



An Bille um Dhaoine a Choimeád ina dTeaghaisí, 2017
Keeping People in their Homes Bill 2017

Meabhrán Mínitheach
Explanatory Memorandum



**AN BILLE UM DHAOINE A CHOIMEÁD INA dTEAGHAISÍ, 2017
KEEPING PEOPLE IN THEIR HOMES BILL 2017**

EXPLANATORY MEMORANDUM

Background

Central Bank of Ireland statistics for September 2016 showed that of the 738,506 mortgage accounts related to principal dwellings (PDH), some 79,562 were in arrears, of which 56,350 were in arrears over 90 days. This data also showed that some 43,543 PDH mortgage accounts had arrears over one year, while some 34,500 had arrears over two years. A study of 21,000 households in 2015, based on Central Bank of Ireland loan-level data, and borrowers Standard Financial Statements, showed that those with long-term mortgage arrears were more likely to: have experienced an unemployment shock since taking out the mortgage; have experienced a divorce since taking out the mortgage; are more likely to be single borrowers with three or more children; have lower net incomes; have higher mortgage debt service ratios (monthly repayment over monthly income); experienced shocks to the debt service ratio since taking out the mortgage; have higher ratio of non-mortgage debt to total debt. This has raised the spectre of an increase in home re-possession among those in the most vulnerable situations, which has the potential to put unprecedented strain on the state-supported housing sector.

Current Law

The Land and Conveyancing Law Reform Acts 2009-2013 enable a lender to apply to the Circuit Court (High Court in some cases) for an order for possession. The Court or County Registrar “may, if it thinks fit, order that possession be granted to the applicant on such terms and conditions, if any, as it thinks fit”. However, in almost all cases there is no detailed consideration of the impact of loss of home on the debtor, or their household members, children or dependents, or of the behaviour of the corporate entity originating or enforcing the security of the loan.

While Irish law gives a Court or County Registrar a wide discretion, EU law already obliges all domestic courts in the EU (including all Irish courts) to examine consumer contracts, including mortgage contracts before them, of their own motion, for unfair contract terms – although this does not take place in all cases. Thus, while the Irish courts have the discretion in granting, adjourning, varying, postponing, suspending or executing possession orders, EU law already requires consideration of additional matters. Indeed, once EU law issues become applicable – as they are in mortgage cases - then the EU Charter of Fundamental Rights obliges Irish courts to consider the “proportionality” of granting, adjourning, varying, postponing, suspending or executing possession orders.

Purpose of the Bill

The loss of a home can be one of the most serious breaches of the right to respect for the home. Research shows that victims of home loss experience a range of reactions, such as feelings of painful loss, a continued longing, a depressive tone, frequent symptoms of psychological, social or somatic distress and sense of helplessness. The European Court of Human Rights has consistently held that any person who risks losing their home should be able to have the proportionality of such a measure reviewed by a court.

In relation to mortgage debt, the critical decision makers in relation to loss of home are the Courts – mainly Circuit Court Judges and County Registrars. The Irish State and the public has entrusted to these the specialized and complex role of examining and balancing the interests of indebted households with those of corporate lenders – at a crucial time – in granting, adjourning, varying, postponing, suspending or executing possession orders on people’s homes. Irish courts have significant discretion in Irish law to consider a wide range of issues in these cases.

This Bill provides Irish Courts with a statutory base to effectively conduct proportionality assessments in relation to possession orders arising from mortgage arrears on people’s homes. It seeks to facilitate Irish Courts in effectively examining the “proportionality” of granting, adjourning, varying, postponing, suspending or executing possession orders.

The Bill seeks to achieve this by amending section 97 of the Land and Conveyancing Law Reform Act 2009 so as to specify the factors to which a court is obliged to have regard when considering an application in relation to an order for possession in respect of a home in which the mortgagor lives.

The “proportionality” assessment on the right to respect for home and loss of home, forms the core of this legislative proposal. Essentially, it means that when there is a choice between several appropriate measures to achieve the objectives legitimately pursued by the legislation, then the court must adopt the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued. Key elements of the Bill are drawn from consumer and human rights jurisprudence of the Court of Justice of the European Union, and indirectly from the jurisprudence of the European Court of Human Rights. The Bill clarifies and embeds “proportionality” into the considerations of Irish Courts, in exercising powers under the Land and Conveyancing Law Reform Act 2009, where there is a risk of people losing their home.

