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# **A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision**

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## **About the Author**

[Dr Liam Thornton](#) is a lecturer in law in UCD School of Law and a member of UCD Human Rights Network. Liam researches and published on issues relating to migration, asylum, the welfare state, social security law and international and European human rights law. You can access Liam's research and publication profile [here](#). *The views expressed in this working paper are mine alone. Given the short time I have had to consider the McMahon Report, any views expressed are preliminary.*

## A. Introduction

The *Working Group Report on the Protection System and Direct Provision (McMahon Report)* report was released on June 30 2015. The *McMahon Report* provides a significant number of recommendations on the protection process in Ireland and the system of direct provision.<sup>1</sup> That changes would be occurring to the protection process and the system of direct provision were hinted at in July 2014. *The Statement of Government Priorities 2014-2016* outlined the need to

*“address the current system of direct provision...to make it more respectful of the applicant and less costly to the tax-payer”.*<sup>2</sup>

There was also a commitment to establish a single procedure for asylum applicants. The publication of the [Heads of the International Protection Bill](#) in March 2015 (before the Working Group reported) has indicated Government willingness to move the single procedure forward. However, the Working Group seems overly ambitious in estimating that the single procedure will be in place and operational by 01 January 2016.<sup>3</sup>

After consultation with Non Governmental Organisations (NGOs) in September 2014,<sup>4</sup> the terms of reference and membership of the Working Group was announced on 13 October 2014.<sup>5</sup> The terms of reference of the Working Group were:

*“Having regard to the rights accorded to refugees under the 1951 Geneva Convention Relating to the Status of Refugees and bearing in mind the Government's commitment to legislate to reduce the waiting period for*

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<sup>1</sup> For a glossary of core terms that will be used as regards immigration status in this analysis, see Thornton, L. [Glossary of Terms: Irish Asylum Law](#) (UCD, 2013).

<sup>2</sup> Department of An Taoiseach, [Statement of Government Priorities 2014-2016](#) (July 2014), p. 9.

<sup>3</sup> Working Group report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (hereinafter the *McMahon Report*), paras 66, 6.17, 6.31, 6.39 and 6.46.

<sup>4</sup> 18 September 2014: Consultation with NGOs as regards terms of reference for the Working Group and other aspects of the protection process.

<sup>5</sup> Department of Justice and Equality, [Terms of Reference and membership of the Working Group](#) (October 2013).

*protection applicants through the introduction of a single application procedure,*

*to recommend to the Government what improvements should be made to the State's existing Direct Provision and protection process and to the various supports provided for protection applicants; and specifically to indicate what actions could be taken in the short and longer term which are directed towards:*

*(i) improving existing arrangements in the processing of protection applications;*

*(ii) showing greater respect for the dignity of persons in the system and improving their quality of life by enhancing the support and services currently available;*

*ensuring at the same time that, in light of recognised budgetary realities, the overall cost of the protection system to the taxpayer is reduced or remains within or close to current levels and that the existing border controls and immigration procedures are not compromised."*

The Working Group commenced work on its report on 10 November 2014.<sup>6</sup> The *McMahon Report* emerged over eight plenary meetings, with the sub-groups identified below meeting on 38 separate occasions.<sup>7</sup>

The limitations on the terms of reference were accepted by NGO representatives at the first meeting. The McMahon Report notes that:

*"organisations advocating an end to direct provision, and who may be disappointed in this limitation, had accepted their appointment on the basis of the terms of reference".<sup>8</sup>*

The core issue identified by the Working Group was "length of time" in the protection process and length of time protection applicants were subject to the system of direct

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<sup>6</sup> Working Group report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (hereinafter the *McMahon Report*), para. 6.

<sup>7</sup> *McMahon Report*, para. 20.

<sup>8</sup> *McMahon Report*, para. 8.

provision.<sup>9</sup> An Agreed Work Programme was set out, with members decided which sub-group they would be part of (and could be part of all sub-groups if they so wished):<sup>10</sup>

- 🚦 Theme 1: Improvements within direct provision;
- 🚦 Theme 2: Improvements to ancillary supports for those in direct provision
- 🚦 Theme 3: Improvements in the determination process for protection applicants.

Overall, the Report contains a mix of significant recommendations on the protection process and processing of asylum claims.<sup>11</sup> However, I argue, there are significant concerns with the recommendations that have emerged as regards direct provision accommodation and supports for asylum applicants.<sup>12</sup> The focus of this working paper relates to categorising some of the recommendations contained in the *McMahon Report* and providing some initial analysis. This analysis is not an exhaustive exploration of every single recommendation made in the McMahon Report.

There is a noticeable lack of any human rights analysis on the system of direct provision and ancillary supports provided for protection seekers. This is stark when compared to at least some level of human rights analysis that informed recommendations on the protection process.<sup>13</sup> The human rights analysis as regards the protection process considers in particular Ireland's obligations under the United Nations Convention on the Rights of the Child (UN CRC), in particular the best interests of the child and the status determination process. In relation to recommendations on the direct provision accommodation and supports available to protection applicants in direct provision, there is a noted lack of engagement Ireland's international human rights obligations. In addition, I argue that the recommendations emerging from the *McMahon Report* on direct provision

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<sup>9</sup> *McMahon Report*, para. 3 and Appendix 6.

<sup>10</sup> *McMahon Report*, para. 4 and Appendix 1.

<sup>11</sup> See generally, Chapter 3 of the *McMahon Report*.

<sup>12</sup> See generally, Chapter 4 and Chapter 5 of the *McMahon Report*.

<sup>13</sup> This issue is discussed in more detail below, pp. 20 to 26. In particular, see discussion on best interests of the child in relation to protection status determination, *McMahon Report*, para 3.138 and paras. 3.181-3.217.

accommodation, further embeds institutionalised living for protection seekers in Ireland.<sup>14</sup>

## B. The People Impacted: Some Core Statistics

### 1. Protection and Direct Provision Statistics

The *McMahon Report* is one of the first attempts by the State to systematically explore the total numbers of persons who are in the protection process and leave to remain process, including those who have unsuccessfully sought protection and leave to remain and who are now subject to a subsisting deportation order. Such figures had not been available as a matter of course, meant that there were significant unknowns as regards numbers within the protection process (and related migration areas such as leave to remain and those subject to deportation orders).

Some of the headline statistics emerging from the *McMahon Report* include:

- As of February 2015, the McMahon Report identified **7,937 persons** who are in the protection process (49%), the leave to remain process (42%) and persons whose claim for protection and leave to remain was not granted, and who are subject to a deportation order (9%).<sup>15</sup>
  - There are 3,876 persons within the protection process. 1,189 persons have been in the protection determination system for 5 years or more.<sup>16</sup>
  - There are 3,343 in the leave to remain process; 2,530 persons have been in the leave to remain process for 5 years or more.<sup>17</sup>
  - There are 718 persons subject to a deportation order. 628 persons have an outstanding deportation order for 5 years or more.<sup>18</sup>

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<sup>14</sup> See below, pp. 26-30.

<sup>15</sup> *McMahon Report*, para. 23 and para. 3.7.

<sup>16</sup> *McMahon Report*, para. 3.8.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

Of this 7,937 persons in the system, 3,607 (46%) live in direct provision accommodation.<sup>19</sup> 4, 330 (54%) of persons live outside direct provision. As the McMahon Report notes:<sup>20</sup>

*“Little is known about the living circumstances of this group. It is assumed that a significant proportion of them may have already left the State and that the remainder live with family, friends or in private accommodation at their own expense. The precise number currently in the State is unknown in the absence of exit immigration controls and/or the undertaking of a caseload verification exercise.”*

It has been known, at least since the 2010 *Value for Money Report on Direct Provision*<sup>21</sup> that significant numbers of those in the protection system do not live in direct provision. The 2010 Report, in rejecting mainstreaming of protection seekers within the social welfare and protection system, on the basis that the operation and modalities of direct provision, deterred many protection applicants from availing of this accommodation and support system. The 2010 Value for Money Report was premised on

*“If conditions for entitlement to Social Welfare and Rent Allowance were changed, then those not currently availing of RIA accommodation would be expected to apply for these payments, which would more than double the projected net additional Social Welfare/Rent Allowance cost. Granting entitlement to Social Welfare and Rent Allowance could also be a ‘pull factor’ and the numbers of new asylum seekers could rise significantly.”<sup>22</sup>*

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<sup>19</sup> McMahon Report, para. 3.10.

