

A Disability Rights Approach to a Constitutional Right to Housing

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ABSTRACT

This article discusses the potential value of a Constitutional Right to Housing in Ireland to the realisation of independent living for disabled people. Article 19 of the United Nations Convention on the Rights of Persons with Disabilities promotes the right of choice over where and with whom to live, the right to access supports to realise your choices and to participate equally in society. Ireland's historic system of institutionalising disabled people is being slowly dismantled, but equally challenging is the lack of available, accessible, and adequate housing in the community. This article outlines how the live issues of defective construction materials, inaccessibility of housing, the invisibility of disabled people's homelessness, and ongoing institutionalisation are preventing full Article 19 UN CRPD realisation. It will suggest how embedding housing as a Constitutional right will contribute to alleviating these rights violations.

KEYWORDS

Independent Living; Article 19 UN CRPD; housing rights; disability; housing accessibility; housing adequacy; institutionalisation

I. Introduction

This paper will examine how a proposed Constitutional right to housing can potentially address decades of housing rights violations experienced by disabled people in Ireland. The discourse around housing and homelessness has excluded the disabled population for the most part. This paper offers a disability perspective to recognise inequalities within Ireland's housing system and to highlight intersectional discriminations using the framework of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). Where issues have not yet been highlighted by literature or media, the author draws upon her own experiences with disability advocates and services.

The paper will first set out a brief overview of the Independent Living Movement and Ireland's experience in this regard. Secondly, it will provide context for the current housing landscape in Ireland. It will then discuss the inequalities and discrimination experienced in relation to housing. These reflections will be focused on the issues of defective construction materials, inaccessible housing, invisibility of housing need for those residing with family, the lack of personal assistance supports, and ongoing institutionalisation within disability services. Finally, the discussion will demonstrate how by adopting a disability rights approach, a Constitutional right to housing can benefit all members of society.

2. Independent Living Movement and the Irish Experience

The Independent Living Movement arose as part of the disability rights movement in the 1960s in the USA.*1 Alongside other social justice and the anti-war movements, the Independent Living Movement was a rejection of the discriminatory status quo. For disabled people, this meant an overly medicalised approach to how their lives were directed, a lack of recognition of their wills and preferences, and segregation within education settings. Large residential institutions were prevalent – these were places where disabled people were isolated from family and friends and subjected to what in some cases amounted to torturous conditions.*2

Hale Zukas was among the activists who participated in the social movements of the 1970s and he has described the success in establishing the first Centre for Independent Living at Berkeley, California.*3 The role of the Centres for Independent Living internationally has developed in line with the principles of the Independent Living Movement – advocacy for appropriate resourcing for personal assistance and mobility devices, peer support, accessibility of public services, accessibility of information, and appropriate income security.*4 Exercising choice over daily life decisions has been a key focus of the activists' campaigns in all jurisdictions.*5

The Independent Living Movement has been met with resistance as systemic and attitudinal change towards disabled people has been slow. The ethos of the Independent Living Movement is captured through Article 19 of the UN CRPD), a disability-specific human rights convention. The UN CRPD does not create any new rights, rather it frames existing civil, political, economic, social, and cultural rights in a disability-friendly manner. After much deliberation among state delegates and disability advocates the text of Article 19 of the UN CRPD reads:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

*c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.*6*

The monitoring mechanism for the UN CRPD, the Committee on the Rights of Persons with Disabilities, has provided further guidance to states through General Comment No. 5 focusing on Article 19 of the convention. The General Comment highlights that when pursuing Article 19 compliance, disabled people's housing needs cannot be considered to be met if they are obliged to live in a particular accommodation arrangement. Housing for disabled people which is limited to certain neighbourhoods also violates the equality principles of choice over housing. The Committee encourages housing construction and retrofitting programmes to embed barrierfree principles into housing design.*7

