Response to Proposals to Amend Homelessness Legislation

November 2023

About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights and equality organisation, which exists to promote 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 operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information, and runs a nationwide network of legal advice clinics where volunteer lawyers provide basic free legal advice.

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. FLAC regularly appears before quasi-judicial tribunals and the courts, including the Workplace Relations Commission, Residential Tenancies Board and the High Court, in cases related to housing and homelessness.

FLAC makes policy recommendations to a variety of bodies, including 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. Relevant recent policy papers include submissions on the right to housing[1], youth homelessness[2] and Traveller accommodation[3] - as well as FLAC's Submission to the Review of the Civil Legal Aid Scheme[4].

[1] FLAC (2022), *Submission to the Housing Commission Consultation on a Referendum on Housing*.

[2] FLAC (2022), *FLAC Submission on the development of a Youth Homelessness Strategy*.

[3] FLAC (2021), *FLAC Submission to the Joint Committee on Key Issues affecting the Traveller Community*.

[4] FLAC (2023), *Stakeholder Submission to the Civil Legal Aid Review*.

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Summary

FLAC has serious concerns with the Department of Housing's proposals to radically overhaul the legislation concerning homelessness and the provision of emergency accommodation by local authorities, and the lack of consultation undertaken in arriving at these alarming proposals.

On the basis of the information which is available to FLAC, it appears that the proposed reforms are unnecessary, regressive, impractical, contrary to a rights-based approach to housing law and policy and, in at least one instance, potentially unlawful. The Department's proposals would:

- remove the safety-net of emergency accommodation for communities already most at risk of marginalisation, disadvantage and homelessness,
- artificially reduce headline **'**homelessness figures' (as currently calculated and reported) which would in turn obscure, rather than improve, understanding of the homelessness crisis and how to respond to it, and
- create additional administrative barriers which may delay or prevent people and families experiencing homelessness from accessing emergency accommodation.

The Department's proposals emerged from a review of the homelessness legislation undertaken by departmental and local authority officials. No report arising from the Review or complete statement of its process, findings and recommendations have been published to date.

The absence of detailed information reduces FLAC's capacity to comprehensively analyse the proposals. What is clear, however, is that the proposals fail to respond to the actual issues with existing homelessness legislation, including:

- the overly restrictive definition of 'homeless' (which only recognises the most stark forms of homelessness),
- the absence of any legal duty on local authorities to provide emergency accommodation, and
- the absence of enforceable minimum standards for emergency accommodation.

It is also evident that warnings previously issued by FLAC and other organisations against the introduction of a 'right to reside' condition for access to social housing have been ignored. It is now proposed to introduce legislation providing for 'right to reside' and 'habitual residence' conditions for access to both social housing supports *and* emergency accommodation. It is also proposed to introduce a 'local connection' test for access to emergency accommodation by way of Ministerial Regulations – despite their being significant questions around the legal

basis for the Minister to introduce secondary legislation adding additional criteria for access to emergency accommodation.

The people most likely to be unable to satisfy (or establish that they satisfy) any new local connection or residency criteria for access to emergency accommodation are those who are already experiencing marginalisation and disadvantage, or who are already experiencing or at risk of homelessness.

The Department acknowledges that the reforms it proposes "…will mean that some cohorts will no longer have an entitlement to homeless emergency accommodation support from housing authorities". In response to this, it commits to "examine what system will need to be put in place to provide humanitarian assistance in appropriate cases, to ensure that no person is left without shelter". It is proposed that this new system will be provided for by way of "policy, rather than legislation". The unfortunate (and ongoing) experience of the system of Direct Provision should be sufficient to warn against such an approach – which would undoubtedly give rise to issues in relation to the standards of accommodation provided, quality of decision-making, transparency and accountability.

Recommendations

- The Department of Housing should publish the review of section 2 and 10 of the 1988 Act, and explain the review process, its findings and its recommendations.

- The Minister should ask IHREC to review and report its views on the current proposals in relation to housing and homelessness legislation (pursuant to section 10(2)(c) of the Irish Human Rights and Equality Commission 2014). That report should be published.

- Proposals to introduce any residence or local connection conditions for access to emergency accommodation should be abandoned.

- The use of the word 'person' in section 2 of the 1988 Act should be retained (even if a reference to 'households' is also added).

- The following approach should be taken to enhancing local authorities powers to assist those at risk of homelessness:
  - expand the definition of 'homeless' in section 2 of the 1988 to clearly include people experiencing "hidden homelessness" (such as those in overcrowded, inadequate or insecure accommodation),

- amend the HAP Regulations to ensure that those who meet that definition of 'homeless' (or who are at risk of homelessness) have access to Homeless HAP, and expand the availability of Place Finder services, and
- amend the Housing Act (Miscellaneous Provisions) Act 2009 to create a duty on local authorities to prevent homelessness, along with any necessary expansion of their powers and functions under that legislation - including an expansion of the circumstances where housing and other supports may be provided to those at risk of homelessness.

