

Submission to the Housing Commission on Inserting a Right to Housing in the Constitution

Introduction

The Citizens Information Board (CIB) welcomes the opportunity to respond to the public consultation by the Housing Commission on a Referendum on Housing in Ireland. The experience of users of CIB funded services – Citizens Information Services (CISs), Money Advice and Budgeting Services (MABS) and the National Advocacy Service for People with Disabilities (NAS) is very informative about the housing issues that affect people and about the shortfalls in existing housing policies and provisions. This submission draws largely on this experience.

International human rights instruments which Ireland has signed up to, including, in particular, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of Persons with Disabilities, set out significant obligations in relation to housing provision. These international human rights instruments establish the right to live in a home in peace, security and dignity, with security of tenure, affordability, accessibility, appropriate location and cultural adequacy.

Despite these rights instruments and despite various housing policies and related legislative provisions, it is widely acknowledged that the right to adequate housing is not realised for many in Ireland. Housing deficits regularly come to the attention of CIB funded services. Housing-related queries comprise 9 percent¹ of almost three quarters of a million queries to CISs annually.

CISs identify a broad range of households affected by the shortage of affordable quality housing – including those working and those on social welfare, lone parents, three generations of families living in overcrowded homes, older renters whose only income is the State Pension, people with disabilities, single adults, separated parents sharing custody of their children, and young people who cannot live in the family home.² The specific issue of Traveller accommodation has been regularly highlighted by CIB and by National Traveller MABS (a CIB funded service).³ It has been noted that Travellers face

¹ Citizens Information Services dealt with over 61,000 housing queries in 2021 and over 50,000 to date in 2022.

² CIB has published a report on the *Housing Assistance Payment (HAP) The experience of Citizens Information Service*, https://www.citizensinformationboard.ie/downloads/social_policy/HAP_Report_CIB_2017.pdf and will shortly publish two reports that focus on housing – one (in partnership with the Disability Federation of Ireland) which looks at the housing needs of people with disabilities and a second collaborative report (with Threshold) which looks at issues relating to the operation of the private rented sector in the provision of social housing from the perspective of those seeking advice.

³ See, for example, *Accommodating Ethnicity*, https://www.citizensinformationboard.ie/downloads/social_policy/MABS_Energy_Poverty_Report_2019.pdf

higher discrimination in their search for accommodation, and are at much higher risk of overcrowding and homelessness.⁴

A forthcoming CIB/Threshold Social Policy Report on the private rented sector highlights the impact of rent inflation on general affordability and its related effects. The issue of homelessness generally and, specifically, in the context of people having to leave their existing accommodation or being faced with the threat of eviction is at the very heart of the debate about inserting a right to housing in the Constitution. Joint research undertaken by CIB and the Disability Federation of Ireland (DFI) highlights the very significant difficulties encountered by people with disabilities and/or mental health difficulties in accessing appropriate housing. It has been noted that disabled people are three times more likely to report discrimination when looking for housing compared to those who do not have a disability.⁵

The difficulties reported to and recorded by CIB funded services relating to accessing, affording and retaining accommodation are substantial and widespread. The extent and reach of the present housing crisis are now well documented and widely recognised. This submission by CIB which is informed by the experience of frontline information providers in responding to housing rights queries, considers the extent to which an amendment to Bunreacht na hÉireann might contribute to an improved, effective and more socially equitable approach to meeting the housing needs of the Irish population.

Inserting a right to housing in the Constitution

CIB has outlined in previous submissions,⁶ that housing policy needs to be developed within a human rights framework within which people's right to adequate housing is regarded as a core component of citizenship and social inclusion. CIB recognises that there is a significant popular movement for inserting a right to housing into the Irish Constitution. This could encompass not just right of access, but issues of affordability and sustainability. At the same time, it could ensure the independence of the Irish judiciary from the executive branch of Government and allow the latter sufficient legal space to decide on the overall level of resources to be made available for housing.

A key question is what current constitutional provisions hinder taking positive measures to address housing shortages and thereby prevent and eliminate homelessness and people living in inappropriate or sub-standard accommodation. The reality may well be that the existing constitutional provisions do not significantly restrict Government's capacity to provide housing in greater quantity and at affordable prices. For example, each local authority in Ireland already possesses strong powers of compulsory acquisition, zoning and planning controls with which to perform its very clear statutory obligation to ensure that there is an adequate supply of housing in its functional area. Also, local authorities have legal powers to acquire and redevelop existing underused lands and buildings to increase the supply of affordable housing.

