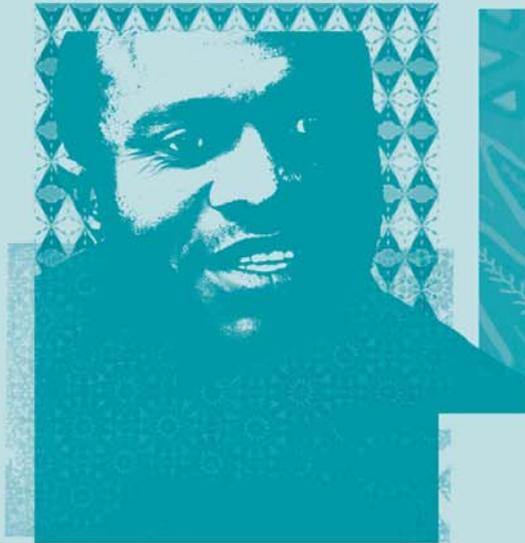




ONE SIZE DOESN'T FIT ALL

A legal analysis of the direct provision and dispersal system in Ireland, 10 years on.





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GLOSSARY

C&AG: The Comptroller and Auditor General's office is established directly by the Irish Constitution to control all payments made by and on behalf of the State and to audit all accounts of money administered by or under the control of the Oireachtas.

CWO: Employed by the HSE, Community Welfare Officers are based in health centres and are responsible for administration of Community Welfare Services, deciding on payments such as the Supplementary Welfare Allowance.

Deciding Officers: Deciding Officers are appointed by the Minister for Social and Family Affairs to make decisions on entitlements to social welfare payments.

Direct provision: The accommodation provided to persons without means who are seeking asylum and permission to remain in Ireland, whereby they receive shelter and full board in accommodation provided by the State. People in direct provision receive a weekly allowance of €19.10 per adult and €9.60 per child.

Dispersal: Newly arrived asylum seekers are initially accommodated in a 'reception centre' before being moved (or "dispersed") to specially designated direct provision accommodation around Ireland.

House Rules: A booklet entitled *Direct Provision Reception & Accommodation Centre Services, Rules and Procedures* was prepared by the RIA (see below). These rules apply in all accommodation forming part of the direct provision system.

HRC: The Habitual Residence Condition is a qualifying condition which those seeking social welfare payments must satisfy. It is explained in greater detail in this report.

HSE: The Health Service Executive is a state-funded body responsible for the delivery of health and personal social services through medical professionals, hospitals and a network of Health Offices and health centres at community level. It is divided into four regions countrywide.

INIS: Irish Naturalisation and Immigration Service, was established by the Department of Justice, Equality & Law Reform in 2005 as a 'one-stop shop' to administer asylum, immigration, citizenship and visa matters.

Minister for Integration: A junior ministry, established in 2007, taking over from the RIA the function of integrating new migrants.

NCCRI: The National Consultative Committee

ONE SIZE DOESN'T FIT ALL

on Racism and Interculturalism was an independent expert body, working with both government and NGOs, formed to provide advice and to develop initiatives to combat racism and to work towards a more inclusive, intercultural society in Ireland. It closed in December 2008 due to the withdrawal of its government funding.

Ombudsman: The Ombudsman investigates complaints from members of the public who feel they have been unfairly treated by certain public bodies.

OPW: The Office of Public Works is an internal service provider to Government Departments. It includes property procurement, property maintenance and property management amongst its core services. It was initially responsible for sourcing appropriate direct provision accommodation but this function has since transferred to the RIA (see below).

ORAC: The Office of the Refugee Applications Commissioner is responsible for processing asylum applications in Ireland. It issues temporary residence certificates to applicants while their claims are being dealt with and conducts interviews with applicants around their claims. Its decisions may be appealed to the Refugee Appeals Tribunal.

RAT: The Refugee Appeals Tribunal decides appeals of asylum seekers whose applications for refugee status have not been approved by the ORAC.

RIA: The Reception and Integration Agency was formed in 2001. It is the section of the Dept. of Justice Equality & Law Reform which is responsible for managing the provision of shelter and support to asylum seekers.

SWA: Supplementary Welfare Allowance is a weekly allowance paid to people who do not have enough means to meet their needs and those of their qualified adult dependants or any qualified children. In addition to the basic allowance, those on SWA may be entitled to other payments to assist with accommodation and other costs. The scheme is run by the Health Service Executive through Community Welfare Officers at local offices of the Health Service Executive.

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FLAC, 13 Lower Dorset Street, Dublin 1

Tel: +353-1-874 5690 | LoCall: 1890 350 250 | Fax: +353-1-874 5320

E-mail: info@flac.ie | Web: www.flac.ie

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Council Directive 2003/9/EC of 27 January 2003 lays down minimum standards for the reception of asylum seekers [Reception Directive]

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PREFACE

FLAC'S 2002 REPORT ON DIRECT PROVISION WAS ENTITLED DIRECT DISCRIMINATION?, RAISING A QUESTION AS TO WHETHER THE TREATMENT OF THOSE SEEKING REFUGE IN IRELAND WAS IN FACT DISCRIMINATORY. THAT REPORT CONCLUDED THAT THE DIRECT PROVISION SYSTEM WAS UNFAIR AND CALLED FOR THE SYSTEM TO BE ABANDONED.

Any doubt that might have continued to exist about the discriminatory nature of the system must be answered by the most recent change affecting those who live in the direct provision system. This change, introduced after Budget 2010 in December 2009 and after this report was concluded, seeks to exclude anyone living in direct provision from receiving social welfare benefits - other than direct provision - under any circumstances. As this report explains, until the December 2009 change to the law, those who sought social welfare payments had to show that they were habitually resident in Ireland. Most of those who live in direct provision were excluded from all benefits as a result, but there were limited circumstances in which some residents with close connections to Ireland might qualify. Work done by FLAC as recently as early December 2009 had contributed to clarifying the law to confirm this. In a series of 9 cases brought to the Chief Social Welfare Appeals Officer, clients of FLAC were found to have been eligible for limited social welfare benefits because they satisfied the habitual residence condition, though all had been refused their benefits until those decisions were made.

However, even this limited exception seems to have been too much for Irish policy makers. Accordingly, in an amendment to the Social Welfare and Pensions (No.2) Bill 2009, introduced at the last moment and guillotined in the Dáil without debate (though sharply questioned by independent and opposition senators in Seanad Éireann) the law was changed to seek to ensure that no direct provision resident, ever, would be able to meet the test of habitual residence. The denial is based entirely on the fact that people in direct provision are waiting for a decision on whether they will be given protection or permitted to remain on humanitarian grounds and they have no control over when that decision will be taken or how long they will have to remain in direct provision.

Discrimination is not always harmful. Sometimes it can be used to protect the vulnerable. This discrimination is not protective, however. It directly affects some of the most vulnerable in Irish society. It is disproportionate and does not advance the public good.

Although often seen as an administration system only, the dispersal and direct provision system is part of the way in which the Irish state applies its laws and responsibilities to those seeking asylum and protection in Ireland. The purpose of this report is to look at that legal framework. Although many of the difficulties which arise in direct provision are a foreseeable, even inevitable result of the absence of a fair, fast, effective asylum procedure, FLAC's focus in this report has remained on the actual conditions in which people are accommodated and have to live in Ireland while they wait for the State to decide on their applications for residence.

In order to carry out this research, FLAC had invaluable assistance from a number of sources. We would firstly like to sincerely thank those in direct provision whose experiences are mentioned throughout this report, both in relation to cases taken and to illustrate an issue. We are also very grateful to all those in organisations which support refugees and asylum seekers and those seeking leave to remain who gave generously of their knowledge, experience and expertise. We also thank the various State agencies and officials who made information available to us and who clarified issues for us as they arose

FLAC wishes to thank its entire staff who worked so hard to bring this report to a conclusion. In particular, FLAC wishes to acknowledge the extensive work of Saoirse Brady and Michael Farrell. Saoirse Brady conducted the bulk of the research into Irish domestic and international law required for the report, and was its main author. Michael Farrell undertook the challenges to the application of the legislation which allowed the law to be clarified and allowed those in direct provision to be treated as individuals rather than as units of administrative responsibility.

The title of this report, *One Size Does Not Fit All*, highlights what is a fundamental difficulty with the system of direct provision as it is administered in Ireland today: everyone who comes to Ireland is different, but all are treated in exactly the same way, thus leading to suffering, loss of dignity and to a failure to respect the individual human rights of people. If contrary to FLAC's recommendation, the system of dispersal and direct provision is not abolished then, in common decency, it should be amended so that people who are obliged to live in it can live in dignity.

INTRODUCTION

This year marks the tenth anniversary of the establishment of direct provision and dispersal, a scheme intended to alleviate the housing shortage encountered by the Irish government caused by the record numbers of people seeking asylum in Ireland in the late 1990s.

While direct provision and dispersal was initially implemented as a pilot project, it soon became a nationwide policy. FLAC issued its first report, *Direct Discrimination?* following the commencement of the scheme.

Now that direct provision has been a part of the normal life of asylum seekers in Ireland for a decade, FLAC revisits the scheme in this report and highlights concerns arising from the application of the scheme, and from the underlying format of the scheme itself.

This report serves to examine the policy of direct provision in the context of Irish law and government policy and the State's obligations to individuals who flee persecution or danger and seek protection and recognition of their status, as is their right under the 1951 Convention Relating to the Status of Refugees and subsequent Protocol of 1967. While the government concerns itself with the "pull factors" which it has suggested attracts these vulnerable people to Ireland, FLAC views the direct provision scheme as a system which tends to dehumanise people and operates as an industry rather than a means by which the government is fulfilling its human rights commitments.

A person seeking asylum or another form of protection is lawfully present in Ireland and is entitled to stay as long as is required for his/her claim to be processed. During that time, which often extends to a number of years, each person is entitled to be treated with respect and should be able to live in dignity. As an organisation

which has long promoted the right of equal access to justice for all those entitled to social welfare benefit and assistance, FLAC is concerned that the direct provision system is one with an inbuilt capacity to discriminate between people and, unless sufficient safeguards are put in place, one with a facility to ignore the human rights of those within the accommodation system in question.

FLAC seeks to dispel myths about people living in direct provision while at the same time highlighting the poor conditions in which this vulnerable group of people has no option but to live. We look at the lives of direct provision residents through their own eyes and from the perspective of human rights law and try to determine whether this system can and does allow someone to live in dignity.

The scheme of direct provision is not regulated by law for the most part, or even by secondary legislation, but rather by a series of directions, rules and regulations put into place by the



executive which directs the scheme and administered by private companies which have no obligation to undergo specialised training to deal with asylum seekers or to understand the rights of asylum seekers in Irish and international human rights law.

Overall the report finds that much of the system of direct provision and dispersal needs substantial overhaul in order to meet the international human rights standards to which the State has committed itself before the community of nations. In addition, the scheme fails to comply with the constitutional rights to fair procedures and due process guaranteed to everybody in Ireland.

1 THE ESTABLISHMENT AND HISTORY OF THE SCHEME OF DIRECT PROVISION

1.1 INTRODUCTION OF DIRECT PROVISION AND DISPERSAL

Direct provision is a scheme whereby asylum seekers and people seeking other forms of protection are provided with accommodation on a full board basis with all their basic needs apparently provided for directly. It was introduced by the government as a pilot scheme in November 1999 and was administered and coordinated by the Directorate for Asylum Support Services, a body set up under the aegis of the Department of Justice, Equality and Law Reform (DJELR).

The number of people seeking asylum had been rising steadily from 31 applications in 1991 to 7,724 in 1999 (DJELR 2001). In 2000 the number of asylum applications had increased by more than 41 per cent to 10,938 over the previous year. This resulted in a high demand on accommodation in Dublin, whereupon the government decided to implement the policy of direct provision described above, along with a policy of dispersal. Accommodation was obtained across the different Health Board areas to ensure a more equal distribution of asylum seekers and those seeking other forms of protection throughout the country. Prior to the introduction of these policies a person seeking asylum or another form of protection was able to access Supplementary Welfare Allowance in the same way as any other destitute person who required this assistance.

The policies of direct provision and dispersal were introduced on an administrative rather than

a legislative basis and became official government policy in April 2000, when the Department of Social and Family Affairs issued Supplementary Welfare Allowance Circulars 04/00 and 05/00. These circulars were intended to provide guidance to the appropriate staff in relation to the implementation of direct provision and dispersal.

Supplementary Welfare Allowance Circular 04/00 outlined the way in which newly arrived asylum seekers would be initially accommodated in a 'reception centre' before being moved to specially designated direct provision accommodation in another part of the country. The cost of accommodating someone in direct provision was then calculated. That sum was deducted from the basic standard Supplementary Welfare Allowance. The balance, which was described as a "residual income maintenance payment to cover personal requisites" (DSFA 2000a), was set at IRE15 (which now equates to €19.10) per week for an adult and IRE7.50 (or €9.60) for a child. Rent supplement was only to be given in "exceptional circumstances".

The second Supplementary Welfare Allowance Circular, 05/00, gave guidance on what to do if a person refused direct provision without "clear and apparent justification" (DSFA 2000b). In such a case the individual would only be granted the same rate of Supplementary Welfare Allowance as would be available in direct provision, in other words the residual direct provision allowance. Exceptions could be made in limited circumstances, including where it might be justified on social or medical grounds.

1.2 ESTABLISHMENT OF THE RECEPTION AND INTEGRATION AGENCY (RIA)

On 28 March 2000 the government announced plans to create a statutory agency named the Reception and Integration Agency (RIA) which would “report to a Statutory Board consisting of representatives of relevant Government Departments” (DJELR 28 March 2000). In a press release, the then Minister for Justice, Equality and Law Reform, John O’Donoghue TD, explained the rationale behind the establishment of the agency by saying that “the Government fully acknowledges and accepts its responsibility to provide shelter and support for asylum seekers”.

In order to manage the provision of shelter and support to asylum seekers, the RIA was formed on 2 April 2001 under the supervision of an officer of the Department of Justice, Equality and Law Reform (DJELR 2001). The RIA was given responsibility for:

- Coordinating the provision of services to both asylum seekers and refugees;
- Coordinating the implementation of integration policy for all refugees and persons who, though not refugees, were granted leave to remain; and
- Responding to crisis situations which resulted in relatively large numbers of refugees arriving in Ireland within a short period of time.

According to the 2001 Department of Justice, Equality and Law Reform *Annual Report*, the RIA would temporarily operate on a non-statutory basis until the appropriate legislation was enacted (DJELR 2001). The then Minister for Justice, Equality and Law Reform, John O’Donoghue TD, responded that he believed it would be “along similar lines to that which underpins other agencies and services in the wider Justice, Equality and Law Reform area” (O’Donoghue 1 March 2001). However, legislation has never been put into place and the Agency continues to operate as a departmental division of the Department of Justice, Equality and Law Reform. On 5 December 2002, any intention to bring forward appropriate legislation was discounted by the then Taoiseach, Bertie Ahern TD, as

the Minister for Justice, Equality and Law Reform indicated that the most effective way at present of ensuring delivery of services to refugees and others who have been granted leave to remain in the State is by the statutory bodies who cooperate through the agency in coordinating delivery of those services, maintaining primary responsibility for them and that there would be no added value at this stage in putting the agency on a statutory basis. That is the reason it is not being pursued. (B. Ahern 5 December 2002)

The position of the RIA seems to have become well established and accepted even in the absence of legislation. The most recent

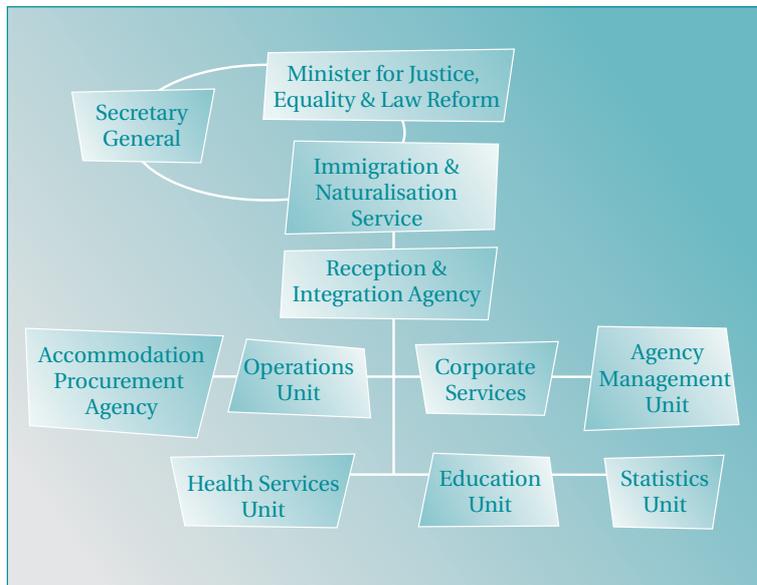


FIGURE 1: Department of Justice, Equality and Law Reform organisational chart

Strategy Statement of the Department of Justice, Equality and Law Reform 2008-2010 describes the “core reception function of the Reception and Integration Agency (RIA)” as providing “accommodation and ancillary services under the Direct Provision system for asylum seekers” (DJELR 2008b)

The role of the RIA was amended in light of the establishment of the Office of the Minister for Integration in 2007, as the integration aspect of its remit has been transferred to that office. The RIA’s current role is now principally concerned with reception only, rather than integration, and is defined in Chapter 4.34 of the *Freedom of Information Section 15 Reference Book* (2008 edition), published by the Department of Justice, as being responsible for:

- Planning and co-ordinating the provision of services to asylum seekers;
- The accommodation of asylum seekers through the Direct Provision system;
- Assisting in the voluntary repatriation of destitute nationals from the twelve States which joined the EU in May 2004 and January 2007.

FLAC has included a simplified organisational chart above to show the direct line of responsibility from the Minister for Justice, Equality and Law Reform to the RIA.

The RIA is described as a functional unit of the Irish Naturalisation and Immigration Service (INIS) of the Department of Justice, Equality and Law Reform. INIS was set up in 2005 to deal with all matters related to asylum, immigration, citizenship and visas. This body is also a subdivision of the department reporting in the normal way to the Minister for Justice, Equality and Law Reform.

There are 40 civil servants working in the RIA, including civil servants who are seconded from other departments such as the Department of Education and Science, the Department of Health and Children, the Department of the Environment, the Health Service Executive, Dublin City Council, the Irish Prison Service and the Irish Red Cross (DJELR 2008a).



1.3 PROVISION OF ACCOMMODATION

On 28 March 2000 the government approved the allocation of 10,000 spaces for asylum seekers in various types of accommodation which included system built accommodation, mobile homes and existing buildings (DJELR 2000). To this end the Office of Public Works (OPW) had already been engaged to source appropriate accommodation since 1999 (C&AG 2002).¹

By 31 December 2000, 62 accommodation centres were operating in 21 counties throughout Ireland (DJELR 2000). By the end of 2001 this had increased to 84 accommodation facilities, consisting of 9 reception centres and 75 accommodation centres across 25 counties.

It encompassed different types of accommodation such as guesthouses, hotels, hostels, mobile homes, system-built facilities and a former holiday camp (DJELR 2001a). However by 2002 the number of centres had decreased again to 60 and comprised 7 reception centres, 50 accommodation centres and 3 'step-down' facilities (DJELR 2002). On 27 May 2003, any entitlement to rent supplement was withdrawn from asylum seekers, resulting in a marked increase in the number of people availing of direct provision services to 6081 (DJELR 2003a) and consequently an increase in the number of facilities to 72.

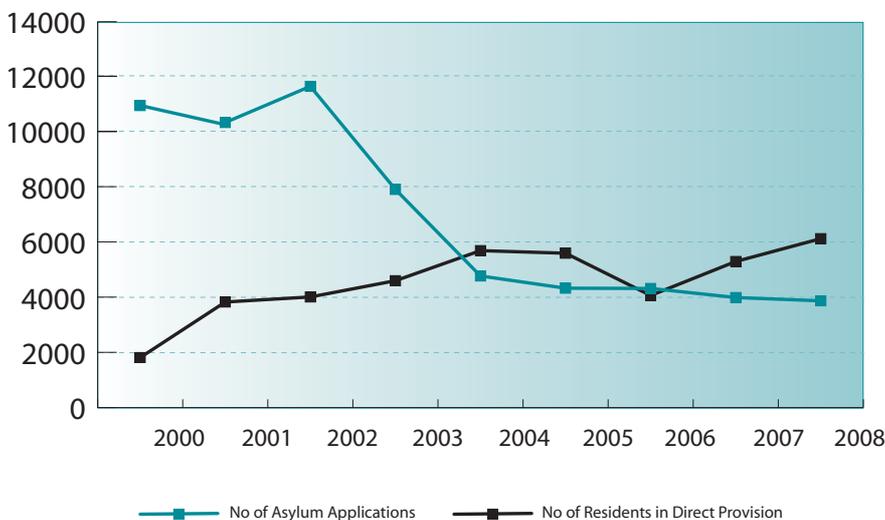
Since its peak in 2005 with 8080 people in direct provision, there has been a noticeable decrease in the number of direct provision residents as people left the system upon obtaining refugee status or leave to remain. It might be expected

¹ Comptroller and Auditor General - see Section 1.5 for an explanation of this office.

that the number of centres would continue to decrease given that the numbers applying for asylum in the State have been declining and 2008 marked the lowest number of asylum applications since 1997 (3866 applications received) and represented a 3 per cent decrease from 2007 (ORAC 2008). However this is not the case as illustrated by the following graph.

This increase in the number of people living in direct provision is acknowledged in the Department's most recent *Annual Report* (DJELR 2008) which notes an "increase of 5.7% over the course of the year" in comparison with an increase of 21% the previous year (DJELR 2007).

FIGURE 2: Asylum applications versus number of direct provision residents



In the Department's *Strategy Statement for 2008-2010* it is noted

Between June 2005 and June 2006 a number of centres were closed, principally arising from the 2005 Irish Born Child (IBC) Scheme which granted a significant number of RIA residents leave to remain in the State. Since then, the underlying trend in the numbers being accommodated has been slowly upwards. (DJELR 2008b: 28)

However the disparity between the fall in the number of asylum applications and the continuing increase in the number of direct provision residents cannot be attributed to any particular policy or scheme. Former Minister for Justice, Equality and Law Reform, Brian Lenihan TD, attempted to explain this trend in

an answer to a parliamentary question on 17 April 2008, where he outlined the influence of a number of factors, "including delays associated with cases where judicial reviews and certain leave-to-remain applications are involved and other complex cases which of themselves take time to resolve, thus leading to a slowing up of throughput within the direct provision system" (Lenihan 17 April 2008).

1.4 CURRENT SITUATION OF ACCOMMODATION PROVISION

In October 2009 there were 54 direct provision centres operating in Ireland. The following illustrates a breakdown of the centres by type of facility, the number of that particular type, the ownership and the potential capacity.²

The total capacity of the entire direct provision accommodation system at the end of October 2009 was 7779; however at that time the number of people being accommodated was 6650 which equates to 85.49 per cent of the total capacity. The RIA states in its *Monthly Statistics Report* for October 2009:

It is desired that RIA maintain a 15% “cushion” between maximum capacity and actual occupancy, as a contingency to cope with unexpected spikes in numbers of asylum seekers coming in to the accommodation system, to allow for temporary or permanent closures of individual centres, and to help RIA to react to medical emergencies causing restrictions to some of our capacity.

(RIA 2009: 12)

TABLE 1: Direct provision accommodation centres

Type of Centre	Quantity	State Owned	Privately Owned	Capacity
Reception centre	2	0	2	459
System Built	2	2	0	575
Hostel	15	1	14	1437
Hotel	15	3	12	1990
Guesthouse	8	0	8	539
Former college/nursing home	6	0	6	1217
Former holiday centre	1	0	1	800
Mobile home park	1	1	0	350
Self-catering	4	0	4	412
Total	54	7	47	7779

² Figures calculated from RIA statistics from their database for end of October 2009 available online at www.ria.gov.ie (last accessed 28 November 2009).

³ Press release issued by the Minister for Justice, Equality and Law Reform, John O'Donoghue TD. Reported in *Irish Times*, 28 March 2000.

TABLE 2: Time spent in direct provision ⁴

Number of years spent in direct provision	Number of Residents (Total 6674)	Percentage of Total Number of Residents
3 +	2156	32%
2 – 3	1248	19%
1 – 2	1623	24%
←1	1590	24%

The government originally envisaged that a person would remain within the direct provision system on “a short-term basis (not more than six months)” (O’Donoghue 28 March 2000).³ However in practice the majority of direct provision residents remain within the system for much longer. The Department of Justice, in its *Strategy Statement for 2005 – 2007*, stated that the RIA was operating “9 self catering facilities for those with serious medical conditions or social problems or who have spent over 2 years in Direct Provision” (DJELR 2005b).

The evidence indicates that people are not moved into self-catering facilities after spending two years in the system as stated in the Department’s previous strategy statement. The latest RIA statistics available as this report goes to print (October 2009) reflect the reality of the situation

whereby the majority of persons seeking asylum or another form of protection spend years of their lives in the direct provision system.

The failure to move people into self-catering facilities cannot be attributed to a lack of capacity; of the current available capacity of 412 self-catering places, only 313 were occupied in October 2009 (75.97 per cent). This is despite the fact that many direct provision residents express a desire to be accommodated in self-catering facilities where possible.

The Department of Justice, Equality and Law Reform, in its 2005 *Annual Report*, identified a “need to ensure a proper mix of accommodation (e.g. family, single male, single female)” (DJELR 2005a). Indeed, according to the most recent information supplied by the RIA for catered accommodation, there are currently 5 centres which house single individuals of both genders, 3 for use of families only,⁵ 12 for single males and 30 for a combination of single individuals of either or both sexes as well as families.

⁴ These figures are taken from RIA statistics issued in October 2009 available online at www.ria.gov.ie (last accessed on 14 December 2009). The statistics report states “in 23 cases the duration of stay is not categorized”. This equates to less than 1 per cent of residents.

⁵ In their statistics outlining the Profile of Status of RIA Residents, RIA describe ‘families’ as “including single parents and childless couples”.

The four self-catering accommodation centres are all mixed families/single people. However, the RIA chart shows there are currently no centres which cater solely for single women.⁶

Serious safety concerns arise around the fact that there is not even one dedicated facility catering for single women, who in some cases may be young, alone and vulnerable. A number of these women may have suffered traumatic experiences of either a violent or sexual nature which caused them to flee from their home country. Peter O'Mahony highlighted this issue in Chapter 7 of *Sanctuary in Ireland, Perspectives on Asylum Law and Policy* (Fraser & Harvey 2003):

Particular problems concerning the physical safety of women arise in direct provision centres because communal accommodation lacks privacy and may increase the risk of sexual or other violence against them.

As the UNHCR *Handbook for the Protection of Refugee Women*⁷ states, all women living in direct provision should be accommodated in a safe environment with appropriate protection procedures in place:

In non-camp settings, promoting physical security for women and girls can involve ensuring that reception centres for asylum-seekers provide separate well lit accommodation for single females, which they can lock.

(UNCHR 2008)

One of the actions suggested in this handbook to address sexual and gender-based violence includes lobbying

national and local government authorities to persuade them to fund places in women's refuges for asylum-seeking women fleeing domestic violence as common practice and to offer all asylum-seeking women single sex accommodation if preferred.

(UNCHR 2008)

Currently this option is not available to female direct provision residents as there are no centres catering solely for women and girls. Furthermore, they normally cannot access women's refuges as they do not have the necessary access to social welfare assistance which is usually a prerequisite to obtaining a place in a refuge.

⁶ See above for source.

⁷ Available online at <http://www.unhcr.org/refworld/docid/47cfc2962.html> (last accessed on 24 November 2009).

1.5 FINANCIAL RESPONSIBILITY FOR DIRECT PROVISION ACCOMMODATION

The financial responsibility for the direct provision system has been divided between several departments. Initially Local Authorities were allocated monies for asylum seeker accommodation. In 1999 the Office of Public Works (OPW) began to purchase, rent or re-commission properties on behalf of the State (C&AG 2002: 39). According to the book of estimates of expenditure on public services, the cost of the Asylum Seekers Programme in 2000 was IRE12.198 (€15.488) million and the estimate for 2001 was given as IRE15 (€19.046) million (Department of Finance 2001). However the OPW *Annual Report* stated that €15,490,000 was actually spent on the construction of accommodation for asylum seekers and the provision cost for 2001 was recorded as €17,890,000 (OPW 2001). These figures do not include the purchase prices of other facilities nor any rent paid for buildings which were leased.

In Chapter 4 of his 2002 *Annual Report*, the Comptroller and Auditor General (C&AG)⁸ specifically analysed the provision of

accommodation for asylum seekers. That chapter assessed the acquisition programme of accommodation and whether it represented value for money⁹ for the Exchequer. The C&AG recognised the circumstances in which the government felt it necessary to employ this course of action based on “the need to find alternative approaches to conventional methods of securing accommodation which would reflect the emergency nature of the evolving crisis” (C&AG 2002). The urgency of the situation was highlighted and the C&AG also evaluated the approach taken and noted the use of Ministerial Orders under s. 2(2) of the Local Government (Planning and Development) Act 1993, later replaced by s.181(2) of the Planning and Development Act 2000. These provisions allowed the relevant Minister to bypass the usual procedures set out in the Planning Acts if s/he is satisfied that this is being done in response to an “accident or emergency” (C&AG 2002). After consultation with the Attorney General’s office, it was agreed that the Minister for Justice, Equality and Law Reform would make such orders, as it was felt that the situation whereby a great number of asylum seekers had to be accommodated did constitute an emergency for the purposes of the aforementioned acts.

⁸ The Office of the Comptroller and Auditor General (C&AG) was established to “provide assurance that public money is properly administered and spent to good effect” (Mission Statement of the Office of Comptroller and Auditor General). All of the annual reports of this office are presented to the Committee of Public Accounts (PAC) which considers the report on behalf of Dáil Éireann.

