



FLAC Submission to the Housing Commission Consultation on a Referendum on Housing

September 2022

About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights and equality organisation, which exists to promote equal access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights, including economic, social and cultural rights.

FLAC, as an Independent Law Centre, takes on a number of cases in the public interest each year, mainly in the areas of housing and homelessness, equality and social welfare. As well as being important for the individual client, these cases are taken with the aim of benefiting a wider community.

Issues around housing and homelessness have dominated FLAC's casework in recent years. The majority of those cases arise from FLAC's Traveller Legal Service and Roma Legal Clinic.¹ FLAC regularly appears before quasi-judicial tribunals and the courts, including the Workplace Relations Commission², Residential Tenancies Board³ and High Court⁴ in cases related to housing.

FLAC makes policy recommendations to a variety of bodies, including to Oireachtas Committees and international human rights bodies. This includes recommendations that are derived from the learning and experience of FLAC's work as an Independent Law Centre.

¹ Case files on housing and homelessness issues constituted one-third of new case files opened by FLAC in 2021. Housing case files also constituted one of the largest categories of total case files dealt with in 2021 (36.4%). Housing files constituted the largest category of total case files dealt with by the Traveller Legal Service in 2021 (62.2%) and the largest number of new files opened by that service in 2021 (53.3%). Within the Roma Clinic, 19.4% of the total open files related to housing, and 22.2% of new case files opened by that service related to housing and homelessness. These trends are consistent with recent years. See: FLAC, Annual Reports 2018 – 2021 <<https://www.flac.ie/publications/category/annualreports/>> accessed 5 August 2022.

² For example, FLAC acted for the complainants in the first claims under the Equal Status Acts where a hotel's refusal to provide emergency accommodation was held to constitute discrimination on the "housing assistance payment" ground. See: FLAC, 'WRC finds hotel discriminated against family when it refused them access to emergency accommodation' (2 March 2022) <<https://www.flac.ie/news/2022/03/02/wrc-finds-hotel-discriminated-against-family-when/>> accessed 22 August 2022.

³ For example, in 2018 a family represented by FLAC secured one of the highest awards of compensation made by the RTB to date in a case concerning an illegal eviction carried out by a landlord which left the family homeless. See: FLAC, Annual Report 2018 [21] <<https://www.flac.ie/publications/flac-annual-report-2018-final/>> accessed 22 August 2022.

⁴ For example, FLAC acted for the successful applicants in *H v South Dublin County Council* [2020] 2 IR 775. The judgment of MacGrath J in that matter clarified the obligations of housing authorities to process housing applications within the statutory time limits prescribed. See: FLAC, 'Important clarification from the Court on the obligations of housing authorities' (11 March 2020) <<https://www.flac.ie/news/2020/03/12/important-clarification-from-the-court-on-the-obli/>> accessed 22 August 2022.

Relevant recent publications include:

- A *Submission to the Joint Oireachtas Committee on Key Issues Affecting the Traveller Community on the subject of Access to Housing and Accommodation*, which highlighted the need for urgent law reform in relation to the delivery of Traveller Accommodation, the standards of that accommodation, evictions, and access to emergency accommodation.⁵
- A *Submission on the development of a Youth Homelessness Strategy* which stressed that equality and human rights should be at the heart of any plan to eradicate homelessness and end the housing crisis. The submission noted that legislation is required to ensure that the housing rights of all individuals and groups are comprehensive, clear and enforceable.⁶
- A *Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland*, which highlighted the specific housing issues encountered by the Traveller and Roma communities, including barriers to accessing social housing supports.⁷
- The four paper *From Pillar to Post* series which examines issues arising in new and existing consumer debt cases in light of the Covid 19 pandemic.⁸
- A *Submission to the Review of the Equality Acts* which emphasises that State bodies including Government Departments and Local Authorities should be brought clearly within the scope of the equality legislation's prohibition of discrimination, as should the functions of those bodies in relation to housing.⁹

⁵ FLAC (2021), *FLAC Submission to the Joint Committee on Key Issues affecting the Traveller Community* <<https://www.flac.ie/publications/flac-submission-to-the-joint-committee-on-key-issu/>> accessed 22 August 2022.

⁶ FLAC (2022), *FLAC Submission on the development of a Youth Homelessness Strategy* <<https://www.flac.ie/publications/flac-submission-on-the-development-of-a-youth-home/>> accessed 22 August 2022.

⁷ FLAC (2021), *FLAC Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland* <<https://www.flac.ie/publications/flac-submission-to-the-independent-antiracism-comm/>> accessed 22 August 2022.

⁸ *Ten Years and Counting* (the second of the four papers) examined how attempts to resolve mortgage arrears problem over the past decade have been, at best, partially successful and how an array of initiatives introduced at various stages lack coherency. See: FLAC (2021), *Paper Two - Ten years and Counting: Conclusions from a decade of attempting to resolve family home mortgage arrears in Ireland* <<https://www.flac.ie/publications/flac-pillar-to-post-paper-2/>> accessed 22 August 2022.

⁹ FLAC (2021), *Submission to the Review of the Equality Acts*.

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Introduction

FLAC welcomes the establishment of the Housing Commission's Referendum Sub-Committee and the opportunity to make a submission on a Referendum on Housing in Ireland. FLAC is happy to engage further with the Housing Commission and the Department of Housing, Local Government and Heritage, and to discuss any of the matters raised in this submission.

This submission is informed by our experience working directly with those experiencing poverty, extreme poverty, homelessness and barriers to accessing social housing and emergency accommodation. The work of FLAC's Traveller Legal Service has been dominated by housing issues, including in relation to evictions, access to emergency accommodation and access to Traveller-specific accommodation and the standards of such accommodation. Similarly, the work of FLAC's Roma Legal Clinic has illustrated the specific and persistent barriers which the Roma community in Ireland face in seeking to access public services including social housing supports.

The Need for a Rights-Based Approach to Housing: Housing as a Right not a Commodity

In this submission FLAC will set out the reason that it considers a clearly articulated constitutional right to housing could be significant in addressing the current housing and homelessness crisis and also provide a backstop against future policies or legislation that would lead to similar circumstances arising again.

The government's *Housing for All* plan recognises that the current operation of the housing system is failing to meet housing need.¹⁰ Increased reliance on the private market to meet housing needs, together with reduced public subsidies to support private ownership with increased support for institutional investment in residential housing has failed to ensure access to affordable and secure housing for all.¹¹ The domination of a market-driven approach to (and outlook on) housing policy has also served to reduce criticisms of that policy to questions of 'supply'. Characterising the problem as a single dimensional issue of supply, however, fails to capture the true

¹⁰ Available at <https://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/#view-the-plan>

¹¹ Corrigan and Watson, *Social Housing in the Irish Market*, Working Paper No. 594 (ESRI, June 2018). See also Keith Adams, et al., *Tenant State of Mind: How Cost Rental Public Housing Can Reverse the State's Transformation to a Tenant*. (Dublin: Jesuit Centre for Faith and Justice, 2022).

extent (and multi-faceted nature) of the housing crisis and its devastating effects on the rights of individuals, families, and groups, including ethnic groups such as Travellers.

The Economic and Social Research Institute has recently reported on the disproportionate exposure of vulnerable groups, such as persons with disabilities, older people, lone parents, migrants and ethnic minorities, to housing-related issues from ‘hidden-homelessness’ to inadequate conditions in accommodation.¹² It has highlighted that the outsourcing of housing provision and reliance on the private market has raised additional issues around the security and quality of housing, particularly for these groups. They crucially note the onus on the State to act in these circumstances.

Viewing housing as a right offers an alternative approach (based on rights, equality and access to justice) to understanding and resolving the housing crisis and preventing its recurrence.

Judging the success or failure of housing policy by reference to the question of housing ‘supply’ alone insulates the State from challenge in relation to the adequacy of housing and whether the rights of individuals, families and groups are vindicated.¹³ By contrast, a rights-based approach places the question of adequacy of housing as the central issue, by recognising that ‘housing’ encompasses more than merely accommodation or ‘shelter’. This approach is endorsed by the United Nations Committee on Economic, Social and Cultural Rights which has stated that housing should not be interpreted “*in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head*”.¹⁴

Understanding housing as a right also recognises its connection with other rights, including those already recognised in Bunreacht na hÉireann, such as the right to privacy, family life, education and the rights of the child. Indeed, the Universal Declaration of Human Rights conceptualises housing as “*a means of realising the right*

¹² Helen Russel and others, ‘Monitoring Adequate Housing in Ireland’ (ESRI, 2021).

¹³ Sinéad Lucey, ‘Access to Justice, Legal Aid and the Right to Housing’ (Conference on a Referendum on Housing in Ireland, Dublin, May 2022).

¹⁴ CESCR General Comment No.4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) E/1922/23.

to a standard of living adequate for the health and wellbeing of [oneself and their family]”.¹⁵

The Potential of a Right to Housing beyond measures to increase ‘Housing Supply’

While it is regularly asserted that the constitutional protection of private property prevents ambitious housing reform and regulation of the housing market, the current constitutional provisions contain no direct barrier to legislative responses to various aspects of the housing crisis:

“[T]he capacity of the State to regulate in the public interest, including through limiting the exercise of private property rights, is expressly recognised in the text of the Constitution and readily accepted by judges”.¹⁶

A constitutionally enshrined right to housing would, however, remove any concern that the constitutional protection of private property is a barrier to ambitious housing legislation which could increase housing supply and allow for enhanced regulation of the housing market.

In addition, FLAC considers that the introduction of the right to housing could and should facilitate a shift in the orientation of housing policy from a market-driven to a rights-based approach.¹⁷ The right to housing should also strengthen the position of individuals and groups, including ethnic groups such as Travellers, suffering from the worst effects of the housing crisis, including poverty and homelessness.

To achieve this ambition, the wording of a constitutional amendment should create a right to adequate housing which is enforceable through the courts with a clear description of the requirements of the right and how it should be implemented.

The right must establish a strong constitutional standard against which State action and inaction can be measured. A constitutional right to housing should clearly set out

¹⁵ Lorna Fox O’Mahony ‘Right to Housing: Theoretical Foundations’ (Conference on a Referendum on Housing in Ireland, Dublin, May 2022).

¹⁶ Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (CUP, 2021) [241].

¹⁷ The UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, sent a letter to the Irish Government in March 2019 criticising the Government “*practice of adopting laws and policies which treat housing as a commodity and undermine the enjoyment of housing as a human right.*” Available at <https://www.ictu.ie/publications/un-special-rapporteur-condemns-financialisation-housing>

the primary responsibility of the State in relation to housing. In FLAC's view, the right to adequate housing not only encompasses consideration of the immediate accommodation needs of particular individuals or families, but also what systemic action needs to be taken by the State to vindicate the constitutional right through legislation and policy.¹⁸

There is also a symbolic benefit to a right to housing. If one function of a constitution is "*a statement of core values and commitments that constitute or form part of the purpose of the state*",¹⁹ a constitutionally enshrined right to housing would confirm its status as a core value and purpose of the State which it is bound to respect.

