



Spotlight

Direct Provision

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Abstract

This Spotlight examines the legal issues associated with the direct provision of services to international protection applicants in Ireland. The paper analyses four main issues: the rights of local communities to be consulted about the location of direct provision centres; the outsourcing of direct provision services to private, for-profit companies; whether individual stakeholders have a right to challenge the legality of direct provision; and whether the Government is satisfying its obligations to protection applicants.

30 March 2020



Contents

Glossary of key terms	1
Introduction	3
Recent protests and attacks	3
Public Debates	6
What is direct provision?	8
History of Direct Provision	10
Role of IPAS/RIA	13
Cost of direct provision services.....	15
Procurement of Direct Provision services.....	18
Planning law and community consultation.....	22
Rights of Protection Applicants	24
International Human Rights Obligations.....	24
Obligations under the European Convention on Human Rights	25
European Human Rights Obligations.....	28
Fundamental rights under the Constitution	30
Other domestic human rights obligations.....	32
Ireland’s Human Rights Performance.....	34
Legislative changes	34
Policy changes	36
Access to remedies.....	40
Evidentiary obstacles.....	40
Procedural obstacles	41
Legal obstacles: the privatisation of public functions.....	42
Conclusions	44

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Glossary of key terms

Term	Meaning
Department	The government department with primary responsibility for the subject matters of this report is the Department of Justice and Equality.
Direct Provision (DP)	The means by which the State meets the basic needs of food and shelter for protection applicants directly rather than through full cash payments, while their claims for protection status are being processed.
Family reunification	If an applicant is granted refugee or subsidiary protection status, he or she may apply to the Minister, within a period of one year from the date of grant, for permission for certain members of his or her family to enter and reside in the State (Ireland). This relates only to spouses and civil partners (as at the date of the protection application), unmarried children under 18 years of age and, in the case of a minor granted protection, parents and siblings of applicants who are under 18 years of age.
ECHR	The European Convention on Human Rights
ECtHR	The European Court on Human Rights
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
IHREC	The Irish Human Rights and Equality Tribunal
International Protection Accommodation Service (IPAS)	Formerly known as the Reception and Integration Agency (RIA) , this agency is responsible for co-ordinating accommodation and related services provided to protection applicants. These services include the provision of accommodation, health care, education and welfare to protection applicants.
International Protection Appeals Tribunal (IPAT)	The IPAT is a statutory independent body established to determine international protection appeals and such other appeal functions conferred on it by the International Protection Act 2015 and other relevant legislation.
International protection applicant	Anyone seeking international protection status, whether that is refugee status or subsidiary protection status.
International Protection Office (IPO)	The IPO is an office within the Immigration Service Delivery (ISD) division of the Department of Justice and Equality (formerly the Irish Naturalisation and Immigration Service (INIS)), responsible for examining and processing applications for international protection. The

Term	Meaning
	head of the IPO is the Chief International Protection Officer, who leads a team of international protection officers. Staff of the IPO will also decide, on behalf of the Minister, whether or not permission to remain in the State (Ireland) should be granted on other grounds to unsuccessful applicants for international protection.
Minister	The Minister with primary responsibility for the subject matters of this report is the Minister for Justice and Equality.
Permission to remain	Among other reasons, a person who does not fully meet the requirements of the definition of refugee (see above) or who is not eligible for subsidiary protection may be granted leave to remain in the State for humanitarian or other specified reasons. Persons granted leave to remain do not have all the same rights as persons granted refugee status, for example, a statutory right to family reunification.
Refugee	A refugee (as defined in section 2 of the International Protection Act 2015) is a person who has been granted refugee status under the terms of the 1951 Convention relating to the Status of Refugees "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."
Subsidiary protection	A non-national of an EU country who does not qualify as a refugee may still be eligible for subsidiary protection if he or she can show on substantial grounds that he or she, if returned to his or her country of origin/country of former habitual residence, would face a real risk of suffering serious harm, and who is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country and he or she is not excluded from eligibility for subsidiary protection for one of the prescribed reasons.
UNCRC	the United Nations Convention on the Rights of the Child
UDHR	The United Nations General Assembly's Universal Declaration of Human Rights

Introduction

The system of direct provision (DP) for protection applicants will be officially 20 years old on Friday, 10 April 2020. Over its 20 years, the system has been the subject of various studies and reports, many of which have been quite critical of it, some calling for reforms, while others have called for the system to be replaced.

Recently, in December 2019, the Oireachtas Joint Committee on Justice and Equality released its [Report on Direct Provision and the International Protection Application Process](#). The Committee identified a number of key issues including: “accommodation that is not fit for purpose; inadequate supports and services that do not cater to the needs of vulnerable individuals arriving in Ireland; long delays in the single application process; issues with accessing the labour market; and issues relating to children in the direct provision system.”¹ The Committee concluded that the “Direct Provision System currently in operation here is flawed in several respects and needs root and branch reform, preferably replacement.”² This conclusion aligned closely with that of Oireachtas Joint Committee on Public Service Oversight and Petitions in 2015, which stated that the system is not fit-for-purpose and recommended that it should be replaced.³ Also in 2015, the Working Group on Improvements to the Protection Process including Direct Provision and Supports to Asylum Seekers, led by Dr Bryan McMahon, released a report (the McMahon Report) containing 173 recommendations for changes to the DP system.⁴

This paper will not look to re-examine the policy issues covered by previous reports. Rather, it will focus on identifying and analysing the legal issues arising from the use of DP as the means of providing reception services to protection applicants in Ireland.

Recent protests and attacks

A number of salient events have taken place over the past 18 months:

- in November 2018, the Caiseal Mara hotel *in Moville, Co Donegal, which had been contracted to provide DP services, was subject to an arson attack;*⁵

¹ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 3 (Chairman’s Preface).

² Ibid, p. 3.

³ Joint Committee on 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 \(DPS\) and the extension of the remit of Freedom of information to cover all aspects and bodies associated with the DPS including all suppliers of goods and services, whether from private or public sectors](#), May 2015, p. 29.

⁴ Working Group on Improvements to the Protection Process including Direct Provision and Supports to Asylum Seekers, [Final Report](#), June 2015.

⁵ Stephen Maguire, [‘Donegal hotel earmarked for asylum seekers set on fire’](#), *The Irish Times*, 25 November 2018.

- in January and February 2019, the Shannon Key West Hotel in Rooskey on the Leitrim/Roscommon border was also targeted by premeditated arson attacks;⁶
- in April 2019, residents held a protest over conditions in the Mosney DP centre, Co. Meath;⁷
- between September and November 2019, community protests were held in Oughterard, Co. Galway⁸ and in Ballinamore, Co. Leitrim⁹ challenging government decisions to set up DP centres in those towns,
- Between October and December 2019 at Achill Sound, Co. Mayo, a group of approximately 150 people protested on a rota basis 24 hours-a-day against the government decision to accommodate 38 protection applicants in the Achill Head Hotel for a period of three months,¹⁰
- in February 2020, members of the Offaly County Council and Independent TD for Laois-Offaly, Carol Nolan, called on the Department of Justice and Equality to suspend plans to open a DP centre at the Marian Hostel in Tullamore.¹¹

These actions may have been triggered by various motives.

There is some evidence that the arson attack in Moville may have been racially motivated. However, there is evidence to suggest that reasons behind the arson attack in Rooskey could have more complex.¹² Locals in Rooskey have stated that their opposition to the proposed DP centre was purely economic. While the owner of a property would stand to make profit by the change of use to a DP centre, the centre itself would not act as an economic driver for the local communities. On the other hand, if a property were to be reopened as a commercial venture, with a mind to attracting tourism to the area, it could stimulate economic growth in the region.¹³

Residents of the DP centre who took part in the protests at Mosney described their actions as a “cry for help” around the conditions and treatment of centre residents. The protests were sparked

⁶ Sorcha Pollak, [‘Rooskey fire was premeditated and carefully planned, says Garda’](#), *The Irish Times*, 12 February 2019.

⁷ Sorcha Pollak, [‘Dozens of asylum seekers protest outside Mosney direct provision centre’](#), *The Irish Times*, 25 April 2019.

⁸ Eileen Magnier, [‘Protest in Oughterard over possible direct provision centre’](#), *RTE News*, 28 September 2019.

⁹ Eileen Magnier, [‘Leitrim group protesting over plan to house asylum seekers’](#), *RTE News*, 21 October 2019.

¹⁰ Rosita Boland, [‘There will always be two groups in Achill now’](#), *The Irish Times*, 7 December 2019.

¹¹ Ciaran Mullooly, [‘Meeting to address concerns over DP centre in Tullamore’](#), *RTE News*, 19 February 2020; Justin Kelly, [‘Offaly TD calls for suspension of direct provision plans in Tullamore’](#), *Offaly Express*, 19 February 2020.

¹² Conor Gallagher, [‘Garda monitoring websites and hate speech activists’](#), *The Irish Times*, 15 March 2019;

¹³ Aaron Rogan and Hannah O’Brien [‘Cashing in on Direct Provision’](#), *Business Post*, 19 May 2019.

in part by the involuntary transfer of a resident to a Longford DP centre and, allegedly, because management had refused to respond to calls for a meeting to discuss grievances at the centre.¹⁴

The more recent community protests in Oughterard, Ballinamore and Achill have been attributed to a number of factors. Some of the protesters were inspired by anti-immigration arguments and xenophobic rhetoric propagated via social media and other platforms. However, it has been reported that the vast majority of local concerns were not grounded in anti-immigration or racist sentiment.¹⁵ Rather, they were focussed on issues such as the lack of local consultation prior to making the decision to locate the centre in the area and whether local services could cope with the influx of protection applicants. Protesters also cited grievances with the DP system itself, calling it inhumane and cruel.¹⁶

Protesters in Ballinamore specifically called on the government to enact a policy of proportional provision. It was argued that proportional provision would guard against a disproportionate number of protection applicants being placed in a small town, ensuring that the number of protection applicants remains reasonably proportionate to the local population. As noted by a spokesperson:

“ ... the proposed resettlement of such large numbers of people in such a small community is completely disproportionate to the needs of both the asylum seekers and the community at large.”¹⁷

¹⁴ Sorcha Pollak, [‘Dozens of asylum seekers protest outside Mosney direct provision centre’](#), *The Irish Times*, 25 April 2019.

¹⁵ Conor Gallagher and Sorcha Pollak, [‘How the far-right is exploiting immigration concerns in Oughterard: Anti-immigrant activists trying to dominate and exploit local debates on direct provision’](#), *The Irish Times*, 23 September 2019.

¹⁶ Eileen Magnier, [‘Protest in Oughterard over possible direct provision centre’](#), *RTE News*, 28 September 2019; Eileen Magnier, [‘Leitrim group protesting over plan to house asylum seekers’](#), *RTE News*, 21 October 2019; Rosita Boland, [‘There will always be two groups in Achill now’](#), *The Irish Times*, 7 December 2019.

