

Observations and Recommendations on the General Scheme of the Criminal Justice (Exploitation of Children in the Commission of Offences) Bill 2020

Irish Human Rights and Equality Commission
October 2021



**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**

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Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014*. In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to examine any legislative proposal and report its views on any implications for human rights or equality.¹

The *General Scheme of the Criminal Justice (Exploitation of children in the commission of offences) Bill 2020* ('General Scheme') was published by the Department of Justice on 15 January 2021.² The Commission notes that the Joint Committee on Justice has now concluded its pre-legislative scrutiny of this General Scheme and has published its report.³

The General Scheme seeks to address, discourage and protect against the grooming, recruiting and exploitation of children into criminal activity by adults.⁴ It is in line with the commitment in the 'Programme for Government – Our Shared Future' to criminalise adults who groom children to commit crimes.⁵ The Commission notes that the General Scheme will 'complement' the ongoing Greentown project and other research, which has focused on examining and addressing the involvement of children in criminal networks in Ireland.⁶

¹ Section 10(2) of the Irish Human Rights and Equality Commission Act 2014.

² See Department of Justice, [Bill to outlaw the grooming of children into crime announced by Ministers McEntee and Browne](#) (press release – 15 January 2021).

³ Joint Committee on Justice, [Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice \(Exploitation of children in the commission of offences\) Bill 2020](#) (7 July 2021).

⁴ The purpose of the proposed legislation, according to the press release which accompanied its publication, is to outlaw the grooming of children into crime. See Department of Justice, [Bill to outlaw the grooming of children into crime announced by Ministers McEntee and Browne](#) (press release – 15 January 2021).

⁵ Government of Ireland, [Programme for Government: Our Shared Future](#) (June 2020), p. 86.

⁶ The Greentown Report was published in December 2016 and examined the influence of criminal networks on children in Ireland: Department of Children and Youth Affairs, [Lifting the Lid on Greentown – Why we should be concerned about the influence criminal networks have on children's offending behaviour in Ireland](#) (2016). As part of the wider 'Greentown' project, targeted interventions are currently being piloted to further protect children in Ireland from becoming involved in criminal networks. See Department of Justice, [Bill to outlaw the grooming of children into crime announced by Ministers McEntee and Browne](#) (press release – 15 January 2021).

There is an increasing trend in adults targeting children to carry out criminal acts on their behalf,⁷ with the evidence indicating that 1,000 children in Ireland who are involved in more serious and prolific offending may be caught up in local crime networks.⁸ In particular, research has reported that the Diversion Programme and court system appear to have been 'routinely gamed' by criminal networks,⁹ and that children, often below the age of criminal responsibility and with multiple vulnerabilities and complexities, are groomed into participation in criminal activity.¹⁰ Europol has also identified that the drug distribution networks in Ireland involve a lower tier of highly disadvantaged young people generally involved in bullying, assaulting, stealing, vandalising, and spreading fear on behalf of networks, as well as a middle tier of young people typically engaged in high-risk, low-reward activities, such as transporting, holding or dealing drugs, carrying guns, and conducting shootings, beatings and serious intimidation.¹¹

The Commission sets out the relevant human rights and equality framework, its general observations on the issues arising, and its specific comments on the General Scheme below.

Throughout this submission, there is a focus on the following groups affected by the proposals:

⁷ Professor Geoffrey Shannon, [*Tenth Report of the Special Rapporteur on Child Protection*](#) (2016), pp. 10, 176. This report notes that one common example of this behaviour is where criminals tell young people to steal items for them and bring these stolen goods to them for payment. See also media reports on gang violence in Dublin.

⁸ There are no comprehensive statistics available which show how much of the crime committed by children is controlled by adults but this estimate comes from a survey carried out with Garda juvenile liaison officers (JLOs). See C. Naughton, S. Redmond, [*National Prevalence Study: Do the findings from the Greentown study of children's involvement in a criminal network \(2015\) extend beyond Greentown*](#) (2017), p. 23.

⁹ See Department of Children and Youth Affairs, [*Lifting the Lid on Greentown – Why we should be concerned about the influence criminal networks have on children's offending behaviour in Ireland*](#) (2016), p. 57.

¹⁰ J. Connolly, [*Responding to Criminal and Anti-Social Behaviour Networks Across Dublin South Central: A Research Study*](#) (2019), p. 16; C. Naughton, S. Redmond, [*National Prevalence Study: Do the findings from the Greentown study of children's involvement in a criminal network \(2015\) extend beyond Greentown*](#) (2017), pp. 8, 13 and C. Naughton, S. Redmond, E. O'Meara Daly, [*Lifting the Lid on Redtown*](#) (2020), p. 40. The findings of a three-year study on criminal gangs and anti-social behaviour found that children in gangs "were being used by more senior criminals to maintain control over pockets of estates... Because they were under the age of 12 and, therefore, below the age of criminal responsibility, they were perceived in some instances to be more useful to undertake small-scale tasks or subtly intimidate neighbours than children over 12". See N. Hourigan, "[Juvenile Justice, Crime and Early Intervention: Key Challenges from the Limerick Context](#)", *Irish Probation Journal* 9 (October 2012).

¹¹ European Monitoring Centre for Drugs and Drug Addiction and Europol, [*EU Drug Markets Report 2019*](#) (2019), p. 49.

1. Children who are the subject of exploitation;
2. Adults who may also be subjected to similar exploitation; and
3. Adults who are accused or convicted of the proposed new offences.

Relevant human rights and equality framework

As the General Scheme is concerned with the exploitation of children and the response of the criminal justice system, it engages a number of fundamental rights, protected under common law, the Constitution, and European and international human rights law binding on the State.

Rights of the child

There are broad and wide-ranging protections for children's rights of relevance to the General Scheme under the Irish Constitution, and European Union ('EU'), Council of Europe and international human rights instruments. Firstly, Article 42A of the Constitution provides that the State:

“recognises and affirms the natural and imprescriptible rights of all children”,
and

“shall, as far as practicable, by its laws protect and vindicate those rights.”

