

IRISH REFUGEE COUNCIL

COMMENTS ON THE GENERAL SCHEME OF THE INTERNATIONAL PROTECTION BILL



May 2015

1. Introduction

The Irish Refugee Council (hereinafter IRC) is Ireland's only national non-governmental organisation which specialises in working with and for refugees in Ireland. Our vision is for a just, fair and inclusive Irish society for people seeking protection. The IRC believes, in accordance with the 1951 Convention relating to the status of refugees, that every person has the right to claim asylum and to have their application considered in a fair and transparent manner. Our mission is to promote and enhance the lives of refugees in Ireland.

This Bill represents the most significant overhaul of the protection system in Ireland since the Refugee Act of 1996. Therefore, it is now timely to create an international protection system based on fairness, transparency and efficiency which respects the rights of persons within such a system. As mentioned in the Statement of Government Priorities 2014-2016, the government has committed to treating asylum seekers with the humanity and respect they deserve. Ireland's obligations to provide a fair and humane protection system must also be viewed within the context of Ireland's human rights obligations within the Constitution and international law along with its position within the Common European Asylum System (CEAS). Ireland is a state party to numerous human rights conventions including principally the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the International Convention on the Elimination of all forms of Discrimination against Women, the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention on Human Rights and Fundamental Freedoms and the UN Convention on the Rights of the Child. Furthermore, the European Convention on Human Rights is also incorporated in Irish law through the ECHR Act 2003 and Ireland is bound by the EU Charter of Fundamental Rights when implementing EU law which also applies with respect to this International Protection Bill.

Since 1999 Europe has been developing a common view for asylum policy in Europe with the creation of a common legislative framework within CEAS. CEAS foresees a sharing of the same fundamental values and the need for a joint approach among Member States to guarantee high protection standards for refugees and persons otherwise fleeing serious harm. However, Ireland's engagement with CEAS has been piecemeal at best in that Ireland retains an option to opt in or out of Directives in the field of international protection. Increasingly Ireland is out of step with its European counterparts and has only signed up to the following minimum standard Directives: the

Qualification Directive, the Temporary Protection Directive and the Asylum Procedures Directive whilst continuing to engage in the Dublin system by recently adopting the recast Dublin III Regulation.¹

As part of the second stage of CEAS, the legislative framework was recast and improved by the EU institutions to address protection gaps, make protection procedures more efficient in Europe as well as to align the legal framework with obligations stemming from jurisprudence of the European Court of Human Rights and Court of Justice of the European Union. The second phase of CEAS was completed during the Irish Presidency of the European Council in the first half of 2013. In presenting the concluded directives to the European Parliament, Lucinda Creighton TD, as Minister for European Affairs, recognised the importance of the recast directives:

“Mr President, I am very pleased to be here today, representing the Irish Presidency of the Council, to mark this important stage in the completion of the second phase of the Common European Asylum System....[T]he new legislative framework further harmonises national asylum systems, the common standards are more protective and fully in line with the evolving case law of the Court of Justice and the European Court of Human Rights, and the new rules will enable Member States to operate efficient asylum systems capable of tackling abuse....An essential element to a credible and sustainable common European asylum system is that Member States build and maintain sufficient capacity in the national asylum systems.”²

Despite this recognition of the second phase of CEAS and the need for national systems to be robust in their own capacity, the IRC is concerned that Ireland chose to not opt in to these recast Directives despite the fact that some of the changes in the legislation reflect broader jurisprudence stemming from European Courts. The IRC reminds the Committee that Ireland remains bound by such obligations and recommends that the standards within the recast Qualification Directive, recast Asylum Procedures Directive and recast Reception Conditions Directive are incorporated into the Bill. In this regard the IRC notes that a number of provisions from the recast Directives have been incorporated into the Bill and welcomes the fact that the statement of objectives in the Regulatory Impact Analysis refers to bringing Ireland’s asylum system in line with the recast Asylum Procedures Directive. Throughout this submission the IRC also recommends where applicable specific provisions

¹ Ireland is also part of the Eurodac Regulation as part of the Dublin system. Although the recast Dublin III Regulation has direct effect Ireland recently introduced the following statutory instrument to assist in its application in Ireland, S.I. no. 525 of 2014 European Union (Dublin System) Regulations.

² Speech by Lucinda Creighton TD, Minister of State for European Affairs, to the European Parliament in Strasbourg on 11 June 2013

in those recast Directives can be incorporated into the Bill for the purposes of improving the single protection procedure in Ireland.

It must be noted that parts of the Heads of the Protection Bill are vague and ambiguous in wording. Therefore these comments are directed at what the IRC interprets the provision as and the IRC looks forward to further clarity from the Minister for Justice and Equality as to the specific content and text of the International Protection Bill. This submission is made without prejudice to such additional submissions as may be made once the text of the International Protection Bill is published. It primarily concerns the following areas of the Irish Protection System:

- The creation of a fair and accessible asylum procedure
- Addressing the needs of vulnerable persons
- Appeals and Remedies
- Family Reunification
- Operational and other measures

The IRC also recommends a key number of areas which have been omitted from the scheme and which should be introduced into primary legislation. This document should be read in conjunction with the general scheme for the drafting of the International Protection Bill and references the relevant Heads of the Bill where appropriate. It generally follows the outline of the scheme of the Bill although some sections are separated out and addressed in specific topics for example with regard to vulnerable persons.