The Minister for Justice and Equality provided a good summary of these protests:

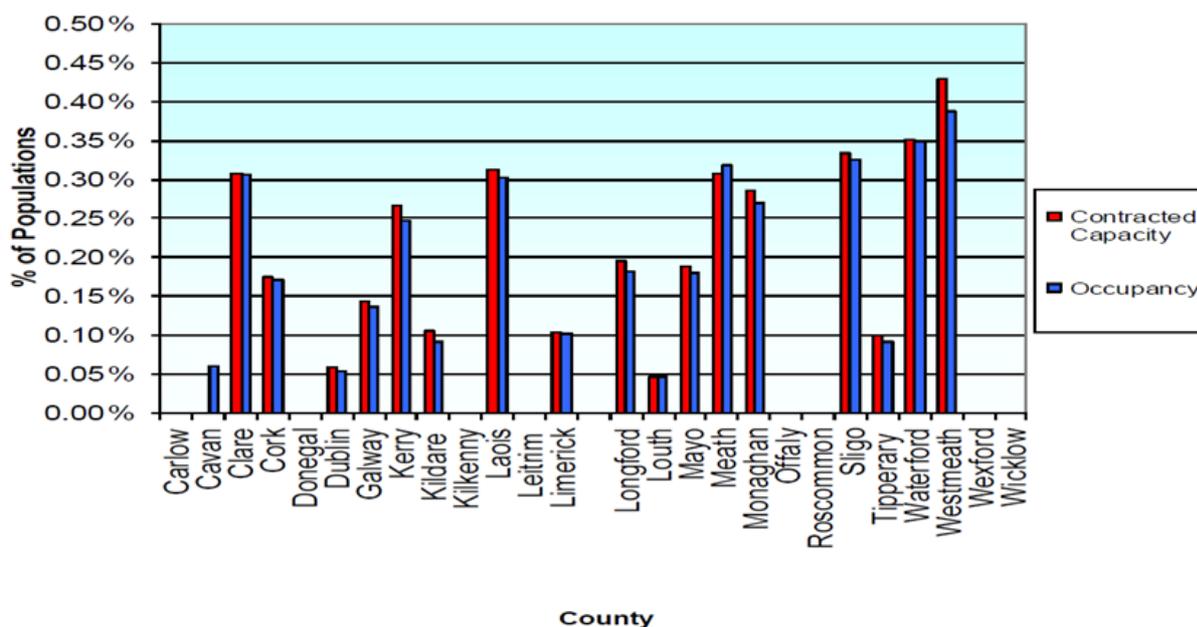
“I am keenly aware of the dissatisfaction expressed by communities that hear through the rumour mill that a centre might be opening in their area. If the contractual arrangements are not finalised, many feel frustrated when the Department is unable to comment publicly. ... The common concerns expressed relate to service provision in the areas of education, health, transport and so on. Where a centre is opening, it is the responsibility of the Government to ensure provision is made for any additional service required. We need to communicate clearly and promptly with communities on these issues to provide them with the reassurance they need.”

Charles Flanagan TD, Minister for Justice and Equality, [‘Provision of Accommodation and Ancillary Services to Applicants for International Protection: Statements’](#), *Dáil Éireann debate*, 13 November 2019.

¹⁷ Eileen Magnier, [‘Leitrim group protesting over plan to house asylum seekers’](#), *RTE News*, 21 October 2019;

Figure 1 provides a snapshot of the proportional spread of residents in DP centres, broken up by county.

Figure 1: Proportional spread of residents in DP centres as a percentage of population (November 2018)



Source: Reception and Integration Agency, Department of Justice and Equality, [Monthly Report](#), November 2018, p. 7.

Public Debates

The events over the past 18 months have sparked a number of public debates on the DP system, raising questions on:

- ⇒ whether local communities should have a right to be consulted on the provision of DP services in their area;
- ⇒ whether services offered to protection applicants should be outsourced to private, for-profit companies;
- ⇒ whether the DP system satisfies Ireland's domestic and international obligations to protection applicants; and
- ⇒ whether individuals or communities have a right to challenge the legality of DP.

This paper will look to address these questions, examining:

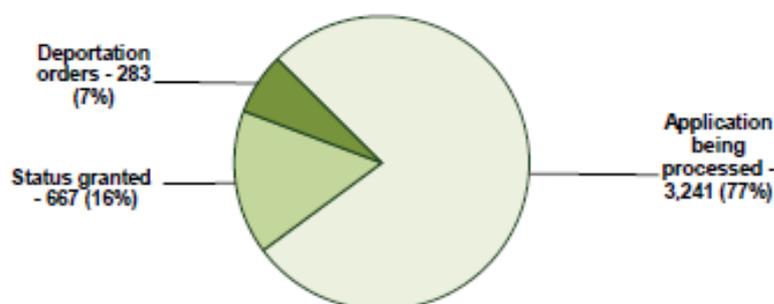
1. the history of the DP system;
2. costs of the DP system and procurement of services;
3. the effect of changes to planning legislation on community consultation;

4. rights of protection applicants and the government's obligations under the Constitution, European law, and domestic and international human rights law;
5. Ireland's human rights performance in relation to international protection; and
6. the evidentiary, procedural and legal obstacles to accessing remedies by protection applicants.

What is direct provision?

Direct Provision (DP) is the chosen means by which the State meets the basic needs of food and shelter for protection applicants while their claims for international protection are processed. Not all of those in DP are awaiting decisions on their protection applications. In some instances, the centres also house people who have already been granted protection status or a right to remain, individuals subject to deportation orders, and a relatively small number of victims of suspected human trafficking and destitute EU citizens. Figure 2 provides a snapshot of the status of direct provision residents in August 2016.

Figure 2: Status of DP residents, August 2016



Source: Comptroller and Auditor General, [Report on the Accounts of the Public Services 2015](#), p. 69.

The cost of food, heat, light, laundry, tv and household maintenance are paid for by the State.¹⁸ Protection applicants who avail of DP services are also given a Daily Expenses Allowance (DEA) at a weekly rate of €38.80 for adults and €29.80 for children and may be entitled to further assistance payments under the Exceptional Needs Payments (ENP) scheme. The ENP may cover travel costs to attend events such as medical or legal appointments.¹⁹

International protection applicants may apply for legal assistance from the Legal Aid Board to help with their protection application or appeals and may be given other services based on their needs. Examples of services include translation, exceptional needs payments, language classes for adults and support in the transition to independent living (allowing residents to cook for themselves and

¹⁸ http://www.ria.gov.ie/en/RIA/Pages/Direct_Provision_FAQs (last accessed on 26 February 2020).

¹⁹ Irish Government Economic and Evaluation Service Unit, Department of Justice and Equality, '[Direct Provision: Overview of current accommodation expenditure](#)', *Spending Review 2019*, August 2019, p. 15.

the provision of designated living space for families).²⁰ A number of other supports are also provided, including education up to Leaving Certificate level (if a person is of an appropriate age) and entitlement to a medical card, covering medical prescriptions, dental care, optician care, pregnancy services and children's health. The Pilot Student Support Scheme was introduced in 2015 with eligibility rules amended in 2019. The scheme is based on the current Student Grant Scheme and provides third-level education supports to eligible school leavers in the protection system. The scheme does not apply to persons in respect of whom a deportation order has been issued.²¹

The accommodation in centres varies from buildings formerly used as hotels and convents to mobile homes and chalets. There are only three purpose-built accommodation centres. The majority of the accommodation is made up of units that are essentially bedrooms, with no separate private living space, together with a mixture of communal and private bathrooms.²²

The majority of rooms do not have cooking facilities. Residents allocated to these rooms are not allowed to cook or store food in their room and rely on food provided by the centre – they are given three meals a day together with refreshments.²³ Some units are self-contained, allowing residents to cook for themselves; these are generally allocated to families.²⁴

Protection applicants are under no obligation to avail of DP services. They are free to move anywhere within the State.²⁵ However, individuals who do not seek DP accommodation cannot claim allowances. A person who avails of accommodation may leave it at any time and a person who does not accept the initial offer may change their mind subsequently.²⁶ A protection applicant is not given a choice as to where he or she will be accommodated – the Department of Justice and Equality designates the allocation of accommodation.²⁷

²⁰ Ibid, p. 15.

²¹ Ibid, pp 14-15; Dr Liam Thornton, "[Spotlight on Direct Provision](#)" in *Children's Rights Alliance, Making Rights Real for Children: A Children's Rights Audit of Irish Law* (Dublin: Children's Rights Alliance, 2015), p. 125.

²² Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 3 (Chairman's Preface); Michelle Lynch, '[Direct Provision: a home away from home?](#)' *Law Society of Ireland Gazette*, 21 June 2017.

²³ Reception and Integration Agency, Department of Justice and Equality, [House Rules and Procedures for Reception and Accommodation Centres](#), January 2019, pp 14, 20.

²⁴ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 3 (Chairman's Preface); Michelle Lynch, '[Direct Provision: a home away from home?](#)' *Law Society of Ireland Gazette*, 21 June 2017.

²⁵ Charles Flanagan TD, Minister for Justice and Equality, '[Provision of Accommodation and Ancillary Services to Applicants for International Protection: Statements](#)', *Dáil Éireann debate*, 13 November 2019.

²⁶ Irish Government Economic and Evaluation Service Unit, Department of Justice and Equality, '[Direct Provision: Overview of current accommodation expenditure](#)', *Spending Review 2019*, August 2019, p. 14.

²⁷ Reception and Integration Agency, Department of Justice and Equality, [House Rules and Procedures for Reception and Accommodation Centres](#), January 2019, p. 11.

Any adult international protection applicant²⁸ may apply for labour market access permission from the Minister of Justice and Equality if he or she has not received a first instance recommendation from the International Protection Office within eight months of their protection application being lodged.²⁹ By November 2019 more than 3,400 permissions have been granted. A protection applicant who is working and chooses to continue to reside in a DP centre is expected to contribute towards the costs of the DP services. He or she may also lose entitlements to the DEA and ENP.³⁰

As at 22 November 2019 there were 6,058 people availing of DP accommodation and services in 39 accommodation centres located in 18 counties.³¹ Of those, more than 700 people with status or permission to remain continue to live in DP centres.³² Since the scheme was first introduced, over 65,000 people have received services through the system.³³ On 16 March 2020, the Department of Justice and Equality announced that a 40th centre was due to open, in the former Skellig Star hotel in Caherciveen, Co. Kerry.³⁴

As of November 2019, a further 1,500 people, approximately, have been accommodated on a bed and full-board basis in 37 hotels and guesthouses around the country.³⁵

History of Direct Provision

As explained by [Dr Liam Thornton](#), prior to the introduction of the DP scheme, asylum seekers (now referred to as international protection applicants) had access to the welfare system on the same basis as Irish citizens. They could qualify for different types of social assistance payments once the legislative conditions set down in social welfare legislation were met. These included

²⁸ [European Communities \(Reception Conditions\) Regulations 2018](#) (S.I. No 230 of 2018) reg. 2(2) provides that a person who is the subject of a Dublin Regulation transfer order is not considered to be an international protection applicant and therefore will not be eligible for the grant of labour market access permission.

²⁹ [European Communities \(Reception Conditions\) Regulations 2018](#) (S.I. No 230 of 2018) reg. 11.

³⁰ Labour Market Access Unit, Department of Justice and Equality, [Information Booklet: Labour Market Access for International Protection Applicants](#), LMA 7; Charles Flanagan TD, Minister for Justice and Equality, '[Provision of Accommodation and Ancillary Services to Applicants for International Protection: Statements](#)', *Dáil Éireann debate*, 13 November 2019.

³¹ Department of Justice and Equality, '[Statement on Tenders for accommodation centres for international protection applicants](#)', *Press Release*, 22 November 2019.

³² Charles Flanagan TD, Minister for Justice and Equality, '[Provision of Accommodation and Ancillary Services to Applicants for International Protection: Statements](#)', *Dáil Éireann debate*, 13 November 2019.

³³ *Ibid.*

³⁴ Department of Justice and Equality, '[Statement by the Department of Justice & Equality](#)', *Merrion Street, Press Release*, 16 March 2020.

