

Submission to the Joint Committee on Justice on the General Scheme of The Smuggling of Persons Bill 2020

Irish Human Rights and Equality
Commission

February 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* (the '2014 Act'). 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 Commission welcomes the opportunity to provide the Joint Committee on Justice with its submission on the *General Scheme of the Smuggling of Persons Bill 2020* (the 'General Scheme'). The Commission has previously highlighted a range of human rights and equality concerns relating to the treatment of people seeking international protection² and victims of trafficking and exploitation in the State.³ In October 2020, the Commission was designated as Ireland's Independent National Rapporteur on the Trafficking of Human Beings.⁴ Human trafficking is a significant problem in Ireland, with this jurisdiction being both a destination and source country for the trafficking of

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

² In particular, the Commission appeared as amicus curiae ('friend of the court') in the Supreme Court case of *NHV v The Minister for Justice and Equality*; IHREC, [Policy Statement on the System of Direct Provision in Ireland](#), December 2014; IHREC, [Recommendations on the General Scheme of the International Protection Bill 2015](#), June 2015; IHREC, [Access to the labour market for applicants for international protection](#), March 2018; IHREC, [The Right to Family Reunification for Beneficiaries of International Protection](#), June 2018; IHREC, [Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#), October 2019; IHREC, [IHREC White Paper Submission Direct Provision](#), December 2020.

³ In particular, the Commission acted as amicus curiae before the High Court in *P v Chief Superintendent of the Garda National Immigration Bureau & Or*, concerning the adequacy of the administrative scheme for the identification of victims of trafficking. Also, see recommendations made to the Council of Europe's Group of Experts on Action against Trafficking (GRETA), and recently to the UN Convention on the Elimination of Racial Discrimination on Ireland's need to take steps to prevent trafficking for labour exploitation.

⁴ The tasks of the National Rapporteur include the carrying out of assessments of trends in trafficking in human beings, the measuring of results of anti-trafficking actions (including the gathering of statistics in close cooperation with relevant civil society organisations active in this field), and reporting. The Commission's designation was provided for by S.I. No. 432/2020 - European Union (Prevention and Combating of Human Trafficking) (National Rapporteur) Regulations 2020 at <http://www.irishstatutebook.ie/eli/2020/si/432/made/en/print> Directive 2011/36/EU of the European Parliament and of the Council, of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

persons for both sexual exploitation and labour exploitation.⁵ Deficiencies in the State's response to trafficking has resulted in Ireland being downgraded by the US Department of State in its recent *Trafficking in Persons reports*.⁶

People smuggling can lead to serious human rights violations and is closely linked with human trafficking.⁷ The absence of an effective criminal justice response can lead to a sense of impunity for smugglers and criminal networks. In this regard, research has shown that the lack of effective legislation and criminal justice processes to address people smuggling has contributed to smugglers and criminal networks viewing smuggling as a 'low risk, high reward'⁸ offence. The Commission believes that legislative and policy reform in this area should be human rights, gender and trauma centred. Equally, the Commission recognises the importance of developing an effective, proportionate and dissuasive criminal justice approach to people smuggling. In this regard, this submission identifies a number of key observations and recommendations that the Commission hopes will assist the Committee in its scrutiny of the General Scheme.

Background to the proposed legislation

On 27 July 2020, the Government approved the General Scheme of *the Smuggling of Persons Bill 2020*. The Bill is intended to implement two European Union and one United Nations legal instruments in the area of people smuggling. Furthermore, the Bill is intended to repeal a significant number of sections of the *Illegal Immigrants (Trafficking) Act 2000*.⁹ The General Scheme of the Bill was submitted to the Oireachtas Committee on Justice for pre-legislative scrutiny.

⁵ GRETA, [Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland](#), 2017, at para.12.

⁶ The failure of the State to take appropriate measures pertaining to identification and non-punishment of victims as well as the provision of legal support and remedies resulted in the US Department of State downgrading Ireland to "Tier 2" status in its 2018 and 2019 Trafficking in Persons reports, and to the "Tier 2 Watchlist" in its 2020 report. See US Department of State: [Trafficking in Persons Report](#) (June 2018); [Trafficking in Persons Report](#) (June 2019); [Trafficking in Persons Report](#) (2020).

⁷ Interpol, Migrant Smuggling at https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/facilitation-irregular-migration_en

⁸ European Parliamentary Research Service, [Combatting migrant smuggling into the EU](#), April 2016, at pages 3-4.

⁹ Section 4 of the General Scheme of the Bill provides that Sections 2, 3, 4, 6, 7, 8, and 11 of the *Illegal Immigrants (Trafficking) Act 2000* are repealed.

The Bill is intended to transpose *Council Directive 2002/90/EC* (the 'Directive') defining the facilitation of unauthorised entry, transit and residence. The Bill also transposes *Council Framework Decision 2002/946/JHA* (the 'Framework Directive') on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. These Instruments, commonly referred to as the 'Facilitators Package', were adopted by the European Union in 2002. The Bill also intends to ratify the *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime* ('the Protocol'); which was adopted in 2000 and entered into force in 2004. The EU acceded to the Protocol in 2006, and Ireland is the only EU Member State not have ratified the Protocol so far.

