, 30 June 2020.

³⁵⁹ Mark Hilliard, *Coronavirus: Doctors ‘concerned’ over child abuse risk during pandemic*, 3 July 2020.

³⁶⁰ Child Care Law Reporting Project, *Reports*, 2021.

³⁶¹ Kitty Holland, *Cases of ‘severe’ child neglect discovered during lockdown*, 18 January 2021.

³⁶² Carl O’Brien, *Covid-19: Sharp increase in women and children fleeing domestic violence*, 10 November 2020.

³⁶³ ESRI, *Covid-19: Implications for policy on children and young people*, 2020, p. 28.

³⁶⁴ Department of the Taoiseach, *Report on Social Implications of Covid-19 in Ireland: Preliminary Assessment*, 15 May 2020, p. 26.

³⁶⁵ See for example, UN, *Policy Brief: The impact of Covid-19 on women*, 9 April 2020.

³⁶⁶ Department of the Taoiseach, *Report on Social Implications of Covid-19 in Ireland: Preliminary Assessment*, 15 May 2020, p. 26.

³⁶⁷ NWCI, *Covid-19 and Women – Our Advocacy Work*.

³⁶⁸ Elaine Loughlin, *Covid-19 has shown it’s still very much a man’s world*, Irish Examiner, 18 October 2020.

³⁶⁹ Clare Wenham, *The gendered impact of the Covid-19 crisis and post-crisis period*, September 2020, p. 53.

³⁷⁰ Carl O’Brien, *Covid-19: Sharp increase in women and children fleeing domestic violence*, The Irish Times, 10 November 2020.

³⁷¹ Jessica Doyle, *L&RS Note: Domestic violence and Covid-19 in Ireland*, 9 June 2020, p.1; Sean McCarthaigh, *Increase in domestic abuse incidents linked to Covid-19 lockdown*, Irish Examiner, 1 June 2020.

³⁷² Jessica Doyle, *L&RS Note: Domestic violence and Covid-19 in Ireland*, 9 June 2020, p. 5.

organisations working on domestic violence have warned that these measures are not sufficient and specifically highlighted the need for further funding and more safe emergency accommodation.³⁷³

Healthcare workers: The majority of healthcare workers in Ireland are female.³⁷⁴ Healthcare workers have been disproportionately affected by Covid-19, negatively affecting their physical and mental health.³⁷⁵

Disproportionate burden of caring responsibilities: Women have a disproportionate burden in relation to caring responsibilities, providing the majority of care for family members. The Covid-19 restrictions, such as the closure of schools and childcare facilities, have increased this burden.³⁷⁶ A joint NGO submission highlighted the disproportionate impact of Covid-19 restrictions on one parent families, the majority of whom are women (86%).³⁷⁷

Rise of unemployment: In April 2020, ICCL contributed to a joint submission on marginalised groups that showed that the sectors likely to be worst affected by job losses – retail and hospitality – are sectors that are heavily female dominated³⁷⁸. PwC's annual Women in Work Index showed that the increased unequal burden of care carried by women caused more women than men to leave the labour market during the pandemic. Consequently, the rise in unemployment rate during the pandemic has been higher for women, causing a "shecession"³⁷⁹.

Abortion: As noted above, it was welcome that Government introduced remote consultations for

those seeking abortion. This ensured services were accessible during the pandemic and ICCL, with the Abortion Working Group led by NWCI, have called for remote consultations to be continued after the pandemic. However, the Abortion Working Group has heard directly from service providers that women who are still travelling to seek abortions that remain illegal under Irish law were impacted by restrictions on travel, causing high levels of distress. At the time of writing, Irish women are awaiting clarity on whether a negative PCR test is necessary in order to travel abroad for a termination of pregnancy.³⁸⁰ Government should clarify this immediately. ICCL calls for abortion to be included as an urgent medical service and, in keeping with the latest amendments to the law on quarantine, those seeking such services abroad should be exempted from mandatory hotel quarantine on their return.

(iii) Race and Ethnicity

Research by the National Economic and Social Council has highlighted that "*Black, Black Irish, Asian, Asian Irish and Traveller groups are more likely to contract Covid-19 than those who are White Irish. This may be linked to their occupation and housing conditions.*"³⁸¹

Anti-Traveller and anti-Roma discrimination is extremely prevalent in Ireland, including in relation to accessing accommodation, education, and health services.³⁸² A National Traveller and Roma Inclusion Strategy (2017-2021) was developed but its implementation has been slow, piecemeal and hampered by a lack of clear targets and budget lines.³⁸³ The context of

"ICCL calls for abortion to be included as an urgent medical service and, in keeping with the latest amendments to the law on quarantine, those seeking such services abroad should be exempted from mandatory hotel quarantine on their return."

³⁷³ Jessica Doyle, *L&RS Note: Domestic violence and Covid-19 in Ireland*, 9 June 2020, p. 5.

³⁷⁴ Ellen O'Riordan, *Women not being heard on critical public health issues, says group*, 4 February 2021.

³⁷⁵ Laura O'Connor et al., *Analysis: new research finds Irish frontline healthcare workers are reporting high rates of anxiety, stress and depression because of the pandemic*, 28 January 2021.

³⁷⁶ NWCI, *Women's experiences of caring during Covid-19*, November 2020.

