

Recommendations on the International Protection Bill 2015

Submitted by Nasc

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1. Introduction

Nasc, the Irish Immigrant Support Centre, is a non-governmental organisation working for an integrated society based on the principles of human rights, social justice and equality. Nasc (which is the Irish word for link) works to link migrants to their rights through protecting human rights, promoting integration and campaigning for change. Through our legal clinics, Nasc provides information, advice, and support to over 1,000 migrants and their families annually living in the Cork area. It is the only NGO offering legal information and advocacy services to migrants in Cork.

Nasc was founded in 2000 in response to the rapid rise in the number of migrants moving to Cork. This rise was due in part to the introduction of the Government's policy on dispersal and the establishment of the Direct Provision System in 1999, which resulted in an increase in the numbers of asylum seekers being dispersed to direct provision accommodation in Cork. At that time there were no services in the city to address the needs of this vulnerable population. There are currently five direct provision centres in Cork City and County, placing Cork as one of the counties with the highest asylum seeking population in the country. We have over fifteen years experience working in the immigration and protection systems and our contribution to this process is directly informed by the issues that present in our legal clinics and through our direct work with asylum seekers at all stages of the process.

This submission includes analysis of key areas of the Bill and recommendations for amendments relating to these areas. This analysis is broken down into General Observations (Section 2) and Specific Observations (Section 3). A full summary of the recommendations for amendments is below:

1.1. Summary of Recommendations for Amendments

- I. Nasc recommends that the Bill be amended throughout such that Ireland is in compliance with all of the Directives under the Common European Asylum System.
- II. Nasc recommends that the Bill be amended to include the introduction of an equality and non-discrimination guarantee.
- III. Nasc recommends that the Bill be amended to include a provision placing our reception system on a statutory footing.
- IV. Nasc recommends that the Bill be amended to include a provision that extends the remit of the Ombudsman and the Ombudsman for Children to the administration of the law relating to asylum and immigration, and to give oversight of the Reception (Direct Provision) System.
- V. Nasc recommends that the Bill be amended to include a clear provision that the Best Interests of the child be a primary consideration in all actions concerning children at every stage of the process.
- VI. Nasc recommends that the Bill be amended to include a provision ensuring that the rights of the child to be heard are given sufficient expression and protection.
- VII. Nasc recommends that the Bill be amended to contain provisions requiring procedural and substantive training for decision-makers who make decisions in relation to children and those who interview them.
- VIII. Nasc recommends amending the legislation to include a provision for the establishment of a vulnerability screening for all applicants, and the provision of supports for those identified as vulnerable throughout the application process.
- IX. Nasc recommends that a clear definition of a separated child, in line with international best practice, should be included in the legislation.
- X. Nasc recommends the inclusion of a clear definition of a separated child, in line with international best practice.
- XI. Nasc recommends that Sections 14 and 15 be amended to reflect the international best practice definition of a separated child (see further below Section 3.1)
- XII. Nasc recommends that Section 15(3) be amended (see further below Section 3.2)
- XIII. Nasc recommends amending Section 15(4) (see further below Section 3.2)
- XIV. Nasc recommends inclusion of a new subsection under Section 15, to allow for a person under 18 to make their own protection application (see further below Section 3.2)
- XV. Nasc recommends deleting Section 55 (5) (see further below Section 3.3.1)
- XVI. Nasc recommends inserting additional text after Section 55 (6) (Page 56, lines 1-3) and after section 56 (5) (see further below Section 3.3.2)
- XVII. Nasc recommends deleting Section 55 (8) (see further below Section 3.3.3)

- XXVIII. Nasc recommends amending Sections 55 (9) (a) and 59 (b) (see further below Section 3.3.4)
- XIX. Nasc recommends inserting a new Subparagraph 55 (10)(a-b) under Section 55 (see further below Section 3.3.5)
- XX. Nasc recommends inclusion after Section 56 (6) a new subsection 55(7) of the right to appeal a negative family reunification decision (see further below Section 3.3.6)
- XXI. Nasc recommends deleting Section 16(3)(b) and replacing with text allowing the right to work after 9 months (see further below Section 3.4)
- XXII. Nasc recommends that Section 20 be amended, to ensure that detention is only used as a measure of last resort (see further below Section 3.5)
- XXIII. Nasc recommends Section 20 (12) be amended to ensure an applicant is not detained for a period in excess of 21 days in aggregate (see further below Section 3.5)
- XXIV. Nasc recommends that Section 20(1)(e)(ii) be amended, and Section 20(18) be deleted (see further below Section 3.5)
- XXV. Nasc recommends that Section 20(15) and 20(16) be amended such that, the phrase ‘in a language that he or she may reasonably be supposed to understand’ be replaced with ‘in a language that the person understands’ (see further below Section 3.5)
- XXVI. Nasc recommends that Section 20 should be amended to include a provision whereby persons detained under this section are informed of a right to the assistance of an interpreter from the outset of their detention (see further below Section 3.5)
- XXVII. Nasc recommends that Section 20(14) (c) should be deleted and replaced with: ‘applicants detained under this section shall have reasonable access to an interpreter from the outset of their detention’ (see further below Section 3.5)
- XXVIII. Nasc recommends that Section 20(13) include a new subsection 20(13)(c), subject to Section 49 (see further below Section 3.5)
- XXIX. Nasc recommends, that at a minimum, Section 37 (3) be amended to restore the time limit to the current position, which is five working days (see further below Section 3.6)
- XXX. Nasc recommends the inclusion of new subsections, taken from the Refugee Act, 1996, Section 12.44, into Section 72(2) (see further below Section 3.7)
- XXXI. Nasc recommends that Section 74 (9) and (10) should be deleted (see further Section 3.8)
- XXXII. Nasc recommends that Section 74(11) is amended to include further safeguards to protect the inviolability of the home (see further Section 3.8)

