Legislative Observation

Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

Submission on the General Scheme of the International Protection Bill 2025

Irish Human Rights and Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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Introduction

The Irish Human Rights and Equality Commission ('the Commission') is Ireland's independent National Human Rights Institution ('NHRI') and National Equality Body ('NEB').

We protect and promote human rights and equality in Ireland.

We are the Independent Monitoring Mechanism for Ireland under the United Nations Convention on the Rights of Persons with Disabilities; the independent National Rapporteur on the Trafficking of Human Beings; and will be assigned the role of the Co-ordinating National Preventive Mechanism under the Optional Protocol to the Convention against Torture, pending ratification.

We are pleased to provide you with preliminary written submissions relating to the General Scheme of the International Protection Bill 2025 (the 'General Scheme'). We reserve the right to comment further during the passage of the legislation, as appropriate.

It is important to appreciate that we are not providing an exhaustive, line by line analysis of the General Scheme. Given the size of the EU Migration and Asylum Pact (the 'Pact') and the timeframe since the publication of the General Scheme (at the end of April) such an analysis is not possible. Therefore, the fact that we do not address any particular issue / Head within this submission should not be considered as an endorsement of the General Scheme's provisions.

Indeed, more generally, the Pact engages a wide range of human rights, including:

- human dignity;
- liberty;
- protection from inhuman and degrading treatment;
- the best interests of the child; as well as
- the right to fair procedure and to an effective remedy.

We anticipate that provisions of the Pact together with the transposing national legislation will be subject to legal challenge for their compliance with the EU Charter on Fundamental Right, in Irish courts and before the Court of Justice of the EU and indeed in other Member States.

We have sought to focus on key areas within the international protection system that are linked to our functions and mandates, and where we have been active in recent years.

Effective scrutiny of legislation by Oireachtas is essential for the protection of human rights and equality in Ireland. We have raised our concerns regarding the undermining of this scrutiny in our ENNHRI Rule of Law report, and in our engagement with the European Commission on its upcoming 2025 Rule of Law Report.[1]

[1] ENNHRI State of the rule of law in Europe – Ireland 2025 https://rule-of-law.ennhri.org/export?country%5B0%5D=25&year%5B0%5D=2025

The existing International Protection system

When announcing the publication of the General Scheme of the new Bill, on 29 April 2025, the Department of Justice stated that the current International Protection ('IP') scheme is not working effectively, and that the Pact offers us an opportunity in Ireland to reset.[2] Generally, the existing system is not working effectively, and some of its aspects are broken.

For example, the State's most recent statistics reveal that currently there are 2,987 IP applicants awaiting an offer of accommodation.[3] This is despite a ruling of the High Court last August, on foot of a case taken by the Commission, that this constitutes a breach of the right to human dignity (Article 1) under the EU Charter of Fundamental Rights.[4] This is just one of a number of High Court cases where the State has been found to be breaching the rights of IP applicants.[5]

The new asylum system, to be introduced on foot of the Pact, aims to significantly shorten the period between an IP applicant making their application and a determination of their status.[6] Central to this new system are essential protections and supports for IP applicants. Given the failures of the current IP system, operating under the International Protection Act 2015 (the 'IPA'), we have significant concerns about the capacity of the State to deliver the necessary

[2] https://www.gov.ie/en/department-of-justice/press-releases/minister-jim-ocallaghan-secures-cabinet-approval-for-publication-of-the-general-scheme-of-the-international-protection-bill-2025/

[3] https://www.gov.ie/en/department-of-children-disability-and-equality/publications/statistics-on-international-protection-applicants-not-offered-accommodation/

[4] *Irish Human Rights and Equality Commission v The Minister for Children, Equality, Disability, Integration and Youth, Ireland and the Attorney General* [2024] IEHC 493 https://www.courts.ie/acc/alfresco/173c9396-0529-4a34-9281-fd4441e5c1e6/2024_IEHC_493.pdf/pdf#view=fitH This judgment was appealed by the State to the Court of Appeal and the hearing took place on 6 and 7 March 2025, with judgment reserved.

[5] See: *S.Y. v Minister for Children, Equality, Disability, Integration and Youth & ors*, [2023] IEHC 187; and *S.A and R.J v Minister of Children, Equality, Disability, Integration and Youth, Ireland and the Attorney General*, [2023] IEHC 717.
In *SA & RJ* the High Court also referred questions, by way of the preliminary reference procedure, to the Court of Justice of the EU on the question of Francovich damages and State's assertion of *force majeure*. On 10 April (Case C-97/24), Advocate General Medina handed down her (non-binding) Opinion, which is available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=297818&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1

[6] For example, the Asylum Procedure Regulation, envisages first instance decisions on admissible applications on their merits in 6 months, while first instance, appeal and return decisions under the 'Border Procedure' are to take place within 3 months.

services (in terms of quantity and quality), by June 2026 and noting the likelihood of a detailed Bill not being available for legislative scrutiny until later this year.

The State's stated commitment to a human rights compliant IP system

The Department of Justice's *Brief on Ireland's National Implementation Plan for the EU Migration & Asylum Pact*[7] (the 'Brief on the NIP', published in March) speaks of the State's commitment to the protection of human rights in line with the EU Charter, the European Convention on Human Rights (the 'ECHR') and the UN Refugee Convention. Unfortunately, in our experience and for reasons set out in this submission, the State's record to date is not reassuring.