Article 24 of the *Charter of Fundamental Rights of the EU* protects the rights of the child, including that children shall have the right to such protection and care as is necessary for their well-being. Article 17 of the *European Social Charter* (Revised) ('Charter') establishes the duty of the State to take all appropriate and necessary measures designed to protect children and young persons against violence or exploitation. The European Court of Human Rights ('ECtHR') also has significant jurisprudence on children's rights, and has recognised the importance of ensuring that children involved in the criminal justice system are re-integrated back into society.¹²

Furthermore, the *UN Convention on the Rights of the Child* ('UNCRC') should be considered by the drafters of this legislation. It has been directly relied upon by the courts in Ireland,¹³ and provides a benchmark against which domestic provisions for the treatment of children in the justice system can be evaluated. The general principles of the UNCRC include protections on non-discrimination, including on the basis of the status or activities of a child's parent or other family members (Article 2); the best interests of the child as a primary consideration (Article 3); the survival and

¹² *Maslov v Austria* [GC], Application No. 1638/03, 23 June 2008.

¹³ See *DPP v VE* [2021] IECA 122.

development of the child (Article 6); and the child's right to express views and be heard on all matters concerning him or her (Article 12). Under Article 7, children also have the right, as far as possible, to know and be cared for by their parents. Article 36 specifically requires States to protect children from all forms of exploitation prejudicial to any aspect of their welfare.

The UNCRC includes specific protections for children's due process rights under Articles 37 and 40, including the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of their sense of dignity and worth. The desirability of promoting the child's reintegration into society where the child can assume a constructive role is also recognised.¹⁴ In recognition that children differ from adults in their physical and psychological development and that exposure to the criminal justice system causes harm to children, the Committee on the Rights of the Child has called for a separate child justice system, with a differentiated, individualised approach.¹⁵ The Committee has emphasised that full compliance with the Convention requires prevention and early intervention, the development and implementation of diversion measures, the protection of children's rights at all stages of the justice system, an appropriate minimum age of criminal responsibility and a reduction in the use of detention.¹⁶

The General Scheme has the potential to bring Ireland into further conformity with these standards by vindicating the rights of children, by virtue of their status as children, including protection from exploitation by adults. However, careful consideration should be given to how best to vindicate the rights of children, with the goal of social reintegration kept in mind, and with a view to protecting children's family rights. As discussed further below, this is particularly relevant where a child has been groomed by their parents, guardians or wider family members into crime.

Child victims and witnesses

As well as the broad protections for children's rights set out above, there are a number of specific human rights standards on child victims and witnesses, which are of

¹⁴ For further commentary, see Sarah Jane Judge BL, *Youth Justice* (2015).

¹⁵ Committee on the Rights of the Child, [*General comment No. 24 \(2019\) on children's rights in the child justice system*](#), UN Doc. CRC/C/GC/24 (2019), para 2.

¹⁶ Committee on the Rights of the Child, [*General comment No. 24 \(2019\) on children's rights in the child justice system*](#), UN Doc. CRC/C/GC/24 (2019).

relevance to the General Scheme. Article 42A of the Constitution was cited recently by the Court of Appeal in *DPP v VE*, which concerned the rights of child victims of crime not to be subjected to oppressive cross-examination or re-victimised through the trial process. The acceptance by the Court of Appeal of ground rule hearings and the special consideration to be given to child witnesses appears directly relevant to cases where the incited child must give evidence.¹⁷

Under both EU and Council of Europe law, the rights of child victims and witnesses to protection against further victimisation, to recovery and reintegration and to effective participation in criminal and alternative proceedings has been recognised. The *Victim's Rights Directive* requires a child-sensitive approach, in which the child victim's age, maturity, views, needs and concerns are taken into account.¹⁸ The Directive also aims to protect the privacy and identity of child victims during criminal proceedings to prevent secondary victimisation.¹⁹ In the *Pupino* case, the Court of Justice of the EU gave its interpretation about the standing of children as victims and witnesses in criminal proceedings. It found that Member States are required to ensure the specific protection of vulnerable victims, including by authorising them to testify in a way that guarantees their protection while also respecting the defendant's right to a fair trial.²⁰ The ECtHR has ruled that, under Article 2 of the *European Convention on Human Rights* ('ECHR'), the duty on States extends to the protection of the right to life of child witnesses and their families, including in cases where they are testifying in open court about drug-related activities and there is a risk of retribution.²¹

While non-binding, the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice provide useful guidance that throughout their engagement with the justice system, child victims and witnesses should be treated with respect for their age, disability, language (including use of Irish Sign Language), their maturity and level of understanding and bearing in mind any communication difficulties they may have. This requires States to put in place child-specific support mechanisms

¹⁷ See *DPP v VE* [2021] IECA 122, para 74.

¹⁸ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

¹⁹ See Article 21(1) and Article 26.

²⁰ CJEU, C-105/03, Criminal proceedings against Maria Pupino [GC], 16 June 2005, paras 53, 59.

²¹ *R.R. and Others v. Hungary*, Application No. 19400/11, 4 December 2012.

and adapted procedures to ensure that children are protected from harm, intimidation and secondary victimisation. In addition, the Guidelines provide that the privacy and family life of child witnesses should be protected.²² Similar standards are also set out in the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.²³

Finally, under international law the requirement on States to take all appropriate measures to ensure the social reintegration of child victims is recognised in Article 39 of the UNCRC. The Committee on the Rights of the Child recognises that violence against children includes forcing them to engage in activities against their will, typically applied by persons who have power over children. Victims of such violence are often children who are marginalised, disadvantaged and discriminated against and who lack the protection of adults responsible for defending their rights and best interests.²⁴

Rights of adults who may also be exploited

While the General Scheme is focused on the grooming of children into criminal activity by adults, the State also has obligations under human rights law to protect other persons at risk of exploitation by criminal gangs. The Victim's Rights Directive provides that persons who are particularly vulnerable, or who find themselves in situations that expose them to a particularly high risk of harm, should be provided with specialist support and legal protection. This includes victims with a close relationship to and dependence on the offender and victims with disabilities.²⁵ Victims who have been identified as vulnerable to intimidation and retaliation should also be offered appropriate measures to protect them during criminal proceedings.²⁶

In the context of trafficking, the ECtHR has held that there is a procedural obligation on Member States to investigate the methods of recruitment, in order to prevent individuals or networks carrying out the exploitation acting with impunity.²⁷ Such an obligation may also be relevant to the State's response to the recruitment by criminal

²² Council of Europe, [*Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum*](#) (2011).