2. The creation of a fair and accessible asylum procedure

The Single Protection Procedure and the Minister's examination of applications (Part 5 and Head 32)

1. The IRC welcomes the long overdue establishment of a single protection procedure which will address refugee status, subsidiary protection and other humanitarian concerns. This will bring the protection system in Ireland more in line with its counterparts in Europe and will create a more streamlined, fairer and efficient procedure where the protection needs of applicants are identified early in the procedure. Nevertheless, the single protection procedure will not solve all the issues in the current system. Other states which have long experience of a single procedure have experienced continuing problems including delays and have found that attempts to shortcut the process have led to further problems which expose the state to additional costs.

Adequate resourcing, training and capacity will be necessary to ensure that any new system will be properly implemented in practice.

2. Furthermore, the IRC believes that only refugee status and subsidiary protection should be examined within a single protection procedure but that any other reasons for remaining, under Head 36A, should only be considered when there has been a complete examination of a person's protection needs at first instance and that they be reviewed by way of an independent appeal if refused. Otherwise Ireland may fall foul of other international commitments, not least the European Convention on Human Rights, part of Irish law.
3. Going forward in the spirit of transparency, the IRC requests that the international protection procedure at first instance under the auspices of the Minister produce and publish rules and procedures which are in place or are developed in the future at the first instance stage of the procedure. Such an approach would also be in line with the functions of the Chair of the International Protection Appeals Tribunals under Head 57.

Training and Competencies of Officers involved in the International Protection Procedure (Part 3- Part 5)

4. The IRC is concerned that there are no provisions in the Bill scheme for the training, qualifications and skills of personnel engaged in the single protection procedure at first instance and when persons seek protection at ports of entry or elsewhere. Although it is noted in Head 57(7) that the Chairperson of the Tribunal may convene training programmes for members of the Tribunal, no reference is made to any training requirements for personnel examining protection applications at first instance. This is of serious concern given the importance of early identification of protection needs of persons in the single protection procedure.
5. Authorised officers, authorised persons, border officials and other personnel who come into contact with persons seeking international protection should have the necessary competencies, skills, knowledge, attitude and training for their roles. This includes not only personnel examining applications for international protection but also immigration officers or other officers at ports of entry or elsewhere who may interview applicants including for the purposes of the preliminary interview under Head 13. The IRC is concerned by the lack of provisions in the Bill scheme for such training and competencies given the important role of authorised persons

and the severe consequences for applicants whose protection needs are not accurately identified.

6. The recast Asylum Procedures Directive requires that the personnel examining applications have the required knowledge in refugee and asylum law.³ The recast Asylum Procedures Directive also requires that persons conducting interviews are competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability.⁴ The IRC recommends that these provisions from the recast Asylum Procedures Directive concerning training and knowledge of authorised personnel are included in the text of the International Protection Bill.

The definition of a Refugee (Head 2)

7. The definition of a refugee in Head 2 is not restricted to third country nationals but applicable to all persons who fit the definition. This approach is welcomed as being in conformity with the non-discrimination principle in the 1951 Refugee Convention and 1967 Protocol.⁵
8. The IRC also welcomes the fact that the Convention ground provision on 'membership of a particular social group' is drafted in an inclusive manner by determining that such a group exists on the basis of either an innate or common characteristic of fundamental importance.
9. Furthermore, the inclusion of the opportunity to invoke compelling reasons of past persecution or serious harm in order to avoid cessation of refugee status or subsidiary protection in Head 8 and Head 10 is welcomed. Such an approach is in accordance with Article 1(C) of the 1951 Refugee Convention.

³ Article 10 of the Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereinafter "recast Asylum Procedures Directive") OJ 2013 L180/60.

⁴ Article 15 of the recast Asylum Procedures Directive.

⁵ Article 3 of the 1951 Refugee Convention provides that 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

Application for International Protection on behalf of Dependents (Head 12(3))

10. With regard to protection applications made on behalf of dependants, Head 12(3) appears to indicate that there is no scope for a dependent child's case to be considered separately to that of their parent. The IRC is concerned that this provision denies the individual child's right to apply for asylum as guaranteed under Article 18 of the Charter of Fundamental Rights. In certain circumstances, children may have protection needs distinct from their parents and so their individual protection needs should be heard and addressed.
11. The IRC also notes there is no provision for adults to be dependants on their spouse's or partner's claims which is permitted under Article 6(3) of the Asylum Procedures Directive. Such spouses or partners should also be given the opportunity to be included within one applicant's claim when their protection needs are linked. Such an approach would eliminate wasted resources or duplication of labour when family members have protection claims dependent on their other family members. This should be provided for in the text of the Bill.

Preliminary Interview (Head 13)

12. Head 13(1) provides a number of ways in which a person who is at the frontier of the State or who is in the State may present that he/she is wishing to apply for international protection. Given the fact that many persons may be unfamiliar with the possibility of seeking international protection and/or may have language difficulties, the IRC recommends that the following wording from the Refugee Act 1996 as amended "or otherwise indicating an unwillingness to leave the State for fear of persecution and/or serious harm" is also included in the International Protection Bill.⁶
13. Head 13(2) refers to establishing a number of matters during the course of that preliminary interview including "details of any person who assisted the person in travelling to the State." It is unclear how this specific information of travel assistance is logically or rationally connected to the protection needs of the person applying for international protection and the IRC reminds the

⁶ Section 8(1) of the Refugee Act 1996 as amended.

Committee of the State's obligations under Article 31 of the 1951 Refugee Convention not to penalise an applicant for irregular entry into Ireland.⁷

Statement to be given to applicant (Head 17)

14. Head 17 appears to refer to the information leaflet issued to applicants which provides information on their rights and obligations during the protection procedure. The format and content of the information leaflet should include clear and accessible language. If it arises that applicants have difficulty understanding the information provided, procedures should be put in place to revise them, considering the particular needs of children. Other methods of delivering such information including by way of audio and video material should also be explored for example for illiterate applicants.