References to an adequate standard of living, including equality of access to public housing for disabled people, is included under Article 28(d) of the UN CRPD. This provision alongside the right to equal access to clean water, social protection, and poverty reduction programmes are all interconnected with enabling disabled people to realise their Article 19 right to live independently. The UN CRPD is not the only human rights mechanism to recognise these rights. The Icelandic Human Rights Centre elaborates on what is entailed in similar provisions contained within the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and Convention Against All Forms of Discrimination against Women.*8 Fundamentally, equality of access to basic public services to sustain life regardless of age, gender, or other demographic, should be respected. Ireland has ratified these Conventions but the primary source of law remains the Irish Constitution. Until the rights contained within the international human rights mechanisms are incorporated into Irish law, the provisions therein remain unenforceable,*9 as is the case with housing rights.

Since the UN CPRD came into force in 2008, the right to live independently has attracted significant academic and policy attention as European member states grapple with the realities of decades of disability services which are institutional in nature. The Academic Network of Experts on Disability (ANED) has identified common gaps across EU Member States in realising Article 19. These include the need for increased awareness of independent living rights, diversified housing types to suit access needs, reformation of legal systems which require disabled people to reside in particular arrangements and to include disabled people in policy-making processes around housing and independent living.*10

While institutionalisation based solely on a diagnosis or perception of disability is no longer an accepted practice across the majority of European states,*11 it can often be the only viable option due to a lack of appropriate alternative community-based supports. The human rights violations caused by Ireland's difficult history

with institutionalisation and the blurred lines between Church and State have been well documented in relation to women and children.*12 How disabled people have experienced these forms of institutions remains largely invisible despite disability being a cause and consequence of institutionalisation and religious incarceration.*13 Disability services to this day have connections, however loose, to religious associations and this style of segregated services is only beginning to be uncoupled from funding and bureaucracy.*14

Here in Ireland we have not experienced an Independent Living Movement in the same way as our UK and USA counterparts, but services have slowly been influenced by progress in neighbouring jurisdictions. Residential services persist for adults with intellectual disabilities who have been institutionalised since childhood or young adults, or for those for whom family support in the community is no longer available. These services are referred to as congregated settings and are delivered through a mixture of charitable disability organisations contracted by the Health Service Executive (HSE) or by the HSE directly for individuals with high levels of support needs.*15

While disabled people are residing more frequently in the community now than in the past, they are reliant on charitable services who are contracted by the HSE to deliver housing, day services, respite, personal assistance, or mobility support services. These community-based services are not effective for everyone however – access to personal assistance is limited and fractured across the country with excessive waiting lists.*16 Day services vary from meaningful personal development and socialisation opportunities to sheltered workshops and communal TV viewing.*17 The lack of personal assistance reduces opportunities to engage in education and employment, to acquire financial independence, and to participate equally in the housing market, particularly during a housing crisis. It is clear then that the right enshrined in Article 19 of the UN CRPD – to live independently – is far from being realised in Ireland. To live in the community requires not only the physical structure of a house, but access to supports to exercise choice over where and with whom to live, as well as daily life activities.

3. Irish Housing Context

The default position in Ireland has been home ownership.*18 There is much written about how this policy is failing across society, with the upwards of 10,000 people availing of emergency homeless accommodation in Ireland in summer 2022.*19 The experience of disabled people is for the most part excluded from these narratives, although a growing movement seeks to highlight the disproportionate impact of the housing crisis on minority groups.*20 The Irish Constitution recognises a right to private property under Article 43. This is not an absolute right however, as the state retains power to regulate the ownership and transfer of property in line with principles of social justice. Most relevant to our discussion is that this limitation on Article 43 materialises as the use of Compulsory Purchase Orders of land for the construction of public resources – roads and utilities.*21 Kenna has noted the limitations of even the

more liberal approach of unenumerated rights*22 contained within the Irish Constitution to suggest a basic right to shelter or housing, instead with rights conferred on private property owners.*23 In the absence of Constitutional rights and laws regulating housing, multi-annual policies have been developed. Responsibility for execution of the policies is divided across local authorities (county/city councils) and the current Department of Housing, Local Government and Heritage.*24 There are two coexisting national housing policies – Housing for All*25 and the National Strategy for Housing for Disabled People 2022–2027.*26 Consideration of the need for a separate housing strategy for disabled people is not the focus of this article although it is a relevant discussion in the context of mainstreaming housing policy. While the text of these policies espouses international best practice and impressive targets for housing planning and delivery, there is little compliance and no accountability for failures to realise these targets.*27