Timeline for the introduction of the new IP system under the Pact

In the next 12 months, the Government will transpose or implement six detailed legislative EU acts and align itself to 2 others.[8]

Concerns relating to the timeline

This gives rise to a number of concerns, including:

- The task of implementing the EU legal framework is considerable and the General Scheme (comprising 244 pages) was only published six weeks ago;
- While we recognise that there were circumstances that may have influenced this – including the formation of a new government – we are concerned at the level and quality of consultation to date;

[7] https://www.gov.ie/en/department-of-justice-home-affairs-and-migration/publications/brief-on-irelands-national-implementation-plan-for-the-eu-migration-and-asylum-pact/, see page 2.
[8] For details of the 8 legislative acts see Dr Caroline Sweeney, Senior Parliamentary Researcher, https://www.oireachtas.ie/en/how-parliament-is-run/houses-of-the-oireachtas-service/library-and-research-service/research-matters/2025-04-08-the-eu-pact-on-migration-and-asylum-implications-for-ireland/

- For example, we have had one meeting with Department of Justice officials to discuss the Pact, on one issue only (the new Independent Monitoring Mechanism) and we have expressed our concerns about the levels of engagement;
- In our view, precious time has been lost when key stakeholders could have been meaningfully consulted. While the General Scheme was not yet ready, the key issues arising from the different legislative acts were apparent to the Government and Department officials – the EU legislative acts have already been in place for a year;
- Consequently, given the size of the General Scheme and the likely size of the Bill, when published, as well as the 12-month timeframe for its enactment and the importance of the issues arising, the opportunity for meaningful pre-legislative scrutiny is now heavily circumscribed;
- We fear that issues that might well, in other circumstances, have been fully explored and resolved in consultation and meaningful Oireachtas scrutiny, may now end up being resolved by the courts;
- Furthermore, from 13 June 2026, the State will be operating two systems – i.e. the existing IP system under the 2015 Act and the new system introduced under the Pact - during a transition period, the duration of which is as yet unknown, but is likely to be for a substantial period; and
- There is no clarity to date on how these two systems will co-exist. For example:
    - what will the relationship be between the International Protection Appeals Tribunal and the new Second Instance Body? Will the functions be delivered by the same people? If so, how?
    - What are the chances of a credible system of vulnerability assessment – a pillar of the new system – being in operation from June 2026 if the existing system cannot deliver such assessments?

Key issues of concern arising in the General Scheme

As stated earlier, we are not in a position to provide a line-by-line analysis of the General Scheme.

Indeed, we would also draw the Joint Committee's attention to the fact that, in a number of locations throughout the General Scheme, there are areas where the Department has not yet provided any substantive detail, including, for example

- Head 41(2)(g) – notification of a transfer decision and the provision of information on how to access legal assistance;
- Head 77(8) – how to access legal representation when international protection is withdrawn;
- Head 110(2)(a)(v) - re guarantees for detained applicants and conditions of detention;
- Heads 112(5), 115, 122(13(a)– re alternatives to detention; and
- Heads 115(2)(b) and 115(3)– detention in the asylum border procedure.

The Right of IP Applicants to Legal Counselling & Legal Advice

Heads 2, 17 and 4 refer.

Under the Pact:[9]

- There is a right to free legal counselling[10] at all stages of the process; and
- A right to free legal assistance and representation at appeal stage;

[9] Article 15 Asylum Procedure Regulation.

[10] Article 16(2) - Free legal counselling shall include the provision of:
(a) guidance on and an explanation of the administrative procedure including information on rights and obligations during that procedure;
(b) assistance on the lodging of the application and guidance on:
(i) the different procedures under which the application may be examined and the reasons for the application of those procedures;
(ii) the rules related to the admissibility of an application;
(iii) legal issues arising in the course of the procedure, including information on how to challenge a decision rejecting an application in accordance with Articles 67, 68 and 69.

but Members States can provide free legal assistance and representation for the administrative procedure in accordance with their national law. Currently IP applicants are entitled to legal advice and representation throughout the IP process under the IPA.

According to the Asylum Procedures Regulation counselling is to be provided by legal advisers or other counsellors, admitted or permitted under national law to counsel, assist or represent the applicants.[11]

Legal advice and representation is something that we are familiar with in the Irish legal system. Legal 'counselling' is not.

According to the Pact counsellors need to be '*admitted or permitted under national law*' - this implies a properly devised, trained and regulated profession, which is no surprise given importance of the issues in hand, the complexity of the new system and the tight timeframes.[12]

The Department of Justice's Brief on the NIP states:

> "the Department is consulting with stakeholders on the approach to be taken to the provision of legal counselling and advice."

We have not been consulted to date, nor is it clear whether the Department has had substantive consultations with the Law Society of Ireland or the Bar Council. It is clear from the General Scheme that the State intends using legal counselling. However – similar to the issue of age assessments, addressed below - the General Scheme is notable for its complete lack of clarity in relation to the State's intentions.