²³ United Nations, [*Guidelines on justice in matters involving child victims and witnesses of crime*](#) (2005).

²⁴ Committee on the Rights of the Child, [*General comment No. 13: The right of the child to freedom from all forms of violence*](#), UN Doc. CRC/C/GC/13 (2011), para 26.

²⁵ See para 38 and Article 3.

²⁶ Para 58.

²⁷ *Rantsev v Cyprus and Russia*, Application No. 25965/04, 7 January 2010.

gangs of structurally vulnerable adults for the commission of offences. For the purposes of this submission, we define a structurally vulnerable person as someone who is particularly vulnerable to human rights abuses due to political, economic, social and cultural structures.²⁸ Moreover, the UN Convention on the Rights of Persons with Disabilities ('UNCRPD') contains specific articles relevant to the discussion of any future legislation in this area. Article 16 requires States to take all appropriate legislative measures to protect people with disabilities from all forms of exploitation, as well as educational measures to provide information on how to avoid, recognise and report such instances of exploitation. Article 13 requires States to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations at investigative and other preliminary stages for witnesses.

Rights of the accused

The General Scheme engages the right of the accused not to be tried or punished save in due course of the law, which encompasses legal certainty, strict interpretation of penal statutes, and proportionality rights.

The common law contains such principles as *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law), which require a criminal statute to be clear and certain.²⁹ Where 'criminal activity' is defined as conduct constituting a criminal offence, it should not matter that an individual is not accused directly of the offence in question but of inciting a child in that respect; the criminal activity must still amount to a criminal offence. The law must be expressed and established with legal certainty. In *People (DPP) v Cagney*, for example, Hardiman J. said:

"From a legal and constitutional point of view, it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful."³⁰

²⁸ Instead of focusing on the personal characteristics of individuals and groups and viewing them as lacking agency, 'structural vulnerability' refers to the political, economic, social and cultural structures which render certain sectors of the population particularly vulnerable to human rights abuses.

²⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), at 120. Cited in D. Walsh, *Walsh on Criminal Procedure*, 2nd ed. (Dublin: Round Hall, 2016), para 1.08.

³⁰

A further principle which is founded in a rights-based analysis is the requirement to interpret a penal statutory provision strictly. Case law has determined that State encroachment on an individual's rights and freedoms is permissible only on the basis of law which satisfies constitutional norms.³¹ This rule of statutory construction applies with particular weight to instances of what might be termed loose or ambiguous language in the terms of a penal statute. In *Inspector of Taxes v Kiernan*,³² Henchy J. held:

"[W]hen a word or expression is used in a statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language."³³

The Commission is of the view that it is in the interests of the accused, as well as the victim, for a problematic criminal process to be avoided by drafting in terms that do not allow for ambiguity.

The principle of proportionality entered Irish Constitutional jurisprudence in *Heaney v Ireland*.³⁴ It requires the court to be satisfied that the encroachment on the constitutional rights and freedoms is necessary, and goes no further than is necessary, to achieve the particular law enforcement objective in issue. This entails a balancing exercise in which the protection of the constitutional rights and freedoms are given a high priority. The law enforcement objective must be of sufficient importance to take precedence over the right or rights affected. The means used to achieve the law enforcement objective must also impair the rights or freedoms concerned as little as possible and their effect on those rights or freedoms must be proportional to their objective.³⁵

³¹ *DPP v Moorhouse* [2006] 1 I.R. 421; *DPP v Flannagan* [1979] I.R. 265; *Mullins v Hartnett* [1998] 4 I.R.

³² [1981] IR 117.

³³ *Inspector of Taxes v Kiernan* [1981] IR 117, per Henchy J. at para 10 of the judgment.

³⁴

³⁵ Para 1.19, citing as an example

The common law also contains the principle of equal application of the criminal law, which is of relevance to the General Scheme.³⁶ There are conceivably situations where a child approaching majority is incited to engage in criminal activity by an adult who is only slightly older. The application of the law would be quite unequal if the young adult receives a significant penalty, and is not entitled to any of the protections of the child justice system. The rule of law is:

“frequently associated with the idea that law should not discriminate arbitrarily between situations or individuals on the basis of human characteristics...”³⁷

The principles that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) are also embodied in Article 7(1) of the ECHR:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”³⁸

Article 7 also lays down the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy.³⁹

³⁶ See D. Walsh, *Walsh on Criminal Procedure*, 2nd ed. (Dublin: Round Hall, 2016), at para 1.11.
³⁷

³⁸ The European Court of Human Rights has stated that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment. See *S.W. v. the United Kingdom*, Application No. 20166/92, 22 November 1995; *C.R. v. the United Kingdom*, Application No. 20190/92, 22 November 1995; *Del Río Prada v. Spain*, Application No. 42750/09; and *Vasiliauskas v. Lithuania*, Application No. 35343/05, 20 October 2015.

³⁹ *Kokkinakis v. Greece*, Application No. 14307/88, 25 May 1993.

