

Ireland's Fifth through Seventh Report to the UN Committee on the Elimination of Racial Discrimination

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A. The Rights of Asylum Seekers and Ireland's Draft CERD Report: Executive Summary

1. I welcome the initiatives taken by the State to engage in a public consultation on Ireland's fifth through seventh report to the UN Committee on the Elimination of Racial Discrimination under the International Convention on the Elimination of Racial Discrimination (CERD). This consultation submission will focus on aspects of the draft report that relate to the rights of asylum seekers in Ireland, and Ireland's freely accepted international legal obligations under CERD. The introduction of the single procedure for assessing protection claims;¹ the extension of a right to work for asylum seekers, the proposed opt-in to the EU's Reception Directive,² and; the introduction of potential education pathways to certain asylum seekers to university,³ are all positive steps that may further protect the socio-economic rights of asylum seekers. The extension of the jurisdiction of the Ombudsman and Ombudsman for Children to cover the system of direct provision is an additional positive step since the CERD Committee last examined Ireland's compliance with CERD in 2011.⁴ All of these issues need to be further explained in the State's current draft of the report.

¹ See generally, [International Protection Act 2015](#) ('the 2015 Act').

² [N.H.V. v Minister for Justice](#) [2017] IESC 35. The precise parameters in relation to the right to work have yet to be finalized. In response to this decision, Ireland has announced its intention to 'opt-in' to 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 [\[2013\] Official Journal L.120](#). If Ireland does not provide for the right to work for asylum seekers by February 2018, the declaration of unconstitutionality will solidify. As this relates to [s.9\(4\)\(b\) of the Refugee Act 1996](#), the precise impact on [s.16\(3\)\(b\) of the 2015 Act](#).

³ See, Department of Education, [Pilot State Scheme for Persons in the Protection or Leave to Remain Systems](#) (August 2017)., As well as formal State mechanisms, the State Report may usefully include information on the University sectors leadership in providing additional routes for migrants, refugees and asylum seekers to University. See, as indicative examples within the hyperlinks, the various schemes on offer: [University College Dublin](#), [Dublin City University](#), [University of Limerick](#) and [University College Galway](#).

⁴ Ombudsman, [Ombudsman and Ombudsman for Children can now investigate complaints from those in direct provision](#), 30 March 2017.

2. As a matter of good practice, I believe it important that the State not only highlights responses to CERD's 2011 Concluding Observations, but also acknowledge the concluding observations/recommendations of other UN treaty bodies to similar issues between 2011 and 2017.⁵ The Draft State Report must provide significantly more information on issues relating to: the system of direct provision accommodation; the low-rate of direct provision allowance; the rights of aged-out unaccompanied minors who transition from TUSLA care to the direct provision system; and the rights of migrant women to access reproduction services, up to and including abortion services.
3. In summary, the following recommendations are offered in order to ensure Ireland's combined draft report provides an accurate picture for the CERD Committee:
 - i. **Provide significant more information on the delays within the protection status determination system and the remedial actions the State have or will adopt to shorten decision making backlogs in the International Protection Office and the International Protection Appeals Tribunal.**
 - ii. **Provide the CERD Committee with more information on the system of direct provision for asylum seekers, including measures adopted to improve standards of living for asylum seekers, including accommodation and levels of monetary payment and the parameters of the right to work for those seeing asylum. With the increased numbers of asylum seekers in direct provision, the State must explain to the Committee how the civil, political, economic, social and cultural rights are being effectively protected for asylum seekers.**

⁵ See: [Concluding Observations, CEDAW, Ireland](#), UN Doc. CEDAW/C/IRL/CO/6-7 (03 March 2017); [Concluding Observations, CRC, Ireland](#), UN Doc. CRC/C/IRL/CO/3-4 (01 March 2016); [Concluding Observations, ICESCR, Ireland](#), UN Doc. E/C.12/IRL/CO/3 (08 July 2015) and [Concluding Observations, ICCPR, Ireland](#), UN Doc. CCPR/C/IRL/CO/4 (24 July 2014).