Observations on the General Scheme

The smuggling of persons has become increasingly associated with serious human rights violations, human trafficking, and people seeking international protection.¹⁰ A recent study found substantial evidence of serious human rights violations occurring in connection with smuggling operations, including loss of life, rape, torture and human trafficking.¹¹ Also, studies show that human smuggling and human trafficking are frequently interlinked, as the crimes are often perpetrated by the same criminal network, along the same route, for the purposes of profit.¹² Data shows that the majority of victims of human trafficking are women and girls.¹³ Also, according to a number of global reports people with disabilities, in particularly children with disabilities, are more likely to be targeted by traffickers. In this regard, international actors recommend that human rights should be at the centre of the governance of irregular

¹⁰ European Commission, *REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)* (March 2017) p.4.

¹¹ European Commission, *DG Migration and Home Affairs, A study on smuggling of migrants. Characteristics, responses and cooperation with third countries*, September 2015, page 54.

¹² The Inter-Agency Coordination Group against Trafficking in Persons (ICAT), *What is the difference between trafficking in persons and smuggling of migrants?* (October 2016).

¹³ See for example European Parliament, Briefing February 2016, The gender dimension of human trafficking [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577950/EPRS_BRI\(2016\)577950_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577950/EPRS_BRI(2016)577950_EN.pdf)

migration.¹⁴ Also, it is the Commission's view that the response to people smuggling and human trafficking should be informed by the relevant gender, child and disability dimensions. An effective criminal justice response is also key to the fight against people smuggling. In this respect, and although human trafficking is distinct from people smuggling, the 2020 *US State Department Report on Trafficking in Persons* highlighted that Ireland has not obtained a trafficking conviction under the *Human Trafficking Act 2008*, as amended.¹⁵ Monitoring bodies have reported that the lack of prosecutions has resulted in "weakened deterrence, contributed to impunity for traffickers, and undermined victims to testify".¹⁶

Accordingly, this submission seeks to address these equally important aspects of people smuggling; the rights and protections of smuggled persons, and the importance of developing an effective, proportionate, and dissuasive criminal justice approach to people smugglers.

¹⁴ United Nations Office of the High Commissioner for Human Rights, [Recommended Principles and Guidelines on Human Rights at International Border](#), 2014, at page 7; Global Migration Group (GMG) Working Group on Migration, Human Rights and Gender, [Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations](#), 2018, at page 21; See United Nations, [Comments on the reform of the European migration and asylum system](#), September 2018.

¹⁵ <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>

¹⁶ TIP (2020) p.269.

Rights and Protections of smuggled persons

The General Scheme is silent on the rights and protections of smuggled persons. Whilst the State has a right to control the entry and residence of irregular migrants¹⁷, it must ensure that legislation is designed in a manner that is compliant with human rights and equality principles and standards.¹⁸ In this regard, irrespective of their migration status, individuals who have been smuggled hold certain fundamental rights that are protected under constitutional, European, and international law. These rights include, for example:

- the right to life;
- the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment;
- the right to liberty and security;
- the right to asylum;
- the right to non-refoulement;
- the right to fair procedures; and
- the right to an effective remedy.

The 'Facilitators Package' while largely concerned with addressing the criminalisation of human smuggling, also applies:

"without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights".¹⁹

In particular, Member States are required to comply with their obligations under Article 31 (on the non-penalisation of their unlawful entry or presence) and Article 33 (on non-refoulement) of the Geneva Convention relating to the status of refugees.

¹⁷ [Abdulaziz, Cabales and Balkandali v. the United Kingdom](#), 28 May 1985, Series A no. 94, para 67.

¹⁸ The Council of Europe have stressed that "a coherent, credible and effective policy with regard to preventing and countering migrant smuggling, which fully respects human rights and the dignity of the smuggled migrants as well as of those providing humanitarian assistance, as well as the principle of non-refoulement, and the prohibition of collective expulsion laid down in Article 19 of the EU Charter of Fundamental Rights are essential parts of a comprehensive EU migration policy". Council of the European Union, [Council conclusions on migrant smuggling](#), March 2016.

¹⁹ Article 6 of the Council Framework Decision 2002/946/JHA.

The implementation the 'Facilitators Package' must not only comply with fundamental rights protected under the Constitution and the *European Convention of Human Rights Act 2003* (the 'ECHR Act 2003'), but also the *Charter of Fundamental Rights*.²⁰ The Court of Justice of the European Union (the 'CJEU') has confirmed that personal rights under EU legislation extend to the protection of irregular migrants.²¹ Furthermore, the *EU Victims' Rights Directive* applies to victims "in a non-discriminatory manner, including with respect to their residence status."²²

One of the central objectives of the UN Protocol is to protect the rights of smuggled persons²³ and ensure the protection of the rights of persons who have been the object of offences under the Protocol.²⁴ Article 16(1) of the Protocol provides that:

"each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment."

Further protective measures are set out in Article 16(3) which states that:

"[e]ach State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol"

²⁰ "Both the Directive and the Framework Decision must be interpreted in the light of the provisions of the Charter of Fundamental Rights of the EU, which according to Art. 6 TEU has the same legal value as the Treaties. Member States are equally bound by it when implementing the Facilitators Package." European Commission, [REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package \(Directive 2002/90/EC and Framework Decision 2002/946/JHA\)](#), March 2017, at page 30.

