

IRISH REFUGEE COUNCIL

**Recommendations on the
International Protection Bill 2015**



November 2015

1. Introduction

This International Protection Bill¹ represents the most significant overhaul of the Irish protection system since the Refugee Act 1996 as amended. Therefore whilst being cognizant of the need for swift legislative action it is important that sufficient time is given to analyse the implications of the amendments to the protection system as presented in the current Bill. This represents a significant opportunity for Ireland to make some fundamental reforms by placing the right to asylum at the core of the Irish protection procedure and addressing the shortcomings of the previous asylum system. This briefing paper provides a number of suggested amendments to the current legislative text and also highlights some key areas where there are lacunas in the law which should be addressed in a revised version of this Bill. As guidance for suggested amendments the IRC refers to elements of the Common European Asylum System and recommendations from the Working Group on the Protection Process where appropriate.² This paper should also be read in conjunction with our comments on the general scheme of the International Protection Bill published in May 2015.³

2. Omissions in the Bill

Training and Qualifications

The IRC remains concerned that there are no provisions in the Bill for the training, qualification and skills of personnel engaged in the protection procedure. Although section 62 empowers the Chairperson of the Tribunal to convene training programmes there is no equivalent provision or training requirements for personnel involved in the examination of international protection claims at first instance. Limited reference is made to the specific knowledge of authorised officers examining unaccompanied children⁴ but no substantive provision is included in the Bill for the comprehensive qualifications and training of personnel involved in all aspects of the protection procedure. As previously mentioned in our comments on the General Scheme of the Bill it is essential that authorised officers, border officials, the Gardaí Síochána and other personnel who come into contact with persons seeking international protection have the necessary competencies, skills, knowledge, attitude and training for their respective roles. The IRC recommends that a **new provision is inserted in the Bill providing for procedural and substantive training requirements for relevant personnel**. Ireland has opted into Regulation (EU) no. 439/2010 establishing the European Asylum Support Office (EASO) and yet only limited references is made to that Office in the Bill with respect to information on internal relocation and designation of safe countries of origin. The new training provision at the

¹ International Protection Bill 2015 available at:

<http://www.oireachtas.ie/documents/bills28/bills/2015/10215/b10215s.pdf>

² Department of Justice and Equality, *Working Group to report to the Government on Improvements to the Protection Process, including Direct Provision & Supports to Asylum Seekers*, Final Report June 2015, (hereinafter Working Group report).

³ Irish Refugee Council, *Comments on the General Scheme of the International Protection Bill*, May 2015.

⁴ Section 35 International Protection Bill 2015.

minimum should include an explicit reference to training programmes by EASO under Article 6 of the EASO regulation for relevant personnel.⁵ In a spirit of transparency and in accordance with the principle of open justice the IRC also recommends that any training material and guidelines developed and utilised by the first instance Ministerial department and the International Protection Appeals Tribunal are accessible and published. In that regard we welcome the efforts by the present Refugee Appeals Tribunal to publish guidance notes on particular aspects of protection procedures. Guidance can also be sought from the relevant training and guidelines developed by the European Asylum Support Office, UNHCR and other actors such as the European Legal Network on Asylum training conferences (ELENA).

In addition the IRC recommends that **an accreditation scheme and training programme is developed for interpreters** involved in the protection procedure. Currently Ireland has no common form of accreditation for interpreters. Good quality interpretation and translation is essential to ensure that there is good communication between officers and individual applicants. This would be a significant positive step in improving the quality of interpretation and therefore improving access to asylum as well as implementing a recommendation of the Working Group on the Protection Process on this issue.⁶

Identification and Assessment of the Needs of Vulnerable Persons

The IRC shares the concern of SPIRASI that the Bill fails to include any specific provisions on the early identification and assessment of vulnerable persons within the proposed single procedure.⁷ The Bill only refers to having ‘due regard [...] to the specific situation of vulnerable persons’ in the context of the content of rights granted to refugees and subsidiary protection beneficiaries.⁸ This is unacceptable as failure to correctly identify the needs of vulnerable persons early in the protection process may mean they are not recognised as being in need of international protection. Other related issues may arise for example linked to late disclosure of protection needs due to trauma and the need for further subsequent applications. Failure to correctly identify any particular vulnerabilities of protection applicants early in the procedure is neither of benefit to the individual concerned or the State. Furthermore this is out of step with many other EU Member States who have an obligation to conduct such assessments under the recast Asylum Procedures Directive⁹ and recast Reception Conditions Directive.¹⁰ Guidance can be taken from Recital 29 of the Recast Asylum Procedures Directive which states that:

⁵ Regulation 6 Support for Training of Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, O.J. L132/1129.5.2010.

⁶ Working group report recommendation 3.275, p.123; See also the Irish Translators and Interpreters’ Association’s [Submission to the Working Group to report to Government on Improvements to the Protection Process, including Direct Provision & Supports to Asylum Seekers](#), March 2015.

⁷ SPIRASI, [Statement on Publication of the International Protection Bill](#), 20 November 2015.

⁸ Section 57 International Protection Bill 2015.

⁹ Article 24 Applicants in need of special procedural guarantees in 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), OJ L180/60 29.6.2013 (hereinafter recast Asylum Procedures Directive).

Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

Now is the opportune time for the government to address the needs of vulnerable persons and the IRC recommends that a **new specific provision is included in the Bill for the early identification and assessment of vulnerable persons and a requirement for procedural safeguards within the protection procedure to be adapted accordingly to their specific needs**. This would be in line with the Working Group report recommendation on vulnerable persons and would meet the concern noted on this issue in the Oireachtas Joint Committee on Justice, Defence and Equality Interim Report on the General Scheme of the International Protection Bill 2015.¹¹

Gender-sensitive asylum procedures

The IRC regrets the fact that the provisions of the Bill as currently formulated fail to take into account the specific needs of persons submitting international protection applications on gender-related grounds. The IRC recommends that **gender guidelines for the purposes of the protection procedure are developed for initial decisions makers and the Tribunal based on UNHCR gender-relevant guidelines**. In this respect the IRC supports the recommendations of the National Women's Council of Ireland regarding such guidelines.¹² These guidelines could

¹⁰ Article 22 Assessment of the special needs of vulnerable persons in 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), OJ L180/96 29.6.2013 (hereinafter recast Reception Conditions Directive).

¹¹ See recommendation 3.299 of the Working Group Report and Houses of the Oireachtas, [Joint Committee on Justice, Defence and Equality Interim Report on Pre-legislative Scrutiny Report of the General Scheme of the International Protection Bill](#), July 2015, p. 8-9.

¹² National Women's Council of Ireland, [Submission to the Joint Oireachtas Committee on Justice, Defence and Equality on the General Scheme of the International Protection Bill](#), 7 May 2015.

be developed with the aid of external experts and published. This would be in line with the UK, Malta, Romania and Sweden, countries which have established their own gender guidelines.¹³ It would also be in line with Ireland's obligations under the Istanbul Convention on preventing and combating violence against women and domestic violence which explicitly calls upon State Parties to take the necessary legislative or other measures to develop gender-sensitive asylum procedures and gender guidelines.¹⁴

Furthermore, the IRC recommends that **applicants are able to request an interpreter of the gender of their choice**. The IRC also recalls Recital 32 of the recast Asylum Procedures Directive which states that:

The complexity of gender-related claims should be properly taken into account in procedures based on the concept of safe third country, the concept of safe country of origin or the notion of subsequent applications.

Accordingly, authorised personnel should be cognizant of the difficulties inherent in gender-related claims and exercise extreme caution when considering the application of inadmissibility procedures, accelerated appeals or other procedures to such applications.

Legislative Framework for Reception Conditions and Facilities

The IRC again strongly recommends that the opportunity is taken during the drafting of this legislation to include a **legal framework for reception conditions and facilities**. Guidance as to the substantive amendments required for such an inclusion can be taken from the recast Reception Conditions Directive. Ireland can either take the approach of directly opting in to that Directive or incorporate its provisions anyhow within this Bill.

Refugee Advisory Board

The IRC recommends that **an independent Refugee Advisory Board should be established** within the Bill. The basis for this could be taken from the Immigration Act 1999 amendment to

¹³ European Parliament, Directorate –General for Internal Policies, [Gender-related asylum claims in Europe study](#), 2012.

¹⁴ Article 60 Gender-based asylum claims in the Council of Europe Convention on preventing and combating violence against women and domestic violence, 12 April 2011 (hereinafter Istanbul Convention). Ireland recently signed the Istanbul Convention; see further Department of Justice and Equality, [Minister Fitzgerald welcomes the signature by Ireland of the Istanbul Convention on preventing and combating violence against women and domestic violence](#), 5 November 2015.

the Refugee Act 1996 which provided under Section 7A for the establishment of a Refugee Advisory Board which was independent in function. However, the IRC recommends that the staffing of the Board should involve representatives who are not part of the first instance authority or the International Protection Appeals Tribunal. This Board could oversee quality and transparency in the single protection procedure and provide suggested actions to be taken in the context of backlogs and delays in administrative decision-making among other actions. The Board could also regularly review the concept of safe country of origin and its application in practice as well as other aspects of the protection procedure. If the proposal to abolish the independent Office of the Refugee Applications Commissioner (ORAC) goes ahead it is even more necessary that an independent Refugee Advisory Board is established to oversee the application of the single protection procedure.