Detention of an applicant (Head 19)

15. Head 19 provides for the detention of an applicant under certain circumstances. The IRC is concerned about the imprecision of terms such as 'reasonable cause' in the provision and notes that there may be situations where a person may need to rely upon false documents out of necessity in order to claim international protection and should not be penalised as an outcome of that as recognised under Article 31 of the 1951 Refugee Convention. Without a clear and comprehensive definition of what constitutes 'reasonable cause' the scheme of the Bill fails to ensure that "*Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum*" as set out in Article 18 of the Asylum Procedures Directive.
16. In terms of a person indicating that they desire to leave the State whilst in detention, it is welcomed that the assigned District Court Judge shall only permit the arrangement of such removal from the State by the Minister on condition that the person no longer wishes to proceed with his/her international protection application and they have obtained, or have been given the opportunity to obtain professional legal advice on the consequences of such a decision under Head 19(13). Legal representation is vital to ensure that the applicant can make an informed choice as to his/her removal from the State.

⁷ Article 31(1) of the 1951 Refugee Convention states that "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

17. The IRC welcomes the fact that detention is not applicable with respect to unaccompanied children and recommends that other vulnerable persons should only be detained as a matter of last resort. The IRC recommends that all detained applicants should have their protection claims prioritised. Furthermore, the IRC reminds the Committee of the State's obligations under the European Convention of Human Rights in that any deprivation of liberty should only be on the basis of individual assessment and subject to the principles of necessity and proportionality where less coercive alternative measures cannot be applied effectively.⁸

Inadmissible Applications (Head 20)

18. The IRC is concerned that this provision enables an application to be found inadmissible because there is deemed to be a first country of asylum. One of the grounds upon which a first country of asylum is identified is "he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, and will be readmitted to that country". It is unclear how and on the basis of what information such a determination of 'sufficient protection' with regard to a third country would be conducted. It is also important to note that the declaratory nature of refugee status and that States have an obligation to respect all the rights of refugees within the 1951 Refugee Convention and not only the principle of non-refoulement. Therefore to find an application inadmissible and deny the right to asylum on the basis that non-refoulement is respected in a third country fundamentally denies an applicant of their catalogue of rights under the 1951 Refugee Convention. That obligation applies to Ireland also in the context of determining an application inadmissible on the basis of 'sufficient protection' elsewhere. The unique international status of refugee protection under the 1951 Refugee Convention should not be undermined by such provisions.

19. Furthermore, jurisprudence from the European Court of Human Rights and the Court of Justice of the European Union also indicates that there may be breaches of human rights obligations in other EU Member States irrespective of the fact that they have granted a protection status as indicated in *M.S.S. v. Belgium*⁹ and *Greece* and *N.S. and M.E.*¹⁰ The IRC is also concerned that the

⁸ See also Article 8-11 of Council Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter "recast Reception Conditions Directive"), OJ 2013 L180/96.

⁹ ECtHR, *M.S.S. v Belgium & Greece*, Application no. 30696/09, 21 January 2011.

¹⁰ CJEU, Joined Cases, C-411/10, C-493/10 *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011.

Scheme of the Bill does not provide any assurance as to how these apparent safeguards in another Member State or a third country will be ensured. Given the lack of clarity and the severe consequences of finding an applicant inadmissible the IRC recommends the deletion of Head 20.

20. Notwithstanding our recommendation that this provision is deleted, if it is retained within the legislation, the IRC welcomes the fact that this provision is appealable to the International Protection Tribunal (Head 20(7)). We would however, recommend that an appeal to the Tribunal should permit an oral hearing in accordance with the interests of justice.

Subsequent applications (Head 21)

21. The IRC considers that access to a fresh protection claim is an integral part of a fair and accessible protection procedure. Over time new evidence or information may become available which further identifies the protection needs of applicants and effective access to the protection procedure will be vital to ensure respect for the right to asylum under Article 18 of the Charter of Fundamental Rights.
22. The IRC is concerned that the requirements of Head 21 are too complex and onerous for applicants, especially given the fact that most persons in this position will not have access to legal representation at that stage of the process. The request for consent currently refers to more than one written statement, written explanations for previous action as well as additional evidence as outlined in Head 21(2). The IRC recommends that a more simplified procedure is put in place for submitting a request for Ministerial consent for a subsequent application.

Assessment of Facts and Circumstances (Head 25)

23. The IRC reiterates its concern that no provisions are made obliging the personnel examining applications to have the requisite knowledge, skills and attitudes for such roles.¹¹ The requirement to examine applications in an independent, objective and impartial basis should also be inserted in the Protection Bill in accordance with Article 10(3)(a) and Recital 17 of the

¹¹ See Section 2-3 above.

recast Asylum Procedures Directive. In addition, the IRC recommend the inclusion in Head 25 of the possibility to seek advice from experts on particular issues such as medical, child-related or gender issues and issues related to gender identity or sexual identity as permitted under Article 10(3)(d) of recast Asylum Procedures Directive.

24. The IRC recommends the inclusion of a specific provision on the need for the authorities to obtain precise and up-to-date information from a variety of objective sources as to the general situation prevailing in the country of origin of the protection applicant and, where necessary, in countries through which they have transited in accordance with Article 8(2)(b) of the Asylum Procedures Directive.

