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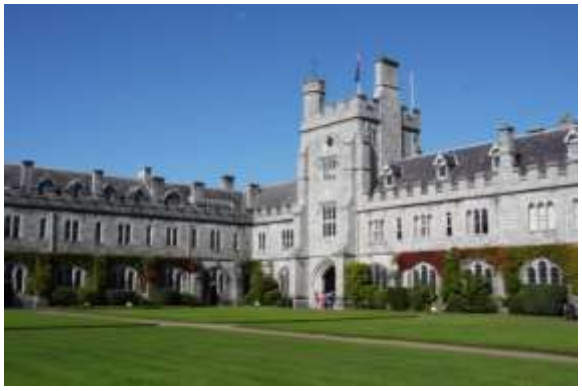

# Legislative Submissions

## Submission on the Scheme for the Immigration Residence & Protection Bill, 2006

CCJHR

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# CCJHR Legislative Submissions

1. *Submission on the Scheme for the Immigration Residence & Protection Bill, 2006*, Siobhán Mullally, Claire Cumiskey, Deirdre Morgan & Liam Thornton, 2006
2. *Submission on Criminal Justice (Trafficking and Sexual Offences) Bill, 2006*, Stop the Traffic Campaign, Cork, 2006

# Submission on the Scheme for the Immigration Residence and Protection Bill, 2006

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## *Introduction*

We welcome the publication of the Scheme for an Immigration, Residence and Protection Bill. The Bill will provide a long awaited opportunity to address questions of immigration and asylum in Ireland in a fair, comprehensive and transparent manner.

Despite many welcome steps outlined in the Scheme, we are concerned that the Scheme, as currently drafted, does not comply fully with international and European human rights standards or best practice in migration and asylum law.

We have recommended further amendments to the Scheme. At a general level, we are concerned that the Scheme mixes questions relating to asylum and protection with more general migration issues concerning immigration and residence for a range of purposes. This may lead to a lowering of protection standards and to further confusion amongst asylum applicants and all those involved in immigration and asylum processes.

## *General Comments on the Scheme*

### Ministerial Discretion

We are concerned at the level of Ministerial discretion retained in relation to immigration and asylum manners. In the interests of a fair and transparent process, it would be preferable in matters relating to immigration / asylum policy were subject to the full rigours of parliamentary scrutiny and given legislative footing in dedicated immigration / asylum legislation.

### Trafficking

The Bill fails to provide a legal response to trafficking and, in particular, fails to address the protection needs of trafficked persons, including, in particular, women and children.

Further amendments are required to ensure compliance with best practice in international standards and to implement the recommendations of the Report of the Working Group on Trafficking (April 2004). In identifying the further amendments required, this submission draws on the:

- UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children;
- 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women;
- 1989 UN Convention on the Rights of the Child;
- Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
- Council of Europe Convention on Action against Trafficking in Human Beings (CoE Convention);
- EU Framework Decision on Combating Trafficking in Human Beings (for the purpose of labour and sexual exploitation) and the;
- EU Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography

It is our submission that a comprehensive legal response to trafficking must:

- Define "trafficking in persons" in accordance with international standards;
- Provide effective tools for law enforcement bodies;
- Strengthen the response of the legal system;
- Establish effective protection and support measures for victims and witnesses of trafficking;
- Provide effective and appropriate protection measures for child victims of trafficking;
- Establish prevention policies.

1. In accordance with international standards, a clear statement is required setting out the **irrelevance of the victim's consent** where any of the improper means specified in the definition of trafficking are used. The irrelevance of consent in all cases involving children must also be clearly stated.

2. The Bill should provide for the establishment of a **specialised unit or task force** within An Garda Síochána, with responsibility for coordinating responses to trafficking and providing training to specialised personnel.

3. **'Effective, proportionate and dissuasive sanctions**' are required to eliminate the problem of trafficking. The Bill should be amended to provide for presumptive mandatory sentences, particularly in the context of **trafficking offences relating to children**. Provisions for monetary sanctions in the context of serious criminal offences are inappropriate and should be removed from the Bill.

4. The Trafficking Bill does not make any provision for the **protection of victims' rights**. In accordance with International and European standards, the Bill should be amended to provide a comprehensive legal response to the needs of victims of trafficking. This would provide for, at a minimum, the following:

    - Identification of victims;
    - Protection of private life of victims;
    - Appropriate medical assistance to victims;
    - Secure accommodation;
    - Recovery and reflection period (minimum 30 days);
    - Temporary Residence permit (minimum 6 months);
    - Translation and interpretation facilities where necessary;
    - Access to counselling and information services, in particular, as regards legal rights, in a language that can be understood;
    - Access to legal aid;
    - Right of access to education for children;
    - Right to access social welfare benefits as necessary.
    - Voluntary repatriation and return of victims;
    - Right of access to the asylum process.

5. Sensitive, well-resourced and effective **protection measures are required for child victims of trafficking**, in accordance with the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. In particular, **prevention measures** arising from the vulnerable position of **child asylum seekers**, whether as separated children, or in the context of family reunification, are urgently required.

6. To ensure full **recovery and reintegration of victims of trafficking** into society, the following should also be guaranteed:

    - Right to work;
    - Right to access vocational training and education;
    - Compensation and legal redress against traffickers.

7. **Protection measures for witnesses and victims during legal proceedings** should be made, including specifically provision for: physical protection, relocation, identity change and assistance in obtaining employment.

8. Provision should be made for protection of victims during **trial proceedings**, in a manner compatible with article 6 of the European Convention on Human Rights. Specific measures required include: protection of the victim's private life, and, where appropriate, identity; victims' safety and protection from intimidation.

9. An offence of '**using the services of a victim of trafficking**', with knowledge that the person is a victim, should be included in the Bill.

10. **A national coordinating body** is required to monitor and coordinate agency responses to trafficking. The publication of the Bill provides an opportunity to establish, on a statutory basis, a coordinating body.