³⁷⁷ Joint NGO Submission to the Special Committee on Covid-19 Response, *Supporting One Parent Families During and After the Covid-19 Crisis*, September 2020.

³⁷⁸ Covid-19 NGO Group, *Marginalised Groups and Promoting Equality, Inclusion and Human Rights in the Covid Crisis – A Joint Submission*, 2020, p. 12.

³⁷⁹ PwC Ireland, *PwC Women in Work Index reveals COVID reversing workforce gains*, 5 March 2021.

³⁸⁰ Kitty Holland, *Calls for clarity on whether abortion an 'urgent' medical service*, *The Irish Times*, 3 May 2021.

³⁸¹ Orlaith Hennessy, *Secretariat Covid-19 Working Paper Series: The impacts of Covid-19 on Ethnic Minority and Migrant Groups in Ireland*, National Economic and Social Council, 6 January 2021, p. 4.

³⁸² NUIG, *Implications of Covid-19 pandemic on Roma and Travellers communities*, 15 June 2020.

³⁸³ Pavee Point, *Civil society monitoring report on implementation of the National Traveller and Roma Inclusion Strategy*, 2019, p. 7.

discrimination against and marginalisation of these communities increases their vulnerability to Covid-19. In May 2020, the Government recognised the “existing vulnerabilities of members of the Traveller and Roma communities in health and accommodation put them at particular risk of contracting the virus.”³⁸⁴

Further, the enforcement of restrictions may have had a disproportionate impact on people on the basis of their race or ethnicity, as noted in the section on policing above. The UN Committee on the Elimination of Racial Discrimination has previously highlighted concerns about racial profiling by AGS members.³⁸⁵ The lack of disaggregated data on the use of Covid-19 related enforcement powers prevents a comprehensive assessment of whether the powers have been used disproportionately and inconsistently. ICCL has received reports that members of the Black Irish community are consistently over policed by AGS and in some instances have been harassed.

(iv) People with disabilities

People with disabilities make up 13.5% of the Irish population.³⁸⁶ The impact of Covid-19 on people with disabilities has been documented internationally and in Ireland.³⁸⁷ For example, Inclusion Ireland highlighted how people with intellectual disabilities may be at increased risk of Covid-19 due to co-morbidities, low levels of literacy, and reliance on others for support and care.³⁸⁸ Covid-19 related restrictions have also had a disproportionate impact on people with disabilities. For example, the use of face coverings creates communication difficulties, especially for those in the deaf and hearing impaired community.³⁸⁹

Lack of access to services: Resources have been focused on residential services, day services have been closed, and some people with disabilities

have had their personal assistant and home services removed in the Covid-19 response.³⁹⁰ IHREC raised concerns about this focus on health care settings rather than social care, family care, and persons living independently, where “disruption to service provision has been challenging.”³⁹¹ Further, “social care” has not always been prioritised as an “essential service” by the relevant regulations, which poses another barrier for people with disabilities and their carers.³⁹²

People with mental health disabilities: The Mental Health Commission has highlighted how mental health service users in acute settings and long-term residential care units “may be particularly susceptible to developing Covid-19 and adverse effects from Covid-19.”³⁹³ It has also highlighted different concerns relating to Covid-19 in mental health facilities, including relating to the testing of staff and staff isolation capacities.³⁹⁴ Further, as noted, procedural safeguards in relation to detention on mental health grounds have been eroded, which is particularly concerning.³⁹⁵

(v) Migrant status

Migrants, refugees, and asylum seekers have been disproportionately negatively affected by Covid-19.³⁹⁶ There have been significant outbreaks of Covid-19 in congregated settings, where migrants, refugees, and asylum seekers live and work, such as direct provision centres.

People residing in Direct Provision centres: There are approximately 7700 people, including more than 1600 children, currently residing in Direct Provision centres.³⁹⁷ These are congregated settings where people share bathrooms, dining areas, living spaces, and laundries. This has meant that social distancing has been “near impossible in many locations.”³⁹⁸ In May 2020, ICCL submitted a joint letter with Nasc

³⁸⁴ Department of the Taoiseach, *Report on Social Implications of Covid-19 in Ireland: Preliminary Assessment*, 15 May 2020, p. 26.

³⁸⁵ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined fifth to ninth reports of Ireland*, 23 January 2020, CERD/C/IRL/CO/5-9, para. 15.

³⁸⁶ Disability Federation of Ireland, *Impact of Covid-19 on people with disabilities and the disability sector*, 29 June 2020, p. 3.

³⁸⁷ See for example, World Health Organisation, *Disability considerations during the Covid-19 outbreak*, March 2020.

³⁸⁸ Inclusion Ireland, *Covid-19 and Intellectual Disability: Supporting People with Intellectual Disabilities and their Families*, 2020.

³⁸⁹ National Health Library and Knowledge Service, *Summary of Evidence: Covid-19*, 12 May 2020, p. 2.

³⁹⁰ Disability Federation of Ireland, *Impact of Covid-19 on people with disabilities and the disability sector*, 29 June 2020, pp. 6-7.

³⁹¹ IHREC, *The Impact of Covid-19 on People with Disabilities, Submission by IHREC to the Oireachtas Special Committee on Covid-19 Response*, June 2020, p. 8.

³⁹² IHREC, *The Impact of Covid-19 on People with Disabilities, Submission by IHREC to the Oireachtas Special Committee on Covid-19 Response*, June 2020, p. 8.