⁹ According to the Comptroller and Auditor General’s website, “Value for Money Reports record the results of examinations into (a) the economy and efficiency with which State bodies acquire, use and dispose of resources (b) the systems, procedures and practices employed by State bodies for evaluation the effectiveness of their operations.” See online at <http://www.audgen.gov.ie/ViewDoc.asp?DocId=-1&CatID=5> (last accessed 28 November 2009).

The Comptroller and Auditor General examined a number of aspects of the acquisition programme including the overall management of the programme, consultation with local communities, the coordination of the strategy and issues relating to unused properties. In particular the C&AG noted that four properties which were purchased and one which was leased had “never been used for their intended purpose of accommodating asylum seekers” (C&AG 2002). The challenges facing the RIA were acknowledged especially those relating to local opposition which included potential court actions and planning issues.

In its consideration of that report, the Dáil Public Accounts Committee concluded that there “was a serious loss of Value for Money in respect of the five locations. A total of €19.6 million was spent without achieving the intended result” (PAC 2005: 19).¹⁰ The Committee criticised the failure of the Department of Justice, Equality and Law Reform in failing to consult local communities or local

planning authorities and explicitly stated:

The overall losses reflect hasty short term actions to address a longer term policy issue. Had risk assessment and management practices been more developed, better decisions might have been made (PAC 2005: 9)

The Committee also recommended that there was a need for

more coherence and better coordination between all the State agencies involved (PAC 2005: 20)

Financial responsibility was transferred to the Vote of the Department of Justice, Equality and Law Reform in 2003. The following table contains the estimates given each year for asylum seeker accommodation since 2003 and the provisional costs, which represent an approximate figure of how much was actually spent on this public service.

TABLE 3: Figures for asylum seekers accommodation given in book of estimates for public services

Year	Estimate for the year	Provisional outturn at end of year	% increase from estimate to outturn
2002		83,847	
2003	72,500	76,552	5.6%
2004	69,254	83,634	20.8%
2005	71,130	84,382	18.6%
2006	74,011	78,728	6.4%
2007	70,020	83,262	18.9%
2008	74,310	91,472	23.1%

¹⁰ Available online at http://www.oireachtas.ie/documents/committees29thdail/pacdocuments/Third_Interim_Report_by_PAC.pdf (last accessed 28 November 2009).

TABLE 4: Applications, residents and costs, 2000 - 2008

Year	Asylum applications	Direct Provision residents	Cost
2000	10938	1811	No figure available
2001	10325	3823	No figure available
2002	11634	4006	83847
2003	7900	4595	76552
2004	4766	5684	83634
2005	4323	5590	84382
2006	4314	4059	78728
2007	3985	5291	83262
2008	3866	6118	91472

As can be seen from Table 3, the estimated figures given are consistently lower than the actual recorded expenditure on asylum seeker accommodation at the end of each year. These figures show that the government has repeatedly underestimated the cost of this service and has failed to make appropriate provision each year. In the 2009 budget announced in October 2008, the allocation of funding to providing asylum seeker accommodation was €70,892 which represented a 5 per cent decrease over the previous year’s estimate and a 22.5 per cent decrease from the figure given for the actual amount spent in 2008. In April 2009, a second budget was announced which cut the allocated spending for asylum accommodation by a further 5 per cent. This represents a cut of 26 per cent from the amount actually spent on the accommodation in 2008 in relation to the estimated spending for 2009.

Table 4 provides a year-on-year comparison between the number of asylum applications, the average number of direct provision residents and the total expenditure in that year. The table illustrates the decline in the number of asylum applications since the peak in 2002 while indicating the increase in direct provision residents. While the cost for direct provision has decreased slightly at times, it has remained high overall.

In 2004, a Value for Money review of the asylum and immigration processes was undertaken by the Irish Naturalisation and Immigration Service for the Department of Justice, Equality and Law Reform (INIS 2006). It is significant to note that this is in effect an internal review, as the Irish Naturalisation and Immigration Service is part of the Department. It was carried out over a twelve-month period beginning in late 2004 and completed in 2005. However, the report was not published until 2006. The review highlighted the steps taken by the Department of Justice, Equality and Law Reform to reduce the number of asylum applications. These included “the citizenship referendum, the speedier processing of claims and the reduction in processing backlogs in the ORAC and RAT, and changes in the eligibility conditions for access to social welfare payments” (INIS 2006). The authors of the report envisaged that

the level of expenditure on accommodation can be expected to decline following the on-going integration of persons awarded residency based on IBCs in 2005.

(INIS 2006)

As already noted, this did not in fact happen and the report identified this as a challenge for the RIA (INIS 2006). A new value for money report is currently underway and is expected to be completed by the end of 2009 (Ahern 28 April 2009).

When former Minister for Justice, Equality and Law Reform Brian Lenihan TD was asked what steps were being taken to address the quality and cost of asylum accommodation, he was confident that the Department of Justice, Equality and Law Reform

consistently achieves quality and value for money through the checks and balances which ensure quality of service, combined with the value for money reflected in the competitive price achieved by the RIA over a number of years in its operation of the direct provision system.

(Lenihan 4 March 2008)

The high cost of direct provision was highlighted when Ciaran Cuffe TD asked the Minister for Justice, Equality and Law Reform, Dermot Ahern TD, to name the five highest value contracts with his department in 2008. Minister Ahern replied that

in 2008, five companies were in receipt of highest value contract expenditure within a range of €5.8 million to €14.1 million from my Department. Four of the companies provide asylum seeker accommodation...

(Ahern 18 February 2009)

According to a response in April 2009, the same Minister referred to the policy to reduce RIA expenditure including the cost of accommodation by 8 per cent (Ahern 28 April 2009) in line with government cost-cutting measures introduced in 2009.

In October 2009, appearing before the Dáil Public Accounts Committee, the Secretary General of the Department of Justice, Equality and Law Reform, Seán Aylward, attempted to justify the State's policy of direct provision as opposed to alternative forms of accommodating those seeking protection, in order to discharge its duty under international law. He said that

[t]he Department of Justice, Equality and Law Reform has accepted responsibility on behalf of the State to house homeless people who have pitched up on our shores and over whose heads we have an obligation to put roofs. If they were taken into the conventional local authority housing system, for example, and houses were built for them, the cost would be in the stratosphere.

(Aylward 9 October 2009)

While it is important to ensure that there is value for money in any public expenditure, part of that value will be to make certain that the objective of the exercise is attained. In this case the objective should be to accommodate direct provision residents while providing an adequate standard of living in an ethical manner which complies with the State's human rights obligations.

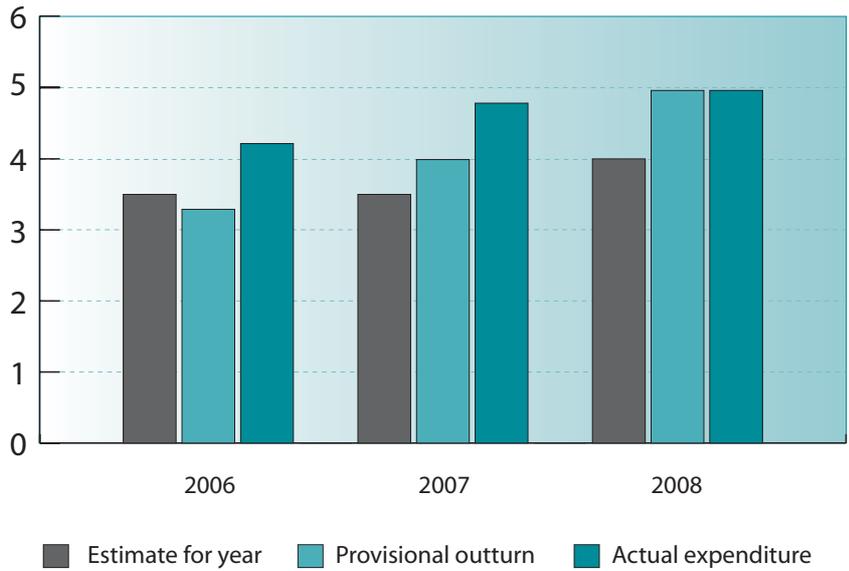


FIGURE 3: Estimates and Expenditure on Direct Provision Allowance

The *Statistical Report on Social Welfare Services 2008* published by the Department of Social and Family Affairs, includes a breakdown of the expenditure on Supplementary Welfare Allowance which includes a separate figure for the direct provision allowance (DSFA 2009a), making it possible to see the amount spent on this basic payment. The scheme is paid out of the budget allocated to the Supplementary Welfare Allowance scheme and is then administered by Community Welfare Officers of the Health Service Executive as is the case with all Supplementary Welfare Allowance payments. The cost of both the payment and the administration is borne by the Department of Social and Family Affairs and the Health Service Executive rather than the Department of Justice, Equality and Law Reform, which administers the rest of the direct provision and dispersal scheme.

In 2007 the total cost of the scheme for the year was €4.784 million and there is a recorded increase of approximately 3.7 per cent in 2008 to €4.963 million (DSFA 2009a). These figures include payments made to residents in self-catering or step-down facilities who receive a portion of the full rate Supplementary Welfare Allowance (minus a contribution for rent and

utilities) at the discretion of the Community Welfare Officer.

As with the budget allocation for direct provision accommodation and associated costs, the amount allocated to the Department for the direct provision allowance in 2008 was underestimated. The initial amount assigned to the scheme was €4 million, however the recorded cost for 2008 was given in the Book of Estimates of Public Expenditure as €4.963 million. The revised estimate for 2009 sets expenditure on the direct provision allowance at €5 million.

The above chart shows the differences between the estimated amount allocated to the scheme in the budgets for 2006, 2007 and 2008, the estimated cost for the year and, in the third column, the actual amount spent in the payment of the scheme as recorded by the Department of Social and Family Affairs.

1.6 THE DIRECT PROVISION INDUSTRY

The Department of Justice, Equality and Law Reform enters into contractual arrangements with private companies to provide accommodation and meals to asylum seekers, people seeking other forms of protection and people seeking leave to remain on humanitarian grounds. These companies are profit-making enterprises and have to tender for a direct provision contract.

1.6.1 THE DIRECT PROVISION CONTRACT

A sample contract or memorandum of agreement between the Minister for Justice, Equality and Law Reform and a contractor for the reception and care of asylum seekers sets out that:

The Contractor hereby agrees to provide residential full board accommodation and other services hereinafter described which said accommodation and other services shall be to a standard which is reasonable having regard to the daily needs of Asylum Seekers.

The agreement outlines the duties of the contractor, which include requirements to keep a daily register of residents, to maximise use of bedroom space, to ensure that all staff and residents are aware of the *Direct Provision Centre Services, Rules and Procedures* as well as to operate a strict code of practice for all staff. Certain aspects of this agreement will be analysed later in this report in relation to the rights of asylum seekers.

The contractor also has a duty to notify the local Community Welfare Officer of any new arrivals so that the new residents may receive their direct provision allowance.

The financial arrangements as agreed by the parties are also set out in the contract. The

contractor is required to ensure that the agreed capacity is achieved at all times, otherwise s/he is liable to pay damages to the Minister if the centre cannot accommodate the specified number of residents. There is also an arrangement whereby the RIA will pay the contractor if the "occupancy at the centre exceeds the agreed capacity". The contract sets out the daily rate payable per person as well as payment for extra residents exceeding the capacity.

The details of individual contracts between the RIA and private companies are not disclosed, as any enquiries on the subject are dismissed due to the "commercial sensitivity" of such contracts.

Three of the biggest companies have been chosen to give an overview of the way in which the commercially run centres operate. Two of the three were established in response to the creation of the direct provision system solely for the purpose of accommodating asylum seekers. The directors of both had some experience of accommodating people in other countries, in one case asylum seekers and in the other workers. The other company was an existing corporate body in Ireland which set up a subsidiary to cater for the new market.

Together these three companies comprise more than 40 per cent of the total capacity for accommodating people in commercially owned direct provision facilities.

1.6.2 BRIDGESTOCK LIMITED

Bridgestock Limited is a privately owned company incorporated under the Companies Acts 1963 to 1999, on 9 May 2001.

The basic document which sets out the company structure, the memorandum of association contains the aims for which the company was founded, encompassing a wide range of activities including the business of hoteliers and restaurant proprietors (Bridgestock Memorandum 2001).

The "principal activity of the company" is described in the Directors' Financial Reports submitted to the Companies Registration Office in 2001 as "the provision of emergency residential accommodation and other services for the daily needs of asylum seekers". According to its website,¹¹ the company also considers itself to be "specialists and the leading provider of Asylum Seeker and Refugee accommodation services in Ireland".

The Directors' Report for 2008 notes the effect which the "immigration policy of the Government" may have on the company and indeed the entire industry. This may be an allusion to the upcoming legislative changes due to take place in the asylum system due to the Immigration, Residence and Protection Bill 2008, which the government hopes will

¹¹ This is at <http://www.bridgestock.ie> last accessed on 8 October 2009.

streamline and accelerate the processing of asylum applications, thereby reducing the time an applicant spends in direct provision. This will obviously have an impact on the industry as a whole if the same amount of accommodation is no longer required.

Bridgestock Ltd currently operates four direct provision centres and one self-catering centre in the West of Ireland. It also runs the state-owned facility in Athlone after successfully winning the tender, most recently on 5 March 2009. The contract for Athlone is only for one year, with an option for renewal for a further year, as "consideration is currently being given to the most appropriate replacement for the mobile homes."

The Railway Hotel in Kiltimagh closed on 24 August 2009 although its contract was not due to expire until 19 January 2010.

As the table below shows, in September 2009 Bridgestock had the capacity to accommodate 17.2 per cent of the total number of residents living in direct provision. With the greatest number of centres capable of housing just over 20 per cent of the total capacity of residents in commercially owned premises, it is the biggest commercial operator in the State.

TABLE 5: Bridgestock direct provision centres

Name and location of centre	Contracted capacity in individual centre	% of total capacity in direct provision centres (total=7779)	% of capacity in commercially owned centres (total=6509)
Old Convent, Ballyhaunis, Co Mayo	329	4.2	5.1
Globe House, Chapel Hill, Sligo	255	3.3	3.9
Athlone Accommodation Centre, Athlone, Co Westmeath	350	4.5	5.4
Lisbrook House, Galway	315	4.1	4.8
Station Road (self-catering), Ballaghaderreen, Co Roscommon	86	1.1	1.3
Total	1335	17.2	20.5

TABLE 6: East Coast Catering direct provision centres

Name and location of centre	Contracted capacity in individual centre	% of total capacity in direct provision centres (total=7779)	% of capacity in commercially owned centres (total=6509)
Balseskin Reception Centre, St. Margaret's, Finglas, Co Dublin	369	4.7	5.7
Hatch Hall, 28A Lower Hatch Street, Dublin 2	210	2.7	3.2
Carroll Village, Dundalk, Co Louth	200	2.6	3.1
Total	779	10	12

1.6.3 EAST COAST CATERING LIMITED

East Coast Catering Ltd was incorporated under the Companies Acts 1963 to 1999 on 26 July 2000.

Its aims, as set out in its memorandum of association, include the intention outlined in 1(a):

- To provide to or on behalf of any person, firm, corporation or governmental or public authority, accommodation in mobile structures, to provide catering services, management and other support services of all kinds in respect of such structures and the persons so accommodated.

The description of the company's principal activities in the annual reports continues to be the "provision of residential accommodation".

East Coast Catering won the tender to develop a reception centre in north Dublin in January 2001 and continues to operate the Balseskin centre in Finglas. The contract was valued at €20,865,951 in November 2006 when the then Minister for Justice, Equality and Law Reform, Michael McDowell TD, responded to a question in the Dáil on the total amount paid to the contractors (McDowell 1 November 2006).

East Coast Catering Ltd currently operates three direct provision centres, one of which is a reception centre (Balseskin) and another of which is self-catering (Carroll Village).

East Coast Catering is the second-largest operator in the State despite only running three centres in comparison to Bridgestock and Millstreet's five centres apiece. The three centres can accommodate a total of 779 residents which equates to 10 per cent of the overall number of direct provision residents or 12 per cent of persons residing in commercially owned centres.

1.6.4 MILLSTREET EQUESTRIAN SERVICES LIMITED

Millstreet Services is the registered business name of Millstreet Equestrian Services Ltd with the stated aim to provide “accommodation and catering services”. The memorandum and articles of Millstreet Equestrian Services Ltd specifies that the company may carry on the business of hoteliers and caterers as well as a wide range of other activities.

Unlike the other two companies mentioned above the main purpose of the company is not only to accommodate asylum seekers.

It is also “engaged in the provision of equestrian services, overseas equestrian tourism activities, the staging of the Millstreet International Horse Shows”.

Millstreet Equestrian Services Ltd currently operates 5 direct provision centres in the South of the country, one of which is self-catering (Mallow).¹²

Millstreet Equestrian Services Ltd is the sixth largest operator in the State and can accommodate 625 direct provision residents in its centres, which equates to 8 per cent of the total capacity in all centres and 9.5 per cent in commercially owned centres.

TABLE 7: Millstreet Equestrian Services Ltd direct provision centres

Name and location of centre	% of total Contracted capacity in individual centre	% of capacity in direct provision centres (total=7779)	capacity in commercially owned centres (total=6509)
Millstreet Accommodation Centre, Millstreet, Co Cork	300	3.9	4.6
73-75 Davis Street, Mallow, Co Cork	50	0.6	0.8
Linden House, New Road, Killarney, Co Kerry	55	0.7	0.8
Bridgewater House, Carrick-on-Suir, Tipperary (South)	120	1.5	1.8
Viking House, Coffee House Lane, Waterford	100	1.3	1.5
Total	625	8	9.5

¹² This list has been compiled using the written answer given by the Minister for Justice, Equality and Law Reform to a Parliamentary Question on 29 April 2008 and has been cross-referenced with the list supplied by the RIA at the end of July 2008 on its website (www.ria.gov.ie).

1.7

INSPECTIONS

TABLE 8: Inspections carried out 2004 – 2008

Year	No of centres open at year end	No of internal inspections by RIA	No of external inspections	Total no of inspections	Minimum no of requisite inspections	% of inspections conducted
2004	74	69	58	127	222	57%
2005	69	58	53	111	207	54%
2006	54	45	53	98	162	60%
2007	62	41	59	103	186	55%
2008	59	79	60	139	177	79%

The 2001 Department of Justice, Equality and Law Reform *Annual Report* noted the setting up of “a series of inspections by the RIA and Excellence in Tourism, the inspectors of Bord Fáilte approved premises” (DJELR 2001). However in 2002 the RIA established an independent inspections process “to ensure that the highest standards in the provision of facilities are upheld” (DJELR 2002). Inspections are also carried out by the RIA’s own internal inspections unit.

The 2003 *Annual Report* provided further detail about both inspections procedures and outlined that the RIA’s inspection team would carry out inspections on both state-owned and commercial properties “at least on a twice yearly basis” (DJELR 2003). In its *Annual Report* for 2004, the Department of Justice, Equality and Law

Reform states that the internal inspection team should carry out at least two inspections a year while the independent assessors (QTS Ltd) should carry out at least one. Therefore at least three inspections a year should be conducted on each facility. Environmental Health Officers may also inspect these premises.

Despite the repeated assurances of the Department that there will be adequate and regular inspections, the above table illustrates the number of inspections actually carried out from 2004 until 2008. It shows the number of centres open at the end of each year as well as the percentage of inspections which were carried out, relative to the minimum number which should have taken place. This table indicates the failure of the RIA to conduct the requisite

number of inspections for at least the fifth year in a row.

The *Irish Times* published a number of articles on 31 October 2007 on the inspection process. The articles raised a number of issues, including inadequate levels of hygiene and safety in a number of hostels, the failure of inspectors to record the views of residents and staff and the fact that very few inspections are conducted at weekends when conditions are thought to be worse (*Irish Times* 31 October 2007). In response to the newspaper's claim that both the RIA and QTS Ltd had failed to achieve the necessary number of inspections during the year, a spokesperson for the Department reiterated that "as far as possible, every effort is made to inspect accommodation centres approximately three times annually" (*Irish Times* 31 October 2007).

The sample contract between the RIA and the contractor includes a clause ensuring that inspectors can access the centre "at all times in order to ensure that all requisite standards are being met".

When an inspection is carried out, the inspector is required to fill out an inspection report which is mainly concerned with the physical conditions and the operation of the accommodation centre.

The inspection report is broken down into categories and deals with different aspects of the centre, including the reception, house rules, child protection issues, fire safety, nutrition and dining arrangement, facilities and bedrooms.

Cleanliness is also assessed as well as the provision of toiletries. Shared bathroom facilities are inspected and each bedroom is examined, even if it is unoccupied. The manager, relevant Community Welfare Officer and Environmental Health Officer are all identified. The inspector also collects documents including the guest register, menu cycle and the Environmental Health Officer's report and has to view the fire register, house rules and the code of practice. A list of the issues noted in the previous inspection is included and progress is recorded. The inspector records any discrepancies or faults and a letter is sent to the management of the particular centre which is then required to explain and rectify any defects.

The Secretary General of the Department of Justice, Equality and Law Reform set out the function of inspections in a letter to the Dáil Public Accounts Committee, dated 15 May 2008, in which he stated:

The purpose of an inspection is to assess the physical condition of the centre and to ensure that the services contracted by the Reception and Integration Agency (RIA) on behalf of the Department are being delivered by the contractor... Inspectors are not given instructions to seek the views of residents or staff members during the inspection; however, if a resident or staff member seeks to talk to the inspector his/her views are recorded.

(Aylward 15 May 2008)



1.8 QUALITY CUSTOMER SERVICE

The RIA states that clinics are held in centres where residents can raise issues of concern about the running of the centre including problems associated with living conditions. The resident can meet with an RIA official in a private meeting room to discuss any concerns. In 2008, 115 information clinics were held (DJELR 2008) which was an improvement on the figures for 2007 with only 38 information clinics (DJELR 2007). This does not include Mosney where clinics take place every four weeks. Formal information clinics do not usually take place in the Dublin-based centres as the public office is relatively accessible to residents and RIA officials make regular visits to the centres in this locality. RIA officials attempt to resolve any issues raised by residents in an informal manner with the management.

As a section of the Department of Justice, Equality and Law Reform, the RIA is a service provider to members of the public. There is therefore an obligation that this service be carried out in line with the *Nine Principles of Quality Customer Service* published on 9 May 1997 as a reference for government departments and offices. This was later expanded to twelve principles in July 2000.¹³ Among the twelve principles are those of quality service standards, equality and diversity, timeliness and courtesy, dealing with complaints and appeals, and consultation and evaluation. A network of Quality Customer Service Officers who represent each department meets periodically to oversee the implementation of the Quality Customer Service initiative.

¹³ See the website <http://www.bettergov.ie> for further details of this initiative (last accessed 28 November 2009).

The recognition of the principle of equality and diversity is fundamental to ensuring that direct provision residents are treated with respect and are provided with necessary services in an appropriate manner. A support pack developed to introduce the Equality/Diversity aspect of the Quality Customer Service initiative was issued by the Quality Customer Service Working Group. The author defines the nature of equality measures as

seek[ing] to guarantee a range of rights to disadvantaged groups and to eliminate various forms of discrimination against them.

If the principles of quality customer service are to achieve the aim for which they were established, then they should inform and permeate the services provided to all service users which, in this instance, means direct provision residents.

1.9 DIRECT PROVISION RECEPTION & ACCOMMODATION CENTRE SERVICES, RULES AND PROCEDURES (HOUSE RULES)

A review of the House Rules agreed in 2002 was carried out between September 2007 and May 2008 (Lenihan 29 April 2008). The House Rules Review Committee consisted of officials from the RIA, the HSE, the Office of the Attorney General, the Garda National Immigration Bureau, staff from the direct provision centres including managers and representatives from the Irish Peace and Justice Commission,¹⁴ the Irish Refugee Council and the Refugee Information Service. The Minister did not give details of the issues reviewed by this committee as he did not feel it was appropriate to elaborate.

The review was completed in 2008 although the report was not published by November 2009. A report of the National Action Plan against Racism, *Not an End – Just a Beginning*, submitted to the government in January 2009, stated that the report of the committee was “accepted by the RIA and was referred to NALA (National Adult Literacy Association) so that a more user friendly version for non-nationals could be produced” (NCCRI 2009).

A booklet entitled *Direct Provision Reception & Accommodation Centre Services, Rules and Procedures* sets out the centres’ obligations to

¹⁴ The Irish Refugee Council and Refugee Information Service are non-governmental organisations. The Irish Peace and Justice Commission is an initiative of the Irish Catholic Bishops Conference.

the residents, the responsibilities of residents and the complaints procedure to be followed by residents. It also includes fire safety rules. The booklet is compiled by RIA staff (which comprises civil servants) and is issued to all asylum seekers on their arrival at the accommodation centre to which they are assigned. After the completion of the review mentioned above, the RIA drafted a new version of the rules in 2008/2009 in which attempts were made to make the document clearer and more easily understood.

It should be noted that the following description of the rules, procedures and services is taken from the 2007 version, as the updated version had not been published by November 2009.

The booklet sets out the main responsibilities of the centre, in accordance with its agreement with the Department of Justice, Equality and Law Reform. The centre must:

- Provide accommodation in a safe, hospitable and clean environment
- Treat residents with dignity and respect. Improper behaviour such as sexual harassment or racism is not acceptable
- Provide three meals a day as required as per the sample menu. Provide infant formula and baby food in line with the infant feeding guidelines
- Cater for any dietary needs required on medical grounds and where possible and practical, cater for ethnic food preferences
- Provide a packed lunch for children attending school where necessary

- Provide tea and coffee making facilities and drinking water outside of normal meal times
- Provide laundry and ironing facilities
- Supply residents with bathing facilities and basic toiletries
- Furnish parents with details on local schools and assist in placement of their children in local schools
- Clean the resident's room on a regular basis if required
- Ensure the resident's room is heated to a comfortable standard
- Change bed linen and towels changed as necessary but at least once a week
- Make available to residents free of charge or at a nominal charge any leisure facilities made available by the Centre
- Treat all complaints seriously and impartially; to provide a clear, fair and efficient procedure for dealing with complaints; and to keep a record of complaints made by residents and staff which are unable to be resolved on an informal basis.

Part 2 outlines a number of duties which the resident must fulfil under the basic House Rules. Failure to comply with these obligations may result in a warning. More serious breaches may result in transfer to another centre, or in "circumstances of extreme gravity", complete expulsion from the direct provision system. The duties of residents include:

- Adhering to the accommodation centre's rules as set out in the full document
- Moving room if required by the manager

in order for the centre to maximise occupancy of beds. The Reception and Integration Agency expects that each centre manager will make full use of bed spaces

- Treating all persons in the centre with dignity and respect. Improper behaviour such as sexual harassment or racism is not acceptable
- Respecting property belonging to both the centre and other residents
- Taking responsibility for and ensuring the safety and best interests of children in the centre at all times
- Notifying the appropriate authorities of any change in address
- Keeping bedrooms in order to assist the manager in maintaining minimum standards as stipulated by the RIA. This may involve unannounced bedroom inspections by the manager, RIA or inspectors appointed by RIA. The resident must cooperate with all such bedroom inspections.

Under the house rules the residents are also prohibited from carrying out certain activities:

- Cooking or storing food in their bedrooms
- Creating excessive noise
- Leaving young children unattended
- Undertaking activities or actions that would compromise the safety or good order of the centre.

In addition there is a section dedicated to the well-being and safety of children in the centres. It also gives a definition of abuse as set out in *Children First: National Guidelines for the Protection and Welfare of Children* issued by the Department of Health and Children in 1999.¹⁵ This is in addition to the Child Protection Policy for Accommodation Centres.

For the full list of duties, see the *Direct Provision Reception & Accommodation Centre Services, Rules and Procedures* booklet.

The third section of the booklet sets out the complaints procedure. The complaints procedure has been a source of controversy and dissatisfaction amongst direct provision residents due to the apparent lack of fairness and transparency.

The fire safety rules are contained in the fourth part of the booklet.

¹⁵ Available online at http://www.dohc.ie/publications/pdf/children_first.pdf?direct=1 (last accessed 28 November 2009).

1.10 COMPLAINTS

There are two separate components to the complaints procedure. Both procedures have both an informal and formal resolution mechanism. The rationale for the complaints procedure “is to have issues and complaints which arise in centres dealt with fairly in a speedy and effective manner. It is the aim of this procedure that issues which arise will be resolved informally in the first instance to the satisfaction of all parties” (RIA 2007)

1.10.1 COMPLAINTS PROCEDURE

The first is in the case of a resident making a complaint against the centre’s failure to provide the appropriate services as required by Part 1 of the *Direct Provision Reception & Accommodation Centre Services, Rules and Procedures* booklet, according to which,

[t]he complaints procedure set out hereunder can be invoked only in relation to issues over which the RIA or the accommodation centre has control.

Furthermore, the document states

All complaints will be fully dealt with and it is expected that the complaints procedure will be used only in cases where a resident has a genuine grievance.

Neither a definition nor examples are given of what constitutes a ‘genuine grievance’, therefore the onus is placed on the resident to prove that there is a problem to be dealt with in the first place.

The second component of the procedure relates to a complaint on the part of the management in the event that a resident breaches the house rules.