Independent Oversight of Access to Territory

The IRC notes that over 3,000 people were refused leave to land from April 2014 to April of this year.¹⁵ It is concerned that there is a paucity of information and no transparency in relation to refusals of leave to enter the territory at Ireland's air and land borders. This is of potential alarm given that some of the people refused may have been trying to seek protection. Therefore the IRC recommends that **an independent oversight and monitoring mechanism is established** at such borders to ensure human rights and equality obligations are observed by the Irish authorities at the point of entry. This role could be led by an independent authority such as the Irish Human Rights and Equality Commission (hereinafter IHREC).

¹⁵ Department of Justice and Equality, [Response to a Parliamentary Question by Thomas Pringle TD by Minister Frances Fitzgerald](#), 26 May 2015.

3. Proposed amendments to the current text

This section addresses proposed amendments under separate themes which recur throughout the Bill. At times we recommend direct text amendments and in other places we recommend new provisions or call for more clarity as to the application of certain proposed procedures.

A. Children's Rights

1. The Best Interests of the Child

The best interests of the child as declared in the Convention on the Rights of the Child (hereinafter CRC) are a paramount consideration for both accompanied and separated children seeking international protection. Correspondingly, Ireland as a State Party to the Convention on the Rights of the Child must uphold its commitments to promote and respect children's rights in a non-discriminatory manner including in the context of children seeking protection here whether accompanied or separated. Currently the Bill only refers in a limited way to the best interests of the child principle in the context of the content of international protection granted upon recognition of a child's status in Section 57(2). Therefore the IRC recommends that a **new provision is included in the Bill reflecting this overarching obligation to respect the rights of the child**. A stand-alone provision reflecting the duty of the State to respect children's rights could be included and guidance could be taken from other Member States legislation such as Section 55 of the UK Borders, Citizenship and Immigration Act 1999 which states the following (emphasis added):

The Secretary of State must make arrangements for ensuring that-
*(a) the functions mentioned in subsection (2) are discharged having regard to the need to **safeguard and promote the welfare of children** who are in the United Kingdom, and.....(2) the functions referred to in subsection (1) are- (a) any function of the Secretary of State in relation to **immigration, asylum or nationality**;*....

Alternative proposal [Scope of the best interests of the child principle] (Page 57, lines 30-35)

Section 57 Situation of Vulnerable Persons

(2) In the application of ~~sections 52 to 56~~ **this Act** in relation to a child under the age of 18 years, the best interests of the child shall be a primary consideration.

Purpose: Ensures the best interests of the child is a primary consideration in all aspects of the protection procedure.¹⁶

Rationale: The current provision is contrary to Ireland's obligations under the CRC as it only extends to children once they have been granted a protection status. There is also just a limited reference to the best interests of the child in the context of the personal interview¹⁷ but it should be a primary principle throughout the process. For example under Article 22 CRC Ireland is obliged to take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the CRC. Furthermore, the recast Asylum Procedures Directive calls upon States in assessing the best interests of the child to 'in particular take due account of the minor's well-being and social development, including his or her background'.¹⁸ The proposed amendment would ensure that the best interests of the child is paramount throughout the protection process. Guidance for example could be taken from the practice in Sweden where the Swedish Aliens Act 2005:716 section 10¹⁹ states:

In cases involving a child, particular attention must be given to what is required with regard to the child's health and development and the best interests of the child in general

2. Definition of a separated child/unaccompanied minor (Page 8, lines 5-35)

Section 2 Interpretations

Insert in Section 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 separated from both parents, or from his or her previous legal or customary primary caregiver;**

¹⁶ The UN Committee on the Rights of the Child, General Comment No. 14 provides further guidance on the principle of the best interests of the child.

¹⁷ Section 35 International Protection Bill 2015.

¹⁸ Recital 33 Recast Asylum Procedures Directive.

¹⁹ Swedish Aliens Act (2005:717), Swedish government translation available at:

http://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf

Purpose: Defines an unaccompanied minor and separated child to ensure early identification of those separated from their parents or caregivers, including those who are in company of smugglers or traffickers. This definition must be supported by procedures for assessing the relationship between children and those accompanying them that is both in line with their best interests and executed in a child-friendly way.

Rationale: Although Section 14 goes some way to defining an unaccompanied minor there is still a lack of clarity as to how a determination is made as to whether someone is 'taking responsibility for the care and protection' of the child concerned. This is particularly concerning in light of the potential situation where a child is being trafficked. The new proposed amendment would bring the Bill more in line with the Separated Children in Europe Programme (SCEP) and UNHCR definition of separated children. This definition was also recommended by the Irish Human Rights Commission as part of their observations on the 2008 version of the then Immigration, Residence and Protection Bill. The Committee on the Rights of the Child²⁰ and UNHCR²¹ also define both separated children and unaccompanied minors in their guidance.

3. Self-identification as an unaccompanied minor (Page 18, lines 10-15)

Section 14 Unaccompanied Minor seeking International Protection

14(1): Where it appears to an officer referred to in section 13 **or when a person self-identifies that they are** ~~that~~ a person seeking to make an application for international protection, or who is the subject of a preliminary interview, has not attained the age of 18 years and is not accompanied by an adult who is taking responsibility for the care and protection of the person, the officer shall, as soon as practicable, notify the Child and Family Agency of that fact.

Purpose: Alters the responsibility of an individual officer to identify whether a person is under the age of 18 and is presenting as a separated child by also allowing the person concerned to self-identify as a child.

Rationale: Given the important ramifications if a person is determined to be an adult it is imperative that this decision is reached in a cautious manner and on the guidance of other actors including the Child and Family Agency as opposed to on the basis of one officer's subjective opinion. When a person presents as a child it is imperative that they are treated as such. This also reflects the principle of their right to be heard under Article 12 of the CRC.²² In case of doubt, the person should be treated as under 18 until such a time that there is sufficient evidence to the contrary. This approach is in line with practice in other jurisdictions for example the UK's Home Office Asylum Process Guidance on processing an asylum application from a child.

²⁰ UN Committee on the Rights of the Child, [General Comment Number 6\(2005\) on the treatment of unaccompanied and separated children outside their country of origin](#), June 2005.

²¹ UNHCR, Guidelines on International Protection No. 8: [Child Asylum Claims under Articles 1\(A\)\(2\) and 1 \(F\) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees](#), 22 December 2009.

²² UN Committee on the Rights of the Child, [General Comment No. 12\(2009\) on the right of the child to be heard](#), 1 July 2009.

4. Identification of separated and unaccompanied children by officers at borders

The IRC recommends that a suggested provision along the lines of this is inserted as a separate subsection under Section 14(1). The IRC is willing to work with legislative drafters on a text along these lines:

Section 14(1) (a) Identification of separated and unaccompanied children at borders

An officer must assess the relationship between children and those accompanying the child at the border where there is doubt as to the role of the adult accompanying the child, in particular where there is an absence of identity documentation.

The purpose of the interview should be to ensure that the person accompanying the child is a parent or habitual carer and, where appropriate, that the parent or carer is not likely to harm or neglect the child. The interview adheres to the following standards:

- i. Children are interviewed separately to parents or those accompanying the child if deemed in the best interests of the child;²³
- ii. The child can request the presence of parent or guardian during this interview;²⁴
- iii. The interviewing officer has the relevant competencies in child protection and child interviewing techniques;²⁵
- iv. A social worker is present and available at the border and is in attendance at the interview;²⁶

Where there are doubts as to the relationship between the child and guardian, the Child and Family Agency should use their powers under S. 3 of the Child Care Act 1991, as amended to take the child into care while a more thorough assessment is undertaken.²⁷

²³ Sweden Aliens Act (2005:716) S. 11 in assessing questions of permits under this Act when a child will be affected by a decision in the case, the child must be heard, unless this is inappropriate. Account must be taken of what the child has said to the extent warranted by the age and maturity of the child. For further information see http://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf.

²⁴ Convention on the Rights of the Child: Articles 5, 18 (2), 20; Committee on the Rights of the Child, General Comment No 6: Paragraphs 21, 24, 25, 33–39, 69, 72; Committee on the Rights of the Child, General Comment No 12: Paragraph 134 (e); Separated Children in Europe Programme, *Statement of good Practice*: Section B6 Quality 4 Children Standards for out-of-home Child Care in Europe: Standard 1; *Core Standards for Guardians of Separated Children in Europe*: Standard 9.

²⁵ Asylum Procedures Directive recast Article 15; EASO (2014) *Practice Guide: Personal Interview*, December 2014; Comment Number 6 para 72 ‘The interviews should be conducted by representatives of the refugee determination authority who will take into account the special situation of unaccompanied children in order to carry out the refugee status assessment and apply an understanding of the history, culture and background of the child. The assessment process should comprise a case-by-case examination of the unique combination of factors presented by each child, including the child’s personal, family and cultural background. The guardian and the legal representative should be present during all interviews’.

²⁶ Article 25(1)(a) Asylum Procedures Directive.

²⁷ Child Care Act 1991, as amended S. 3 **3.**—(1) It shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection. (2) In the performance of this function, a health board shall— (a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating

- | |
|--|
| <p>i. Any assessments as to the relationship between the child and the parent or carer should be executed in a timely manner, ensuring the time spent separated is kept to a minimum.²⁸</p> |
|--|

Purpose: Ensures all separated children are identified as separated and adequate checks are in place to ensure children are not exploited or trafficked by those accompanying them.

Rationale: Separated children are not always identified at borders as unaccompanied.²⁹ They can be accompanied by persons who are not their parents, legal guardians or habitual carers and can sometimes be accompanied by persons intending to exploit them. It is for this reason international guidance emphasises the need for intervention at the border where appropriate. This amendment would also flow into Section 34(7) in the context of a personal interview once a child has entered into the protection procedure.