The ECHR also provides, similar to principles in domestic law, that rights may legitimately be restricted if they are in accordance with the law and necessary in a democratic society for the prevention of disorder or crime.⁴¹ As noted above, legality does not merely refer back to whether interference is allowed by domestic law but it also relates to 'the quality of the law', requiring it to be accessible to the person concerned, compatible with the rule of law and foreseeable as to its effects.⁴² Once it is established that a particular interference is 'in accordance with the law', consideration turns to whether the measure in question has a legitimate aim and if so, whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.⁴³ This principle of proportionality embodies the notion of minimal restraint on the exercise of protected rights and interests, and requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.⁴⁴ The jurisprudence of the ECtHR also recognises the importance of parliamentary scrutiny of the proportionality assessment at a domestic level.⁴⁵

⁴⁰ *Vasiliauskas v. Lithuania*, Application No. 35343/05, 20 October 2015, paras. 153 & 154. See also *Korbely v. Hungary*, Application No. 9174/02, 19 September 2008; *Kononov v. Latvia*, Application No. 36376/04, 17 May 2010; and *Del Río Prada v Spain*, Application No. 42750/09, 21 October 2013.

⁴¹ See Article 8(1).

⁴² For example, *Gachechiladze v. Georgia*, Application No. 2591/19, 22 July 2021 and *Gumenyuk and Others v. Ukraine*, Application No. 11423/19, 22 July 2021, para 96.

⁴³ *Markovic and Others v. Italy*, Application No. 1398/03, 14 December 2006, para 99 and *Gumenyuk and Others v. Ukraine*, Application No. 11423/19, 22 July 2021, para 70.

⁴⁴ *Hirst v. The United Kingdom*, Application No. 74025/01, 6 October 2005, para 71 and *Imeri v. Croatia*, Application No. 77668/14, 24 June 2021, para 84.

⁴⁵ *Dickson v. The United Kingdom*, Application No. 44362/04, 4 December 2004, paras 80, 83.

General observations

A child and family-centred approach

While the focus of the General Scheme on breaking the link between criminal gangs and the children they try to recruit is welcome,⁴⁶ the complex issues that arise due to family and kinship ties are overlooked.⁴⁷ For example, studies have shown that children involved in criminal networks are often groomed by older family members, including parents.⁴⁸ Encouraging the participation of a child in the criminal justice process, including the provision of testimony, may be difficult if their parent, older sibling or other family member is facing charges and penalties for grooming or encouraging them to commit crimes. While the *Youth Justice Strategy 2021-2027* includes a broad commitment to provide appropriate information services to assist children throughout the court process, there is a policy gap relating to the provision of independent information and advocacy for children whose parents or close family members may be criminalised under the General Scheme.

This is of central importance given that the 'collateral' and hidden effects of the imprisonment of a parent or other family member on children are well documented, including disruptions in childcare arrangements, relationship breakdowns, financial loss, stigmatisation, and social isolation.⁴⁹ Long-term effects can range from negative perceptions of the criminal justice system to impacts on physical, social and emotional development.⁵⁰ Irish research has shown that family breakdown and separation from a parent following on from a custodial sentence is a traumatic experience for children.⁵¹

⁴⁶ See Department of Justice, [Bill to outlaw the grooming of children into crime announced by Ministers McEntee and Browne](#) (press release – 15 January 2021).

⁴⁷ Department of Children and Youth Affairs, [Lifting the Lid on Greentown – Why we should be concerned about the influence criminal networks have on children's offending behaviour in Ireland](#) (2016). See also, Dáil Éireann debate, [Criminal Law \(Recruitment of Children to Engage in Criminal Activity\) Bill 2018: First Stage](#) (7 March 2018).

⁴⁸ C. Naughton, S. Redmond, [National Prevalence Study: Do the findings from the Greentown study of children's involvement in a criminal network \(2015\) extend beyond Greentown](#) (2017), pp. 8, 18-19 and C. Naughton, S. Redmond, E. O'Meara Daly, [Lifting the Lid on Redtown](#) (2020), pp. 27, 40.

⁴⁹ Irish Penal Reform Trust, ["Picking up the Pieces": The Rights and Needs of Children and Families Affected by Imprisonment](#) (2012).

⁵⁰ IPRT, [Piecing it Together- Supporting Children and Families with a Family Member in Prison in Ireland](#) (2021), p. 24 and B. Weaver and D. Nolan, [Families of Prisoners: A Review of the Evidence](#) (Centre for Youth and Criminal Justice, 2015), pp. 4-5.

⁵¹ S. O'Malley and C. Devaney, "Supporting incarcerated mothers in Ireland with their familial relationships; a case for the revival of the social work role" (2016) *Probation Journal* 1-17.

The impact of such separation has been further intensified during the Covid-19 pandemic, with the children affected experiencing increasingly poor physical and mental health, including weight loss, sleeplessness and nightmares, self-harm, increased anxiety and changes in behaviour (including increased anger and aggression).⁵² The 2019 UN Global Study on Children Deprived of their Liberty recommended that there be a presumption against a custodial measure or sentence for primary caregivers, given the:

“detrimental impact of family separation due to parental incarceration.”⁵³

The Commission recommends that consideration be given to the family and kinship ties that can exist in the exploitation of children in the commission of offences, including the possible alternatives to prosecution or custodial measures where the inciter is a parent or other family member.⁵⁴

The Commission recommends that independent and specialised information and advocacy services should be available throughout the criminal justice process for all children coming within the scope of the legislation, and particularly those exploited by parents, family members or other adults in the commission of offences.

The Commission is of the view that the legislative proposals must also be part of a wider, comprehensive approach to fulfilling children’s rights and tackling child offending. This approach should ensure that the legislative proposals are not used by An Garda Síochána to profile specific communities of children and their families, on the grounds of race or socio-economic status for example,⁵⁵ and also requires a shift in focus from punitive responses to prevention and early intervention measures. Such measures include further support for youth services, including outreach services; employment and education measures, including investment in early childhood

⁵² IPRT, [Piecing it Together- Supporting Children and Families with a Family Member in Prison in Ireland](#) (2021), p. 24.

⁵³ M. Nowak, [UN Global Study on Children Deprived of their Liberty](#) (2019), p. 426.