- In line with the Department's obligations under section 42 of the Irish Human Rights and Equality Commission Act 2014, no changes to the definition of 'homeless' or the conditions for access to emergency accommodation or social housing should be advanced until an inclusive and transparent consultation process has taken place. Any proposals which emerge from such a consultation process should be equality, human rights and poverty-proofed. Any consultation process must include engagement with people experiencing or at risk of homelessness and the NGOs that work with them.

- In advance of a referendum on a Constitutional Right to Adequate Housing (which the Government should commit to holding urgently), the Department should undertake a comprehensive review of housing and homelessness legislation – with a view to creating a rights-based statutory framework through which the State may deliver on any new constitutional obligations. The present review and consultation processes should be halted and replaced with that new process.

- Even in advance of such a review and consultation process, the Department should introduce legislation which begins the transition to a rights-based approach to housing and homelessness law and policy:
  - 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, Direct Provision (and the system replacing it) 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.
  - 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.
- A specialised and accessible (and, as far as possible, non-adversarial) statutory tribunal for housing and homelessness matters should be introduced.

- Measure to promote access to justice should be introduced to ensure that housing rights provided for in law are effective and enforceable in practice. These measures include:
  - The 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 provision of legal aid 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 in relation to housing and homelessness.
  - The provision of dedicated legal services for marginalised groups, (such as FLAC's Traveller Legal Service and Roma Legal Clinic) including through long-term funding for such services.
  - The provision of preventative and targeted legal services for people experiencing or at risk of homelessness. This should include the delivery of legal services through collaborative service delivery models - in which legal services collaborate and co-locate with other community services; for example through "Health Justice Partnerships" and "Street Law" programmes which measure and respond to legal need.
  - Revision of rules of standing to enable representative actions in housing matters concerning systemic issues.

1. Context: Homelessness Legislation & the Need for Rights-Based Reform

FLAC believes that rights-based reform of housing and homelessness law is needed to address the current housing and homelessness crisis.[5] Existing housing and homelessness legislation does not recognise a right to adequate housing.

The government's *Housing for All* plan recognises that the current operation of the housing system is failing to meet housing need.[6] Increased reliance on the private market to meet housing need has failed to ensure access to affordable and secure housing for all – and to prevent or resolve the present housing and homelessness crisis.[7]

Viewing housing as a right offers an alternative approach to resolving the housing crisis and preventing its recurrence. Such an approach requires more than measure to increase 'supply' – it requires comprehensive reform of housing law and policy in a manner which promotes human rights, equality and access to justice, and which puts in place clear obligations on the State and State Bodies such as local authorities. The absence of a constitutional right to housing does not pose a barrier to the introduction of rights-based legislation.

1.1. Existing Homelessness Legislation: Absence of a Right to Emergency Accommodation

Two provisions of the Housing Act 1988 form the legislative basis for the powers and functions of local authorities in relation to the provision of emergency accommodation to homeless persons. Section 2 of the 1988 Act is the sole statutory basis for determining whether someone is homeless. If a person has no accommodation available which they could reasonably occupy and cannot provide for accommodation from their own resources, they are legally homeless. Section 10 of the 1988 Act affords local authorities broad powers to provide accommodation and financial assistance to persons assessed as homeless pursuant to section 2 of that legislation.

However, the legislation does not articulate any minimum standards for emergency accommodation provided pursuant to section 10 and it does not explicitly create a right to emergency accommodation for those who meet the definition of homelessness. Further, the

[5] For further detail, see: FLAC (2022), *Submission to the Housing Commission Consultation on a Referendum on Housing*.

[6] Available at https://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/#view-the-plan

[7] 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).

definition of 'homeless' has been criticised for only recognising 'the most stark form of homelessness.[8]

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.[9] In *Middleton v Carlow County Council*[10], the High Court effectively confirmed the absence from the Housing Act 1988 of any minimum duty on the State to those experiencing homelessness.[11]

1.2. Proposals for Rights-Based Reform

Legislative reform is required to ensure that the housing rights of all individuals and groups – including access to emergency accommodation - are comprehensive, clear and enforceable.

FLAC's submission to the Housing Commission made a number of proposals for rights-based reform to housing and homelessness legislation[12]:

- 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, Direct Provision (and the system replacing it) 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.

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[8] Samantha Morgan-Williams (RTÉ, 7 February 2022), *Why new legal definitions for homelessness are needed*.

[9] For more detailed analysis, see: FLAC (2022), *Submission to the Housing Commission Consultation on a Referendum on Housing*, pp.2-5.

[10] [2017] IEHC 528.

[11] The High 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".

The earlier decision of the Supreme Court in *O'Donnell v South Dublin County Council* 2015 [IESC] 28 indicated that the courts will only impose a duty on a local authority to provide housing in exceptional circumstances - where there has been a clear disregard for the constitutional rights of a particular applicant which can be remedied through relevant statutory powers.

[12] FLAC (2022), *Submission to the Housing Commission Consultation on a Referendum on Housing*, p.31.

