

Explanatory notes on the model laws criminalising People Smuggling and People Trafficking

The model laws draw on two primary sources

- The elements for effective legislation agreed at the legislation development workshop held at Port Dickson, Malaysia, from 23 – 25 September 2002 (the Elements Paper); and
- The *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (the People Smuggling Protocol) and the *Protocol to Prevent, Suppress and Punish the Trafficking in Persons, Especially Women and Children* (the Trafficking in Persons Protocol), both of which supplement the United Nations *Convention Against Transnational Organised Crime* (the TOC Convention).

The model laws are intended to allow states to effectively prosecute people smuggling and trafficking in persons, and to be consistent with both the Elements Paper and the criminalisation obligations in the People Smuggling Protocol and the Trafficking in Persons Protocol.

The model laws do not fulfil all obligations under the Protocols or the issues identified in the Elements Paper. Some of the elements that have not been included, such as protection of smuggled and trafficked persons or rules of procedure and evidence, will require detailed interaction with individual countries' existing legislation.

Each state must determine the appropriate penalties to apply to the offences in these model laws. However the Elements Paper encourages States to consider the penalties applied by other states in the region, and to ensure that penalties reflect the serious nature of these crimes and are sufficient to allow cooperation in mutual legal assistance and extradition.

Model People Smuggling law

Clause 1: Purpose

This clause should set out the purpose of the law. The current purpose clause is drafted for countries that have signed the People Smuggling Protocol, and wish to implement the criminalisation obligations in that Protocol.

If the state has not signed the People Smuggling Protocol, then it should draft its own purpose clause, for example “The purpose of this law is to criminalise people smuggling and related criminal activities, and to allow cooperation between states in combating these crimes.”

Clause 2: Definitions

This clause defines a range of terms used in the model laws.

The definition of “people smuggling” includes a requirement that the act be committed to obtain a financial or other material benefit. The Elements Paper suggests that states consider whether or not people smuggling should only be an offence when done for a material benefit – states may choose to expand the definition of people smuggling by removing the phrase of “in order to obtain a financial or other material benefit”.

The definition of “exploitation” is taken from the Trafficking in Persons Protocol, and includes a reference to “practices similar to slavery”. This is intended to include concepts such as debt bondage, serfdom, women’s sexual slavery and child slavery (which are covered by the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*). States may wish to consider explicitly including some of these slavery-like practices in the definition. Alternatively, if they have ratified the 1956 *Supplementary Convention* they may wish to make reference to this Convention.

Clause 3: Offence of People Smuggling

This clause creates the offence of people smuggling.

Clause 4: Aggravated People Smuggling offences

This clause creates the same offence as clause 3, but imposes a higher penalty if there are circumstances that make the offence more serious.

Clause 5: Offence relating to fraudulent travel or identity documents

This clause criminalises producing, providing, procuring or possessing a fraudulent travel or identity document for the purposes of people smuggling. “Fraudulent travel or identity document” is defined in clause 2.

Clause 6: Scope of application

The Elements Paper recognises the importance of extraterritorial jurisdiction for these crimes. This clause sets out a number of cases in which states may wish to exercise this extraterritorial jurisdiction as the offences have a link to that state, for example when the offence is committed by a national of that state. States should consider the circumstances in which they will exercise this extraterritorial jurisdiction, and whether they wish to add or remove any circumstances from the list in this clause.

Clauses 7 and 8: Participation in a people smuggling offence, and attempt to commit a people smuggling offence

These clauses criminalise a wide range of involvement in people smuggling, namely aiding, abetting, counselling, procuring, conspiring in or attempting the commission of any of the offences in this law.

Many states may already have laws covering aiding, abetting, counselling, procuring, conspiring in or attempting the commission of an offence. Where these laws already exist, states may wish to replace clauses 7 and 8 with a copy of their existing laws, or they may wish to apply their existing laws to the offences contained in this law instead.

Clause 9: Offence to facilitate stay of a smuggled person

This clause criminalises assisting or facilitating an unauthorised migrant or smuggled person to stay in the country that they have been smuggled into, where that is done unlawfully, intentionally and for a material benefit. Subclause 2 ensures that “unlawfully” in this offence includes providing false documents, however this does not limit the meaning of “unlawfully”.

Clause 10: Immunity from criminal prosecution

Subclause 1 implements the provisions of the People Smuggling Protocol (Article 5).

States should consider whether they wish to provide the further immunities from prosecution listed in subclauses 2 and 3.

States may also wish to consider extending the immunity to prosecution outside of this law for the smuggled persons’ illegal entry, period of unlawful residence or false documents.

Clause 11: Money Laundering, Extradition and Mutual Assistance

This clause provides options for states regarding extradition, mutual legal assistance and money laundering to facilitate cooperation in combating these crimes.

If the state has existing money-laundering, extradition or mutual legal assistance laws, then clause 11 can be used to apply those laws to the offences in this law.

If the state has signed or ratified the People Smuggling Protocol, then clause 11 can also be used to allow extradition and mutual legal assistance to be provided between States Parties to that Protocol in relation to the offences in this law.

