

ESC Rights Group,  
c/o Louise Glennon,  
Advocacy Officer,  
Amnesty International,  
48 Fleet Street,  
Dublin 2.

Constitutional Convention,  
Secretariat,  
16 Parnell Square East,  
Dublin 1.

26<sup>th</sup> June 2013

Dear Chairman,

This submission is being made to the members of the Constitutional Convention by a group of organisations and individuals, detailed below, as part of their efforts to advance basic human rights such as health, housing and other economic, social and cultural rights in Ireland.

Ireland has committed to uphold these fundamental rights when it ratified the International Covenant on Economic, Social and Cultural Rights in 1989.

The Constitutional Convention presents a unique opportunity to reflect on Ireland's international human rights obligations and to ensure that all human rights, both civil and political as well as economic, social and cultural, are granted equal protection in Bunreacht na hÉireann.

This group calls on the members of the Constitutional Convention to review the constitutional protection of economic, social and cultural rights during their final meeting, and to recommend their constitutional incorporation to Government.

Yours sincerely,



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Louise Glennon, on behalf of the ESC Rights Group.

**Organisations:** Amnesty International Ireland, Atheist Ireland, Children's Rights Alliance, Claiming Our Future, Community Action Network, Disability Federation of Ireland, European Anti Poverty Network (EAPN) Ireland, Equality and Rights Alliance, FLAC (Free Legal Advice Centres), Focus Ireland, Immigrant Council of Ireland, Inner City Organisation Network, Irish Council for Civil Liberties, Irish National Organisation of the Unemployed, Marriage Equality, National Women's Council of Ireland, OPEN, TASC, The Wheel.

**Individuals:** Aiden Lloyd, Brian McGuinness, Claire Conlan, Donal Ó Brolcáin, Edel Hackett, Hazel Larkin, Prof. Hugh Frazer, Dr. Jane Pillinger, Kenneth Sheehy, Katie Boyle, Mary Chambers, Noreen Byrne, Oisín Bourke, Trevor Quinn.

# **A call for the examination of economic, social and cultural rights in Ireland**

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**A submission to the Constitutional Convention made by the following:**

**Organisations:**

Amnesty International Ireland,  
Atheist Ireland,  
Children's Rights Alliance,  
Claiming Our Future,  
Community Action Network,  
Disability Federation of Ireland,  
European Anti Poverty Network (EAPN) Ireland  
Equality and Rights Alliance,  
FLAC (Free Legal Advice Centres),  
Focus Ireland,  
Immigrant Council of Ireland,  
Inner City Organisation Network,  
Irish Council for Civil Liberties,  
Irish National Organisation of the Unemployed,  
Marriage Equality,  
National Women's Council of Ireland,  
OPEN,  
TASC,  
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**Individuals:**

Aiden Lloyd,  
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Hazel Larkin,  
Prof. Hugh Frazer  
Dr. Jane Pillinger,  
Kenneth Sheehy,  
Katie Boyle,  
Mary Chambers,  
Noreen Byrne,  
Oisín Bourke,  
Trevor Quinn.

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## **A. Introduction**

1) The fundamental human right to health, housing, education, and other economic, social and cultural rights, are not properly protected in Irish law.

2) This submission sets out the case for economic, social and cultural (ESC) rights, why they should be reviewed by the Constitutional Convention and given explicit legal recognition in the Irish Constitution.

3) This submission has been prepared as part of wider programmes of work, carried out by many of the organisations and individuals named above, to strengthen the protection of ESC rights for people in Ireland.

**We call on the members of the Constitutional Convention to include the constitutional protection of economic, social and cultural rights as an additional issue on their agenda, to be examined in the final weekend of the Convention, and to recommend to the Government that these rights be given constitutional protection.**

## **B. What are economic, social and cultural rights?**

4) Economic, social and cultural (ESC) rights are fundamental human rights. They belong to everyone in Ireland, as the Irish Government committed to them by ratifying the International Covenant of Economic, Social and Cultural Rights. The protection of these rights is necessary to ensure a life of dignity.