## *Comments on Selected Provisions of the Scheme for the Immigration, Residence and Protection Bill*

### Head 25: Long-term residence permit

**Section 2 (a)** outlines the 'standard eligibility requirements' for long-term residence permits. Section 2(a)(iii) states that the applicant must show that he/she is in a position to support himself and has not needed to avail of state support. The preamble to *Council Directive 2003/109/EC* concerning the status of third country nationals who are long-term residents states that '*economic considerations should not be a ground for refusing to grant long-term resident status and shall not be considered as interfering with relevant conditions*'. It is therefore submitted that economic considerations should be removed from the eligibility requirements under this head.

*Article 7(2) Council Directive 2003/109/EC* provides that written notification of a decision to grant a long-term residence permit should be given '*… as soon as possible and in any event **no later than six months** from the date on which the application was lodged*'. No provision relating to the period within which applications will be determined are evident in the scheme of this Bill and we would encourage the Minister to insert a clause to this effect in order to ensure that the determination process is conducted in a fair and transparent manner.

Of concern is the discretion afforded to the Minister under **section 5** to issue a long term residence permit to persons who do not satisfy the reckonable residence requirement and such permits will remain subject to probationary conditions which will apply for 2 years. The probationary conditions concerning medical care and access to third-level education for dependents should be removed from the Bill.

## Head 26: Protection temporary residence permit

**Section (1)(b)(iv)** states that a protection residence permit is not an **identity document**. *UNHCR* state that, due to that fact that the principle of non-refoulement applies to persons awaiting a final decision in relation to an application for protection, that such persons should be provided with an identity document in order to ensure that the right to protection against refoulement is respected. Therefore, we urge the Minister to amend this section to ensure that protection temporary residence permits will be accepted as identity documents in accordance with the international principle of non-refoulement as provided for in Article 33 Refugee Convention 1951, Article 3 CAT, Article 3 ECHR and Articles 6 and 7 of the ICCPR.

**Section (3)** provides that the Minister may prescribe different periods of validity for different classes of protection applicants. This provision is not representative of a fair and transparent immigration or asylum policy and such unnecessary discretion is likely to lead to inconsistencies and confusion.

## Head 27: Protection residence permit

We welcome the fact that no distinction is to be made between the period of validity for protection residence permits issued as a result of the grant of refugee status or subsidiary protection.

**Section 5** outlines the entitlements of persons granted a permit under this head. *ECRE (ECRE Information Note on Council Directive 2004/83/EC, October 2004)* has stated that such rights and entitlements should be as a result of a decision to grant refugee/subsidiary protection and should not be dependent on the issuing of a residence permit. In effect persons granted status could be barred from accessing basic entitlements as a result of delays in the initial issuance or renewal of permits. In addition, Hathaway argues: *'Protection includes not only the establishment of physical security but also the **early provision of identity documentation** requisite to assessing basic entitlements.' (Reconceiving International Refugee Law, 1997 p.8)* (emphasis added).

It is recommended that a statement is inserted under this head confirming that the right to access entitlements flows from a decision to grant protection and that such a right is not necessarily dependent on the possession of a permit. In order to facilitate access to entitlements, a system should be put in place to insure that permits are issued simultaneously with the notification of positive status determinations.

## Head 28: Foreign nationals' Register

This head provides for the compilation and maintenance of a foreign national's register for persons who have been granted residence permits. *UNHCR EXCOM Conclusion No. 91* recommends that the registration of refugees and asylum-seekers should conform with **fundamental principles of confidentiality** and be *'conducted in a non-intimidating, non-threatening and impartial manner, with due respect for the safety and dignity of refugees'*, and by staff (including a sufficient number of female staff) who have received adequate training. We recommend that an express declaration confirming that confidentiality will be respected in the registration process is included under this head.

In addition, persons subject to protection residence permits should not be punished for any failure on their part to provide authorities with documentary evidence, where such a failure is due to the absence of such information. The manner in which information is requested should be in writing and there should

be a possibility of extending the 7-day time period in which information must be provided in order to allow for the accruement of documentation, health and family considerations.

## Heads 29-31: Cessation & Revocation of Protection Permit

Cessation of Refugee Status should only take place in accordance with Article 1(C)5 and 6 of the 1951 Convention Relating to the Status of Refugees. It should be explicit in the envisaged Bill that the duty is on the Minister to prove that a person has ceased to be a person requiring refugee or subsidiary protection. The list of reasons for revoking or refusing to re-new the residence permit of a person with refugee or subsidiary status under **Head 29(3)(d)** and **Head 29(3)(e)** is broad and open-ended, and does not sufficiently taken account of Ireland's obligations under Article 3 of the UN Convention Against Torture and Article 3 of the European Convention of Human Rights and Fundamental Freedoms. *UNHCR ExCom Conclusion No. 69 on Cessation of Status* notes that there should be a review of human rights situations in an objective and verifiable way.

It is commendable that the Minister is required to consider the length of residence of the individual in question and closeness of family, social, economic and cultural ties with the State. Considering a person's conduct, by looking at his/her conduct (including any criminal convictions) should be secondary to ensuring that the country of origin can be considered to offer sufficient protection from persecution.

Under **Head 31** the Minister should be explicitly required to examine, in revoking the residence permits of refugees or those who have subsidiary protection, whether the situation in their country of origin/habitual residence has gone through a genuinely fundamental change, that such a change is enduring, and that there is an eradication of the reasons for persecution, and an actual restoration of protection by that particular State (See: UNHCR Ceased Circumstances guidelines.)

The procedure to be invoked under **Head 30** and in particular the 15-day time limit to make representations to the Minister, and appeal any decision to the High Court is too short and given the extremity of the measures is exceptionally short given the seriousness of the actions which the Minister is attempting to carry through. It would also be appropriate that the Minister consider whether such countries are parties to the main UN Human Rights Treaties and any regional human rights treaties in force. There should also be an automatic appeals process to review the decision of the Minister, possibly by the Protection Appeals Tribunal, to ensure an independent review of any finding of cessation or revocation of the protection permit. This would have the practical effect of limiting appeals to the High Court. However, as mentioned, the time limits involved for making representations and appealing the Minister's decision is exceptionally short.

