

Elaborating on the challenges facing LGBT asylum seekers: Asylum procedures and reception conditions in Ireland

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1. Introduction

Research and practice increasingly highlight the unique hardships faced by persons applying for international protection on account of persecution based on their sexual orientation and gender identity. Only recently have abuses faced by Lesbian, Gay, Bisexual and Transgender (LGBT, hereafter) persons come to be accepted under traditional refugee protection frameworks informed by the Refugee Convention. This acceptance has taken shape parallel to a similar understanding within the broader international human rights field where the fundamental rights of LGBT people are becoming more firmly established.¹ With the establishment of LGBT persons as ‘rights-holders’, persecution of people perceived as exhibiting diverse sexual and gender identities can more readily be understood as a failure of state protection (thereby triggering Refugee Convention duties), as opposed to a failure on the part of the applicant to adhere to societal norms or avoid atypical behaviour that would draw attention – the rationale behind which many LGBT applications would have been dismissed in the past. However, such progress is painstakingly gradual and many countries are applying these newly established standards in an inconsistent or often inappropriate manner, if they have regard to the appropriate standards at all.² Furthermore, at least in the European context, there is a widespread lack of transparency with regards to first-instance asylum decisions, as well as little disaggregated data on asylum applications on the basis of application ground. In the absence of any clear national or regional trends, generating a picture of the extent to which those seeking international protection on the basis of sexual orientation or gender identity are treated as required by the now-established standards is difficult.

¹ Jenni Millbank, Sexual Orientation and Refugee Status Determination over the Past 20 years: Unsteady Progress through Standard Sequences? In Thomas Spijkerboer, (ed) *Fleeing Homophobia* (2012). Millbank outlines how the insertion of sexual orientation and gender identity into refugee protection discourse occurs in a piecemeal fashion through the “trickle down” of ground-breaking jurisprudence of the higher courts, which is reinforced by “educating up”, which involves providing interventions at lower levels in decision making, such as training, policy and guideline development and grassroots advocacy and activism. This two-pronged approach ensures that legal developments are implemented in practice on the ground.

² For a comprehensive, comparative overview of state practice at the European level in relation, see: Sabine Jansen and Thomas Spijkerboer, “Fleeing Homophobia”, COC Netherlands and VU University Amsterdam, (2011).

In the context of these developments, this paper aims to shed some light on the challenges faced by LGBT people seeking international protection in Ireland. There is limited transparency on asylum data in Ireland; public access to first-instance decisions is not possible and there is no disaggregated breakdown of data by application ground,³ and access to Direct Provision centres where asylum seekers are accommodated is limited.⁴ However, data from appellate bodies⁵ as well as anecdotal evidence⁶ suggests that a significant proportion of international protection claims are made by people on the basis of their sexual orientation or gender identity. The approach taken by authorities in assessing these claims, or the extent of any provisions made to accommodate the needs of LGBT applicants is unknown. Given recent research expressing concern at a pervasive culture of ‘disbelief’ in the Irish decision making process,⁷ as well as widespread scrutiny of the Direct Provision system, this paper aims to draw into relief the specific experiences of LGBT asylum seekers in Ireland against the State’s international refugee and human rights obligations.

Ireland has undergone significant legislative change with the introduction of the International Protection Act (2015 as amended, IPA hereafter), which came into force at the beginning of 2017, reshaping the Irish international protection procedure. This change will no doubt have significant implications for LGBT applicants and exposing any concerns at this early stage in the rollout of the new procedures is crucial for pre-empting potential protection gaps. By outlining the reality for this specific group of asylum seekers at the Irish domestic level, this paper aims to articulate recommendations for the government to ensure that Ireland’s asylum system is in line with minimum international standards.

1.2 Comment on the Methodology

As mentioned already, access to data relating specifically to asylum cases based on sexual orientation or gender identity is practically non-existent in the Irish context. As such, the analysis of the legal framework and limited existing literature on sexual orientation and gender identity in asylum relevant to the Irish system in this paper will be supplemented by insights from additional relevant sources to which the author has access.

Firstly, information on decisions at appeals stage can be gleaned from an online archive of decisions published on the International Protection Appeals Tribunal’s (where protection

³ The previous Office of the Refugee Applications Commissioner (now International Protection Office) in Ireland maintained monthly and annual statistics on asylum applications and decisions, including breakdown by country of origin. See: <http://www.orac.ie/website/orac/oracwebsite.nsf/page/orac-stats-en>

⁴ Access to Direct Provision Centre for visitors is restricted to certain hours of the day and subject to the permission of the centre manager. See: Reception and Integration Agency House Rules and Procedures for Reception and Accommodation Centres, June 2017, para. 2.12,

⁵ The International Protection Appeals Tribunal Decisions Archive provides access to all international protection appeal decisions since 2001, subject to completing an online registration process. Available here: <http://www.protectionappeals.ie/website/rat/ratweb.nsf/SplashPageForROMDA.html>

⁶ Some of the information provided in this paper is informed by the author’s experience working in the Irish Refugee Council’s Independent Law Centre, and through interviews with members of the ‘Identity’ LGBT asylum seeker support group, facilitated by the Irish Refugee Council’s Information and Referral Service.

⁷ Sue Conlon, Irish Refugee Council, *Difficult to Believe: The assessment of asylum claims in Ireland*, (2012).

applicants may appeal first-instance decisions of the International Protection Office) website.⁸ Access to the redacted decisions is subject to online registration, after which the archive may be searched according to certain filters and keywords. For the purposes of this paper, all decisions containing the key word “sexual orientation” from the year 2014 onwards were drawn out. This timeframe was selected in keeping with the purpose of this paper to sketch out a picture of the approach taken by decision makers with respect to LGBT cases, rather than intending to gather exhaustive quantitative data, which is beyond the scope of this paper. The Tribunal decisions would give an indication of the extent to which first-instance decision makers, as well as the Tribunal itself, are keeping with emerging standards in international protection procedures relating to sexual orientation and gender identity.

Additionally, this paper will give due account to the experiences of LGBT asylum seekers themselves, whose voices are too-often omitted from discussion yet all the more valuable in an environment with a pervasive lack of policy and legislative guidance highlighting and addressing the issues faced by LGBT people in the asylum process. In this vein, this paper will supplement the analysis with insight from semi-structured, informal interviews with four members of the LGBT support group, ‘Identity’, which is facilitated by the Irish Refugee Council’s Information and Referral Service. In addition, anecdotal evidence from the client-facing work of the Irish Refugee Council’s Independent Law Centre will be taken in to account. The Law Centre is the only independent law centre in Ireland providing early legal advice (ELA) to asylum seekers upon arrival in the State. Again, while this anecdotal information does not purport to be wholly representative of the situation for all LGBT asylum seekers in Ireland, it will ground findings from the legal and policy analysis in the lived experiences of some of those navigating the Irish asylum process and may lay the groundwork for more in-depth research in future.