5) The rights are outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. This covenant forms part of the International Bill of Rights, the basis of international human rights law. It protects the following rights:

- to **work**;
- to the enjoyment of **just and favourable conditions of work**;
- to **form trade unions** and join the trade union of their choice;
- to **social security**, including social insurance;
- to the widest possible **protection and assistance for the family**;

- the right of everyone to an **adequate standard of living for their family**, including adequate food, clothing and housing, and to the continuous improvement of living conditions;
- the right of everyone to the enjoyment of the highest attainable standard of physical and mental **health**;
- to **education**;
- to take part in **cultural life**.

6) The Covenant also protects rights that are not named in the document, but are derived from those that are named. For example, the right to strike is not named, but is included in the right to form and join trade unions. Similarly the right to housing also includes protection from forced eviction.

7) The Covenant states that these **rights are guaranteed to all without discrimination** of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It is critical to remember that discrimination is forbidden on other grounds, including disability, sexual orientation or gender identity, marital or family status, or socio-economic status.

8) The UN Committee on Economic, Social and Cultural Rights oversees the implementation of the Covenant. They have written General Comments to be read alongside the Covenant. These comments outline what the rights mean, and the obligations on states to implement them. Independent experts, such as the Special Rapporteur on health, have also provided significant detail on the meaning of these rights.<sup>1</sup>

### **C. Obligations on government**

9) This Covenant recognises that governments do not necessarily have the resources to deliver the full protection of rights instantly. Instead the Covenant requires states to take immediate steps to protect these rights, by delivering, at the very least, a minimum level of protection of these rights, and ensure that everyone

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<sup>1</sup> Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/67/302

can access them without discrimination. It also requires that states **deliver these rights progressively over time**. In doing so they must use the “**maximum resources**” available to them. It also says that governments must not go backwards in the delivery of these rights without justification.

#### **D. Ireland and the ICESCR**

10) Ireland signed the International Covenant of Economic, Social and Cultural Rights in 1973, and ratified it in 1989. By ratifying, Ireland agreed to abide by and implement the Covenant. However it has never been given legal effect in Irish law.

11) In 2012, Ireland signed the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. When ratified by Ireland, the protocol will give people, a right to take a case to the UN, if their rights to health or housing for example, are being violated and if all domestic remedies have been used. In signing this document, the Government committed to adhere to the object and purpose of the Optional Protocol, i.e. that they consider these rights to be legally enforceable, but are not yet tied in law to that commitment.

#### **E. Why now?**

12) There are a number of reasons why these rights should be examined as part of the Constitutional Convention process, and in turn, their constitutional incorporation supported by the Convention members.

13) **Forum:** The Constitutional Convention, as a venture in participative democracy, is seeking to ensure that the Constitution is fully equipped for the 21<sup>st</sup> century; it presents an ideal opportunity for the people of Ireland to review the provisions of the Constitution and to call for the inclusion of all human rights to which Ireland has committed.

14) **Context:** The impact of the global economic and financial crisis on Ireland has been significant. The severity of this impact has been widely documented, including by the UN Special Rapporteur on Extreme Poverty and Human Rights during her visit to Ireland in 2011, “*Ireland’s economic and financial crises have wrought havoc on the country, with grave implications for the Irish people*”. During this same visit the

independent expert stated that she saw the crisis as providing “*an opportunity for Ireland to put human rights at the heart of the recovery, and to meet some of its long-standing social goals*”, and called on the “*Government to ensure that all rights protected under international human rights treaties, in particular economic, social and cultural rights, are given full effect in domestic law.*”<sup>2</sup>

15) Furthermore, the General Comments of the Covenant, in seeking to protect these rights during an economic crisis advise, that “*If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified...*”<sup>3</sup>

16) The inclusion of economic, social and cultural rights in the Constitution would provide a framework for the protection of these internationally recognised rights. The human rights framework can strengthen accountability by acting as a guide to legislators and policy makers when making decisions, allocating resources, and ensuring that these rights are delivered for people living in Ireland.

17) **Popular mandate:** There is widespread support for constitutional protection of economic, social and cultural rights and for the Constitutional Convention to examine this issue.