25. In terms of the modified ‘benefit of the doubt’ principle under Head 25(7) drawn from the Qualification Directive¹² the IRC reminds the Committee of the ‘benefit of the doubt’ contained within the UNHCR Handbook that “while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.”¹³ The European Court of Human Rights has also noted that the benefit of the doubt may need to be applied: “The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof.”¹⁴ Furthermore, the fact that an applicant failed to apply for international protection at the earliest possible time should not be heavily relied upon as a factor to deny the benefit of the doubt.

Credibility (Head 26)

26. The IRC welcomes the fact that the numerated grounds in former section 11B of the Refugee Act 1996 have been removed from legislation in Head 26. The IRC reminds the Committee that it is

¹² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *O.J.* L304/12.

¹³ Para 196 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

¹⁴ ECtHR, *R.C. v. Sweden*, Application no. 41827/07, 9 March 2010; See also UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, May 2013.

the credibility of the applicant's application for international protection and not the credibility of the person themselves that is examinable for the purposes of international protection.

Actors of Protection and Internal Protection (Head 29 and Head 30)

27. The IRC welcomes the fact that the improved language in the recast Qualification Directive was adopted with respect to actors of protection and internal protection in Head 29 and Head 30.¹⁵ Such an approach is in line with Ireland's human rights obligations under the European Court of Human Rights' jurisprudence such as *Salah Sheekh v. the Netherlands*.¹⁶ Notwithstanding those improvements, the IRC notes that the concept of internal protection has no basis in international refugee law and its applicability will depend on the individual circumstances of the case. In applying that provision, the IRC reminds the Committee that the burden of proof is on the Minister for Justice and Equality, and not the applicant to establish whether there is a viable internal protection alternative in a person's country of origin.

Safe Country of Origin (Head 31 and Head 66)

28. The IRC considers that a country should never be presumed to be safe for all people at all times. A fair asylum procedure is the best mechanism for determining a person's protection needs rather than designating particular countries as safe.

29. Furthermore, the application of this provision, unless there are serious grounds for considering the country is not safe in individual circumstances, places too heavy a burden on the applicant. Head 31(b) is not in conformity with recast Asylum Procedures Directive whereby Recital 40 of that Directive only requires 'counter-indications' from the applicant and not 'serious grounds' to rebut the presumption of a safe country of origin. The IRC recommends the removal of Head 31 and Head 66 from the Protection Bill.

The Minister's examination of applications (Head 32)

¹⁵ Articles 7 and 8 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)(hereinafter "recast Qualification Directive", O.J. L337/9.

¹⁶ ECtHR, *Salah Sheekh v. the Netherlands*, Application no. 1948/04, 11 January 2007.

30. The IRC recalls the importance of maintaining the primacy of the 1951 Refugee Convention in the single procedure in Head 32. The IRC recommends the inclusion of Article 10(2) of the recast Asylum Procedures Directive which calls for the determining authority to first determine whether the applicants qualify as refugees, and if not determine whether the applicants are eligible for subsidiary protection. The standard of ensuring that all applications are examined and decisions taken individually, objectively and impartially should also be included in the Protection Bill.

Personal Interview (Head 32A)

31. The right to be heard is a fundamental right which must be respected within the personal interview.¹⁷ The IRC recommends that interviewing personnel have acquired general knowledge of problems which could adversely affect an applicant's ability to be interviewed via training and supervision, such as indications that the person may have been tortured in the past in accordance with Article 14 of the recast Asylum Procedures Directive.

32. The IRC is concerned that the Protection Bill does not make any specific reference to a requirement of sensitivity skills or training on the part of interviewers, which could potentially lead to re-traumatisation of the applicant and/or possible cultural misunderstandings and lead to an adverse finding on the applicant's account where none objectively exists.

33. Furthermore, provisions should be included within the Protection Bill to ensure that the personal interviews are conducted under conditions which enable applicants to fully present the grounds for their protection applicants. In this regard the IRC recommends the inclusion of provisions enabling an interviewer and/or interpreter of the same sex to be present if the applicant requests in order to ensure a gender-sensitive asylum procedure.

34. In the limited circumstances where a personal interview is omitted under the grounds in Head 32A (8) there should be a provision indicating a positive obligation on the determining authority to provide an opportunity to the applicant to submit further information.

¹⁷ In CJEU, Case C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney-General*, Judgment of 22 November 2012 the Court affirmed at para. 87 that "the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely."

35. In accordance with the principle of equality of arms and the right to good administration, the IRC recommends that applicants and/or their legal representatives are given a copy of the interview record directly subsequent to the personal interview under Head 32A. This is not only of benefit for the applicant but also the Minister in ensuring that any misunderstandings are quickly addressed and information provided in the personal interview is clarified.

36. Furthermore, the IRC recommends including a provision on the audio recording of preliminary and personal interviews as an element of good practice. This would be in line with the practice in a number of other States such as Canada and Germany.¹⁸ An audio recording system will help to quickly resolve disputes on the content of interview records and is of benefit and protection both for the individual person concerned and the personnel of determining authority as well as leading to a reduction in resources needed by limiting challenges to an interview record at a later date.

Withdrawal or deemed withdrawal of application at first instance (Head 34)

37. The IRC welcomes the fact that the State, when determining an application is withdrawn, no longer refers to determining that the protection applicant concerned is not entitled to protection but in fact the examination of the application is just terminated. However, in terms of the notice period required when an application appears to be implicitly withdrawn we would suggest maintaining the 15 day time limit as is the current standard and not reducing it to 10 days.

38. The IRC notes that the Ministerial notice issued when a case is deemed withdrawn under Head 34(4) requires the applicant to confirm in writing within 10 days of the date of the notice that he or she wishes to continue with his or her protection application. The IRC recommends that this provisions is extended to 15 days' notice which was the previous practice under Section 11(11) of the Refugee Act 1996 as amended.