⁵⁴ For further information on protecting the rights of children with imprisoned parents, see Council of Europe, [Recommendation CM/Rec\(2018\)5 of the Committee of Ministers to member States concerning children with imprisoned parents](#) (2018).

⁵⁵ IHREC, [Submission to the Anti-Racism Committee](#) (August 2021), p. 67. See also, European Commission against Racism and Intolerance, [ECRI Report on Ireland: fifth monitoring cycle](#) (2019), para 52 and C. Gallagher, [Gardaí have negative view of Travellers, survey finds](#) (The Irish Times, 20 August 2020).

education and care; cultural and leisure activities; addiction, mental health and rehabilitation supports; and intensive family and community-based programmes.⁵⁶ In this regard, the Commission notes the newly designed community intervention programme being piloted for children caught up in serious and prolific crime, the outcomes of which are intended to have a key influence on the development of the Department's policies and interventions in the youth justice area.⁵⁷ The Commission welcomes the rights-based approach adopted in the *Youth Justice Strategy 2021-2027*, the commitment to maximising the use of research and data, and the focus on developing community-based interventions designed around the needs of the children and with appropriate interagency cooperation.⁵⁸

Such measures are intended to:

"provide support at the earliest opportunity (ideally before offending behaviour occurs), address the underlying causes of offending behaviours, and maximise opportunities to avoid or divert from interaction with the criminal justice system."⁵⁹

The Commission recommends that the legislative proposals be part of a wider, comprehensive approach to prevention and early intervention to meet the needs of children and tackle child offending.

The Commission recommends the full implementation and ongoing evaluation of the *Youth Justice Strategy 2021-2027*, in partnership with specific communities of children at risk of exploitation.

Minimum age of criminal responsibility

The Committee on the Rights of the Child urged Ireland to increase the minimum age of criminal responsibility to 14 years for all offences in 2016.⁶⁰ Taking into account

⁵⁶ See J. Connolly, [Responding to Criminal and Anti-Social Behaviour Networks Across Dublin South Central: A Research Study](#) (2019), pp. 16-17 and Committee on the Rights of the Child, [General comment No. 24 on children's rights in the child justice system](#) (18 September 2019), p. 4.

⁵⁷ Department of Justice, [Minister McEntee launches new research which offers hope for children caught up in crime networks](#) (press release, 7 January 2021).

⁵⁸ Department of Justice, [Youth Strategy 2021-2027](#) (April 2021).

⁵⁹ Department of Justice, [Youth Strategy 2021-2027](#) (April 2021), p. 5.

⁶⁰ Committee on the Rights of the Child, [Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland](#) (1 March 2016), p. 17.

documented evidence in the fields of child development and neuroscience, the Committee also commends States that have a higher minimum age such as 15 or 16.⁶¹ As an example, the minimum age of criminal responsibility is 15 years in Finland, Norway and Sweden, and 16 years in Portugal.⁶²

However, the age of criminal responsibility remains unchanged in Ireland⁶³ and has been criticised by the Special Rapporteur on Child Protection.⁶⁴ In its 2019 Conclusions, the European Committee of Social Rights found that Ireland does not conform with Article 17(1) of the European Social Charter on the ground that the age of criminal responsibility is too low.⁶⁵

The Commission notes that the Department of Justice is currently engaged in a review of the *Children Act 2001*, but there is an absence of any clear commitment or timeline for raising the age of criminal responsibility. As the General Scheme addresses the issue of adults purposefully targeting young children and grooming them to commit crimes, it should pave the way for the State to raise the age of criminal responsibility.⁶⁶

The Commission recommends that the General Scheme be accompanied by legislative proposals to raise the age of criminal responsibility to 14 years for all offences as an absolute minimum, and to continue to increase it to a higher age such as 15 or 16.

⁶¹ Committee on the Rights of the Child, [General comment No. 24 on children's rights in the child justice system](#) (18 September 2019) at p. 6.

⁶² CRIN, [Minimum Ages of Criminal Responsibility in Europe](#).

⁶³ The age of criminal responsibility in Ireland is 12 years, but there is also provision for 10 and 11 year old children charged with serious offences including murder, manslaughter, rape or aggravated sexual assault to be tried in the Central Criminal Court.

⁶⁴ Professor Geoffrey Shannon, [Tenth Report of the Special Rapporteur on Child Protection](#) (2016), pp. 8, 83–84.

⁶⁵ European Committee of Social Rights, [Conclusions 2019: Ireland](#) (2019), p. 38.

⁶⁶ For an overview of the appropriate interventions for children below the minimum age of criminal responsibility, see Committee on the Rights of the Child, [General comment No. 24 on children's rights in the child justice system](#) (18 September 2019) at p. 4.

Observations on the General Scheme

The threshold for criminal activity

The definition of criminal activity under the General Scheme is all-encompassing as any offence, not only arrestable or indictable offences, falls within its scope.⁶⁷ This concept requires some degree of reasonable definition and limitation of scope.⁶⁸

As an example, regulatory, licensing and corporate offences, and the majority of road traffic offences, are clearly not relevant and should not come within the proposed provisions. As recognised by the General Scheme,⁶⁹ the Commission also notes that limiting the new offences by a higher threshold could militate against the possibility of early intervention, before the child victim has been introduced to or involved in more serious criminality. Offences that are dealt with by way of summary disposal may be centrally relevant as 'gateway offences', including handling stolen property, drug possession, trespass and minor cases of criminal damage. The Commission is of the view that further legislative clarity is needed, in order to ensure that victims, the child and the accused are not unnecessarily or arbitrarily the subject of an ineffective, over-reaching, oppressive or uncertain criminal process.

The Commission recommends that the concept of 'criminal activity' should be reduced in scope by providing a schedule of applicable offences, which more narrowly and specifically caters for the objectives of the proposed legislation. The provision that it is not a requirement that the scheduled offence has been committed, or the child convicted or prosecuted for that offence, should be retained.

