



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

# Submission to the Minister for Housing, Local Government and Heritage on the General Scheme of the Housing (Miscellaneous Provisions) Bill 2024

Irish Human Rights and Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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## Abbreviations

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The EU Charter	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
The 2003 Directive	Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents
The 2004 Directive	Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
The 2011 Directive	Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims
The 2014 Directive	Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers
DSGBV	Domestic, Sexual and Gender-Based Violence
The 2015 Regulations	European Communities (Free Movement of Persons) Regulations 2006 (S.I. 548 of 2015)
The Convention	European Convention on Human Rights
The 2009 Act	Housing (Miscellaneous Provisions) Act 2009
The Circular	Housing Circular 41/2012 on access to social housing supports for non-Irish nationals
The 2005 Act	Social Welfare Consolidation Act 2005

## Recommendations

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### General Observations

The Commission recommends that:

- › before proceeding further with the legislative proposals the State consider the human rights and equality considerations raised by the proposed measures.
- › any legislative proposals in relation to access to social housing supports must take account of the Department's Public Sector Duty obligations under Section 42 of the Irish Human Rights and Equality Commission Act 2014.
- › in light of the significant human rights and equality issues raised by the legislative proposals the State must first demonstrate the need for, and value of, the proposals and how it will ensure that the proposals will not have a discriminatory and disproportionate impact on structurally vulnerable groups.
- › a formal, standardised independent appeals mechanism in respect of social housing decisions be set out as a statutory requirement in the legislation.
- › it must be set out clearly in the legislation that the requirement to prove lawful and habitual residence does not apply to applications for emergency services under the Housing Act 1988 in order to prevent any issues for persons accessing emergency accommodation.

### Specific Observations

The Commission recommends that:

- › the legislation clarifies that the lawful and habitual residence requirement forms part of the overall assessment of housing need and will not be a new preliminary criterion which an applicant must meet before they can be assessed for social housing.
- › the requirement for all household members to demonstrate lawful and habitual residency in the State be removed.

- › the absolute bar on all EU/EEA citizens accessing social housing assistance during the first three months of residence in Ireland be removed from the legislation as it is not compliant with EU law.
- › the State must ensure that any difference in treatment between third country nationals based on length of residence and/or residence permission must be objectively and reasonably justified, pursue a legitimate aim, and be proportionate to the aim.
- › the legislation be amended to ensure that the 5 years reckonable residency requirement does not apply to victims of trafficking in a manner that is contrary to the Anti-Trafficking Directive.
- › the legislation be amended to include parents of EU citizen children accessing education in another Member State in the list of persons having a lawful right to reside.
- › it is made clear in the legislation that residence in the State prior to receiving status can be relied upon for the 5 years reckonable residency requirement so that there is not a disproportionate impact on international protection applicants seeking housing assistance.
- › the legislation should include exemptions from the habitual residence requirement for victims of trafficking and victims of domestic, sexual, or gender based violence.

## Introduction

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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'). The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to examine any legislative proposal and report its views on any implications for human rights or, equality.<sup>1</sup> In this regard, we welcome the opportunity to provide the Minister for Housing with our submission on the General Scheme of the *Housing (Miscellaneous Provisions) Bill* (the 'General Scheme').

The General Scheme was approved by Government on 30 January 2024. The General Scheme provides for, *inter alia*, amendments to the Housing (Miscellaneous Provisions) Act 2009 to provide legal and habitual residence as eligibility criteria in the Social Housing Assessment process and limiting eligibility for EU/EEA nationals to those who have been in the State longer than three months.<sup>2</sup>

The proposed changes to social housing assistance proposed by the General Scheme will have a significant impact on the entitlement of certain cohorts of persons to access such assistance. This will likely result in more people being denied access to social housing support and being forced to rely on emergency accommodation under the Housing Act 1988. As such, we have concerns with a number of provisions of the General Scheme, including the provisions relating to lawful and habitual residence, the potential significant implications of the legislative proposals on structurally vulnerable groups, and the lack of appeals mechanism. These concerns, along with our other observations on the General Scheme, are laid out below.

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<sup>1</sup> Section 10(2)(c) of the [Irish Human Rights and Equality Commission Act 2014](#).

<sup>2</sup> The Joint Committee on Housing, Local Government and Heritage met on 23 April for Pre-Legislative Scrutiny of the General Scheme. Transcript available [here](#).

## Relevant Human Rights and Equality Standards

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### Irish Constitution

Regrettably, there is no existing right to housing in the Irish Constitution. The Government commits in its Programme for Government to hold a referendum on housing,<sup>3</sup> with proposed wording submitted to the Minister in June 2023 by the Housing Commission.<sup>4</sup> We have previously urged the Government to hold a referendum on inserting the right to housing into the Constitution, which should establish minimum core obligations and introduce the concept of progressive realisation.<sup>5</sup>

### EU Law

The Charter of Fundamental Rights (“the EU Charter”) enshrines a series of personal, civil, political, economic and social rights that EU citizens and residents are entitled to, with a number concerning housing, including Article 7<sup>6</sup> and Article 34(3).<sup>7</sup>

Other pieces of EU legislation are relevant to the treatment of EU Citizens and third-country nationals in respect of accessing housing. The 2004 Directive<sup>8</sup> provides for the equal treatment between EU citizens and nationals of a member state, save where the EU citizen is not economically active.<sup>9</sup> Directive 2014/54/EU<sup>10</sup> (“the 2014 Directive”) provides that EU citizens working in a Member State shall enjoy the same housing rights and benefits afforded to national workers. The key distinction therefore in respect of the

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<sup>3</sup> Department of the Taoiseach, [Programme for Government: Our Shared Future](#), (2020) P.120

<sup>4</sup> The Housing Commission, [Report of The Housing Commission](#) (2024) p.23

<sup>5</sup> IHREC, [Submission to the Committee on Economic, Social and Cultural Rights on Ireland's fourth periodic report](#) (2024) p.113

<sup>6</sup> Article 7 of the EU Charter provides “*Everyone has the right to respect for his or her private and family life, home and communications*”.