²¹ In a case concerning an EU employment Directive the Court held that the provisions of the Directive did not "exclude third-country nationals from the scope of the directive; nor do they expressly permit Member States to do so." [Case C-311/13, O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen](#), Judgment of the Court (Fifth Chamber) of 5 November 2014.

²² Article 1 of the [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](#).

²³ [Article 2 of the UN Protocol](#) states that the purpose of the Protocol is "to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants."

²⁴ [Article 4 of the UN Protocol](#) sets out that the Protocol shall also apply to the "protection of the rights of persons who have been the objects" of the offences under the Protocol.

Article 16(4) also provides that;

“[i]n applying the provisions of this article, States Parties shall take into account the special needs of women and children.”

Similar to the ‘Facilitators Package’, the provisions of the Protocol do not “affect the other rights, obligations and responsibilities of States and individuals” (Article 19.1) under international humanitarian law and international human rights law, in particular, the Geneva Convention relating to the status of refugees and the principle of non-refoulement.

The Commission recommends that further measures are required to strengthen the rights and protection of rights of smuggled persons under the General Scheme; by including a provision similar to section 16 of the Protocol, which provides for specific rights and protections for smuggled persons, and the specific rights of women, children and people with disabilities.

Non-punishment principle

The General Scheme does not make reference to Article 5 of the UN Protocol,²⁵ which states that “[m]igrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object” of people smuggling. This is a critical provision as the Special Rapporteur on the human rights of migrants has stated that:

“criminalization of irregular migration further limits victims’ access to justice and protection and decreases the likelihood that they will report abuse to authorities. The added fear of criminal prosecution and punishment further prevents trafficked and smuggled persons from seeking protection, assistance and justice”.²⁶

In addition, many of people who have been smuggled are asylum seekers or are victims of human trafficking. Both asylum seekers and victims of human trafficking are afforded

²⁵ [Article 5 of the UN Protocol](#)

²⁶ [United Nations General Assembly, Human rights of migrants, A/65/222, 03 August 2010](#), para 43. See also Fundamental Rights Agency, [Criminalisation of migrants in an irregular situation and of persons engaging with them](#), 2016, at page 15.

special protection under law, and should not be penalised for unauthorised or, irregular entry into the State.

The Commission recommends the General Scheme be revised to include a provision that smuggled persons are not liable for an offence.

Identification procedure

The General Scheme is silent on the identification procedure for smuggled persons. The Special Rapporteur on the human rights of migrants has said that a State's anti-smuggling work should be:

“carried out in a manner that respects and protects human rights [...] and does not block access to asylum procedures and the identification of trafficked victims.”²⁷

An inadequate administrative procedure for the identification of smuggled persons may place individuals at risk of abuse and exploitation.²⁸ Flaws in the identification process may lead to victims of trafficking or exploitation incorrectly labelled as smuggled persons and may mean that they are unable to access their legal right to protection and assistance.²⁹ The Commission has previously expressed concern about the inadequate system for the identification of victims of trafficking,³⁰ which may lead to victims not being identified and not being able to access support and assistance.³¹ The Commission

²⁷ [United Nations General Assembly, Human rights of migrants, A/65/222](#), 03 August 2010, para 79.

²⁸ While, as outlined above, human trafficking and people smuggling are distinct offences in law, there may be difficulties in distinguishing between the two “without an active investigation.” Guideline 2 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking. See United Nations Economic and Social Council, [Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council](#), E/2002/68/Add.1, 20 May 2002.

²⁹ A smuggled person's dependence on a smuggler can place them at risk human rights violations (e.g. torture or other cruel, inhumane or degrading treatment or punishment; human trafficking; or exploitation) along a route and when they reach a State; and children, in particular, face a heightened risk of violence, abuse and exploitation United Nations General Assembly, [Sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; and trafficking in persons, especially women and children](#), A/72/164, 18 July 2017, para 32. Also, see United Nations Human Rights Council, [Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations: Report of the United Nations High Commissioner for Human Rights](#), A/HRC/34/31, 26 January 2017, para 14.

³⁰ [IHREC Submission to GRETA, 5 September 2016, at page 4.](#)

³¹ Understanding the lived experience of trafficking sheds further light on these barriers or gaps of provision in supporting victims. In a qualitative study of 15 victims of labour trafficking, Doyle et al (2019) provides a 'bottom up' analysis of the barriers in the investigation, prosecution and conviction of victims

has recommended that the victim identification process be placed on a statutory footing, which should include a clear statement regarding the rights and entitlements that flow from a positive decision regardless of the victim's nationality or immigration status.³² Also, any such identification process should take into account any language barriers, should be human rights, gender and trauma centred, and further should ensure measures are in place to protect the rights of people with disabilities.

The Commission recommends that proposed legislation place an identification process on a statutory footing, which should include a clear statement regarding the rights and entitlements that apply regardless of the smuggled person's nationality or immigration status.

The Commission further recommends that an identification process should be human rights, gender and trauma centred and ensure measures are in place to protect the rights of people with disabilities.

