



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

Contents

Introduction	2
1. Commit to a Clear Timeline for a Referendum on the Right to Housing.....	2
2. Proposed Wording	3
Harmonising the Constitutional Imbalance	3
The Need for a Stand-Alone Right	3
Formulation of Wording	4
Policy Obligations of the State under a Stand-Alone Right	5
Realisation within Available Resources	6
Defining Adequate Housing	6
3. A Catalyst for Change	7
Conclusions	8

Introduction

Home for Good is a broad coalition of organisations and individuals including academic, legal, housing, and homelessness experts who believe that constitutional change is an essential underpinning to successfully tackle our housing and homelessness crisis.

As many of our members are advocates from frontline organisations, we know how important a right to housing is for those experiencing housing exclusion and homelessness, and for those living in inadequate, unsafe, insecure or overcrowded accommodation. As citizens, we understand the importance of the home in the fundamental social and economic infrastructure of our society.

Home for Good welcomes this opportunity to work with the Housing Commission. We hope that this submission will contribute to the Commission's work and facilitate the Commission being in a position to propose a positive wording that would see a robust constitutional right to housing in Ireland.

Home for Good recently appeared before the Joint Committee on Housing on July 5th 2022. Here, we reiterated the need for two key actions as the next steps to progress the right to housing:

1. that a referendum is called as soon as is practical after the Commission publishes its report, and;
2. that the Commission in its report will include a proposal for the wording for a referendum on the right to housing. From our perspective, this would ideally build upon the work that Home for Good have completed in this area. Of course, we remain open to ongoing engagement with the Commission.

This submission to the Public Consultation on a Referendum on Housing in Ireland will reiterate and expand on the need for these two key actions.

1. Commit to a Clear Timeline for a Referendum on the Right to Housing

Home for Good seeks that a timeline for a referendum on the right to housing is progressed with urgency, following the closing of this consultation and the publication of the upcoming report due from the Housing Commission.

Housing in Ireland is truly in a state of crisis at all levels and a referendum on the right to housing cannot be delayed. In March 2018 during his time as Taoiseach, Tánaiste Leo Varadkar TD declared a national homeless and housing crisis in Ireland. Over four years later and the situation has deteriorated even further. The urgent need for a referendum on a right to housing is driven by the ongoing housing crisis. While the insertion of a right to housing in the Constitution is not a panacea for the current crisis, if done correctly it would place a constitutional obligation and clear responsibility on the Irish State and government to progressively realise a right to housing providing a balanced, stand-alone, and enforceable right to housing that would support the development and advancement of progressive and effective housing policies. This will increase the options for an ambitious government, and successive Governments, to address the crisis, as well as ensuring that housing remains a national priority regardless of changes in government. This forthcoming report needs to include a recommendation that a referendum on the right to housing take place in 2023.

2. Proposed Wording

Home for Good is comprised of academic, legal, housing, and homelessness experts who see the real effect of the current imbalance in our Constitution. The referendum needs to provide a balanced, stand-alone, and enforceable right to housing that would support the development and advancement of progressive and effective housing policies. In that regard, Home for Good has prepared the following proposed constitutional amendment:

Recommendation:

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.

This proposed wording, formulated by legal and policy experts, has already received cross-party political support. The proposed wording is explained in detail below.

Harmonising the Constitutional Imbalance

Bunreacht na hÉireann currently provides protection of private property rights in both Article 43 and Article 40.3. There is no equivalent protection for the right to housing in the Constitution. This means that the starting point for every legal analysis in respect of the regulation of land must begin from the perspective of a property owner's right. While this right can 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. As a result, the Constitution perceives property as a private interest held by a rights' holder, with the common good cast in opposition and the State given the role of protector of this private right.

A more effective and proactive constitutional approach would be to maintain the existing protections for private property rights but weigh these against a separate right to housing. In this scenario, the legislature and the courts would be tasked with balancing two rights against each other, subject to the usual restrictions around proportionality and rationality.

