

## Submission to the Public Consultation on a Referendum on Housing in Ireland

### Introduction

Focus Ireland welcomes the opportunity to make this submission to the Housing Commission's Public Consultation on a Referendum on Housing in Ireland.

Focus Ireland's perspective on this issue is based on the clear understanding that access to adequate housing is a human right, and that the question which we must address is how that right is best vindicated in Irish society. Specifically, whether it would be more effectively vindicated if it were named in our Constitution.

We argue that a serious problem arises from the fact that successive Governments have consistently interpreted the Constitution in such a way as to create a real barrier to legislation which would progress a right to access adequate housing. We recommend that the Commission seek clarification from the Government on the basis for the advice from successive Attorney Generals (AG), which is contrary to most academic legal opinion. Clarity on the legal basis for the AG office's interpretation of the Constitution in this way will help to identify the most effective means to remove this barrier. In the absence of such clarification, the only solution to the impasse lies in a referendum to rebalance the Constitution.

Focus Ireland is a member of 'Home for Good' and along with our colleagues we have come to the conclusion that, based upon the interpretation of successive Governments and in the absence of clarification on this interpretation, constitutional change is necessary for any successful programme to tackle our housing and homelessness crisis. This submission supports the submission of 'Home for Good' and sets out the particular experiences and perspectives which have informed Focus Ireland in reaching those common positions.

### Access to Adequate Housing is a Right

Since its foundation by Sr Stanislaus Kennedy in 1985, Focus Ireland has recognised access to housing as a right, arguing that 'everyone has a right to a place they can call home.' This position was further developed in our 1995 submission to the Constitutional Review Group which sought for the Right to Housing to be included in the Constitution.

In 2014, Focus Ireland was invited to address the Irish Constitutional Convention on the issue of 'A Right to Access Adequate Housing', as part of its deliberation on economic, social and cultural rights. The Convention recommended that the Government should hold a referendum to include such a right in the Constitution, which is the only major recommendation of the Convention that has not yet been implemented.

Focus Ireland campaigned for all parties involved in the 2002 and 2016 General Elections to commit to introducing a 'Right to Access Adequate Housing' in the Constitution. Our campaigning contributed to the reference to this issue in manifestos of the Green Party and Fianna Fáil, and subsequently in the current Programme for Government, contributing to this consultation process.

It is clear from international treaties to which the Irish State has committed, that the State recognises the idea that there are economic, social and cultural rights, and that a right to access adequate housing is one of them.

A Right to Housing is set out in key international human rights treaties;<sup>1</sup>

- It is set out in Article 11 of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), and explained in General Comments 4 and 7 of the UN Committee on Economic, Social and Cultural Rights.
- The European Convention on Human Rights (ECHR) includes specific rights that protect the right to housing, including; Article 8, the right to family and private life and protection of the home; Article 6, the right to due process in the case of eviction.

It is also worth noting that the ‘Housing First’ policy, which is a cornerstone of the Government’s strategy to tackle homelessness, places the statement that ‘Housing is a basic human right’ as a core principle. It goes on to say that; *“In the Housing First programme, housing is not offered as an enticement to get an individual into treatment or as coercion to get an individual to sober up. It is instead offered as a matter of right”*.<sup>2</sup>

Additionally, the Lisbon Declaration on the European Platform on Combatting Homelessness, which was endorsed by the Irish Government in June 2021, and further committed to in ‘Housing For All’, notes that; *“Principle 19 of the European Pillar of Social Rights stresses the need for social housing or housing assistance of good quality for those in need, the right to appropriate assistance and protection against forced eviction for vulnerable people and adequate shelter and services for people experiencing homelessness.”*

These examples demonstrate that the State does indeed recognise the existence of a right to access housing of an appropriate standard for the purpose of attaining an adequate standard of living, how that right is best vindicated must now be addressed.

## Is Constitutional Change Needed?

A number of academic experts on Irish constitutional law have taken the view that Bunreacht na hÉireann does not constitute a barrier to progressive policy measures which may contribute to addressing the housing and homelessness crisis,<sup>3</sup> and that to recommend a referendum on this issue may be both erroneous and superfluous.<sup>4</sup> The views of such academic lawyers, some of which were presented to the Housing Commission at a conference on a referendum on housing in May, suggest that a right to access adequate housing may be vindicated legislatively, contrary to the consistent opinion of the office of the AG.

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<sup>1</sup> Housing-related binding obligations on States from European and International Case Law, FEANTSA (2016) [2016-06-housing-related-binding-obligations6411857525167192995.pdf \(feantsa.org\)](https://www.feantsa.org/2016-06-housing-related-binding-obligations6411857525167192995.pdf)

<sup>2</sup> Tsamberis, S. (2020) ‘Irish Housing First Manual’ Government of Ireland’ p16

<sup>3</sup> See Walsh, R. (2022) ‘Constitutional Property Rights – Setting Parameters for Responses to the Housing Crisis’.