Right to international protection and principle of non-refoulement

The 'Facilitators Package' and the UN Protocol clearly state that anti-smuggling measures should not affect the rights of refugees and asylum seekers under international humanitarian law, in particular the principle of non-refoulement. This is not reflected in the General Scheme.

of labour exploitation specifically. The system of support was characterised by the victims as excessively slow and complicated, a lack of available support services or local knowledge of same services, fear of deportation or disclosing their migration status, while some experienced ongoing coercion and threats from traffickers. Some feared that they themselves had committed a crime. Doyle, S., Murphy, C., Murphy, M. Rojas Coppari, P. and Wechsler, R. (2019) *'I Felt Like She Owns Me': Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland*. British Journal of Criminology, 59, 231-251. See: http://mural.maynoothuniversity.ie/13881/1/CM_I%20felt%20like.pdf Also the Migrants Rights Centre Ireland exploratory study of stakeholder interviews and desk-based analysis on trafficking for forced labour in cannabis production found that there is sufficient evidence to suggest that some of those who have been convicted for drug-related offences in fact were trafficked to the country and engaged in forced labour. None of those convicted have been identified as human trafficking while traffickers enjoy impunity. This indicates a need for greater victim identification efforts by relevant authorities. Migrants Rights centre Ireland (2014) *Trafficking for Forced Labour in Cannabis Production: The Case of Ireland*. <https://www.drugsandalcohol.ie/21642/1/Full-Report-Trafficking-for-Forced-Labour-in-Cannabis-Production-1.pdf>

³² The Commission has addressed this concern in reports to the Council of Europe and United Nations. See IHREC, [IHREC Submission to GRETA in advance of its Second Evaluation Round of Ireland](#), 5 September 2016, at page 29; IHREC, [Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#), October 2019, at page 129.

The *Recommended Principles and Guidelines on Human Rights and Human Trafficking* provide that a State should ensure:

“procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.”³³

The Commission recommends that the proposed legislation expressly recognise that the provisions thereunder do not affect the rights, obligations, and responsibilities of States and individuals under international human rights law and international humanitarian law, in particular the Geneva Convention on the status of refugees and the principle of non-refoulement.

Return of a person who has been the subject of smuggling

The General Scheme does not address the obligations to return or accept the return of a person who has been the subject of smuggling. This obligation applies without prejudice to the right to apply for international protection and the principle of non-refoulement. Article 18(5) of the UN Protocol³⁴ provides that

“[e]ach State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.”

The Global Migration Group state that:

“[a]ny migrant who is asked to consent to a voluntary return process must be fully and meaningfully informed of the choice they make, having access to up-to-date, accurate and objective information, including in relation to the place and

³³ Guideline 2, point 7 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking. See United Nations Economic and Social Council, [Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council](#), E/2002/68/Add.1, 20 May 2002.

³⁴ [Article 18 of the UN Protocol](#).

the circumstances to which they will be returning. Consent must be given free of any coercion.”³⁵

A human rights based return should be focussed on the voluntary consent of a person to return rather than forced removals or returns.³⁶

The Commission recommends that proposed legislation recognise the obligation on the State to accept and facilitate the voluntary return of a person who was a subject of people smuggling.

Offences (Sections 5(1) – (3))

Section 5(1) states that a person who organises or, knowingly facilitates the entry into, or presence in, the State of a person who is not an Irish citizen or, a citizen of a designated state is guilty of an offence. It seeks to apply this offence to “[a]cts done or omissions made” outside as well as inside the state. Section 5(2)(c) and (d) extends the states jurisdiction to prosecute to certain extraterritorial activities.

An offence that is vague and uncertain in its remit and potential application will be contrary to the fundamental principle of legal certainty and also to the right to a fair trial.³⁷ A crime must be clearly defined in law, with sufficient precision to enable an individual to know or, at least find out with a sufficient measure of certainty, what is prohibited and unlawful. Also Article 7 of the ECHR, which prohibits punishment without law, requires offences and corresponding penalties to be clearly defined by law.³⁸ The concept of “law” within the meaning of Article 7, comprises qualitative requirements, in particular those of accessibility and foreseeability.³⁹ These qualitative requirements

³⁵ Global Migration Group (GMG) Working Group on Migration, Human Rights and Gender, [Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations](#), 2018, at pages 31.

³⁶ United Nations Office of the High Commissioner for Human Rights, [Recommended Principles and Guidelines on Human Rights at International Border](#), 2014, at page 37.

³⁷ See *King v. Attorney General* [1981] I.R. 233, 264: “Article 38.1 of the Constitution provides ‘no person shall be tried on any criminal charge save in due course of law.’ If the ingredients of the offence charge are vague and uncertain, the trial of the alleged offence based on those ingredients is not in due course of law.” *The People (Director of Public Prosecutions) v. Cagney* [2008] 2 IR 111 “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.” (para 121-122)

³⁸ *Douglas v. DPP* [213] IEHC 343.

³⁹ See for example - *Cantoni v. France*, application 17862/91, § 29

must be satisfied as regards both the definition of an offence,⁴⁰ and the penalty the offence in question carries.⁴¹

Sections 5(1)-(3) as currently drafted are vague and lack certainty. It is respectfully submitted that an individual would not be able to know with an adequate measure of certainty whether an act or, omission was unlawful under these sections. In particular, section 5 (2)(d) appears to allow for an extraterritorial prosecution where a European Arrest Warrant has been refused. It is unclear how this could occur where a surrender has been so refused. Also, it is noted that section 5(2)(c) requires the Director of Public Prosecution's consent, while section 5(2)(d) does not – the rationale for this distinction is not clear.