<sup>20</sup> McMahon Report, para. 3.12.

<sup>21</sup> DJELR, [Value for Money and Policy Review: Asylum Seeker Accommodation Programme \(Reception and Integration Agency\)](#), 30 July 2010. For an analysis of this report, see Thornton, L. “Asylum Seekers, Reception Conditions and Value for Money”, *Human Rights in Ireland*, 30 August 2010.

<sup>22</sup> DJELR, [Value for Money and Policy Review: Asylum Seeker Accommodation Programme \(Reception and Integration Agency\)](#), 30 July 2010 at p. 58.

While not explicitly engaged with in the McMahon Report, it may have been the case that similar concerns prevented examination of whether access to the general social protection system should be granted for those seeking protection in Ireland.

## 2. Judicial Review of Decisions

A key narrative that has emerged around delays within the protection, leave to remain and deportation systems, is that protection seekers are mainly responsible for the length of time in the system, by taking judicial reviews. Minister Fitzgerald, responding to a parliamentary question in 2014, stated:<sup>23</sup>

*“in very many instances the delay in finalising cases is due to applicants challenging negative decisions by initiating multiple judicial reviews at various stages of the process. Thousands of applications cannot be finalised because of these legal challenges...”<sup>24</sup>*

There are around 1,000 persons waiting on judicial reviews as of February 2015.<sup>25</sup> That is about 1 in every 7 applicants. Of those seeking judicial reviews of either Office of the Refugee Applications Commissioner (ORAC) , Refugee Appeals Tribunal (RAT) or Irish Naturalisation and Immigration Service (INIS) decisions, 82% (835) have been in the overall system for 4 years +. 66% (675) have been in the overall system for 5 years +. As regards length of time in the judicial review process,

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<sup>23</sup> Minister Frances Fitzgerald TD, [Written Response to Question on the Direct Provision System](#), Dáil Debates [unrevised], Wednesday 18 June 2014.

<sup>24</sup> See: see the speech by the former Minister for Justice, Equality and Law Reform, Mr. Michael McDowell T.D., at the publication of the First Annual Report of the Office of the Refugee Applications Commissioner, available at <http://www.inis.gov.ie/en/INIS/Pages/SP07000127> [last accessed, 07 August 2014]; Mr. McDowell's response to a parliamentary question from Deputy Michael D. Higgins, *Dáil Eireann Debates*, Vol. 623, Col. 1131- 1137 (05 July 2006). Mr. McDowell referred to the “the level of deliberate abuse of our current [asylum] processes”. See also, DJELR, “[McDowell takes firm action to deal with influx of Romanian asylum seekers](#)”, Press Release, 18 January 2007. Minister Fitzgerald's predecessor, Alan Shatter T.D, stated ([23 October 2013](#)) “it is worth noting that a substantial number of those residing for long periods within the direct provision system, are adults living with their children who have challenged in the courts by way of the judicial review process decisions made refusing applications for asylum and / or permission to remain in the state and whose cases await hearing or determination. There are presently approximately 1,000 such cases pending before the courts.”

<sup>25</sup> Of these, 433 of the judicial reviews are pending against the Refugee Appeals Tribunal (RAT), see *McMahon Report*, para 3.28. 75 judicial review decisions are pending against the Office of the Refugee Applications Commissioner (ORAC), *McMahon Report*, para 3.57. There are “approximately” 400 persons engaged in judicial reviews against decisions of INIS relating to pre November 2013 subsidiary protection decisions and leave to remain decisions, see *McMahon Report*, paras. 3.92.



38% (381) have been in the system for 4 years + and 5% of those awaiting judicial reviews have been awaiting hearing for more than 5 years.<sup>26</sup>

The rates of challenge to decisions of ORAC, RAT and INIS for the years 2009-2014, are as follows:

- **ORAC 2009-2014:**<sup>27</sup> 341 (3.61%) of the 9,434 negative decisions of ORAC were subject to judicial review proceedings between 2009 and 2014.<sup>28</sup> “Of the proceedings that have been determined in 2009-2014 (662):<sup>29</sup> 390 (58.91%) of these challenges were unsuccessful or withdrawn. 103 (11.56%) of the challenge were successful and 92 (13.90%) of these challenges were settled.<sup>30</sup>
- **RAT 2009-2014:**<sup>31</sup> RAT issued 8,392 negative decisions between 2009-2014. 1,293 (15.41%) of these negative decisions were subject to legal proceedings. Of the “proceedings determined” (1,420),<sup>32</sup> 819 (57.68%) were unsuccessful or withdrawn. 166 of the proceedings (11.69%) were successful. 288 cases (20.28%) were settled.<sup>33</sup>
- **INIS 2009-2014:**<sup>34</sup> INIS issued 5,931 negative decisions in this time period. 1,678 cases (28.29%) were subject of legal proceedings. “Of the proceedings determined” (1,301),<sup>35</sup> 513 cases (39.43%) of these challenges were either withdrawn or unsuccessful. 53 cases (4.07%) were successful and 753 challenges (56.5%) were settled. This very high settlement rate is attributed to the impact of the Court of Justice of the European Union’s decision in *Zambrano*.<sup>36</sup>

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<sup>26</sup> *McMahon Report*, para. 3.94.

<sup>27</sup> *McMahon Report*, para. 3.96. See also, Table 7 (Appendix 6).

<sup>28</sup> *Ibid.*

<sup>29</sup> In this regard, the *McMahon Report* states that 662 judicial review proceedings were determined against ORAC between 2009-2014, some of these reviews would have been filed prior to 2009, but determined after 2009, see Table 7 (Appendix 6).

<sup>30</sup> 77 (11.63%) of the applications in Table 7 are labelled “Other applications”, it is not clear what this means.

<sup>31</sup> *McMahon Report*, para. 3.97.

<sup>32</sup> As with the ORAC statistics, these must include judicial reviews lodged prior to 2009, but determined after this date, see Table 8 (Appendix 6).

<sup>33</sup> There are 147 “Other Applications”, it is not clear what this means.

<sup>34</sup> *McMahon Report*, para. 3.98.

<sup>35</sup> This may include judicial reviews lodged prior to 2009, but not decided until after 2009, see Table 8 (Appendix 6).

<sup>36</sup> *McMahon Report*, para. 3.85 and para. 3.98

## C. The “Five Year Rule”

This working paper will not be considering some of the core recommendations on improving the operation of the protection system, designed for all claims to be determined (protection and any leave to remain application) within 12 months.<sup>37</sup> The focus on speedy determination of asylum claims is nothing new. In the 2002 Programme for Government, the Fianna Fail and Progressive Democrat coalition stated (optimistically):<sup>38</sup>

*“We will ensure that new asylum applications are dealt with within six months and that other applications, which are currently outstanding, can be dealt with quickly.”*

Similar promises (without time commitments) were made in the Fianna Fail and Green Party Programme for Government 2007-2012, and the Fine Gael and Labour Programme for Government 2011-2016.<sup>39</sup> The *McMahon Report* provides substantial recommendations as regards numbers of decision makers needed to ensure meeting a 12 month period for disposal of protection and leave to remain claims once the single procedure is operating “efficiently”.<sup>40</sup> In order to ensure the efficient operation of the single procedure, the Working Group has proposed that all individuals in the protection, leave to remain or deportation processes, for 5 years or more, should, in general, be granted either protection status or leave to remain within 6 months of this reports publication. The *McMahon Report* “discounted the possibility of an amnesty”.<sup>41</sup> Instead, the McMahon Report recommends:<sup>42</sup>

*“All persons awaiting decisions at the protection process and leave to remain stages who have been in the system for five years or more from the date of initial application should be granted leave to remain or protection status as*

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<sup>37</sup> McMahon Report, para. 58, 3.164 and 4.32.

