



# **Proposed Legislation to add National Residence Conditions for Access to Social Housing Supports**

Submission to inform the Oireachtas Joint  
Committee on Housing, Local Government and  
Heritage's Pre-Legislative Scrutiny of Part 2 of the  
General Scheme of the Housing (Miscellaneous  
Provisions) Bill 2024

**May 2024**

## 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. We operate a telephone information and referral line from which approximately 12,000 people receive basic legal information each year, and phone advice clinics (from which 3,318 people received basic legal advice in 2023).

As an Independent Law Centre, FLAC 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. We also operate a Traveller Legal Service, Roma Legal Clinic and LGBTQI Legal Clinic.

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<sup>1</sup>, youth homelessness<sup>2</sup> and Traveller accommodation<sup>3</sup> - as well as FLAC's Submission to the Review of the Civil Legal Aid Scheme<sup>4</sup>. Additionally (and of particular relevance), we have produced analyses of Department of Housing Circular 41/2012<sup>5</sup> (which purports to provide guidance to local authorities in "considering whether to accept an application for social housing support from a non-Irish national") and of the proposals to introduce legal and habitual residence criteria for access to emergency homeless accommodation<sup>6</sup>.

FLAC is a member of the Chief Justice's Access to Justice Committee and the Review Group for the Department of Justice's current Review of the Civil Legal Aid Scheme.

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<sup>1</sup> FLAC (2022), [Submission to the Housing Commission Consultation on a Referendum on Housing](#).

<sup>2</sup> FLAC (2022), [FLAC Submission on the development of a Youth Homelessness Strategy](#).

<sup>3</sup> FLAC (2024), [Traveller Accommodation: Access to Justice, Human Rights and Equality - Submission the Joint Committee on Key Issues affecting the Traveller Community](#).

<sup>4</sup> FLAC (2023), [Stakeholder Submission to the Civil Legal Aid Review](#).

<sup>5</sup> FLAC Casebook Blog (29 June 2021), [A Barrier to EU Nationals accessing Social Housing Supports: The Impact of Housing Circular 41/2012 on Roma families in Ireland](#).

<sup>6</sup> FLAC (2023), [Response to Proposals to Amend Homelessness Legislation](#).

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## Introduction

FLAC welcomes the opportunity to make a submission to the Oireachtas Joint Committee on Housing, Local Government and Heritage (“**the Joint Committee**”) to inform its pre-legislative scrutiny of the General Scheme of the Housing (Miscellaneous Provisions) Bill 2024 (“**the General Scheme**”). This submission is concerned with Part 2 of the General Scheme which outlines potential amendments to the Housing (Miscellaneous Provisions) Act 2009. Those amendments would require applicants for social housing supports to demonstrate that each member of their household is lawfully and habitually resident in the State and, in some cases, the length of time each household member has been (or currently is) permitted to reside in the State (their “reckonable” residence).

FLAC co-authored a joint letter to the Joint Committee (dated 18 April 2024) which set out a number of preliminary concerns with Part 2 of the General Scheme. This submission makes a number of additional observations and responds to matters raised at the meeting of the Joint Committee on 23 April 2024 which was attended by witnesses from the Department of Housing, Local Government and Heritage (“**the Department**”), as well as representatives from housing and legal civil society organisations.

This submission is informed by FLAC’s work as an Independent Law Centre. Issues around housing and homelessness have dominated FLAC’s casework in recent years. FLAC regularly appears before quasi-judicial tribunals and the courts in cases related to housing and homelessness. The majority of those cases arise from our Traveller Legal Service and Roma Legal Clinic.

We have frequently acted in cases where Roma families have been refused access to social housing supports on the basis of Department of Housing Circular 41/2012 (“**the Circular**”) which purports to put in place legal residence requirements for access to social housing supports. As is detailed further below, our experience has been that the Department and local authorities are not prepared to defend legal challenges to decisions to refuse access to social housing supports made pursuant to the Circular. In each of the many cases FLAC has been involved in (including five in 2020 alone), the threat or the fact of a legal challenge led to the matter being resolved or settled with our clients being re-assessed as eligible for access to social housing supports without reference to the Circular. We also frequently represent Roma clients who have been refused access to social welfare payments by reference to the ‘habitual residence condition’ in social welfare law. That legislation informs the provisions of Part 2 of the General Scheme to a significant extent. As a result, FLAC is keenly aware of the complex legal and evidential issues which arise in this area.

Barriers to (and delays in) accessing social welfare payments and public services (including social housing supports such as the Housing Assistance Payment) can have a devastating impact on individuals' and families' lives – it can result in evictions, and exacerbate or create health issues and debt issues. In the social welfare context, even access to the weekly Supplementary Welfare Allowance payment (a basic income support intended to act as a social safety net) is subject to the habitual residence condition. Negative decisions on habitual residence can therefore leave people and families in extremely precarious situations and, in FLAC's experience, are often linked to homelessness and extreme poverty.