2. Legal Framework for LGBT Asylum Seekers in Ireland

2.1 Ireland’s International and Regional Obligations

Ireland is party to the key international treaties setting out the core obligations states must take account of in their domestic international protection legislation and procedures, including the Refugee Convention and its protocol, as well as most of the key international human rights treaties (Ireland has not yet ratified the Convention on the Rights of Persons with Disabilities).⁹ While these conventions make no explicit reference to persons fleeing persecution on account of their sexual orientation or gender identity, developments over the last two decades at the international level have established that many of the rights contained in these texts apply to LGBT people. For example, the United Nations Human Rights Council in 2011 passed a wide-ranging resolution decrying global violence and discrimination against

⁸Available here: <http://www.protectionappeals.ie/website/rat/ratweb.nsf/SplashPageForROMDA.html>

⁹ Oireachtas Library and Research Service, International Human Rights Law: Operation and Impact (2016), p. 6. (available here: http://data.oireachtas.ie/ie/oireachtas/libraryResearch/2016/2016-09-28_spotlight-international-human-rights-law-operation-and-impact_en.pdf)

people on the basis of their sexual orientation or gender identity.¹⁰ The resolution requested that the Office of the High Commissioner for Human Rights (OHCHR), responsible for overseeing state implementation of the international human rights treaties, produce a report on the extent of human rights violations against LGBT people, as well as recommendations on States to ensure that rights for LGBT persons are upheld. This landmark resolution sparked a flurry of activity at the UN level addressing systematic violence and discrimination, and clarifying States' obligations,¹¹ including the establishment of the Human Rights Council's first ever independent expert on human rights issues relating to sexual orientation and gender identity in 2016, who has already issued a number of thematic reports.¹²

In its 2015 report to the Human Rights Council, OHCHR highlighted the particular challenges faced by LGBT asylum seekers and called on States to ensure that people seeking protection on the basis of their sexual orientation or gender identity are not returned to a country where they would face persecution.¹³ The report emphasised the importance of domestic asylum procedures that are sensitive to the needs of LGBT people (including recognition of sexual orientation and gender identity as grounds for persecution and the need to institute LGBT-friendly refugee status determination via training and appropriate questioning).¹⁴ The United Nations High Commissioner for Refugees (UNHCR), the agency mandated with overseeing the implementation of the Refugee Convention and providing statutory guidance on the proper application of its provisions, has issued authoritative guidelines on asylum claims based on sexual orientation or gender identity, which decision makers should take due account of in refugee status determination.¹⁵ The UNHCR has also recently published a report on the work they have done elucidating the protection needs of asylum seekers of diverse sexual orientation or gender identity,¹⁶ as well as a comprehensive training package (designed in partnership with the International Organisation for Migration) which includes modules aimed at assisting stakeholders address the protection needs of

¹⁰ United Nations Human Rights Council, Resolution 17/19 Human Rights, Sexual Orientation and Gender Identity, A/HRC/RES/17/19 (14 July 2011)

¹¹ See for example; OHCHR, High Commissioner's report to the Human Rights Council on violence and discrimination based on sexual orientation and gender identity, A/HRC/19/41 (15th December 2011); OHCHR, High Commissioner's report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 (May 2015); OHCHR, Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, HR/PUB/12/06 (2012); Living Free and Equal: What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, HR/PUB/16/3 (2016).

¹² Human Rights Council, Resolution 32/2 Protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/RES/32/2 (15 July 2016).

¹³ OHCHR, High Commissioner's report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 (May 2015) paras, 64-65.

¹⁴ OHCHR, High Commissioner's report to the Human Rights Council on discrimination and violence against individuals based on their sexual orientation and gender identity A/HRC/29/23 (May 2015) para. 78(i).

¹⁵ UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09 (23 October 2012).

¹⁶ UNHCR, Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees (December 2015).

LGBT displaced persons.¹⁷ This acknowledgement at the international level of the protection needs of LGBT people and specifically LGBT asylum seekers leave little room for doubt that LGBT rights are part and parcel of the refugee protection regime.

At the European level, Ireland is also bound to human rights law emerging from European Union (EU) law and the European Convention on Human Rights (ECHR). With respect to EU asylum law, a number of directives of the Common European Asylum System (CEAS) have developed over time making specific reference to sexual orientation and gender identity, generating a set of obligations for EU Member States to cater to the particular needs of LGBT asylum seekers. Not all of these provisions apply to Ireland on account of the State's position in relation to 'opting out' of some of the EU instruments and their recast versions, however there are some relevant points to draw out in relation to protection of LGBT asylum seekers. The recast Qualification Directive (2011) outlines how member states must recognise persecution on account of both sexual orientation and gender identity (the latter category only being added to the directive upon recast) where it may be a core element of an individual's asylum application.¹⁸ The recast Asylum Procedures Directive (2013), in its preamble, asks member states to be cognisant of the "special procedural needs" of certain categories of applicant, arising on account of their sexual orientation or gender identity.¹⁹ Article 15 requires that the person conducting the substantive interview of the applicant is "competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability."²⁰ The recast Reception Conditions Directive sets out minimum standards for accommodation of asylum seekers undergoing the international protection status determination process.²¹ While there is no explicit mention of sexual orientation or gender identity in the Reception Conditions Directive or its recast, it does incorporate general provisions to ensure the wellbeing of all asylum seekers in reception centres, some of which are particularly important for LGBT applicants. Article 2, for example, sets out a non-exhaustive list of categories of "vulnerable persons" who may have special reception needs.²² This list is open-ended so as to allow states to extend these guarantees to other potential vulnerable groups, which should be taken to include LGBT people if necessary. It is important that national asylum authorities are receptive to the fact that many persons who have experienced persecution on account of their sexual orientation or gender identity may also exhibit some of the vulnerability traits contained in the provision, such as people who have been subject to torture, rape or sexual

¹⁷ UNHCR, Training package on the protection of LGBTI persons in forced displacement (December 2015). Available here: <http://www.unhcrexchange.org/old/topics/15810/contents>

¹⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)(Qualification Directive, hereafter), Art. 10 (1)(d).

¹⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)(Procedures Directive, hereafter), Recital (29).

²⁰ Procedures Directive, Art. 15 (3)(a).

²¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)(Reception Conditions Directive, hereafter).

²² Reception Conditions Directive, Art. 21.

assault.²³ With regards to safety and preventing violence or re-traumatisation in reception centres, the Reception Conditions Directive imposes on Member States the obligation to “take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres.”²⁴ While again, not explicitly referencing sexual orientation or gender identity, this provision should be read in conjunction with other relevant EU legislation. The Directive on the rights of victims, for example, holds that “[v]iolence that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately is understood as gender-based violence.”²⁵ This is particularly relevant to LGBT individuals who may be expected to share accommodation with people from the same country of origin, cultural or religious background that gave rise to persecution in the first place and risks being repeated in the reception environment.