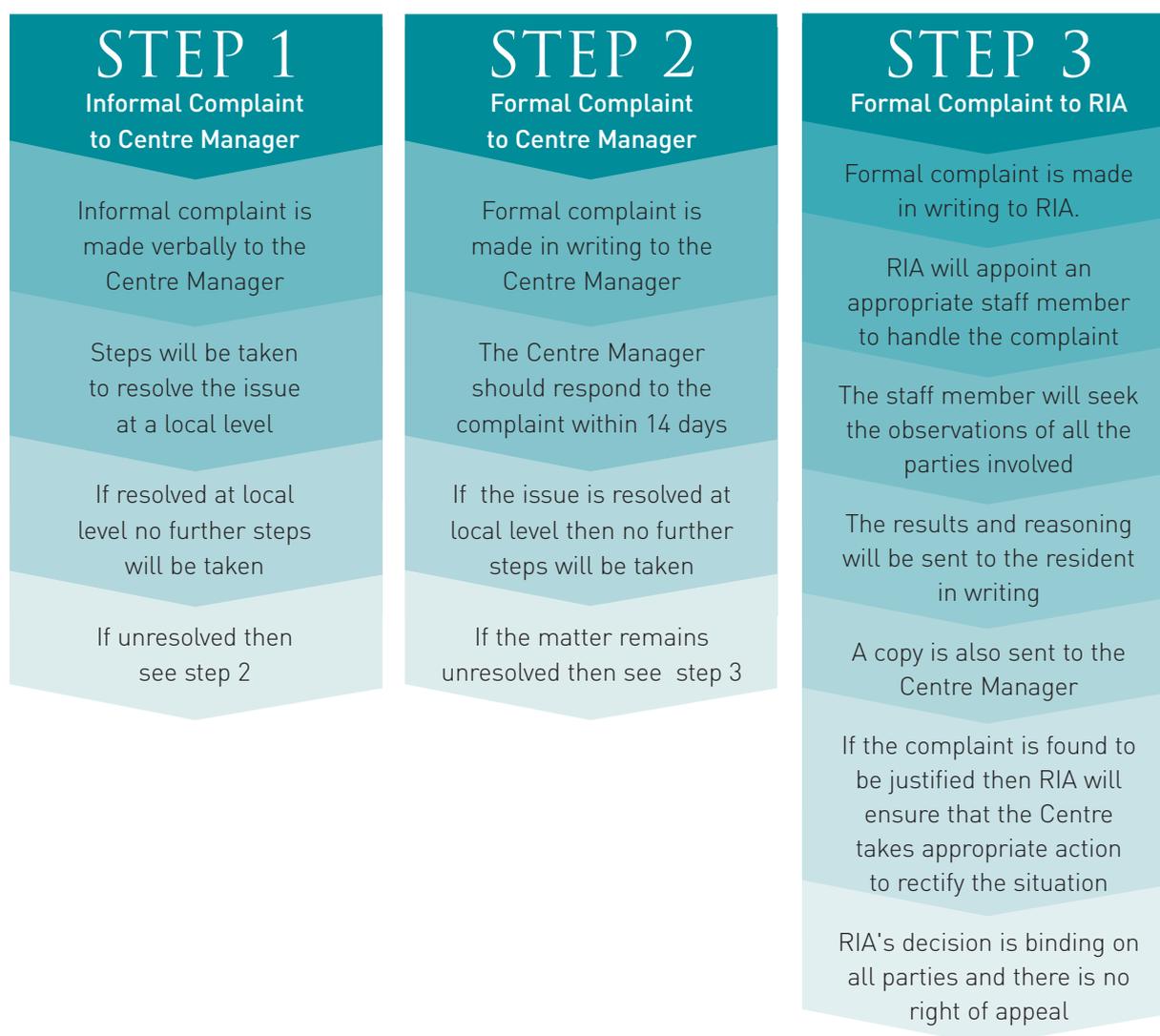
The referral of complaints to the RIA may indicate that the process is not independent due to the contractual nature of the RIA’s relationship with the centre manager or a general manager of a number of centres. In order for it to be sufficiently independent, there should be a dedicated complaints section in RIA, separate from the administration of the direct provision scheme. There should also be the option for a review of decisions by a more senior official.

Further, the right to fair procedures and due process, laid down in the Constitution, as well as in Article 6 of the European Convention on Human Rights, should be applied in the context of the complaints procedure. Both instruments require a fair hearing before an impartial adjudicator. In matters which may have serious repercussions for the resident, such as transfer or expulsion, the resident should be afforded the opportunity to challenge the decision at an oral hearing. He/she should also be entitled to assistance in preparing for such a hearing and be permitted to be represented.

The following charts represent FLAC's summary of the complaints procedures. The first deals with the case of a complaint made against the service provider by a resident while the second chart illustrates the procedure in the case of a complaint by the service provider against a resident.

The House Rules booklet states that the Centre should "keep a record of complaints made by residents and staff which are unable to be resolved on an informal basis" (RIA 2007). However when asked about complaints in the direct provision centres, former Minister for Justice, Equality and Law Reform, Brian

FIGURE 4: Complaint against Service Provider by Resident



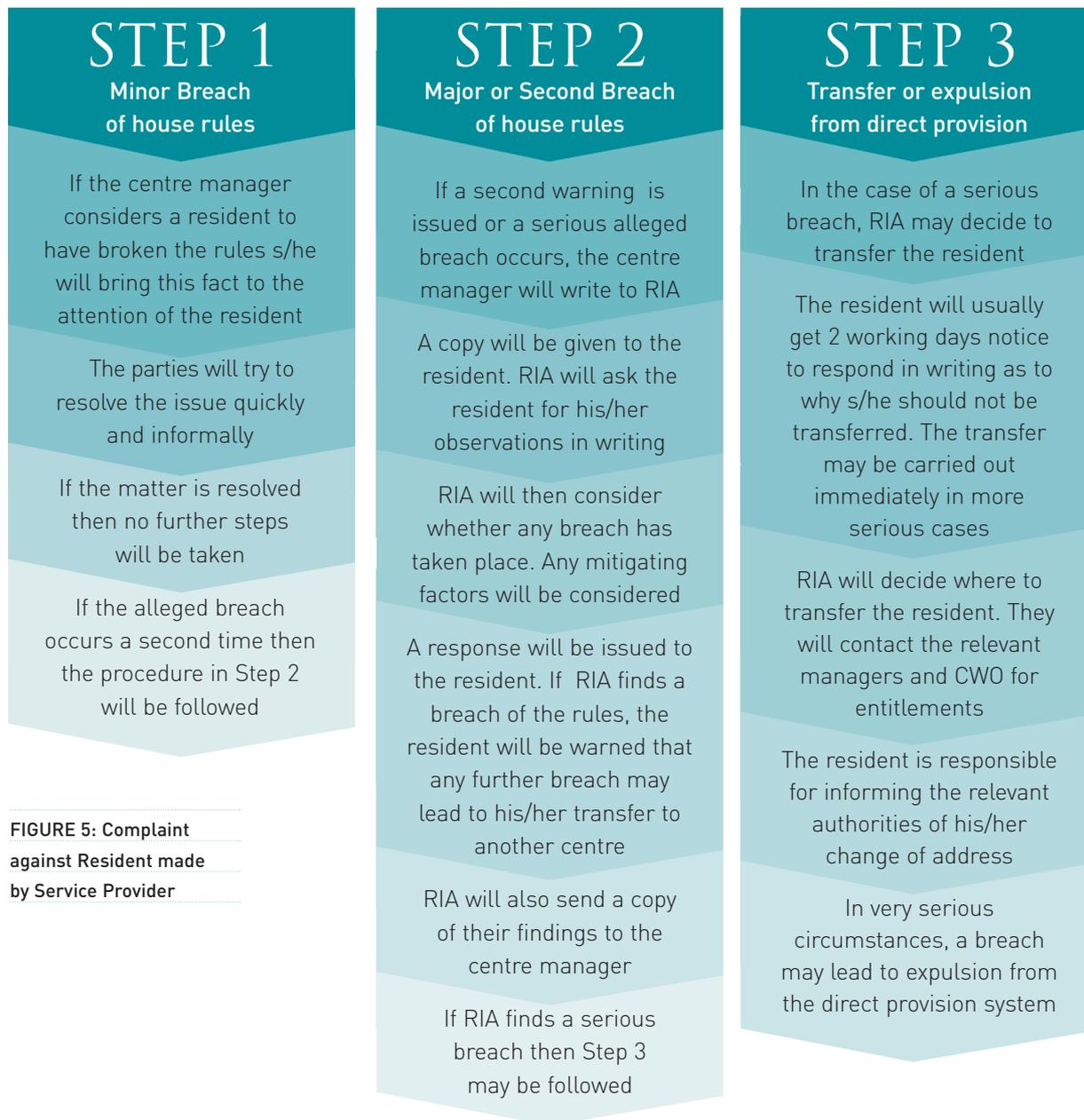


FIGURE 5: Complaint against Resident made by Service Provider

Lenihan TD, stated that “the RIA does not compile statistics on the number of complaints or appeals received or actions taken following on from such complaints or appeals” as it was felt that they would not be a proper reflection of the quantity or type of complaint due to the “informal

activity” which takes place to resolve issues at local level (Lenihan 29 April 2008). He continued by saying that the RIA took direct action when there was a rise in complaints in a particular centre or an increase in the type of complaint became apparent.



An impartial and independent complaints mechanism is necessary to ensure that residents have complete confidence in the direct provision system and will raise issues of concern with both management and the RIA. Despite the reassurance given in the House Rules booklet to the contrary, many residents believe that any attempt to bring grievances to the attention of those in charge may result in a negative decision on their asylum application or some other form of punitive measure such as transfer to another centre.

There is no automatic right of appeal as the decision of the RIA is binding on the parties involved. In the case of expulsion by a centre manager without prior approval from the RIA, the resident may make written representations to have the decision overturned.

If the resident does not feel that the matter has been resolved in a fair manner then he/she has the option to make a complaint to the Office of the Ombudsman. The Ombudsman can investigate complaints about the administrative actions of government departments or actors. If a grievance is found to be justified then steps may be taken to secure redress for the person who has complained.

The decision may also be open to challenge through judicial review proceedings through which "the courts examine the legality of all public actions including their own" (De Blacam 2009).

1.10.2 THE OMBUDSMAN'S GUIDE TO INTERNAL COMPLAINTS PROCEDURES

The Office of the Ombudsman of Ireland has published guidelines to assist public bodies to "establish efficient and credible internal complaints handling systems"¹⁶ which should be adapted to suit the body's own particular needs.

In the first place, the Ombudsman has set out the benefits to the public body of having such a system which would not only improve quality service but would also be more cost-effective as well as saving time and resources. Other advantages include avoiding negative publicity. The system might also indicate areas within the office or department which may need improvement. The benefit to consumers of the body is also highlighted as there would be an appropriate means of resolving issues and this would create a "greater sense of inclusiveness" and would promote a feeling of empowerment on the part of the individual. Perhaps the most important advantage to the consumer would be the "assurance that their complaint[s] are being taken seriously and that they are being treated properly, fairly and impartially".

The Ombudsman outlines the necessary conditions for establishing an internal complaints system without which the process will be a meaningless exercise. The importance of commitment on the part of management and

staff is emphasised. Training is essential and in order to work successfully the complaints system must have clear objectives.

The essential features of a good internal complaints system are:

- Accessibility
- Simplicity
- Speed
- Fairness and Independence
- Confidentiality and Impartiality
- Effectiveness
- Flexibility

In the context of the direct provision system, these guidelines could be very useful in establishing a complaints system which is both meaningful and accessible to hostel staff and residents alike. The existing complaints procedure lacks impartiality, independence and support. Residents do not have faith in a system where they have to make a complaint about a particular service to the people who are responsible for providing that service.

There is also a perception amongst residents that making a complaint may have a negative effect on the outcome of an asylum application despite assurances to the contrary. This negative view of the existing complaints mechanism could be addressed by the adoption of a more transparent, accessible and independent way of handling complaints. A proper appeals process is essential in order to maintain standards of fairness.

¹⁶ Available online at <http://ombudsman.gov.ie/en/Publications/Guidelines/InternalComplaints/> (last accessed on 12 October 2009).

1.11 CONCLUSION

The direct provision process as it now stands is unsatisfactory due to the unfair treatment of asylum seekers, as well as in terms of the lack of value for public money which it represents. The scheme was introduced on an administrative basis and continues to operate as such and the body responsible for the scheme has never been put on a statutory footing, as was originally foreseen. The Department of Justice, Equality and Law Reform has contracted out the responsibility of providing for asylum seekers to private operators who see it as a profit-making exercise rather than a complex and involved process that requires sensitivity, adequate resources and sufficient staff support. As already discussed, government bodies are required to provide a quality customer service to all consumers – in this case, direct provision residents.

Residents must have faith in the system in order for it to work efficiently and successfully. Currently, residents have reservations regarding the system due to the lack of an independent appeals process and the fact that they are left in a drawn-out process for a number of years while awaiting a decision on their status. The conditions in which they live may be tolerable for the short space of time initially contemplated by the government, but in practice people are spending prolonged periods in situations which are not beneficial to their overall well-being and development. Residents might also have more confidence in the system if inspections were carried out on a more regular basis and if they were consulted in this process in order to improve conditions in the centres.

2 DIRECT PROVISION AS PART OF THE SOCIAL WELFARE SCHEME

Since the publication in 2003 of FLAC's previous report on this subject, *Direct Discrimination?*, the situation for people living in direct provision has deteriorated as they are no longer eligible in the same way for most social welfare payments they might have received then. *Direct Discrimination?* outlined the small number of payments to which asylum seekers were entitled, provided they met qualifying criteria, including:

- One Parent Family Payment
- Child Benefit
- Disability Allowance
- Carer's Allowance
- Widow/Widower's (Non-contributory) Pension
- Blind Person's Pension
- Old Age (Non-contributory) Pension

Those living in direct provision no longer have automatic access to any of these payments since the introduction of the Habitual Residence Condition (HRC)¹⁷ on 1 May 2004. In the vast majority of cases people resident in direct provision have been found not to have satisfied the criteria for fulfilling this condition and do not receive these payments. Many residents find it difficult to survive on the meagre direct provision

allowance which has not been increased since it was introduced in 2000. This is despite the fact that the regular Supplementary Welfare Allowance has risen by 112 per cent between 2000 and 2009 from €96.50 to €204.30.

This chapter provides an overview of the payments which direct provision residents may still access as well as updating the position on the Habitual Residence Condition following a number of social welfare appeals. The government's social inclusion and anti-poverty policies are also examined in the context of direct provision residents.

¹⁷ See section 2.2 for a full explanation of the Habitual Residence Condition.

2.1 SOCIAL WELFARE ENTITLEMENTS AND DIRECT PROVISION RESIDENTS

2.1.1 SUPPLEMENTARY WELFARE ALLOWANCE

Supplementary Welfare Allowance is provided for in the Social Welfare (Consolidation) Act 2005¹⁸ and also by the Social Welfare (SWA) Regulations 1995 – 2006. *Social Welfare Booklet 54* contains guidance on the SWA Scheme (DSFA 2008a).

Supplementary Welfare Allowance is a scheme designed to provide a basic minimum income for people whose means are insufficient to meet their needs and those of their dependants. It is a means-tested payment and is paid in respect of the applicant with additional amounts for any qualified adult and/or qualified child(ren). A qualified adult is usually the spouse or partner of the claimant. A qualified child is a child under 18 years of age who usually lives with the claimant and is maintained by him/her. In 2009 the maximum weekly rate of Supplementary Welfare Allowance was €204.30 plus €135.60 for each qualified adult and €26 for each qualified child.

2.1.2 DIRECT PROVISION ALLOWANCE

A person living in direct provision cannot qualify for full-rate Supplementary Welfare Allowance as the Direct Provision Allowance is assessed as a fraction of the full allowance. According to Supplementary Welfare Allowance Circular No. 08/09, issued by the Supplementary Welfare Allowance section of the Department on 15 June 2009,

[a]sylum seekers are not regarded as habitually resident in the state. If the person is an asylum seeker, s/he should be referred to the Department of Justice's Reception and Integration Agency (RIA). Direct provision arrangements apply in these circumstances. (DSFA 2009b)

However the "Direct Provision Allowance" of €19.10 per week for adults and €9.60 per week for a child is referred to as a reduced rate of Supplementary Welfare Allowance or Direct Provision Allowance.

¹⁸ Chapter 9 of Part 3 and Chapter 3 of Part 10 of the Principal Act contain the provisions setting out the SWA scheme. Part 4 of Schedule 3 incorporates the Rules as to Calculation of Means.



2.1.3 THE VALUE OF THE DIRECT PROVISION ALLOWANCE

Direct provision is assessed at full rate SWA (€204.30) for the applicant, the qualified adult rate (€135.60) for his/her partner and the child dependant rate (€26) for each child.¹⁹ It is specified that the accommodation is full board and that breakfast, lunch and evening meal are provided. Therefore these figures are meant to encompass both food and lodging. In other words, the figure is based on a theoretical calculation that a direct provision resident is receiving the equivalent of full rate Supplementary Welfare Allowance through the provision of accommodation, board and a payment of €19.10.

When direct provision was introduced, the Supplementary Welfare Allowance (SWA) adult rate stood at £76 (€96.50) so the allowance of €19.10 was equivalent to slightly less than 20 per cent of the Supplementary Welfare Allowance payment. In 2009 the SWA rate was €204.30 meaning the €19.10 allowance equates to less than 10 per cent of today's Supplementary Welfare Allowance payment.

At the time of the introduction of this payment, the Community Welfare Officers who issued the payment thought it so unfair that they considered striking in protest (*Irish Times* 5 May 2000). Community Welfare Officers and administrators in the Eastern Health Board (EHB) branch,

¹⁹ See http://www.citizensinformation.ie/categories/moving-country/asylum-seekers-and-refugees/services-for-asylum-seekers-in-ireland/direct_provision The figures have not been updated for 2009, the same formula using 2009 rates of payment has been used to illustrate the point. Last accessed on 26 August 2009.

members of Impact trade union, voted for strike action as they felt they were “being asked to operate the SWA scheme in a discriminatory way” (*Irish Independent* 14 May 2000).

Two phases of an internal review by the Department of Social and Family Affairs of the Supplementary Welfare Allowance Scheme have been carried out to date, the first in 2004 and the second in 2006. The majority of the recommendations relating to asylum seekers contained in the 2004 review were repeated in the 2006 report. The situation of asylum seekers in relation to this scheme was assessed as it is currently administered “using the Supplementary Welfare Allowance system as the payment vehicle” (DSFA 2006b).

The Group recommended that the direct provision allowance should be administered directly by the Department of Justice, Equality and Law Reform, as direct provision residents were not found to be “part of the target group for the basic supplementary welfare allowance scheme” (DSFA 2006b). Furthermore the Group felt that it was “administratively inefficient for Community Welfare staff to administer any payments to asylum seekers in Direct Provision centres” as this represented “duplication”. The Group recommended that this function should be carried out by Department of Justice, Equality and Law Reform officials who they said already maintain a presence in the direct provision centres, as it would establish a “more effective service to this group, as they would now have all of their day-to-day needs met by a single

agency”. However, this recommendation does not reflect the reality where the staff members present in the accommodation centres are employees of private contractors rather than Department of Justice, Equality and Law Reform employees. In any event, no change has taken place.

While these arguments relate to the administration of the scheme, there is a concern that if the Direct Provision Allowance is not considered to be a part of the Supplementary Welfare Allowance scheme, this may affect the small number of other payments to which direct provision residents may be entitled, namely Exceptional Needs Payments, Urgent Needs Payments and Back to School Clothing and Footwear Allowance. In order to qualify for these payments, an applicant usually has to be in receipt of another social welfare or Health Service Executive payment, in this case the Direct Provision Allowance of €19.10. This was not addressed in the Working Group’s report.

The Irish Refugee Council and other groups, including FLAC, have consistently called for an increase of the Direct Provision Allowance to €65 per week for an adult and €38 per week for a child in line with inflation. However, the government has failed to increase the payment.

2.1.4 EXCEPTIONAL NEEDS PAYMENTS AND URGENT NEEDS PAYMENTS

Exceptional Needs Payments (ENP) and Urgent Needs Payments (UNP) may be paid under the Supplementary Welfare Allowance scheme at the discretion of the Community Welfare Officer involved. They are not subject to the Habitual Residence Condition and are in addition to the €19.10.

An Exceptional Needs Payment may be granted to “help meet essential, once-off, exceptional expenditure which a person could not reasonably be expected to meet out of their weekly income” (DSFA 2008d).²⁰ These are also available on a discretionary basis to anyone in receipt of Supplementary Welfare Allowance.

The rate of the Exceptional Needs Payment is not a set amount as it will depend on the type of assistance required by the applicant. In practice, direct provision residents receive two payments per year to cover clothing expenses: €150 per annum for a child and €300 per annum for an adult.

An Urgent Needs Payment may be made to purchase an item which is of vital necessity

to the applicant including clothing, food or household goods. The rate will depend on the type of assistance needed.

The Working Group on the Supplementary Welfare Allowance Scheme, in its 2004 report, states that “Exceptional Needs Payments support the overall policy of the National Anti-Poverty Strategy in addressing the needs of groups at high risk of poverty with specific needs i.e.... those seeking asylum...” (DSFA 2004). The Group also noted that it had received submissions outlining the unfairness of a situation whereby “two seemingly similar cases are treated differently” due to the discretionary nature of the payment. In both its 2004 and 2006 reports, the Group noted that representatives had called for the development of guidelines on meeting the recurring needs of asylum seekers through Exceptional and Urgent Needs Payments (DSFA 2004; 2006b).

The fact that these payments are recognised as being in line with government anti-poverty policy by helping to alleviate in some way the poverty experienced by asylum seekers should indicate that such assistance is necessary. There should also be consistency in granting such payments and any discretion exercised should take full account of the applicant’s limited means.

²⁰ See <http://www.welfare.ie/EN/Schemes/SupplementaryWelfareAllowance/Pages/ExceptionalNeedsPayments.aspx> (last accessed on 12 October 2009).

2.1.5 BACK TO SCHOOL CLOTHING AND FOOTWEAR ALLOWANCE

The function of the Back to School Clothing and Footwear Allowance is to provide financial assistance to families in receipt of social welfare or Health Service Executive payments who have children attending school. The scheme begins on 1 June and ends on 30 September each year.²¹ The Back to School Allowance is not subject to the Habitual Residence Condition.

There are two different rates of payment and they are determined by the age of the school-going child. The rates for 2009 are:

- €200 per child aged 2 – 11 years on or before 1 October.
- €305 per child aged 12 – 22 years on or before 1 October.

The payment is made at the discretion of the local CWO but there are a number of qualifying criteria which must be met:

- a) The child or children must be aged between 2 and 22 years old before 1 October in the year in which the application is made and must be in full-time education (this includes pre-school, primary and post-primary education);
- b) The applicant must be in receipt of a qualified child allowance in respect of the child or

children (including the child rate of Direct Provision Allowance);

- c) The applicant must be in receipt of certain qualifying payments;
- d) The income of the family must be within certain set limits.

A direct provision resident who is the parent or guardian of a school-going child or children will meet this criteria.

2.1.6 CHILD BENEFIT

Child Benefit is a monthly state payment made to a parent, usually the child or children's mother. This is different from the qualified child payment which parents in direct provision receive. Most children living in Ireland receive Child Benefit. The child must be:

- Under 16; or
- 16,17 or 18 and in full-time education

In addition, in order to receive Child Benefit, the child's parent is now subject to the Habitual Residence Condition. Direct provision residents used to automatically receive this payment but those who applied after 1 May 2004 have to satisfy the Habitual Residence Condition in order to be eligible for payment.

²¹ Further details can be found in *SW 75 Information Leaflet* available online at <http://www.welfare.ie/publications/sw75.html> (last accessed 28 November 2009).

In a presentation to the Joint Oireachtas Committee on Social and Family Affairs on 6 February 2008, a Principal Officer of the Department of Social and Family Affairs discussed the meaning of residence in relation to Child Benefit. He stated that “there has always been a residence condition for child benefit” but explained that this applied to a ‘qualified child’ who “must be ordinarily resident in the State” and the ‘qualified adult’ claiming the benefit was defined as “a person with whom a qualified child normally resides” (DSFA 2008g). The representative went on to say that the application of the HRC to the Child Benefit payment is now more “explicit”, as “ordinary” has now become “habitual” residence.²² FLAC also made a presentation to the Committee, following an invitation to discuss FLAC’s concerns about the HRC with the committee members.

Government policies to eliminate child poverty highlight the significance of Child Benefit in general as it is described as an “important means of reducing child poverty and supporting the welfare of children, given its universal coverage...” (DOHC 2000a). The government has also committed to eliminating child poverty through the provision of the “financial supports necessary” (DOHC 2000a).

The UN Convention on the Rights of the Child²³ stipulates in Article 3 that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative

bodies, the best interests of the child shall be a primary consideration”. Article 2 of the same Convention prohibits “discrimination of any kind” against any child within the jurisdiction of the State Party including discrimination based on their parents’ status. Article 26 provides for recognition of every child to “benefit from social security, including social insurance”.

Under the European Convention on Human Rights (ECHR), incorporated into Irish law by the European Convention on Human Rights Act 2003, Ireland is obliged to protect and promote the right to privacy and family life under Article 8 of the Convention and ensure freedom from discrimination under Article 14. However in relation to its application to Child Benefit, the HRC has had implications for both these fundamental rights. The European Court of Human Rights discussed the applicability of both articles in a case entitled *Niedzwiecki v Germany*.²⁴

By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision... It follows that Article 14 – taken together with Article 8 – is applicable (§ 31).

The measures taken to restrict access to this benefit must be reasonable and not infringe on either right.

²² Child Benefit is a family payment under EU law and as such an EU worker is entitled to Child Benefit for a non-resident child.

²³ Ireland signed the Convention on 30 September 1990 and ratified it without reservation on 21 September 1992.

²⁴ Case no. 58453/00 (2006) 42 E.H.R.R. 33.

2.1.7 ONE PARENT FAMILY PAYMENT

One Parent Family Payment is paid to lone parents who are raising a child or children without the support of a partner. To qualify for a One-Parent Family Payment the claimant must:

- Be the parent, step-parent, adoptive parent or legal guardian of a qualified child;
- Have the main “care and charge” of at least one qualified child who is under 18 years of age or aged 18-22 and in full-time education and living with him/her. One-Parent Family Payment is not payable if a couple has joint equal custody of a child or children;
- Have an income of €425 or less per week (as of 2009);
- Satisfy a means test;
- Be habitually resident;
- Not be cohabiting (that is, living with someone as husband and wife).

If the claimant is separated or divorced he/she must:

- Have been separated for at least three months;
- Have made efforts to get maintenance from his/her spouse;
- Be inadequately maintained by his/her spouse.

If the claimant is unmarried he/she will:

- Be required to seek maintenance from the other parent.

For the purposes of means-tested payments, direct provision is assessed as full rate SWA minus €19.10/€9.60.

In order to qualify for this payment the Department does not accept that a parent who is geographically separated from his/her partner or spouse is separated for the purposes of qualifying for this payment.

2.1.8 DOMICILIARY CARE ALLOWANCE

Domiciliary Care Allowance is a monthly payment made to the carer of a severely disabled child who resides with the carer who is usually a parent. Direct provision residents who met the qualifying criteria were in receipt of this payment as it was not subject to the HRC.

Since the enactment of the Social Welfare and Pensions Act 2008 which amended the Social Welfare (Consolidation Act) 2005, any applicant must now satisfy the HRC.

2.1.9 CARER'S ALLOWANCE

Carer's Allowance is a payment made to people living in Ireland who are looking after someone who is in need of support because of age, physical or learning disability or illness, including mental illness.

There are a number of criteria to satisfy in order to qualify for Carer's Allowance:

- You have to live with or be able to provide full-time care for a person who requires such care;
- You have to be resident in the State;
- You have to be at least 18 years old; and
- You must not be working or taking training or education classes for more than 15 hours a week. If you are involved in training or education alternative and adequate cover must be arranged.

In addition the person being cared for must be

- Over 16 years of age and in need of full-time care and attention; or
- Under 16 years of age and in receipt of Domiciliary Care Allowance.

A person will be considered as requiring full-time care where

- He or she is so incapacitated as to require continuous supervision in order to avoid danger to him or herself or continual supervision and frequent assistance

throughout the day in connection with normal bodily functions; and

- He or she is so incapacitated as to be likely to require full-time care and attention for a period of at least twelve months.

The Carer's Allowance is means-tested. For the purposes of means-tested payments direct provision is assessed as full rate SWA minus €19.10/€9.60. It is also subject to the Habitual Residence Condition.

2.1.10 DISABILITY ALLOWANCE

Disability Allowance is paid on a weekly basis to people who have a disability between the ages of 16 and 65.

In order to qualify for Disability Allowance the claimant must:

- Have an injury, disease or physical or mental disability that has continued or may be expected to continue for at least one year;
- As a result of this disability be substantially restricted in undertaking work that would otherwise be suitable for a person of the claimant's age, experience and qualifications;
- Be aged between 16 and 65,

Disability Allowance is subject to a means test and the Habitual Residence Condition. The claimant may also be obliged to undergo a medical examination in order to qualify.

2.1.11 GUARDIAN'S PAYMENT (NON-CONTRIBUTORY)

Guardian's Payment may be made in circumstances where a child is in the care of a guardian where:

- both his/her parents are deceased; or
- one parent has died and the other has abandoned or failed to provide for the child; or
- both parents have abandoned or failed to provide for the child.

The guardian does not have to be a legally appointed guardian. The payment is subject to a means test of the child's means. The child may receive the payment up until the age of 18 or 22 if in full-time education.

This payment is also subject to the Habitual Residence Condition.

2.1.12 STATE PENSION (NON-CONTRIBUTORY)

In order to qualify for the State Pension (Non-Contributory) a claimant must

- Be aged 66 or over;
- Not qualify for a State Pension (Contributory);
- Pass a means test;
- Satisfy the Habitual Residence Condition.

Less than one per cent of direct provision residents fall into the older person category in order to meet the age requirement for the State pension.



2.2 THE HABITUAL RESIDENCE CONDITION AND CLARIFICATION OF THE LAW

Since its introduction on 1 May 2004, the Habitual Residence Condition (HRC) has made a difference to the lives of direct provision residents. It means asylum seekers and people seeking humanitarian leave to remain are not automatically entitled to certain social welfare payments as they were before, except for the reduced rate of Supplementary Welfare Allowance of €19.10.