## Head 37: Member of a family of a holder of a protection residence permit

The right to family unity is contained in Article 6 European Convention of Human Rights. Article 16(3) of the Universal Declaration of Human Rights and 23(1) of the International Covenant on Civil and Political Rights proclaim that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

*EX Com (No. 85 (XLIX) 1998) exhorts states* to consider applications for family reunification "*in a positive and humanitarian spirit and* ***without undue delay***". There is no provision under this head providing for the time frame in which application for family reunification will be processed. From anecdotal evidence and the experience of NGO's working in the area, applications for family reunification currently take

between 12 and 18 months to process and this has resulted in undue and unreasonable hardship to applicants. The High Court has said that the Minister for Justice was at fault for not delivering a decision in relation to an application for family reunification in a timely fashion (*Iatan & Ors v Commissioner of An Garda Síochána & Ors* 2006 IEHC 30).

It is recommended that a provision is inserted under this head which clearly states the time frame in which a decision on an application for family reunification will be reached. Such a provision should at a minimum be in accordance with *Council Directive 2003/86/EC* on the right to family reunification which states that a decision should be reached no later than nine months from the date of the lodging of the application (Article 5(4)).

*Council Directive 2003/86/EC* also provides that:

> *"A set of rules governing the procedure for examination of applicants for family reunification and for entry and residence of family members should be laid down. Those procedures should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as transparent and fair, in order to offer appropriate legal certainty to those concerned".*

Under the current system in this jurisdiction, applications for family reunification are ultimately decided at the discretion of the Minister for Justice, Equality and Law Reform. We recommend that procedures are put in place, such as those provided for in the EU Directive on family reunification in order to insure that applications for family reunification are determined in a fair and transparent manner.

In order to respect the family unit in accordance with international guidelines, a determination on the right to family reunification should not be taken solely on the basis of documentary evidence. *Article 11(2) Council Directive* provides that "*Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.*"

Also of note is *EX Com No. 24 (XXXII) 1981* which stated that "*When deciding on family reunification, the* ***absence of documentary proof*** *of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment".*

It is imperative that the determination of an application for family reunification does not hinge entirely on documentary evidence submitted by the applicant and the Scheme of this Bill should be amended to reflect the European and International guidelines in this area.

According to *ExCom No. 88(L) 1999* – when considering an application ***'liberal criteria'*** should be applied in identifying family members who have the right to be admitted in order to promote 'comprehensive' family reunification. **Section 5 (a) and (b)** of the Bill identifies family members that may benefit from family reunification. It is submitted that such criteria is excessively narrow and does not recognise diverse cultural notions of what constitutes a family unit and should be amended to include same sex marriages and family relationships that do not necessarily have a common blood line.

Under the current family reunification application process and the scheme of this bill there is no provision for an **independent appeal** of a decision to refuse an application for family reunification. UNHCR has stated under its procedural standards for refugee status determinations, the provisions of which should be applied to family reunification determinations, that appeals should be decided by an officer other than the officer that the decided the initial application, applicants should be informed of

the right to appeal, be provided with an appeal application form and time frames should be set out, in which appeal applications will be determined. We recommend that the Bill includes all the provisions outlined above in order to provide for a family reunification application procedure that reflects best practice in accordance with international guidelines.

## Head 38: Definition of *refoulement*

**Head 38(1)** Sets out a definition of *refoulement* followed by three grounds on which it can apply.

We commend the Minister for providing an express provision regarding the obligation of non-refoulement. We recommend the Minister expressly state the *jus cogens* nature of this obligation and recognises the obligations which *non-refoulement* provides due to this status and the consequential obligation it places on the state. We would also urge the Minister to expressly list the International Treaties under which the obligation of *non-refoulement* derives such as:

1. Article 33 of 'the Geneva Convention', which **Head 38(1)(a)** attempts to reference. We urge the minister to use the language of the convention.
2. Article 3 of the ECHR, which is incorporated into Irish law under the ECHR Act 2003. We remind the Minister that under Section 3(1) every organ of state is bound to perform its functions in a way, which is compatible with the ECHR. We also note that **Head 38(1)(b)** which makes an indirect reference to Art 3 should be redrafted to use the language of the ECHR and that the reference to "*(within the meaning of Head 43 [Entitlement to protection in the State]),"* be deleted as it excludes nationals of other EU member states from protection under Article 3, which is incompatible with the ECHR and the ECtHR jurisprudence.
3. Article 3 of the UN Convention Against Torture (UNCAT), we commend the Minister for the express inclusion of UNCAT within the meaning of the Criminal Justice (UNCAT) Act 2000 and to extend this to reference to within the meaning of UN Committees Against Torture's jurisprudence.
4. Article 7 of the International Covenant on Civil and Political Rights, (ICCPR),

We are concerned at the element of 'pick and choosing' of standards that is the situation of the present draft, and that the express inclusion of the above treaties and standards from which the obligation of *non-refoulement* derives will offer clarity to both decision makers and those potentially *refouled.*

We remind the Minister of both UNHCR EXCOM Conclusion No.77 which *"[s]tresses the importance of [international instruments] interpretation and application by States in a manner consistent with their spirit and purpose" and* UNHCR EXCOM Conclusion No.72 which reaffirms *"the responsibility of States to respect and ensure the fundamental human rights of refugees and asylum-seekers to life, liberty and security of person as well as to freedom from torture or other cruel, inhumane or degrading treatment or punishment"*

**Head 38(1)** allows for the determination of *non-refoulement* to be **in the opinion of the Minister,** we remind the Minister in applying his discretion of UNHCR EXCOM Conclusion No.79 which states *"the principle of non refoulement is not subject to derogation."* This status derives both from customary and treaty law including the ECHR and we reiterate or earlier reference to Section 3(1) of the ECHR Act 2003.

**Head 38(2)** this provision allows for protection from serious assault or sexual assault.
We commend the Minister's inclusion of this protection-orientated clause.

**Head 38(3)** this provides for a presumption of *non-refoulement* if a person chooses or acquiesces in the choice of destination.