Report of examination and determination of application (Head 35)

¹⁸ For more information see the Irish Refugee Council, the Single Protection Procedure, a Chance for Change, 2009.

39. The IRC notes that Head 35(5) provides that where a determination cannot be made within 6 months of the date of application then the Minister shall, upon request from the applicant, provide them with information on an estimated timeframe within which a determination may be made. The IRC recommends that persons who are in the protection procedure for longer than 6 months should be given access to greater entitlements.

Notification of determination of application at first instance (Head 36)

40. Head 36(3) provides that where a Minister's declaration is that the applicant is a person in respect of whom a refugee declaration should be given the notification need only consist of that fact. The IRC believes that a decision to grant refugee status should be reasoned in line with best practice and the principle of good administration. This would also be of relevance in the context of any future action the Minister may take in relation to cessation or revocation.
41. Head 36(6) permits the Minister to withhold information obtained by a Department of State, other branch or office of the public service by or on behalf of the government of another State. The provision indicates that such information shall not be disclosed unless the consent of the other State is obtained. The IRC believes that such a provision is not in conformity with the principle of equality of arms and recommends that any information obtained relevant to the applicant's protection application is disclosed to him or her in accordance with the EU law principle of the right to good administration. In this regard, IRC notes Article 22 of the Asylum Procedures Directive which obliges States to not obtain any information from alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin. This, by analogy, also applies with respect to the International Protection Appeals Tribunal under Head 38(12).

Examination and determination in relation to permission to remain (Head 36A)

42. In applying this provision the IRC recalls the State's obligations under the European Convention on Human Rights in particularly Article 3 (prohibition on torture, inhuman and degrading treatment or punishment) and Article 8 (right to respect for private and family life) ECHR as well as other relevant provisions such as the right to the integrity of the person (Article 3 Charter)

and right to human dignity (Article 1 Charter) under the European Charter of Fundamental Rights.¹⁹

43. In addition further guidance should be given to terminology such as ‘national security’, ‘public order’ and the ‘common good’ given the implications for individual applicants. The IRC also recommends that refusal of permission to remain on human rights grounds should be appealable to the International Protection Appeals Tribunal.

44. A person may have very valid reasons for needing to remain in the state and these need to be given equal priority to an international protection claim. The IRC is concerned that the burden on the applicant to identify reasons for remaining when they do not have the necessary knowledge, for example, of rights under the European Convention on Human Rights, is too high. There should be an obligation on the state to properly explore any further reasons for remaining based on their own training and expertise, not least given the serious step of deportation and the effect of it, that is, permanent exclusion from the state.

Prioritisation (Head 67)

45. The IRC reminds the Committee of the requirements under the CJEU ruling of *HID C-175/11* that persons subject to a prioritised procedure are able to fully access their procedural rights under the Asylum Procedures Directive throughout such a procedure.²⁰

46. In the spirit of transparency and legal clarity, the IRC recommends the removal of Head 67(1) which gives the Minister absolute discretion to prioritise any application for international protection. Furthermore, the IRC finds the wording of Head 67(2) unclear and ambiguous as to the objective as the list appears to be more a list of accelerated protection procedures rather than applications which should be prioritised.

¹⁹ For further information see European Council on Refugees and Exiles and Dutch Council for Refugees, *the Application of the EU Charter of Fundamental Rights to Asylum Procedural Law*, October 2014.

²⁰ CJEU, C-175/11, *H.I.D. and B.A. v. Refugee Applications Commission and Others (Ireland)*, 31 January 2013.

Prohibition of Refoulement (Head 44)

47. The principle of non-refoulement is enshrined within the 1951 Refugee Convention as well as international and regional human rights law and customary international law. Accordingly the IRC recommends deleting the reference to 'where in the opinion of the Minister' given the absolute nature of the prohibition of non-refoulement in human rights law which provides for no exception and therefore is broader than Article 33(2) of the 1951 Refugee Convention.
48. The IRC also recommends maintaining within the principle of non-refoulement the wording within the Refugee Act 1996 which states "Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia.....the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."

Revocation of refugee declaration or subsidiary protection declaration (Head 46A)

49. The IRC reminds the State of its obligations under Article 14(6) of the Qualification Directive to ensure that where a refugee declaration is revoked under Head 46(2) (a) and (b) that the person concerned has access to their rights and entitlements in Articles 3, 4, 16, 22, 31, 32 and 33 of the 1951 Refugee Convention.

3. Addressing the needs of vulnerable persons

Identification and Assessment of Specific Needs of Vulnerable Persons

50. The IRC regrets the fact that the scheme of the International Protection Bill has failed to include any specific provisions on the identification and assessment of vulnerable persons within the protection procedure. The scheme only recognises the need of vulnerable individuals in relation to the content of their status under Head 52. Failure to take into account the individual and personal circumstances of vulnerable persons may lead to the incorrect determination of protection needs and at the worse, potentially breach the principle of non-refoulement.
51. The European Court of Human Rights has itself acknowledged the vulnerability of protection applicants stating that "The Court attaches considerable importance to the applicant's status as

an asylum seeker and, as such a member of a particularly underprivileged and vulnerable population group in need of special protection.”²¹

52. It is important that an asylum seeker’s specific vulnerabilities are identified early on in the asylum procedure. This is necessary also for the national authorities to respect their international human rights obligations including the right to human dignity under Article 1 of the Charter of Fundamental Rights. The IRC recommends that a specific provision is introduced into the Protection Bill for the early identification and assessment of vulnerable persons and a requirement for the procedural safeguards within the protection procedure to be adapted accordingly to their specific needs.