However, while the recast provisions of the EU asylum *acquis* ostensibly offer a strong legislative foundation upon which EU countries may operationalise asylum procedures that are receptive to the needs of LGBT asylum seekers, comparative research indicates that practice in this area is inconsistent and often at odds with international standards.²⁶ Key areas identified as cause for concern include disparate approaches to assessment of the credibility of LGBT asylum claims, dismissal of cases on the basis that a person can find safety by acting discreetly to avoid their sexual orientation becoming known, inappropriate or insufficient use of relevant country of origin information and reports of discrimination and ill treatment in reception centres. The Court of Justice of the European Union has recently picked up on areas where such disparate practice is particularly pervasive and has offered some clarity on how states should approach claims based on sexual orientation. In the *X, Y and Z* case, concerning three men from African countries where criminal sanctions against homosexuality exist, the Court was asked three specific questions about asylum claims based on sexual orientation: First, do homosexual men come under the Particular Social Group category of the refugee definition in Article 10 of the Qualification Directive; Second, can homosexual asylum seekers be returned to their country of origin on the basis that they may act discreetly to avoid persecution, and third, does criminalising legislation constitute persecution within the meaning of Article 9 of the Qualification Directive. On the first question, the Court ruled that the existence of criminal laws targeting homosexuals suggests that those persons must be regarded as a social group.²⁷ For the second question, for criminalisation of homosexuality to constitute persecution, sanctions such as imprisonment must be “actually applied.”²⁸ This point was met with some criticism by both UNHCR and

²³ ILGA Europe, *Laying the Ground for LGBTI Sensitive Asylum Decision-Making in Europe: Transposition of the Recast Asylum Procedures Directive and of the Recast Reception Conditions Directive*, (May 2014) p.13.

²⁴ Reception Conditions Directive, Article 18(4).

²⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Recital 17.

²⁶ Sabine Jansen and Thomas Spijkerboer, “Fleeing Homophobia”, COC Netherlands and VU University Amsterdam, (2011).

²⁷ CJEU, C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v X, Y and Z*, (7th November 2013) para. 48.

²⁸ *Minister voor Immigratie en Asiel v X, Y and Z*, para. 56.

intervening advocacy groups who maintain that the very existence of criminalising legislation can foster conditions for LGBT citizens that curtail access to rights and may eventually meet the threshold of persecution.²⁹ In answering the third question, the Court ruled against the possibility for determining authorities to refuse an asylum claim on the basis that the applicant could exercise discretion in his country of origin in a strong statement that ‘requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it.’³⁰ The Court approached these questions in the context of the particular circumstances of the case, e.g. in cases where the country of origin in question has criminalising legislation. While this does not exclude LGBT applicants from other countries of origin, some of its responses don’t necessarily extend to cases involving applicants from countries where homosexuality is not penalised, limiting the effective scope of the judgement somewhat.

In the more wide-reaching *A, B & C* judgement, the Court held that a person’s self-declaration as LGBT should be taken as the starting point for a more detailed evidentiary investigation by the decision making authority. In particular, the Court criticised and condemned certain practices used by some EU decision makers to ascertain the credibility of an LGBT asylum claim, finding them to be in violation of both the Qualification and Procedures Directives, as well as provisions of the EU Charter of Fundamental Rights pertaining to human dignity and respect for private and family life. The judgement stated that credibility assessments of such claims should not be based on stereotypical assumptions; should be made without recourse to inappropriate or invasive lines of questioning; should not require the applicant to produce inappropriate documentation proving their sexuality, such as videos or images of a sexual nature and that late disclosures of sexual orientation during asylum proceedings should not form the basis for a negative credibility finding.³¹ A strong statement on the appropriate means of conducting credibility assessment in LGBT cases to be sure, however, the judgement also serves as a reminder that overarching legislative guarantees at the international level are not necessarily reflected in practice, which may ultimately depend on effective advocacy and litigation at the national level to ensure implementation.

For its part, Ireland is somewhat unique in that it has adopted a piecemeal approach to the EU’s Common European Asylum System (CEAS). In practice, this means that Ireland has ‘opted out’ of some CEAS instruments and their subsequent ‘recasts’. Specifically, Ireland has opted out of the recast iterations of the Asylum Procedures and Qualification Directives,

²⁹ UNHCR Observations in the cases of *Minister voor Immigratie en Asiel v. X, Y and Z* (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive, para. 4.3.2; Observations by Amnesty International and the International Commission of Jurists on the Case *X, Y and Z v. Minister Voor Immigratie, Integratie en Asiel* (C-199/12, C-200/12 AND C-201/12) Following the Opinion of the Advocate General Sharpston of 11 July 2013 (2nd October 2017).

³⁰ *Minister voor Immigratie en Asiel v X, Y and Z*, para. 70.

³¹ Court of Justice of the European Union, *Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie* (2 December 2014), para. 72.

and both versions of the Reception Conditions Directive, which has allowed the State to sidestep putting asylum seeker accommodation on a statutory footing (which will be discussed in more detail later). However, notwithstanding a somewhat selective approach to the CEAS, Ireland still remains party to the other strand of European human rights law from which obligations to asylum seekers also stem; that of the ECHR and the jurisprudence of its attendant monitoring body, the European Court of Human Rights (ECtHR), which provides interpretative guidance of ECHR provisions and remedies violations therein. The ECHR itself makes no specific reference to LGBT asylum seekers, and while the ECtHR boasts a rich body of asylum jurisprudence (often engaging non-derogable provisions such as Article 3 on the prohibition on torture), there have been limited significant developments on sexual orientation and gender identity cases specifically. A recent judgement, *O.M v Hungary*, dealt with treatment of LGBT asylum seekers held in detention. The Court unanimously found a violation of Article 5 ECHR (right to liberty and security) in Hungary's detention of the applicant in an environment where he was subject to repeated harassment by his fellow detainees as a result of his sexual orientation, despite having made numerous requests for a transfer to more appropriate facilities.³² In reaching this finding, the Court made some important comments on the treatment of LGBT asylum seekers, stating that "in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place."³³ This is a significant statement for two reasons. Firstly the Court instructs asylum authorities to be cognisant of the possibility that LGBT asylum seekers may be vulnerable and that this must be ascertained on the basis of an individualised assessment of their case. The Court's existing case law on vulnerable groups has significant protection implications for persons designated as a member of such a group.³⁴ This recognition by the Court should also inform the decision maker's interpretation of provisions of the CEAS pertaining to vulnerable asylum seekers with special needs in cases based on sexual orientation or gender identity. Secondly, the Court emphasises that national authorities in the "placement of asylum seekers who claim to be a part of a vulnerable group[...] should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place."³⁵ There is no reason why the Court's guidance here on detention placement should not also apply to other allocation procedures, such as the provision of accommodation. This is particularly important in reception centres where asylum seekers are dispersed to accommodation centres throughout the host country, or may be expected to share a room with other people from their country of origin or religious background, as is the case with the Irish system of Direct Provision.

³² *O.M. v. Hungary*, Application no. 9912/15, (5 July 2016).

³³ *O.M. v. Hungary*, para. 53.

³⁴ See e.g. Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The promise of an emerging concept in European Human Rights Convention Law' (2013) 11(4) IJCL.

³⁵ *O.M. v. Hungary*, para. 53.