³⁹³ Mental Health Commission, *Covid-19 Paper 1, Supervising, monitoring and supporting Irish residential mental health services during Covid-19*, 24 September 2020, p. 1.

³⁹⁴ Mental Health Commission, *Assurance required on Covid-19 test results for mental health staff*, 11 May 2020; Mental Health Commission, *Work ongoing to protect 3800 residents of mental health facilities*, 20 April 2020.

³⁹⁵ ICCL, *ICCL Submission on the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020*, 18 March 2020.

³⁹⁶ National Economic and Social Council, *The impacts of Covid-19 on Ethnic Minority and Migrant Groups in Ireland*, 2011.

³⁹⁷ Irish Refugee Council, *Submission to the Special Committee on Covid-19*, 26 May 2020, p. 1.

³⁹⁸ Irish Refugee Council, *Submission to the Special Committee on Covid-19*, 26 May 2020, p. 2.

(the Migrant and Refugee Rights Centre) and the Irish Refugee Council to the Minister for Justice expressing serious concern at reports that residents of a Direct Provision Centre in Caherciveen were being detained against their will following the publication of a photograph with padlocks across the gates of the Centre.³⁹⁹ The Irish Refugee Council conducted a survey to understand people's experiences of Direct Provision during the Covid-19 pandemic. Over half of the respondents stated that they "did not feel safe in Direct Provision during the pandemic".⁴⁰⁰

The pandemic has also highlighted the failure of the Government to collect data on health issues and vulnerabilities of people applying for international protection, which is a requirement of the EU Reception Conditions Directive.⁴⁰¹ Further, different people living in Direct Provision face particular challenges, such as children. LGBTI+ people living in Direct Provision face specific issues, being at high risk of experiencing significant emotional distress and isolation.⁴⁰² In February 2021, a white paper to end Direct Provision and establish a new international protection support service was published, which is a welcome step in addressing persistent human rights issues in the system.⁴⁰³ ICCL expressed concern at a pause in health and safety inspections of Direct Provision centres during the pandemic.⁴⁰⁴ We have long called for independent, rights-focused inspections of Direct Provision, which we believe take on a greater importance during a pandemic. We recently launched a campaign on this issue.⁴⁰⁵

(vi) Sexual Orientation and Gender Identity

It is widely recognized that LGBTI+ people have been heavily impacted by the pandemic⁴⁰⁶.

Violence against LGBTI+ people: As highlighted by the Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI), for a number of people belonging to LGBTI communities, compliance with lockdown regulations meant returning home and potentially being confined in hostile environments with family members who are unsupportive or do not accept their sexual orientation or gender identity.⁴⁰⁷ As the Council of Europe Secretary General stated, "LGBTI+ young people who have traditionally been stigmatised and marginalised are now exposed to an even greater risk of hate speech and violence, at home and in public".⁴⁰⁸ This resulted in an increase in the risk of domestic violence, physical and emotional abuse during the pandemic. There was also a negative impact on reporting and requests for help complicated by the fact that victims could be living in proximity to their abuser.⁴⁰⁹ This negative trend has also been recognised in Ireland by civil society organisations.⁴¹⁰

Access to healthcare and other support services: The Government has recognized that "social distancing presents challenges for the LGBTI+ community in accessing healthcare and other support services", and that "the impact on mental health may also be greater for those who are not 'out' to their families/in their living situation or whose families are

"Access to healthcare is of particular importance for transgender and intersex people, and worries about mental health is a key concern for LGBTI+ people."

³⁹⁹ ICCL, *Monitoring rights during the pandemic, 2-8 May 2020*, 2020.

⁴⁰⁰ Irish Refugee Council, *Submission to the Special Committee on Covid-19*, 26 May 2020, p. 6.

⁴⁰¹ Irish Refugee Council, *Submission to the Special Committee on Covid-19*, 26 May 2020, pp. 3-4.

⁴⁰² Covid-19 NGO Group, *Marginalised Groups and Promoting Equality, Inclusion and Human Rights in the Covid Crisis – A Joint Submission*, 2020, p. 32.

⁴⁰³ Department of Children, Equality, Disability, Integration and Youth, *A White Paper to End Direct Provision and to Establish a New International Protection Support Service*, 2021.

⁴⁰⁴ Maresa Fagan, ICCL: *Government must introduce proper direct provision inspections*, 30 March 2021.

⁴⁰⁵ ICCL Press Release, *People in Direct Provision not getting the care they deserve*, 30 March 2021.

⁴⁰⁶ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, *Violence and discrimination based on sexual orientation and gender identity during the coronavirus disease (COVID-19) pandemic*, 28 July 2020, ref: A/75/258.

⁴⁰⁷ Council of Europe Steering Committee on Anti-Discrimination, Diversity and Inclusion, *COVID-19: An analysis of the anti-discrimination, diversity and inclusion dimensions in Council of Europe member States*, November 2020, p. 32.

⁴⁰⁸ Statement by Secretary General Marija Pejčinović Burić ahead of the International Day against Homophobia, Transphobia and Biphobia (IDAHOT), *Young LGBTI persons must be protected against violence at home and in public, during this crisis and always*, 15 May 2020.

