



Tithe an
Oireachtais
Houses of the
Oireachtas

An Comhchoiste um Dhlí agus Ceart

Tuarascáil maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim Ghinearálta an Bhille um Cheartas Coiriúil (Cionta Gnéasacha agus Gáinneáil ar Dhaoine), 2022

Márta 2023

Joint Committee on Justice

Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

March 2023

Table of Contents

CATHAOIRLEACH'S FOREWORD	3
COMMITTEE MEMBERSHIP	4
Joint Committee on Justice	4
GLOSSARY OF TERMS AND ACRONYMS USED	7
COMMITTEE RECOMMENDATIONS	9
 CHAPTER 1 - Introduction	 13
Purpose of the Bill	13
Procedural basis for scrutiny	14
 CHAPTER 1 - Engagement with Stakeholders.....	 15
Introduction.....	15
 CHAPTER 2 - Summary of Evidence	 17
1. Lack of specific identification process for child victims of trafficking.....	18
2. Need for more clarification around the collective decision-making process of the Competent Authorities	20
3. Indicators or criteria that should be referred to when making a referral to the National Referral Mechanism	21
4. Supports that will be provided to victims (Head 19)	22
5. Accommodation for victims of trafficking.....	23
6. Lack of appeals process or timeframes within which decisions or appeals should be issued within the General Scheme	24
7. 'Credibility requirement'	25
8. Non-prosecution principle (Head 21)	26
9. Head 3 (2)(c) - 'age and maturity'	27
10. Other suggested measures to strengthen the legislation.....	28
 CHAPTER 3 - Summary of Submissions.....	 31
1. Comments on part 2 of the General Scheme	32
2. Interpretation for Part 3 (Head 12)	35
3. Competent Authorities of the National Referral Mechanism (Head 13)	37
4. Application for recognition as a victim of human trafficking (Head 14)	38
5. National Referral Mechanism Operational Committee for the identification of victims of human trafficking (Head 15).....	40
6. Sharing of information by Competent Authorities and Trusted Partners (Head 16)	42

7. Access to services by victims of human trafficking (Head 19)	44
8. Additional Points	46

APPENDICES..... 48

APPENDIX 1- ORDERS OF REFERENCE OF THE COMMITTEE.....	48
--	-----------

APPENDIX 2 - LIST OF STAKEHOLDERS AND SUBMISSIONS.....	57
---	-----------

CATHAOIRLEACH'S FOREWORD

In September 2022, the Minister for Justice, Ms. Helen McEntee TD, forwarded the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 to the Joint Committee on Justice in accordance with Standing Orders for the purpose of pre-legislative scrutiny. The Committee welcomes the General Scheme's intention to strengthen the law on consent in rape cases and putting the National Referral Mechanism on a statutory footing, among other aims.

The Committee notes that the progression of this legislation is also timely, given the recent introduction of an EU Directive¹ that will update the original EU Anti-Trafficking Directive [Directive 2011/36/EU] which guides the best practice approach towards cases of human trafficking and protecting the victims of trafficking. On this note, the Committee hopes that the Department of Justice will continue monitoring the developments of this EU legislative proposal and ensure that any relevant updates to the EU Anti-Trafficking Directive will be considered and reflected in this legislation, where necessary.

In undertaking pre-legislative scrutiny, the Committee has sought to scrutinise the proposed legislation and provide recommendations on areas where it believes change or amendments are warranted. Among the areas identified for further examination within the General Scheme include the need for a separate identification mechanism for child victims of trafficking [Head 12]; the need to expand the list of indicators or criteria that should be referred to when making a referral to the National Referral Mechanism; and the need for clearer guidelines on the supports that will be provided to victims of trafficking (Head 19).

The Committee has made a number of recommendations and a copy of this report and recommendations will be sent to the Minister for Justice. I would like to express my appreciation to all the witnesses for their contributions and to the Members of the Committee for their work on this subject.

Finally, I hope that this report will help to inform the legislative process and make a valuable contribution to the forthcoming legislation.



James Lawless TD (FF) [Cathaoirleach]
March 2023

¹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0732&from=EN>

COMMITTEE MEMBERSHIP

Joint Committee on Justice

Deputies



James Lawless TD (FF) [Cathaoirleach]



Colm Brophy TD
(FG)



Patrick Costello TD
(GP)



Alan Farrell TD
(FG)



Pa Daly TD
(SF)



Aodhán Ó Ríordáin TD
(LAB)



Martin Kenny TD
(SF)



Thomas Pringle TD
(IND)



Niamh Smyth TD
(FF)

Senators



Robbie Gallagher
(FF)



Vincent P. Martin
(GP)



Michael McDowell
(IND)



Lynn Ruane
(IND)



Barry Ward
(FG) [Leaschathaoirleach]

Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil on 3rd September 2020.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 25th September 2020.
3. Deputy Jennifer Carroll MacNeill elected as Leas-Chathaoirleach on 6 October 2020.
4. Deputy James O'Connor discharged and Deputy Niamh Smyth nominated to serve in his stead by the Fifth Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 19th November 2020.
5. Deputy Michael Creed discharged and Deputy Alan Farrell nominated to serve in his stead by the Fifteenth Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 28th June 2022.
6. Deputy Brendan Howlin discharged and Deputy Aodhán Ó Ríordáin nominated to serve in his stead by the Nineteenth Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 8th November 2022.
7. Deputy Jennifer Carroll MacNeill was discharged, pursuant to Standing Order 34, on 21st December 2022.
8. Senator Barry Ward was elected as Leas-Chathaoirleach at the Committee meeting on 15th February 2023.
9. Deputy Colm Brophy nominated to serve on the Committee by the Twenty First Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 7th March 2023.

GLOSSARY OF TERMS AND ACRONYMS USED

National Referral Mechanism (NRM)	<p>Under Head 12 of the General Scheme, the ‘National Referral Mechanism’ (NRM) means the framework through which the State fulfils its obligations to protect and promote the human rights of trafficking victims.</p> <p>The General Scheme proposes to put the NRM on a statutory footing.</p>
Operational Committee	<p>Head 15 of the General Scheme outlines the functions of the National Referral Mechanism Operational Committee. Its objectives are</p> <ol style="list-style-type: none"> to act as the National Referral Mechanism of the State in order to identify victims of human trafficking, to make collective decisions on the identification of a victim of human trafficking and to carry out related functions under this Part. <p>‘Trusted Partners’ and ‘Competent Authorities’ will be members of the Operational Committee.</p>
Competent Authorities (CAs)	<p>Head 13 of the General Scheme provides that</p> <ol style="list-style-type: none"> An Garda Síochána, The Child and Family Agency, The Health Service Executive The Minister for Children, Equality, Disability, Integration and Youth, The Minister for Justice, The Minister for Social Protection, The Workplace Relations Commission. <p>will be designated as Competent Authorities for the purposes of identifying victims of human trafficking within the framework of the National Referral Mechanism.</p>
Trusted Partners (TPs)	<p>Head 12 and Head 18 of the General Scheme define that a civil society organisation or body that works with, or provides services to victims, or</p>

	<p>potential victims of human trafficking, may apply to the Minister to be designated as a “Trusted Partner” (TP).</p> <p>TPs are responsible for accepting applications from suspected victims of trafficking under Head 14 to refer to the Operational Committee for decision under Head 17.</p>
--	--

COMMITTEE RECOMMENDATIONS

The following recommendations were made by the Committee in relation to the topic:

1. The Committee recommends that the legislation ensures that there is a specific identification process for child victims of trafficking, which should be victim-centred and child-specific.
2. The Committee recommends that a smaller panel of experts from within Competent Authorities (CAs) and Trusted Partners (TPs) be appointed as 'Operational Panels', who can be called upon to preside over decisions in relation to identifying potential victims of trafficking.
3. The Committee recommends that Competent Authorities should refer to international indicators of trafficking, including the Delphi indicators, when identifying or referring a potential victim of human trafficking.
4. The Committee recommends that the legislation should state more clearly the supports that will be provided to victims of trafficking, in keeping with those stipulated in the EU Anti-Trafficking Directive 2011/36/EU.
5. The Committee recommends that victims of trafficking should not be accommodated in Direct Provision centres and that gender-specific sheltered accommodation must be provided for these victims.
6. The Committee recommends that an appeal mechanism should be provided under this legislation.
7. The Committee recommends that the legislation should set out clear timelines within which a decision in relation to an application to be recognised as a victim of trafficking must be issued.
8. The Committee recommends that all bodies and individuals who engage with victims of trafficking should be adequately trained.

9. The Committee recommends that the ‘credibility test’ proposed under Heads 14 and 17, to determine whether an individual is a victim of human trafficking, should be removed and the current threshold for identification centring on reasonable grounds of belief should be maintained.
10. The Committee recommends that consideration be given to enshrining a non-prosecution principle as a statutory defence within the legislation, to guarantee that victims of trafficking would not face prosecution for any offence that they were pressured into committing as a result of being trafficked.
11. The Committee believe that the provisions under Head 3 (2) (c), for ‘age and maturity’ to be an argument of reasonable belief that consent was given, should be maintained under this legislation.
12. The Committee recommends that a central database be established, in keeping with relevant provisions under GDPR, to capture all available data in relation to the prevalence of human trafficking in Ireland.
13. The Committee recommends that separate legal representation would extend to victims of trafficking or sexual exploitation.
14. The Committee recommends that the definition of ‘exploitation’ in the legislation should be kept broad, to incorporate rarer forms of trafficking such as exploitative marriages and to incorporate emerging forms of human trafficking.
15. The Committee recommends that any questions raised during a trial that intend to refer to evidence of a victim’s other sexual experiences should adhere to the usual rules of evidence in prosecutions of this type.
16. The Committee recommends that the Bill include express provisions giving Competent Authorities and Trusted Partners authority to refer to the Operational Committee for the identification of victims who lack capacity, such as children or adults with diminished capacity.

17. The Committee recommends that the use of language for information sharing under Head 16(b) should be amended e.g., 'may share such information', to clarify the obligation or choice to share information.
18. The Committee recommends that the term 'suspected victims of trafficking' is retained and defined, where there are reasonable grounds to believe a person has been a victim of an offence under section 2 or 4 of the *Criminal Law (Human Trafficking) Act 2008* or section 3 of the *Child Trafficking and Pornography Act, 1998*.
19. The Committee recommends that in relation to the definition of 'child', the term 'age assessment' be included and defined in the Bill in regard to potential child victims of trafficking. Age assessments should be carried out by Tusla, or another competent body, supported by strict policy-guidelines that are child-centred and adapted to the person's specific needs (cultural, gender, etc.) and should not be based on a medical test.
20. The Committee further recommends that the guidelines should explicitly adopt the principle of the 'benefit of the doubt' regarding age determination of young applicants. The presumption of minority should be applied unless and until an age assessment test proves otherwise.
21. The Committee recommends that child applicants should be appointed a 'Children's Legal Advisor' at the earliest stage of the referral and identification process. The term 'Children's Legal Advisor' should also be included and defined in the interpretations section in the Bill.
22. The Committee recommends that a mechanism of independent review of decisions relating to the status of a Trusted Partner should be included.
23. The Committee recommends that, to adhere fully to the non-punishment principle, the Bill should amend the *Criminal Law (Human Trafficking) Act 2008*, to include a specific statutory defence for victims of trafficking where they have

committed crimes as a direct consequence of them being trafficked. The legislative process of this Bill should also examine the feasibility of extending the expungement of criminal convictions to victims of other forms of human trafficking.

24. The Committee recommends that the protections from deportations be extended to include transfers under the Dublin III Regulations.
25. The Committee recommends that the Bill clearly state that no Gardaí below the rank of superintendent will be part of an Operational Committee and that all members of the Operational Committee must be of sufficient seniority and appropriately trained on the trafficking of human beings.

CHAPTER 1 - Introduction

This is the report on pre-legislative scrutiny of the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022, which will strengthen the laws surrounding consent in rape cases and provide enhanced support to victims in human trafficking cases.²

Purpose of the Bill

Among the General Scheme's objectives include enhancing the laws surrounding consent in rape cases, so that a defendant's belief that a victim was consenting to sexual intercourse must be 'objectively reasonable'. The General Scheme will also support victims of sexual violence and human trafficking by putting the National Referral Mechanism (NRM) on a statutory footing. Currently victims of trafficking can only report instances of trafficking to an Garda Síochána, however, this legislation will increase the bodies and organisations that victims of trafficking can report to and make it easier for these victims to come forward.

The General Scheme also introduces further safeguards for victims of sexual offences, through ensuring anonymity for victims in all trials for sexual offences and enhancing a victim's right to separate legal representation, for example, in situations where a victim is being questioned on their previous sexual history. These recommendations stemmed from the 'O'Malley Review' and the Department of Justice's implementation plan of this Review, *Supporting A Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases*.³

² [gov.ie](http://www.gov.ie) - Government approves publication of General Scheme of Bill which will strengthen law on consent in rape cases and support victims in sexual violence and human trafficking cases (www.gov.ie)

³ [gov.ie](http://www.gov.ie) - Minister McEntee welcomes new legislation as she marks World Day against Trafficking in Persons (www.gov.ie)

Procedural basis for scrutiny

Pre-legislative consideration was conducted in accordance with Standing Order 174A, which provides that the General Scheme of all Bills shall be given to the Committee empowered to consider Bills published by the member of Government.

CHAPTER 1 - Engagement with Stakeholders

Introduction

The Joint Committee on Justice invited submissions from stakeholders on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022.

On 6th December 2022, the Committee held a public engagement with several of these stakeholders, as laid out in the table below:

Table 1: List of public engagements with Stakeholders

Organisation	Witnesses
Immigrant Council of Ireland (ICI)	Brian Killoran, CEO Mary Henderson, solicitor and member of legal team
Irish Human Rights and Equality Commission (IHREC)	Dr. Salome Mbugua, Commission Member Dr. Nusha Yonkova, Head of Anti-Trafficking
Rape Crisis Network Ireland (RCNI)	Dr. Cliona Saidléar, Director
Professor Michael Breen, Professor Michael Healy	Professor Michael Breen, Professor Emeritus, Mary Immaculate College, Limerick Professor Michael Healy, Vice President for Research Mary Immaculate College, Limerick
The Migrant Rights Centre Ireland (MRCI)	Ms. Edel McGinley, Director Ms. Isabel Toolan, Anti-Trafficking Lead
Department of Justice	Ms. Lisa Doherty, Principal Officer, Criminal Justice Legislation Mr. Deaglán Ó'Briain, Principal Officer, Criminal Justice Policy

The primary focus of this meeting was to allow for an engagement between the Members and stakeholders to discuss possible areas of the General Scheme which may need to be amended.

This report summarises the engagements and the key points considered by the Committee when drafting the recommendations set out in this report.

A link to the full transcript of the engagement can be found [here](#).

CHAPTER 2 - Summary of Evidence

In the course of the public hearing, a number of important points were raised.

In welcoming this legislation, stakeholders highlighted the importance of ensuring that this legislation would provide an opportunity to be as detailed, prescriptive and transparent as possible, in listing the rights and provisions it will include in relation to victims of trafficking. Stakeholders recommended that as many provisions as possible should be included in this primary legislation rather than leaving them to be specified in secondary legislation.

A summary of the main areas discussed in evidence to the Committee follows.

1. Lack of specific identification process for child victims of trafficking

Many stakeholders were strongly of the view that there needs to be a distinct and separate identification process for child victims of trafficking.

The Committee was informed that currently, three separate systems must interact to identify a child victim of trafficking, these being international protection, human trafficking and general child protection systems. Stakeholders highlighted that this complex arrangement has contributed to the fact that no child had been identified as a victim of trafficking in the last two years and witnesses expressed serious concerns at this, arguing that it demonstrates the urgent need to re-design the identification process for child victims of trafficking.

Witnesses told the Committee they are aware of instances where the systems responsible for child victims of trafficking failed to appoint an appropriate individual to represent the best interests of these victims or where victims were not identified correctly as children and missed receiving the appropriate supports child victims are entitled to. They stressed that this is an unacceptable outcome as the impact of trafficking on a child victim is catastrophic and that child victims should receive appropriate and specific supports.

The Committee heard that the EU Anti-Trafficking Directive ['the EU Directive'] itself provides much guidance on child-specific measures that should be included within national anti-trafficking legislation and that other international publications also provide guidance on best practice in this area, e.g. recommendations from the Organization for Security and Co-operation in Europe (OSCE).

Witnesses pointed out that when child victims of trafficking are identified, they will be referred to Tusla for assistance and support. The Committee heard that this is not always appropriate, as the unaccompanied minor's unit within Tusla with responsibility for these children is already strained with its current workload. This unit is also directed towards children who are seeking international protection, which may not be applicable to every child victim of trafficking, who may require different services for their individual circumstances. Witnesses suggested that there should be a specialised unit within Interpol which deals with child victims of trafficking.