There is ongoing consideration of the potential for a referendum to enshrine a right to housing within the Irish Constitution.*28 O’Connell has noted the crux of debates on this issue will pertain to the usefulness of this constitutional amendment and the impact on the public purse if such a right is litigable.*29 In the face of over 10,000 people officially homeless, numerous civil society organisations have advocated for a Constitutional right to housing to bring about a discussion about housing rights and to attempt to strengthen advocacy tools for budgetary and policy allocations to prevent and reduce the harms connected with homelessness.*30

This paper will now consider some of the most important barriers to realising housing rights within an Article 19 UN CRPD compliant framework.

4. Contemporary Housing Rights Violations

There are multiple barriers to disabled people securing housing with choice over where and with whom to live, and the opportunity to participate equally in their community. In short, Article 19 relies not only on the delivery of disability support and access to technology and assistive devices, but also on the housing sector, the economy, and the wider community. While many European states grapple with housing crises, the experiences of disabled people within these crises are distinct and have been largely invisible within wider policy and resource decisions. These experiences include encountering defective construction materials, inaccessible housing stock, invisibility of disabled people’s homelessness, lack of personal assistance, and ongoing institutionalisation.

4.1 Defective Construction Materials

Regulation of the construction industry, in particular the production of construction materials – blocks and concrete – has been highlighted over the last ten years, but with particular national traction in the last year.*31 There is no one category of persons affected by the crisis – private homeowners, mortgage holders, landlords, private rented tenants, and social housing tenants are all affected.*32 Public buildings such as schools, libraries, and local authority offices are also affected,*33 making

community services more difficult to deliver safely and in an accessible manner in line with Article 19(c) UN CRPD.

The campaign for redress for houses affected by mica and pyrite highlights another challenge to the realisation of independent living for disabled people in Ireland. Mica and pyrite are naturally occurring minerals in rocks used in building materials*34 which unless adequately managed result in the disintegration of the materials. The experiences of those residing in affected properties are crumbling homes, financial loss, impermanency of housing, physical and mental illness exacerbated by inadequate housing and exposure to weather, damp, flooding, exposed electrics, exacerbation of existing disabilities and health conditions.*35 The defective blocks crisis can affect disabled people in multiple manners, although this has not yet been thoroughly investigated. For homeowners or residents who have built or specified their housing to be accessible to disabled members of the household, the additional labour and costs involved in this are now being undermined as their homes are now, or soon to be, structurally unsound to the point of uninhabitability. Further, households with a disabled family member have increased difficulty securing alternative accessible accommodation. Before accepting that they must leave their homes, the financial investments made to attempt to resolve structural issues to their houses have depleted the financial resources of many families. Considering the additional costs of heat and health implications, the financial power of families with disabled members is even further diminished.*36 Many families have been forced to adapt to living within caravans and portacabins or to move in with extended family whose homes*37 are not designed to house large numbers or to have accessible features.

There has yet to be a redress scheme proposed which meets the needs of those affected in terms of providing 100% redress for the costs involved in rectifying their accommodations in the West of Ireland. This is in sharp contrast to the response by government to similar property defects in the Leinster region.*38 The inequality of responses is being perceived as discrimination in terms of urban prioritisation, and with the broad social-economic deprivation through lack of infrastructure and investment in the North-West of Ireland, it is difficult to identify any other rationale for the disparities in redress schemes. Any scheme introduced must be cognisant of the advancements in both environmental and disability accessibility housing standards which will increase costs of rebuilds. To ignore this will further limit the supply and availability of sustainable and accessible housing in the immediate term and the future.