2.2 Ireland's domestic legislation - the International Protection Act 2015

Ireland first transposed its Refugee Convention obligations and established a formalised procedure for conducting refugee status determination via the Refugee Act 1996 (as amended).³⁶ However, as systematic deficiencies in the system under the Refugee Act began to emerge, it soon became clear that a substantial overhaul of the legislation was required to ensure that the Irish asylum process meets international standards. Key among these issues were systemic delays arising out of Ireland's bifurcated approach to determining both refugee and subsidiary protection status. At odds with other EU member states, the Irish system required that a protection applicant first exhaust the refugee status determination process and if they were ultimately found to be ineligible, they may then restart the process anew under an application for subsidiary protection, effectively doubling the length of time people spend in the system. This produced unwieldy delays, resulting in significant financial costs on the State, and most importantly taking an unjustifiable human toll on those spending many years navigating the asylum process in Ireland.³⁷ In response to mounting civil society pressure, the Irish government convened a working group composed of experts, stakeholders and government representatives to work together to investigate and produce recommendations on how Ireland's protection process could be improved.³⁸ The final 'Report of the Working Group on the Protection Process' (Working Group Report, hereafter) surpassed 400 pages in length and put forward 173 recommendations for the state to address, touching on almost every aspect of the Irish asylum system, including the reception system of Direct Provision (for which there is no legislative basis in Ireland).³⁹ The report preceded the speedy passing of the International Protection Bill in November 2016 and was signed into law as the International Protection Act by the President of Ireland a mere 6 weeks later in December of that year. This was much to the chagrin of advocacy groups who felt that that the new legislation was passed without scrutiny and failed to acknowledge concerns on the substance of the bill,⁴⁰ as well as the recommendations set out in the government's own Working Group Report. While the Act finally introduces a single procedure, in line with Ireland's EU counterparts, it is important to remain aware that a single procedure should not be taken as a cure-all for the breadth of issues inherent in Ireland's asylum system. Notwithstanding controversy, the International Protection Act (2015) came into force on December 31st 2016.

³⁶ Refugee Act 1996 (as amended), available here: <http://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/print.html>

³⁷ Sue Conlan, *Counting the Cost: Barriers to employment after direct provision*, (2014); Muireann Ni Raghallaigh, Maeve Foreman, Maggie Feeley, *Transition from Direct Provision to Life in the Community – the experiences of those who have been granted refugee status, subsidiary protection or leave to remain*, (2016)

³⁸ For a detailed overview of the working group process, see: Ciara, M. Smyth, *Chronicle of a Reform Process: The Irish Working Group on Protection*, *Journal of Refugee Studies*, Volume 29, Issue 3, (1 September 2016) Pages 388–410.

³⁹ *Working Group to Report to Government Working Group on the Protection Process on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers*, Final Report June 2015, available here: <http://bit.ly/1GYBUL5>

⁴⁰ See, for example: Irish Refugee Council, *Recommendations on the International Protection Bill 2015*, November 2015, available here: <http://bit.ly/1Oq2OAS> ; NASC, *Recommendations on the International Protection Bill 2015*, 30 November 2015, available here: <http://bit.ly/2kBBm8d> ; Irish Human Rights and Equality Commission, *Recommendations on the General Scheme of the International Protection Bill 2015*, June 2015, available here: <http://bit.ly/2kZ1mLE> .

With regards to persons seeking asylum on account of their sexual orientation or gender identity in Ireland, the International Protection Act does provide explicit guidance in relation to the ‘particular social group’ component of status determination. Section 8(1)(d) of the Act transposes Article 1(d) of the 2004 Qualification Directive, providing that “depending on the circumstances in the country of origin, a particular social group may include a group based on a common characteristic of sexual orientation”, and section 8(3)(b) goes further to provide that “gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.” This is strong acknowledgement at the national legislative level that LGBT asylum seekers may fall within the particular social group criterion, especially considering that Ireland is only party to the 2004 Qualification Directive, which does not include gender identity in any capacity. However, provision for these groups in legislation does not necessarily imply protection in practice. In the absence of any policy guidelines or training modules on issues relating to sexual orientation and gender identity there is still a wide margin of error for decision makers to incorrectly address these claims.

On the basis of limited available official data, it would appear that sexual orientation and gender identity based cases form a significant cohort of protection claims lodged in Ireland. While the International Protection Office does not disaggregate this data by type of claim or grounds of persecution, the Irish Refugee Council’s Drop in Service and Independent Law Centre receive frequent queries in relation to these types of cases, and the Irish Refugee Council facilitates a peer support group dedicated to LGBT asylum seekers, that currently has over 30 active members.⁴¹ Currently this group is not publicly advertised and information about the group spreads mainly by word of mouth, either between asylum seekers themselves or is relayed by caseworkers to those who attend the Irish Refugee Council’s drop-in service. Furthermore, the International Protection Appeals Tribunal’s Decision Archive contains a rich body of appeals decisions, which, while not exhaustive, certainly indicates that a substantial number of cases based on sexual orientation or gender identity make it to appeals stage. The archive’s search function allows for a search of available decisions based on a list of preselected ‘Common Terms’, one of which is ‘sexual orientation.’ Unfortunately, the archive is only capable of displaying a maximum of 250 search results per query, so it is impossible at this juncture to give a wholly accurate number of cases that involve sexual orientation. However, a search of decisions from each year during the 2006 to 2013 period returns over 250+ decisions that contain the common term ‘sexual orientation.’ The figures decrease dramatically after 2014, where the search function returns just 98 cases between the entire 2014 to 2017 period. This decrease could be due to the fact that the archive has not been fully updated for the most recent years yet and/or those that are presently available are those only deemed to be of sufficient legal value. Either way, for convenience and temporal relevance, this paper will only take account of decisions uploaded from 2014 onwards. A more exhaustive analysis of the decisions is beyond the scope of this paper but the IPAT

⁴¹ Based on information received from the Coordinator of the Irish Refugee Council’s Information and Referral Service, who administrates the group’s mailing list.

archive remains a useful resource that would certainly be beneficial for future research projects looking to identify patterns and trends relating to specific types of asylum claim.

In the context of this recent legislative reform, and also with respect to other important aspects of the protection system that are not governed by the new Act, such as reception conditions, the following sections will look in more detail at the situation for LGBT asylum seekers with an aim to identifying any challenges this particular cohort might during the asylum process

3. International Protection Procedures in Ireland

It has been widely documented that LGBT asylum applicants face particular challenges in the procedures governing international protection status determination. As noted earlier, practice among EU Member States diverges in approach to established international standards and is subject to disparate interpretation of the CEAS instruments among national authorities. This is particularly the case for LGBT applicants who face a number of specific issues in domestic procedures, such as reliance by the authorities on problematic concepts such as the discretion requirement, flawed approaches to credibility assessment informed by stereotypical assumptions and inappropriate questioning, or using an applicant's late disclosure of their sexual orientation as a means to discredit or dismiss their case.⁴² There is a limited body of research in the Irish context that corroborates issues raised at the broader European level. Existing research, taken together with individual accounts of interviews with the Identity support group, anecdotal evidence from the experience of the Irish Refugee Council Independent Law Centre, as well as evidence from the Tribunal Decisions Archive, some key issues can be extrapolated in relation to the current situation for LGBT asylum seekers in Irish protection procedures, namely in the areas of identification of LGBT applicants' special needs and with respect to the decision maker's approach to credibility assessment of an applicant's claim.