<sup>4</sup> Casey, C. (2022) ‘Written evidence to the Government of Ireland’s Housing Commission’.

Additionally, Focus Ireland is deeply conscious that holding a referendum involves a considerable allocation of resources, not only from the State in providing the mechanisms for voting, but also from civic society bodies in making the case for or against an amendment, and facilitating public engagement in what will inevitably entail complex arguments. Ideally, a referendum should be an occasion for public deliberation which deepens our national understanding of complex challenges, however experience shows that they can also be divisive and even an opportunity to amplify untruths and misconceptions.

Focus Ireland does not recommend entering into a referendum process lightly.

Considering the opinion of academic lawyers that our constitutional structure does not present a barrier to progressive housing policy, is there a need to undertake the time consuming process of seeking to place this right into the Constitution?

[Successive Governments have interpreted the Constitution in such a way as to make the absence of a right to access adequate housing a major problem.](#)

Despite the consensus among academic lawyers, that the Constitution does not in principle present a barrier to progressive housing policies as Article 43.2 allows private property to be regulated according to the principles of social justice and the exigencies of the common good, policymakers and successive Governments have repeatedly cited the existing constitutional protection of private property to rule out progressive housing policies.

Concerns about constitutionality were expressed in a minority report to the Kenny Report (1973) effectively preventing implementation of its progressive reforms on land use. Former Ministers for Housing have cited constitutional barriers to practical measures they would otherwise have followed.<sup>5</sup> An 'Oireachtas Research Paper' published in September 2019 sets out the evidence for this pattern,<sup>6</sup> it shows that on twelve separate occasions over recent years that legislation proposed in the Dáil has not progressed due to concerns about Article 43 as a constitutional barrier. The proposals to extend the Covid-19 eviction moratoriums to prevent rising homelessness constitutes a further example of this type of barrier. This prevents ideas being considered on their merits and cannot be allowed to continue in face of the plight of those at the sharp edge of the housing shortage.

Bunreacht na hÉireann currently provides protection of private property rights in both Article 43 and Article 40.3. There is no equivalent right to housing in the Constitution. This means that the starting point of every legal analysis in respect of the regulation of land begins from the perspective of a property owner's right. While this right may be restricted, in the interests of the common good, the starting point for analysis remains the private interest, with the common good only relevant insofar as it justifies the State in limiting this right to private property. At the recent legal conference on the right to housing organised by the Housing Commission, it was persuasively argued that as a result of this wording, the State is positioned as protector of this private right.

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<sup>5</sup> 'My hands are tied: Kelly' Irish Examiner 1<sup>st</sup> April 2016 <https://www.irishexaminer.com/news/arid-20390447.html>

<sup>6</sup> Keyes, "Briefing Paper: Property Rights and Housing Legislation", Oireachtas Library and Research Service, 2019. Available here: [https://colettekelleher.ie/wp-content/uploads/2020/01/Enquiry-2019\\_715-Property-rights-and-housing-legislation.pdf](https://colettekelleher.ie/wp-content/uploads/2020/01/Enquiry-2019_715-Property-rights-and-housing-legislation.pdf)

AG advice regarding this constitutional structure has been cautious, risk adverse to the potential unconstitutionality of giving weight to the common good.<sup>7</sup> This contradiction between academic consensus and political reality has created a profound inertia at the heart of Irish housing policy where constitutional reform is simultaneously both unnecessary and essential for progress.

### Ireland's relationship with international treaties

It is noted above that Ireland has endorsed international conventions which include economic, social and cultural rights, including the right to access adequate housing. However, it remains a great concern that Ireland continues to seek derogation from Article 31 of the revised European Social Charter (ESC), which provides specific criteria and guidance for the progressive realisation of the right to housing and the reduction and prevention of homelessness. In the 2021 explanation for non-acceptance of provision of the revised ESC,<sup>8</sup> the Irish Government states '*Article 31 of the Charter could not be accepted because of existing provisions in the Irish Constitution which have not changed since ratification of the Charter*'.

The European Committee of Social Rights (ECSR) points out, however, that Article 31 cannot be interpreted as imposing an obligation of 'results'. The ECSR outlined the practical and resource implications of the Article, and concludes that; '*the legislative and practical measures, including funding, taken by the Irish authorities to ensure the right to housing open the possibility of Ireland to accept Article 31 of the Charter*'.

However, the Irish Government's view maintained that the issue of acceptance of Article 31 will be re-examined if and when the constitutional position changes.