⁶⁷ 'Criminal activity' is defined simply as "conduct that constitutes an offence". Head 2(1) of the General Scheme.

⁶⁸ The Commission notes that the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 in Victoria, Australia created an offence of recruiting a child to engage in criminal activity. Under this law, it is an offence for an adult (aged over 21 years) to recruit a child to engage in criminal behaviour which would be punishable with a prison sentence of at least five years. For further discussion on this approach see, Oireachtas Library and Research Service, [The recruitment of children to commit crime](#) (2020).

⁶⁹ Head 2 of the General Scheme notes that it would be possible to have a higher threshold for criminal activity by defining it as constituting an arrestable or indictable offence. However, it states that this might not capture all situations, including where children were being directed to engage in acts of intimidation, as highlighted in recent studies on criminal gang participation and anti-social behaviour.

Distinguishing between Head 3(1) and Head 3(2)

Head 3(1) proposes that it be a criminal offence for adults to compel, coerce, induce or invite a child to engage in criminal activity. The proposed offence under Head 3(1), because it is separately provided for, must be intended to be separate and distinct from the offence of directing criminal activity by a child under Head 3(2).⁷⁰ It appears that the first offence addresses the recruitment of a child to become engaged in criminal activity, whereas the second offence addresses the exploitation of children in repeated or more systematically managed and hierarchical crime. Indeed the General Scheme expressly states that the offender under Head 3(2) may not have engaged in the behaviour covered by Head 3(1).

The distinction between these offences is not clearly set out, including whether there is a graduated scope of gravity between Head 3(1) and (2) or within each Head considering the different terms used to describe the nature and extent of the offender's incitement of the child. This requires further attention at drafting stage in the interests of legal certainty. An offender is entitled to proportionate treatment at sentencing stage and to be made aware with sufficient certainty of the gravity and precise extent of the criminal allegation. The victim and the public are also entitled to transparency in this regard.

The Commission recommends that the offences provided under Head 3(1) and 3(2) respectively be more clearly distinguished in terms of the context and gravity of the conduct concerned.

The requirement of communication

It has always been a requirement of the common law offence of incitement that passive presence is insufficient: 'something must be said or done by the accused' to ensure that the incited crime is brought about.⁷¹ Therefore, under the General Scheme, the adult must engage in some sort of communication on the subject of the criminal activity that he or she intends the child to engage in. This requirement for communication also applies where a person is managing or directing child exploitation. The offence of

⁷⁰ The definition for 'directs' under Head 2(1) is to control or supervise the activity, or give an order, instruction or guidance, or make a request, with respect to the carrying on of the activity.

⁷¹ P. Charleton, P. McDermott, C. Herlihy and S. Byrne, *Charleton & McDermott's Criminal Law and Evidence*, 2nd ed. (Bloomsbury Professional: 2020), para 7.104.

incitement requires that, while the accused need not know the details of the plan, he or she must intend to bring about the criminal result in question and must know the external elements of the crime.⁷²

The Commission recommends that the necessity and extent of communication by the inciter to the incited child with respect to the criminal activity be clearly defined in both proposed offences.

The requirement for the offence to be capable of commission

It is a very significant feature of these offences that an adult may be convicted of one of the proposed offences where the child has not yet (or has not in fact) engaged, been prosecuted or been convicted of the relevant criminal activity (Head 3(3)). It is not a requirement at common law that the objective of the incitement be achieved. There is however the conceptual difficulty that the common law offence of incitement requires that the offence be capable of commission (not impossible due to mistake of fact or law).⁷³ To ensure clarity, this principle should be clearly provided for in the proposed legislation.

The Commission recommends that the proposed legislation contain a requirement that the criminal activity to which the child is incited should be capable of commission.

The intended scope of the proposed provisions

The General Scheme is focused on adults compelling, coercing, inducing, inviting and directing children to commit offences. Whilst legal certainty remains a fundamental requirement, the broader the offences covered the more children who will be protected by the proposed legislation. Other statutory frameworks include definitions which are of relevance to the context of incitement and the objectives of the General Scheme. A notable example is section 5A of the *Child Trafficking and Pornography Act 1998* which

⁷² *Ibid.*

⁷³ An impactful reminder of this occurred in *R v Whitehouse* 1977 Q.B. 868 where the English Court of Appeal overturned a conviction of a father who had pleaded guilty of two counts of incest of his 15-year-old daughter. This was on the basis that the prosecution had to concede that the common law offence of incitement of which he had been charged consisted of inciting another to commit a crime. A girl of 15 was incapable of committing the crime of incest under the relevant provision, section 11 of the Sexual Offences Act 1956.

makes it an offence for a person to 'cause', 'incite' or 'recruit' a child to participate in a pornographic performance. The *Criminal Law (Sexual Offences) Act 2017* also makes it an offence to 'counsel' or 'incite' a child to touch with a part of the body, or with an object, the body of any person (section 4(1)). The word 'encourage' is also notably absent from the General Scheme and might assist in distinguishing the offences under Head 3(1) and Head 3(2).

Furthermore, the proposed offences clearly codify the common law offence of incitement in the context of the exploitation of children.⁷⁴ This should be expressly acknowledged and confirmed by the use of the word 'incite' in formulating the general offences so that the well-established principles of the common law of incitement can be applied and relied upon by prosecutors and defendants in a future trial. This will also help to clarify the parameters and meaning of the proposed offences. If an offence has been long established at common law and is the subject of a substantial body of precedent on its substance and application, it is unlikely to be considered incompatible with the rule of law on the basis of its broad scope.⁷⁵

The Commission recommends that consideration be given to other verbal formulations of incitement offences in existing statutory frameworks.⁷⁶

The Commission recommends that the word 'incite' be included in the proposed offences so that the well-settled common law applications and case law on the crime of incitement may apply and give legal certainty to the offences.