- iii. Further information on the rights of separated children should be provided. The Draft State Report should commit to ensuring the full application of the equity of care principle for separated children, in particular as regards ensuring judicial oversight of the placement of separated children into care, be it residential care or foster care. The human rights concerns with direct provision are more acute for separated children who ‘age-out’. The Draft State Report must commit to fully respecting, protecting and fulfilling the rights of this vulnerable group.**
- iv. Migrant women, and in particular asylum seeking women, must have their constitutional right to travel in order to obtain a termination of pregnancy effectively protected. Information provided in the Draft State Report must outline how Irish law, policy and practice aligns with minimum international human rights guarantees on access to abortion. This must include information on how asylum seeking women can have their right to access a termination outside of Ireland practically protected.**

B. Protection Status Determination System

4. Overall, Ireland has an exceptionally low number of applications for international protection (refugee protection and subsidiary protection) in a European and global context. The table below shows the very limited impact the current refugee crisis has had on Ireland.

*Table 1 First Time Protection Applications in the EU and Ireland compared 2011-2016
(confirmed statistics only)⁶*

Year	Total Applicants* for International Protection in the EU	Ireland (as a percentage of total EU applications)
2016	1,260,910	2,245 (0.18%)
2015	1,321,600	1,480 (0.11%)
2014	626,960	1,440 (0.23%)
2013	431,090	946 (0.22%)
2012	335,290	956 (0.28%)
2011	309,040	1,290 (0.41%)

* The 2013 -2016 figures include Croatia, the figures from 2011-2012 exclude Croatia.

5. It is important to inform the CERD Committee of the difficulties in transitioning to the single procedure system under the International Protection Act 2015. Focusing on the status determination system, asylum seekers must wait a significant period of time for a first instance decision on a protection claim. This

⁶ See generally, Eurostat, [Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data](#) (rounded) (Last update: 04 October 2017). Table updated from Liam Thornton, “[A View from Outside the EU Reception Acquis: Reception Rights for Asylum Seekers in Ireland](#)” in Paul Minderhoud and Karin Zwaan (eds). *The recast Reception Conditions Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Oisterwijk, The Netherlands: Wolf Legal Publishers), 49.

raises significant questions as regards Ireland's compliance with **Article 5(a) of UN CERD** . Article 5(a) CRRD provides:

“.... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;”

6. UN Human rights treaty bodies have emphasised time and time again the need for timely, fair and transparent status determination mechanisms. The claim that the single procedure was introduced as a result of recommendations made in the McMahon Report is questionable.⁷ While the McMahon Report made such a recommendation, the single procedure had been promised since 2006. The general scheme of the International Protection Bill were issues in March 2015, some three months prior to the publication of the McMahon Report.⁸ As of at December 2017, asylum seekers whose cases are not prioritised will not have their first International Protection Office (IPO) interview for up to 20 months.⁹ It is important that the Draft State CERD Report highlight to the UN CERD Committee that the Irish High Court has decided in *D.N. v Chief Appeals Officer*,¹⁰ that protection applicants have a right to their “applications [being] processed in a reasonable time”.¹¹ The delay in determining, and granting, the subsidiary protection application of the applicants in this case, resulted in prolonged stay within the direct provision system. White J. in *D.N.* indicated that the subsidiary protection application should have been determined within 12

⁷ The publication of the [Heads of the International Protection Bill](#) occurred in March 2015 (before the Working Group reported in June 2015). The Government first committed to a single procedure in the mid-2000s, and two other Bills had been published that, amongst other issues, would have provided for the single procedure, if they had become law, see Immigration, Residence and Protection Bill 2008 and Immigration, Residence and Protection Bill 2010.

⁸ See, Department of Justice, [General Scheme of the International Protection Bill and Regulatory Impact Analysis](#), 24 March 2015.

⁹ Irish Refugee Council, [Refugee decision making waiting times at crisis point](#), 13 December 2017;

¹⁰ *D.N. (a child), suing by his mother and next friend, A.S. and A.S. v Chief Appeals Officer, Minister for Justice and Equality, Attorney General and Minister for Social Protection* [2017] IEHC 52 (16 February 2017). For a summary of this decision, see Liam Thornton, “[Languishing in Direct Provision: Rights in ‘Reasonable’ and ‘Unreasonable’ Times, Human Rights in Ireland](#)”, 06 February 2017.

