



The ESC Rights Initiative

**Dedicated to Strengthening
Constitutional Protection of Economic,
Social and Cultural Rights**

www.escri-irl.org

Submission to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach on responding to the Eighth Report of the Convention on the Constitution (Economic, Social and Cultural Rights (ESC))

27 February 2018

1 Background

In accordance with its remit, in 2013 the Convention on the Constitution conducted a full investigation in order to ascertain whether the fundamental human right to health, housing, education, and other economic, social and cultural (ESC) rights are properly protected in Irish law. **The Convention members subsequently concluded (by 85%) that protection of ESC rights needed to be strengthened in Bunreacht na hÉireann.** Government has committed to responding to all of the recommendations of the Convention within 4 months of receiving its report. To date (2018), Government has not responded to the Eighth Report of the Convention which addressed ESC rights. It is that context that we make this submission.

2 This Submission

This submission sets out the case for why economic, social and cultural rights should be given explicit legal recognition in Bunreacht na hÉireann.

The submission draws heavily on the work experiences of our member organisations in dealing with the many social issues (including accommodation, health, poverty, educational and cultural alienation) faced by the communities they work with. The submission is also informed by the work of human rights lawyers in seeking the

vindication of human rights through the courts. It is the firm conviction of all those involved that no substantial progress will be made on these matters until they are recognised as fundamental rights in our Constitution.

The submission is also made in the full knowledge that **the elected legislature and appointed executive over many decades have proved to be either unable or unwilling to adequately address poverty and inequality.** Clearly, this matter needs revisiting, particularly in light of the findings recently published by the European Committee of Social Rights (ECSR) in its review of Ireland’s performance under the European Social Charter, covering the years 2012 to 2015. In total, 13 conclusions of non-conformity were found, with the rate of conformity in Ireland being below the overall average of State parties. **Among issues highlighted were the lack of an adequate overall and coordinated approach to combating poverty and social exclusion,** as well as an effective and equal access to social services. Ireland was also criticised for maintaining austerity-era cuts to social security entitlements, despite the onset of economic recovery.

Furthermore, a report by the Economic and Social Research Institute (ESRI) in November 2017 ¹ highlighted the effect of the recession on families, finding that overall, 94% of families reported being affected by the recession, with 23% “very significantly” affected. In addition, another ESRI report on Poverty Dynamics of Social Risk Groups in the EU, published ² in January 2018. It found that lone parents and families of working-age adults with a disability experience higher deprivation and poverty rates across all countries. Ireland stood out as having poorer outcomes for vulnerable groups, especially in terms of material deprivation. There was also some evidence of polarisation over time to the detriment of vulnerable groups. This again serves to highlight how the most vulnerable are being left behind and the need for enhanced protection and more proactive targeted measures for such groups.

The Pobal Deprivation Index, also released last year, ³ highlighted that those in disadvantaged communities in urban areas, saw further increases in deprivation in the past number of years and that the locations of deprived and affluent areas have not changed. It further revealed that small towns and more rural areas are still seeing the consequences of job loss, cutbacks in services, emigration and austerity for struggling households. These communities are unable to take advantage of the recent economic improvements due to poor social infrastructure, such as a lack of public transport, broadband and key services.

1 <http://www.esri.ie/pubs/RB20170404.pdf>

2 <http://www.esri.ie/pubs/BKMNEXT345.pdf>

3 <http://www.pobal.ie/Pages/New-Measures.aspx>

These studies indicate that the impact of the global economic and financial crisis on Ireland has been significant. The severity of this impact is widely documented, including by the UN Special Rapporteur on Extreme Poverty and Human Rights during her visit to Ireland in 2011, "*Ireland's economic and financial crises have wrought havoc on the country, with grave implications for the Irish people*". During this same visit the independent expert stated that she saw the crisis as providing

... an opportunity for Ireland to put human rights at the heart of the recovery, and to meet some of its long-standing social goals", and called on the "Government to ensure that all rights protected under international human rights treaties, in particular economic, social and cultural rights, are given full effect in domestic law."⁴

3 What are economic, social and cultural rights?

Economic, social and cultural rights are fundamental human rights and therefore apply to everyone to ensure a life of dignity. These include, but are not exclusive to:

- Access to education, including cultural activities
- Access to health services
- Access to social protection
- Access to housing
- Access to employment
- Access to quality public services
- Access to social rights for minority social groups.