¹⁸ An example of how a systemic breach of the right to adequate housing could be remedied was set out by the European Committee on Social Rights in the case of FEANTSA v France (Case 39/2006), 4 February 2008.

¹⁹ Jeff King, 'Constitutions as Mission Statements' in Denis Galligan and Mile Versteeg (eds) *Social and Political Foundations of Constitutions* (CUP, 2013) 73.

Recommendations

1. FLAC recommends a referendum to propose the inclusion of a right to adequate housing in the Constitution. This referendum should take place as a matter of priority.

Section 1 of this submission sets out FLAC's analysis of the current constitutional and legal order which gives rise to this recommendation and also informs FLAC's view on the form of a constitutional right to adequate housing.

2. The proposed wording of the amendment to the Constitution should ensure that:

- Adequate housing is expressly recognised as a fundamental right.
- The right to adequate housing is enforceable, with breaches of the right subject to review by the courts.
- The duty of the State to vindicate the right (including through legislation) and to ensure access to adequate housing is recognised.
- A minimum standard of adequate housing is stated through a non-exhaustive list of factors.
- The right to housing is explicitly recognised as connected to other constitutional rights (such as the right to privacy, family life, education and the rights of the child) and values such as dignity.
- The role of the right in promoting social inclusion is affirmed.
- The right is underpinned by a substantive conception of equality and requires the specific circumstances and housing needs of individuals and groups, including ethnic groups such as Travellers to be taken into account.

Each of these elements are reflected in FLAC's proposed wording for a constitutional amendment. The necessity of each element is discussed in detail in sections 2 and 3 of this submission.

3. The Commission should recommend that supporting legislation, and the amendment of existing legislation, is necessary to ensure that the right to adequate housing is effective from the outset and in practice.

While the absence of a constitutional right to adequate housing does not pose a barrier to the introduction of rights-based housing legislation, the introduction of such a right should mandate the reform of the housing code to ensure that it is consistent with the right and also prevent future regressive policies or legislation that would undermine the right:

- The statutory obligations on local authorities to provide social housing and emergency accommodation should be elevated to a duty to ensure the vindication of the right to adequate housing.
- The minimum standards for social housing, emergency accommodation, Traveller accommodation the system replacing Direct Provision should be clearly provided for in legislation and provide that each of those forms of accommodation are adequate by reference to their habitability, security, affordability, accessibility, cultural appropriateness and suitability. These minimum standards should be enforceable with effective oversight where standards are breached.
- Section 2 of the Housing Act 1988 should be amended to ensure that it includes all forms of homelessness, including those living in inadequate accommodation.
- The Residential Tenancies Acts should be reformed to ensure the adequacy of private rented accommodation by reference to the factors listed above. Security of tenure and the prevention of arbitrary evictions, should be given robust protection in the Residential Tenancies Acts.
- All forms of arbitrary eviction should be prohibited, ensuring that any proposed eviction is subject to a merits based review by an independent tribunal.

These matters are discussed in further detail in section 4.1 of this submission.

4. While also not strictly within the scope of this consultation, FLAC highlights that the vindication of the right to access to justice is necessary to ensure that

the right to housing is meaningful and enforceable in practice. Section 4.2 of this submission contains discussion and recommendations in this regard.

Proposed Wording for Constitutional Amendment

ADEQUATE HOUSING

ARTICLE 43A

- 1 The State recognises, and shall vindicate, the right of all persons to adequate housing.
- 2 The State shall ensure access to adequate housing and where necessary, in view of actual conditions, provide adequate housing.
- 3 The State affirms that, in particular, adequate housing encompasses habitability, security, affordability, accessibility, cultural appropriateness and suitability.
- 4 The State acknowledges the connection between the right to adequate housing and human dignity, social inclusion, substantive equality and the enjoyment of other fundamental rights.
- 5 The State shall take legislative and other measures to ensure the realisation and vindication of the aforementioned right having due regard to the nature of the right.

1. The Experience of Housing Rights: Constitutional & Legislative Inadequacies

FLAC's Experience

FLAC's submission is informed by its work as an Independent Law Centre and experience working directly with those experiencing poverty, extreme poverty, homelessness and barriers to accessing social housing and emergency accommodation.

The work of FLAC's Traveller Legal Service has been dominated by housing issues including in relation to evictions, denial of access to emergency accommodation and Traveller-specific accommodation and the standards in such accommodation. Similarly, the work of FLAC's Roma Legal Clinic has illustrated the specific and persistent barriers which the Roma community in Ireland face in seeking to access public services such as social housing.

Absence of a Constitutional Right to Housing

Adequate housing, and access to it, is not recognised as a right in Irish law.

At present, in the absence of an express right to housing in Irish constitutional law, "*the basis for protecting rights related to housing often arise out of infringements of other constitutional rights*".²⁰ As will be set out in this submission, in practice, to challenge inadequate housing, advocates must rely on rights that do not refer directly to housing or accommodation. For example, cases concerning the adequacy of housing are considered through the prism of other rights such as the right to respect for family life, the right to privacy, education, inviolability of the dwelling, bodily autonomy or constitutional values such as human dignity.

The case law in this area, as discussed later in this submission, would indicate that the reliance on these other rights to effectively compel a response to a particular housing situation is difficult and often impossible.

²⁰ Mercy Law Resource Centre, 'The Right to Housing in Ireland' (May, 2016).

Insufficient Housing Legislation

As will be discussed below, the legislation and regulations governing social housing, emergency accommodation and Traveller-specific accommodation are often of limited use in achieving positive outcomes for those with unmet housing need.

Emergency Accommodation

Homelessness is defined in section 2 of the Housing Act 1988. Section 10 of that legislation addresses the provision of emergency accommodation. However, the legislation does not create a right to emergency accommodation for those who meet the definition of homelessness (which itself has been criticised for only recognising ‘the most stark form of homelessness²¹). Access to this discretionary form of assistance is dictated by reference to available resources and those with acute housing needs may be denied access to even the most basic safety net of emergency accommodation.

Middleton v Carlow County Council, gives a sense of the courts’ approach to reviewing administrative decision making by local authorities in the context of housing and access to emergency accommodation. The case before the High Court concerned consideration of whether there was a basis to quash the respondent’s decision to refuse emergency accommodation to the applicants pursuant to sections 2 and 10 of the Housing Act 1988.²² The Court concluded that “*the wording of both s. 2 and s. 10 of the Act of 1988 [are] not mandatory in nature. Section 2(a) ... expressly states ‘in the opinion of the authority’ and s. 10 ... uses the word ‘may’ in dealing with the provision of accommodation for homeless persons*”. As a result, “[in] applying the provisions of the Act of 1988, the [local authority] has discretion.”²³

It is clear that the Court was anxious to avoid any incursion into the discretion regarded as more properly within the domain of the local authority. In doing so, however, the Court confirmed the absence from the Housing Act 1988 of any minimum duty on the

²¹ Samantha Morgan-Williams, ‘Why new legal definitions for homelessness are needed’ (RTÉ, 7 February 2022) <<https://www.rte.ie/brainstorm/2022/0207/1278337-ireland-homelessness-definition-legislation/>> accessed 5 August 2022.

²² Section 2 of the Housing Act 1988 sets out the definition of homelessness for the purpose of the Act, while section 10 confers a range of powers on local authorities to address situations of homelessness through a variety of measures.

²³ [2017] IEHC 528.

State to those experiencing homelessness. The Court approached the matter as an exercise in statutory interpretation within the confines of traditional administrative tests of rationality in decision making and was reluctant to second guess the assessment carried out by the local authority. While judicial review is a constrained form of review of administrative decision making it is problematic if those limitations insulate administrative decision making from scrutiny in light of the constitutional rights that may be engaged. In *Middleton* the Court relied very heavily on the conclusions of the local authority as regards the housing situation of the applicants with little scrutiny of whether those conclusions were robust and realistic in terms of their factual circumstances. This approach was largely informed by the view that the statutory scheme conferred very wide decision making discretion on the local authority and was very limited in terms of the entitlements of any particular applicant seeking emergency support.

The decision of the Supreme Court *O'Donnell v South Dublin County Council* clearly indicates the limitations of the present role of the courts in housing cases but also a potentially important role in acting as a corrective in the housing context where appropriate.²⁴ That case concerned the circumstances of a Traveller family living in grossly inadequate mobile home accommodation on a halting site, where the local authority was refusing to provide an additional mobile home to improve their living circumstances. While the Court did not accept that there was a breach of statutory duty in respect of the Applicant family in general, indicating that the parents had been remiss in various ways in dealing with their accommodation situation, it did consider that a duty devolved on the local authority in respect of one member of the family; a young girl with severe disabilities and who was living in very undignified circumstances. In finding that there was a breach of duty in respect of the minor applicant girl the Court stated:

“Clearly, the established jurisprudence of this Court makes clear that, to interpret s.13(2) as mandating a housing authority to provide a mobile home for a travelling person would be to usurp the functions of the Oireachtas. But Acts of the Oireachtas are to be read and interpreted in the light of the Constitution. If, in an exceptional case such as this, statutory powers are given to assist in the realisation of constitutionally

²⁴ 2015 [IESC] 28.

*protected rights or values, and if powers are given to relieve from the effects of deprivation of such constitutionally protected rights, and if there are no reasons, constitutional or otherwise, why such statutory powers should not be exercised, then I think such powers may be seen as being mandatory. In so finding I do no more than reiterate a statement of interpretation in cases of this exceptional category expressed by Costello J in the High Court, in O'Brien v Wicklow Urban District Council (Unreported, High Court, 10th June, 1994)."*²⁵

In *O'Donnell* the constitutional rights identified by the Court as being engaged were autonomy, bodily integrity and privacy, which were all recognised as being "substantially diminished". The Court recognised the clear inter-relationship between these rights and the adequacy of the Applicant's housing.

While this case went beyond considering housing legislation in isolation, and placed it squarely within a constitutional context, it is also evident that it was only because of the very exceptional circumstances of the minor applicant girl in the case that the Court was willing to take the step of interfering with the decision making process of the local authority. There was no argument in the case of resource allocation, or competing priority between applicants, or whether this was an issue best determined by the local authority itself, rather the Court found that the Council had failed to have regard to its statutory duty and consider same in the context of the minor applicant taken as an individual with rights separate to the rest of her family. Crucially, however, the Court was clear that it was the very exceptionality of the circumstances of the minor applicant that allowed the Supreme Court make a finding in her favour. The Court indicated that it was the fact that the Council was "faced with clear evidence of inhuman and degrading conditions" that imposed a mandatory duty in the circumstances.