We recommend the removal of this provision as it conflicts with the non-derogable nature of the obligation of *non-refoulement* and is contrary to the spirit and purpose of the principle. It is tantamount to asking the individual to consent or to waiver the right of protection from torture, cruel or inhuman conditions. This provision could lead to actual *refoulement* contrary to the states obligations and we remind the Minister of the positive obligations which UNCAT and the ECHR places on states to include positive steps in order to prevent torture and other related acts being committed. We remind the Minister of UNHCR EXCOM Conclusion No102 (j), which *"Recalls its Conclusions No 6 and 7, as well as numerous subsequent references made in its other Conclusions to the principle of non-refoulement; expresses deep concern that refugee protection is seriously jeopardized by expulsion of refugees leading to refoulement; and calls on States to refrain from taking such measures and in particular from returning or expelling refugees contrary to the principle of non-refoulement."*

**Head 38(4)** states *"The sending of a person to a safe third country within the meaning of Head 61[Safe countries] is presumed not to be a refoulement."*

We recommend the deletion of this provision as being contrary to the non-derogable nature of the obligation of *non-refoulement*. The allowance for a presumption of *non-refoulement* raises issues of protection for the applicant, especially considering the applicable procedures for **Head 61** applicants which is truncated and does not allow for appeal with suspensive effect. In practice this would mean that the rebuttal of this presumption (if allowed) would be carried out after the person is returned to potential conditions amounting to *refoulement* thus contravening the states obligations. The duty of non-refoulement is binding right up to the actual moment of return and requires that there be a system in place which would be able to access the risk to the individual applicant prior to return at that moment, this would involve amongst other things accessing up to date country of origin information. The State is also obliged to protect against the possibility of chain *refoulement*. We remind the Minister of UNHCR ExCom Conclusion no 85 (a) which "*Stresses that, as regards the return to a third country of an asylum-seeker ... including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker(s) in accordance with accepted international standards, will ensure effective protection against refoulement, and will provide the asylum-seeker(s) with the possibility to seek and enjoy asylum"*

The **Head 38(4)** provision conflicts with the purpose of *non-refoulement* to provide protection. (See discussion under Head 61 on geographical reservation, the individual nature of an asylum claim and appeal with suspensive effect.)

**Head 38(5)** considers that the removal of a person whose temporary residence permit has expired or been refused and was founded on an expression of fear related to that destination is not a *refoulement*, and the procedure for making a contrary representation is under **Head 59.**

We recommend the removal or redrafting of this provision as the conclusive statement that this "is not a *refoulement*" is contrary to the purpose of protection under the obligation of *non-refoulement* and regard the discretionary procedure outlined in Head 59 as not sufficient to amount to access to fair and effective procedures to ensure against actual *refoulement*. We remind the Minister of UNHCR EXCOM Conclusion no 85(q) which *"Strongly deplores the continuing incidence and often tragic humanitarian consequences of refoulement in all its forms, including through summary removals, occasionally en masse, and reiterates in this regard the need to admit refugees to the territory of States, which includes*

*no rejection at frontiers* ***without access to fair and effective procedures for determining their status and protection needs****;"*

## Head 43: Entitlement to Protection

Head 43 corresponds to Article 2(c) of the EU Qualification Directive. In relation to the use of the word 'protection' UNHCR note that the more correct term is 'asylum' given that it is a legal obligation of a State to ensure that this is provided for. Ireland has a duty to uphold its legal international obligations which it accepted when acceding to the 1951 Convention and 1967 Protocol. Article 3 of the 1951 Convention outlines that there should be no discrimination on the basis of nationality for those seeking to apply for refugee status. This is reconfirmed in UNHCR ExCom Conclusion No. 31: *The nature of the general legal obligations of states parties to the Covenant* (2004). There it was stated that the rights within the 1951 Convention and 1967 Protocol "must also be available to all individuals regardless of their nationality and statelessness…" (para. 10). To ensure compliance with human rights law and best practice, Ireland should remove the limitation of EU Member State nationals from eligibility for refugee status.

## Head 43(3)(a): Subsidiary Protection

The exclusion of stateless persons from subsidiary protection within the Scheme does not fit within the definition of 'subsidiary protection' provided for by Article 2(e) of the EU Qualification Directive. Article 2(e) of the Directive defines subsidiary protection as capable of being provided to third country nationals or stateless persons who do not qualify for refugee protection but who face 'serious harm.'

The exclusion of nationals of EU member states is worrying and in line with UNHCR recommendations EU nationals should be eligible for subsidiary protection.

*UNHCR ExCom Conclusion LVI of 2005* recognised the need to provide for complementary protection and that this should strengthen rather than undermine refugee protection regimes'.

The grounds of protection under the subsidiary head 'serious harm' are very limited. Persecution for persecution's sake (i.e. not related to one's race, religion, nationality, political opinion, membership of a social group) may also take place and it is apt that subsidiary protection protects such people. An example of some areas where protection, in line with general principles of international human rights law, could be extended to include: those who are in danger/were in slavery or servitude (UDHR, Art. 4; ICCPR, Art. 8; ECHR, Art. 4) recognition as a person before the law and entitled to equal protection by the law (UDHR, Art. 6 and Art. 7 ICCPR, Art. 14 and Art. 16; freedom of thought and conscience (UDHR Art. 19; ICCPR Art. 18; ECHR Art. 9); freedom from arbitrary arrest and detention (UDHR Art. 9; ICCPR Art. 9; ECHR Art. 5 and Art. 6); freedom from arbitrary interference with private and family life (UDHR, Art. 12; ICCPR Art. 17, ECHR Article 8) and gross violation of social and economic rights which is directed at an individual or group of individuals (and where violation is not based on the five grounds) (UDHR Arts. 22-27, ICESCR Arts. 6-15; CEDAW, Art. 1; CRC Art. 26 and Art. 28). All the grounds mentioned above are protections which people in Ireland enjoy under *Bunreacht na hEireann*.

UNHCR has noted in its key issues of concern as regards the Qualification Directive that the requirement of an individual risk in situations of generalised violence is a significant step backwards in the international protection regime.

## Head 44: Application for protection and information re: procedure

The right to legal representation should not be qualified in terms of "where reasonable and practicable." Indeed, there should be an explicit provision in the envisaged Bill to guarantee protection applicants the right to legal advice and representation at all levels of the process. The practical effect of this would be seen in better and more reasoned decisions at first instance, a less confused first instance procedure and more confidence within the system as a whole by all the parties within the system.

There should be a duty on the State to provide legal representation from the first instance, ensuring greater fairness and efficiency in the system.

The claimant should also be guaranteed a right to information in a language which s/he understands.