<sup>38</sup> Department of An Taoiseach, [An Agreed Programme for Government between Fianna Fail and the Progressive Democrats](#) (June 2002), p. 28.

<sup>39</sup> Department of An Taoiseach, [Programme for Government 2007-2012](#), p. 58 and Department of An Taoiseach, [Programme for Government 2011-2016](#), p. 21.

<sup>40</sup> *McMahon Report*, paras 6.31 -6.49.

<sup>41</sup> *McMahon Report*, para. 3.4.

<sup>42</sup> *McMahon Report*, para. 3.128.

*soon as possible and within a maximum of six months from the implementation start date subject to the three conditions set out below for persons awaiting a leave to remain decision. It is recommended that an implementation start and end date be set by the authorities as soon as possible.”*

This will impact on an estimated **3,350 persons** (out of 7,937 persons in the system).<sup>43</sup> Of the 3,350 persons, 1,480 are within direct provision. While it is estimated that there may be up to 2,870 individuals who could benefit from this scheme outside direct provision,<sup>44</sup> the Working Group is of the view that around half of these individuals are no longer in Ireland.<sup>45</sup> At para. 3.129 of the *McMahon Report*, the system used to grant status is set out, with requirements to ensure that all those granted some residency status are of good character, and considerations of national security and public policy can be considered.<sup>46</sup> The McMahon Report also provides a number of considerations that the State can take account of where an individual has been sentenced to a term of imprisonment for 12 months or more.<sup>47</sup> The McMahon Report recommends that all such persons coming within the qualifying criteria be issued with a decision within 6 months.<sup>48</sup> While keeping this at the level of administration, there may be some concerns expressed that this is not a legislative right been provided to the applicants.<sup>49</sup> This ‘five year solution’ is to continue, as

*“[T]he Working Group considers that no person should in principle be in the system for five years or more. The Working Group recommends that this principle continue to apply into the future notwithstanding the [properly resourced single procedure] solution...”<sup>50</sup>*

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<sup>43</sup> *McMahon Report*, para. 3.151.

<sup>44</sup> *Ibid.*

<sup>45</sup> This is based on ORAC’s assessment of a subsidiary protection backlog of 3,657 cases, where the number of live cases fell off to 1,619, see McMahon Report, para. 3.152.

<sup>46</sup> *McMahon Report*, para. 3.129.

<sup>47</sup> *McMahon Report*, para. 3.130.

<sup>48</sup> *McMahon Report*, para. 6.25. The McMahon Report goes into some detail on the issues that may arise for those currently engaged in judicial reviews.

<sup>49</sup> Although not fully on par with the McMahon Report recommendation, the [Immigration \(Reform\) \(Regularisation of Residency Status\) Bill 2014](#) could be a starting point for placing this recommendation on a statutory footing.

<sup>50</sup> *McMahon Report*, para. 3.165.

## D. The Recommendations on Direct Provision: Accommodation and Standards

The Working Group has made a number of unqualified recommendations, qualified recommendations and requests for further reviews of different aspects of direct provision accommodation.

### 1. *The Unqualified Recommendations*

These recommendations relate to a number of core areas, including:

- i. **Multi-Disciplinary Assessment:**<sup>51</sup> Multi-disciplinary assessment of needs of protection applicants within 30 days, and for this to be taken into account in the protection determination process, with follow up on an “on-going and regular basis”. Communication between different statutory agencies and others (RIA, legal advisors, health care providers etc.). Steps should be taken to encourage protection applicants avail of this assessment.
- ii. **Accommodation Provision:**<sup>52</sup> All single residents sharing rooms and all family units should be provided with an individual locker for storage of personal items. This should be acted on without delay. All requests for tenders should specify adequate indoor and outdoor recreational space for children and young people, and consultations with resident children and young people “should be built into the specifications.”<sup>53</sup> All requests for tenders for centres for single people should specify the requirement for communal kitchens.<sup>54</sup> There should be consultation with residents on 28 day menu cycles.<sup>55</sup>
- iii. **Standards and Oversight:** Extending the remit of Ombudsman and OCO to cover complaints relating to services provided to persons in direct provision and transfer decisions. Residents can contact either (or both) offices after

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<sup>51</sup> *McMahon Report*, paras 4.210.

<sup>52</sup> *McMahon Report*, paras 4.54.

<sup>53</sup> *McMahon Report*, para. 4.75, bullet point 3.

<sup>54</sup> *McMahon Report*, paras 7.75, bullet point 1(iii).

<sup>55</sup> *McMahon Report*, para. 4.102, bullet point 2.

internal mechanisms are exhausted (including an independent appeal).<sup>56</sup> RIA must appoint an officer to ensure complaints are dealt with. Complaint mechanisms must be open to all residents, including children and young people.<sup>57</sup> RIA must build confidence and trust in these complaints systems and that residents will not be adversely affected by making a complaint and “ensure centre management buy into the importance of ensuring an open culture that is conducive to residents making complaints.”<sup>58</sup> Contracts with providers should ensure managers have experience of working with refugees and protection applicants.<sup>59</sup> Centre Managers should have knowledge of basic mental health issues and health services, social welfare system, medical issues, a compassionate and empathetic style.<sup>60</sup>

- iv. **Transfers:**<sup>61</sup> RIA continue to provide detailed reasons for involuntary transfer. Recording of statistics in relation to voluntary and involuntary transfers.
- v. **Child Protection:** Access to cultural diversity training for social workers, with the identification of a named social worker by the Child and Family Agency and the Health Service Executive to contact in each direct provision centre.<sup>62</sup> RIA is to continue to have consideration of child safety when assigning residents to direct provision centres.<sup>63</sup>
- vi. **Community Outreach:** By the end of 2015, all direct provision centres should enter into partnership agreements with local leisure and sports clubs.<sup>64</sup>

## 2. *The Qualified Recommendations*

These recommendations all relate to accommodation provision. All recommendations as regards greater respect for private and family life are significantly qualified. RIA informed the Working Group that it was not clear that all centres would be “structurally in a position to effect the proposed changes...”<sup>65</sup> It could take “upwards of” two years, from issue of tender to get new accommodation

<sup>56</sup> *McMahon Report*, paras 4.135.

<sup>57</sup> *McMahon Report*, para. 4.135, bullet point 3 (ii).

<sup>58</sup> *McMahon Report*, para. 4.135, bullet point 3 (iii).

<sup>59</sup> *McMahon Report*, para. 4.155, bullet point 1.

<sup>60</sup> *Ibid.*

<sup>61</sup> *McMahon Report*, para. 4.139.

<sup>62</sup> *McMahon Report*, para. 4.199.

<sup>63</sup> *Ibid.*

<sup>64</sup> *McMahon Report*, para. 4.75, bullet point 3.

<sup>65</sup> *McMahon Report*, para.4.77 and 4.89.

on stream that would meet the recommendations of the *McMahon Report*.<sup>66</sup> In any event, given the “market for self-contained units”,<sup>67</sup> some of the recommendations below may not be possible to implement.

Two core phrases come up time and again in the McMahon Report’s recommendations on direct provision accommodation: “in so far as practicable” and “subject to any contractual obligations”. All direct provision accommodation facilities are to be in line with a proposed “Standard Setting Committee” that will “reflect government policy across all areas of service in Direct Provision”.<sup>68</sup> The highly qualified recommendations include:

- i. All centres should “in so far as is practicable” provide a secure storage facility for bulky items (eg suitcases).<sup>69</sup>
- ii. In so far as practicable, all existing centres should install appropriate play, recreation and study facilities.<sup>70</sup>
- iii. “Subject to contractual obligations”, RIA should “identify spare capacity within accommodation centres, and seek to bring this on stream to alleviate cramped conditions for those sharing”.<sup>71</sup>
- iv. 80% of single persons in direct provision accommodation currently share rooms.<sup>72</sup> Single persons should have a right to apply for a single room after 9 months and this should be ensured “in so far as reasonably practicable”, that they are offered a room after 15 months.<sup>73</sup> By the **end of 2016**, existing centres for single people should be reconfigured to provide communal kitchens “in so far as reasonably practicable having regard to any contractual obligations.”<sup>74</sup> This should run in parallel with a catering option “as not all residents may wish to cater for themselves.”<sup>75</sup>

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<sup>66</sup> *McMahon Report*, para. 4.78.

