

THIRD RIGHT TO HOUSING REPORT:

Children & Homelessness: A Gap in Legal Protection

Mercy Law Resource Centre





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PART I: CONTEXT AND PURPOSE OF REPORT

Introduction

As of April 2018, the number of homeless children in Ireland was recorded at 3,689¹ representing 29% of national homelessness² figures. In light of these figures, renewed calls have been advanced both on an international and domestic level for policies which ensure homeless children are not left to languish in a position of rooflessness, or in unsuitable emergency accommodation for extended periods of time. There is ample evidence demonstrating that the damage suffered by a child who is homeless – in respect of the child’s physical, mental, and social development – can be profound. It is equally clear that emergency accommodation – B&B’s, hostels and hotels – are an unsuitable place for infants and children to live and develop, especially when children are residing in such accommodation for extensive periods of time.

The children’s charity Barnardos captures the sad reality of the situation:

“Life for a family in emergency accommodation is difficult. Eating, studying, sleeping, playing, dressing and clothes-drying all happen within the same small four walls. Children share beds with their siblings and often their parents. Families live out of suitcases, having given away or stored many of their belongings, never settling, always aware that they may have to move on.”

The disruption that homelessness has on family life and childhood development and well-being is acute. Homeless children are vulnerable to a range of emotional problems, including anxiety, sleeplessness, aggression

and withdrawal.³ There is an obvious risk that these conditions pose a clear threat to a variety of basic constitutional rights enjoyed by children- the right to bodily and mental integrity⁴, to basic educational development⁵, and the ability to enjoy a normal and stable family life⁶. Considering the potentially corrosive impact homelessness has on these basic rights- ones closely linked to basic human dignity, a concept which takes pride of place in our Constitution - it is crucial that those facing such situations have access to robust legal safeguards.

The purpose of this report is to critically evaluate the legal safeguards and redress mechanisms currently available to homeless children in Ireland; both those who are roofless and those residing in unsuitable emergency accommodation for extended periods of time. The report considers both judicial and administrative forms of redress and argues that these existing mechanisms are currently insufficient, and have proven inadequate to the task.

Outline of report

PART I considers potential legal protections available to children who are homeless.

This part shows that attempts to rely on the courts to vindicate the rights of homeless children has proven broadly ineffective. This is attributable to several factors:

1. The fact that there is no right to shelter – whether through-
 - a) The Constitution, or
 - b) Statute.
2. The fact the judiciary have shown a notable reluctance to second-guess public authorities in issues concerning housing & homelessness; and
3. the reality that there is no legal aid for housing and homelessness matters, which ensures accessing legal advice and representation for homeless families is extremely difficult in the first instance.

PART II examines non-judicial forms of redress, and considers the role of:

1. The Children’s Ombudsman, and
2. The Irish Human Rights and Equality Commission (‘IHREC’).

These are statutory bodies with responsibility for promoting human rights awareness and compliance in the State.

This part suggests that both bodies are potentially useful supplementary means of redress, and have shown admirable willingness to voice concern at the treatment of children in homelessness. However, we also suggest there are severe limitations to their substantive effectiveness.

In the context of the Ombudsman, this stems from the relatively weak nature of its statutory remedial powers. In respect of IHREC, while its powers are in theory quite ample, it is a relatively new body whose more extensive powers remain untested. IHREC’s statutory inquiry power, in particular, remains a potentially potent tool that could be employed to robustly assess the position of the many thousands of children who are homeless and residing in deeply unsuitable accommodation for rights compliance, and possibly affords a robust remedy.

PART III of the report concludes that there is currently a demonstrable gap in legal protection for some of the most vulnerable children in the state. The final section of the report considers best practices for protecting homeless children in other jurisdictions and proposes potential domestic legal reforms in light of same.

PART II: LEGAL SAFEGUARDS FOR HOMELESS CHILDREN

(a) No constitutional right to shelter for homeless children in families

While there are several other constitutional rights which can be plausibly linked to those facing homelessness, namely, the right to bodily integrity⁷, the constitutional right of the person to protection⁸, and the State's constitutional duty toward children,⁹ the courts appear unwilling to interpret existing constitutional rights in a manner to encompass or vindicate a right to basic shelter.

Right to Bodily Integrity

The right to bodily integrity was first recognised by the court in *Ryan v Attorney General*¹⁰, where the Supreme Court held that the personal rights referred to in A40.3.1 of the Constitution are not confined to the enumeration of “life, person, good name, and property rights” in A40.3.2. The right to bodily integrity was recognised to fall within the category of ‘personal rights’ protected by the article. The right guarantees that “no mutilation of the body or any of its members may be carried out under the authority of the law except for the good of the whole body and that no process which is or may (...) be dangerous or harmful to the life or health of the citizen may be imposed (...) by the Oireachtas”¹¹.

In *O'Brien v Wicklow UDC*¹², the High Court appeared to suggest that a State failure to provide adequate accommodation or shelter

may, in appropriate circumstances, amount to an infringement of this right. *O'Brien* concerned a claim by a Traveller family that the State, acting through the local authority, had a duty to provide serviced halting sites for them.

The evidence before the court was that the family were living in appalling conditions which were unfit for habitation. The High Court concluded that “the plaintiffs have a constitutional right to bodily integrity which is being infringed by the conditions under which they are living”¹³.