<sup>7</sup> Article 34(3) of the EU Charter directly refers to the right to social and housing assistance, however it is caveated by the statement that such a right is to be in accordance with the rules laid down by Community and National laws and practices.

<sup>8</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, at Article 24

<sup>9</sup> Member states are entitled to refuse access to social assistance to EU citizens who are not economically active during the first three months of residency, or longer while they remain unemployed (see Article 24(2)).

<sup>10</sup> Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, see Article 2(1)(f)

entitlements of EU citizens to equal treatment is whether the EU citizen is economically active or not.

As well as providing for equal treatment for EU citizens, EU legislation also deals with the equal treatment of third country nationals within the EU. Directive 2003/109/EC grants third country nationals who are long-term residents the right to equal treatment in access to goods and services made available to the public, including housing assistance.<sup>11</sup> Directive 2013/33/EU lays down minimum EU standards regarding reception conditions for asylum-seekers.<sup>12</sup> Directive 2011/95/EU<sup>13</sup> provides that persons who have been granted international protection are entitled to receive the same social assistance as provided to nationals of the Member State.<sup>14</sup> Directive 2011/36/EU<sup>15</sup> requires Member States to ensure that assistance and support are provided to victims of human trafficking.<sup>16</sup>

The Court of Justice of the European Union (“the CJEU”) has also provided guidance to Member States on the application of habitual residence requirements in the context of accessing social assistance programmes.<sup>17</sup>

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<sup>11</sup> Article 11(1). ‘Long term resident’ is defined as legal and continuous residence within a member state for a period of 5 years. Article 3(2) of the 2003 Directive identifies a number of classes of person to whom the Directive does not apply, including third country nationals pursuing studies or vocational training; and applicants for and recipients of temporary protection, subsidiary protection, and refugees.

<sup>12</sup> Material reception conditions include housing, food and clothing provided in-kind, financial allowances or vouchers, and a daily expenses allowance. The Directive does not oblige Member States to provide any particular type of accommodation to asylum seekers, or for equal treatment in respect of accommodation or housing assistance with nationals of the relevant Member State.

<sup>13</sup> Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, Article 29

<sup>14</sup> The CJEU confirmed in *Ayubi* (C-713/17) that Article 29(1) of Directive 2011/95/EU imposes on each Member State, in unambiguous terms, an obligation to ensure that every refugee to which it grants protection enjoys the same level of social assistance as that provided for by the State to its nationals.

<sup>15</sup> Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Article 11

<sup>16</sup> Article 11(5) of the Directive sets out that the assistance to be provided *must “include at least standards of living capable of ensuring victims’ subsistence through measures such as the provision of appropriate and safe accommodation and material assistance”*. Note that Article 1(9)(b) of the recently adopted Recast Directive (Directive (EU) 2024/1712) which amends Directive 2011/36/EU and which must be transposed into national law by 15 July 2026, provides that ‘appropriate and safe accommodation’ includes ‘shelters’. This aspect of the 2011 Directive was amended to narrow the flexibility and to strengthen the assistance to be provided. However, beyond this, as with Directive 2013/33/EU, Member States are not obliged to provide any particular type of accommodation, nor does the 2011 Directive provide for equal treatment in respect of accommodation or housing assistance with nationals of the relevant Member State.

<sup>17</sup> In *Swaddling v Adjudication Officer* C-90/97 the CJEU held that Member States could not specify a minimum period of residence in order for habitual residence to apply, and identified five factors to be used in determining habitual residence. In *Collins* (C-138/22) the CJEU also determined that where a habitual residence requirement is enforced, it must be done for legitimate purposes and in a proportionate manner.

## European Convention of Human Rights

As with the Constitution, the European Convention on Human Rights (“the Convention”) does not contain any express right to housing or to be provided with housing assistance. The primary protections in respect of housing are contained on Article 8 which provides for the respect of family and private life and the home of persons covered by the Convention, and Article 14’s guarantee of equality.