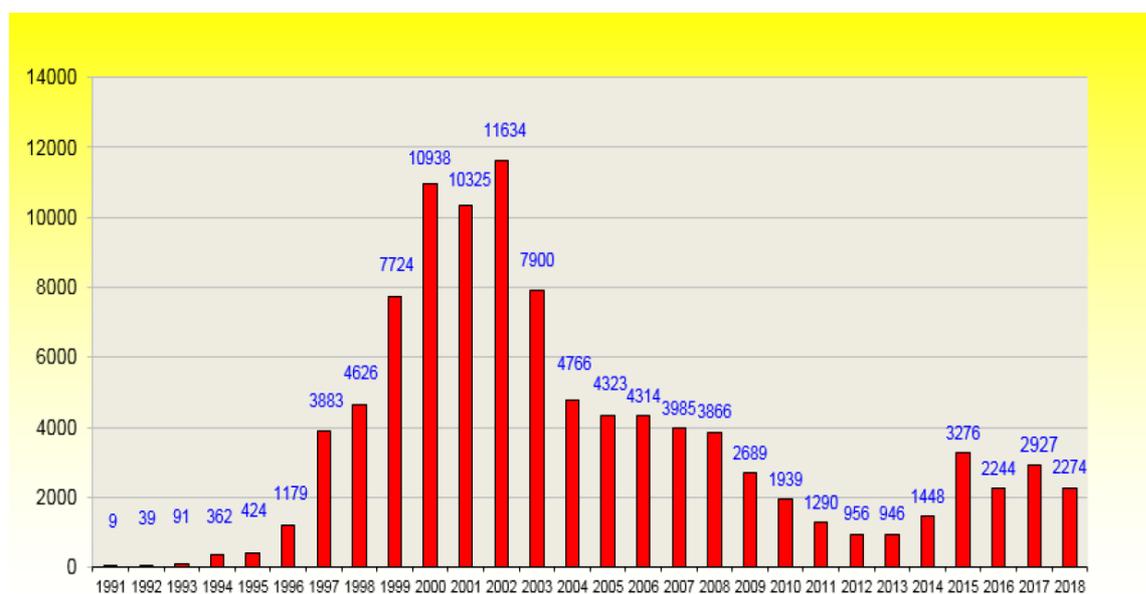
³⁵ Department of Justice and Equality, '[Statement on Tenders for accommodation centres for international protection applicants](#)', *Press Release*, 22 November 2019.

payments relating to illness and medical conditions, non-contributory pensions, one parent family payments, child benefit and supplementary welfare allowance.³⁶

The policy of DP and dispersal was initially introduced on an administrative rather than a legislative basis. The pilot scheme commenced in November 1999, administered and coordinated by the Directorate for Asylum Support Services (DASS), a body set up within the then Department of Justice, Equality and Law Reform.³⁷

The DP Scheme was set up in the context of significant increases in the numbers applying for asylum (see Figure 3). Numbers increased from 362 applicants in 1994, to 7,724 in 1999, peaking at 11,634 in 2002.³⁸

Figure 3: Applications for Declaration as a Refugee 1991 to end of November 2018



Source: Reception and Integration Agency, Department of Justice and Equality, [Monthly Report](#), November 2018, p. 2.

³⁶ Dr Liam Thornton, '[Social welfare law and asylum seekers in Ireland : an anatomy of exclusion](#)', [2013] 20(2) *Journal of Social Security Law* 66-88. Supplementary welfare allowance was a discretionary payment that could be made in cash or in kind and was available to everybody in the state whose means did not satisfy their needs. Supplementary welfare allowance ensured that asylum seekers received a rate of payment equal to that of unemployment assistance payment and their rent would be paid through supplementary rent supplement: *ibid.* See also [Section 187](#) and [Section 200](#) of the [Social Welfare \(Consolidation\) Act 2005](#).

³⁷ Reception and Integration Agency, Department of Justice and Equality, '[Background](#)', About RIA.

³⁸ Reception and Integration Agency, Department of Justice and Equality, [Monthly Report](#), November 2018, p. 2.

The stated rationale for the introduction of DP was as a policy response to an accommodation crisis following this increase, and to a ‘serious prospect’ of widespread homelessness among asylum seekers, particularly in Dublin.³⁹

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.⁴⁰ Map 1 shows the current locations of DP accommodation centres around the country.

Map 1: Centre Disbursal and Breakdown



Source: Reception and Integration Agency, Department of Justice and Equality, [Monthly Report](#), November 2018, p. 11.

The DP scheme became official government policy on 10 April 2000, when the Department of Social and Family Affairs issued Supplementary Welfare Allowance Circulars 04/00 and 05/00

³⁹ See Reception and Integration Agency, Department of Justice and Equality, [Annual Report 2016](#), p. 6.

⁴⁰ Free Legal Advice Centres (FLAC), [One Size Doesn't Fit All: A legal analysis of the direct provision system in Ireland, 10 years on](#). November 2009 pp 13–14.

which were aimed at providing guidance to the appropriate staff in relation to the implementation of DP and dispersal.⁴¹ The cost of accommodating someone in DP was calculated and that sum was then deducted from the basic standard supplementary welfare allowance. The balance, which was described as a "residual income maintenance payment to cover personal requisites" was paid directly to the asylum seeker or his or her legal guardian.⁴²

On 2 April 2001, DASS was replaced by the Reception and Integration Agency (RIA). The RIA is currently referred to as the International Protection Accommodation Services (IPAS).⁴³

Role of IPAS/RIA

The IPAS/RIA is a functional unit of the Immigration Service Delivery (ISD) division of the Department of Justice and Equality (formerly, the Irish Naturalisation and Immigration Service (INIS)), a division of the Department of Justice and Equality. According to its website, the agency is responsible for:⁴⁴

- contracting suitable commercial accommodation and sites throughout the State for accommodating protection applicants;
- contracting out the management (including arrangements for catering and security) of State-owned accommodation centres;
- monitoring the operation of accommodation centres on an on-going basis;
- accommodating protection applicants at reception centres in Dublin for an initial period of 14 days for the purposes of orientation, information provision, voluntary health screening, needs assessment and assistance with the first stages of asylum applications;
- dispersing protection applicants from reception centres in Dublin to accommodation centres around the country;
- co-ordinating the provision of services (health and education) at accommodation centres;
- providing training and support to proprietors and management of centres;
- monitoring the implementation of contracts for services; and
- engaging with local support groups established to welcome and be of assistance to protection applicants.

⁴¹ Free Legal Advice Centres (FLAC), [One Size Doesn't Fit All: A legal analysis of the direct provision system in Ireland, 10 years on](#). November 2009 pp 13–14.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Reception and Integration Agency, Department of Justice and Equality, '[Background](#)', About RIA. (last accessed on 27 February 2020).

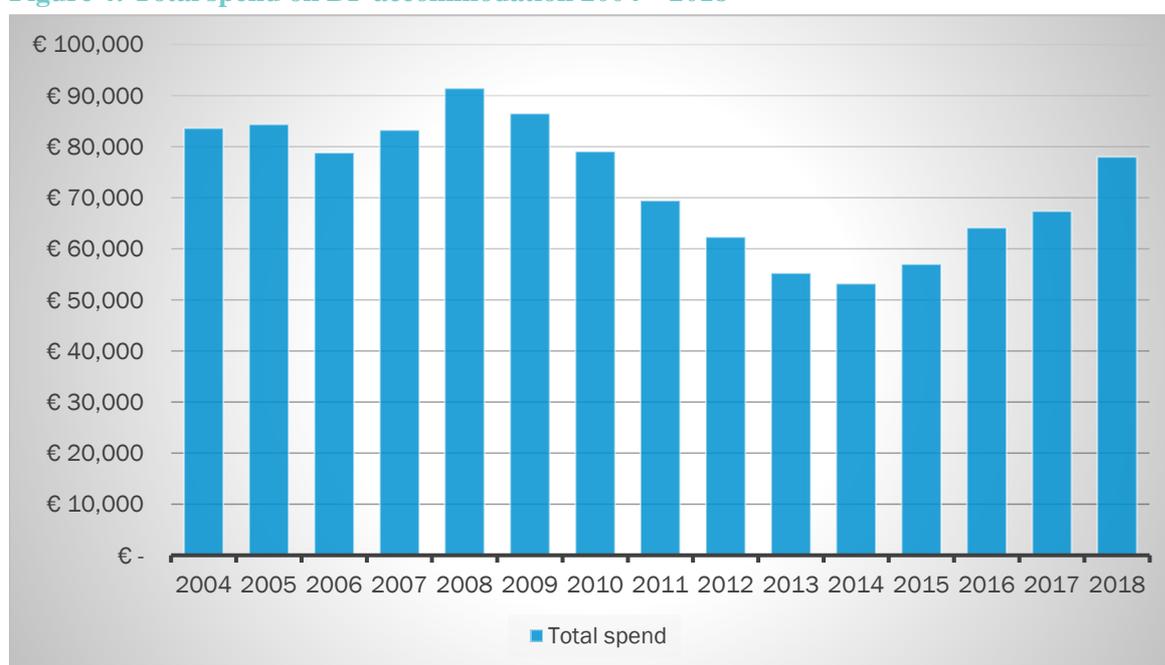
In fulfilling its general accommodation responsibilities, the IPAS/RIA does not lease premises from commercial contractors. Rather, it procures a range of services from the private sector for a fixed period of time. Services include accommodation, catering, housekeeping and leisure facilities.⁴⁵

⁴⁵ Ibid. See also Reception and Integration Agency, Department of Justice and Equality, [House Rules and Procedures for Reception and Accommodation Centres](#), January 2019, pp 13-16.

Cost of direct provision services

In August 2019, the Irish Government Economic and Evaluation Service (IGEES) unit of the Department of Justice and Equality published a spending review of the DP system. The review noted that in the year 2018, expenditure on DP reached €78 million, its highest level since 2010 (see Figure 4). Provisional figures provided by the RIA indicated that this would exceed €120 million in 2019, based on current trends.⁴⁶ The funding of wider education, health and social welfare entitlements is the responsibility of the relevant Government departments and is not included in these figures.

Figure 4: Total spend on DP accommodation 2004 – 2018



Source: Adapted from data in IGEES Unit, Department of Justice and Equality, '[Direct Provision: Overview of current accommodation expenditure](#)', *Spending Review 2019*, August 2019, p. 18.

The upward cost trends reflect the higher costs of new contracts for DP services. New DP contracts require service providers to provide higher standards of accommodation and services, including the provision of independent living.⁴⁷

The IGEES spending review found that the recent increases in actual and anticipated costs are also due to the increased use of emergency accommodation. On average, the cost of emergency

⁴⁶ Irish Government Economic and Evaluation Service Unit, Department of Justice and Equality, '[Direct Provision: Overview of current accommodation expenditure](#)', *Spending Review 2019*, August 2019, p. 19.

⁴⁷ *Ibid*, p. v.

accommodation is €100 per person per night versus €35.50 in DP centres.⁴⁸ The increased use of this type of accommodation has been attributed to the lack of capacity of existing DP centres to cope with demand, compounded by the inability of IPAS/RIA to quickly increase DP capacity.⁴⁹ The IPAS/RIA has been hindered by the new requirements to adhere to a formal procurement process and by local issues, which have triggered the withdrawal of expected capacity.⁵⁰ The Department has acknowledged:⁵¹

“The use of emergency accommodation is sub-optimal. It is worse than direct provision ... The use of emergency accommodation is not where we want to be and we need to move away from that.”

The Oireachtas Joint Committee on Justice and Equality, stated in its [Report on Direct Provision and the International Protection Application Process](#):⁵²

“As well as being highly inappropriate for long-term living, with the Department referring to the current situation as ‘sub-optimal’, resorting to emergency accommodation is not a cost-effective solution for the State.”

As noted by the Comptroller and Auditor General in the [Report on the Accounts of the Public Services 2015](#), the amount of DP accommodation required is demand-led and difficult to predict. The Department has stated that “dealing with a demand-led, unpredictable volume of service users is particularly challenging where the provision of accommodation can quickly become politically fraught and contested.”⁵³ In the past, the RIA dealt with these challenges by maintaining excess capacity and entering into contracts for capacity, not contracts for use. However, there are other factors, which increase costs and make the precise matching of demand and supply virtually impossible, including:⁵⁴

- nationality and ethnicity of new international protection applicants;
- family status and size;
- rates of departure from and return to DP; and

⁴⁸ Ibid, p. v.

⁴⁹ Ibid, p. v.

