

LAW SOCIETY SUBMISSION



SUBMISSION ON THE GENERAL SCHEME OF THE INTERNATIONAL PROTECTION BILL

Joint Committee on Justice, Defence and Equality

8 May 2015

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Introduction

The Human Rights Committee of the Law Society of Ireland welcomes the opportunity to make a submission to the Joint Committee on Justice, Defence and Equality on the General Scheme of the International Protection Bill.

The Human Rights Committee was established in November 2004, with the main purpose of raising awareness in the profession and the public of human rights issues under the European Convention on Human Rights Act 2003, the EU Charter of Fundamental Rights and other national and international instruments. The Committee comprises members of the Law Society who have a particular interest, and/or practice as solicitors in the area of, human rights law.

This submission, prepared by the Human Rights Committee, will take the opportunity to address the Joint Committee on the issues arising out of the General Scheme of the International Protection Bill, which the Human Rights Committee considers as warranting further examination at this point in time.

Certain members of the Human Rights Committee have specific expertise in this area of law:

- Grainne Brophy, Managing Solicitor, Smithfield Law Centre (incorporating Refugee Legal Service), Legal Aid Board;
- Shane McCarthy, Solicitor, Member Refugee Appeals Tribunal;
- Hilikka Becker, Solicitor, Independent Legal Expert in Migration, Refugee and Human Rights Law, Member Refugee Appeals Tribunal.

The views expressed in this submission do not purport to reflect the views of the Refugee Appeals Tribunal (its members or Chair), nor do they purport to reflect the views of the Legal Aid Board. The submission is being provided by the Human Rights Committee of the Law Society on the basis of its members acting in their capacity as members of this Law Society Committee, and based on their experience as solicitors with extensive experience in this area of law.

Executive Summary – Overview

On considering the General Scheme of the International Protection Bill (“the Bill”), the Human Rights Committee (“the Committee”) believes that it is vital to bear in mind the broader legal setting of this proposed legislation – that Ireland is bound to implement its international human rights obligations under the [1951 Geneva Convention relating to the Status of Refugees](#) (‘the 1951 Geneva Convention’).

It must also be recalled that Ireland should have regard to the [Common European Asylum System](#) (‘CEAS’) which delineates the agreed common principles of the treatment of asylum seekers in Europe. While being cognisant that Ireland is not directly bound by all the EU Common Standards as set out by CEAS, the Committee strongly recommends that, nonetheless, Ireland should be guided by these European standards and should view them as minimum standards of legal protection which ought to be adhered to in any proposed legal system of international protection.

The Long Title of the Bill reflects this intention of implementing Ireland’s international and European legal obligations.

It is evident from the short title of the Bill – *International Protection* – that the primary aim of the Bill is to provide for the protection of asylum seekers in compliance with our international human rights obligations – this is important to take into consideration in the broader context of the immigration system in Ireland. The immigration system has the additional role of maintaining Ireland’s borders and monitoring migration, which have the potential to come into conflict with the underlying aims of international protection. It is a positive development that this Bill deals solely with the issue of international protection and separates the two roles within Ireland’s immigration and asylum policy.

In any system of international protection for asylum seekers, the fundamental principles of international human rights law should be respected, for example, the right of access to justice, the right to bodily integrity, the right to work (the latter should be in line with EU standards as defined by the CEAS, principally the revised [Reception Conditions Directive](#)).

The Committee notes that the Bill will not be considered in a vacuum by the Justice, Defence and Equality Committee (‘the Justice Committee’); rather, it will be reviewed in the broader context of other issues relevant to international protection, such as the budgetary constraints that lead to delays in the system and the ongoing discussions surrounding direct provision.

Executive Summary of issues and recommendations

In this submission, the Human Rights Committee has attempted to flag a number of issues arising throughout the Bill, as warranting further consideration and discussion; however, while the following summary of observations provides a general indication of some of the primary points addressed, it is not an exhaustive summary of all of the views of the Committee.