This would reframe the current overly narrow interpretation 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 would better frame the State's role in housing — not only as a protector of private property rights, but also as a protector of our human right to safe and secure housing.

The Need for a Stand-Alone Right

To rebalance the Constitution and ensure that potential barriers to progressive housing policy are removed, Home for Good proposes the insertion of a right to housing as a stand-alone justiciable right of equal value to the right to private property.

Policymakers have repeatedly ruled out progressive housing policies to tackle the current crisis, on the grounds that the constitutional protection of private property presents a strong barrier to State

intervention. An ‘Oireachtas Research Paper’ published in September 2019¹ exposes a very worrying pattern. It shows that on twelve separate occasions over recent years, legislation proposed in the Dáil has not progressed due to the spectre of Article 43 being raised as a barrier. A recent example occurred when proposals to extend the Covid-19 eviction moratoriums, to prevent rising homelessness, were not considered by Government in part due to concerns regarding the constitutional protection of private property rights. This stifling of ideas cannot be allowed to continue in face of the plight of those at the sharp edge of the housing shortage.

There is significant consensus among academic lawyers that the Constitution does not present an automatic barrier to progressive housing policies as Article 43.2 allows private property to be regulated according to the principles of social justice. However, the limitation of a constitutional right in the general ‘interests of the common good’ is significantly different from the balancing of two equally important constitutional rights. The Irish Courts have generally taken a different approach, on the one hand the interaction of a constitutional right with the common good, and on the other hand the interaction of competing constitutional rights. Although this is not perfectly consistent across all the case law, two general trends are evident:

- Where the right to private property is limited in the interests of the common good, the Courts will apply a proportionality test to that limitation. The law limiting property rights must be rationally connected to the aim, impair the right as little as possible and be proportionate to the aim (*Re the Planning and Development Bill 1999 [2000] 2 IR 321, 354*).
- Where legislation seeks to balance two protected constitutional rights, the Courts are more deferential and will apply a rationality test (*Tuohy v Courtney [1994] 3 IR 1, 47*).

This is an important practical distinction that reflects the supreme importance of constitutional rights over other considerations such as the common good.

Furthermore, regardless of the views of academic lawyers it is abundantly clear from the data provided above that successive governments have viewed the Constitution as presenting a real challenge to housing reform. Without clear constitutional reform it is difficult to see this changing.

We believe that the express recognition of a constitutional right to housing will free up the policy space to address housing in a broader and more robust way by allowing the right to private property to be balanced against the right to housing.

The right to housing would apply to every person. Owner-occupiers remain the largest proportion of Irish society and if the proposed wording were adopted, they would have increased constitutional protection, enjoying the right to private property, the right to housing and the right to inviolability of the dwelling to protect their home. A person who lives in a home which they own will have nothing to fear from this proposed amendment and will in fact have their rights strengthened.

Formulation of Wording

Our recommendation is that there be two aspects to the constitutional right:

- a recognition of a directly enforceable right; and
- a separate statement of the State’s obligation to realise that right within available resources.

¹ 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

For the right to be directly enforceable, it is necessary to assert the recognition and guarantee of the right in plain terms. However, given that what is being proposed is a socio-economic right, it will involve positive duties being placed on the State and must have some regard to resources. As such, it is necessary to affirm the positive obligation to realise the right and the conditions attaching to that obligation. This has been achieved in Article 42.4 of the Constitution in respect of the right to primary education and a similar approach is recommended here.

The wording of the recommended amendment is partly derived from Article 11.1 of the ICESCR. In doing so, it keeps the right to housing in line with international standards to which Ireland has subscribed, as well as providing a body of knowledge at international level that can be instructive to policy makers and courts. In particular, the reference to 'adequate housing' is deliberately chosen to ensure the right to housing is set at a meaningful level while allowing sufficient flexibility as acceptable standards of housing evolve over time. In particular, General Comment 4 to ICESCR sets out guidance for the interpretation of Article 11 and the core terminology incorporated into this proposed wording. This is discussed further below.