5. Application for international protection for a separated child (Page 18, lines 35-40)

Section 15 Application for International Protection

The IRC recommends that 15(4) is replaced **with a new subsection allowing a separated child to make an application for asylum on his or her own behalf**. Such an approach would be in accordance with Article 7 recast Asylum Procedures Directive³⁰ and Article 12 of the Convention on the Rights of the Child as well as following a recommendation of the Working Group report.³¹ In this regard see also Chapter VI of Comment No. 6 by the UN Committee on the Rights of the Child which refers to the necessary procedural safeguards required for an unaccompanied child to seek international protection.

to children in its area; (b) having regard to the rights and duties of parents, whether under the Constitution or otherwise— (i) regard the welfare of the child as the first and paramount consideration, and (ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and (c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family. (3) A health board shall, in addition to any other function assigned to it under this Act or any other enactment, provide child care and family support services, and may provide and maintain premises and make such other provision as it considers necessary or desirable for such purposes, subject to any general directions given by the Minister under [section 69](#). (4) The provisions of the Health Acts, 1947 to 1986, and the [Health \(Amendment\) Act, 1987](#), shall apply in relation to the functions of health boards and their officers under this Act and the powers of the Minister under those Acts shall have effect accordingly as if those Acts and this Act were one Act.

²⁸ UN Committee on the Rights of the Child, *Comment Number 14* para 93 on time delays.

²⁹ EMN (2009) [Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study: EMN Synthesis Report](#), 1 May 2010.

³⁰ Article 7(3) Recast Asylum Procedures Directive states that “Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.”

³¹ Recommendation 3.199 of the Working Group report.

In the alternative the IRC recommends that unaccompanied children's applications for international protection are on the basis of having access to independent legal advice (Page 18, lines 35-40)

Section 15 Application for International Protection

Section 15(4): ~~Subject to sections 21 and 22~~, where it appears to the Child and Family Agency, on the basis of information available to it **and on the basis of independent legal advice from a legal representative**, that an application for international protection should be made on behalf of a child in respect of whom the Agency is providing care and protection, it shall arrange for the appointment of an employee of the Agency or such other person as it may determine to make such an application on behalf of the child and to represent and assist the child with respect to the examination of the application.

Purpose: Provides that the Child and Family Agency (Tusla) consults with an independent legal representative in relation to identifying whether or not an application for international protection should be applied for on behalf of a separated child.

Rationale: The current provision does not require the Child and Family Agency to receive independent legal advice when considering applying for protection on behalf of a separated child. The sole decision is left at the discretion of the Child and Family Agency which may operate in a manner which is contrary to the child's individual right to asylum as guaranteed under Article 18 of the Charter of Fundamental Rights. Given the implications for the child and the complexity of asylum law which may encompass persecution of a child-specific nature it is important that legal representatives who have expertise in both child and asylum law are consulted with in making this important decision. The role of the social worker should include the facilitation of access to legal advice and access to the asylum procedure for separated children. The Child and Family Agency should regularly review the personal circumstances and protection needs of children in their care to establish whether an application for international protection is necessary. Such reviews should be conducted in conjunction with independent legal advice from legal representatives.

6. Application for international protection- accompanied child's power to make a separate application for asylum (Page 18, lines 20-40, Page 19, line 5)

The IRC recommends that a **new subsection is added to Section 15 to enable an accompanied children to claim asylum on their own behalf**. This amendment would benefit children who may have different protection needs to their parents on the basis of their age and other personal circumstances as well as guaranteeing their own individual right to asylum as required under Article 18 of the Charter of Fundamental Rights. It would also reflect Article 7 recast Asylum Procedures Directive³² and Article 12 of the Convention on the Rights of the

³²Article 7(3) Recast Asylum Procedures Directive states that "Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her

Child. This would also be in accordance with Committee on the Rights of the Child Comment Number 6 which states (Para 66): ‘Asylum-seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection, irrespective of their age’.³³

7. New provision for a representative/guardian for unaccompanied minors

The IRC recommends that a new provision is inserted in the Bill for the **appointment of an independent representative or guardian** to act in the best interests of the child in line with EU and international obligations under Section 2 of the Bill.³⁴ The representative should be free of potential conflict of interest. Ireland could adopt the definition of representative under Article 2(n) of the recast Asylum Procedures Directive which states:³⁵

‘Representative’ means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive;

Furthermore, the IRC recommends, in line with international best practice, that Ireland provides for the appointment of legal guardianship for all separated children and guidance is provided by the Fundamental Rights Agency in that respect.³⁶

parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.”

³³ UN Committee on the Rights of the Child, [General Comment No. 6\(2005\) on treatment of unaccompanied and separated children outside their country of origin](#), June 2005.

³⁴ UN Guidelines for the Alternative Care of Children; Article 12 of the UN Convention on the Rights of the Child.

³⁵ At a minimum Ireland should comply with its minimum obligations under Directive 2005/85/EC Asylum Procedures Directive Article 2(i) having opted into that instrument.

³⁶ EU Fundamental Rights 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.

On the issue of the independence of the guardian or representative of the separated child the IRC notes that the UNHCR in their Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees state that 'An independent, qualified guardian needs to be appointed immediately, free of charge in the case of unaccompanied or separated children'. The recast Asylum Procedures Directive also expressly requires representatives or guardians to be independent under Article 25(1)(a) which states that 'Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives'.

8. Knowledge and skills of authorised officers examining separated children's applications for international protection (Page 35-36, lines 35-10)

Section 35 Applicants who are unaccompanied minors

Section 35(b) the personal interview is conducted by a person who has the necessary knowledge **and competency to take into account** of the special needs of a minor **including any child-specific protection needs**, and (c) the report of the personal interview together with the report under section 38 in respect of the child's application is prepared by a person with the necessary knowledge of the special needs of minors **including any child-specific protection needs**.

New subsection 35(d): **the authorised officer shall ensure that the interview is conducted in a child-appropriate manner. The officer conducting the interview should also have expertise in communicating with children to ensure the child's voice is heard and considered in line with their age, maturity and capacity.**

Purpose: These amendments ensure that the authorised officer conducting the personal interview and writing the report is not only knowledgeable with respect to child care concerns but in addition, has expertise in identifying any child-specific protection needs in the context of refugee status and subsidiary protection determination. The new subsection also ensures that interviews are conducted in a child-friendly manner.

Rationale: The examination of separated children's asylum claims requires not only expertise in children's rights but also child protection needs in the context of both refugee status and subsidiary protection. Children may often present with different protection needs to adults and therefore it requires a particular expertise and skill to correctly identify any persecution or serious harm they may fear/face if returned to their country of origin. These amendments clarify the knowledge required by authorised officers who conduct interviews with separated children. The new subsection also guarantees that children are able to be heard in a safe environment during their personal interview and that the interview itself is conducted in a child-friendly manner. In addition, the IRC supports the IHREC's recommendation that Tribunal

members assigned children's appeals have specific knowledge of the needs of children and that the representative of the Minister at such appeals has the same knowledge.³⁷

(a) If an unaccompanied minor has a personal interview on his or her application for international protection as referred to in Articles 14 to 17 and 34, that interview is conducted by a person who has the necessary knowledge of the special needs of minors; (b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor

Guidance can be taken from the recast Asylum Procedures Directive Article 25.3:

9. New provision enabling access to expert advice (Pages 35-36, lines 35-10)

The IRC recommends that a new subsection is inserted under Section 35 **enabling interviewing officers to seek advice, whenever necessary, from experts on child-related issues** for e.g. country of origin experts with respect to child-specific persecution.³⁸ This would reflect the practice in other jurisdictions in Europe under Article 10(2)(d) of the recast Asylum Procedures Directive.

10. Deletion of the examination to determine the age of an unaccompanied minor by medical means (Pages 30-31, lines 35-25)

Section 24 Examination to determine the age of unaccompanied minors

The IRC recommends the **deletion of Section 24(2)(c)** which represents a significant step backwards in providing for medical assessments to be conducted on minor children. Given that it is a medical fact that there is a known margin of error in such tests (namely: bone density x-rays,³⁹ dental exams⁴⁰ and physical assessments⁴¹) and notwithstanding obligations set-out in

³⁷ Irish Human Rights and Equality Commission, [Recommendations on the General Scheme of the International Protection Bill 2015](#), June 2015.

³⁸ See: <http://www.unicef.nl/wat-doet-unicef/kinderrechten-in-nl/child-notice/english/>

³⁹ Ranta (2003) describes the margins of discrepancy that are applied to age assessments in Sweden as 24 months for 9-18 year olds. See: T. Smith & L. Brownlees (2011) Age assessment practices: a literature review & annotated bibliography. New York: UNICEF.

⁴⁰ X-rays to look at the existence and development of wisdom teeth are often used for older children, generally those who are between 16 and 22 years of age. Age assessments based on wisdom teeth eruption are thought

Council Directive 97/43/Euratom of 30 June 1997 *on health protection of individuals against the dangers of ionizing radiation in relation to medical exposure*,⁴² the IRC recommends that **the provision should instead provide for a social age-assessment procedure which includes psycho-social development and available documentation undertaken by an independent inter-disciplinary body consisting of persons not involved with the child's care or protection needs.**⁴³ This proposed approach is best practice and avoids exposing the child to harmful, invasive and unnecessary medical procedures.⁴⁴ Such a proposed age determination procedure should include procedural safeguards outlined in 24(2)(a)(b) in the Bill.

11. Age assessment procedures should be carried out as a measure of last resort (Page 31, lines 25-30)

Section 24 Examination to determine the age of unaccompanied minors

New subsection in Section 24: **Age assessment procedures should be carried out as a measure of last resort and not as a matter of routine in line with best practice.**

Purpose: To ensure that age assessment is not routinely used as part of the protection procedure for separated children.