⁴⁰⁹ Council of Europe Steering Committee on Anti-Discrimination, Diversity and Inclusion, *COVID-19: An analysis of the anti-discrimination, diversity and inclusion dimensions in Council of Europe member States*, November 2020, p. 32.

⁴¹⁰ Covid-19 NGO Group, *Marginalised Groups and Promoting Equality, Inclusion and Human Rights in the Covid Crisis – A Joint Submission*, 2020, p. 32.

unsupportive.”⁴¹¹ Access to healthcare is of particular importance for transgender and intersex people, and worries about mental health is a key concern for LGBTI+ people.

As highlighted by ICCL and a number of Irish NGOs:

“LGBTI+ people are less likely to access mainstream health and social care services as they do not see these services as inclusive of them. This can lead to LGBTI+ people delaying access to health and social care when they need it, leading to poorer health and wellbeing outcomes, including higher rates of mental health problems including suicidality, self-harm, substance misuse, depression and anxiety.”⁴¹²

On a positive note, LGBTI+ groups (including BeLonG To, LGBT Ireland and TENI) have been providing ongoing support to LGBTI+ people in Ireland, transferring their services online during the pandemic.⁴¹³

9.4 Recommendations

RECOMMENDATIONS TO GOVERNMENT ON PROTECTING AT-RISK COMMUNITIES

1. Carry out a regular human rights impact assessment on the impact of the emergency situation and restrictions on at-risk groups in order to ensure Government takes appropriate and sufficient measures to mitigate negative impacts.

CHILDREN

2. Increase funding to children’s programmes and services to ensure improved wellbeing and outcomes for children.
3. Develop a policy to ensure that in-school provision can continue to be provided to all marginalised and vulnerable children, including Traveller and Roma children during periods of school closures.

OLDER PEOPLE

4. Facilitate the participation of older people in policy-making that impacts them, including relating to Covid-19 restrictions.
5. Conduct an inquiry into the impact of Covid-19 related measures on the rights of older people, including the levels of oversight of care in nursing homes.
6. Provide for national clinical oversight of care of private nursing homes.
7. Implement the recommendations made by the Expert Panel on Nursing Homes.
8. Ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including nursing homes, prisons, police stations, direct provision centres, and psychiatric hospitals.

GENDERED IMPACT OF RESTRICTIONS:

9. Provide increased funding to non-governmental organisations that provide services to victims of gender based violence, including domestic violence.
10. Introduce supports to address the disproportionate impact of Covid-19 on women and caregivers, including public and affordable childcare, universal mental health services, and improved supports for unpaid and paid care, in line with the National Women’s Council of Ireland’s recommendations.
11. Extend remote access to GP consultations on termination of pregnancy beyond the pandemic and clarify whether abortion is considered an urgent medical service for travel in terms of exemptions from the general ban on travel and exemption from mandatory hotel quarantine on return.

⁴¹¹ Department of the Taoiseach, *Report on Social Implications of Covid-19 in Ireland: Preliminary Assessment*, 15 May 2020, p. 26.

⁴¹² Covid-19 NGO Group, *Marginalised Groups and Promoting Equality, Inclusion and Human Rights in the Covid Crisis – A Joint Submission*, 2020, p. 32

⁴¹³ Covid-19 NGO Group, *Marginalised Groups and Promoting Equality, Inclusion and Human Rights in the Covid Crisis – A Joint Submission*, 2020, p. 32.

ETHNIC AND RACIALISED COMMUNITIES:

12. Take specific measures to address Traveller health and education inequalities, in line with Pavee Point's recommendations.⁴¹⁴
13. Fully implement the National Traveller and Roma Inclusion Strategy, including by developing concrete action plans with clear targets, indicators, outcomes, timeframes, and associated budget lines.
14. Take steps to ensure that disaggregated data on the basis of prohibited grounds of discrimination is collected during the exercise of all Covid-19 related enforcement powers.

PEOPLE WITH DISABILITIES:

15. Ensure the provision of social care is classified as an essential service in Covid-19 regulations.
16. Repeal Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020, as noted above.

MIGRANTS, REFUGEES, AND ASYLUM-SEEKERS:

17. Take specific measures to address the impact of Covid-19 for those living in Direct Provision centres, in line with the Irish Refugee Council's recommendations.⁴¹⁵
18. Develop a policy to ensure that in-school provision can continue to be provided to all marginalised and vulnerable children, including children in Direct Provision and children of migrants, refugees and asylum seekers.
19. Fully implement the commitments to replace Direct Provision and establish a not-for-profit system.

20. Ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including nursing homes, prisons, police stations, direct provision centres, and psychiatric hospitals.
21. Take specific measures to improve migrant workers' rights, in line with MRCI's recommendations.⁴¹⁶

LGBTI+ COMMUNITY:

22. Continue to resource LGBTI+ organisations offering frontline services to provide and adapt existing supports to reach people in their own homes, in line with Community Work of Ireland and others' joint submission recommendations.
23. Monitor on an ongoing basis the issues faced by the LGBTI+ community, especially those most at-risk, and coordinate between the responses provided by LGBTI+ organisations and other mainstream services and supports. This can only be achieved if the organisations continue to be supported by the State through access to core funding, in line with Community Work of Ireland and others joint submission recommendations.
24. Specific needs of LGBTI+ people living in Direction Provision Centres should be addressed when designing responses to Covid.