The Simon Communities of Ireland have also called for legislation to strengthen 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". See: Simon Communities of Ireland (2003), *Submission to the All Party Oireachtas Committee on the Constitution*, p.23.

- 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.
- 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.

Measures to promote access to justice are vital to ensure that housing rights provided for in law are effective and enforceable in practice[13]. These measures include:

- The 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 provision of legal aid 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 in relation to housing and homelessness.
- The provision of dedicated legal services for marginalised groups, (such as FLAC's Traveller Legal Service and Roma Legal Clinic) including through long-term funding for such services.

[13] 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. See: 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).

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

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. This has been reflected in FLAC's experiences of the Traveller Legal Service and Roma Legal Clinic.

See further: FLAC (2022), *Submission to the Housing Commission Consultation on a Referendum on Housing*, pp.35-6.

- The provision of preventative and targeted legal services for people experiencing or at risk of homelessness. This should include the delivery of legal services through collaborative service delivery models - in which legal services collaborate and co-locate with other community services; for example through 'Health Justice Partnerships' and 'Street Law' programmes which measure and respond to legal need.[14]
- Revision of rules of standing to enable representative actions in housing matters concerning systemic issues.

Specific measure are also needed to promote transparency and accountability in decision-making by local authorities on eligibility for access to social housing and emergency accommodation. 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 relation to housing, including access to emergency accommodation. 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.[15] There would be significant benefits to the introduction of a specialised and accessible (and, as far as possible, non-adversarial) statutory tribunal for housing and homelessness matters.[16]

A constitutional right to adequate housing is not required to introduce the reforms proposed by FLAC. In fact, the introduction of such measures could be an important precursor to a constitutional amendment by:

- putting in place a rights-based framework for the vindication of the new right and the performance of the State's constitutional obligations, and
- illustrating the tangible and practical benefits of a rights-based approach to housing.

[14] FLAC (2023), *Stakeholder Submission to the Civil Legal Aid Review*, pp.128-30.

[15] This is well illustrated by cases such as *Middleton v Carlow County Council* 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". 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 and families. See: Sinéad Lucey, 'Access to Justice, Legal Aid and the Right to Housing' (Conference on a Referendum on Housing in Ireland, Dublin, May 2022).

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].

[16] Such a tribunal should have expertise in the area of social housing and powers to make orders for specialised remedies. See further: FLAC (2022), *Submission to the Housing Commission Consultation on a Referendum on Housing*, pp.37-8.

2. The Department's Proposals for Reform to Homelessness Legislation

The Department of Housing has indicated that it proposes to introduce sweeping reforms to homelessness legislation by way of the Housing (Miscellaneous Provisions) Bill 2023 and the introduction of Ministerial Regulations. Significant policy reforms are also envisioned. These proposals emerged from a review of sections 2 and 10 of the Housing Act 1988.

The Review process and its outcomes are summarised below.

2.1. The Review Process

The *Housing for All Q3 2022 Progress Report* included an "Action Plan Update". Amongst the actions added to the *Housing for All* plan was a commitment for the Department of Housing to "carry out a review of the relevant sections of the Housing Act 1988 to address issues arising in the implementation of the Act in order to enable local authorities to better address homelessness".[17]

The next *Housing for All Progress Report* stated that the review "has been completed" and that the Department would seek "legal advice on the recommendations emerging from the review with a view to implementing the appropriate responses once complete".[18]

In March 2023, the Minister for Housing was asked (by way of a Parliamentary Question) if he would:

- "outline the rationale for the review of sections 2 and 10 of the Housing Act 1988 completed by his Department",
- whether "the findings and recommendations arising from that review will be published", and
- whether "there will be any public consultation prior to the implementation of those recommendations".

In his written response, he stated:

> "My Department undertook review of sections 2 and 10 of the Housing Act 1988 in recognition of the significant changes in homelessness since the drafting of the Housing Act 1988 and to enable local authorities and homeless services to better address homelessness.

[17] Department of Housing (November 2022), *Housing for All: Action Plan Update and Q3 2022 Progress Report*, p.15.

[18] See: Department of the Taoiseach (2023), *Housing for All Q4 2022 Progress Report*, action 3.3, p.18.

> In July 2022, my Department commenced work with a group of Regional Homelessness Leads, to conduct the review. The review is now complete and and *[sic]* a policy position is being developed. Stakeholder consultation will be considered in due course."[19]

In an email to members of the National Homeless Action Committee (the 'NHAC') of 17 October 2023, Ms Sinead Healy (Assistant Principal Officer, Homelessness Policy, Funding and Delivery Unit, Department of Housing) provided further information in relation to the review, its outcome and the implementation of its recommendations:

> "Earlier this year the Homelessness Policy, Funding and Delivery unit (Homelessness Unit) of the Department completed a review, in conjunction with nominated representatives from the CCMA [City and County Managers Association], of the homelessness-related aspects of the Housing Act, 1988.
>
> A number of recommendations were highlighted that will require amendments to primary legislation. The Homelessness Unit consulted with the Department's legal team in order to draft proposed amendments to the legislation. These amendments will be included alongside a number of other Housing-related matters as part of the General Scheme for the Housing (Miscellaneous Provisions) Bill 2023. A Memo for Government will be formally submitted to request permission to draft the Bill, alongside permission to submit the General Scheme for pre-legislative scrutiny."