2.2.1 RATIONALE FOR THE INTRODUCTION OF THE HRC

The HRC was initially introduced by the government in the context of EU enlargement and the accession of ten new member states²⁵ to the European Union in May 2004. The Government feared an influx of “welfare tourists” from the ten accession countries, so a decision was taken to limit access to all means-tested allowances and Child Benefit by anyone, irrespective of nationality, who could not demonstrate two years’ habitual residence in Ireland or the Common Travel Area. Cousins (2006) explains that “[t]he greatly increased numbers of both asylum seekers and migrant workers had raised concerns among certain policy makers about this issue”. According to ministerial responses, the reason for introducing the HRC seems to have been prompted by the impending EU enlargement. Yet in a *Report*

on a Review of Asylum and Immigration published by the Department of Justice, Equality and Law Reform in September 2006, “changes in the eligibility conditions for access to social welfare payments” was cited as a factor in reducing the number of asylum seekers in Ireland (DJELR 2006a). It is unclear whether this is a by-product of the legislative changes or a clear intention.

The concept of “welfare shopping” is one which continues to cause concern to European governments which have taken measures to prevent it. Referring to a report by the British Home Office in 2002 entitled *Understanding the decision-making of asylum seekers*, an Inter-Agency Partnership of NGOs working with asylum seekers in Britain submitted evidence to the Parliamentary Joint Committee on Human Rights, stating that

Despite the fact that there is little evidence to suggest that the support provisions of a host country impact on the decisions of asylum seekers, asylum support provision is increasingly wielded by government as a tool to both discourage people from seeking asylum in the first instance, and to coerce voluntary return. (Martin 2006)

Up until the HRC was introduced, asylum seekers were entitled to a small number of basic payments including Child Benefit, One Parent Family Payment, Disability Allowance, Carer’s Allowance and the Old Age Pension (FLAC 2003). The effect of the HRC has been to impose a further condition to be satisfied before a person can receive any of these payments.

²⁵ The ten countries who acceded to the European Union on 1 May 2004 are the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

2.2.2 THE HRC AND IRISH LEGISLATION

From 1 May 2004 the HRC was established as an additional qualifying condition in order to be eligible for certain social assistance schemes which are means-tested. It was also applied to the formerly universal Child Benefit payment. The Social Welfare Acts 1993 – 2004 were changed to reflect this.²⁶ An explanatory note specified that the HRC would apply to the following payments:

- Unemployment Assistance
- Old Age (Non-Contributory) and Blind Pensions
- Widow(er)'s and Orphan's (Non-Contributory) Pensions
- One-Parent Family Payment
- Carer's Allowance
- Disability Allowance
- Supplementary Welfare Allowance (other than once off exceptional needs and urgent needs payments)
- Child Benefit.

At that time the rule was that a person would be considered to be habitually resident if he/she had lived in Ireland or another part of the Common Travel area for a "substantial continuous period". If this was less than two years, then it was presumed that the applicant was not habitually resident and the onus would be placed on him/her to prove the contrary.

This presumption was subsequently enacted into domestic law in s.246 of the Social Welfare Consolidation Act 2005. However a definition of what constituted habitual residence was still not provided:

It shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless he has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date.

²⁶ S.17, Schedule 1 of the Social Welfare (Miscellaneous Provisions) Act 2004 inserted a number of provisions into the Social Welfare Acts 1993 – 2004 which were in force at the time and this was effected through a commencement order, the Social Welfare (Miscellaneous Provisions) Act 2004 (Section 17)(Commencement) Order 2004 (SI 184/2004).

A definition of the HRC was later set out in s. 30 of the Social Welfare and Pensions Act 2007 which inserted an additional subsection into s. 246 of the Social Welfare Consolidation Act 2005:

(4) Notwithstanding the presumption in subsection (1), a deciding officer of the Executive, when determining whether a person is habitually resident in the State, shall take into consideration all the circumstances of the case including, in particular, the following:

- (a) the length and continuity of residence in the State or in any other particular country;**
- (b) the length and purpose of any absence from the State;**
- (c) the nature and pattern of the person's employment;**
- (d) the person's main centre of interest; and**
- (e) the future intentions of the person concerned as they appear from all the circumstances.**

This remains the relevant law in November 2009.

2.2.3 THE HABITUAL RESIDENCE CONDITION IN THE EUROPEAN CONTEXT

The Department of Social and Family Affairs (in its freedom of information section)²⁷ refers to a number of decisions of the European Court of Justice (ECJ) to outline what it means by the term "habitual residence". These cases include *Di Paolo* [C-76/76][1977] E.C.R. 315, *Knoch* [C-102/91] [1992] E.C.R. I-4341, *Lair* [C-39/86][1988] E.C.R. 3161, *Swaddling* [C-90/97] [1999] E.C.R. I-1075 and *Collins*. [C-138/02] [2004] E.C.R. I-2703.

The five criteria laid down in the 2007 Act were taken from the decision of the European Court of Justice in the case of *Swaddling v. Adjudication Officer*. Mr Swaddling was an EU citizen who lived and worked in France before returning to the UK, his member state of origin, where he applied for a non-contributory social welfare payment. He was initially refused as the UK authorities stated that he did not satisfy the habitual residence test on his return to the country. The Court ruled that he could not be refused simply on the basis that the length of time spent in the country was too short; there were other factors which had to be considered which are set out below.

²⁷ Available at <http://www.welfare.ie/foi/habres.html> (last viewed 28 November 2009).

2.2.4 CONSIDERATION OF THE SWADDLING FACTORS IN RELATION TO DIRECT PROVISION RESIDENTS

a) Length and continuity of residence in the State or in any other particular country

Many asylum seekers or people seeking humanitarian leave to remain or subsidiary protection have been living in the State for a number of years. According to RIA statistics at the end of October 2009, 32 per cent of people living in direct provision have been there for more than three years and a further 19 per cent have lived there for more than two years.

b) The length and purpose of any absence from the State

Asylum seekers are not permitted to leave or attempt to leave the State without the consent of the Minister while their application is under consideration.²⁸

c) The nature and pattern of the person's employment

When assessing this criterion, decision makers will usually look at a person's employment record and consider the type and length of any job undertaken as well as any periods of unemployment. Asylum seekers are not permitted to work while their

application is being determined,²⁹ therefore the nature and pattern of employment is not a relevant consideration when determining their habitual residence.

d) Main centre of interest

A person's main centre of interest is usually the place where he/she has made a life for himself/herself and the place which he/she considers home. If a person has been living in Ireland for a number of years while awaiting a determination on his/her status, then often his/her centre of interest will move from the country of origin to Ireland. The longer he/she stays in Ireland, then the more likely it is that he/she may lose contact with his/her home country. In many cases the person has fled due to a conflict in his/her country of origin. Indeed it is common that people lose contact with any family members who were left behind. The decline in the number of new asylum applications and the increase in the number of direct provision residents indicates that the asylum process takes some time. Naturally enough persons make connections with the place where they live whether through activities or relationships with other people and through their children's involvement in school, sports, etc. These connections should be taken into consideration when assessing this criterion.

²⁸ In accordance with s. 3(4)(a) of the Refugee Act 1996 as amended.

²⁹ As provided for in s. 3(4)(b) of the Refugee Act 1996.

e) Future intentions of the applicant

In order to assess habitual residence, the decision-maker has to consider whether or not the applicant intends to make Ireland his/her home and what he/she intends to do here. The fact that a person has claimed asylum in the State is a strong indication of his/her future intentions and demonstrates his/her wish to live in Ireland. The Department argues that the person does not have a choice in whether he/she stays as the decision on whether he/she remains in the State is left to the authorities, but this in effect then means that asylum seekers are penalised because they do not have control over their own future.

No one single factor of these five is a determining factor but those who are in the asylum or leave to remain process may qualify on the basis of the relevant criteria, in particular the centre of interest, future intentions and in certain cases the length and continuity of residence in the State.

2.2.5 THE CURRENT ADMINISTRATION OF THE HRC AS IT RELATES TO THE POSITION OF PEOPLE LIVING IN DIRECT PROVISION

Former Minister for Social and Family Affairs Martin Cullen TD stated the following in relation to the position of the Department on assessing each HRC claim:

Each case received for a determination on the Habitual Residence Condition is dealt with in its own right and a decision is based on application of the guidelines to the particular individual circumstances of each case.

(Cullen 30 January 2008)³⁰

However, this is not always the case, as at the same time as this statement was made, there was in place a blanket policy to refuse social welfare payments to people living in direct provision. This position was made clear in the Internal Review of the HRC completed by the Department of Social and Family Affairs in 2006 and was incorporated into the guidelines issued by the Department to its Deciding Officers in June 2008. In the 2006 Review, the Department stated in relation to the position of persons awaiting a decision on their residency status (including people living in direct provision) that

³⁰ *Dáil Debates*, Vol. 645 No. 1.

[a]s regards determining cases where the residency status of the applicant has not been decided, Deciding Officers consider that the HRC test is not satisfied where the applicant has not been granted status to remain in the State. If and when status has been granted the Deciding Officer revises the decision and the person is deemed to be habitually resident as and from the date status is granted.

(DSFA 2007)

In that review, it was recommended that the guidelines governing the application of the HRC be extended to certain groups of people including asylum seekers (DSFA 2007).

2.2.6 UPDATED HRC GUIDELINES (JUNE 2008)

In a document issued by the Department on 9 June 2008 entitled “*Guidelines for Deciding Officers on the Determination of Habitual Residence*”, several categories of people were unequivocally excluded as incapable of satisfying the HRC, including asylum seekers or persons living in direct provision. This guidance contradicts the legislation which does not contain any specific provision to exclude asylum seekers or those who are awaiting a final determination of their residency status. The guidelines state

[a]n asylum seeker is a person who has applied to the Minister for Justice, Equality and Law Reform for recognition as a refugee and whose application has not yet been determined. S/he is allowed to stay in Ireland subject to certain conditions being met while his/her application is being examined. Such persons, while awaiting decisions on their applications or who have appealed a refusal of refugee status, cannot satisfy either the habitual residence condition or the normal residence condition for any DSFA payments.

(DSFA 2008b)

The HRC guidelines set out the five *Swaddling* criteria and state that “in all cases it is imperative to base any such decision on

the factors listed at (a) to (e) above as habitual residence cannot be determined by reference to a period of time alone” (DSFA 2008b). As outlined above the five criteria for deciding on a person’s habitual residence are explicitly contained in s. 246 of the Social Welfare Consolidation Act 2005, as amended by s. 30 of the Social Welfare and Pensions Act 2007. In this instance it would seem that the new guidelines are outside the powers of the Department of Social and Family Affairs as there is no statutory basis for refusing payments outright to a person simply because of their residency status.

Mel Cousins describes the reliance by staff on administrative guidelines and circulars issued by the Department of Social and Family Affairs, stating that

the Department issues a very large number of guidelines to its staff, most of which are available on the departmental website. These largely explain the Acts and Regulations in non-legalistic terms. However, in a number of cases, issues which have not been addressed in legislation are provided for in guidelines.

(Cousins 2002)

In relation to the use of guidelines and circulars, Hogan and Gwynn Morgan in *Administrative Law in Ireland* conclude that “principle and authority seem to argue that administrative rules are not law, and thus, cannot change that procedural or substantive law” (3rd edn, 1998).

2.2.7 DECISIONS OF THE CHIEF APPEALS OFFICER

These issues were examined by the Chief Appeals Officer of the Social Welfare Appeals Office in a series of cases which came before him in 2008 and were decided in 2009. In four separate cases the appellant, who was a person seeking asylum or another form of protection, was initially refused Child Benefit on the basis that she could not satisfy the HRC while still within the asylum process. In each of these cases the Appeals Officer in question held that the appellant was habitually resident and therefore qualified for the payment. However, the DSFA refused to issue payment and instead sought a review by the Chief Appeals Officer under s. 318 of the Social Welfare (Consolidation) Act 2005

The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

In three of these cases, the client was originally represented by another organisation which then referred the case to FLAC when the Appeals Officer’s decision was not implemented. FLAC represented the fourth client from the outset of her appeal.

In these cases there was no dispute about the fact that the Department could seek a review, but rather that payment could be withheld in the interim. On this basis a judicial review was initiated in relation to the earliest decision but this was later settled out of court as the Chief Appeals Officer completed his review in this particular case in June 2009, just days before the court hearing.

The review process took more than a year and a number of submissions outlining the current position of the HRC were made by both sides. In all four cases the Chief Appeals Officer upheld the original decision of the Appeals Officer and found the appellant habitually resident. Each case was decided on its own individual facts and this point was made clear.

In all four cases, the Department's reasoning for seeking a review was due to the opinion that the Appeals Officer "had not placed proper weighting on previous court rulings relating to the residency status of persons in the asylum process, namely, by Chief Justice Murray in the case of *Goncescu and Others v Minister for Justice, Equality and Law Reform*."³¹

The *Goncescu* case concerned appellants who had exhausted the asylum process and had

deportation orders outstanding against them. They were from countries due to accede to the EU in 2004 and sought to avail of certain establishment agreements between Ireland and their home countries in order to regularise their status in the State. To do so without having to first return to their home countries, they had to show that they were legally resident in Ireland. The court held that having reached the end of the asylum/ leave to remain process they no longer had a temporary right to remain in Ireland. The Chief Justice, who delivered the judgment in the case, discussed a definition of residence but not in the context of social welfare and qualifying conditions for payments. Furthermore, he did not discuss the term 'habitual residence'.

In addition, the Chief Justice did in fact recognise that a person in the asylum process has a legal entitlement to be present in Ireland as he/she is issued with a 'temporary residence certificate' pursuant to s. 9(3) of the Refugee Act 1996. Despite the residence certificate being temporary in nature, it still confers a legal right on the holder to remain in the state pending a decision on their asylum application. This right is in practice carried forward to persons seeking leave to remain/subsidiary protection.

³¹ [2003] 3 I.R. 442.

The Chief Appeals Officer in rejecting the argument put forth by the Department of Social and Family Affairs that the *Goncescu* decision was an authority on habitual residence, found that it was not relevant in the circumstances before him because

[t]he facts of the matter are that the Goncescu case did not have a social welfare relevance and that the judgment pre-dated the introduction of the habitual residence legislation

The Chief Appeals Officer also made it very clear that, in his opinion, the Oireachtas did not seek to exclude any particular group of people when enacting the relevant legislation in 2005 and subsequently amending it in 2007. As he said,

I do not believe there was any intention in framing the legislation to exclude a particular category (such as asylum/ protection seekers) from access to social welfare benefits. If there was any such intention, the relevant legislative provisions would have reflected that intention and removed any doubt on the issue.

In three of the four cases, the Department of Social and Family Affairs also contended that the Appeals Officer in each case was wrong to have relied on a previous outcome of a social welfare appeal which it believes could not set a precedent. The Chief Appeals Officer examined whether earlier decisions of Appeals Officers could be referred to in other cases where there are similar circumstances and stated:

... I do not believe that it is appropriate for Appeals Officers to refer to details of previous appeal cases in their oral hearing reports or in their formal written decisions. Having said that, however, I acknowledge the point made by FLAC that there is value in issues of general principle and approach being identified in previous appeal determinations which may provide guidance and assistance to appellants in the context of their own appeals.

Therefore, previous decisions relating to general principles may be taken into account by an Appeals Officer in situations where to do otherwise would result in inconsistencies in decisions.

2.2.8 CONCLUSION

The practical outcome of the Chief Appeals Officer's reviews outlined above mean that an asylum seeker or person seeking another form of protection may not be automatically excluded from satisfying the HRC. Instead the criteria set out in the Social Welfare and Pensions Act 2007 must be applied in the same way to this person as they would be in any other case where the HRC applies.

2.3 GOVERNMENT ANTI-POVERTY AND SOCIAL INCLUSION POLICY

Since 1997 the government has adopted the following definition of poverty which underpins all of its anti-poverty and social inclusion policies:

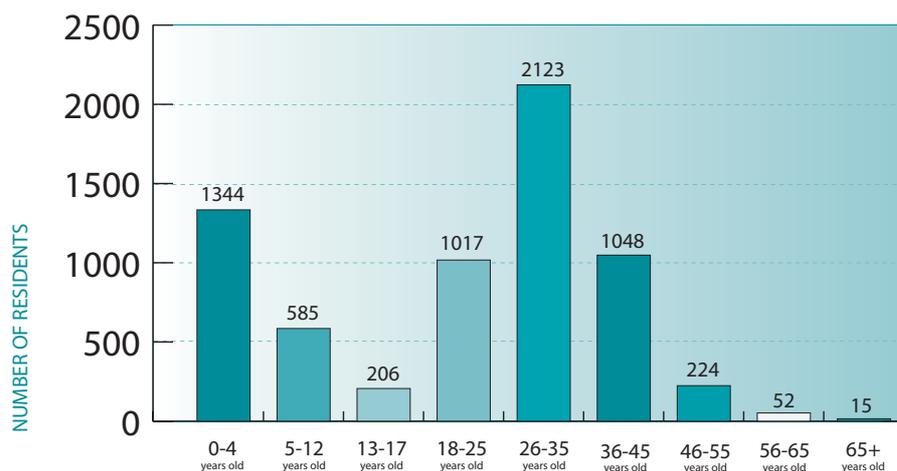
People are living in poverty if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living which is regarded as acceptable by Irish society generally. As a result of inadequate income and resources people may be excluded and marginalised from participating in activities which are considered the norm for other people in society.³²

According to this explanation of what it means to be poor, it can clearly be seen that those in direct provision are living in poverty.

Two of the government's policy documents outlining anti-poverty and social inclusion strategies – the *National Action Plan for Social Inclusion 2007 – 2016* (OSI 2007) and *Towards 2016* (DOT 2006) – have adopted the “lifecycle approach” which places the individual at the centre of policy development and delivery.

³² Definition taken from the Office of Social Inclusion website, available online at <http://www.socialinclusion.ie/poverty.html> [accessed 26 August 2009].

FIGURE 6: Direct provision residents by lifecycle stage



The key lifecycle groups include

- Children
- People of Working Age
- Older People
- People with Disabilities
- Communities.

To put this in the context of people living in direct provision, the above chart illustrates the age profile of residents in direct provision.

These figures are taken from Reception and Integration Agency statistics for the end of October 2009. According to these statistics, the total number of residents at the end of October 2009 was 6640.³³ This means that in terms of the 'lifecycle approach' used, 2135 or 32 per cent of residents are children under 18 and 4464 or 67 per cent of residents are of working age. Less than 1 per cent of direct provision residents fall into the older person or retirement-age category.

It is worth looking at the breakdown by lifecycle of the population as a whole. The following statistics are taken from figures supplied in the 2006 census and reported in the *National Report for Ireland on Strategies for Social Protection and Social Inclusion 2008 – 2010*:

Approximately 1.036m (24 % of the population) were under 18, with some 2.736m (65%) in the working age bracket 18 to 64 and a further 0.468m (11%) aged 65 or over.

(DSFA 2006a)

There are no statistics available showing the number of people with a disability.

As children and people of working age represent the majority of people in direct provision, the following sections focus on these two life stages.

³³ The number recorded on the live register is 6640. These statistics are available at [http://www.ria.gov.ie/filestore/publications/RIAOct\[A4\]2009.pdf](http://www.ria.gov.ie/filestore/publications/RIAOct[A4]2009.pdf) No date of birth is known for 26 individuals which equates to less than 1 per cent.

2.3.1 CHILDREN, POVERTY AND SOCIAL EXCLUSION

In respect of children, one of the main goals stated in both the *NAPinclusion* (OSI 2007) and *Towards 2016* (DOT 2006) is that

[e]very child should grow up in a family with access to sufficient resources, supports and services, to nurture and care for the child, and foster the child's development and full and equal participation in society.

Emphasis is placed on supporting the family. Another priority goal which is highlighted is that

Every child should have access to world-class health, personal social services and suitable accommodation.

Since the introduction of the direct provision system, the government has repeatedly stated that it meets its obligations to asylum-seeking children by providing accommodation and food as well as free education at primary and secondary level.

In a response to a Parliamentary Question on 26 February 2002 on the "existing treatment of asylum seeking children, in the context of anti-poverty policy", the then Minister for Social, Community and Family Affairs, Dermot Ahern TD, responded that asylum seeking children were provided for through the system of direct

provision as well as being entitled to Child Benefit. He emphasised the importance of Child Benefit and noted the substantial increases made in the payment. He stated that the

improvements in child income support demonstrate the absolute commitment of the Government to tackling the issue of child poverty, wherever it occurs.

The Minister described the "new targets and policy measures, including those in relation to children and ethnic minority groups" contained in the National Anti-Poverty Strategy as representing "a more ambitious approach to the reduction of poverty in Ireland" (Ahern 26 February 2002).

However, Child Benefit is no longer routinely available to children living in direct provision. This once universal payment, which was apparently helping the State to fight child poverty, is now withheld from most parents of one of the most vulnerable groups of children in Irish society. These children are not included when compiling statistics for the EU Survey on Income and Living Conditions (EU-SILC) on child poverty, as they are not considered to be living in a 'household'. In recent statistics on child poverty, the Combat Poverty Agency noted that although these children (along with homeless children, Traveller children and children leaving institutional care) are living in temporary accommodation, they are also at "high risk of poverty".³⁴

³⁴ See <http://www.cpa.ie/povertyinireland/childpoverty.htm> (last accessed on 12 October 2009).

Ireland also has obligations under the UN Convention on the Rights of the Child which emphasise the “best interests of the child” and prohibit discrimination on any grounds. These requirements extend to all children regardless of their residency status. These obligations are reflected in the National Children’s Strategy (DOHC 2000a).³⁵

When asked by FLAC about the effect of living in direct provision without access to social welfare entitlements such as Child Benefit, one resident said

We are psychologically affected. We’re stagnant and can’t move. It also means I can’t provide for my children.

Another resident summed up the children’s feelings of social exclusion:

It makes life difficult for my children, like in the summer I would like to take them to the swimming pool and also buy them small things but I cannot afford to do that. The children are left in [the accommodation centre] from January to December without interacting; it’s not that they do not want to interact but because they cannot afford to. Sometimes my children will ask for something and it is so sad for me that I cannot afford to give it to them.

This statement is at odds with one of the main aims of the National Children’s Strategy which aims to eliminate social exclusion and promote social inclusion. In this strategy, the government recognises the detrimental effect social exclusion can have on a child:

Because of social exclusion, some children cannot develop the range and quality of relationships and networks that most children enjoy and which are essential to a good quality of childhood.

(DOHC 2000a: 47)

³⁵ See online at http://www.dohc.ie/publications/national_childrens_strategy.html (last accessed on 12 October 2009).

2.3.2 PEOPLE OF WORKING AGE

People of working age constitute the majority of people living in direct provision. The government has recognised in one of its high-level goals that

[e]mployment has proven to be a major factor for people exiting poverty and also influences quality of life and social well-being. Therefore, while social welfare income support remains crucial and must be adequate to meet needs, passive income support alone is not sufficient if poverty and social exclusion are to be comprehensively addressed.

(OSI 2007)

Asylum seekers are prohibited from working and, for the most part, are unable to access a wide range of social welfare supports. Therefore despite being one of the most vulnerable groups in society, they are completely excluded from this high-level goal. Ireland and Denmark are the only EU States which do not allow asylum-seekers any access to the labour market after a certain period of time if a final decision has not been reached on their applications for protection.

Although unemployment levels had decreased in the years of the 'Celtic Tiger' the government recognised that "there remains a group of people in 'consistent poverty' with the 'at risk of poverty' indicator remaining high for certain vulnerable

groups" (OSI 2008). Direct provision residents are not specifically mentioned in that report. Furthermore, the government acknowledges that the decline in employment opportunities and the rise in redundancies "will lead to a sustained increase in the numbers of unemployed" but it predicts that the extent of the 'slowdown' will be "somewhat offset by a substantial reduction in the number of immigrants" (*ibid.*). The 'immigrants' referred to do not include direct provision residents who are not 'economically active' and therefore are not included in the unemployment statistics.

In the *National Report for Ireland on Strategies for Social Protection and Social Inclusion 2006-2008*, submitted to the European Commission, the social protection system is described as "the cornerstone of the Government's strategy for combating poverty and strengthening social cohesion" (DSFA 2006a: 4).³⁶ In the follow-up report for 2008- 2010, the government continues to recognise the importance of the social protection system but emphasises that any progress will take place in the context of the economic downturn:

... if economic growth falls below the projected levels, it will be necessary to re-prioritise or make more gradual progress in order to adhere to these key principles and in particular to secure a sustainable fiscal performance, while emphasising the need to protect the most vulnerable people. (OSI 2008: 6)³⁷

³⁶ *National Report for Ireland on Strategies for Social Protection and Social Inclusion 2006-2008*, available online at http://www.socialinclusion.ie/pub_nsspi.html (last accessed 28 November 2009).

*The National Action Plan against Racism 2005-2008*³⁸ also recognised the important role that work plays as Objective 2 of the Plan and “is primarily concerned with economic inclusion and equality of opportunity, including a focus on employment, the workplace and combating poverty” (DJELR 2005b: 31). Expected outcomes of this objective were also outlined and included:

- Inclusion through employment rights, responsibilities and workplace policy;
- Inclusion through national plans and programmes that tackle poverty and social exclusion; and
- Inclusion through the development of a comprehensive approach to social and equality statistics.

The National Action Plan against Racism 2005 – 2008 came to an end in 2008 and reported to the Taoiseach and the Minister for Integration in January 2009 in a report entitled *Not an End – Just a Beginning*.³⁹ While those in direct provision were not a target group of the plan, it is difficult to reconcile the current situation of direct provision residents, who are prohibited from working, with the objectives of government policies which address social exclusion for other groups by promoting employment and training opportunities.

Faced with the reality of the situation, one resident expressed her disappointment to FLAC at not being allowed to work

It is frustrating and depressing that I am not allowed to work... I cannot wait to start work. If I was allowed to work while in direct provision maybe I would have some dignity and respect as a human being.

Another spoke of her frustration at the government’s refusal to allow her access to one of the most important child support payments

If I got Child Benefit I could improve my child’s life. I can’t blame myself for this at the moment as I’m being denied the opportunity to improve my child’s life, it’s not my fault. It is very stressful mentally and very frustrating.

In an analysis of the reception conditions of asylum seekers in Ireland, Thornton concludes that

[g]overnment strategies of inclusion and poverty proofing to ensure that a person’s standard of living “is regarded as acceptable by Irish society generally” seem not to apply to asylum seekers.

(Thornton 2007)

³⁷ *National Report for Ireland on Strategies for Social Protection and Social Inclusion 2008-2010*, available online at <http://www.socialinclusion.ie/publications/NSSPI2008-2010.html> (last accessed 28 November 2009).

³⁸ Available online at <http://www.justice.ie/en/JELR/NPAREn.pdf/Files/NPAREn.pdf> (last accessed 28 November 2009).

³⁹ Available online on the website of the Minister for Integration at <http://url.ie/43xs> (last accessed 28 November 2009).

In October 2009 the *Renewed Programme for Government*⁴⁰ was published and includes a commitment by the government to “ensure that Government policy as a whole is directed at enabling people to meet their full potential and at reducing long-term dependence on income support payments” (DOT 2009: 16). The renewed Programme also included a commitment to a more just and caring society:

In these straitened times we must avoid the temptation to retreat to self interest as a method of survival. We are obliged to protect those who cannot protect themselves.

Those who have come to Ireland to seek international protection in the form of refugee status, humanitarian leave to remain or subsidiary protection must be dealt with fairly and afforded the same social protection as other groups at risk of poverty or social exclusion.

⁴⁰ Available online at http://www.taoiseach.ie/eng/Publications/Publications_2009/Renewed_Programme_for_Government,_October_2009.pdf (last accessed 28 November 2009).

3 IRELAND'S HUMAN RIGHTS OBLIGATIONS

3.1 HUMAN RIGHTS SOURCES

The concept that human rights are universal is key to understanding the State's human rights obligations under both domestic law and international human rights law. As Marks and Clapham (2005) comment,

[t]hese are rights you have because you are a human being rather than because you belong to a particular community.

The responsibility of states in relation to the application for human rights is discussed by Asbjorn Eide in *Making Human Rights Universal: Achievements and Prospects*, who states that there is

...a spatial distribution of jurisdiction and responsibility between sovereign states, each being in charge of the maintenance of law and order and of the promotion of social development within its borders. The exercise of their respective jurisdictions should be based, however, on universal human rights. Consequently, states have the primary responsibility for human rights observance within their respective borders.

[Eide in Stokke & Tostensen 2001]

In certain circumstances the State may have to interfere with the fundamental rights of the individual if there is a justified reason as will be discussed below. The main sources of human rights law as it applies in Ireland are set out in this section.

3.1.1 BUNREACTH NA HÉIREANN (THE IRISH CONSTITUTION)

The Irish Constitution was adopted on 29 December 1937 and is the basic law of Ireland. The Constitution contains a number of fundamental rights, both stated and implied, and the Irish courts have recognised the presence of such rights. In *Ryan v Attorney General*,⁴¹ Walsh J. stated that

[t]he natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law... While the Constitution speaks of certain rights being imprescriptible or inalienable, or being antecedent and superior to positive law, it does not specify them.

In the later case of *McGee v Attorney General*,⁴² Walsh J. elaborated on the concept of the Constitution as a protector of human rights:

Articles 41, 42 and 43 emphatically reject the theory that there are no rights

⁴¹ *Ryan v Attorney General* [1965] I.R. 294.

⁴² *McGee v Attorney General* [1974] I.R. 284.

without laws, nor rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority... (Walsh J. cited in Forde 2004)

Fundamental human rights extend to non-citizens as well as citizens, but it is important to note that not all of the rights enshrined in the Constitution would appear to apply to non-citizens. In the case of *Oguekwe v The Minister for Justice, Equality and Law Reform*,⁴³ the parents of an Irish-born child challenged decisions of the Minister for Justice, Equality and Law Reform to refuse leave to remain under the Irish Born Child scheme and to issue deportation orders against them. The parents asserted the personal rights of their Irish citizen child including his right to family life. Denham J. discussed this point and reiterated that although the Irish citizen child had personal rights within Article 41.3.1 of the Constitution, “the rights are not absolute, they have to be weighed and balanced in all the circumstances of the case”. She also highlighted that a decision had to be made by “striking a fair balance in each case” and recognised that the State may have legitimate public policy aims to prevent or restrict the exercise of such rights but these would have to be “proportionate to the legitimate aim pursued”.