<sup>67</sup> *McMahon Report*, para. 4.78.

<sup>68</sup> *McMahon Report*, para. 47 and 4.226.

<sup>69</sup> *McMahon Report*, para. 4.58, Bullet Point 6.

<sup>70</sup> *McMahon Report*, para. 4.75, Bullet Point 2.

<sup>71</sup> *McMahon Report*, para. 4.58, Bullet Point 1.

<sup>72</sup> *McMahon Report*, para. 41 and 487, Bullet Point 2.

<sup>73</sup> *Ibid.*

<sup>74</sup> *McMahon Report*, para. 40 and para. 4.75.

<sup>75</sup> *McMahon Report*, para. 4.75, Bullet Point 1(ii).

As regards **Families**, practically all recommendations are significantly qualified. A core recommendation is that families should have access to cooking facilities and private living spaces “is so far as practicable”.<sup>76</sup> In order to achieve this:

- a. “Within 12 months of completion of the final report of the Working Group” existing direct provision centres that have cooking facilities should allow access to these “in so far as practicable and subject to any contractual obligations”.<sup>77</sup> This should run parallel to a catering option “as not all residents may wish to cater for themselves.”<sup>78</sup>
- b. There should be consultation on the cooking supplies provided to residents;<sup>79</sup>
- c. “Within 6 months of the final report”, direct provision centres that do not have cooking facilities and “subject to any contractual obligations” facilitate parents/young persons to make school lunches for themselves. The Report then lists the types of food that could be provided.<sup>80</sup>
- d. “By end 2016”, “a sufficient number of centres” should be reconfigured to provide families with use of their own “private living space” “in so far as practicable having regard to contractual obligations”.<sup>81</sup>
- e. All requests for tenders (presumably new tenders) should “specify the requirement for self-contained units with cooking facilities and/or family quarters together with communal kitchens.”<sup>82</sup>

### *3. Further Reviews and Assessments*

There are **a significant number of requested** further reviews or assessments or recommendations for the creation of new administrative bodies:

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<sup>76</sup> *McMahon Report*, para. 4.75.

<sup>77</sup> *McMahon Report*, para. 4.75, bullet point 1(i).

<sup>78</sup> *Ibid.*

<sup>79</sup> *McMahon Report*, para. 4.75, bullet point 1(ii).

<sup>80</sup> *McMahon Report*, para. 4.75, bullet point 1(iii).

<sup>81</sup> *McMahon Report*, para. 4.75, bullet point 1(iv).

<sup>82</sup> *McMahon Report*, para. 4.75, bullet point 1(v).

- i. RIA should without delay “develop a set of criteria” taking into account the multipurpose nature of bedrooms in direct provision accommodation. This criteria should “take account” of the Department of Environment, Community and Local Government’s criteria for quality housing.<sup>83</sup> This should take account of the fact that (i) each room should facilitate a range of activities; (ii) adequate floor areas and room sizes (iii) well proportioned spaces (iv) furniture and person effects should allow free circulation within the room.<sup>84</sup> Once this review is complete, RIA should ensure that capacity is aligned with the review, “in so far as contractual obligations permit.”<sup>85</sup>
- ii. RIA should “without delay” complete a review as to minimum requirements in terms of furniture for multi-purpose direct provision rooms to suit sleeping as well as living e.g. chair, desk and adequate storage.<sup>86</sup>
- iii. All of the criteria identified above “should be” incorporated into tender requests for accommodation centres.<sup>87</sup>
- iv. RIA should conduct a “**nutritional audit**” to ensure food meets required standards including for children, breastfeeding mothers and needs of those with medical conditions.<sup>88</sup>
- v. RIA should conduct a “review of security arrangements” in direct provision accommodation centres, to ensure measures are proportionate to security risk.<sup>89</sup>
- vi. RIA “should review” its proposals in relation to guests in private quarters in terms of the proportionality of the reformed ‘House Rules’;<sup>90</sup>
- vii. Establishment of an inspectorate (or identify an existing body) to assess accommodation in light of standards set down by the ‘standard setting committee’. The Inspectorate should also make regular reports on general matters relating to welfare of residents in Direct Provision centres.<sup>91</sup>

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<sup>83</sup> DECLG, [Quality Housing for Sustainable Communities](#) (2007).

<sup>84</sup> *McMahon Report*, para. 4.58, bullet point 2 (i)-(iv).

<sup>85</sup> *McMahon Report*, para. 4.58, bullet point 3.

<sup>86</sup> *McMahon Report*, para. 4.58, bullet point 4.

<sup>87</sup> *McMahon Report*, para. 4.58, bullet point 6.

<sup>88</sup> *McMahon Report*, para. 4.99 and para. 4.102.

<sup>89</sup> *McMahon Report*, para. 4.122, Bullet Point 1.

<sup>90</sup> *McMahon Report*, para. 659. These House Rules were found to be unlawful in [CA & TA v Minister for Justice](#) [2014] IEHC 532, see further: Thornton, L., “[C.A. and T.A.: The Direct Provision Case](#)”, (2014) 4 *Irish Journal of Family Law* 116.

<sup>91</sup> *McMahon Report*, para. 4.426, Bullet Points 2-3.



- viii. Child and Family Agency (CFA) “should liaise” with RIA to develop a child welfare strategy and to advise on individual cases;<sup>92</sup>
- ix. RIA, in conjunction with CFA, “should review” its House Rules as regards parents leaving children under 14 unsupervised;<sup>93</sup>
- x. CFA, HSE and RIA “should collaborate” to provide early intervention and onsite supports to direct provision residents.<sup>94</sup>

## **E. Recommendations on Protection Applicant Supports**

The Working Group have made a number of recommendations as regards improving the quality of life of those in the protection process. These recommendations include, improved financial supports, education and training, health care, further assistance to vulnerable protection seekers and supports to enable persons transition out of direct provision accommodation.<sup>95</sup>

### *1. Unqualified recommendations*

**Increase rate of direct provision allowance:** The working group has recommended an increase in direct provision allowance (DPA) for adults and children. It is recommended that the adult rate to increase to €38.74 and child rate to €29.80 (qualifying child allowance under Supplementary Welfare Allowance).<sup>96</sup> There is an additional recommendation for the Department of Social Protection to reinstate Community Welfare Service officials in direct provision centres<sup>97</sup> and strive for consistency in administration of Emergency Needs Payments.<sup>98</sup>

### *2. Qualified Recommendations*

**The Right to Work:** Once the single procedure is “operating efficiently”,<sup>99</sup> provision for access to the labour market for a protection applicant, if the first instance protection decision is not provided within 9 months, and the applicant has been

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<sup>92</sup> *McMahon Report*, para. 4.199, Bullet Point 1.

<sup>93</sup> *McMahon Report*, para. 4.199, Bullet Point 2.

<sup>94</sup> *McMahon Report*, para. 4.199, Bullet Point 3.

<sup>95</sup> In this review, I will not be engaging in an analysis of the recommendations on transitioning out of direct provision, see *McMahon Report*, Ch. 5.

<sup>96</sup> *McMahon Report*, para. 51, 5.27 and 5.30 Bullet Point 1.

<sup>97</sup> *McMahon Report*, para. 5.7, 5.19, 5.29 and 5.30 Bullet Point 2.

<sup>98</sup> *McMahon Report*, para. 5.30, Bullet Point 3.