It is important, in the view of CIB, that progress on achieving equality of access to housing is measured according to indicators grounded in impact rather than on aspirational statements of intent within the

⁴ Oireachtas Library, Traveller Accommodation: The challenges of implementation, https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-10-01_spotlight-traveller-accommodation-the-challenges-of-policy-implementation_en.pdf

⁵ Irish Human Rights and Equality Commission, <https://www.ihrec.ie/app/uploads/2018/06/Discrimination-and-Inequality-in-Housing-in-Ireland..pdf>

⁶ [Housing for All – CIB submission 2021](#)

Constitution. In this sense, a constitutional amendment would have to be followed by a stronger emphasis on social housing provision and the allocation of the resources required to deal with the housing shortage that is at the core of the present housing crisis.

Possible approaches to amending the Constitution

Ascertaining what the content of a right to housing should be is a complex process. CIB notes that it has been suggested⁷ that concern that the Constitution is overly protective of property rights is misplaced, and that the existing wording of Art. 43 offers adequate protection for legislative regulation of the property market. It has been noted that the balance of outcomes over time in Irish constitutional property rights adjudication has favoured the public interest as opposed to property rights, and that there is little to suggest that the courts would view constitutional property rights as imposing a barrier to radical housing reform, should appropriate safeguards be included.

One option is to amend the Constitution so as to impose a duty on the State to provide for the right of access to adequate housing. It has been noted that a number of attempts in Ireland to use the Constitution to protect public sector tenants facing eviction were unsuccessful. Some of the court judgements were on the basis that it was both reasonable and constitutional that there be available to a housing authority a rapid method of recovering possession of a dwelling provided by it.

The adoption of a constitutional right to housing would address concerns about the extent of the power of the Oireachtas to regulate property rights. Thus, legislation seeking to balance that right – i.e. the right to housing - against the property rights of other citizens would be upheld by the courts unless it can be shown that the legislation is so contrary to reason and fairness as to constitute an unjust attack on property rights.

A critically important point, however that should not be lost sight of in discussions about amending the Constitution to provide a right to housing, is that the resolution of our current housing crisis lies in the provision of more houses. The enactment of a constitutional right of access to adequate accommodation would, however, oblige the State to provide for access to adequate housing and would thus enhance the ability of those in need of accommodation to bring pressure to bear on the State to ensure the delivery of such housing. It would enable the Oireachtas to provide for more stringent regulation of private property rights where this was seen as necessary and reasonable in pursuit of the aim of meeting all citizens' right to adequate housing.

In formulating the wording of any constitutional amendment on housing, a decision needs to be taken as to whether the amendment would take the form of an enforceable right to housing rather than an alternative such as an aspirational or symbolic provision, or a provision expressly authorising certain legislative measures related to housing that have implications for constitutionally-protected private property rights.

If the amendment were to take the form of an enforceable right to housing, a question would arise of how such a right would be interpreted and enforced by the Courts. In this regard, the experience of how the Irish courts have interpreted and enforced similar rights already contained in the Constitution

⁷ Gerry Whyte, *Providing for a Right to Housing in the Irish Constitution*, Conference on a Referendum on Housing in Ireland May 10/11, 2022

relating to the rights of children with special educational needs under Article 42 of the Constitution has been noted as being very informative in this regard.⁸

On the one hand, the courts were willing to find that the State had violated the rights of children by failing to provide them with the services to which they were constitutionally entitled. However, the courts did not - for the most part - stretch the interpretation of the constitutional rights in question to compel the Government to take steps to vindicate constitutional rights.

Because available resources are always limited, the approach that courts will take to the enforcement of a constitutional right to housing in individual cases will also invariably be limited, even where the right in question is clearly intended to be enforceable. However, the large volume of cases that passed through the courts (with regard to the rights of children with special educational needs) served to focus public and political attention on this issue, leading to legislative reform and vastly improved resource allocation. As such, the inclusion of a right to housing is potentially a valuable tool for achieving improvements that prove difficult to achieve through the political system alone. It has been noted that the courts in this and many other cases have reiterated that decisions on levels of public expenditure are to be made by the legislature and not by the courts.

[Extent of current housing problem that needs to be addressed](#)

The priority in allocation of increasing resources, however, must be to address those most in need. The principle of “progressive realisation” of rights requires that the State gradually and fully implement the rights, as resources permit, with no unjustified regression.