3.1 Identification of LGBT Applicants' Needs

Key to ensuring that a decision maker is equipped to make a fully-accurate assessment of an asylum claim and that the applicant is able to put forward the most accurate representation of their testimony at first instance, is that the asylum system facilitates early identification of an applicant's special needs. This ensures that procedural obstacles can be avoided, may prevent unnecessary appeals and allows for speedy referral to support services. The UNHCR Guidelines on Sexual Orientation and Gender Identity flag the importance of "pre-screening so that they [LGBT applicants] can lodge their claims fully and without fear."⁴³ Many asylum seekers arrive at the port of entry either not knowing that sexual orientation or gender

⁴² Janna Wessels, *Sexual Orientation in Refugee Status Determination*, Refugee Studies Centre, Working Paper Series No. 73 (2011); Nicole La Violette, 'Overcoming Problems with Sexual Minority Refugee Claims: is LGBT Cultural Competency Training the Solution' in Thomas Spijkerboer (ed.) *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Taylor and Francis Books, Oxon, United Kingdom, 2013).

⁴³ UNHCR Guidelines, para. 58.

identity may be a ground upon which they can claim protection or not feeling comfortable to disclose due to a perceived unsympathetic environment or simply because they had never had an opportunity to speak openly about such personal issues in the past. In Ireland, people may lodge their asylum applications at the port of entry (usually Dublin airport), or directly at the IPO, at which they are briefly interviewed by an international protection officer or an immigration officer to capture key details of the case, such as the basis for the application, their route of travel and biographical details, after which they are transferred to a reception centre, if necessary.⁴⁴ All of the applicants that were interviewed for the purposes of this paper were already aware that sexual orientation was a ground upon which they could make their application and felt comfortable to disclose this at the point of application. However, the respondents also pointed out that they felt that the official conducting the preliminary interview, both at the IPO and Dublin airport, did not go into too much detail on the connection between the person's sexual orientation and their fear of persecution, nor were they given any opportunity to add any information that they felt might be relevant. This could simply be because the purpose of the preliminary interview is to capture material information and is not intended to delve into the substance of the claim. On another view, the preliminary interview is also the applicant's first point of contact with the Irish asylum process and as such, is an opportunity to identify any vulnerabilities or special needs, including (but certainly not limited to) those arising out of being LGBT. The Working Group Report framed the importance of an early vulnerability identification mechanism for LGBT asylum seekers in terms of facilitating access to information and legal advice.⁴⁵

These issues were mirrored by the individuals consulted with as part of this paper. All respondents articulated how the lack of early access to tailored medical advice, counselling services, social support or legal advice sensitive to the LGBT elements of their claim had an impact on their engagement with the asylum process. In particular, some applicants had not received any legal advice or information until they had received a negative decision on their application and were at appeal stage. They stated that had they received this information earlier in the process, they felt the outcome may have been different and that they wouldn't have had to deal with the stress of uncertainty throughout the first instance stage of the process. One respondent stated that in the absence of access to legal representation she even received incorrect information: *"I feel like if I had had legal support from the beginning that it would have helped a lot. I didn't know that legal support was available. And some people give wrong information. People say that you don't need it at the beginning – only when you get a rejection do you need a solicitor."* Because of the information provided to her by peers, the individual did not actively seek legal support until she received her negative decision. Those who received legal advice at a later stage claimed that it had an immediate positive effect on their wellbeing and peace of mind in relation to both their asylum case and general quality of life in Ireland. In a similar vein, many respondents emphasised that they felt that the lack of signposting to support such as the Irish Refugee Council Drop-in Service, LGBT services like those provided at Outhouse LGBT resource centre in Dublin, or the Identity

⁴⁴ International Protection Act (2015), Section 13.

⁴⁵ The Working Group Report, p. 126.

LGBT asylum seeker group, at an early stage in the process led to them feeling isolated and unsupported generally throughout their time in Ireland.

While not an issue that was flagged in any of the cases or interviews utilised for this paper, a lack of an early identification mechanism for special needs or supports can lead to disclosure of an applicant's sexual orientation or gender identity long after they have made their initial application – sometimes being revealed only at interview stage, which can cause significant difficulties and may even lead to a negative credibility finding on the basis that the applicant had withheld important information related to their claim. The UNHCR Guidelines make explicitly clear that late disclosure should not be taken as a negative credibility inference and such a delay may even be emblematic of the person's self-identification and the stigma they associate with being LGBT in the first place: *“Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared. Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview.”*⁴⁶ Despite recommendations from the Working Group calling for an early, dedicated vulnerability screening process for all asylum applicants that takes place at least 30 days after the preliminary interview occurs,⁴⁷ the International Protection Act only makes provision for screening of one type of vulnerable applicant. Section 14 of the Act provides for a situation where the authorised officer conducting the preliminary exam believes the applicant is an unaccompanied minor, directing the officer in such a circumstance to make a referral to the Child and Family Agency, who can take responsibility for the child's general welfare and protection needs.⁴⁸ There is one explicit reference to vulnerability with regards to the “situation of vulnerable persons,” however this is limited to outlining guidance in relation to ensuring access to the “content of international protection” for vulnerable persons, thereby applying only to those who have received a positive decision on their claim.⁴⁹

In establishing a framework for a vulnerability screening that is inclusive of LGBT issues, Ireland could draw guidance from the Recast Asylum Procedure's Directive (which the State has not opted-in to), which contains a provision directing asylum authorities to identify, within a reasonable timeframe, applicants with ‘special procedural needs.’⁵⁰ An ‘applicant in need of special procedural guarantees’ is defined in Article 2 of the Directive as “an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances.” Under this framework, the officer receiving the asylum application and conducting the preliminary interview should be competent to conduct an individualised assessment of each case that is sufficient to identify any needs that person may have, including those arising out of their sexual orientation and

⁴⁶ UNHCR Guidelines

⁴⁷ Working Group Report, p. 129.

⁴⁸ International Protection Act (2015), Section 14.

⁴⁹ International Protection Act (2015), Section 58.

⁵⁰ Asylum Procedures Directive (2014), Article 24.

gender identity. Such a vulnerability screening mechanism should also include relevant competency training for all staff working with asylum seekers, including those at ports of entry. As it stands in Ireland, no such formalised training module dealing specifically with sexual orientation and gender identity issues is in place for staff at either the points of entry to the state, nor staff working at the international protection office. Neither are there any publicly available policy documents or guidelines detailing how such claims should be approached by decision makers and there are no official resources available for LGBT applicants, such as a basic information leaflet detailing LGBT support services. The Irish authorities could take guidance for such a policy or guidance document from the UK Home Office's policy instruction on sexual orientation in asylum claims.⁵¹ The United Nations Committee against Torture, in its 2017 concluding observations on its review of Ireland, recommended that the State, in the context of international protection procedures, "[e]stablish a formalized vulnerability screening mechanism for torture victims and other persons with special needs, provide them with care and protection to avoid re-traumatization, including during international protection procedures."⁵² This is a compelling statement that Ireland's obligation to identify and address vulnerability and special needs of all applicants (and not just those who are LGBT) in international procedures are a matter of international human rights law and may not be evaded simply on account of the fact that the State has chosen not to opt-in to certain instruments of the CEAS.