4.2 Inaccessible Housing Stock

Very much connected to the issue of construction standards is the inadequacy of accessibility standards to which new housing is legally obliged to conform. The Irish Disability Act 2005 and Part M of the Building Regulations outline minimum accessibility requirements, the most recent of which were revised in 2010.*39 Currently all houses must enable a wheelchair user to visit the property. This visitability standard is wholly insufficient to ensure an adequate supply of housing which disabled people

can live in. The Irish Wheelchair Association has been campaigning for Part M to reflect true liveability standards, incorporating Universal Design principles.*40

Universal Design has been developed since the 1990s to attempt to make spaces usable for the widest possible audience, regardless of individual access needs.*41 The first principle is that the space is designed considering equitable use – that everyone be able to use the space regardless of mobility or dexterity. Secondly, flexibility in use ensures that the space or item can be adapted to suit the user’s needs. Thirdly, design must be simple and intuitive – easy to understand and use. The fourth principle relates to perceptible information of a space. It should be easy to ascertain information about facilities within a space – differentiating glass from doors, hot and cold-water taps, depth perception. The fifth principle builds in a tolerance for error on the user’s part so that potential for accidents and injury is minimised. Spaces should require a minimum level of physical effort, such as easy opening of doors, manoeuvrability of floor surfaces, etc. The final principle relates to the design of the space to allow for sufficient space and sizing for approaching rooms and facilities.

The principles of Universal Design should be incorporated into all new housing and retrofitting of existing housing stock to ensure houses are liveable, rather than merely visitable. The housing market should have available an adequate stock of housing where a disabled person can reside with whomever they choose in a geographic location convenient to them. The entrance way to the property should be accessible, doorways and halls should be wide enough to pass through and to change direction. Kitchen and bathroom facilities should be designed so as to be easily and safely used by all residents. Bedrooms should be on the ground floor or a mechanism to facilitate being transported to the next floor should be in place. Living space should be adequate and functional. The house should feel like a home.

These principles will ensure that disabled people can access housing on the general housing market on an equal basis with others. In the event of acquiring disability through accident or ageing, Universal Design will allow us to remain in our homes rather than being forced to avail of institutional supports such as hospitals or nursing homes. Part M of the Building Regulations must be amended to reflect truly liveable standards for housing and public facilities. Incorporating environmentally friendly facilities and construction materials that are of an adequate standard will be a vital step towards equal housing for disabled people. A Constitutional right to housing must recognise that housing must meet the needs of an ageing population and be adaptable depending on our needs.

4.3 Invisibility of Homelessness

The lack of options of housing and personal supports can result in disabled adults continuing to reside with their families of origin, long after the natural life course expectations. Adults with intellectual disabilities are particularly affected by this issue and their invisibility within homelessness data has resulted in policies which have ignored their needs.*42 They are considered to have their housing needs met and family members are put in uncomfortable situations of insinuating to services

and local authorities that they will revoke their support in order to attempt to secure a place on a housing list for the disabled person.*43 The delays to securing social housing often result in tacit acceptance of the family home as a housing situation, despite its unsuitability.

It is only in the last year that documentation enables social housing applicants to indicate their access and support needs.*44 The Irish Wheelchair Association has shown housing list delays of up to seven years and that there are currently over 5,000 disabled people whose social housing needs remain unmet.*45 Coupled with ableist attitudes towards disabled people having relationships, remaining at home can be a deterrent to decision making about socialising, forming relationships, and eventually reproductive decisions of their own.*46 This highlights the centrality of housing choice and independent living supports as the foundation for enjoyment of all aspects of disabled people's rights.