3.1.2 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Ireland became a member of the United Nations on 14 December 1955. The State has signed and ratified a number of international human rights instruments of the United Nations including

- UN Declaration of Human Rights (1948)
- UN Convention Relating to the Status of Refugees (1951)
- UN Protocol Relating to the Status of Refugees (1967)
- UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965)
- UN International Covenant on Civil and Political Rights (ICCPR) (1966)
- UN International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
- UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
- UN Convention on the Rights of the Child (CRC) (1989)
- UN Convention on the Rights of Persons with Disabilities.⁴⁴

As a member of the UN, Ireland is required to periodically report to a number of UN bodies on the progress of the implementation of the international instruments to which the State is a signatory. By ratifying the above instruments, the State is bound to implement the terms of each of these by protecting and promoting the rights described in each.

⁴³ *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795; [2008] 2 I.L.R.M. 481

⁴⁴ Ireland signed the Convention on 30 March 2007 but has yet to ratify it.

3.1.3 EUROPEAN CONVENTION ON HUMAN RIGHTS

Ireland is a signatory to the European Convention on Human Rights (ECHR) which was adopted by the Council of Europe in 1950 and came into force in 1953. In 2003, the European Convention on Human Rights Act was passed which incorporated the Convention into Irish law.

S. 3(1) of the ECHR Act 2003, obliges “every organ of the State” to “perform its functions in a manner compatible with the State’s obligations under the Convention provisions”.

An “organ of the State” is defined in s. 1 of the ECHR Act 2003 as including

...a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.

Government departments are organs of the State according to this definition. Since the RIA is a unit within the Department of Justice, Equality and Law Reform, its actors are also obliged to act in a manner compatible with Ireland’s obligations under the ECHR. The Department of Equality, Justice and Law Reform still owes a duty to the asylum seeker as the

“organ of the State” responsible for upholding his/her human rights, despite contracting out the provision of accommodation and services to private companies. The Department does not transfer its duty to the contractor. This point is addressed by Dr Padraic Kenna in *ECHR and Irish Law*:

However, when the State is engaging in the provision of services through a private operator/contractor, any individual affected may bring an action against the public body that entered into such a contract, which failed to protect their human rights.

(Kenna in Kilkelly 2004)

The Department of Justice, Equality and Law Reform, as is the case with other government departments exercising an executive function of the State, is required to carry out all of its functions with due regard to the protection of rights enshrined in the ECHR.

Human rights law envisages that on occasion, the State will have to interfere with fundamental human rights. However, any such interference needs to be for a legitimate aim, and must be proportionate to the end proposed to be served. In applying the ECHR, states are afforded a margin of appreciation



...in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject matter and its background

(Ovey & White 2005)

Thus in matters of immigration policy the State may be allowed a wider margin, but only if this can be shown to be in proportion to the intended purpose served by the policy.

3.2 NON-DISCRIMINATION AND EQUALITY BEFORE THE LAW

In a large-scale nationally representative sample of immigrants' experience of racism and discrimination in Ireland, carried out in the summer of 2005, the authors found that 17.6 per cent of those with contact with the immigration services reported that they were badly treated or received poor services (McGinnity 2006). This was the highest reported incidence of institutional discrimination in Ireland. According to the survey, the highly educated were significantly more likely to experience discrimination in two domains: employment and the public arena. Migrant women were found to be less likely to experience discrimination in public places but if anything,

more likely to experience institutional discrimination. Asylum seekers were found to be much more likely to experience discrimination than work permit holders. This was true for all the domains, which were relevant to both groups: public places, shops and restaurants and institutions, even after controlling for national or ethnic origin.

One of the underlying principles of international human rights law is that of non-discrimination. In addition, Irish constitutional law and domestic legislation recognises the principle of equality. Ireland has also transposed EU directives into Irish law, particularly Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic background, more commonly referred to as the Race Directive aimed at prohibiting discrimination on grounds of race.

The Universal Declaration of Human Rights⁴⁵ begins by stating that:

All human beings are born free and equal in dignity and rights

In subsequent articles, it reinforces the fundamental human right of non-discrimination including, in Article 7, the recognition that

[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.

Subsequent international law treaties and obligations entered into by the Irish State have further enforced the standard of non-discrimination.

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) obliges all State Parties to the Covenant to ensure that all "individuals within its territory and subject to its jurisdiction" are able to enjoy the rights and fundamental freedoms contained in the Covenant "without distinction of any kind, such as race, colour, sex, language, religion, political opinion, national or social origin, property or any other status" (Article 2). Thus the ICCPR does not apply merely to those who have been granted a recognised legal status within a country but to all those present within the borders of a State. Like Irish citizens, those in direct provision are entitled to respect for their political and civil rights as well as their economic, social and cultural rights despite having to await formal recognition of their refugee status or, in the case of unsuccessful asylum seekers, a determination on their right to remain in Ireland.

Article 26 of the ICCPR provides for equality before the law of "all persons" who are entitled "without any discrimination to the equal protection of the law". The Article states that

... the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... national and social origin... or other status.

⁴⁵ Article 1, Universal Declaration of Human Rights 1948.

The Covenant does not differentiate between citizens and non-citizens; it affords the same level of protection to all people within a jurisdiction. To illustrate this point, General Comment No. 31 of the UN Human Rights Committee explicitly states that

...the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.

The economic, social and cultural rights of those people in direct provision are also protected from discrimination under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 2 of the UN Convention on the Rights of the Child also forbids discrimination on the basis of any status and obliges States Parties to

...respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

It is clear from the language used in the international instruments that the rights they contain do not apply exclusively to citizens of the State party, but also to people of other nationalities present in the State. The Irish government is obliged to apply these standards to the asylum seekers for whom they are ultimately responsible. In an article entitled *The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing* by Clare Breen (2008), it is asserted that

[g]iven the broad application underpinning international human rights law, it would be somewhat incongruous if the more generous provisions of human rights treaties were to be regarded as excluding asylum seekers thereby limiting the level of protection accorded to this group to the basic standards provided for in the Refugee Convention.

(Breen 2008)

The Irish Constitution, in the first of its list of personal rights,⁴⁶ recognises the right of equality of citizens in its statement that

[a]ll citizens shall, as human persons, be held equal before the law.

Although non-citizens do not enjoy the same rights as citizens under the Constitution, it was stated by Denham J. delivering a judgment of the Supreme Court in the case of *Oguekwe v*

⁴⁶ Article 40.1, Bunreacht na hÉireann.

The Minister for Justice, Equality and Law Reform that “the first and second applicants, even though they are foreign nationals, are entitled to protection under the Constitution”. She went on to quote from the judgment in the Supreme Court case of *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*⁴⁷ which recognised that non-Irish nationals do enjoy rights under the Constitution:

... [A] person who is not entitled to be in the State cannot enjoy Constitutional rights which are co-extensive with the Constitutional rights of citizens and persons lawfully residing in the State. There would however, be a constitutional obligation to uphold the human rights of the person affected which are recognised, expressly or by implication, by the Constitution, although they are not co-extensive with the citizen’s Constitutional rights.

The constitutional guarantee contained in Article 40.1 has done little to develop a culture of equality in Irish law (Moriarty & Massa 2008) but legislation has now been enacted in Ireland to promote equality and render non-discrimination illegal in many instances. The Equality Act 2004 is particularly relevant as it transposes EU Council Directive 2000/43/EC of June 2000 – commonly called the Race Directive – into Irish law. That Act, together with the Equal Status Act 2000, constitutes the principal legislation prohibiting discrimination and challenging

instances of such discrimination. The Equality Acts 2000-2004 prohibit discrimination on nine separate grounds, one of which is race. They apply to those who supply services including accommodation. The Acts also impose a specific obligation to provide reasonable accommodation to persons with disabilities.

The overseeing body for the implementation of Ireland’s non-discrimination legislation is the Equality Authority. The Authority’s mandate is to promote equality of opportunity and to combat discrimination in the areas covered by the Employment Equality Acts and the Equal Status Acts. It is a specialised equality body for the promotion of equal treatment as required under the EU Race Directive and the amended Gender Equal Treatment Directive (Equality Authority, 2007). Individual complaints of discrimination on one of the nine prohibited grounds are principally heard by the Equality Tribunal although a limited number must go before the District Court. There is a right of appeal from decisions of the Tribunal or the Court.

S. 3(1) of the Equal Status Acts 2000-2004 defines discrimination and says that discrimination will be deemed to occur:

(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the “discriminatory grounds”)

⁴⁷ [2000] 2 I.R. 360 at page 410.

The discrimination may occur directly or indirectly. S. 3(1)(c) elaborates that something will be discriminatory

...where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The discriminatory grounds specified in s. 3(2) of that section include the grounds of race and disability.

The prohibition on discrimination is not absolute. Discrimination which is mandated by legislation is permitted. In addition, there is permission to discriminate against non-Irish nationals in certain circumstances. However, as with all limitations on fundamental rights, the right to non-discrimination must be construed broadly while the limitations must be construed narrowly.

S. 5(2)(l) permits discrimination where it can be categorised as “differences, not otherwise specifically provided for in this section, in the treatment of persons in respect of the disposal of goods, or the provision of a service, which can reasonably be regarded as goods or a service suitable only to the needs of certain persons.”

S. 14 of the Equal Status Acts 2000-2004 then contains a number of exemptions which permit discrimination if such discrimination is allowed

by legislation, either domestic or European and also discrimination against non-nationals on specific grounds. This is set out as:

14.—(1) Nothing in this Act shall be construed as prohibiting—

(a) the taking of any action that is required by or under—

(i) any enactment or order of a court,

(ii) any act done or measure adopted by the European Union, by the European Communities or institutions thereof or by bodies competent under the Treaties establishing the European Communities, or

(iii) any convention or other instrument imposing an international obligation on the State,.....

(aa) on the basis of nationality—

(i) any action taken by a public authority in relation to a non-national—

(I) who, when the action was taken, was either outside the State or, for the purposes of the Immigration Act 2004, unlawfully present in it, or

(II) in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State,

or

(ii) any action taken by the Minister in relation to a non-national where the action arises from an action referred to in subparagraph (i)

This latter set of exceptions set out in s. 14(aa) follows directly from an exemption contained in Article 3 (2) of the EU Race Directive which does not apply to

...difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

It should be noted that the exceptions mentioned in subsection (aa) relate to the acts of public authorities only. Many of the actions that affect asylum seekers and others in direct provision are not carried out by public authorities but rather by private companies. As already discussed, the RIA is the public body responsible for accommodating people in direct provision.

Clare Breen argues that direct provision may constitute a form of indirect discrimination:

The Act does not refer to the category of asylum seekers itself as a prohibited ground of discrimination. As a result, an asylum seeker would have to establish that the less favourable treatment was as a consequence of his or her categorisation as being of particular race or national or ethnic origin. However, discrimination is not

confined to measures that directly target particular categories of persons. The concept of indirect discrimination prohibits measures that have as their impact disproportionately negative consequences for that person or group of persons. Consequently, it could be argued that the policy of Direct Provision has a disproportionately negative impact on individuals whose race, ethnicity, or nationality is other than Irish.

(Breen 2008)

However, overall, there is little positive effort to ensure that asylum seekers, a group that may already be claiming asylum in Ireland on the grounds of discrimination in their country of origin, are protected in any positive way against discrimination. The risk of such a failure of protection is that racism may flourish in circumstances far removed from scrutiny, or even from the day-to-day knowledge of most people in Ireland.

In 2004 the UN Committee for the Elimination of all forms of Discrimination issued *General Comment 30 on Discrimination against Non-Citizens*. It stated that States Parties must

[e]nsure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.

Article 14 of the ECHR also seeks to ensure freedom from discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

However, an infringement of the Convention on the basis of this article may only be considered in the context of another article, as stated by the European Court of Human Rights in *Haas v The Netherlands*:⁴⁸

Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to ‘the enjoyment of the rights and freedoms’ safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.

Differential treatment may be permitted, and will not constitute discrimination for the purposes of Article 14, if the State can show that such

treatment is objectively justified. The treatment must also be proportionate to the legitimate intention of the State’s actions (Ovey & White 2006). These components of the non-discrimination ground can be found in Protocol No 12 to the ECHR, which Ireland has signed but not yet ratified.

In December 2008, the European Commission published a proposal to recast the Directive, laying down minimum standards for the reception of asylum seekers more commonly referred to as the Reception Conditions Directive. The Directive provides for the “dignified standard of living and comparable living conditions in all Member States” of those seeking asylum or another form of protection. However Ireland has opted out of this Directive⁴⁹ but has the choice to ‘opt in’ to the new Directive once it comes into force. In the explanatory memorandum to the proposal, the Commission has emphasised that

... the principle of non-discrimination will be reinforced by the imposition of the obligation on Member States to ensure that asylum seekers are not unjustifiably treated in comparison to nationals concerning the level of material reception conditions to be provided under the Directive.

If the Irish State was to opt in to this measure, this would underline the need to justify any discriminatory treatment against direct provision residents.

⁴⁸ *Haas v The Netherlands* (App 36983/97) [2004] 39 E.H.R.R. 897, paragraph 41.

⁴⁹ In accordance with Article 1 of the Protocol on the position of the UK and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community which allows Ireland and Britain to “opt in” to measures establishing a Common European Asylum System.

3.3 THE RIGHT TO SEEK ASYLUM

Often there is a misconception that asylum seekers or persons seeking other forms of protection are not legally entitled to enter and remain in Ireland. This however is not the case. Article 14(1) of the Universal Declaration of Human Rights confers the right on everyone “to seek and to enjoy in other countries asylum from persecution”. The legal basis for the determination of claims of people seeking asylum is contained in the 1951 Geneva Convention Relating to the Status of Refugees (referred to here as the Refugee Convention). The Refugee Act 1996, established the procedure to be followed in determining claims for refugee status in the State and to set out the rights of refugees recognised under that procedure.

Section 2 of the Refugee Act 1996 sets out the definition of a refugee which is taken directly from Article 1 of the Geneva Convention:

In this Act “a refugee” means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail

himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

However the United Nations High Commissioner for Refugees (UNHCR) has continually stated that an asylum seeker is a person awaiting a determination on his/her application for international protection. In the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, the following definition is given:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

(UNCHR 1979/1992)⁵⁰

The UNCHR has repeatedly stressed the interrelated connection between the right to seek asylum and recognition as a refugee:

⁵⁰ For a more detailed discussion on this point see Lauterpacht & Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, available at: <http://www.unhcr.org/refworld/docid/470a33af0.html> (accessed 9 September 2009).

Asylum, in the core sense of admission to safety in another country, security against refoulement, and respect for basic human rights, is the heart of international protection. Without asylum, the very survival of the refugee is in jeopardy.

(UNCHR 1993 cited in Thornton 2007).

Another important point to note is that the right to asylum afforded under Article 14 of the UDHR not only confers the right to *seek* asylum but also the right to *enjoy* asylum. The theme of the High Commissioner's Note on International Protection for 2008, to commemorate the 60th anniversary of the UDHR, was the application of "Articles of the Declaration of particular relevance to persons of concern to UNHCR" (UNHCR 2008: Paragraph 1).⁵¹ The High Commissioner pays particular attention to the right to life, liberty and security of person, the right to freedom of movement, the right to equal protection of the law, the right to work, the right to an adequate standard of living and the right to education.

Recognition of this obligation to allow individuals the right to seek asylum forms the basis for the other rights examined in this report as asylum seekers are lawfully present in the state until a final determination has been made on their claim for protection. While living in this jurisdiction the State is obliged to ensure that its treatment of these individuals complies with other human rights instruments to which Ireland is a signatory.

3.4 ASYLUM-SEEKING CHILDREN

Article 22(1) of the UN Convention on the Rights of the Child specifically provides for the rights of the asylum-seeking child:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status... shall, whether accompanied or unaccompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in this Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The European Council on Refugees and Exiles (ECRE), an EU-wide organisation that focuses on asylum and refugee issues, has issued a position paper on refugee children⁵² which includes recommendations for their protection. This also encompasses children seeking to be recognised as refugees under the 1951 Geneva Convention:

Refugee children have the full rights of children and the full rights of refugees.

⁵¹ View full note at <http://www.unhcr.org/excom/EXCOM/488dd0e12.pdf> (last accessed on 9 September 2009).

⁵² Available at <http://www.ecre.org/files/children.pdf> (last accessed 9 September 2009).

This requires that each state should fully respect both the 1989 UN Convention on the Rights of the Child and the 1951 Convention relating to the Status of Refugees.

(ECRE 1996)

Asylum-seeking children are especially vulnerable and it is imperative that their right to seek asylum is respected as well as their right to enjoy the civil, political, economic, social and cultural rights enshrined in international human rights law.

3.5 SEPARATED CHILDREN

The Separated Children in Europe Programme is a joint initiative of the UN High Commissioner for Refugees and the international charity Save the Children. It defines a separated child as “under the age of 18 years...who is outside his/her country of origin and separated from both parents or his/her previous legal/customary primary care giver” (SCEP 2004).⁵³ They are sometimes referred to as “unaccompanied children” or “unaccompanied minors”.



⁵³ Save the Children and The Separated Children in Europe Programme, *Position Paper on: Returns and Separated Children*, September 2004.

S. 8(5) of the Refugee Act 1996 provides for their care stating

- a) **“Where it appears to an immigration officer or an authorised official that a child under the age of 18 years, who has either arrived at the frontiers of the State or has entered the State, is not in the custody of any person, the officer shall, as soon as practicable, so inform the HSE and thereupon the provisions of the Child Care Act 1991 shall apply in relation to the child.**

The Child Care Act 1991 applies to all children in the State.⁵⁴ This Act forms the main legislative framework for the care and protection of children. S. 3 of the Child Care Act 1991 sets out the functions and duties of the HSE and s. 3(1) of that Act stipulates the primary duty or function of the HSE:

- 3(1) It shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection**

Separated children, deprived of parental care and guardianship, are often destitute and constitute a group which needs adequate care and attention. The Act goes on to specify⁵⁵ certain steps that the HSE must take. Amongst other matters, it must

- Take such steps “as it considers requisite” to identify children who are not receiving adequate care and protection;
- Perform its function by having regard to the welfare of the child as the first and paramount consideration and, as far as practicable and reasonable, must give due consideration to the rights of the child;
- Provide child care and family support services and “may provide and maintain premises and make such other provision as it considers necessary or desirable for such purposes” subject to general direction.

This legislative framework, in turn, is supported by the Irish Constitution and by the UN Convention on the Rights of the Child, which Ireland ratified in 1992. The provisions of the 1991 Act and the obligations of the HSE and of the State under that Act are equal, regardless of the child’s nationality or immigration status.

Other duties spelled out in the legislation include the duty of the HSE to take reasonable steps to provide suitable accommodation⁵⁶ and, where it appears that a child will not receive care or protection unless a court makes a care order, it is the duty of the respective health board to make application for a suitable care or supervision order.⁵⁷ As with other children

⁵⁴ The definition of a child, for the purposes of the Act, is set out in s.1 “child” means a person under the age of 18 years other than a person who is or has been married;”

⁵⁵ Ss. 3(2) and 3(3) Child Care Act 1991.

⁵⁶ S. 5 Child Care Act 1991.

⁵⁷ S. 16 Child Care Act 1991.

who are at risk and in need of protection, children who apply for asylum must be protected and their welfare promoted by the HSE. The standards in relation to such children are set by the child care legislation.

The majority of separated children who arrive in Ireland are referred by the immigration authorities or the Office of the Refugee Applications Commissioner to the HSE in the Eastern region. The child is then usually assigned to a social work team which makes decisions on behalf of that child in terms of accommodation and care.

According to the Ombudsman for Children's Office report, *Separated Children living in Ireland*,

[b]etween 2000 and 2008, 454 separated children seeking asylum went missing from the care of the HSE and, of these, 58 were subsequently accounted for. 396 separated children remain missing from the care of the HSE (OCO 2009).

From January to June 2009, a further 23 separated children under HSE care have gone missing (*Irish Times*, 17 June 2009; OCO 2009). In July and August 2009, 39 children were referred to HSE but 6 of these were classified as missing from care by September 2009 (*Sanctuary* newsletter, 30 September 2009). According to a major report on asylum seeking

children in Ireland published by the Irish Refugee Council, *Making Separated Children Visible*, the current system of supporting and supervising separated children is "inadequate" and

has a detrimental effect on their mental and physical health and educational attainment. Separated children, the majority of whom are adolescents, are at risk of engaging in unsafe sexual behaviour and drug and alcohol abuse. They are at particularly high risk of sexual exploitation and of being trafficked or re-trafficked (IRC 2007).

The report also found that the accommodation provided for these children is different to that provided for other children in care and is reminiscent of the direct provision accommodation provided for adult asylum seekers:

The majority of separated children do not reside in children's care centres, but in privately managed hostel accommodation... Of particular concern is the fact that private hostels and residential centres occupied by separated children are not subject to inspections by the Irish Social Services Inspectorate.

Both the Ombudsman for Children in her report to the UN Committee on the Rights of the Child in 2006⁵⁸ and the Commissioner for Human

⁵⁸ Available online at <http://www.oco.ie/whatsNew/reports-to-un-committee-on-the-rights-of-the-child.aspx> (last accessed 7 September 2009).

Rights of the Council of Europe after his visit to Ireland in 2007⁵⁹ highlighted concerns about the difference in treatment between Irish children in care and separated children seeking asylum. The Commissioner went on to discuss the reasons why separated children may end up in Ireland:

Separated children may be seeking asylum because of fear of persecution or the lack of protection due to human rights violations, armed conflict or disturbances in their own country. They may be the victims of trafficking for sexual or other exploitation, or they may have travelled to Europe to escape conditions of serious deprivation

(Council of Europe 2007)

Another concern raised by the Commissioner was “that the proportion of social workers allocated to separated children seeking asylum is considerably lower than that allocated to Irish children in care, even though both groups are protected by the same Child Care Act 1991.”

In addition, his report pointed out the lack of a *guardian ad litem* system specifically in the context of children going missing from care:

Unaccompanied minors lack the protection normally provided by families and are consequently particularly vulnerable. This is even more so when children have been traumatised through

forced participation in armed conflict. In order to provide adequate care for separated children, and especially the more vulnerable ones, accommodation centres should be staffed by vetted and professional personnel. Children should also be given information adapted to their age regarding the dangers of human trafficking. Moreover, the provision of guardians ad litem for each child would benefit the objective of preventing disappearances as well.

This reference to the need for a *guardian ad litem* links directly to other concerns about whether the case of every child who needs and deserves protection in the State is actually heard. In this context, s. 8(5)(b) of the Refugee Act 1996 provides:

Where it appears to the HSE, on the basis of information available to it, that an application for a declaration should be made by or on behalf of a child referred to in paragraph (a), the HSE shall arrange for the appointment of an employee of the HSE or such other person as it may determine to make an application on behalf of the child.

S. 9(12)(c) of the Refugee Act 1996 provides that:

Where an unmarried child under the age of 18 years is in the custody of

⁵⁹ Available online at <https://wcd.coe.int/ViewDoc.jsp?id=1283555&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679> (last accessed 7 September 2009).

any person (whether a parent or a person acting in loco parentis or any other person) and such person is detained pursuant to the provisions of this section, the immigration officer or the member of the Garda Síochána concerned shall, without delay, notify the HSE of the detention and the circumstances thereof

Little attention has turned to the obligations of the HSE in relation to these particularly vulnerable children. The absence of a *guardian ad litem* for each child in fact means that the legal rights of the child may be overlooked in the system. The Irish Refugee Council has called for the appointment of a *guardian ad litem* for each child in line with the government's own commitment under the *National Children's Strategy* in 2000:

The Irish Refugee Council recommends that the IRP Bill amends article 26 of the Child Care Act 1991 in order to extend the role of the guardian ad litem outside of court proceedings and to ensure that every separated child is appointed an independent, professional guardian ad litem as defined by the CRC in its General Comment No 6. The GAL should be appointed until a durable solution has been achieved or until the child turns 18 years old.

(IRC 2008b: 22)

In response to calls for such a system to be put in place, the Department of Justice, Equality and

Law Reform is quoted in a report on separated children published by the Economic and Social Research Institute in September 2009 as saying

that under the *Child Care Act, 1991* the HSE project and/or social worker involved must regard the “welfare of the child as the first and paramount consideration” which therefore mitigates the need for a *guardian ad litem*

(Joyce & Quinn 2009: 47).

In addition, replying to the recommendations of Mr Hammarberg, Commissioner for Human Rights of the Council of Europe, the Irish government stated that

The Office of the Minister for Children and the Health Service Executive (HSE) are working towards the provision of appropriate services which meet the needs of separated children. The HSE are devising a National Operational Policy for separated children. This is at an advanced stage and will support the principle that all children in the care of the HSE should receive the same standard of care whether they are separated children seeking asylum or indigenous children in care. (Council of Europe 2007:

Appendix 2).

According to the ESRI report, the National Operational Plan on Separated Children is “reportedly nearing completion” but is not yet available:

Reportedly the Operational Plan indicates that the Dublin-based Service for

Separated Children Seeking Asylum will be decentralised, with a reduction in the current hostel type accommodation provision together with increased use of registered child placements and foster care placements.

(Joyce & Quinn 2009: 34)

and abuse of separated children is very grave. If properly implemented, the Government's response to the Ryan report could prevent such human rights abuses from occurring again in this State.

(IRC 2009)⁶²

In July 2009 the Office of the Minister for Children issued a document entitled *Report of the Commission to Inquire into Child Abuse, 2009 – Implementation Plan*,⁶⁰ in which it announced that

The HSE will end the use of separately run hostels for separated children seeking asylum and accommodate children in mainstream care, on a par with other children in the care system (by December 2010).

The IRC responded to the move calling it “a very welcome development”:⁶¹

To date the Irish Government has failed to meet its international obligations to protect such children. This failure has contributed to an increased risk of exploitation, and to many separated children going missing from HSE care. Separated children are extremely vulnerable. The risk of trafficking

These moves to reduce the risks to separated children living in Ireland, while also aiming to provide a better standard of care for them, are welcome. However, adequate resources need to be allocated to the HSE and the Gardaí to ensure that the expected results are achieved. In April 2009 a Joint Protocol was signed between the HSE and the Garda Síochána to liaise more closely in relation to missing children which will hopefully address some of the deficiencies in the current system. Geoffrey Shannon, Special Rapporteur for Child Protection in Ireland, referring to the Joint Protocol at a conference organised by the UNHCR and Trinity College Dublin in June 2009, said that it had been “neither published nor scrutinised”.⁶³

The HSE needs to ensure that it lives up to its responsibilities to these vulnerable children and make certain that all children in state care are treated equally and adequately protected. Their rights as children need to be respected and upheld fully in order to offer this protection.

⁶⁰ Available online at http://www.omc.gov.ie/documents/publications/Implementation_Plan_from_Ryan_Commission_Report.pdf (last accessed 7 September 2009).

⁶¹ IRC press release issued on 31 July 2009 available at http://www.irishrefugeecouncil.ie/detail.php?category_id=2&sub_category_1_id=2&sub_category_2_id=24&sub_category_3_id=58 (last accessed 7 September 2009).

⁶² *Report of the Commission to Inquire into Child Abuse* (Chairman: Mr Justice Sean Ryan), May 2009.

⁶³ A summary of his contribution is available as part of an overall conference summary at <http://www.unhcr.ie/pdf/childconferencesummary.pdf> (last accessed 28 November 2009).



3.6 THE RIGHT TO HOUSING

The right to housing is one of the most important rights when analysing the scheme of direct provision as it explains why the Irish government is obliged to provide accommodation for asylum seekers and persons seeking other forms of protection. The Refugee Convention also requires the government to provide housing. The government has to ensure that no one is forced into destitution, another issue which is addressed in this section, as the right to housing is closely linked to the right to enjoy an adequate standard of living.

The right to housing is set out in Article 11(1) of the International Covenant on Economic Social and Cultural Rights, in which State Parties

recognize the right of everyone to an adequate standard of living for himself and his family, including adequate

food, clothing and housing, and to the continuous improvement of living conditions.

This right is also protected in Article 25 of the Universal Declaration on Human Rights, Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention on the Elimination of Discrimination Against Women and Article 27 of the Convention on the Rights of the Child.

In *General Comment 4* of the Committee on Economic, Social and Cultural Rights, the Committee stressed that the right to adequate housing cannot be affected by any form of discrimination. While many critics of the direct provision system focus on the right of the family to adequate accommodation, the Committee recognises that

individuals, as well as families are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such

factors. In particular, enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination (CESCR 1991)

The Committee encourages states to take a broad view of the right to housing and advises that the right to housing is more than having adequate shelter or a physical dwelling. It emphasises that “it should be seen as the right to live somewhere in security, peace and dignity”. A definition of what an adequate house must contain is given and includes

certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage...

Some of the elements of adequate housing are not present for those in direct provision, as the majority of such centres do not contain self-catering facilities.

Article 21 of the 1951 Convention relating to the Status of Refugees makes reference to housing and obliges that the Contracting States,

in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall

accord to refugees lawfully residing in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

The UN Committee on the Elimination of Racial Discrimination (CERD) has also commented on the right to housing in *General Comment 30*, which relates to discrimination against non-citizens, and has called on States to

guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing...

(CERD 2004)

The CERD has already noted, in its concluding observations to Ireland’s first national report to the Committee, that it “is concerned at the possible implications of the policy of dispersal of and direct provision for asylum-seekers” in Ireland under Article 3, which prohibits discrimination.

While the European Convention on Human Rights does not confer a right to housing, Article 8 also encompasses another important factor which is the “the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence”. In direct provision centres there is often a lack of privacy as asylum seekers’ rooms may be subject to unannounced inspections by management or staff as provided for under the house rules.

3.6.1 ADEQUATE SPACE AND LIVING CONDITIONS

The UN Committee on Economic, Social and Cultural rights has stressed that in order for housing to be adequate, it must be habitable, and this can be achieved by “providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors” (CESCR 1991).