⁵⁰ Ibid, p. v.

⁵¹ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 27.

⁵² Ibid, p. 26

⁵³ Comptroller and Auditor General, [Report on the Accounts of the Public Services 2015](#), September 2016, p. 68.

⁵⁴ Irish Government Economic and Evaluation Service Unit, Department of Justice and Equality, [‘Direct Provision: Overview of current accommodation expenditure’](#), *Spending Review 2019*, August 2019, p. 38.

- special needs.

It has been reported that since 2000, the Department has paid €1.2 billion directly to private DP accommodation providers; further funds have been spent on the provision of catering and other services by private contractors in state-owned DP centres.⁵⁵

The submission of the Centre for Criminal Justice & Human Rights, University College Cork to the Joint Committee on Justice and Equality was highly critical of the current system of outsourcing DP services to private, for-profit contractors. This criticism featured in a number of the 126 submissions published alongside the Committee's report.⁵⁶ In its report, the Committee concluded:⁵⁷

“... we must also move away from the current reliance on commercial companies and for-profit individuals to provide accommodation and who oversee and run Direct Provision centres across the country. Even with the best intentions, private providers working on a for-profit basis lack the requisite expertise in housing or social care to adequately and effectively manage such centres and meet the complex social needs of residents.”

⁵⁵ Aaron Rogan and Hannah O'Brien '[Cashing in on Direct Provision](#)', *Business Post*, 19 May 2019.

⁵⁶ Centre for Criminal Justice & Human Rights, School of Law, University College Cork, [Submission to the Oireachtas Committee on Justice and Equality on Direct Provision and the International Protection Application Process](#), May 2019, p. 12. See also, for example, Irish Refugee Council, [Submission to Joint Oireachtas Committee on Justice and Equality](#), May 2019, p. 32.

⁵⁷ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, pp 47-48.

Procurement of Direct Provision services

Until December 2018, the RIA did not use a formal competitive process, as set out in public procurement rules, to contract DP accommodation or services. Instead, it advertised for ‘expressions of interest’ on its website and in national newspapers. The advertisements noted that the Department of Justice and Equality was drawing up a list of potential suppliers who would be contacted if they were needed. The advertised minimum requirements for lodging an expression of interest were that the premises should comprise “hotels, hostels, guesthouses, etc. which can accommodate upwards of fifty persons and which should be reasonably close to all services e.g. shops, schools, transport, etc.”⁵⁸

As noted by the Comptroller and Auditor General, the Department did not provide evidence to show how it evaluated those who responded to the notice. It asserted that the selection process involved a determination of whether the relevant premises had satisfied the minimum standard of accommodation as detailed in the *Housing Act 1966* and whether it had passed a site visit, which included checks on facilities and proximity to services. If satisfied, the RIA would negotiate a price with a selected provider and agree a contract, usually for a period of one year.⁵⁹ The standard contract specified that services must be delivered “to a standard which is reasonable having regard to the daily needs of asylum seekers”.⁶⁰ However, the contract did not define what was considered to be reasonable. Further, almost half the deliverables included in the contract terms were worded in such a way that they could not be properly measured.⁶¹

When this procurement method was challenged, the Department asserted that its procurement procedure was appropriate in the circumstances, equating to the ‘negotiated procedure’ provided for in EU procurement rules. This assertion was challenged by the Comptroller and Auditor General on grounds that the Department had not complied with key requirements of the negotiated procedure, including publication of award criteria and award notices. Further, under EU procurement laws, negotiated procedures can only be used in limited circumstances and procurement of DP centres would not fall within these limited circumstances.⁶²

⁵⁸ Comptroller and Auditor General, [Report on the Accounts of the Public Services 2015](#), September 2016, p. 73.

⁵⁹ *Ibid.*, p. 74.

⁶⁰ *Ibid.*, p. 76.

⁶¹ *Ibid.*, p. 76.

⁶² Negotiated procedures should only be used where:

- no tenders or no suitable tenders were submitted in response to a request for tenders;
- there is only one supplier in the market; and

In December 2018, the IPAS/RIA commenced its most recent tender process by running a series of regional procurement competitions through the Government's EU-compliant procurement portal www.e-tenders.gov.ie.⁶³ All existing accommodation providers operating within the system were required to apply through the new tendering process to have their contracts renewed.⁶⁴ The new procurement competitions require tenderers to be capable of implementing a 'common higher standard' of service across all new and existing accommodation centres. The 'common higher standard' would need to align with the 2019 [National Standards for accommodation offered to people in the protection process](#) (the 'National Standards'). Among other things, the National Standards require DP centres to:⁶⁵

- provide independent living (allowing residents to cook for themselves and the provision of designated living space for families);
- publish a residents' charter, which describes the services available to children and adults living in the centre, including how and where the services are provided;
- provide continuous training to staff in the centre aimed at improving the service provided for all children and adults living in the centre; and
- have a dedicated Reception Officer, who is suitably trained to support all residents' especially those people with special reception needs both inside the accommodation centre and with outside agencies.

As explained in the Joint Committee on Justice and Equality's report, the National Standards meet all applicable minimum international standards.⁶⁶

The IPAS/RIA failed to procure any additional centres from the South-East Tender competition, leading the Department in August 2019 to declare "procuring accommodation centres is proving difficult for RIA."⁶⁷

While the regional tender process is ongoing, to meet demand the Department has advertised in the national media for expressions of interest from property owners for a short-term contract,

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- because of extreme urgency not attributable to the contracting authority and brought about by events unforeseeable by the contracting authority, and where there is insufficient time for an open competition or one of the other competitive procedures permitted: Ibid, p. 74.

⁶³ David Stanton TD, Minister of State for Equality, Immigration and Integration, [Response to Parliamentary Question No. 673 \(Direct Provision Data\)](#), *Dáil Éireann Debate*, 23 July 2019.

⁶⁴ Department of Justice and Equality, '[Statement on tenders for accommodation centres for international protection applicants](#)', *Press Release*, 22 November 2019.

⁶⁵ Ibid.

⁶⁶ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 16. The report provides a summary of the 10 themes set out in the National Standards: *ibid*, pp 16-21.

⁶⁷ Irish Government Economic and Evaluation Service Unit, Department of Justice and Equality, '[Direct Provision: Overview of current accommodation expenditure](#)', *Spending Review 2019*, August 2019, p. 19.

usually one year.⁶⁸ It appears that procurement of ‘short-term’ emergency accommodation remains entrenched in the expressions-of-interest model.⁶⁹ The criticisms in the Comptroller and Auditor General’s 2015 report, outlined above, would apply to this procurement method, even when used to procure ‘emergency accommodation’.

On 16 March 2020, the Department of Justice and Equality announced that it would be opening a new accommodation centre for international protection applicants (also known as asylum seekers) in the former Skellig Star hotel in Caherciveen, Co. Kerry, as part of its emergency response to COVID-19. The contract term would be for a 12-month period to eventually provide accommodation for 150 single people in 56 bedrooms. The accommodation was offered to the Department under the Expressions of Interest process, not the tender process. The Department stated that it would consult with representatives of local communities prior to opening the centre.⁷⁰

Covid-19

On 23 March 2020, the Department of Justice and Equality announced a comprehensive plan to deal with the possible spread of Covid-19 among residents in its accommodation centres.

All accommodation centres including emergency centres have been asked to complete contingency plans for Covid-19. IPAS has been reviewing the individual plans to ensure shared learning and best practice across centres. Furthermore, the nine HSE Community Healthcare Organisations (CHO) regions have been assessing centres to establish their state of readiness and have been offering appropriate advice to limit the possible spread of the disease through centres. The advice to centre management has been supported by the distribution of public health information to centres through the circulation of notices in multiple languages.⁷¹

Each centre has also been asked to generate a self-isolation capability for use by persons suspected to have the Covid-19 and to heed the HSE advice on follow up relevant actions. To support social distancing and to reduce contacts in the centres, no visitors are allowed entry into centres during the Covid-19 emergency.⁷²

⁶⁸ Jennifer Bray, [‘State pledges to consult communities over direct provision centres’](#) *The Irish Times*, 22 November 2019.

⁶⁹ David Stanton TD, Minister of State for Equality, Immigration and Integration, [Response to Parliamentary Question No. 673 \(Direct Provision Data\)](#), *Dáil Éireann Debate*, 23 July 2019.

⁷⁰ Department of Justice and Equality, [‘Statement by the Department of Justice & Equality’](#), *Merrion Street, Press Release*, 16 March 2020.

⁷¹ Department of Justice and Equality, [‘Statement in relation to Contingency Planning for Accommodation Centres’](#), *Press Release*, 23 March 2020.

⁷² *Ibid.*

Centres without independent living arrangements (where applicants can cook for themselves and their families) have been asked to implement staggered meal times or to provide takeaway facilities, where canteens have been temporarily closed.⁷³

⁷³ Ibid.

Planning law and community consultation

Under [section 32](#) of the [Planning and Development Act 2000](#) (P&D Act), as amended, planning permission must be sought for any unauthorised development. Under [section 2\(1\) of the P&D Act](#), the term unauthorised development includes any unauthorised use, which has been defined by that section to include “a use which is a material change in use of any structure or other land and being development other than ... exempted development”. Under [section 4\(1\)\(f\) of the P&D Act](#), development (and a change of use) is classified as exempted development if ‘is carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned, whether in its capacity as a planning authority or in any other capacity’.

On 17 December 2015, Mr. Alan Kelly, T.D., Minister for the Environment, Community and Local Government, signed into law the [Planning and Development \(Amendment\) \(No. 4\) Regulations 2015](#) (S.I. No 582 of 2015). These regulations had the effect of removing the need for planning permission to change the use of prescribed premises⁷⁴ providing overnight accommodation to accommodation centres or emergency reception and orientation centres for refugees, applicants for international protection and persons subject to deportation orders. Such a change of use is now classified as exempted development.⁷⁵

[Section 5](#) of the P&D Act allows for an application to be made to the planning authority or An Bord Pleanála to question whether a particular development falls within a category of exempted development. Therefore, a challenge may arise if there is a question of whether the relevant premises fall within one of the prescribed categories. However, prospective objectors have no right to challenge the category itself. Thus, if prescribed premises are used to accommodate applicants for international protection, refugees or persons subject to deportation orders, a member of the public cannot challenge this change of use under planning law. There are a number of grounds upon which exempted development could lose its ‘exempted’ status but none of these would be applicable to a simple change of use of this nature.⁷⁶

Development applications associated with the categorisation of premises as prescribed premises are subject to normal planning rules. For example, an appeal was made to An Bord Pleanála

⁷⁴ These premises are hotels, motels, hostels, guesthouses, holiday accommodation, convents, monasteries, Defence Forces barracks and other premises or residential institutions providing overnight accommodation: see [Planning and Development \(Amendment\) \(No. 4\) Regulations 2015](#) (S.I. No 582 of 2015) art. 4

⁷⁵ [Planning and Development Regulations 2001](#) (S.I. No. 600 of 2001) Sch. 2 Class 14(h) and 14(i).

⁷⁶ Ibid regs. 5-9. See also, Deputy Aodhán Ó Ríordáin, Minister of State at the Department of Justice and Equality, ‘[Planning and Development \(Amendment\) \(No. 4\) Regulations 2015: Motion](#)’, *Joint Committee on Environment, Culture and the Gaeltacht debate*, 15 December 2015 and David Brown BL, *The Law of Local Government*. Dublin: Roundhall, 2014 pp 370-380.

challenging Leitrim County Council's decision to confirm the planning status of the Shannon Key West Hotel in Rooskey as a hotel (and thereby its designation as an exempted development for the purposes of providing emergency accommodation).⁷⁷

In November 2019, it was reported that the Government pledged to engage with local communities before finalising the procurement process on new regional DP centres.⁷⁸ This may create a moral obligation on the Government to consult with and consider the views of local communities.