Aside from the embarrassment that should be caused by a failure to fully endorse the revised ESC, this position identifies an interpretation that the Constitution, at the most senior level, that it is not just silent on the right to housing but is intrinsically incompatible with it. The fact that this is the formal interpretation of Bunreacht na hÉireann in our relationship with the Council of Europe suggests a necessity to establish a new balance between existing rights to private property and the 'common good'.

### The need for Government to clarify the nature of Constitutional impediments.

As legal advice from the AG's office is considered confidential, there is no way to reconcile the academic constitutional expertise with the practical behaviour of Government. It is in this context that the Government, which continues to cite the constitutional barriers to reform, has asked the Housing Commission to advise it on what changes may be needed. Essentially, the Housing Commission has been asked to resolve a Governmental problem while, citing legal privilege, the Government does not explain how the problem arises.

In these circumstances, it is hard to see how the Commission can satisfactorily complete its task without the Government furnishing it with, in the broadest terms and in keeping with conventions of case-specific advice by the AG, information on the considerations which resulted in these proposals

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<sup>7</sup> Casey, C. (2022) p2.

<sup>8</sup> Fourth Report on the Non-Accepted Provisions of the European Social Charter: Ireland, European Committee of Social Rights (07.09.2021) <https://rm.coe.int/4th-report-on-non-accepted-provisions-of-the-esc-by-ireland-2021/1680a3c1b4>

being seen as unconstitutional. We propose that the Commission request that clarification, if it has not already done so.

The clarification of the Government's position should be subject to public discussion. This may shed light upon other ways of vindicating a right to access adequate housing, without recourse to a referendum. Alternatively, it may help us to have a more precise understanding of the constitutional amendment which is required.

However, if no such clarification is forthcoming, we cannot continue with the current impasse where Government insist progressive legislation is contrary to the Constitution, while constitutional lawyers say there is no barrier. In that case, an amendment to clarify the matter becomes essential and urgent to address issues such as the question of housing supply and land use in a broader and more effective way.

The submission will now outline our view of the potential role of a constitutional right to access adequate housing, and how a referendum on this right would be structured given the information currently in the public domain.

## A Constitutional Right to Access Adequate Housing

Focus Ireland recognises that the insertion of a right to housing in the Constitution is not a panacea for the current crisis, but it can place a constitutional obligation and clear responsibility on the Irish State and Government to progressively realise a right to housing and provide greater balance to the Constitution, thereby increasing the options available to Government to address this crisis.

Constitutionalising social rights affirms their importance within the statement of fundamental values that the people of Ireland believe in, and has potential to be a catalyst for change. The symbolic nature of a constitutional right to access adequate housing, and the subsequent steering it provides to the Executive branch of the State, can be an important signal to Government's concerning the priorities of the electorate.

A constitutional right to housing would remove the current overly narrow interpretation of the restriction of private property rights and enable the Government to respond to the current housing and homelessness crisis in a manner which properly and fairly balances competing interests. Not only would this create a fairer balance, it will better frame the State's role in housing — as a protector of private property rights, but also as a protector of our human right to adequate housing. This important balancing role is highlighted by Prof. Colm Ó Cinnéide in his submission to the Housing Commission.<sup>9</sup>

The removal of the supposed constitutional impediment to ambitious policy can open new legislative possibilities to begin to effectively address the housing and homelessness crisis. Despite the stated priorities of successive Governments and a series of national housing and homeless strategies that were presented as 'ambitious', the fact that there are 61,880 people currently waiting for social housing and 10,568 people currently in emergency homeless accommodation, alongside up to 166,000 vacant homes throughout the country, makes it clear that providing adequate housing has not yet been given the overwhelming priority which it deserves.

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<sup>9</sup> Ó Cinnéide, C. (2022) 'Does Constitutionalising Social Rights Make a Difference?'

## The Timeline for a Referendum on the Right to access adequate housing

Focus Ireland recommends that a timeline for any referendum on the right to access adequate housing, should one be necessary, is progressed with exigency, following the closing of this consultation and the publication of the upcoming report due from the Housing Commission.

Since the lifting of the moratorium on evictions that was in place periodically between March 2020-April 2021, the number of people who are officially homeless has risen by 30%. This is likely to further increase as the cost of housing has continued to grow, and supply has constricted further. The current cost-of-living crisis is compounding financial pressure felt by those most at risk of poverty and social exclusion, who are at the highest risk of homelessness, while reintroduction of a moratorium on evictions has been ruled out due to the barrier presented by the Constitution. Similarly, urgent action on the scandal of housing and development land being left unused has been hampered by the constitutional position.