Ms Healy's email invited members of the NHAC to provide "observations and feedback in relation to the homeless related provisions".

However, no report arising from the Review or complete statement of its process, findings and recommendations have been published to date (nor were they furnished to the NHAC members). The only information available in relation to those matters is contained in a short document circulated by Ms Healy to the NHAC which "summarises the review and consideration of the issues, and outlines the proposed new provisions" (hereafter referred to as 'the Consultation Note').

The Consultation Note provides more detail in relation to the Department's rationale for initiating the review.

> "The numbers accessing section 10-funded emergency accommodation across the State have increased significantly since the 1988 Act commenced and now stands at over 12,500 individuals. The demographic make-up of those in emergency accommodation

[19] Parliamentary Question 14804/23.

has also changed significantly in this period, with higher numbers of families as well as higher numbers of migrants using emergency accommodation.

Many of those in emergency accommodation do not have a housing pathway, this includes non-EEA migrants without legal status and EEA migrants who do not meet the eligibility criteria for social housing and as such can remain in emergency accommodation for some time. The expectations upon and responsibilities of housing authorities have evolved significantly since the introduction of the 1988 Act, and the response of Government requires re-tooling in order to address many of the challenges currently faced, including an emphasis on the need to prevent homelessness in the first instance.

In response to concerns raised by the County and City Managers Association (CCMA) and in recognition of the significant changes in homelessness since the drafting of the 1988 Act, the Department reviewed sections 2 and 10 of the 1988 Act."

The Consultation Note confirms that the Review Group comprised departmental officials and "Regional Homelessness Leads, nominated by the CCMA".

2.2. Outcome of the Review

The Consultation Note states that Review Group's "consideration and consultation" led to a number of issues with section 2 and 10 of the Housing Act 1988 being identified:

- "a lack of clarity on eligibility for access to section 10 arrangements, assistance and accommodation, especially in light of Departmental social housing policy"
- "that there is no legal definition for a household at risk of homelessness"
- "that housing authorities are not obliged to consider preventative measures for households at risk of homelessness"
- "the outdated nature of the language in the Act, and its representation of homelessness as an issue primarily affecting adult individuals rather than families."

The Consultation Note then outlines the legislative and other measures proposed to respond to those issues. It notes that "detailed legal advice" was sought to assist in formulating those proposals.

First, it is proposed to include provisions in the Housing (Miscellaneous Provisions) Bill 2023 which will:

- "provide a definition for 'at risk of homelessness'"
- "introduce a reference into legislation to prevention measures that housing authorities may take to assist those at risk of homelessness under section 10(1)"

- "oblige housing authorities to have regard to the best interests of the child when considering the accommodation needs of households with children and if necessary to engage families with appropriate bodies and agencies who can provide supports"
- "update the language used in the Act, substituting the term 'household' for 'person' in sections 2 and 10"
- "link access to section 10 arrangements, assistance and accommodation to the legal and habitual residency criteria for social housing support"

It is also proposed to provide "clarity", by way of Ministerial Regulations, on the circumstances where a local authority may:

- "withdraw emergency accommodation in cases where an individual represents a danger to other service users"
- "apply local connection criteria in the provision of emergency accommodation in order to regularise the management of homeless presentations by households who may have an entitlement to social housing support, but whose entitlement is in another local authority functional area"

Finally, the Consultation Note acknowledges that the Review's intention "to clarify eligibility and align with the eligibility criteria in both the 2009 Act and wider Social Protection legislation… will mean that some cohorts will no longer have an entitlement to homeless emergency accommodation support from housing authorities". The note states that those "cohorts" are likely to be those "who are either unlawfully in the country or may have just arrived from another EU country and/or do not meet the definition of a worker in EU law after three months residency". In response to this:

> "The Minister has therefore requested the Department to examine what system will need to be put in place to provide humanitarian assistance in appropriate cases, to ensure that no person is left without shelter. It is intended that this will be dealt with as a matter of policy, rather than via legislation, allowing for flexibility of approach. It is intended that extensive consultation will be undertaken in this regard, including with stakeholders in the local authorities and in the NGO sector."

3. Analysis of the Review Process

The proposals for reform outlined above emerged from a review process which was seemingly concluded without any consultation with people experiencing or at risk of homelessness and the NGOs that work with them. The Review Group was comprised of departmental officials and "Regional Homelessness Leads, nominated by the CCMA".