¹¹ [2017] IEHC 52 at para. 27.

months.¹² As this maladministration was solely caused by the State, White J. granted a declaration that the applicants rights to timely determination of a legal right had been violated under the Irish Constitution and European Union law.¹³ Compensation of €2,000 was awarded for the State's breach of constitution and EU rights.¹⁴ Including such information will be of significant benefit to the Draft State Report, as it shows how courts protect the rights of foreign nationals, including (former) asylum seekers, who will usually be of a different racial/ethnic background from the majority of those in Ireland.

7. Given the current time-frames for determining entire protection claims under the International Protection Act 2015, it is highly likely that asylum seekers right to good administration and timely, fair decision making, is contrary not only to Ireland's obligations under CERD, but also under the Irish Constitution and European Union law. The Draft State Report should emphasise the steps taken (if any) by the State to reduce decision times and outline resources that will be committed to ensuring the protection of legal rights of asylum seekers in the status determination process. This should include much more information on the funding provided to the independent International Protection Office (IPO) in order to deliver fair and efficient status determination reports at first instance, and on appeal to the International Protection Appeals Tribunal (IPAT). Information on protection status determination training, in particular training focused on equality, non-discrimination and anti-racism should be outlined. Where no such training has yet occurred, the State may find it useful to organise such training prior to Ireland's examination before the UN CERD Committee.

¹² [2017] IEHC 52 at paras 30 and 31.

¹³ [2017] IEHC 52 at para. 33.

¹⁴ The second applicant (*A.N.*) was awarded €1,640 for this delay, see further, Irish Legal News, [High Court: Unreasonable delay in granting subsidiary protection warrants compensation](#), 20 February 2017.

C. Direct Provision System

8. The delays in determining whether an individual is entitled to refugee or subsidiary protection has significant knock on impacts on other rights protected by UN CERD. Socio-economic rights recognised under Article 5(e) of UN CERD must be respected, protected and if necessary fulfilled for asylum seekers. Article 5(e) provides that States parties must prohibit and eliminate discrimination based on race/ethnicity etc. in protecting the following rights in particular:

“(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training...”

9. The general corpus of international human rights legal obligations upon the State indicates that where there is a significant divergence in rights protections between citizens and non-citizens, that this be (a) provided for in law; (b) be legitimate and permitted by international human rights law, and; (c) that the rights restrictions be proportionate.¹⁵ While the Irish High Court has determined that the non-legislative direct provision system for asylum seekers is permissible under domestic law,¹⁶ this is not the case under international

¹⁵ See generally, Statement, CESCR, [Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights](#), UN Doc. E/C.12/2017/1 (2017), para. 5 and General Comment No. 20, ICESCR, [The Right to Social Security \(Art. 9\)](#), UN Doc. E/C.12/GC/9 (4 February 2008). For a review of international human rights law and the socio-economic rights of asylum seekers, see: Liam Thornton “[The Rights of Others: Asylum Seekers and Direct Provision in Ireland](#)” (2014) 3 (2) *Irish Community Development Law Journal*, 22.

¹⁶ See, [C.A. and T.A. v Minister for Justice & Equality and others](#) [2014] IEHC 532. For a summary of this decision, see Liam Thornton, “[C.A and T.A: The Direct Provision Case](#)” (2014) 17 (4) *Irish Journal of Family Law* 16.

human rights law. The existence of the direct provision system, created by means of internal private circulars,¹⁷ lacking any parliamentary approval and oversight,¹⁸ raises significant concerns as regards Ireland's meeting of its international human rights obligations. With Ireland committing to be bound to the European Union Reception Directive 2013,¹⁹ if the system of direct provision is maintained, it must be provided with a legislative grounding.