'Legal counselling' is not defined and is only mentioned on three occasions in the General Scheme. No substantive detail is provided.[13]

[11] Article 19(1) of the Asylum Procedure Regulation. The article also speaks of non-governmental organisations accredited under national law to provide legal services or representation to applicants.
[12] The UK equivalent is heavily regulated.
[13] For example, Head 2 deals with interpretation and the relevant entry for 'legal counselling' is as follows: *"'[L]egal counselling' has the meaning assigned to it by head yy"*

The right to appropriate legal support is part of IP applicants' right to an effective remedy under Article 47 of the EU's Charter of Fundament Rights. We anticipate that the limitations on access to legal advice and representation during the administrative process will likely be the subject of legal challenge for their compliance with the EU Charter of Fundamental Rights.

It is apparent from the General Scheme that there are areas where there is likely to be significant disagreement between IP applicants and the State during the administrative process[14] that give rise to issues of fundamental rights and where IP applicants will not be able to vindicate those rights, as necessary, absent appropriate legal representation.

We request that the Committee addresses the following key issues:

- IHREC considers that solicitors and barristers could not provide legal counselling under existing professional, ethical and regulatory rules;
- Nor is it clear that legal protections like confidentiality and legal privilege would apply during legal counselling;
- If legal counselling is provided during the administrative process, then the keeping of records by the counsellor will be vital and these will need to be available to solicitors / barristers at the legal assistance / representation stages; and
- The Asylum Procedure Regulation[15] requires the best interests of the child as a primary consideration – it is not clear how this could be vindicated absent legal assistance / representation throughout the process, and particularly in the case of unaccompanied minors.

[14] E.g. Head 75 and the implicit withdrawal of applications, or Head 25 and the examination of persons, including their password protected devices during screening
[15] Article 22.

The Commission recommends that the State abandons its intention to introduce legal counselling. Instead, as is permissible under the Pact,[16] the State should undertake to provide legal assistance throughout the International Protection process (i.e. administrative and appeal stages).

The treatment and protection of age disputed minors

Heads 63 and110 refer.[17]

Under the existing IP system, the Commission has provided legal representation[18] to a number of unaccompanied children where their minority status was disputed by the authorities. We are concerned at the lack of clarity in this current process.

The relevance of a proper age assessment procedure will be even more important when the new system, under the Pact, enters into force. This is because unaccompanied minors are exempt from the truncated 12-week asylum border procedure.[19] It is deeply concerning, therefore, that the General Scheme provides no clarity on what is envisaged under the new system with regard to age assessments.

[16] See Recital 16 of the Asylum Procedure Regulation.
[17] Head 110(1)(a) states that the asylum border procedure shall be applied to unaccompanied minors only in the circumstances referred to in Head 63(3)(a)(ii), that is to say where there are reasonable grounds to consider the applicant as a danger to the national security or public order of the State or the applicant had been forcibly expelled for serious reasons of national security or public order.
This is in contrast with unaccompanied minors who are in the accelerated examination procedure, where five grounds are set out under Head 63(3)(a), reflecting Article 42(3) of the Asylum Procedures Regulation. However, where a Member State finds that the required, special procedural guarantees of people cannot be provided in an accelerated procedure, then they cannot be subjected to the acceleration (Art 21(2)). In other words, unaccompanied minors cannot be subjected to an accelerated examination on the merits unless they are provided with "*the necessary support*" that "*create the conditions necessary for the genuine and effective access to procedures*" (Recital 20) and allows them to both benefit from the rights and comply with the obligations of the Asylum Procedures Regulation, and this during the entire procedure (Art 21(1)). For more detail see "*Children's rights in the 2024 Migration and Asylum Pact: PICUM Analysis New Migration Pact Series, October 2024*" at https://picum.org/wp-content/uploads/2024/10/PICUM-Analysis-Children-Rights.pdf pp. 20 and 21.
[18] Under section 40 of the IHREC Act 2014, the Commission's legal team may provide legal assistance (including advice and/or legal representation) to members of the public who fulfil specified statutory criteria.
[19] Except where there are reasonable grounds to consider that they are a danger to national security or public order – see *supra* at fn. 17.

Reference to age assessments is made on only four occasions in the General Scheme and it is clear that, while a Head specifically addressing age assessments was intended to be included in the General Scheme, it has not actually been produced.[20] This comes as no surprise given the lack of clarity in the existing system.

Indeed, under the existing system, we question whether IP age assessments are actually being undertaken by the authorities in compliance with the law. Under the current system, set down by the IPA, the age assessment duty rests with the International Protection Office (the 'IPO').[21] The procedure under statute[22] is that the IPO notifies Tusla when it appears to an IPO officer that person is under 18 years, and this triggers a presumption of minority under Child Care Acts. In practice Tusla undertakes an assessment of eligibility for services under the Child Care Acts, not an age assessment under the IPA. The statutory basis for the assessment undertaken by Tusla under the Child Care Acts is not absolutely clear.

We understand that Tusla's current position is that, while the determination of a child's age is not part of the intake eligibility assessment, there may be a requirement to explore if the person is in fact a child as part of that assessment. Furthermore, Tusla's position appears to have changed somewhat over the years. In our engagement with Tusla in 2023, we received a document that stated the following:

[20] Head 110(1)(b) states: that *"[w]here there is doubt as to the applicant's age, the competent authorities shall promptly carry out an age assessment in accordance with head yy (age assessment)"*. The other references to age assessments are at Head 141(10)(f) and Head 141(14)(b).