Ireland's social housing system and the legal framework created under the Housing Acts is also supposed to act as a safety net. We have grave concerns that the imposition of strict and complex residence conditions could remove this safety net for many.

We would be happy to attend before the Joint Committee to present the analysis and recommendations contained in this submission.

## Recommendations

- 1. FLAC does not believe that Part 2 of the General Scheme should form the basis of new legislation creating residence conditions for access to social housing supports. The current proposals and approach to policy development in this area should be abandoned.** We have reached this conclusion (which we hope will be endorsed by the Joint Committee) on the basis of the analysis set out below which highlights that:
  - ▶ The residence conditions outlined in the General Scheme would be **far more complex and restrictive** than those set out in the previous Circular. Our experience of the Circular (and the social welfare legislation on which the General Scheme is based) indicates that the current proposals could prevent access to social housing supports (including the Housing Assistance Payment) and **massively increase the risk of homelessness for non-Irish nationals and minority ethnic and migrant communities** who already experience discrimination and disadvantage. Alarming, the General Scheme is ambiguous as to whether failing to meet the strict new residence conditions will disentitle people who have previously been deemed eligible from access to social housing supports.
  - ▶ It is **not clear that the legislation outlined in the General Scheme complies with EU law** and it **could be applied in a manner which is contrary to the rights of EU/EEA citizens by depriving them of access to social housing supports.**
  - ▶ The General Scheme does not include the necessary safeguards to ensure that the complex new conditions are applied correctly and consistently. There is **no legislative proposal to create an independent, accessible and expert appeals tribunal** (which is

already urgently needed). There is a general **lack of clarity as to how the proposed new eligibility conditions would be applied and adjudicated on in practice.**

- ▶ It remains unclear whether separate proposals (which emerged from the Department last year) to introduce legal and habitual residence conditions for access to emergency accommodation will be advanced.

**2. The Joint Committee should recommend that a fresh process of policy development is initiated.** In our view, the fatal flaws in the contents of the General Scheme are **the result of a top-down and *ad hoc* approach to policy development** which has excluded the perspectives and expertise of statutory and civil society stakeholders and, crucially, the experiences of the communities which would be disproportionately impacted by the proposals. Instead:

- ▶ **An inclusive and participatory consultation process is necessary to inform policy development in this area**, particularly in light of 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). In this instance, that Duty requires **rigorous impact assessments of the potential effects of the changes proposed**, including whether they will increase the likelihood of homelessness and poverty among certain groups. Any potential adverse consequences must be clearly addressed and mitigated through safeguards in the ultimate legislative scheme.
- ▶ **The Irish Human Rights and Equality Commission should be central to the process of policy development in this area.** It has undertaken a considerable body of work in relation to the Circular. As a result, it has specific experience and expertise in this area, along with human rights and equality law, policy and practice more generally.

**3. The Committee should consider whether an overall review of the social housing and homelessness legislation is needed.** At present, the law in these areas is not informed by a recognition of adequate housing as a right. FLAC believes that rights-based reform of housing and homelessness law is needed to address the current housing and homelessness crisis and as an important precursor to the introduction of a constitutional **right to adequate housing**. Such a review should, in our view, overtake (and replace) the process of implementing the reforms set out in the General Scheme.

## Analysis of the Proposed New Residence Conditions for Access to Social Housing Supports (Part 2 of the General Scheme)

### *Analysis & Experience of Housing Circular 41/2012*

In an appearance before the Joint Committee on 23 April 2024, Mr David Kelly (Assistant Secretary, Homelessness, Rental and Social Inclusion Division, Department of Housing, Local Government and Heritage) stated that the purpose of Part 2 of the General Scheme was to place the Department's policy regarding the eligibility of non-Irish nationals for social housing supports on a legislative footing.<sup>7</sup> The policy referred to is a departmental circular concerning "access to social housing supports for non-Irish nationals" which was introduced in December 2012.<sup>8</sup>

As noted above, FLAC's experience and analysis of the Circular informs this submission. FLAC has consistently highlighted the fact that the Circular purports to put in place residence conditions for access to social housing supports which have no basis in legislation. The Housing (Miscellaneous Provisions) Act 2009 (as amended) 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). Neither the legislation nor the regulations put in place any requirement for applicants for social housing supports to establish that they have a right to reside in the State. While the Minister may issue guidance<sup>9</sup> to local authorities on the performance of their functions as housing authorities under the Housing Acts, this cannot be interpreted as a power to introduce additional eligibility criteria for access to social housing supports. In *Kinsella v Dun Laoghaire Rathdown County Council*<sup>10</sup>, the High Court confirmed that a housing authority may only exclude applicants from entitlement to social housing supports on the basis of matters

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<sup>7</sup> Houses of the Oireachtas (2024), [Joint Committee on Housing, Local Government and Heritage - General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024: Discussion](#), p.27.

<sup>8</sup> Department of Housing, Local Government and Heritage (2012), [Circular Housing 41/2012 - Access to Social Housing Supports for non-Irish nationals](#).