- While being cognisant that Ireland is not directly bound by all the EU Common Standards as set out by the [Common European Asylum System](#), the Committee strongly recommends that, nonetheless, Ireland should be guided by these European standards and should view them as minimum standards of legal protection which ought to be adhered to in any proposed legal system of international protection.
- The Committee considers that the opportunity should have been taken to introduce a statelessness determination procedure, and to provide a system that can provide protection for such individuals in line with Ireland's international obligations.
- The Committee has raised two distinct issues as requiring particular further attention - separated children and interpretation/translation.
- The Committee has concerns regarding the proposed abolition of the Office of the Refugee Applications Commissioner. The Committee is of the view that this body should be maintained and its independence further guaranteed.
- The Committee strongly recommends that a full impact assessment must be carried out in order to determine the exact implications and consequences of repealing the Refugee Act 1996.
- The Committee recommends that specific provision should be made within the proposed legislation for a right of access to a legal representative. Any such provisions should also clarify that such access must be effective in practice; this means that applicants must be made aware of their right to legal representation and legal advice. It is insufficient to state that all applicants are entitled to access legal services but then fail to take practical steps to ensure this right can be exercised.
- The Committee recommends that the Justice Committee should hear expert evidence on the issue of age assessment (of minors).
- The Committee is concerned that there seems to be no appeal mechanism following refusal of a leave to remain application.

- The Committee is concerned regarding the issue of family reunification and considers that further clarification of the relevant Heads is required, (e.g. it is not entirely clear how a person may *'cease to be a qualified person or a family member'*. The definitions of 'family member' and 'qualified person' are unclear).
- The Committee recommends that Head 22 should be framed in terms of protecting the human rights of the applicant by referring them to whatever medical treatment they might require in their own interest.
- The Committee recommends that Head 35(2)(a) should include reference to the type and quality of fact-finding research which the Minister must carry out in assessing protection claims. (The Committee refers the Justice Committee to the ['Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status'](#), as issued by the UNHCR pursuant to the 1951 Geneva Convention.)
- The Committee recommends that clarification be provided as to when applications under Head 36A ('leave to remain' applications) are to be considered.
- The Committee considers that in circumstances where the Minister fails to make a determination within 6 months of the date of application (see Head 35(3)), then at that point in time of the application process, provision should be included in the Bill to entitle the applicant to access the labour market and pending a final outcome of their application, thereby permitting them to move out of direct provision and allowing them to receive the necessary social supports to do so.
- The Committee recommends that provision should be included in the Bill to give an applicant and their legal representative at least 15 working days to update the application for leave to remain in order to give them the opportunity to provide further information and up-to-date submissions.
- The Committee recommends that grounds for the revocation of a deportation order should at least include those currently provided in Section 3(6) of the Immigration Act 1999 in relation to the Minister's considerations prior to the making of such order. The Committee is concerned that, as the Bill appears to also omit any mechanism for appealing a deportation order or the refusal to revoke such order, then any such order may be rendered permanent in nature by the Bill.
- The Committee recommends that the Minister's discretion under Head 46(1) should be maintained (in relation to *'Revocation of refugee declaration or subsidiary protection declaration'*).

Part 1 ('Preliminary'): Heads 1 - 5

- 1.1. Under Head 2 ('*Interpretation*'), there is no definition included for statelessness. Ireland is a signatory to the [1954 Convention relating to the Status of Stateless Persons](#) and has international obligations in this regard. The Committee considers that the opportunity should have been taken to introduce a statelessness determination procedure, and to provide a system that can provide protection for such individuals in line with Ireland's international obligations.
- 1.2. Generally, throughout the Bill, the Committee notes that there appears to be an inconsistency in terminology in the interchangeable use of 'appeal' and 'review'.
- 1.3. Under Head 5 ('*Repeals and revocations*'), it is proposed that the Refugee Act 1996 ('the 1996 Act') be repealed in full. The Committee strongly recommends that a full impact assessment must be carried out in order to determine the exact implications and consequences of such a legislative repeal.