2. General Observations and Recommendations

Nasc broadly welcomes the publication of the International Protection Bill, 2015 and welcomes the fact that the Bill relates solely to protection, removing the uneasy tension between immigration and

protection legislation. We particularly welcome the proposed introduction of a single or unified procedure to replace our current system, in which eligibility for refugee status and subsidiary protection status are considered sequentially. The sequential nature of our current system has led to inordinate delays in the processing of applications, resulting in asylum seekers spending many years awaiting a decision on their application.

The introduction of the Single Procedure coupled with the key overarching reforms outlined in the McMahon Report on the Protection Process and Direct Provision, of which Nasc was a member, offers the State a unique opportunity to establish a fair, efficient, and transparent protection system that is in compliance with our obligations under International Human Rights Law, E.U Law and Domestic Legislation. The proposed introduction of the Single Procedure goes some way to address some of the systemic issues that have lead our current dysfunctional system. However, we are disappointed that a number of the recommendations of the Working Group relating to improvements in the process are not reflected in the Bill in its current form.

2.1. Opting into and Transposition of EU law

It is Nasc's contention that one of the primary and principle reasons for the well-documented systemic failures in our current Protection and Reception systems stems from the fact that we have failed to meet the relevant minimum E.U. minimum standards for Protection and Reception of Asylum Seekers. These standards are set out in a suite of Directives known as the Common European Asylum System (CEAS), which derives from Member States' obligations under Article 63¹ of

¹Article 63 Provides: 1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

the Treaty on the Functioning of the EU (TFEU). The primary Directives here are: the Reception Conditions Directive², the 'Dublin' Regulation³, the Recast Qualification Directive⁴ (adopted in December 2011), the Recast Eurodac Regulation,⁵ and the Procedures Directive⁶. A number of these Directives were passed by European Parliament in June 2013, when Ireland held the presidency of the European Council. These Directives set down the **minimum and conservative** standards to be followed and it is open to Member states to implement more favourable provisions.

Ireland is not bound to participate in European instruments in this area,⁷ but may opt-in to any Directive it wishes to. To date, Ireland has opted in to only one Directive in the Recast CEAS instruments - the Recast Dublin Regulation. The current Bill will also bring Ireland into compliance with the Recast Qualifications Directive⁸, but not the recast Procedures or Receptions Directives. The Bill, which is absent of any of the substantive provisions in these Directives, would seem to indicate a marked unwillingness and a missed opportunity by the State to introduce and be held accountable to a clear set of minimum basic standards for the reception, processing and withdrawal of protection applications in Ireland.

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- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
 - (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
 - (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection

³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

⁵ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013

⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

⁷ Under Protocol, No 21, annexed to the Treaty of European Union and the Treaty on the Functioning of the European Union, "on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice"

⁸ See Explanatory and Financial Memorandum to International Protection Bill, 2015, p. 2

Ensuring that Ireland is in compliance with all of the CEAS Directives would include measures granting a limited right to work after nine months for protection applicants, legislating for the Best Interests of the Child, and the introduction of a vulnerability assessment for all applicants upon entry into the system to facilitate early detection and disclosure of potential victims of trafficking and/or torture. The Bill should be amended throughout to reflect and incorporate the recast Directives.

Nasc recommends that the Bill be amended throughout, such that Ireland is in compliance with all of the Directives under the Common European Asylum System.

2.2. Equality

Nasc are concerned that the General Scheme does not contain a provision of non-discrimination or equality, and given the fact that our equality legislation does not extend to protection policy:

Nasc recommends that the Bill be amended to include the introduction of an equality and non-discrimination guarantee.

2.3. Statutory Provision for Reception Centres

There is currently no legislative basis for the direct provision system. We need to implement a reception system that has undergone Parliamentary scrutiny, and ensures compliance with our international obligations under the ECHR Act, 2003 and also EU law.

Nasc recommends that the Bill be amended to include a provision placing our reception system on a statutory footing.

2.4. Extending the Remit of the Ombudsman

Several aspects of the Reception and Integration Agency's 'House Rules', including the complaints procedure, were deemed unlawful in High Court Justice Mac Eochaidh's ruling in *C.A. and T.A.*⁹. This

⁹ *C.A. and T.A (a minor) v Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* (14 November 2014).

is an extremely welcome development; Nasc has long highlighted the failures in the existing complaints procedure and called for an independent and impartial complaints mechanism to provide oversight of the direct provision system. The High Court ruling has compelled the Reception and Integration Agency (RIA) to develop an independent complaints system, which has yet to be fully implemented, as far as we understand.