<sup>99</sup> *McMahon Report*, para. 53, para. 5.49, Bullet Point 1.

cooperating with status determination bodies.<sup>100</sup> The right to work should continue until the end of the protection determination process.<sup>101</sup> Where an applicant does succeed in entering employment, she should make a contribution to her accommodation and food within direct provision, if the right to work is provided and exercised.<sup>102</sup>

**Access to Education:** For school-going children, access to a homework club (on school grounds or in the direct provision centre) is necessary.<sup>103</sup> There are 60 students aged 15-18 who are currently in direct provision and will sit their leaving cert in 3-4 years time.<sup>104</sup> 100 young people obtained their leaving certificate in the last 5 years and live in DP centres.<sup>105</sup> 21 students sat the Leaving Certificate in 2014. 22 students were scheduled to sit their leaving cert in 2015.<sup>106</sup> For adults (new arrivals, the *McMahon Report* recommends access to English language education within one month.<sup>107</sup> For those 6 months + in the direct provision system, information on other potential courses open to them should be made available.<sup>108</sup> Universities and colleges should consider applying EU/EEA rates to those in the protection process or leave to remain stage for five years or more.<sup>109</sup> In courses above NFQ Level 4, those in the system for two years or more should be eligible to apply but subject to same conditions as others (i.e. if there is a requirement to be unemployed, and on the “live register”, this would apply to protection seekers).<sup>110</sup> The McMahon Report recognised that this does not impact in any way on those currently in the system.<sup>111</sup> No rationale is provided for the reason as to why it will not apply to current applicants.

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<sup>100</sup> *Ibid.*

<sup>101</sup> *McMahon Report*, para. 5.49, Bullet Point 2.

<sup>102</sup> *McMahon Report*, para. 5.49, Bullet Point 3.

<sup>103</sup> *McMahon Report*, para. 4.67. The Report notes that “just over half of the family centres” operate homework clubs, see para. 5.61.

<sup>104</sup> *McMahon Report*, para. 5.65, Bullet Point 1.

<sup>105</sup> *McMahon Report*, para. 5.65, Bullet Point 2.

<sup>106</sup> *McMahon Report*, para. 5.65, Bullet Point 3.

<sup>107</sup> *McMahon Report*, para. 5.72.

<sup>108</sup> *McMahon Report*, para. 5.74.

<sup>109</sup> *McMahon Report*, para. 5.76 and 5.82.

<sup>110</sup> *McMahon Report*, para. 5.79.

<sup>111</sup> *Ibid.*

**Healthcare supports:** The McMahon Report welcomed the HSE initiative to waive prescription charges, and calls for it to be implemented as soon as possible.<sup>112</sup> A number of health promotion initiatives and information leaflets on health services should be made available to protection seekers.<sup>113</sup>

**Support for Vulnerable Protection Seekers, including LGBT Protection Seekers:** Organisations providing services to protection applicants “should consider training staff in LGBT issues”.<sup>114</sup> The McMahon Report also recommends that representatives of Department of Social Protection should exercise discretion in administering Emergency Needs Payments to “support LGBT people in the system to access appropriate supports and services”.<sup>115</sup> The McMahon Report also recommends that information leaflets to highlight LGBT issues “displayed prominently”, along with RIA Safety Statement highlighting LGBT issues.<sup>116</sup>

**Supports for Separated Children:** All separated children over 16 should have an aftercare plan.<sup>117</sup> Currently, the HSE provide aftercare support to 82 separated children who have reached 18 years.<sup>118</sup> “As far as practicable and subject to their wishes”, separated children moving into direct provision should be accommodated in a direct provision centre near to residential placement or previous foster carers.<sup>119</sup> Training and other supports should be provided to foster carers to assist a young person’s transition to direct provision.<sup>120</sup> The McMahon Report also recommends that the Department of Children and Youth Affairs “should convene” a “stakeholder group” to consider “optimum supports” for separated children, including integration into Irish society.<sup>121</sup>

**Linkages with Local Communities:** The Government to “give consideration” to including protection applicants in integration strategy and to make funding available

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<sup>112</sup> *McMahon Report*, para. 5.100.

<sup>113</sup> *Ibid.*

<sup>114</sup> *McMahon Report*, para. 5.113.

<sup>115</sup> *McMahon Report*, para. 5.113, Bullet Point 2.

<sup>116</sup> *McMahon Report*, para. 5.100, Bullet Point 6.

<sup>117</sup> *McMahon Report*, para. 5.121.

<sup>118</sup> *McMahon Report*, para. 5.122.

<sup>119</sup> *McMahon Report*, para. 5.134, Bullet Point 3.

<sup>120</sup> *McMahon Report*, para. 5.134, Bullet Point 3.

<sup>121</sup> *McMahon Report*, para. 5.134, Bullet Point 4.

for local integration strategies. Consideration to be given to set up “Friends of the Centre” groups<sup>122</sup> and building community linkages. This also includes a suggestion to open up direct provision centres for an “Open Day”.<sup>123</sup>

### *3. Requests for Reviews & Training*

The McMahon Report “strongly urges” that a **review** occur as regards pregnancy and family planning issues, including crisis pregnancy issues that arise.<sup>124</sup> The review should explore issues related to the right to travel documents, financial assistance, confidentiality etc.<sup>125</sup>

The Irish Human Rights and Equality Commission should consider including in their Strategic Plan the inclusion of **education and training** on equality and diversity issues for public bodies engaged in the provision of supports to persons in the direct provision system.<sup>126</sup>

## **F. A Preliminary Assessment of the McMahon Report: Human Rights and Embedding Institutional Living in Direct Provision**

From an initial reading and examination of this report, in my view, this is a report of two halves. One half of the report (Chapter 3 in particular) on the protection process and recommendations on the five year grant of a form of residency status is clear and coherent. Clear recommendations are made as regards status determination and a substantial analysis of the rights of the child (along with other areas). That is not to say that the narrative of the McMahon Report in Chapter 3 is not without its issues (but I will leave this for another day). Throughout Chapter 4 and Chapter 5, highly qualified language and significant caveats infects the totality of recommendations on direct provision accommodation and ancillary supports.

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<sup>122</sup> *McMahon Report*, para. 5.146 and para. 5.152, Bullet Point 3.

<sup>123</sup> *McMahon Report*, para. 5.148.

<sup>124</sup> *McMahon Report*, para. 5.100, Bullet Point 3.

<sup>125</sup> *Ibid.*

<sup>126</sup> *McMahon Report*, para. 5.175, Bullet Point 3. The Sub-Group on supports to protection applicants noted “that the Commission [IHREC] has a substantial budget (€6.8 million in 2015) that could be drawn on to good effect”. This was removed from the final version of the report (on file with author).

## 1. Human Rights Obligations and Direct Provision Accommodation and Supports

From my initial reading of the report, there appears to be two unequivocal recommendations that may impact on those currently in direct provision, who are not resident in the centres for five years: an increase in direct provision allowance and the provision of a locker for each individual adult in direct provision accommodation centres. All other recommendations are subject to significant caveats as regards contractual obligations and implementation restricted in so far as reasonably practicable. For over 15 years, report after report<sup>127</sup> has emphasised the significant violations of human rights that occur on a daily basis for those subject to direct provision accommodation and supports. The *McMahon Report*, while recommending an increase in direct provision allowance, does not recommend the payment of child benefit to those seeking protection in Ireland.

It is important to emphasise that international human rights obligations on the social and economic rights of protection seekers are far from clear and precise (with the exception of the UN Covenant on the Rights of the Child, discussed below).<sup>128</sup> Socio-economic rights are those rights recognised under international law as forming part of the corpus of human rights. These include (but are not limited to) the following:<sup>129</sup>

- The right to social security (art. 22 UDHR, art. 9 ICESCR),
- The right to work and to fair conditions of work (art. 23 UDHR, arts. 6 & 7 ICESCR), The right to rest and leisure (art. 24 UDHR),
- The right to an adequate standard of living, including food, water, clothing and shelter and medical care (art. 25 UDHR, arts. 11 & 12 ICESCR),
- The right to elementary education (art. 26 UDHR, art. 13 ICESCR),

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<sup>127</sup> For a full list of these reports, see Thornton, L. [“#DirectProvision15: 15 Years of Direct Provision in Ireland”](#), Human Rights in Ireland, 06 April 2015.