10. The Committee on the Elimination of Racial Discrimination, has determined that where a State seeks to rely on Article 1(2) CERD, which permits differentiation in rights enjoyment based on citizenship, a type of proportionality analysis will be engaged in.²⁰ General Recommendation No. 30 on *Discrimination against Non-Citizens* recognises that Article 1(2) allows for differentiation where it is wholly based on citizenship. However, this must not be construed as detracting from the rights or freedoms enunciated by the UDHR, ICCPR or ICESCR.²¹ The preamble to the general recommendation noted how xenophobia against non-nationals, including refugees and asylum seekers "constitutes one of the main sources of contemporary racism."²² The General Comment provides that four core socio-economic rights are deemed to inhere in all, and could not be construed as coming within the Article 1(2) distinction: the right to education, the right to adequate housing, the right to adequate conditions of employment and the right to access healthcare.²³ All those of school-going age should be entitled to education regardless of their immigration status (or lack thereof)²⁴

¹⁷ For an overview of the core circulars establishing the system of direct provision accommodation, and the rates of direct provision allowance, see, Liam Thornton, "[Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion](#)" (2013) 20(2) *Journal of Social Security Law* 66-88.

¹⁸ While asylum seekers are excluded from most welfare payments under the Social Welfare (Consolidation) Act 2005 (as amended), there is no positive legal provisions that establish either the direct provision system nor the rates of direct provision allowance.

¹⁹ See, Department of Justice and Equality, [Government agrees framework for access to work for International Protection Applicants](#), 21 November 2017.

²⁰ Compare for example, Communication No. 10/1997, CERD, [Habassi v Denmark](#), UN Doc. CERD/C/54/D/10/1997 (17 March 1999), where access to financial loan facilities had been restricted to Danish citizens, was not deemed to be appropriate. However, language requirements (the ability to speak Danish) for accessing insurance facilities, were deemed to be appropriate, see Communication No. 32/2003, CERD, [Sefic v Denmark](#), UN Doc. CERD/C/66/D/32/2003 (10 March 2005), para. 7.2.

²¹ General Recommendation No. 30, CERD, [Discrimination against Non-Citizens](#) UN Doc. CERD/C/64/Misc.11/rev.3 (February/March 2004).

²² *Ibid.* preamble paragraph II.

²³ *Ibid.* paras. 30-38.

²⁴ *Ibid.* para. 30

and education should not be segregated.²⁵ Health care should be made available to non-citizens and States should not limit the right to preventative, curative or palliative care.²⁶ Nevertheless, states may legitimately restrict access to the labour market for non-citizens.²⁷ The General Recommendation on Discrimination against Non-Citizens did not discuss obligations that a state party may have in terms of asylum seekers equal enjoyment of social assistance or social security. However, in two individual communications: *D.F v Australia*²⁸ and *D.R. v Australia*,²⁹ the Committee determined that citizenship restrictions in accessing social assistance payments were permitted under CERD. Nevertheless, the CERD Committee has expressed concerns as regards the limits on socio-economic rights for asylum seekers within concluding observations.³⁰ Asylum seekers should be treated in a humane manner and “in accordance with law”.³¹ Therefore, it is questionable whether the significant time period that asylum seekers are subject to the system of direct provision complies with Ireland’s freely accepted obligations under CERD.

11. In response to the CERD Committee’s recommendation in para. 20 of the 2011 Concluding Observations- it would be important to emphasise that similar concerns regarding (i) reducing time spent in direct provision and (ii) enhancing the standard of living for asylum seekers, have also been concerns of the UN Human Rights Committee;³² the Committee on Economic, Social and Cultural

²⁵ *Ibid.* para. 31

²⁶ *Ibid.* para. 36

²⁷ *Supra.* fn. 21 at para. 34.

²⁸ Communication No. 39/2006, CERD, [D.F. v Australia](#), UN Doc. CERD/C/72/D/39/2006 (03 March 2008).

²⁹ Communication No. 42/2008, CERD, [D.R. v Australia](#), UN Doc. CERD/C/75/D/42/2008 (15 September 2009).