To reflect the urgency this crisis demands, and the role which a constitutional right to access adequate housing would have in contributing to solutions, we believe the Commission's forthcoming report needs to include a recommendation that a referendum on the right to access adequate housing take place in 2023.

While we argue for a clear and urgent timeline for the referendum, we do not take for granted that even a well drafted proposal will be adopted by the Irish people.

The experience of recent referenda has shown that Government, along with supportive opposition parties, must set out a clear statement of legal provisions which will arise from the proposed change in the Constitution. This serves both to show what positive impacts can be expected from the change, as well as addressing unreasonable expectations or fears of that change, such as the 'free house' misconception of this right. While the nature of housing provision may not allow as relatively simple a forecast of legislative impact which accompanied constitutional proposals on, for instance, divorce, a similar projection of legislative impact should be developed as part of the preparations for a referendum on housing. The Housing Commission, with its long-term perspective, is ideally placed to initiate this work.

This could involve the publication of the heads of a proposed 'Housing Act 2023', which would set out a range of proposals in relation to ending vacancy and dereliction, the securing of planning 'betterment' value for the public good, and homelessness prevention which, the Attorney General's office believe would be permitted if the referendum were agreed.

## A Proposal for Wording for a Referendum on the Right to access adequate housing

As a member of Home for Good, a group comprised of academic, legal, housing, and homelessness experts, we see the real effect of the current imbalance in our Constitution. We support the wording proposed by Home for Good which has been carefully formulated by legal and policy experts and has already obtained broad cross-party support. The reasoning behind this wording is set out in the Home for Good submission.

The referendum needs to provide a balanced, stand-alone, and enforceable right to access adequate housing that would support the development and advancement of progressive housing policies.

The insertion of a new Article 43A on Housing in the Constitution as follows:

### ***Housing***

#### ***Article 43A***

**1 The State recognises, and shall vindicate, the right of all persons to have access to adequate housing.**

**2 The State shall, through legislative and other measures, provide for the realisation of this right within its available resources.**

### Implications on Policy Obligations of the State

While the Irish state has, since its foundation, accepted a responsibility to some degree to provide housing for those who cannot access it through their own means, the recommended amendment gives a constitutional framework for this State involvement and places a positive obligation on the State to act.

Focus Ireland acknowledges that action occurs at a statutory level through the Housing Acts but raising the obligation to a constitutional level creates a new balance with the rights of private property owners, allowing Government to consider measures which, by its own account, have been ruled out due to the present constitutional structure.

A constitutional amendment providing for a stand-alone right to access adequate housing will not guarantee everyone a house, nor will it provide a right to a 'free house'. The right provides for generalised access to housing, of an adequate standard, which is not the same as a right to a house.

For example, the way by which this could be considered by the Courts may be in line with the decision of Barron J. in *University of Limerick v. Ryan*, concerning the right to bodily integrity and Traveller specific accommodation under s. 13 of the Housing Act 1988. As described by Prof. Padraic Kenna; "[t]he decision shows that while a court can order specific provision be made, it will not adjudicate in the priority waiting list, or queuing system, for individual allocations".<sup>10</sup>

### Realisation Within Available Resources

Focus Ireland acknowledges that the provision of housing ultimately depends on the availability and allocation of resources. A constitutional amendment cannot, of itself, generate additional resources. Rather, it would oblige the State to use a share of existing resources for a particular purpose. This is expressly acknowledged within the proposed wording of an amendment, ensuring clarity of understanding.

It is accepted that the State has spent a considerable level of resources in efforts to address the housing and homelessness crisis. However, a significant proportion of this expenditure has been spent on 'passive' measures which address the immediate need of emergency shelter, rather than 'active' measures which alter the circumstances of the person at risk of homelessness, such as building public homes, expenditure upon which has not sufficiently increased to keep up with demand. A directly enforceable right to access adequate housing would see housing policy measured

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<sup>10</sup> Kenna, P (2022) 'Submission to Conference on a Referendum on Housing in Ireland' p7.

with due regard to the positive duty to take necessary steps for the progressive realisation that right, whilst considering resources available.

## Conclusion

For the reasons set out in this Submission, in the event that there is no clarification regarding AG advice which has repeatedly cited a constitutional impediment to progressive housing policy, Focus Ireland has come to the conclusion that constitutional change would be necessary for any successful programme to tackle our housing and homelessness crisis. Despite the views of academic lawyers that this is simply not the case, the inertia which has been created by the interpretation of Bunreacht na hÉireann adopted by successive Governments, and its impact upon the development of policy, has created a need for the express recognition of a constitutional right to adequate housing. This constitutional right can free up the policy space to address this crisis in a more effective way.

We recommend that any necessary referendum provides for a balanced, stand-alone, and enforceable right to adequate housing that would support the development and advancement of progressive housing policies.