Whilst it is clearly the intention of the General Scheme to tackle the practice of recruitment and exploitation of children in the commission of crime by crime networks, the proposed provisions are clearly not limited to that context. Where the adult in question is the parent or guardian, family member or any other influential adult in the life of the child, and holds racist views or other prejudices, the offences in the General

⁷⁴ See P. Charleton, P. McDermott, C. Herlihy and S. Byrne, *Charleton & McDermott's Criminal Law and Evidence*, 2nd ed. (Bloomsbury Professional: 2020), para 7.114, where the authors point out that there are many statutory provisions consisting of incitement. The authors state that, "despite the statutory formulation, by using the concept of incitement, the legislature is taken in this legislation and others of similar kind, to adopt the existing law as to its elements."

⁷⁵

⁷⁶ The word 'recruit' would seem to fit within the proposed offence under Head 3(1) and the word 'cause' would seem to fit within the proposed offence under Head 3(2).

Scheme could be applied to hate crimes. The current complement of *actus reus* components - compelling, coercing, inducing or inviting - would not however protect victims of hate crimes perpetrated by adults inciting children, for instance by wilfully providing misinformation and inculcating them with racist propaganda.

The General Scheme may also have implications for the statutory and administrative framework on human trafficking when a trafficked child is coerced into criminal activity.⁷⁷ According to Europol, since 2016 there has been increased recognition of the potential links between trafficking in human beings and the drugs trade, for example, the exploitation of victims, including children, at cannabis cultivation sites.⁷⁸ Europol has also raised the issue of domestic trafficking and coercion, including evidence that the 'county lines' model of drug supply extensively documented in the United Kingdom is now being used in Ireland.⁷⁹

The Commission was appointed National Rapporteur on the Trafficking of Human Beings in October 2020 and has repeatedly highlighted the deficiencies in the State's response to trafficking, particularly an inadequate administrative scheme for the identification, non-punishment and protection of victims of trafficking, including child victims.⁸⁰

The Commission recommends that the Minister consider the application of the proposed offences to the protection of children against human trafficking and

⁷⁷ For example, see *V.C.L. and A.N. v the United Kingdom*, Application Nos. 77587/12 and 74603/12, 5 July 2021.

⁷⁸ European Monitoring Centre for Drugs and Drug Addiction and Europol, [EU Drug Markets Report 2019](#) (2019), pp. 37-38.

⁷⁹ This model involves drugs being supplied from a central base in a major city to one or more supply areas in provincial towns: "The new supply model typically consists of more established 'elders' recruiting younger (often teenage) associates and sending them to provincial areas to act as dealers, while a dedicated phone line is established in the city. Users in the provincial areas call this line to place orders, which are then relayed to the dealers residing in the provincial town. This ensures that the provincially based dealers remain dependent on the city-based 'elders'. The model makes extensive use of the exploitation of vulnerable people, including recruiting children in the care of social services or excluded from school: "This exploitative business model allows criminal groups to expand to new areas at low cost and minimal risk, as they do not have to pay the vulnerable individuals whom they exploit, who are also the most exposed to the risk of arrest." European Monitoring Centre for Drugs and Drug Addiction and Europol, [EU Drug Markets Report 2019](#) (2019), pp. 39, 48.

⁸⁰ See IHREC, [Submission to the Third Universal Periodic Review Cycle for Ireland](#) (March 2021), p. 7 and IHREC, [Ireland Fails to meet 'Minimum Standards for the Elimination of Trafficking' and is Kept on US Government Tier 2 Watchlist](#) (1 July 2021).

incitement to hatred, and modifies the definitions in the General Scheme accordingly.

Structurally vulnerable adults

For the purposes of this submission, we define a structurally vulnerable person as someone who is particularly vulnerable to human rights abuses due to political, economic, social and cultural structures. The provisions of the General Scheme and the related commentary are focused on the exploitation of children. However, they fail to recognise that individuals and networks may also recruit structurally vulnerable adults,⁸¹ such as disabled people, into criminal activity, and the State's obligations in this regard as set out above. As the designate Independent Monitoring Mechanism for the CRPD in Ireland,⁸² this issue is of particular concern to the Commission.

According to Europol, the 'county lines' model of drug supply referenced above recruits people dependent on drugs, who may allow the use of their accommodation for drug dealing in exchange for drugs or to pay off drug debts but then are forced to continue engaging in drug dealing.⁸³ It has highlighted that in some Member States, people with physical and mental disabilities are being increasingly targeted by traffickers involved in the drugs trade.⁸⁴ The 'County Lines Guidance' by the UK Home Office also recognises that criminal gangs target adults with a physical or learning disability, mental health or substance misuse issues, as well as adults with prior experience of neglect, physical or sexual abuse, or experiencing homelessness.⁸⁵

The Commission recommends that consideration be given to addressing the exploitation of structurally vulnerable adults within the General Scheme, including disabled people across all impairments.

⁸¹ Instead of focusing on the personal characteristics of individuals and groups and viewing them as lacking agency, 'structural vulnerability' refers to the political, economic, social and cultural structures which render certain sectors of the population particularly vulnerable to human rights abuses.

⁸² Article 33 of the CRPD requires that an independent mechanism be established to monitor the progress of Government in improving its laws, policies and essential services to ensure that people with disabilities enjoy the same human rights as everyone else.

⁸³ European Monitoring Centre for Drugs and Drug Addiction and Europol, [EU Drug Markets Report 2019](#) (2019), p. 39.

⁸⁴ European Monitoring Centre for Drugs and Drug Addiction and Europol, [EU Drug Markets Report 2019](#) (2019), p. 212.

⁸⁵ UK Home Office, [Criminal Exploitation of children and vulnerable adults: County Lines guidance](#) (2017).