⁴¹⁴ Pavee Point, *Covid-19 and Irish Travellers: Interim Responses, Reflections and Recommendations*, 2020, p. 18.

⁴¹⁵ Irish Refugee Council, *"Powerless" Experiences of Direct Provision during the Covid-19 Pandemic*, August 2020.

⁴¹⁶ Migrant Rights Centre Ireland, *Working to the Bone: The Experiences of Migrant Workers in the Meat Sector in Ireland*, 2020, p. 6.

10

CONCLUSION AND RECOMMENDATIONS

Human Rights in a Pandemic

A HUMAN RIGHTS ANALYSIS OF THE
IRISH GOVERNMENT'S RESPONSE TO COVID-19



Conclusion

Throughout this report, ICCL has identified areas for improvement in the Irish Government's response to Covid-19 from a human rights perspective. We urge Government to ensure that the main emergency legislation underpinning the response is regularly reviewed in light of its impact on human rights. We call for robust debate whenever legislation is due for renewal. We identify clear areas for improvement when the Minister for Health makes regulations that restrict rights, including better consultation, prior publication, and clearer communication. We call for a proportionality assessment for every restriction on rights and certification that new laws are human rights compliant. We identify a need for more transparency in decision making processes that lead to restrictions on rights and highlight the need for all public actors to fulfil the public sector human rights and equality duty.

We call on government to prioritise targeted communication and supports over criminal sanctions when enforcing Covid-19 regulations. We echo that call in our recommendations to An Garda Síochána. We urge an immediate end to the use of spit hoods. We recommend better data collection to enable a more in-depth analysis of the Garda response. We call for increased use of video link for witnesses and juries to facilitate in-person criminal trials and more targeted resources to address the justice backlog.

We identify some areas where we consider the restrictions on rights may have been disproportionate. Blanket bans on the exercise of rights are to be avoided. They are likely to be disproportionate given that restrictions on rights must be the most minimal possible. In light of this, we call for exceptions to

blanket bans on gatherings for the pandemic-safe exercise of fundamental rights such as protest and worship. We call for a more targeted approach to restrictions on movement, including by distinguishing between geographical areas where the risk to public health is higher.

On the right to liberty, we call for the immediate repeal of law that removed safeguards for people challenging their detention in Mental Health Tribunal proceedings. We call for an end to mandatory hotel quarantine as soon as public health advice permits and, until then, to significantly strengthen a prior review and appeals process.

With regard to data rights, we call for an end to the tracker element of the Covid-app unless its efficacy is demonstrably proven. We urge a robust data protection approach to the roll-out of the EU Covid-19 Certificate and we call for an investigation into the controversy over arbitrary withdrawals of the Pandemic Unemployment Payment in the summer of 2020.

We make a number of recommendations on how at-risk communities can be better protected from a disproportionate impact of the restrictions, including better data collection, increased funding, supports, and human rights compliant inspections of all care settings. We repeat our longstanding call for the ratification of the Optional Protocol to the UN Convention against Torture.

Protecting the right to life and to health in a pandemic will always be the priority. However, ICCL believes that ensuring restrictions on other rights comply with the human rights framework protects us all too; now and well into the future as we 'build back better'.

Protecting the right to life and to health in a pandemic will always be the priority. However, ICCL believes that ensuring restrictions on other rights comply with the human rights framework protects us all too; now and well into the future as we 'build back better'

All Recommendations

FOR GOVERNMENT: LAW MAKING EMERGENCIES

A.	Where emergency situations require a response that restricts the exercise of rights, the following six principles should be taken into account:
1.	PRINCIPLE 1: Rights can be limited but not suspended without a derogation.
2.	PRINCIPLE 2: Legislation should be subject to scrutiny, consultation and oversight by the Oireachtas.
3.	PRINCIPLE 3: Legislation should be demonstrably compatible with human rights law.
4.	PRINCIPLE 4: Law must be clear, precise and accessible and must be communicated clearly to the public.
5.	PRINCIPLE 5: Evolving responses to the emergency must be demonstrably connected to evidence of effectiveness and need.
6.	PRINCIPLE 6: Access to justice and accountability must be maintained.

B.	When legislating for emergency measures in the future and if the Government is to renew the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020, include the following:
7.	Sunset clause: Ensure all emergency legislation has a sunset clause and, when legislation is due to be renewed, ensure sufficient time for meaningful Oireachtas debate and a human rights review.
8.	Need for a meaningful proportionality test: Establish a statutory requirement that Government would carry out a meaningful proportionality test when restricting rights, including by making best efforts to ensure all limits on rights are the least restrictive possible to achieve their objectives.
9.	Better Consultation: Establish a statutory requirement for consultation with the Irish Human Rights and Equality Commission whenever regulations are made that severely impact rights.
10.	Better Scrutiny: Establish a statutory requirement that the Oireachtas has pre-legislative scrutiny over each set of regulations unless the exigency of the public health situation requires an urgent response.
11.	Oireachtas Approval: The Oireachtas should be required to approve regulations within a set period of time.
12.	<p>Non-discrimination clauses. Include a broad non-discrimination clause in all emergency legislation to ensure government avoids potential discriminatory impacts of the law. Amend the current Emergency Legislation as follows:</p> <ul style="list-style-type: none"> (i) Introduce a non-discrimination clause in s.31A(2) of the Health Act 1947, as amended by s.10 of the Emergency Legislation. This section lists the factors that the Minister must have regard to when taking measures to prevent the spread of the virus. (ii) A similar non-discrimination clause in s.11 which amends the Public Health Act 1947 with the introduction of s.38A. This section gives broad powers to medical officers to detain individuals. S.38A(2) lists factors a health worker must have regard to when making a decision to detain an individual.