<sup>9</sup> Section 5 ('Guidelines') of the Housing (Miscellaneous Provisions) Act 2009.

<sup>10</sup> [2012] IEHC 344.

expressly provided for in the 2009 Act or the regulations made under that legislation.<sup>11</sup> Further, the Circular does not accurately reflected EU law.<sup>12</sup>

In FLAC's experience, many local authorities adopt a rigid and formulaic approach in applying the Circular when dealing with applications for social housing supports from non-Irish EU/EEA nationals in the first instance. Local authorities treat the Circular as if it is legally binding and there is no discretion regarding its application. On the other hand, another feature of FLAC's experience of casework involving the Circular is the fact that, while local authorities rigidly apply the Circular at first instance, they do not appear to be prepared to defend decisions made pursuant to the Circular when faced with the fact or threat of legal proceedings.

For example, during 2020, FLAC acted on behalf of five Roma families who were excluded from accessing social housing supports by reference to the Circular. In each case, the local authority agreed to assess (or re-assess) the relevant housing application without reference to the Circular after FLAC initiated or threatened legal proceedings (to challenge decisions made on the basis of the Circular). In each instance, the applicants were then deemed eligible for social housing supports.<sup>13</sup> In several cases, FLAC has joined the Minister for Housing to proceedings relating to the Circular, or put him on notice of potential proceedings relating to the Circular. In each instance, those proceedings have settled in favour of FLAC's clients before being determined by the High Court.

At one point, it was FLAC's understanding that local authorities had stopped applying the Circular altogether in light of the legal challenges to its validity. In any event, the Circular was never applied consistently. The manner in which it was applied (and whether it was applied at all) varied between local authorities and over time. This is illustrated by the reports submitted by the four Dublin local authorities to the Irish Human Rights and Equality Commission ("**IHREC**") in 2018 when they were invited to undertake 'equality reviews' of non-Irish

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<sup>11</sup> In *Kinsella*, the High Court examined whether a person receiving social housing from one local authority is entitled to apply to another local authority for housing. The Housing (Miscellaneous Provisions) Act 2009 provides that the only situation that will automatically make a person ineligible for housing support is where there are rent arrears due for a specific period. Hogan J held that the Council could not impose a separate criteria (not provided for in the 2009 Act) to automatically exclude a household from being assessed on the basis that they were already in receipt of social housing support from another local authority. See further: Finn Keyes & Neil Maddox, *Housing Law and Practice* (Clarus Press, 2024), pp.22-4.

<sup>12</sup> "[Directive 2004/38/EC] 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." See further: FLAC Casebook Blog (29 June 2021), [A Barrier to EU Nationals accessing Social Housing Supports: The Impact of Housing Circular 41/2012 on Roma families in Ireland](#).

<sup>13</sup> FLAC Casebook Blog (29 June 2021), [A Barrier to EU Nationals accessing Social Housing Supports: The Impact of Housing Circular 41/2012 on Roma families in Ireland](#).



nationals' access to social housing supports in their respective areas.<sup>14</sup> IHREC's accounts of those Reviews (which were published in 2021) show differing approaches to the Circular and how it was applied by the local authorities:

- ▶ Dublin City Council informed IHREC that “where a provision of the Circular is contrary to EU law, DCC will uphold EU law and disapply the Circular”.<sup>15</sup>
- ▶ Both South Dublin County Council<sup>16</sup> and Fingal County Council<sup>17</sup> stated that they do not apply the Circular to applications for social housing supports.
- ▶ The approach of Dún Laoghaire-Rathdown County Council was unclear but IHREC stated that it “remains concerned in respect of the application by DLRCC of the Circular on Access to Social Housing Supports for non-Irish nationals”.<sup>18</sup>

The Department and the Government now appear to acknowledge that the Circular is legally problematic. Mr Kelly states that “the policy [of requiring applicants for social housing support to demonstrate that they satisfy residence conditions] requires primary legislation” and that “[the Department’s] legal advice over the last number of years has been that this policy needed to be underpinned in primary legislation”.<sup>19</sup> In light of this, it is our view that it is now incumbent on the Department to withdraw the Circular and confirm that it should not be applied by local authorities.

### ***Differences between the Circular and the More Complex and Restrictive Residence Conditions proposed in the General Scheme***

As is clear from the above, the Circular raised complex legal issues which led to several legal challenges to its provisions and its overall validity. It also raised significant human rights and equality concerns which led to IHREC exercising its statutory power to seek equality reviews from certain local authorities. The Circular purports to require applicants for social housing

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<sup>14</sup> Irish Human Rights and Equality Commission, [Equality Review](#), “Provision of accommodation services for non-Irish nationals by local authorities in Dublin”.

<sup>15</sup> Irish Human Rights and Equality Commission (2021), [An account of Dublin City Council’s Equality Review and Action Plan, in respect of non-Irish nationals’ \(EEA nationals and non-EEA nationals\) access to social housing services within DCC’s functional area](#), p.30.