The European Court of Human Rights (“ECtHR”) has held that the requirement to prove lawful residence in the State to access social welfare benefits is not unlawful under Article 14 of the Convention,<sup>18</sup> and that states have a margin of appreciation in respect of the provision of social assistance benefits.<sup>19</sup> However, the Court has been clear that its case-law shows that a difference in treatment must be objective and reasonably justified, proportionate, and in pursuit of a legitimate aim.<sup>20</sup>

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<sup>18</sup> *X v Ireland* (Applications nos. 23851/20 and 24360/20)

<sup>19</sup> See *Niedzwiecki v. Germany* (App No. 58453/00) and *Carson and Others v. the United Kingdom* (App No. 42184/05)

<sup>20</sup> *Niedzwiecki v. Germany* (App No. 58453/00) para 32. The ECtHR also held that that whether or not a difference in treatment for the purpose of social benefits would amount to a breach of Convention rights would depend on a case-by-case analysis

## General Observations on the General Scheme

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### Lawful Residency and Habitual Residency

Head 5 of the General Scheme inserts a new section into the Housing (Miscellaneous Provisions) Act 2009 (“the 2009 Act”) providing for lawful and habitual residency in the State as explicit eligibility criteria for all members of an applicant household applying for social housing support. It would appear that the legislation purports to put the policy position in Housing Circular 41/2012 on access to social housing supports for non-Irish nationals<sup>21</sup> (“the Circular”) on a statutory footing, as well as adding habitual residence as a requirement. Whilst habitual residence has not been a condition of eligibility in relation to accessing social housing supports to date, it has been a feature of social welfare law for almost 20 years.

Head 4(1) purports to insert a definition of the term “habitually resident” and provides that this shall be construed in accordance with section 20A. In considering whether a person is habitually resident for the purpose of section 20A, a decision maker must have regard to the factors set out in Head 5(6).<sup>22</sup> The provisions of Head 5(6) of the General Scheme in effect seek to mirror the existing habitual residency provisions contained in s.246 of the Social Welfare Consolidation Act 2005 (“the 2005 Act”).

We have had substantive engagement with the issues arising from the lawful residency requirement under the Circular and its application, spanning a number of years and employing different Commission functions, including by inviting the four local authorities in Dublin to undertake an Equality Review and an Equality Action Plan pursuant to section 32 of the IHREC Act 2014,<sup>23</sup> and providing legal assistance to individuals to challenge

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<sup>21</sup> Circular Housing 41/2012 - Access to Social Housing Supports for non-Irish nationals, available [here](#).

<sup>22</sup> These are: the length and continuity of residence; the length and purpose of any absence from the State; the nature and pattern of employment; the person’s main center of interest and; the future intentions of the person concerned as they appear from all the circumstances. The criteria set out in Head 5(6) in respect of the factors to be determined when assessing habitual residence are taken from the decision of the CJEU in *Swaddling* and as outlined in section 246(4) of the *Social Welfare Act 2005, as amended*. In addition, the concept of habitual residence was discussed by the Dunne J. in *O v Minister for Social Protection* where she stated that it was a familiar concept in both domestic and EU law (see para 53).

<sup>23</sup> In 2018, we invited the four local authorities in Dublin to undertake an Equality Review and an Equality Action Plan pursuant to section 32 of the IHREC Act 2014 in respect of non-Irish nationals’ (EEA nationals and non-EEA nationals) access to social housing services and to promote equality of opportunity for EEA and non-EEA nationals in respect of access to social housing, as well as to homeless services. In all four of the equality reviews, we expressed concern in respect of the application of the Circular on access to social

erroneous decisions on the right of residence made pursuant to the Circular.<sup>24</sup> The Circular has proven problematic in that it does not fully reflect current law and its application has resulted in the unlawful exclusion of certain cohorts of people from accessing social housing supports. The Commission has previously recommended that the Circular be reviewed and amended to ensure that EEA nationals are not unlawfully discriminated against in accessing social housing supports.<sup>25</sup> We have also raised concerns about the application of the Circular in relation to victims of trafficking,<sup>26</sup> and called for Local Authorities to develop mandatory, comprehensive training for all staff involved in social housing provision to eliminate discriminatory attitudes and protect the rights of structurally vulnerable groups, as required by the Public Sector Duty.<sup>27</sup>

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housing supports for non-Irish nationals, the potential application of the Circular to non-Irish nationals accessing homeless services and the potential conflation of the eligibility criteria for access to homeless services and social housing support. [Equality Reviews: Provision of Accommodation Services for non-Irish Nationals by Local Authorities](#). See [Dublin City Council Non National Equality Review IHREC](#); [Fingal County Council Non National Equality Review IHREC](#); [Dún Laoghaire-Rathdown County Council Non National Equality Review IHREC](#) and [South Dublin County Council Non National Equality Review IHREC](#).

<sup>24</sup> In 2019, we provided legal assistance under section 40 of the IHREC Act 2014 to two EU nationals to challenge the decision of a local authority to remove them from the social housing list because they purportedly did not have right of residence in Ireland. The local authority relied on the Circular in assessing the right of residence. However, the complainants had a right of residence under EU law. The case was settled and the local authority reinstated the complainants onto the social housing list backdated to the date of their original application - IHREC, Annual Report (2019) p. 22. IHREC's 2020 Annual Report also refers to a legal assistance case where two people, who had the right to reside under EU law, were refused access to the social housing list; through correspondence the local authority agreed to place them on the list. See *Two Applicants v A Local Authority*, IHREC, Annual Report (2019) p. 22. Mercy Law Resource Centre ('MLRC') has also highlighted the issues arising from application of the Circular from their casework experience: EEA nationals refused access to the social housing list due to not being in employment for one year, or while having children in full-time education within the State; a non-EEA national who had been lawfully resident for over 13 years was refused admission to the list due to not having residency status for five years as advised by the Circular. These cases were ultimately resolved in favour of MLRC's clients. See Mercy Law Resource Centre, [Minority Groups and Housing Services: Barriers to Access](#) (2021), p.7-8.

<sup>25</sup> IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) p. 94.