Report in relation to the health of an applicant (Head 22)

53. The IRC is concerned that no mention is made of the express consent of the applicant for the furnishing of a medical report in relation to the physical or psychological health of the applicant. The IRC further submits that respect for the human dignity of the applicant should be the central principle with regard to such medical examinations and that the least invasive method of medical examination should be used. An independent medical practitioner should be selected for such functions and not a nominated practitioner by the Minister.

Separated Children

Interpretation (Head 2)

54. A definition for separated children should be included to ensure the timely identification of those separated from their parents or caregivers, including those who are in the company of smugglers or traffickers. Such an approach would bring the Bill more in line with the SCEP²²/UNHCR definition of separated children. The IRC recommends that the following is inserted under *Head 2*:

“separated child” means a child under the age of 18, who is outside his or her country of nationality or, if stateless, outside his or her country of habitual residence and who is

²¹ECtHR, *MSS v Belgium and Greece*, Application no. 30696/09, 21 January 2011.

²² Separated Children in Europe Programme

separated from both parents, or from his or her previous legal or customary primary caregiver”²³

55. At a minimum, the IRC recommends that the Protection Bill should transpose Article 2(l) of Directive 2011/95/EU (the Qualification Directive) which states:

“‘unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States”

Age Assessment (Head 23)

56. This Protection Bill, for the first time in proposed Irish asylum legislation introduces a provision on age assessment. This is disappointing as Ireland has always applied a social-age assessment methodology.²⁴ Although the process of appeal and some of the age decisions the various government agencies have made have been criticized, the non-invasive methodology was always viewed as a positive measure. Given the known margin of error in any medical age assessment procedures, the IRC recommends that Ireland should opt instead for a social age-assessment undertaken by an inter-disciplinary body consisting of persons not involved with the child’s care or protection needs. This methodology is best practice and does not expose the child to invasive and sometimes harmful medical procedures.²⁵

Unaccompanied minor seeking international protection (Head 12, 14 & 33)

57. The IRC notes that there is no provision for the appointment of a representative for separated children as required by Article 2(i) in Directive 2005/85/EC Asylum Procedures Directive:

‘representative’ means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation

²³ Recommended by the Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, March 2008.

²⁴ *Moke v. Refugee Applications Commissioner* [2005] IEHC 317.

²⁵ Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, available at: <http://www.refworld.org/docid/4ff535f52.html> [accessed 7 May 2015]

which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests;

Ireland is obliged to transpose the provisions contained within this Directive at a minimum. However, it is recommended that Ireland provides or the provision of *legal* guardianship for all separated children in line with international best practice.²⁶

58. It is recommended that Ireland provides a stand-alone provision on the best interest of the child in line with international best practice which ensures the best interest is taken into account in all actions and decisions taken on behalf of the child.²⁷

4. Appeals and Remedies

International Protection Appeals Tribunal (Head 55 and 56)

59. The IRC welcomes the commitment to an independent International Protection Appeals Tribunal which is inquisitorial in nature. Such an approach reflects Article 8(2)(a) of the Procedures Directive that applications for protection be examined and decisions taken individually, objectively, and impartially.

60. The IRC is concerned that the provision in Head 56 that the Minister appoints International Protection Appeals Tribunal members who determine appeals against first instance decisions would not constitute an impartial examination of applicant's protection needs. Therefore Head 56 may be in violation of Article 14 of the International Covenant on Civil and Political Rights which entitles everyone to a fair and public hearing by a competent independent and impartial tribunal established by law. The IRC recommends that the selection of PRT members be made by an independent commission which would maintain and strengthen judicial independence by removing this responsibility from the Minister and any subsequent perception of impartiality of PRT members.

²⁶ Fundamental Right Agency: FRA Recommendation: A legal guardian should be provided to every separated, asylum seeking child as soon as possible. Appropriate legal representation, advice, counselling and free legal aid should be provided to separated children and their guardians or other representatives as soon as possible.

²⁷ For example: the Borders, Citizenship and Immigration Act 2009 Section 55 on the duty regarding the welfare of children.

Functions of chairperson of Tribunal (Head 57)

61. The IRC welcomes the commitment of the Tribunal to establish or adopt rules and procedures with the objective of ensuring fair procedures in a transparent manner by way of their publication. The IRC recommends that specific reference is included in the Bill for the involvement of the Tribunal Users Group in the development of such procedures and policies into the future as well as other expert parties where appropriate.

Appeal to Tribunal (Head 37)

62. By limiting the right of appeal to applicants only on the grounds of refugee status and subsidiary protection, the IRC has serious concerns that persons who wish to appeal against refusal of permission to remain decisions with raise rights of the European Convention on Human Rights are being denied the effective remedy under Article 13 of the ECHR incorporated into Irish law by the 2003 Human Rights Act. For example, an applicant who states that their removal from the State would breach their right to have their private and family life respected, would not under the general scheme of this Bill, be able to raise these issues as grounds of appeal.
63. Furthermore, under this section, the only opportunity to remedy an infringement of an applicant's human rights under the European Convention on Human Rights which falls outside the scope of refugee status or subsidiary protection is judicial review at the High Court. The IRC argues that this is not, considering its narrow remit, the delay entailed and the expense and timescales placed on all parties of the judicial review process, the effective remedy envisioned by Article 13 of the ECHR.
64. Given the statutorily independent nature of the International Protection Appeals Tribunal, the IRC regrets that the Minister under Head 37(4) may prescribe procedures dealing with appeals to the Tribunal including the holding of oral hearings. Such matters should only be within the remit of the Chairman of the Tribunal.