13.	<p>Limits on Broad Powers: Ensure emergency legislation does not create overly broad powers for any State actor. Amend the current Emergency Legislation as follows:</p> <p>(i) S.31A(1)(h) of the Health Act 1947, as amended by s.10 of the Emergency Legislation gives the Minister for Health 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”. This broad power requires explicit limitations such as a requirement to be ‘urgent, necessary and proportionate’.</p> <p>(ii) 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 infringe on rights. Expediency can never be a factor that alone can be used to justify rights infringements.</p>
14.	<p>Regular review: Establish a statutory requirement for a substantive review of the exercise of emergency powers.</p>
15.	<p>Human Rights Impact Assessment: Establish a requirement to carry out a human rights impact assessment of the legislation should be included.</p>

C.	When drafting regulations under emergency legislation that restrict rights:
16.	Publish emergency regulations before they enter into force.
17.	Consult with the Irish Human Rights and Equality Commission where laws impact on rights.
18.	Demonstrate that every restriction on rights has been subject to a proportionality assessment.
19.	Enable pre-legislative scrutiny and oversight by the Oireachtas.
20.	Ensure targeted, timely communication of restrictions on rights ensuring there is no blurring of lines between law and guidance.
21.	Focus on ensuring compliance with public health advice through positive reinforcement of messaging, targeted communication and the provision of key support
22.	Use criminal law as a means of enforcement in a sparing manner and only where clear public health advice grounded in scientific medical evidence is communicated effectively and efforts to ensure compliance through consent have demonstrably failed.
23.	Utilise the ‘affected areas’ provision in the Emergency Legislation to ensure a targeted approach to rights restrictions.

D.	For all decision making in an emergency that results in restrictions on rights:
24.	Gather data, including by conducting a human rights impact assessment, on all restrictions on rights to inform decision making and to ensure laws and policies respond to real needs, discrimination is avoided, and differential impacts are minimised and mitigated by key supports.
25.	Ensure transparency and effective communication of decision-making processes so the public understands the grounds for decisions that lead to different levels of restrictions on rights.
26.	Improve composition of expert advisory teams, including the current team- NPHET, by adding a broader range of experts beyond public health specialists, including a human rights expert.
27.	Ensure public sector actors understand and fulfil the public sector human rights and equality duty required under s.42 of the Irish Human Rights and Equality Commission Act 2014.

IMPACT OF RESTRICTIONS ON RIGHTS

28.	Include small, safe protests as a reasonable excuse to organise and participate in an event.
29.	Issue guidelines to protest organisers and participants on how to organise and participate in a small, safe protest.
30.	Refrain from blanket bans on gatherings: Ensure that restrictions on private and family life are proportionate and any disproportionate negative impact on certain groups, such as people living alone, vulnerable people, and caregivers, is addressed from the outset of the emergency, such as through providing for support bubbles and childcare pairing arrangements.
31.	Ensure that where restrictions impinge on rights, the Government takes particular care to communicate the precise scope of these restrictions, in particular in relation to restrictions on free movement.
32.	Ensure that where restrictions impinge on rights, the Government takes particular care to communicate the precise scope of these restrictions, in particular in relation to restrictions on free movement.
33.	Where there are geographical restrictions on the right to movement, a targeted approach linked with numbers of cases should be applied to ensure that the interference with the right to movement is the most minimal possible and the interference is demonstrably necessary and proportionate to the aim of protecting public health.
34.	Ensure that any penalties for breach of restrictions that constitute an interference with rights, especially fixed penalty provisions, are proportionate to the aim of protecting public health and to the harm caused by the particular breach.
35	<p>Repeal Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020, which limits safeguards relating to the Mental Health Tribunal. If Part 5 is not immediately repealed:</p> <ul style="list-style-type: none"> (i) Ensure that patients are assisted in making written submissions, where that is the form of patient representations to the Tribunal, including by a legal representative. (ii) Ensure that more than one member of the Tribunal is sitting and hears these cases and Tribunals do not resort to a one-person Tribunal, except in the most exceptional cases and where there is a clear need for the Tribunal to operate in this manner.

MANDATORY HOTEL QUARANTINE

36.	End mandatory hotel quarantine in Ireland as soon as public health advice permits, ensuring that the requirement to quarantine is directly connected to scientific data on cases of Covid-19.
37.	Ensure legislation on mandatory hotel quarantine is reviewed extensively with a focus on ensuring its compatibility with human rights law, if it is to be renewed beyond its current sunset clause.
38.	<p>While mandatory hotel quarantine remains in place:</p> <ul style="list-style-type: none"> (i) Ensure that all people entering mandatory hotel quarantine are given a physical and mental health medical review and all necessary medical treatments, supports or interventions are provided. (ii) Implement a system of effective and transparent review before people must enter mandatory hotel quarantine. (iii) Implement an effective and transparent appeal process for all people subject to mandatory quarantine, including the right to an oral hearing with legal representation. (iv) Ensure people subject to mandatory hotel quarantine have access to legal representation. (v) Ensure all places of mandatory hotel quarantine are subject to regular inspections to ensure conditions meet the standards for detention. (vi) Ensure the designation of States is based on non-discriminatory, objective, transparent and foreseeable criteria that is based on up-to-date medical necessity.