Each state should consider its individual circumstances and adapt paragraph 11 accordingly. In particular, states should consider whether they need to take any further action, such as making regulations or amending existing legislation, to give effect to clause 11.

Clause 12: Obligation on commercial carriers

This clause imposes a fine on any commercial carrier that brings a person into a country without proper travel documents and ensures that the carrier is liable for the costs of detaining and removing the unauthorised migrant or smuggled person. Subclause 2 sets out the circumstances in which the carrier will not have to pay the fine and costs.

Clause 13: Liability of a company

This clause makes it clear that a company can be liable for any of the crimes in this act, especially the fines for the liability of commercial carriers. It also sets out how to determine the knowledge and actions of a company for these crimes.

Model People Trafficking law

Clause 1: Purpose

This clause should set out the purpose of the law. The current purpose clause is drafted for countries that have signed the Trafficking in Persons Protocol, and wish to implement the criminalisation obligations in that Protocol.

If the state has not signed the Trafficking in Persons Protocol, then it should draft its own purpose clause, for example “The purpose of this law is to criminalise trafficking in persons and related criminal activities, and to allow cooperation between states in combating these crimes.”

Clause 2: Definitions

This clause defines a range of terms used in the model laws.

The definition of “exploitation” is taken from the Trafficking in Persons Protocol, and includes a reference to “practices similar to slavery”. This is intended to include concepts such as debt bondage, serfdom, women’s sexual slavery and child slavery (which are covered by the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*). States may wish to consider explicitly including some of these slavery-like practices in the definition. Alternatively, if they have ratified the 1956 *Supplementary Convention* they may wish to make reference to this Convention.

Clause 3: Offence of People Trafficking

This offence criminalises the recruitment, transport, harbouring or receiving of a person for the purposes of exploitation by any of the means listed in the clause, which are taken from Trafficking in Persons Protocol.

Clause 4: Offence of Trafficking in Children

This offence makes it clear that it is a crime to recruit, transport, transfer, harbour or receive a child for the purposes of exploitation, regardless of the means used.

Clause 5: Offence of exploiting a trafficked person

This clause makes it an offence to participate in or profit from the exploitation of a person who has been trafficked. While this is not an obligation under the Trafficking in Persons Protocol, the Elements Paper explains that, to be comprehensive, laws should also criminalise “exploiting persons who have been trafficked”.

Clause 6: Consent of Trafficked Person irrelevant

This clause makes it clear that if the trafficked person “consented” to the trafficking or the exploitation (the offences under clauses 3, 4 and 5), this does not provide a defence for the perpetrator.

Clause 7: Offence relating to fraudulent travel or identity documents

This clause criminalises producing, providing, procuring or possessing a fraudulent travel or identity document for the purposes of people trafficking. “Fraudulent travel or identity document” is defined in clause 2.

Clause 8: Scope of application

The Elements Paper recognises the importance of extraterritorial jurisdiction for these crimes. This clause sets out a number of cases in which states may wish to exercise this extraterritorial jurisdiction as the offences have a link to that state, for example when the offence is committed by a national of that state. States should consider the circumstances in which they will exercise this extraterritorial jurisdiction, and whether they wish to add or remove any circumstances from the list in this clause.

Clauses 9 and 10: Participation in a people trafficking offence, and attempt to commit a people trafficking offence

These clauses criminalise a wide range of involvement in people trafficking, namely aiding, abetting, counselling, procuring, conspiring in or attempting the commission of any of the offences in this law.

Many states may already have laws covering aiding, abetting, counselling, procuring, conspiring in or attempting the commission of an offence. Where these laws already exist, states may wish to replace clauses 9 and 10 with a copy of their existing laws, or they may wish to apply their existing laws to the offences contained in this law instead.

Clause 10A: Immunity from criminal prosecution

The Elements Paper says that “Protection of, and assistance to, persons who have been trafficked needs to be considered.” There is no provision in the Trafficking in Persons Protocol specifically on immunity of trafficked persons from prosecution, however Article 9(1)(b) states that “States Parties shall establish comprehensive policies, programs and other measures to protect victims of trafficking, especially women and children, from revictimization.” States should therefore consider whether they wish to provide the immunities from prosecution set out in this clause.

Clause 11: Money Laundering, Extradition and Mutual Assistance

In order to facilitate cooperation in combating these crimes, paragraph 11 of each model law provides options for states regarding cooperation through extradition, mutual legal assistance and money laundering laws.

If the state has existing money-laundering, extradition or mutual legal assistance laws, then clause 11 can be used to apply those laws to the offences in this law.

If the state has signed or ratified the Trafficking in Persons Protocol, then clause 11 can also be used to allow extradition and mutual legal assistance between States Parties to that Protocol in relation to the offences in this law.

Each state should consider its individual circumstances and adapt clause 11 accordingly.

Clause 12: Obligation on commercial carriers

This clause imposes a fine on any commercial carrier that brings a person into a country without proper travel documents and ensures that the carrier is liable for the costs of detaining and removing that person. Subclause 2 sets out the circumstances in which the carrier will not have to pay the fine and costs.

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