The Commission recommends that sections 5(1)-(3) be revised to ensure legal certainty; and that they it comprises of key elements of accessibility and foreseeability as regard to the definition of the offence and its scope of application. Section 5(3) states that a document issued by the government of a designated state certifying a "matter of law" in that state – "shall be admissible in proceedings for an offence under section 5(2)(a)" and "shall be conclusive as to the matter certified".

The presumption of innocence is a core component to the right to a fair trial.⁴² Allowing a certificate from another state to be admitted as a conclusive evidence would clearly impact on the presumption of innocence and an accused's right to a fair trial. Also, and in relation to fair trial rights there may be situations where there is a need to look behind a certificate from another State, in particular where fair trial or rule of law issues arise in respect of that State. Finally, section 5(3) in its current form is potentially unconstitutional, as determining the admissibility and conclusiveness of evidence are matters to be determined by the judiciary and not the legislator.⁴³

The Commission recommends that section 5(3) be revised to ensure that the accused's right to a fair trial is upheld and further that the role of determining evidence lies with the Courts rather than the legislator.

⁴⁰ *Jorgic v. Germany*, application 74613/01, 12 July 2007, paras 103-114.

⁴¹ *Kafkaris v. Cyprus* [GC], application 21906/04, 12 February 2008, § 150; *Camilleri v. Malta*, application 35349/05, 26 September 2006 §§ 39-45.

⁴² Article 38.1 of the Constitution, Article 47 of the Charter and Article 6 of the ECHR.

⁴³ See Article 34.1 of the Irish Constitution and *Maher v. Attorney General* [1973] IR 140.

Inchoate offences (Section 5)

The General Scheme does not refer to inchoate offences, for example, attempting to commit, or acting as an accomplice. Article 2 of the EU Directive provides that sanctions shall also apply to those who instigate, are an accomplice in, or attempt to commit the offence. Article 6(2) of the UN Protocol sets out similar categories – attempting to commit, accomplice, organising or directing – for those who may be held liable for offences. It is submitted that if similar offences are not reflected in primary legislation, legal uncertainty may arise, and impact on the effectiveness of prosecutions.⁴⁴

The Commission recommends that Section 5 be revised to include inchoate offences, in line with Article 2 of the EU Directive and Article 6 of the UN Protocol.

Financial or other material gain (Section 5)

Section 5 omits “financial or other material benefit” as an element of the offence of people smuggling.⁴⁵ Under the Directive (2002/90/EC), the facilitator of entry and transit does not need to have obtained any financial benefit from the smuggling in order for it to be considered a crime.⁴⁶ However, Article 6(1) of the Protocol requires that the act be for “financial gain or other material benefit”.

The United Nations Office of Drugs and Crime (the ‘UNODC’) has stated that the financial and material benefit element of the crime is a “key component” of the international definition,⁴⁷ explaining that it was intended by the drafters to ensure that

⁴⁴ In Turkey, the law previously prosecuted attempted migrant smuggling at the same level as an actually committed migrant smuggling operation. It has been reported the defence lawyer were able to successfully argue that an act of migrant smuggling could not be considered as such unless successfully completed. This is an important turning point for prosecutors in penalising smugglers. See [European Commission, DG Migration & Home Affairs A study on smuggling of Migrants. Characteristics, responses and cooperation with third countries Final Report September 2015](#), at page 89.

⁴⁵ UNODC, Issue paper: [the concept of “Financial or other material benefit” in the Smuggling of Migrants Protocol, 2017](#).

⁴⁶ Article 1(a) which concerns “any person who intentionally assists a person “to enter, or transit across” the territory does not include “financial gain” as a constituent element of the offence. However, article 1(b) states “any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens

⁴⁷ UNODC, [The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol](#), 2017, at page ix.

those who provided support for smuggled persons for humanitarian and family reasons were not prosecuted:⁴⁸

“The inclusion of financial or other material benefit as a constitutive element of the migrant smuggling crime is a clear indication of the Smuggling of Migrants Protocol’s focus on tackling those – particularly organized crime groups - who seek to benefit from smuggling migrants. This is also confirmed in the travaux préparatoires of the Protocol, which states that ‘the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties.’⁴⁹

Criminalising people smuggling without requiring a financial other material element to the crime may have the effect of criminalising a wider range of circumstances not intended under the Protocol, including for example people providing assistance on the basis of family or for humanitarian grounds. From the limited data that is available, it would seem that prosecutions of this nature are rare,⁵⁰ but nevertheless do occur.⁵¹ Moreover, it could have wider unintended policy implications. For example, research from the European Union has found that those involved in providing assistance to irregular migrants report that they fear sanctions, can also experience intimidation by some national authorities when carrying out their work.⁵²

It is acknowledged that a strict interpretation of financial gain may, in certain circumstances, be difficult to prove in the context of people smuggling. However, an examination of guidance developed by UNODC and other jurisdictions is instructive.⁵³

⁴⁸ UNODC, *The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol* (2017) p.14.

⁴⁹ [United Nations General Assembly, Interpretative notes for the official records \(travaux préparatoires\) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto](#) (A/55/383/Add.1, 3 November 2000, para. 88).