Part 2 ('Qualification for International Protection'): Heads 6 - 11

- 2.1. The definition of '*persecution*' under Head 6 appears to be somewhat unclear. It is proposed to be defined as follows:
 - (1) In these Heads acts of persecution must be—
 - (a) sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or
 - (b) an accumulation of various measures, including violations of human rights, which is sufficiently severe to affect an individual in a similar manner as mentioned in paragraph (a).
- 2.2. While the definition appears to be in-line with the definition provided in the 2011 [Qualification Directive](#) (part of CEAS), for the sake of greater clarity it would assist if reference to the definition of persecution as per the 1951 Geneva Convention was also included.
- 2.3. Under Head 7 ('*Reasons for persecution*'), the Committee considers that the proposed concept of 'race' is incomplete and needs further revision (see Head 7(1)(a)). The current proposed definition – "*the concept of race shall in particular include considerations of colour, descent or membership of a particular ethnic group*" - raises serious concerns for the Committee. The definition should, at a minimum, refer to the definition contained in the [International Convention on the Elimination of all Forms of Racial Discrimination](#) (UNCERD).
- 2.4. Equally, the concept of 'membership of a particular social group' – as set out under Heads 7(1)(d) and 7(3) - seems to be incomplete, and creates a higher threshold for inclusion as opposed to the definition contained in the 1996 Act. The 1996 Act explicitly referred to sexual orientation as consisting of membership of a particular social group, but this no longer seems to be the case under Head 7.
- 2.5. The Committee has particular concerns around Head 7(3) regarding sexual orientation ("*sexual orientation shall not include acts considered to be criminal in the State*"), sexual identity and gender identity.
- 2.6. Additionally, recognition of membership of a trade union as consisting of membership of a particular social group appears to have been removed in its entirety.

Part 3 ('Application for International Protection'): Heads 12 - 24

- 3.1. The design of the 'Application for International Protection' or 'single application procedure', as set out in the General Scheme of the International Protection Bill ('the Bill') appears to be unnecessarily complicated. Efforts should be made to simplify it. As the Bill now stands, it appears that all claims are considered at once rather than the three very distinct claims of asylum, subsidiary protection, and leave to remain being considered individually.
- 3.2. As it currently stands, the procedure can be broadly outlined as follows:
 - At first instance, the applicant will attend a personal interview with an officer of the Minister, where they will be expected not only to make their case for asylum or subsidiary protection, but also for leave to remain on any other ground;
 - If the application for protection is refused, the Minister will go on to determine if there are grounds to grant leave to remain;
 - It appears that a refusal of an application for protection can be appealed to the Tribunal but there seems to be no appeal mechanism following refusal of a leave to remain application.
- 3.3. This mechanism is not sufficiently clear as to how it will guarantee that each claim will be fully assessed purely on its own merits. It must be borne in mind that each application raises its own diverse issues for consideration, particularly as regards the differences between a claim for asylum or subsidiary protection and a claim for leave to remain. The structure of the application process needs to be clarified as potentially it could require the introduction of another mechanism which would consider the leave to remain applications and any residual protection issues.
- 3.4. Head 12 ('Application for international protection') appears to propose that initial applications be made to the Minister, thus removing the Office of the Refugee Applications Commissioner ('ORAC'). ORAC is a dedicated expert body which currently examines these applications; the Committee is of the view that this body should be maintained and its independence further guaranteed.
- 3.5. Head 13(4) ('Preliminary Interview') currently only allows for a "record of the preliminary interview" to be "kept by the officer conducting it", and it does not include the mandatory provision of such copies to the applicant's legal representative. The Committee considers that any records, notes and/or transcripts of the preliminary interview should be automatically provided to the legal representative of the applicant.
- 3.6. As regards Head 15 ('Permission to enter and remain in the State'), the Committee considers that these provisions should clarify that permission for the applicant to leave the

State will not be unreasonably withheld; for example, if permission is sought to travel abroad for health reasons and/or medical treatment.

- 3.7. Head 19 (*'Detention of the applicant'*) – the Committee observes that any detention provisions must be in line with international human rights standards, and must never be used where an alternative mechanism is available.
- 3.8. Specific provision should be made within the proposed legislation for a right of access to a legal representative. Any such provisions should also clarify that such access must be effective in practice; this means that applicants must be made aware of their right to legal representation and legal advice. It is insufficient to state that all applicants are entitled to access legal services but then fail to take practical steps to ensure this right can be exercised. Currently, Head 19(4) states that an immigration officer or member of An Garda Síochána can apply to the District Court to have a person being detained brought before a judge of the District Court, in circumstances where the officer or member forms the opinion that the person should not be so detained (under the proposed detention grounds of Head 19). This is an insufficient protection of the applicant's right to liberty as there is no reference under Head 19 to any right of the applicant to seek legal advice to challenge their detention.
- 3.9. Head 21 (*'Subsequent application'*) is a positive development in terms of this area; however, the Committee notes that the threshold set out in Head 21(4)(a) is too high:
- 4) The Minister shall give consent to the making of a subsequent application where, following a preliminary examination of the request he or she is satisfied that-
 - (a) since the person concerned ceased to be an applicant new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will qualify for international protection, and
 - (b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application (including, as the case may be, any appeal in the matter of that application).
- 3.10. This threshold of what can be termed as 'significant changes', does not reflect the reality of such applications and their nature. It is also effectively pre-empting the outcome of any such deemed application without first examining it on its merits.
- 3.11. Similarly, Head 21(4)(b) as above, should be amended to refer to persons who are 'unable' rather than 'incapable'; and it should also take account of situations whereby the applicant was 'unable' to present the findings due to the fact that misinformation was given to the applicant or due to the failure of any agent on the applicant's behalf.
- 3.12. The purpose and rationale of Head 22 (*'Report in relation to the health of an applicant'*) is somewhat unclear.