## Head 44(2): Unaccompanied Minors / Separated Children

The State is obliged to ensure that the rights of a refugee claimant child, whether accompanied or unaccompanied, enjoys all the rights set out by the UN Convention on the Rights of the Child. In line with other child based legislation, the best interests of the child should be the paramount and primary concern in all actions that should be undertaken by State bodies when dealing with a refugee claim by an unaccompanied / separated child.

Depending on the age and maturity of the child, his/her wishes should be taken into account and the envisaged Bill should place an obligation on the HSE to ascertain the child's view on issues which arise from his/her refugee claim and his/her reception within the State (CRC Article 12).

In General Comment Number 6 of 2005 on *Treatment of Unaccompanied and Separated Children outside their Country of Origin* the expert Committee on the Rights of the Child note the need for child sensitive assessment of the application by suitably qualified individuals within the refugee determination body. The child should have access to a person who will represent his/her interests. The Committee noted that under Article 2, unaccompanied children are entitled to all the rights as set out under the CRC.

In relation to the appointment of a 'responsible person', the role and functions of this individual should be clearly outlined. Paragraph 33 of General Comment 6 states that such a person should have the necessary expertise and that s/he will be the link between the child and the agency that has responsibility for taking care of the child. Such a person should be given the express obligation to safeguard the child's legal, social, psychological, material and educational needs. Given the legal issues involved with the claim for protection, the HSE, while always guardians for the best interests of the child, should be required to consult with lawyers as to whether an asylum claim should be brought.

If it is disputed that a person is a child, the Bill should make provision for examination by an independent paediatrician and where the results are inconclusive the person should be given the benefit of the doubt. Until such time as it is proved otherwise, a person claiming to be a child should be treated as such under national legislation.

In general there should be a legislative duty placed on all organs of the State to respect the rights of all children seeking asylum and to secure the child's best interests in accordance with the State's obligations under the CRC.

## Head 45: Minister's Investigation of Protection Applicants

It is important that the dependants of an asylum claimant have a say in the refugee status determination procedure and if it appears to the deciding officer that the dependent may have a claim of his/her own, then a separate RSD procedure should be initiated.

## Head 47: Burden of Proof

The burden of proof as provided for in Head 47 is not in compliance with international best practice. Proving refugee status is the joint task of the investigator and the claimant. As paragraph 96 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* notes "the duty to ascertain and evaluate the relevant facts is shared by the applicant and the examiner." Paragraph 97 of the *Handbook* notes that the requirement of evidence should not be too strictly applied. This principle should be specifically stated within the envisaged Bill and is reflected in Article 4 of the *Qualification Directive* where the duty of EU Member States to assess, with the applicant, the claim for refugee status is recognised.

Article 4(3) of the *Qualification Directive* sets out a variety of factors which the adjudicator should take account of and the envisaged Bill should explicitly outline these factors. Article 4(5) of the *Qualification Directive* should also be transposed into the Bill as it outlines areas where the applicant should be given the benefit of the doubt. Such grounds should be listed but not regarded as exhaustive.

The standard of proof applicable is not outlined in the Bill. It is recommended that the Bill incorporates the internationally accepted standard which is below the civil standard of proof and should be set at "a reasonable degree of likelihood of persecution." (See *I.N.S. v Cardoza* (1987) 467 US 407 and *R v Secretary of State for the Home Department, ex parte Sivakumaran et al.* (1988) 1 All ER 193).

## Head 48: Credibility

Many of the grounds which go towards the credibility of the applicant have little to do with the substantive claim for refugee status. In line with UNHCR best practice an applicant's credibility should not be affected by their failure to comply with domestic requirements regulating their stay within the State or which have only the most tentative links to the asylum claim. In assessing credibility, the UNHCR *Handbook* notes that many asylum seekers may feel apprehensive towards State authorities (para. 198) and the cumulative effect of the applicant's story as a whole should be examined and not isolated discrepancies. Where the applicant is seen as generally credible, s/he should be given the benefit of the doubt, once his/her statements are coherent and plausible, and does not run counter to generally known facts. Best practice on assessing credibility should be reflected in the Bill. This will ensure both a fairer and more efficient asylum process, avoiding unnecessary appeals processes.

## Head 49: Duty to Co-Operate

The asylum procedure should be on the basis of mutual cooperation between the asylum seeker and deciding officer.

## Head 50: Prioritisation of applications

Vulnerable groups should have their claims for asylum prioritised. In all other situations, a single asylum process, respecting due process and administered efficiently, will ensure a fair and efficient asylum process. Research to date has shown that accelerated and multiple asylum procedures tend to divert resources into time consuming, expensive judicial review and appeal hearings.

## Head 51: Report of Investigation of protection application

In line with best practice the interviewer should be specifically trained on matters of refugee status determination. The envisaged Bill should make such training a requirement. It should be expressly stated that the RSD procedure is inquisitorial rather than adversarial.

The grounds upon which the Minister may decide not to grant an oral appeal for the applicant in many cases have little to do with the substantial case being put forward by the refugee claimant. The right to a fair hearing is essential within refugee status determination procedures. Appeals can often clarify inconsistencies in the claimant's story or bring to bear new facts which had not previously been put before the tribunal.

The possibility of a 4-day time limit should be removed from the envisaged Bill. The 10-day limit is insufficient to ensure that the claimant and his legal representatives can produce an appeal, which is wholly paper based.

The right to an oral hearing for all appeal cases should be restored in line with best practice.

## Head 52: Notification of determination of protection application at first instance

The 15-day time-limit for appealing a negative determination should be extended to ensure that a refugee claimant has sufficient time to review his/her position and submit an appeal.

## Head 54: Protection Review Tribunal, Head 56: Role of the Members of the Tribunal & Head 57: Role of the Chairperson

The Scheme makes clear the independence which the Tribunal as a whole shall have, however it is unclear as to the independence of each of the Members. It is welcome that the Chairperson of the Tribunal would be able to conduct elements of review to ensure consistency of decisions within the Tribunal. However, it should be noted that previous decisions can only assist Members at a most general level, given the very individualised nature of refugee claims. However, the envisaged Bill should make clear, in line with administrative law, that the decision is for the decision-maker, the assessor of the appeal, to make decisions. Members should only be guided by law and in and there is a duty on the Member to act in an impartial and independent manner (*McLoughlin v Minister of Social Welfare* [1958] I.R. 1 and article 6(1) of the ECHR). In this regard it is for the Member to decide whether to regard directions of the Chairperson. The envisaged Bill should provide an explicit provision that Members are independent in the exercise of their duties.