[21] Section 24(1) of the IPA 2015 provides that when an IPO officer, with reasonable cause, considers it necessary to determine whether an IP applicant is under 18, they may arrange for the use of an examination to determine the person's age.
As the Ombudsman for Children states '*it follows from this provision that the International Protection Office (IPO) has responsibility to undertake age assessments*.@ See the OCO's submissions on Ireland's EU Migration Pact National Implementation Plan, at www.oco.ie/library/oco-submission-on-the-eu-migration-pact/ at page 25.

[22] Section 14 of the IPA 2015 provides as follows:
1) Where it appears to an officer referred to in *section 13* that a person seeking to make an application for international protection, or who is the subject of a preliminary interview, has not attained the age of 18 years and is not accompanied by an adult who is taking responsibility for the care and protection of the person, the officer shall, as soon as practicable, notify the Child and Family Agency of that fact.
2) After the notification referred to in subsection (1), it shall be presumed that the person concerned is a child and the Child Care Acts 1991 to 2013, the Child and Family Agency Act 2013 and other enactments relating to the care and welfare of persons who have not attained the age of 18 years shall apply accordingly.

> "The Assessment for Eligibility for Services under the Child Care legislation is an age assessment approach conducted by Tusla's Social Workers"
>
> "… if deemed to be an adult (over 18 years old), the person is discharged from the care of Tusla, and referred to the International Protection Office (IPO) or the Garda National Immigration Bureau (GNIB) for further age determinations.
>
> NB: The IPO or the GNIB are the government agencies with a legal and statutory responsibility around age determinations for asylum seekers in Ireland". [emphasis added]

In its submissions on the Department of Justice's Brief on the NIP, the Children's Ombudsman noted as follows:

> "Age assessment is a complex and sensitive process, which should lead to procedures that are rights-based and follow strict, objective and reliable rules. Through our complaints and investigation's function, we have received information suggesting that the situation in Ireland is characterised by weak guarantees, fragmented procedural frameworks, and no application of the presumption of minority. It is the OCO's understanding that the IPO and Tusla have engaged in bilateral discussions during 2023/2024 with a view to clarify and define their respective roles and responsibilities in relation to age assessment. We are not privy to the final outcome of this process, and we would welcome clarity in this respect".[23]

We share these concerns.

[23] *Supra* fn. 21, at page 26.

Even if the IPO was to undertake age assessments in full compliance with the IPA, currently there is no clarity on the actual criteria that a person conducting the IPA age assessment must apply.[24]

We are concerned at the paucity of detail in the General Scheme in relation to how age assessments will be undertaken under the new system. On the basis of our experience to date, we are concerned that children will not be afforded the presumption of minority and, with no credible age assessment process in place, they will end up being treated as adults and entering the truncated 12-week asylum border procedure. Any such failure by the State will inevitably end up in litigation and most certainly will not serve the best interest of the children involved.

The Commission recommends that, as a matter of urgency and in advance of the publication of the Bill, the State should clarify its position and publish the detail of its intended age assessment process under the new system, so that meaningful pre-legislative scrutiny can take place.

The Commission recommends that proposed process should set out clearly the roles and responsibilities (under international protection legislation and not the Child Care Acts) for age assessments, the respective roles of the IPO, Tusla and any other proposed actors, the criteria for assessment of age, and provision for a transparent appeals process.

Legal representation for children during the age assessment process

Head 140 and Head 141(1)(f) refer.

[24] The IPA 2015 only sets out broad considerations that must form part of an age assessment under the Act. Section 24(2) IPA says:
An examination under subsection (1) shall be:
(a) performed with full respect for the applicant's dignity;
(b) consistent with the need to achieve a reliable result, the least invasive examination possible; and
(c) where the examination is a medical examination, carried out by a registered medical practitioner or such other suitably qualified medical professional as may be prescribed.

We are also concerned at the current lack of legal representation for children generally during the age assessment process.[25] It appears from the General Scheme that there is no intention to remedy this.[26] This reinforces the concern that legal 'counselling' is not sufficient to represent the interests of a child during the age assessment process. We propose that the Bill should include the right of an age disputed minor to legal representation throughout the age assessment process.

The treatment of IP applicants with false or no (destroyed) ID

Head 63(1)(a)(iii), Head 63(3)(a)(iv) and Head 106(1)(a) refer.

Article 45 of the Asylum Procedure Regulation[27] provides that the truncated 12-week asylum border procedure is mandatory for IP applicants who have intentionally misled the authorities by presenting false documents or where there are clear grounds to consider that they have, in bad faith, destroyed or disposed of an identity or travel document in order to prevent the establishment of his or her identity or nationality.