However, in law, there is no requirement on the owner of the premises or the IPAS/RIA to notify or consult local communities or even local authorities if the proposed DP centre relies on a classification of exempted development (bringing it outside of the planning process).

⁷⁷ Orla Ryan, '[Fears over legal challenge 'disrupting' asylum seekers led to Direct Provision centre being scrapped](#)', *The Journal*, 6 May 2019. In the case of the Shannon Key West Hotel, there were also prospective underlying issues between the owner and the lessee affecting the use to which the building could be put under the lease agreement: *ibid*.

⁷⁸ Jennifer Bray, '[State pledges to consult communities over direct provision centres](#)' *The Irish Times*, 22 November 2019.

Rights of Protection Applicants

International Human Rights Obligations

Ireland has committed to upholding international norms to safeguard the wellbeing of people who arrive in the State seeking protection from persecution and human rights abuses in their countries of origin.

In 1950, the United Nations General Assembly charged the Office of the United Nations High Commissioner for Refugees (UNHCR) with responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organisations.⁷⁹ In its [Conclusion No. 82 \(XLVIII, Conclusion on safeguarding asylum, 1997\)](#), the Executive Committee of the UNHCR emphasised the overall obligation on signatories “to treat asylum seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments.”⁸⁰ The human rights and refugee law standards are set out in human rights instruments, including:

- the [1951 Refugee Convention and the 1967 Protocol](#);
- the [Universal Declaration of Human Rights](#) (UDHR);
- the [International Covenant on Civil and Political Rights](#) (ICCPR);
- the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR);
- The [UN Convention on the Elimination of All Forms of Racial Discrimination](#); and
- the [UN Convention on the Rights of the Child](#) (UNCRC).

These instruments include the following obligations:

- Article 33 of the Refugee Convention establishes the principle of *non-refoulement*. This principle provides that a State cannot return a refugee to a territory in which the life or freedom of that refugee would be threatened on a treaty ground. As a precautionary measure, the principle of *non-refoulement* applies not only to recognised refugees but also to those who have not had their status formally declared (protection applicants).⁸¹

⁷⁹ ‘[Statute of the Office of the United Nations High Commissioner for Refugees](#)’ (1950), GA Res. 428(V), Annex, UN Doc. A/1775, paras 1 and 6.

⁸⁰ Executive Committee of the UNHCR, ‘[Safeguarding Asylum](#)’, *Conclusion No. 82 (XLVIII) – 1997*, 48th session, Contained in United Nations General Assembly Document No. 12A (A/52/12/Add.1), 17 October 1997.

⁸¹ UNHCR, [Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol](#), pp 2-3.

- Article 25 of the UDHR recognises the right of every person to a standard of living adequate for the health and well-being of her or himself and her/his family, including food, clothing, accommodation, medical care and necessary social services.
- The ICCPR provides standards for the existence of civil rights such as protection against arbitrary detention and torture and the right to recognition everywhere as a person before the law.
- The ICESCR spells out basic reception principles in the area of economic and social rights.
- Article 3 of the UNCRC requires States to make the best interests of the child a primary consideration when taking any action concerning children. Although, Ireland has signed and ratified the UNCRC, it has not fully incorporated it into national law. Ireland's ratification of the convention does not confer a right to rely directly on the convention's provisions before Irish courts.⁸²
- The UN Convention on the Elimination of All Forms of Racial Discrimination calls on States to prohibit and to eliminate racial discrimination and guarantee the right of everyone to equality before the law, without distinction as to race, colour, or national or ethnic origin.

It follows that at a minimum, under these instruments, the State is required to provide people seeking asylum with shelter and other material needs while their protection application is being processed and treat them equally.

Obligations under the European Convention on Human Rights

Ireland has ratified and given effect to the [European Convention on Human Rights](#) (ECHR) through the [European Convention on Human Rights Act 2003](#), as amended. The most relevant parts of the ECHR are Articles 3, 8, 13 and 14, and Protocol No. 12 to the Convention:

- Article 3 prohibits torture, and "inhuman or degrading treatment or punishment";
- Article 8 protects the right to respect for private and family life;
- Article 13 provides a right to an effective remedy; and
- Article 14 and Protocol 12 to the Convention prohibit discrimination generally and promote equality before the law and equal protection of the law.

With the exception of the rights in article 3 of the ECHR, these rights are not absolute rights – the individual States maintain a margin of appreciation⁸³ in interpreting the rights in relation to their

⁸² *Olaniran v Minister for Justice, Equality and Law Reform* [2010] IEHC 83 at [33]; *Dos Santos v Minister for Justice and Equality* [2013] IEHC 237. See also John Stanley BL, *Immigration and Citizenship Law*. Dublin: Roundhall, 2017, p. 35.

⁸³ The margin of appreciation allows signatory States to retain a degree of flexibility in interpretation of obligations arising from ECHR rights, where matters relate to certain national areas.

domestic circumstances. The rights impose public law obligations⁸⁴ on the State and its authorities. The ECHR does not directly impose obligations on private parties. However, the European Court of Human Rights (ECtHR) has recognised that States can be liable for failures to regulate and control acts of private parties that violate ECHR rights.⁸⁵

Inhuman or degrading treatment or punishment

The ECtHR, in the case of *MSS v Belgium and Greece*,⁸⁶ found that the lack of provision of adequate reception conditions for an Afghan asylum seeker in Greece amounted to inhuman and degrading treatment in violation of Article 3 of the ECHR. The Court found that the Greek authorities had failed to have due regard to the particular vulnerabilities of the asylum seeker and had allowed his living conditions to fall to a level of severity prohibited under Article 3. The Court stated:

“... to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.”⁸⁷

The Court continued:

“Treatment is considered to be ‘degrading’ when it 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 suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others”.⁸⁸

The intention of the local authorities is immaterial. Rather, the focus is on the treatment and the subjective effects of that treatment on the asylum seeker.⁸⁹

⁸⁴ Public law obligations are requirements that arise from legal relationships with public bodies, as opposed to private individuals.

⁸⁵ See Dr Daniel Augenstein, Assistant Professor, Tilburg University, The Netherlands, ‘[State responsibilities to regulate and adjudicate corporate activities under the European Convention on Human Rights](#)’, *Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises*, April 2011. See also Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A comparative perspective* (Oxford, Oxford University Press: 2007).

⁸⁶ CE:ECHR:2011:0121JUD003069609, [Application no 30696/09](#), 21 January 2011.

⁸⁷ *Ibid* at [219]. See also *Tarakhel v Switzerland* CE:ECHR:2014:1104JUD002921712, [Application no 29217/12](#), 4 November 2014 at [118].

⁸⁸ *MSS v Belgium and Greece* CE:ECHR:2011:0121JUD003069609, [Application no 30696/09](#), 21 January 2011 at [220].

⁸⁹ *Ibid* at [220].

Right to respect for private and family life

The right to respect for private and family life in Article 8 of the ECHR is not an absolute right to privacy. However, encroachment into the privacy of an individual must be reasonable and justifiable – a fair balance must be achieved between the interests of the individual and those of the community and the State retains a ‘margin of appreciation’. The ECtHR has explained:

“Where a particularly important facet of an individual’s existence or identity is at stake, the margin will normally be restricted. Where, however, there is no consensus within the Contracting States, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.”⁹⁰

To maintain a case, the individual must show that the actions of the State “entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8.”⁹¹

Right to an effective remedy

The ECtHR has ruled:

“Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an ‘arguable complaint’ under the Convention and to grant appropriate relief”.⁹²

Right to equal treatment

The ECtHR has specified “only differences in treatment based on an identifiable characteristic, or ‘status’, are capable of amounting to discrimination within the meaning of Article 14”.⁹³ The Court also noted:

“The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background. ... Similarly, a wide margin of appreciation is usually allowed to the State

⁹⁰ *Hristozov v Bulgaria* CE:ECHR:2012:1113JUD004703911, [Applications nos 47039/11 and 358/12](#), 13 November 2012 at [118]

⁹¹ *Costello-Roberts v United Kingdom* CE:ECHR:1993:0325JUD001313487, [Application no 13134/87](#), 25 March 1993 at [36].

⁹² *Kurić v Slovenia* CE:ECHR:2012:0626JUD002682806, [Application no 26828/06](#), 26 June 2012 at [369]. See also *Kudła v Poland* CE:ECHR:2000:1026JUD003021096, [Application no 30210/96](#), 26 October 2000 at [157]. In the case of [CA and TA v Minister for Justice and Equality](#) [2014] IEHC 532 at [6.2] Justice Mac Eochaidh ruled that “... the only remedy in Irish law for a breach of the ECHR was damages, or a declaration of incompatibility of law in accordance with the European Convention on Human Rights Act 2003.”

⁹³ *Stummer v Austria* CE:ECHR:2011:0707JUD003745202, [Application no 37452/02](#), 7 July 2011 at [87].

under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'.⁹⁴

European Human Rights Obligations

Common Asylum System – Reception Conditions Directive (recast)

On 30 June 2018, the [European Communities \(Reception Conditions\) Regulations 2018](#)⁹⁵ (the '2018 Regulations') came into force, transposing the [recast Reception Conditions Directive](#) (the 'recast RCD') into Irish law. The recast RCD and the 2018 Regulations confirm the rights of protection applicants to receive material reception conditions (including housing, food and associated benefits in kind, the daily expenses allowance (formerly the Direct Provision Allowance (DPA)) and the clothing allowance),⁹⁶ medical assistance,⁹⁷ education⁹⁸ and to access review and appeal mechanisms.⁹⁹

International protection applicants¹⁰⁰ may apply for labour market access permission if they have not received a first instance recommendation from the International Protection Office within eight months of their protection application being lodged.¹⁰¹ However, if a protection applicant is in receipt of an income, his or her right to material reception conditions will be affected.¹⁰²

[Regulation 7](#) of the 2018 Regulations requires the Minister to designate premises to be an accommodation centre. Further obligations include:

- a requirement to conduct a vulnerability assessment of protection applicants within 30 working days of their preliminary interview (under [section 13 of the International Protection Act 2015](#)) ([Regulation 8](#) of the 2018 Regulations);¹⁰³ and

⁹⁴ Ibid at [88] – [89].

⁹⁵ (S.I. No 230 of 2018).

⁹⁶ [Ibid](#) (S.I. No 230 of 2018) regs 2, 4-6.

⁹⁷ [Ibid](#) reg. 18.

⁹⁸ [Ibid](#) reg. 17.

⁹⁹ [Ibid](#) regs 20-23.

¹⁰⁰ [European Communities \(Reception Conditions\) Regulations 2018](#) (S.I. No 230 of 2018) reg. 2(2) provides that a person who is the subject of a Dublin Regulation transfer order is not considered to be an international protection applicant and therefore will not be eligible for the grant of labour market access permission.

¹⁰¹ [Ibid](#) reg. 11. The labour market access permission is regulated under [ibid](#) regs 11-16.

¹⁰² [Ibid](#) reg. 5 and Sch. 2.

¹⁰³ [European Communities \(Reception Conditions\) Regulations 2018](#) (S.I. No 230 of 2018) reg. 8.

- a requirement to make the best interests of the child a primary consideration when dealing with minors ([Regulation 9](#) of the 2018 Regulations).¹⁰⁴

The 2018 Regulations not only established a legislative basis for the DP system for the first time since its creation, it also aimed to align the DP system with EU reception condition norms.¹⁰⁵ In the case of [CA and TA v Minister for Justice and Equality](#),¹⁰⁶ which was decided in late 2014, Mac Eochaidh J found that the manner in which Ireland had provided material support to protection applicants was not a form of implementation of Union law at the time. Therefore, the rights in the [Charter of Fundamental Rights of the European Union](#) (the 'EU Charter') did not govern Ireland's actions in this area. The transposition of the recast RCD has changed this position.

The following section examines EU Charter rights.

