



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

Housing Commission
Custom House
Dublin
D01 W6X0

Sent by email: ConsultHC@housingcommission.gov.ie

RE: Public consultation on a Referendum on Housing in Ireland

2 September 2022

Dear Sir/Madam,

I write further to the call by Minister Darragh O'Brien, TD for submissions to the consultation on a Referendum on Housing in Ireland, taking place under the *Housing for All: A New Housing Plan for Ireland* and the *Housing Commission*.

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the Irish Human Rights and Equality Commission Act 2014 (the '2014 Act'). In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality. The Commission has prioritised housing in its *Strategy Statement 2022-2024*, including protection of housing as a human right.¹

While Ireland has no constitutional or legally established right to housing, the right to adequate housing is a central part of Ireland's obligations under international human rights law.² Access to

¹ Irish Human Rights and Equality Commission, *Strategy Statement 2022-2024*, 2012, p11.

² Adequate housing was recognised as part of the right to an adequate standard of living in article 25 of the 1948 Universal Declaration of Human Rights. Available at: <https://www.un.org/en/universal-declaration-human-rights/index.html>; the European Convention on Human Rights (ECHR) guarantees a right to housing, under Article 8, the right to family and private life and protection of the home; and Article 6, the right to due process in the case of eviction. Available at: https://www.echr.coe.int/documents/convention_eng.pdf; Article 11 of the International Covenant of Economic, Social and Cultural Rights sets out the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>; The Commission has also called on the State to accept the provisions of the European Social Charter in full, including Article 31(1-3) on housing and homelessness. Article 31(1-3) sets out the responsibility of the State to promote access to housing of an adequate standard, to prevent and reduce homelessness with a view to its gradual elimination, and to make the price of housing accessible to those without adequate resources. Available at: <https://www.coe.int/en/web/european-social-charter>



affordable, safe, secure, and decent standard housing is essential for individuals' physical health, psychological wellbeing, and to live a life with dignity. There is a critical link between the right to adequate housing and the enjoyment of other related and interdependent rights, including the right to family life and the right to privacy.³

The Constitution is the repository of our highest rights and values, and our priorities as a society. The Commission believes that economic, social and cultural (ESC) rights, including housing, must be protected in the Irish legal order through incorporation of these rights at a constitutional level, backed by appropriate supplementary statutory protections and policy measures.⁴

In terms of constitutional protection, the Commission is of the view that it is preferable to add ESC rights, including housing, to a new standalone article of the Constitution for example as an Article 40A, rather than to integrate them into the existing constitutional text. There are several reasons for this. It allows the new rights to be given an express identity as ESC rights (including in the title of the article, and from their grouping together) rather than leaving the nature of these entitlements to be implied by their wording. A standalone provision would also allow—if necessary—for specific text making it clear that the rights were justiciable, and any limitations or directions in terms of judicial enforcement.⁵

Protecting a right such as housing in a constitution does not mean that everyone is entitled to a house forthwith.⁶ It is, rather, a guarantee that your rights in these respects are vindicated insofar as possible, within available resources, and not *unreasonably* ignored, regressed, or denied.⁷ A constitution may also protect a certain minimum core of these rights—essential entitlements like a right to basic shelter—in an even stronger way.⁸ Constitutional protection allows for the difficult realities and trade-offs of government to be taken into account.⁹ Notwithstanding, the Commission notes that where there is unreasonable policy or persistent failure to protect the rights, the rights will be found violated and consequences should follow from this.¹⁰

³ OHCHR and the right to adequate housing. Available at: <https://www.ohchr.org/en/housing>

⁴ IHREC, *Policy Statement on the Incorporation of Economic, Social and Cultural Rights in the Irish Constitution*, forthcoming, 2022, p4.

⁵ IHREC, *Policy Statement on the Incorporation of Economic, Social and Cultural Rights in the Irish Constitution*, forthcoming, 2022, p4.

⁶ See e.g. the South Africa case of *Soobramoney v Minister for Health* 47 [1998] (1) S.A. 765 (CC). See generally Sandra Liebenberg, S. *Adjudicating Social Rights under a Transformative Constitution*, in Langford, M. (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008)

⁷ See Davis, D., *Transformation: The Constitutional Promise and Reality*, *South African Journal on Human Rights*, 26, no. 1, 2010, p85-101.