<sup>26</sup> In the Second Evaluation of the Implementation of the EU Anti-Trafficking Directive the Commission raised concerns as to the application of Circular 41/2012 in relation to victims of trafficking, noting that it impermissibly creates exclusions from eligibility from social housing support, which are not found in law, and denies to victims lawfully resident in the State accommodation to which, as a matter of EU law, they are entitled. The Commission reiterated its recommendation that all national (IPAS) and Local Authority housing policies be reviewed to ensure the specific needs of victims of trafficking are met and that the interplay of such policies does not adversely impact on victims of trafficking. The Commission also reiterated its recommendation that all Local authorities cease the application of Circular 41/2012 to refuse housing assistance to victims of trafficking on short-term residence permits, with immediate effect. See IHREC (2023) [Trafficking in Human Beings in Ireland: Second Evaluation of the Implementation of the EU Anti-Trafficking Directive](#), p.119-121

<sup>27</sup> IHREC, [Ireland and the International Covenant on Economic, Social and Cultural Rights: Submission to the Committee on Economic, Social and Cultural Rights on Ireland's fourth periodic report](#) (January 2024) p. 116.

We have also repeatedly expressed concern regarding the habitual residence condition, and other administrative obstacles, which impede equal access to social welfare services for structurally vulnerable groups.<sup>28</sup> We have concerns that the habitual residence condition as it is applied under social welfare law, and the lawful residency requirement under the Circular, have a discriminatory and disproportionate effect on structurally vulnerable groups and ethnic minority communities,<sup>29</sup> including Roma, seeking access to basic social protections such as Child Benefit,<sup>30</sup> housing supports<sup>31</sup> and Disability Allowance.<sup>32</sup> While the habitual residence condition is applied to all applicants for benefits regardless of their nationality, it is not neutral in its application in practice. Migrant, Traveller, and Roma families face particular challenges in meeting its conditions, due to

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<sup>28</sup> IHREC, [Ireland and the International Covenant on Economic, Social and Cultural Rights: Submission to the Committee on Economic, Social and Cultural Rights on Ireland's fourth periodic report](#) (January 2024) p. 85; IHREC, [Parallel Report, Ireland and the Convention on the Elimination of All Forms of Discrimination against Women: Submission to the Committee on the Elimination of Discrimination against Women for the List of Issues prior to Reporting on Ireland's 8<sup>th</sup> Periodic Cycle](#) (September 2023) p. 81. See also IHREC, [Comments on Ireland's 16<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (May 2019) p. 22; IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) p. 79; IHREC, [Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth and Seventh Reports](#) (January 2017) p. 92; See also IHREC, [Report to UN Committee on Economic, Social and Cultural Rights on Ireland's Third Periodic Review](#) and IHREC, [Irish Human Rights Commission Submission to the UN Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights](#) (June 2014) p.22.

<sup>29</sup> IHREC, [Parallel Report, Ireland and the Convention on the Elimination of All Forms of Discrimination against Women: Submission to the Committee on the Elimination of Discrimination against Women for the List of Issues prior to Reporting on Ireland's 8<sup>th</sup> Periodic Cycle](#) (September 2023) p. 81. See also IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) p. 79; see also IHREC, [Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth and Seventh Reports](#) (January 2017) p. 92; see also IHREC, [Comments on Ireland's 16<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (May 2019) p. 22.

<sup>30</sup> See for example, IHREC, [Submission to the Committee on the Rights of the Child on Ireland's combined fifth and sixth periodic reports](#) (2022), pp. 79-80.

<sup>31</sup> Due to discrimination, their employment rates, and their disproportionate risk of precarious/unregistered work, Roma can be at a particular disadvantage meeting the requirements of the Circular and for many it is a de facto bar on their eligibility. The National Roma Network, [Roma Accommodation Advocacy Paper](#) (2022). Roma women often lack documentation, proof of address and/or language and literacy skills to prove their connection to the State, despite residing in the jurisdiction for many years. We have also been informed by civil society that the Habitual Residence Condition has a wider impact on the ability of Roma women to leave an abusive relationship. We have previously recommended the introduction of legislation to provide for a DSGBV waiver to the Condition. Irish Traveller and Roma Women, [Alternative Report to GREVIO on the Implementation of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence](#) (2022)..

<sup>32</sup> We are aware of individuals granted permission to remain in the State under the *International Protection Act 2015* being refused Disability Allowance as they have been deemed to fail to satisfy the habitual residence condition.

their employment patterns, absence of family ties, or overall length of time spent in the country.<sup>33</sup>

Despite repeat criticism from treaty monitoring committees,<sup>34</sup> the Commission<sup>35</sup> and civil society,<sup>36</sup> the State has not acknowledged or assessed the discriminatory impact these conditions have on specific communities, citing their universal application.<sup>37</sup>

Most recently, the Committee on Economic, Social and Cultural Rights in its concluding observations on Ireland stated:

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“The Committee is concerned about reports of the inadequacy of social security benefits, including unemployment benefits. The Committee is also concerned about the reported lack of administrative capacity of social security services to deliver targeted and individualized support to beneficiaries. The Committee is further concerned about certain conditions attached to social security benefits, including the habitual residence condition, which effectively denies access to certain disadvantaged groups and has a significant-discriminatory effect on Traveller and Roma communities, victims of domestic violence, people experiencing homelessness and migrants”.<sup>38</sup>

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The Committee called on Ireland to review the conditions attached to social security benefits, including the habitual residence condition, with a view to removing the conditions

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<sup>33</sup> IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019) p. 79; see also IHREC, [Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth and Seventh Reports](#) (January 2017) p. 92; see also IHREC, [Comments on Ireland's 16<sup>th</sup> National Report on the Implementation of the European Social Charter](#) (May 2019) p. 22; IHREC, [Report on Ireland and the International Covenant on Economic, Social and Cultural Rights](#) (May 2015) p.63; IHREC, [Irish Human Rights Commission Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights](#) (June 2014) p. 22.