³⁰ See for example: [Concluding Observations, France](#), CERD, UN Doc. A/49/18 (1994) 20 at para. 144; [Concluding Observations, CERD, Spain](#), UN Doc. A/49/18 (1994) 72 at para. 503; [Concluding Observations, CERD, Ireland](#), UN Doc. CERD/C/IRL/CO/2 (14 April 2005), para 13; [Concluding Observations, CERD, Hungary](#), UN Doc. A/57/18 (2002) 63 at para. 380 where the Committee expressed its concern at the prevailing conditions in refugee shelters and “strongly encouraged” upgrading of such facilities to meet international standards. See also, [Concluding Observations, CERD, United Kingdom of Great Britain and Northern Ireland](#), UN Doc. A/58/18 (2003) 88 where the Committee noted the establishment of National Asylum Support Service (which wholly separated asylum seekers access to ‘traditional’ welfare state supports, as being “an important step in providing support to eligible asylum seekers and ensuring they can access necessary services.” (para. 527)

³¹ [Concluding Observations, CERD, Norway](#), CERD, UN Doc. CERD/C/NOR/CO/19-20 (8 April 2011), para. 12.

³² [Concluding Observations, ICCPR, Ireland](#), UN Doc. CCPR/C/IRL/CO/4 (24 July 2014).

Rights,³³ and, the Committee on the Rights of the Child.³⁴ Therefore, the State has had significant notice of issues that the CERD Committee may themselves engage with. The information provided for in the Draft State Report at pp. 20-21 on direct provision is minimal.

12. As highlighted above in Table 1, Ireland has not been effected in any significant way by the refugee crisis. However, time periods for deciding protection claims have increased significantly. In 2011, the CERD Committee expressed concerns about the length of time asylum seekers in Ireland were subject to the direct provision system. Since this date, there have been some positive developments in reducing the numbers of persons in the system of direct provision. However, in recent months, the length of time asylum seekers must spend in direct provision has increased. In Table 2 below, a 'snapshot' is presented comparing the numbers in direct provision in December 2012, December 2013, December 2015 and November 2017 (the date of last available data). The December 2015 date was chosen as the impact of a number of recommendations from the McMahon Report were filtering through. The Draft State Report may usefully note the reduction in numbers of people in the direct provision system for four years or more. However, it is concerning that the numbers in direct provision for between one and four years has increased significantly. This is despite a relatively low number of applications for protection status in 2016 and 2017. The operationalisation of the International Protection Act 2015 could be one reason for the growth in the time spent by asylum seekers in direct provision. The Draft State Report must provide full information to the UN CERD Committee on remedial measures that have been or will be adopted to lessen the period of time protection seekers remain in direct provision.

³³ [Concluding Observations, ICESCR, Ireland](#), UN Doc. E/C.12/IRL/CO/3 (08 July 2015), para. 14.

³⁴ [Concluding Observations, CRC, Ireland](#), UN Doc. CRC/C/IRL/CO/3-4 (01 March 2016), paras 65 and 66.

Table 2: Time Spent by Asylum Seekers in the Direct Provision System (Snapshot)³⁵

Time	December 2012	December 2013	December 2015	November 2017
1 Year or less	956	608	2,035	2,085
1-2 Years	463	379	534	1,018
2-4 Years	1,103	948	581	1,475
4-6 Years	1,416	1,271	586	327
6 Years +	845	1,228	1,149	448
Total Asylum Seekers³⁶ in Direct Provision	4,783	4,434	4,885	5,353

13. It would be important that the State Draft Report provide a full account of the McMahon Report, which, amongst other matters, reviewed aspects of the system of direct provision. However, the Draft State Report should acknowledge that the McMahon Report had only a limited scope to examine alternatives to direct provision.³⁷ The terms of reference for McMahon, were to suggest improvements, and not to explore alternatives to the system of direct provision.³⁸ The 2011 CERD Committee's concluding recommendations also emphasised that the State was required to (i) improve living conditions for asylum seekers in direct provision and (ii) review the system of direct provision. No information is provided in the Draft State Report of precise measures adopted, beyond making reference to the McMahon Implementation Reports.³⁹

³⁵ Figures obtained from, Reception and Integration Agency, [Annual Report 2012](#) (RIA, 2013), p. 11; Reception and Integration Agency, [Monthly Report: December 2013](#) (RIA, 2013), p.19; Reception and Integration Agency, [Monthly Report: December 2015](#) (RIA, 2015), p.19 and Reception and Integration Agency, [Monthly Report: November 2017](#) (RIA, 2017), p.17. At the time of writing, figures for December 2017 had not been released by the Reception and Integration Agency.

