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**SPIRASI Submission to Joint Committee on Justice, Equality,  
Defense and Women's Rights on the 'Immigration, Residency  
and Protection Bill 2008'.**

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## Introduction

The Immigration, Residency and Protection Bill 2008 is an important step towards the construction of a more comprehensive and coherent legislative framework for the management of inward migration to Ireland. In particular, SPIRASI welcomes the introduction of a single procedure for all protection applicants, including the incorporation of subsidiary protection and the transposition into Irish law of the EU Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. As a general remark, given the complexity of the Bill and the span of its coverage, inadequate time has been allowed for organizations like ours to carefully process the text.

SPIRASI recognizes that many other organizations have made submissions highlighting concerns on particular aspects of the Immigration, Residence and Protection Bill 2008 such as family reunification, summary deportations, excessive ministerial discretion, the requirement on foreign nationals to carry a passport and residence permit, separated children, judicial review, carrier liability and the interpretation and implementation of the non-refoulement principle, etc. As we consider these well covered, and in order to avoid duplication, we would like to highlight our concerns under the following headings:

- Detention with Specific Reference to Torture Survivors
- Marriage of Foreign Nationals
- Protection Review Tribunal
- Non-Entitlement to Services of Foreign Nationals Unlawfully Present
- Burden of Proof

### 1. Detention with Specific Reference to Torture Survivors

We concur with the UNHCR view that detention should not only be in line with article 31 of the 1951 Convention Relating to the Status of Refugees, the relevant Conclusions of UNHCR's Executive Committee (no. 44 (XXXVII) of 1986, as well as other international and regional human rights law. SPIRASI endorses the principle that immigration detention, especially the detention of asylum seekers, should only be exercised in 'exceptional circumstances' and for 'limited periods of time' and for 'specified grounds to achieve a legitimate purpose'. Moreover, the necessity of detention should be established in each individual case, following a careful consideration of other options.

The Centre for the Care of Survivors of Torture at SPIRASI is the only 'International Rehabilitation Council for Torture Victims (IRCT)' accredited centre for the care and rehabilitation of torture survivors on the island of Ireland. Aware of a large and growing literature on the documented negative psychological effects, including retraumatisation, of detaining those who have experienced torture in their pre-migratory environments, often in detention facilities and prisons, we strongly suggest that section 71 which deals with the arrest and detention of protection applicants in certain circumstances, be modified to include a paragraph stating that 'survivors of torture are to be exempted from detention'.

Instead, we recommend that non-custodial, humane alternatives to detention be used, if indicated for defined purposes, for this internationally recognized vulnerable population of asylum seekers. The European Council on Refugees and Exiles (ECRE) in their 1996 position paper on the 'Detention of Asylum Seekers' proposed the following : supervisory systems, reporting regimes, bail or guarantee systems within reach of support groups, and the promotion of voluntary return prior to any proposed detention of any rejected asylum seeker.

In line with the recommendations of the Public Health Association of Australia and the Medical Foundation for Victims of Torture, SPIRASI also recommends that the legislation should oblige the Minister to put in place procedures to ensure that those who have survived torture and related abuse are identified prior to admission to a detention facility at a pre-screening medical check. This should be carried out by medical specialists who have expertise in identifying torture and its sequelae. SPIRASI additionally recommends that a clause be inserted stating that should survivors of torture be detained as a result of not having been identified at a pre-screening medical check, but comes to the attention of medical or other authorities subsequently, then the medical doctor treating the person in detention should be legally bound to inform the relevant authorities of his/her findings so that the detention can be reviewed. Additionally, procedures should be put in place to ensure the medical staff at detention centers in such an instance can refer a detainee who makes a claim of torture for an independent medical examination by a medical doctor with experience and expertise in documenting torture, should the detainee wish to document torture as part of his/her asylum claim.