The Programme for Government (May 2016) states that this Government “*wants to keep families in their homes and avoid repossessions insofar as is possible. We will protect the family home and introduce additional long term solutions for mortgage arrears cases...*”.

This Bill provides a viable solution which is wholly consistent with the Government’s stated objectives.

Provisions of the Bill

Section 1 of the Bill defines the term “Principal Act” which is used in section 2.

Section 2 of the Bill amends section 96 by substituting revised wording for subsection (3) of that section. Section 96 of the Land and Conveyancing Law Reform Act 2009 deals with the application of sections 97 to 111. The purpose of the revised wording of section 96(3) is to make it clear that the terms of section 97 are not limited to housing loans.

Section 3 substitutes section 97 of the Land and Conveyancing Law Reform Act 2009 with an entirely new provision. Section 97 deals with the repossession of a mortgaged property.

The proposed new section 97 will contain seven subsections.

Section 97(1) is identical to section 97(1) of the 2009 Act as it currently stands. Section 97(1) provides that a mortgagee (i.e. the bank) must not take possession of a mortgaged property without a court order, which has been granted under section 97, unless the mortgagor (i.e. the homeowner) consents in writing to the repossession. This requirement is also made subject to section 98. This Bill relates entirely to issues in respect to the loss of home, arising from possession orders associated with a mortgage, including a judgment mortgage. It does not relate to possession proceedings relating to tenants in mortgaged properties or the operation of the Residential Tenancies Board.

Section 97(2) is identical to section 97(2) of the 2009 Act as it currently stands. Section 97(2) states that a mortgagee may apply to court seeking possession of a mortgaged property. When such an application is being made, the court may decide to grant possession but making that possession subject to certain terms and conditions.

The proposed subsections (3) to (6) (inclusive) of section 97 as set out in this Bill contain entirely new text.

Section 97(3) is a new requirement which will oblige a court to have regard to considerations of proportionality, as well as all to the circumstances of the case involving the property which is the subject of an existing or requested order for repossession. A court is required to consider these factors when granting, adjourning, varying, postponing, suspending or executing an order for possession of a mortgaged property in which the mortgagor ordinarily resides. These factors must also be considered when a court is attaching terms or conditions to such an order for repossession. As to what precisely is meant by the circumstances of the case, and the principle of proportionality, these are to be interpreted by reference to subsections (4) and (5).

Section 97(4) provides that when a court is considering the proportionality of an order for repossession, the court is obliged to have regard to all of the factors which are specified in paragraphs (a) to (f), such as whether the order being sought pursues a legitimate aim, the impact which an order for repossession will have on the borrower and other household members, the circumstances surrounding the execution of the mortgage contract, the availability of State support to the institution which seeks the order, as well as the estimated costs to the State of providing alternative, emergency accommodation for that household. The Dublin Regional Homeless Executive has reported that the annual cost in 2015 of accommodating one family in a hotel was more than €55,000, or almost €153 per room per night. The range of factors included here are those which are regularly considered in relation to Article 8 ECHR, and also within family law legislation in Ireland.

Section 97(5) provides that where the institution seeking the order for repossession is not the credit institution which first granted the mortgage, the court must, when considering the question of proportionality, have regard to a range of factors, such as the amount which the institution paid to acquire the loan, as well as to whether the loan or mortgage was also offered for sale at the same reduced level to the homeowner, and other considerations.

Section 97(6)(a) clarifies that the new considerations set out in section 97(3) to (5) apply to proceedings which have been initiated after the coming into operation of this Bill and which have been brought by a mortgagee seeking an order for possession of a mortgaged property in which the mortgagor ordinarily resides. Under section 97(6)(b), section 97 also applies to proceedings which have been initiated before the coming into operation of this Bill, provided an order for repossession has not yet been granted by the court. Under section 97(6)(c), section 97 also applies to all cases where an order for repossession has been granted but not yet executed and in relation to which a variation or suspension of the repossession order is now being sought.

Section 97(7) defines the term “household” which is used throughout section 97.

Section 4 of the Bill sets out the short title.

*Deputy Kevin ‘Boxer’ Moran
Feabhra, 2017.*