<sup>34</sup> GREVIO, [Baseline Evaluation Report: Ireland](#) (2023), pp. 16, 52; CEDAW, [Concluding observations on the combined sixth and seventh periodic reports of Ireland](#), (2017), paras 46-47; CESCR, [Concluding observations on the third periodic report of Ireland](#) (2015), para 21.

<sup>35</sup> IHREC, [Submission to the Anti-Racism Committee](#) (2021) and IHREC, [Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women](#) (2023), p. 81.

<sup>36</sup> The National Roma Network, [Roma Accommodation Advocacy Paper](#) (2022); Pavee Point, [Habitual Residence Condition – Briefing Paper](#) (2014); Safe Ireland, [Report on the impact of the Habitual Residence Condition on women seeking protection and safety for themselves and their children from a domestic violence perpetrator](#) (2013).

<sup>37</sup> Government of Ireland, [Fourth periodic report submitted by Ireland](#) (2021), paras 105-108.

<sup>38</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the fourth periodic report of Ireland (2024), para 34.

that are discriminatory or have a discriminatory effect and take effective measures to improve the uptake rates of such benefits. In applying the habitual residence condition to social housing assistance in the manner proposed in the General Scheme, the State will create similar difficulties for disadvantaged groups in respect of accessing housing assistance. This will likely lead to further pressure being imposed on an already stretched emergency accommodation system. The application of the habitual residence condition to social housing assistance will likely result in further criticism being made of Ireland by human rights treaty monitoring bodies on this issue.

In the context of these repeated criticisms, there is a worrying lack of reflection within the General Scheme of the considerable human rights and equality considerations raised by the proposed measures. This is particularly concerning in light of the Department's Public Sector Duty obligations under Section 42 of the Irish Human Rights and Equality Commission Act 2014.<sup>39</sup>

The inclusion of the habitual residence condition represents a significant additional requirement to be met by those seeking to access social housing support. It is stated that the reason for this is to ensure that recipients of such support are resident in the country and have a long-term intention of remaining.<sup>40</sup> However, given the disproportionate and discriminatory impact of similar provisions under social welfare law on minority and structurally vulnerable groups, the complex nature of the habitual residence provisions that will have to be applied by decision-makers who may lack relevant expertise, and in the absence of any statutory appeals mechanism,<sup>41</sup> the State should explain how it has determined the need for such a measure and the value that will be achieved by its implementation.

Given the mistakes associated with the application of the Circular and the habitual residence condition under the social welfare regime, before proceeding with these legislative proposals, the State must demonstrate how it will ensure that similar mistakes will not be repeated in relation to the provision of social housing supports and that unlawful, discriminatory and disproportionate outcomes will be avoided.

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<sup>39</sup> The Public Sector Equality and Human Rights Duty ('the Duty') is a statutory obligation for public bodies in Section 42 of the Irish Human Rights and Equality Commission Act 2014. Section 42(1) requires public bodies, in the performance of their functions, to have regard to the need to eliminate discrimination, promote equality and protect human rights of staff and people availing of their services.

<sup>40</sup> Explanatory notes to Head 5 of the General Scheme.

<sup>41</sup> See further below.

The Commission recommends that before proceeding further with the legislative proposals the State consider the human rights and equality considerations raised by the proposed measures.

The Commission recommends that any legislative proposals in relation to access to social housing supports must take account of the Department's Public Sector Duty obligations under Section 42 of the Irish Human Rights and Equality Commission Act 2014.

The Commission recommends that in light of the significant human rights and equality issues raised by the legislative proposals the State must first demonstrate the need for, and value of, the proposals and how it will ensure that the proposals will not have a discriminatory and disproportionate impact on structurally vulnerable groups.

## **Lack of appeals mechanism**

As mentioned above, there is no provision in the General Scheme for an appeals mechanism, unlike the social welfare regime.<sup>42</sup> Under the social welfare structure, decision makers have experience in dealing with habitual residence matters and there is a substantial formal appeals infrastructure, with multiple levels of recourse all the way to the High Court.<sup>43</sup> The lack of an appeals mechanism in the General Scheme is of significant concern given the complexity of the issues to be determined by deciding officers and the need for clear administrative accountability to minimise the risk of persons being adversely affected by incorrect decisions. The lack of an appeals mechanism may also amount to a breach of an applicant's rights to fair procedures as protected by the Constitution, the EU Charter and the European Convention.

The Commission recommends that a formal, standardised independent appeals mechanism in respect of social housing decisions be set out as a statutory requirement in the legislation.

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<sup>42</sup> Habitual Residence Condition under section 246 of the Social Welfare Consolidated Act 2005. Note, there may be informal processes to appeal social housing assistance decisions made by local authorities but there is a general lack of transparency and formalised process to follow should an applicant wish to appeal a decision. See [Liberties Rule of Law Report 2023 – Ireland](#) (2023), p. 25.