<sup>128</sup> This part of the analysis of the *McMahon Report* relies heavily on a number of previously published papers, including: Thornton, L. “Direct Provision and the Rights of the Child in Ireland” (2014) 17(3) *Irish Journal of Family Law* 68; Thornton, L. (2014) [“Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe”](#), FRAME Working Paper No. 6, January 2014.

<sup>129</sup> These rights are also protected under various other thematic treaties on Race, Women, Children and Disability, as well as being protected (to a great degree) by the European Social Charter and under the European Charter of Fundamental Rights (EUCFR).

- The family has a right to adequate social protection since it is the “natural and fundamental group unit of society” (art. 10 ICESCR).

In the last decade, the Council of Europe<sup>130</sup> and the European Union<sup>131</sup> have played a key role in developing a pan-European normative framework as regards the protection of socio-economic rights of protection seekers in Europe. Legislative action by the European Union,<sup>132</sup> coupled with judicial interpretation of cases relating to the socio-economic rights of protection seekers by the Court of Justice of the European Union<sup>133</sup> and the European Court of Human Rights,<sup>134</sup> has protection seekers recognised as rights bearers in accessing accommodation, education and a basic standard of living. This came about due to the presence of EU law on issues relating to ‘reception conditions’ of protection seekers. The Reception Conditions Directive (RCD)<sup>135</sup> and the successor Recast Reception Directive (RRD)<sup>136</sup> are unique, in that a very basic standard of living has been set down from those considered outside the European polity. It has been estimated that the total cost across 25 member states (excluding Ireland and Denmark) for providing reception conditions to asylum seekers (and in some cases those seeking subsidiary protection as well as third country non asylum applicants) is €1.5 billion.<sup>137</sup> Ireland is

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<sup>130</sup> K. Sithole, “The Council of Europe, Rights and Political Authority” (2013) 21(1) *European Review* 118, 121-123.

<sup>131</sup> D. Chalmers and others, *European Union Law: Text and Materials* (2<sup>nd</sup> edition, Cambridge: CUP, 2010), pp 9-50.

<sup>132</sup> See, for the European Union, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] O.J. L.31/18 and 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 [2013] O.J. L.180/96.

<sup>133</sup> See in particular, Joined cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department, M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2012] 2 *Common Market Law Reports* 9 and Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, judgement of the CJEU, 24 February 2014.

<sup>134</sup> The seminal decision on the socio-economic rights for asylum seekers is Application no. 30696/09, *M.S.S v Belgium and Greece*, judgement of the ECtHR, 21 January 2012.

<sup>135</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] O.J. L.31/18 (this will be referred to as the Reception Conditions Directive or RCD).

<sup>136</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection [2013] *Official Journal of the European Union* L. 180/96 (hereinafter Recast Reception Directive or RRD).

<sup>137</sup> EU Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and Council laying down minimum standards for reception of asylum seekers (Recast), SEC(2008) 2944 (3 December 2008) at p. 45.

not bound by the Reception Conditions Directive or the Re-Cast Reception Directive, although the *McMahon Report* does recommend that Ireland:<sup>138</sup>

“...opt-in to all instruments of the Common European Asylum System, unless clear and objectively justifiable reasons can be advanced not to.”

As I have noted elsewhere:<sup>139</sup>

*“While there is much merit in the cosmopolitan view of international human rights law, it does not reflect the reality, recognised by treaty bodies and the UNHCR, that differing standards of reception conditions for asylum and protection seekers may not necessarily violate international human rights standards. The Committee on the Rights of the Child has been the only treaty body to rule out any distinctions in the enjoyment of rights for asylum and protection seekers. The approach of the Committee on Economic, Social and Cultural Rights appears to be shifting as regards equal and non-discriminatory enjoyment of rights for those seeking asylum and protection. The various other human rights treaty bodies and UNHCR, while accepting the indivisibility of rights and also seeking to ensure asylum and protection seekers are recognised as rights bearers, nevertheless have accepted that there may be differences in treatment and in the socio-economic rights enjoyed by asylum seekers. This is evidenced by the acceptance of measures that separate asylum and protection seekers from host communities, and where asylum and protection seekers do not enjoy the same standard of living compared to others who are dependent on social assistance within states. It is not always clear when differences in levels of socio-economic rights protection for asylum seekers are legitimate, reasonable and proportionate. It might be accepted that asylum seekers may be subject to a separate welfare or social security regime upon arrival in a state. However, over time, such separation becomes more difficult to justify, in particular, when there are significant differences in the mode of delivery and monetary level of social supports, despite similarities*

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<sup>138</sup> *McMahon Report*, para. 3.178.

<sup>139</sup> Thornton, L. [“The Rights of Others: Asylum Seekers and Direct Provision in Ireland”](#) (2014) 3(2) *Irish Community Development Law Journal* 22 at 39.

*in terms of levels of need. At present, the requirements of international human rights law are not clear.”*

The United Nations High Commission for Refugees (UNHCR) has noted that the majority of persons of concern to them continue to be children<sup>140</sup> and the best legal framework for protection of refugee and asylum seeking children is the Convention on the Rights of the Child (CRC). The UN Convention on the Rights of the Child (CRC) is relevant in a number of respects to children in the asylum system and of particular significance to children in the direct provision system. States must respect and ensure that all children within Ireland, regardless of legal status, enjoy all the rights set down in the CRC.<sup>141</sup> In all actions concerning children, including in social welfare institutions, the best interests of the child is the primary consideration.<sup>142</sup> The CRC explicitly recognises that children seeking asylum (alone or as part of a family group) “receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights” under the CRC.<sup>143</sup> The socio-economic rights of children are outlined in a variety of the CRC’s articles and mainly reinforce recognised rights under the International Covenant on Civil and Political Rights<sup>144</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>145</sup> All children have the right to health,<sup>146</sup> the right to benefit from social security,<sup>147</sup> the right to an adequate standard of living,<sup>148</sup> the right to education,<sup>149</sup> the right to rest and leisure,<sup>150</sup> and protection from economic exploitation<sup>151</sup> including protection from sexual exploitation<sup>152</sup> and trafficking.<sup>153</sup>

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<sup>140</sup> See, UNHCR, *Global Trends 2013* (Geneva: UNHCR, June 2014) and UNHCR, Executive Committee Conclusion on Children No. 84 (XLVIII) of 1997, preamble paragraph 1. , UNGA Doc. No. A12 (A/52/12/Add. 1).

<sup>141</sup> Article 2 CRC. In this regard, other international human rights treaties are not as categorical as regards the equal applicability of rights for asylum seekers vis-à-vis citizens. For discussion on this, see: Thornton, L. (2014) “Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe”, FRAME Working Paper No. 6, January 2014, available at <http://www.fp7-frame.eu/> [last accessed: 07 August 2014].

<sup>142</sup> Article 3(1) CRC.

<sup>143</sup> Article 22 CRC.

<sup>144</sup> International Covenant on Civil and Political Rights 1966, (ICCPR) 999 U.N.T.S. 171.

<sup>145</sup> International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) 993 U.N.T.S. 3

<sup>146</sup> Article 24 CRC.

<sup>147</sup> Article 26 CRC.

<sup>148</sup> Article 27 CRC.

<sup>149</sup> Article 28/29 CRC.

<sup>150</sup> Article 31 CRC.

<sup>151</sup> Article 32 CRC.

<sup>152</sup> Article 34 CRC.