EU COVID-19 CERTIFICATE:

- 39.** Ensure that the EU Covid-19 Certificate complies with privacy and data protection rights, including by ensuring the following:
- (i) The system's specifications must be published to allow for independent scrutiny.
 - (ii) The system's Data Protection Impact Assessment must be published.
 - (iii) The certificates must not conflict in any way with the GDPR.
 - (iv) Principles of effectiveness, necessity, proportionality, non-discrimination, and purpose limitation must guide their creation and these principles must be continuously reviewed.
 - (v) The Irish authorities must carry out a human rights impact assessment before the system is launched and afterward to measure their impact. ICCL notes that the European Commission had not carried out an impact assessment to identify the impact of these measures and to assess the effectiveness of existing, less intrusive measures.
 - (vi) Certificates should have a limited amount of personal data.
 - (vii) Data obtained when verifying the certificates should not be retained.
 - (viii) A central database (of any data obtained) should not be established.
 - (ix) A clear review process and 12-month sunset clause must be set down. From then, there would be no justification in requiring citizens to present health documents to exercise their right to free movement.
 - (x) Purpose of the certificates must be clearly defined.
 - (xi) A mechanism for how they will be monitored must be provided.
 - (xii) Use of any data after the pandemic must be forbidden. There must be no future use of the certificates once disbanded.
 - (xiii) Irish authorities must provide universal, accessible, timely and free of charge testing for those who wish to use the certification system.
 - (xiv) Any entity or third party that will process and receive data via these certificates should be made public so citizens can exercise their GDPR rights.

AT-RISK COMMUNITIES:

- 40.** Carry out a regular human rights impact assessment on the impact of the emergency situation and restrictions on at-risk groups in order to ensure Government takes appropriate and sufficient measures to mitigate negative impacts.

CHILDREN:

- 41.** Increase funding to children's programmes and services to ensure improved wellbeing and outcomes for children.
- 42.** Develop a policy to ensure that in-school provision can continue to be provided to all marginalised and vulnerable children, including Traveller and Roma children.

OLDER PEOPLE:

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| 43. | Facilitate the participation of older people in policy-making that impacts them, including relating to Covid-19 restrictions. |
| 44. | Conduct an inquiry into the impact of Covid-19 related measures on the rights of older people, including the levels of oversight of care in nursing homes. |
| 45. | Provide for national clinical oversight of care of private nursing homes. |
| 46. | Implement the recommendations made by the Expert Panel on Nursing Homes. |
| 47. | Ratify OP-CAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including nursing homes, prisons, police stations, direct provision centres, and psychiatric hospitals. |

GENDERED IMPACT OF RESTRICTIONS:

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| 48. | Provide increased funding to non-Governmental organisations that provide services to victims of gender based violence, including domestic violence. |
| 49. | Introduce supports to address the disproportionate impact of Covid-19 on women and caregivers, including public and affordable childcare, universal mental health services, and improved supports for unpaid and paid care, in line with National Women's Council of Ireland's recommendations. |
| 50. | Extend remote access to GP consultations on termination of pregnancy beyond the pandemic and clarify whether abortion is considered an urgent medical service for travel in terms of exemptions from the general ban on travel and exemption from mandatory hotel quarantine on return. |

ETHNIC AND RACIALISED COMMUNITIES:

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| 51. | Take specific measures to address Traveller health and education inequalities, in line with Pavee Point's recommendations. ⁴¹⁷ |
| 52. | Fully implement the National Traveller and Roma Inclusion Strategy, including by developing concrete action plans with clear targets, indicators, outcomes, timeframes, and associated budget lines. |
| 53. | Take steps to ensure that disaggregated data on the basis of prohibited grounds of discrimination is collected during the exercise of all Covid-19 related enforcement powers. |

PEOPLE WITH DISABILITIES

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| 54. | Ensure the provision of social care is classified as an essential service in Covid-19 regulations. |
| 55. | Repeal Part 5 of the Emergency Measures in the Public Interest (Covid-19) Act 2020, as noted above. |

⁴¹⁷ Pavee Point, *Covid-19 and Irish Travellers: Interim Responses, Reflections and Recommendations*, 2020, p. 18.

MIGRANTS, REFUGEES, AND ASYLUM-SEEKERS:

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| 56. | Take specific measures to address the impact of Covid-19 for those living in Direct Provision centres, in line with the Irish Refugee Council's recommendations. ⁴¹⁸ |
| 57. | Develop a policy to ensure that during periods of school closures, in-school provision can continue to be provided to all marginalised and vulnerable children, including children in Direct Provision and children of migrants, refugees and asylum seekers. |
| 58. | Fully implement the commitments to replace Direct Provision and establish a not-for-profit system. |
| 59. | Ratify OP-CAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including nursing homes, prisons, police stations, direct provision centres, and psychiatric hospitals. |
| 60. | Take specific measures to improve migrant workers' rights, in line with MRCI's recommendations. ⁴¹⁹ |