We strongly recommend that oversight of that mechanism be officially extended to the Offices of the Ombudsman and the Children's Ombudsman and that this oversight be guaranteed in legislation in the Bill. Nasc has long advocated for the Department of Justice to recognise the Offices of the Ombudsman and the Children's Ombudsman's investigatory remit over all administrative issues relating to asylum to the exclusion of decisions on status, which includes accommodation, administration processes and internal complaint handling. These are areas the Offices of the Ombudsman and the Children's Ombudsman already believe to be within their remit; however the Department of Justice does not share this understanding.¹⁰ An explicit enabling provision in the Bill will ensure that that remit cannot be contested. Ombudsman Emily O'Reilly, in one of her last actions prior to taking up the role of European Ombudsman, presented to the Joint Oireachtas Committee on Public Service Oversight and Petitions in September 2013 on this area continuing to remain outside the Ombudsman's jurisdiction, and noted that 'this anomalous situation is virtually unique in terms of the jurisdiction of national Ombudsmen internationally'. We recommend that the necessary amendments to the Ombudsman Act be included in the Bill.

Nasc recommends that the Bill be amended to include a provision that extends the remit of the Ombudsman and the Ombudsman for Children to the administration of the law relating to asylum and immigration, and to give oversight of the Reception (Direct Provision) System.

¹⁰ See JOC Public Service Oversight and Petitions, Report on the extension of the remit of the Ombudsman to cover all aspects and bodies associated with the Direct Provision System (DPS) on DP, 2015; Office of the Ombudsman, *A report by the Ombudsman for Children on the operation of the Ombudsman for Children Act, 2002* (March 2012).

2.5. The Best Interests of the Child Principle

The principle of the best interests of the child derives from Article 3 of the UN Convention on the Rights of the Child (CRC), which Ireland ratified in 1992. In addition, Ireland is bound by the European Convention on Human Rights (ECHR), which does not specifically address the principle; however the European Court of Human Rights (ECtHR) has developed a practice of interpreting certain substantive Convention rights in light of the principle.¹¹ The best interests of the child principle is also enshrined in Article 24 of the EU Charter of Fundamental Rights, which became legally binding in Ireland following the passing of the Lisbon Treaty in 2009. In implementing the various EU Directives under the CEAS in the International Protection Bill, Ireland is bound to do so in conformity with the rights contained in the Charter of Fundamental Rights. Finally, both the Child and Family Agency Act 2013 and the Children First Bill) give significant prominence to the best interests of the child principle in relation to all functions Tusla, the Child and Family Agency (CFA), performs under the legislation.

The UN Committee on the Rights of the Child defined this principle as a ‘threefold concept’: a substantive right; a fundamental, interpretive legal principle; and a rule of procedure.¹² Thus, giving effect to the best interests of the child principle is not solely a question of incorporating provisions into domestic legislation on substantive rights. It is a question of interpreting and drafting legal provisions in a manner that is compatible with the principle, as well as designing rules of procedure to ensure they are compatible with and facilitate the application of the principle.

The application of the best interests of the child principle does not give an automatic right to international protection; a child must meet the same eligibility criteria as any other protection application. That being said, the best interests of the child principle is potentially relevant to evaluating a claim for protection when the applicant is a child, for instance acts of persecution of a child-specific nature or child-specific country of origin information may be relevant in assessing an

¹² In the case of *Neulinger and Shuruk v Switzerland*, the ECtHR held that there is a ‘broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount’.

application. Additionally, the Working Group on the Protection Process and Direct Provision clearly recommended that that the Bill should reflect this principle.

Nasc recommends that the Bill be amended to include a clear provision that the Best Interests of the Child be a primary consideration in all actions concerning children at every stage of the process.

2.6. The Right of the Child to Be Heard

Article 12 of the CRC (and Article 24 of the CFR) provides that States must assure that a child 'who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child', and that 'the views of the child [be] given due weight in accordance with the age and maturity of the child', and that the child 'be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law'. Therefore, a child who is capable of forming his or her own views must be provided the opportunity to be heard at all stages of the asylum procedure.

Nasc recommends that the Bill be amended to include a provision ensuring that the rights of the child to be heard are given sufficient expression and protection.

2.7. Training for Those Working With Children

Giving effect to the best interests of the child principle requires those working in the system to have a high level of awareness of the specific rights and needs of children and their obligations under international and domestic law. The provision of training is necessary in this regard.

Nasc recommends that the Bill be amended to contain provisions requiring procedural and substantive training for decision-makers who make decisions in relation to children and those who interview them.

2.8. Situation of Vulnerable Persons

Section 57, which requires the minister to have due regard to the specific situation of vulnerable persons, is the only reference to vulnerability in the legislation. The application of this provision however is very limited and only applies once status has been granted.