Rights in the Charter of Fundamental Rights of the European Union

The [EU Charter](#) contains a number of rights that are central to European citizenship and where EU law applies, the relevant provisions are applicable to all persons residing within the Member State. Articles 1 (human dignity), 4 (prohibition of torture and degrading treatment), 7 (respect for private and family life), 20 (equality before the law), 21 (non-discrimination), 24 (rights of the child) and 41 (right to good administration) may be directly applicable to the DP system. Articles 4, 7, 21 and 41 align closely with ECHR (discussed above), while articles 24 and 41 align with Constitutional rights (discussed below). This section will be limited to a discussion of Article 1.

Under the EU Charter "Human dignity is inviolable. It must be respected and protected."¹⁰⁷ This right is not only considered to be a fundamental right in itself, it underpins all the fundamental rights listed in the EU Charter.¹⁰⁸ In the case of *Zubair Haqbin v Federaal agentschap voor de opvang van asielzoekers*,¹⁰⁹ the Court of Justice of the European Union (CJEU) found [Article 20 of the recast RCD](#) relating to the reduction or withdrawal of material reception conditions¹¹⁰ must be read in line with Article 1 of the EU Charter. A sanction under the provision may not have the effect

¹⁰⁴ [Ibid](#) reg. 9.

¹⁰⁵ Dr Liam Thornton, 'A Time for Hope? The European Communities (Reception Conditions) Regulations 2018' in Nasc and Centre for Criminal Justice and Human Rights, University College Cork, *Beyond McMahon: The Future of Asylum Reception* (2018), pp 17-21.

¹⁰⁶ [2014] IEHC 532.

¹⁰⁷ [Charter of Fundamental Rights of the European Union Art. 1](#).

¹⁰⁸ EU Agency for Fundamental Rights, '[Explanations relating to the Charter of Fundamental Rights: Article 1](#)', [2007] OJ C303/17.

¹⁰⁹ (C-233/18) [EU:C:2019:956](#).

¹¹⁰ Transposed in [European Communities \(Reception Conditions\) Regulations 2018](#) (S.I. No 230 of 2018) reg. 6.

of depriving an applicant for international protection of the possibility of meeting his or her most basic needs.¹¹¹

Fundamental rights under the Constitution

The Constitution acknowledges a number of fundamental rights. These rights apply without distinction – they apply to a protection applicant in the same manner as they would apply to a citizen.¹¹²

The courts have read that [Article 40.3 of the Constitution](#) includes a freedom to work.¹¹³ Article 40.3 specifically guarantees the personal rights of the citizen, in particular, rights to life, person, good name, and property. The courts have accepted that these personal rights may extend to non-citizens residing in the State – non-citizens may rely upon a constitutional provision, where that provision is not substantially associated with the concept of citizenship (where the relevant provision relates to the essence of human personality).¹¹⁴ In 2017, in the case of *NHV v Minister for Justice and Equality*,¹¹⁵ the Supreme Court found that the absolute prohibition on seeking or entering employment or carrying on any business, trade or profession was unconstitutional. O'Donnell J explained:

“... in circumstances where there is no temporal limit on the asylum process, then the absolute prohibition on seeking of employment ... is contrary to the constitutional right to seek employment.”¹¹⁶

[Article 40.5 of the Constitution](#) establishes “[t]he dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.”¹¹⁷ In the case of *Omar v Governor of Cloverhill Prison*¹¹⁸ Justice Hogan confirmed that the inviolability of the home applies to every home in the State, irrespective of the nationality or status of its occupants.

Under [Article 42.1 of the Constitution](#), the State recognises the right of parents to be the main and natural educators of their children. This right extends to the religious and moral, intellectual,

¹¹¹ *Zubair Haqbin v Federaal agentschap voor de opvang van asielzoekers* (C-233/18) [EU:C:2019:956](#) at [57].

¹¹² See *Re: Article 26 and Electoral (Amendment) Bill* [1984] IR 268.

¹¹³ *NHV v Minister for Justice and Equality* [2017] IESC 35 at [12]. See also *Landers v Attorney General* (1975) 109 ILTR 1, *Murtagh Properties v Cleary* [1972] IR 330, *Murphy v Stewart* [1973] IR 97 and *Cafolla v O'Malley* [1985] 1 I.R. 486.

¹¹⁴ *NHV v Minister for Justice and Equality* [2017] IESC 35 at [11].

¹¹⁵ [2017] IESC 35.

¹¹⁶ *Ibid* at [21].

¹¹⁷ Inviolability of the dwelling means that no one, including the Gardaí, may enter the place where a person lives without a warrant or other legal authority to enter. If someone is arrested as a result of an unlawful entry into the home, the arrest would be illegal.

¹¹⁸ [2013] IEHC 579 at [11].

physical and social education of their children. This right adds weight to the constitutional recognition of the family as the natural primary and fundamental unit group of society.¹¹⁹ These family rights should be read in line with the broader ECHR right to respect for private and family life.¹²⁰

[Article 42A](#) was added to the Constitution in 2015 via the [Thirty-first Amendment of the Constitution Act 2012](#). The Article affirms the natural and imprescriptible rights of children and acknowledging that the best interests of the child are held as a paramount consideration where the State seeks to intervene to protect the safety and welfare of that child. This provides further weight to the idea that the best interests of the child should be a primary consideration. Prior to this amendment to the Constitution, in the case of [Dos Santos v Minister for Justice and Equality](#),¹²¹ McDermott J highlighted that art.3 of the UNCRC required that the best interests of the child be regarded as ‘a’ primary consideration, not necessarily ‘the’ primary consideration and therefore so long as the relevant decision maker considered the best interests of the child in his or her decision-making process, this would be sufficient – the best interests of the child “is not the first but one amongst a number of matters that should be to the forefront of the decision maker’s mind.”¹²² The Special Rapporteur on Child Protection, Dr Geoffrey Shannon, stated in his 11th Report:

“In a ‘best interests assessment’ for an individual migrant child, the child’s best interests should be considered as a primary consideration – they should have high priority and a larger weight must be attached to what serves the child best.”¹²³

The Constitution does not specifically include a right to privacy but the courts have recognised that the personal rights in the Constitution imply the right to privacy. As with the right to private and family life in the ECHR, this is not an absolute right and the protection afforded to an individual’s privacy in Ireland is not materially different from the protections available in international law.¹²⁴

¹¹⁹ See [Article 41 of the Constitution](#). See also *McGee v Attorney General* [1974] IR 284 at 311 per Walsh J.

¹²⁰ [European Convention on Human Rights](#) Art. 8. See also [CA and TA v Minister for Justice and Equality](#) [2014] IEHC 532 at [9.18] per Mac Eochaidh J.

¹²¹ [2014] IEHC 559.

¹²² *Ibid* at [49] and [60].

¹²³ Dr Geoffrey Shannon, Special Rapporteur on Child Protection, [Eleventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas](#), 2018, p. 6

¹²⁴ See, for example, [CA and TA v Minister for Justice and Equality](#) [2014] IEHC 532 at [8.6] per Mac Eochaidh J.

Other domestic human rights obligations

Equal Status Act 2000, as amended

The [Equal Status Act 2000](#), as amended, (the '2000 Act') outlines 10 grounds of discrimination. Subject to certain exemptions, the 2000 Act prohibits discrimination (including indirect discrimination) in the provision of goods and services, accommodation and education on one or more specified ground. Grounds of discrimination include age, civil status, disability, family status, gender, race, colour or nationality, religion, and sexual orientation. The 2000 Act also allows positive action to promote equality for disadvantaged persons or to cater for the special needs of persons. Services provided by the State are covered as are services provided by most private actors.¹²⁵

Irish Human Rights and Equality Commission Act 2014 - The public sector duty

[Section 42 of the Irish Human Rights and Equality Commission Act 2014](#) (the '2014 Act') creates a binding **positive obligation** on public bodies to ensure that all stakeholders, including staff, are treated equally, and in a manner that promotes equality and effectively protects their human rights. The Irish Human Rights and Equality Commission (IHREC) refers to this duty as the Public Sector Duty (PSD). Subsection 42(2) of the 2014 Act provides, for the purposes of giving effect to the PSD, all public bodies must ensure that human rights and equality considerations are incorporated into the development of policy and strategic planning and that these considerations become central to the way in which public functions are carried out.¹²⁶

The 2014 Act requires the IHREC to provide guidance and encourage public bodies to satisfactorily comply with the PSD.¹²⁷ In its guidance document [Implementing the Public Sector Equality and Human Rights Duty](#), the IHREC notes the PSD "is an ongoing obligation, which must be continually engaged with and considered, including in the development of strategic plans."¹²⁸

Among others, the PSD applies to Departments of State and any other person, body or organisation established by any scheme administered by a Minister. By definition, this would include the International Protection Accommodation Services (IPAS), formerly referred to as the Reception and Integration Agency (RIA).¹²⁹

¹²⁵ Irish Human Rights and Equality Commission, '[Equal Status Acts](#)', *Factsheet* (Last accessed 11 March 2020).

¹²⁶ [Irish Human Rights and Equality Commission Act 2014 s. 42\(2\)](#).

¹²⁷ [Irish Human Rights and Equality Commission Act 2014 s. 42\(3\)](#).

¹²⁸ Irish Human Rights and Equality Commission, [Implementing the Public Sector Equality and Human Rights Duty](#), 2019, p. 19

¹²⁹ [Irish Human Rights and Equality Commission Act 2014 s. 2\(1\)](#) definition of 'public body'.

Although it is yet to be tested in this context, it would be surprising if the IPAS (or RIA) were able to avoid its PSD by signing contracts with private service providers to deliver DP accommodation and services. In *McLoughlin v Minister for Social Welfare*¹³⁰, while referring to a statutory duty imposed on an Social Welfare Appeals Officer, O'Daly J held that a person may not abdicate his or her statutory duty. He stated:

“[t]hat duty is laid upon him by the Oireachtas and he is required to perform it ... freely and fairly as becomes anyone who is called upon to decide on matters of right and obligation.”¹³¹

Failure to have regard to the PSD may result in a breach of the 2014 Act. [Section 41](#) of the 2014 Act empowers IHREC to institute proceedings for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons. However, this must be read in line with [subsection 42\(11\)](#) of the 2014 Act, which expressly limits the extent to which a person may rely on the PSD to frame a cause of action against a potentially errant public body.

¹³⁰ [1958] IR 1.

¹³¹ Ibid. There is a body of construction law and employment law precedent limiting the extent to which a person may contract out of a statutory duty: see Irish Law Reform Commission, [Report on defective premises](#), May 1982 and in particular, *Siney v Dublin Corp* [1980] I.R.400. As to employment law see the rule set out by Lord Westbury in *Hunt v Hunt* (1862) 4 DF & J 221, “no man can renounce a right of which his duty to the public and the claims of society forbid renunciation”, at 223.

Ireland's Human Rights Performance

Over the past five years, since the publication of the McMahon report, a number of changes have been made to the DP system, both from a legislative and a policy perspective.

Legislative changes

In 2017, the Government streamlined the protection application process, creating one procedure through the enactment of the [International Protection Act 2015](#) (the '2015 Act'). Although the introduction of the single application procedure did not directly affect the DP system, it created a single right of appeal to the International Protection Appeals Tribunal, resulting in a more efficient determination of protection applications. The implementation of the single application procedure has been associated with a reduction in the average time spent in DP centres.

Table 1 provides a snapshot of the amount of time applicants have resided in DP centres, comparing 2015 with 2019.

Length of Time	2015	2019
Less than 1 year	23%	44%
1-2 years	9%	24%
2-3 years	7%	13%
3-4 years	8%	13%
4-5 years	9.5%	4%
5 years or more	43.5%	2%

Source: IGEES Unit, Department of Justice and Equality, '[Direct Provision: Overview of current accommodation expenditure](#)', *Spending Review 2019*, August 2019, p. 31.