However, in the highly influential decision in *TD v Minister for Education*¹⁴, several judges expressly signalled that the Constitution “could not be relied upon to protect implied socio-economic rights” like a right to shelter¹⁵. Murphy J noted:

.....

“ With the exception of Article 42 of the Constitution, under the heading “Education”, there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio economic benefit for any of its citizens however needy or deserving.”¹⁶

.....



Murphy J also held that the right to bodily integrity established in *Ryan* did not “suggest the existence of any general right in the citizen to receive, or an obligation on the state to provide, medical and social services as a constitutional obligation”¹⁷. This decision was a strong signal that the “Irish courts... could not be relied upon to protect socio-economic interests that are not explicitly referred to in the Constitution or legislation”¹⁸.

The recent 2015 Supreme Court decision in *O'Donnell v South Dublin County Council*¹⁹ in some respects represented a slight shift from this stance. In *O'Donnell*, the plaintiff was living in overcrowded accommodation that was unfit for human habitation and had a reasonable requirement for separate accommodation. Her disabilities ensured that she was also in need of different accommodation for medical or compassionate reasons. The plaintiff was also unable to meet the cost of the accommodation or to obtain other suitable shelter. The Supreme Court stated that the existing statutory obligations of South Dublin County Council had to be considered in light of constitutionally protected rights and values and the

exceptional circumstances of deprivation in this case, which were known to the local authorities for a number of years. The Supreme Court accepted that the plaintiff was subjected to inhuman and degrading accommodation conditions, which compromised her rights to autonomy, bodily integrity and privacy under Article 40.3.

The Court noted that the housing authority “when faced with clear evidence of inhuman and degrading conditions, [had] to ensure it carried out its statutory duty”²⁰ under the Housing Acts in a manner which respected the plaintiffs’ constitutional rights. The Court noted that while the authorities may have discharged their statutory duties to the rest of the applicant’s family, the evidence did not show that the County Council performed its statutory duty, towards the applicant- who had profound disabilities- “*insofar as it was practicable*” as the Constitution provides²¹.

The authority’s powers under s.10 of the Housing Act 1988 could have been exercised and executed with the aim of respecting these rights by making offers of financial assistance, having repairs carried out and/or lending a

second caravan so as to make temporary accommodation space for the plaintiff and her needs. The Court awarded the plaintiff damages for the breach of the respondent's duties toward her.

The decision in *O'Donnell* recognises that the Constitution can, in extremely exceptional instances, place a positive obligation on State authorities to exercise their existing statutory powers in a manner which vindicates fundamental constitutional rights as far as practicable. In certain circumstances this may include a need to provide basic, adequate shelter. With regard to particularly vulnerable homeless children, it is at least arguable that local authorities may have to exercise their powers under s.10 of the Housing Act 1988 in a manner which vindicates their bodily integrity through providing adequate shelter. However, such a duty has not been elaborated upon in other cases involving homelessness²².

Right to Protection of the Person

The constitutional right of the person to protection in Article 40.3 has been held to protect both the physical person, i.e. one's body and physical integrity²³, as well as mental and psychological integrity as well.

In *Kinsella v Governor of Mountjoy Prison*²⁴, the applicant's life was in danger amongst the general prison population. To protect him, the prison authorities kept him for 11 days in solitary confinement in an unfurnished padded cell that was used to observe those at risk of self-harm. He had no reading material, no radio or television, and no toilet facilities beyond a cardboard box. His only contact with the outside world was one six-minute phone call per day. The High Court said that these conditions violated his constitutional rights, and outlined the extent of the constitutional right of the person to protection as follows:

“ *By solemnly committing the State to protecting the person, Article 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality [O]ne does not need to be a psychologist to envisage the mental anguish which would be entailed by a more or less permanent lock-up under such conditions for an eleven day period.* **”**²⁵

The applicant's detention violated the basic minimum standards needed for the protection of his person, which included his mental integrity. The scope of this case law is unclear²⁶. On the one hand the right could be limited to the determination of whether or not government private action actually attacks an individual's physical or mental integrity—a *negative* duty not to interfere with the right. On the other it could be broader and extend to place a positive duty on the State to provide basic, adequate shelter for vulnerable homeless children whose physical and mental integrity are at risk.

The potential adverse impact of being homeless or residing in inadequate shelter on an individual's mental and physical integrity is undoubtedly considerable, and the point is therefore certainly arguable²⁷. However, for the moment the courts have been reluctant to entertain arguments based on this ground. Indeed, in a string of recent cases the Courts appeared unwilling to extend protection of the person to create a positive duty on the State to provide basic, adequate shelter²⁸.

The reality remains that there is no express constitutional right to shelter or housing for adults and children in Irish law. The existing legal landscape suggests that an implied right to adequate shelter may only in very limited instances be a necessary corollary of other constitutional rights, including the right to bodily integrity and the right of the person. However, for all intents and purposes there is no clear legal right to shelter for homeless families with children.

Childrens' Rights Amendment

The insertion of Article 42A into the constitution has done nothing to alter this lack of constitutional protection. Although the provision has not received extensive treatment by the courts, in a number of cases the judiciary have appeared reluctant to apply some of its provisions beyond the bounds of family law proceedings. For example, the Courts have held that the best interests requirements in Article 42A.4 does not apply to immigration decisions.²⁹

In several recent High Court cases concerning homelessness the applicants argued *inter alia* that Article 42A required local authorities to exercise their statutory discretion in a manner consistent with the constitutional rights and best interests of the child.³⁰ These claims were unsuccessful, and on each occasion the Court did not engage in any detail with arguments made in respect of the applicants' rights under 42A, despite the potentially clear adverse impact of homelessness on the well-being of the applicants' children in each case.