The Irish Government committed to these human rights by ratifying a range of international treaties, both through the United Nations and through its membership of European institutions (see Section 6)

4 The people's opinion – The Constitutional Convention

The Constitutional Convention, as a deliberative process of participative democracy provided an opportunity for the people of Ireland to review the provisions of the Constitution in terms of its protection of human rights in the context of Ireland's international commitments and obligations. By a large majority (85%) the members of the Convention recommended the strengthening of ESC rights in the Constitution.

⁴ Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, A/HRC/17/34/Add.2.

Polling carried out by Red C in April 2012, commissioned by Amnesty International, identified that 84 per cent of people believe that if the Irish Government commits to protect a human right internationally, it should have to make sure it protects that right in Ireland for all those living here regardless of the person's background. In terms of a popular mandate, it is clear that there is widespread support for constitutional protection of economic, social and cultural rights.

5 How are economic, social and cultural rights protected in Bunreacht na hÉireann?

The 1937 Constitution of Ireland, Bunreacht na hÉireann, contains provisions for human rights. However, while the Constitution makes some provision in relation to private property, and primary education, most of the rights protected in the Constitution are civil and political rights. The Constitution does not offer similar guarantees for all economic, social and cultural rights.

Article 45 on the Directive Principles of Social Policy, allows for a right to a livelihood, protection of the vulnerable and an obligation of the state towards the health of people living in Ireland. However, Article 45 also states that the Directive Principles

... shall not [...] be cognisable by any Court under any of the provisions of this Constitution

These principles are intended to inform legislators and policy makers but they are rarely, if ever, referred to by the Oireachtas. There have been some cases where Irish courts have interpreted other provisions in the Constitution to protect ESC rights, but this has been very limited.⁵

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

- The Constitution Review Group concluded in 1996 that “*rights expressly protected by the Constitution are, by contemporary standards, incomplete*” and that “*articles 40-44 contain flaws and are in need of revision*”.⁶
- The Ninth Report of the All Party Oireachtas Committee on the Constitution made a commitment to a further investigation of whether the Constitution should include legally enforceable, socio-economic rights. This has not occurred.

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

6 Report of the Constitution Review Group, Dublin, 1996, p.188

- In the Belfast/Good Friday Agreement, the Irish Government agreed to take steps to further strengthen the protection of human rights in its jurisdiction, bringing forward measures to strengthen and underpin the constitutional protection of human rights. This included drawing on international legal instruments in the field of human rights.

However, few of these gaps identified in official reports commissioned by successive governments have been addressed.

Indeed, the current Constitution is out of step with Ireland's international obligations.

6 Ireland's International Obligations

This submission is also made with the knowledge of new long term international commitments of the Irish State, including the following:

- *The United Nations International Covenant on Economic, Social and Cultural Rights (ICESR)*

The United Nations International Covenant on Economic, Social and Cultural Rights in October 1973. This covenant forms part of the International Bill of Rights, which forms the basis of international human rights law. It protects the following rights:

- to **work**;
- to the enjoyment of **just and favourable conditions of work**;
- to **form trade unions** and join the trade union of their choice;
- to **social security**, including social insurance;
- to the widest possible **protection and assistance for the family**;
- the right of everyone to an **adequate standard of living for their family**, including adequate food, clothing and housing, and to the continuous improvement of living conditions;
- the right of everyone to the enjoyment of the highest attainable standard of physical and mental **health**;
- to **education**;
- to take part in **cultural life**.

The Covenant also protects rights that are not named in the document, but are derived from those that are named. For example, the right to strike is not named,

but is included in the right to form and join trade unions. Similarly, the right to housing also includes protection from forced eviction and for any housing to be of an adequate standard.

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

The UN Committee on Economic, Social and Cultural Rights, which oversees the implementation of the Covenant, have published *General Comments* to be read alongside the Covenant. These comments outline what *Rights* mean and the obligations on States to implement them. Independent experts, such as the Special Rapporteur on health, have also provided significant detail on the meaning of these rights.⁷

The Covenant recognises that governments do not necessarily have the resources to deliver the full protection of rights instantly. Instead the Covenant requires States to take immediate steps to protect these rights, by delivering, at the very least, a minimum level of protection of these rights, and ensure that everyone can access them without discrimination. It also requires that States **deliver these rights progressively over time**. In doing so they must use the *maximum resources available to them*. It also says that governments **must not regress** in the delivery of these rights without considering all other options and only in extreme circumstances.

Ireland signed the ICESCR in 1973 and ratified it in 1989. By ratifying the Covenant Ireland agreed to abide by and implement its statutes. However, the Covenant has never been given legal effect in Irish law.