The power of the Chairperson to request the High Court to re-examine a particular case is welcome, however, judges should be encouraged to attend workshops on asylum and immigration law to ensure

that they will arrive at decisions informed by best practice and Ireland's international legal obligations in these fields.

## Head 59: [Subsequent] [further] applications for protection

A case deemed to be withdrawn should be subject to a preliminary admissibility procedure, and this would be better done by a person who would not be the Minister. In relation to persons who withdrew their application, or whose application was deemed withdrawn, there should be provision for a substantive review of their asylum claim.

## Head 60A: Access to Tribunal Decisions

The Scheme fails to provide full and fair access to Tribunal decisions, failing to fully respect the principle of 'equality of arms' in adjudication processes. This provision should be amended so as to allow for publication of tribunal decisions, with names of applicants deleted and anonymity protected.

## Head 61: Safe Countries

The concepts of safe country of origin and safe third country have attracted considerable controversy within international refugee law as access to asylum procedures is limited through the application of generalised rather than individual assessments of safety, bringing with it an increased risk of *refoulement*.

The criteria for safety includes reference to the 'general political circumstances', whether or not there is 'generally and consistently' no persecution, and general compliance with the standards provided for the ICCPR, UNCAT and the ECHR.

The references to general compliance fail to acknowledge the individualised risks that specific groups may face, (e.g. minority communities, LGBT persons). The reference to international human rights instruments is unduly limited and should include each of the core human rights treaties, as a minimum.

The possibility of designating part of a country as safe expands the application of the internal protection alternative, without, however, providing any guidance as to the standards to be applied in determining the reasonableness of such an alternative.

The expanded use of accelerated procedures in the Bill would lead to considerably increased risks of *refoulement.*

The absence of a right of appeal with suspensive effect, also increases the risk of *refoulement,* and brings into doubt the availability of an effective remedy. In the case of *Conka v Belgium* the European Court of Human Rights held that the notion of an effective remedy under Article 13 requires that the remedy should prevent the execution of measures that are contrary to the Convention. In this case the applicant had no guarantee that the Conseil d'Etat of Belgium would deliver its decision or hear his case before his expulsion, or that the authorities would allow him a minimum period of grace in order for his appeal to be heard before expulsion. The Court concluded that the applicant did not have a remedy available that satisfied the requirements of Article 13.

**Head 61(1):**
It should be noted that the scheme of the Bill lists as part of its objectives in the preamble, **Head 1(i)** states *"to maintain consistency with Ireland's international legal obligations [including obligations under the Geneva Convention] with respect to refugees and to uphold its humanitarian traditions with respect to the displaced and the persecuted;"* We commend the Ministers inclusion of this objective. It is important to note that the 'Safe Country of Origin' concept has no legal basis in 'the Geneva Convention' (as defined in the scheme Head 3).

Issues of concern that arise in relation to the designation of a country or part of a country as 'safe' include:

**De facto geographical reservation:** The 1967 Protocol Art1 (3) states that the Geneva Convention shall be applied "without any geographic limitation". Consequently the designation of a country or part of a country as safe is a de facto reservation to the Geneva Convention. The UNHCR agrees 'safe country of origin' can be used for expedited treatment of an application on the condition that there are procedural safeguards to protect the asylum seeker. The procedures applied to an applicant as a consequence of a **Head 61** order, are contained under **Heads 50, 51, 52, 58.** These procedures, if implemented, will lead to significant gaps in protection for the applicant and a failure to comply with standards set in the core UN human rights treaties. As such they are tantamount to a barrier to a 'fair and effective or efficient' assessment of claims as recommended in UNHCR EXCOM Conclusions nos 103 and 87.

**Applicable Procedures:**

**Head 50:** allows for applications from safe countries to be given priority at the Minister's discretion, consequently falling under **Head 51(2)** meaning that in applying for an appeal under **Head 58** they will be subjected to reduced time limits of either TEN days under **Head 52(5)** without an oral hearing or the possibility, at the discretion of the Minister, under **Head 52(6),** to a further reduced time limit of FOUR working days without an oral hearing under **Head 52(7).**

**Time Limits:** Asylum applications raise complex legal issues and need appropriate time limits for preparation which reflect this complexity. An applicant's 'country of origin' is a distinct issue from any credibility issues as confirmed by UNHCR EXCOM Conclusions no 30 and 12. These state that accelerated procedures should be confined to 'clearly abusive' or 'manifestly unfounded' claims and *"are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Geneva Convention nor to any other criteria justifying the granting of asylum." "e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention;"*

**Oral Hearing:** In the interest of fair, effective and good administrative decisions an applicant should be provided with an oral hearing on appeal before any decision that would adversely affect him or her is taken to allow for equality of arms (Article 6 of the ECHR and the right of reply under constitutional justice Article 40.3 of the Constitution)

The truncated procedures that exist at present in the scheme amount to a de facto exclusion and consequently form a geographical limitation contrary to the Geneva Convention. We would urge the Minister to reconsider these 'expedited' procedural barriers and apply appropriate and reasonable time limits. We would also recommend that oral hearings be allowed in all cases, as this is a necessary safeguard, considering the nature and content of refugee claims and the State's obligation under the principle of *non-refoulement*.

We recommend that the applicable procedures be amended to allow for applicants to access a regular asylum procedure irrespective of their country of origin and that **Head 58(11) (d) and (e)** should be amended to provide for an express right to legally aided representation and an interpreter for oral hearings. Inclusion of these amended provisions would provide procedural safeguards to ensure access to an effective legal remedy as required by Article 13 of the ECHR, a right to a fair trial as required by Article 6 of the ECHR and ensure constitutional justice as guaranteed under Article 40.3 of the Constitution as well as ensuring for fair and effective administrative decisions. A general consideration to note regarding rights guaranteed under ECHR is that under the European Convention on Human Rights Act 2003 there is an obligation on every organ of the state to exercise its functions in a manner compatible with the State's obligations under the Convention.