The Working Group recommended that a vulnerability assessment be carried out on all applicants for protection upon arrival in the State. The early identification of vulnerable applicants is essential, in order to provide targeted supports for this category of people throughout the application process. For vulnerable persons, which could include unaccompanied minors, victims of torture, LGBTI applicants and the elderly, the lack of early identification and the delivery of targeted supports can have a negative impact on the quality of their asylum application, the length of time they are in the system and their care while they in the system. Reports relating to a person's specific circumstances, for example medico-legal reports for victims of torture, may not be available when the person initially submits his or her protection application.

The Refugee Act, 1996 contains only one provision related to the identification of vulnerable persons, the scope of which is confined to unaccompanied minors.¹³ The only mention of vulnerable persons in the Bill is in Section 57 where 'due regard shall be had' in the application of section 52- 56 (those concerning the 'Content of International Protection'). Thus, in the current Bill, vulnerability is only taken into account once a person has received a positive decision on their protection application and been granted a protection status, not in the application process itself.

Under the Recast Procedures Directive (Article 24), which Nasc recommends Ireland opt in to, States must ensure vulnerable applicants are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of the Directive throughout the duration of the asylum procedure. The Directive requires States to assess within a reasonable period of time after an application is made whether an applicant needs 'special procedural guarantees'.¹⁴ The

¹³ Section 8 establishes a procedure to be followed where an unaccompanied minor is identified by an immigration officer or the ORAC.

¹⁴ The recast Asylum Procedures Directive:

Recast Reception Conditions Directive, which Nasc also recommends opting in to, also includes provisions on vulnerable persons and how they are to be identified, namely Articles 21 and 22. Article 21 outlines a number of examples of vulnerable persons, which have been outlined in Section 57 (this list cross references the Procedures Directive). Article 22 outlines what a vulnerability assessment should look like, and that this assessment should dictate what ‘special reception needs’ are required for the support of that applicant.

Currently, voluntary health screenings are available in Baleskin Reception Centre for new protection applicants who opt to stay in direct provision accommodation. Vulnerabilities may be disclosed or discovered as part of that screening or subsequently in consultation with an applicant’s GP.

Article 24 - Applicants in need of special procedural guarantees

1. Member States shall assess within a reasonable period of time after an application for international protection has been made whether the applicant is an applicant in need of special procedural guarantees.
2. The assessment referred to in paragraph 1 may be integrated into existing national procedures and/or into the assessment referred to in Article 22 of [the recast Reception Conditions Directive] and need not take the form of an administrative procedure.
3. Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.
4. Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.

Recital 29 provides further explanation as to what is intended under this provision:

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

Article 22 – Assessment of the special reception needs of vulnerable persons

1. In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs. That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure. Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.
2. The assessment referred to in paragraph 1 need not take the form of an administrative procedure.
3. Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.
4. The assessment provided for in paragraph 1 shall be without prejudice to the assessment of international protection needs pursuant to [the Qualification Directive].

However no formal mechanisms currently exist for notifying the Reception and Integration Agency or decision-making officers of any specific needs arising out of such vulnerability.

Nasc recommends that vulnerability be taken into account from the point of initial application for international protection, and that this need to be provided for in the Bill. Nasc also recommends that a vulnerability assessment for all protection applicants, in line with the Receptions and Procedures Directives, be included in the legislation, with formal mechanisms of referral in the case of established vulnerabilities to ensure that vulnerable persons receive appropriate information, health or psychological services and procedural supports.

Nasc recommends amending the legislation to include a provision for the establishment of a vulnerability screening for all applicants, and the provision of supports for those identified as vulnerable throughout the application process.

3. Specific Observations and Recommendations

3.1. Unaccompanied Minors Seeking Protection

Unaccompanied minors (or Separated Children Seeking Asylum) are defined as “children under 18 years of age who are outside their country of origin, who have applied for asylum and are separated from their parents or their legal/customary care giver.”¹⁵ There are many reasons why children arrive unaccompanied and child trafficking is one of the reasons. Separated children are a vulnerable cohort and the state is duty bound by international and domestic law to protect and provide for separated children in the same way as children normally resident in the State. Currently, it is under the Child Care Act, 1991 and the Refugee Act, 1996 (as amended) that the responsibilities of the State are set out in relation to the care needs of separated children who seek asylum in the State. Separated children who arrive in this jurisdiction are placed in the care of the State, with Tusla, the Child and Family Agency (CFA).

¹⁵ Statement of Good Practice, Separated Children in Europe Programme

Nasc recommends the inclusion of a clear definition of a separated child, in line with international best practice.

As it stands, there is a lack of clarity in the Bill about whether a minor is deemed ‘accompanied’ or ‘unaccompanied’. In law and international best practice, a child is either accompanied by a parent or guardian or is an unaccompanied or separated child. Sections 14 and 15 of the Bill make reference to a ‘responsible adult’, which is not defined and does not accord with Irish law (unlike the term ‘guardian’). This ‘responsible adult’ has extensive powers enabling them to make an application for international protection on behalf of a potentially unaccompanied or separated child under Section 15, including the power to consent to a medical examination of a child, without their relationship to the child ever having to be established. The adult could be a friend, brother, sister or equally the child’s trafficker.