<sup>16</sup> Irish Human Rights and Equality Commission (2021), [An account of South Dublin County Council’s Equality Review and Action Plan, in respect of non-Irish nationals’ \(EEA nationals and non-EEA nationals\) access to social housing services within SDCC’s functional area](#), p.14.

<sup>17</sup> Irish Human Rights and Equality Commission (2021), [An account of Fingal County Council’s Equality Review and Action Plan, in respect of non-Irish nationals’ \(EEA nationals and non-EEA nationals\) access to social housing services within FCC’s functional area](#), p.19.

<sup>18</sup> Irish Human Rights and Equality Commission (2021), [An Account of Dún Laoghaire-Rathdown County Council’s Equality Review and Action Plan to ensure that non-Irish nationals, \(EEA and non-EEA nationals\) are not treated less favourably on the grounds of race in respect of access to social housing services within its functional area](#), p.16.

<sup>19</sup> Houses of the Oireachtas (2024), [Joint Committee on Housing, Local Government and Heritage - General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024: Discussion](#), p.27.

supports to establish that they are legally resident in Ireland. This legal and evidential burden has a disproportionate negative impact on people and families who are already more likely to experience discrimination, disadvantage and homelessness, including those from minority ethnic and migrant communities such as the Roma community.<sup>20</sup> Even establishing that one has right to reside in Ireland as an EU worker (or as the family member of such a person) can be quite difficult and raise complex questions of law and evidence. Research by the Economic and Social Research Institute (“ESRI”) has highlighted the issues which have arisen in this area in the social welfare context:

“In practice, the right of an EEA national to reside in the State is much more difficult to assess in the context of an application for social welfare than that of a non-EEA national. [Department of Social Protection] officials indicated that it can be hard to check or prove the date of an applicant’s entry to the State. In addition... the employment history of the applicant becomes critical. There is no legal definition of what constitutes ‘employment’ for the purpose of establishing residence in Ireland...”<sup>21</sup>

The proposals in Part 2 of the General Scheme go further than the Circular. The residence requirements envisioned are more complex and demanding than the ‘legal residence’ (or ‘right to reside’) conditions discussed above. Unlike the Circular, the legislation outlined in the General Scheme would explicitly require *every* member of an applicant household to establish that they are legally *and* habitually resident in Ireland.<sup>22</sup> In addition to the ‘legal residence’ requirement, the proposed legislation would add a ‘habitual residence’ condition which relates to the factual nature and basis of an applicant’s residence in the State. This is distinct from the existing ‘normal residence’ and ‘local connection’ requirements which relate to the factual basis and nature of an applicant’s residence in the functional area of the relevant local authority.<sup>23</sup>

Under section 246 of the Social Welfare Consolidation Act 2005 (as amended), an almost identical habitual residence condition exists as a qualifying condition for all means-tested social welfare payments and Child Benefit. A United Nations Independent Expert on Extreme Poverty described that condition as “a considerable obstacle for members of vulnerable

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<sup>20</sup> FLAC Casebook Blog (29 June 2021), [A Barrier to EU Nationals accessing Social Housing Supports: The Impact of Housing Circular 41/2012 on Roma families in Ireland](#).

<sup>21</sup> Economic and Social Research Institute (2014), [Migrant Access to Social Security and Healthcare: Policies and Practice in Ireland](#), p.17.

<sup>22</sup> Section 1 of Head 5 of the General Scheme states: “*all members* of an applicant(s) household must be lawfully resident in the State in accordance with subsection (5) and habitually resident in the State in accordance with subsection (6)” (emphasis added).

<sup>23</sup> Regulation 5 of the Social Housing Assessment Regulations 2011 provides that a household applying for social housing support shall either apply to the authority for the functional area in which the household normally resides, the authority in which the household has a local connection, or an authority that agrees at its discretion to assess the household’s application.

groups, particularly people experiencing homelessness, Travellers, asylum-seekers and refugees, migrant workers and returning Irish migrants, to access services to which they are entitled”.<sup>24</sup> Similarly, the United Nations Committee on Economic, Social and Cultural Rights have specifically recommended that Ireland “review the habitual residence condition so as to eliminate its discriminatory impact on access to social security benefits, particularly among disadvantaged and marginalized individuals and groups”.<sup>25</sup>

‘Habitual residence’ conditions are inherently subjective and their language is vague and imprecise. They do not set out a clear test but rather a non-exhaustive list of malleable factors for consideration by decision-makers. There are considerable and longstanding issues with the quality of decision-making on entitlement to social welfare payments in the first instance.<sup>26</sup> FLAC has first-hand experience of the inconsistent manner in which habitual residence conditions may be applied and of how they (like the ‘legal residence’ conditions discussed above) may act as a barrier to particular groups’ access to vital public services such as social welfare. FLAC has repeatedly highlighted the disproportionate impact of the habitual residence condition under social welfare law on members of the Roma community who often face significant difficulties satisfying the condition due to lack of documentation, proof of address and language and literacy skills.<sup>27</sup> Similar concerns emerged from the landmark *Roma in Ireland: A National Needs Assessment* report in 2018.<sup>28</sup>