<sup>43</sup> [Department of Social Protection, Appeals Procedures](#).

## Impact on Homeless Services

Consideration should be given to the potential impact of the amendments under the General Scheme on access to emergency accommodation. The provision of emergency accommodation is governed separately to the provision of social housing support. Section 10<sup>44</sup> of the Housing Act 1988 (“the 1988 Act”) provides that a housing authority may provide housing or financial assistance to a person who is deemed homeless within the meaning of section 2 of the 1988 Act. Section 10 of the Housing Miscellaneous Provisions) Act 2009 (“the 2009 Act”) makes clear that the provision of homeless accommodation under the 1988 Act is separate to the provision of social housing support under the 2009 Act.

Therefore, in order to be entitled to apply for accommodation under section 10 of the 1988 Act, a person must be deemed to be homeless by showing that they do not have accommodation available to them which they can reasonably occupy and that they are unable to provide accommodation from their own resources.<sup>45</sup> No other eligibility criteria apply to the provision of emergency accommodation by a housing authority.

The conflation between the two statutory regimes is evidenced by those working within the system who have highlighted the barriers applicants face when attempting to access emergency homeless supports due to the application of social housing eligibility criteria. One such example highlighted is how the ‘local connection’<sup>46</sup> test for social housing is applied to persons accessing emergency accommodation.<sup>47</sup> The local connection test has

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<sup>44</sup> The provision is an enabling provision in that it gives the housing authority a power to provide accommodation to homeless persons but does not expressly provide homeless persons with a right to accommodation. However, the Courts have interpreted similar enabling housing provisions as creating an obligation on housing authorities to use their powers in appropriate circumstances. This can be seen in the comments of Baker J. in *Mulhearn v Carlow County Council* [2017] IEHC 528

<sup>45</sup> The statutory definition of homeless person is contained in section 2 of the 1988 Act which provides as follows: “A person shall be regarded by a housing authority as being homeless for the purposes of this Act if— (a) there is no accommodation available which, in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of, or (b) he is living in a hospital, county home, night shelter or other such institution, and is so living because he has no accommodation of the kind referred to in paragraph (a), and he is, in the opinion of the authority, unable to provide accommodation from his own resources”.

<sup>46</sup> The ‘local connection’ test for social housing supports under Regulations 5 and 6 of the Social Housing Assessment Regulations 2011 (SI 84/2011) (the 2011 Regulations)

<sup>47</sup> See examples provided by Mercy Law Resource Centre in appendix 1 of [its Submission to the Joint Oireachtas Committee on Housing, Local Government and Heritage on the General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024](#).

no relevance to the 1988 Act and therefore should not be applied to persons seeking to access homeless services. However, those working within the system have reiterated that this continues to happen in practice.<sup>48</sup>

In order to avoid conflation between the criteria for accessing emergency accommodation and the criteria for accessing social housing and any unlawful application of the different criteria, the General Scheme should be amended to explicitly state that the requirement to prove lawful and habitual residence does not apply to applications for emergency accommodation under the 1988 Act.

The Commission recommends that it must be set out clearly in the legislation that the requirement to prove lawful and habitual residence does not apply to applications for emergency services under the Housing Act 1988 in order to prevent any issues for persons accessing emergency accommodation.

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<sup>48</sup> Mercy Law Resource Centre, [Submission to the Joint Oireachtas Committee on Housing, Local Government and Heritage on the General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024](#) p. 9.

## Specific Observations on the General Scheme

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### Habitual and Lawful Residence: Prerequisite to Social Housing Eligibility Assessment (Head 5(1))

As outlined above, Head 5(1) inserts a new provision (Section 20(1A)) into the Housing (Miscellaneous Provisions) Act 2009 that has the effect of inserting lawful and habitual residency as an assessment criteria for social housing supports. It purports to put the policy position as set out in Circular 41/2012 on a statutory footing, and also introduces a new condition of habitual residency. However, the Circular does not adequately address the intricacies of legal status in relation to residency, with the result of unlawfully excluding people from access to services and supports. It is likely that these statutory requirements of lawful and habitual residency will lead to an increase in non-Irish nationals being excluded from the housing list, and it will have a disproportionate impact on those who are already in a structurally vulnerable position.

Head 5(1) states that all members of the applicant's household must show lawful and habitual residence:

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"in order to be eligible to be assessed for the social housing supports listed in section 19"

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This would appear to present an additional hurdle in that before being able to apply for social housing a person must first prove their residency status. The notes to Heads 4 and 5 of the General Scheme state that the habitual residency criteria:

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"will serve as a prerequisite to proceeding further in assessing a household's eligibility for social housing support".

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This appears to suggest that the assessment of lawful and habitual residence will be a preliminary step rather than an additional criterion to be satisfied as part of the social housing eligibility assessment procedure under section 20 of the 2009 Act.

As such, persons deemed not to have lawful and habitual residence will be prevented from making an application to be assessed for social housing support which would give rise to concerning constitutional requirements of fair procedures, particularly in light of the failure to provide for an appeals mechanism. This would also contrast with the existing position

under section 20 of the 2009 Act, whereby both eligibility and social housing need are assessed after the application is made.<sup>49</sup>

The Commission recommends that the legislation clarifies that the lawful and habitual residence requirement forms part of the overall assessment of housing need and will not be a new preliminary criterion which an applicant must meet before they can be assessed for social housing.