LGBTI+ COMMUNITY:

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| 61. | Continue to resource LGBTI+ organisations offering frontline services to provide and adapt existing supports to reach people in their own homes, in line with Community Work of Ireland and others joint submission recommendations. |
| 62. | Monitor on an ongoing basis the issues faced by the LGBTI+ community, especially those most at-risk, and coordinate between the responses provided by LGBTI+ organisations and other mainstream services and supports. This can only be achieved if the organisations continue to be supported by the State through access to core funding, in line with Community Work of Ireland and others joint submission recommendations. |
| 63. | Specific needs of LGBTI+ people living in Direct Provision Centres should be addressed when designing responses to Covid-19. |

FOR THE DEPARTMENT OF JUSTICE AND MINISTER FOR JUSTICE:

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| 64. | Enact amendments to the Garda Station Legal Advice Scheme to enable payment for remote consultations and advice during interviews. |
| 65. | Allocate additional judges to the criminal courts to mitigate the severe backlog of cases. |
| 66. | Consider suitable applications for enhanced remission and temporary release as a means to reduce prison overcrowding. |
| 67. | Adequately resource and prioritise reforms to the Coroner's System that would address the backlog in inquests caused by Covid-19 and transform it into a full-time professional service. |

⁴¹⁸ Irish Refugee Council, *"Powerless" Experiences of Direct Provision during the Covid-19 Pandemic*, August 2020.

⁴¹⁹ Migrant Rights Centre Ireland, *Working to the Bone: The Experiences of Migrant Workers in the Meat Sector in Ireland*, 2020, p. 6.

FOR THE MINISTER FOR HEALTH, HSE AND THE DEPARTMENT OF HEALTH:

REGULATIONS

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| 68. | Ensure a proportionality test and consultation with IHREC is undertaken when making regulations under emergency legislation that restrict rights. |
| 69. | Ensure transparency to assist the public in understanding the grounds and processes of decision-making leading to measures that restrict some rights in order to protect public health. |

COVID APP

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| 70. | Be transparent in all aspects of the continued roll out of the Covid app; |
| 71. | Publish all available data related to the efficacy of the symptom tracker part of the app and outline research methodology related to this data collection; |
| 72. | Publish details relating to the figures for the 14 metrics that the app has, reportedly, been collecting on both a daily and cumulative basis to date |
| 73. | Regularly publish the minutes of the meetings of the App Advisory Committee; |
| 74. | Publish details relating to how and when use of the app will end. |

FOR THE DEPARTMENT OF SOCIAL PROTECTION:

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| 75. | Commission an independent review of the activities of social welfare inspectors at Ireland's ports and airports to ascertain if they have at all times been carried out lawfully. |
| 76. | The review should establish how many claims for social welfare payments were suspended due to the airport checks in a manner in which the claimants' rights to fair procedures were breached. |
| 77. | It should outline how the Department selected particular flights and passengers. |
| 78. | It should be completely transparent about how data was and continues to be shared between Government Departments. |

FOR AN GARDA SÍOCHÁNA (AGS):

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| 79. | Facilitate remote access between solicitors and suspects by videolink for private consultations and during police interviews. |
| 80. | Prioritise a community-based policing approach to enforcing Emergency Regulations and only use coercive measures, such as issuing fines or referral to the DPP, as a last resort. Apply a high threshold to non-compliance such as flagrant, repeated breaches of the penal provisions within the Regulations. |
| 81. | Immediately end the use of spit hoods, which potentially violate the absolute right not to be tortured or subjected to inhuman or degrading treatment or punishment. |
| 82. | Record the use of enforcement powers and publish disaggregated data on all policing encounters in the context of enforcing the Emergency Regulations. |
| 83. | Publish detailed guidelines on how AGS is approaching all policing operations related to enforcing the Emergency Regulations, including inspections, checkpoints, issuing fines and referrals to the DPP. |
| 84. | Develop and publish guidelines on how protests are policed during a pandemic to ensure transparency, consistency and a human rights compliant approach. |
| 85. | Commission a review into the role of AGS in the activities of social welfare inspectors at Ireland's ports and airports |

FOR THE COURTS SERVICE:

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| 86. | Continue to seek out potential venues which can be allocated to the hearing of criminal trials safely. |
| 87. | Jury trials should proceed by invoking additional safeguards such as staggered witness times and the use of videolink. |
| 88. | District Court hearings should resume by invoking additional safeguards such as staggered hearing times and the use of videolink for witnesses |
| 89. | Expand the availability of videolink consultation for prisoners. |

FOR THE DIRECTOR OF PUBLIC PROSECUTIONS:

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| 90. | Consider alternatives to prosecution in appropriate cases. |
| 91. | Consider the scope and importance of the right to protest when weighing the public interest in pursuing prosecutions against protest organisers for breach of Covid-19 restrictions. |

FOR THE DATA PROTECTION COMMISSIONER:

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| 92. | Closely monitor the impact on data protection rights of proposed technological solutions to emergency situations. |
| 93. | Publish a note on its investigation into the activities of social welfare inspectors at Ireland's ports and airports to ascertain if they were carried out lawfully. |



**The Community
Foundation for Ireland**

ICCL wishes to acknowledge and thank
The Community Foundation for Ireland for their support.
This report is funded by a Community Foundation
for Ireland Donor Advised Grant.



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