Questions were also raised as to when a guardian or guardian *ad litem* should be appointed to a child victim of trafficking. Witnesses informed the Committee that the EU Directive stipulates that a guardian should be appointed to all unaccompanied child victims and that where a parent is not acting in the best interests of the child, a guardian will also be appointed.

Some witnesses told the Committee that it would be better for a guardian to be appointed rather than a guardian *ad litem*, as child victims will interact with the State in a number of different ways to access their rights and services and not only in court proceedings. However, it was also recommended that the provisions around how children can access legal assistance may require amending to cover specific circumstances, e.g where children may need to avail of legal assistance and are not old enough to access legal advice under the Civil Legal Aid Act or accessing legal advice while in the care of Tusla.

The Committee heard that in Scotland, a specific child advocate service is assigned to all victims of trafficking, however, witnesses underlined that Ireland is far behind these standards, as guardians are not generally appointed to children within the Irish childcare system.

Witnesses recommended that any individual or system that is appointed to represent the interests of the child, must be adequately resourced and that the system proposed should be victim-centred and child-specific.

The Committee also heard that there are insufficient procedures around how to carry out an age assessment when it is suspected that a victim of trafficking may be underage. Witnesses pointed out that the ICI provided a suggested template to the UN Committee on the Rights of the Child on the age assessment procedures that should be followed in these instances. Witnesses urged that appropriate provisions should be included in this legislation to ensure that age assessments are carried out in an appropriate manner on suspected child victims of trafficking. It was recommended that any suspected child victim of trafficking should be treated as such until an assessment is undertaken that proves otherwise.

2. Need for more clarification around the collective decision-making process of the Competent Authorities

Members raised questions around how the proposed collective decision-making procedures between bodies on the Competent Authorities (CAs) would operate in relation to identifying a victim of trafficking.

Witnesses highlighted that the operational guidelines around the operation of the NRM have not been made available and that there is a lack of detail in the General Scheme around how the CAs and Operational Committees would interact in relation to collective decision-making.

The Committee heard that the OSCE has a handbook in relation to the operation of the NRM and the recommendations within this handbook should be referred to when the operational guidelines are disclosed, to ensure that they align with international best practice.

Witnesses suggested that an ‘Operational Panel’ should be created, that would comprise select members of the CA and Trusted Partners (TPs) who would have specific expertise in areas of trafficking to inform them when making decisions in relation to identifying potential victims.

Witnesses recommended that designating a smaller group of experts would help to ensure that the decision-making process maintains high standards but would not be slowed down and would be able to make efficient decisions, which will help to identify victims as early as possible. This approach would also resolve any concerns around expanding the list of members of CA or TPs.

The Committee was told that NGOs and civil society groups should also be involved in the decision-making process, however, it was highlighted that stakeholder groups would require more details around how the processes would work in order to provide their assistance and expertise.

3. Indicators or criteria that should be referred to when making a referral to the National Referral Mechanism

Witnesses pointed out that the General Scheme does not reference international indicators for identifying victims of trafficking, such as the Delphi indicators or criteria set by the Group of Experts on Action against Trafficking in Human Beings (GRETA).

The Committee heard that the Delphi indicators are a methodology designed by European Commission and the International Labour Organization, which list the signs of trafficking and help guide relevant authorities in assessing a case of trafficking by categorising it through use of strong, weak and medium indicating criteria.

Witnesses highlighted that the present list of indicators set out in the General Scheme is too short and agreed that the criteria for identification under the General Scheme should be based on all known indicators of trafficking, including internationally agreed criteria and that a nationally agreed set of indicators should also be considered for inclusion within the legislation.

The Committee heard that it is essential that the criteria for identification of victims of trafficking be kept as broad as possible, in order to ensure that as many victims as possible would be eligible for referral to the NRM.

4. Supports that will be provided to victims (Head 19)

Witnesses welcomed the fact that the General Scheme will not obligate victims of trafficking to co-operate with criminal investigations in order to receive the supports available to them. However, it was recommended that this legislation should state more clearly the range of supports and services that will be provided to victims of trafficking.

The Committee heard that the EU Directive is very prescriptive about the particular supports that should be provided to these victims. Among these supports include the right to housing, social assistance, health services and immigration status.

Witnesses referenced equivalent legislation recently passed in Scotland, which also outlines a greater level of supports that a victim of trafficking would receive than is planned within this General Scheme.

Witnesses told the Committee that specifying the rights for victims of trafficking would not prejudice the rights provided to other groups within the State as these are already provided for in other legislation.

Witnesses told the Committee that it is important that victims would be made aware of their rights and entitlements at the earliest stage possible after presenting for identification, to provide transparency and clarity to these victims about the process they are engaging in and what to expect. Witnesses said that doing this could help to assist these victims in recovering from the trauma of being trafficked and could also encourage them to assist with future investigations relating to their trafficker.

Witnesses hoped that providing more clarity around the supports victims of trafficking would receive could help to increase identification rates of those who have been trafficked.

5. Accommodation for victims of trafficking

Members and witnesses were in agreement that victims of trafficking should not be accommodated in Direct Provision centres and that this type of accommodation is wholly unsuitable for such vulnerable individuals.

Witnesses highlighted to the Committee that housing a victim of trafficking in a Direct Provision centre, where they may have to share a room and where there could be a lot of unpredictability and people coming and going, creates a huge challenge for a victim to recover from their ordeal and be re-integrated into society.

Some witnesses said that they had previously recommended the creation of shelter accommodation, on a pilot basis, to accommodate victims of trafficking, but said they have received no confirmation of when such a pilot would be introduced and urged that this be rolled-out as a matter of priority.

Witnesses urged that victims should be accommodated in gender-specific, shelter accommodation and that the use of Direct Provision centres to accommodate victims of trafficking should be stopped.

6. Lack of appeals process or timeframes within which decisions or appeals should be issued within the General Scheme

During the engagement, it was pointed out that the legislation as proposed does not contain an appeals process for situations where an application to be recognised as a victim of trafficking is refused and witnesses recommended that an appeals mechanism should be included under Head 17 of the General Scheme.

It was pointed out that an appeals mechanism would typically be included in an administrative process such as this, as providing a right of appeal is essential to ensure the process is transparent and fair for all applicants.

The Committee heard that pursuing a judicial review is an unsuitable avenue through which to appeal a decision. These reviews are expensive, they utilise valuable time within courts and place strain on victims while they wait for the judicial review to conclude. Witnesses highlighted that the lengthy process inherent in a judicial review does not reflect the need for an early identification process outlined within the EU Directive.

In response to the points raised by witnesses and members, representatives from the Department of Justice confirmed that the Bill, when published, will provide an appeals mechanism in some capacity.

Witnesses also pointed out that the General Scheme does not stipulate the timelines within which a decision should be made in relation to an application to be recognised as a victim of trafficking and it was recommended that the legislation should include clear guidelines on this.

The Committee heard that the OSCE lays out clear guidelines on the acceptable timeframes within which decisions on an application should be issued. These guidelines stipulate a five-day waiting period for an initial decision on an application and a 90-day deadline for any decisions made on an application after this. Witnesses noted that the period within which a decision should be issued in relation to an application for a child victim is significantly shorter than an application for adult victims.

7. ‘Credibility requirement’

Witnesses recommended to the Committee that the ‘credibility test’ proposed under Heads 14 and 17, to determine whether an individual is a victim of human trafficking, should be removed from the General Scheme.

The Committee heard that a credibility test is not a requirement under international law in this sphere and that its inclusion in this legislation may cause dissension among members of the Operational Committee, who might have a different understanding of what a credible test would entail. This would result in delays and hinder the central goal of this legislation, which is to introduce an effective and early mechanism to identify victims of trafficking.

It was recommended that the current, lower threshold for identification, which centres on reasonable grounds of belief, would be more appropriate to ensure that as many victims as possible would be eligible to engage with the NRM.

8. Non-prosecution principle (Head 21)

Witnesses informed the Committee that a non-prosecution principle should be enshrined as a statutory defence within the General Scheme to guarantee that victims of trafficking will not be prosecuted for any offences that they were pressured to commit while being trafficked.

Witnesses pointed out that this principle is made clear within the EU Directive and the General Scheme should ensure that it aligns with the Directive in this area.

Witnesses highlighted that, in guaranteeing this principle within the legislation, this will ensure the human rights of victims are respected and would help encourage them to co-operate as a witness in any criminal investigation against their trafficker.

Representatives from the Department of Justice responded that, in including a non-prosecution principle within this legislation, it was intended that this would cover non-prosecution for immigration offences that occurred while being trafficked but it was not intended to include a blanket prohibition on prosecution when it concerned serious offences such as sexual assault. It was argued that consideration of such cases would be better handled by the Director of Public Prosecutions (DPP), where prosecutorial guidelines could be referred to when adjudicating on such cases.

9. Head 3 (2)(c) - 'age and maturity'

Head 3 details the factors a jury may have to consider on the question of reasonable belief of a woman's consent with regard to sexual offences.

Members questioned the suggestion by some witnesses that Head 3(2)(c) should be removed and expressed concern that a child of 13 or 14 years of age would not be allowed to argue that they were not mature enough to understand or identify the necessary steps to ensure consent was given.

In response, witnesses told the Committee that the age of criminal liability is set at 10 years of age, but that the DPP would still be tasked with deciding on whether an individual under 14 years of age could be charged with a sexual offence. It was argued that the need for the DPP to reach such a decision provides a safeguard to child defendants in cases of sexual assault.

Witnesses stressed that the factor of 'mental capacity' should be distinguished from 'age and maturity' and argued that if age and maturity were left in this section as currently phrased, this could cause uncertainty or dissension regarding how old or mature one has to be to understand what constitutes rape.

Witnesses told the Committee that age and maturity can still be considered as part of a trial and that a jury will consider all the evidence and arguments put before them as part of a trial.

Members acknowledged that this suggestion had been contained within a paper from the Law Reform Commission, however, they maintained concerns around the suggestion that this section be removed.

10. Other suggested measures to strengthen the legislation

- **Training**

Witnesses recommended that all individuals and bodies that engage directly with victims of trafficking should receive appropriate training on how to deal with these vulnerable individuals. This training should be gender appropriate and should take into account the individual circumstances and cultural context pertaining to each victim.

The General Scheme should also set out clearly the level of training and expertise expected of members of the Operational Committee, CAs and TPs, who should be trained appropriately to recognise the indicators relating to trafficking in order to ensure that as many victims as possible will be identified.

Witnesses also called for training on human trafficking to be aimed at a wider group of agencies and incorporated into other training programmes. They told the Committee this would be beneficial so that as many agencies as possible are made aware of the indicators relating to trafficking and would be prepared to appropriately aid a victim of trafficking, in situations where this becomes necessary.

- **Data on human trafficking**

The Committee heard recommendations from witnesses that all data on human trafficking, including data on victims that are outside of the NRM, should be captured within a central database in order to gather comprehensive data on the prevalence of human trafficking in Ireland. It was recommended that any database should be accessible in both the Republic and the North of Ireland.

Witnesses said that there is much valuable data gathered by NGOs on this topic but they do not have the capabilities to adequately gather and analyse this data.

Witnesses told the Committee that sufficient funding must be made available so that

these organisations would have the resources to properly collect and register this data.

Witnesses argued that the General Scheme should provide more guidance on how data sharing provisions would operate and that it be ensured these comply with relevant provisions under GDPR.

- **Separate legal representation**

Witnesses recommended that, under Head 5 of the General Scheme, the provisions for separate legal representation to support victims of sexual offences should also extend to victims of trafficking. It was argued that omitting victims of trafficking from these protections would give the impression that this offence is not as grave as other sexual offences.

Members noted that, in the Committee's previous report on ['Victim's Testimony in cases of rape and sexual assault'](#), the Committee had recommended that separate legal representation be provided throughout the entire trial process to support victims of sexual assault. Members re-iterated their support for separate legal representation for victims and agree with suggestions that this should also extend to victims of trafficking or sexual exploitation.

- **Definition of exploitation**

Witnesses told the Committee that the term 'exploitation' should be defined in a broad manner in order to capture new forms of human trafficking that may develop in future and also to address more uncommon forms of trafficking such as forced marriages, the sale of children and illegal adoptions.

- **Questions relating to sexual experience**

Witnesses informed the Committee that any questions raised during a trial that intend to refer to evidence of a victim's other sexual experiences should list clearly the types of questions that will be asked on this topic, the limits around the questions that will be asked and a justification regarding the need to raise questions on this topic in the first instance.

Members questioned why some witnesses had suggested that the phrase 'other sexual experience' under Head 5 should specifically reference pregnancy, miscarriage, abortion and contraception, among other areas of sexual activities.

Witnesses responded that they believed it was better to list all of the possible areas of sexual experience that may be referenced during a court hearing, in order to guide assessments made as to whether questions around these topics are appropriate for the case in question or not.

CHAPTER 3 - Summary of Submissions

The Committee received submissions from the following Stakeholders.

- Laura Wallace, Irish PhD candidate at the University of Leeds.
- Immigrant Council of Ireland (ICI)
- Ruhama
- Dublin Rape Crisis Centre (DRCC)
- Professor Michael Breen, Professor Michael Healy & Dr. Amy Healy
- Rape Crisis Network Ireland (RCNI)
- Tusla
- National Women's Council of Ireland (NWC)
- Irish Human Rights and Equality Commission (IHREC)

The following unsolicited submission was also received by the Committee

- International Transport Workers' Federation (ITF)
- The Migrant Rights Centre Ireland (MRCI)
- MECPATHS
- AkiDwA
- Bar of Ireland

Stakeholders welcomed the General Scheme in expanding the list of authorities that can identify a potential victim of trafficking; in putting the National Referral Mechanism on a statutory basis; and in marking a further step towards compliance with the EU Anti-Trafficking Directive 2011/36/EU ('the Directive').

The submissions highlighted in particular, the need for a separate identification mechanism for child victims of trafficking [Head 12]; that the General Scheme should include more details on the rights that will be provided to suspected child victims of trafficking (Head 13) and the supports provided to all victims (Head 19); and that safe and gender-specific accommodation should be made available for victims of trafficking and the use of Direct Provision to house victims should cease [Head 19].

1. Comments on part 2 of the General Scheme

Submissions outlined the following main points, which will be expanded on further below

- The ‘gendering’ of rape should be replaced with more gender-neutral language. [Head 3]
- ‘Sexual experience evidence’ should be given a clearer definition, to ensure that only relevant evidence is permitted in such trials. [Head 4]
- Legal representation should be available for the entire trial process and not only for questions in relation to sexual history. [Head 5]

Submissions welcomed several of the proposed amendments to the *Criminal Law (Rape) Act 1981* under the General Scheme including, among others, the changed approach towards an objective formulation of belief in consent, which must be established on reasonable grounds (Head 3) and the right of victims to avail of legal aid when an application is made at preliminary trial to raise questions in relation to their sexual experience (Head 4).

The following comments were made in relation to Heads within part 2 of the General Scheme:

Head 3

- To support the changes proposed under Head 3, it was recommended that a set of guidelines should be developed for judges, to help them best explain concepts like consent and belief in consent to jurors and dispel any prejudices jurors may have in relation to rape victims.
- It was recommended that the ‘gendering’ of rape within Head 3 of the General Scheme be re-assessed and that more gender-neutral language is used within the proposed legislation.
- Submissions recommended that section 2(c) of this Head should be removed, allowing for ‘age and maturity’ to be considered as part of an argument of reasonable belief that consent was given. It was argued that including this

section could create uncertainty or dissension regarding how old or mature one has to be to understand what constitutes rape.

Head 4

- This Head should provide a clearer definition of what constitutes 'sexual experience evidence' to ensure that this evidence is not inappropriately included in the trial. Legal representation should also intervene where they feel any line of questioning in this area is unnecessary or unsuitable.

Head 5

- It was recommended that legal advice and legal representation should be made available for the duration of the entire trial process and not limited to questions surrounding sexual history. Submissions argued this would help safeguard the rights of victims, as provided for within the EU Directive on Victims' Rights and the *Criminal Justice (Victims of Crime Act) 2017*, to enable victims to give evidence to the best of their ability on the day. The Legal Aid Board would need to ensure that it has staff who are sufficiently trained in criminal law pertaining to sexual offences and who are informed on the specific vulnerabilities of victims of sexual crimes, in order to provide appropriate legal services to these victims.
- It was recommended that the phrase 'other sexual experience' under this Head should be defined more clearly and include references to 'pregnancy, miscarriage, abortion, contraception and other indicia of sexual activity'.
- It was re-iterated that when questions in relation to 'other sexual experience' are raised, that the category of questions that will be asked and the rationale or purpose behind asking these questions must be made clear. This is crucial to ensure that these questions are necessary in the context of the trial and cross-examination.

It was recommended that free legal aid should be made available for all victims of sexual violence, even in cases when there is no prosecution, in order to address the fact that there is a disparity in the ease of accessing legal aid for victims of gender-based crimes.