## **Requirement for all Household Members to be Habitually and Lawfully Resident in the State (Head 5(1))**

We have concerns regarding the requirement under Head 5(1) for *all* members of a household to show lawful residence and habitual residence, meaning that persons are not assessed on an individual basis in order to be eligible to apply for social housing assistance. The requirement that every member of a household must prove lawful and habitual residence could have the consequence of disentitling an applicant from obtaining social housing assistance on the basis of the residence status of another member of their household. This would amount to a very significant interference with the rights of an applicant otherwise entitled to social housing assistance.

By way of simple example, the operation of Head 5(1) in its current guise would have the effect of disentitling an Irish national from accessing social housing assistance if they were to cohabit with a person who, although lawfully resident in Ireland was unable to meet the other criteria set out in section 20A. This would arguably amount to an unlawful interference with the private and family life of the applicant and it is difficult to see how it could be objectively justified. In addition, the requirement that all members of the household meet the habitual residence requirement could be said to be unreasonable and

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<sup>49</sup> Section 20(2) provides "Where a household applies for social housing support, the housing authority concerned shall, subject to and in accordance with regulations made for the purposes of this section, carry out an assessment (in this Act referred to as a "social housing assessment") of the household's eligibility, and need for, social housing for the purposes of determining—(a) whether the household is qualified for such support, and..."

disproportionate contrary to the decision of the CJEU in *Collins*<sup>50</sup> and the decision of the ECtHR in *Niedzwiecki*.<sup>51</sup>

The Commission recommends that the requirement for all household members to demonstrate lawful and habitual residency in the State be removed.

## Access to Social Housing supports for EU/EEA Nationals (Head 5(2))

Head 5(5)(c) provides that a person who has a right under the 2004 Directive<sup>52</sup> and the 2015 Regulations<sup>53</sup> to enter and reside in the State and is deemed under those Regulations to be lawfully resident in the State shall, for the purposes of Head 5(1), be taken to have a right to lawfully reside in the State. However, this is subject to Head 5(2) which states that all EU/EEA citizens exercising their free movement rights are not eligible to be assessed for social housing supports during the first three months of residence in the State. Article 24 of the 2004 Directive guarantees that EEA nationals who have exercised their free movement rights and become lawfully resident in another Member State shall enjoy equal treatment with the nationals of that Member State in matters of housing. Whilst Article 24(2) of the 2004 Directive provides a derogation that Member States shall not be obliged to confer entitlement to social assistance for the first three months of residence, this applies only to persons:

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“other than workers, self-employed persons, persons who retain such status and members of their families”.

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<sup>50</sup> In *Collins* (C-138/22), the CJEU determined that where a habitual residence requirement is enforced, it must be done for legitimate purposes and in a proportionate manner.

<sup>51</sup> In *Niedzwiecki v. Germany* (App No. 58453/00), the ECtHR provided that whether or not a difference in treatment for the purpose of social benefits would amount to a breach of Convention rights would depend on a case-by-case analysis, stating at para 32. “...a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it ‘has no objective and reasonable justification, that is if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’”.

<sup>52</sup> Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>53</sup> European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015).

Ireland's transposition of the 2004 Directive, the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015) ("the 2015 Regulations") provides that a non-worker shall not be entitled to receive assistance under the Social Welfare Acts during the first three months of their residence in Ireland and for such longer period where they continue to seek employment in Ireland.<sup>54</sup> The 2015 Regulations make no reference to social housing assistance under the 2009 Act. Therefore, at present an EU citizen can maintain that they are entitled to apply for social housing assistance and that they are not disenfranchised in any way by the 2015 Regulations.

In addition to the 2004 Directive, Directive 2014/54/EU<sup>55</sup> ("the 2014 Directive") includes measures intending to facilitate the standardised application of the right to free movement of workers within the EU. Its scope covers access to a number of social rights, in particular related to housing (Article 2(1)(f)). It has also been made clear by the CJEU in *Garcia-Nieto*<sup>56</sup> that a Member State may not disenfranchise a worker, self-employed persons or those who retain that status from accessing social assistance at any time, including during their first three months residence in the host Member State. Therefore, the absolute bar on all EU/EEA citizens accessing social housing assistance during the first three months of residence in Ireland would appear to be in breach of the provisions of the 2004 Directive and Article 2(1)(f) of the 2014 Directive.

The Commission recommends that the absolute bar on all EU/EEA citizens accessing social housing assistance during the first three months of residence in Ireland be removed from the legislation as it is not compliant with EU law.

## Reckonable Residency for non-EU/EEA nationals (Head 5(3))

Head 5(3) provides that all non-EEA nationals (excluding those listed in Head 5((5)(d)-(j))) must have 5 years years reckonable residency in the State in addition to a current valid

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<sup>54</sup> The 2004 Directive was originally transposed into Irish Law by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. 656 of 2006) ("the 2006 Regulations"). The 2006 Regulations were revoked by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015) ("the 2015 Regulations") which came into force on 1 February 2016. Unlike the 2006 Regulations, the 2015 Regulations only disentitle the non-worker to assistance under the Social Welfare Acts.