While the decision might be relied on to suggest that housing rights are already sufficiently or at least partially protected through the protection of other constitutional rights, in establishing such a high threshold on judicial intervention, the Supreme Court effectively affirmed that absent an express right to housing, the role of the courts in dealing with housing cases would be a very marginal one, and only where there was a clear disregard for the constitutional rights of a particular applicant which could be

²⁵ Ibid. at para. 65,

remedied through relevant statutory powers.²⁶ In other words, absent a statutory right, the Constitution would be of no avail in such cases.

Social Housing

The Housing Acts 1966 to 2015, along with the Social Housing Assessment and Allocation Regulations,²⁷ govern the provision of social housing and emergency accommodation by local authorities. They set out the conditions for accessing social housing and emergency accommodation but they do not create a right of access to either form of accommodation and the courts have not interpreted the legislation as giving rise to such rights.

The scheme provided for under the Housing Acts and Social Housing Assessment and Allocation Regulations provide that local authorities may ‘allocate’ housing to those who meet the strict criteria for social housing support and are on the housing list. Refusal of a ‘reasonable’ offer of housing can result in suspension from the housing list.²⁸ In theory, the legislation gives those on the housing list the right to refuse ‘unreasonable’ offers. However, the question of what constitutes a ‘reasonable’ offer is decided by the local authority itself. While a suspension from the housing list (arising from a refusal of offers of accommodation) may be challenged in the courts on the basis that the offers were in fact unreasonable, based on the legislative scheme, the courts will accord considerable deference to the decisions of local authorities and a reluctance to engage with the circumstances and rights of those who might pursue such challenges. This is aside from the obvious consideration that in any event access to the resources to bring such a challenge are self-evidently going to be limited for a person who meets the income limit for social housing.

This situation arises despite the fact that living in accommodation that does not meet an individual or family’s needs or is inappropriate to their circumstances and may have

²⁶ The statutory powers in this cases related to the function of local authorities under section 10 of the Housing Act 1988 to deal with homelessness, as the Court determined that the minor applicant bin the case fulfilled that statutory definition of being “homeless.”

²⁷ S.I 84/ 2011 Social Housing Assessment Regulations (as amended) and S.I 198/2011, Social Housing Allocation Regulations (as amended).

²⁸ The Minister for Housing is conferred with the power to make regulations dealing with refusals of “reasonable offers” of social housing support under section 22(4) of the Housing (Miscellaneous Provisions) Act 2009. The relevant regulations are contained in the Social Housing Allocation Regulations 2011 which provides that if a household refuses two reasonable offers of accommodation within a twelve month period they may be suspended from the housing list for a period of twelve months, which period of suspension does not count towards priority on the housing list.

a serious detrimental effect on their lives and enjoyment of their rights. This includes their right to respect for private and family life, the right to education and the cultural rights of ethnic minorities such as Travellers.

Through FLAC's case-work, we have regularly identified instances where those on the housing list have been offered (or have accepted) accommodation which is inadequate by reference to their specific needs or circumstances. This includes persons with disabilities²⁹ and Travellers.³⁰

What constitutes adequate housing necessarily depends on the circumstances and needs of individuals, couples, families and groups. Yet frequently the accommodation provided or offered does not reflect these needs.³¹ Providing adequate or appropriate accommodation often becomes a marginal consideration, dismissed by reference to resource-constraints. Unsuitable accommodation is characterised as 'reasonable' in this paradigm. For example, a local authority may view persons with disabilities living in institutional settings as accommodated despite the official policy of decongregation.³² Similarly, Travellers experiencing homelessness, who may previously have been seeking Traveller-specific accommodation, may find themselves compelled to accept whatever is immediately offered to them.³³

An example of this is found in *C & Ors v Galway County Council* [2017] IEHC 784 where the High Court assessed the reasonableness of a housing offer in light of the relevant statutory framework. A central feature of the case was the special educational

²⁹ For persons with disabilities it is often the case that housing must meet specific requirements or be modified in order to effectively accommodate them. This can encompass the design of bathrooms and extend to proximity to public transportation. This necessarily reduces the already limited housing stock available through the social housing system and may require further effort on the part of a local authority to meet their needs. While it has been suggested that requiring accommodations for persons with disabilities has moved from permissive to mandatory (in light of the ratification of the UN Convention on the Rights of Persons with Disabilities), this appears to arise chiefly where other constitutional rights are stake, which at present excludes adequate housing. See: Shivaun Quinlivan and Lucy-Ann Buckley, 'Reasonable accommodation in Irish constitutional law: two steps forward and one step back – or simply out of step?' [2021] 72(1) Legal Quarterly 61 [87].

³⁰ Traveller specific accommodation is discussed further below at p. 10.

³¹ At present local authorities are required to classify housing need by reference to household size and gender, age (being over 65 years old), being a Traveller, coming within the definition of homeless, or having an enduring disability, however the legislation is silent as to how those defined needs should be met. See Regulation 24 of the Social Housing (Assessment) Regulations.

³² Health Service Executive Ireland, 'Time to Move on from Congregated Settings' <<https://www.hse.ie/eng/services/list/4/disability/congregatedsettings/timetomoveon.html>> accessed 10 August 2022.

³³ *Doherty & Ors v South Dublin County Council & Ors* [2007] IEHC 4.

needs of a child and the constitutional right to free primary education. It was stressed that the housing offer, the refusal of which resulted in a threat of withdrawal of emergency accommodation to the Applicant family, would detrimentally affect their receipt of the appropriate educational supports, given its prohibitive distance from the facility where the applicant was then enrolled and the reduced supports available in the identified area where the house was allocated. The decision of the Court indicates a considerable reluctance to engage with considerations of appropriate accommodation and housing adequacy and also whether the educational rights of the minor applicants were a relevant consideration for the local authority to take into account. It is worth setting out the reasoning of the Court at some length as it summarises the case law in the area:

“The respondent states that it is for the respondent to assess whether or not the accommodation is reasonable and points to the judgment of Baker J. in Mulhare v. Cork County Council [2017] IEHC 288, and in particular para. 41 thereof where the court states:

‘It seems to me outside my competence, and not a matter for judicial review, to direct that the respondent would provide a house within the narrow geographical radius identified by the applicants as suitable for their needs, as to do so would be to engage in an assessment of the housing stock and of the needs of the applicants which are outside the power of a court.’

The applicant suggests that that statement was made in the context of an application for mandamus directing the respondent to provide housing for the applicants within a five mile radius of where one of the applicants was receiving medical treatment, and therefore this judgment is not relevant.

I do not accept that the succinct statement of law in para. 41 of the judgment of Baker J. aforesaid is confined to such applications as was made in the case before her, but in fact is consistent with general jurisprudence such as the Supreme Court judgment in Henry Denny & Sons (Ireland) Ltd Minister for Justice Social Welfare [1998] 1 IR 34 when Hamilton CJ cautioned “... [T]he courts should be slow to interfere with the decision of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact...such conclusions must be corrected.”

The aforesaid statement of Baker J is also in keeping with T.D. v Minister for Education and Ors [2001] 4 IR 259, where the Chief Justice stated:

'I would have the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as "socio-economic rights'.

The Chief Justice having earlier stated that save with regard to rights unequivocally established, some degree of judicial restraint is called for in identifying new rights."³⁴

The absence of consideration of the adequacy of housing by both local authorities and the courts beyond the very basic statutory assessment of needs in those rare cases that come before it, is symptomatic of a housing system predicated primarily on the question of mediating 'supply' and the distribution of limited resources with little scope for the consideration of rights and the broader social role of housing.

The Housing Assistance Payment ('HAP') and Approved Housing Bodies

Those on local authority housing lists may access the Housing Assistance Payment ('HAP'). Under this scheme the local authority pays for the provision of private rented accommodation (with individuals also paying a contribution).

The HAP scheme sees private landlords acting as the providers of accommodation for those who qualify for social housing support and illustrates the increased dominance of commercial tenure in the Irish housing 'market'. Increased reliance on HAP supports and expands the private housing market.³⁵

The expansion of the HAP scheme is a move from direct State support towards a system which places the burden on households to compete in the private rental market for ever-scarcer housing.³⁶ Additionally, the largely unregulated voluntary housing sector³⁷, referred to under housing legislation as Approved Housing Bodies ('AHBs') has evolved rapidly over the past number of decades to take on an ever more

³⁴ Ibid at para. 17.

³⁵ Michael Byrne and Michelle Norris, 'Housing market financialisation, neoliberalism and everyday retrenchment of social housing' [2019] 54(1) Environment and Planning A: Economy and Space 182.

³⁶ Research has found that those in the private rented sector tend to have shorter occupancy than those in local authority housing and the owner occupied sector, see *Monitoring Adequate Housing in Ireland*, Russell, Privalko, McGinnity and Enright, ESRI, 2021, at p. 156.

³⁷ The Housing (Regulation of Approved Housing Bodies) Act 2019 has not yet been commenced and of itself is largely silent in relation to the rights of tenants of AHBs.

significant role in the delivery of social housing.³⁸ The expansion of social housing stock owned and managed by AHBs creates a situation where housing legislation and the obligations of local authorities in that regard do not apply to social housing tenants of AHBs, although they are providing housing directly from local authority housing lists. One obvious example of this is the fact that AHBs have been brought within the scope of the Residential Tenancies Act 2004, such that the protection from eviction of a tenant of an AHB in certain circumstances is equated to that of a tenant in private rented accommodation.³⁹ On the other hand, as a result of various challenges through the Courts,⁴⁰ the State was obliged to enact reforming legislation to provide for a merits based hearing before a court in the event that it is sought by a local authority to evict a tenant.⁴¹ In relation to an AHB, there is no effective security of tenure within the first six months of the tenancy, leaving AHBs open to evict tenants at will without need to justify their decision making in that regard. Therefore even within the provision of social housing there is a bifurcated level of rights and entitlements amongst tenants

The decline of social housing and emergence of subsidised private rental accommodation⁴² and the failure to regulate the provision of housing and evictions by AHBs further signals a move towards a social housing system with only limited regard to rights, entitlements or security for those who rely on it.

Traveller-Specific Accommodation

The Housing (Traveller Accommodation) Act 1998 was intended to address the range of accommodation needs of Travellers, from standard housing to transient halting sites, and to require a programmatic process of planning, funding and delivery by local authorities and central government on a multi-annual basis. The 1998 Act creates an

³⁸ The Residential Tenancies Board states: *“There are approximately 520 Approved Housing Bodies in Ireland with a stock size of over 30,000 homes. AHBs provide housing in response to a range of different needs including families on low incomes, households with special needs, such as older persons, people with disabilities and homeless households. AHBs work in partnership with Local Authorities, and receive nominations from the Local Authority social housing waiting list for available accommodation provided by the AHB.”* Extract from Residential Tenancies Board website, accessed on 2 September 2022.