⁵⁰ UNODC, *Issue paper: the concept of “Financial or other material Benefit” in the Smuggling of Migrants Protocol 2017*, page 64.

⁵¹ [European Parliament, Directorate-General for Internal Policies, Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance in irregular migrants, 2016. page 40.](#)

UNODC, *Issue paper*, op. cit., p. 26.

⁵² [European Parliament Directorate-General for Internal Policies, Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance in irregular migrants, 2016. page 45.](#)

⁵³ [UNODC, Model Law against Smuggling Migrants, at page 14 -15](#)

For example, other jurisdictions have set out under law an adequately broad and clear definition of 'financial and other material gain' or 'benefit' and have developed legal guidance for law enforcement and prosecutors on how to prove 'financial or material gain' in the context of people smuggling.⁵⁴

The Commission recommends revision of the General Scheme to include 'financial gain or other material benefit' as an element to a Section 5 offence to ensure additional safeguards are included in this proposed legislation for those who provide assistance to smuggled persons for humanitarian or familial purposes.

Humanitarian purposes (Section 5(4))

Section 5(4) of the General Scheme provides that it will be a defence to a person charged under Section 5 to prove (on the balance of probabilities) that any act, or omission was;

- (a) to assist a person seeking protection, in the course of his or her work on behalf of a bona fide organisation, if the purposes of that organisation include giving assistance without charge to persons seeking such protection; or
- (b) for humanitarian purposes and otherwise than for gain.

Article 1(2) of the Council Directive 2002/90/EC provides that States may decide not to impose sanctions on a person who facilitates entry or transit in situations where the objective is to provide humanitarian assistance to the person/s concerned. The UNODC states that irrespective of whether national legislation includes the financial or material benefit element, there should be safeguards within the legislative framework to ensure that humanitarian groups acting with a purpose other than financial or other material benefit are not prosecuted.⁵⁵

Also, the Fundamental Rights Agency has stated that legislation to fight smuggling at Member State level, or explicitly exclude punishment, "should always include financial and material benefit as a requirement for punishment" or explicitly exclude punishment

⁵⁴ Financial or other material benefit" is defined as "any type of financial or non-financial inducement, payment, bribe, reward, advantage, privilege or service (including sexual or other services)." [UNODC, 2018 UN Model Law Against Migrant Smuggling, pages 13-14.](#)

⁵⁵ UNODC, [The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol](#), 2017, at page 71

for facilitation of unauthorised entry and stay based on humanitarian assistance grounds, in order to avoid risks of punishment for humanitarian assistance provided by, for example, NGOs to smuggled migrants.⁵⁶ The Special Rapporteur on the human rights of migrants has recommended that States ensure that all legislation concerning smuggling:

“has humanitarian exemptions applicable to persons and organizations that conduct humanitarian assistance or provide aid to migrants without criminal intent”.⁵⁷

Section 5(4) is cast as a defence, rather than an exemption, or exclusion.⁵⁸ This does not appear consistent with international recommendations, as in practice it means that a person acting on behalf of a “bona fide organisation” or for “humanitarian purposes” will likely be charged with an offence under Section 5, and thereafter it will be for that person to prove their innocence.⁵⁹ Accordingly, this will likely have a chilling effect on people providing assistance to people seeking international protection, or people acting on humanitarian grounds.

The Commission recommends that further consideration should be given to revising the General Scheme to provide humanitarian assistance as an exemption, or exclusion, under proposed legislation as opposed to a defence.

⁵⁶ [Fundamental Rights Conference 2014: Fundamental Rights and Migration to the EU: Conference Conclusions, FRA, November 2014](#), p.2.

⁵⁷ See United Nations Human Rights Council, [Right to freedom of association of migrants and their defenders: Report of the Special Rapporteur on the human rights of migrants](#), A/HRC/44/42, 13 May 2020, para 89(p).

⁵⁸ The 2000 Act cast this provision as an exclusion rather than a defence.

⁵⁹ The European Parliament stated that “in line with the UN Smuggling Protocol, acts of humanitarian assistance should not be criminalised”. See European Parliament, [European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised \(2018/2769\(RSP\)\)](#). In guidance on the ‘facilitators package’, the European Commission stated that Article 1 of the Council Directive must be interpreted as follows: “i) humanitarian assistance that is mandated by law cannot and must not be criminalised; ii) in particular, the criminalisation of NGOs or any other non-state actors that carry out search and rescue operations at sea, while complying with the relevant legal framework, amounts to a breach of international law, and therefore is not permitted by EU law; iii) where applicable, assessment of whether an act falls within the concept of ‘humanitarian assistance’ in Article 1(2) of the Directive – a concept that cannot be construed in a manner that would allow an act mandated by law to be criminalised – should be carried out on a case-by-case basis, taking into account all the relevant circumstances.” See European Commission, [Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence](#) (September 2020) p.7.