### People in Ireland

18) Polling carried out by Red C in April 2012, commissioned by Amnesty International, identified that 84 per cent of people believe that if the Irish Government commits to protect a human right internationally, it should have to make sure it protects that right in Ireland for all those living here regardless of the person’s background. 81 per cent specifically agreed that the Constitutional Convention should look at how the Constitution protects rights like the right of access to healthcare, while 78 per cent supported an examination of the right to housing.<sup>4</sup>

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<sup>2</sup> Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, A/HRC/17/34/Add.2.

<sup>3</sup> Committee on Economic, Social and Cultural Rights, General Comment 19, The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008).

<sup>4</sup> Amnesty International – Red Express, Ombibus Surveys, April 2012

International support:

19) The UN Committee on Economic, Social and Cultural Rights, when examining Ireland's compliance with the Covenant, recommended that Ireland incorporate the Convention, including all of these economic, social and cultural rights, in the Constitution<sup>5</sup>. This call was echoed by the UN Special Rapporteur on Extreme Poverty and Human Rights following her visit to Ireland in 2011.

20) Political support:

- Labour has expressed its support for the Convention to examine economic, social and cultural rights, through Senator Ivana Bacik, the leader of their delegation to the Constitutional Convention. In 1999, the Labour Party proposed a Bill, the Twenty First Amendment of the Constitution (No.3) Bill, which sought to recognise economic, social and cultural rights in the Constitution. Both Labour and Fine Gael members of the current Cabinet voted in favour of this Bill.
- Fianna Fáil has expressed its support for these rights to be examined by the Constitutional Convention, through its leader Micheál Martin, T.D. in 2012, and Senator Averil Power in March 2013. In a Dáil debate on 26 June 2012, Micheál Martin, T.D., highlighted the potential for the Convention to address other issues, including human rights, and asked, "In the existing Constitution we have universal access to primary education,... have we ever considered that in regard to health?".
- Sinn Féin's response to Government's proposals on the Constitutional Convention called for the Convention to have the mandate to consider the broadest possible scope of matters, in particular, the need for guarantees of economic and social rights.
- The Technical Group has called for a full review of the fundamental rights already included in the Constitution, with the aim of ensuring that it is compliant with international human rights law. The group called for specific attention to be paid to Ireland's ratification of the International Covenant on Economic, Social and Cultural Rights.

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<sup>5</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights : Ireland, 2002, UN Doc. E/C.12/1/Add.77, para.23

### Equality and human rights organisations

21) In June 2012, twenty of Ireland's leading equality and human rights organisations called for the Constitutional Convention to examine human rights, for the Government to engage in a consultation process with civil society regarding the Convention, and to support the inclusion of economic, social and cultural rights on its agenda. Many of those groups are now involved in broader campaigning for constitutional protection of economic, social and cultural rights, including through this submission to the Convention. The Irish Human Rights Commission has also stated that the lack of provision of economic, social and cultural rights in the Constitution and legislation means that there are gaps in protection for these rights.<sup>6</sup>

### **F. How are economic, social and cultural rights protected in Bunreacht na hÉireann?**

22) The 1937 Constitution of Ireland, Bunreacht na hÉireann, contains provisions for human rights.

**However**, while the Constitution does make some provision in relation to private property, and primary education, most of the rights protected in the Constitution are civil and political rights. The Constitution does not offer similar guarantees for all economic, social and cultural rights.

23) Article 45 of the Constitution, the Directive Principles of Social Policy, allows for a right to a livelihood, protection of the vulnerable and an obligation of the state towards the health of people living in Ireland. However, this Article also states that the Directive Principles '*shall not [...] be cognisable by any Court under any of the provisions of this Constitution*' (Art. 45).

**However**, these principles are intended only to inform legislators and policy makers but they are rarely, if ever, referred to by the Oireachtas. There have been some cases where Irish courts have interpreted other provisions in the Constitution to protect ESC rights, but this has been very limited.<sup>7</sup>

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<sup>6</sup> Irish Human Rights Commission, Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland, March 2011

<sup>7</sup> For an overview of Irish constitutional provision and interpretation of ESC rights, see Irish Human Rights Commission, Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document, 2005.