Rationale: This amendment would follow recommendations by UNHCR, SCEP and Save the Children's Statement of Good Practice.⁴⁵

to be even less precise than other methods, giving a confidence interval of over two years around the estimated age (Kullman, 1995:01). Ibid.

⁴¹ Age assessments based on physical development can be carried out using a number of anthropometric measurements, including height, weight and skin, and puberty rating, which do not involve the use of x-rays. However, these methods have been highly criticised because they do not take into consideration variations between ethnicity, race, nutritional intake and socio-economic background (see Einzenberger 2003 and Crawley, 2007. (The King's Fund and the Royal College of Paediatrics and Child Health, 1999:40). Ibid.

⁴² Repealing Directive 84/466/Euratom Council Directive 97/43/Euratom of 30 June 1997 on health protection of individuals against the dangers of ionizing radiation in relation to medical exposure, and repealing Directive 84/466/Euratom *Official Journal L 180*, 09/07/1997 P. 0022 – 0027 Article 3(1)

⁴³ For guidance on social age assessments, see UK caselaw *B v Merton London Borough Council* [2003] EWHC 1689; See also the procedural guidance given by Stanley Burnton J in *R (B) v Merton London Borough Council* (2003) EWHC 1689 (Admin), [2003] 4 All ER 280.

⁴⁴ Separated Children in Europe Programme, [Position Paper on Age Assessment in the Context of Separated Children in Europe](#), 2012.

⁴⁵ SCEP Statement of Good Practice 2009 "Age assessment procedures should only be undertaken as a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age. SCEP Statement of Good Practice, 2009"

12. Taking of Fingerprints from children under 14 years of age (Page 21, line 20-25)

Section 19 Taking of Fingerprints

~~19 (2) Fingerprints shall not be taken under this section from a person who has not attained the age of 14 years, other than in the presence of — (a) his or her parent, or another person who is taking responsibility for him or her, or (b) where applicable, a person appointed by the Child and Family Agency under section 15(4) to make an application on behalf of him or her.~~

Purpose: To ensure that fingerprints are not taken by anyone under the age of 14 years of age for the purposes of this Bill.

Rationale: The IRC is concerned that children under the age of 14 are subjected to having biometric data taken from them without their own informed consent in accordance with their age and maturity. The IRC also notes that the recast Eurodac Regulation (EU) No. 603/2013 only allows for the fingerprinting of children who are 14 years or older so this new proposal in the Bill to take the fingerprints of younger children is disproportionate to the aim to be achieved and potentially infringes their right to privacy and data protection under the European Convention on Human Rights and the Charter of Fundamental Rights.⁴⁶

⁴⁶ Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management for large-scale IT systems in the area of freedom, security and justice (recast), OJ L180/1 29.6.2013.

B. Preliminary Issues and Qualification for International Protection

13. Acts of Persecution (Page 13, line 25)

Section 7 Acts of persecution

Section 7(2) The following are examples of acts which may amount to acts of persecution for the purposes of subsection (1): (a) acts of physical or mental violence, including acts of sexual violence **and acts of domestic violence**; (b) legal, administrative, police or judicial measures, or a combination of these measures, that are in themselves discriminatory or are implemented in a discriminatory manner; (c) prosecution or punishment that is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts of a kind referred to in section 10(2); (f) acts of a gender-specific or child-specific nature.

Purpose: Ensures that domestic violence is recognised correctly as a form of persecution.

Rationale: The IRC supports the recommendations made by the Immigrant Council of Ireland and Women's Aid under the General Scheme of this International Protection Bill (March 2015) that domestic violence should be clearly listed as a form of persecution. It is noted that section 7(2) currently provides a non-exhaustive list of examples of acts which may amount to persecution. However, the proposed amendment would provide further legal certainty and clarity for victims of domestic violence and would be in accordance with Ireland's obligations under the Istanbul Convention on preventing and combating violence against women and domestic violence which Ireland recently signed.⁴⁷

14. Definition of membership of a particular social group (Page 14, line 25)

Section 8 Reasons for persecution

Include a new subsection under Section 8(3): For the purposes of subsection (1)(d):....**(c) membership of a particular social group includes membership of a trade union**

Purpose: Reinstate the previous provision in the Refugee Act 1996 which clearly states that trade unions can be a particular social group for the purposes of refugee status determination.

⁴⁷ Department of Justice and Equality, [Minister Fitzgerald welcomes the signature by Ireland on the Istanbul Convention on preventing and combating violence against women and domestic violence](#), 5 November 2015.

Rationale: This amendment reinstates the current position that trade unions fall within the definition of the 1951 Refugee Convention ground of a particular social group. For the sake of legal certainty and consistency in approach it is recommended that this provision is retained within the 2015 Bill.

15. New definition on Statelessness (Page8, lines 5-35)

Section 2 Interpretations

The IRC recommends that a **definition on statelessness is included within the Bill** under Section 2. Ireland as a signatory to the 1954 UN Convention relating to the Status of Stateless Persons must uphold its commitments in this regard. This would also require establishing a procedure to identify stateless applicants and the IRC supports the Immigrant Council of Ireland's recommendations under the General Scheme of this International Protection Bill (March 2015) with respect to statelessness. Guidance as to the content of a statelessness definition could be taken from Article 1 of the 1954 UN Convention:

For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law;

16. Documents to be issued to legal representatives (Page 12, line 25-30)

Section 5 Service of Documents

Insert new subsection (3): **A copy of any notice or other document that is required or authorised by or under this Act to be served on or given to a person should also be sent directly to his/her legal representative at the time of issuing the notice or document;**

Purpose: Ensures that the applicant's legal representative is also fully informed of actions taken by the authorities and documents issued to his/her client.

Rationale: The current provision does not clarify whether legal representatives also receive copies of decisions or notices issued to their clients. This amendment ensures legal certainty and clarity by expressly providing that they should have speedy access to such documentation to act in the best interests of their clients.

The IRC also recommends **throughout the Bill that when decisions / documents / copies of interview records are furnished to applicants that copies are also sent to their legal representatives at the same time.** The whole Bill should also be reviewed for consistency in language as reference is made in some sections⁴⁸ also to 'legal practitioners' as opposed to legal representatives but no definition of such is provided.

C. Application for International Protection

17. Enhanced clarity with respect to conduct of preliminary interview (Page 17, lines 10-35)

Section 13 Preliminary Interview

The IRC recommends that **more clarity** is provided with respect to where the preliminary interview is conducted and by whom. The current text seems to indicate that an immigration officer could conduct a preliminary interview at the frontiers of the State which would be of concern for the IRC given that no provisions are present on the training and qualifications of such personnel. The IRC strongly recommends that a new provision is inserted in this respect to ensure that people seeking international protection or otherwise indicating an unwillingness to leave the State for fear of return to their country of origin or another country, have **access to independent legal advice**. Therefore the IRC recommends that a **new provision is inserted enabling access to an independent body such as IHREC and independent legal advice and information** at such areas such as Dublin airport and other transit areas. Such a recommended provision would be in line with Article 8 of the recast Asylum Procedures Directive⁴⁹ and would ensure that persons are fully informed of their right to seek asylum as guaranteed under the Charter of Fundamental Rights.⁵⁰

18. Review of reporting requirements for applicants (Page 19, lines 10-35)

Section 16 Permission to enter and remain in the State

Section 16(3) sets out a number of requirements for protection applicants such as not attempting to leave the State without the consent of the Minister, not seeking or engaging in employment or complying with reporting requirements at specified intervals (Section 16(3)(d)(ii)). **The IRC recommends that some flexibility is maintained in this reporting requirements and the possibility is provided to periodically review the reporting requirements depending on the personal circumstances of a protection applicant.** So for example if an applicant for international protection is heavily pregnant the reporting requirements to present at a specified Garda Síochána station should be lifted.

⁴⁸ For example Article 20(14) International Protection Bill 2015.

⁴⁹ Article 8 recast Asylum Procedures Directive on information and counselling in detention facilities and at border crossing points.

⁵⁰ Article 18 Charter of Fundamental Rights.

19. Clarification on information provided to the applicant (Page 20, line 25-35)

Section 18 Statement to be given to applicant

The statement provided to the applicant under this provision should **include information on how to assert entitlements in law in practice** so for example on how to consult a legal representative in practice. Failure to provide information on how to access one's entitlements makes them meaningless in practice. Furthermore the **IRC recommends that a separate statement or information leaflet written in a child friendly manner** is provided for separated children.

20. Clarification on grounds for inadmissibility (Page 25, lines 20-25)

Section 21 Inadmissible application

Section 21 (2) An application for international protection is inadmissible where one or more than one of the following circumstances applies in relation to the person who is the subject of the application: (a) another Member State has granted refugee status or subsidiary protection status to the person **and he/she does not fear or face persecution, serious harm or other human rights violations there;**

Purpose: Provides that a person's application for protection is only inadmissible when he/she does not fear or face persecution or serious harm or other human rights violations in the country where he/she has previously been granted an international protection status.

Rationale: The amended provision clarifies when an application may be inadmissible in a manner which respects Ireland's human rights obligations under the European Convention on Human Rights and the Charter of Fundamental Rights. Jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union clearly indicates that there may be breaches of human rights obligations in other Member States irrespective of the fact that they have been granted a protection status there.⁵¹ The jurisprudence of such courts in the context of Dublin III Regulations is of specific relevance when a person is denied access to an asylum procedure here on the basis of protection elsewhere.⁵² It is imperative that people are not deprived of the right to even be admitted to the protection procedure here in situations where they may be a risk of persecution or serious harm or other human rights violations in the other country, be it another EU Member State or third country. This example highlights the problems associated with Section 21 as it is currently formulated:

"A sub-Saharan African woman who is recognised as a refugee in Hungary due to her membership of an ethnic minority clan is subjected to racist attacks there over a number of

⁵¹ For example ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011; 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.