While the Courts have not definitively ruled on whether Article 42A may provide any additional protection for homeless children, thus far the amendment has had a muted impact.

(b) No statutory right to shelter for homeless children in families

There is no statutory right to shelter or housing in Irish law for homeless children who reside with their families. The Housing Acts 1966-2014 and related Regulations relate to the right to apply and be considered eligible for social housing.³¹

The Child Care Act 1991 imposes a legal responsibility on the Child and Family Agency to provide for the care and welfare of children who can no longer remain at home³². Section 5 of the 1991 Act provides the Agency shall take such steps as are reasonable to make available suitable accommodation for the child who is homeless in its area, provided there is no accommodation available to him which he can reasonably occupy or no State care is received. However, this provision only applies where the child is not in the care of their parents. It would not encompass the majority of homeless children residing in a family unit.

Aside from this provision, families with children have a statutory entitlement to:

- Apply for social housing assistance³³ and the right to be assessed for social housing assistance once they have applied³⁴;
- Not to be discriminated against on the basis of gender, marital status, family status, sexual orientation, religion, age, disability, race, social welfare status or membership of the Traveller Community;³⁵
- Apply for an exclusion order if you are the victim of anti-social behaviour³⁶; and
- Rights in relation to the procedure for a tenancy warning and eviction³⁷.

Aside from these modest protections, the provision of shelter to homeless children residing with their family – whether emergency or permanent – is heavily discretionary.

Section 2 of the Housing Act 1988 provides that a person will be regarded as homeless if:

“There is no accommodation available which, in the opinion of the local authority, the person could reasonably occupy, and in the opinion of the local authority, the person is unable to provide accommodation from their own resources; or if the person lives in emergency accommodation and, in the local authority’s opinion, is unable to provide accommodation from their own resources.” (Emphasis added)

Section 10 gives local authorities discretionary power to provide for the accommodation needs of people who are homeless by making

arrangements with voluntary housing associations, by arranging accommodation, or through giving assistance or financial assistance as the authority considers appropriate. However, under these provisions the local authority is not obliged to provide neither settled nor emergency accommodation to those assessed as homeless. In other words, they have *discretion* to do so but no *duty*.

A string of very recent High Court decisions concerning local authorities and their statutory responsibilities toward homeless individuals underscore the breadth of this discretion and the lack of any right to shelter which the Courts can protect and enforce. The cases concerned are: *Mulhare v Cork County Council*³⁸, *Middleton v Carlow County Council*³⁹, *Tee v Wicklow County Council*⁴⁰ and *C v Galway County Council*⁴¹. Despite their different facts, when considered together the cases demonstrate a very clear trend: the courts appear extremely reluctant to interfere with or second guess the discretion of local authorities in the discharge of their functions relating to housing.

Mulhare involved a challenge to the refusal of Cork County Council to provide for alternative accommodation more appropriate and accessible to the severe physical and medical needs of the applicant and her mother. The applicants also sought accommodation sufficiently proximate to the hospital they regularly attended for treatment. It was not disputed that the applicant's current accommodation was deeply unsuitable for their needs. It was also accepted that the Council had offered to carry out refurbishment works to adapt the property to make it more accessible⁴².

The Court refused to grant an order directing the council to provide adequate housing to the applicants, or to order they be prioritised in the allocation of accommodation. In doing so, the Court strongly emphasised the expertise of the Council and the comparative lack of judicial competence over issues concerning the allocation of housing.

The Court held that while the allocation of housing by a local authority must be done "in accordance with the scheme of priorities and based on a reasonable and reasoned consideration of an application", it was ultimately a matter within the "competence and expertise of the housing authority and it is not the function of the court to direct how that policy is to be applied in any particular case"⁴³. The Court concluded that "great care must be taken by the courts in the making of any order that might preordain the application or direct the decision-making process of a local authority in its management of housing"⁴⁴.



A similarly deferential approach was taken in *Middleton*, which concerned a challenge to the local authority's determination that the applicant and her son were not homeless under s.2 of the Housing Act 1988. The applicants argued that they met the definition of being "homeless" as provided for in the Act and thus eligible for emergency accommodation pursuant to s.10 of same. The applicants had been living in a tent outside the local authority's office in Carlow due to refusal of emergency accommodation by the County Council. The Respondent in turn argued that the applicants were not homeless as they could reasonably be expected to use alternative accommodation- in this case a family member's home- while the applicants contended they only presented as homeless precisely because their relatives could no longer provide them with shelter.

Expressly citing *Mulhare*, the Court again emphasised the need for deference when reviewing decisions of the local authority. Noting that s.2 and s.10 of the 1988 Act provide the Council with statutory discretion, the Court stated its own role "is limited"⁴⁵.

The Court decided that the appropriate standard of review was that set out in *O'Keeffe v An Bord Pleanala*⁴⁶. Under this standard, decisions of a statutory body will only be quashed if they are "fundamentally at variance with reason and common sense", "indefensible for being in the teeth of plain reason" or "flagrantly" disregarded common sense⁴⁷.

This standard meant that the Court's jurisdiction was limited to reviewing "whether there was a rational basis for the decision of the respondent in the context of the provisions of the Act of 1988"⁴⁸. The Court held the local authority's determination that the applicant was not homeless and that she could rely on family and friends for accommodation support was not fundamentally irrational- despite the applicant's strenuous insistence that she could not do so.