We are concerned, more generally, about the State's approach to IP applicants who present without valid identity or travel documentation. The Immigration Act 2004[28] criminalises[29] a failure to produce valid identity documentation on demand unless the accused had

[25] Currently children are provided with an advocate, but not a solicitor.
[26] Head 141 speaks of the appointment of representatives who, according to Head 141(1)(f), "*will assist with the age-assessment procedure*".
[27] Article 45(1) of the Asylum Procedure Regulation, referencing Article 42(1), point (c), which provides as follows:
"the applicant, after having been provided with the full opportunity to show good cause, is considered to have intentionally misled the authorities by presenting false information or documents or by withholding relevant information or documents, particularly with respect to his or her identity or nationality, that could have had a negative impact on the decision or there are clear grounds to consider that the applicant has, in bad faith, destroyed or disposed of an identity or travel document in order to prevent the establishment of his or her identity or nationality".
[28] Section 12(2)(b).
[29] Section 20 of the Passport Act 2008 sets down a series of offences related to the possession and/or use of false passports. Section 20(1)(f) of the International Protection Act 2015 provides for the arrest of an IP applicant without warrant if an immigration officer or Garda suspects suspects, with reasonable cause, that the applicant without reasonable excuse destroyed their identification or is/was in possession of false identification. The person may then be detained in accordance with the terms of this statute.

reasonable cause for not complying with these requirements. A person guilty of an offence under this Act[30] is liable on conviction to a fine or to up to 12 months imprisonment, or both.[31]

There are obvious reasons why people present without valid identity documentation, including:

- Many must travel illegally, often relying on smugglers who reclaim passports on arrival, forcing the person to present to authorities without a document;
- Victims of trafficking may have had their passports stolen, confiscated, withheld or have been trafficked on false documentation; and
- For some IP applicants, obtaining passports or visas is impossible or dangerous.[32] Visiting government offices in their home country may risk their lives, forcing them to travel without documents or use false ones.

Ireland is a signatory to the UN Refugee Convention. Article 31(1) of that Convention states that Contracting States shall not impose penalties, on account of their illegal entry, on refugees who, coming directly from a territory where their life or freedom was threatened enter without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Similarly, the UNHCR Handbook countenances IP applicants arriving in countries without documentation.[33] However, the Refugee Convention has not been made part of domestic law in Ireland and, accordingly, it cannot be relied on directly in a prosecution for a criminal offence.

It is a defence in criminal proceedings under the 2004 Act to prove reasonable cause (not defined) for not complying with the requirement to present valid identification. It would be rational to argue that people who present without a valid identity document, for any of the

[30] Section 13(1).
[31] See, for example, https://www.irishtimes.com/ireland/2024/02/23/man-jailed-for-two-months-as-a-deterrent-after-he-arrived-at-dublin-airport-without-a-passport/. See also section 22 of the Passport Act 2008.
[32] See, for example, Mr Sadullah Ovacikli, a Turkish prosecutor, had the Probation Act applied last October, see https://www.thejournal.ie/turkish-prosecutor-coup-fled-ireland-passport-jail-6503554-Oct2024/
[33] Para 196: "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents".

reasons set out above, are acting reasonably (in the words of the Irish statute) or in good faith (having regard to the wording of the EU's Asylum Procedure Regulation).

Prosecutions are nonetheless occurring. In that event individuals may receive criminal legal aid, but there are reasons why they might plead guilty – e.g. being held on remand pending the trial may extend the period in detention.

While a criminal defence solicitor, funded by criminal legal aid, will advise on the offence before the Court, there is a concern that they may not advise in the round, as immigration law may well not be an area of specialisation.

This Bill is an opportunity for the State to ratify the Refugee Convention and – in terms of providing legal certainty for individuals who have been forced to enter without valid identity documents - ensure coherence between the Refugee Convention, the Asylum Procedure Regulation (which only forces individuals into the Border procedure where they have acted in 'bad faith') and national law (to clarify the reasonable cause defence).

The Commission recommends that the Bill is used to ratify the relevant provisions of the Refugee Convention and to ensure coherence between the Refugee Convention, the Asylum Procedure Regulation and national law, in particular regarding the defences available to an International Protection applicant who fails to produce valid identification.

Concerns about the impact of the system on victims of human trafficking

For the reasons explained in the previous section, we are concerned that many victims of human trafficking will end up in the truncated asylum border procedure. We have a number of concerns regarding the Pact in relation to presumed and identified victims of trafficking. Ireland's implementation of the PACT must be consistent with other related EU legal

obligations on the State, including the Anti-Trafficking Directive[34] and Victims of Crime Directive.[35]

Victims of Trafficking Entering the Asylum Border and Accelerated Procedures

The streaming of cases based on the status of a country as a 'safe country of origin' is concerning, noting the countries of origin of victims of trafficking. The status of unaccompanied minors and age-disputed minors, and the risks regarding child trafficking needs to be considered, noting the chronic issues with the current low identification rate.

As referred to above, it is quite possible for victims of trafficking to not have proper identity documents. The EU Anti Trafficking Directive notes in the preamble[36] that signs of control of a trafficker over victims could be established when the persons '*are not in possession of their national identity cards or passports*.' [37] It is well recognised that traffickers make frequent use of forged or altered documents to traffic people[38] and that retention of travel or identity documents is a common form of coercion.[39]

The timelines raise significant issues regarding the disclosure of trafficking and the scope and timing of same, including how, in such a system, IP applicants who have been trafficked will be sufficiently supported and advised, and feel sufficiently safe to make such disclosure.