³⁶ The Reception and Integration Agency do not provide a break-down of the stage that direct provision accommodation residents are at as regards their protection or leave to remain claims. Therefore, this figure does include those whose claims for protection have been decided negatively, but who may be applying for leave to remain in Ireland, or have an outstanding deportation order against them.

³⁷ For a full discussion on human rights concerns relating to the McMahon Report, see: Liam Thornton, [A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision](#), UCD Working Paper, 01 July 2015.

³⁸ Working Group report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (hereinafter the [McMahon Report](#)), para. 8.

³⁹ See, Department of Justice and Equality, [Third and Final Progress Report on the Implementation of the McMahon Report's Recommendations](#), June 2017.

It would be important for the State to highlight any new strategies i.e. cooking facilities, improvements to living areas, improvements on non-shared bedrooms, provision child play areas etc. that has emerged or is in development to roll out across the entire direct provision system. The Draft State Report must also engage specifically with recommendations emerging from the McMahon Report that are not being adopted. In 2011, direct provision allowance for adults was €19.10 per week, with €9.60 per child. In 2017, direct provision allowance is €21.60 per week per adult and per child.⁴⁰ This deviates significantly from the cautious recommendation in the McMahon Report, that the 2015 adult rate of direct provision allowance be €38.74, and the 2015 child rate of direct provision allowance be €29.80.⁴¹ The Draft State Report must provide an explanation as to why the 2018 rates of direct provision allowance continue to be so low.

14. It is surprising that the issue of the right to work for asylum seekers has not been provided with more prominence in the Draft State CERD Report. While the matter is still under consideration, the Government has committed, broadly, to providing for some form of right to work for asylum seekers, on the basis of the 2017 Supreme Court decision.⁴² The CERD Committee has expressed concerns as regards a nine-month time limit in asylum seekers accessing the labour market,⁴³ but welcomed changes in other legal systems that limited this time period for accessing the labour market to six months.⁴⁴ Given that it appears Ireland will be adopting the minimum standard established under the EU's Reception Directive, if a nine month period without the right to work being exercisable is implemented, this may not be in conformity with Ireland's obligations under CERD. This will need to be explained fully in the Draft State CERD Report.

⁴⁰ For the reasons this small increase to child and adult DPA payments occurred, see Liam Thornton, [Understanding the Increases in Direct Provision Allowance for Asylum Seekers](#), 17 July 2017.

⁴¹ *McMahon Report*, para. 51, 5.27 and 5.30 Bullet Point 1.

⁴² See, *N.H.V. v Minister for Justice & Equality and Others* [2017]IESC 35. For a summary of this decision, see: Liam Thornton, [Asylum Seekers and the Right to Work: The Supreme Court Decision](#), 30 May 2017.

⁴³ Concluding Observations, CERD, Luxembourg, UN Doc. CERD/C/LUX/CO/14-17 (2014), para. 13.

⁴⁴ Concluding Observations, CERD, Belgium UN Doc. CERD/C/BEL/CO/16-19 (2014), para. 3(a).