The Court in *Tee v Wicklow County Council* also applied the deferential *O'Keeffe* standard, holding that the discretion of the Council could only be displaced where it was "arbitrary or capricious manner or in a manner that flies in the face of fundamental reason and common sense"⁴⁹. The Court added that in dealing with issues such as the homeless crisis, the Council "dedicates particular officers to dealing with this issue on a daily basis who clearly possess significant expertise in this area to which the court should extend considerable deference"⁵⁰. The Court held that the Respondent's conclusion that the applicants were not homeless- because they could access alternative accommodation in Malaysia - was not at "variance with fundamental reason and common sense"⁵¹.

A similar tendency was displayed in *C v Galway County Council*⁵², which concerned a lone parent applicant and her five children from the Traveller community. One of the applicants had autism and other severe intellectual disabilities which required specialist medical treatment five days a week.

Two of the other applicant children had milder forms of intellectual difficulty. The applicants became homeless after they were evicted from private rented accommodation and were provided with emergency accommodation. The applicants were eventually offered transitional accommodation, but this was refused on the basis that the location meant that the applicant child with severe mental disabilities would not be able to attend treatment on a 5-days a week basis. Following this refusal, the Council withdrew emergency accommodation from the applicants. The applicants argued this withdrawal was in breach of the Constitution and European Convention on Human Rights Act 2003, particularly due to the fact most applicants were vulnerable children.

The Court rejected this argument and concluded that the Council's decision was reasonable and not in breach of the applicant's rights. The Court added that it "should be slow to interfere with the decision of expert administrative tribunals", implying that the Council was such a body⁵³. Notably, the Court in *C v Galway* did not consider or engage in any detailed arguments made in respect of the applicants' rights under the Constitution and ECtHR Act 2003. In particular, the Court did not address the argument made under article 42A, despite the fact the applicant's children were clearly potentially adversely affected by the decision.

The judicial trend of extending *O'Keefe* deference to local authorities makes successful challenges to exercises of statutory discretion considerably difficult, unless a decision is manifestly unreasonable or taken in bad faith. The Court's consistent use of the *O'Keefe* standard of review- which merely asks whether there was relevant materials for the public authority's decision - is the most deferential standard of review, considerably more deferential than the proportionality test outlined by the Supreme Court in *Meadows v Minister for Justice*⁵⁴.

The Courts' adoption of the *O'Keefe* standard of review is significant as this standard has typically been reserved for decisions implicating "areas of special skill and knowledge, such as planning and development", such as the decisions of An Bord Pleanála. This trend is likely to make successful challenges to exercises of statutory discretion touching on homelessness considerably difficult, unless a decision is manifestly irrational or taken in bad faith. The decisions also highlight starkly that there is neither a statutory nor constitutional right to basic shelter or housing in Irish law.

(c) No Legal aid for housing and homeless matters

Legal aid is essential in providing individuals with access to justice, especially in the legal enforcement of economic, social and cultural rights⁵⁵. In the absence of any constitutional or statutory right to housing in Ireland, bringing judicial review proceedings is the only possibility left for an applicant to reverse adverse findings made by the local authority. Thus, it is of paramount importance that individuals are able to afford and initiate proceedings to review the decisions of local authorities. Legal aid is legislated through the Civil Legal Aid Act 1995. It provides a statutory basis for the Legal Aid Board whose primary function is to provide legal aid and advice in civil cases to persons who satisfy the requirements of the Act. Civil legal aid is largely restricted to matters of family law. Legal aid in the category of land dispute cases or conveyancing cases is explicitly prohibited.

There are only two main exceptions to the exclusion of legal aid to be provided in housing issues. 1) Section 28 (9)(c)(iii) of the 1995 Act provides for legal aid where a subject matter of a dispute is the applicant's home, where the applicant either suffers from an infirmity of mind or body due to old age or to other circumstances, or may have been subjected to fraud, duress or undue influence in the matter and where a refusal to grant legal aid would cause hardship to the applicant. 2) Legal aid may also be provided for proceedings arising out of a dispute between spouses as to the title to or possession of any property and in

respect of proceedings under the Landlord and Tenant Acts, 1967 to 1994 (insofar as they relate to residential property), the Residential Tenancies Act 2004 and a limited number of other Acts in accordance with section 28(9)(c) (i) of the Civil Legal Aid Act 1995 as amended. In our experience, these exceptions do not cover the majority of complex legal issues faced by those who are homeless or at risk of homelessness. For example, a homeless family attempting to challenge a refusal of emergency accommodation by a local authority.

Due to the lack of legal aid for housing and homeless matters, independent law centres such as Mercy Law Resource Centre and Ballymun Community Law Centre were set up in order to fill the void and provide quality legal advice, information and legal representation to empower disadvantaged individuals and promote greater access to justice. However, these law centres are limited in their funding and their capacity to meet all the needs of the society. Robust statutory provision of legal aid is crucial to successfully tackle the problem of insufficient legal aid services for the most vulnerable.

“ Local authorities have a discretion but no duty to provide emergency accomodation for children in families ”



PART III: NON-JUDICIAL FORMS OF REDRESS

Apart from the option of bringing judicial review proceedings to quash the local authority's decision, non-judicial forms of redress are available but their substantive effectiveness is in serious doubt.