Screening Process

Preliminary vulnerability checks are only one part of the screening process. Furthermore, preliminary vulnerability checks risk being superficial. Seven days is not considered enough time to ensure vulnerabilities and needs, including in respect of trafficking, are fully identified. If the applicant is a potential victim of trafficking and is not identified/detected during the

[34] https://eur-lex.europa.eu/eli/dir/2024/1712/oj https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0036
[35] https://eur-lex.europa.eu/eli/dir/2012/29/oj/eng
[36] Recital 27.
[37] https://eur-lex.europa.eu/eli/dir/2024/1712/oj
[38] https://www.europol.europa.eu/crime-areas/forgery-of-administrative-documents-and-trafficking-therein
[39] https://webapps.ilo.org/infostories/en-GB/Stories/Forced-Labour/Deceptive-Recruitment-and-Coercion#retention-of-passports

screening, they are at risk of going into the asylum border and accelerated procedures without receiving assistance and without being in receipt of legal advice. It is unclear how any 'dynamic' procedure would work and how responsive any such procedure would be any disclosure of trafficking and identification of related vulnerabilities at a later date. Most identified victims in Ireland have been third country nationals and effective vulnerability assessments play a key role on early identification as mandated by Article 11 of the EU Anti-Trafficking Directive. It is essentially that such assessments are undertaken in a thorough manner with sufficient time.

Limited Legal Aid for Victims of Trafficking

There is a right to legal counselling only in the administrative procedure and, as mentioned above, it is not clear what legal counselling means. Free legal aid is only available at appeal stage, which is inadequate, particularly for vulnerable cohorts such as victims of trafficking.

Victims of Trafficking and Detention / the New Centres at Borders

As discussed further below, detention is provided for in the Pact and is completely unsuitable for victims of trafficking. Minors can be also detained in certain circumstances, which is extremely concerning. There are concerns with the scope for *de facto* detention and the impact of this on potential victims of trafficking. There is a complete lack of information on the availability of specialist services/adequately trained staff in the new procedure and at new centres. This is of particular concern noting that there is completely inadequate provision of accommodation for victims of trafficking in the current system.

The Relevance of the National Referral Mechanism ('NRM') and the EU Anti-Trafficking Directive

The Criminal Law (Sexual Offences and Human Trafficking) Act 2024 provides for a National Referral Mechanism to better identify and support victims of trafficking. The relevant provisions are yet to be commenced, however it is understood that the system will be operational in the near future, once Operational Guidelines are finalised.

There is a complete lack of clarity or consideration of how the two processes will align. We await the accompanying NRM Operational Guidelines and clarity as to how the NRM can be aligned with the provisions of the International Protection Bill 2025. The General Scheme must also take into account the EU Anti Trafficking Directive, including the new obligations brought by the 2024 amendments, to ensure alignment.

Designated Asylum Border Facilities[40]

Heads 10, 13, 15, 17, 18, 19, 23, 24, 25 and 123 refer.

In March 2024, when announcing Ireland's intention to opt into the Pact, the then Minister for Justice announce that the legislative changes would provide for new dedicated accommodation for those who are being processed in the border procedure.

In its National Implementation Plan for the Pact, the Department of Justice stated that a key element of that plan is:

> "Designated reception centres:
>
> The plan provides for the co-location of screening and processing services. The centres will be one-stop shops with multi-disciplinary teams on site. Applicants may register an application digitally, receive legal counselling and advice, undergo a vulnerability assessment and a health check, and undergo an interview for both a first-instance decision and an appeal in the same location within a new statutory timeframe".[41]

While, on first reading, this stated intention may sound promising, we have concerns, including on the following issues:

The State's reliance on digital systems

[40] See definition in Head 123.
[41] See *supra* fn. 7, at page 4.

Digital access can have administrative advantages, but the State must recognise its limitations, including that:

- It presumes literacy;
- It does not necessarily facilitate the right to reasonable accommodations for those with disabilities; and
- Often vulnerable, traumatised or isolated individuals struggle with the digital access approach and the lack of human interaction. This has been apparent during the ongoing failure by the State to offer accommodation to male IP applicants – their only way of engaging with IPAS, while homeless, has been via an on-line portal.

The Commission recommends that alternatives to the digital access approach are provided for, in appropriate cases, in the new system.

Vulnerability assessments

Under the new system preliminary vulnerability checks[42] must be complemented by an in-depth vulnerability assessment.[43] The assessment of special reception needs[44] and special procedural guarantees[45] must be commenced as soon as possible and concluded within 30 days of the IP application and conducted by specially trained staff.

We believe that there is little or no realistic prospect that, by June 2026, Ireland will be able to deliver the necessary level and quality of vulnerability assessments within the prescribed time periods. This view is based on the State's chronic failure to deliver vulnerability assessments under the existing IP system. The extent of the State's current failure is clear from the information provided on the *IPAS Support Services* page[46] on gov.ie, which says as follows:

[42] Conducted under the Screening Regulation.
[43] As set down by the Asylum Procedures Regulation and the Reception Conditions Directive.
[44] Article 25 of the Reception Conditions Directive.
[45] Article 20 of the Asylum Procedures Regulation.
[46] https://www.gov.ie/en/international-protection-accommodation-services-ipas/publications/support-services/

> ‘Vulnerability Assessment Programme
>
> The significant increase in numbers of arrivals and constraints on available accommodation across the International Protection Accommodation Service (IPAS) portfolio placed extreme pressure on IPAS resources, including the Vulnerability Assessment Programme.
>
> As a result, a decision was made in March 2024 to suspend the programme and to seek to procure an external contractor to manage it. Following the suspension, resources were redirected to support operations across the Resident Welfare Team and IPAS overall, including to conduct a Vulnerability Triage of newly arrived single male applicants and identify those with very high needs requiring priority for accommodation when available.
>
> The Vulnerability Assessment Programme recommenced on 11 November 2024 for families applying for International Protection.
>
> In addition, Vulnerability Assessments will be offered to those who were queued for an assessment when the former programme was suspended in March 2024…”.