⁵² Ibid; ECHR, *Tarakhel v. Switzerland*, Application no. 29217/12; R (on the application of EM(Eritrea)) v. Secretary of State for the Home Department, [2014] UKSC 12.

months culminating in her being severely beaten by a gang of Hungarians. She then seeks asylum in Ireland as protection is not forthcoming by the Hungarian authorities. In such a situation she would be denied any access to the protection procedure here despite her account of racism being consistent with known country information concerning Hungary and the risk of her experiencing further persecution and serious harm should she be returned to Hungary.”

21. Exemption for separated children from an inadmissibility procedure (Page 24, lines 20-40)

Section 21 Inadmissible application

Insert new subsection of Section 21: **This provision does not apply to unaccompanied minors seeking international protection;**

Purpose: Exempts separated children from the inadmissible procedure therefore enabling them to access the protection procedure.

Rationale: Inadmissibility procedures are contrary to the principle of access to an effective remedy and may infringe a person’s individual right to asylum under Article 18 of the Charter of Fundamental Rights. Equally they may operate in a manner incompatible to the principle of *non-refoulement* and the best interests of the child. Given the specific vulnerability of separated children the proposed amendment ensures that they are not deprived access to the protection procedure.

22. Clarification required on what ‘sufficient protection’ means under the first country of asylum provision (Page 27, lines 10-15)

Section 21(15) First country of asylum concept

The IRC recommends that the **meaning of ‘sufficient protection’ under Section 21(15(a)(ii)) is clarified** to indicate that that the person not only benefits from the principle of *non-refoulement* but has rights equivalent to refugee status and is able to assert those rights in practice in the proposed first country of asylum. Otherwise such applications should not be deemed inadmissible. In the IRC’s opinion the provision as it is currently formulated also **lacks clarity** on how and on the basis of what information should a determination of ‘sufficient protection’ with regard to a third country be conducted which raises concern given the implications of denying a person the right to enter a protection procedure here. The IRC also has serious concerns about how the inadmissibility procedure will be implemented in practice and notes that Article 34 of the recast Asylum Procedures Directive which obliges Member States to hold a specific interview on inadmissibility grounds was omitted from the Bill. In that regard, the IRC recommends that a specific **new subsection is inserted on the holding of an**

admissibility interview in accordance with the recast Asylum Procedures Directive and clear guidance is given on the procedural safeguards which must be adhered to during the admissibility procedure.⁵³ The holding of a personal interview would also be in accordance with the right to be heard in Article 41 of the Charter of Fundamental Rights on the right to good administration.

23. Report in relation to the health of an applicant (Page 30, lines 15-30)

Section 25 Report in relation to the health of an applicant

Overall the IRC is concerned about the potential of this provision as it is currently worded to violate people's fundamental rights including their right to dignity and bodily integrity under the Charter of Fundamental Rights.⁵⁴ However if it is to be maintained in the Bill the IRC recommends the following amendments:

Section 25 (1): Where, in the performance by the Minister or an authorised officer of his or her functions under this Act in relation to an applicant, a question arises regarding the physical or psychological health of the applicant, the Minister or authorised officer, as the case may be, may ~~require~~ **request** the applicant's **consent** to be examined, and a report in relation to the health of the applicant furnished, by a nominated registered medical practitioner. (2) Where, in the performance by the Tribunal of its functions under this Act in relation to an applicant, a question arises regarding the physical or psychological health of the applicant, the Tribunal may ~~require~~ **request** the applicant's **consent** to be examined, and a report in relation to the health of the applicant furnished, by a nominated registered medical practitioner. (3) In this section, "nominated registered medical practitioner" means **an independent registered medical practitioner of the applicant's choice** ~~as the Minister may from time to time and for the purposes of this section, nominate~~

Purpose: Ensure that medical examinations are only conducted on the basis of the applicant's express informed consent and by an independent medical practitioner of the applicant's own choice

Rationale: Subjecting someone to a medical examination against their express consent is a serious violation of their right to bodily integrity under Article 3 of the Charter of Fundamental Rights. The person's express informed consent is necessary as well as express guidance as to when it is required to have a report furnished on the basis of a person's physical or psychological health. Where a person is unfit to make an informed decision themselves then the person with responsibility to provide for their best interests should assess whether to make an informed consent on their behalf. To ensure the integrity of the process an independent medical

⁵³ Article 34 recast Asylum Procedures Directive on special rules on an admissibility interview.

⁵⁴ Article 1 (Human Dignity) and Article 3 (Right to the integrity of the person) Charter of Fundamental Rights.

practitioner of the applicant's own choice should be sought for conducting such reports and examinations. The definition of 'medical practitioner' under Section 2 should also be amended accordingly.

The IRC also notes that the word 'examined' under Section 25(1) is ambiguous and may result in applicants having to undergo unnecessary medical tests which do not go to the core of their protection claim. Therefore the IRC recommends that **the examination is limited to non-invasive examinations which respect the human dignity of the person concerned**. There should also be an express provision providing that the **cost** of any such medical reports and examinations are borne by the State. Furthermore, if this provision is maintained within the Bill the IRC recommends that **guidelines are issued** as to its application in practice.

D. Detention

24. New provision on detention (Page 22, line 15)

Section 20 Detention

Insert new subsection 20(1): **An immigration officer or a member of the Garda Síochána shall not detain a person for the sole reason that he or she is an applicant for international protection;**

Purpose: Ensures that persons are not detained simply because they are seeking international protection

Rationale: The amendment ensures that Ireland acts in accordance with its international legal obligations regarding the deprivation of liberty, jurisprudence of the European Convention on Human Rights and Article 31 of the 1951 Refugee Convention. Furthermore the IRC recommends that a new provision is inserted clarifying that **detention is only used as a measure of last resort** which can only be applied with alternative non-custodial measures have proven to be ineffective. The IRC also recommends that the **term ‘reasonable cause’ is defined** under Section 20(1) and is clarified. A clear definition of this term should be provided in the Bill to ensure that people are not arbitrarily detained during the protection procedure.

25. Power to detain and arrest without warrant (page 22, line 15-20)

Section 20 Detention of an applicant

Section 20(1) An immigration officer or a member of the Garda Síochána may ~~arrest without warrant an applicant and detain him or her~~ **an applicant** in a prescribed place (in this section-referred to as a “place of detention”), being a prison or other place in the charge of a governor, an immigration officer or a member of the Garda Síochána, where that-officer or member, with reasonable cause, suspects that the applicant—

Purpose: Reinstates the power to detain as stated in Section 9 of the Refugee Act 1996 as amended.

Rationale: This amendment balances the State’s right to regulate its borders and control immigration with the individual’s right to liberty and to seek protection under the European Convention on Human Rights and Charter of Fundamental Rights. It also reinstates the power to detain as stated in Section 9 of the Refugee Act 1996 as amended.

The power to arrest without warrant is a significant and unnecessary expansion of the State's power to detain under the current Refugee Act 1996 as amended. The power to arrest without warrant is only given by An Garda Síochána in a number of limited circumstances, including where a person is suspected of having committed an arrestable offence that carries a penalty of five years or more or in the case of suspected drinking and driving under the Road Traffic Acts. Section 20(1) as currently formulated in the Bill would put certain immigration related offences on a par with those which IRC considers unacceptable. The aim of the proposed amendment is to prevent arbitrary detention and seek to protect the applicant's right to liberty under Article 5 of the European Convention on Human Rights.

26. Altered and/or substituted identity documents (page 22, lines 25-30)

Section 20 Detention of an applicant

Section 20(1)(e)(ii) (ii) without reasonable cause - is or has been in possession of a forged, ~~altered or substituted~~ identity document.

Purpose: Aims to prevent attaching a penalty to a means by which many asylum seekers and refugees access protection in accordance with Article 31 of the 1951 Refugee Convention.

Rationale: The insertion of 'altered or substituted' identity documents expands the categories of documentation grounds for detaining a person. This is wider than that contained in the Refugee Act 1996, which only contains reference to 'forged' documents under Section 9(7)(f) of that Act. The IRC receives reports that agents and smugglers who facilitate the transfer of asylum seekers to the State force them to hand over their own original identity documents in return for 'substitute identity documents' as defined by Section 20(18) of the Bill. The subsection as currently formulated would give immigration officers and An Garda Síochána the power to arrest persons in such circumstances and detain them. This would be contrary to the State's obligations under Article 31 of the 1951 Refugee Convention. If this recommendation was inserted into the Bill **the definition of 'substituted identity document' under Section 20(18) of the Bill would also be deleted.** Smugglers and traffickers often force people with protection needs to exchange their original documents for substituted documents as defined under Section 20(18). Making it an offence to possess or to have possessed such documents would unreasonably penalize persons who have no choice but to rely upon such smugglers and/or traffickers to escape persecution and/or reach a place of safety in their countries of origin.

27. District Court power to detain (page 22, lines 30-40)

Section 20 Detention of an applicant

Section 20(3)(a) Where a person is brought before a judge of the District Court under *subsection (2)*, the judge may—(a) subject to *subsection (4)*, and if satisfied that one or more of the paragraphs of *subsection (1)* apply in relation to the person, commit the person concerned to a place of detention for a period not exceeding ~~21~~ **10** days from the time of his or her detention;

Purpose: Reinstates the District Court’s power to detain as it was in the Refugee Act 1996 as amended.