3.2 Credibility assessment of asylum cases based on sexual orientation or gender identity

Credibility assessment is the process whereby decision makers determine whether or not an applicant's personal account of their claim is to be believed or not. This assessment involves an examination of the material facts in a case, which requires taking account of both the applicant's statements and other elements relating to the core of the claim including (but not limited to) country of origin information and documentary evidence submitted by the applicant. It is the outcome of this assessment upon which a first instance asylum decision often turns and noticing a trend in European asylum claims being refused on negative credibility findings, as well as inconsistent approaches to credibility assessment practices among European States, the UNHCR published comprehensive guidance on the issue in 2013 clarifying the key principles relating to credibility assessment.⁵³

In asylum cases based on sexual orientation or gender identity credibility assessment poses particular challenges for both the applicant and the decision maker. Documentary evidence and reliable country of origin information supporting an applicant's assertion that they are LGBT is difficult or often impossible to obtain. In this context, a decision maker's approach to credibility assessment is often boiled down to whether or not a person claiming asylum on

⁵¹ UK Home Office, Policy Instruction – Sexual orientation in asylum claims, Version 6.0 (August 2016). Available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/543882/Sexual-orientation-in-asylum-claims-v6.pdf

⁵² United Nations Committee against Torture, Concluding Observations on Ireland, CAT/C/IRL/CO/2(31) August 2017), para. 12(b).

⁵³ UNHCR, Beyond Proof – Credibility Assessment in EU Asylum Systems (May 2013), p.7.

the basis of their sexual orientation or gender identity is genuinely an LGBT person. This may place an unreasonably high burden on the applicant to prove their sexual orientation or gender identity, as evidenced in the *A, B & C* judgement of the CJEU referenced earlier, where some applicants felt compelled to submit inappropriate documentary evidence, in contravention of human rights norms. Given that there can rationally be no uniform way in which people express their sexual orientation and gender identity, credibility assessment of such cases has been the subject of much debate. UNHCR has made their position on the issue quite clear, endorsing in their Guidelines an approach to credibility based on the applicant's self-identification, urging decision makers to "maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. [...] [As] there are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country."⁵⁴

Some of the issues identified at the European level, particularly with regard to understandings of credibility assessment, similarly arise in the Irish context. In its 2011 report "Difficult to Believe", the Irish Refugee Council conducted research suggesting that a key reason for the historically low 5% acceptance rate during that year could be attributed to a "culture of disbelief" among decision makers stemming from a misguided approach to credibility assessment.⁵⁵ That same year, the UNHCR began a quality assurance initiative in Ireland at the invitation of the authorities, drawing on the outputs of UNHCR's regional projects, including the CREDO Project linked to their credibility guidelines.⁵⁶ The acceptance rate has changed significantly in the years since, increasing to a 20.8% first instance grant rate for refugee status in 2016.⁵⁷ This improvement is undoubtedly in no small part due to training on core principles of credibility assessment by bodies such as the UNHCR, however, the figure still leaves a significant proportion of applications that are refused at first instance.

Available evidence would suggest that issues around credibility assessment persist particularly for LGBT asylum seekers. Out of the 60 decisions based on sexual orientation or gender identity currently available on the IPAT decisions archive since 2014, 34 of those upheld the original negative decision of the IPO. Of the 34 decisions that were upheld, negative credibility was cited as the reason for refusal in 21 of those cases. This suggests that credibility is still a significant factor in international protection refusals of claims based on LGBT grounds. While it is beyond the scope of this paper to assess the approach taken to credibility in each individual case, the figures imply that negative credibility findings are the reason for most negative decisions in LGBT cases at first instance (at least those which are brought to appeal). The Irish High Court has dealt with credibility assessment of sexual orientation cases and offered some guidance where it has found Tribunal Members to have erred in their approach to credibility. In the 2012 case of *P v Refugee Appeals Tribunal*, the applicant submitted that the tribunal member erred in concluding that the applicant was not

⁵⁴ UNHCR Guidelines, para. 60.

⁵⁵ Sue Conlon, Irish Refugee Council, *Difficult to Believe: The assessment of asylum claims in Ireland*, (2012).

⁵⁶ Working Group Report, p. 111.

⁵⁷ Asylum Information Database, Ireland Country Report 2016 Update, p.7.

gay on the basis that the negative credibility finding was inferred from the applicant's account of the incident which caused his flight from his country of origin, his travel details and his failure to seek asylum in other countries but no comment on the credibility of the applicant's testimony in relation to his self-identification as a gay man.⁵⁸ In agreeing with the applicant's arguments and ultimately quashing the Tribunal's decision, the Judge stated that the Tribunal Member "may have slipped into error as it appears that he failed to mention that the key part of any applicant's claim in such cases, as highlighted in the report, is his or her self-identification as LGBTI. [...] It is not simply a question of performing physical sexual acts with a member of the same sex as distinct from a member of the opposite sex: it is rather a defining feature of that very identity."⁵⁹ The judgement highlights the need to shift away from the trend of focusing on sexual identity through the lens of sexual activity and towards a broader view of sexuality as shaping a person's identity and sense of self, especially circumstances where that person's sense of self has been effected by persecutory events. In another case where the applicant contended that the Tribunal's negative credibility finding was not grounded in rational analysis, the High Court expressed "concern that the appeal was not properly considered and fairly weighed [...] because there is no finding in the decision as to whether the applicant was a homosexual or not. There is no specific finding as to whether the applicant was a homosexual or not.[...] The court is left to speculate whether it was accepted that he was a person in need of state protection."⁶⁰ The Tribunal's decision was found to be "fundamentally flawed" as it found that "on the basis of the information provided [the applicant] had not suffered any persecution for a Convention reason in Georgia, nor was he likely to face persecution upon returning to his country of origin."⁶¹ The Tribunal's decision was made without giving any weight whatsoever to the applicant's self-identification as gay.

This worrying pattern of dismissing cases on the basis of negative credibility findings without focusing on the core issue of whether or not the applicant is in fact LGBT is an issue that has been experienced anecdotally by the Irish Refugee Council's Independent Law Centre. While it is impossible to say whether this is representative of the full breadth of decisions on this ground, many negative decisions that have come through the Law Centre seem to demonstrate that the focus of the IPO's assessment is to discredit the applicant's narrative of past persecution (or other peripheral issues, such as delay in past persecution, or lack of identity documents, etc), without investigating the core issue as to whether or not the applicant is LGBT. The applicant is then not given the 'benefit of the doubt' in relation to the issue of their sexual orientation due to the previous negative findings made, despite the fact that those findings often do not relate to the applicant's sexual orientation at all. Given that it is well established that fear of persecution is a forward looking assessment of the risk to an applicant should they be returned to their country of origin as a member of their stated Convention ground, the current trend that seems to be applied by some decision makers is a worrying one. While not obliged to conduct a forward looking assessment in every case, it is

⁵⁸ *P v. Refugee Appeals Tribunal & anon*, [2013] IEHC 448, para. 4.

⁵⁹ *P v. Refugee Appeals Tribunal & anon*, [2013] IEHC 448, para. 20.