**Non-discrimination clause**: Article 3 of the 1951 Geneva Convention includes a non-discrimination clause "without discrimination as to race, religion or country of origin". Procedural barriers (as discussed above) established on the basis of country of origin may lead to conflict with the State's obligations under the Geneva Convention.

**General compliance with obligations under the CAT, the ICCPR, and, where appropriate, the ECHR:** Applying a general compliance test to ascertain the safety of a country directly conflicts with the individual nature of the asylum process. A general designation of a country as safe may not consider the possible rapid change in human rights situations. The procedures applied to **Head 61** orders (outlined above) do not allow for a fair and efficient assessment of individual persecution.

Countries that may be considered 'generally' safe for the majority of the population may not afford appropriate protection for minority communities – an example being the Roma community in many Eastern European States. The European Court of Human Rights (ECtHR) stated that an individual assessment of an asylum claim must be carried out before any transfer is made: *TI v UK Application no 43844/98 (7th March 2000).* We urge the Minister to consider the individual nature of an asylum claim. A 'safe country of origin' order should not act as a barrier to a fair and effective procedure.

The text of **Head 61(1)(b)(i)(ii) and (iii)** is grafted directly from The Refugee Act 1996 as amended. The Minister should amend the criteria to include the criteria listed in Annex II of the Procedures Directive **Council Directive 2005/85/EC**. This Annex extends and strengthens the criteria listed in the scheme to include *"(c) respect of the non-refoulement principle according to the Geneva Convention; (d) provision for a system of effective remedies against violations of these rights and freedoms."*

The Minister should also consider broadening the criteria further to include the UNHCR suggested criteria: that account needs to be taken of *"not simply of international instruments ratified and relevant legislation enacted there, but also of the actual degree of respect for human rights and the rule of law, of the country's record of not producing refugees, of its compliance with human rights instruments, and of its accessibility to national and international organizations for the purposes of verifying human rights issues"* UNHCR, "Asylum Processes," Paragraph 39. This provides a more protection orientated approach and ensures compliance with international obligations as stated in the schemes objectives which recalls UNHCR EXCOM Conclusions no 103(s) *"Underlines the importance of applying and developing the international refugee protection system in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it."*

The express inclusion of (c) respect of the ***non-refoulement*** principle in assessing a country as safe is particularly significant as it goes towards protecting applicants against the dangers of chain *refoulements.* The obligation on the State not to *refoule* an applicant is a principle, which governs all areas of the asylum procedure and all removals, it is a norm of customary international law and as such is binding on all states and is provided for in Article 33 of the Refugee Convention, Article 3 of the Convention against Torture, Articles 6 and 7 of the International Covenant on Civil and Political Rights and Article 3 of the ECHR. (The principle of *non-refoulement* in relation to the scheme is discussed under Part 6: Removal from the State.)

We urge the minister to consider a more intensive 'protection orientated' model when considering the safety of a country with priority given to safety needs of the individual claim within the asylum process.

**Head 61(3)** Allows for the Minister to make orders concerning applications under the Dublin II Regulations Council Regulation (EC) No. 343/2003 and Safe Third Countries as designated under **Head 61(4)**

1. **Protection based approach:** In allowing for a transfer **Head 61(3)(b)** allows for specification of the circumstances and procedure. In addition to the list there should be an express provision to ensure that such a transfer will not either prejudice a claimant's access to a fair procedure in another state as guaranteed under Article 6 and 13 of the ECHR or lead to chain refoulement. The Minister should seek to include these express procedural safeguards to prevent such occurrences and to ensure full compliance with international obligations and the State's obligation of non-refoulement. UNHCR EXCOM Conclusions constantly reaffirm the importance of the duty of states to prevent refoulement from No 103 of 2005 through to No 1 of 1975

2. **Appeal with suspensive effect: Head 61(3)(b)(ii)** allows for an appeal against the transfer but regrettably does not guarantee suspensive effect, **Head 61(3)(b)(ii)** allows for the transfer of the applicant irrespective of the appeal lodged. It is contrary to good administration, constitutional justice and international obligations to curtail the rights of individuals, who may be in need of protection and to enforce removal prior to the exhaustion of review/appeal mechanisms. The need for suspensive effect is necessary to ensure against refoulement, especially considering the lack of harmonisation between states and the risk of chain refoulement.

   The right of appeal is essential and is ineffective without an explicit statement of a suspensive effect. The right to an effective remedy is embodied in EC law, article 47 of the Charter of Fundamental Rights of the EU, and in Article 13 of the ECHR. It implies the right to remain in the territory until all review and appeal avenues have been exhausted. The need for procedural safeguards such as suspensive effect is confirmed by the ECtHR in *TI v UK* (cited above) where it was asserted that the duty to ensure against non-refoulement cannot be avoided simply by a responsibility sharing agreement such as the Dublin Convention or the fact that the 'Geneva Convention' binds the destination state. UNHCR EXCOM Conclusion No. 8(vii) states that asylum seekers "should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending."

   The Minister should amend this provision to expressly allow for the right to suspensive effect in order to ensure the State's compliance with its duty to provide an effective remedy and to protect an applicant against refoulement.

**Detention pending removal: Head61 (3)(b)(viii);** UNHCR ExCom Conclusions no 44(b) "Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided." The Minister should ensure that if detention is resorted to, that the asylum seeker is detained in dedicated facilities and not placed in prisons, as is the current practice. This will improve the public perception of the asylum seeker as UNHCR ExCom Conclusions no 93(ix) states: "Key to the effective operation of any reception arrangement are public opinion favourable to asylum-seekers and refugees and confidence and trust in the asylum system, the promotion of both is an important responsibility to be pursued in tandem with the arrangements themselves"

**Temporary Detention under Head61 (3)(b)(ix):** This provision allows for the detention "(for a period not exceeding 48 hours) of a person who, having arrived in the State directly from a Member State or a safe third country, makes an application for protection until a decision on the matters at subparagraph (i) has been made." The potential applicant in this situation is utterly deprived of procedural safeguards, the applicant can potentially be deported within 48 hours of arrival due to the lack of a guarantee for suspensive effect under **Head 61(3)(b)(ii).**

**T**he duty of non-refoulement includes the duty of admittance at frontiers.

We urge the Minister to remove **Head 61(3)(b)(ix)** as it is unduly repressive and contrary to Article 14 of UDHR "the right to seek asylum", it is incompatible with the right to an effective remedy under Art 13 of the ECHR and Article 47 of the Charter of Fundamental Rights of the EU and it is creating a real risk of actual refoulement. (See Part 6 Removal from the State and the comments of UN Human Rights Commissioner above).