Rationale: Twenty one days is more than double the length of time the District Court was empowered to detain an applicant in Section 9(10) of the previous Refugee Act 1996 as amended. The State’s power to interfere and/or restrict an individual’s right to liberty must be proportionate and reasonable. An individual’s right to liberty is protected by Article 40.4 of the Constitution, Article 5 of the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Restricting or otherwise interfering with that right is a matter of the utmost seriousness. Section 20(3)(a) as formulated in the current text of the Bill would almost certainly result in persons with protection needs being detained for periods of up to three weeks renewable pending the determination of their application for protection. This is a disproportionate and unreasonable interference with the individual’s right to liberty and moreover with their right to access protection. The IRC is concerned that such periods of detention would hamper and/or otherwise impact upon their application for protection and that it would aggravate Post traumatic Stress Disorder and any related symptoms of trauma.

28. Arrest without warrant for failure to comply with conditions (page 23, lines 25-35)

Section 20 Detention of an applicant

Section 20(9) A member of the Garda Síochána may ~~arrest without warrant and~~ detain, in a place of detention, a person who, in the member’s opinion, has failed to comply with a condition imposed by the District Court under *subsection (3)(b)*.

Purpose: Reinstates the power to detain given to members of An Garda Síochána under the Refugee Act 1996 as amended while limiting unnecessary expansion of their power to arrest without warrant.

Rationale: As above at recommendation 25, the power to arrest without warrant is an extraordinary measure. Section 20(9) seeks to expand the categories of persons An Garda Síochána may arrest without warrant from Section 20(1) which is contrary to the right to liberty.

29. Other necessary modifications (page 23, lines 35-40)

Section 20 Detention of an applicant

Section 20(10) A person detained under *subsection (9)* shall be brought as soon as practicable before a judge of the District Court assigned to the District Court district in which the person is being detained, and *subsections (3), (4) and (5)* shall apply to such person detained under *subsection (9)* as they apply to a person detained under *subsection (1)*, subject to the modifications that references in those subsections to the judge's being satisfied that one or more of the paragraphs of *subsection (1)* apply shall be construed as a reference to his or her being satisfied that the person has failed to comply with a condition referred to in *subsection (3)(b)*, ~~and any other necessary modifications.~~

Purpose: Provide clarity to applicants and ensure legal certainty.

Rationale: Article 38 of the Constitution provides that “No person shall be tried on any criminal charge save in due course of law.” A person charged with an offence is entitled to certainty about the law and may only be charged with offences existing at the time of his arrest. Subsection 20(10) as currently formulated in the Bill is vague and uncertain, denying an applicant his/her entitlements under the law. It also is in compatible with the principle of the rule of law which presupposes that those who are affected by a law should be able to ascertain its meaning and effect.⁵⁵

30. District Court power to detain for 21 days renewable (page 24, lines 0-5)

Section 20 Detention of an applicant

Section 20(12) Where a person is detained under *subsection (3) or (10)*, a judge of the District Court assigned to the District Court district in which the person is being detained may, if satisfied that one or more of the paragraphs of *subsection (1)* applies in relation to the person, commit the person for further periods (each period being a period not exceeding ~~21~~ **10** days) pending the determination of the person's application for international protection.

⁵⁵ See further the Law Reform Commission [Consultation Paper on Statutory Drafting and Interpretation: Plain language and the Law](#) 1999.

Purpose: Reinstates the District Court’s power to detain for ten days under the Refugee Act 1996 as amended.

Rationale: As above in recommendation number 27, the deprivation of a person’s liberty is a matter of the utmost seriousness, it must be proportionate and in line with the principle of necessity.

31. New provision on a maximum period for detention

The IRC recommends that the **maximum detention limit** for the purposes of this legislation is for renewable ten day periods subject to a **statutorily determined definite time period limiting the number of detentions**. Guidance can be taken from other areas of law in this regard bearing in mind however the overall principle that applicants should not be detained on the basis of their seeking international protection.⁵⁶ The manner in which Section 20 is currently formulated appears to allow for arbitrary indefinite detention in renewable periods. A maximum limit on detention must be established in law as a safeguard against such arbitrariness. The UNHCR detention guideline no. 6 specifically states that “indefinite detention is arbitrary and maximum limits on detention should be established in law.”

The IRC further recommends that **all persons detained for immigration related reasons are not held in prison facilities**. The practice of detaining persons for immigration related reasons in prison facilities is punitive in nature and should be abolished. In this regard the UN Committee against Torture has reported its concern at the placement of persons detained for immigration-related reasons in ordinary prison facilities together with convicted and remand prisoners.⁵⁷

⁵⁶ The IRC notes that for example a person may be detained under Section 50 of the Criminal Justice Act 2007 for an initial period of six hours; then under a first extension authorized by Superintendent; a second extension authorised by Chief Superintendent; and the District Court may then authorize two further extensions of detention, making a total of four renewable periods of detention in all. In the area of mental health law a person may also be detained under Section 15(3) of the Mental Health Act 2001 for periods of twenty one days renewable to a maximum of six months.

⁵⁷ UN Committee against Torture, *Consideration of reports submitted by State Parties under Article 19 of the Convention, Concluding observations of the Committee against Torture: Ireland*, 17 June 2011.

E. Assessment of Applications for International Protection

32. New provision on compelling reasons exception (Page 34, line 5)

Section 27 Assessment of Facts and Circumstances

Section 27(5): The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such serious harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, **but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.**

Purpose: Reinstates the compelling reasons exception in S.I. no. 518 of 2006 European Communities (Eligibility for Protection) Regulations 2006.

Rationale: The previous provision under Section 5(2) of S.I. no. 518 of 2006 European Communities (Eligibility for Protection) Regulations 2006 provided for this exception where a person may be so traumatised or have experienced such horrendous persecution in the past that it was deemed inhumane to send them back even if objectively there were good reasons to consider that such persecution or serious harm would not be repeated. This is good practice which should be maintained in the context of the future protection system.

33. Internal Relocation (Page 35-36, line 35)

Section 31 Internal Protection

Amend subsection 31(1)(b): can safely and legally travel to and gain admittance to that part of the country and ~~can reasonably be expected to~~ **is able to** settle there.

Purpose: Bring this provision more in line with the European Court of Human Rights jurisprudence on the issue of internal relocation.

Rationale: The leading judgment on the concept of internal relocation by the European Court of Human Rights states that whether or not the person is 'able to settle there' is part of the assessment for internal relocation.⁵⁸ Therefore it is clearer than the diminished standard of 'reasonably be expected to settle there' which is in the current text of the Bill. The IRC follows

⁵⁸ ECtHR, *Salah Sheekh v. the Netherlands*, Application no. 1948/04, 11 January 2007.

the European Council on Refugees and Exiles' (ECRE) opinion that the word 'settle' itself implies an assessment of different factors, inter alia the possibility for economic survival in the area taking into consideration the personal circumstances of the applicant.⁵⁹

34. Presumption for Internal Relocation when the Persecutor is the State (Page 35-36, lines 30-35; lines 5-10)

Section 31 Internal Protection

Insert new subsection: **Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant.**

Purpose: Clarifies that the presumption is that an internal relocation alternative is not applicable when the State or agents of the State are the actors of persecution.

Rationale: This recommendation is in line with the Michigan Guidelines on the Internal Protection Alternative 1999⁶⁰ and the IHREC recommendations on the General Scheme of the International Protection Bill.

⁵⁹ ECRE, [Information Note on the recast Qualification Directive](#), October 2013.

⁶⁰ University of Michigan Law School, Professor Hathaway, [International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative](#), April 1999.

F. Examination of applications at first instance

35. Access to the labour market (Page 41, lines 20-25)

Section 38 Report of examination and determination of application

Following Section 38(5) insert a new provision: **Where a recommendation referred to in subsection 2(b) has not been made within 9 months of the date of application, the applicant shall be granted access to the labour market.**

Purpose: Express provision for access to the labour market for protection applicants awaiting the decision on their claim.

Rationale: Ireland is out of step with other EU Member States by depriving asylum seekers of any access to the labour market.⁶¹ This recommended approach would bring Ireland more into step with its European counterparts and Article 15 of the recast Reception Conditions Directive. The specific modalities of accessing employment could be developed with the consultation of experts in this area. As noted by the Council of Europe Committee on Migration, Refugees and Displaced Persons, successful employment of asylum seekers is beneficial to host societies as it reduces the costs in providing social assistance and aids integration as well as on an individual level building the self-worth of the person concerned.⁶² It should be noted that the UN Economic and Social Council in its Concluding Observations on Ireland reported their concern at the restrictions to employment for asylum seekers here.⁶³

36. Findings leading to accelerated appeals (Page 41, lines 5-30)

Section 38 Report of examination and determination of application

Section 38(4): Where a report under this section includes a recommendation of the authorised officer referred to in subsection (3)(c), the authorised officer concerned may include in the report one or more of the following findings:.... (b) that the applicant has made inconsistent, contradictory, improbable ~~or~~ **and** insufficient representations which make his or her claim to be eligible for international protection clearly unconvincing; ~~(c) that the applicant has failed without reasonable cause to make his or her application as soon as reasonably practicable after his or her arrival in the State, having had opportunity to do so; (d) that the applicant, for a reason referred to in section 31, is not in need of international protection;~~

⁶¹ The IRC notes that Section 16(6)(b) seems to indicate that persons who already have access to the labour market remain enabled to access that right during the protection procedure. However that approach will only result in employment of asylum seekers in very limited circumstances and means that different protection applicants receive differential treatment in a manner which may violate the principle of non-discrimination under Article 3 of the 1951 Refugee Convention.