(i) Ombudsman for children

This statutory office was established under the Ombudsman for Children Act 2002. Its main functions are to protect the rights of children and young people in Ireland, investigate complaints about services provided to children by public organisations, and promote the rights and welfare of children through advising government on policy decisions. In recent years, the proportion of complaints relating to housing concerns increased year on year, doubling from 3% in 2014 to 6% in 2017⁵⁶. 81% of housing complaints relate to access to suitable housing, including local authority housing allocation, suitable housing for children with disabilities, emergency homeless accommodation, medical priority allocation and general transfer issues. Complaints can only be made to the Ombudsman if the complainant is not satisfied with the outcome of the internal complaints/appeals procedure of the body against whom the complaint is lodged. If legal proceedings have already commenced, the Ombudsman may not investigate such complaints. Any complaints must be made to the Ombudsman within 12 months where the time starts to run from the date the decision is made, or action is taken or from the date that the complainant became aware that the decision or action occurred.

Complaint findings of the Ombudsman for Children are not legally binding and most complaints are resolved at the preliminary

examination stage. When complaints are not possible to be solved at the preliminary examination stage, the Ombudsman will write to the public body and advise them of any remaining concerns which still remain and potential links between their administrative actions and adverse effect on a child. The Ombudsman will then draft terms of reference and notify the public body of potential areas for investigation and ask for a response from the public body to the Ombudsman's proposal to investigate. After the receipt of such response, the Ombudsman may decide to continue to a full investigation or if there is no case to answer, or if the issue has already been resolved, to end such investigation.

If the complaint has reached the final stage of the complaints process and investigation, and the Ombudsman makes a finding that there was a link between the public body's actions and adverse effect on the child or children, recommendations will be made to the public body. The public body is not obliged to follow any such recommendations, however, failure to comply may result in a report drafted by the Ombudsman to the Houses of the Oireachtas. There are plenty of examples of successfully resolved complaints⁵⁷ made to the Ombudsman which caused the public body to provide accommodation after preliminary examination had been initiated, but these also demonstrate the inaction of the public body before any such complaints were lodged.

The non-judicial form of redress provided by the Ombudsman for Children's Office is only limited to making recommendations for public authorities regarding their decisions but no remedies are available to the complainant - the homeless child or their family. Their remedy is dependent on the public body's own decision on whether to amend their previous practice and provide suitable accommodation after such complaint is lodged as there is no constitutional nor legislative duty to provide suitable and adequate housing.

(ii) Irish Human Rights and Equality Commission (IHREC)

The IHREC is set up under the IHREC Act 2014.⁵⁸ Its functions include:

- Protecting and promoting human rights and equality.
- Encouraging the development of a culture of respect of human rights, equality, and intercultural understanding in the State.
- Promoting understanding and awareness of the importance of human rights and equality of the State.
- Encouraging good practice in intercultural relations, to promote tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person, and
- Working towards the elimination of human rights abuses, discrimination and prohibited conduct.

S10(2) of the 2014 Act sets out the specific functions that are intended to further the overall functions of the Commission as provided in s10(1). These specific functions include:

- Instituting legal proceedings in certain matters;
- providing practical assistance, including legal assistance, to persons in vindicating their rights and;
- conducting inquiries in accordance with s35 of the Act where it considers that there is evidence of (i) a serious violation of human rights or equality of treatment obligations in respect of a person or class of persons, or (ii) a systemic failure to comply with human rights or equality treatment obligations.

Thus far, no inquiries have been initiated by the IHREC and these powers remain untested. IHREC has been vocal in encouraging the government to bring its housing & homeless policy in line with international human rights best practice.⁵⁹ While this willingness to scrutinise and critique government policy is welcome, IHREC's more robust statutory powers remain untried. Moreover, while it can admonish government for policy decisions which adversely impact human rights, IHREC can do little to compel state bodies to take active steps to redress human rights breaches.

PART IV: GAP IN LEGAL PROTECTION – A COMPARATIVE VIEW

(a) Scotland:

The right to housing is recognised in over eighty-one constitutions and several countries have statutory rights providing the right to housing. Scotland provides a prominent example of a statutory right to housing. Special provisions are contained with statutes in relation to protection for homeless children. Part II of the Housing (Scotland) Act 1987 as amended sets out a local authority's duties to homeless people in Scotland. Individuals who apply to the local authority for homeless accommodation with dependent children have a statutory right to shelter. Local authorities have an additional statutory duty to have regard to the best interests of the applicant's dependent children, and must ensure that accommodation provided for such a person is suitable for occupation by such children, so far as consistent with their best interests.

Scotland has also adopted a national programme –Getting It Right For Every Child (GIRFEC) – in considering the best interests of children facing homelessness. As a corporate and multi-agency approach is adopted in Scotland, local authority and other relevant agencies work together to best meet the needs of the individual child. It is noted in the guidance for local authorities that the responsibility for meeting the best interests of the child does not rest solely with the local authority section dealing directly with homelessness. Other organisations such as the Child Protection Committees, NHS Boards, police services, children's reporters and the voluntary sector all co-operate and play key

roles in identifying, supporting and protecting children experiencing homelessness⁶⁰.