³⁹ Section 3(2A) Residential Tenancies Act brings a residential tenancy created by an approved housing body within the scope of the Act where with public authority provides a dwelling, of which it is the owner, to an approved housing body under a contract or lease between the public authority and the approved housing body.

⁴⁰ See for example *Donegan v Dublin City Council & Dublin City Council v Gallagher*, [2012] IESC 18, *Pullen & Ors v Dublin City Council* [2008] IEHC 379.

⁴¹ See Part 2, Housing (Miscellaneous Provisions) Act 2014.

⁴² Corrigan and Watson, Social Housing in the Irish market, Working Paper No. 594, ESRI June 2018.

obligation on local authorities to make an assessment of the accommodation needs of members of the Traveller community who qualify for social housing supports.

However, the 1998 Act also increased the controlling and punitive powers of local authorities in dealing with unofficial encampments by extending the scope of the circumstances in which a local authority could require a temporary dwelling to be moved, when placed within proximity to a halting site or other Traveller accommodation.⁴³ The legislation twinned better accommodation provision with the elimination of unofficial encampments. More than twenty years since the enactment of the legislation, it is clear that there are major issues with both strands of this approach. These concerns are dealt with in detail in the *FLAC Submission to the Joint Oireachtas Committee on Key Issues Affecting the Traveller Community on the subject of Access to Housing and Accommodation*.⁴⁴ The *Traveller Accommodation Expert Review* has called for an “overhaul” of the 1998 Act; its failings having been evidenced by an “extremely high rate of Traveller homelessness”, failures to meet the scale of accommodation needed by Travellers and an increase in those living in “overcrowded conditions”.⁴⁵

Regardless of the ambitions of the 1998 Act, in FLAC’s experience, Traveller-specific accommodation needs are regularly characterised as unreasonable, including in relation to the accommodation of large families, provision of group housing to accommodate extended families and other forms of culturally appropriate accommodation.⁴⁶

An example can be seen in the judgment in *Crumlish v Donegal County Council* where the applicant (who was represented by FLAC) challenged her suspension from the housing list after refusing two offers of accommodation characterised by the local authority as reasonable despite not aligning with her stated housing needs and

⁴³ Section 10 of the Housing (Miscellaneous Provisions) Act 1992.

⁴⁴ FLAC (2021), *FLAC Submission to the Joint Committee on Key Issues affecting the Traveller Community* <<https://www.flac.ie/publications/flac-submission-to-the-joint-committee-on-key-issu/>> accessed 22 August 2022.

⁴⁵ Department of Housing, Planning and Local Government (2019), *Traveller Accommodation Expert Review*. Available at: <https://rebuildingireland.ie/news/minister-english-publishes-the-report-of-the-expert-review-group-on-traveller-accommodation/> This does not even address the dismal failure to provide any transient accommodation by local authorities.

⁴⁶ Arguably, the language of Court of Appeal in *Clare County Council v. Bernard McDonagh & Helen McDonagh* [2020] IECA 307, illustrates this misunderstanding of the significance of Traveller specific accommodation referred to as “bespoke housing demand of the appellants”.

preferences.⁴⁷ The implication of characterising these offers as reasonable is that the applicant's insistence on housing meeting her needs as a Traveller was unreasonable. This is despite those needs being related to the distinctive traditions and culture of Travellers like nomadism and living with extended family groups. Framing specific housing needs in this manner reflects the trend to view housing as a matter of resource-allocation rather than exploration and vindication of rights; a consequence of which is that people are left in accommodation that cannot be regarded as adequate in that it is culturally inappropriate.

One academic author has noted that "... *the refusal of the courts to take account of Traveller culture allows housing authorities to provide large scale sites that ghettoise Travellers and that arouse particularly strong opposition from settled people.*"⁴⁸ Traveller housing exclusion has also in part been perpetuated by the continued provision of culturally inadequate accommodation by local authorities with the effect of forcing the assimilation of Travellers into standard forms of social housing.⁴⁹ This has been described as directly impinging on their cultural rights and ability to pursue a Traveller way of life as it is described in the jurisprudence from the European Court of Human Rights.⁵⁰

Failures to Drawdown Funding for Traveller-Specific Accommodation & to Implement Traveller Accommodation Programmes

The issues discussed above are compounded by systemic failures in relation to the provision of Traveller-specific accommodation.

⁴⁷ [2020] IEHC 233

⁴⁸ Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, Institute of Public Administration 2015).

⁴⁹ Ronnie Fay, 'Equality Review of Traveller Accommodation by IHREC' (Pavee Point, 14 July 2021) <<https://www.paveepoint.ie/equality-review-of-traveller-accommodation-must-result-in-new-initiatives-that-respect-traveller-culture-and-identity/>> accessed 9 August 2022; Darren O'Donovan, 'Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention of Human Rights' [2016] 16(1) *International Journal of Discrimination and the Law* 5.

⁵⁰ *Ibid.* This issue of Travellers feeling compelled to accept accommodation unsuited to their needs was at the centre of the decision of the High Court in *O'Reilly v Limerick County Council* [2006 IEHC 174, where the Court found that the Applicant Traveller families were not disentitled to the reliefs sought in the case by reference to the fact they had been provided with settled accommodation by the local authority which they thereafter vacated to resume living on the roadside. The Court stated "*on the evidence it is not infrequent that persons in the category of the applicants are unable to sustain living in settled accommodation especially accommodation which the evidence shows was not in fact well suited for their needs and not specifically designed or identified with their requirements in mind.*" [at para.79]

Since the introduction of the 1998 Act, the Department of Housing has provided local authorities with ring-fenced funding for the provision of Traveller-specific accommodation. While central funding has increased, this has not necessarily met with an increase in drawdown. Coupled with the lasting effects of capital cuts during the period from 2008 to 2013⁵¹, this has resulted in an acute shortage of accommodation available to Travellers and a consequent increase in homelessness.

The allocation and drawdown figures also indicate that drawdown rates vary significantly between local authorities. The Traveller Accommodation Expert Review noted with concern that “*drawdown rates were particularly low in some of the local authorities where the Traveller population has expanded most in the 2011 to 2016 intercensal period*”.⁵²

Equality Reviews conducted by the Irish Human Rights and Equality Commission on the failures nationally to draw down ring fenced capital budgets to meet obligations on Traveller-specific accommodation found evidence that the substantive delivery of Traveller accommodation projects rarely matches the targets set by local authorities in their statutorily-mandated Traveller Accommodation Plans.⁵³ Recently published figures suggest that this remains the case.

FLAC has also repeatedly highlighted a serious flaw in the 1998 Act that means elected representatives may adopt a Traveller Accommodation Programme (which the local authority is legally bound to implement), but then block the delivery of the objectives of the Programme through the planning process.⁵⁴ Local authorities may

⁵¹ In March 2016, the UN Committee on the Right of the Child criticised “drastic reductions” in the capital budget for the provision of Traveller accommodation over the previous ten-year period.

See: United Nations Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, Geneva: OHCHR, para.69(c).

See also: Pavee Point (2013), Travelling with Austerity, at pp 24 to 26.

⁵² In response to a Parliamentary Question in July 2020, the Minister for Housing stated that “[his] Department is no longer allocating specific budgets to individual local authorities from the... funding available overall” in order to “facilitate ease of access to such funding”. However, there is nothing to suggest that those allocation figures were ever binding, either in law or in practice.

See PQ [16553/20]: <https://www.oireachtas.ie/en/debates/question/2020-07-21/283/>

See also: *Traveller Accommodation Expert Review* at page 49.

⁵³ Irish Human Rights and Equality Commission, ‘Provision of Traveller accommodation by local authorities’ <<https://www.ihrec.ie/our-work/equality-review/>> accessed 9 August 2022.

⁵⁴ Section 16 of the Housing (Traveller Accommodation) Act 1998 provides: “A housing authority shall, in securing the implementation of an accommodation programme, or an amendment to or replacement of an accommodation programme, take any reasonable steps as are necessary for the purpose of such implementation.”

ignore their legal obligations in this manner and largely do so with impunity. The present model for the delivery of Traveller accommodation allows the deep prejudice that lies within most communities against the development of specific accommodation for Travellers to hamper the implementation of Traveller Accommodation Programmes.⁵⁵

Housing Circular 41/2012

A further example of discrimination in the housing system is contained in Housing Circular 41/2012. The Circular was introduced by the Department of Housing, Local Government and Heritage in December 2012. The Circular states that only those EU/EEA nationals with a right to reside in Ireland under Directive 2004/38/EC are eligible to be assessed for social housing supports. However, no such criteria arises from the Housing (Miscellaneous Provisions) Act 2009 which does not stipulate that having a right to reside in the State under EU Law is required in order to access social housing supports. The 2009 Act provides that local authorities may provide social housing supports subject to an eligibility assessment. The details of that assessment are set out in the Social Housing Assessment Regulations 2011 (as amended).

The Directive is transposed into Irish law by the European Communities (Free Movement of Persons) Regulations (Statutory Instrument No. 548 of 2015). However, the Circular does not accurately reflect the Directive or the 2015 Regulations. Indeed, the Circular refers to the predecessor regulations to the 2015 Regulations which have since been repealed.

While being currently employed in the State or having a work history of over 52 weeks in the State may afford an EU/EEA national a right of residence in the State, the Directive and the 2015 Regulations provide for several wholly separate bases on which a right of residence may be established. They also provide for equal treatment for all EU citizens in access to public services such as housing.

⁵⁵ For instance FLAC acted in a case concerning the decision of the elected members of a local authority to vote against a proposal to develop a halting site already included in its own Traveller Accommodation Programme. See <https://www.flac.ie/news/2021/11/23/waterford-council-decision-not-to-proceed-with-hal/>

In 2020 alone, FLAC advocated for five Roma families who were unable to access social housing on the basis of the Circular despite being lawfully resident in the State under EU law. While reliance on the Circular has not been evident in more recent case work, it further illustrates the vulnerability of certain groups within the housing system to unequal treatment that is not specifically prohibited in legislation.⁵⁶

Conclusion

A common thread that emerges from FLAC's casework is a fundamental failure to meet housing needs of clients, which cannot be challenged by reference to an express and enforceable right to adequate housing. A constitutional imperative on the State to ensure access to adequate housing would not only compel the State to address housing scarcity in macro terms but also address a range of issues which FLAC has repeatedly witnesses through its casework such as failures to provide suitable or culturally appropriate accommodation. The limited avenues for challenge offered by the various statutory schemes and rights connected to adequate housing underline the need for an express constitutional right to housing, one that instigates legislative reform, adequate resource allocation, equality of outcomes and ultimately leads to democratic accountability in the regulation of housing supply, including, where appropriate, enforcement through the Courts for failure to abide by the right.