Nasc recommends that Sections 14(1) (Page 18, lines 20-25) and 15(1)(b) (Page 18, lines 20-25) be amended to reflect the international best practice definition of a separated child, in the following manner:

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

*15. (1) Subject to sections 21 and 22, a person who has attained the age of 18 years and who is at the frontier of the State or who is in the State (whether lawfully or unlawfully) may make an application for international protection— (a) on his or her own behalf, or (b) on behalf of another person who has not attained the age of 18 years and who is at the frontier of the State or who is in the State (whether lawfully or unlawfully), where the person who has attained the age of 18 years ~~is taking responsibility for the care and protection~~ **the parent or legal or customary caregiver** of the person who has not attained the age of 18 years.*

3.2. The right of a child to make a protection application

The UN Committee on the Rights of the Child's General Comment 6 states that 'asylum seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection irrespective of age'. As it stands, under Section 15(3) of the Bill, a person who makes an application for protection under subsection (1)(a) 'shall be deemed to also have made an application for international protection on behalf of his or her dependent child where the child is not an Irish citizen', under certain criteria outlined in Section 15(3)(a-c). This is counter to the rights of the child to make a separate protection application on their own behalf. Amending Section 15(3) to clearly articulate that right, it will also remove any potential conflict with Head 7(2)f, which makes explicit reference to acts of persecution of a child-specific nature.

Nasc recommends that Section 15(3) (Page 18, lines 28-30) be amended as follows:

15. (3) Subject to sections 21 and 22, a person who makes an application under subsection (1)(a) ~~shall be deemed to also have made~~ **may make** an application for international protection on behalf of his or her dependent child where the child is not an Irish citizen and -

In addition Section 15, must include provisions for an unaccompanied minor to make an application on their own behalf.

Nasc recommends amending Section 15(4) (Page 18, lines 36-42) to be as follows:

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

Nasc also recommends inclusion of a new subsection under Section 15, as follows:

15. (7) Subject to sections 21 and 22, a person under the age of 18 and who is at the frontier of the State or who is in the State (whether lawfully or unlawfully) may make an application for international protection on his or her own behalf.

3.3. Family Reunification

Nasc recommends that the family reunification provisions in the Bill be amended to bring the International Protection Bill in line with the existing rights of persons granted international protection in Ireland currently. We recommend:

3.3.1. *Removing the time restriction on for families entering the State to join the sponsor*

Section 55 (5) permits the Minister to provide a time limit by which a family member granted family reunification must have entered the State. Nasc is concerned about the introduction of any such restrictions which may not take into consideration any exceptional measures or obligations which may arise which may prevent travel. Nasc also notes that the cost of travel is usually borne entirely by the sponsor and can represent a very significant cost, particularly for those with large families. In our extensive experience working in family reunification, it is common for delays to occur in family members travelling to Ireland. These may include delays in obtaining entry visas to Ireland or exit visas from the home country, difficulties in obtaining travel documents, raising the cost of travel (particularly for large families) and making arrangements for the care of any family members who may not be eligible for travel. We are concerned that in some circumstances the safety of the family may be jeopardised if they are required to travel at a time that it may not be safe to do so.

Nasc recommends deleting Section 55 (5) (Page 55, lines 37-39), as follows:

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

3.3.2. Amending the provision on the cessation of permission to remain when a marriage or civil partnership fails to allow for retention of status in exceptional cases

Sections 55 (6) and 56 (5), in their current form do not provide for any exemptions on the loss of the right to reside in the State for family members of refugees. We are concerned that this may disproportionately impact on spouses or civil partners who experience domestic abuse. Our experience and the experience of domestic violence organisations is that victims of domestic abuse often remain in abusive and/or dangerous relationships, as they believe that it may otherwise compromise their immigration status. This would reflect the current policy in the INIS Victims of Domestic Violence Immigration Guidelines¹⁶.

Nasc has also had experience in assisting family members of refugees to resolve their immigration statuses in the event of the death of the sponsoring refugee. At a time of great personal grief and hardship for families concerned, it is important that they be able to retain their status in the State.

Nasc recommends inserting after Section 55 (6) (Page 56, lines 1-3) and after section 56 (5) (page 57, lines 15-18), as follows:

55. (6) and 56. (5) A permission given under subsection (4) to the spouse or civil partner of a sponsor shall cease to be in force where the marriage or the civil partnership concerned ceases to subsist.

Without prejudice to subsection 6 a permission granted under subsection (4) may be retained by the spouse or civil partner of a sponsor where the marriage or civil partnership concerned ceases to subsist where this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or civil partnership was subsisting or the death of the sponsor.

¹⁶ Victims of Domestic Violence Immigration Guidelines available at <http://www.inis.gov.ie/en/INIS/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf/Files/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf>

3.3.3. Removing the obligation to apply for family reunification within 12 months of being granted refugee or subsidiary protection status.