Scotland has banned the use of B&B accommodation for applicants who are pregnant or have children except in very limited circumstances, including:

1. where the applicant is homeless because of an emergency, such as a flood, or fire
2. the applicant have specifically asked to be placed in an area where there is no other temporary accommodation available
3. homeless application was made outside normal office hours, or
4. the council does not have any suitable temporary accommodation for the applicant. Even if applicants with children were placed in B&B accommodation, the applicant should not have to stay there for more than 7 days.⁶¹



(b) England:

The recent adoption of Homelessness Reduction Act 2017 (in force from April 2018) creates a new duty to prevent homelessness for all eligible applicants threatened with homelessness in England⁶². Apart from this preventative statutory duty, housing authorities also have the duty to address any support needs of individuals who are homeless or at risk of homelessness and their family members, through coordinating with relevant agencies and departments. Similar to Scotland, England has restricted the use of B&B accommodation. It is unlawful for a council to use B&B accommodation for pregnant women or families with children for more than 6 weeks.

A homeless applicant is also deemed to have priority need for housing assistance if he/she has dependent children who usually live with them and are unable to support themselves, including their own children, step-children or other children in their household.

(c) France:

Like Scotland, France provides for statutory protection of the right to housing and has provided protective measures for children who are facing homelessness. French law creates categories of priority situations for allocating housing or accommodation. Guardians of at least one minor child, or guardians who have at least one dependent with a disability are explicitly classified as people with ‘priority housing needs’. Children are given express acknowledgement in the assessment of priorities for housing applications. People who are deemed “priority” by a mediation committee have a statutory entitlement to social housing support in a timely fashion, and can take legal action before an administrative court to have this right judicially enforced. Compensatory actions can also be taken, and the availability of a legal remedy has helped ensure the rehousing of over 100,000 households since the adoption of a right to housing in 2007⁶³.



PART V: KEY ISSUES AND RECOMMENDATIONS

Bridging the Gap in Legal Protection for homeless children in Ireland

The Irish Society for the Prevention of Cruelty to Children (ISPCC) has highlighted failures of the Irish state to protect homeless children in Ireland⁶⁴. In their findings, they note that children in Ireland are worse off than children who are homeless in the UK due to fewer legal protections. Ireland does not have a constitutional or statutory right to housing. UK and France on the other hand have provided their children facing homelessness with a legally enforceable right to housing. England and Scotland have provided further protection as to afford their children a right to temporary accommodation and assistance. Over 3,600 children are living in emergency⁶⁵ accommodation in Ireland and yet there is no statutory regulation of such accommodation. The use of bed and breakfast accommodation for families with children is banned in the UK. In contrast, although the ‘Rebuilding Ireland’ plan has committed to ending the practice of using B&B as emergency accommodation in Ireland by 2017, the increased use of alternatives such as hotels and family hubs have difficulties similar to using B&Bs as emergency accommodation. Hotels and family hubs are similarly unsuitable and unsustainable for children as an emergency accommodation in the long term.

Without time limitations for the use of unsuitable emergency accommodation for homeless children in Ireland, the average period spent by homeless families in emergency accommodation is ten and a half months⁶⁶. This is likely to be longer than their peers in Scotland. Aside from concerns over a lack of legal time limits, the lack of clear minimum standards for emergency accommodation remains a concern, and safety guidance/voluntary codes for child safety in emergency accommodation have yet to emerge. In contrast, the use of hotels/ B&Bs in Scotland as emergency accommodation is subject to regulation on minimum standards of accommodation.

Ireland’s failure to provide adequate and suitable temporary or emergency accommodation⁶⁷ for homeless children has not gone unnoticed by international human rights bodies, and has attracted concerns from the UN Committee on the Rights of the Child in its Concluding Observations to the Irish government in February 2016 as well as criticism from the UN Special Rapporteur on Child Protection⁶⁸.

“Children in Ireland are worse off than children who are homeless in the UK due to fewer legal protections.”²⁵

(a) UN Special Rapporteur's Report

The UN Special Rapporteur's report on human rights-based national housing strategies laid out 10 key principles of an effective rights based housing strategy, arguing that a strategy should:

1. Be based in law and legal standards.
2. Prioritise those most in need and ensure equality.
3. Be comprehensive and whole-of-government.
4. Encourage rights-based participation.
5. Be accountable to budgeting and tax justice.
6. Have human rights-based goals and timelines.
7. Be open to accountability and monitoring mechanisms.
8. Ensure access to justice.
9. Clarify the obligations of private actors and regulate financial, housing and real estate markets.
10. Implement international cooperation and assistance.

These principles could serve as useful guidelines to fill Ireland's gap in legal protection of homelessness and more protection should be afforded to children experiencing or facing homelessness.

(b) Issues for consideration

We offer the following recommendations as examples of reforms which would bolster legal protection for homeless children:

- Introduction of a human rights-based housing strategy to progressively realise the right to adequate housing for all.
- Legal aid should be made available for homeless and housing matters.
- Priority for applicants with children should be given as safe and secure accommodation is fundamental to well-being and family life.
- Statutory provision should also be made for the local authority to take into account the best interest of the child when discharging their functions.
- Time limits should be imposed on the use of emergency or temporary accommodation for applicants with children as it has been demonstrated that the damaging impact of unlimited stay in emergency or temporary accommodation can be severe⁶⁹.
- Allow homeless families who are deemed homeless to choose whether to opt for the 'self-accommodation' option⁷⁰ or not.
- Services provided to children living in emergency or temporary accommodation should be improved. Access to school, healthy food and clean water should be guaranteed.