Oral Hearing (Head 38)

65. The IRC welcomes the fact that the oral hearing at the Protection Appeals Tribunal should be as informal as is practicable, and consistent with fairness and transparency (Head 38(6)(d)). However, the scheme indicates that an oral hearing may only be held in public where there applicant so consents and where in the opinion of the Tribunal, it is in the interests of justice to do so. The IRC believes that public hearings should be the norm before the International Protection Appeals Tribunal unless the applicant is a child or other special considerations apply.²⁸

66. Furthermore the oral hearing is dependent on the applicant requesting it unless the Tribunal Member of their own motion thinks it is in the interests of justice to do so. The IRC believes that there should be a presumption in favour of an oral hearing at all times and not confining to request only.

Accelerated appeal procedures for manifestly unfounded applications (Head 39)

67. The IRC is concerned that decisions including determinations that a claim is manifestly unfounded under Head 35(4) lead to restricted appeal rights with no oral hearing and shorter time-limits for appeal under Head 39. The Tribunal should have the power to conduct oral hearings for such appeals when the interests of justice require it. Such an approach would more correctly reflect the right to be heard under Article 41 Charter of Fundamental Rights and the right to good administration. This is particularly relevant with respect to Head 35(4)(b) which includes a finding that an application is manifestly unfounded when the applicant has made inconsistent, contradictory, improbable or insufficient receptions which are 'clearly unconvincing' in relation to the eligibility of the applicant for international protection. The IRC reminds the Committee that the well-founded fear test for refugee status is a low standard of 'real likelihood of risk' and credibility assessments concerning elements of an applicant's claim are correctly evaluated on the standard of 'balance of probabilities.' Therefore, the use of the terminology 'clearly unconvincing' is misleading, lacks clarity and should be removed.

²⁸ The Irish Refugee Council, *Difficult to Believe – The assessment of asylum claims in Ireland*, 2012.

Decision of Tribunal on Appeal (Head 42)

68. The IRC notes that a number of matters are listed under Head 42(1) which the Tribunal should consider when examining an appeal and recommends that a specific provision should be introduced to the fact that any observations/representations by the applicant's legal representatives are taken into account by the presiding Tribunal member.

5. FAMILY REUNIFICATION

Family Definition

69. The IRC welcomes the fact that civil partners are included within the definition of family under Head 50(8). However, spouse and civil partners only qualify as such if the marriage or civil partnership was already subsisting upon the date the sponsor made an application for international protection in Ireland. The IRC is concerned that this does not provide for families which may be formed upon or after arrival in the State. The principle of refugee family reunification exists in order to ensure that refugees can move on with their lives in the state that provides protection and the presence of a family, including one formed after the protection claim is made, is an important part of that.
70. As in Ireland, the process of granting protection can take years, it is reasonable to expect that families can form once a protection applicant is present in the State. By not providing for this type of family, Ireland runs the risk of interfering with the right to respect for private and family life under Article 8 ECHR. The IRC therefore recommends that the current provision be extended to allow for this type of family reunification as respect for family unity should not be made condition upon the time of application. This is in line with UNHCR Executive Committee Conclusion No. 88 of 1999 to allow for "the consideration of liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family."
71. Furthermore IRC notes in Head 50(8)(e) that 'member of the family' is defined as 'a child of the sponsor who, on the date of the application under paragraph (1) is under the age of 18 years and is not married. Irrespective of the fact that a child may be married the principle of family unity should be maintained with his/her parents and siblings. In addition Head 50(8)(d) excludes married children from the definition of family. The fact that parents are excluded from the

family definition for married children raises questions as to its compatibility with the Convention on the Rights of the Child and in particular Article 2 on the prohibition on discrimination.²⁹

Duration of right of residency for family members of applicants

72. The IRC reminds the Committee of the state's duty to maintain the principle of family unity in Article 23 of the Qualification Directive and Article 8 ECHR and Article 7 of the Charter of Fundamental Rights. Given the fact that family members will also have similar protection needs to their sponsors it is unclear why they should be given lesser residence rights than sponsors as appears to be indicated under Head 48. The IRC recommends that family members are given the same permission to reside in Ireland as their sponsors of the specified period of not less than three years and renewable under Head 48(2). Such an approach would also create a lesser administrative burden on the State in terms of arranging renewable permits.

73. Head 48(3(b)) and Head 50(6) provides that permission to remain as a family member of a qualified person shall cease once that person ceases to be a family member so for example in the event of a marriage separation. The IRC recommends that family members retain the right of residency in Ireland in the event of such separation independently of the qualified applicant as was the previous procedure under section 18 of the Refugee Act 1996(as amended).³⁰

Family Reunification Application

74. The wording under Head 50(1) lacks clarity but seems to indicate that a person must submit a family application within 12 months of the granting of status. The IRC recommends that applying for family reunification should not be conditional on any application for such family reunification being submitted within 12 months of the granting by the Minister of a refugee or subsidiary protection declaration. There may be many reasons as to why family reunification applications may be submitted at a late date including the tracing of missing family members.

²⁹ For further information see ECRE Information Note on Recast Qualification Directive, October 2013.

³⁰ Section 18(3)(a) of the Refugee Act 1996 as amended provides that family members of refugees are entitled to their rights under section 3 of the Refugee Act 1996 as amended so long as the refugee continues to reside in the State.