The situation in direct provision varies from centre to centre and this includes the amount of space provided to either an individual or a family. Single individuals in many instances are usually required to share a room with other residents. As Nasc, an Irish NGO that seeks to respond to immigrants’ needs, points out in its 2008 report, *Hidden Cork*,

[a]nother significant difficulty with room sharing was the fact that the rooms were often of an inadequate size to accommodate the number of people allocated to them, leading to overcrowding. Ventilation also appeared to be a problem in some instances. (Nasc 2008: 22).

Families are also obliged to share rooms which may be suitable when the children are infants but as the size of the family increases or the children grow older, it causes problems in terms both of space and of privacy and development. One lady living in direct provision told FLAC:

The accommodation is not appropriate. My husband and two kids are here and I’m currently expecting another baby and we only have 2 rooms, there is nothing else available.

Another resident talked of the tensions caused by living in a small space:

I am sharing a room with my daughter and with baby twins, there’s not enough room and it causes me to squabble with my daughter. But I’m stuck with it, there’s nothing I can do.

Limited space is a recurrent theme in consultations with direct provision residents. In a 2006 report published by the Mayo Intercultural Action, *Building a Diverse Mayo*, the researchers were told by residents

that their accommodation was very cramped and had no facilities for children. Women who are parenting alone have to take care of their children, for twenty-four hours a day, in overcrowded accommodation. They have to share a bed with one or two young children and some have to share rooms with other women and children. (MIA 2006: 5)

In a study carried out by the University of Limerick, *Getting To Know You - A Local Study of the Needs of Migrants, Refugees and Asylum Seekers in County Clare*, the type of

accommodation in Knocknalisheen accommodation centre was described:

Generally residents live in partitioned rooms, sharing a toilet and shower cabinet with one other family, two families to a room with a partition between them. If full families are accommodated, that is families with a father present, then they occupy a full (double) room but the family must include four people to qualify

(Ní Shé *et al* 2007: 49).

The report concluded that

The kind of shelter supplied by Knocknalisheen might constitute a reasonable temporary provision but it represents a considerable deprivation for families who have to live at the Centre for several years.

(*ibid.*: 50)

In response to this observation, Mr Noel Dowling, Principal Officer with the Reception and Integration Agency stated that this was an “arguable point” and went on to say

The circumstances in which RIA was established are well known. Direct Provision, run by the Department of Justice, Equality and Law Reform, was the only system that could have fulfilled Ireland’s humanitarian and international obligations and, at the same time, not have created an economic pull factor for economic

migrants using the asylum system to enter the State

(Dowling in Ní Shé *et al* 2007: 100)

Despite these comments, Minister for Justice, Equality and Law Reform Dermot Ahern TD has stated

I am assured by the RIA that centres are not overcrowded. Indeed, all bedrooms are measured to ensure they conform to appropriate legislative requirements. Instances of temporary overcrowding may arise where, for example, there has been a birth in a family unit and arrangements need to be put in place to allocate additional space to the family.

(Ahern 9 July 2009)

Even if this overcrowding is temporary, the accommodation providers should take measures to avoid these situations. However, the examples given suggest that instances of overcrowding do occur to the discomfort of direct provision residents.

Another direct provision resident who spoke to FLAC felt that the facilities provided in the accommodation centre were unsuitable:

I share a toilet and a bathroom; there are 3 baths and 3 toilets for 20 rooms which can accommodate 40-50 people.

Following his visit to Ireland in November 2007, Human Rights Commissioner Thomas Hammarberg, referred to the “limited private space” afforded to families who had to share

one room in the Kinsale Road Accommodation Centre. He acknowledged that civil society representatives had indicated that this was a more widespread problem and referred to an *Irish Times* article reporting that independent inspectors engaged by the RIA found “deficiencies exist in certain centres” including overcrowding.⁶⁴ The Commissioner called on the Irish government to provide family accommodation to families with children who were seeking asylum in Ireland (Hammarberg 2008).

In response the government defended its current policy and stated that

The Reception and Integration Agency (RIA) has always provided family accommodation to families seeking asylum in Ireland. The variety of accommodation in use allows RIA to meet the needs of all family configurations claiming asylum... Families are never assigned to a room suitable only for a single person. In all cases, service providers are contractually obliged to conform to relevant statutory requirements in relation to room capacity

(Irish government cited in Council of Europe 2008).

The ‘statutory requirements’ referred to above relate to overcrowding and are set out in s. 63 of the Housing Act 1966 (Kenna 2006) which states

A house shall for the purposes of this Act be deemed to be overcrowded at any time

when the number of persons ordinarily sleeping in the house and the number of rooms therein either

- a) **Are such that any two of those persons, being persons of ten years of age or more of opposite sexes and not being persons living together as husband and wife, must sleep in the same room, or**
- b) **Are such that the free air space in any room used as a sleeping apartment, for any person is less than four hundred cubic feet (the height of the room, if it exceeds eight feet, being taken to be eight feet, for the purpose of calculating free air space) and “overcrowding” shall be construed accordingly.**

In relation to s. 63(a) there are instances where a parent may have to share a room with his/her teenage daughter(s) and/or son(s) which would appear to be a breach of this provision. In the case of a breach, the Act provides for a fine. The Minister for Justice, Equality and Law Reform has outlined the procedure to be followed in the case of a breach of any statutory provisions

Any report of a diminution in standards which comes to the attention of the RIA is immediately followed up and proprietors are instructed to make any changes and improvements deemed necessary. Follow-up inspections are also arranged as appropriate. In cases where standards stipulated in the contract have not been met and the

⁶⁴ “Health and safety risks exposed in asylum centres” *Irish Times*, 31 October 2007.



proprietor has not made sufficient efforts to remedy the situation, there is provision for the contract to be terminated

[Ahern 24 September 2008].

On the same occasion he also stated that no contract has been terminated due to any issues arising from an inspection.

In other situations there may be a number of people in a room and, as pointed out in Commissioner Hammarberg's 2007 report, there have been accounts of "overcrowding" recorded in independent inspection reports. Inadequate or restricted space and overcrowding may be expected where more than two people not only sleep in a standard sized double bedroom, but also carry on most of their daily activity there as well. This is encouraged by the emphasis on ensuring "maximisation of capacity in each bedroom at all times" contained in the contract between the Minister for Justice, Equality and Law Reform and the private contractor.

3.6.2 CHILDREN AND HOUSING

The UN Convention on the Rights of the Child under Article 4 provides for the protection of a child's economic, social and cultural rights.

The unsatisfactory nature of direct provision accommodation for growing children contradicts the policy of the government outlined in the *National Children's Strategy*, in which it is stated:

All children must have access to good-quality housing appropriate to their needs. Although not homeless, some children are members of families living in inappropriate accommodation.

(DOHC 2000a)

This does not refer to asylum-seeking children, as this statement was made in 2000, the same year in which direct provision was introduced. The Strategy also refers to the limited space in

which children have to spend their free time. The authors acknowledge that children spend much of their time indoors:

Bedrooms have become play areas for many children, limiting the space needed to enjoy the vigorous exercise so important to physical and mental health.

(DOHC 2000a)

In the case of many asylum-seeking children, as already expressed, they have to share one room with their parent(s) and siblings. This is not only the family's bedroom but it is often their recreational space as well. While some hostels do have recreational facilities, many do not and children are in effect confined to their shared bedroom.

As the Department of Justice, Equality and Law Reform has frequently pointed out, there are obligations on all contractors to comply with statutory provisions, including those under the Housing Act 1966 which sets out minimum standards.

3.6.3 HOMELESS ASYLUM SEEKERS AND DESTITUTION

The RIA's house rules permit the expulsion of an asylum seeker in certain circumstances as already outlined under the Complaints Procedure section. This has resulted in a number of asylum seekers becoming homeless with no access to services as they have been deemed not to satisfy the Habitual Residence Condition.

The Minister for Justice, Equality and Law Reform claimed in October 2008 that people who had been expelled from the direct provision system had

chosen – through their own actions – to exclude themselves from such accommodation. Expulsion arises as a result of, inter alia, persistent violent and aggressive behaviour, threats to persons and property, assault, violence, vandalism and damage to property.

(Ahern 1 October 2008)⁶⁵

Some of the former residents to whom the Minister referred suffer from mental health problems. Many asylum seekers and people seeking other forms of protection suffer from Post Traumatic Stress Disorder and other mental health disorders. In a study carried out by the Royal College of Surgeons Medical School, it was found that "asylum seekers had a significantly

⁶⁵ This response was given in relation to a written question posed by Pat Rabbitte TD (Lab).

higher risk of PTSD and depression/anxiety symptoms” and that the research

supports the findings of other studies and implies that mental health problems often develop and/or increase after arrival in Ireland.

[Toar *et al* 2009]

The authors of the study also observed that the length of the asylum process “has been associated with an increase in psychiatric disorders”. In the context of the expulsion of some individuals with such disorders, it is important that this problem is addressed through proper medical evaluation and appropriate treatment.

There is no evidence to show, in the course of the expulsion process, whether any consideration had been given to underlying mental health or behavioural disorders. Such health problems need to be addressed through the provision of appropriate medical evaluation and treatment. The Minister for Justice, Equality and Law Reform gave the number of asylum seekers who had been expelled from the direct provision system between April 2007 and October 2008:

The RIA has had to withdraw accommodation from 22 asylum seekers in the past 18 months. Of these, 14 were at the ‘Leave to Remain’ or Subsidiary Protection phase of the process. The other eight were either at the primary stages of the asylum process or were involved in a judicial review process. The mean average

length of time spent in direct provision in all of these cases prior to expulsion was 30 months. (Ahern 8 October 2008)

It is not known how many of these individuals suffered from mental health illnesses.

In the case of an expelled asylum seeker, he/she is not entitled to access benefits which other homeless persons usually receive and there is no obligation on any other state-run organisation to house him/her. In these cases the Minister has stated that

No other State body is obliged to provide accommodation to asylum seekers, even when – through their own actions – they effectively lead to their own departure from a centre. (*ibid*)

The Minister for Justice, Equality and Law Reform concluded his statement by declaring that any asylum seeker may withdraw from the asylum procedure at any stage and avail of voluntary repatriation.

Ireland cannot expel or forcibly return a person to their country of origin before his/her asylum claim and any further claims for protection are determined. Expulsion or forced return to a person’s home country otherwise referred to as *refoulement*, is strictly prohibited under Article 33 of the Refugee Convention if it would endanger his/her life or freedom. There is a wider prohibition on *refoulement* under international customary law and in particular Article 3 of the ECHR. Ireland has opted in to

Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status and to Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Returning the applicant to the country of origin before his/her asylum claim and any further claims for protection are completed could lead to a violation by Ireland of the prohibition of *refoulement*. Therefore, since there is no option to expel a person still within the asylum or humanitarian leave to remain or subsidiary protection process from the country, the State must accommodate the individuals expelled from direct provision in some way so as not to violate other human rights provisions.

In October 2008, the issue of destitute asylum seekers came before the High Court in the case of *N v. Minister for Justice, Equality and Law Reform*.⁶⁶ This concerned a 35-year-old Afghani asylum seeker suffering from a mental illness, expelled from direct provision accommodation and forced to sleep in a derelict factory. In the initial hearing before Hedigan J., the Department of Justice, Equality and Law reform defended the RIA's actions in expelling the man as he had been "barred as a result of alleged violent behaviour" (*Irish Times* 31 October 2008). Counsel for the asylum seeker had claimed that the State's failure to house him constituted

"inhuman and degrading treatment in breach of Article 3 of the European Convention on Human Rights" (*Irish Times* 24 October 2008). The applicant also claimed that there was a lack of an adequate and fair appeal to any decision taken by the RIA to evict an asylum seeker who had allegedly committed a serious breach of the house rules. In addition, lawyers for the plaintiff argued that

the problem was exacerbated because Ireland had refused to incorporate the 2003 EU reception directive which ensures the right to a "dignified standard of living for asylum seekers".

(*Irish Times* 31 October 2008)

The case was settled out of court before hearing, with the State agreeing to re-house the Afghani man in suitable direct provision accommodation, taking into account his specific medical needs.

The issue of homeless and destitute asylum seekers has been the subject of litigation in Britain. In the leading case of *R. v Secretary of State for the Home Department, Ex p. Adam, Limbuela and Others*,⁶⁷ the House of Lords found that the failure to provide "the most basic necessities of life" may in certain cases, breach Article 3 of the European Convention of Human Rights which forbids inhumane or degrading treatment, if it attains a "minimum standard of severity" as expressed by Lord Bingham.

⁶⁶ The outline applicant submission in the case is on file with the author, no further written submissions were made to the High Court.

⁶⁷ [2006] 1 AC 396 (HL).

In this case, Mr Wayoka Limbuela, an Angolan national then aged 23, applied for asylum in the UK in 2003. While initially given emergency accommodation by the State, this accommodation was withdrawn after a decision that he had not claimed asylum as soon as was 'reasonably practicable'. He then spent two nights sleeping rough outside Croydon police station. During this time, he had no money and no access to food or to washing facilities. He also suffered various medical complaints which needed medication. He unsuccessfully begged for food and a blanket. He then got further short-term emergency shelter but the court found that his prospects were only to go back to sleeping rough and begging or trying to find other support. The evidence was that he was frightened of sleeping rough because of previous experience in his country of origin.

The House of Lords examined the question as to when the Secretary of State's duty of care for the destitute asylum seeker arises and held that it arose

when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and

condition, any facilities or sources of support available to the applicant, the weather and the time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.

In his discussion on Article 3 of the ECHR in the same case, Lord Hope referred to the decision in *Pretty v UK*⁶⁸ in the European Court of Human Rights, where the court considered Article 3

in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. The prohibition is in one sense negative in its effect, as it requires the state – or in the domestic context, the public authority – to refrain from treatment of the kind it describes. But it may also require the state or the public authority to do something to prevent its deliberate acts which would otherwise be lawful from amounting to ill-treatment of the kind struck at by the article [...] Where the public authority is directly responsible for the treatment the express prohibition in the article applies, and is absolute.

In the *Limbuela* case Lord Brown also made reference to the *Pretty* judgment, and cited the following definition of degrading treatment set down by the European Court of Human Rights:

⁶⁸ *Pretty v United Kingdom* [2002] 35 E.H.H.R. 1, 33

Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading.

Lord Scott pointed out the statutory bars preventing asylum seekers from accessing basic social security and from being able to work. He said that the failure of the State to provide for these asylum seekers as they were not 'destitute' under the terms of the statutory provision, added to the fact that they could not work, "constitutes 'treatment' of them for article 3 purposes".

Baroness Hale emphasised the responsibility of the State in cases where the State itself had caused a person to suffer and had taken the policy considerations

to an extreme which the Poor Law itself did not contemplate, in denying not only all forms of state relief but all forms of self sufficiency, save family and philanthropic aid, to a particular class of people lawfully here. [...] [I]t is of the essence of the state's obligation not to subject any person to suffering which contravenes article 3 that the ends cannot justify the means.

The House of Lords identified the policy concerns on the part of the government which wanted to discourage potential economic migrants but they also recognised that asylum seekers are exercising their "vital right to claim refugee status and meantime are entitled to be here". Although it was decided that the State does have an obligation under Article 3 of the ECHR to provide for destitute asylum seekers at risk of suffering, they also set the threshold for 'degrading treatment' for the purposes of Article 3 very high although it was not possible to formulate a test which would be applicable in all cases. Taking into consideration the factors listed above by Lord Bingham, it was held that street homelessness and deprivation of basic necessities could amount to degrading treatment. In the case of the British authorities, responsibility lay with the Secretary of State to provide for this group of people.

In the Irish context, the scheme of direct provision is not established on a statutory basis but the RIA is the body or 'public authority' responsible for accommodating asylum seekers. However, as it is a divisional department of the Department of Justice, it is ultimately the Minister for Justice, Equality and Law Reform who is responsible. The RIA has since completed a review of the House Rules and Procedures where the case of *N v Minister for Justice, Equality and Law Reform* outlined above was taken into account; it is hoped that the revised document will contain the right to a fair and independent appeal against expulsion from the direct provision system.

3.7 RIGHT TO FAMILY LIFE

The right to family life is set out in Article 41 of the Irish Constitution, which states:

- 1° The State recognises the Family as the natural, primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
- 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

The importance of this right in the context of a child's wellbeing is reflected in the *National Children's Strategy 2000 - 2010*:

The Final Report of the Commission on the Family, Strengthening Families For Life, identified the experience of family living as the single greatest influence on an individual's life. This is also reflected in the family provisions of the Constitution. A supportive family environment is the foundation on which children can build the wider network of relationships they need. Supporting families is, therefore, essential to supporting children.

The Government is committed to protecting the family through political, economic, social and other measures, which will support the stability of the family. (DOHC 2000a)

The family is also afforded protection in the Universal Declaration of Human Rights. Article 12 of the Universal Declaration on Human Rights prohibits any "arbitrary interference" with a person's family, while Article 16(3) declares that

[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and State.

This sentiment is echoed in Article 23(1) of the ICCPR. Article 10(1) of the ICESCR elaborates even further and obliges the State to ensure that

[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

The ECHR also affords the right to respect for private and family life under Article 8. Article 8(1) says that

everyone has the right to respect for his private and family life, his home and his correspondence.

In reality, the State has assumed the responsibility for providing for the family living in direct provision, as parents cannot be self-sufficient due to the prohibition on working and the inability to provide for themselves and their children on the paltry amount of allowance afforded them. In *Beyond the Pale*, the researchers found that “parenting was undermined by the constraints of hostel life” (Fanning *et al* 2001).

The situation has not changed since then and as one mother living in direct provision told FLAC:

We are psychologically affected - we're stagnant and can't move. It also means I can't provide for my children.

Another resident expressed her frustration at having to live with her child in direct provision:

There are restrictions that you can't do anything about. That's the frustrating aspect of the system. You can't fend for yourself!

The Preamble to the UN Convention on the Rights of the Child introduces the rights of family in very strong terms:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance [...]

It continues by recognising the importance to the child's development of growing up “in a family environment, in an atmosphere of happiness, love and understanding”.

The *National Children's Strategy* also refers to the UN CRC and

recognises that the family generally affords the best environment for raising children. It is clear that children's attainment of their developmental goals is dependent on the supports available to them at all levels, but predominantly within their families.

(DOHC 2000a)

The Supreme Court has handed down decisions in which it had to consider the rights of Irish citizen children in terms of their rights under the Constitution and the ECHR. In both the *Oguekwe* and *Dimbo* cases against the Minister for Justice, Equality and Law Reform delivered on the same day, 1 May 2008 [IESC 25 & 26], Denham J. confirmed the High Court's position that the Irish citizen child not only had personal rights within the meaning of Article 40.1.3 of the Irish Constitution, but that he or she also had rights deriving from “being a member of a family within the meaning of Article 41”. As already expressed, these rights have to be “weighed and balanced in all the circumstances of the case” and in certain cases public policy concerns may override these rights if they are “proportionate to the legitimate aim pursued”, as clarified by Denham J.

However, it is questionable whether the aim of the direct provision policy is proportionate to the conditions in which the children of direct provision residents have to live. It is not only Irish citizen children who should be afforded the right to a family life, as this right is also inherent in international human rights law as outlined above.

In the context of a roundtable discussion on the theme of families and children in living in direct provision, Integrating Ireland and the Children's Rights Alliance produced an information sheet in 2009 which highlighted the potential negative impact of living in direct provision accommodation on a child:

Direct provision, comprising of institutional communal centres, is not well designed for, nor supportive, of children or parenting. Children cannot have a normal childhood living for prolonged period of time

in institutional setting. Questions have also been raised about the adequacy of direct provision to meet the medical, nutritional, developmental and educational needs of children.

(Integrating Ireland & Children's Rights Alliance 2009)

Both children and adults are affected by the lack of privacy, as indicated by the extract below from a report by the Irish Refugee Council:

The lack of personal space and privacy is a problem raised by most asylum seekers living in communal accommodation... It is immediately evident on arrival into most accommodation centres that it is extremely difficult to have a conversation that would not be overheard by several others. (IRC 2001)



3.8 RIGHT TO FOOD

Article 11 of the International Covenant on Economic, Social and Cultural Rights refers to the “right of everyone to an adequate standard of living for himself and his family, including adequate food”.

In 1999 the UN Committee on Economic, Social and Cultural Rights (CESCR) issued *General Comment 12* on the right to adequate food, in which it explains the right in its broadest terms. The Committee recognises that although hunger and malnutrition are generally issues faced in underdeveloped countries, these problems also “exist in some of the most economically developed countries” (CESCR 1999). While there may not be a shortage of food within a country, the access of certain individuals may be restricted due to their economic circumstances. The Committee therefore states that:

The right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. (CESCR 1999)

The right to food therefore includes access to food which is both culturally appropriate and provides adequate nutritional value as indicated in the General Comment. The Committee has explicitly stated that a State may be in violation of Article 11 of the Covenant if there is

any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, [...] religion, [...] national or social origin, [...] birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights.

The right also imposes an obligation on the State to be ultimately accountable for the actions of “all members of society” including the private business sector in their observation of the right to food.

The Committee clarifies the obligations on State Parties to provide food security by developing a national strategy which

should address critical issues and measures in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security. (CESCR 1999)

This comment highlights the cross-cutting nature of this fundamental right and emphasises the importance of government policy in other areas which will impact on the right to food.

3.8.1 THE RIGHT TO FOOD FOR DIRECT PROVISION RESIDENTS

Within direct provision, for the most part, residents are provided with their three meals a day. Although the State is providing food for the residents, this is not always adequate or appropriate. Many people living in direct provision complain that the mealtimes are very stringent and the choice limited. As a large number of people have to be accommodated, correspondingly large quantities of food are prepared which often do not accommodate varied dietary requirements or cultural exigencies. One of the most common complaints amongst those living in direct provision is the loss of autonomy around the timing of meals and choice of food.

One direct provision resident told FLAC that

[t]he food is not good here so I have to buy food with the money I get. I am tired and bored of the food here and sometimes I can't go and get the food at the allocated times because of my baby and the staff won't let other people get food for me.

As demonstrated above the right to food entails more than mere provision of foodstuffs.

The RIA's document entitled *Direct Provision Reception & Accommodation Centre Services, Rules and Procedures*, forbids the resident to

“store food” in their bedroom or “to cook food in any area of the centre”. Often residents need to supplement their diets with other foods such as fresh fruit and vegetables but, over and above financial constraints, they are also limited in what they can buy as they cannot store the food in a safe and appropriate way given lack of access to refrigerators, although this varies from centre to centre.

As there are so many different nationalities and ethnic groups living in direct provision, it may admittedly be difficult to cater for individual tastes and appetites. Residents of different nationalities refer to the unsuitability of the food and may feel it caters for a particular group of people rather than everyone. Others refer to it as “Irish food” and find it hard to eat; some people even have difficulty digesting it. Mandahar *et al's* study on *Food Nutrition and Poverty among Asylum Seekers in North West Ireland* highlights the cultural importance of food and the effect it has on other aspects of an individual's welfare:

The food poverty experienced by asylum seekers is also exacerbated by socio-cultural issues. Most non-Europeans talked about their preference for their own familiar ethnic foods and meals, the availability and consumption of which tended to enhance their feelings of general appetite, level of food intake as well as emotional well-being.

(Mandahar *et al* 2006)

The lack of choice forces people to try and supplement their diet using their small direct provision allowance, as one resident told FLAC:

I spend it on food as the food here is always the same, rice or potatoes and sometimes beef. I am hungry in the evenings but there is no fridge to store food so I mostly buy bread.

Even if an adequate quantity of food is provided by the centre, it may not always be of sufficient nutritional quality. The majority of the asylum seekers consulted in Mandahar's study reported that they had gained weight.

In a recently published piece of research commissioned by the SONAS Community of Practice entitled *Training Needs of People Working with Asylum Seekers*, an accommodation centre manager highlighted the limitations placed on the staff when it came to the provision of food for residents in direct provision:

[...] working for the larger companies we were under severe budget constraints and as the unit manager[s], we had to tow the line if we wanted to hang onto our jobs. So the food suffered. Consequently the residents suffered.

(Casey 2008)

The importance of providing both adequate and appropriate food has been recognised by the HSE in the recently published *National Intercultural Health Strategy*:

While generalisations should be avoided around all direct provision centres and their provision of food, it is clearly important that the HSE work closely with the Reception and Integration Agency (RIA) to ensure the provision of quality, culturally appropriate food and associated aspects around health promotion.

(HSE 2008)

The quality and safety of the food is also relevant to fulfilling the right to adequate food.

3.8.2 CHILDREN AND THE RIGHT TO FOOD

Another major issue of contention for residents in Direct Provision centres is the fact that they cannot choose when to wean their children onto solid foods. For those mothers who cannot or do not wish to breastfeed, instant formula is provided up until the child is one year old; however from the week when the child turns one, the parent(s) receives a letter stating:

As baby (name) will be one year old on (date of first birthday) we are writing to inform you that you will receive your last quota of baby milk and milupa on week beginning (week of child's birthday). Refer to infant feeding guidelines for advice.

The Infant Feeding Guidelines for Direct Provision Centres in Ireland were published in October 2005 by the Health Promotion Unit of the HSE in the North Eastern Area. These guidelines indicate that children should start solid foods alongside milk from between 4 and 6 months if they are formula-fed or from 6 months if they are breastfed. The wishes or cultural traditions of the parents are not taken into consideration and the guidelines specifically state that

it was beyond the remit of this document to provide comparable cultural age appropriate weaning foods for the vast number of cultures residing in the Direct Provision system.

In one case a child in a direct provision centre was allergic to cows' milk and the parents had to request the HSE to authorise the use of formula food for the infant for a further five weeks after her first birthday, but this was later withdrawn.

In the HSE's own information publication, *Starting to Spoon Feed Your Baby*, it is recommended that by "preparing homemade foods you know exactly what your baby is eating". Parents in direct provision are not given this option and are reliant on the food provided by the canteen in their centre. Furthermore the following advice given in this pamphlet on when to feed your child cannot always be followed by parents living in direct provision (unless the child is breastfed) as the decision on when to eat has already been made for them.

Infants follow their own individual patterns of feeding and sleeping. It is recommended that these patterns be followed rather than try to adapt the baby to the pre-school schedule.

In the main government policy paper on children in Ireland – the *National Children's Strategy* – the importance of healthy eating for children is recognised and the responsibility for ensuring that children maintain a healthy diet lies with their parents. It is also a government policy objective (DOHC 2000a). However this objective cannot be fulfilled in the majority of direct provision accommodation centres as parents are dependent on the food that is supplied by the centre. As discussed above they do not have a choice in what they give their children and unless the government takes a more active role

in determining what kind of food is provided in hostels, then the catering companies are likely to choose the most cost-effective food options within those specified by the RIA in the sample menu issued to centres.

Despite the failure to allow asylum seekers the choice and resources to cater for themselves, the government is aware of the implications which poverty, and more specifically food poverty, has on young children:

It has been found that the diet of our children is linked to the socio-economic class of the parents - the less the family experiences poverty and social exclusion, the better the implications for healthy eating habits. The long-term implication for health, is an additional reason for tackling poverty and social exclusion when the child is young. (DOHC 2000a)

In contrast to the government's acknowledgment of a link between poverty, diet and ill health, the authors of a much-quoted study from 2001 found that

[g]enerally, the food provided in hostels was inadequate and unsuitable for the needs of parents and those of their children. The lack of choice and control experienced by respondents in the preparation of food contributed significantly to the financial hardships they experienced. (Fanning *et al* 2001)

This continues to be the case in the current system as the lack of food leads to a greater feeling of social exclusion, especially amongst children, as evidenced by the comments of one parent to FLAC:

It sets my children back from their friends in school. For instance I give my children a particular cheap juice and a schoolmate started calling her the name of that juice in school.

In the study by Mandahar *et al*, the connection between the low income levels and food poverty was again highlighted:

The realities of food poverty emerge strongly as participants reported insufficient money to meet all their needs, including food, and talked of difficulties managing on a low income. They spoke of fear of running out of food, accepting help from friends, buying on credit, paying the bills first and then not having much left over for food, and missing meals to make food last. (Mandahar *et al* 2006)

The right to food is extremely important as the denial of this right has serious implications for the enjoyment of other rights, including the right to health and the right to life.

3.9 THE RIGHT TO HEALTH

Health is a state of complete physical, mental and social well being... (WHO 1948)

This is the definition of health given by the World Health Organisation, which has been adopted by the government in their policy document *The National Health Strategy: Quality and Fairness* (2001). To elaborate further:

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without the distinction of race, religion, political belief, economic or social condition. (WHO Constitution 1948).

This extract from the World Health Organisation's constitution echoes Article 12.1 of the International Covenant on Economic, Social and Cultural Rights:

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Committee on Economic, Social and Cultural Rights issued *General Comment 14* on the right to health in 2000, in which it set out four "interrelated and essential elements" which are

necessary to promote and protect the right:

- Availability – facilities, goods and services relating to health care must be made available in sufficient quantity. The level to which these must be obtainable is proportionate to the level of development in the State Party.
- Accessibility – healthcare services, goods and facilities must be accessible to all persons within the jurisdiction of the State Party without discrimination especially the most vulnerable or marginalised sections of the population. They must also be physically accessible as well as being affordable for all members of society.
- Acceptability – healthcare services, goods and facilities must "be respectful of medical ethics and culturally appropriate".
- Quality – medical services must be of good quality and carried out by skilled professionals in a sanitised and safe environment. Medicine and equipment must be scientifically approved.

Under the heading of "specific legal obligations", the Committee reminds States that they are "under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including [...] minorities, asylum seekers and illegal immigrants, to preventative, curative and palliative health services" (CESCR 2000, emphasis added).

The definition of the right to health is not confined to having the right to access and avail

of adequate medical treatment; it is more wide-ranging and reliant on enjoyment of other fundamental human rights “such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy [...] environmental conditions and access to health-related education and information, including on sexual and reproductive health” (WHO 2007).

People living in direct provision have the same everyday health needs as the rest of the population as well as particular needs relevant to their individual circumstances. However health is a cross-cutting issue which, as outlined above, affects and is affected by a number of other factors.