⁶² Council of Europe Parliamentary Assembly, [Refugees and the right to work](#), 25 June 2012.

⁶³ UN Economic and Social Council, Concluding Observations on the Third Periodic Report of Ireland, 19 June 2015.

Purpose: To limit the grounds for providing for accelerated appeals under Section 42

Rationale: The findings listed in Section 38(4) are used under Section 42 to have a shorter timeframe for appealing first instance decisions as well as having such appeals heard without an oral hearing in an accelerated manner. The proposed amendments outlined above will improve this provision's compliance with the State's international obligations particularly in light of the right to effective access to justice and right to an effective remedy. The IRC recommends deleting Section 38(4)(c) as such a provision does not reflect the core of the claim and the timing of an international protection application is often peripheral to the claim. The reference to a section 31 internal protection finding was also deleted as internal protection is a complex matter depending on the individual circumstances of the applicant. It also often forms part of the holistic assessment of a protection claim. Given these complexities it is dangerous to have that as a ground for a limited appeal right. This proposed amendment will therefore result in an internal relocation finding not being the basis for an accelerated appeal at the International Protection Appeal Tribunal. Lastly the amendment under Section 38(4)(b) is to ensure that such issues are considered cumulatively rather than separately in order to consider that a protection claim is clearly unconvincing for the purposes of that section.

37. Notification of recommendation at first instance (Page 41-42, lines 35;5-40)

Section 39 Notification of recommendation in relation to application at first instance

Section 39(3) indicates that recommendations granting a person refugee status need only consist of that fact. The IRC recommends that **reasoned decisions are issued for all protection decisions including when an applicant is granted refugee status**. This would also ensure that there is clarity on the grounds a person was granted international protection should for example cessation arise at a later stage.

G. Appeals to the Tribunal

38. Power to prescribe procedures for the International Protection Appeals Tribunal (Page 43, line15-20)

Section 40 Appeal to Tribunal

Section 40(4): The ~~Minister may, in consultation with the chairperson and~~ **may**, having regard to the need to observe fair procedures, prescribe procedures for and in relation to appeals under subsection (1), including the holding of oral hearings.

Purpose: Ensures that only the Independent Chairperson of the Tribunal has the power to prescribe procedures for the Tribunal.

Rationale: Given that it is proposed that the first instance is determined by a Ministerial department it is important that there is an effective independent remedy for persons in the

protection procedure. Therefore, procedures for the purposes of the appeal should only fall within the remit of the Chairperson of the Tribunal in light of the statutorily independent nature of the International Protection Appeals Tribunal.

H. Declarations and Other Outcomes

39. The grounds for permission to remain (Page 51, lines 5-30)

Section 48 Permission to remain

Section 48(3) In deciding whether to give an applicant a permission, the Minister shall have regard to the applicant's family and personal circumstances and his or her right to respect for his or her private and family life **and other human rights under the European Convention on Human Rights and the EU Charter of Fundamental Rights**, having due regard to— (a) the nature of the applicant's connection with the State, if any, (b) humanitarian considerations, (c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions), (d) considerations of national security and public order, ~~and~~ (e) the common good, **(f) age; (g) the duration of residence in the State of the person, (h) the employment (including self-employment) record of the person, and (i) the employment (including self-employment) prospects of the person.**

Purpose: Ensures that permission to remain is considered in light of Ireland's human rights obligations under the European Convention on Human Rights and the EU Charter of Fundamental Rights as well as the individual circumstances of the person concerned at the time the decision is taken (see recommendation 40 below).

Rationale: The amended provision provides more clarity as to the legal obligations an authorised officer must abide by in considering a person's permission to remain. This encompasses and extends beyond applicant's right to family life. The individual circumstances of the applicant must also be considered and the IRC recommends re-instating some of the provisions in Section 3 of the Immigration Act 1999.

The IRC requests that **more clarity is provided as to when permission to remain is considered** within a single procedure. Currently section 48(1) seems to indicate that permission to remain may be considered when the person has been refused refugee status or subsidiary protection at first instance or when the Tribunal has affirmed such a recommendation. Does this mean that permission to remain could be considered at the same time as a pending appeal on international protection needs? More clarity for the sake of legal certainty is required.

Furthermore the IRC recommends that an individual **right to appeal a refusal for permission to remain to the International Protection Appeals Tribunal** is introduced in the Bill. This would ensure that there is effective access to a remedy when a refusal to grant permission to remain is incompatible with a person's fundamental human rights without the necessity of lengthy and expensive proceedings by way of judicial review in the Courts.

40. Extend the time possible to submit information relevant for a permission to remain examination (Page 51, lines 20-30)

Section 48 Permission to remain

Section 48(6): An applicant— (a) may, at any stage **during the protection procedure including during appeal** ~~prior to the preparation of the report under section 38(1) in relation to his or her application~~, submit information that would, in the event that subsection (1) applies to the applicant, be relevant to the Minister's decision under this section, and (b) shall, ~~from the time of the making of his or her application until the preparation of the report under section 38(1)~~, **up until a decision is made under section 48(3)** inform the Minister of any change in the applicant's circumstances that would be relevant to the Minister's decision under this section.

Purpose: Alters the requirement to only submit information prior to a report being issued under Section 38(1).

Rationale: The current provision only allows relevant information to be submitted prior to a first instance report being issued on the person's application for international protection. However, further information may come to light at a later stage for example during the appeal process which may be relevant for the purposes of any examination of their permission to remain. Failure to take into account such relevant information due to a time limit may in fact lead to the State violating its obligations under the European Convention on Human Rights and Charter of Fundamental Rights. This example highlights the problems associated with Section 48(6) as it is currently formulated:

"A young woman claims asylum and is refused at first instance before which she raises no further grounds as to why she should be permitted to remain in Ireland. Following the appeal process a year later, her doctor confirms that she has cancer and reports that without necessary medical treatment she only has a few months to live. The necessary medical treatment is available in Ireland. The woman is refused to submit this information to the Minister as a reason to remain in Ireland as the legislation only allows such information to be submitted before the first instance decision on her protection claim. The woman will most likely die if returned to her country of origin."

The IRC also notes in such circumstances that the State may actually have legal obligations to grant this person permission to remain as shown in the jurisprudence of the European Court of Human Rights.⁶⁴

⁶⁴ ECtHR, [D. v. the United Kingdom](#), Application no. 30240/96, 2 May 1997.

41. Grant more time to submit an appeal to the High Court from a revocation decision (Page 53, line 20)

Section 51 Revocation of refugee declaration or subsidiary protection declaration

Section 51(8): A person to whom a notice under subsection (7)(b) is sent may, within ~~10~~ **15** working days from the date of the notice, appeal to the High Court against the decision of the Minister to revoke the declaration.

Purpose: Reinstates the time-limit for submitting an appeal of a revocation decision to the High Court to the standard 15 days in the Refugee Act 1996 as amended.

Rationale: Revocation is a particularly complex and technical concept which requires persons subject to it to receive comprehensive individual legal advice and representation. The previous equivalent provision in the Refugee Act 1996 as amended (Section 21(4)(b)) provided that such persons would have 15 working days to appeal such a decision. The IRC recommends that that timeframe is maintained in the International Protection Bill.

42. Timeframe for availing of an option to voluntarily return to the country of origin (Page 50, lines 5-10)

Section 47 Option to voluntarily return to the country of origin

Section 47(3) provides the person concerned with only five days in which to respond to a voluntary return notice. Although some leeway is provided under subsection 5 where it appears that the person is making reasonable efforts to leave the State it is unclear why it is necessary to provide such a short timeframe for making such an important decision. 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. The five day time limit would be extremely difficult for example for families with young children who are attending school here and other vulnerable applicants such as people with mental health problems. The IRC recommends that **the reference to a five day time-limit is deleted in Section 47(3).**

I. Family Reunification

43. Remove time-limit for family members entering the State under family reunification (Page 55, line 33)

Section 55 Permission to enter and reside for member of family of qualified persons

~~Section 55(5) : A permission given under subsection (4) shall cease to be in force if the person to whom it is given does not enter and reside in the State by a date specified by the Minister when giving the permission.~~

Purpose: It removes the time-limit for entering and residing in the country as a family member of a sponsor.

Rationale: Although limited guidance is given in this subsection as to the proposed time-frame the Minister envisages when granting permission to enter and reside as a family member, it is problematic that such a limitation on the right to family reunification is even proposed in the Bill. There are a myriad of reasons why family members may not be able to enter the country by a specific date including due to travel costs, documentation requirements, their safety and other reasons. Sponsors may also need to arrange someone to accompany minor family members for example during the journey due to their age. Such persons should not be denied their right to family life on the basis of practical obstacles and an arbitrary time-limit.

44. Insert independent appeal rights for family reunification (Placement in Part 6 of the Bill: Appeals to Tribunal, pages 43-48)

The IRC recommends that a **separate appeal mechanism to the International Protection Appeals Tribunal on family reunification is established**. Such an approach would be a more favourable and less costly alternative to judicial review when people's family reunification rights under the Bill are infringed. The Tribunal would also be well-placed to examine human rights considerations in the context of the right to family life.

45. Remove time-limit for applying for family reunification (Page 56, line 15)

Section 55 Permission to enter and reside for member of family of qualified person

Section 55(8): An application under subsection (1) shall be made ~~within 12 months of the~~ **any time after the sponsor has been given a declaration** under section 46 of the refugee **status** ~~declaration~~ or, as the case may be, **a** subsidiary protection declaration ~~to the sponsor unless the Minister is satisfied, that the sponsor could not reasonably have made the application within that period.~~

Purpose: Deletes the requirement to submit a family reunification application within 12 months.