2. Interpretation for Part 3 (Head 12)

Submissions outlined the following main points, which will be expanded on further below

- General Scheme should include a child-specific identification process.
- 'Benefit of doubt' principle should be applied to suspected child victims of trafficking.
- The term 'exploitation' should be given a broad definition to cover new forms of human trafficking.

Head 12 defines terms used in Part 3 of the General Scheme, including the terms 'child', 'competent Authority', 'National Referral Mechanism', 'trafficks', and 'Trusted Partner'.

Submissions highlighted the need for the General Scheme to include a child-specific identification process. To inform the establishment of this identification process, recommendations from within the 'First National Evaluation Report of the National Rapporteur on Human trafficking', the Group of Experts on Action against Trafficking in Human Beings (GRETA) 3rd evaluation report and the Organization for Security and Co-operation in Europe's (OSCE) country report of 2020 should be referred to.

Competent Authorities (CA) and Trusted Partners (TP) should be required to undertake child trafficking training so they are suitably qualified to carry out this role.

It was pointed out that the General Scheme lacks details on the methods to determine a person's age, which could risk excluding some child victims of trafficking from receiving adequate protection. Submissions recommended that the 'benefit of the doubt' principle should be applied in these situations, so that where there is doubt, it is assumed a victim is a child in the first instance and is offered enhanced protections, as treating a child victim as an adult would carry greater risks for the victim.

It was recommended that the term 'age assessment' should be included within the General Scheme. Age assessments should be carried out by Tusla in relation to potential child victims of trafficking and these assessments should observe strict

guidelines, including that assessments are child-centred, appropriate to the child's cultural or gender needs and that they do not include any medical testing.

Submissions recommended that the terms 'exploitation' is provided with a broad definition, to cover new forms of human trafficking as coercion and commercial exploitation including forced marriage, surrogacy or pregnancy.

Stakeholders recommended that the definition of the term 'victim' should include an individual who is awaiting the results of an appeal on their application, as this right must be included within the legislation.

3. Competent Authorities of the National Referral Mechanism (Head 13)

Submissions outlined the following main points, which will be expanded on further below

- Head 13 should include details on the rights and protections that will be provided to suspected child victims of trafficking children.
- Head 13 should clarify the membership of the CAs.

Submissions argued that Head 13 should include details on the protections it will provide to children suspected of being victims of trafficking. It should specify Tusla's responsibilities when applying on behalf of a child that is a suspected victim of trafficking and the timeframe within which an application must be submitted. The Head should include details on the child-specific entitlements and rights a presumed child victim of trafficking should receive and should stipulate that once an application has been made on behalf of a suspected child victim, they should be entitled to immediate access to protection services.

Head 13 should also provide further clarity on the membership of the CA. Submissions recommended that the General Scheme should also state that no Garda below the rank of Superintendent should be a member of the Operational Committee, while others recommended that Local Authorities should be included as a CA. In addition, it should be clarified whether this body will be an independent agency or will form part of a section within an existing Government Department.

Some submissions recommended that, as the Minister for Justice has the role of National Co-Ordinator, that they should be given responsibility for the Operational Committee to reflect this.

Submissions recommended that each CA should be adequately trained on matters relating to the identification of victims of human trafficking.

In order to ensure transparency, it was recommended that CAs and TPs should record any instances where it was decided not to refer a suspected victim onto the Operational Committee.

4. Application for recognition as a victim of human trafficking (Head 14)

Submissions outlined the following main points, which will be expanded on further below

- Submissions questioned the inclusion of the ‘credibility test’ under this Head (and Head 17).
- CAs or TPs should have an obligation to refer any individual they believe / who believes themselves that they are a victim of trafficking.
- CA and TPs should refer to international indicators, e.g. Delphi indicators, when making decisions regarding referrals.

Head 14 sets out the mechanism of identifying a victim of human trafficking by a CA or TP. Where the CA or TP is satisfied an application is ‘credible’ and based on ‘reasonable grounds’, they will refer the application to the Operational Committee to make a further determination on it.

Submissions questioned the inclusion of the ‘credibility test’ under this Head (and Head 17) to determine whether an individual is a victim of human trafficking or not. It was pointed out that this would impose a higher threshold than which is currently expected from the EU Anti-Trafficking Directive 2011/36/EU (‘the Directive’) and was argued that a lower standard should be applied, to ensure as many victims as possible are eligible for the NRM.

Stakeholders argued that the list of reasonable grounds that the Operational Committee refers to in decision making should comply with the definition of trafficking and include wider criteria, among them evidence that the individual has been coerced, threatened, abducted, or had force used against them; or evidence that the alleged trafficker took advantage of the vulnerability of the trafficked person to the degree that victim had no other option but to submit to being trafficked.

It was recommended that there should be an obligation on CA and TP to refer any individual they believe or who believes themselves that they have been a victim of human trafficking. It was argued that this would be particularly important in terms of child victims, who may be unlikely to identify themselves as a victim of trafficking. Other

submissions suggested that this Head should enable victims to refer themselves to the NRM, in situations where it may be difficult for victims to submit an application through a TP or CA.

Submissions highlighted that the Delphi and Dignity indicators or other international indicators should be included in the General Scheme as the criteria which the CA or TP may consider in refer to when making a referral.

Submissions recommended that this Head contain a provision to allow an individual to appeal or have a decision reconsidered where it was decided not to refer a victim onto the Operation Committee.

5. National Referral Mechanism Operational Committee for the identification of victims of human trafficking (Head 15)

Submissions outlined the following main points, which will be expanded on further below

- Timeframes within which decisions or appeals should be issued in relation to an application for identification as a victim of trafficking should be specified.
- Head 15 should stipulate the Operational Committee should meet at least four times per year.

Head 15 provides for the functions of the National Referral Mechanism (NRM) Operational Committee, including that it will act as the National Referral Mechanism of the State to identify victims of human trafficking and will make decisions as regards identifying victims of human trafficking.

Some stakeholders recommended that the operational framework under which the Committee operates should be contained within primary legislation, to allow it to receive adequate scrutiny by the Oireachtas.

Submissions recommended that there should be more information within this Head on the timeframes within which a decision on the identification of a victim must be made and within which an individual should appeal a decision made by the NRM.

Head 15 should state the minimum number of times the Operational Committee should meet per year and submissions recommended the Committee should meet at least four times a year, so that victims will not be left waiting more than four months to receive an answer on their application.

Several submissions highlighted that this Head does not reference any procedures for child-specific identification of victims of trafficking. It was also highlighted that international studies have shown in some instances that almost 21% of trafficking victims were identified as children and stakeholders recommended that those on the Committee have adequate expertise regarding child victims of trafficking to effectively handle this volume of cases.

Submissions recommended that the Department of Justice design procedures to select certain members of the CA and TP, based on their expert knowledge, who would together form specific panels to oversee identification decisions under Head 17 relating to exploitation. The desired expert knowledge when considering these applications includes the form of exploitation the applicant has been subject to; gender-based violence; forced labour and employment-related matters, legal expertise and; child trafficking

The power to refer a suspected victim of trafficking into the NRM should be widened to include additional 'first responders', as policing and health services, additional statutory agencies and further organisations that work with victims including NGOs and specific victim-support agencies.

6. Sharing of information by Competent Authorities and Trusted Partners (Head 16)

Submissions outlined the following main points, which will be expanded on further below

- Head 16 should provide child victims with a legal guardian to represent their interests, to align with Article 16(3) of Directive.
- Head 16 should provide for a child specific NRM.

Head 16 details the necessary cooperation between the members of the CA and TP, including that which may be necessary in determining whether an individual is a victim of human trafficking or not.

It was recommended that, in order to ensure that the best interests of the child are guaranteed within this legislation, the General Scheme should contain child specific provisions concerning the identification and application for recognition as a victim of trafficking.

Submissions recommended that the General Scheme provide that all child victims of trafficking would have a legal guardian appointed, at the earliest stage, to represent their interests, as required under Article 16(3) of the Directive.

Submissions recommended that a database should be established, which would gather comprehensive data on the prevalence of human trafficking in Ireland. This should include data on potential victims of trafficking outside of the NRM and data on individuals who interact with authorities on the suspicion they have been trafficked, even if they do not engage with the NRM. The database should be managed by the Department of Justice and the data should be collected on a rolling basis and published into annual reports, which would be formally laid before the Oireachtas. Consideration should also be given to creating a shared database that could be used between Northern Ireland and the Republic, due to the regular engagement between the two jurisdictions in relation to issues of human trafficking.

Regarding the sharing of information under this Head, it was recommended that information should only be shared when deciding on a victim's case and that that no

agency should refer any individual to immigration authorities who has not already been referred to the Operational Committee. It was argued that it may encourage more victims to come forward if they are certain that they will not be referred to immigration authorities.

Tusla pointed out that the General Scheme assigns it with two conflicting roles, as it has a role as a parent for children in its care and is required to stand up for the child's best interests, while its inclusion as a CA would require Tusla to decide upon whether a child will be formally recognised as being a victim of human trafficking or not. If Tusla determines that a child is not a victim of trafficking, this could have implications for the child's immigration status and access to support services.

7. Access to services by victims of human trafficking (Head 19)

Submissions outlined the following main points, which will be expanded on further below

- Safe and gender-specific accommodation should be provided for victims of trafficking.
- General Scheme should stipulate that support for victims will not be contingent on them engaging with criminal investigations.
- Head 19 should include reference to the 60-days 'recovery and reflection' period.

Head 19 intends to provide an outline of services and supports that may be necessary to meet the needs of victims of human trafficking. Some submissions argued that the services for victims of trafficking remain inadequate, referencing the Trafficking in Persons (TIP) report by the US Department of State and GRETA report, which state the same.

Stakeholders recommended that Head 19 should set out in clearer terms the services that will be offered to victims, as these are stated clearly in the corresponding Article 11 of the Directive. Among the supports that should be guaranteed include social welfare supports, housing assistance, medical and psychological care and immigration status, where necessary (to enable the above supports to be provided to victims).

Other submissions suggested that, in order to monitor the services that are provided to victims, the Operational Committee should prepare an annual report to the Minister or Oireachtas describing the services that have been made available to victims.

Stakeholders stated that safe and gender-specific accommodation should be offered for victims of trafficking, in accordance with the criteria set out by the Directive. Stakeholders stressed the unsuitability of Direct Provision accommodation for victims of trafficking, as this does not cater for the needs of victims or adequately shield them from becoming victims of trafficking again.

It was recommended the General Scheme should stipulate that supports for victims will not be made contingent on them cooperating with a criminal investigation or trial.

It was pointed out that Head 19 does not provide for a 60-days recovery and reflection period. Submissions argued that this period is important in order to allow victims of trafficking to have time to recover from their experience and to reflect upon whether they would like to report their situation to law enforcement. Stakeholders urged that the 60-days period be guaranteed under this Head.

Stakeholders also recommended that this Head should stipulate that a cultural mediator or trafficking expert will be appointed to aid with the identification process where required.

8. Additional Points

In addition to the above key issues, some stakeholders indicated specific interest in certain areas, as follows:

- **Prohibition on deportation of victims of trafficking (Head 20) & Protection from prosecution for a human trafficking offence (Head 21)**

Submissions re-iterated the need for these Heads to align with the provisions of Article 8 of the provisions of the of the Directive to ensure that victims of human trafficking are protected from prosecution or punishment for being complicit in criminal activities, as a result of their being trafficked.

This could be achieved through providing guidance for Gardaí and prosecutors on when and how this provision should be applied. Submissions also suggested that a statutory defence could be adopted to guarantee this.

Other submissions argued that guarantees of non-prosecution for offences committed while being trafficked should be expanded to cover additional offences. It was recommended that section 45 of *the Modern Slavery Act 2015* should be referred to for guidance on this.

- **RCNI**

The RCNI proposed that, under Part 2 of the General Scheme, an offence of digital rape and an offence of voyeurism should be inserted into this section.

RCNI also recommended that additional special measures be introduced under the General Scheme, including:

- A ban on cross-examination of the complainant by the defence in relation to any element of their appearance at the time of the offence
- That section 16 of *the Criminal Evidence Act, 1992* be amended to enable pre-recorded evidence and the pre-recording of cross-examination and re-

examination of adult victims with full capacity, to be used by victims as their principal evidence and additional evidence at trial.

- That the special measures provisions of the *Criminal Evidence Act, 1992* as amended, the *Criminal Justice (Victims of Crime) Act 2017*, the *Criminal Law (Sexual Offences) Act 2017* and the *Domestic Violence Act 2018* be amended to allow all victims of and witnesses to sexual offences and violent offences to avail of special measures.
- That Section 14 of the *Criminal Evidence Act, 1992* in relation to the use of intermediaries be amended, to expand the circumstances in which intermediaries may be utilised.

- **Professor Michael Breen, Professor Michael Healy, Dr. Amy Healy**

Among the recommendations made by Professor Breen, Professor Healy and Dr. Healy include the need for specialist, comprehensive and continuous education and training to be made available for those who deal directly with victims of human trafficking, alongside those within ancillary services as the courts and frontline medical services.

- **Dr. Laura Wallace**

Dr. Wallace recommended that the terminology used in the General Scheme and the conceptual frameworks in which these terms have been devised should be evaluated to ensure that it does not exclude certain groups from being protected under the legislative framework.

Dr. Wallace also recommended that expert-working groups should be established to incorporate the perspectives of those who have been part of industries where exploitation often occurs, as their perspectives would be valuable in helping to inform and shape policy in this area.

APPENDICES

APPENDIX 1- ORDERS OF REFERENCE OF THE COMMITTEE

Standing Orders 94, 95 and 96 – scope of activity and powers of Select Committees and functions of Departmental Select Committees

Scope and context of activities of Select Committees.

94.(1) The Dáil may appoint a Select Committee to consider and, if so permitted, to take evidence upon any Bill, Estimate or matter, and to report its opinion for the information and assistance of the Dáil. Such motion shall specifically state the orders of reference of the Committee, define the powers devolved upon it, fix the number of members to serve on it, state the quorum, and may appoint a date upon which the Committee shall report back to the Dáil.

(2) It shall be an instruction to each Select Committee that—

(a) it may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

(b) such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil;

(c) it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 125(1)⁴; and

⁴ Retained pending review of the Joint Committee on Public Petitions

(d) it shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal office-holder of a State body within the responsibility of a Government Department or

(iii) the principal office-holder of a non-State body which is partly funded by the State,

Provided that the Committee may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

(3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice to the Business Committee by a Chairman of one of the Select Committees concerned, waives this instruction.

Functions of Departmental Select Committees.

95. (1) The Dáil may appoint a Departmental Select Committee to consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Dáil on any matter relating to—

(a) legislation, policy, governance, expenditure and administration of—

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

(b) the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) A Select Committee appointed pursuant to this Standing Order shall also consider such other matters which—

(a) stand referred to the Committee by virtue of these Standing Orders or statute law, or

(b) shall be referred to the Committee by order of the Dáil.

(3) The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—

(a) for the accountability of the relevant Minister or Minister of State, and

(b) to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) A Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts—

- (a) consents to such consideration, or
- (b) has reported on such accounts or reports.

(5) A Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be specified in these Standing Orders or by order of the Dáil: provided that the Joint Committee shall not consider—

- (a) the Committee Stage of a Bill,
- (b) Estimates for Public Services, or
- (c) a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Chairman of the Select Committee appointed pursuant to this Standing Order shall also be Chairman of the Joint Committee.

(8) Where a Select Committee proposes to consider—

- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 133, including the compliance of such acts with the principle of subsidiarity,
- (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
- (c) non-legislative documents published by any EU institution in relation to EU policy matters, or
- (d) matters listed for consideration on the agenda for meetings of the relevant Council (of Ministers) of the European Union and the outcome of such meetings, the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:
 - (i) members of the European Parliament elected from constituencies in Ireland,
 - (ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
 - (iii) at the invitation of the Committee, other members of the European Parliament.

(9) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

- (a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 130 apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.⁵

⁵ Retained pending review of the Joint Committee on Public Petitions.

Powers of Select Committees.

96. Unless the Dáil shall otherwise order, a Committee appointed pursuant to these Standing Orders shall have the following powers:

(1) power to invite and receive oral and written evidence and to print and publish from time to time—

(a) minutes of such evidence as was heard in public, and

(b) such evidence in writing as the Committee thinks fit;

(2) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(3) power to draft recommendations for legislative change and for new legislation;

(4) in relation to any statutory instrument, including those laid or laid in draft before either or both Houses of the Oireachtas, power to—

(a) require any Government Department or other instrument-making authority concerned to—

(i) submit a memorandum to the Select Committee explaining the statutory

Instrument, or

(ii) attend a meeting of the Select Committee to explain any such statutory instrument: Provided that the authority concerned may decline to attend for reasons given in writing to the Select Committee, which may report thereon to the Dáil,

and

(b) recommend, where it considers that such action is warranted, that the instrument should be annulled or amended;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss—

(a) policy, or

(b) proposed primary or secondary legislation (prior to such legislation being published),

for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy or proposed legislation;

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the attendee, oral briefings in advance of meetings of the relevant EC Council (of Ministers) of the European Union to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(7) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(8) power to require that a member of the Government or Minister of State who is officially

responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 197;

(9) subject to any constraints otherwise prescribed by law, power to require that principal office-holders of a—

(a) State body within the responsibility of a Government Department or

(b) non-State body which is partly funded by the State,
shall attend meetings of the Select Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil;

and

(10) power to—

(a) engage the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

(b) undertake travel;

Provided that the powers under this paragraph are subject to such recommendations as may be made by the Working Group of Committee Chairmen under Standing Order 120(4)(a).'