Barriers to (and delays in) accessing social welfare payments and public services (including social housing supports such as the Housing Assistance Payment) can have a devastating impact on individuals’ and families’ lives – it can result in evictions, and exacerbate or create health issues and debt issues.<sup>29</sup> For example, in the social welfare context, those whose application for a payment has been refused in the first-instance by reference to the habitual residence condition cannot even access the weekly Supplementary Welfare Allowance payment (a basic income support intended to act as a social safety net) while they seek to review or appeal the initial negative decision because that payment is also subject to the habitual residence condition. This occurs even if they have no other form of income.<sup>30</sup> This

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<sup>24</sup> Department of Foreign Affairs (2011), [Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona to the UN Human Rights Council](#), p.12.

<sup>25</sup> United Nations (2015), [Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland](#), p.6.

<sup>26</sup> This is reflected in the fact that over half of decisions which are subject to an appeal are overturned. See: Social Welfare Appeals Office, [Annual Reports](#).

<sup>27</sup> FLAC (2023), [Annual Report 2022](#), p.41 & FLAC (2021), [Submission to the Department of Children, Equality, Disability, Integration and Youth’s Consultation on Ireland’s National UPR Report](#), pp.8-9 & 13.

<sup>28</sup> Pavee Point Traveller and Roma Centre & Department of Justice and Equality (2018), [Roma in Ireland: A National Needs Assessment](#).

<sup>29</sup> FLAC (2023), [Annual Report 2022](#), p.41.

<sup>30</sup> FLAC (2022), [FLAC Submission on the development of a Youth Homelessness Strategy](#), pp.9-10.

can leave people and families in extremely precarious situations and, in FLAC's experience, is often linked to homelessness and extreme poverty.<sup>31</sup>

Ireland's social housing system and the legal framework created under the Housing Acts is also supposed to act as a social safety net, in this instance for "persons who cannot afford to provide for their own housing needs".<sup>32</sup> We have grave concerns that the imposition of a 'habitual residence' condition could remove this safety net for many and drastically increase the risk of homelessness for non-Irish nationals and minority ethnic and migrant communities who already experience discrimination and disadvantage.

The Explanatory Notes to the proposed new residence conditions in the General Scheme state:

"One of the objectives of the proposed new approach is to provide, where possible, some consistency as to how State entities assess social entitlements and where practicable to provide for complementary processes and the approach taken by the Department of Social Protection to the assessment of lawful and habitual residence has been specifically considered."

It is worth highlighting that there are approaches to defining the residence requirements for access to public services which are considerably less complex than the current approach under social welfare law and the approach envisioned under the General Scheme. For example, to access public health services in Ireland, it is only necessary to satisfy a single 'ordinary residence' test.<sup>33</sup> An 'ordinary residence' test is also used for access to third-level education supports.<sup>34</sup> No 'habitual residence' test is applied in either of those contexts.

### ***Application of the Proposed New Residence Conditions to Current & Ongoing Eligibility for Social Housing Supports***

There are major ambiguities in Part 2 of General Scheme regarding the impact the proposed new residence criteria will have on:

- ▶ The entitlement of those currently in receipt of social housing supports or who have been assessed as eligible for social housing supports.

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<sup>31</sup> "In three of the social welfare casefiles active during 2022, Roma clients who were in receipt of no weekly social welfare payment were also experiencing homelessness." FLAC (2023), [Annual Report 2022](#), p.41.

<sup>32</sup> Finn Keyes & Neil Maddox, *Housing Law and Practice* (Clarus Press, 2024), p.13.

<sup>33</sup> Section 45 of the Health Act 1970 (as amended). See also: Economic and Social Research Institute (2014), [Migrant Access to Social Security and Healthcare: Policies and Practice in Ireland](#), p.28.

<sup>34</sup> Section 14 of the Student Support Act 2011 (as amended).

- ▶ The ongoing entitlement to social housing supports of those who meet the proposed new residence criteria but who may subsequently be deemed to have lost their right to reside in the State or their status as ‘habitually resident’.

From the text of the General Scheme, it is unclear whether the proposed legislation will disentitle a significant number of people who have previously been deemed eligible from access to social housing supports.<sup>35</sup> The scale of the impact of such an interpretation would be all the greater in light of the fact that the proposed new conditions apply to every person listed on a given housing application (i.e. each member of a family). As we noted in the letter to the Joint Committee dated 18 April 2024: “People who are already most at risk of homelessness, discrimination and disadvantage (in particular those from minority ethnic and migrant communities) would be disproportionately impacted”. In general, there is a notable lack of clarity as to how the proposed new eligibility conditions would be applied and adjudicated on in practice.