Section 55 (8) limits the right to family reunification to the 12 month period after the sponsor has been recognised as a person in need of international protection. Current legislation does not contain this restriction. This time period should be removed as it will severely impact the most vulnerable family members who may have become separated in fleeing conflicts or who may have been imprisoned. Nasc has represented a number of sponsors who have only successfully found family members years after they have been granted status. Under the proposed legislation, they would have lost their right to family reunification.

Amino from Somalia was granted refugee status. She successfully applied for family reunification for her children, who were living in a refugee camp in Ethiopia, to join her. At the time of her application, she was unable to find her husband Mohamed who had become separated from the rest of the family. She had applied for tracing through the Red Cross but this did not yield any leads. Four years after she was granted status, her husband contacted her through social media. He had been frantically searching for her and their children for years and a chance encounter with a mutual acquaintance gave him enough information to track her down. Amino was able to apply for family reunification to complete her family.

Nasc recommends deleting Section 55 (8) (Page 56, lines 15-18), as follows:

~~An application under subsection (1) shall be made within 12 months of the giving under section 46 of the refugee declaration or, as the case may be, subsidiary protection declaration to the sponsor unless the Minister is satisfied, that the sponsor could not reasonably have made the application within that period~~

3.3.4. Removing of the restriction of family reunification rights to marriages and civil partnerships subsisting at the time of the sponsor's application for protection.

Confining the definition of 'family members' to relationships based on civil partnerships or marriage at the time of the application for international protection ignores the realities of family life and is contrary to the principles of Article 8 of the ECHR. In Ireland 35.4% of all births occur outside

marriage or civil partnership. The restrictive definition of ‘family members’ would mean that sponsors would have a right to apply for biological children, but in some cases, not the other parent and could effectively lead to breaking up the family unit. This would significantly undermine the integrity of the family life in the State.

While we welcome the extension of family reunification rights to civil partners of refugees, Nasc are concerned that, in reality, LGBT refugees will remain unable to realise their rights to family reunification with same-sex spouses or partners. Section 55 provides that the relationship must have been subsisting at the time of the sponsor’s application for protection in Ireland however same-sex marriages or civil partnerships are generally illegal in the top refugee-producing countries. In fact, in the majority of such countries same-sex sexual activity is illegal. It is quite possible that a sponsor’s application for international protection may have been based on the risk of persecution because of their sexual orientation and it would be unrealistic to expect, in these circumstances, couples to have married or obtained a civil partnership prior to the sponsor fleeing their country of origin.

Nasc recommends amending Sections 55 (9) (a) and 59 (b) (Page 56, lines 21-26), as follows:

(a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application ~~for international protection in the State~~ under this section),

(b) where the sponsor is a civil **or de facto** partner, his or her civil **or de facto** partner (provided that the civil partnership is subsisting on the date the sponsor made an application ~~for international protection in the State~~ under this section),

3.3.5. Provide for family reunification of dependent family members at the discretion of the Minister

Section 55 does not provide any means for a refugee or person eligible for subsidiary protection to apply for family reunification with other dependent family members including parents, wards, grandchildren and adult children. As outlined by UNHCR, refugee families “rarely fit neatly into preconceived notions of a *nuclear* family (husband, wife and minor children... A broad definition of a

family unit – what may be termed an extended family – is necessary to accommodate the peculiarities in any given refugee situation.”¹⁷

The Refugee Act, 1996 includes the possibility for refugees to apply for dependent family members, “any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.”¹⁸ No similar provision is included in the Bill. Nasc is extremely concerned that these provisions are inadequate and will particularly affect very vulnerable family members including adults with disabilities and orphaned wards who have become part of the sponsor’s family unit.

Sami, a refugee, came to Nasc for assistance with a family reunification application. Sami had spent several years waiting for his application for asylum to be processed in Ireland. Once he was granted refugee status, he immediately wished to apply for family reunification with his wife and 4 children who were living in a refugee camp. Sami’s eldest child was over 18 and suffered from a significant physical disability. Sami had a right to family reunification with his wife and 3 younger children, and the Minister used his discretion to also grant Sami’s eldest son family reunification under s18(4) to ensure that the family unit was maintained.

Nasc recommends inserting a new Subparagraph 55 (10)(a-b) under Section 55, as follows:

55. (10) (a) The Minister may at his or her discretion, give permission in writing to dependent member of the family of a sponsor to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 52 in relation to a qualified person

¹⁷ UN High Commissioner for Refugees (UNHCR), *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: <http://www.refworld.org/docid/4ae9aca12.html> [accessed 5 May 2015] UNHCR has outlined five guiding principles of family reunification:

- a) The family is the natural and fundamental group unit of society, and is entitled to protection by States
- b) The refugee family is essential to ensure the protection and well being of its individual members
- c) The principal of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific
- d) Humanitarian considerations support family reunification efforts
- e) The refugee family is essential to the successful integration of resettled refugees

¹⁸ Article 18(4) Refugee Act, 1996

55. (10) (b) In paragraph (a), “dependent member of the family”, in relation to a sponsor, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the sponsor who is dependent on the sponsor or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.