D. Aged-Out Separated Children

15. The CERD committee in 2011 had noted concerns with the protection of the rights of separated children in Ireland. The numbers of separated children seeking asylum in Ireland has decreased significantly over the last 15 years, from 600 children in 2001 to only 33 children in 2015, and 34 children in 2016.⁴⁵ As of at October 2017 (date of last available figures), the Social Work Team for Separated Children Seeking Asylum, a specialist service within the Child and Family Agency, had 73 separated children under its care.⁴⁶ (Eurostat, 2016; ORAC, 2016; Child and Family Agency, 2014). The majority of separated children arriving in Ireland are 16 or 17 years of age (McMahon Report, 2015). Between 2010 and 2015, there were 424 separated children placed in the care of the Child and Family Agency (*Dáil Debates*, 20 April 2016). The Draft State Report must inform the CERD Committee that ‘equity of care’ for separated children is now the norm.⁴⁷ However, there are still issues with the full implementation of the Child Care Act 1991 for separated children in Ireland. The clear majority of separated children who are not reunited with family members are brought into ‘voluntary care’ by the Social Work Team for Separated Children Seeking Asylum (Social Work Team), based in Dublin.⁴⁸ Irish law demands that consent from a parent is necessary in order to use the ‘voluntary care’ provision.⁴⁹ However, in the case of most separated children, parents are both absent and often uncontactable, yet voluntary care is still utilised. Even where an alleged parent or guardian is contacted (by telephone or Skype), and gives consent to the placement of the separated child into the care of the Child and Family Agency, this should not exclude judicial involvement with the form and type of care the separated child will receive. The

⁴⁵ ORAC, [Summary Report of Key Developments 2016](#) (ORAC: 2017), p.21.

⁴⁶ It is important to note that not all separated children will necessarily apply for asylum. For complete statistics on separated children in care of the Child and Family Agency in 2017, see: Tusla, [Monthly Management Data Activity](#) (October 2017).

⁴⁷ See, Department of Children and Youth Affairs (DCYA) (2011) [Ryan Report Implementation Plan: Second Progress Report](#). Dublin: DCYA, p.6 & p.24.

⁴⁸ There are no teams with this specific remit outside of the capital given that the vast majority of separated children present themselves to the authorities in Dublin, see: McMahon Report, paras 3.188 to 3.203 and Muireann Ní Raghallaigh & Liam Thornton, “Vulnerable Childhood, Vulnerable Adulthood: Direct Provision as Aftercare for Aged-Out Separated Children Seeking Asylum in Ireland” (2017) 19(3) *Critical Social Policy* 386 at 388-390 (open access version of article [here](#)).

⁴⁹ *O’H v Health Services Executive* [2007] 3 IR 117.

use of the voluntary care provision means that judicial scrutiny as regards the type, form and duration of the care placement for separated children is largely missing, with inevitable negative impact on separated children. This raises concerns around the equal applicability of laws towards separated children in the State.

16. There are also human rights concerns once separated children “age out” (i.e. reach the age of 18), and transition from care to the system of direct provision. More information must be provided in the Draft State Report on the supports (or lack thereof) for aged-out separated children. Many of the issues highlighted in the previous section, as regards rights concerns with the system of direct provision and the low level of direct provision allowance, become more acute for aged-out separated children. The McMahon Report recommended that that foster carers of separated children, should receive training in order to build the independence and resilience of aged-out separated children to cope with moving into direct provision.⁵⁰ So, while providing an extensive list of noted issues that arise with placing aged-separated children in direct provision, noting the “lack of purpose” these young people will experience, a key solution is to propose ‘independence and resilience training’ while they are children in foster care, in order to facilitate them as young persons to move into the institutionalised living space of direct provision.

⁵⁰ McMahon Report, para. 5.134.

E. Migrant Women & Right to Travel

17. Migrant women and asylum seeking women, along with poor women generally) are disproportionately impacted by the narrow grounds for termination of pregnancy which currently exist in Irish law.⁵¹ While abortion pills are available in Ireland, most notably from providers such as [Women on Web](#), asylum seeking women are specifically prohibited from leaving Ireland, with a criminal conviction possible where she does so without permission.⁵² There appears to be some system in place for granting asylum seeking women with a travel permission. In response to a Parliamentary Question, the then Minister for Justice noted,⁵³

“On rare occasions such permission has been sought and I am advised by the Irish Naturalisation and Immigration Service (INIS) of my Department that requests are dealt with on an individual and exceptional basis and that statistics for such requests are not captured automatically.”