Vulnerability assessments are a legal entitlement under the Pact. Moreover, they are essential for the fair and credible operation of the new system in compliance with national and EU human rights norms.[47] Without them IP applicants’ rights will not be adequately protected, with significant consequences for their asylum application.

[47] In this context the content of the General Scheme requires closer scrutiny. For example, Head 19(6) provides that where an applicant refuses to undergo a vulnerability check, they shall be informed by the Minister that such a refusal may have implications as to the credibility of their claim where adverse pre-existing health conditions or previous torture is raised as part of his or her international protection claim. This may have particular implications for individuals who have recently suffered torture, or sexual violence and it does not speak to a trauma informed approach to vulnerability assessments, nor to the protection of fundamental rights, including human dignity.

The Commission recommends that the Joint Committee pays particular attention to this issue during pre-legislative scrutiny.[48] This concern reinforces the importance of IP applicants being able to access legal advice and representation throughout the IP process (and not just at appeal stage).

Detention

Heads 12, 45,115 and 122 refer

The Department of Justice's Brief on the NIP says[49] as follows:

> "The Pact sets out clear requirements for certain applicants to reside in particular areas or accommodation centres, and to report to the authorities regularly. Detention can only be applied in accordance with all the safeguards provided for in the Reception Conditions Directive – i.e. it can only be used when it proves necessary and proportionate based on an individual assessment, as a measure of last resort when less coercive measures are not possible, and subject to judicial scrutiny. Where detention is used as a last resort it will be managed through AGS and the Irish Prison Service. Alternatives to detention are being explored to deliver enhanced monitoring of applicants."

We note that the General Scheme greatly expands on the use of **detention** relative to the current system.

We are concerned that this gives rise to human rights and equality considerations, particularly as it relates to children and other vulnerable individuals. For example, Head 12 provides for the arrest without warrant and detention of applicants who refuse to travel to screening

[48] https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice/2024-04-30/3/
[49] Page 5.

centres "*until screening is completed*", which is not subject to an absolute temporal limit.[50] Children can also be arrested without warrant and detained.

We note that the General Scheme also provides for detention in circumstances as disparate as a person being a "probable source" of infective illness (Head 18) and being at risk of absconding (Head 45).[51] If enacted, and notwithstanding the Department of Justice's statement in its Brief on the NIP, this will make detention a significant feature of the new system.

Applicants for international protection are not criminals. They are exercising their right to apply for protection. We are concerned that the introduction of such a broad suite of detention provision will lead to the effective criminalisation of applicants for international protection in some circumstances, or at least the perception that it has been criminalised.

De facto **detention**

Heads119 and 121 refer

The use of ***de facto*** **detention** is not addressed in this statement and this is of concern.

To date, concerns about the level of restrictions/control in Direct Provision centres is already well documented.[52] The Pact will now permit the imposition of requirements on IP applicants to reside in a particular area or accommodation centre and to report to the authorities regularly. It is unclear how this will be operationalised.

For example, does the State envisage:

[50] Head 12(4) speaks of a two-day limit, but this is subject to Head 12(5), which provides that '…notwithstanding subhead (4), where a person is detained for the purposes of Screening in accordance with head 12, his or her detention shall continue until such a time as Screening is completed or further detention is ordered in accordance with head 122". The notes on Head 12 state that: "[t]he policy view is that two days is a reasonable period for detention under the terms of this head (…) However, it is prudent to add additional time in case a transfer cannot be completed quickly e.g. in the context of adverse weather conditions".

[51] See also Heads 115 and 122.

[52] E.g. see Dominic Hewson (2022) 'All the time watched': an analysis of disciplinary power within the Irish Direct Provision system, Journal of Ethnic and Migration Studies, 48:3, 676-692, DOI: 10.1080/1369183X.2020.1844001 To link to this article: https://doi.org/10.1080/1369183X.2020.1844001.

- Requirements to sign in/out;
- To swipe in/out;
- Curfews;
- Restrictions in km from base;
- Tagging IP applicants; or
- Apps on phones to track location?

We are concerned that in practice the Bill potentially will go even further.

Head 121 (Restrictions on Movement) speaks of reporting requirements for some IP applicants to immigration officers or the Garda Síochána and (Head 121(5)) provides that the Minister may make such arrangements, including contractual arrangements, as they consider appropriate for electronic systems in respect of such reporting requirements (including the processing of biometric data).

In our view all of this will amount to *de facto* detention.

We would also draw the Committee's attention to the fact that Ireland is the only country governed by the Pact that has not yet ratified the Optional Protocol on the Convention Against Torture ('OPCAT') and, accordingly, that will fail to afford IP applicants the protections deriving from OPCAT.