A Report by the Houses of the Oireachtas, Parliamentary Budget Office (PBO) in 2022⁹ estimates that in addition to the 61,880 households eligible for social housing, there are 59,821 households in HAP tenancies – representing some 152,000 people. A more accurate estimate for households with a housing need may be closer to 122,000.¹⁰ However, it should be noted that homeless figures tend to exclude those in ‘hidden homeless’ living situations – those staying with friends or family, ‘sofa surfing’, or those who are not interacting with homeless services.

[Locating housing issue within a human rights framework](#)

A rights-based approach to housing not only acknowledges that housing is more than bricks and mortar but also that adequate housing allows all members of society to not only survive, but to thrive and achieve their full potential, whilst leading to a more just, inclusive and sustainable society.

Since progress to date in Ireland has not kept pace with either actual housing needs or targets, there is a need for a wider engagement on the matter at societal, political and governmental levels. This dialogue needs to be located within a human rights framework within which people’s right to adequate housing is a core component of citizenship as well as reflecting the provisions of Article 19 of the UNCRPD with regard to persons with disabilities. The resource implications of direct social

⁸ Conor O’Mahony, *Interpretation and Enforcement of Economic and Social Constitutional Rights in Ireland: Lessons from Cases on Article 42*, Conference on a Referendum on Housing in Ireland May 10/11, 2022.

⁹ Housing Ireland: Trends in Spending and Outputs of Social and State Supported Housing 2001-2020, [2022-03-02_housing-ireland-trends-in-spending-and-outputs-of-social-and-state-supported-housing-2001-2020_en.pdf \(oireachtas.ie\)](#)

¹⁰ *Ibid.* p.36

housing provision by Local Authorities are of course significant, but may not be as great in the longer-term as the costs involved in the current approach with its over-reliance on the private sector.

For households with below average or average incomes (most people with disabilities), there is clearly an affordability issue, most notably in Dublin, as competition from medium and high-income households is squeezing them out of the market. This issue applies to both people reliant on state support and to others on low income but not entitled to state support.

The inclusion of a right to housing in the Constitution would bring Ireland in line with Article 31 of the Council of Europe's Revised European Social Charter which sets out the responsibility of the State to "promote access to housing of an adequate standard, to prevent and reduce homelessness and to make the price of housing accessible".

In its current form, the Constitution provides for the right to private property but not for the right to housing – except in a manner that is somewhat nebulous, imprecise and open to challenges. As such, any changes to regulation in respect of land are constructed in the context of a property owner's rights rather than with any direct consideration of a right to housing. In the current housing crisis, and indeed in more normal times, a more effective and proactive constitutional approach would be for the legislature and the courts to balance the two rights, thus removing the current narrow interpretation of private property rights. A constitutional amendment would enable the Government to respond to the challenges around housing supply and security, affordability, and homelessness in a fairer and more balanced manner.

A right to housing in the Constitution of Ireland would place an obligation on the Government to progressively realise this right and ensure access to affordable, secure housing for all.

What a constitutional right to housing would mean in practice

In our Constitution, Article 43 protects private property and prevents the State from abolishing the right to private ownership or the right to transfer property. However, Article 43 recognises that the right to private property must be regulated in the interests of social justice and permits limits on the right in the interests of the common good. However, there is no definition of what the 'common good' means in practice. A constitutional right to housing is an essential prerequisite for tackling our current housing and homelessness crisis. The property rights in Article 43 need to be balanced by a careful consideration of the 'common good', already referenced in the Constitution but not defined.

The 'Home for Good' campaign,¹¹ a coalition of organisations advocating for constitutional change on housing, argues how this has had consequences in the past. On 12 separate occasions over recent years, pending legislation to reform Ireland's housing crisis failed to progress in the Dáil when Article 43 was raised as a barrier.

A relevant trend identified¹² is that the Government over the years has frequently opposed proposed legislation Bills on the basis of the private property rights protection in the Constitution, and in particular on the Attorney General's interpretation of those provisions. This paper has identified at

¹¹ [Why a Referendum | Home for Good](#)

¹² [Oireachtas Library and Research Service Briefing Paper on Property rights and housing legislation 2019](https://www.homeforgood.ie/assets/files/pdf/enquiry_2019_715_-_property_rights_and_housing_legislation.pdf)
[https://www.homeforgood.ie/assets/files/pdf/enquiry_2019_715 -
_property_rights_and_housing_legislation.pdf](https://www.homeforgood.ie/assets/files/pdf/enquiry_2019_715_-_property_rights_and_housing_legislation.pdf)

least 12 Bills that the Government has opposed or resisted on the basis of concerns around private property rights.