In response to questions from the Joint Committee about the impact of the proposed legislation on current entitlement to social housing supports, Mr David Kelly of the Department stated: “If somebody has been granted social housing supports, there is no intention to seek to withdraw”.<sup>36</sup> However, this statement of intent is not clearly reflected in the provisions of the General Scheme. Further, Mr Kelly sought to downplay any potential impact on current and ongoing entitlement to social housing supports by stating that the residence conditions in the General Scheme are “the same” as the policy in the Circular.<sup>37</sup> This is not the case. As discussed above, the proposed conditions in the General Scheme are more restrictive and complex than the policy in the Circular and, in any event, the Circular has not been applied in a consistent manner.

Mr Kelly noted that: “I do not have exact details of cases [but] there may be cases where somebody has been granted a social housing support despite not meeting [the conditions set out in the Circular]”. Many such cases undoubtedly exist. The Department has been a party to several legal challenges to the Circular which settled on the basis of the applicants’ being deemed eligible for access to social housing supports (despite having previously been excluded on the basis of the Circular) and should therefore be privy to the details of many such “cases”.

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<sup>35</sup> Section 1 of Head 5 of the General Scheme states that the proposed new conditions must be satisfied “in order to be *eligible to be assessed* for the social housing supports” (emphasis added).

<sup>36</sup> Houses of the Oireachtas (2024), [Joint Committee on Housing, Local Government and Heritage - General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024: Discussion](#), p.38.

<sup>37</sup> *ibid.*

There is no indication that the Department has undertaken any impact assessments as to the effect which the proposed changes will have on non-Irish nationals who are currently in receipt of or assessed as eligible for social housing supports. There is also nothing to suggest that the Department has sought to assess the potential impact which the proposed changes will have on the number of non-Irish nationals who seek access to emergency homelessness accommodation (in light of their ineligibility for social housing supports).

### ***Compliance of the Proposed New Residence Conditions with EU Law***

As we noted in the letter to the Joint Committee dated 18 April 2024, the restrictive nature of the proposed new residence conditions may give rise to breaches of EU law. Like the social welfare legislation, the General Scheme seeks to comply with the minimum standards set by the EU Citizenship Directive (Directive 2004/38/EC)<sup>38</sup> but not to go beyond them. This heightens the risk that negative decisions on entitlement could be contrary to EU law and the rights of EU/EEA citizens.

Separately, the Court of Justice of the European Union has held that the provisions of the Free Movement of Workers Regulation (Regulation EU No. 492/2011) may give rise to residence rights in certain instances. These rights arise independent of the provisions of the Citizenship Directive.<sup>39</sup> However, the legislation outlined in Part 2 of the General Scheme does not expressly contemplate such situations (nor does it appear flexible enough to do so).

Further, the EU Race Directive (Directive 2000/43/EC) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. That directive prohibits

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<sup>38</sup> The EU Citizenship Directive (Directive 2004/38/EC) lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by European Union citizens and their family members. The Directive is transposed into Irish law by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015).

<sup>39</sup> Article 10 ('Workers' families') of the Free Movement of Workers Regulation (Regulation EU No. 492/2011) states: "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions." In *Baumbast and R* (Case C-413/99), the Court of Justice of the European Union (CJEU) ruled that: "Children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [which has since been replaced by article 10 of Regulation No 492/2011]... Where children have the right to reside in a host Member State in order to attend general educational courses ... that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right..." In *Teixeira* (Case C-480/08), the CJEU confirmed that the article 10 of EU Regulation No. 492/2011 "allows a child to have an independent right of residence in connection with the right of access to education". Further, the Court ruled that right to reside of the parents of such children also arises from article 10 "without [a requirement] to satisfy the conditions laid down in Directive 2004/38/EC".

discrimination on the grounds of racial or ethnic origin in relation to social protection, including social security and healthcare, social advantages, and access to and supply of goods and services which are available to the public, including housing.

The departmental officials who addressed the Joint Committee on 23 April 2024 stated that, while the “Attorney General’s office [has] looked at this general scheme”, there will not be a “detailed examination” of its compliance with EU law until the Bill is formally drafted. They stated that they were “not aware that it is consistent [with European law and human rights law]” and that they will be “very reliant on the Attorney General [in] making sure that the legislation is consistent with the latest EU legislation in this area”.<sup>40</sup> Given how far advanced the proposed legislation is, and how detailed the General Scheme is, these remarks are alarming.

### ***Absence of an Accessible & Independent Appeal Mechanism***

There is limited accountability for (and transparency in) decision-making by local authorities on eligibility for access to social housing supports and emergency homelessness accommodation. This is well illustrated by the fact that residence conditions (set out in a non-statutory circular) were applied to applications for social housing supports for over a decade despite the fact that those conditions had no basis in primary legislation. The conflation of the eligibility criteria for social housing supports and emergency accommodation by local authorities is also a longstanding issue.<sup>41</sup>

Judicial review is often the only means to challenge decisions of local authorities in relation to housing and 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.<sup>42</sup> As a result, FLAC believes that 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.<sup>43</sup>

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<sup>40</sup> Houses of the Oireachtas (2024), [Joint Committee on Housing, Local Government and Heritage - General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024: Discussion](#), p.29.