Key terms are not defined, including for example, “humanitarian purposes”, “for gain” and “bona fide organisation” which could give rise to legal uncertainty. A European Commission evaluation of the ‘Facilitators Package’ highlighted that the main concern for non-governmental organisations, civil society groups, religious groups, and academics was the effect of the definition of ‘humanitarian assistance’ on the provision of humanitarian assistance to smuggled persons.⁶⁰ Concerns were expressed that the ‘Facilitators Package’ has not been effective in creating clarity and legal certainty with regard to the distinction between humanitarian assistance and the criminal offence of facilitation, as the Council Directive does not define ‘humanitarian assistance’.⁶¹ To address this, proposed legislation could explicitly set out clear definitions and include categories of persons and groups who provide services that are exempt from prosecution. For example, in France the relevant law provides that:

“relatives and anyone providing legal, linguistic or social advice, or any type of assistance for exclusively humanitarian purposes, have been exempted from criminalisation as regards facilitating transit or residence, although not for facilitating entry.”⁶²

The Commission recommends that key terms be defined, including for example “humanitarian purpose”, “for gain” and “bona fide organisation”. In particular

⁶⁰ The 2017 evaluation assessed whether the EU legal framework against facilitation of unauthorised entry, transit and residence was achieving its objectives and was still fit-for-purpose. The evaluation examined the effectiveness, efficiency, relevance, coherence and EU added-value of the existing provisions. The evaluation noted a perceived lack of legal certainty and a lack of appropriate communication between authorities and those operating on the ground. The European Commission considered a legal revision at that stage to be unnecessary, the Commission proposed a more effective exchange of knowledge and good practices between prosecutors, law enforcement and civil society to address the practical consequences of those weaknesses. See European Commission, [REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package \(Directive 2002/90/EC and Framework Decision 2002/946/JHA\)](#), March 2017. Also see Research Social Platform on Migration and Asylum (ReSOMA), [Crackdown on NGOs and volunteers helping refugees and other migrants](#) (June 2019).

⁶¹ European Commission, [REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package \(Directive 2002/90/EC and Framework Decision 2002/946/JHA\)](#), March 2017, at page 20.

⁶² European Commission, [Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence](#) (September 2020) p.5.

proposed legislation should include categories of persons and organisations that provide services that would be exempt from prosecution.

Aggravating factors (Section 5(5))

Section 5(5) of the General Scheme provides that a court can take into account the following aggravating factors when determining sentencing a person for an offence under Section 5 that:

- (a) endangered or was likely to endanger the life or safety of the person to whom the offence related; or
- (b) resulted in the exploitation or inhuman or degrading treatment of the person to whom the offence related.

Section 5(5)(a) above only partially reflects the Article 1(3) of the Framework Directive (2002/946/JHA). In particular, it does not include that “the offence was committed as an activity of a criminal organisation” as an aggravating factor. Other EU member states have developed a wider range of aggravating factors, including:

- When the offence involves a minor;⁶³
- When offence relates to a protected characteristic, such as age, pregnancy, disability;⁶⁴
- Using directly, or indirectly fraudulent actions, violence threats or any form of coercion;⁶⁵ and
- When the offence (or rather the abuse committed in the context of smuggling) caused incurable illness, permanent physical or mental incapacity, loss of an organ or use of organ, or serious mutilation.⁶⁶

The Commission recommends that aggravating factors be amended to include a wider range of categories, including offences that involve: membership of criminal

⁶³ See for example Belgium – Article 77, Belgian Immigration Law, 15 December 1980. Also [European Commission, DG Migration & Home Affairs A Study on smuggling of migrants: Characteristics, responses and cooperation with third countries, Final Report, 2015](#). Pages 73-74. Other countries referred to in this report include: Bulgaria, France, Italy and Niger.

⁶⁴ Ibid. See specifically Belgium.

⁶⁵ Ibid, Countries that include this as an aggravating factor are Belgium, Hungary, Italy and Sweden.

⁶⁶ Ibid.

organisation, minors, women and disabled people, fraud and coercion, and offences that cause permanent physical or mental harm.

Humane treatment of persons on vessels (Sections 9, 10, and 11)

Sections 9, 10 and 11 respectively address the exercise of enforcement powers in respect of ships, and are intended to give effect to Article 8 of the UN Protocol on measures against the smuggling of migrants by sea. The UN Protocol states that the operation of measures under Article 8 shall be in accordance with the safeguards clauses in Article 9 of the Protocol. Specifically, Article 9(1)(a) provides:

“Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

(a) Ensure the safety and humane treatment of the persons on board;”

Sections 9, 10 and 11 of the General Scheme do not contain a corresponding provision to “ensure the safety and humane treatment of persons on board”.

The Commission recommends that Sections 9, 10 and 11 of the General Scheme be revised to adequately give effect to Article 8 of the UN Protocol and include a clause that requires State officials to ensure the safety and humane treatment of the persons on board the vessel.

Penalties (Sections 5(6), Section 13 and Section 19)

The General Scheme provides that a person or, a body corporate (Section 19 and 5(6)) who commits an offence under it shall be liable:

- (a) on summary conviction, to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 12 months or both, or
- (b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 10 years or both.

Section 13 of the General Scheme provides for the forfeiture of ships, aircrafts of or other vehicles used for the purpose of people smuggling. The Court, in determining whether to make such an order, shall have regard:

“to the value of the property, and to the likely financial and other effects, on the person whose property it is proposed to forfeit, of the making of the order (taken together with any other order that the court contemplates making).”