The supervising body responsible for ensuring states parties to the CRC are abiding by their legal obligations, the Committee on the Rights of the Child, has emphasised throughout their examination of state reports, concluding observations and general comments that children seeking asylum enjoy all the rights set down in the CRC.<sup>154</sup> In all dealings with asylum seeking children, the best interests of the child is to be the primary consideration and emphasises that special care needs to be taken of already disadvantaged groups within society and this includes refugee and asylum seeking children.<sup>155</sup> In General Comment No. 13 on the *Best Interests of the Child*, the CRC Committee has confirmed:

the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, *asylum, immigration...*<sup>156</sup>

The CRC Committee has stated in a number of concluding commentaries that the rights under the Covenant apply to all children within the jurisdiction of a State **regardless of their immigration and nationality status**.<sup>157</sup> The Committee has found that the prohibition of discrimination “prohibits differences in treatment on grounds that are not arbitrarily and objectively justifiable, including nationality.”<sup>158</sup> In all dealings with asylum seeking children, the best interests of the child is to be the primary consideration and emphasises that special care needs to be taken of already disadvantaged groups within society and this includes refugee and asylum seeking

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<sup>153</sup> Article 35 CRC.

<sup>154</sup> In Concluding Observations, CRC, Qatar, UN Doc. CRC/C/111 (2001) 59, the Committee stated that all children within Qatar’s jurisdiction “must enjoy all the rights set out in the Convention without discrimination” (para. 296(a)); Concluding Observations, CRC, Iceland, UN Doc. CRC/C/124 (1998) 109 at para. 483.

<sup>155</sup> See, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14 (29 May 2013), para. 75 and Concluding Observations, CRC, Ireland, CRC/C/73 (1998) 14 at para. 96.

<sup>156</sup> General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14 (29 May 2013), para. 30 (emphasis added).

<sup>157</sup> Article 2(1) of the Covenant applies to all children within the jurisdiction of a state party. In Concluding Observation, Qatar, CRC, UN Doc. CRC/C/111 (2001) 59, the Committee stated that “children within its [Qatar’s] jurisdiction enjoy all the rights set out in the Convention without discrimination” (para. 296(a)); Concluding Observations, Iceland, CRC, UN Doc. CRC/C/124 109 at para. 483.

<sup>158</sup> Concluding Observations, Belgium, CRC, UN Doc. CRC/C/118 (2002) 29 at para. 97.

children.<sup>159</sup> The Committee on the Rights of the Child has seemingly rejected any attempt to differentiate between the socio-economic rights of children in asylum-like situations. Distinctions in treatment in the fields of health, social welfare and education, between citizen children and non-national children have been frowned upon.<sup>160</sup> In relation to the right of a child to an adequate standard of living, the Committee has expressed concern where vulnerable children were living in situations where the household income remains significantly lower than the national mean.<sup>161</sup> Asylum seeking children, be they in the care of their parents, or unaccompanied, should also have full access to a range of services<sup>162</sup> and asylum seeking families should not be discriminated against in provision of basic welfare entitlements that could affect the children in that family.<sup>163</sup>

So as a state party to the CRC, it is very clear that asylum seeking children/children in a family who has a member claiming asylum, must be treated equally vis-à-vis citizen children. In Ireland to date, law and administration, and now the *McMahon Report* has rejected such a rights based approach to children in direct provision. The 2015 *List of Issues of the Committee on the Rights of the Child* to Ireland had not been issued prior to the finalising of the McMahon Report. However, it remains instructive as to what the precise obligations of Ireland are towards children in the asylum system.

At para. 10, the UN Committee on the Rights of the Child requests:<sup>164</sup>

*“Please provide additional information on the criteria for the fulfilment of the so called “Habitual Residence Condition” in order to access social services. In doing so, please provide information on measures, if any, taken to ensure that this condition does not result in children from asylum-seeking, refugee,*

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<sup>159</sup> Concluding Observations, CRC, Ireland, CRC/C/73 (1998) 14 at para. 96.

<sup>160</sup> Concluding Observations, CERD, Italy, CRC/C/124 (2003) 36 at para. 161.

<sup>161</sup> Concluding Observations, CRC, Ireland, UN Doc. CRC/C/IRL/CO/2 (September 2006), para. 56.

<sup>162</sup> *Ibid.* para. 64. See also, Concluding Observations, CRC, United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (2008), paras 70-71.

<sup>163</sup> Concluding Observations, CRC, United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/121 (2002) 23, para. 142(b); Concluding Observations, CRC, Canada, UN Doc. CRC/C/15/Add.215 (2003), para 47(e).

<sup>164</sup> CRC, [List of Issues for Ireland](#), UN Doc. CRC/C/IRL/Q/3-4/.

*migrant, and Traveller and Roma ethnic minority backgrounds being excluded from primary care, child benefits and social protection”*

International and European human rights law provides only a minimum base of protection for those seeking asylum as regards their social and economic rights. That the recommendations from the *McMahon Report* on living conditions and ancillary supports for protection seekers did not even consider Ireland’s international human rights obligations is worrying. Expert consideration was given by the Working Group on the best interests of the child obligations upon Ireland as regards protection status determination.<sup>165</sup> The only conclusion I can draw from the total absence of any consideration of the best interests of the child as regards direct provision accommodation and ancillary supports, is that the Working Group are aware that their recommendations in these areas, do not align with Ireland’s international human rights obligations under the UN Convention on the Rights of the Child.

## *2. Embedding Institutional Living in Direct Provision*

The welfare state is a multi-faceted institution, dedicated to minimum and basic provision of resources and providing a modicum of support for those who are in need. The welfare state is also an area of control, punishment, degradation, segregation and disempowerment. This comes to the fore when those who are seen as having little connection to a State, may have to rely on social welfare and social assistance support. Within Ireland, the provision of welfare supports to protection seekers was never to be more than a basic subsistence allowance, through direct provision accommodation and a minimal welfare payment. Penal sanctions are not only present within a system of criminal justice, but may also be present in relation to non-criminal activities.<sup>166</sup> The welfare state, as an institutional conception, also contains inter-mixed elements of *punishment* and *welfare*.<sup>167</sup> The punitive function of

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<sup>165</sup> McMahon Report, para. 3.181 *et seq.*

<sup>166</sup> Ramsay, P. “The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare state” (2006) *Modern Law Review* 29 at p. 37.

<sup>167</sup> See primarily, Garland, D, “The Birth of the Welfare Sanction” (1981) 8(1) *British Journal of Law and Society* 29; Garland, D. *Punishment and Welfare: A History of Penal Strategies* (Aldershot; Gower, 1985) and Garland, D. *The Culture of Crime Control: Crime and Social Order in Contemporary*

the administrative and governmental Irish state towards protection seekers is inherently more obvious, visual and targeted. The central reason for a more punitive approach to protection seekers is in their uncertain residency status, the fact that they are recently arrived immigrants, and public and political perception of the rationale behind protection seekers choice of a host country. The linkage between welfare and citizenship or belonging to a nation, which protection seekers do not have upon arrival, mark them out as prime targets for more limited social service and care provision.<sup>168</sup> Reception conditions for protection seekers, I argue, are in Ireland *a forum for punishment*.<sup>169</sup>

The development of the punitive aspects of direct provision accommodation has gone totally unchallenged in the *McMahon Report*. The privatisation of provision for those in direct provision is embedded, with the *McMahon Report* recommending diversity and cultural awareness training, along with nutritional audits to paper over significant abridgement in personal liberty. The *McMahon Report* implicitly supports the continued private delivery of accommodation and services of those in direct provision. Through its elucidation of 'accommodation policies' and 'soft' recommendations in health care, LGBT rights, rights of separated children, the sophisticated means of social control within direct provision continues the disciplinary function and potential of this system.<sup>170</sup> The significant control over living conditions, eating arrangements', near total supervision of the parental role, are relatively unchallenged by the *McMahon Report*. While there are some soft recommendations "in so far as practicable, and subject to any contractual obligations" as regards family living quarters, allocation of rooms to single applicants, possibility for individual or communal cooking, no other societal group has such enforced supervision of intimate aspects of daily lives. Public support for political

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*Societies* (Oxford; OUP, 2001) and Garland, D. "Beyond the Culture of Control" (2004) 7 *Critical Review of International Social and Political Philosophy* 160.