18. It is important for the Draft State Report to include information on access to termination for migrant women and asylum seeking women in Ireland. The right to travel as a protected constitutional right,⁵⁴ also applies to asylum seeking women. While it is not possible for Ireland to guarantee entry for the migrant/asylum seeking women into the country which they seek to procure a termination, there may be some positive obligation upon Ireland to use reasonable efforts to assist the migrant/asylum seeking woman to gain access to termination services in another State. In the examination of Ireland’s 2017

⁵¹ For a detailed exploration and critique of grounds upon which termination of pregnancy is currently permitted in Ireland, see: Mairead Enright and others, “[Abortion Law Reform in Ireland: A Model for Change](#)” (2015) 5(1) *feminists @law*; Máiréad Enright & Fiona de Londras, “[“Empty Without and Empty Within”: The Unworkability of the Eighth Amendment after Savita Halappanavar and Miss Y](#)” (2014) 20(2) *Medico-Legal Journal of Ireland* 85; Fiona de Londras & Laura Graham, “[Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate](#)”, (2013) 3(3) *Irish Journal of Legal Studies* 54 and Fiona de Londras, “Suicide and Abortion: Analysing the Legislative Options in Ireland” (2013) 19(1) *Medico-Legal Journal of Ireland* 4

⁵² [Section 16\(3\)\(a\)](#) of the 2015 Act.

⁵³ Written Answers, Department of Justice and Equality, [Question 139: Asylum Applicants](#), 13 December 2016.

⁵⁴ For an exploration of this issue, see Liam Thornton, [The Right to Travel, Reproductive Rights and Asylum Seekers](#), 16 January 2013.

report, the Committee on the Elimination of Discrimination Against Women, noted:

“Women and girls without means to travel outside the State party to obtain an abortion, such as poor women, asylum seekers and migrant women and girls, may be compelled to carry their pregnancies to full term or to undertake unsafe abortion, which may lead to severe mental pain and suffering.”

19. Given the impact of Ireland’s restrictive abortion regime on asylum seeking women, the State is strongly urged to explain in the report why statistics are not maintained in relation to travel permissions granted to asylum seeking women. To show the State’s commitment to its obligations under CERD, a time-limited review of travel permissions granted, by gender, and reason for travel permission being granted, by INIS from 2015 to 2017 (inclusive) be included. Given confidentiality requirements, while this may not be able to include ‘termination’ as a reason for travel, some broad grounds i.e. health and/or social and/or family reasons, for permitting travel should be identified. In addition, any representations made by the State to other countries in permitting persons access medical services should be outlined. It is also important more generally to inform the Committee on the possibilities of removing Article 40.3.3. from the Constitution and potentially legislating for broader access to termination of pregnancy that currently exists.

20. Even if an asylum-seeking woman is granted a permission to travel (assuming another state permits the asylum-seeking woman to enter), then procuring a termination may not be possible given the cost of the medical procedure and related expenses. Medical abortions (i.e. abortion pill) treatment for women travelling from Ireland to Britain can cost up to €510. Surgical abortions from 9 weeks onwards ranges in price from €560 to €1,670.⁵⁵ For women seeking asylum, the direct provision allowance payment of €21.60 would not cover a wish to terminate the pregnancy in a jurisdiction where this is permissible. (At the time of writing) Asylum seeking women cannot work, so may be unable to self-fund access to abortion. There is limited civil society financial assistance

⁵⁵ Price information taken from [Marie Stopes](#) on Wednesday, 03 January 2018.

that may be available to an asylum-seeking women.⁵⁶ The State must clarify in its Draft State CERD Report, how the rights of asylum-seeking women to access termination abroad are respected, protected and fulfilled.

About Dr Liam Thornton

Liam is an [Assistant Professor in Law](#) in UCD School of Law. Liam's research and publications engage significantly with the rights of asylum seekers in legal systems, nationally and internationally. Liam has previously been an academic expert for the Irish Constitutional Convention. In 2015, Liam contributed, as part of an NGO delegation, to the review of Ireland's examination by the UN Committee on Economic, Social and Cultural Rights in Geneva. You can access Liam's publications at www.liamthornton.ie.

⁵⁶ Such as monetary assistance that may be provided by the civil society organisation, [Abortion Support Network](#), who assist women travelling from Ireland and Northern Ireland with costs associated with accessing abortion services.