(1) Where, in the performance by the Minister of his or her functions under these Heads in relation to an applicant, a question arises regarding the physical or

psychological health of the applicant, the Minister may require the applicant to be examined and a report furnished by a nominated registered medical practitioner in relation to the health of the applicant.

(2) Where, in the performance by the Tribunal of its functions under these Heads in relation to an applicant, a question arises regarding the physical or psychological health of the applicant, the Tribunal may require the applicant to be examined and a report furnished by a nominated registered medical practitioner in relation to the health of the applicant.

(3) For the purposes of this Head, “nominated registered medical practitioner” means such registered medical practitioner as the Minister may nominate from time to time.

- 3.13. In such circumstances, whereby “*a question arises regarding the physical or psychological health of the applicant*” and a medical report is deemed as being ‘required’ of the applicant, the Committee recommends that this section should be framed in terms of protecting the human rights of the applicant by referring them to whatever medical treatment they might require in their own interest.
- 3.14. The Committee also has concerns regarding the independence and expertise of the “nominated” medical practitioner and notes that the applicant should be entitled to have their own medical reports commissioned and considered in such circumstances.
- 3.15. Additionally, it is unclear who bears the costs of such a medical report – this ought to be clarified.

Part 4 ('Assessment of Applications for International Protection'): Heads 25 – 31

- 4.1. The Committee considers that, rather than using the term 'country of origin' in the Bill, the term which should be used throughout is '*country of nationality/country of habitual residence*'. Country of origin is defined in this manner under Head 2 ('*Interpretation*') but, for the avoidance of confusion, it would be preferable if the longer phrase were used throughout the Bill.
- 4.2. Head 25 ('*Assessment of facts and circumstances*') appears not to include the "compelling reasons" ground for a declaration of protection. It is essential that such an option be provided for the minority of applicants who may need to rely on it in their applications for refugee status, particularly where a decision on their application has been delayed for lengthy periods.
- 4.3. The Committee notes that a 'compelling grounds' assessment will continue to be included in Head 8(3) to ensure that, where there has been a fundamental change of the situation in the applicant's country of nationality/former habitual residence, a person who otherwise qualifies for protection, is now excluded pursuant to Article 1C of the 1951 Geneva Convention¹. This is currently reflected in Section 21(2) of the 1996 Act.
- 4.4. As regards Head 31 ('*Applicant from a safe country of origin*'), the Committee is concerned that this designation '*safe country of origin*' may not take account of internal difficulties and other factors that may make a country unsafe. The Committee is also concerned that a designation may become out of date in the light of developing unrest, rebellion or other disturbances, and that persons in need of protection because of the changed circumstances would not receive it because of this provision.

¹ The text of the relevant paragraph 5 of Article 1C (also reflected in paragraph 6 with regard to stateless persons) is as follows:

This Convention shall cease to apply to any person falling under the terms of section A if (...) he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality

Part 5 (*Examination of Applications at First Instance*): Heads 32 – 36A

- 5.1. Provision should be included under Head 32A (*Personal Interview*) to require that a copy of the notes of the personal interview must be provided to the legal representatives and the applicant in a timely fashion and in advance of a decision being issued.
- 5.2. In the interests of ensuring fair procedure, Head 32A(6) should provide for the applicant to have a right to legal representation at the personal interview, and that legal representation will be provided if they cannot afford same.
- 5.3. In relation to Head 35 (*Report of examination and determination of application*), subsection (2)(a) states as follows:

The report under subhead (1) shall-

(a) refer to the matters relevant to the application which are-

- (i) raised by the applicant, in a personal interview under Head 32A or a preliminary interview under Head 13 or at any time before the conclusion of the examination, and
- (ii) other matters the Minister considers appropriate,

- 5.4. The Committee considers that Head 35(2)(a) should refer to what is described in international refugee law as the 'shared duty' between the State and the refugee applicant, i.e. the assessment of a refugee claim is based on a shared duty between the applicant and the State (in this case, the Minister at first instance) that all relevant information at the disposal of the applicant will be provided by them, and in turn the Minister undertakes to consider all relevant information available including relevant 'country of origin' information – Head 25 (*Assessment of facts and circumstances*) refers to this duty.² To elaborate on this shared duty, it is evident that the Minister must carry out high quality and objective research (such as recognised 'country of origin' reports) before the determination is made.
- 5.5. The Committee recommends that Head 35(2)(a) should include reference to such research and fact-finding research, as it is important that this proposed section reflect the shared duty as described above. This will assist in ensuring that the Minister takes sufficient care to ensure that there is a fair and complete assessment of the claim before the report is finalised. The Committee refers the Justice Committee to the ['Handbook And Guidelines On Procedures And Criteria For Determining Refugee Status'](#), as issued by the UNHCR pursuant to the 1951 Geneva Convention.

² Head 25 (*Assessment of facts and circumstances*) – Head 25(5):

"The following matters shall be taken into account by the Minister or, as the case may be, the Tribunal for the purposes of the examination of an application for international protection or the determination of an appeal in respect of such an application:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied...". Etc.

- 5.6. Head 35(4)³ requires an unnecessarily subjective assessment of the applicant's claim and should be withdrawn from the Bill.
- 5.7. Head 35(5) refers to the Minister failing to make a determination within 6 months of the date of application, and providing the applicant with a revised timeline for a determination. The Committee considers that in these circumstances and at that point in time of the application process, provision should be included in the Bill to entitle the applicant to access the labour market and pending a final outcome of their application, thereby permitting them to move out of direct provision and allowing them to receive the necessary social supports to do so.
- 5.8. Under Head 36A (*'Notification of determination of application at first instance'*), Head 36A(2) contains a list of matters for the Minister to consider in determining whether permission should be granted for leave to remain. This list omits a number of criteria, currently contained in Section 3(6) of the Immigration Act 1999, such as age of the person, length of residence, their employment record, etc., all of which ought to be included in this Head. Additionally, the principle of non-refoulement should also be contained under this Head and the best interests of any children affected should also be considered.
- 5.9. The Committee is of the view that clarification is needed as to when applications under Head 36A ('leave to remain' applications) are to be considered – is it only when there is a final determination of the protection application encompassing any appeal of such an application?
- 5.10. The Committee recommends that provision should be included in the Bill to give an applicant and their legal representative at least 15 working days' notice of their entitlement to update the application for leave to remain in order to give them the opportunity to provide further information and up-to-date submissions.
- 5.11. Finally, the Committee refers the Justice Committee to the regulatory impact assessment prepared in relation to this Bill which outlines the differences between the protection applications as compared to the leave to remain applications.

³ Head 35(4): In addition to the setting out of a determination referred to in paragraph (c) subhead (3) the Minister may include in the report under subhead (1) any of the following findings made by the Minister-

- (a) that the examination of the application for international protection revealed only issues that are not relevant or are of minimal relevance to the eligibility of the applicant for international protection,
- (b) that the applicant has made inconsistent, contradictory, improbable or insufficient representations which are clearly unconvincing in relation to the eligibility of the applicant for international protection, or
- (c) that the applicant has failed without reasonable cause to make his or her application earlier, having had opportunity to do so.