3.3.6. Provision of a right of appeal of negative decisions

The Bill does not provide for a right of appeal on a negative family reunification decision. In the event that the sponsor wishes to challenge a decision, the only legal remedy open to him/her is judicial review proceedings. Nasc believes that judicial review is not an adequate remedy as it is not an appeal on the facts of the case and is an inefficient and costly mechanism.

Nasc recommends inclusion after Section 56 (6) a new subsection 55(7), which states as follows:

55. (7) The sponsor has the right to appeal a negative decision, to an independent appeals body.

3.4. Permission to Remain in the State

Section 16 outlines the conditions which attach to a permission granted to a Protection Applicant whilst remaining in the state.

Section 16 (3) b places an outright prohibition on the Protection Applicants to seek, enter or be in employment. Ireland is now the only country in the E.U., bar Lithuania, that has a blanket ban on Protection Applicants entering the work place. The impact that this has on the lives on protection applicants is well documented by Nasc, protection applicants and other NGOs in the field. It has formed part of the public discourse on our protection system in recent months, receiving wide public support for the lifting of the ban. Importantly, the Working Group on the Protection Process and Direct Provision recommended that protection applicants be granted the right to work if a decision on their application was not received within a nine month period. Nasc is deeply concerned that, despite this, the prohibition on the right to work is restated in the current draft Bill.

Nasc recommends in the strongest possible terms that protection applicants should be given access to the labour market and that Section 16 (3) (b) be removed and replaced with a provision in line

with Article 5 of The Reception Conditions Directive, granting qualified or limited access to the labour market.

Nasc recommends deleting Section 16(3)(b) (page 19 line 15-20) and replacing with the following text:

16. (3) (b) An applicant shall have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the Tribunal has not been taken and the delay cannot be attributed to the applicant.

3.5. Detention of an applicant

Section 20 provides for the circumstances under which an applicant for protection can be detained. Nasc is currently undertaking research into Immigration Related Detention and this is due to be published later this year. The initial findings emerging from the research to date would indicate that a considerable number of applicants who are detained, were not informed of their right to challenge the detention, were housed with convicted prisoners and unaware of their rights, or were not provided with information in a language that they could understand. Nasc's findings echo those of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its report on the Irish prison system published in November 2015.

In defining "a place of detention", Nasc considers prisons or Garda Stations are not a suitable place for the detention of Protection Applicants who have not been convicted of a criminal offence and who are attempting to enter the state, are awaiting the outcome of their protection applications or are subject to deportation orders. Detention in prisons and Garda Stations runs contrary to the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Where detention is the only option, protection applicants should be held in specific centres and away from the general prison population.

Further, we would also note that detention of protection applicants should only be a measure of last resort, with clearly defined limits to avoid risk of long term or indefinite detention. Article 8 of the Receptions Directive provides that "a state should only detain a Protection applicant if other less

coercive measures cannot be applied effectively" and "An applicant shall be kept only for as short a period as possible".

Section 20 as it is currently drafted does not, in our view, meet this requirement and Nasc recommends that the section be amended to provide that detention only be used as a measure of last resort to ensure that we are in compliance with our International Human Rights obligations, and bringing us into line with the E.U Directive.

Nasc recommends that Section 20 be amended to insert the following suggested provision, under subsection (18):

20. (19) Applicants will only be detained as a measure of last resort and only if other measures cannot be applied effectively.

Section 20 (2) grants the powers to the District Court Judge to "commit the person concerned to a place of detention for a period not exceeding 21 days". Section 20 (12) provides for the continuous extension of these 21 day periods. This means in practice that protection applicants may be detained for successive 21 day committals, until a decision has been made on their protection application, potentially amounting to indefinite detention. There is no upper limit set down in legislation.

Nasc recommends Section 20 (12) (page 24 line 5) be deleted.

Section 20(1)(e)(ii) introduces new grounds for detention, which provides that a Protection Applicant can be detained if he/she "is or has been in position of a forged, altered or substituted identity document". Whilst Section (20) (18) offers a definition of a substituted identity document, whether or not a document is substituted is a highly subjective decision, with no oversight, and one which confers wide discretionary powers on immigration officers. This is of particular concern when viewed against the severity of the sanction, which is detention. Due consideration should be given to including a requirement to establish nationality, a lower threshold, as an alternative to identity.

Nasc recommends that Section 20(1)(e)(ii) be amended as follows, and Section 20(18) be deleted:

20. (1) (e) (ii) is or has been in possession of a forged, altered or substituted identity document.

Section 20(15) provides for informing a detained person 'in a language that he or she may reasonably be supposed to understand' that they are being detained, the fact they will be brought before a court and of their entitlement to consult a lawyer, notify UNHCR and a 'reasonably nominated' person. It also includes the right to the assistance of an interpreter for the purpose of solicitor consultations and court appearances.

To ensure that potential detainees are fully aware of the rights, especially when the applicant's liberty is at stake, the State has an obligation to ensure that the applicant is fully aware that he has been detained and the reasons for his detention. The current provision falls short of this obligation. Additionally, the right to the assistance of an interpreter should not be confined to legal consultations and court appearances.