<sup>55</sup> Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers

<sup>56</sup> [Garcia-Nieto](#) (C-299/14), para 44.

permission to remain in the State or have a right to remain in the State for a period that would allow them to obtain 5 years reckonable residency. Similarly to Circular 41/2012, Head 5(4) provides exemptions to the 5 year residency requirement for refugees, programme refugees and those under subsidiary protection and their family members (Head 5(5)(d-j)), where no defined length of lawful residency is required.

The requirement under Head 5(3) regarding 5 years of reckonable residency appears to be derived from the provisions of Directive 2003/109/EC (“the 2003 Directive”) which provides that in order to be entitled to long term resident status a third-country national must have resided legally and continuously within the territory of the Member State for a period of five years immediately prior to the submission of the relevant application

Therefore, where a third-country national can show that they have resided legally and continuously within the State for a period of five years the entitlement to equal treatment under Article 11 of the 2003 Directive will be engaged. However, the difference in treatment between third-country nationals based on the length of residence and/or the length of the residence permission may be open to challenge on grounds of discrimination unless the State can show that there is an objective and reasonable justification for the difference in treatment and that it is in pursuit of a legitimate aim. It is also necessary for the State to show that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>57</sup>

The Commission recommends that the State must ensure that any difference in treatment between third country nationals based on length of residence and/or residence permission must be objectively and reasonably justified, pursue a legitimate aim, and be proportionate to the aim.

As the independent National Rapporteur on Trafficking, we have concerns that the requirement for a non-EEA victim of trafficking to have 5 years reckonable residency could be incompatible with Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (“the Anti-Trafficking Directive”) in that it prevents the State from complying with its obligation to provide ‘appropriate and safe’ accommodation. In practice, most identified victims of trafficking are accommodated in

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<sup>57</sup> *Collins* (C-138/22)

Direct Provision centres. However, it is possible that for some, this type of accommodation is not, or ceases to be, 'appropriate and safe'. For example, in the case of a person who has spent one or two years in Direct Provision as a victim of trafficking, it could be argued that the basic conditions, the over-crowding, the transfers, the lack of privacy and the absence of any scope for meaningful personal autonomy may become inappropriate over time. In those circumstances, the only other mechanism by which such a person may be provided with accommodation by the State is under section 19 of the 2009 Act. However, to the extent that the Head 5(3) – which purports to place paragraph 7.4.2 of the Circular on a statutory footing - makes victims of trafficking ineligible for social housing support by requiring a residence permission valid for five years (which is impossible under the Administrative Immigration Arrangements), it is incompatible with Article 11(5) of the Anti-Trafficking Directive in that it prevents the State from complying with its obligation to provide 'appropriate and safe' accommodation.

The Commission recommends that the legislation be amended to ensure that the 5 years reckonable residency requirement does not apply to victims of trafficking in a manner that is contrary to the Anti-Trafficking Directive.

## **Persons deemed lawfully resident (Head 5(5))**

The persons included in Head 5(5) as having a lawful right to reside for the purpose of section 20A(1) include the persons with an entitlement to equal treatment in the State pursuant to the various EU legislation set out above. We are of the view that the list contained in Head 5(5) should include the parents of EU citizen children accessing education in another Member State in line with the decision of the CJEU in *Ibrahim* (C-310/08)<sup>58</sup> and *Teixeira* (C-480/08)<sup>59</sup>.

The Commission recommends that the legislation be amended to include parents of EU citizen children accessing education in another Member State in the list of persons having a lawful right to reside.

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<sup>58</sup> *Ibrahim* (C-310/08).

<sup>59</sup> *Teixeira* (C-480/08).

## **Exclusion of Certain Cohorts of Person (Head 5(10))**

Head 5(10) provides that a person granted an immigration protection shall not be considered habitually resident in the State for any period before the date on which the declaration or permission concerned was given or granted. This provision does not prevent a period who has been granted immigration permission from being considered habitually resident as and from the date of the granting of the permission, provided they can satisfy the criteria set out in Head 5(6).

A potential difficulty will arise where a person applies for social housing immediately on receipt of an international protection status as to whether they can rely on the residence in the State prior to the granting of their status for the purpose of Head 5(6)(a). This should be clarified in the legislation to ensure that residence in the State prior to the granting of status can be relied on for the purpose of Head 5(6)(a), even if it cannot be considered habitual residence in line with Head 5(10). If this is not clarified, significant difficulties may be experienced by international protection applicants seeking to leave direct provision after they have been granted protection.

In addition, Article 29 of Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection provides that persons who have been granted international protection must be entitled to receive the same social assistance as provided to nationals of the Member State.

The Commission recommends that it is made clear in the legislation that residence in the State prior to receiving status can be relied upon for the 5 years reckonable residency requirement so that there is not a disproportionate impact on international protection applicants seeking housing assistance.

## **Failure to provide for exemptions in relation to habitual residence**

We consider that the failure to provide for exemptions for victims of human trafficking or DSGBV will potentially result in very vulnerable groups of people being excluded from accessing social housing support and being totally reliant on emergency accommodation and homeless supports in order to access accommodation. This could exacerbate the

difficulties already experienced these vulnerable groups. In order to avoid such difficulties, it would be open to the State to include an exemption and/or a discretion to allow a housing authority to provide social housing assistance in certain limited circumstances notwithstanding that a particular applicant would otherwise not meet the habitual residence criteria set out in Head 5 as currently drafted.

The Commission recommends that the legislation should include exemptions from the habitual residence requirement for victims of trafficking and victims of domestic, sexual, or gender based violence.





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