Rationale: The IRC recommends that the requirement to submit a family reunification application within 12 months of receiving a declaration of refugee status should be deleted. There should be no time-limit on applying for family reunification. The introduction of a time-limit to apply for family reunification ignores the realities of families taking flight to seek refuge. Often family members may be missing for long periods of time and tracing assistance is required. Although subsection 8 provides the ability to apply at a later date if the ‘Minister is satisfied, that the sponsor could not reasonably have made the application within that period’ this provision is down to the subjective opinion of the officer authorised to act on behalf of the Minister. Given the consequences of depriving someone of their right to family reunification under the European Convention on Human Rights it is recommended that this subsection (8) is amended as above. In the alternative **the IRC recommends completely deleting Section 55(8).**

46. Provide for exemptions for cessation of permission to remain when a marriage or civil partnership ceases (Page 56, line 5)

Section 55 Permission to enter and reside for member of family of qualified person

Article 55(6) states that permission to enter and reside as a spouse or civil partner to a sponsor ceases when the marriage or the civil partnership concerned ceases to subsist. This means that the spouse or civil partner’s permission to remain in Ireland ceases once the marriage or civil partnership ceases. Women’s aid for example has shown that women in violent relationships will often not report domestic violence on the grounds that they fear being removed from the State.⁶⁵ That fear could continue under this provision. **The IRC recommends that an exemption is made so that victims of domestic violence can continue to reside in Ireland once the relationship or civil partnership is over.** Such an approach would also be in line with the Irish Naturalisation and Immigration Service (INIS) Victims of Domestic Violence Immigration Guidelines. Furthermore the IRC is deeply concerned that there is **a lack of clarity as to the legal status of family members once a marriage or civil partnership ceases to subsist.**

47. Definition of family member (Page 56, lines 20-25)

Section 55 Permission to enter and reside for member of family of qualified person

Section 55(9):) In this section and section 56, “member of the family” means, in relation to the sponsor— (a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date **of the application under subsection (1)** ~~the sponsor made an application for international protection in the State~~), (b) where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date **of the application under subsection (1)** ~~the sponsor made an application for international protection in the State~~)....

Purpose: Includes family members who formed part of a family since the applicant submitted their application for international protection and reinstates the standard in Section 18 of the Refugee Act 1996 as amended and Regulation 16 of the European Communities (Eligibility for Protection) Regulations 2006.

Rationale: The current definition of family members under Section 55(9) includes spouses or civil partners “provided that the marriage is subsisting on the date that the sponsor made an application for international protection in the State.” However this fails to include families ties established during the international protection procedure. The recommended proposal above would reinstate the status quo under section 18 of the Refugee Act 1996 as amended and Regulation 16 of the European Communities (Eligibility for Protection) Regulations 2006 which currently requires that the relationship is subsisting on the date of the application for family reunification. This recommendation is also supported by the IHREC.⁶⁶

It is important to consider the practical implications that such a provision may have on for example LGBTI couples. A person for example who fled their country of origin because of persecution on the grounds that they are gay may only have experienced a relationship in Ireland. Accordingly they may only have established a civil partnership or relationship or marriage since their application for asylum. Such persons would be effectively deprived of family reunification on the operative basis of this provision as it is currently worded.

48. Provide for family reunification of dependant family members (Page 56, lines 25-30)

Section 55 Permission to enter and reside for member of family of qualified person

The current provisions do not include the possibility to apply for family reunification for dependent family members such as grandparents, adult children, nieces and nephews, uncles and aunts and others who may be dependent on the sponsor for financial, emotional and other support reasons such as ill health. Section 18 of the Refugee Act 1996 as amended gives the Minister discretion to grant permission to enter and reside for such dependent family members but no equivalent provision is present in the Bill. The IRC recommends that a **new subsection is inserted for the purposes of ensuring family reunification is available for dependent family members**. Guidance can be sought from the present text of Section 18 of the Refugee Act 1996 as amended. This example highlights the problems associated with Section 55 as it is currently formulated due to the absence of a provision on dependent family members:

“A Syrian woman is kidnapped by ISIS/Daesh in Aleppo and subsequently escapes from them. She seeks protection in Ireland and is granted refugee status at first instance. She subsequently learns that her sister and brother-in-law were killed during the Syrian conflict and their three minor children, two girls and a boy, are now orphaned. She is very close to the children as they all lived in the same household and she often looked after them. She

⁶⁶ Irish Human Rights and Equality Commission, [Recommendations on the General Scheme of the International Protection Bill 2015](#), June 2015.

tries to apply for family reunification for her dependent nieces and nephew but is unable due to the restrictions in the legislation.”

J. Miscellaneous

49. New provision on prioritising well-founded claims (Page 74, line 25-35)

Section 72 Prioritisation

Section 72(2) In according priority under subsection (1)(a) or making a request under subsection (1)(b) the Minister may have regard to the following:

Insert new provisions **-(l) where the application is likely to be well-founded; (m) where the applicant is an unaccompanied minor**

Purpose: To prioritise particularly well-founded claims and applications submitted by separated children when it is in their best interests to do so.

Rationale: The current provision excludes prioritising cases at first instance or upon appeal on the grounds that they are particularly well-founded or because the applicant is a separated child. The recommended proposal is in line with Article 31(7) of the recast Asylum Procedures Directive in ensuring effective and timely access to a decision on the newly inserted grounds and thereby respecting the right to asylum as guaranteed under the Charter of Fundamental Rights. It also supports recommendation 3.215 of the Working Group report and more broadly supports early recognition of protection needs for particularly well-founded claims given the current refugee crisis in Europe. In light of our recommendation that the best interest of the child is an overarching principle of the International Protection Bill, prioritisation would only be utilised for separated children where it is in their best interests to do so.

50. International human rights law and the definition of safe countries of origin (Page 73, line15-35)

Section 71 Designation of safe countries of origin and Section 32 Applicant from a safe country of origin

In the current Bill the fact that an applicant is from a designated country of origin has the effect that they are given a shorter timeframe for submitting an appeal with no oral hearing for the appeal by virtue of Section 38(4) and Section 42.⁶⁷ This is extremely problematic given that such a designation by nationality alone creates a presumption that a person's application is manifestly unfounded prior to actually examining the basis of their protection application.

For example under the proposed legislation if a lesbian from South Africa⁶⁸ claims protection they would be required to demonstrate from the outset that there are 'serious grounds for

⁶⁷ It should be noted that Section 42(b) permits the Tribunal to hold an oral hearing in such cases if it is 'in the interests of justice to do so'.

⁶⁸ Currently South Africa is on the Safe Country of Origin list by virtue of Article 12(4) of the Refugee Act 1996 as amended.

considering' that the country is not safe in her particular circumstances. In effect it places a greater burden of proof on the individual applicant to establish her protection needs which is unacceptable bearing in mind that South Africa for example has a high incidence of lesbians being subject to 'curative rape' despite the fact that it also recognises same-sex marriages. In such circumstances it is difficult to see at all how a country that permits 'curative rape' to happen by way of not protecting lesbians from such attacks could in any way be considered a safe country of origin at all. The IRC also questions the compatibility of the safe country of origin concept with Article 3 of the 1951 Refugee Convention and its 1967 Protocol which requires refugees to be treated without discrimination based on their country of origin. The IRC **recommends the deletion of safe country of origin within the Bill and accordingly calls for the deletion to Section 71 and Section 32 and amendment to Section 38(4) and Section 42.**

In the alternative that this provision is maintained in the Bill the IRC recommends that more references are made to broader international human rights instruments and adherence to them in practice as well as in law as part of the assessment as to whether to designate a country of origin as safe. Section 71(3)(b) currently provides that the Minister must take into account observance of the rights and freedoms laid down in the European Convention on Human Rights , the ICCPR and UNCAT when designating a particular country as a safe country of origin. **The IRC recommends that observance of rights under the following legal instruments must also form part of that assessment: the Charter of Fundamental Rights, the UN Convention on the Rights of the Child, the UN Covenant on Economic, Social and Cultural Rights, CERD and CEDAW.** Such an approach would be in line with the IHREC recommendations on the General Scheme of the International Protection Bill.

51. Amendment of the Immigration Act 1999 (page 78-79. lines 35-5)

Section 74 Powers to deport

Section 74(11) For the purposes of arresting a person under subsection (1) or (2), the immigration officer or member of An Garda Síochána **in possession of a valid search warrant** may enter (if necessary, by use of reasonable force) and search any premises (including a dwelling) where the person is or where the immigration officer or the member, ~~with reasonable cause,~~ suspects that person to be, and where the premises is a dwelling, the immigration officer or the member shall not, unless acting with the consent of an occupier of the dwelling or other person who appears to the immigration officer or the member to be in charge of the dwelling, enter that dwelling.....

Purpose: Limits the powers of An Garda Síochána to enter an applicant's premises without a search warrant.

Rationale: It is reasonable to require An Garda Síochána to obtain a valid search warrant prior to entering an applicant's premises. The District Court can issue a search warrant when a Garda swears an oath that he has reasonable grounds for suspecting that a person evading a deportation order resides within. The power to enter and search a premises without a warrant is an exceptional measure usually only given in relation to serious criminal offences, such as the

Misuse of Drugs Act and Criminal Law Acts. While evading a deportation order is an offence, it is not an offence of such magnitude as to make this power necessary. This recommendation should also be read in light of Justice Hogan's decision in *Omar v. Governor of Cloverhill Prison* on the constitutional guarantee of inviolability of the dwelling under Article 40.5 of the Irish Constitution.

Irish Refugee Council

November 2015