24) The need for constitutional protection of economic, social and cultural rights has been identified previously elsewhere:

- The Constitution Review Group concluded in 1996 that *“rights expressly protected by the Constitution are, by contemporary standards, incomplete”* and that *“Articles 40-44 contain flaws and are in need of revision”*.<sup>8</sup>
- The Ninth Progress Report of the All Party Oireachtas Committee on the Constitution made a commitment to a further investigation of whether the Constitution should include legally enforceable, socio-economic rights. This has not occurred.
- In the Belfast / Good Friday Agreement, the Irish Government agreed to take steps to further strengthen the protection of human rights in its jurisdiction, bringing forward measures to strengthen and underpin the constitutional protection of human rights. This included drawing on international legal instruments in the field of human rights.

**However** few of these gaps identified in official reports, commissioned by successive governments, have been addressed. The current Constitution is out of step with Ireland’s international obligations.

## **G. Why the Constitution?**

25) Without protection of these rights in Irish law, people in Ireland cannot legally claim these rights. The continuing lack of recognition of economic, social and cultural rights in national law remains a major obstacle to their legal enforcement in Ireland. This has real consequences for people whose rights are not protected.

Constitutional incorporation of economic, social and cultural rights is important for the following reasons:

- The Constitution is the fundamental legal document of the State. In setting out how Ireland should be governed and the rights of its citizens, the Constitution should give explicit recognition to both civil and political as well as economic, social and cultural rights. The Constitution should explicitly recognise all human rights.
- Protection of economic, social and cultural rights in the Constitution would help ensure that Ireland delivers its obligations to respect, protect and fulfil

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<sup>8</sup> Report of the Constitution Review Group, Dublin, 1996, p.188

these rights. It would provide a way to guarantee that legislation and policy measures give full effect to economic, social and cultural rights, whilst clarifying the application of these rights at the national level.

- Inclusion of economic, social and cultural rights in the Constitution would reflect Ireland's commitment to the universality, indivisibility and realisation of all human rights without distinction. International law says that all human rights are interdependent and indivisible; no one right is more important than another, the protection of one impacts on the protection of others. This reflects how people experience these rights.
- Inclusion of these rights in the Constitution would define more clearly the role of Irish institutions, such as the Oireachtas, or state agencies, in protecting economic, social and cultural rights, making justice more accessible for the people of Ireland.
- Inclusion of these rights will bring Ireland's Constitution in line with the growing trend among many countries that have recently revised their Constitutions and recognised that economic, social and cultural rights are legally enforceable.

#### **H. How would these rights be incorporated into Bunreacht na hÉireann?**

26) There are a number of ways in which economic, social and cultural rights could be provided for in Bunreacht na hÉireann.

- Individual articles could be inserted into the Constitution, protecting some or all of the rights provided for in the International Covenant on Economic, Social and Cultural Rights, in the same way as articles 42 and 43 provide for education and private property.
- Article 40 could be amended to include economic, social and cultural rights as personal rights under the Constitution. Article 29, which covers the application of international agreements in domestic law, could be amended to make international human rights treaties, like the International Covenant on Economic, Social and Cultural Rights, part of domestic law.
- A Bill of Rights could be created as an addendum to the Constitution rather than an amendment or addition to the existing articles.

## **I) Conclusion**

27) We call on the Constitutional Convention to examine economic, social and cultural rights and to recommend to the Government their constitutional protection.

28)The Constitutional Convention can avail of the great wealth of expertise available to it as to the ways in which constitutional protection of economic, social and cultural rights could be achieved in Bunreacht na hÉireann.

30) This is the opportunity to bring Bunreacht na hÉireann up to date, to reflect the modern society that we live in, to define who we are as a nation, and what values are important to Ireland today, and to outline how these values must be protected. To do so, the Convention must name and seek to address the gaps that exist in the Constitution, the gaps in the protection of basic human rights, which can help to ensure that all individuals live a life of dignity.

31) It is time the Constitution protected all human rights, including economic, social and cultural rights.