APPENDIX 2 - LIST OF STAKEHOLDERS AND SUBMISSIONS

The Committee received submissions from the following stakeholders:

- Laura Wallace, PhD Candidate at the School of Philosophy, Religion and History of Science, University of Leeds
- Immigrant Council of Ireland (ICI)
- Ruhama
- Dublin Rape Crisis Centre (DRCC)
- Professor Michael Breen, Professor Michael Healy, and Dr. Amy Healy, Mary Immaculate College, Limerick
- Rape Crisis Network Ireland (RCNI)
- Tusla
- National Women's Council (NWC)
- Irish Human Rights and Equality Commission (IHREC)
- The Migrant Rights Centre Ireland (MRCI)

The Committee also received submissions from the following:

- International Transport Workers' Federation (ITF)
- MECPATHS
- AkiDwA
- The Bar of Ireland

[Submissions are available in the online version of the Committee's Report, which will be accessible at <https://www.oireachtas.ie/en/committees/33/justice/>].

Submission for the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 General Scheme.

SOHT_01(1)

In 2018, the US State Department's Trafficking in Persons (TIP) report gave Ireland a Tier 2 ranking in what it described as the Irish government's failure to protect the victims of sexual exploitation and trafficking, along with its failure to convict traffickers. Prior to this, Ireland held a Tier 1 position for six years which means that Ireland was previously meeting the minimum standard to eliminate the most serious forms of trafficking. Therefore, measures that eradicate trafficking and protect all victims of human trafficking and exploitation are of critical importance. With this in mind, harm reduction, as a matter of urgent policy, is at the heart of this submission to the Justice Committee. Within this document is a call to recognise the impact of terminology used across this bill and how the conflation of terminology can obscure and limit victims of human trafficking from accessing resources and safety, whilst further excluding marginalised communities from its legislative and political model. Recommendations are made to challenge the current anti-trafficking framework by moving towards a harm reduction model that recognises the expertise of those currently working within the most affected industries with regards to human trafficking.

Terminology as foundational in harm reduction policy

Harm reduction is most commonly discussed in terms of the use of drugs, homelessness, disordered eating, and mental health advocacy. In the context of this submission, *harm reduction* refers to reducing negative outcomes through policy, human rights and public health-based practices which includes accurately defining the parameters of human trafficking and its associated exploitations. The aim of harm reduction as a policy in this context is to protect the safety, dignity, and rights of victims of human trafficking.

This is in direct opposition to abolitionist policies that legislate to eradicate or criminalise the entirety of the commercial sex industry as a key method in protecting people from human trafficking and the associated abuses. A policy approach of harm reduction acknowledges the complex and interconnected reasons people become susceptible to exploitation. This in turn can reduce the harms of human trafficking. It is vital that the terminology within the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 General Scheme represents the in-depth and complex aspects around exploitation. Without this, Ireland's legislative framework will remain ineffective for victims of human

trafficking whilst also causing harm to other marginalised groups. To illustrate this more clearly to the Justice Committee, the examples of migration, human trafficking, and so-called modern slavery will be used below as examples of where these terms become conflated and how they can be better understood.

Migration and Migrant smuggling

While there is no unanimously agreed upon definition for migration, it can be broadly understood as the physical movement of a person or group from one place to another; in the context of the discussion around human trafficking, it is typically used to discuss a person who has crossed from one country to another. Migrant smuggling or human smuggling, although often used interchangeably with human trafficking, differs due to the migrant's perceived autonomy. This is discussed in the academic literature in three parts. For a person to fall into a category of migrant smuggling there is: (i) A smuggler or intermediary who undertakes the job of facilitating the cross-border movement. (ii) Payment to the smuggler by the migrant or someone paying on their behalf. (iii) **Consent**. The migrant's choice to participate in the transaction is voluntary.¹ This is highlighted due to the need to have conceptual clarity around these terms as they continue to permeate discussions around "migrant prostitution" and human trafficking in the Irish context. A discourse prevails that because some people selling sexual services in Ireland are migrants, their labour falls into the context of human trafficking and sexual exploitation. By acknowledging the definition above, it allows for expert working groups to be formed to understand if migrants to Ireland are susceptible to exploitation, including sexual exploitation, because of immigration policies. This would aid in a better understanding of how to ensure policies do not stop migrants accessing basic support services.

Human Trafficking

Human trafficking can lead to the slavery and exploitation of a person but trafficking is better defined as a **process** in which the recruitment, transportation, transfer, harbouring or receipt of a person is done so through force, coercion, abduction, fraud, deceit, abuse of power, or the giving or receiving of money in order to gain consent of a person that would not have consented otherwise.² However, human trafficking is regularly being discussed in Irish politics as, predominantly, the sexual exploitation of women and girls. The process of human trafficking does have a significant impact on

¹ Baird T and van Liempt I (2016) Scrutinising the double disadvantage: knowledge production in the messy field of migrant smuggling. *Journal of ethnic and migration studies* 42(3). Routledge: 400–417.

² UNODC (2000). United Nations Conventions against Transatlantic Organised Crime and the Protocols Thereto. Available at: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THEREO.pdf

gender-based exploitation but it is - in and of itself- a separate process. Human trafficking is not, and should not, be a catch-all term.

Modern Slavery

Modern slavery can be an **outcome** of human trafficking but, importantly, can occur without any trafficking at all. In short, modern slavery acts as an umbrella term for a whole host of experiences and circumstances that involve forced labour. This is problematic when it comes to policy and legislative frameworks as, human trafficking expert Emily Kenway points out, when we discuss modern slavery, we are discussing a specific frame (which is understood as words which are defined relative to conceptual frames).³ That is to say, being anti-slavery in the west is par for the course. This is pointed out not to disparage anti-slavery efforts, but to engage the Justice Committee with the need to properly interrogate what modern slavery and forced labour actually is. The concept of modern slavery is extremely broad (and often uncritically includes all forms of prostitution) and, as argued here, is better understood by looking at the systems in Ireland that produce systems of exploitation; such as immigration laws and the system of direct provision, the ongoing housing crisis, failing mental health services, alongside the industries in which forced labour most commonly occurs.

Conclusion and Recommendations

To stop exploitation and human trafficking in Ireland, the conceptual frameworks in which we understand them needs to be interrogated. In Ireland's case, the moral imagination has been historically nurtured through Christianity. This can, and often does, undergird conceptual frameworks around justice and morality which in turn influence the approaches taken when combatting human trafficking and exploitation. The issues of exploitation noted above do not exist in isolation. The ramifications of a policy focused solely on trafficking as an isolated phenomena will continue to be ineffective. Instead, a focus on expert-working groups that centres the voices of people with experience of working within the industries where exploitation is often found should guide future policy decisions. With this in mind, the following recommendations are made to the Justice Committee for consideration:

³ Kenway E. (2021). The Truth about Modern Slavery. Pluto Press. Pp 1-3

Recommendations

- To protect victims of human trafficking and sexual exploitation, a move beyond short-term law enforcement options is recommended with a goal to create expert working groups that include **current** workers. This includes workers within the fishing industry, construction industry, workers in the commercial sex industry, and domestic workers to allow for in-depth knowledge development and analysis on the current human trafficking and forced labour situation in Ireland. This would allow for a range of responses that can accommodate situations locally and nationally.
- To provide clear definitions that acknowledge that the differences between migration, human trafficking, exploitation, modern slavery, and forced labour are important.
- An interrogation into the systems that are fostering the exploitation(s) and trafficking of persons in Ireland. This includes, but is not limited to, immigration policy, the direct provision system, the on-going housing crisis, the cost of living crisis, working conditions and national minimum wage.

Lastly, I would like to thank the members of the Justice Committee for your thoughtful consideration of the above.

Is mise, le meas,

Laura Wallace (Irish citizen)

PhD Candidate – Sociologist of religion, gender, and human trafficking

Submission to Joint Committee on Justice on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

Preliminary Observations

October 2022

Working for **equality**



Immigrant
Council of
Ireland

INTRODUCTION

The Immigrant Council of Ireland Independent Law Centre (ICI) is an independent human rights organisation that promotes access to justice for migrants and their families, including Irish citizens, living in Ireland. More than 5,000 individuals are directly supported through our information, support and legal services each year. With over 15 years' experience as a frontline service provider across the broad spectrum of migration, residence and citizenship related applications, the organisation has significant insight regarding the issues affecting migrants and their families in the immigration system. The Immigrant Council has adopted as one of its organisational priorities specific actions in the area of anti-human trafficking. As an Independent Law Centre we provide legal representation, advice and information to victims of human trafficking. More broadly, we conduct research and engage in collaborative actions regarding the needs of survivors of trafficking in areas such as accommodation, gender specific support services, integration supports such as education and employment, training on the holistic support of survivors of human trafficking and other associated areas.

BACKGROUND TO THE PROPOSED LEGISLATION

This submission focuses exclusively on Part 3 of the General Scheme providing for the establishment of a revised National Referral Mechanism (NRM) for Victims of Trafficking.

The [EU Anti-Trafficking Directive 2011/36/EU](#) (the Directive), in which Ireland participates, provides for a holistic, non-discriminatory, human rights-based and gender specific approach to the identification and support of victims of human trafficking. Since the adoption of the Directive, the ICI has advocated for the enactment of legislation in Ireland to transpose the Directive and to provide for such an approach. As such, the ICI welcomes that the publication of the [General Scheme of the Criminal Justice Sexual offences and Human Trafficking\) Bill 2022](#) (General Scheme) is a step towards that objective. We believe that clearly setting out in legislation the operation of the NRM and the system of identification of victims of human trafficking will significantly enhance the investigation, prosecution, and prevention of human trafficking.

Reform of the existing NRM in Ireland is long-overdue. In 2015, the Irish High Court delivered judgment in [P.v. Chief Superintendent of the Garda National Immigration Bureau & Ors \[2015\] IEHC 222](#). The case considered the existing administrative arrangements for the identification of and provision of supports to victims of human trafficking in Ireland and held that the Directive had not been adequately transposed into Irish law by those arrangements, which have been in place since 2008.

Following the judgment, the Immigrant Council of Ireland, in collaboration with the Migrant Rights Centre Ireland and Ruhama, made a submission to the Department of Justice in 2016 to support the establishment of an improved system of identification and protection of all victims of trafficking irrespective of their legal status or nationality, in accordance with State's obligations, in particular the Directive. The principles set out in that submission (see Appendix 1), which we believe were shared by the Department of Justice, An Garda Síochána and other members of the current NRM, were also agreed upon by various NGOs and other relevant stakeholders, and

reflected our considered view regarding the fundamentals that should underpin the NRM and any identification process to be developed in Ireland. The most important of those principles are that any system of identification and support must be non-discriminatory, efficient, accountable and transparent.

We note that these principles are set out clearly in the [OSCE/ODIHR 12 principles](#)¹ for effective NRM structures. However, we are concerned that the General Scheme does not take sufficient account of these well-established best practice principles in relation to the identification and support of victims of human trafficking and that there is an overall lack of clarity, as draft operating guidelines have not yet been published, which would enable all stakeholders to comprehensively consider and make recommendations regarding the proposed operations of the revised NRM.

PRELIMINARY OBSERVATIONS ON THE GENERAL SCHEME

We welcome that a non-discriminatory and multi-agency approach has been incorporated into this draft. We are also pleased to see that it appears, in line with the provisions of Article 11(3) of the Directive, that victims of human trafficking are not required to cooperate with criminal investigations in order to receive the full range of assistance and entitlements. If this is the case, and the Department should clarify the position, this is a welcome and significant step forward from the current victim identification requirements.

However, overall, certain issues are still of considerable concern to us. When compared with the [OSCE/ODIHR 12 principles](#) for effective NRM structures, there are significant gaps in the General Scheme. In its current format we do not believe the goal of establishing a NRM that is underpinned by international best practice principles is met nor does it take account of previous submissions made by the Immigrant Council and other stakeholders to the Department.

The General Scheme does not make any reference to the existing [Administrative Immigration Arrangements for the protection of suspected victims of human trafficking](#) (AIAs). It is not clear if the AIAs will continue to operate, and if so whether they will be amended when the legislation is enacted or whether the Operational Guidelines will replace the AIAs.

In this submission, we highlight key issues to be addressed to in the legislation:

HEAD 12 – INTERPRETATION SECTION

Part 3 of draft Scheme commences with **Head 12**, which relates to interpretation of relevant terms including definitions of types of ‘exploitation’, including sexual exploitation, labour exploitation, removal of organs and forced criminality. The definitions are in keeping with the provisions of existing legislation, namely the Criminal Justice (Human Trafficking) Act 2008

¹ See the 12 Principles for effective NRM structures elaborated at pages 20-23 of National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons OSCE/ODIHR 2022, https://www.osce.org/files/f/documents/f/5/510551_0.pdf

(2008 Act) and the Criminal Justice (Human Trafficking) (Amendment) Act 2013 (2013 Act). The General Scheme, however, only refers to the 2008 Act and the legislative drafters should ensure that the definition also cover the 2013 Act. With reference to Article 2(3) of the Directive and ‘exploitation’, the existing legislation represents only the minimum standard required and the ICI recommends that the legislation also defines ‘exploitation’ in sufficiently broad a manner to allow for new or emerging forms of human trafficking including coercion and commercial exploitation in the context of, for example, forced or ‘sham’ marriage, surrogacy, forced pregnancy, illegal adoption, etc.

We note that the 2008 Act and 2013 Act do not refer to ‘consent’ and nor does the General Scheme. Article 2(4) of the Directive provides that the consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where various means are used, to include ‘threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person’.

The interpretation section also defines a ‘Trusted Partner’ (TP) as a body or organisation that has been designated by the Minister for Justice to accept applications from victims of trafficking (VOTs) to be identified and to refer those applications to the Operational Committee (OC). This is further elaborated on in **Heads, 13, 14 and 17**.

HEAD 13 – COMPETENT AUTHORITY

Head 13 relates to the Competent Authority (CA) and provides that several Ministers (Justice, Social Protection and Children, Equality, Disability, Integration and Youth) and other State bodies, to include An Garda Síochána (AGS), the Child and Family Agency (Tusla), the HSE and Workplace Relations Commission, will form the CA. In principle, this together with the introduction of a role for Trusted Partners (see **Head 18**), is to be welcomed, as it moves sole responsibility for victim identification away from AGS/Minister for Justice, as is currently the case, and the multi-disciplinary approach has potential to greatly enhance the State’s ability to identify and support victims.

It is, however, not clear whether the list of bodies in the General Scheme is exhaustive or if others may be included, such as, for example, the International Protection Office with responsibility for processing protection applications, which is a body likely to receive applications for protection from individuals who have been, or are, or at risk of trafficking and which is obliged to carry out vulnerability assessments in respect of applicants.

Head 13 does not elaborate further on membership or composition of the CA, whether it will be housed within a specific Government Department or a standalone agency with specialised staff seconded to it from the identified bodies, or whether there will be dedicated units within each of the identified bodies, etc. The legislation should clearly establish this, so that there is clarity where applications for victim identification may be received.

It is further recommended that the legislation specify the minimum qualifications and mandatory training required for staff appointed by bodies to the CA and also organisations designated as Trusted Partners (**Head 18**). Clarity on the professional skills/competencies and selection

process of those who will be able to represent these CAs and TPs at the Operational Committee (OC) (see further below, **Head 15**) is needed ensuring that all members of the OC have relevant experience and knowledge of human trafficking and administrative decision making. Adequate funding and resourcing must be provided to the CAs and TPs to ensure they can carry out their duties with appropriate care and professionalism.

Recognising this and referring to the proposed Third National Action Plan on Trafficking, it is very important that all members of the OC, CA's and TP's are engaged in mandatory training for the effective implementation of the NRM, including training to recognise and counter child trafficking.