In November 2019, the average length of time spent in a DP centre was 21 months. Although this figure has reduced over recent years, staying in DP accommodation may have significant impacts on the mental health and family life of international protection applicants. As noted by IHREC:

“Inappropriate living conditions, isolation, and a lack of activities, among other issues, adversely affect physical and mental health of persons living in Direct Provision centres.”¹³²

¹³² Irish Human Rights and Equality Commission, [Submission to the UN Committee against Torture on the List of Issues for the Third Examination of Ireland](#), January 2020, pp 34-35.

The Joint Committee on Justice and Equality made similar comments in its report, stating:

“ ... living in direct provision for longer periods of time can have damaging effects on children, families and individuals due to the institutional nature of the accommodation provided.”¹³³

The 2018 Regulations have placed the DP system on a statutory footing for the first time in its history. In November 2019, the Minister for Justice and Equality recognised that the State “is now legally obliged to deliver” the prescribed standards and rights.¹³⁴

The 2018 Regulations introduced a limited right to work for international protection applicants¹³⁵ for the first time, bringing the existing legislation into line with the Supreme Court’s decision in [NHV v Minister for Justice and Equality](#).¹³⁶ By November 2019, more than 3,400 permissions have been granted.¹³⁷ However, evidence suggests that many permit holders are still unable to access employment. Practical issues such as difficulties in opening bank accounts and applying for drivers’ licences emphasise the problems faced with accessing the labour market from centres mainly located in rural areas.¹³⁸

Due to capacity limits on DP centres, the State has been providing emergency accommodation to international protection applicants in hotels and guesthouses since September 2018. IHREC has voiced a number of concerns with the use of emergency accommodation. Some residents have had to live in emergency accommodation for periods of nine months and there have been reports of inadequate living conditions, the short-term (weekend) relocation of residents to help maximise profits, the failure to provide information about entitlements, the failure to place children in school and preschool, the need for some adults to share beds with strangers, unsuitable food for the cultural and religious beliefs of residents, and delays in accessing legal advice and medical cards.¹³⁹

¹³³ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 23.

¹³⁴ Charles Flanagan TD, Minister for Justice and Equality, ‘[Provision of Accommodation and Ancillary Services to Applicants for International Protection: Statements](#)’, *Dáil Éireann debate*, 13 November 2019.

¹³⁵ [European Communities \(Reception Conditions\) Regulations 2018](#) (S.I. No 230 of 2018) reg. 2(2) provides that a person who is the subject of a Dublin Regulation transfer order is not considered to be an international protection applicant and therefore will not be eligible for the grant of labour market access permission.

¹³⁶ [2017] IESC 35.

¹³⁷ Charles Flanagan TD, Minister for Justice and Equality, ‘[Provision of Accommodation and Ancillary Services to Applicants for International Protection: Statements](#)’, *Dáil Éireann debate*, 13 November 2019.

¹³⁸ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, pp 34-36.

¹³⁹ Irish Human Rights and Equality Commission, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland’s Combined 5th to 9th Report](#), October 2019, pp 114-115.

The 2018 Regulations also create an obligation to conduct a vulnerability assessment of protection applicants within 30 working days of their preliminary interview.¹⁴⁰ A number of organisations including IHREC have questioned whether a vulnerability assessment process has been instituted in Ireland. As vulnerability assessments are generally undertaken during a medical screening appointment at the initial contact with the IPAS/RIA in the Baleskin reception centre, some protection applicants who are sent directly to emergency accommodation have not received a vulnerability assessment.¹⁴¹ To limit the extent to which individuals are affected, the Department has engaged a third party contractor to perform mobile health screening.¹⁴²

Policy changes

Accommodation centre rules

In 2014, in the case of [CA and TA v Minister for Justice and Equality](#)¹⁴³ Justice Colm Mac Eochaidh found aspects of the DP system relating to accommodation centre rules¹⁴⁴ had breached the applicants' rights – particularly, the right to respect for private and family life under article 8 of the ECHR. The RIA amended the accommodation centre rules to rectify this breach.¹⁴⁵

Complaints handling

In the same case, Justice Mac Eochaidh found that the applicants' were entitled to have an independent complaints-handling procedure – it was not acceptable that the RIA was the final decision-maker in a dispute relating to accommodation and services that it was charged with providing.¹⁴⁶ The complaints procedure has since been amended.¹⁴⁷

The current complaints procedure for issues and problems that arise in IPAS/RIA centres requires residents to first make a complaint directly to the centre manager. Any complaint must be taken in confidence. Complaints can be made in four stages. The first stage involves an informal verbal

¹⁴⁰ [European Communities \(Reception Conditions\) Regulations 2018](#) reg. 8.

¹⁴¹ Irish Human Rights and Equality Commission, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#), October 2019, p. 116.

¹⁴² Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, pp 30-32.

¹⁴³ [2014] IEHC 532.

¹⁴⁴ Notably, the daily registration requirement, the requirement to notify proposed absences, unannounced searches of bedrooms with or without permission, the rule against having guests in the bedroom, and an inadequate complaints procedure: see *ibid* at [8.7]-[8.14]

¹⁴⁵ The most recent iteration consists of the Reception and Integration Agency, Department of Justice and Equality, [House Rules and Procedures for Reception and Accommodation Centres](#), Revised, January 2019.

¹⁴⁶ [CA and TA v Minister for Justice and Equality](#) [2014] IEHC 532 at [8.15]-[8.16].

¹⁴⁷ See Reception and Integration Agency, Department of Justice and Equality, [House Rules and Procedures for Reception and Accommodation Centres](#), Revised, January 2019.

complaint. If the issue is not satisfactorily resolved a written complaint may be made (stage 2). The centre management will then have 14 days in which to respond to the formal complaint. After this stage, if the resident is still not satisfied with the response, he or she may then formally complain to the IPAS/RIA (stage 3). In very exceptional and serious circumstances (where circumstances would make it difficult for the issue to be resolved by the centre manager in a fair and independent manner) the IPAS will accept complaints that commence at stage 3. If the resident is not satisfied with the outcome of a stage 3 process, he or she may then (and only then) submit the complaint to the Office of the Ombudsman or the Office of the Ombudsman for Children as appropriate.¹⁴⁸

Where the resident is not satisfied with a decision made under the 2018 Regulations, he or she may request a review within 10 working days of the date of issue of the decision. The resident retains a right to challenge the decision of the review officer, by appeal to the International Protection Appeals Tribunal.¹⁴⁹

The Joint Committee on Justice and Equality reported DP residents felt:

“current oversight and complaint mechanisms are often ineffective and inaccessible. For example, visits by the Office of the Ombudsman had been conducted inside centres where CCTV was in operation, leaving residents reluctant to engage with the process for fear of being seen by centre management to be causing trouble. The Committee emphasised that for the National Standards to be effective, oversight mechanisms must ensure that residents can engage with them in confidence and privacy.”¹⁵⁰

Rollout of National Standards

The rollout of the 2019 [National Standards](#) through the procurement process will take place over the next year. The standards will apply and be legally binding from 1 January 2021. The standards have been received generally in a positive light.¹⁵¹ However, calls have been made for an independent oversight and inspection mechanism to be established to monitor their implementation in practice.¹⁵² The continued use of emergency accommodation further undermines the proper implementation of the National Standards. As noted by the Children’s Rights Alliance, since the Department cannot impose its required standards on hotels and

¹⁴⁸ Reception and Integration Agency, Department of Justice and Equality, [House Rules and Procedures for Reception and Accommodation Centres](#), Revised, January 2019 pp 35-37.

¹⁴⁹ [European Communities \(Reception Conditions\) Regulations 2018](#) regs 20, 21.

¹⁵⁰ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 28.

¹⁵¹ Ibid.

¹⁵² Irish Human Rights and Equality Commission, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland’s Combined 5th to 9th Report](#), October 2019, p. 113; Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 16.

guesthouses who are providing emergency accommodation, there is a lack of clarity about the supports provided to those housed in such accommodation.¹⁵³

Public Sector Duty

The Department of Justice and Equality has openly acknowledged its positive duties associated with [section 42 of the Irish Human Rights and Equality Commission Act 2014](#). It has stated:

“[f]rom 2019 onwards, all governance agreements made by the Department outlines the obligation for all public bodies [i.e. the agencies] to include the Public Sector Duty in their strategic planning process and report on a regular basis on their progress.”¹⁵⁴

The Department’s Equality and Human Rights Assessments include an assessment of the work performed by the RIA, in which the RIA accepts that its work is fundamentally affected by equality and human rights issues. Notably, assessment have not been completed by private contractors employed by the IPAS/RIA. Furthermore, the RIA has acknowledged that although it has commissioned equality and diversity training for contractors, it does not have a systematic process in place to provide this training to contractors and their staff on an ongoing basis.¹⁵⁵

Welfare of Children and Vulnerable Groups

The RIA assessment draws attention to the introduction of a Child Protection and Welfare Policy and a Policy and Practice Document on safeguarding RIA residents against Domestic, Sexual & Gender-based Violence and Harassment. The assessment notes:

“Both policies have been accompanied by training for contractors and their staff to ensure that they staff to ensure that they are aware of their obligations in relation to child protection and welfare and in relation to responding to instances of domestic, gender-based or sexual violence or harassment.”¹⁵⁶

In December 2019, the Royal College of Physicians of Ireland (RCPI) published a position paper on children in the DP system. The paper argued:

“Children and young people thrive if they can live in families, safe communities and supportive environments that provide the right conditions and opportunities to reach their fullest emotional and developmental potential.

¹⁵³ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 27.

¹⁵⁴ Department of Justice and Equality, [‘Our Public Sector Equality and Human Rights Duty’](#), *Press Release* (last accessed on 13 March 2020).

¹⁵⁵ Department of Justice and Equality, [Public Sector Duty: Equality and Human Rights Assessments](#), p. 54.

¹⁵⁶ *Ibid*, p. 54.

These elements and supports are crucial in the prevention of adverse childhood experiences and long-lasting mental health challenges. Direct Provision settings cannot provide this environment as it cannot adequately meet the needs of children and their families in terms of security, family autonomy, nutrition and access to education and health services.”¹⁵⁷

The issues outlined by the RCPI are exacerbated when families are placed in emergency accommodation. The IPAS/RIA have accepted this and have confirmed that they prioritise the movement of families out of emergency accommodation into DP centres.¹⁵⁸

In the case of [CA and TA v Minister for Justice and Equality](#)¹⁵⁹ the applicants pleaded:

“The conditions and restrictions inherent in Direct Provision living in combination with the intense financial pressure experienced by families served to grossly impair the establishment and enjoyment of normal family life and distort the role and parenting function of residents...”¹⁶⁰

Justice Mac Eochaidh rejected the argument on grounds that the applicants failed to adduce sufficient evidence to support their claim and prove that they had suffered adverse effects. He stated:

“Though my instinct tells me that ‘direct provision’ is not an ideal environment for rearing children, I cannot assume the skill and knowledge of a psychologist to make conclusions about the suitability of ‘direct provision’ for children ... because of a failure of proof, the contention that the respondents are responsible for creating a negative atmosphere in which the second named applicant is being reared, in breach of relevant ECHR and Constitutional rights must fail.”¹⁶¹

¹⁵⁷ Royal College of Physicians of Ireland, [Children in Direct Provision: A position paper by the Faculty of Paediatrics](#), December 2019, p. 4.

¹⁵⁸ Joint Committee on Justice and Equality, [Report on Direct Provision and the International Protection Process](#), December 2019, p. 39.

¹⁵⁹ [2014] IEHC 532.

¹⁶⁰ Ibid at [9.12].

¹⁶¹ Ibid at [9.19].

Access to remedies

Evidentiary obstacles

As touched on above, in [CA and TA v Minister for Justice and Equality](#)¹⁶² the applicants faced a number of evidentiary obstacles to their judicial review challenge.