- Provide robust statutory based standards for the use of emergency accommodation to house children and families.
- Change from a welfare-based approach to a rights-based approach in both housing strategy and child protection.
- Most importantly, to provide a base rock of legal protection a constitutional or statutory right to housing must be introduced.

(c) Conclusion

As Mercy Law Resource Centre has consistently maintained, a legally enforceable right to housing would not “give a key to a home for all”, but it would provide a “recognition that a home is central to the dignity of each and every person and a foundation of every person’s life”⁷¹. Such a right would also mean that the most vulnerable children and families in the state would be better able to vindicate their entitlement to the basic human rights which form the cornerstone of our constitution.



ENDNOTES

- 1 Focus Ireland – April 2018 figure; according to the Department of Housing the latest figure of homeless children across Ireland is 3,755.
- 2 Discrimination and inequality in housing in Ireland report, Irish Human Rights and Equality Commission, 15 June, 2018
- 3 UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 21, The Right to Adequate Housing, available at https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf
- 4 Unenumerated right under A40.3 Constitution of Ireland; recognised in *Ryan v Attorney General* [1965] I.R. 294
- 5 A44 Constitution of Ireland
- 6 A41 Constitution of Ireland; A8 (1) European Convention of Human Rights
- 7 *Ryan v Attorney General* [1965] I.R. 294
- 8 Article 40.3 of the Constitution of Ireland
- 9 Article 42A of the Constitution of Ireland
- 10 [1965] I.R.294; see also Gerard Hogan and Gerry Whyte, J.M. Kelly: *The Irish Constitution*, 4th ed (Dublin: Lexis Nexis Butterworths, 2003) –“this was the first time that anyone had claimed a specific right as latent in the general expression ‘personal rights’ and not deduced from any of the rights actually enumerated in the section- life, property etc.”
- 11 [1965] I.R.294, 312
- 12 (HC ex tempore, 10 June 1994)
- 13 (HC ex tempore, 10 June 1994), at 3-4
- 14 [2001] IESC 101; [2001] 4 I.R. 259
- 15 Gerry Whyte, ‘Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement’ Draft paper by Gerry Whyte, Law School, Trinity College Dublin, presented at the IHRC Conference on Economic, Social and Cultural Rights, 9 December 2005
- 16 [2001] IESC 101; [2001] 4 I.R. 259, at 316
- 17 [2001] IESC 101; [2001] 4 I.R. 259, at 316
- 18 Gerry Whyte, ‘Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement’ Draft paper by Gerry Whyte, Law School, Trinity College Dublin, presented at the IHRC Conference on Economic, Social and Cultural Rights, 9 December 2005
- 19 [2015] IESC 28
- 20 [2015] IESC 28 [70]
- 21 [2015] IESC 28 [74]
- 22 See *Mulhare v Cork County Council* [2017] IEHC 288; *Middleton v Carlow County Council* [2017] IEHC 528; *Tee v Wicklow County Council* [2017] IEHC 623 and *C v Galway County Council* [2017] IEHC 784
- 23 In *A v Refugee Appeals Tribunal* [2011] IEHC 373 Hogan J relied on the right of the person to quash a decision of the Refugee Appeals Tribunal, which had not have sufficient regard to the risk that A, a minor, would be subject to female genital mutilation if she were deported to Nigeria. As he observed: “The subjection of any female to FGM is an open assault on her person, the very right which by Article 40.3.2 of the Constitution of the State expressly undertakes to defend and vindicate in so far as it is practicable to do so”. The right was similarly invoked to protect physical wellbeing in *H v HSE* [2011] IEHC 297 where Hogan J ordered the detention of a disturbed young man in St. Patrick’s Institution not for any punitive reason, but for his own safety and welfare. Kenny observes that the “protection of physical integrity is surely the very least that this right could mean, though its application to particular cases could be a matter of dispute, and is surely subject to limitation.
- 24 [2011] IEHC 235
- 25 [2011] IEHC 235 [8]-[9]. Hogan J subsequently distinguished *Kinsella* on the facts in *Connolly v. Wheatfield Prison* [2013] IEHC 334 where the plaintiff was kept in solitary confinement at his own request. However he was not subject to sensory deprivation, his case was kept under constant review and he received considerable care and attention from the prison psychologists (though Hogan J cautioned that if the detention continued indefinitely without any variation, the plaintiff’s constitutional rights might be violated). Hogan J did say that solitary confinement must be regarded as an exceptional measure that requires monitoring and regular review

by the authorities. In *Sullivan v Boylan* (No.1), [2012] IEHC 389 Ms. Sullivan had been subject to threats and intimidation by a debt collector, which included repeated phone calls, emails, and text messages, and the besetting of her home. Hogan J ordered an injunction restraining him from this conduct, as it violated inter alia, A40.3.2's protection of the person: "[I]t requires little imagination to visualise the acute mental distress which Ms. Sullivan suffered out of this (...) outrageous conduct. The citizen's right to the security of his or her person necessarily implies that the subjection by the unlawful means of any person to what would objectively be regarded as acute mental distress must be regarded as amounting in itself to a breach of A40.3.2"

26 David Kenny, 'Recent Developments in the Right of the Person in Article 40.3' 327, "Mental integrity could be interpreted in a fairly narrow way: as a negative entitlement, preventing treatment that would jeopardise the psychological well-being of individuals, as in *Kinsella* and *Sullivan*. But it is apparent that this could be a broad protection".