## 2. Marriage of Foreign Nationals

Section 123 deals with the marriage of foreign nationals and provides for the introduction of restrictions on the right to marry for foreign nationals. Section 123(1) states that "the marriage of a foreign national to an Irish citizen does not, of itself, confer a right on the foreign national to enter or be present in the State." Section 123(3) (a) imposes a 3 months notification requirement to be furnished to the Minister prior to the solemnization while section 123(2)(b)

determines that the foreign national at the time of marriage must be the holder of an entry permit for the purpose of the marriage or hold a residence permission. In effect, these provisions would constitute a prohibition on protection seekers and other individuals present in the country on non-renewable residence permits such as students and tourists from contracting marriages as well as curtailing the rights of Irish citizens to marry. The reasons for such a refusal are enumerated in sections 123 (4) (a)-(d). Furthermore, we note that section 123(7) (a) criminalizes anyone who solemnizes or permits a form of marriage which is not valid under the above provisions. Moreover, anyone who is party to [123 (7) (b)] or who facilitates such a marriage [123 (7) (c)] is also criminalized.

Independent of a potential infringement of the right to freedom of religion as protected under article 9 of ECHR and article 44 of the Irish Constitution, SPIRASI believes that these provisions are clearly controversial as they challenge the implicit right to marry in our Constitution and article 12 of ECHR. It is our view that this section is disproportionate to purpose and inconsistent with our Constitution and international human rights obligations.

### 3. Protection Review Tribunal

We note that sub-sections 91(1) and 91(2) provides for the establishment of a Protection Review Tribunal (PRT) to independently review decisions made by the Minister for Justice, Equality and Law Reform in relation to protection applicants and that sub-sections 91(3) establishes that the PRT will be inquisitorial in nature and independent in the performance of its functions.

In order to maintain the integrity, independence and credibility of the Protection Review Tribunal, SPIRASI believes that sub-sections 92(4) which states that “a person being appointed to be a member of the Tribunal in a part-time capacity shall be appointed by the Minister” should be modified to ensure that such officials are independently recruited through the public appointments commission after a competitive process as is stipulated in sub-section 92 (5) for the appointments of the chairperson and full-time members of the PRT. In view of the critical nature of the work of a PRT member, the animating recruitment principle would more ideally be that all such appointments should be full-time professional decision makers. It is noted that the ‘appropriate experience’ mentioned in sub-sections 92(2) and 92(3) does not make explicit a requirement we feel should be necessary: namely, relevant experience and explicit expertise in international human rights law and international refugee law. Section 95 deals with access to Tribunal decisions. It is our view that the proposed restrictions on the publication of future Protection Review Tribunal decisions do not best serve the interests of transparency and public accountability. It is best international practice to publish all such decisions.

#### 4. Non-Entitlement to Services of Foreign Nationals Unlawfully Present

Section 6 provides that a foreign national whose presence is unlawful in the State shall not be entitled to any benefits or services by: a Minister of the Government, Local Authorities, Health Services Executive, or any office/body established under any enactment or under the Companies Act in pursuance of any powers conferred by or under any other enactment while this provision includes offices or bodies financed wholly or partly by government funds. In particular, provision 6(1) (ii) could be interpreted to make it an offence for voluntary organizations to advocate for, assist or provide humanitarian assistance to those categorized as 'foreign nationals unlawfully present'. Our view is that such provisions are harsh and would, in effect, oblige the staff of such bodies to act as an 'immigration officer', a role outside their remit.

We note that this restriction does not apply where: a) the foreign national is unable due to insufficient funds to avail of essential medical treatment per section 6(2) (a) (i); b) medical or other services necessary for the protection of public health per section 6(2)(ii); c) access to education to a person who is under the age of 16 years per section 6(2)(iii), where the foreign national does not have sufficient resources to pay for that treatment or those services. In particular, the attempt to limit access to free education for those under 16 years seems to us to be contradictory to the Education Act 1998 and article 42.2 of the Irish Constitution which imposes an obligation on the State to provide free primary education.

#### 5. Burden of Proof

Section 75 (1) deals with Burden of Proof in relation to protection applicants and places this burden on the shoulders of the applicant. This approach to the burden of proof would be particularly burdensome for traumatized applicants. SPIRASI's view is that this position would represent an unwelcome departure from the approach adopted in the Refugee Act 1996.