Part 6 ('*Appeals to Tribunal*): Heads 37 - 42

- 6.1. Head 38(2)(a) requires that reasons be given for a request to withdraw from an oral hearing. This appears to be a somewhat arbitrary requirement as an applicant who declines an oral hearing at the time of lodging their appeal (Head 37(2)(b)) is not required to give reasons as to why they do not want an oral hearing.
- 6.2. It is commendable that there is provision now being made for hearings to take place in public (Head 38(7) – '*An oral hearing may be held in public where the applicant so consents and where, in the opinion of the Tribunal, it is in the interests of justice to do so*'). However, it should not be framed as something which is solely within the discretion of the Tribunal once the applicant consents to the hearing being held in public. Section 16(14) of 1996 Act, which requires that hearings be held in private, should be interpreted as allowing the applicant to waive his/her right to a private hearing. Justice must not only be done but must also be seen to be done.
- 6.3. Hearings should also be recorded, as can be facilitated in Court, via Digital Audio Recording. This will avoid any dispute as to what occurred during the hearing, will allow for quality control in respect of interpreters, and will inevitably speed up settlements and facilitate alternative dispute resolution, etc. in the event of litigation. This should also apply to the preliminary interviews at the first instance for all protection claims.
- 6.4. Head 38(6)(a) refers only to the Tribunal enabling the applicant to be present and their legal representative, where they have one. Explicit provision should be made to allow the applicant to have someone accompany them at the hearing and the Tribunal should facilitate this, unless it appears that it would be contrary to the interests of justice or an interference with the hearing.
- 6.5. Head 41 ('*Withdrawal and deemed withdrawal of appeal to Tribunal*') refers to the applicant being deemed to withdraw their application if no explanation is furnished to the Tribunal within 3 working days of having failed to attend an oral hearing. While the Committee notes that similar provisions are currently contained in the 1996 Act, it considers that this is too short a period and a more reasonable timeframe should be provided.
- 6.6. Generally, the Committee notes that many of its concerns around the processing of claims at the first instance – fair procedures, legal representation, a thorough assessment of the claim, human rights compliant determinations – arise again in relation to the Tribunal.

Part 7 (*'Declarations and other Outcomes'*): Heads 43 - 46

- 7.1. The time constraints contained under Head 43A regarding the option to voluntarily return to the 'country of origin' are too short and provide the individual with little or no options regarding seeking any legal advice within that period of time. This renders this option both impractical and inaccessible, and is contrary to the interests of both the applicant and the State.
- 7.2. Head 43(11) states that '*A refugee declaration or a subsidiary protection declaration, although given or deemed to have been given under these Heads, shall not be in force in relation to an Irish citizen*'. This is of concern as it seems to remove the possibility of family reunification for refugees or subsidiary protection grantees who have since become Irish citizens. This will mean that such individuals are effectively disadvantaged by becoming Irish citizens. Clarification should be provided in relation to the effect of this provision.
- 7.3. Head 44 (*'Prohibition of refoulement'*) defines the principle of non-refoulement as follows:
- A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory, where in the opinion of the Minister, the life or freedom of that person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or, where in the opinion of the Minister, there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
- 7.4. This definition has been expanded to take into account both threats to life and freedom and also the threat of torture. This is a positive development. Nonetheless, further care must be taken in how this definition will be expanded upon and treated by the Bill.
- 7.5. Additionally, Head 45(5) (Head 45 (*'Deportation Order'*)) states that a person who would otherwise be subject to a deportation order 'but for' Head 44, should be given permission to remain but there is no detail or explanation as to the nature or duration or length of that permission.
- 7.6. In relation to revoking a deportation order, Head 45(4) provides no specific grounds upon which the Minister may revoke such an order. The Committee recommends that grounds for the revocation of a deportation order should at least include those currently provided in Section 3(6) of the Immigration Act 1999 in relation to the Minister's considerations prior to the making of such order. The Committee is concerned that, as the Bill appears to also omit any mechanism for appealing a deportation order or the refusal to revoke such order, then any such order may be rendered permanent in nature by the Bill.
- 7.7. Head 46(1) deals with the '*Revocation of refugee declaration or subsidiary protection declaration*' and appears to fetter the Minister's discretion under particular circumstances as to whether or not to revoke a declaration. In such particular circumstances, it will now become mandatory for the Minister to revoke the refugee declaration or subsidiary protection declaration. The Committee recommends that the Minister's discretion in this

regard should be maintained. For example, under Head 46(1)(c), it appears that the Minister would have to revoke a declaration in circumstances where there has been “*misrepresentation or omission of facts, whether or not including the use of false documents*” – this type of revocation should be limited to circumstances where there has been fraudulent or intentional misrepresentation regarding material facts which were core to the application and declaration. On occasion, people who have been trafficked will be in possession of false documentation. Fettering or removing the Minister’s discretion in this manner fails to allow for consideration of such circumstances.