An asylum seeker is entitled to a medical card if he/she fulfils the means test which he/she will, in most cases if not all, due to his/her lack of income. It is not automatically granted and the direct provision resident has to apply for the scheme. There are instances where a person has left or been expelled from direct provision and the medical card has been withdrawn, which causes a lot of hardship. The medical card scheme entitles the holder to access medical services including free General Practitioner services, public hospital in-patient and out-patient services, dental, optical and aural services, maternity and infant care services and grants and psychological services. However, there are waiting lists for some of these services.

3.9.1 RIGHT TO HEALTH AND GOVERNMENT POLICY

A limited number of policies have attempted to address the right to health for asylum seekers, including *The National Health Strategy: Quality and Fairness 2001*, *The National Health Promotion Strategy 2000 – 2005* and *The National Health Information Strategy 2004* which highlighted the lack of information relating to the health and status of certain vulnerable groups in society:

In general the population health surveillance function is under-developed, and information on morbidity, health inequalities, health status and health determinants of the population and subgroups is limited and fragmentary. At present, information on the health needs and health status of disadvantaged groups, such as Travellers or asylum seekers, is not routinely available. (DOHC 2004)

In February 2008, the HSE launched the *National Intercultural Health Strategy 2007-2012*. The Social Inclusion Unit of the HSE is seen as the best-placed governmental entity to apply the Intercultural Health Strategy.

The Strategy includes a profile of asylum seekers who are one of the target groups and addresses the unique health needs and problems faced by this vulnerable group of people:

While there can be some tendency to homogenize people according to ethnic or cultural group to which they belong, it is important to emphasise the heterogeneity that exists among the diverse groups and within the individual members of these groups. Nonetheless, within the context of their respective status and structures in Ireland, it is necessary to highlight those aspects unique to each ethnic group that may have an impact on their overall health status. (HSE 2008)

This reflects recognition of the right to health care services which are culturally appropriate and practically required in the statements of the health provider. Direct provision residents are entitled to a free medical card.

3.9.2 MENTAL HEALTH

A lot of people who live in direct provision have been through experiences which not only caused them to leave their home countries in search of protection but have left them traumatised or caused mental health difficulties. In addition the direct provision scheme is having a negative impact on many direct provision residents.

A National Conference run by the HSE West in January 2006 focused on 'Addressing the Mental Health Needs of Minority Ethnic Groups and

Asylum Seekers in Ireland'. In his address to the conference, Dr Philip Crowley, the Deputy Chief Medical Officer of the Department of Health and Children, summarised the main issues pertaining to the mental health of asylum seekers:

Their mental health is adversely affected by social isolation, pre and post-arrival trauma, culture shock, language barriers, fear of deportation coupled with a lack of understanding about services, poverty and poor housing. (HSE 2006)

A Vision for Change, the report of the Expert Group on Mental Health Policy published by the Department of Health and Children in 2006, recognised the necessity to include minority groups including asylum seekers in policies relating to mental health initiatives. It specifies that the right to treatment should take into account a person's cultural background and that staff should receive appropriate training to enable this to occur. High quality services are crucial in ensuring the "creation of an environment of equality and participation in society" (DOHC 2006).

3.9.2.1 MENTAL HEALTH ISSUES ARISING FROM EXPERIENCES IN COUNTRY OF ORIGIN

Asylum seekers who have fled their country of origin in order to seek protection are likely to have experienced some degree of trauma. In some cases this may have been caused by separation from family and friends, loss of possessions or grief due to the death of loved ones. In other cases the person may have been subjected to acts of physical or sexual violence, imprisonment or torture or may have witnessed such acts perpetrated against others, which has left lasting psychological effects. For many, the trauma will be a combination of both.

SPIRASI, a not-for-profit, humanitarian organisation based in Dublin, provides services for the rehabilitation of survivors of torture. Its Centre for the Care of Survivors of Torture (CCST) is the only such specialist centre in Ireland and has been accredited by the International Rehabilitation Centre for Torture Victims. In August 2004 the CCST and the North Eastern Health Board initiated the Asylum Seeker and Refugee Counselling Support Service (ARCSS) and although it was initially set up to provide counselling to asylum seekers and refugees who were traumatised due to events in their country of origin, it now encompasses people who have suffered during the asylum process in Ireland. In 2007 the centre “provided specialist medical and psychotherapeutic services to 900 individuals during 2007, of

whom 469 were new referrals”. There is currently a waiting list for the ARCSS project counselling services and the project is limited due to lack of funding and resources. It is also limited in scope due to its geographical location as only people living in the North East of Ireland catchment area are eligible to avail of this service.

3.9.2.2 MENTAL HEALTH ISSUES IN RELATION TO DIRECT PROVISION AND DISPERSAL

A number of factors contribute to the mental health difficulties experienced by asylum seekers living in direct provision. Often the feelings of isolation and loneliness caused by forced migration are compounded by social exclusion, the long periods of time spent in the direct provision system, the uncertainty of their status in the country and the loss of autonomy.

In one recent piece of research staff working in the direct provision system described asylum seekers as “being depressed, institutionalised, lonely, isolated, having psychological problems, being traumatised” (Casey 2008).

The HSE has commented on the delays in processing asylum applications, stating that

there is no doubt that the nature of the process, as presently applied, causes significant stress to the asylum seeker,

with associated effects on physical and mental health. (HSE 2008)

The uncertain nature of their status to remain in Ireland, coupled with the conditions in which they are living, cause direct provision residents to become depressed.

At the annual conference of the Irish Medical Organisation in March 2008 Dr Bernard Ruane, a General Practitioner working in Kerry, stated that he had spoken to colleagues and they believed that there is “a 90 per cent depression rate” in asylum seekers who have been here for six months (Donnellan 2008). He identified their cramped living conditions and the prohibition on asylum seekers working as factors contributing to their depression.

In a study undertaken by the Department of General Practice at the Royal College of Surgeons in Ireland, it was concluded that

mental health problems often develop and/or increase after arrival in Ireland. Factors such as social isolation, lack of work, cultural shock, language barriers, asylum procedure stress, fear of deportation and separation from children, have been suggested to be the major causes of post migration stress.

(Toar *et al* 2009)

The study found that asylum seekers used General Practitioner services more than mental health services but it was not known if this was due to lack of knowledge on the part of the

individual or lack of availability or indeed whether there was a cultural aspect behind the poor uptake.

While the initial medical assessment carried out when a person arrives to seek asylum may indicate existing mental health difficulties, there is no routine follow up to assess any difficulties which may present after the individual is present in the country for some time. The Royal College of Surgeons study emphasises

the need for preventative measures or coping strategies in addition to psychological and psychiatric treatment. Addressing pre-migration traumas with psychological support, should be combined with a strategy to increase coping or reduce post migration stressors, as they are a strong predictor of mental health problems in these vulnerable groups. (Toar *et al* 2009)

3.9.3 WOMEN AND THE RIGHT TO HEALTH

As well as being protected by the right to health enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights, women's right to health is further safeguarded in Article 12 of the Convention on the Elimination of Discrimination Against Women:

States Parties shall take all appropriate measures to eliminate discrimination in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

General Comment No. 14 of the CESCR discusses the subject of women and the right to health under Article 12. The Committee advises State Parties to eradicate discrimination based on gender and encourages the development and implementation of strategies and policies to promote women's right to health and to lower any risks to their health that women may face including domestic violence and birth related issues. The Committee specifically states:

The realisation of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.
(CESCR 2000)

In 2000 the ICCL Women's Committee, in collaboration with the NCCRI and the *Irish Times*, published a document entitled *Women and the Refugee Experience: Towards a Statement of Best Practice*, in which they made specific recommendations around the needs of female asylum seekers. These recommendations include the need for awareness in the health services of the inability of certain women to communicate effectively not only due to language barriers but also in some cases as a result of "the trauma of abuse, dislocation and adjusting to a new environment" (ICCL 2000).

In its *Intercultural Health Strategy* and referring to the World Health Organisation, the HSE expresses the significance of gender "as a key determinant of health" and stresses the negative consequences that migration can have on women (HSE 2008). The situation of women seeking asylum is described as "particularly harrowing" as they may have to assume more responsibility as the decision maker or head of the household, a role with which they may not be familiar as it may have been traditionally held by a father, husband or brother. This may be particularly difficult in the direct provision setting where they are isolated and have limited resources. Despite the lack of statistics on the specific health needs of women from ethnic minorities in Ireland, "it is acknowledged that this group reports increased levels of depression and poor health".

The *National Women's Strategy* makes reference to female asylum seekers by acknowledging that the needs of certain vulnerable groups of women need to be addressed

Within Ireland, there is a number of groups of women who might be described as having special needs, by reason, for example, of their culture, sexual orientation, geographic location, ethnicity, or a disability. It is essential that all Government policies continue to take into account the needs of members of these groups. (DJELR 2007b)

Female asylum seekers are included in vulnerable groups as the Strategy refers to the comments of the UN Committee on the Elimination of Racial Discrimination in response to Ireland's periodic report in 2005. The Committee advised Ireland "...to take measures with regard to the special needs of women belonging to minority and other vulnerable groups, in particular female Travellers, migrants, refugees and asylum seekers" (ICERD cited in DJELR 2007b). The *National Women's Strategy* deals with this issue by stating that "support services ...have been put in place for asylum seekers and refugees" (DJELR 2007b). The strategy does not deal specifically with this vulnerable group; they are later mentioned in the context of migrant women who have come to Ireland and have been granted refugee status, but there is no recommendation tailored for their distinct needs.

As well as the medical services mentioned above in relation to the medical card, female asylum seekers are also entitled to access

maternity and infant care services.⁶⁹ However, through the consultation process conducted by the HSE for the *National Intercultural Health Strategy*, it is apparent that

[w]omen in direct provision expressed concern regarding a lack of follow up on their own and the baby's health following discharge from the Maternity hospital. Emotional support appeared particularly absent in these situations.

(HSE 2008)

Another important issue which impacts on the reproductive health of women, in particular asylum-seeking women, is the right to seek an abortion. Article 16(1)(e) of Convention on the Elimination of Discrimination Against Women states that women should have

(t)he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights. (CEDAW 1979)

However, abortion is not available in Ireland due to the constitutional prohibition in force under Article 40.3.3, except under circumstances where it can be proven that there is a "real and substantial risk to the life, as distinct to the health of the mother".⁷⁰ The consequences of this prohibition in Ireland are usually avoided by travelling to Britain, where the woman in

⁶⁹ See more information on this on the Citizens Information website at http://citizensinformation.ie/categories/health/women-s-health/maternity_and_infant_welfare_services#rules (last accessed 28 November 2009).

⁷⁰ *Attorney General v X* [1992] 1 I.R. 1

question can terminate the pregnancy. Despite the restriction on the right to travel of refugee women, the Department of Justice, Equality and Law Reform will authorise travel for health reasons and arrange travel documents and visas.

The UN Human Rights Committee in its Concluding Comments to Ireland's examination under the ICCPR in July 2008, repeated "its concern regarding the highly restrictive circumstances under which women can lawfully have an abortion in the State party" and recommended that

The State party should bring its abortion laws into line with the Covenant. It should take measures to help women avoid unwanted pregnancies so that they do not have to resort to illegal or unsafe abortions that could put their lives at risk (article 6) or to abortions abroad (articles 26 and 6).
(UNHRC 2008)

These concerns echo earlier comments of the Committee on the Elimination of all forms of Discrimination Against Women in 2005.⁷¹

3.9.3.1 THE HEALTH IMPACT OF VIOLENCE AGAINST WOMEN

The Refugee Act 1996 has included "serious assault of a sexual nature" in s. 5(2) as one of the grounds for non-return of an asylum seeker. This recognition indicates that sexual violence is sometimes used as a weapon in conflicts. Human Rights Watch has commented:

Sexual violence against women happens at an alarming rate, in times of peace and during armed conflict... In the context of the HIV/AIDS pandemic, these brutal attacks can also be deadly.⁷²

The Galway Rape Crisis Centre (GRCC) runs a dedicated asylum seeker clinic and has published a report for the period 2005-2007.⁷³ Its findings show the high instance of rape or sexual violence amongst asylum seekers; the types of abuse included

trafficking, sexual slavery, rape, ritual abuse and child sexual abuse. Rape by armed forces was by far the most common among those clients seen by the Centre. All had reported this abuse in their country of origin and had come to GRCC suffering from post traumatic stress disorder. (GRCC 2007)

⁷¹ See full text at <http://www2.ohchr.org/english/bodies/cedaw/docs/ire-E.pdf> (accessed 6 September 2009).

⁷² See <http://199.173.149.120/women/sexualviolence.html> and see further on the HRW website at <http://www.hrw.org/en/category/topic/women%E2%80%99s-rights/sexual-violence> (last accessed 28 November 2009).

⁷³ Available online at <http://www.galwayrcc.org/pdf/RefugeeReport.pdf> (last accessed 28 November 2009).

The report also identified a number of side-effects, including “insomnia, headaches, confusion, nightmares, irrational fear, anxiety, depression and suicidal feelings”, all of which become more problematic when living in a shared environment such as direct provision. Furthermore the results suggested that counselling offered by GRCC was impeded by the direct provision system, as it “compounds the feelings of powerlessness associated with sexual violence”.

Another issue which needs to be addressed in relation to women’s health is the issue of cultural practices which are not indigenous to Ireland, specifically the custom of female genital mutilation or cutting (FGM or FGC). In some instances this may be the reason why the female asylum seeker has fled her country and sought protection. The ICCL handbook, *Women and the Refugee Experience*, also deals with the issue of FGM:

This practice raises many human rights issues, including reproductive and sexual rights, women’s right to protection from violence, the right to health, the right to freedom from cruel, inhuman and degrading treatment and children’s rights. The fact that the mutilation has already happened should not prohibit the finding of a ‘well-founded fear of persecution’ should the applicant be returned to her country of origin. (ICCL 2000)

The Irish Family Planning Association estimates the number of women in Ireland who have undergone FGM to be 2500.⁷⁴ Often a woman will not have told her doctor as it may not always be considered culturally appropriate to do so; medical personnel will thus not be aware of her condition until they see it firsthand. In many instances, medical staff will not be trained to recognise or deal with the complications associated with FGM. The *National Intercultural Strategy* stresses the need for staff training on how to give appropriate care and support to women who have undergone this procedure (HSE 2008). The Women’s Health Council, a statutory body established in 1997, published a literature review on the practice in the Irish context in 2008⁷⁵ and has recommended that data be collected on the number of women who have undergone FGM/C presenting to health service providers in order to understand the extent of the problem and provide adequate services accordingly.

In addition to this, the Office of the Minister for Integration (through Pobal) funded the *AkiDwa Female Genital Mutilation (FGM) Health Project 2008-2009* which helped to develop “an information resource for health-care professionals working in Ireland on FGM”.⁷⁶

With her permission, each woman or girl should be examined for FGM at her initial medical examination after she applies for asylum. In this way, any specific needs associated with the condition may be taken into account when assigning her to direct provision accommodation.

⁷⁴ <http://www.ifpa.ie/eng/Media-Info-Centre/News-Events/2009-News-Events/Deputy-Jan-O’Sullivan-Officiates-at-Majira-Training-Graduation-in-Limerick> (last accessed 17 October 2009).

⁷⁵ Available online at http://www.whc.ie/documents/40_fgm.pdf (last accessed 28 November 2009).

⁷⁶ Report is available online at http://www.akidwa.ie/FGM_Final.pdf (last accessed 28 November 2009). The comment by AkiDwa is from <http://www.akidwa.ie/fgm.php> (last accessed same date).

3.9.4 CHILDREN AND THE RIGHT TO HEALTH

Article 24 of the UN Convention on the Rights of the Child protects a child's right to health:

States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. (UNCRC 1989)

Article 12(2)(a) of the International Covenant on Economic Social and Cultural Rights also has a specific focus on the child's right to health and calls for "the healthy development of the child" (ICESCR 1966).

General Comment No 14 of the Committee on Economic, Social and Cultural Rights reiterates the 'best interest of the child' principle:

In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration. (CESCR 2000)

The *National Children's Strategy* has adopted the best interests approach. It has as one of its main objectives that

[c]hildren will be supported to enjoy the optimum physical, mental and emotional wellbeing. (DOHC 2000a)

The health implications affecting individuals living in direct provision discussed above can also be applied in the context of children residing in the system. They may also suffer from mental health issues as well as feeling negative effects on their physical health. This is discussed in the *Intercultural Health Strategy*:

A number of children from families who are seeking asylum have witnessed or experienced traumatic events and a series of losses in reaching Ireland. They may present with a variety of vaguely defined symptoms, including non-specific physical conditions, developmental delay or behavioural difficulties. (HSE 2008)

The importance of promoting and providing appropriate health services for children is recognised as having long-term consequences, as

[c]hildhood is a developmental period when the foundations for good health in future life will be laid down.

(DOHC 2000a)

The right to health is one of the most fundamental rights and in terms of children's rights should be afforded the appropriate protection and attention necessary.

As can be seen, there have been a number of strategy and policy papers which have addressed the right to health of asylum seekers. For the most part they have been thorough, thoughtful and have been cognizant of the human rights of



those under discussion. However, the reality for direct provision residents is that they have access only to the most basic service. Very often, the service is in a language they do not understand, in a foreign culture, and may be physically inaccessible from their accommodation. The gap between rhetoric and reality must be bridged.

3.10 THE RIGHT TO WORK

Under s. 9(4)(b) of the Refugee Act 1996, individuals seeking protection in Ireland are prohibited from working while their claim is being considered. This can mean that people are barred from employment for periods ranging from months to years. The fundamental right to work is protected in a number of international instruments, most notably under Article 6 of the International Covenant on Economic, Social and Cultural Rights, which grants

the right to everyone to the opportunity to gain his living by work which he freely chooses or accepts [...]

(ICESCR 1966)

On 26 July 1999, the government granted the right to work to asylum seekers who had been in the State for more than 12 months awaiting a final decision on their application. Anyone who had applied for asylum before that date would also be entitled to work once they met the 12-month criterion. However, by 4 November 1999 only 15 work permits had been issued to asylum seekers in this category (Harney 4 November 1999). In April 2000, a unit was established within FÁS based in Tallaght to “assess the skills of the eligible asylum seekers and to match them to available jobs”. A similar unit was established in Blanchardstown in June 2000 (Harney 13 June 2000). The results of the initial skills audit indicated that 60 per cent of people profiled were ready to join the Irish labour market (*ibid.*) and, by October 2000, approximately 800 people had attended these FÁS units. A total of 3,535 asylum seekers were granted the right to work on the foot of the government decision in July 1999 and by February 2002, 1,783 individuals had been placed in employment with 331 people in training with FÁS (Harney 5 February 2002). The scheme was not extended to people who applied after the cut-off point of 26 July 1999. It is difficult to assess the exact number of people who availed of this scheme, as some were granted status to remain in Ireland throughout the duration of the scheme and were therefore entitled to work under their new status, or they were refused and about to be deported.

As it currently operates, the direct provision system leads to feelings of helplessness among residents who are prohibited from working. Asylum-seekers are allowed to participate in certain training courses, but are prevented from accessing FÁS courses. The rationale for this decision was outlined by former Tánaiste and then Minister for Enterprise, Trade and Employment, Mary Harney TD:

Asylum seekers are not part of the labour force as such and, in these circumstances, it would not be appropriate to allow access to FÁS training courses which are designed to assist people with a legal entitlement to work in the country to get employment. (Harney 10 October 2001)

Former Minister for Justice, Equality and Law Reform, Michael McDowell TD, defended the government’s position not to allow asylum seekers the right to work as he thought it would have a major negative impact on the Government’s asylum strategy; it would be a major pull factor leading to a large increase in asylum applications (McDowell 16 October 2003).

The Minister was of the view that many people were already working illegally, although he did not provide any evidence to substantiate this claim (McDowell 12 February 2003). He also maintained that granting the right to work would encourage people-traffickers to send potential victims to Ireland.

The majority of asylum-seekers in Ireland would welcome the opportunity to work. There are many skilled people presently living in direct provision who could make a real contribution to Irish society. This report has already referred to the length of time some people may spend in the system. This long period of time may be demoralising for those who are not permitted to undertake gainful employment but it also results in an unnecessary burden on the State. Most other states within the European Union take a different view, as outlined below.

The HSE has recently commented on the negative effects on the health of asylum seekers who are denied the right to work:

Lack of entitlement to work, when this restriction extends over a long period, may further compound mental health, with boredom, depression, sense of isolation and loss of self esteem commonly reported symptoms.

(HSE 2008)

Asylum-seekers themselves feel that the right to work would give them a greater sense of confidence and self-esteem while also allowing them to contribute positively to Irish society, as one person explained to FLAC:

I am not happy about not being allowed to work. If I could work, I would be doing more than sitting around the house and I would also be integrating into Irish society.

3.10.1 EU RECEPTION DIRECTIVE

Council Directive 2003/9/EC of 27 January 2003 lays down minimum standards for the reception of asylum seekers. It is more widely referred to as the 'Reception Directive'. Adopted by 25 of the 27 EU member states, it allows for a government to grant the right to work to asylum seekers after a period of time which each state can stipulate.

Ireland and Denmark have opted out of the Reception Directive. One of the main reasons behind the prohibition on allowing direct provision residents the right to work is that the state did not want to create an "economic pull factor for economic migrants using the asylum system to enter the State" (Dowling in Ní Shé *et al* 2009). However, one of the principles behind the Directive is to "limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception" which would seem to contradict the Irish government's perception that granting this right would serve as a "pull factor".

Under Article 11(1) of the Directive, Member States can determine a period of time from the date of application for asylum, during which an applicant may not enter paid employment. Article 11(2) sets out the entitlement of an asylum seeker to work after a year, if a decision has not been reached at first instance and the delay is not on the part of the applicant. As mentioned above, this Directive has been adopted by all Member States apart from



Ireland and Denmark. While Ireland is keen to harmonise its asylum procedures with the rest of Europe, indicated by its adoption of Council Directive 2005/85/EC of 1 December 2005,⁷⁷ it does not wish to attain a minimum standard of reception in line with the rest of Europe. Senior RIA officials have indicated that the main reason for this stance is so as not to allow asylum seekers to work in Ireland.

Late in 2008, the European Commission proposed a recasting of the Reception Directive. Referring to an asylum seeker having access to the labour market, the Commission stated:

Access to employment is beneficial both for the asylum seeker and the hosting Member State. Facilitated access to employment for asylum seekers could prevent exclusion from

the host society, and therefore facilitate integration. It would also promote self-sufficiency among asylum seekers. Mandatory unemployment on the other hand imposes costs on the State through the payment of additional social welfare payments. It should be noted in this respect that labour market restrictions could encourage illegal working. This is particularly relevant for those Member States which create obstacles on access to the labour market and which grant very low welfare assistance to asylum seekers at the same time. (European Commission 2008)

This statement has particular resonance in the Irish context. The Commission emphasised the benefits of work to both the individual seeking asylum or protection and the host society.

⁷⁷ This Directive deals with minimum standards on procedures in Member States for granting and withdrawing refugee status.

3.10.2 RECOMMENDATIONS CALLING FOR THE RIGHT TO WORK

The Council of Europe's Commission against Racism and Intolerance (ECRI), in its third report on Ireland recommended that the Irish authorities consider facilitating asylum seekers to take up paid employment (Council of Europe 2007).

Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, made an official visit to Ireland from 26 to 30 November 2007. In his report on the visit, he recommended that the Irish government introduce temporary work permits for asylum seekers (Council of Europe 2008).

The refusal to grant the right to work to asylum seekers and those awaiting decisions on their status is a denial of a fundamental human right. Ireland is out of step with its European colleagues on the issue. The denial of the right to work is also costing the Irish State in economic terms.

In response to the Commissioner's recommendation, the government replied that it

believes that, as a matter of public policy, asylum seekers should not be allowed to work while their applications are being considered. Any change to this policy would undermine the asylum process and

wider immigration system [...] These systems would be undermined by giving immigrants who secure entry to the State, on the basis of unfounded asylum claims, the same access to employment as immigrants who follow the lawful route to employment.

(Council of Europe 2008)

The government continues to justify its position in denying the right to work to asylum seekers by referring to the potential incentive to economic migrants which may ensue if this right were recognised. It seems unfair that people who have been living in Ireland for a period of time – in many cases for years – while the State determines their claim can continue to be denied this right on the basis of a possible negative outcome. No substantial evidence has been put forward to suggest that there would be an influx of economic migrants if the right to work were granted. The proposition that this justifies governmental policy undermines the genuine applications for protection made by vulnerable people coming to Ireland.

3.11 THE RIGHT TO EDUCATION

The right to education is an important one and has long been recognised as such due to the power it can give to all members of society, especially those who are members of marginalised groups. Education can lead to a more active participation in society and allows individuals a sense of empowerment which can ultimately lead to self-sufficiency. It is seen as one of the most effective tools in combating poverty and deprivation.

Marks and Clapham refer to the position put forward by Katrina Tomasevski, the former UN Special Rapporteur on the Right to Education, who emphasised the significance of education in relation to the enjoyment of other rights and fundamental freedoms:

Through education, the capacity to exercise rights and freedoms may be maximised; without it, that capacity may be virtually disabled. It is in this sense that Tomasevski proposes that the right to education operates as a multiplier. 'It enhances all other human rights when guaranteed and forecloses the enjoyment of most, if not all, when denied'.

(Marks and Clapham 2005)

The right to education is also protected in Article 2 of the *First Protocol* to the ECHR:

No person shall be denied the right to education. (ECHR 1952)

In practice, states are afforded a wide margin of appreciation; in other words, they are given a lot of leeway in deciding the extent of this right and how it should be interpreted.

The right to education is also protected in Articles 13 and 14 of the UN International Covenant on Economic, Social and Cultural Rights as well as Article 5(e)(v) of the UN Convention on the Elimination of Racial Discrimination.

3.11.1 EDUCATION AND ASYLUM-SEEKING CHILDREN

All children of school-going age living in Ireland are entitled to free primary and post-primary education, including children and young adults living in direct provision. The Education Act 1998 is described as

the most important source of law for this framework from a practical point of view. Schools, teachers and VECs must keep in mind its provisions, and particularly bear in mind that there is no distinction between citizens of the State and non-citizens in relation to the provision of education and the right to receive it. (IVEA 2004a)

The right to education is recognised in Article 42.1, 42.3.2 and 42.4 of the Irish Constitution. Article 42.1 stipulates:

The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

The Constitution also allows for public, private and even home schooling. Article 42 also provides that children are entitled to free primary education having “due regard, however, for the rights of parents, especially in the matter of religious and moral formation”. This opinion is echoed in the second sentence of Article 2 of the First Protocol to the ECHR mentioned above which provides

In the exercise of any functions which it assumed in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

This second sentence has been examined by the European Court of Human Rights in *Kjeldsen, Busk Madsen & Pedersen v Denmark*.⁷⁸

The second sentence of Article 2 aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the ‘democratic society’ as conceived by the Convention.

⁷⁸ [1979 - 1980] 1 E.H.R.R. 711, paragraph 50

Article 44.4 of the Constitution also protects pluralism:

Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

The Education (Welfare) Act 2000 aims to promote school attendance through the establishment of a National Educational Welfare Board. The functions of the Board are set out in s. 10 of the Act:

10.—(1) The general functions of the Board shall be to ensure that each child attends a recognised school or otherwise receives a certain minimum education, and to assist in the formulation and implementation of policies and objectives of the Government for the time being concerning the education of children and, for those purposes, but without prejudice to the generality of the foregoing—

- a) to promote and foster in society, and in particular in families, an appreciation of the benefits to be derived from education, in particular as respects the physical,

intellectual, emotional, social, cultural and moral development of children, and of the social and economic advantages that flow therefrom [...]

Despite these safeguards, in September 2007 a so-called 'crisis' erupted in certain schools which were located close to the biggest direct provision accommodation centre. The controversy sparked a lot of political debate around the planning of national (also called 'primary') schools and the availability of school places for non-Catholic children, as highlighted in the following extract from the ICCPR *Shadow Report* prepared by an NGO alliance of FLAC, ICCL and IPRT:

In September 2007, a number of Catholic schools across the State operated a Catholics-first enrolment policy resulting in many children from non-Catholic families facing a crisis in obtaining places in primary schools. This was as a result of the dominance of Catholic run schools in Ireland. This is leading to de facto segregated primary school provision affecting in particular Black and minority ethnic children. It further highlights the lack of provision of schools for the diverse range of children [...] (FLAC, ICCL & IPRT 2008)

The UN Human Rights Committee, in relation to Ireland's *Third Periodic Report* under the UN ICCPR, considered the situation whereby the

“vast majority of Ireland’s primary schools are privately run denominational schools that have adopted a religious integrated curriculum”.

The Committee specifically highlighted, as one of the three priority recommendations, that “the State party should provide, within one year, relevant information on its implementation of the Committee’s recommendations” in relation to this particular issue. It reiterated similar concerns raised by the UN Committee on the Elimination of Racial Discrimination⁷⁹ and the UN Committee on the Rights of the Child.⁸⁰

In terms of domestic policy, Objective B of the *National Children’s Strategy* states that “[c]hildren will benefit from a range of educational opportunities and experiences which reflect the diversity of need” (DOHC 2000a). The importance of education in a child’s life is well documented and the government has identified both the causes of and potential consequences associated with ‘educational disadvantage:

[M]any children suffer from educational disadvantage because of where they live, poverty, unemployment, poor educational attainment of parents and their socio-economic group. These factors are known to be associated with early school leaving, literacy problems and

poor or no educational qualifications, which in turn can lead to unemployment, poverty [...] and diminished life opportunities. In recent years the education system has given increased attention to these problems and the approaches developed to tackle and actively to compensate for these inequalities will be enhanced through the Strategy.

(DOHC 2000a)

Often the parents of children living in direct provision are not given sufficient support to allow their children to participate fully in school and extra-curricular life. While free education is provided for all children of primary or post-primary age, there are a number of factors which can have a negative impact on a child’s access to education.