HEAD 14 – APPLICATION FOR RECOGNITION AS A VICTIM OF TRAFFICKING and HEAD 17 – IDENTIFICATION OF HUMAN TRAFFICKING BY THE NRM OPERATIONAL COMMITTEE

Head 14 provides that an application may be made by a person who believes that they have been, or is, or may be a victim of trafficking. The application can be made to Competent Authority (CA) or Trusted Partner (TP). Where the CA or TP receives an application and is satisfied that the application is a) credible and b) based on 'reasonable grounds', they must refer the application to the Operational Committee (OC) to determine the application. 'Reasonable grounds' to be considered include evidence that the person has been trafficked for purposes of exploitation; evidence that the person has been coerced by another person, including for purposes of forced labour, labour exploitation or prostitution; failure to pay minimum wage; evidence of deception by another person regarding the terms and conditions of employment, nature of employment and/or conditions of travel into State. This is stated to be a non-exhaustive list.

The General Scheme introduces an additional "credibility" test as to whether a person is a victim of human trafficking. In addition, there is inconsistency between **Head 14**, where credibility is referenced and **Head 17** (providing for the establishment of arrangements for the OC to identify VOTs using a multi-disciplinary and cross-agency team) decisions must be taken based on assessment on the balance of probabilities that the application is credible.

It is not clear why it appears that a more elaborate test than that currently applied by the Competent Authority (AGS) is provided for in the General Scheme and introduces a standard that is not compatible with the Directive, which mandates in Article 11(2) that Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any human trafficking offences.

Head 14(4) refers to a non-exhaustive list of matters that may be considered by the CA or a TP when considering whether there are reasonable grounds for the purposes of recognising a person as a victim of trafficking and deciding to refer an application to the OC. The 'reasonable grounds' refer to 'evidence', as opposed to indicators of human trafficking. The legislation should not impose a higher standard than required by the Directive.

HEAD 15 – NRM OPERATIONAL COMMITTEE FOR THE IDENTIFICATION OF VICTIMS OF HUMAN TRAFFICKING

Head 15 relates to the Operational Committee (OC) and provides that each Competent Authority (CA) will be represented at the OC, as will Trusted Partners (TPs), and will make decisions on 'a collective basis in accordance with procedures agreed by the CAs'. No input from TPs is envisaged, which is questionable. The OC will agree frequency of meetings and interim arrangements to apply to applicants awaiting a determination, including provision of services. As drafted, the General Scheme does not provide any indication of acceptable timeframes for a decision. The intended operating guidelines for the OC have not yet been published, which would enable more informed commentary to be provided regarding the intended operating procedures. It is important that transparency in the formulation and implementation of the operating guidelines is maintained and that a clear and short timeframe for a decision is specified. It is also recommended that decisions are issued in writing and that there are clear timeframes within which to make further submissions and/or to submit an appeal. We note that an appeal process is not currently provided for, which is an omission.

HEAD 16 – SHARING OF INFORMATION BY COMPETENT AUTHORITIES AND TRUSTED PARTNERS

Head 16 relates to the cooperation of Operational Committee members and the sharing of information relevant to the application and determination that the applicant is a victim of trafficking. Information may only be shared with consent of applicant and, if the applicant is a minor, the consent of the applicant's parent or guardian is required. The General Scheme provides that if there is no parent/guardian, Tusla will represent child's best interests. As current drafted, this Head gives rise to several important considerations.

The obligation to share information is stated to be without prejudice to any power or duty which the Competent Authorities may have to provide information to each other under any other enactment or rule of law, which is extremely vague. The legislation should be explicit regarding the use by any CA bodies any use of large-scale IT systems in the area of asylum, migration and border controls.

Additionally, how these provisions would work in practice is unclear, e.g., what if there is an identified parent of a child who does not consent or is not within the jurisdiction and/or is non-cooperative? A child applicant should not be prevented from pursuing an application under **Head 14** and regard must be had to the age, capacity and maturity of an individual applicant child to provide consent. For example, those aged 16 years and older could be deemed 'competent minors'. In this regard, we also note that Head 16 merely refers to a limited role of Tusla to represent a child's best interests in relation to the sharing of information. The General Scheme does not provide that all child victims of trafficking will have a legal guardian appointed to represent their interests, as is mandated by Article 16(3) of the Directive.

Related to the above and, fundamentally, the General Scheme does not provide for a child specific NRM. Nor has particular attention been paid to child-specific provisions concerning identification and application for recognition as a VOT. The best interests of the child should not merely be represented but must be the primary consideration as per the Directive (Article 13 provisions on assistance, support and protection measures for child victims of trafficking and Article 16(2) regarding Member State's obligation to shall take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child) and

Ireland's obligations under the UN Convention on the Rights of the Child (UNCRC). We note that **Head 19** sets out that in the case of a child VOT, access to child protection services of the Child and Family Agency is to be provided for. In this regard, the adequacy of age assessment procedures for migrant children under the Childcare Act 1991 (as amended) must be provided and we note the current lack of published guidance regarding age assessment procedures. We further note that children that children provided with services under the Childcare Act 1991 (as amended) are allocated a social worker; a social worker is, however, not a legal guardian.

HEAD 18 – DESIGNATION BY ORDER OF TRUSTED PARTNER

Head 18 relates to applications by organisations to be recognised as a Trusted Partner, which can include NGOs, charitable organisations, etc. that support or provide services to VOTs. The draft provisions also enable the Minister to refuse such an application and to revoke designated TP status, provisions which are reasonable but would benefit from greater clarity regarding timeframes for dealing with applications and the grounds upon which applications may be refused and/or designated status revoked, as well as the procedures for processing relevant applications.

As stated above, providing for the introduction of Trusted Partners and a multi-disciplinary approach is welcomed and has potential to greatly enhance the State's ability to identify and support victims. Whilst **Head 18(2)** sets out the particulars that an organisation or seeking trusted partner status must set out when applying, which includes matters relating to the nature and type of services provided by the organisation or body, the numbers of persons to whom services were provided by the organisation or body, etc. similar considerations relating to **Head 13** apply and it is recommended that the legislation specify the minimum qualifications and mandatory training required for staff of Trusted Partners that would have a role in the Operational Committee. Head 18 does not deal with the critical issue of adequate funding or appropriate remuneration of staff of Trusted Partners with a role in the Operational Committee to ensure that Trusted Partners may carry out duties effectively, efficiently and with necessary professionalism. The legislation should also address issues relating to confidentiality of service users of Trusted Partners and potential conflicts of interest.

HEAD 19 – ACCESS TO SERVICES BY VICTIMS OF HUMAN TRAFFICKING

Head 19 relates to access to services by victims of trafficking (VOT) and provides that where Operational Committee determines that a person is a VOT, the person shall be accepted into the NRM. It is then the responsibility of the CA, acting individually or collectively, to ensure provision of an 'appropriate care package' to include but not limited to – social welfare, accommodation (there is specific reference to Direct Provision) or local authority, health, civil legal aid, education, training and employment opportunities, child protection services (if a child), info and advice regarding rights as a VOT (but not limited to same) and repatriation (if desired).

Article 11 of the Directive is extremely instructive regarding the services to be provided to victims and the legislation should reflect same. As noted above already, Article 11(2) of the Directive mandates that Member States must take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to human trafficking

offences. Further, Article 11(3) provides that Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial (as is currently required under the existing AIs, which are referred to above in our preliminary observations). Article 11(5) requires that the assistance and support measures shall be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate. Finally, Article 11(7) requires that Member States shall attend to victims with special needs, where those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered.

Head 19 does not make any reference to access to any recovery and reflection period nor to providing access to residence permission for non-EEA nationals or provision of information relating to the possible granting of international protection, as may be required in some instances.

Where a person is recognised as a VOT the HRC that is generally applied to social welfare applicants must be set aside. Additionally, the "nationality" test that is applied in consideration of applications for local authority housing must also be set aside.

We are especially disappointed that the General Scheme refers to Direct Provision in the context of accommodation, which it is submitted is not in compliance with the appropriate or safe accommodation or gender specific approach required by the Directive. We remind the Committee of the recommendations of the [Catherine Day Advisory Group report](#) with regard to appropriate accommodation for victims of trafficking (see recommendation 4.11), as well as the stated [commitments](#) of the Government to end Direct Provision generally and is in direct contradiction of the human rights and victim centred approach set out in the draft Third National Action Plan on Combatting Human Trafficking. We recommend that reference made to ensuring appropriate and safe accommodation for VOT within new NRM as a matter of priority and recommend that references to Direct provision are removed.

Head 19 includes reference to civil legal aid services and note that there are presently restrictions under the Civil Legal Aid Act 1995 that exclude provision of services in respect of certain issues or before certain tribunals and bodies dealing with social welfare appeals, housing, employment and equality rights, etc. The legislation giving effect to the NRM should amend the 1995 Act to ensure that victims of trafficking are not excluded from receive advice and representation to obtain necessary redress and/or for the purpose of claiming compensation, as provided for by Article 12(2) of the Directive.

HEADS 20 AND 21 – PROHIBITION ON DEPORTATION OF VICTIM OF TRAFFICKING AND

Head 20 provides for a specific prohibition on deportation for immigration offences committed whilst being trafficked while an application for VOT is under consideration or after a positive decision has been issued by OC under **Head 17(1)**. **Head 21** reflects principle of protection from prosecution and provides that provides that a person cannot be prosecuted for their role in their

own trafficking. These Heads need to be drafted to ensure compliance with the requirements of Article 8 of the Directive, victims of human trafficking should be protected from prosecution or punishment for involvement in criminal activities such as, for example, the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.

CONCLUSION

In summary, although we welcome its publication and the commitment by Government to bring forward legislation, the General Scheme is disappointing when compared with the wide range of material that is available, both in Ireland and internationally, that clearly sets out the best practice principles that should inform the legislative framework establishing the revised NRM to support and identify victims of human trafficking.

As currently drafted, the General Scheme appears to be lacking significantly with respect to what is required to deliver a robust effective NRM to identify and support victims. It should be assessed with reference to the [OSCE/ODIHR Handbook](#) (2nd Ed., 2022), in particular the 12 principles of an effective NRM structure reference above and, in particular, access to recovery and reflection; the best interests of children; non-conditional on cooperation with criminal investigation/prosecution; non-punishment; and non-detention; social inclusion and criminal justice/redress.

We welcome the opportunity for continued engagement with Joint Committee as the legislation is developed.

Ends.

Appendix 1:

Discussion Document: In consideration of an Identification and Protection

Process for of Victims of Human Trafficking.

Submitted to: **The Anti Human Trafficking Unit, Department of Justice & Equality**

From: **The Immigrant Council of Ireland, the Migrant**

Rights Centre Ireland and Ruhama.

Date: **June 2016**

A. Purpose

The purpose of this document is to support the establishment of a system for the identification and protection of all victims of trafficking in human beings regardless of their legal status or nationality, in accordance with the State's obligations under the Constitution, the European Convention on Human Rights 1950, the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, the Council of Europe Convention on Action against Trafficking in Human Beings 2005, and Directive 2011/36/EU. Increasing the rates of identifications is a key concern primarily for victims and also to measure trends of trafficking within the country. The identification procedure in this context is understood as not contingent on a police investigation and/or an immigration permission being granted. For example, a person may wish to return home or not formalise their complaint. In such circumstances, identification in itself is critical for accurate recording of this crime.

B. Underpinning Principles

The NGOs submitting this document for consideration of the AHTU, and other stakeholders, are in agreement that the principles set out below should underpin any identification process developed in Ireland

Non-discrimination: All victims should be identified regardless of their immigration status or nationality, including persons from the EU and persons seeking asylum. This would ensure that victims have the right to make an application for asylum and for a Temporary Residence Permissions (TRP) concurrently. At the moment victims do not have this right and so a two tier system exists whereby victims who are granted a TRP can access private accommodation and the right to work among other rights while an asylum seeker who is a victim of trafficking must reside in direct provision and can't access the labour market. Adhering to the principle of non-discrimination would ensure that the right to seek and enjoy asylum does not impede on the granting of TPR and the corresponding rights.

Accountability: Ensure that early-identification is a low threshold based on a credible suspicion which triggers the positive obligation towards the victim in a speedy and efficient manner.

Efficiency: Identify all victims with equal speed and consistently ensuring the identification process is time-bound with all decisions issued without delay. For example, all suspected victims identified for the purpose of receiving a recovery & reflection period within 7 days. This would ensure that the early identification procedure doesn't produce long delays.

Inclusivity: Include a range of stakeholders as decision-makers in the identification process. Stakeholders should also include first responders. Non-governmental organisations should be formally included in the decision making structure.

Transparency: Ensure that the decisions relating to the identification process are issued in writing to the victim and their legal representative.

Independence: Apply an independent appeals process to the identification process to ensure all negative decisions within the identification procedure relating to Reflection and Recovery Periods, Temporary Residence Permission (TRP), Renewals and/or revocation of TRP can be challenged.

Access to rights: Suspected Victims should have access to early legal intervention to assess all options, including whether or not to cooperate in a criminal investigation. In addition, a letter should be sent to all victims, without delay, listing all their entitlements without discrimination to their nationality. For example, the right to material assistance, social welfare assistance, private rented accommodation, training and employment, medical and psychological care, and any other rights should be listed. This document will be an important support for EU national who often can't access their rights due to the Habitual Residence Condition.

Victims of trafficking who are EEA nationals should not be subject to the Habitual Residency Condition in order to facilitate their equal access to rights and entitlements in relation to third country nationals.

Participation: Ensure that the participation of victims in the criminal investigation is not mandatory and that it is not a condition for the right to remain in the country or to access their rights. Victims often fear retaliation and fear their traffickers. They also often suffer from Post-Traumatic Stress Disorder and other debilitating stress and are incapable of taking part in an investigation. Their rights should not be conditional on assisting in an investigation as is the current situation.

Do no Harm: Ensure this principle is adhered to at all times so that victims are not re-traumatised in the identification procedure. Ensure that victims do not give numerous accounts of their experience to be identified and ensure that stakeholders work together to avoid re-traumatisation.

Non-punishment Principle: Strenuous efforts must be made, from the point of first contact by statutory authorities, to ensure that victims of trafficking are not criminalized for activities which they were required to undertake by traffickers.

C. Key Provisions

- a. **Legal Advice:** The Legal Aid Board shall grant legal advice to a person who is an alleged victim of a trafficking in human beings in accordance with section 26(3B) of the Civil Legal Aid Act 1995 (as inserted by section 3 of the Civil Law (Miscellaneous Provisions) Act 2011).
- b. **International Protection:** Nothing in any identification arrangements shall affect the right of any person to claim international protection in the State pursuant to the Refugee Act 1996 or the European Union (Subsidiary Protection) Regulations 2013. The fact that a person has claimed or availed of international protection in the State shall not affect his or her entitlement to identification or protection in accordance with such Arrangements.
- c. **Assistance and Protection:** A person identified as suspected victim of trafficking in human beings or as a victim of trafficking in human beings, as the case may be, shall receive:
 - appropriate and safe accommodation,
 - material assistance,
 - necessary medical treatment including psychological assistance, counselling and information,

- translation and interpretation services where appropriate,
- legal advice and representation,
- appropriate protection on the basis of an individual risk assessment,
- Permission to remain in the state, if required
- Waving of the Habitual Residence Condition for EU nationals

Where a child is identified as suspected victim of trafficking in human beings or as a victim of trafficking in human beings, as the case may be, an individual assessment of the special circumstances of the child victim shall be performed, taking due account of the child's views, needs and concerns with a view to finding a durable solution for the child. A child identified as suspected victim of trafficking in human beings or as a victim of trafficking in human beings, as the case may be, shall have access to education within a reasonable time.

D. Potential Stages of identification

The following section outlines "Stages of Identification" but does not represent a formal proposal by the submitting NGOs. These potential stages highlighted are drawn from NGOs own suggestions and from a number of examples from other EU jurisdictions. Each stage requires interrogation by all stakeholders to ensure that no 'unintended consequences' may arise that would negatively affect victim rights. We present them as a starting point from which we feel a better identification process can evolve with the input of other stakeholders including the AHTU, Garda Síochána and legal professionals. It is noted that, in particular, the question of whether to establish a 'conclusive decision' stage requires careful consideration.

The NGOs submitting this document further acknowledge that there is an evaluation of the UK Human Trafficking Identification pilot procedures and recommend that development of an Irish process for identification should take into consideration the findings of this evaluation in order to learn from the successes, and potential shortcomings of this example.

Stage One: Support and Assistance

This stage is where a suspected victim is referred to the first responder or the first responder comes in contact with the suspected victim. A range of supports may need to be implemented at this point to support the suspected victim to leave the exploitative situation such as ongoing contact with the person to build their confidence and trust to leave, arranging for the person to leave safely, liaising with An Garda Síochána for back

up support to ensure the suspected victims can leave safely and/or collect their belongings, and transporting the person to safe accommodation.

Stage Two: Referral and identification by first responder

Entry to the identification and protection system is by way of referral to the Anti-Human Trafficking Unit.

- A referral shall be in the form prescribed for that purpose by the Minister.
- A referral may be made, in relation to an applicant, by –
 - a. the applicant himself or herself,
 - b. a legal representative of an applicant, or
 - c. a first responder [from a list of first responders to be agreed]
 - d. Support organisations
- No referral shall be made or received without the consent of the applicant. However, the consent of an applicant who is a child shall not be required; however, where the referral is made by a Support Organisation, the views of the child in respect of the referral shall be specified in the referral.
- Where the age of an applicant is uncertain and there are reasons to believe that the applicant is a child, the applicant shall be presumed to be a child.