⁶⁰ *Z.K. -v- Refugee Appeals Tribunal & anor*, [2014] IEHC 543, para. 12.

⁶¹ *Z.K. -v- Refugee Appeals Tribunal & anor*, para. 25.

crucial that the decision-maker ensures that any decision not to conduct such an examination is made on the correct basis. The recent case of *P.S. -v- Refugee Appeals Tribunal* reinforced the point:

*“It is well established that international protection decision makers are not required in every case to assess conditions in a country of origin or the risk of future persecution. Such assessment will normally be required where the applicant’s credibility is accepted and the nexus between harm suffered and feared and the 1951 Convention is established. Where credibility is fundamentally rejected the decision maker is entitled to cease deliberations at that point. Thus for example, in this case where the applicant claims to be Nigerian, the decision maker would not be required to assess the conditions in Nigeria if it were established that the applicant was not Nigerian.”*⁶²

In other words, where a core element of the person’s claim can be discredited, it may be possible to dispense with a forward looking assessment. However, in circumstances where the decision maker has failed to even consider the core of the person’s claim, i.e. whether or not they are actually LGBT, it is impossible for them to justify neglecting to conduct an assessment of whether or not that person might face persecution upon return to their country of origin. It is clear that while first instance acceptance rates are markedly higher in recent years, there still remains a significant number of refusals and with respect to cases based on sexual orientation, in particular, there is reliance on credibility as a means to dismiss a case. Considering that evidence suggests credibility reasoning is often flawed with respect to sexual orientation cases, in particular, there may be need for more in-depth research into the scale of these trends, so that effective recommendations can be made to decision makers.

4. Reception Conditions for LGBT asylum seekers in Ireland

With the exception of the deliberations leading to the institution of a single procedure under the International Protection Act, no single aspect of the Irish asylum system has generated as much discussion as Ireland’s system of accommodating people while in the asylum process. International protection applicants are housed under a system known as Direct Provision, managed by the Reception and Integration Agency (RIA), an administrative division of the Department of Justice. Direct Provision has no statutory basis and it was initially conceived as a short-term solution to accommodate asylum seekers and provide them with food, board and basic necessities for no longer than six months.⁶³ However, due to significant delays in the system, as outlined earlier, most people spend an average of three years in Direct Provision and in some cases more than seven years.⁶⁴ Asylum seekers have limited access to higher education and are prohibited from seeking any sort of remunerated employment. The

⁶² *P.S. -v- Refugee Appeals Tribunal & ors*: [2016] IEHC 398, para. 40.

⁶³ Liam Thornton, ‘Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion’ [2013] 20 (2) *Journal of Social Security Law* 24, p. 33.

⁶⁴ Irish Refugee Council, *Direct Provision: Framing an alternative reception system for people seeking international protection* (2013) p. 16. Available here: http://www.irishrefugeecouncil.ie/wp-content/uploads/2013/12/DP_Report_New-Font.pdf

latter point has been the subject of a recent Supreme Court judgement in which it stated that the absolute prohibition on employment for asylum seekers is unconstitutional.⁶⁵ The system has raised major human rights concerns and the toll that it takes on its residents has been well documented by NGOs, legal practitioners, experts and international bodies.⁶⁶ This negative impact is particularly acute in respect of vulnerable people with special needs, including LGBT persons.⁶⁷

As mentioned already, Ireland is not party to the CEAS' Reception Conditions Directive and there is no mention of Direct Provision or of reception conditions more generally, either in the Refugee Act 1996 or the International Protection Act 2015. Furthermore, as Ireland is also not party to the recast Asylum Procedures Directive, there is no domestic obligation on the Irish authorities to consider the special needs of asylum seekers throughout any of the asylum procedure, let alone in terms of accommodation. This means that there is no formal mechanism to take account of any concerns LGBT asylum applicants might have in relation to their accommodation. It is standard practice for all asylum seekers to have access to a general practitioner or psychologist for health screening upon arrival, which may influence the person's subsequent transfer to a Direct Provision centre elsewhere in the country (i.e. to be near crucial medical facilities) under the dispersal system, whereby asylum seekers are transferred throughout the country after their initial registration in Dublin. Despite claims that the practice of dispersal is unfair and doesn't take into account special needs, RIA has maintained that "it seeks to respond to the various changes in circumstance or need which arise from the 'life changes' which occur within any individual or family unit."⁶⁸ The Working Group Report recommended that the initial health screening be replaced by a more robust process that facilitates a multidisciplinary needs assessment, which has unfortunately not come to pass.⁶⁹ With respect to reception conditions for LGBT applicants specifically, a key recommendation of the Working Group Report was for the State to facilitate training programmes for "staff in LGBT issues to sensitively deal with queries and build trust so as to

⁶⁵ *N.H.V -v- Minister for Justice & Equality and ors*, [2017] IESC 35.

⁶⁶ See, for example: Keelin Barry, *What's Food Got To Do With It: Food Experiences of Asylum Seekers in Direct Provision* (2014); Samantha Arnold, *State Sanctioned Child Poverty and Exclusion: The case of children in State accommodation for asylum seekers* (2012); Salome Mbugua, *Am Only Saying It Now: Experiences of Women Seeking Asylum in Ireland* (2010); Emily O'Reilly, 'Dealing with Asylum Seekers: Why Have We Gone Wrong?' 102(406) *Studies Magazine* 1, (2013); Irish Refugee Council, *Direct Provision: Framing an alternative reception system for people seeking international protection* (2013); Liam Thornton, 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion' [2013] 20 (2) *Journal of Social Security Law* 24; Liam Thornton, 'Direct Provision and the Rights of the Child in Ireland' (2014) 17 (3) *Irish Journal of Family Law* 67-75; FLAC, *Our Voice, Our Rights: a parallel report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights* (2014); Sue Conlan, *Counting the Cost: Barriers to employment after direct provision*, (2014); Muireann Ni Raghallaigh, Maeve Foreman, Maggie Feeley, *Transition from Direct Provision to Life in the Community – the experiences of those who have been granted refugee status, subsidiary protection or leave to remain*, (2016)

⁶⁷ See my overview of the implications of the International Protection Act on vulnerable persons, including with respect to Direct Provision: Luke Hamilton, *The Protection of Vulnerable Asylum Seekers in Ireland*, *The Researcher*, Volume 11, Issue 2, October 2016.

⁶⁸ Corona Joyce and Emma Quinn, The Economic and Social Research Institute, 'The Organisation of Reception Facilities for Asylum Seekers' (February 2014) p. 14

⁶⁹ Working Group Report, para 46, p. 21

encourage disclosure. Where possible, a trained staff member should be identified as a point of contact and their details made available in centres.”⁷⁰ The Department of Justice’s latest and final progress report on the implementation of the Working Group recommendations cites that implementation of this recommendation is “in progress”, citing an action point in the 2016 National Operational Plan of the Health Service Executive being the provision of ‘LGBT training for health services staff across 3 community health organisations.’⁷¹ The impact of such training remains to be felt. This progress is insufficient in that training in relation to LGBT issues (and those faced by other vulnerable groups) should extend beyond the health sector, and is particularly required for staff in RIA and the IPO. It is also particularly disconcerting that this progress report is titled the “final” progress report, suggesting that no further updates on the States’ implementation of the Working Group Recommendations will be put forward.