In addition to the issues identified above, it is worth noting that those outside of the prescribed income thresholds (which are set at a relatively low level) are excluded from receiving 'social housing supports'.⁵⁷ This leaves those unable to access or compete in the private housing market completely outside the scope of State support. FLAC is aware of families who are wholly dependent on social welfare but nonetheless do not qualify for social housing supports, and have no access to other affordable housing options.

The present non-interventionist market-driven housing system could be recalibrated with a strong constitutional role for the State in housing supply, in a manner similar to the present constitutional imperative requiring access to free primary education. The

⁵⁶ See <https://www.flac.ie/blog/a-barrier-to-eu-nationals-accessing-social-housing-supports/>. A different instance of a local authority refusing housing supports to a non- Irish National and her citizen child is addressed in the judgment *Tee & Anor v Wicklow County Council*, [2017] IEHC 194.

⁵⁷ See <https://www.gov.ie/en/publication/04c69-social-housing-support-table-of-income-limits/>

comparison to be drawn between the right to education in the constitutional context and the right to housing is quite compelling as the State is seen as having the role of mediating access to educational resources through private actors while also respecting the wishes and preference of parents. Most notably the right to education is not expressed to be conditional on available resources, but rather assumes, being a constitutional imperative, that the State will make the relevant resources available.⁵⁸

On the basis of the analysis and experience outlined above FLAC submits that there should be a constitutional amendment providing for access to adequate housing.

⁵⁸ It can only be surmised that we have never had an educational crisis similar to our housing crisis because the Constitution throws a protection cloak around educational provision that does not exist in relation to housing.

2. Understanding and Defining the Right

FLAC's experience (and the analysis of that experience above), informs its view as to the form that a constitutional right to housing should take. This includes FLAC's view on the understanding and definitions of 'housing' and a 'right to housing' which should be included in such wording.

It is submitted that the right to housing must be provided for in a manner which ensures it responds as effectively as possible to the procedural and substantive deficits in the current legal order and housing system. FLAC recommends that:

- The Constitution should provide for a standalone right to 'adequate housing'.
- The right to adequate housing should be explicitly recognised as connected to other constitutional rights (such as the right to privacy, family life, education and the rights of the child) and values such as human dignity and equality, so that the broader societal role of housing is explicitly recognised and taken into account by the State.
- The duty of the State to ensure access to adequate housing and to vindicate the right to housing should be stated in the Constitution.

A Standalone Right to 'Adequate Housing'

Housing is recognised a standalone right in the European Social Charter and the International Covenant on Economic, Social and Cultural Rights, both of which have been ratified by the State.⁵⁹ Article 34.3 of the EU Charter of Fundamental Rights states that "*[i]n order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices*". Reflecting these commitments, the right should be incorporated into the Constitution, including as part of the European legal order to which we are bound.

Housing, when understood as a right, encompasses more than simply accommodation or 'shelter'. The United Nations Committee on Economic, Social and Cultural Rights

⁵⁹ However, Ireland has not accepted/ratified Article 31 of the European Social Charter which provides for a right to housing.

has stated that housing should not be interpreted “*in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head*”.⁶⁰

A right to housing requires the recognition that housing “*provides a space in which our psychological needs can be met. Secure housing is both intrinsically and instrumentally important in the formation and protection of community, belonging and place in the world*”.⁶¹ For example, while the ‘accommodation’ provided by the State through the Direct Provision scheme can be described as ‘shelter’, it is highly doubtful that it could be characterised as either housing or a home.

Conceptualising housing in this manner clearly implies that the right is concerned with the adequacy of housing and this should be reflected in the wording of any constitutional amendment. The requirements of what constitutes ‘adequate housing’ are dealt with in further detail in section 3.2 below.

The Connection between Housing and Other Rights

Enshrining housing as a constitutional right would also recognise its connection with other rights, including those already recognised in Bunreacht na hÉireann, such as the right to privacy, family life and the rights of the child and constitutional values such as human dignity and equality. Housing has been characterised as a foundational need and right, “*a precondition for the enjoyment of several human rights, including the rights to work, health, social security, vote, privacy or education*”.⁶²

Under the Universal Declaration of Human Rights housing is understood as “*a means of realising the right to a standard of living adequate for the health and wellbeing of [oneself and their family]*”.⁶³ By natural extension, in the absence of housing or adequate housing, the enjoyment of other related constitutional rights is negatively impacted. This is reflected in the cases discussed in section 1 that illustrate the connection between housing, cultural rights, the right to private and family life and the

⁶⁰ CESCR General Comment No.4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) E/1922/23.

⁶¹ Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Bloomsbury Publishing, 2013) [4 – 5].

⁶² Office of the United Nations High Commissioner for Human Rights, ‘The Right to Adequate Housing’ (Fact Sheet No. 21/Rev. 1).

⁶³ Lorna Fox O’Mahony ‘Right to Housing: Theoretical Foundations’ (Conference on a Referendum on Housing in Ireland, Dublin, May 2022).

right to education. Those examples, which concern members of the Traveller community and people with disabilities, also illustrate the connection between housing and equality. The need for a clear equality component to a right to housing is discussed in further detail in section 3.3.

Housing is linked intrinsically to human dignity and flourishing. The absence of adequate housing can be construed as a denial of a means to realise an adequate standard of living. The “*importance of housing to privacy, autonomy and freedom; its function in facilitating participation and inclusion in society; and its role in providing the material goods that make all of these things meaningful and possible*” cannot be overstated.⁶⁴

The connection between housing and other rights and values should be reflected in the wording of any constitutional amendment:

Explicitly recognising the connection between housing and other rights and values could valuably guide the legislature in introducing measures to vindicate the right, and the court’s approach to interpreting the right in relevant cases.⁶⁵ As discussed above, the court’s approach in recent cases does not make a link between the provisions of the Housing Acts and the enjoyment of constitutional rights that may be impaired through an absence of adequate housing and current housing assessments are also predicated on a very narrow conception of “needs”. While a harmonious approach to the interpretation of the Constitution might be regarded as a sufficient means by which the right to housing would be interpreted in light of other constitutional rights, it is submitted that this is a concept that is only relevant to the courts and is not a concept readily applied by the legislature or executive, and indeed may be subject to variable application by the courts if not explicitly included in the right.⁶⁶

⁶⁴ Jessie Hohmann, ‘Housing as a Right’ in Katharine Young and Malcolm Langford (eds) *Oxford Handbook on Economic, Social and Cultural Rights* (2022).

⁶⁵ Such a reference in the Constitution would avoid courts adopting a narrow view of the right to housing and placing within its societal context relevant to the wellbeing of the household, supporting families, ensuring the dignity, privacy and bodily integrity of the individual and contributing to sustainable communities. See in this regard Lorna Fox O’Mahony ‘Right to Housing: Theoretical Foundations’ (Conference on a Referendum on Housing in Ireland, Dublin, May 2022).

⁶⁶ So for instance in *Bacik v An Taoiseach, Ireland and The Attorney General*, [2020] IEHC 313, the Court stated: “If a literal interpretation of one provision might bring it into conflict with the literal meaning of another provision, then it is legitimate to resort to the harmonious approach with a view to interpreting both provisions in a way which avoids inconsistency.” This approach to harmonious interpretation would only require a

Further, O'Mahony has suggested that dignity, as a background principle in Irish constitutional law, can function as a basis for interpreting rights “*by reference to the equal treatment and respect that should be afforded to all human beings*”.⁶⁷ In *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49, the constitutional value of dignity was identified as a basis for deriving rights from the constitutional text. Dignity now occupies a valuable role in constitutional adjudication by operating as a “*normative justification for and interpretive aid to rights provisions*”.

The State's duty to Ensure Access to Adequate Housing & to Vindicate the Right to Adequate Housing

Understanding housing as a right must give rise to a clear, positive duty on the State to vindicate that right.

A right to housing should require State action to ensure access to adequate housing through social housing or the private market (the ‘procedural’ element of the right) and measures to ensure that accommodation is adequate (the ‘substantive’ element of the right). Similarly, the Court should be able to intervene, where necessary, to ensure that failures in either regard are rectified and that a remedy is provided.

The dual nature of the State's obligations (i.e. procedural and substantive) should be reflected in the wording of any constitutional amendment. The substantive nature of the State's duty should be reflected in a general obligation to vindicate the right to adequate housing. To reflect the State's procedural obligations, the right should contain a duty to ensure ‘access to’ adequate housing.

This recommendation is informed by the experience of other jurisdictions in enshrining a right to housing into their constitutions.⁶⁸ Section 26(1) of the South African Constitution enshrines a “right to have access to adequate housing” (rather than a “right to adequate housing”). This has been described as primarily “*procedural*

consideration of other rights in the Constitution if same is required to avoid any conflict between such rights and any right to housing that might be included by referendum.

⁶⁷ Conor O'Mahony, ‘The Dignity of the Individual in Irish Constitutional Law’ in Dieter Grimm, Alexandra Kemmerer and Christopher Mullers (eds) *Human Dignity in Context* (Hart Publishing, 2016)

⁶⁸ As detailed in the comparative analysis of the right to housing in international legal instruments and domestic constitutions including Finland, Belgium, India and South Africa in Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Bloomsbury Publishing, 2013).

understanding of the right to housing” which has limited the benefits of the right.⁶⁹ In practice, the right to housing defined in procedural terms fails in improving the “*concrete living conditions of those who are marginalised and powerless*”.⁷⁰

Where the constitution and the courts emphasise ‘proceduralism’ (i.e. to provide access to housing but not necessarily housing itself), they require states to ‘act’ rather than deliver.⁷¹ Such an approach may limit the extent to which the State is accountable for breaches of the right and the remedies which a court could order in such circumstances.

However, there is still merit in including a constitutional obligation to ensure ‘access to’ adequate housing as it places clear responsibility for vindicating the right to adequate housing on the political branches of the State while also making a distinction between the role of the State as regulator of the housing market, policing against the over-commodification of housing and regulating the private rented sector on the one hand and being the direct provider of housing on the other where individuals are otherwise excluded from access. In addition to political accountability to the electorate, it also ensured the accountability of the legislature and executive to the courts in respect of measures taken by the State to ensure access to adequate housing (or inaction in this regard). Ensuring the State is accountable is essential in securing the effectiveness of a right to housing. The need for the right to housing to be enforceable, and the related issue of remedies, is discussed in further detail in section 3.1 below.

Conclusion: The Experience of South Africa

The approach taken to a constitutional right to housing in Ireland should be informed by the experience of such rights other jurisdictions.⁷² The experience of the South African right of ‘access to adequate housing’ is certainly instructive (as is reflected in

⁶⁹ Aoife Nolan, ‘Jessie Hohmann, the Right to Housing: Law, Concepts and Possibilities’ [2014] 14(3) Human Rights Law Review 581; Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Bloomsbury Publishing, 2013) [133].