<sup>41</sup> Section 2 of the Housing Act 1988 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. However, FLAC has frequently encountered cases where local authorities rely on non-statutory measures, such as the “local connection” test (which applies only to applications for social housing supports), to refuse to assess people as homeless. See further: FLAC Casebook Blog (20 December 2021), [Continued use of “local connection” tests a concern for FLAC](#).

<sup>42</sup> Sinéad Lucey (FLAC Managing Solicitor) (May 2022), [Presentation at the Housing Commission’s Conference on a Right to Housing in Ireland: Access to Justice, Legal Aid and the Right to Housing](#).

<sup>43</sup> 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.36-8.



The proposals in the General Scheme would add a new layer to the decision-making process concerning entitlement to social housing supports in which complex questions of domestic, European and international law are considered. A detailed analysis of documentary evidence of 'habitual residence' would also be required.

The departmental officials who addressed the Joint Committee on 23 April 2024 accepted that measures to ensure a high quality of first-instance decision-making and the introduction of an appeal system are both necessitated by the proposals in the General Scheme:

“The appeals mechanism is something on which we will work with the Attorney General’s office during the drafting process to make sure there is a robust system in place.

With regard to local authorities, any time new legislation is issued, the Department will always work with the sector to prepare detailed guidance on the implementation. There will generally be detailed circulars to issue to local authorities to accompany new legislation. Generally, legislation would not be commenced until local authorities are geared up to implement it and there is an understanding. Therefore, there will be a lot of training for local authority staff. The Housing Agency tends to do a lot of work with local authorities and communities of practice stakeholder engagement. There will be quite a period of engagement with local authorities, prior to and during the enactment of the legislation, to make sure that there is a consistent implementation across the 31 local authorities.”<sup>44</sup>

However, the lack of detail about those proposed measures (particularly the new appeal system which is envisioned) is worrying. No draft regulations, circulars or guidance have been published to date. The absence of any reference to an appeal system in the General Scheme suggests that an internal review system (on an administrative rather than legislative basis) is envisioned. In practice, this would mean 31 separate appeals systems across each of the local authorities. As noted above, there is already an urgent practical need for an independent, accessible, expert tribunal which complies with the requirements of fair procedures and natural justice.

### ***Residence Conditions & Access to Emergency Accommodation***

There is a separate legislative regime which sets out the criteria for access to emergency homelessness accommodation (as distinct from social housing supports more generally).<sup>45</sup> As

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<sup>44</sup> Houses of the Oireachtas (2024), [Joint Committee on Housing, Local Government and Heritage - General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024: Discussion](#), pp.27-8.

<sup>45</sup> Two provisions of the Housing Act 1988 form the legislative basis for the powers and functions of local authorities (in their capacity as housing 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



a result, the proposals in the General Scheme should not be applied to applications for emergency homelessness accommodation. However, as noted above, the conflation of the conditions which apply to eligibility for social housing supports with those which apply to access to emergency homelessness accommodation is a longstanding issue. In the past, the residence conditions set out in the Circular have been relied upon to refuse applications for emergency homelessness accommodation from non-Irish nationals.<sup>46</sup> It is highly concerning that representatives of the Department who appeared before the Joint Committee on 23 April 2024 stated that they are “not aware” of that issue.<sup>47</sup>

Representatives of the Department stated that the legislative changes proposed in the General Scheme would not result in the application of legal and habitual residence condition to applications for emergency homelessness accommodation.<sup>48</sup> However, it is highly important to note that the Department has recently considered a *separate* set of legislative changes to achieve that outcome. Those proposed changes were outlined in a ‘consultation note’ sent to members of the National Homeless Action Committee by the Department’s Homelessness Policy, Funding and Delivery Unit in October 2023. Like a number of other organisations, FLAC made a detailed submission to the Department outlining our strong objections to those proposed changes to the law concerning homelessness and emergency accommodation.<sup>49</sup> In that submission, FLAC stated 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”.

In FLAC’s view, the proposals set out in the 2023 ‘consultation note’ 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.

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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.

<sup>46</sup> Mercy Law Resource Centre (2020), [Minority Groups and Housing Services: Barriers to Access](#), at p.8.

<sup>47</sup> Houses of the Oireachtas (2024), [Joint Committee on Housing, Local Government and Heritage - General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024: Discussion](#), p.40.

<sup>48</sup> Houses of the Oireachtas (2024), [Joint Committee on Housing, Local Government and Heritage - General Scheme of the Housing \(Miscellaneous Provisions\) Bill 2024: Discussion](#), p.36.

<sup>49</sup> FLAC (2023), [Response to Proposals to Amend Homelessness Legislation](#).