That these recommendations be implemented is particularly important given that the Working Group Report and information gleaned from interviews with the Identity group members has highlighted a number of particular issues faced by LGBT people in Direct Provision, namely in relation to safety and feelings of isolation. The report highlighted incidents where LGBT residents felt that they did not feel comfortable disclosing their sexual orientation for fear that they “would experience discrimination by people from their own countries of origin or experience the same negative attitudes that led them to seek international protection.”⁷² This mirrors the experiences shared by members of the Identity group who were spoken to in relation to this paper. One respondent felt particularly uncomfortable about the lack of privacy in Direct Provision and was concerned that she was expected to share a room with a heterosexual woman from a different country - *“I haven’t had any problems recently because I am now sharing a room with someone who is also gay. But before I was sharing a room with someone who is straight and they were bringing their boyfriend. But now I have a safe space.”* This person initially shared a room with a woman who was drinking a lot and exhibiting behaviour that made the applicant very uncomfortable. She attempted to approach the manager of the centre who was unresponsive to her concerns. She eventually moved into a room with a lesbian friend without the manager’s permission due to feeling increasingly unsafe.

Another respondent shared experiences of trying to resolve an incident of bullying she faced in her Direct Provision centre by a male resident who discovered that she was a lesbian and would frequently taunt her: *“I used to report it to the management. And she wasn’t taking it seriously, she [the manager] was like “Ok, I’ll deal with it, I’ll talk to him” and it became even worse. It developed to something physical. We would have arguments. I would have to avoid the centre to avoid him. I felt like I had to stay away to avoid problems.”* After failing

⁷⁰ Working Group Report, p. 227.

⁷¹ Department of Justice, Report of the Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports for Asylum Seekers and Final Progress Report on the Implementation of the Report’s Recommendations, June 2017, p. 20. Available here: http://www.justice.ie/en/JELR/3rd_WG_Progress_Report_-_July_2017.pdf/Files/3rd_WG_Progress_Report_-_July_2017.pdf

⁷² Working Group Report, p. 225.

to achieve any sort of resolution from the management, this respondent felt more comfortable avoiding her accommodation centre altogether, rather than face the man harassing her. This mirrors findings of the Working Group Report, which detailed the experiences of a gay applicant who had been sexually harassed by another resident of his centre and felt that he couldn't report what had happened as he was not convinced that the centre management could resolve the situation and it may result in him being further targeted.⁷³ There is a pervasive lack of confidence in Direct Provision staff and management among LGBT residents to the extent that some do not report serious incidents of abuse and harassment. These findings suggest a general lack of understanding within the Reception and Integration Agency of issues pertaining to LGBT residents. To date, the Working Group's recommendation for RIA to develop a "safety statement" and "dignity and respect policies incorporating the rights of LGBT people" has gone unheeded.⁷⁴ RIA has developed guidelines on sexual harassment and sexual violence, however, the Irish Human Rights and Equality Commission has expressed concern as to whether these guidelines were actually being implemented or not.⁷⁵

Another key issue cited by both the Working Group Report and Identity group members in relation to Direct Provision was the general isolation of life in Direct Provision. Under the dispersal system mentioned previously, residents are often transferred to Direct Provision centres in other parts of the country, with little to no say in where they are sent and often to places in rural parts of the country. The Working Group, in its consultation with LGBT asylum seekers, noted that most applicants who were transferred outside of Dublin felt particularly isolated due to limited supports related to sexual orientation or gender identity outside of the major cities, and difficulty travelling to access supports in cities due to restricted financial means.⁷⁶ One member of the Identity group commented on the importance of being able to travel to Dublin attend social meetings with other LGBT people – *"There is nothing in Waterford. My only access to support for LGBT things is with the Identity group. It's important to have somewhere to be with other LGBT people and outside of Direct Provision, so that I feel that I can get a bit of strength. I feel that the Identity group definitely helps."* The length of time people often spend in Direct Provision can lead to residents developing mental health problems associated with isolation and idleness. It is important that access to enriching social environments is facilitated where possible. The Working Group noted that all LGBT participants in their research had raised deficiencies in both access to and quality of mental health support services.⁷⁷ Limited access to key support services as well as meaningful social contact can result in an intolerable environment for any individual. As such, much work remains to be done with regards to improving accommodation conditions for LGBT asylum seekers in Ireland. A two pronged approach that addresses the key areas of concern around safety and isolation would require ensuring that serious incidents of bullying,

⁷³ Working Group Report, p. 226.

⁷⁴ Working Group Report, p. 227.

⁷⁵ Irish Human Rights and Equality Commission, Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women, Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports, January 2017, p. 117.

⁷⁶ Working Group Report, para. 5.110, p. 226.

⁷⁷ Working Group Report, para. 5.111, p. 226.

abuse and ill-treatment are effectively remedied and that the environment in accommodation centres is made as LGBT-friendly as possible, and also facilitating access to services outside of accommodation centres, by sharing information on available services and ensuring that access to such services is not restricted by poor transport or lack of financial support for travel to important social gatherings.

5. Conclusions

Circumstances for people seeking protection from persecution on account of their sexual orientation or gender identity have no doubt improved considerably in recent years. As international human rights standards for LGBT people have become better articulated, so too have those safeguards become translated into refugee protection discourse. At the European level, both the CJEU and the ECtHR have contributed to a robust set of regional legislative tools for the protection of LGBT persons seeking asylum. However, this progress at the regional level risks being undermined by improper application of these provisions by national asylum authorities in some European countries. Ireland is one such country where progress and developments in domestic international protection procedures are dampened by oversights when it comes to the particular needs of marginalised groups within the asylum seeking community. The cursory overview of the experiences of LGBT persons in the Irish asylum process provided in this paper indicate that there are indeed a number of shortcomings when it comes to addressing the protection needs of this particular group. However, that is not to say that these shortcomings are without solutions and there are a number of responses the Irish government should consider in addressing protection gaps for the LGBT asylum seeker group.

At a minimum, the Irish State should:

- Establish an **early vulnerability screening mechanism**, more extensive than the current medical assessment already instituted at Baleskin, that facilitates identification of special needs including (but not limited to) those linked to the person's sexual orientation or gender identity as soon as possible after an international protection application has been lodged;
- By virtue of an effective vulnerability screening mechanism, ensure **early access to key supports** for LGBT applicants such as legal advice, mental health support, and information on social events for members of the LGBT community;
- Ensure that frontline government staff working with asylum seekers receive regular **competency training** on issues relating to sexual orientation and gender identity to allow them to identify and address the special needs of LGBT applicants;
- Include in **training on credibility assessment** for international protection officers dedicated modules on the particular challenges faced by LGBT applicants;

- Commit to implementing the Working Group Report recommendations in relation to **reception conditions for LGBT asylum seekers** so as to ensure their safety and well-being, including sensitivity training programmes for RIA staff; taking into account the voices of LGBT residents themselves with regards to addressing complaints and transfer requests, and the development of policies for Direct Provision that incorporate the rights of LGBT people.