3.1. The 'Consultation' Process

The only formal attempt at consultation was initiated after the Review Group had made its findings and policy proposals were formulated and significantly advanced. The invitation to engage with that consultation was only extended to members of the National Homeless Action Committee – the majority of whom are representatives of Government Departments and State Bodies.[20] While the NHAC does include representatives from civil society organisations and housing NGOs, the groups included are largely national organisations.

As a result, the significant number of advocacy and support organisations operating locally, and at the coalface of the housing and homelessness crisis, have not been consulted. Similarly, organisations working with people and communities experiencing marginalisation and disadvantage (and who are disproportionately impacted by the housing and homelessness crisis[21]) are largely excluded from the consultation process.

The organisations referred to above have a wealth of first-hand experience of the legal framework concerning homelessness. These groups are ideally placed to offer constructive and evidence-based proposals for rights-based reform – such as those outlined by FLAC in Section 1 pf this document. Unfortunately, the Department has initiated a "consultation" process only after it has decided on the reforms it deems necessary and how to implement them.

It is unclear whether the Department has engaged with bodies such as the Irish Human Rights and Equality Commission ('IHREC') or the Ombudsman for Children in relation to the proposals and, if so, at what stage any such engagement took place. We would highlight that section 10(2)(c) of the Irish Human Rights and Equality Commission 2014 provides that one of IHREC's functions is to "either of its own volition or on being so requested by a Minister of the Government… examine any legislative proposal and report its views on any implications for human rights or equality".

[20] See: https://www.gov.ie/ga/foilsiuchan/aad47-national-homeless-action-committee/#membership

[21] The Economic and Social Research Institute has reported on the disproportionate exposure of groups such as people with disabilities, older people, lone parents, migrants and ethnic minorities, to housing-related issues from 'hidden-homelessness' to inadequate conditions in accommodation. See: Helen Russel and others, 'Monitoring Adequate Housing in Ireland' (ESRI, 2021).

As noted above, the Department has not published or circulated any report arising from the review of the 1988 Act or outlined its findings and recommendations in full. The Consultation Note does not provide any evidential basis for the "issues" it identifies or how the reforms proposed will address them, and it has only been circulated after the Department sought legal advice on implementing the recommendations which emerged from the Review by way of legislation.

3.2. The Need for an Alternative Process

As is outlined in further detail in the next section of this document, the significance of the reforms proposed cannot be understated. The legislation which it is proposed to amend is being re-examined for the first time since it was enacted 35 years ago. It is proposed to radically overhaul the legal framework through which the State and State Bodies respond to the greatest social issue of our time - a homelessness crisis with a devastating impact on thousands of people and, in particular, people and communities who are experiencing marginalisation and disadvantage. Such a project should not be conducted in a manner which excludes the voices and experiences of those suffering the effects of the housing crisis and those who advocate on their behalves.

An inclusive and participatory consultation process is necessary and would be consistent with the Department's obligations under section 42 of the Irish Human Rights and Equality Commission Act 2014 (the Public Sector Equality and Human Rights Duty) to have regard to human rights and equality standards in carrying out its functions (including its policy development functions).

4. Analysis of the Department's Proposals for Reform

FLAC's ability to analyse the current proposals is severely restricted by the lack of information available. The analysis set out below should only be considered FLAC's preliminary response to the current proposals – pending the publication of the review and further information by the Department of Housing.

However, on the basis of the information which is available, it appears that the reforms proposed are regressive, impractical, contrary to a rights-based approach to housing law and policy and, in at least one instance, potentially unlawful. The Department's proposals would:

- create additional administrative barriers which may delay or prevent people and families experiencing homelessness from accessing emergency accommodation,
- remove the safety-net of emergency accommodation for people and families already most at risk of marginalisation, disadvantage and homelessness, and
- artificially reduce headline **'**homelessness figures' (as currently calculated and reported) which would in turn obscure, rather than improve, understanding of the homelessness crisis and how to respond to it.

4.1. Preventative Measures & the Definition of 'Homeless'

The Consultation Note proposes to "introduce a reference into legislation to prevention measures that housing authorities may take to assist those at risk of homelessness under section 10(1)" and to "provide a definition for 'at risk of homelessness'". These proposals are made on the basis of the Review Group's assertion that: "housing authorities are not obliged to consider preventative measures for households at risk of homelessness". That assertion is not strictly accurate in circumstances where section 37 of the Housing (Miscellaneous Provisions) Act 2009 obliges housing authorities to adopt "Homelessness Action Plans" which must include "measures to achieve the following objectives—(a) the prevention of homelessness".

Further, in response to "the outdated nature of the language in the Act, and its representation of homelessness as an issue primarily affecting adult individuals rather than families", the Consultation Note proposes to: "update the language used in the Act, substituting the term 'household' for 'person' in sections 2 and 10". The Note provides no evidence that the use of the word "person" rather than "household" constrains the Department's ability to respond to family homelessness. Child and family homelessness is one of the most widely discussed political and social issues of our time and it is difficult to accept or understand the assertion that the legislation has given rise to a perception that homelessness primarily affects "adult individuals".