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

⁷ For example, the Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/67/302

The UN Committee on Economic, Social and Cultural Rights, when examining Ireland's compliance with the Covenant, recommended that Ireland incorporate the Covenant, including all of these economic, social and cultural rights, in the Constitution. ⁸ This call was echoed by the UN Special Rapporteur on Extreme Poverty and Human Rights following her visit to Ireland in 2011.

Furthermore, the General Comments of the Covenant, in seeking to protect these rights during an economic crisis advise, that

If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified... ⁹

This did not happen!

➤ *The United Nations Agenda 2030 for Sustainable Development*

In 2015 the United Nations adopted a resolution *Transforming our World: the 2030 Agenda for Sustainable Development* better known as Agenda 2030. The goals set out in Agenda 2030 replaced the [Millennium Development Goals](#) that came to an end in 2015. However, unlike the MDGs, Agenda 2030 applies not just to *developing* countries but to all UN member countries. Agenda 2030 includes many goals directly related to the provision and delivery of policies, such as on minimum income and poverty reduction (goal 1), health (goal 3), education (goal 4), quality housing and homelessness (goal 11), decent work (goal 8) and strong institutions and services (Goal 16).

Along with 192 other countries, Ireland signed these UN objectives on 25 September 2015.

➤ *Treaty on the European Union (TEU) and the Treaty Establishing The European Communities (TFEU) (together known as the Lisbon Treaty)*

The TEU sets out the fundamental principles of the Treaties in its preamble:

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the

⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, 2002, UN Doc. E/C.12/1/Add.77, para.23

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

inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law. ¹⁰

This sentiment is repeated in Article 2, which goes further by also referring to *respect for the human rights of persons, including the rights of persons belonging to minorities*. While Article 6 ... *recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights ... which shall have **the same legal value as the Treaties***.

This *Charter on Fundamental Rights of the European Union* is an integral part of the Treaties. It was first adopted as a political declaration by the European Council in Nice, December 2000, then integrated into the Lisbon Treaty in December 2007. The Charter sets out the fundamental principles and common values underpinning European economic, social and cultural rights.

Conscious of the indivisible, universal values of human dignity, freedom, equality and solidarity, it is based on the principles of democracy and the rule of law. ¹¹

The Charter set out the detailed rights of European citizens under the Treaties to:

- Dignity (Title 1)
- Freedoms (Title 2)
- Quality (Title 3)
- Workers' rights (Solidarity - Title 4)
- Citizens' rights (Title 5)
- Justice (Title 6).

The TFEU goes into greater detail on the treaty rights of a) free movement of persons, including workers (Title IV); b) employment rights (Title IX); social and labour market policies (Title IX).

The TEU and the TFEU, including the Charter on Fundamental Rights were ratified by the Irish electorate by referendum in October 2009 and thus incorporated into Bunracht na hÉireann, under Article 29.4.5° and 29.4.6°.

10 *Treaty on the European Union (TEU) Preamble*

11 *Charter of Fundamental Rights of the European Union, Preamble*

➤ *Council of Europe Revised European Social Charter*

The European Social Charter was adopted by the member States of the Council of Europe in 1961. The Charter was revised and brought up to date in 1996. It sets out to protect the fundamental rights, including social, economic and cultural rights and guarantees all citizens of the member States rights and freedoms that are important to all individuals in their day-to-day lives. Ireland ratified the European Social Charter in 2000, but opted out of Article 31 which covers access to housing.

Nonetheless this did not prevent a number of decisions against Ireland on matters of accommodation/housing. For example, in October 2017, the European Committee of Social Rights, which monitors the actions of Council of Europe member States with regard to the Social Charter, issued its decision following investigation of a Collective Complaint (FIDHV Ireland 2014). In it they found Ireland to be in violation of Article 16 (The rights of the family to social, legal and economic protection) of the Revised European Social Charter and that it failed to take sufficient and timely measures to ensure the right to housing of an adequate standard for a not insignificant number of families living in Local Authority Housing. The Committee said that the evidence presented raised serious concerns about both the habitability of the housing and the access of tenants to services

➤ *European Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights)*

This international treaty is intended to protect [human rights](#) and fundamental [freedoms](#) in [Europe](#). Drafted in 1950 by the then newly formed [Council of Europe](#), the convention entered into force on 3 September 1953. All forty-seven [Council of Europe member States](#) are party to the Convention. In 1959 the Convention established the [European Court of Human Rights](#) (ECHR). Any citizen of the member States who feels his or her rights have been violated under the Convention by the State in which they live can take a case to the ECHR. Judgments are binding on the States concerned and they are obliged to execute them. The [Committee of Ministers of the Council of Europe](#) monitors the execution of judgements, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained.