<sup>168</sup> Although this paper is not considering issues relating to terrorism and security, similar rationales can be seen in how States 'balance' fears relating to immigration, asylum, liberty and State control. David Cole notes that the liberties and rights of non-citizens are vulnerable to restriction, in particular, when perceived threats to the nature and functioning of a State are highlighted, see Cole, D. "Their Liberties, Our Securities: Democracy and Double Standards" (2002) 54 *Stanford Law Review* 953 at p. 957.

<sup>169</sup> Duff, A & Garland, D. "Thinking About Punishment" in *A Reader on Punishment* (Oxford/New York; OUP, 1994), p. 23.

<sup>170</sup> Dean, H. *Welfare Rights and Social Policy* (London, Pearson, 2002) at p. 67 and Garland, D. *The Culture of Crime Control: Crime and Social Order in Contemporary Societies* (Oxford; OUP, 2001) at p. 6 and p. 39.

action in limiting social rights of protection seekers have seen the most restrictive and punitive forms of control utilised within social welfare provision in the modern era.<sup>171</sup> The level of control and supervision for protection seekers far exceeds the level of control within traditional welfare service delivery bodies.<sup>172</sup> This has been achieved by labelling protection seekers as ‘undeserving’ and viewing protection seekers as “incapable of discharging the responsibilities of the late modern freedom”.<sup>173</sup> There is recognition by Ireland that some will need protection (those who come within the strict definition of ‘refugee’, those in need of ‘subsidiary protection’ and those granted humanitarian leave to remain). However, the ‘respectable’ asylum seeker, who is granted protection status, will still need to show his or her moral fibre through staying within direct provision, unless he or she can afford to opt out of such a system.

As Noel Dowling, Principal Officer in the Reception and Integration Agency has noted, persons in direct provision have a “generous and nutritious selection of food...” and:<sup>174</sup>

*“They are housed in a very large ensuite room measuring 35ft. x 12ft. They have no bills to concern themselves with....are not concerned about heating the premises...do not have to concern themselves with paying for food and domestic good.”*

Mr Dowling continued:

*“The allegations...demonstrates a startling lack of appreciation for the daily realities of many other non-protection seekers, particularly given the difficult economic circumstances unemployed individuals and low income families currently face....the facilities are designed to be suitable for a genuine protection seeker. It is submitted that were a person genuinely fleeing*

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<sup>171</sup> Similar sentiments can be gleaned from public reactions to crime and crime control, see Garland (2001), *supra*. fn. 170 at p. 193.

<sup>172</sup> Garland (2001) notes similar limitation of welfare rights for individuals within welfare provision in the UK and the United States. Those considered to abuse freedoms and rights provided within liberal democracy must be contained and controlled, *supra*. fn. 170 at p. 195.

<sup>173</sup> *Ibid.*

<sup>174</sup> C.A. & T.A v Minister for Justice [2014] IEHC 532, paras. 3.18-3.20.

*persecution in their home country, such a person would welcome the quiet and peaceful enjoyment of the Eglinton Hotel on the seafront in Salthill, Galway.” [emphasis added by me].*

‘Less eligibility’ is an underlying doctrine within the asylum reception system in Ireland. Like the ‘Poor Law’ concept of less eligibility, the protection seeker should not be in a better position than the lowest paid worker, now defined by reference to minimum wage legislation. However, in addition, the protection seeker should be worse off than an individual on the lowest level of social welfare provision. Maintaining protection seekers on a level of provision less than others entitled to welfare provision is viewed as deterring others from making an asylum claim. The lower level of welfare provision for protection seekers is seen as natural. The clandestine nature of protection seekers within the host State is often highlighted as justification for not equalising welfare entitlement. Notions of the undeserving poor, responsible for his or her plight within the asylum reception institution, are present within political discourse.<sup>175</sup>

The legal system (through ministerial circulars, statutory instruments, legislation or the courts) can rationalise the reasons for difference. Bringing protection seekers outside the law, by questioning reasons for their presence and denying the legality of their presence is often the first punitive strategy.<sup>176</sup> Despite operating within the law by claiming asylum, an individual is then forced to adopt a standard of living below that considered social minima i.e. the lowest level of a standard social welfare payment. The *McMahon Report* was never going to recommend the absolute abolition of direct provision accommodation. However, it also has not made direct recommendation on placing the (limited) reception conditions for protection seekers on a legislative footing (however the Working Group may have thought this was

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<sup>175</sup> See see Thornton, L. “[Upon the Limits of Rights Regimes: Reception Conditions for Asylum Seekers in the Republic of Ireland](#)” (2007) 24(2) *Refuge- Canadian Periodical on Refugee Studies* 86 and Breen, C. “The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers’ Right to an Adequate Standard of Housing” (2008) 20(4) *International Journal of Refugee Law* 611 and Thornton, L. “[Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion](#)” (2013) *Journal of Social Security Law*, 66-88.

<sup>176</sup> In *Goncescu v. Minister for Justice, Equality and Law Reform* [2003] IESC 49 the Irish Supreme Court seemed to suggest that although asylum seekers are permitted to enter the State to claim asylum (Section 9 of the 1996 Act), “...an application for asylum fall into a particular category and never enjoy the status of residents as such who have been granted permission to enter and reside in the State as immigrants.” See also *C.A. & T.A v Minister for Justice* [2014] IEHC 532.

implicit in its recommendation that Ireland opt-in to EU law on asylum issues). The significant caveats attached to practically all the recommendations on living space and living conditions is startling. There is no human rights analysis of core issues/areas, such as the right to shelter and housing, the right to food and the rights of the child (beyond the discussion of child protection issues that arise due to placing protection seekers in direct provision accommodation in the first place).<sup>177</sup> In addition, there is no consideration of whether institutional living is the best means to respect and protect the rights of persons in the protection system. In relation to the right to work, the *McMahon Report*, notes:<sup>178</sup>

*“The prohibition on access to the labour market is a barrier to living with dignity as it has the potential to undermine a person’s sense of value and worth. It can also prevent the realisation of physical, emotional and mental integrity and denies a person autonomy and effective control over their lives.”*

However, the McMahon Report then ignores this assessment in making the limited right to work concession (only as soon as the single procedure is operating “effectively”) available to new applicants. The 1,604 adults remaining in direct provision,<sup>179</sup> who do not qualify under the *5 year rule*, will not be entitled to seek or enter employment.

## **G. A Partial Conclusion**

While there is a need for more time to examine in more detail the recommendations of the *McMahon Report on the Protection System and Direct Provision*, two preliminary conclusions seem apt.

The lack of clarity from most international human rights treaty bodies on what precisely constitutes proportionate, objective and reasonable limitations on the social and economic rights of protection seekers has contributed to domestic systems, like Ireland, offering significantly lesser protection of socio-economic rights for protection

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<sup>177</sup> *McMahon Report*, para. 4.61 to 4.75.

<sup>178</sup> *McMahon Report*, para. 5.42

<sup>179</sup> Based on figures in Appendix 6, Table 1. This figure includes 719 adults who have been in direct provision for less than one year.

seekers compared to citizens or other residents. This reality is reflected (to an extent) in the core recommendations of the *McMahon Report*. The report provides some hope for faster and fairer outcomes for people in the protection process. However, the recommendations on living conditions and ancillary supports leave much to be desired. The solution to greater protection of protection seekers lies in neither in law nor in strategic litigation. While these are important in achieving broader aims and seeking to use law to promote human rights; only a fundamental re-evaluation of society's approach to protection seekers in Ireland will result in the recognition of, what Arendt terms, "the right to have rights." To date law and administration, and now the *McMahon Report*, will be used to justify exclusion, separation and distancing of protection seekers from Irish society and placing people in the direct provision system. Until there is more fundamental societal introspection, on "the rights of others", institutionalised and impoverished living for protection seekers will continue.