Given the financial incentive that is linked to people smuggling, a further exploration of monetary penalties and other non-custodial sanctions may be warranted. For example, in Belgium, fines for the smuggling and trafficking of migrants are applied depending on the number of “victims”. The higher number of victims the higher the fine - this approach aims to take the financial gain from the smugglers as the high fines are proportional to the profits made by that traffickers or, smugglers.⁶⁷ It is noted that Section 13 of the General Scheme allows for the forfeiture of vehicles used in human trafficking, which is in line with Article 1.2 of the EU Framework Directive. However, Article 1.2 also provides that, where appropriate, criminal penalties might also include:

“a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed verified and deportation.”⁶⁸

Furthermore, Article 3 of the EU Framework Directive identifies specific penalties for legal entities, including for example temporary or permanent exclusion from the practice of commercial activities, judicial winding up orders, or exclusion from entitlement to public benefits or aid.

The Commission recommends further examination of the range of penalties that might be imposed on a person, or body corporate, including financial and other sanctions to ensure that penalties are effective, proportionate, and dissuasive.

⁶⁷ Ibid.

⁶⁸ [Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence](#)

Training for enforcement officials

Article 14(1) of the UN Protocol⁶⁹ sets out that “States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing” people smuggling and “in the humane treatment of migrants who have been the object of” people smuggling. Article 14(2)⁷⁰ provides that states shall cooperate with international organisations, non-governmental organisations, and civil society in designing training.

The *Recommended Principles and Guidelines on Human Rights at International Borders* developed by United Nations Office of the High Commissioner for Human Rights (the ‘OHCHR’) recommends ongoing training for enforcement officers – focussed on international human rights relevant to their work, including; non-discrimination; gender equality; and identifying and supporting vulnerable persons – to ensure that their work takes account of emerging issues and human rights based responses.⁷¹ GRETA has recommended that Irish authorities ensure that frontline staff involved in the identification or referral of victims of trafficking should be provided with regular training, guidance, toolkits and criteria. Equally, there is a need to provide training to relevant officials on the investigation and prosecution of people smugglers in order to ensure prosecution and conviction of smugglers.

The Commission recommends that consideration be given to including a provision requiring the State to provide specialised training, for officials, including both training on prosecuting people smugglers and on the rights and humane treatment of smuggled persons.

Irrespective of the inclusion of a statutory provision on training, the Commission recommends that the adoption of proposed legislation should be accompanied by ongoing training in these areas to relevant actors. Training should be human rights

⁶⁹ [PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME](#), 2000.

⁷⁰ Ibid.

⁷¹ Guideline 3 of the *Recommended Principles and Guidelines on Human Rights at International Borders* recommends that States build human rights capacity. See United Nations Office of the High Commissioner for Human Rights, [Recommended Principles and Guidelines on Human Rights at International Border](#), 2014, at pages 18-19.

and gender focused and should also take into account the right of children and people with disabilities.

Data collection and review

The General Scheme is silent on data collection and does not provide for a mechanism to review the adequacy and effectiveness of the legislation. The OHCHR recommends that States should continually assess the human rights impact of migration measures and consider facilitating independent monitoring of the operation of migration policies and legislation, and conditions in reception facilities to ensure compliance with human rights principles.⁷² The *EU Action Plan against migrant smuggling (2015-2020)* emphasises the importance of EU Member States effectively tackling the offence by:

“[g]athering and sharing information on modus operandi, routes, economic models of smuggling networks, on links with trafficking in human beings and other crimes, and on financial transfers”.⁷³

The Council of the EU have also stressed:

“the need to significantly increase and improve the collection, sharing and analysis of data and knowledge about migrant smuggling, in order to develop more effective, coordinated, evidence-based policies”.⁷⁴

In effectively implementing the ‘Facilitators Package’, the European Parliament have called upon Member States to:

“put in place adequate systems to monitor the enforcement and effective practical application of the Facilitators Package, by collecting and recording annually information about the number of people arrested for facilitation at the border and inland, the number of judicial proceedings initiated, the number of

⁷² United Nations Office of the High Commissioner for Human Rights, [Recommended Principles and Guidelines on Human Rights at International Border](#), 2014, at pages 12-13, 26.

⁷³ European Commission, [EU Action Plan against migrant smuggling \(2015 - 2020\)](#), May 2015, at pages 4-6.

⁷⁴ Council of the European Union, [Council conclusions on migrant smuggling](#) (March 2016).

convictions, along with information on how sentences are determined, and reasons for discontinuing an investigation".⁷⁵

Data collected should also be disaggregated along the grounds set under equality law.⁷⁶

The Commission recommends that the State collect and publish disaggregated data on the offences under proposed legislation.

The Commission recommends that consideration be given to including a provision that the Act will be reviewed after a set number of years (e.g. two years) to monitor the effectiveness of the law in addressing the smuggling of persons. Any such review should require the relevant Minister to place a report before the Houses of the Oireachtas on the operation of the Act.

⁷⁵ European Parliament, [*European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised \(2018/2769\(RSP\)\)*](#). point 6.

⁷⁶ The Equal Status Acts 2000-2018 prohibit discrimination along nine grounds: gender, marital status, family status, age disability, sexual orientation, race, religion, and membership of the Traveller community. Housing assistance discrimination is also prohibited in respect of accommodation services.



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