Protocol 12 of the Convention states:

Article 1: General prohibition of discrimination

- 1 *The enjoyment of any right set forth by law shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*
- 2 *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*¹²

➤ *The Interinstitutional Proclamation on European Union Pillar of Social Rights*

Regina Doherty T.D, Minister for Employment Affairs and Social Protection attended a meeting of the Council of Ministers for Employment, Social Policy, Health and Consumer Affairs on 23 October 2017, in Luxembourg, when she spoke of the importance of the European Social Pillar:

*The Interinstitutional Proclamation on the European Pillar of Social Rights is an important political commitment which provides guidance to Member States and the EU institutions. Its aim is to ensure that we have a social system which is robust in the face of 21st century challenges such as globalisation and the changing nature of work.*¹³

Likewise, An Taoiseach, Leo Varadkar TD, when signing up to the European Social Pillar at the EU Social Summit in Gothenburg on 17 November 2017, further indicated the support and commitment of the Irish Government. The European Social Pillar sets out twenty specific principles under three broad categories – (i) equal opportunities and access to the labour market; (ii) fair working conditions; and (iii) social protection and inclusion.

These principles include specific policy areas such as: training & life-long learning; work-life balance; childcare and support to children; social protection; unemployment benefits; minimum income; old age income and pensions; health care; inclusion of people with disabilities; long-term care; housing and assistance for the homeless; access to essential services.

12 *European Convention on Human Rights Protocol 12, Article 1*

13 Speech by Regina Doherty TD Minister for Employment Affairs and Social Protection to the Council of

Ministers for Employment, Social Policy, Health and Consumer Affairs, October, 2017.

7 Why Bunreacht na hÉireann?

Apart from all of the international obligations of the Irish State, without protection of these rights in **Irish** law, people in Ireland cannot legally claim their economic, social and cultural rights. The continuing lack of recognition of these rights in national law remains a major obstacle to their legal enforcement. This has real consequences for citizens of Ireland whose rights are not protected.

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

- Bunreacht na hÉireann is the fundamental legal document of the State. In setting out how Ireland should be governed and the rights of its citizens, it should give explicit recognition to both economic, social and cultural rights and civil and political rights. The Constitution should explicitly recognise all human rights.
- The protection of economic, social and cultural rights in would ensure that Ireland delivers on its international obligations to respect, protect and fulfil these rights. It would provide a way to guarantee that legislation and policy measures give full effect to economic, social and cultural rights, whilst clarifying the application of these rights at the national level.
- Inclusion of economic, social and cultural rights in the Constitution would reflect Ireland's commitment to the universality, indivisibility and realisation of all human rights without distinction. International law says that all human rights are interdependent and indivisible; no one right is more important than another, the protection of one impacts on the protection of others. This reflects how citizens experience access to these rights.
- Inclusion of these rights in the Constitution would define more clearly the role of Irish institutions, such as the Oireachtas, or State agencies, in protecting economic, social and cultural rights, making justice more accessible for the people of Ireland.
- Inclusion of these rights will bring Ireland's Constitution in line with the growing trend among many countries that have recently revised their Constitutions and recognised that economic, social and cultural rights are legally enforceable.

8 How would these rights be incorporated into Bunreacht na hÉireann?

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

- Individual articles could be inserted into the Constitution, protecting some or all of the rights provided for in the International Covenant on Economic, Social and

- Cultural Rights, in the same way as Articles 42 and 43 provide for education and private property.
- Article 40 could be amended to include economic, social and cultural rights as personal rights under the Constitution.
 - Article 29, which covers the application of international agreements in domestic law, could be amended to make international human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights and the Revised European Social Charter and European Convention on the Protection of Human Rights, part of domestic law.
 - A Bill of Rights could be created as an addendum to the Constitution rather than an amendment or addition to the existing articles.

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

The counter arguments

The *Programme for Government 2016*, in noting the Constitutional Convention's recommendations, encapsulates the main counter arguments to the constitutionalising of ESC rights, stating:

Due to the substantial questions raised on the balance of rights, proper governance and resources, we will refer this report to the new Committee on Housing (sic) for consideration.