Nasc recommends that Section 20(14) (c) (page 24 line 25-30) should be amended to provide:

20. (14)(c) ~~the assistance of an interpreter for the purpose of consultation with a solicitor under paragraph (a) and for the purpose of any appearance before a court under this section~~ have reasonable access to an interpreter from the outset of their detention.

Nasc recommends that Section 20(15) (page 24 line 30) be amended to provide:

(15) An immigration officer or, as the case may be, a member of the Garda Síochána detaining a person under subsection (1) or (9) shall, without delay, inform the person or cause him or her to be informed, ~~in a language that he or she may reasonably be supposed to understand~~ in a language that he/she understands.

Nasc recommends that Section 20(14)(c) (page 24 line 30), be amended as follows:

20. (14)(c) ~~the assistance of an interpreter for the purpose of consultation with a solicitor under paragraph (a) and for the purpose of any appearance before a court under this section~~ **Applicants**

detained under this section shall have reasonable access to an interpreter from the outset of their detention.

Head 20 (13) outlines the procedures to be followed where a Protection Applicant indicates a desire to leave the State. Notwithstanding the fact that protection against *non-refoulement* is provided for in the Bill under Section 49, Nasc recommends that to ensure compliance with our obligations not to return an applicant to a place in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, that this is inserted into this Section as one of the stated grounds to be satisfied before a order is made in the District Court.

Nasc recommends that Section 20(13) include the addition of a new subsection after Section 20 (13) (c) –[new subsection after line 22 on page 24], as follows:

20. (13)(d) Due regard shall be had to the provisions of section 49 when making any order under this section

3.6. Failure by applicant to cooperate

Section 37 provides that applications for protection at first instance shall be deemed to be withdrawn if the applicant fails to attend for interview and failed to furnish the Minister with an explanation for the non attendance within a three day period. It is Nasc's view that three days is an unreasonably short period of time in which to notify the Minister of the applicant's reasons for non-attendance, which may be due to a number of factors such as change of address, lack of language and understanding, and the particularly vulnerable nature of protection applicants, among other factors. This provision is harsher than the existing period under the 1996 Act, which is 5 days, and is significantly out of step with the Qualifications Directive.

Nasc recommends, that at a minimum, Section 37 (1) be amended as follows:

37. (1) Where an applicant does not attend for a personal interview on the date and at the time fixed under section 34(1) for the interview then, unless the applicant, not later than ~~3~~ 5 working days from that date,

Nasc is also concerned that assuming the applicant overcomes this onerous hurdle, they are then required to overcome an additional threshold in ensuring that the Minister is satisfied that the explanation offered is 'reasonable in all the circumstances'. Nasc recommends that a set of objective criteria be provided on what is deemed 'reasonable' grounds.

3.7. Prioritisation of vulnerable applications

Section 72 refers to the discretion of the Minister in regard to the prioritisation of applications. Both the Refugee Act 1996 and the 2013 Subsidiary Protection Regulations facilitate the prioritisation of applications with reference to age and other factors linked to vulnerability; however Section 72 does not include these specific references to vulnerability for the Minister to apply discretion. The legislation should ensure that the Minister can continue to prioritise cases where appropriate by reference to the vulnerability of the application, for example his or her status as an unaccompanied minor.

Nasc recommends the inclusion of new subsections, taken from the Refugee Act, 1996, Section 12.44, into Section 72(2) (Page 74-75), as follows:

- 72. (2) (l) the grounds of applications under section 8,
- (m) the country of origin or habitual residence of applicants,
- (n) any family relationship between applicants,
- (o) the ages of applicants and, in particular, of persons under the age of 18 years in respect of whom applications are made,
- (p) the dates on which applications were made,
- (s) if there are special circumstances regarding the welfare of applicants or the welfare of family members of applicants
- (t) the vulnerability of the applicant, under Section 57

3.8. Amendment of Immigration Act 1999

Section 74 amends and substitutes section 5 of the Immigration Act 1999 and introduces new provisions for the detention of persons against whom a deportation order is in force. Section 74(8)(a) provides that a person cannot be detained for a period or periods exceeding 8 weeks in aggregate but the Bill also provisions that a person can be detained for periods in excess of 8 weeks

where they have previously been detained or those who had not left the State since the expiry of their last period of detention following leave being granted by a judge of the District Court. Under the current section 5 Immigration Act 1999, as amended, persons can only be detained for a maximum period of 8 weeks (section 5(6)(a)). Section 74 has the potential to lead to indefinite periods of detention.

Nasc recommends that Section 74 (9) and (10) should be deleted from the Bill and the current position retained to ensure that persons with deportation orders are not detained for indefinite periods of time.

Nasc recommends Section 74 (9) and (10) should be deleted (page 78 lines 15 to 30)

Section 74(11) provides that immigration officers or Gardai may enter a dwelling for the purpose of arresting a person against whom a deportation order is in force without the requirement of a valid search warrant. Nasc believes that it is reasonable to require that immigration officers or Gardai obtain a search warrant in order to enter and search a provide dwelling.

Nasc recommends that Section 74(11) is amended to include the following (page 78 line 40)

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