Since the 1990s, as institutionalisation has decreased and education has been developed alongside or in some ways incorporated into mainstream education,*47 there has been a cohort of adults for whom further education, training and employment has not yet been fully established*48 and whose primary supports have come from their parents or siblings.*49 These family members are ageing themselves and are unable to meet the needs of their disabled relative and, in the event of a crisis illness or death, the disabled person is accommodated within institutional settings.*50

Research from the National Platform of Self Advocates demonstrates the interconnections between housing and transport – both need to be sufficiently planned to ensure convenient access to public transport and local facilities*51 to fully realise Article 19 of the UN CRPD. Proximity to family and friends might also be important, so a wide geographic spread of housing which is accompanied by the appropriate supports is required to truly fulfil Article 19. A Constitutional right to housing must require due consideration for access to the community and to family supports where desired by disabled people to ensure equality.

4.4 Lack of Personal Assistance

Even if we lived in a world where housing was accessible and considerately located, Article 19(b) of the UN CRPD recognises the need for supports to enable disabled people to live independently and to participate in their communities. No exhaustive list of what these supports entails is provided, and rightly so, as technology advances and society adapts to environments, so support needs will change. Instead, the UN CRPD refers to personal and technological assistance.

It is important to differentiate personal assistance from personal care. Personal assistance enables a person to live a life of their choosing, to engage in education, employment, and recreational activities in their communities.*52 It goes far beyond the maintenance of hygiene and fundamental life actions in the home as is considered to be personal care. As far back as 1996, statutory investigations indicated that a minimum of ten hours of assistance per week is required to meet only the basic needs.*53 However, there remains no right to personal assistance in Ireland.

The Disability Act 2005 was intended to establish a system of assessing and providing support, with an emphasis on early intervention for disabled children. The Act establishes a right to an assessment of need and the identification of resources required in order to meet the needs identified.*54 However, the Act falls short of guaranteeing that these resources are actually provided. This attracts considerable criticism as most disabled children and adults are unable to acquire the identified supports through privately financed means.*55

Further consternation has arisen as the waiting lists for the initial assessment of need have far exceeded nine months,*56 placing opportunities for personal development and social inclusion even further out of grasp for disabled people. As of 2018, the average personal assistance provided is 43 minutes a day,*57 far below the standards set almost three decades ago. Where adequate personal assistance is provided, the impact is overwhelmingly positive to enable choice and control in the daily lives of disabled people, facilitating education and employment, and increasing their financial independence.*58 This in turn increases their power within the housing market.

4.5 Ongoing Institutionalisation

As mentioned previously, Ireland's history of institutionalisation has made it difficult to dismantle institutional care. Institutionalisation does not merely refer to physical environments, but to the denial of choice and control over daily life.*59 While the large institutional buildings in Ireland have been gradually closed,*60 institutionalisation has become even more hidden in plain sight with premises being used to accommodate other minority cohorts such as refugees and asylum seekers within the Direct Provision system*61 and with family hubs*62 intended to address homelessness.

Ireland's membership of the European Union provides an additional impetus for the dismantling of institutional settings in line with EU ratification of UN CRPD*63 and associated policies such as the European Strategy for the Rights of Persons with Disabilities 2021–2030 and the commitment to discontinue non-UN CRPD compliant services through the EU Structural Funds.*64 The European Union Agency for Fundamental Rights has used Ireland as a case study in their cross-European research into the process of moving from institutions to the community.*65 Their findings indicate that for a short period investment in institutions will have to continue at the same time as investment in independent living schemes in order to realise deinstitutionalisation. There is also a requirement for input from staff and family members to support the transition to independent living as well as the preparation within community-based services, including the construction of accessible housing, to avoid disabled people merely moving to a different environment without any meaningful progress on exercising choice and control over their lives.*66 The report finds that no one European Member State has been fully successful to date at realising Article 19 UN CRPD but there much to be gained from knowledge and experience sharing.