⁸ Tasioulas, J. *Minimum Core Obligations: Human Rights in the Here and Now*, Nordic Trust Fund/ World Bank Research Paper, October 2017. Available at: <https://openknowledge.worldbank.org/handle/10986/29144>

⁹ Tushnet, M. *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* 2009, Princeton University Press.

¹⁰ Landau, D. *The reality of social rights enforcement*. *Harv. International Law Journal* 53, 2012.



The Commission recommends¹¹ that the following elements be included in any final proposal:

- the rights should be justiciable, and included in the personal rights provisions of Articles 40-44;
- the text should suggest or invite a reasonableness approach, or a progressive realisation approach, for vindication of ESC rights;¹²
- certain rights—such as basic accommodation and emergency healthcare—should be protected as minimum core entitlements which should never be denied to anyone;¹³
- the rights should be protected directly by the text, without intermediation of “provision may be made by law for the protection of”;
- the protections should not be limited to “citizens”, as some of the rights in Article 40-44 are, but expressly apply to all persons;¹⁴
- the text should suggest remedial flexibility for the judiciary in enforcing them¹⁵.

It is crucial that housing rights are included in the core rights provisions of the Constitution, as justiciable rights—rights that can be enforced in court.¹⁶ Judicial protection provides a crucial backstop and safeguard for rights, and ensures that they are taken seriously as core rights concerns, and not treated as lesser than other rights protections. It is also critical that any move to insert ESC rights into the Constitution is buttressed and supplemented by appropriate policy and statutory measures, including¹⁷:

- non-judicial oversight processes, such as a standing Oireachtas Committee on Human Rights and Equality, to ensure that ESC rights are protected for all whom they should protect, and to monitor the efficacy of State policy in this area;
- reform of litigation procedures¹⁸ and the provision of judicial training and education to enable litigation and adjudication on ESC rights;

¹¹ IHREC, *Policy Statement on the Incorporation of Economic, Social and Cultural Rights in the Irish Constitution*, forthcoming, 2022, p4.

¹² This approach is notably—and effectively—adopted in South Africa. See Davis, D., *Transformation: The Constitutional Promise and Reality*, *South African Journal on Human Rights*, 26, no. 1, 2010, 85-101.

¹³ The minimum core obligations set out in standards such as ICESCR are applicable in a global context; ongoing domestic interpretation of the minimum requirements is needed in the context of a wealthy country like Ireland. See Russell, H. et al., [Monitoring adequate housing in Ireland](#), Economic and Social Research Institute, 2021, p5.

¹⁴ Most provisions of the Constitution refer to the rights of the citizen, but are enjoyed by all persons in the State unless something about their nature relates intimately to citizenship; see *Kelly* (n 12 **Error! Bookmark not defined.**) [7.1.28]-[7.1.36].

¹⁵ Any new proposal should not resemble Article 45 of the Constitution (Directives of Social Policy). A45 offers guidelines to the Oireachtas on a number of socio-economic rights but the article is explicitly non-justiciable.

¹⁶ See generally Jeff King, *The Justiciability of Resource Allocation*, *Modern Law Review*, 70, no.2, 2007, 197.

¹⁷ IHREC, *Policy Statement on the Incorporation of Economic, Social and Cultural Rights in the Irish Constitution*, forthcoming, 2022, p14.

¹⁸ Examples of such reform would be broader third party amicus/intervenor participation to help with the gathering of complex evidence; reconsideration of *locus standi*/ripeness/mootness rules to ensure appropriate opportunity to bring cases on ESC rights; and broader rules on class actions.



- improving access to justice to enable vindication of ESC rights, including through improved access to legal aid, as well as additional legal and independent advocacy supports;
- protecting certain rights—such as housing—as statutory rights in addition to their constitutional protection, to more specifically instantiate them and guide the actions of the administrative branches of government in vindicating these rights;
- incorporation, at sub-constitutional level, of the obligations in the International Covenant on Economic, Social and Cultural Rights into Irish domestic law;
- a robust and comprehensive data system to facilitate monitoring and review.

Protecting ESC rights, including housing, would be a development of our constitutional order, but one that is in harmony with it and its underlying values. These rights are critical, relating as they do to fundamental and basic entitlements necessary to live and to live well.

The Commission supports the work of the Housing Commission in delivering on its ambitious agenda and I hope that these observations are of assistance in advancing this timely and important work.

Yours sincerely,

Sinéad Gibney
Chief Commissioner

Irish Human Rights and Equality Commission