There needs to be flexibility here and certain agencies may need to have a role here for the first stage referral. For example, if a suspected victim needs to be referred during out of office hours, An Garda Síochána may need to be involved to arrange accommodation.

Stage Three: Reflection and Recovery Period

1. Granting of Reflection and Recovery

Where a referral is made to the Anti Human Trafficking Unit by the first responder, a Deciding Officer shall make a decision within twenty-four hours from the receipt of the referral as to

whether there are reasonable grounds to believe that the applicant is a suspected victim of human trafficking. The Deciding Officer shall, in reaching his or her decision, have regard to –

- a. the referral form,
- b. any material accompanying the referral,
- c. the Garda Síochána Opinion, if any, and
- d. where the applicant is a child, the best interests of the child and child victims identification guidelines

The Deciding Officer shall, in reaching his or her decision –

- a. observe the principles of constitutional justice and fair procedures in, and
- b. apply the Delphi and ‘Dignity’ Indicators. [Note: the ILO and ‘Dignity’ indicators refer to Labour and Sex trafficking respectively. it is recommended that consideration be given to whether there is a benefit to developing identification indicators with due regard for other particular mechanisms of different forms of THB, including organ removal.

Where the Deciding Officer is satisfied that there are reasonable grounds to believe that an applicant is a suspected victim of trafficking in human beings, the Deciding Officer shall formally identify the applicant as a suspected victim of trafficking in human beings.

Where an applicant is formally identified as a suspected victim of trafficking in human beings the Deciding Officer shall notify the applicant in writing of his or her identification, and shall also so notify –

- the applicant’s legal representative, if any,
- where the referral was made by a Support Organisation, the organisation.

A notification in writing shall –

- a. invite the suspected victim to contact the appropriate service provider for assistance and protection, and
- b. be accompanied by a list of such providers, including their contact details.

2. Refusal of Reflection and Recovery Period

Where the Deciding Officer is not satisfied that there are reasonable grounds to believe that an applicant is a suspected victim of trafficking in human beings, he or she shall notify the applicant in writing of his or her decision, and shall also so notify -

- a. the applicant's legal representative, if any,
- b. where the referral was made by a Support Organisation, the organisation.

A notification shall include the reasons for the decision.

3. Review of negative reasonable-grounds decisions

Where an applicant receives a notification under he or she may apply to have the decision reviewed by a Review Officer within 30 days of the notification (this might be referred to as "an application for a review").

An application for a review shall be in the form prescribed for that purpose by the Minister.

An application for a review may be made, in relation to an applicant, by –

- a. the applicant himself or herself,
- b. a legal representative of the applicant, or
- c. a Support Organisation.

No application for a review shall be made or received without the consent of the applicant.

The consent of an applicant who is a child shall not be required, however, where the application for a review is made by a Support Organisation, the views of the child in respect of the application for a review shall be specified in the application.

The Review Officer shall carry out a review of the Deciding Officer's decision and shall –

- affirm the decision, or
- set aside the decision of the Deciding Officer and substitute his or her own decision.

The Review Officer shall, in reaching his or her decision, have regard to –

- a. the referral form,
- b. any material accompanying the referral,
- c. the Garda Síochána Opinion, if any,
- d. the decision of the Deciding Officer,
- e. the application for a review,
- f. any material accompanying the application for a review, and
- g. where the applicant is a child, the best interests of the child and identification guidelines.

The Review Officer shall, in reaching his or her decision –

- a. observe the principles of constitutional justice and fair procedures and
- b. apply the Delphi and 'Dignity' Indicators [and any other such indicators as may be developed & agreed, specific to other forms of human trafficking]

Where the Review Officer is satisfied that there are reasonable grounds to believe that an applicant is a suspected victim of trafficking in human beings, the Review Officer shall formally identify the applicant as a suspected victim of trafficking in human beings.

Where an applicant is identified as a suspected victim of trafficking in human beings the Review Officer shall notify the applicant in writing of his or her identification, and shall also so notify –

- a. the applicant's legal representative, if any,
- b. where the application for a review was made by a Support Organisation, the organisation.

A notification shall –

- invite the suspected victim to contact the appropriate service provider for assistance and protection, and
- be accompanied by a list of such providers, including their contact details.

Where the Review Officer decides to affirm the decision of the Deciding Officer, he or she shall notify the applicant in writing of his or her decision, and shall also so notify –

- a. the applicant's legal representative, if any,
- b. where the referral was made by a Support Organisation, the organisation.

A notification shall include the reasons for the decision.

Stage Four – Conclusive Decision by a Committee under the auspice of AHTU through Multi-Stakeholder Panels.

- 1. Request for a conclusive identification decision [As noted above, This section warrants very particular consideration to assess the pros and cons of conclusive identification; taking learning from examples in other jurisdictions who use such an approach as to its benefits to victims]**

Where an applicant is identified as a suspected victim of trafficking in human beings by a Deciding Officer or a Review Officer, the Anti-Human Trafficking Unit shall –

- a. convene a Conclusive identification Committee in respect of the applicant, as soon as may be after the decision is made, and
- b. request from the Committee a conclusive identification decision.

A Conclusive Identification Committee shall have three members and shall consist of –

- a. an official of the Anti-Human Trafficking Unit of not below the grade of [?GRADE] who shall act as Chairperson of the Committee,
- b. an official not below the grade of [?GRADE] of –
 - i. the Health Service Executive where the suspected victim is above the age of 18 years, or
 - ii. the Child and Family Agency (TUSLA) where the suspected victim is a child, and
- c. a person nominated for the purpose by a Support Organisation/NGO representative at the invitation of the suspected victim, or where no such person has been nominated, a person who is a member of the Conclusive Identification Committee Panel.

The Minister shall establish and maintain a panel of not more than ten persons from the persons nominated and appointed for such term and on such conditions as the Minister determines (in these Arrangements referred to as the “Conclusive Identification Committee Panel”).

A request for a conclusive identification decision shall be in the form prescribed for that purpose by the Minister.

2. Conclusive identification decision

A Conclusive Identification Committee shall make a based on whether there is credible suspicion that the suspected victim is a victim of trafficking in human beings as soon as may be from the receipt of the request for a conclusive identification decision.

A Conclusive Identification Committee shall, in reaching its decision, have regard to –

- a. the referral form,
- b. any material accompanying the referral,
- c. the decision of the Deciding Officer,
- d. the application for a review, if any
- e. any material accompanying the application for a review, if any,
- f. the request for a conclusive identification decision,
- g. where the applicant is a child, the best interests of the child, and child identification guidelines
- h. any other relevant material.

The Conclusive Identification Committee shall, in reaching its decision-

- a. observe the principles of constitutional justice and fair procedures, and
- b. apply the Delphi and 'Dignity' Indicators [and any other such indicators as may be developed & agreed, specific to other forms of human trafficking]

The Conclusive Identification Committee shall reach its decision on the basis of a majority.

The Conclusive Identification Committee shall formally identify the person as a victim of trafficking in human beings.

Where a person is formally identified as a victim of trafficking in human beings in accordance with the Conclusive Identification Committee shall, within seven days, notify the person in writing of his or her identification, and shall also so notify –

- a. the applicant's legal representative, if any,
- b. where the referral was made by a Support Organisation, the organisation, and
- c. the Anti Human Trafficking Unit.

Where the Conclusive Identification Committee is not satisfied that a person is a victim of trafficking in human beings, the Committee shall within seven days, notify the person in writing of his or her identification, and shall also so notify –

- a. the applicant's legal representative, if any,
- b. where the referral was made by a Support Organisation, the organisation, and
- c. the Anti Human Trafficking Unit.

A notification shall include the reasons for the decision.

Receipt of a notification shall not, of itself, affect the identification of a person as a suspected victim of trafficking in human beings.

A suspected victim of trafficking in human beings who receives a notification referred to in paragraph 52 may request that the Anti Human Trafficking Unit convene another Conclusive Identification Committee.

Where a request is made by a suspected victim of trafficking pursuant to paragraph 55, the Anti Human Trafficking Unit shall convene another Conclusive Identification Committee where new

elements or findings arise or are presented which add to the likelihood of the person being identified as a victim of trafficking in human beings.



13/10/2022

Ruhama written submission to Department of Justice on:

**CRIMINAL JUSTICE (SEXUAL OFFENCES AND HUMAN TRAFFICKING) BILL 2022
GENERAL SCHEME**

Part 2, Head 5

- i. Ruhama suggests victims trafficked for the purposes of sexual exploitation are afforded the same protections as victims of rape and other sexual assault offences in criminal trials. Despite Head 5 extending the provisions for separate legal representation to complainants of other sexual assault offences this does not extend to victims of trafficking for the purposes of sexual exploitation.
- ii. Ruhama recommends that the right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experiences) should be extended to include S.3 of 2008 Act offences of trafficking for the purposes of sexual exploitation.

Part 3, Head 12

- i. Ruhama recommends a child-specific identification process for victims of child trafficking, with all 'competent authorities' and 'trusted partners' undertaking mandatory child trafficking training. Ruhama also recommends that the Department of Justice provides clarity regarding section 3(2) of the Child Trafficking and Pornography Act 1998 by distinguishing between cases that involve trafficking of children for sexual exploitation and those which involve sexual exploitation of children simpliciter (i.e. without any element of trafficking).

- ii. Ruhama is concerned about the lack of guidance on the determination of a person's age as this may leave some child victims outside the protections offered by the State. The Bill should outline 'the benefit of the doubt principle', on the understanding that the dangers inherent in treating a child as an adult are far greater than the danger of providing immediate care to an adult.
- iii. In relation to the definition of 'child', Ruhama recommends that the term 'age assessment' is included and defined in the bill in regard to potential child victims of trafficking. The age assessment should be carried out by Tusla following strict policy-guidelines that are child-centred and adapted to the person's specific needs (cultural, gender, etc.) and, in any case, not applying medical testing. The guidelines should apply the benefit of the doubt taking into account that the dangers inherent in treating a child as an adult are far greater than the danger of providing immediate care to an adult.
- iv. Ruhama also recommends in relation to the definition of 'child' that the term 'guardian advocate' be included and defined in the Bill. The guardian advocate is independent from that of the 'parental guardian' and is the person who provides legal support to the child during the NRM process. The legal advocate should be trained in child protection, child trafficking, and related risks and needs, and should be present throughout any processes, including the age assessment.
- v. v. Ruhama supports the recommendation that specific guidelines be drawn up to provide clarity on sections 14 and 15 of the International Protection Act, to provide clear guidance on the criterion on which officers use to determine when a person may be a child, and as to when an adult is entitled to 'take responsibility' for a child.¹ This Bill is an opportunity to provide the necessary clarity in order to ensure that child victims of trafficking are recognised and treated appropriately within the statutory NRM.

Part 3, Head 13

- i. Given the role of the Minister for Justice as National Coordinator, Ruhama recommends this be formally recognised and outlined in the Bill. This can be achieved by assigning overall responsibility of the Operational Committee to the Minister for Justice.
- ii. Ruhama is concerned that Head 13 does not specify the minimum level of seniority of Operational Committee members. Ruhama recommends that, similarly to other legislation, the Bill clearly states that no Gardaí below the rank of superintendent will be part of the Operational Committee and follows the same for other members of the Operational Committee.

¹ IHREC (2022) Human Trafficking in Ireland, p. 25

- iii. Ruhama is concerned that Head 13 does not sufficiently cover the protections for child applicants for recognition as a victim of human trafficking. Ruhama recommends that a specific section for children be added which clearly outlines Tusla's obligations to apply on behalf of a child suspected to be a victim of trafficking within a specified timeframe.
- iv. Ruhama also recommends that the Bill includes the immediate access to protection services for children suspected to be victims of trafficking once the Competent Authority or Trusted Partner has positively decided to refer the applicant to the Operational Committee. The Bill should outline the child-specific entitlements and rights a presumed child victims of trafficking is entitled to receive following a positive decision on the part of the Competent Authority and/or Trusted Partner.
 - i) Safe, child-specific accommodation
 - ii) A legal guardian if necessary
 - iii) A specially trained legal advisor. The advisor should be appointed by Tusla at the earliest stage.
 - iv) A child-specific Recovery and Reflection period of 60 days.
 - v) Immediate attendance to health care needs.
 - vi) Immediate access to education (and training)

Part 3, Head 14

- i. Ruhama recommends the expansion of the term 'coerced' in Head 14, (4) (b) to include 'taking advantage of a person's vulnerability'.
- ii. The list of reasonable grounds upon which the Operational Committee may base its decision does not fully accord with the definition of trafficking. In addition to those outlined in Head 14, the criteria should be expanded to include:
 - Evidence that the person has been coerced, threatened, abducted, or otherwise has had force used against them
 - Evidence that the person has been deceived or has had a fraud committed against them

Evidence that the alleged trafficker abused his or her authority or took advantage of the vulnerability of the trafficked person to such extent as to cause the applicant to have had no real and acceptable alternative but to submit to being trafficked

Evidence that the alleged trafficker coerced, threatened or otherwise used force against any person in whose care or charge, or under whose control, the trafficked

person was for the time being, in order to compel that person to permit the trafficker to traffick the trafficked person, or

Evidence that the trafficker made payment to, or conferred any right, interest or other benefit on, any person in whose care or charge, or under whose control, the trafficked person was for the time being, in exchange for that person permitting the trafficker to traffick the applicant.

Part 3, Head 15

- i. Specifically relating to Head 15(5)(i) and (ii) the Bill should outline the minimum number of times the Operational Committee must meet per annum. Ruhama recommends this should be no less than 4 times/year. This will ensure that no victim (applicant) will wait longer than 4 months for a decision to be made on their application to be recognised as a victim of trafficking.
- ii. In regards to (5)(ii) “Interim arrangements for applicants awaiting a determination on their application, including provision of support services,” Ruhama strongly recommends that where a Competent Authority and/or Trusted Partner has made a positive Stage 1 decision to refer the person to the Operational Committee for identification, that such applicants be granted the 60 day Recovery and Reflection period in line with the recommendations below relating to Head 14 (above).
- iii. Ruhama also recommends that under Head 15, the Bill should clearly designate the Department of Justice as the National Referral Mechanism Coordinator and includes a list of its functions:
 - i) To act as a central NRM authority
 - ii) To be responsible for co-ordinating the execution of all the activities related to the NRM implementation
 - iii) To report directly to government and the Independent National Rapporteur (IHREC)
 - iv) To contribute to the development of national, regional, and international anti-trafficking policies and strategies and ensuring co-ordination and coherence between NRM Competent Authorities and Trusted Partners²

² OSCE (2022) NRM Handbook, p. 31

Part 3, Head 16

- i. Ruhama recommends consistence in the use of reference to applicant across the Bill (see Head 16(5)).

Part 3, Head 17

- i. As with Head 14 above - which relates to the decision by a Competent Authority or a Trusted Partner whether to refer a person to the Operational Committee - the grounds upon which the Operational Committee should base their decision should be expanded to meet the definition of trafficking as outlined above.
- ii. Head 17 (or as a standalone Head) should include in-built rights of access to an effective, accessible judicial remedy, to challenge the merits of any negative decisions at both the preliminary and conclusive stage of the identification process.

Part 3, Head 19

- i. Ruhama recommends that Head 19 should include a right to family reunification for all persons positively identified.
- ii. Direct Provision accommodation is deemed very inappropriate for victims of trafficking. Ruhama recommends that the Bill commits to victim access to gender-specific accommodation for victims of trafficking, in addition to assistance from local authority pursuant to its obligations under the Housing Acts 1966 to 2021.

Part 3, Head 21

- i. Ruhama welcomes the inclusion of Head 21 'Protection from Prosecution for a Human Trafficking Offence' but is deeply concerned by the limited nature of the provision, as currently drafted. Ruhama recommends that Head 21 be expanded to include a statutory defence where a victim of trafficking has been involved in unlawful activities where such involvement is a direct consequence of their situation as a trafficked person. This would bring Ireland into compliance with international standards which, according to the United Nations High Commissioner for Human Rights, require that:

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, *or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons*³[emphasis added]

Similarly, Guideline 4(5) provides that States should consider:

Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

In 2005, for the first time, an explicit reference to these ideas was included in Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings provides that:

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so. Ruhama is of the view that Head 21, even when read in conjunction with the DPP Prosecutors Guidelines⁴ does not honour fully the non-prosecution requirement.