The combined effect of these proposals would appear to be:

- a cursory amendment to the definition of 'homeless' in section 2 of the 1988 Act, and
- the creation of a new category of persons who are 'at risk of homelessness' in respect of whom local authorities will be empowered to provide a range of new 'prevention measures'.

It is unclear whether persons deemed "at risk of homelessness" would have access to emergency accommodation[22], Homeless HAP[23] and local authority 'Place Finder' services[24] under the Department's proposals. In any event, the approach suggested is somewhat confused in circumstances where measures aimed at preventing homelessness are already dealt with separately in the Housing (Miscellaneous Provisions) Act 2009.[25]

A far more coherent approach would be to:

- expand the definition of 'homeless' in section 2 of the 1988 to clearly include people experiencing "hidden homelessness" (such as those in overcrowded, inadequate or insecure accommodation),
- amend the HAP Regulations to ensure that those who meet that definition of 'homeless' (or who are at risk of homelessness) have access to Homeless HAP, and expand the availability of Place Finder services, and
- amend the Housing Act (Miscellaneous Provisions) Act 2009 to create a duty on local authorities to prevent homelessness, along with any necessary expansion of their powers and functions under that legislation - including an expansion of the circumstances where housing and other supports may be provided to those at risk of homelessness.

[22] Emergency accommodation can only be provided pursuant to section 10 of the 1988 Act to people who meet the definition of 'homeless' in section 2 of that legislation.

[23] In the four Dublin local authority areas, households which include people who meet the definition of 'homeless' (regardless of whether or not they are in emergency accommodation) are also eligible for Homeless HAP pursuant to the Housing Assistance Payment Regulations 2014 (S.I. No. 407 of 2014) (as amended) introduced under the Housing (Miscellaneous Provisions) Act 2014.

[24] In January 2018, the Department of Housing, Planning and Local Government issued Housing Circular 4/2018 which extended the Homeless HAP Place Finder Service to all 31 local authorities.

[25] Section 10(b) of the 2009 Act states that local authorities may provide:

"…assistance, other than financial assistance or housing support, provided— (i) in accordance with a homelessness action plan to households that were formerly homeless before their occupation of their current accommodation and, in the opinion of the housing authority, such assistance is necessary for the purposes of supporting those households in remaining in occupation of that accommodation...".

However, the extent to which the local authorities may provide support to specific/individual households and persons pursuant to this provision (and in accordance with Homelessness Action Plans more generally) is unclear and may be quite limited.

4.2. Legal and Habitual Residency Criteria

The Consultation Note proposes to "link access to section 10 arrangements, assistance and accommodation to the legal and habitual residency criteria for social housing support".

This proposals comes about in response to the supposed "lack of clarity on eligibility for access to section 10 arrangements, assistance and accommodation, especially in light of Departmental social housing policy" and in order to "clarify eligibility and align with the eligibility criteria in both the 2009 Act and wider Social Protection legislation".

It must be highlighted that the Housing (Miscellaneous Provisions) Act 2009 does not create any "legal and habitual residency criteria for social housing support". Such criteria have only been applied to applications for social housing support on the basis of a Housing Circular (41/2022) with no clear legal basis and which does not accurately reflect EU law.[26]

However, in November 2022, the Minister for Housing stated that he intends "to bring forward legislation early in the new year regarding eligibility of non-nationals for social housing, including provision for legal residence as an eligibility criterion in any assessment for social housing support".[27] On foot of that statement, FLAC (along with Crosscare, Mercy Law Resource Centre, Community Law and Mediation, the Irish Refugee Council, and the Immigrant Council of Ireland) wrote to the Minister. That letter set out a number of concerns in relation to the proposal based on the previous experience of Housing Circular 41/2012 - which has had the effect of acting as a barrier to individuals and families from disadvantaged and marginalised communities from accessing social housing supports.[28]

The letter stated that it is "vital that the voices of those communities, and the experience of those who advocate on their behalf, inform any proposal to replace the circular. For that reason, we advocate for an open and participatory consultation process regarding any such proposed legislative change".

The letter also emphasised that any proposed legislation must explicitly provide that the right to reside criterion does not apply to access to emergency accommodation due to the devastating and disproportionate impact this would have on people and communities experiencing marginalisation and disadvantage:

[26] Housing Circular 41/2012 was introduced in December 2012. Paragraphs 5 and 6 of the Circular state that local authorities should only assess housing applications from non-Irish EU/EEA nationals where: they are in employment in the State; they are unable to work due to accident or injury, or; they are a jobseeker with a record of 52 weeks employment in the State.

[27] See: Written Response to Parliamentary Questions of 22 November 2022.