⁷⁰ *ibid.*

⁷¹ Padraic Kenna, ‘Jessie Hohmann, the Right to Housing: Law, Concepts, Possibilities’ [2013] 7(2) European Journal of Homelessness

⁷² While the focus in this submission is on the experience of South Africa as that is one of the few jurisdictions to have constitutionalised the right to housing, the experience in other jurisdictions are also given detailed consideration in *The Right to Housing in Comparative Perspective*, Mercy Law Resource Centre, 2018. Available at <https://mercyllaw.ie/wp-content/uploads/2018/06/MLRC-Second-Right-to-Housing-Report.pdf>

section 3.1 which deals with enforcement and remedies). However, calls for the adoption of the South African model (which are reflected in some proposed constitutional amendments in relation to the right to housing) should be tempered by the analysis above concerning the limitations of purely 'procedural' rights to housing.

Further, the approach of the courts in South Africa to interpreting their right of access to adequate housing has been shaped by that country's specific history and tradition of 'transformative constitutionalism'. That process of using the values set by the constitution to usher in change in the social, legal, economic and political systems, places specific demands on the courts when they are considering cases concerning constitutional rights.⁷³ This allows the South African courts to make interventions which relate to State policy quite broadly a role which the Irish Courts have not assumed.

⁷³ Eric Kibet and Charles Fombad, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' [2017] 17(2) African Human Rights Law Journal.

3. Key Components of the Right

There are a number of key components that should be reflected in the wording of a right to housing to ensure its effectiveness:

3.1. Enforceability

FLAC has observed that “*both the legislature and the judiciary have traditionally taken a conservative position on the justiciability of economic, social and cultural rights*”.⁷⁴ This is underpinned by arguments that they “*may have cost implications for the Exchequer or that judicial enforceability would interfere with the separation of powers*”.⁷⁵ This is in tension with the approach of the UN Committee on Economic, Social & Cultural Rights’ view that any distinction between civil & political rights and economic, social & cultural rights (such as housing) is “*arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent*”.⁷⁶ Despite the State stressing its support for economic, social and cultural rights at the international level, at the domestic level, it continues to defend itself against legal actions related to socio-economic rights by distinguishing them from other rights.⁷⁷ The judiciary remains highly deferential to the State on matters perceived to relate to the distribution of state resources.

FLAC is of the view that a right to housing must be enforceable, and breaches of the right must be subject to review by the courts. It has been long recognised by the Courts that their role is to act as a guardian and guarantor of constitutional rights, the dissenting judgment of Denham J in *T.D. v Minister for Education* [2001] 4 IR 259 captures this particularly well:

“[o]n those very rare occasions when such a declaratory approach is not feasible then the court has the power and indeed the duty and responsibility to uphold the

⁷⁴ FLAC, ‘Our Voice, Our Rights: A Parallel Report in response to Ireland’s Third Report under the International Covenant on Economic, Social and Cultural Rights’ [14]
<https://www.flac.ie/assets/files/pdf/our_voice_our_rights.pdf?issuusi=ignore> accessed 5 August 2022.

⁷⁵ FLAC, ‘Our Voice, Our Rights: A Parallel Report in response to Ireland’s Third Report under the International Covenant on Economic, Social and Cultural Rights’ [14]
<https://www.flac.ie/assets/files/pdf/our_voice_our_rights.pdf?issuusi=ignore> accessed 5 August 2022.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

Constitution and to vindicate constitutional rights. This is at the core of the duty and responsibility of the [Superior Courts] of Ireland”.

One can “*infer a commitment to social inclusion from the text of the Constitution and that the most appropriate agency for policing that constitutional norm is the judiciary, given the failure, indeed, at times, egregious failure, of our political system to attend to the needs of marginalised minorities*”.⁷⁸ This reflects the need to be able to access the courts where breaches of the right to housing occur. This would not mean that the courts would be responsible for housing policy in place of the Government, in fact “*enumerated rights, democratically determined, limit judicial activism and clearly demarcate Government’s policy role*”.⁷⁹ The role of the courts would be to determine if the State has effectively facilitated access to adequate housing, in the event the State has failed in this duty, to remedy the violation of a right to adequate housing with suitable restraint.

*“[T]he right to housing would mean that legislation and policy would have to be proofed to ensure they reasonably protect the right, in the same way as they are proofed in regard to other substantive rights. This would ensure that at that early stage a check would be in place to ensure the legislation or policy reasonably respects the right to adequate housing. This would mean that policies on housing and homelessness could not be based on a political whim or simply based on the philosophy of the reigning government. Policy would instead be grounded in the basic obligation to respect the right. In that sense it would be an enduring protection”.*⁸⁰

⁷⁸ Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, Institute of Public Administration 2015) [7].

⁷⁹ Eoin Ó Broin, *Home* (Merrion Press, 2019) [153].

⁸⁰ *ibid* [154 – 155].

It is well-documented in the experience of other jurisdictions which recognise an enforceable right to housing, that control over resource allocation and budgetary matters,⁸¹ ultimately remains with the political branches.⁸²

Remedies

The approach taken by the courts, in relation to remedies of breaches of the right to housing, to echo *Airey v Ireland*, must ensure that the right to housing is not merely theoretical or illusory but practical and effective.

Mandatory and coercive orders will likely form a necessary component of vindicating the right to adequate housing in the event of continued failures by the political branches. The use of mandatory orders has been a matter of extensive discussion in Irish constitutional law. The preference of the judiciary, and the approach required by precedent, is to avoid inroads to the political sphere occupied by Government and the Oireachtas. Nolan has cautioned:

*“If the courts are only prepared to grant mandatory orders where there has been ‘a conscious and deliberate decision by [an] organ of State to act in breach of its constitutional obligations accompanied by bad faith or recklessness’, or as ‘an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself’ it would probably be only in the most extreme circumstances that the courts would be prepared to grant such orders for housing rights violations”.*⁸³

She highlights that the South African courts have taken an innovative approach to the use of mandatory and coercive orders to ensure that the right to housing may be effectively enforced while maintaining respect for the separation of powers. This includes the use of ‘structural interdicts’ - orders designed to address systemic issues

⁸¹ It has recently been noted that, “the anticipated costs of implementing a constitutional right to housing are no longer a mystery”. See: Padraic Kenna, ‘Submission to Conference on a Referendum on Housing in Ireland’ (Conference on a Referendum on Housing in Ireland, Dublin, May 2022).

Leilani Farha, in their capacity as UN Special Rapporteur on housing, concluded that states have the “capacity and resources to secure adequate housing for all, but have, instead, used these resources to create further inequality”. See: Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context A/HRC/34/51 (18 January 2017).

⁸² Mercy Law Resource Centre, ‘The Right to Housing in Comparative Perspective’ (March 2018).

⁸³ Nolan notes, as a qualification, that “[a]dvocates might, however, have more success in obtaining mandatory orders where the obligations at issue are statutory, rather than constitutional, in nature or where the services or facilities being demanded are already in existence”. See: Aoife Nolan, ‘Litigating Housing Rights: Experiences and Issues’ [2006] 28 DULJ 145.

where the Court plays a supervisory role.⁸⁴ Such examples should helpfully inform the approach of the Irish courts. The Supreme Court has itself recently demonstrated an innovative approach to remedies through the use of suspended declarations of unconstitutionality.⁸⁵

Declaratory orders and awards of damages also have a positive contribution to make in the housing rights litigation. In certain instances, they may be sufficient to correct or ameliorate the conditions giving rise to violations of a right to adequate housing.

In grappling with the challenge of adjudicating on matters related to the right to housing the Courts should consider that “*in carrying out its constitutional function of defending and vindicating personal rights, the Court must have available to it any power necessary to do so in an effective way. If that were not the case, this Court could not carry out the obligation imposed upon it to vindicate and defend such rights*”.⁸⁶

⁸⁴ For example, in the case of *City of Cape Town v Rudolph & Ors*, “the High Court judge found, on the evidence before him, that the City of Cape Town had displayed and continued to display, an unacceptable disregard for an order of the Constitutional Court in *Grootboom* and did not consider that that a declaration, standing on its own, would suffice”. Consequently, “he granted a structural interdict requiring the City of Cape Town to report back to the court on a set date with details on what steps it had, and would, take to comply with the order”. See: Aoife Nolan, ‘Litigating Housing Rights: Experiences and Issues’ [2006] 28 DULJ 145.

⁸⁵ See for example *N.H.V. v Minister for Justice and Equality* [2017] IESC 35.

⁸⁶ *D.B. v Minister for Education* [1999] 1 I.R. 29 Kelly J at [40].

3.2. Minimum Standards

Mercy Law Resource Centre notes that “[t]he right to housing would... provide a clear floor of protection in respect of basic, adequate housing for all”.⁸⁷ The definition of what constitutes adequate housing and the steps the State will take to realise this are of crucial importance: “If the right cannot be laid claim to, it is a hollow promise and any attempt to invoke it as an instrument in a project of advocacy is fraught with uncertainty”.⁸⁸

Factors for Determining Adequacy

To be effective, the right to housing must include practical core minimum standards. Courts tend to be more receptive to the enforcement of concrete and precise rights and duties, rather than broadly framed constitutional norms.⁸⁹

The minimum standards should draw on the definition provided by the European Social Rights Committee of “a dwelling which is safe from a sanitary and health point of view, that is, possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity; is structurally secure; not overcrowded; and with security of tenure supported by law”.⁹⁰ The inclusion of security of tenure is important in strengthening protection against evictions. At present, however, security of tenure under the Residential Tenancies Act is relatively dilute and easily displaced by the property rights of the landlord, despite growing dependence on the rental market over the last number of years. In addition an important precedent in relation to constitutional protection from arbitrary eviction was established by the Supreme Court in the particular context of a homeless Traveller family being evicted pursuant to powers conferred on a local authority under planning law⁹¹ and similarly protection from arbitrary eviction, in so far as it provides immediate protection for someone who is

⁸⁷ Mercy Law Resource Centre, ‘The Right to Housing in Comparative Perspective’ (March 2018).

⁸⁸ Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Bloomsbury Publishing, 2013).

⁸⁹ Sandra Liebenberg ‘The Protection of Economic and Social Rights in Domestic Legal Systems’ in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds) *Economic, Social and Cultural Rights* (2nd edn, Kluwer Law International 2001).

⁹⁰ *European Federation of National Organisations Working with the Homeless (FEANTSA) v France* (ESCR Case no 39/2006), decision on merits, 5 December 2007, para 76.

⁹¹ *Clare County Council v Bernard McDonagh and Helen McDonagh* [2022] IESC 2.

homeless or at risk of homelessness, is an important adjunct to a right to adequate housing.