It is unclear as to what *balance of rights* means, but presumably it refers to private property rights and what the Constitution terms *the public good*. Both legislators and the judiciary have always been overly judicious when dealing with potential infringements of private property rights, while remaining unconcerned about matters of public good, even though they carry equal weight in the Constitution, leading to the conclusion that **this is a deeply embedded ideological stance rather than a legal or legislative reality**.

Proper governance appears to be an oblique reference to the *separation of powers* principle; the prime argument been that the establishment of ESC rights would compromise the *separation of powers* principle by granting undue influence over policy and expenditure to the judiciary. Wild doomsday claims have been made on the *separation of powers* issue, but the reality is that there are plenty of checks that could be put in place to prevent any dilution of this principle. Some countries have adopted

alternative forms of constitutional review to protect ESC rights. For example, Finland's non-partisan Constitutional Parliamentary Committee is empowered to provide robust ex-ante scrutiny over government proposals and their compliance with rights, which ensures that ESC rights are given adequate consideration and vindication in the legislative process. Under this system of review measures found to have a retrogressive impact on ESC can only be passed after the government has considered amendments to remedy any inconsistencies. However, even if ESC rights are offered judicial constitutional protection, the experience of countries like South Africa highlights that Courts will continue to offer considerable deference to measures adopted by elected representatives in respect of ESC rights. **Even if ESC rights are given constitutional protection there is no question that the legislative and administrative branches will retain ultimate responsibility over taxation and resource allocation.**

The third counter argument is a straightforward concern about the resource implications for the State arising from justiciable rights. This argument ignores the *progressive realisation* clause of ESC rights instruments – i.e. to progressively realise these rights within the resource constraints of the State. However, it is important to remember that resource constraints have not been an undue impediment to the realisation of existing education and health rights in the Constitution. It is also important to note there are social and economic costs that arise when an equality and human rights approach is **not** properly incorporated into policy design and implementation: such an approach would lead to a more effective, efficient and equitable use of resources.

To that end it is fitting that the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach has been tasked with this work and it will be critical that it is progressed in keeping with the recommendation of the Constitutional Convention and Ireland's international treaty obligations.

9 Conclusion

The economic recovery that Ireland is experiencing is not being felt by all. Many of the most vulnerable and socially excluded groups are being left behind, and **Ireland has, to date, failed to take the opportunity to put human rights at the heart of the recovery.** Incorporating the International Covenant on Economic, Social and Cultural Rights into domestic law would provide a strong impetus to government to develop effective legislation and robust implementation mechanisms to address housing needs, health inequalities and endemic poverty among other issues. This would ensure a minimum level of provision for which the institutions of the state – legislature, executive and its administrative agencies – could be held accountable. It would compel the legislature and

executive to establish baselines, define statistically the needs to be met, set targets and timescales commensurate with available resources and monitor and review progress; that is what progressive realisation means - no more, no less. It will not open the floodgates to untrammelled litigation, imperil the State's finances or undermine the power of the legislature. It will, however, oblige Government and the legislature to step up to their responsibilities and commitments.

We are a wealthy nation with an ambition to develop a dynamic and innovative presence at the European and global level. That will not be achieved if we remain a nation riven by poverty, disadvantage and inequality. Constitutional recognition of ESC rights will assist that quest by promoting social solidarity and social cohesion which will in turn enhance democracy in the eyes of the communities it serves.

At a policy and decision-making level, the beginnings of improvements in economic circumstances nationally allow for discussion and exploration of the choices that are available to us as a country about how the benefits of recovery are prioritised and who in society gains. We must ensure that values of inclusion, equality and social justice underpin and guide those considerations and decisions.

27 February 2018

Aiden Lloyd, Chair

on behalf of the Irish The ESC Rights Initiative

Member Organisations include: Focus Ireland; Peter McVerry Trust; Age Action; Mercy Law Resource Centre; Irish National Organisation of the Unemployed; Community Action Network; Amnesty International Ireland; Children's Rights Alliance; One Family; National Women's Council Ireland; Immigrant Council; The Wheel; Equality Rights Alliance; Disability Federation of Ireland; Saint Vincent De Paul; All Together In Dignity ATD; Longford Women's Link; Irish Council for Civil Liberties; Unite; Marriage Equality; TASC; EAPN Ireland; Inner City Renewal Group; Irish Refugee Council; FLAC; Pavee Point Traveller & Roma Centre; Irish Heart Foundation.

Secretariat until May 2018:

ATD, 26 Mountjoy Square, Dublin 1 (01 855 81 91 – www.atdireland.ie)

E-mail: escrightsirl@gmail.com - Website: www.escr-irl.org