The applicants sought to rely on reports that had been drafted by a variety of governmental, non-governmental and international organisations. Mac Eochaidh J ruled that these reports were hearsay, and inadmissible in evidence. He explained that the rules of evidence cannot be disapplied in judicial review proceedings and stated:

“This Court is not concerned with what persons who are not parties or witnesses in these proceedings might think about the legality, proportionality or quality of ‘direct provision’. Their views might have been of considerable assistance to the applicants (and to the court) had viva voce evidence been given but this did not happen. Therefore, though I have read the documents which have been exhibited by the applicants, I have decided that I cannot have regard to the views expressed therein in determining any question before this Court. The authors of the reports have not heard the argument in this case. Nor have they seen or heard the evidence of the applicant. They have not been exposed to the evidence and the views of the respondents. This case can only be decided on the pleadings, the evidence and the arguments of the parties.”¹⁶³

Secondly, the applicants struggled to prove that the time they spent in DP accommodation caused negative effects. The applicants relied solely on their affidavit attached to their application for judicial review.¹⁶⁴ Given the respondent’s rebuttal of the claims, the “court was not offered the means to resolve this dispute”.¹⁶⁵

Mac Eochaidh J found, given the lack of specificity in the pleadings and the lack of direct evidence put forward by the applicants, it was not possible for them to sustain a claim that DP was a form of inhuman and degrading treatment.¹⁶⁶

Mac Eochaidh J opined:

¹⁶² [2014] IEHC 532.

¹⁶³ [2014] IEHC 532 at [4.10].

¹⁶⁴ Under [Order 84 rule 20\(2\) of the Rules of the Superior Courts](#) all applications for judicial review must be in the correct form, supported by an affidavit.

¹⁶⁵ [2014] IEHC 532 at [5.3].

¹⁶⁶ [2014] IEHC 532 at [6.9] and [7.25] – [7.27].

“The applicants could have sought a plenary hearing of this action but did not. They could have requested cross examination of the respondents on their affidavits but did not. They could have filed affidavits by suitably qualified persons as to the effects of ‘direct provision’ but they did not. The applicants thereby failed to discharge the burden of proof to establish that ‘direct provision’ has the negative effects alleged.”

Procedural obstacles

The statement by Justice Mac Eochaidh that the applicants in the case of [CA and TA v Minister for Justice and Equality](#)¹⁶⁷ could have sought a plenary hearing raises procedural questions.

[Order 84 rule 26\(5\) of the Rules of the Superior Courts](#) provides that where a court decides a relief should not be granted on an application for judicial review, but it might have been granted if it had been commenced by way of a plenary summons, the court is allowed to continue hearing the case as if it were commenced by way of a plenary summons. As has been noted by Hogan and Morgan, there is no converse power allowing plenary proceedings to be converted into judicial review proceedings. Hogan and Morgan suggest that the rationale for this prohibition may stem from a concern:

“... were such a power to exist, it would facilitate litigants who wished to circumvent the inherent restrictions in the [Ord.84](#) procedure (the need for leave, strict time limits, etc.) by commencing their action by way of plenary summons and for these reasons, the Superior Courts Rules Committee deliberately elected to allow conversion in one direction only.”¹⁶⁸

Given this prohibition, if the applicants had sought a plenary action instead of applying for judicial review, it is probable the court would have refused the action on grounds that:

“It would make a nonsense of the system of judicial review if a party could by-pass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or the same substantive ends. What would be the point of courts considering applications for leave or considering applications to extend time if a party could simply by-pass that whole process by issuing a plenary summons?”¹⁶⁹

¹⁶⁷ [2014] IEHC 532.

¹⁶⁸ Gerard Hogan and David Morgan, *Administrative Law in Ireland* (5th ed.) Dublin: Roundhall, 2019 at [19-87].

¹⁶⁹ *Shell E&P Ireland Ltd v McGrath* [2013] IESC 1, [2013] 1 IR 247 at 262 per Clarke J See also Gerard Hogan and David Morgan, *Administrative Law in Ireland* (5th ed.) Dublin: Roundhall, 2019 at [19-90].

Where the court decides not to follow the procedure in Order 84 rule 26(5), an applicant appears to have few options. It appears the only possibility would be for the applicant to commence proceedings by way of plenary summons in parallel with an application for judicial review.

Legal obstacles: the privatisation of public functions

In another case, [ZK v Reception and Integration Agency](#)¹⁷⁰, Humphreys J noted that as the relevant DP centre was a private facility, not a public law institution, any issue in relation to the living conditions would “at best” be a matter for ordinary civil action, not judicial review. That said, he did concede that “a genuinely public law matter does not cease to be a public law matter if the State outsources its provision to a private entity. In that sense, judicial review can be sought against private law entities carrying on public functions.”¹⁷¹

This statement raises the question of how the privatisation of public functions affects a stakeholder’s capacity to seek legal remedies. The IHREC has expressed concern that “human rights accountability mechanisms can be weakened where the State delivers its public functions through non-State actors.”¹⁷² Furthermore, where public functions are contracted out to the commercial sector, the profit motive may take precedence over implied duties to protect the rights of stakeholders.¹⁷³

[Associate Professor Catherine Donnelly](#) has emphasised that private actors are not necessarily subject to the same legal accountability mechanisms as public actors. Private actors are not subject directly to public law controls such as judicial review, the judicial procedure acts and actions taken for a breach of ECHR rights.¹⁷⁴ She explains:

“Administrative law mechanisms test decision-making for openness, fairness, participation, impartiality, accountability, honesty and rationality, and their non-application to private actors performing governmental functions creates a lacuna in legal accountability.”¹⁷⁵

Hogan and Morgan clarify this gap:

The reason why ‘contracting out’ has been regarded askance by orthodox public law lies in the question of how private bodies can be made to observe the usual principles of

¹⁷⁰ [2016] IEHC 20.

¹⁷¹ [2016] IEHC 20 at [18] and [20] per Humphreys J.

¹⁷² Irish Human Rights and Equality Commission, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland’s Combined 5th to 9th Report](#), October 2019, p. 120.

¹⁷³ Ibid p. 120. See also, Irish Refugee Council, [Submission to Joint Oireachtas Committee on Justice and Equality](#), May 2019, p. 32.

¹⁷⁴ Catherine Donnelly, ‘The Privatisation of Government Functions’ in *The Irish Constitution: Governance and Values*, edited by Oran Doyle and Eoin Carolan, Thomson Roundhall, Dublin: 2008, pp 240-255.

¹⁷⁵ Ibid p. 245.

democratic participation and accountability. To elaborate, if a function is vested in a Minister, then the Minister is responsible to the Dáil for its exercise. Next, if the function is vested in another type of public body, then the Minister is (though to a lesser extent) responsible and the chief executive can be called to account ... But what if the function has been contracted out to a private company? The traditional answer would be that accountability comes in the form of 'the market' ... The result is that, at the moment, we are in an uncertain and probably unsatisfactory state as regards control and accountability in respect of public functions which have been contracted out. However, one possible form of control is that the function contracted out may well be one of those which are subject to a regulator ..."¹⁷⁶

The notion of privity of contract rules out contractual remedies for service recipients and tort law relies on the stakeholder proving a duty of care and damages. Further, damages available in tort may not adequately vindicate the right.¹⁷⁷ Donnelly suggests that the means by which private actors may be held accountable for contracted public duties may be in an action for wrongful interference with a constitutional right, a constitutional tort. In the case of *Meskill v CIE*¹⁷⁸ the Supreme Court recognised an action for breach of constitutionally-protected rights against persons other than the State and its officials. However, the case law interpreting this potential right of action is limited and it has been accepted that this type of action must be considered to be an action of last resort (only to be invoked when other private law actions would be ineffective).¹⁷⁹

¹⁷⁶ Gerard Hogan and David Morgan, *Administrative Law in Ireland* (5th ed.) Dublin: Roundhall, 2019 at [4-47].

¹⁷⁷ See generally Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A comparative perspective* (Oxford, Oxford University Press: 2007).

¹⁷⁸ [1973] IR 121.

¹⁷⁹ Catherine Donnelly, 'The Privatisation of Government Functions' in *The Irish Constitution: Governance and Values*, Oran Doyle and Eoin Carolan (eds), Thomson Roundhall, Dublin: 2008, pp 252-253. See also *Hanrahan v Merck Sharp and Dohme* [1988] ILRM 629 at 636; *McDonnell v Ireland* [1997] IESC 9, [1998] IR 134 at 147.

Conclusions

Recent events have raised questions about:

- ⇒ the right of local communities to be consulted about the location of DP centres;
- ⇒ the outsourcing of DP services to private, for-profit companies;
- ⇒ whether individual stakeholders have a right to challenge the legality of DP; and
- ⇒ whether the Government is satisfying its obligations to protection applicants.

The rights of the local communities to be consulted

Local communities have limited legal rights to challenge the location of DP centres even if a prospective DP centre threatens to impose a disproportionate burden on local services or to affect the local economy by undermining the local tourist industry.

Changing the use of a property from an accommodation provider to a provider of DP services is classified as exempted development and therefore the current planning laws cannot be invoked to challenge such a change. Prospective objectors have no right to challenge a decision to allow specified accommodation providers to offer DP services, but they may instigate a challenge if there is a question of whether the relevant property falls within one of the prescribed categories of accommodation provider.

The Government has made some efforts to allay community concerns, by promising a level of community consultation prior to locating a DP centre. However, local communities have no legal rights to enforce the Government to follow up on these assurances or to consider local submissions.

Outsourcing of DP services

The Department of Justice and Equality has recently amended the system by which DP centres are procured, to ensure a level of compliance with European procurement standards. However, as shown by the Department's recent announcement of the new DP Centre in Caherciveen, Co. Kerry, it has not completely shifted away from the expressions-of-interest procurement process. Furthermore, to date, all emergency accommodation has been procured through the expressions-of-interest procurement process. It is questionable whether this type of procurement process will result in the procurement of sustainable DP accommodation, delivered at the best value for money, sparking concerns that the current system allows private entities to 'cash in' on the DP system. Concerns have also been raised on whether private providers working on a for-profit basis could ever possess the requisite expertise in housing or social care to adequately meet the complex social needs of residents.

Applicable rights and remedies

Stakeholders who believe that their rights have been infringed face a number of obstacles to access effective remedies. These obstacles are evidentiary, procedural and legal in nature.

Proving that potential infringement cause negative effects is difficult. The rules of evidence exclude hearsay and require that evidence is given first-hand – allowing the other side to challenge the information through cross-examination. A reliance on the judicial review procedure to obtain relief limits the extent to which evidence may be adduced, as the judicial review procedure requires a case to be put by way of affidavit, limiting the extent to which a party may rely on plenary proceedings to prove their case.

The privatisation of the DP system creates further difficulties. Private actors are not necessarily subject to the same legal accountability mechanisms as public actors. They are not subject directly to public law controls such as judicial review, the judicial procedure acts and actions taken for a breach of ECHR rights. Furthermore, aggrieved stakeholders cannot rely on claims grounded in contract or tort as the relationship between service provider and service user are too remote for those remedies to be effective. However, there remains some possibility that a private actor could be held accountable for contracted public duties through an action for wrongful interference with a constitutional right (a constitutional tort).

A final word

Over its 20 years, the DP system has undergone a number of changes. These changes have definitely improved the quality of life of people relying on DP accommodation and services. However, these changes have often been grounded in a need to respond to a systemic flaw or omission highlighted by case law or an independent report. The reactive nature of change makes that change relatively piecemeal, covering up the problems rather than offering long-term solutions. A sustainable, fair and responsible approach to protection applicants may only be achievable through a thorough proactive examination and reform of the current law and policies. The Joint Oireachtas Committee on Justice and Equality recommended root and branch reform, preferably replacement. The movement away from a reliance on private contractors to perform what is arguably a public law duty could be fundamental to this reform.



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