Part 8 ('Content of International Protection'): Heads 47 - 52

- 8.1. Under Head 48 ('*Permission to reside in the State*'), a family member who is admitted through reunification will no longer be entitled to remain for as long as the refugee is, but only for as long as they continue to be, a "family member" of a "qualified person". It is not entirely clear how a person may 'cease to be a qualified person or a family member'. This must be clarified. It is not clear if a family member could have their 'permission to reside' revoked in circumstances where their relative ceases to be a refugee due to becoming an Irish citizen (see the concerns regarding Head 43 above), or perhaps in circumstances where an underage child of a refugee becomes an adult, or in the event of the dissolution of a marriage of a qualified person.
- 8.2. Head 50 ('*Permission to enter and reside for member of family or qualified person*') sets a restrictive deadline of 12 months (from the date of the refugee declaration or subsidiary protection declaration) within which the individual must apply for family reunification. People from war-torn countries often lose track of their family members, sometimes for years. A strict deadline for such applications is unrealistic given the instability of war-torn/politically volatile states from which refugees flee, and could result in families remaining separated with no possibility of reunification thus failing to take account of the human rights to family and private life. Furthermore, such a deadline would exclude persons who became refugees while they were still minors from access to family reunification, upon reaching the age of majority, with spouses/civil partners.
- 8.3. The Committee is also concerned about Head 50(8) and the definition of '*member of the family*' in relation to marriage and civil partnership. The requirement that the marriage or civil partnership must be in existence at the time of the asylum application does not take into account the circumstances in which many refugees find themselves.
- 8.4. In relation to the legal institution of 'civil partnership', civil partnership is defined in the Bill by reference only to the '*Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*'. Many LGBTI individuals flee their country of origin for reasons of persecution of their sexual identity or gender as their countries of origin not only do not allow for any kind of marital status capable of recognition under the 2010 Act, but they also often directly or indirectly persecute such individuals and their families. In effect, this requirement under Head 50(8) could indirectly discriminate against LGBTI refugees/grantees of subsidiary protection.
- 8.5. Head 50(2) refers to investigating the identity of a person making such an application, the relationship between them and the qualified person, and "*the domestic circumstances of the person who is the subject of the application*". Potentially, the latter requirement of 'domestic circumstances' could encompass dependent family members such as elderly parents, etc. but it is unclear. It is further noted that, under Head 50(8), a restrictive definition of 'family member' is provided where a '*member of the family*' is defined as being limited to spouses, civil partners, children of the qualified person who are under 18 and not married, or parents of the qualified person where the qualified person is under 18.

Part 10 (*'International Protection Appeals Tribunal'*): Heads 55 - 60

- 9.1. Regarding Head 59 (*'Registrar'*), the Committee notes that this new role is not adequately explained, it requires further clarity in order to ensure that the independence of the Tribunal and the Chairperson is preserved.
- 9.2. The Committee notes the absence of the Refugee Advisory Board, as contained under the 1996 Act. In that absence, the Committee would suggest that the matter of protection and leave to remain determination would come under the remit of the Ombudsman and the Ombudsman for Children.

Separated Children

- 10.1. The Committee considers that greater detail needs to be added to the primary legislation regarding the issue of separated children in the protection context.
- 10.2. Head 52(2) states that, as regards the relevant provisions of the rest of Part 8 (*‘Content of International Protection’*), the best interests of the child “*shall be a primary consideration*”. It is submitted that the best-interests principle should be fully enshrined in the legislation and that the definition of a separated child as prescribed by the [‘Separated Children in Europe: Programme Statement of Good Practice’](#) should be laid down in the primary legislation.
- 10.3. Clear and objective procedures on the assessment of the age of a child on arrival in the State should be laid down in the primary legislation. Provision should also be made for this assessment to be made by appropriate and trained personnel. Currently, there is no statutory procedure in relation to age assessment.⁴ This decision-making power must be exercised in accordance with the principles of constitutional justice and fair procedures and should include the right of review. Such principles require certain minimum statutory safeguards.
- 10.4. At Head 23 (*‘Medical examination to determine the age of unaccompanied minor’*), there is no guidance provided regarding what factors a medical examination should take into account and the qualifications such a medical examiner should hold. In accordance with the UNHCR guidelines on best practice, there should be provision for the physical, developmental, psychological, environmental and cultural attributes of the child to be examined by independent professionals with appropriate expertise and familiarity with the child’s ethnic and cultural background. Examinations should never be forced or culturally inappropriate. Particular care should be taken that the examinations are gender appropriate. The Committee recommends that the Justice Committee should hear expert evidence on this hugely complex issue of age assessment.
- 10.5. The current proposals vest powers in the Immigration Officer with potentially serious consequences; for example, the power to detain could lead to the consequential detention of a minor as a result of a flawed age assessment. Immigration officers should be trained to recognise children at risk at the point of entry and to make decisions that are in the best interests of the child.
- 10.6. The proposed legislation should lay down clear and objective guidance on the assessment of the responsible adult of a separated child. In law a child is either accompanied by a guardian or is a separated child. If the child is a separated child, they should be referred to the Child and Family Agency. The current proposals allow for the use of a “*responsible adult*” (see Head 12 *‘Application for international protection’*) – a term which may not protect the interests of the child and does not accord with Irish law and the purpose of which is