- ii. Having considered the three independent reviews of the Modern day Slavery Act 2015 Ruhama is of the view that the recognised challenges of the non-prosecution provision of the UK law⁵ lie, not in the existence of the defence, but, instead, in a lack of data collection and a lack of training for police, lawyers and the judiciary regarding when and how the defence should be applied. Importantly, there is no suggestion that the defence should be removed, which logically implies that such a defence is recognised as a necessary part of the protection architecture for victims. Ruhama echoes the Anti-slavery Commissioner Report (2020) findings that, as a bottom line ‘We owe it to the victims of modern slavery and trafficking to use current legislation effectively before we start making it harder for those whose offending is a direct consequence of their trafficking.’ As such, Ruhama holds that it is essential a non-prosecution defence similar to that outlined in s.45 Modern Day Slavery Act 2015 be included in the Bill and that this must be supported by rigorous data collection and continued, specialist training of An Garda Síochána, lawyers and the judiciary.

³ Principle 7. Recommended Principles and Guidelines on Human Rights and Human Trafficking (2001), United Nations High Commissioner for Human Rights available at <https://www.ohchr.org/Documents/Publications/Traffickingen.pdf>

⁴ “the prosecutor should consider whether the public interest is served by a prosecution of the suspect.” Director of Public Prosecutions (2019) *Guidelines for Prosecutors: 5th Edition*, s. 4.7 pp. 12-13

⁵ s.45 Modern Day Slavery Act 2015

**Submission to the Joint Committee on Justice:
General Scheme of the Criminal Justice (Sexual
Offences and Human Trafficking) Bill 2022**

October 2022

About Dublin Rape Crisis Centre

The mission of Dublin Rape Crisis Centre (DRCC) is to prevent the harm and heal the trauma of all forms of sexual violence in Ireland.¹ DRCC has been at the forefront of the Irish response to sexual violence for more than 40 years. That response includes:

- Running the National 24-Hour Helpline and associated services;
- Providing individual advocacy, counselling and other support;
- Accompaniment and support services for those attending the Sexual Assault Treatment Unit (SATU) and those reporting to An Garda Síochána or attending court;
- Data collection and analysis on trends and issues relating to sexual violence.

As a frontline service provider, DRCC works with and supports people who have been directly affected by sexual violence including online abuse. DRCC are also committed to eliminating its tolerance through education, awareness raising, advocacy and policy analysis.

About the submission

DRCC broadly welcomes the Joint Committee's review of the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022. DRCC is pleased to participate in the stakeholder consultation, to provide further considerations to the Committee to eliminating barriers to accessing justice within the criminal justice process for victims/survivors of sexual offences.

Head 3 Amendment of section 2 of Act of 1981

1. Head 3 amendment provides for the inclusion of the amendment of section 2 of Act of 1981 that strengthens the law on consent, knowledge and belief in rape cases by providing that the accused's defence that he believed the complainant was consenting has to be objectively reasonable. Currently, a man is not guilty of rape if he honestly believed that he had a woman's consent, regardless of whether that belief is objectively reasonable.
2. This change means an accused person can no longer use this defence if they believe that consent was given even if it is totally unreasonable. The belief of the accused person in what took place and how it took place will no longer take higher precedence over the belief of the victim. The accused person will have to explain how they could have reasonably believed the victim consented.
3. The DRCC welcomes this amendment as a much needed, further interpretation of the 2017 shift to consent-based rape legislation. However, jurors may struggle with understanding the nuances and significance of this reform unless they are provided with further guidance on its significance. Further, it is well proven that jurors in rape trials respond to and interpret legal rules against the backdrop of their own beliefs and attitudes about sexual violence. Unfortunately, such attitudes are often erroneous or prejudicial and influenced by the impact of so-called 'rape myths' regarding 'real rape' or 'real victims.' Therefore, we recommend that that in order to support this proposed reform, that legislation require a bench book of guidance be constructed to support judges in directing jurors on consent, belief in consent and other related matters.¹
4. The DRCC highly recommends that legislators take an opportunity to examine the gendering of rape in legislation. Currently, Head 3 states, "when a *man* commits rape" and situates the victim to always be addressed by law as woman, she, or her. We encourage an amendment to Head 3 that seeks to assert that both the role of victim and perpetrator are defined within a gender-neutral scope.
5. We also recommend that an amendment should be made to simplify the existing provision on "self-induced intoxication." An important concern

¹ See Realities of Rape Trials in Ireland. Research by Dr. Susan Leahy 2021.
<https://www.drcc.ie/search/?q=realities+of+rape+&sa=>

with reform in this area is to ensure that the relevant provision may be readily explained to and understood by jurors. This particular subsection, as currently constructed, is likely to pose challenges in this regard. We suggest that perhaps could be expressed more simply by stating, “that the accused cannot rely on intoxication to argue that they did not have capacity to form a reasonable belief in relation to consent.”

Head 4 Amendment to Section 3 of the Act of 1981

6. This amendment provides for the requirement that the victim is entitled to legal aid when an application has been made at that initial hearing for permission to question the victim on their sexual history (Section 3) in the course of the later trial.
7. The DRCC welcomes the entitlement of victims to access legal aid when a relevant application for questioning on their sexual experience is been made at the preliminary trial as it is essential for a victim’s understanding of proceedings if they are to be asked this extra set of highly intrusive, personal questions on their sexual experience later on in the course of the trial. This legal representation should also help to elicit why such questioning should be necessary at all. Legal representation should be available to the victim in relation to any application at preliminary hearing (e.g. counselling notes) that might impact the victim.
8. More broadly, we ask that legislators provide a legislative definition on what precisely constitutes ‘sexual experience evidence.’ This is important to ensure that such evidence is not inappropriately or inadvertently admitted.

Head 5 Amendment of section 4A of the Act of 1981

9. Head 5 provides for the extension of legal representation for victims in all sexual offence trials while the victim is being questioned on their sexual history. Currently, legal representation is available in rape and aggravated sexual assault trials (but not all sexual offences) and in addition, the representation is only for the period during which the defence made the application to engage in such questioning of the victim’s sexual history. It does not extend legal representation to the victim for the period that they were actually undergoing such examination. This amendment is welcome.

10. Such legal representation for sexual assault victims is provided by the Legal Aid Board. In addition, it is the intention of the Department of Justice that victims of sexual offences should be entitled to seek legal advice from the very outset, when they consider reporting right through all the legal stages of the case where currently victims have no representation.
11. **The DRCC recommends that legal advice and legal representation be made throughout the entire trial process, not limited to the questioning of sexual history and certain other minor exceptions. The presence of legal representation to ensure the victim is fully and thoroughly prepared for a case, as well as to protect victims from re-traumatisation through the court process would greatly enhance the capacity of victims to give their best evidence. As the O'Malley review puts it, the Irish court system operates in a 'binary' way, meaning there are only two actors at play, the prosecution and the accused.² This fails to adequately recognise the rights of victims. These rights are emerging through developments in human rights and also through EU and national legislation, principally the EU Directive on Victims' Rights and the Victims of Crime Act 2017 and will undoubtedly gain greater recognition in our court systems over time. If not amended for legal advice and legal representation to be made available throughout the trial process, victims' voices will be continuously lost during trial.**
12. **Victims will continue to be traumatised by the court process in contravention of their legal rights. We submit that this head should be extended to provide legal advice throughout the investigation and trial process as well as representation for victims for the entire court trial or, at the very least, until such time as the prosecution case concludes, at which stage the victim is no longer required as potential witness.**
13. **It is proposed that legal advice and legal aid will be provided through the Legal Aid Board. That agency currently is mainly tasked with civil and family law matters and mediation with a minor involvement if limited section 3 representation is required. In order to fulfil this extended mandate, the Board will need to develop expertise and experience on criminal law matters in relation to sexual offences and the particular vulnerabilities of victims/survivors of sexual crimes and provide a sufficiently trained and**

² [O'Malley, T. \(2020\) Review of Protection of Vulnerable Witnesses](#)

properly resourced unit within the Board in order to provide an adequate service to victims of sexual offences.

Head 6 Amendment of section 6 of the Act of 1981

- 14. This amendment provides for the extension of privacy and anonymity in all sexual offence trials.**

The DRCC welcomes this amendment as it further ensures the privacy and anonymity in all sexual offence trials is maintained.

Head 7 Amendment of section 7 of the Act of 1981

- 15. The DRCC welcomes the amendment to extend anonymity protections for victims whom have a mental illness or a mental or intellectual disability as the O'Malley review found that there was some uncertainty about their right to anonymity at present.**

- 16. We also welcome the inclusion of electronic media and social media within the definitions of "published" and "broadcast."**

Head 8 Amendment of section 8 of the Act of 1981

- 17. This amendment provides for the anonymity of accused persons in all types of sexual assault and rape cases and if convicted, they may be identified unless to do that would lead to the identification of the victim.**

- 18. The DRCC agrees with the right to anonymity of the accused persons. However, Head 8 should be amended to codify once and for all that waiving anonymity of both the convicted person and the victim be entirely at the behest of the victim without any necessary court approval.**

Head 11 Repeals

- 19. The DRCC welcomes the repeal of where a trial is held otherwise in public, the verdict and sentence (if any) must be announced in public.**

Head 13 Competent Authorities of the National Referral Mechanism

20. This amendment provides that the following bodies be determined as Competent Authorities for the purposes of identifying victims of human trafficking within this framework, in part of the National Referral Mechanism: An Garda Síochána, The Child and Family Agency, The Health Service Executive, The Minister for Children, Equality, Disability, Integration, and Youth, The Minister for Justice, The Minister for Social Protection, and The Workplace Relations Committee.
21. The DRCC agrees with the proposed designated Competent Authorities. The legislation should include a capacity for the Minister to add or remove additional Authorities as is deemed useful for the protection of victims from time to time. The legislation should include a requirement that each such designated Competent Authorities, to whom will identify victims/survivors of human trafficking, have adequately trained and resourced experts to manage this function.

Head 15 National Referral Mechanism Operational Committee for the identification of victims of human trafficking

22. The Operational Committee will determine operational guidelines such as the frequency of meetings and interim measures for applicants awaiting on determination of their application, including support services.
23. The DRCC welcomes the development of the Operational Committee and their immediate function of constructing operational guidelines.
24. We recognize that the legislation as it stands does not refer to children-specific identification of victims of human trafficking. Therefore, the DRCC recommends that amendments be made to include child-specific identification strategies to ensure the legislation meets the requirements provided by UNICEF's Identification of Victims/Persons 'At Risk' of Trafficking in Human Beings.³

Head 19 Access to services by victims of human trafficking

³ [UNICEF \(2022\) Identification of Victims/Persons 'At-Risk' of Trafficking in Human Beings](#)

25. Head 19 suggests that entitlements are not inherently granted, rather it is on a case-by-case basis. Therefore, it only outlines the type of supports and services that may be available to meet the needs of the specific victim.
26. **The DRCC recommends, that Head 19 be amended to include the minimum standards of services and supports be provided such as adequate and safe accommodation. This would then permit recognition of the need for specific refuge accommodation for victims of trafficking for sexual exploitation.**
27. **The legislation should provide a mechanism whereby the Committee must furnish an annual report to the Minister or the Oireachtas of the services provided for those identified as victims of trafficking to monitor that adequate services are being provided to this particularly vulnerable category of exploited victims. The risk of Head 19 as it stands is that the needs of the victim will get lost or will be unmet because of the complexity of the system and the innate subjectiveness of a case-by-case basis approach. By being legally bound within legislation to provide data on the services trends can be captured and, subsequently, justified or not.**

Written submission to the Joint Committee on Justice: General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022.

Prof Michael Breen, Prof Michael Healy, Dr Amy Healy

Mary Immaculate College, Limerick

PART 3

National Referral Mechanism for Victims of Human Trafficking

Head 12

Competent Authority or Trusted Partner

The concept of a Trusted Partner is a significant development in the fight against human trafficking and the supporting of victims. This has been sought by GRETA specifically:

GRETA considers that the Irish authorities should take further steps to ensure that national action to combat THB is comprehensive, and in particular to:
- further involve NGOs and other members of civil society in the development and implementation of anti-trafficking policy, including evaluation of anti-trafficking efforts ...

This was recognised in the official Irish response to the GRETA report

...it is intended to examine ways in which civil society can continue to effectively contribute to the development and implementation of policy in relation to human trafficking.

We agree entirely with the decision to designate trusted partners as members of the operational committee.

Head 13

List of Competent Authorities

Head 14

Application for recognition as a victim of human trafficking

We believe that the full definition used in Article 3 of the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime should be incorporated here in Section 4

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of

deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

Head 15

National Referral Mechanism Operational Committee for the identification of victims of human trafficking

In its recommendations in 2022, the TIP report recommended, *inter alia*, that Ireland should

- *Improve victim identification and referral by issuing a revised national referral mechanism in coordination with NGOs; providing victim identification training for all front-line officials, including for labor inspectors; and offering formal identification, a recovery and reflection period, and services to all victims.*
- *Allow formal victim identification by entities other than the police, including civil society, labor inspectors, social workers, and health care professionals.*
- *Allow all victims to access the national referral mechanism without requiring cooperation with law enforcement.*

In the HTEPII report, we recommended

That the authority to refer a victim of trafficking into the NRM be expanded.

(1) The authority to refer a victim or potential victim of trafficking into the NRM must be expanded to incorporate additional organisations / service providers as registrars (or 'first responders'). This is vitally important given the essential knowledge of individual cases of potential victims of trafficking held by victim support organisations.

(2) The responsible Minister in each jurisdiction should ensure that the list of registrars is as wide as possible, taking cognizance of the vulnerability of the victims and the need for confidentiality.

(3) HTEPII recommends that the list of registrars for the NRM should include the primary agencies (e.g., policing and health services), and relevant statutory agencies as well as selected, authorised organisations that work with victims (e.g., NGOs, charitable organisations, victim-support organisations).

(4) In the Republic of Ireland, this process is underway under the remit of the working group set up by the D.O.J.E., incorporating An Garda Síochána and other statutory and non- statutory bodies. In Northern Ireland there have been discussions about the possibility of widening the First Responder function to NGOs and consultation is ongoing in this regard.

Head 16

Sharing of information by Competent Authorities and Trusted Partners

In the HTEPII Report we recommended the following

(1) Addressing provision of services to victims of trafficking depends on the availability of reliable, high-quality data documenting the scale and scope of this crime.

(2) Such a database would support the recommendation of the Council of Europe regarding the appointment of National Rapporteurs for monitoring the anti-trafficking activities of State institutions (CETS 197:29(4)) through facilitating the gathering of all relevant data. In Ireland this role will be carried out by the Irish Human Rights and Equality Commission (IHREC) which has been designated as Ireland's independent national rapporteur on human trafficking, for the purposes of EU anti-human trafficking legislation. In NI, the Inter-Departmental Ministerial Group on Modern Slavery carry out this function.

(3) All data, including data on potential victims of trafficking outside of the NRM, must be collected, collated, and reported within the dynamic database on a rolling basis and consolidated into annual reports which would be laid before the respective legislative bodies in each jurisdiction.

(4) This database should include all information arising from persons who come into contact with the authorities on suspicion of having been trafficked even if they choose not to go into the NRM, such that all screening data is available for subsequent analysis.

(5) The database must be overseen in each jurisdiction by the respective Justice Departments.

(6) Mechanisms to resource non-statutory organisations (i.e., funding, personnel, opportunity) to consolidate and register the data they assemble on potential trafficking cases must be put in place. These data must be considered for inclusion in the dynamic national database.

(7) Given the interplay between the two jurisdictions on the Island of Ireland in respective of human trafficking, consideration should be given to the creation of a shared database for use by all relevant parties.

Head 17

Identification of a victim of human trafficking by the National Referral Mechanism Operational Committee

In the HTEPII Report, we recommended the following:

That the Department of Justice and Equality (IE) and the Department of Justice (NI) publish a clear and detailed eligibility protocol for entry into the NRM in both jurisdictions.

(1) Victims of trafficking and potential victims of trafficking need to be recognised first and foremost as victims. Provision of appropriate health, legal, protective, and welfare services for victims is an essential first response.

(2) A comprehensive and unambiguous published protocol for referral of known victims of trafficking and potential victims of trafficking into the respective NRMs needs to be established by the Department of Justice and Equality (IE) and the Department of Justice (NI).

(3) This protocol must address the fears and concerns of the many potential victims of trafficking who do not come forward to the authorities.

(4) The protocol must incorporate a formal identification process (currently missing in the Republic of Ireland) with due protection for the individual victim. Such formal identification should incorporate regular liaison and feedback to the victim throughout the process.

(5) The protocol must formally record the reasons for all decisions reached under its purview. (6) Eligibility for entry to an NRM should be considered irrespective of any other legal considerations, such as asylum applications or potential criminal charges.

Head 18

Designation by Order of Trusted Partner

Head 19

Access to services by victims of human trafficking

We note the latest TIP report states “services for victims remain inadequate.” We concur entirely. The most recent GRETA report in 2022 also deals with this issue and we would strongly recommend that the GRETA recommendations are adopted and implemented in full.