In their *Time to Move On* report, the Health Service Executive recognised the prevalence of institutional settings of over ten people as a 'congregated setting' and set targets to ensure no more than four disabled people would reside together and

avail of disability services as a unit.*67 In 2011, the population of disabled people residing in congregated settings was approximately 4,000 people.*68 While this is only a small part of the disabled population in Ireland, the restrictions on the rights of the disabled persons affected dominate most of the discussion around independent living in the country. The process is most referred to as ‘decongregation’ in Ireland, while it is referred to as ‘deinstitutionalisation’ or ‘transitioning to the community’ in other jurisdictions.*69

As of 2021, the approximate population within congregated settings remains slightly over 2,000. Research from McCarron et al.*70 and McConkey et al.*71 has highlighted the cost benefits of investing in community-based services in place of residential and institutional settings. This was also recognised by the *Time to Move On* report in 2011, the HSE’s overview of disability residential services and the policy underpinning the movement towards living independently in the community.*72 This is evidence of the slow rate of progression towards community-based services. Largely, the issues of lack of supply of accessible housing and the lack of availability of personal or technological assistance are all contributory factors in the ongoing institutionalisation. This is not the focus of this paper, but it should be noted that over 1,000 adults under the age of 65 are inappropriately residing in nursing homes for older people due to a lack of alternative community arrangements.*73

The ongoing reliance on institutions prevents sufficient investment in Article 19 UN CRPD compliant services and restricts disabled people’s ability to live in community-based housing.

5. Conclusion

A Constitutional right to housing will not equate to housing being provided to every person in need of it. Even where litigation may be brought under a Constitutional right to housing, the separation of powers between government and courts prevents judges from making judgments with any meaningful pull on the public purse strings.*74 What a Constitutional right to housing can achieve is to require all government activity relating to housing to be conducted in an equitable manner, to respect the human rights to housing of everyone in Ireland.

This paper has highlighted the additional barriers to housing experienced by disabled people within the current housing system and challenges which will need to be addressed for a Constitutional right to housing to be effective. Where a Constitutional right to housing is introduced, targeted interventions will need to be put in place to ensure that the right is realised for the disabled population. This can be achieved throughout the housing process. First, the production of materials used in construction must be regulated and a redress scheme implemented for every household affected by defective materials such as mica, pyrite, or related safety materials. There should be parity with former redress schemes for similarly affected properties which have compensated for extra costs associated with sourcing alternative accommodation. For disabled people, any additional costs over and above immediate accommodation should also be recognised. This might include costs

connected with assistive technology, adaptations to properties, specialised transport, or health costs.

Secondly, Part M of the Building Regulations needs to be amended to ensure that the minimum accessibility requirements meet the threshold of liveability, rather than visitability. Further, planning authorities and local authorities must be mandated to increase the stock of accessible properties in tandem with sustainable community development obligations. Introducing documentation on social housing applications to express accessibility needs is a step forwards in this regard as it will enable local authorities to get a more accurate reflection of housing need. However, a more substantial shift in approach is required to enable disabled adults who are inappropriately residing with their family of origin into adulthood. This cohort should not be considered as having their housing needs met and should be supported to build independent living skills and to choose where and with whom they wish to live along with appropriate supports.

While there has been a significant focus on the process of moving residents of institutional and congregated settings to the community, the pace of transition has been extremely slow. No doubt a lack of accessible housing and coordinated supports is contributing to this delay. The lack of appropriate community-based disability supports, including accessible housing, is a direct cause of the inappropriate accommodation of disabled people under the age of 65. There is an ongoing campaign for a right to personal assistance which will be of major significance in realising disabled people's inclusion and equality.*75 Any personal assistance services that are devised in the future must be equitable across age, impairment type, and geographic location.

A Constitutional right to housing must be framed in a disability rights compliant manner if Ireland is to meet our obligations under Article 19 of the UN CRPD. Only by taking a disability inclusive approach to housing rights will we move towards redressing the discrimination experienced in the past and the future of ongoing exclusion in disabled people's lives.

NOTES

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