FLAC's submission also warned against the proposal to introduce a non-statutory system of "humanitarian assistance" for those who "will no longer have an entitlement to homeless emergency accommodation": "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 proposals set out in the 2023 'consultation note' emerged from a review of the homelessness legislation undertaken by departmental and local authority officials. No report arising from that review or complete statement of its process, findings and recommendations have been published to date. The Department refused to release any records in relation to the review to FLAC under Freedom of Information legislation on the basis that the documents "relate to the deliberative processes of the Department" and that their release "would be contrary to the public interest". However, a schedule of records which was released appears to suggest that the Cabinet Committee on Housing has been briefed on the review of homelessness legislation on several occasions and that the Department's work in relation to the proposals is advanced to the point that "proposed" amending legislation has been prepared.

We have not received any substantive update from the Department on the status of those proposals to amended homelessness and emergency accommodation legislation in response to our submission.

### ***Weaknesses in the Current Policy Development & Consultation Process***

In November 2022, the Minister for Housing stated that he intends "to bring forward legislation... regarding eligibility of non-nationals for social housing, including provision for legal residence as an eligibility criterion in any assessment for social housing support".<sup>50</sup> Those legislative proposals are now significantly advanced and have arrived at this point in the absence of any comprehensive, structured and inclusive public and expert consultation process. The General Scheme which is currently being scrutinised by the Joint Committee does not even seem to be generally available to the public.

Over the past eighteen months, FLAC has stressed to the Department that an inclusive and participatory consultation process is necessary, particularly in light of its 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). In this instance, some of

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<sup>50</sup> Houses of the Oireachtas (22 November 2022), [Written Response of the Minister for Housing, Local Government and Heritage to Parliamentary Questions 306 & 307 from Eoin Ó Broin TD](#).

the most fundamental human rights are engaged by the potential reforms under consideration and groups protected by equality law will be disproportionately impacted by any legislative changes. As a result, the Public Sector Equality and Human Rights Duty requires rigorous impact assessments on the potential effects of any changes. Any potential adverse consequences for groups who experience discrimination and disadvantage must be clearly addressed and mitigated through safeguards in the legislative scheme. The experiences and inputs of those groups should inform policy development. Unfortunately, the General Scheme has not been subject to an adequate equality, human rights and poverty-proofing process as required by the Public Sector Equality and Human Rights Duty.

It is unclear to what extent the Department has engaged with statutory bodies such as IHREC or the Ombudsman for Children in relation to the current 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". As highlighted above, IHREC undertook a considerable body of work in relation to the Circular. As a result, it has specific experience and expertise in this area, along with human rights and equality law, policy and practice more generally. It should be central to the process of policy development in this area. It also appears that the Department has not yet received a detailed legal analysis of the current proposals from the Attorney General.

A limited number of housing, legal and advocacy organisations have now had the opportunity to engage with the current proposals through the Pre-Legislative Scrutiny process conducted by the Joint Committee. However, the absence of details around how the proposed new criteria would be implemented in practice and clear legal advice underpinning the approach adopted in the General Scheme limits the effectiveness of that process. FLAC's analysis is largely based on our experience of social housing casework on behalf of EU/EEA nationals. However, there has only been limited input from organisations with experience of representing 'third country' nationals, refugees and asylum seekers who have faced barriers in seeking to access social housing supports. Members of the Department's Homelessness Policy, Funding and Delivery Unit have not appeared before the Joint Committee in relation to the separate (but highly relevant and related) proposals to introduce legal and habitual residence criteria for access to emergency accommodation.

### ***The Need for a Rights-Based Approach to Housing Policy & Legislation***

FLAC believes that rights-based reform of housing and homelessness law is needed to address the current housing and homelessness crisis. At present, the law is not informed by

the recognition of adequate housing as a right. Drawing on our experience as an Independent Law Centre, FLAC has called for a referendum on a right to adequate housing.<sup>51</sup> In 2022, we made a detailed submission to the Housing Commission which proposed wording for a constitutional housing amendment that specifically enshrines the right to adequate housing.<sup>52</sup> We also recommended legislative reforms to ensure that the housing rights of all individuals and groups – including access to social housing supports and emergency accommodation - are comprehensive, clear and enforceable.<sup>53</sup>

A constitutional right to adequate housing is not required to introduce the legal 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.

In response to the proposals which emerged last year to amend the homelessness and emergency accommodation legislation, FLAC recommended that the present *ad hoc* and top-down processes of policy development and reform in relation to social housing and emergency accommodation should be halted. Instead, 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.<sup>54</sup>

We believe that that approach would be highly preferable to further piecemeal reform of the Housing Acts. It should also involve a consideration of the residence conditions for access to social housing supports and, as outlined in the recommendations above, overtake (and replace) the process of implementing the reforms set out in the General Scheme.

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<sup>51</sup> The Programme for Government commits to a “[referendum] on housing”. See: Department of the Taoiseach, [Programme for Government: Our Shared Future](#), p.120.

<sup>52</sup> For further detail, see: FLAC (2022), [Submission to the Housing Commission Consultation on a Referendum on Housing](#).

<sup>53</sup> 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.

<sup>54</sup> FLAC (2023), [Response to Proposals to Amend Homelessness Legislation](#), v.