A stand-alone right

A constitutional right to housing would form the baseline for all housing-related measures and be the prism through which any measure will be viewed. An obligation to realise a right to housing, within available resources, would be a statement of both legal obligation and political intent. It would provide a mandate for action to address housing need and an impetus to gradually realise that right.

CIB is of the view that any constitutional amendment would include a stand-alone and directly enforceable right to housing. This is necessary in order to address issues associated with the constitutional requirement to protect private property which has presented a barrier to State intervention in terms of the common good. The inclusion of a stand-alone right to housing would remove perceived barriers to the implementation of housing policy which affects private property rights. With a stand-alone right to housing, there will be a counterbalancing obligation to realise that right and an impetus for concerted and consistent action by the State.

The proposed constitutional amendment would, in addition, reinforce and clarify that housing is indeed an integral component of 'social justice' and of the 'common good'.

A constitutional amendment providing for a standalone right to housing would provide for generalised access to housing to an appropriate standard, which, it should be noted, is not the same as a right to a house. For example, the right to education in Article 42.4 has been a significant impetus for action, but it has never guaranteed parents the right to a school of their choosing, to be provided in the location of their choosing.

There is a strong argument that, in order to rebalance the Constitution and ensure that any potential barrier to progressive housing policy is effectively removed, the insertion of a right to housing as a stand-alone right of equal value to the right to private property is necessary. Any amendments to the Constitution or any approach to legislating for a right to housing would clearly have to balance the rights of landowners with the rights of those in need of housing.

Overview

It is important to note that there is some consensus among academic lawyers that the Constitution does not present an automatic barrier to progressive housing policies on the basis that the substantial constitutional recognition of the State's entitlement to regulate private property under Article 43.2 allows private property to be regulated according to the principles of social justice. Nevertheless, this express recognition of the principles of social justice has not been sufficient to allow those providing legal advice to policy makers to endorse housing policies that have been proposed to address the housing crisis.

The provision of housing ultimately depends on the availability and allocation of resources. A constitutional amendment cannot, of itself, generate additional resources. Therefore, the most that a constitutional amendment can do is to oblige the State to use a share of existing resources for a particular purpose. That resource issue will almost certainly continue to exist whether or not there is an express recognition of a housing right in the Constitution.

Notwithstanding the resource aspect of the challenge, a constitutional wording should expressly state that, while the realisation of the right is within available resources, the State should seek to realise the right of every individual in the shortest possible time in accordance with the maximum available

resources. It has been noted that the Courts are most unwilling to be seen as in any sense ‘legislating’ where elected politicians are designated to carry out this function. A constitutional obligation to realise the right to housing could nonetheless in serious cases be relied on to effectively address significant failure by the State to comply with its constitutional obligation.

Where the State has unreasonably failed to discharge its obligations in respect of housing, the amendment would empower the courts to review such failure to grant appropriate remedies, up to and including mandatory orders directing the State to address the housing needs of particular individuals. The lessons of existing constitutional rights case law (e.g. primary education Art.42.4) is that the courts would be slow to intervene in this way in all but the most serious of cases. However, that experience also shows that litigation may be one mechanism available to compel the State to remedy situations brought about by the State’s neglect of its constitutional duty.

CIB is of the view that the focus in public and policy discourse on the need for constitutional reform should not in any way detract from the need to proactively implement current policies as well as introducing reforms allowable under current constitutional and legislative provisions. In particular, CIB believes that the following reforms should be prioritised:

- The zoning of more land for housing
- The abolition of ‘no-fault’ evictions
- The introduction of further legislation to improve security of tenure in the private rented sector
- The provision of a greater level of protection and support to tenants who accrue rent arrears and the introduction of an arrears management strategy, similar to the mortgage arrears framework provisions
- Revision of HAP rent limits in line with market rents
- Expansion of Rent Pressure Zones and greater enforcement of such zones
- Additional measures (e.g., tax) to incentivise landlords to remain in or enter the market
- Improve the standards of private rented accommodation by fully implementing existing standards.