[28] The FLAC Casebook (29 June 2011), *A Barrier to EU Nationals accessing Social Housing Supports: The Impact of Housing Circular 41/2012 on Roma Families in Ireland*

> "Any legislation introducing a residence requirement for access to social housing supports must explicitly provide that the criterion does not apply to access to emergency accommodation. Social housing supports and emergency homeless accommodation provision are governed by separate legislative regimes, which is appropriate given the different purposes served by each form of accommodation…
>
> The discretionary power of Local Authorities to provide homeless accommodation under section 10 of the Housing Act 1988 is a particularly important safeguard for vulnerable groups such as victims of domestic violence, victims of trafficking, former minors in care who have not previously been registered by Tusla, refugees and their families, members of disadvantaged and marginalised groups (such as the Roma and Traveller Communities), the undocumented, people subject to deportation orders and those experiencing extreme poverty and homelessness.
>
> Statistics show that migrants in Ireland are disproportionately reliant on the private rented housing market and are consequently over represented in homelessness figures, for example in those reported for Dublin. The effects of any measure to limit access to emergency accommodation for people experiencing homelessness would be all the more devastating in the context of the current crisis."

The Consultation Note confirms that this warning has been ignored. So too has the letter's call for an open and transparent consultation process in relation to changes to the residency criteria for access to social housing support. It now appears that the Department intends to introduce legislation providing for a right to reside criterion (as well as an habitual residence criterion) for access to both social housing supports *and* emergency accommodation. The only safeguard built into this expanded proposal is a commitment to examine the creation of a new non-statutory scheme of "humanitarian assistance" for those unable to access emergency accommodation (which is analysed in further detail below).

It is important to emphasise the addition of a right to reside criterion *alone* to the conditions for accessing social housing supports (as distinct from emergency accommodation) was a matter of major concern for FLAC in light of the disproportionate impact that it would inevitably have on people and communities experiencing marginalisation and disadvantage. The expanded proposal in the Consultation Note is inhumane – and the process through which it has emerged is unacceptable.

In the absence of further detail, it is impossible to assess whether the new criteria proposed would accord with the right of freedom of movement of European Union citizens and the relevant Directives which give effect to that right.

4.3. Local Connection Criterion

The Consultation Note proposes to provide "clarity", by way of Ministerial Regulations, on the circumstances where a local authority may: "apply local connection criteria in the provision of emergency accommodation in order to regularise the management of homeless presentations by households who may have an entitlement to social housing support, but whose entitlement is in another local authority functional area".

This proposal conflates the criteria for access to social housing supports with those which apply in the context of emergency accommodation. Section 2 of the 1988 Act is the sole statutory basis for determining whether someone is homeless and therefore eligible to access emergency accommodation. If a person has no accommodation available which they could reasonably occupy and cannot provide for accommodation from their own resources, they are legally homeless. There is no legal basis for the application of a local connection test in this context. However, FLAC has frequently encountered cases where local authorities rely on non-statutory measures, such as the "local connection" test, to refuse to assess people as homeless.[29]

Section 10(1) of the 1988 Act empowers the Minister to introduce regulations in relation to the provision of emergency accommodation by local authorities. Section 10(11) lists a number of specific matters which may be provided for by way of regulations:

> "(a) the manner in which housing authorities exercise their powers under this section;
>
> (b) the amount and conditions of recoupments under subsection (4);
>
> (c) the notification by a housing authority of the decision on a request for accommodation and the reasons therefor;
>
> (d) the furnishing of information to a housing authority in relation to a request for accommodation or assistance from the authority;
>
> (e) such other incidental, consequential or supplementary provisions as may appear to the Minister to be necessary or expedient."

However, a power to introduce regulations cannot be interpreted so as to allow a Minister to introduce regulations which amend or run contrary to the provisions of primary legislation.[30] Further, the doctrine of *ultra vires* prohibits the introduction of regulations which go beyond the scope specified in the primary legislation which empowers the Minister to introduce such

[29] The FLAC Casebook (20 December 2021), *Continued use of "local connection" tests a concern for FLAC*.

[30] *Cooke v Walshe* [1984] IR 710.

regulations.[31] In *Kennedy v Law Society of Ireland*[32], Fennelly J summarised the doctrine of *ultra vires* as follows: "The delegatees of statutory power cannot be allowed to exceed the limits of the statute …".

Significantly, the courts have held that the introduction of 'secondary legislation' is only constitutionally permissible where the regulations are "giving effect to principles and policies which are contained in the statute [i.e. the piece of primary legislation empowering the Minister to make the regulations] itself".[33] Delegated legislation can only be valid where there is "sufficient guidance" in the primary legislation.[34]

The absence from the 1988 Act of principles and policies to guide the introduction of regulations concerning access to emergency accommodation is notable. Further, the 1988 Act only creates one condition for access to emergency accommodation – satisfying the definition of homeless in section 2. The addition of another condition (a local connection test) could therefore be characterised as running contrary to the provisions of the primary legislation or as an attempt to amend it.

4.4. Quality of Decision-Making & Access to Reviews/Appeals

The experience of Independent Law Centres such as FLAC demonstrates that significant issues and inconsistencies already exist in the application of residence and local connection criteria by local authorities.[35] It is now proposed to expand the circumstances in which such criteria are applied. The absence of any accompanying proposals to improve first instance decision-making in local authorities is therefore extremely alarming.