The status and rights of the victim of exploitation

While the General Scheme creates new offences on the exploitation of children, the provisions do not address the status or rights of the child involved, in particular whether they are to be regarded as a victim of the offence. As set out above, child victims and witnesses have specific rights within the criminal justice process, including the right to be protected from harm, intimidation and further victimisation and to be treated in a child-sensitive manner, taking their age, maturity, views, needs, concerns and any communication difficulties into account. Furthermore, effective access to justice requires the provision of appropriate accommodations and supports for structurally vulnerable adult victims, who may be brought within the scope of the General Scheme as recommended above. Such supports may also be required for victims of exploitation who turn 18 during the criminal justice process and 'age out' of the special protection measures for children.

Section 15 of the *Criminal Justice (Victims of Crime) Act 2017* requires that an individual assessment be carried out so that victims have their specific needs protected during criminal proceedings. In conducting such assessments, the victim's dependence on the alleged offender and the particular vulnerability of victims of organised crime, human trafficking, violence in a close relationship, sexual violence or exploitation and victims with disabilities must be taken into account.⁸⁶ Section 15 also allows for consideration of the circumstances surrounding the commission of the alleged offence, and requires regard for the best interests and views of the child victim.⁸⁷

On the basis of the current provisions, children incited to engage in criminal activity may be prosecuted for any offence carried out. This can be considered to run contrary to the objectives of the proposed offences in the General Scheme "to avoid further criminalising children",⁸⁸ and there is a lack of clarity as to the degree to which being incited by an adult may operate as a partial or full legal defence.

⁸⁶ Section 15(2) of the 2017 Act.

⁸⁷ Section 15(2)(a-b) and Section 15(7) of the 2017 Act.

⁸⁸ Head 3(1) of the General Scheme.

The Commission recommends that the status of a child or structurally vulnerable adult involved in incited criminal activity be further clarified under the General Scheme.

Taking into account the human rights and equality standards set out above, the Commission recommends that the legislative proposals should reflect the rights and special protection needs of children or structurally vulnerable adults involved in criminal proceedings under the General Scheme. In particular, consideration should be given to:

- including specific reference to Section 15 of the *Criminal Justice (Victims of Crime) Act 2017* in the proposed legislation;
- the use of ground rules hearings and procedural and age-appropriate accommodations as required; and
- the specific needs of victims with disabilities, across all impairments.

The Commission recommends that consideration be given to making provision for applications by defendants of incited criminal activity at the earliest possible stage (pre-prosecution), where an adult has been convicted in respect of that criminal activity under the proposed legislation.

Children are entitled to reporting restrictions on proceedings under the *Children Acts 2001 to 2021*. Section 93 of the Acts prohibits, subject to certain exceptions, publication of the name, address or school of a child involved in criminal proceedings or any detail likely to lead to their identification. These protections should also apply to proceedings where the child is incited to engage in criminal activity.

The Commission recommends that specific reference to Section 93 of the *Children Acts 2001 to 2021* be made in the proposed legislation to ensure the preservation of anonymity for the child.

Penalties

The General Scheme provides that those found guilty of the new offences will face imprisonment of 12 months on summary conviction and up to five years on indictment.⁸⁹

⁸⁹ Head 3(4).

A sentencing regime based on the incitement offence alone, not anchored or tied in a graduated way to the nature of the criminal activity which the child is incited to become engaged in, will lead to anomalous results. For example, a child may be incited to commit aggravated burglary or a much less serious public order offence, such as engaging in abusive or insulting words or behaviour with an intent to breach the peace. The former offence has a maximum penalty of life imprisonment whereas the latter is subject to a maximum term of imprisonment of 3 months.

A further difficulty arises from Section 7(1) of the *Criminal Law Act 1997*, which provides, as relevant, that:

“Any person who counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.”

The potential for anomaly under this provision would be that the maximum penalty for the incited offence (the ‘criminal activity’) could be significantly higher than the offence under the General Scheme.

Taking into account the principles of legal certainty, equal treatment and proportionality, all interested parties, and in particular the victims, offenders and the children caught in between them, would be better served by offences and penalties, which graduate a scale of culpability and gravity. This would provide assurance that the penalty was proportionate and limit the need for sentencing hearings and appeals of the ruling on sentence on the grounds that the gravity and commensurate penalty are unclear.

The Commission recommends that the Minister should consider the implications of penalties being disproportionate, where a child who is incited to commit a crime receives a harsher penalty than the inciter, due to the sentencing options available to judges under the proposed legislation. The Minister should consider a graduated scale of penalties or linking the maximum available tariff between the proposed offence and the incited criminal activity.

The Committee on the Rights of the Child commends States that allow the application of the child justice system to persons aged 18 years and older whether as a general rule

or by way of exception.⁹⁰ The Commission notes that the 'Programme for Government – Our Shared Future' includes a commitment to examine increasing the age limit for the application of the Garda Youth Diversion Programme to 24 years old and to work with all criminal justice agencies to build capacity to deliver restorative justice, safely and effectively.⁹¹ Furthermore, the Youth Justice Strategy 2021-2027 commits to examining the necessary steps to establish a diversion process for those aged 18-24, and to developing initial pilot approaches.⁹²

In line with these commitments, the Commission is of the view that the General Scheme should ensure appropriate interventions, including diversionary measures, for young people who are transitioning into adulthood and found guilty of the new offences. The use of diversion measures in appropriate cases under the proposed legislation would take account of the principle of equal application of the criminal law as set out above, particularly where a young person is charged with inciting a child only slightly younger. As referenced above, the Commission also notes the role that older siblings and other family members may play in grooming children to commit crimes, and the importance of non-custodial measures.

The Commission recommends that consideration be given to allowing adults aged up to 24 years who are found guilty of the new offences to enter the Garda Youth Diversion Programme, where appropriate.

The Commission recommends that the decision to prosecute an adult for the incitement of a child should take into account their respective ages, if necessary.

⁹⁰ Committee on the Rights of the Child, [General comment No. 24 on children's rights in the child justice system](#) (18 September 2019), p. 7.

⁹¹ Government of Ireland, [Programme for Government: Our Shared Future](#) (June 2020), pp. 85-86.

⁹² Department of Justice, [Youth Strategy 2021-2027](#) (April 2021), p. 23.



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