**Head 61(4):** Safe third country.

1. **General compliance with obligations under the Geneva Convention, CAT, the ICCPR.** The Minister should include the ECHR in the list of **Head 61(4)(b)(i).** (See comments under **Head 61(1**) above)

2. **Procedural Safeguards;** The Minister should include in **Head 61(4)(b)(iii)** in stating the provisions provided for in the agreement between the State and the 'Safe Third Country', the express provision of access to a fair and efficient asylum procedure which will not be prejudiced by a transfer under **Head 61(3)**. An express non-refoulement guarantee should also be inserted. In considering inclusion of these clauses the Minister should consider the ECtHR decision in *TI v UK* (cited above under **Head 61(3**)) which found that the duty to ensure against non-refoulement cannot be avoided simply by a responsibility sharing agreement such as the Dublin Convention or the fact that the destination state is bound by the "Geneva Convention." Similarly regard should be given to *Agiza v Sweden* (CAT/C/34/D/233/2003 of 24th May 2005) decision of the Committee Against Torture where diplomatic assurances where considered insufficient to negate a state's duty to protect a person against refoulement.

   UNHCR ExCom Conclusions 15, 58 and 85 have outlined criteria for applying Safe Third Country practices. Conclusion 15(h)(iv) states "Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State." it does provide that if "it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State;" Conclusion no 58(f) provides express protection against refoulement and that Asylum seekers "are permitted to remain there and

to be treated in accordance with recognised basic human standards." With regard return under bilateral and multilateral agreements Conclusion no.85 states "it should be established that the third country will treat the asylum-seeker(s) in accordance with accepted international standards, will ensure effective protection against refoulement, and will provide the asylum-seeker(s) with the possibility to seek and enjoy asylum."

**See comments and recommendations under Head 61(1) and (3) with regards the lack of proper procedural safeguards, which apply to applicants under Head 61(4) also.**

**Head 61(7): Withdrawal "**Where a protection application has been transferred to a Member State pursuant to Council Regulation (EC) No. 343/2003 or to a safe third country for examination, the application shall be deemed to be withdrawn."

Safe Third Country practices have been proven to be inefficient. It may prove more efficient and in line with the objectives under **Head 1** "to protect the socio-economic fabric of the State" to allow all asylum seekers access to a fair and efficient regular system rather than streamlining and creating exceptions which involve unnecessary expenditure.

## Head 67: Restrictions on the Marriage of Foreign Nationals

The restrictions imposed on the marriage of foreign nationals in the State impose disproportionate restrictions on the human right to marry, as protected in the Irish Constitution, Article 12 of the ECHR and other international human rights instruments.

## Head 71: Registers

The obligation of hotels, providers of accommodation on a commercial basis, businesses and educational establishments, to maintain a register of all foreign nationals attending or staying in such premises could act as an impediment to integration and lead to an upsurge in racial profiling. Persons who fail to act in accordance with this provision of the scheme are guilty of an offence. It is submitted that such a provision could lead to discriminatory practices on the part of service providers. *Article 14 of the European Convention of Human Rights* prohibits discrimination on the grounds of national origin.

There should be a clear statement as to the importance of **confidentiality** in the maintenance of such a scheme, in addition to an express obligation on the part of those covered by this head to inform individuals of the existence and purpose of such a register. In addition to the above it should be noted that the existence of such a register will only serve to promote a two-tiered system of rights and does not adhere to the preamble of the scheme in which it is stated that included in the objectives of this bill is the objective "*to promote the successful integration of permanent residents into the State, while recognising that integration involves mutual obligations for new immigrants and Irish society*" (Head 1 (f)).

## Head 72: Judicial Review

1. **Head 72(2) Time Limit:** restates the 14 days allowed under Section 5 of the Illegal Immigrants Trafficking Act 2000. This time limit is too short and fails to take adequate account of the complex legal issues raised in asylum claims and the need for preparation time which reflects this complexity.

2. **Head 72(3) Extension of the 14-day limit:** We recommend the deletion of Section 3 as being unduly restrictive on the right of access to a fair trial and an effective remedy as provided for in Article 6 and Article 13 of the ECHR respectively, Article 47 of the Charter of Fundamental Rights of the EU and Article 34.3.1 of the Constitution.

3. **Head 72(6)(a) and (b) Review with Suspensive effect:** The right of access to the courts to review a decision is essential and is ineffective without an explicit statement of a suspensive effect. The right to an effective remedy is embodied in EC law, Article 47 of the Charter of Fundamental Rights of the EU, and in Article 13 of the ECHR. It implies the right to remain in the territory until all review and appeal avenues have been exhausted. The need for procedural safeguards such as suspensive effect is confirmed by the ECtHR in *TI v UK* (cited above) where it was asserted that the duty to ensure against non-refoulement cannot be avoided simply by a responsibility sharing agreement such as the Dublin Convention or the fact that the destination state is bound by the 'Geneva Convention'. The UNHCR EXCOM Conclusion No. 8(vii) states that asylum seekers "*should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending."*

   The State is under an obligation to protect applicants against *refoulement.*

   We urge the Minister to amend **Head72 (6)** expressly provide for judicial review with suspensive effect

## Head 82: Requirements as to production of documents

The requirement for foreign nationals to produce documentation 'on demand', when requested to do so 'at any time' by an immigration officer or a Garda has been drafted in an excessively broad manner and is not representative of an immigration policy that addresses the issue of integration. It is highly probable that this provision will lead to the targeting of certain immigrant communities and the diminution of the freedom of movement of foreign nationals who have been naturalised as a result of racial profiling. We strongly recommend that this head is amended to strictly outline the circumstances under which an immigration officer/Garda can request the production of documentation in order to protect the rights and freedoms of foreign nationals resident in the state.