While the Consultation Note does propose the introduction of an obligation to consider the "best interests of the child" in local authority decision-making, it makes no reference to the publication of guidance, the provision of training to decision-makers, or the provision of legal assistance, advocacy and translation supports to applicants for emergency accommodation and social housing supports.

These concerns are heightened in circumstances where (as discussed in section 1 of this document) there is extremely limited accountability for local authorities in the field of housing. While the Consultation Note suggests that its proposals would align the criteria for emergency

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[31] Oran Doyle and Tom Hickey, *Constitutional Law: Texts, Cases and Material*, (2nd Edn, Clarus Press, 2019), pp.186-9.

[32] [2000] 2 IR 458.

[33] *Cityview Press v. An Chomhairle Oiliúna* [1980] IR 381 [399].

[34] *Naisiúnta Leictreach Contraitheoir Éireann v Labour Court* [2021] IESC 36, Charleton J. [27].

[35] The FLAC Casebook (29 June 2011), *A Barrier to EU Nationals accessing Social Housing Supports: The Impact of Housing Circular 41/2012 on Roma Families in Ireland* , Mercy Law Resource Centre (2020), *Minority Groups and Housing Services: Barriers to Access*, at p.8.

accommodation with those which apply in the social welfare system, it overlooks the fact that social welfare legislation provides for access to multiple accessible review and appeal mechanisms.

On a practical level, it should be highlighted that "aligning" the criteria in the 1988 Act with the criteria for social housing supports more generally will undoubtedly add to the time it takes for a local authority to issue decisions around entitlement to emergency accommodation. Social housing legislation provides that a local authority may take 12 weeks (and in some circumstances longer) to issue a decision in relation to entitlement to social housing supports. The Consultation Note makes no reference to a time limit for decisions on entitlement to emergency accommodation. The Note does not even acknowledge (let alone seek to address) the issues which a family experiencing homelessness would inevitably encounter in trying to compile the necessary documentation and information to establish that they satisfy the complex new criteria for access to emergency accommodation which are proposed.

4.5. Proposed Non-Statutory Humanitarian Shelter Scheme

The Consultation Note acknowledges that the reforms it proposes "…will mean that some cohorts will no longer have an entitlement to homeless emergency accommodation support from housing authorities". In response to this, it notes that the Department will "examine what system will need to be put in place to provide humanitarian assistance in appropriate cases, to ensure that no person is left without shelter".

It is proposed that this new system will be provided for by way of "policy, rather than legislation". The unfortunate (and ongoing) experience of the system of Direct Provision should be sufficient to warn against such an approach – which would undoubtedly give rise to issues in relation to the standards of accommodation provided, quality of decision-making, transparency and accountability.

The people most likely to be unable to satisfy (or establish that they satisfy) any new local connection or residency criteria for access to emergency accommodation are most likely to be those who are already experiencing marginalisation and disadvantage. This includes victims of domestic violence, victims of trafficking, refugees, people from minority ethnic and/or migrant communities such as the Roma and Traveller communities, the undocumented, people subject to deportation orders and those experiencing poverty or extreme poverty. To remove the safeguard of emergency accommodation for these groups, along with only a commitment to "examine" the introduction of an additional non-statutory scheme concerned with providing "shelter", is unconscionable.

The absence of a statutory mechanism to provide for those who are no longer entitled to emergency accommodation can only envision a situation where those people have no access

to shelter. It must be highlighted that, in such circumstances, the rights of such person under the Constitution, Charter of Fundamental Rights and the European Convention on Human Rights would be engaged and potentially breached.

4.6. Policy Impact of the Proposals

The existing provisions of the 1988 conceptualise emergency accommodation as a safety net for *anyone* experiencing homelessness. This system is distinct from the legislative scheme governing access to social housing. Implicit in this approach is an acknowledgement that homelessness is an exceptional situation and, when it arises, it merits an emergency response for those experiencing a profound crisis.

Aligning the criteria for emergency accommodation with those which apply to social housing supports suggests a change in the assumptions which underpin policy in this area – with homelessness no longer meriting an exceptional response but rather being treated in the same way as other, long-term forms of housing need. This change in approach is very difficult to square with the stated ambition of the *Housing for All* plan to eradicate homelessness.

The number of people accessing emergency accommodation is generally treated as the 'official count' of homelessness in the State. However, the picture painted by these figures is already incomplete in that they do not included "people sleeping rough, people couch surfing, homeless people in hospitals and prisons, those in Direct provision centres, and homeless households in Domestic Violence refugees".[36]

The reforms proposed by the Department would only serve to further obscure our understanding of the extent and nature of the homelessness crisis by excluding significant numbers of people from access to emergency accommodation. Similarly, a shift to counting homeless 'households' rather than 'persons' may also have an artificial deflationary effect on the overall figures – and would further blur the distinction between the State's response to homelessness and the provision of social housing supports more generally.

[36] Peter McVerry Trust, *Information on homelessness in Ireland*.