According to UNCESCR, factors such as affordability, habitability, accessibility, cultural adequacy and suitability should also be included: “*These elements are just as fundamental as the basic supply and availability of housing. For housing to be adequate, it must, at a minimum, meet the [afore-outlined] criteria*”.⁹²

These elements further recognise the role of pre-existing constitutional rights in determining adequacy of housing, from the right to bodily integrity to constitutional values such as dignity, and create a requirement for a context-specific assessment of adequacy. They further embed adequate housing in a social context, rather than focusing on solely physical components.⁹³

Climate Change

Climate change will have significant implications for the right to adequate housing over time that may require flexibility in determinations of adequacy:

“*.. the adverse effects of climate change have a range of implications, which can increase with greater global warming, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, [...] the right to adequate housing*”.⁹⁴

The Human Rights Council has called upon States to “*to take the right to adequate housing into account in strategies for adaptation to and mitigation of climate change*” and “*to work with affected communities and individuals to develop and promote environmentally sustainable and sound housing design, construction and maintenance to address the effects of climate change while ensuring the right to adequate housing*”.⁹⁵ This captures the need for a broad range of factors to be open to the Courts in making determinations on adequate housing.

⁹² CESCR General Comment No.4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) E/1922/23.

⁹³ Silvia Cittadini, ‘Adequate for whom? Reflections on the right to adequate housing from fieldwork on Roma inclusion in Italy’ [2022] 32(1) *Romani Studies* 85.

⁹⁴ United Nations Human Rights Council, ‘Human rights and climate change’ (41/21) 2019.

⁹⁵ United Nations Human Rights Council, ‘Adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context’ (43/14) 2020.

These factors related to housing adequacy should shape State policy in vindicating the right to housing and the Courts assessment of whether the right to housing has been vindicated in a given case.⁹⁶ For example, in South Africa the approach of the Constitutional Court has been to assess the housing system and policies for their role in realising the right to adequate housing through the prism of the given case.⁹⁷

Therefore, FLAC recommends the inclusion of a non-exhaustive list of factors to be considered in assessing what constitutes adequate housing for an individual, couple, family or group in the potential constitutional amendment.

⁹⁶ Office of the United Nations High Commissioner for Human Rights, 'The Right to Adequate Housing' (Fact Sheet No. 21/Rev. 1).

⁹⁷: *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

3.3. Equality and Non-Discrimination

An ongoing concern of FLAC in the current operation of the housing system is the failure to engage with and provide for the needs of marginalised individuals and groups. As noted from the outset of this submission, the housing needs of persons with disabilities, Travellers and Roma in the areas of social housing and emergency accommodation are often overlooked.

Ireland should learn from other jurisdictions where, following the introduction of a right to housing, “*the legal interpretation of the right to housing appears to float in a vacuum, divorced from the actual questions of suffering, marginalisation and destitution it should seek to remedy*”.⁹⁸ The introduction of a right to housing should be based on a substantive conception of equality in order to counter this risk. As discussed above, the right to housing must require taking account of the specific circumstances of those in need (by reference to context-specific factors for assessing the adequacy of housing). It must also take into account existing inequalities and the need to eliminate discrimination and promote equality of opportunity.

Promoting Equality of Opportunity and Eliminating Discrimination

The Committee on Economic, Social and Cultural Rights. Crucially, confirms that “[s]tates have an obligation to prohibit and eliminate discrimination on all grounds and ensure *de jure* and *de facto* equality in access to adequate housing”.⁹⁹ This extends beyond State provision of social housing and emergency accommodation into ensuring effective protections against discrimination and mechanisms to vindicate rights where discrimination is experienced in the private market.¹⁰⁰ In the case of persons with disabilities, the Committee has regularly noted that at times affirmative action to address underlying inequality may be necessary to ensure the full enjoyment of the right to adequate housing.¹⁰¹

⁹⁸ Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Bloomsbury Publishing, 2013) [13].

⁹⁹ CESCR General Comment No.4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) E/1922/23.

¹⁰⁰ Aoife Nolan, ‘Litigating Housing Rights: Experiences and Issues’ [2006] 28 DULJ 145.

¹⁰¹ Centre on Housing Rights and Evictions, ‘The Rights to Adequate Housing and Right to Water: A Need for Further Development’ (May 2004) < <https://www.un.org/esa/socdev/enable/rights/ahc3cohre.pdf> > accessed 5 August 2022.

The Committee has conclusively stated that “[s]tates parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration” and “[t]his means that housing strategies and policies must target and prioritise those that are most vulnerable and should not result in more advantaged groups benefiting at the expense of others”.¹⁰² Fineman’s work echoes the Committee’s recommendations and argues for a responsive state “that ensures equality of opportunity and meaningful, not merely formal, access for individuals to society’s institutions”.¹⁰³

The right to housing must ensure that the legislature and courts are sensitive to existing inequalities and that State action is equality-proofed. The equality guarantee in Article 40.1 of the Constitution has been of limited use in this regard. While it is sufficiently broad to encompass substantive equality¹⁰⁴ it has not been interpreted by the Superior Courts in such a manner.¹⁰⁵ Rather the equality guarantee as it stands is concerned with formal equality, and consequently has “*meant that Irish constitutional law has rarely been beneficial for disadvantaged groups whether homosexuals, non-Irish nationals, members of the Traveller community, or people with disabilities*”.¹⁰⁶ Similarly, a number of exemptions in the Equal Status Acts (and the way they have been interpreted by the Courts) limit or obscure the extent to which statutory equality law applies to “State activity” in areas such as housing.¹⁰⁷ This is despite the fact that EU Directive 2000/43 (the Race Directive) prohibits discrimination on the grounds of racial or ethnic origin in “access to and supply of goods and services which are available to the public, including housing”.

An embedded equality component should be included in the wording of a right to housing to ensure that measures taken to vindicate the right are sensitive to existing inequalities and actively promote equality of opportunity. This approach would also

¹⁰² CESCR General Comment No.4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) E/1922/23.

¹⁰³ Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ [2008-2009] 20 Yale J.L & Feminism [20].

¹⁰⁴ As conceptualised by Fredman.

¹⁰⁵ Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2019) [7.2.05]; Ben Mitchell, ‘Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law’ [2015] 53(1) *The Irish Jurist* 36-57; See for example the recent decision of O’Malley J in *Donnelly & Ors v The Minister for Social Protection & Ors* [2022] IESC 31.

¹⁰⁶ Colm O Cinnéide, ‘Aspirations Unfulfilled: The Equality Right in Irish law’ (2006) IHRLR 41.

¹⁰⁷ FLAC Submission to the Consultation on the Review of the Equality Acts (2021).

create a constitutional imperative for eliminating discrimination in housing policy and for ensuring that anti-discrimination legislative clearly applies to the State's housing functions.

Consideration of Individual/Specific Circumstances

The wording of the right must ensure that the adequacy of housing is not determined by reference to a box-ticking exercise for compliance with a blanket standard of adequate housing. Such an approach could actively exclude those with specific housing needs and potentially even limit the capacity of local authorities to respond to housing needs within their functional areas. The wording for referendum should account for this risk, and seek to capture the range of possible housing needs relevant to assessments of adequacy (as discussed above in section 3.2) in a suitably flexible manner. This could be complemented by the public sector equality and human rights duty given that it requires all public bodies “*to promote equality, prevent discrimination and protect the human rights of their employees, customers, service users, and everyone affected by their policies and plans*”.¹⁰⁸

The right should provide that the extent, seriousness and urgency of individuals' housing needs must be engaged with by the legislature and the courts. Such an approach is illustrated by the approach of the South African Constitutional Court in *Grootboom*, where the Court directed its attention to the failure of housing programmes to address the needs of those in 'desperate situations'.¹⁰⁹ They examined the various dimensions of responses to a housing crisis and considered the capacity of the housing programmes to meet the applicants' short-term, medium-term and long-term housing needs. In finding a failure on the part of the State to fulfil their constitutional obligation to meet the needs of those in desperate situations, they focused on the short-term needs of the applicants and considered the reasonableness of “*a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis*”.¹¹⁰

¹⁰⁸ Section 42, Irish Human Rights and Equality Commission Act 2014.

¹⁰⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

¹¹⁰ *ibid*; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn, CUP 2019); Bertie Ramcharan, *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials*, The Raoul Wallenberg Institute Human Rights Library Volume 22 (Martinus Nijhoff Publishers 2005).

4. Ensuring the Effectiveness of the Right

The constitutional text enshrining a right to housing is of critical importance. However, there are a number of broader considerations in ensuring that the right is effective from the outset and in practice.

4.1. Legislation

The introduction of supporting legislation following the initial introduction of a right to adequate housing, and the amendment of existing legislation, is necessary to ensure it is meaningful in the short-term. As discussed above, existing legislation is not informed by a recognition of adequate housing as a right.

Adequacy & Minimum Standards

As noted by FLAC in its submission on the Development of a Youth Homelessness Strategy, *“legislation is required to ensure that the housing rights of all individuals and groups are comprehensive, clear and enforceable. A rights-based housing system must include legally enforceable minimum standards. While Housing For All commits to ‘examine the potential for independent regulation of the social housing sector’, it does not contain any commitments in relation to the introduction of minimum legislative standards for emergency accommodation, Traveller accommodation and the system replacing Direct Provision”*.

While the absence of a constitutional right to housing does not pose a barrier to the introduction of rights-based housing legislation, the introduction of such a right should mandate the reform of the housing code to ensure that it is consistent with the right to housing, including in the following ways:

- The statutory obligations on local authorities to provide social housing and emergency accommodation should be elevated to a duty to ensure the vindication of the right to adequate housing.
- The minimum standards for social housing, emergency accommodation, Traveller accommodation the system replacing Direct Provision should be clearly provided for in legislation and provide that each of those forms of accommodation are adequate by reference to their habitability, security, affordability, accessibility, cultural appropriateness and suitability. These minimum standards should be enforceable.

- Section 2 of the Housing Act 1988 should be amended to ensure that it reflects all forms of homelessness, including those living in inadequate accommodation.¹¹¹
- The Residential Tenancies Acts should be reformed to ensure the adequacy of private rented accommodation by reference to the factors listed above. Security of tenure and the prevention of arbitrary evictions, should be given robust protection in the Residential Tenancies Acts.
- All forms of arbitrary eviction should be prohibited, ensuring that any proposed eviction is subject to a merits based review by an independent tribunal.

The State's role in ensuring Housing 'Supply'

The Housing Act 1966, which, although still referred to as the Principal Act, has largely been repealed, stands as an example of how a constitutional right to housing might be expressed in statutory form and makes the State primarily responsible to ensure access to and the delivery of adequate housing. Under the 1966 Act the State occupied a central role in housing provision, the State provided central funding, not only for the direct delivery of social housing, but also supporting private ownership and improving the overall quality of the State's housing stock however tenured. Local authorities were the primary vehicles for delivery of housing and were given extensive statutory powers for this purpose. A proactive approach to housing was mandated with building programmes being developed around assessments of current and future need for housing in the State.