6. OPERATIONAL AND OTHER MEASURES

Ministerial Discretion

75. The IRC is concerned by the broad discretion granted to the Minister for Justice and Equality to issue Regulations in relation to any matter raised in the International Protection Bill under Head 3. Such matters pertaining to protection should be consolidated and incorporated into this piece of primary legislation rather than creating piecemeal legislation as demonstrated by the plethora of statutory instruments following the Refugee Act 1996 as amended. Now is the time for transparency and clarity in primary legislation.

Programme Refugees

76. The IRC is concerned by the fact that Head 53 permits the Minister to grant permission to reside for programme refugees for a specified period of less than three years. Resettlement is viewed as a durable solution and such persons should be entitled to the permission to reside as other refugees for periods of three years or more, renewable.

Option to voluntarily return to the country of origin (Head 43A)

77. The IRC is concerned that the issuing of a specific notification of the option to voluntarily return to the applicant's country of origin during the protection procedure will result in anxiety and confusion for the applicant's concerned. Such information can be more generally provided by way of the generic information leaflet on the protection procedure outlining the rights and guarantees for applicants within the procedure. Furthermore, it is unclear why such notices are only valid for 5 days and then expire. Given the ramifications of such decisions more time should be made available in order for applicants to individually reach an informed conclusion as to whether to voluntarily return or not.

78. The IRC is also concerned about the vagueness in language under Head 43A(5) which appears to indicate that voluntarily return is not an option and the person must be removed by deportation order if the Minister is of the 'opinion that adverse concerns relating to national security or criminality arise in relation to the person'. The IRC recommends that language should be clear

and unambiguous and terms such as 'adverse concerns' should be omitted for lack of legal clarity.

Contracts for Services (Head 68)

79. The IRC is concerned by the lack of clarity in the wording of Head 68 and its implications. It appears to indicate that the Minister may contract out its services. Although noting and welcoming the work of the Processing Panel in clearing the asylum backlog, the IRC is concerned that in taking such an approach the Minister's personnel will never build within the Department the sufficient capacity, skills and knowledge needed for conducting a protection procedure. Any utilisation of a Processing Panel should only be viewed as a short term measures whilst capacity and resources are built up within the relevant Department. The IRC reminds the Committee that the Minister for Justice and Equality can never contract out of her obligations under international law in this regard.

Abolishment of the Office of the Refugee Applications Commissioner

80. The IRC regrets that the Bill effectively abolishes the Office of the Refugee Applications Commissioner (ORAC) for its work to be subsumed within the Department of Justice and Equality. Given the Minister for Justice and Equality's role in border and immigration control the independence of ORAC in the exercise of its functions should not be lost in the single protection procedure. Over time ORAC has developed the specific capacity and training to conduct a protection procedure and such knowledge will be lost should the Department of the Minister take over this important role. During the passage of the Refugee Bill (which was eventually passed in 1996), all parties recognised the importance of separation of the protection decision from the Department of Justice. No argument has been advanced as to why that has been reversed, particularly given the training, skills and expertise that ORAC has developed over a number of years. The IRC strongly recommends maintaining an independent body outside of the Department of Justice to assess claims within a single procedure.

Lack of Provisions for Reception Conditions and Facilities

81. The IRC strongly recommends the inclusion of a legal framework within the scheme of the Bill for reception conditions and facilities. Given that this is the most significant reform of asylum law in Ireland since 1996, Ireland should take the opportunity to address the issues surrounding

reception facilities given the inherent problems in the Direct Provision system. Such an approach would also be in accordance with the governments' own statement of priorities from 2014-2016 to 'treat asylum seekers with the respect and humanity they deserve'. The framework exists in the recast Reception Conditions Directive and therefore Ireland can either opt-in or incorporate the Directive into the Bill. This would include the right to work, over which Ireland has been out of step with its European partners for more than ten years.

Refugee Advisory Board

82. The IRC believes that an independent Refugee Advisory Board should be established within the scheme of the Bill. Such a board will oversee quality and transparency in the single protection procedure including with respect to reception conditions and should be required to report annually to the Oireachtas on its activities.

Early Legal Advice and Quality Assurance

83. The IRC believes that both early legal advice and representation and the use of quality assurance mechanisms help the quality and consistency of decision making with the protection procedure. The IRC Independent Law Centre has provided early legal advice since 2011 for those with unmet legal needs and particular vulnerabilities within the protection procedure. The IRC believes that early legal advice and representation is an essential pillar of a meaningful asylum system and effective legal aid in this area of law. Given the complexities of this area and the inherent vulnerability of people seeking protection, early intervention is as valuable and important in international protection law as it is in other areas of civil legal aid, such as family and child protection law. The IRC recommends that a specific provision is included within the Protection Bill for the provision of free early legal advice and assistance.

84. The IRC also recommends that an auditing and quality assurance mechanism is incorporated within the relevant Department for the review of quality of decision-making within the protection procedure and that periodic reports are published on training, guides and other procedures and policies put in place by the Minister for the purposes of the protection procedure. The role of an independent inspectorate could also be included within the scheme of the Bill along the similar module to the UK's role of Independent Chief Inspector of Borders and

Immigration. Such independent scrutiny could assist in improving the quality and efficiency of decision-making in the single protection procedure.

Conclusion

Overall, despite some important improvements, the General Scheme of the International Protection Bill indicates that there has been a missed opportunity to develop primary legislation in line with best practice in international protection law and the improved standards within the recast asylum acquis. Although the establishment of a single procedure is a welcome development, it will not be the panacea for all of the deficiencies within the asylum procedure unless further improvements are made in legislation and practice. The IRC believes that the legislation which will set the framework for the future of international protection in Ireland must be guided by clarity and transparency, the protection of human rights, fairness and the rule of law.