Due to the nature of the direct provision system, the RIA reserves the right to transfer residents without consent or prior notice. In many instances, people are only informed of the proposed transfer shortly before it takes place. This can have a devastating effect on young children or adolescents who have formed relationships with their schoolmates or who have settled in and are performing well at a particular school. Transfers also take place during the school year. In other cases, an individual may have requested a change of

⁷⁹ Concluding Observations of the UN CERD on Ireland: UN Doc: CERD/C/IRL/CO/2, para 18 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.IRL.CO.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.IRL.CO.2.En?Opendocument) (last accessed 28 November 2009).

⁸⁰ Concluding Observations of the UN CRC on Ireland: UN Doc: CRC/C/IRL/CO/2, para 60 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.IRL.CO.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.IRL.CO.2.En?Opendocument) (last accessed 28 November 2009).

room or centre but the only option they are given is to transfer to a centre in a completely different part of the country, which means the parent(s) have to decide between disrupting the child's schooling and having more favourable living conditions. This is a difficult choice, as both are highly important for a child's development.

Many residents indicated to FLAC that they were happy with the education which their children were receiving. However they wanted to be more involved. Parents would like to have a choice in which school their child attends, but due to their being confined to certain geographical areas with very little access to transport and without the resources to provide this transport themselves, the selection is usually quite restricted. As one parent living in direct provision indicated to FLAC:

I would like more involvement in my children's schooling. I would like to be able to walk to their school and know what they're doing but there's no access, no transport to the school. I don't want my sons to go to a boys-only school [...] but they have to go where they're sent, there's no choice.

The expense associated with children going to school is a major burden to parents in direct provision as they cannot always afford the items which the school requires their children to have from their own €19.10 direct provision allowance or indeed their child's allowance, a mere €9.60 per week. This has been compounded by the restrictions placed on these parents from accessing child benefit and other social assistance payments.⁸¹ Sometimes parents can rely on charitable help, but this is not always available and in a lot of cases the child has to go without. This can cause frustration on the part of the parents, the school and the child, as one parent explained to FLAC:

My child always needs something for school, pencils and sharpeners. I get a lot of letters from the school. Examples of costs for trips are €27/€20/€15. The teachers also say that we have to pay for books. My child cries and is angry because we cannot afford these.

The government has to ensure that children who live in direct provision are not disadvantaged due to their parents' financial circumstances. While the State may not be discriminating directly against these children, the reality is that they are suffering 'educational disadvantage' due to the difficult economic circumstances in which they are required to live while their parents and their own status is regularised.

⁸¹ See section 2.1.6 on Child Benefit.

3.11.2 EDUCATION AND ADULT DIRECT PROVISION RESIDENTS

While the right to education for children living in direct provision is recognised, the right to education for adults poses a number of problems. Adults do have access to some basic English language and FETAC (Further Education and Training Awards Council) courses, but educational opportunity for adults of all ages is very limited.

A document entitled *Re: Access to PLC, VTOS and Youthreach programmes for non EU nationals*, which was first circulated in 2001 by the Department of Education, continues to be relevant today. It outlines the entitlements or, in most cases, the lack of entitlement on the part of asylum seekers, to access educational courses. The Vocational Education Committee (VEC)⁸² is advised that any asylum seeker who is enrolled on an educational programme be

notified in writing that their enrolment on an education and training programme is without prejudice to their application for asylum and cannot be used as a basis for seeking to stay in the country where applications are refused. The asylum seeker should confirm in writing to the VEC that s/he accepts this condition. (DOE 2001)

This implies that the government is more concerned with avoiding the conferral of any legal rights on asylum seekers that might arise out of providing education to them than it is about making sure that these people are able to access education in the first place.

Another barrier to accessing education is the cost. People who are awaiting a determination on their asylum application or request for humanitarian leave to remain are not eligible to access financial support in the way of grants or subsidies. They cannot access university or third level education as they do not qualify for the free fees initiative and they would be liable to pay full fees as a non-EU national. This situation has a particularly negative impact on young adults who finish their Leaving Certificate who, although permitted to apply for third level courses, are unable to take up any course they are offered because of the cost. In some instances such people defer their place for a year but there is no way of knowing whether a decision will have been made in relation to their case by the beginning of the following academic year. In any event, they will still not qualify for free fees if they do not meet the requirement of being resident in the EU for three of the previous five years.

This policy also has a especially harsh impact on separated children, as they are permitted to live in designated accommodation (separate from the

⁸² A VEC is a statutory body responsible for the provision of a wide range of education, training and support services to all sectors of the community. There are 33 VECs throughout the country.

direct provision system) while they remain in full-time education. When these children reach the age of majority and complete their secondary education, without being able to accept a place on a third level course, they not only lose their access to further education but they are also required to leave their accommodation and move to mainstream direct provision accommodation.

Lack of childcare facilities is another obstacle to educational access for adult direct provision residents. Some parents cannot avail of free courses in English language or computing since there is no one to look after their children while they go to class, particularly if the children are not of school-going age. There are childcare facilities in a few accommodation centres, but these are usually quite limited and overstretched due to demand.

The final difficulty which direct provision residents encounter in relation to the right to education is the failure of the authorities and potential employers to recognise the qualifications which the residents gained outside the State. Before coming to Ireland many residents worked in their home countries and have various qualifications. Being denied the right to work and having very limited access to educational or training opportunities results in individuals becoming deskilled and unmotivated. The reluctance to recognise educational qualifications will have implications for the individual when he/she is granted some sort of residency status and will seek employment.

3.12 FREEDOM OF MOVEMENT

The freedom of movement of asylum seekers is curtailed under ss. 9(4) and 9(5) of the Refugee Act 1996.

Under Article 12(1) of the International Covenant on Civil and Political Rights,

everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (ICCPR 1966)

The Article does not refer to citizens nor mention any particular type of residency status; as long as a person is legally entitled to be present in the State, they are included in the scope of Article 12.

Restrictions on the rights contained in Article 12 of the ICCPR are prohibited "except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others". Restrictions on the rights of asylum seekers to travel freely or to choose their place of residence would not seem to fall within any of the above mentioned exceptions. *General Comment No 27* of the UN Human Rights Committee, regarding the freedom of movement protected under Article 12, states:

The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination.

(UNHRC 1999)

The RIA website contains the following advice for people coming to Ireland as asylum seekers:⁸³

You will be expected to remain in the accommodation centre to which you are dispersed until your application has been fully processed, including any appeal period if applicable. You may only move from this accommodation with the permission of the Reception and Integration Agency and only in circumstances where the Agency is in a position to offer you alternative accommodation.”

This requirement is set out in s. 9(5)(a) of the Refugee Act 1996, which necessitates an asylum applicant, if required by an immigration officer and so notified in writing, “to reside or remain in particular districts or places in the State”. This provision would seem to apply to persons from particular countries, namely Nigeria, South Africa and Croatia. The resident is reminded that failure to comply with the requirement shall be “an offence” with a penalty “specified in s. 9(7) of the Refugee Act 1996” (RIA 2007).

However, in a written response on the issue of his Department’s responsibility for the provision of accommodation for asylum seekers, Minister for Justice, Equality and Law Reform Dermot Ahern TD stated:

It needs to be understood that there is no obligation placed upon asylum seekers to avail of the accommodation offered by RIA. (Ahern 1 October 2008)

Thus this seems to contradict and create some confusion around the statutory provision outlined which would appear to be a requirement placed on the asylum seeker to remain in direct provision accommodation.

According to *General Comment 27*, while Article 12 of the International Covenant on Civil and Political Rights allows for restrictions on freedom of movement and the right to choose one’s own residence,

[t]he law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.

(UNHRC 1999)

⁸³ From the RIA website at http://www.ria.gov.ie/coming_to_ireland_as_an_asylum_seeker/ (last accessed 28 November 2009).

Therefore if the statutory provision applies to all asylum applicants, and not just those from specified countries, then the position should be made clear as otherwise the State may be violating the right to freedom of movement.

In practice, people usually leave the direct provision system to stay with friends as they cannot afford the cost of rented accommodation. People who move out of direct provision accommodation are no longer entitled even to the small allowance which they usually receive and are also refused additional payments like clothing allowances and Urgent Needs Payments. As long as the relevant authorities are informed of the move, they are not penalised in any other way and they may continue with their application for refugee status, leave to remain or subsidiary protection. It is important however, that the authorities are alerted to the person's change of address as this could have implications for his or her asylum application. If correspondence is not answered within the specified timeframes, then the application for protection could be deemed withdrawn.

Article 26 of the Refugee Convention provides for the freedom of movement of refugees and the right to choose their place of residence. Article 31(2) of the same Convention sets out that

[t]he Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in that country is regularised or they obtain admission into another country. (UN 1951)

According to Professor James Hathaway,

Article 31(2) is not only a limitation on detention, but on all measures which infringe a refugee's freedom of movement... no refugee-specific limitation on freedom of movement may be more than strictly provisional. The restrictions must come to an end once reasons which make it necessary come to an end – for example, when the response to the mass influx has been organised, or the preliminary assessment of identity and circumstances of entry is completed... Thus, when asylum seekers are required to live on an ongoing basis in a reception centre or hostel, as may be the case, for example, in Denmark, Germany and Ireland, Article 31(2) is contravened". (Hathaway 2005)

The International Convention on the Elimination of All Forms of Racial Discrimination affords the right of freedom of movement and residence in Article 5(d)(i).

Furthermore, freedom of movement is protected in Article 2 of the Fourth Protocol to the ECHR, which states:

Everyone lawfully in the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(ECHR 1963)

This provision in the Fourth Protocol reflects the wording of Article 12(1) of the UN International Covenant on Civil and Political Rights. The reasoning illustrated above, concerning the lawful presence of asylum seekers in a state, is also applicable in the case of the ECHR. In *Jacobs & White: The European Convention on Human Rights*, (4th ed.) the authors stress

As for persons who are not nationals, they are lawfully within the territory so long as they comply with any conditions of entry which may be imposed.

(Ovey & White 2006)

There should be no restrictions placed on this freedom unless they are lawful and proportionate. The Department of Justice, Equality and Law Reform feels that its actions are fair in the circumstances as it maintains that its international obligations are fulfilled while Ireland is not a target for economic migrants (Dowling in Ní Shé *et al* 2009). However, the current situation is not clear as it would appear from the Refugee Act that asylum seekers may be legally obliged to stay in direct provision accommodation. At any rate, the relevant statutory provision is not so precise as to refer to the scheme.

Supplementary Welfare Allowance Circulars 04/00 and 05/00 initially dealt with these issues and allowed for independent living in limited circumstances. The withdrawal of any access to rent supplement for asylum seekers in May 2003, compounded by the prohibition on working, has

in effect made it almost impossible for a person to leave direct provision, even if they may lawfully do so.

Asylum seekers in Ireland have the right to move freely within the State (although this may be restricted by their limited financial resources), but they do not have the right to choose their own place of residence. It is expressly stated in the RIA's *Direct Provision Reception and Accommodation Centre Services, Rules and Procedures* that "no resident has an entitlement to be moved to another accommodation centre of his or her choosing" (RIA 2007). If such a request is made and subsequently refused, there is no right of appeal. On the RIA website, those making applications for asylum are advised that they "are required to reside or remain at the accommodation centre allocated [...] by the RIA" and that they "can only move from this accommodation with the permission of the RIA and only in circumstances where the RIA is in a position to offer you alternative accommodation". The excessive periods of time which people then have to spend in direct provision accommodation, along with the refusal to consult with the resident, render the measure disproportionate to the purpose of the scheme.

On occasion asylum seekers have been moved from one hostel to another without any prior notice. Sometimes this is due to the opening of a new hostel or the closing down of an existing one. According to the "House Rules" a resident who is going to be transferred should be given notice of any such transfer but this sometimes occurs with very little notification.

In his study on the *Training Needs of People Working with Asylum Seekers*, Casey notes that the location of centres in remote places not only has a negative impact on residents, but may also affect their relationships with staff, as “the personal and interpersonal problems encountered by staff can be more pronounced in these areas” (Casey 2008).

Asylum seekers are forbidden to leave the country until a decision has been made on their status⁸⁴ and while the rationale behind this prohibition may be justified (to prevent asylum seekers from making a parallel application for asylum in another jurisdiction, although this issue has been dealt with by the Dublin II Convention) it means that, in certain cases, asylum seekers may not be permitted to leave the State for a prolonged period of time. Due to the long delays encountered by many direct provision residents in reaching a final determination on their status, this may cause hardship as people cannot visit relatives in other countries or travel abroad for medical treatment.

3.13 FREEDOM OF ASSOCIATION

Article 22 of the International Covenant on Civil and Political Rights states:

Everyone has the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (ICCPR 1966)

Article 15 of the Refugee Convention also affords the right of association to refugees and makes particular reference to not-for-profit organisations

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory, the most favourable treatment accorded to nationals of a foreign country, in the same circumstances. (UN 1951)

The European Convention on Human Rights also protects the right to freedom of association in Article 11 and is subject only to the usual restrictions based on national security, public safety, health and morals or for the protection of others' rights. None of the justifications for any limitation on this right would seem to be applicable in the current situation and while

⁸⁴ S 9(4)(a) of the Refugee Act 1996.

this fundamental freedom would not appear to be restricted in any official sense, it is limited in practice.

According to the RIA House Rules, all visitors to a Direct Provision centre must “report to Reception and sign in and out” (RIA 2007). While it is necessary to monitor security and protection to any place where there are young children, there are concerns that in certain cases this procedure may be used to prevent interaction between residents and workers from NGOs and the community and voluntary sector generally. As commented by a spokesperson for Integrating Ireland:

We are not allowed into certain hostels simply because we are trying to give asylum seekers a voice.

*(Irish Examiner 17 November 2008)*⁸⁵

In a number of hostels, Residents’ Committees have been formed which are a constructive way for residents to come together and discuss the issues which affect them. It may also be beneficial for the RIA and centre managers as it will provide them with one collective body to deal with instead of individual complainants.

The importance and beneficial nature of the freedom of association was illustrated in a case where a direct provision centre became the focus of media attention. The centre residents went on hunger strike to highlight certain issues which

they felt the management were not addressing adequately. The residents’ protest was called off when representatives of the Irish Refugee Council intervened and helped to mediate between management and the newly formed Residents’ Committee.⁸⁶ The interaction between the two main parties was facilitated by the presence of a third party who sought to reach agreement before the disagreement escalated any further.

The success of the Residents Committees would seem to be dependent on relations between the management and staff and the residents and support workers. This varies from centre to centre as personalities come into play. Often tension mounts when one party feels that its actions are being misconstrued. Again the need for an adequate complaints procedure arises.

In 2008 it was reported that a councillor was refused entry to a direct provision centre after receiving an invitation from the resident’s committee. The Minister for Justice, Equality and Law Reform defended the action of the management and said this was in line with a policy whereby visitors have to request permission from the management to enter a hostel. He assured Deputy Ó Snodaigh, who posed the question in parliament, that

The RIA has always been facilitative towards requests from public representatives, support groups and others

⁸⁵ See online at <http://archives.tcm.ie/irishexaminer/2008/11/17/story77614.asp> (last accessed 19 October 2009).

⁸⁶ See Ruadhán Mac Cormaic, “Asylum seekers end protest”, *Irish Times*, 20 August 2008.

**who wish to engage with the residents of
asylum seeker accommodation centres.**

(Lenihan 29 April 2008)

While it is reasonable for the management of a particular centre to take certain safety precautions, a balance needs to be struck between the right of the residents to receive visitors of their choice and the duty of the management to enforce safety procedures.

3.14 FREEDOM OF EXPRESSION

Freedom of expression is a fundamental right protected in Article 19 of the ICCPR. Its denial in a country of origin forms the basis of many asylum claims.

Article 10 of the ECHR provides

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive or impart information and ideas without interference by public authority and regardless of frontiers.

There is a perception among residents that if they speak out against their conditions or complain about a member of staff then this will have a negative impact on their application for asylum or leave to remain. While the RIA does not have any involvement in the determination of an application for asylum or other form of protection, many residents are afraid to voice their opinions because of the view that they may be penalised.

In its report, *Building a Diverse Mayo*, Mayo Intercultural Action outlines this situation:

Asylum seekers regularly report that they are told by hostel staff and management that if they complain, it will affect their asylum claim. Even

though a claim for asylum cannot be influenced by complaints made to hostel managers or to the Reception and Integration Agency (RIA), confidence in the complaints procedure has been eroded. (MIA 2006)

A number of NGOs have been critical of the lack of an independent complaints mechanism within the direct provision system. Amnesty International and the Irish Centre for Human Rights, in their joint publication *Breaking Down Barriers*, suggest that this “is also indicative of an attitude towards asylum seekers which underscores the entire reception and accommodation system” (Amnesty & ICHR 2006).

The inequality of the current complaints procedure has already been discussed earlier in this report⁸⁷ but suffice to say that the unfairness in this aspect of the system can have a negative effect on the freedom of expression of residents.

The failure of the inspectors and independent assessors to consult with residents may also constitute a curtailment of their freedom of expression, as there is no impartial party to listen to and consider their views.

Another potential infringement of the right to freedom of expression occurred during the campaign for the local elections in June 2009, when it emerged that the RIA had issued a circular forbidding the “distribution or display of party political leaflets, posters or circulars” (RIA 2008c). Asylum seekers and those seeking protection have the right to vote in local elections, but information from the various local election candidates was returned to sender by the management of direct provision centres in accordance with Circular 01/08. The ICCL and Integrating Ireland, on learning of this development, made a complaint to the Standards in Public Office Commission and to the director of the OSCE Office for Democratic Institutions and Human Rights, as it was felt the actions taken by the RIA were “designed to stifle political debate” (*Irish Times* 5 June 2009). Other people who were registered to vote in the local elections received this literature and since the direct provision centre is a person’s “home” while s/he is awaiting a decision on their protection claim, s/he should be allowed to receive the same information as everyone else in order to make an informed decision. Usually the correspondence is addressed to the individual, so it is an act of interference for these items of post to be sent back without the addressee’s permission.

⁸⁷ See Section 1.10.1 regarding the Complaints Procedure.

CONCLUSION

This report has set out the establishment of the direct provision and dispersal scheme and the developments in the administration of the scheme which have taken place during the last decade. These developments have impacted negatively on the people living in direct provision who have fled persecution in their home countries in order to seek protection and safety here in Ireland where they hope to enjoy the fundamental human rights to which we are all entitled.

The government uses the schemes of direct provision and dispersal as a 'push factor' rather than a 'pull factor'. The system of direct provision in its current form is used as a deterrent to discourage people from claiming their fundamental right to seek asylum. While it is acknowledged that the State has to operate some sort of immigration policy, this should not be carried out to the detriment of those who are most in need of the State's protection.

Through the implementation of the direct provision scheme, a number of fundamental human rights are not being protected by the State. The State is failing to comply with its human rights obligations under both domestic and international law, in particular in relation to the rights outlined in this report.

Direct provision and dispersal has resulted in the social exclusion and deprivation of individuals seeking asylum, another form of protection or humanitarian leave to remain. The impoverished and isolated situation in which direct provision

residents find themselves is not in line with the government's own initiatives to avoid social exclusion and to eliminate consistent poverty, in particular child poverty. People living in direct provision are unable to support themselves due to the low levels of social welfare support they receive and the prohibition on work during the time while his/her application is being processed, which usually far exceeds the six month period which the government originally intended.

The UN High Commissioner for Refugees has highlighted the increasingly vulnerable position of people who have sought, or are seeking, protection:

In the context of the current economic recession, xenophobia, intolerance and discrimination, often targeted at refugees and asylum-seekers, continue to be a serious concern across Europe, highlighting the need to support the integration of newcomers. (UNHCR 2009a)

The economic downturn cannot be used as a justification to limit anyone's basic human rights and fundamental freedoms. Human rights are not an optional extra. They constitute binding legal obligations. The system of direct provision was developed hurriedly in Ireland at a time when it had little experience of how to deal with those who sought asylum and protection here. That time has passed. The Irish State is sophisticated and experienced in its approach to protection and immigration matters. It has not applied this increased knowledge and understanding of human rights law as it affects this vulnerable group, to the system of direct provision. It is hard to see what justification there is for treating destitute people seeking the protection of the Irish State differently from other destitute people living in Ireland.

However, if the State is intent on treating those seeking protection in a different way, then FLAC urges the various agencies of the state to carry out an audit of the system against the human rights obligations of the State and to make the adjustments necessary to ensure that all of those who live in direct provision, because they are obliged to do so, have their human rights recognised, respected and promoted.

RECOMMENDATIONS

Ten years after its introduction, direct provision has failed to adequately protect the rights of those seeking asylum and protection in Ireland. Given that failure, it should be abolished as a system. While it remains in place however, the following recommendations should be put into effect:

OVERARCHING RECOMMENDATIONS

- The State should respect, protect and promote the fundamental human rights of people regardless of their immigration status.
- Following on from this, the State should carry out an audit of its policy of dispersal and direct provision to ensure it meets human rights standards in Irish law and in international human rights treaties that Ireland has ratified.
- A greater level of care needs to be taken to guarantee the rights of those in direct provision who are particularly vulnerable, whether by reason of their age, gender, disability, health, sexual orientation or other attribute.
- The Department of Justice, Equality and Law Reform needs to operate the direct provision and dispersal system in a fair and transparent way. Residents must be given a voice in decisions made about them and an objective and fair hearing if difficulties arise in the administration of the system.
- In making any decision to relocate a person, account should be taken of his/her physical and mental health, cultural, religious and other background and the potential for conflict within a direct provision centre because of the person's ethnicity or history in his/her country of origin.

SPECIFIC RECOMMENDATIONS

Recommendations on the operation of the direct provision and dispersal system

- While the policy of direct provision remains, self-catering facilities should be used to full capacity. When renewing contracts with service providers, the RIA should give preference to self-catering facilities rather than accommodation centres which cater for the residents (section 1.4).
- Any assessment of direct provision in relation to value for money should take account of the whole cost of the system, including the long-term consequences for residents vis-à-vis health and social inclusion (section 1.5).
- The information contained in the Department of Justice, Equality and Law Reform should better reflect the operation of the RIA. This should include the number of people in direct provision, the cost, the number of inspections and information clinics and figures for complaints, transfers and expulsions. The RIA should also publish its annual report on its website (section 1.7).
- The mandatory number of inspections by both the RIA and the private inspection company should be carried out annually. An annual report listing the condition of all centres and any concerns raised by the inspectors should be made public. The inspection process should be transparent and should represent a thorough examination of the premises and conditions in which direct provision residents live. The inspection should therefore include a consultation with residents (section 1.7).
- RIA contracts, policies and procedures should be drawn up in line with the nine principles of Quality Customer Service which are binding on all government departments (section 1.8).
- The *Direct Provision House Rules, Procedures and Services*, a booklet outlining the obligations of the centre and the rights of residents, should be reviewed to address the concerns of direct provision residents (section 1.9).
- The RIA should ensure that statistics are kept on the number of complaints made by residents and that these complaints are fully investigated and resolved to the residents' satisfaction. These complaints should not be available to any other part of the Department of Justice, Equality and Law Reform and adequate safeguards to ensure anonymity should be put in place (section 1.10).
- The complaints procedure in direct provision centres should be reformulated using the Ombudsman's guidelines (section 1.10.2).

Recommendations on the operation of the social welfare system

- Direct provision was always intended as a short-term solution. Due to delays in the status determination process, those who still do not have a decision after one year should be treated as any other destitute person and given access to Supplementary Welfare Allowance (sections 2.1.1, 2.1.2 and 2.1.3).
- If full-rate Supplementary Welfare Allowance is not granted to persons awaiting a decision on their status, the direct provision allowance should be increased to €65 per week for an adult and €38 per week for a child in line with inflation (section 2.1.3).
- The guillotined measure which was rushed through the Dail in the Social Welfare and Pensions (No.2) Act 2009, which denies any direct provision resident the right to be recognised as habitually resident in Ireland, should be re-introduced and debated by the Oireachtas in a measured way. (section 2.2 and Preface).
- Delays within the social welfare system should be minimised through a series of measures aimed at making better decisions at first instance and through improved cooperation between the Department of Social and Family Affairs, the Health Service Executive and the Social Welfare Appeals Office to ensure that appeals are processed in a timely fashion (section 2.2).
- More resources should be allocated to the Social Welfare Appeals Office as the current appeals processing wait along with the increase in the number of appeals received due to people's reliance on social welfare payments in times of recession, indicates the need for more staff to process the appeals (section 2.2).

Recommendations on the implementation of the State's human rights commitments

- The exemption in s.14 of the Equal Status legislation which permits unequal services to those in direct provision should be removed. This should be based on the principle of equality of services to those in direct provision, which should underpin all RIA activities (section 3.2).
- The State should adopt the approach of viewing asylum seekers as refugees who are simply awaiting a formal declaration rather than treating them with suspicion (section 3.3).
- The State should implement the principle of the "best interest of the child" in all decisions concerning children (section 3.4).

- The State should ensure equal treatment between all children receiving state care (sections 3.4 and 3.5).
- The State should provide for professional care in the accommodation facilities for separated children and assign a *guardian ad litem* to each separated child (section 3.5).
- The Department of Justice, Equality and Law Reform should examine its practices and procedures to ensure that no one is left homeless and destitute in violation of human rights obligations in both Irish and international law (section 3.6.3).
- The complaints and proposed expulsion procedures should be amended to ensure that the health difficulties of the person under review, including any mental health difficulties, are properly considered (section 3.6.3).
- No-one should be expelled from the direct provision system without a suitable alternative solution being offered (section 3.6.3).
- To respect their right to food, direct provision residents in Ireland should be given the necessary support, access to facilities and social assistance. Direct provision residents should be given the opportunity to choose, prepare and cook their own food appropriate to their culture, diet and individual needs (section 3.8).
- Parents should be given the resources and facilities to prepare food for their children. The decision as to what to feed their children should be the parents' alone. This also applies to the decision when to wean a child onto solid food (section 3.8.2).
- The RIA and private catering companies should ensure that the quality of food provided is of a high standard and is sufficiently nutritious. Healthy eating should be promoted and encouraged throughout the direct provision system (section 3.8).
- The Irish government should examine and adopt the *Voluntary Guidelines* to support the progressive realisation of the right to adequate food in the context of national food security, as issued by the Food and Agriculture Organisation of the United Nations (adopted in 2004) (section 3.8).
- The government should adhere to the four interrelated and essential elements of the universally recognised right to health, namely availability, accessibility, acceptability and quality of healthcare services (section 3.9).
- A thorough needs assessment rather than a basic routine health screening should be carried out for each person when they apply for asylum (section 3.9).

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- There is insufficient data available on the health needs of asylum seekers and refugees. More detailed information should be collected and collated. This should take into account the particular needs of vulnerable groups including women, children, disabled individuals and lesbian, gay, bisexual or transgendered persons (section 3.9).
 - Health service providers should be culturally sensitive in relation to patients from other countries and backgrounds (section 3.9).
 - The Health Service Executive should be allocated the necessary funds and resources to implement its Intercultural Health Strategy in full (section 3.9.1).
 - In relation to the specific mental health needs of persons seeking asylum or another form of protection, the government should ensure that there are adequate mental healthcare facilities for all individuals, including direct provision residents (section 3.9.2).
 - A health impact assessment should be carried out by the RIA in relation to the long-term consequences of living in the direct provision system (section 3.9.2.2).
 - Women living in direct provision who are or who become pregnant should be given appropriate medical attention and aftercare (section 3.9.3).
 - Women in direct provision should not be restricted in their reproductive rights, in particular with respect to family planning (section 3.9.3).
 - Since a child's health is dependent on so many other rights, such as the rights to food, adequate housing and education, it is imperative that this right is not considered in its narrowest meaning but is looked at in the light of the 'whole child' perspective usually favoured by the government (section 3.9.4).
 - Direct provision residents should be granted temporary work permits if they are waiting longer than six months for a decision on their status (section 3.10).
 - In consultation with direct provision residents and the NGOs which work with them, the government should give proper consideration to "opting-in" to the recast Reception Directive (section 3.10.1).
 - Ireland should increase its efforts to ensure that non-denominational primary education is widely available in all regions, in view of the increasingly diverse and multi-ethnic composition of the population of the State (section 3.11).
 - Residents should be consulted about any transfers where the move may have a direct or indirect impact on a child's education (section 3.11.1).

- Young adults who complete their Leaving Certificate and wish to access third-level education should be provided with opportunities to do so (section 3.11.2).
- In order for direct provision residents to avail of free English language courses or other free courses provided to them, they should have access to free childcare facilities (section 3.11.2).
- Education should be promoted and facilitated for direct provision residents (section 3.11.2).
- More relevant educational and personal development courses should be accessible to direct provision residents. The institutes of further education should consult with direct provision residents living in the locality in order to tailor these courses to their interests and needs (section 3.11.2).
- Direct provision residents should be allowed to have their qualifications recognised despite the fact they are currently not permitted to work. This step would help to accelerate their integration into the Irish labour market if status is then granted (section 3.11.2).
- The RIA and centre management should encourage and facilitate residents to form residents' committees in order to assist all sides involved in the direct provision system to maintain good lines of communication (section 3.13).
- NGOs and other interested persons should be allowed to access direct provision centres where their assistance or expertise is required or requested (section 3.13).
- Residents' views should be taken into account in matters concerning their lives (section 3.14).

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This report updates and elaborates on some of the key concerns about the system of direct provision and dispersal identified in FLAC's 2003 publication, *"Direct Discrimination?"* The report examines the system of direct provision in the context of government policy, domestic law and international human rights standards. Asylum seekers and those seeking subsidiary protection or humanitarian leave to remain, living in direct provision accommodation, experience high levels of poverty and are particularly susceptible to social exclusion. There is a particular focus in the report on the impact of the Habitual Residence Condition on this vulnerable group, especially regarding their entitlement to access social welfare payments. FLAC assesses the direct provision system in a human rights context to determine whether the scheme is in compliance with international standards and norms, with due regard given to economic, social and cultural rights.



13 Lower Dorset St, Dublin 1
T 01-874 5690 F 01-874 5320
E info@flac.ie W www.flac.ie

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