⁴ The only ‘guidance’ available is from the case of [Moke v Refugee Applications Commission](#), 2005 IEHC 317.

unclear. The Committee is of the view that a child is either with their parents/legal guardians or the child is unaccompanied.

- 10.7. There does not appear to be anything in the Bill that will protect a potential child victim of trafficking. The Bill does not provide any guidance on how the suitability of the proposed adult can be ascertained, save the reference at Head 32A regarding the personal interview. While there is provision that an interviewer may inform the Child and Family Agency following enquires, the interview may not take place for several weeks after the minor's arrival in the State, thus potentially creating a vulnerable situation for the child.
- 10.8. There should be clarity in the legislation as to the legal relationship between the child and the Child and Family Agency.
- 10.9. Where it is proposed to place a separated child in the care of an adult or purported relative at any stage, every effort must be made to identify a suitable and verifiable family tie between the child and the adult based on the documents provided or that the proposed adult is a fit person in all the circumstances and that this is in the best interests of the minor. While in practice the Child and Family Agency conduct such investigations, including DNA, such procedures should be reflected in the Bill. .
- 10.10. It is recommended that a separated child should be appointed a legal guardian to represent and assist them in the protection process.

Translation and Interpretation

- 11.1. Given the huge importance of evidence in protection (and leave to remain) claims, particularly in the context of the credibility assessment of an applicant where in most cases such evidence is the deciding factor, it is essential that competent interpreters and translators are provided at all stages of the process. There is no legislation regulating translators and interpreters in Ireland, nor is there any national professional qualification on foot of statute, or a practice direction from the courts. Translation and interpreting are unregulated in Ireland, which means that anyone who speaks English and another language can call themselves a translator or an interpreter.
- 11.2. The Committee understands that practitioners in this area have concerns in relation to the quality of the interpretation and translation services available at each stage of the protection application process. It is the Committee's view that the interpreters' and translators' professions should be regulated by the State to ensure that adequate interpreters are provided and that minimum standards must be discussed, defined and enforced in this area.
- 11.3. The Committee considers that it is absolutely crucial that qualified and regulated interpretation and translation services be provided at every stage of the international protection application system. Such services are essential in ensuring that there is effective and clear communication with all applicants at all stages of the process. It is of extreme importance to ensure that applicants can understand what is happening to their claim, what is required of them, and their legal entitlements. The importance of these services arises repeatedly throughout the Bill.
- 11.4. For example, Head 17 (*'Statement to be given to applicant'*) refers to the Minister providing the person with "*a statement in writing specifying in a language that the applicant may reasonably be supposed to understand of the procedure to be followed ... and of his or her rights and obligations ...*"; the emphasis should be on the importance of ensuring that there is effective communication, such that communication *must be* in a language and form (depending on levels of literacy) which the person can reasonably understand.
- 11.5. Head 32A (*'Personal interview'*) raises a further matter of serious concern regarding the requisite standard of interpretation in the application process. Head 32A(4) states that the Minister's only obligation in this regard is to ensure that the interpreter speaks a language "*that the applicant may reasonably be supposed to understand and in which he or she is able to communicate*". The Committee considers that this minimum threshold does not hold the application process to sufficiently high practice standards. A more practical and effective test would be, at the very least, that both the applicant and interpreter ought to be able to understand and clearly communicate with one another – without misinterpretation.

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