In addition to the link to ICESCR, the proposed wording is an adaptation of the formulation in section 26(1) and 26(2) of the Constitution of the Republic of South Africa. The South African formulation similarly sets out core principles of an express right and a stated obligation to realise that right. The particular wording proposed here has, however, been adapted to bring it into line with the language used in existing Irish constitutional rights' guarantees, while adopting the core concepts as in the South African model. This provides the added benefit of a body of existing case law from a similar legal system that can help inform the operation of a new right in the Irish Constitution in due course.

In reviewing State action, or inaction, affecting socio-economic rights, the South African Constitutional Court has generally considered whether the executive's conduct was 'reasonable' (ie, applying the legal standard of 'reasonableness'). The conduct of the executive is evaluated by the courts at that higher level while the detail of how the right is respected within that standard is left to the appropriate organs of the State (eg, executive and legislature).

Policy Obligations of the State under a Stand-Alone Right

The recommended amendment gives a constitutional framework for State involvement in the provision of housing. It places a positive constitutional obligation on the State to act, rather than, for example, to adopt an entirely passive market-led approach to housing.

This already occurs, to some extent, at a statutory level through the Housing Acts, but the obligation would be raised to a constitutional level and balanced against the right to private property. It would become the touchstone against which all action or inaction by the State would be measured.

Where intervention is required for those who cannot house themselves, there is room for manoeuvre as to whether the State will be obliged to do this directly or whether it would suffice for the State instead to fund others to do this. The existing constitutional socio-economic right to primary education (Article 42.4) has allowed for the State to fund others to provide the education directly. The State already provides housing to those in need through Local Authorities and Approved Housing Bodies under the Housing Acts. It is to be expected that such methods would be in line with the obligation in the second paragraph of the proposed stand-alone right.

As set out above, the inclusion of a stand-alone right will remove perceived barriers to the implementation of housing policy which affects private property rights. This would change the architecture of the legal space in which housing policy will operate. At present, policymakers are concerned that proposals might be unlawful because of the overriding limitations provided by

private property rights. That concern inevitably affects the development of housing policy. With a stand-alone right to housing, there will be a counterbalancing obligation to realise that right and an impetus for concerted and consistent action by the State.

While constitutional rights are frequently seen as the preserve of lawyers and the Courts, the effect of constitutional rights on overall policy is also important. It will form the baseline for all housing-related measures and be the prism through which any measure will be viewed. The Constitution is a political as well as a legal document. The proposed obligation to realise a right to housing is a statement of legal obligation but, even more importantly, it is a statement of political intent and an assertion of the State's obligation and responsibility to act. In the event that the amendment is carried with substantial popular support, it will provide both a political mandate and political capital for action to address housing need.

Realisation within Available Resources

Housing is a human rights issue but also has an inextricable economic element. A constitutional amendment providing for a standalone right to housing will not guarantee everyone a house, never mind a "free" house. Rather, the right provides for generalised access to housing to an appropriate standard. It is expected that it would operate similarly to the right to education in Article 42.4, which has been a significant impetus for action but has never guaranteed parents the right to a school of their choosing in the location of their choosing.

The provision of housing ultimately depends on the availability and allocation of resources. A constitutional amendment cannot, of itself, generate additional resources. The most the amendment can do is oblige the State to use a share of existing resources for a particular purpose. That reality will exist whether or not there is an express recognition of it in the proposed right. However, for the sake of ensuring clarity of understanding of the obligations, to safeguard the role of the Oireachtas and to ensure that the right retains meaning by reflecting what can be achieved in the letter of the law, it is proposed that the wording would expressly recognise that realisation is within available resources. This is also the approach envisaged under international law, which recommends that a State realise the right of every individual, in the shortest possible time, in accordance with the maximum available resources.