OPCAT, when finally ratified, will cover both places of detention and *de facto* detention and there will be a requirement for the National Preventative Mechanism to include an agency/agencies that will inspect these centres. It is, as yet, unclear who this will be.

The State's operation of detention and *de facto* detention will be governed by the rights guaranteed under the EU's Charter of Fundamental Rights including: the right to dignity (Article 1); prohibition on degrading treatment (Article 4); liberty (Article 6); respect for family and private life (Article 7); and protection of personal data (Article 8) etc. If the new Act does not adequately protect these rights, this aspect of the new systems will likely be heavily litigated.

The Commission recommends that the International Protection Bill should be enacted at the same time as the full ratification of OPCAT.

The Independent Monitoring Mechanism

Heads 123 to 139 refer.

The Pact requires Member States to provide for an independent mechanism to monitor compliance with fundamental rights during the screening of new arrivals and when assessing asylum claims at external borders.[53] The General Scheme proposes the establishment of the position of Chief Inspector of Asylum Border Procedures.

The EU's Fundamental Rights Agency (the 'FRA') has, as required by the Pact[54], produced guidance on the design and functions of an Independent Monitoring Mechanism ('IMM'). It is clear that, in light of this guidance, the proposal in the General Scheme falls well short of the Pact's requirements for an IMM and is not fit for purpose.

For example:

The requirement for independence

FRA notes:

- the need for a high degree of independence and operational autonomy drawing from safeguards in OPCAT, the Venice Principles and the Paris Principles; and
- that the IMM should be free from any institutional affiliation with authorities responsible for asylum management.

[53] Article 10 of the Screening Regulation and Article 43(4) of the Asylum Procedure Regulation.
[54] Article 10(2) of the Screening Regulation.

In other words, the Chief Inspector should not be answerable to the Government – but the General Scheme makes clear that they can be removed by the Minister for Justice (Head 124(4)).[55]

Operational and financial autonomy

The standards set down by FRA operational autonomy imply that the Chief Inspector would have their own budget and vote, and would not be reliant on the Minister for Justice for funding. However, the General Scheme makes clear that funds are provided by the Minister (Head 126).

Independent and effective investigations

Head 131 provides that if a potential breach of fundamental rights is identified in the course of an inspection of a designated asylum border facility, the Chief Inspector may conduct a formal investigation. However, the powers afforded to the Chief Inspector are largely regulatory in nature. For example, there is no indication that officers of the Chief Inspector will be warranted or are skilled to collect evidence, if necessary, to the criminal law standard.

It is clear from Head 134 that the Chief Inspector's reporting line is to the Minister for Justice[56], who shall (according to Head 134(2)) notify the Chief Inspector as soon as practicable of the action (if any) that will be taken on foot of the report and the rationale for same. This is hardly independent oversight, given that the Minister for Justice has ultimate authority over and responsibility for the asylum border facilities. What if the Chief Inspector discovers urgent issues of child neglect/protection, or evidence of commission of a criminal offence? Even if the Chief Inspector has the authority to bypass the Ministerial reporting line in appropriate circumstances – something that is not apparent from the General Scheme - one

[55] Furthermore, Head 128 envisions the establishment of an Advisory Board for the Chief Inspector. However, according to Head 129(13) the Minister for Justice has the power to dismiss Board members for 'stated misbehaviour'.

[56] Head 134(1) states that '[i]f the Chief Inspector is of the opinion that a report under head 133(7) discloses a concern in relation to the fundamental rights of applicants in designated border facilities the Chief Inspector shall provide a copy of the report to the Minister with such recommendations as he or she sees fit".

could very quickly get into challenging investigative scenarios involving a number of agencies inc. the Garda Síochána, Fiosrú (if the detention facility is a Garda station), Tusla, or the Health and Safety Authority etc. This does not augur well for efficient and responsive investigations. What if, during the course of an investigation, the Chief Inspector concludes that an individual is being unlawfully detained? Does the Chief Inspector have the power/authority/responsibility to take or arrange for Article 40/*habeas corpus* proceedings in these circumstances?

The Commission recommends that Part 15 of the General Scheme is discarded and replaced by an Independent Monitoring Mechanism that complies with the requirements of the Fundamental Rights Agency Guidance, including independence, and that is fit for purpose.

Conclusion

The Pact and the introduction of a new IP system is a reality and, whatever individuals' views on the merits or otherwise of the system, it is in all of our interests that the system works well, in a lawful and efficient manner, with due regard for the human rights of the people entering the system.

The General Scheme does not provide the necessary guarantees or reassurance.

Given the size of the task in hand, time is exceptionally tight. The General Scheme alone is 244 pages. The Bill will be a multiple of this in terms of size and will not be produced until later this year. Nevertheless, the Act will have to be in place before June next year.

For these reasons pre-legislative scrutiny is now heavily circumscribed. The Government needs to devise an early and collaborative system of working with stakeholders to seek to ensure that the new Bill will be fit for purpose. Otherwise, we are in danger of introducing a system that does not respect and vindicate the fundamental rights of IP applicants, that gets mired in litigation and, ultimately, loses the confidence of the public and those it is supposed to serve and protect.

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