While the 1966 Act and corresponding policy initiatives were not without flaws, they underlined the role of the State in meeting housing needs including through interventions in the private market. Again, the absence of a right to housing is no

¹¹¹ The Simon Communities of Ireland, have called for strengthening local authorities' obligations to "house people experiencing homelessness; to give those who are homeless meaningful access to appropriate housing and to outline the standards and services, which embody housing rights" in this legislation. See: Simon Communities of Ireland 'The Right to Housing and the Homelessness Crisis: Submission by the Simon Communities of Ireland to the All Part Oireachtas Committee on the Constitution' (September, 2003) <<https://www.simon.ie/wp-content/uploads/2021/04/Submission-to-Oireacthas-Committee-on-Right-to-Housing-and-the-Homelessness-Crisis-September-2003.pdf>> accessed 5 August 2022.

barrier to such interventions and initiatives today, but such a right should, if introduced, require a similar approach while also taking account of the current context.

4.2. Access to Justice

While not strictly within the terms of reference of the Housing Commission, FLAC considers it important to highlight the importance of access to justice in supporting an effective right to adequate housing, and trust that the following considerations might be taken up by the Commission in its ongoing work.

The introduction of a right to adequate housing, although it would provide a valuable floor of protection, would not of itself ensure that the right is enforceable in practice. Access to justice is therefore crucial to any discussion of a right to adequate housing. Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments.¹¹² In the absence of access to justice, people are unable to exercise and vindicate their rights, have their voices heard, challenge discrimination, or hold decision-makers and executive power to account.¹¹³

The vindication of the right of access to justice is not only important in resolving legal issues around access to housing and homelessness, but also in preventing those issues arising. Groups and individuals who experience disadvantage and discrimination are disproportionately represented in the homeless population, and are also more likely to suffer justiciable problems (meaning problems for which there is a potential legal remedy within a civil and/or criminal justice framework) which render them more vulnerable to homelessness.¹¹⁴ Homelessness is often a by-product of so-called 'clustered injustice' – the cumulative and related problems (including legal problems) which arise from poverty or social exclusion such as discrimination or issues around accessing social welfare payments.¹¹⁵ This has been reflected in FLAC's

¹¹² The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed. Article 7 of the Racial Equality Directive obliges EU Member States to ensure that judicial and/or administrative procedures are available to victims of racial discrimination to enforce their right to equal treatment.

¹¹³ See generally United Nations Development Programme and European Union Agency for Fundamental Rights and Council of Europe (2016) Handbook on European law relating to access to justice (2016).

¹¹⁴ Alexy Buck, Nigel Balmer and Pascoe Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice problems among Vulnerable Groups' [2005] 39 Journal of Social Policy and Administration, 302- 320.

Canadian Forum on Civil Justice, 'Everyday Legal Problems and the Cost of Justice in Canada' (2016) <<https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>> accessed 22 August 2022.

¹¹⁵ Luke Clements, *Clustered Injustice and the Level Green*, Legal Action Group (2020).

experiences of the Traveller Legal Service and Roma Legal Clinic. The promotion of the right of access to justice means that such problems can be prevented or resolved – and the risk of further problems (or ‘knock on effects’) emerging, including homelessness, is reduced.

The UN Special Rapporteur on Housing categorised the global housing crisis as a crisis in access to justice:

“Violations of the right to housing are as much failures in the administration of justice as they are failures of housing programmes. If those living in inadequate housing and in homelessness have no access to justice, they are deprived of agency to bring violations to light, to address root causes or ensure appropriate responses. They are unable to challenge the policy choices and decisions that created the conditions in which they live.”¹¹⁶

The Special Rapporteur continued outlining the additional barriers faced by marginalised groups in accessing justice to have their right to adequate housing vindicated:

“Victims of violations of the right to adequate housing are among the most marginalized groups in society. They face a range of barriers to accessing justice, including challenges related to literacy, education, poverty, discrimination, access to legal representation and ability to navigate complex legal and administrative systems. Where legal aid is available, it is often unavailable for housing cases and rarely available to advance substantive claims to the right to housing. Lengthy delays in cases being heard and decided means that access to justice may be too late to be effective for those in the most dire circumstances...States must take all reasonable measures to overcome these barriers and ensure the widest possible enjoyment of access to justice for the right to housing. Mobile courts can provide access to justice in remote areas and legal assistance should be provided through community outreach, combined with community legal education about the right to housing and how to claim

¹¹⁶ Leilani Farha, ‘Access to justice for the right to housing: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context’ A/HRC/40/61 (15 January 2019).

it. The right of access to justice for the right to housing requires distinctive approaches for different groups.”¹¹⁷

These comments reflect FLAC’s view that access to justice exists on a continuum including information, legal advice, advocacy, access to the Courts, access to effective remedies, and fair and just laws. They also support our calls for ‘a radical re-imagining’ of the delivery of various aspects of access to justice.¹¹⁸ They further reflect FLAC’s experience in this field, as the Traveller Legal Service and Roma Legal Clinic have demonstrated the extensive benefits of and need for targeted and specialised approaches to access to justice, including promotion of awareness of rights and community education.

The vindication of the right of access to justice in respect of housing and housing rights would require specific measures to be taken such as:

- The scope of the Civil Legal Aid Scheme to be expanded to include provision of legal aid where legal advice and representation is required in quasi-judicial tribunals and other areas currently not covered by the Civil Legal Aid Act 1995. This includes cases heard by the Workplace Relations Commission, the Residential Tenancies Board and the Social Welfare Appeals Office.
- The Civil Legal Aid Act 1995 should be amended to ensure that legal aid is available in eviction cases.
- Bodies such as IHREC, the Citizens Information Board, the Legal Aid Board, and relevant NGOs should be resourced and enabled (and, where relevant, mandated) to provide information and to conduct targeted education and outreach campaigns concerning legal rights, entitlements and services.
- The provision of dedicated legal services for marginalised groups, including through long-term funding for such services.

¹¹⁷ Leilani Farha, ‘Access to justice for the right to housing: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context’ A/HRC/40/61 (15 January 2019).

¹¹⁸ FLAC, ‘FLAC annual report indicates access to justice crisis’ (27 June 2022) <<https://www.flac.ie/news/2022/06/27/flac-annual-report-indicates-access-to-justice-crisis/>> accessed 5 August 2022.

- Revision of rules of standing to enable representative actions in housing matters concerning systemic issues.
- The examination of the introduction of a specialised and accessible housing tribunal which uses an inquisitorial model for resolving disputes relating to social housing and emergency accommodation.

Legal Standing and Representative Actions

With effective access to justice, particularly access to the Courts, a wider public interest is served by allowing for the clarification and refinement of the right to housing. Individual outcomes may have a collective benefit. However, at present, the burden of enforcement of rights through the Courts is placed on individuals.¹¹⁹ In FLAC's experience, it is currently extremely difficult to challenge systemic issues through the Courts.¹²⁰

There are a number of avenues to address this, from modification of current legal aid rules to ensure that housing issues are not excluded, to an expansion of standing rules to allow for *actio popularis* or representative actions in cases concerning housing and housing rights. In general comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights has noted that “[i]n some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness” which would support this modification of standing rules.¹²¹

Access to the Courts

There is limited accountability for local authorities and the State in the field of housing. Judicial review is often the only means to challenge decisions of local authorities in

¹¹⁹ Sinéad Lucey, 'Access to Justice, Legal Aid and the Right to Housing' (Conference on a Referendum on Housing in Ireland, Dublin, May 2022).

¹²⁰ Christopher Bowes, 'A Barrier to EU Nationals accessing Social Housing Supports: The Impact of Housing Circular 41/2012 on Roma Families in Ireland' (29 June 2021) <<https://www.flac.ie/blog/a-barrier-to-eu-nationals-accessing-social-housing-supports/#:~:text=In%202020%2C%20FLAC%20opened%20two,housing%20support%20from%20a%20non%2D>> accessed 5 August 2022.

¹²¹ CESCR General Comment No.4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) E/1922/23.

relation to housing. This is not an effective remedy in many cases given that it is not a merits-based review and it is not accessible in terms of procedure or costs.¹²²

This is well illustrated by cases such as *Middleton v Carlow County Council* [2017] IEHC 528 in which the Council was found to have acted lawfully in ending their provision of emergency accommodation as it was not ‘*fundamentally at variance with reason and common sense*’.¹²³ This is an extremely low obligation on local authorities, especially in the context of decisions with vast implications for the lives and rights of individuals.

The Potential of a Housing Tribunal

While organisations, such as FLAC, Mercy Law Resource Centre and Threshold provide housing advocacy, there is no formal advocacy structure in social housing and emergency accommodation. As discussed above, those who can access legal advice and representation are often forced to challenge adverse decisions in the High Court – with the associated risks in relation to costs and significant issues in relation to the extent to which that forum provides an effective remedy.

FLAC believes that, alongside a right to housing, there may be significant benefits to the introduction of a specialised and accessible tribunal for housing matters. Such a tribunal should have expertise in the area of social housing and powers to make orders for specialised remedies.

In circumstances where there is a dispute between a local authority and applicant or resident of social housing; the aims of both concern the proper functioning of its social housing system. Court procedure, however, is designed to deal with *inter-partes* disputes where competing rights are concerned. A Housing Tribunal should be empowered and required to use an inquisitorial (rather to an adversarial model) where the onus is on the adjudicator to establish the key facts and relevant law. Such a model is currently provided for in the legislation dealing with complaints under equality law, and indeed the Social Welfare Appeals Office provides a relatively non-adversarial

¹²² Sinéad Lucey, ‘Access to Justice, Legal Aid and the Right to Housing’ (Conference on a Referendum on Housing in Ireland, Dublin, May 2022).

¹²³ Further, access to judicial review is actively under threat due to the proposed reforms by the Department of Justice to, *inter alia*, increase the threshold for leave applications and requirements for *locus standi*. See: Department of Justice, ‘Civil Justice Efficiencies and Reform Measures’ (2022) [33].

model in dealing with appeals in relation to access to social welfare payments. Such a tribunal would necessarily have to account for the matters raised in *Zalewski* and be responsive to the ongoing work of the Law Reform Commission.¹²⁴ As with other quasi-judicial tribunals, an appeal to the Courts should be made available from decisions of a Housing Tribunal.

The Tribunal should also be required to publish decision in the interests of transparency and promoting good administration.

¹²⁴ Law Reform Commission, 'Webinar: Quasi-Judicial Decision Making Post-Zalewski' <<https://www.youtube.com/watch?v=IXUSik5S4t0&t=3509s>> 5 August 2022.