Defining Adequate Housing

The proposed amendment includes reference to 'adequate housing'. This term was deliberately chosen as some standard needs to be included to ensure the right to housing is set at a meaningful level, while allowing sufficient flexibility for policymakers as acceptable standards of housing evolve over time. This specific term was chosen in part because the United Nations has defined the term 'adequate housing' at international level.

In recognition of the fundamental role that housing plays in our lives in terms of providing a decent standard of living and enabling us to live with dignity, housing internationally is considered a fundamental human right. Housing has been an integral feature in the development of international human rights since the United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948.

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) has been ratified by almost 150 states including Ireland. Article 11 states: *'The States Parties to the present Covenant recognize 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.'*

All States signed up to this Covenant agreed to ‘take appropriate steps to ensure the realization of this right’. The UN further defines states’ housing obligations under the ICESCR in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights, a monitoring body of 18 independent experts. The UN’s definition of adequate housing is the most clear and comprehensive definition of what is the right to housing and what it should include as it takes into consideration²:

- Legal security of tenure
- Availability of services, materials and infrastructure
- Affordable housing
- Habitable housing
- Accessible housing
- Location
- Culturally adequate housing

Utilising this wording ensures the right to housing is in line with international standards to which Ireland has subscribed, as well as providing a body of knowledge at international level that can be instructive to policy makers and courts.

3. A Catalyst for Change

The Constitution is a statement of fundamental values that the people of Ireland believe in. It shapes all Government policy and legislation. A home is fundamental for a person’s dignity and necessary to form a foundation for life.

The imbalanced constitutional structure has been repeatedly proven to fail the people of Ireland in relation to accessing housing. It perpetuates high levels of vacancy and dereliction across the country, it allows for land hoarding, and it has contributed to our national housing crisis.

Including a Right to Housing in the Constitution would not alone solve our current housing crisis; however, it has an enormous potential to be a catalyst for change. The inclusion of a Right to Housing in our Constitution will place an onus on the State to develop and implement policy and practice which will meet the right to adequate housing of our citizens, and safeguard against future housing crises from occurring.

Despite 61,880 households currently waiting for social housing, 10,492 people living in emergency homeless accommodation, and the existence of 166,000 vacant homes, it is clear that housing has not yet been given the overwhelming priority from Government which it deserves.

A right to housing in our Constitution provides every level of Government with a guiding principle and a constitutional impetus to ensuring all people have access to affordable and secure homes. In practical terms, this means refusing to accept the endemic and unending housing crisis in our society. It will incentivise and open up new ways of ensuring sufficient, affordable and social housing is made available. It will move us closer to having a society with sufficient levels of housing available for people’s diverse needs, including housing with universal design for people with disabilities. It will enable us as a society to better cater to the housing needs of our ageing population, of minority groups such as members of the Travelling Community, and of single people and small and large families alike.

² Available at:

https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf

Conclusions

Home for Good wants to ensure that the people of Ireland will have the opportunity, in 2023, to vote in a referendum that will insert a right to housing in our Constitution.

The fundamental problem is not that our Constitution sets out strong property rights. Rather, it is that the Constitution fails to set out what is meant by the 'common good,' against which those rights are intended to be balanced, and more importantly that it does not expressly protect a right to housing. Those in need of housing reform are left to rely on something that has been given no place and no words in the Constitution.

We propose that the Constitution be amended to make it clear that access to adequate housing is an essential part of the common good. The recommended amendment would preserve the right to private property while also offering a counterbalancing right to housing. It would unlock a major barrier that is essential to reforming housing legislation and policy, and can be a vital part of ending the current housing crisis.

We believe that the Commission can best serve its mandate if it provides in its report a clear wording for the insertion of the right to a home in the Constitution along with a recommended timeline. Given the broad support shown across the Oireachtas for the wording outlined above, we would be happy to engage further with the Commission in this area.