27 People experiencing homelessness make up a growing vulnerable population that has an unacceptably high risk for preventable disease, progressive morbidity and premature death. Homeless people experience much higher levels of Hepatitis-C, HIV, TB, poor nutrition, drug and alcohol addiction and mental health difficulties than the

general population. See The Simon Community, 'Submission by the Simon Communities of Ireland to the All Party Oireachtas Committee on the Constitution' <http://www.simon.ie/Portals/1/Docs/policies/submissions/archives/right_to_housing_sept_2003.pdf>

28 See *Mulhare v Cork County Council* [2017] IEHC 288; *Middleton v Carlow County Council* [2017] IEHC 528; *Tee v Wicklow County Council* [2017] IEHC 623 and *C v Galway County Council* [2017] IEHC 784

29 *Dos Santos v. Minister for Justice and Equality* [2015] IECA 210, [2015] 2 I.L.R.M. 483 per Finlay Geoghegan J. at para. 18.

30 *Tee v Wicklow County Council* [2017] IEHC 288; *C v Galway County Council* [2017] IEHC 784.

31 However, as noted above the decision of the Supreme Court in *O'Donnell* is authority for the proposition that in exceptional cases- when a housing authority is faced with clear evidence of inhuman and degrading conditions - it must ensure it discharges its statutory powers under the Housing Acts in a manner which vindicates constitutional rights.

32 Child welfare and protection services formerly operated by the Health Service Executive (HSE) are now operated by the Child and Family Agency since January 2014.

33 Social Housing Assessment Regulations 2011, art 5

34 Housing (Miscellaneous Provisions) Act 2009, art 20

35 Equality Acts 2000-2015.

36 Housing (Miscellaneous Provisions) Act 1997, s3

37 Housing (Miscellaneous Provisions) Act 2014, Part 2

38 [2017] IEHC 288

39 [2017] IEHC 528

40 [2017] IEHC 623

41 [2017] IEHC 784

42 [2017] IEHC 288, para 1

43 *Ibid*, para 40

44 *Ibid*, para 56

45 [2017] IEHC 528, para 40, 43

46 [1993] 1 I.R. 39

47 [2017] IEHC 528, para 40

48 *Ibid*, 43

49 *Tee*, para 24

50 *Ibid*, para 25

51 *Ibid*

52 [2017] IEHC 784

53 *Ibid*, para 17

54 [2009] IESC 3. This more demanding test requires that: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

- 55 Garth, Byrant G. and Cappelletti, Mauro, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 Buffalo Law Review 181
- 56 Ombudsman for Children Annual Report 2017
- 57 For several relevant case studies in the area of housing and homelessness, see <https://www.oco.ie/complaints/case-studies/>.
- 58 Under s10(1) of the 2014 Act.
- 59 For example, in 2015, the IHREC has published a report to the UN committee on the rights of the child in Ireland. IHREC recommended that the State take further steps to progressively realise the right to adequate housing. In order to fulfil the State's obligations under Article 27(3) of the UN Convention on the Rights of the Child (UNCRC), IHREC recommended that the State take measures to ensure that both social housing and affordable housing are of sufficient quality and are made accessible to low income families.
- 60 Paragraphs 3.2-3.13 of Chapter 3 of the Code of Guidance on Homelessness published by the Scottish Executive detail provisions for partnership working with other agencies and use of protocols.
- 61 The Homeless Persons (Unsuitable Accommodation) (Scotland) Amendment Order 2017 which amended Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014 which provided a cap of 14 days of using B&B as accommodation for families with children, unless there are exceptional circumstances.
- 62 <http://www.housingrightswatch.org/page/state-housing-rights-20; Equality Act 2010 impose 'equality duty' on social housing providers and all local government authorities in England to adopt measurable equality objectives>
- 63 'L'Effectivite du droit au logement opposable' Minister for Housing 2016 report on effectiveness of the DALO law.
- 64 <https://www.ispcc.ie/news-media/news/homeless-children-in-ireland-worse-off-than-their-uk-peers-ispcc-highlights-failures-of-state-on-international-human-rights-day-15376>
- 65 The phrase temporary and emergency are used interchangeably.
- 66 Data on homeless families in emergency accommodation
- 67 <https://www.independent.ie/irish-news/news/dr-niall-muldoon-housing-policy-and-legislation-is-failing-children-35984157.html>
- 68 November 2016, annual report of the Special Rapporteur on Child Protection
- 69 Jannette E. Herbers, J.J. Cutuli, Amy R. Monn, Angela J. Narayan, Ann S. Masten, "Trauma, Adversity and Parent- Child Relationships Among Young Children Experiencing Homelessness' J Abnorm Child Psychol (2014) 42:1167-1174
- 70 This is an alternative method of providing emergency accommodation that is allowed under the broad flexibility afforded to housing authorities under s10 of the Housing Act 1988, the families assessed as homeless is required to source their own hotel accommodation which local authority will then pay for; see further analysis of the impact of 'self-accommodation' option at: <https://mercyllaw.wordpress.com/2017/05/25/the-self-accommodation-option-of-emergency-accommodation-is-failing-vulnerable-homeless-families/>
- 71 Mercy Law Resource Centre, 'The Right to Housing in Ireland', (May 2016), p.2



MLRC
Mercy Law Resource Centre

Mercy Law Resource Centre


25 Cork Street, Dublin 8

T 01 453 7459 **F** 01 453 7455

E info@mercylaw.ie

W www.mercylaw.ie

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