One glaring example of the inadequacy of such services is the failure to provide special housing provision for the victims of human trafficking. The current provision is by direct provision. Pressures on housing in Ireland notwithstanding, the use of direct provision to house victims of human trafficking should cease immediately. Not only does it fail to meet the multiple needs unique to such victims but it also opens them to the potential for further victimisation to traffickers who can still access them with relative ease. We note with regret that the dedicated accommodation centre for victims of trafficking, albeit for only a very small number of victims, has not opened yet despite being promised on foot of the 2020 TIP report.

The 2022 GRETA report also makes a specific recommendation in respect of housing provision for victims of human trafficking

GRETA once again urges the Irish authorities to set up, as a matter of priority, specialised accommodation facilities for victims of THB and to ensure that accommodation is gender-sensitive, appropriate and safe, and that victims are provided with specialised services. In addition to better support and protection of the victims, this would also be in the interest of the investigation. Further, the authorities should enact statutory rights to assistance and protection for possible victims of trafficking, as specified in Articles 10 and 12 of the Convention, regardless of the victims' nationality or immigration status (paragraph 205).

Head 20

Prohibition on deportation of victim of trafficking

Head 21

Protection from prosecution for a human trafficking offence

We concur entirely with the recommendation from GRETA in its third report on Ireland

GRETA considers that the Irish authorities should take further steps to ensure consistent application of the principle of non-punishment of victims of THB for their involvement in unlawful activities, to the extent that they were compelled to do so. Such measures should include the development of detailed guidance for police officers and prosecutors on the scope and application of the nonpunishment provision. Consideration should also be given to adopting a specific legal provision on the non-punishment of victims of trafficking for their involvement in unlawful activities, to the extent that they were compelled to do so.

Conclusion

There was strong evidence of the high level of aspiration and intent in the first and second national action plans to prevent and combat trafficking of human beings in Ireland. The first plan laid out 29 key objectives and they were spelled out in a series of 144 action items. Each item in the plan had a time frame, an indication of responsible parties, and a mechanism for assessment. One identifiable weakness in the first plan was the lack of detail in the responsible parties, insofar as the listing of the groups involved, each of which has a role to play, is an unsatisfactory approach to actually assigning responsibility for delivery of the item in question.

The second action plan listed 65 actions to be undertaken, some of which followed on from the previous plan. Unlike the first plan, the list of action items in the second plan did not have any timeline indicators. Only two of the 65 actions stipulated the establishment of a timeline in conjunction with

partners.

Both plans were effectively evaluated by external agencies, viz., the Group of Experts on Action against Trafficking in Human Beings (GRETA), the US Department of State, and the Irish Human Rights and Equality Commission (IHREC). The published response from Ireland for some of the recommendations made by GRETA, for example, is not always a robust commitment, e.g., where the phrase “Ireland notes the comments of GRETA in this regard”.

The second GRETA Report in 2017 was more critical than the first, insofar as GRETA had to repeat requests made in the first 2013 report, and which in GRETA’s view required immediate action. In the 2017 report, GRETA identified eight items which they regarded as requiring immediate action. The same report used the phrase ‘Greta once again urges the Irish authorities’ in respect of further 13 items.

The US Department of State’s Trafficking in Persons reports have been very critical of Ireland’s response to human trafficking, indicating in their view a deterioration of anti-trafficking efforts since 2018. 2017 was the last year in which the TIP report signalled that “The Government of Ireland fully meets the minimum standards for the elimination of trafficking.” From 2018 to 2020 that changed to “The Government of Ireland does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so.”

In 2018, the TIP report stated “However, these efforts were not serious and sustained compared to the efforts during the previous reporting period. ... The government has not obtained a trafficking conviction since the law was amended in 2013; it initiated only three prosecutions in 2017 and had chronic deficiencies in victim identification and referral.” Consequently, Ireland was downgraded to Tier 2.

In 2019, the TIP report stated “However, the government did not meet the minimum standards in several key areas. ... Authorities failed to initiate any prosecutions in 2018 and had chronic deficiencies in victim identification, referral, and assistance. ... The government lacked specialized accommodation and adequate services for victims.”

In 2020, the TIP report stated “However, the government did not demonstrate overall increasing efforts compared to the previous reporting period. ... The government has not obtained a trafficking conviction since the law was amended in 2013, which weakened deterrence, contributed to impunity for traffickers, and undermined efforts to support victims to testify. ... The government continued to have systematic deficiencies in victim identification, referral, and assistance. ... The government continued to lack specialized accommodation and adequate services for victims, and the amended working scheme for sea fishers increased their vulnerability to trafficking.” Consequently, Ireland was downgraded to Tier 2 Watch List.

In 2021 Ireland remained on the TIP Tier 2 Watch List. While acknowledging the work done in Ireland, the report also stated

However, the government did not demonstrate overall increasing efforts compared to the previous reporting period, even considering the impact of the COVID-19 pandemic on its anti-trafficking capacity. While courts convicted one trafficker under false imprisonment charges, the government has not obtained a trafficking conviction under the anti-trafficking law since it was amended in 2013, which weakened deterrence, contributed to impunity for traffickers, and undermined efforts to support victims to testify. The government investigated and prosecuted fewer suspected traffickers, did not prosecute any labor traffickers, and victim identification decreased for the fourth year in a row. The government continued to have systemic deficiencies in victim identification, referral, and assistance, and lacked specialized accommodation and adequate services for victims. Therefore Ireland remained on Tier 2 Watch List for the second consecutive year.

While the TIP report methodology is not immune from criticism, its comments over the course of the last 6 reports need to be taken seriously, not least the light of the downgrading on Ireland on this topic by the US.

In 2022, Ireland was upgraded in the TIP report to Tier 2. The report responded positively to Irish initiatives

These efforts included increasing convictions compared with the year prior—including two convictions under the anti- trafficking law for the first time since at least 2013—and consequently assigning significant sentences. The government formally recognized seven sea fishers as trafficking victims and identified potential trafficking victims during inspections, which was an increase compared with prior year reporting. The government also expunged more than 600 prior convictions for commercial sex offenses, many of which may have involved prior sex trafficking victims, and launched an awareness campaign in partnership with an international organization. Furthermore, the government increased funding for victim assistance and for public awareness and prevention efforts compared with the prior year.

Even so, the TIP report identified ongoing deficiencies in Ireland's response to human trafficking

The government prosecuted fewer suspected traffickers than the prior year and did not prosecute any labor traffickers. Systemic deficiencies in victim identification, referral, and assistance persisted, and services for victims remained inadequate. The government did not uniformly screen for trafficking in vulnerable populations, like sea fishers, before referring them to immigration authorities for deportation, even when victims self-identified. The government did not adopt an updated national anti-trafficking action plan (NAP), amend its national referral mechanism, or overhaul its accommodation framework for trafficking victims, which continued to leave victims with inadequate and unsuitable accommodations. The government did not report providing trafficking- specific training to any judges, remained without legal safeguards to protect victims from prosecution for unlawful acts traffickers compelled them to commit, and did not report awarding restitution or compensation for trafficking to any victims in 2021.

The IHREC submission to GRETA in advance of the publication of the second national plan makes for uncomfortable reading. Stressing that “the entire system for the protection of victims of human trafficking is dependent

on the existence of an effective mechanism for the identification of victims of trafficking” it is trenchantly critical of the failure of the plan in respect of a fundamental review of the identification process. It makes 29 specific recommendations, not all of which have been adopted as yet.

The IHREC comments on Ireland’s 15th National Report on the implementation of the European Social Charter make important references to labour exploitation, including the gender dimension of such exploitation. The report also references the invocation of data protection restrictions by the Irish state “to excuse inaction in relation to the taking of concrete measures to identify and protect vulnerable persons at risk of exploitation”. There is a potential here for a strong conflict of interest between different arms of the state -- the Department of Justice on the one hand is charged with oversight of the anti-trafficking efforts in the state but is also charged with data protection issues. It is not clear how this can be resolved. In its submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights, IHREC noted

The IHRC notes that the Anti-Human Trafficking Unit of the Department of Justice and Equality has acknowledged in its Annual Report for 2012 that difficulties arise in collating and interpreting the figures furnished by inter-governmental and non-governmental organisations and the Garda Síochána in relation to possible survivors of human trafficking. While the Unit attributes this difficulty to restrictions on the processing of personal data under the Data Protection Acts 1988 and 2003 it is unclear to the IHRC why such personal data (and perhaps sensitive personal data) may not be processed in a manner that is consistent with the safeguards provided for under those Acts (p. 51).

It is worth noting UCD’s Sexual Exploitation Research Programme (SERP), which published a report in 2020 on the implementation of the 2017 Sexual Offences law. As well as focusing on some of the risk factors associated with trafficking for sexual exploitation, their research with buyers “consistently indicates an indiscriminate attitude to the circumstances of the person from whom they are seeking to buy sexual acts”. Insofar as some of the women are trafficked, this should be a matter of concern to those interested in anti-trafficking efforts in Ireland. We believe this “indiscriminate attitude” should be specifically covered in the legal provisions against human trafficking.

We note that beyond general education of the wider public, there is no mention in the legal framework for education and training for those involved in dealing with the victims of human trafficking. In the HTEPII Report, we recommended

That a strategy be developed for the creation and roll-out of expert, bespoke education and training for all individuals and organisations involved in the identification, management and support of victims and potential victims of trafficking.

(1) Specialised education and awareness training must be broadened and enhanced for all individuals likely to come into direct contact with human trafficking victims, e.g., accident and emergency personnel, sexual violence clinics, and transportation personnel.

(2) Appropriate, extensive, continuing and integrated education and training must be delivered by experts to all statutory and non-statutory personnel who deal with individuals suspected of being trafficked, so as to ensure insofar as possible that any individual presenting to such personnel as a potential victim of trafficking can be directed to prompt, competent and documented guidance appropriate to their needs.

(3) The same education and training must also be available to the ancillary services, the courts, frontline medical services and others working in this field.

(4) Education and training must be gender-appropriate and sensitive to individual circumstances and cultural contexts.

(5) The scope of this training should encompass, as appropriate, all of the following groups insofar as they are involved with trafficking victims: statutory and non-statutory agencies, social workers, solicitors, barristers, judges, prosecutors, media personnel, as well as NGOs who request it. With regards to identification, frontline service providers who can be key in identifying potential victims also need to be trained including nurses, doctors, Gardai and social workers.

(6) Revisions to the NRMs should be backed up by education and training such that those who are involved in the decision-making process, whether as a designated authority or referring agency, are fully trained to prevent delays in decision making but also to provide fair decisions.

In the 2022 TIP report, the authors noted, *inter alia*,

The government did not report providing trafficking- specific training to any judges, remained without legal safeguards to protect victims from prosecution for unlawful acts traffickers compelled them to commit, and did not report awarding restitution or compensation for trafficking to any victims in 2021.

The GRETA report in 2022 recommended, *inter alia*,

sensitising prosecutors and judges to the different forms of THB, the rights of victims of THB and the need to adopt victim-centred and trauma-informed approaches, and providing training which includes the relevant case-law of the European Court of Human Rights

Finally, while the HTEPII report identified some of victims of human trafficking unknown to the authorities, it is important to note that this did not identify all the victims, and due to methodological, time, and financial constraints, did not cover all areas of human trafficking equally, e.g. the identification sexual trafficking victims in the report cannot be taken as a representative sample of trafficking victims. As we stated at the conclusion of HTEPII,

A further area for research involves better understanding of the venues, industries and practices that allow trafficking to develop or actually support or permit its existence in Ireland & Northern Ireland. In line with the TIP reports (Trafficking in Persons, US State Department), such additional research may be of assistance in prosecuting suspected offenders of both sex and labour trafficking, in better

training of relevant personnel, in increasing victim identification, and in proposing an improved referral mechanism in coordination with various official and unofficial actors. Given the critical role that support organisations may play as a source of information about trafficking beyond the official records, it is anticipated that this work is worthy of a significant investment of time and energy across the Island of Ireland.

This work is still outstanding.

ENDS

Introduction – Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

Introduction – This Submission

RCNI welcomes very much this opportunity to make submissions to the Joint Oireachtas Committee on Justice on this General Scheme of the forthcoming Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022¹. Part 2 (Sexual Offences) which implements some recommendations made in the O'Malley Review Report² on the supports for vulnerable witnesses in the investigation and prosecution of sexual offences, is the focus of most of our submissions. Head 3 in this Part also addresses changes recommended by the Law Reform Commission in its Report on Knowledge or Belief Concerning Consent in Rape Law (2019)³.

While we welcome Part 3 on the National Referral Mechanism on Victims of Trafficking on the basis that it sets out a clear structure for the referral and recognition of trafficked people by the State, we do not have the detailed knowledge of sexual trafficking issues needed for cogent comment on this aspect of the General Scheme.

Structure of this Submission

As requested, this submission is set out on a “Head by Head” basis. Our comments are set out in order under the relevant Head in numbered paragraphs. Our list of recommendations under each Head is at the end of the document. The text of each relevant Head is set out below in contrasting type for ease of reference.

Head 3 Amendment of section 2 of Act of 1981

Provide that: The Act of 1981⁴ is amended by the substitution of the following section for section 2

– “2. (1) A man commits rape if—

(a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and (b) at that time he—

(i) knows that she does not consent to the intercourse, or

(ii) is reckless as to whether or not she consents to the intercourse, or

(iii) does not reasonably believe that she consents to the intercourse, and references to rape in this Act and any other enactment shall be construed accordingly.

¹ Full text may be accessed via this web-link: [General Scheme of the Criminal Justice \(Sexual Offences and Human Trafficking\) Bill 2022](#)

² Review report itself is accessible via this web-link: [Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences \(justice.ie\)](#), and Supporting a Victim's Journey (the implementation plan for the O'Malley RR recommendations) is accessible via this web-link: [Supporting A Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases - The Department of Justice](#)

³ Accessible via this web-link: <https://www.lawreform.ie/fileupload/Reports/LRC%20122-2019%20Knowledge%20or%20Belief%20Concerning%20Consent%20in%20Rape%20Law.pdf>

⁴ Here is a link to the consolidated online text of the 1981 Act for easy reference: [Revised Acts \(lawreform.ie\)](#)

(2) If the question of reasonable belief that a woman consents to the intercourse arises in a rape trial, the jury shall have regard to the following circumstances related to the accused's personal capacity –

- (a) any physical, mental or intellectual disability of the man,
- (b) any mental illness of his, and
- (c) his age and maturity.

(3) If the question of reasonable belief that a woman consents to the intercourse arises, the jury is also to have regard to the steps, if any, taken by the accused to ascertain whether the woman consented to the intercourse.

(4) It shall not be a defence that the accused was so intoxicated by the effect of alcohol or some other drug that he did not have the capacity to understand whether the woman was consenting; but, where his level of self-induced intoxication was such that he did have the capacity to understand whether the woman was consenting, the jury shall determine whether the man's belief was reasonable by reference to whether his belief would have been reasonable if he had not been intoxicated."

RCNI Commentary on Head 3:

1. The Law Reform Commission (LRC) wording in its draft Bill at the end of its 2019 Report on this topic⁵ is tighter, creating a causal link between a lack of capacity to understand whether there was consent because of any disability or mental illness the man had **at that time**, or because of the age and maturity of the man **at that time**: "The circumstances referred to in subsection (2)(a) are where the man, at the time the intercourse occurred, lacked the capacity to understand whether the woman was consenting or not **by reason of**— (a) any physical, mental or intellectual disability the man had **at that time**, or (b) any mental illness the man had **at that time**, or (c) the age and maturity of the man **at that time**. [our emphasis];
2. LRC recommended that with regard to the question of reasonable belief in the woman's consent, the jury should consider **only** this closed list of factors potentially affecting the personal capacity of the accused to understand whether the woman was consenting **at the time of the intercourse**, and nothing else other than any steps taken by the accused to ascertain whether there was consent. RCNI's view is that this is the right approach.
3. In relation to 2(2) (a) and 2(2)(b) above: RCNI's view is that the wording of the LRC in its own Draft Bill is preferable and should replace this wording, however omitting Section 2(2)(c) for the reasons set out below.
4. With regard to Section 2(2)(c) above: "his age and maturity": RCNI's view is that this ought to be deleted. If an accused person is over the age of criminal responsibility and the DPP has consented to the prosecution going ahead, that means that he has the necessary understanding to be aware that initiating or continuing intercourse either knowing she did not consent or being reckless as to whether she did or not – is an offence, and a very serious one. After all, ignorance of the law is not a defence. There should be no possibility that some well-developed young man of 13 or 14 can argue that he was not old enough or mature enough to know what he was doing – and therefore is not guilty of rape. Leaving in this limb would open the door to uncertainty through arguments about how old or mature one would have to be to understand what rape is. Age and maturity are different from the other limbs: they are not about mental capacity. They are about knowing right from wrong and taking responsibility for one's actions.

Head 5 Amendment of section 4A of the Act of 1981 ⁶

⁵ LRC Report (2019) on Knowledge or Belief Concerning Consent in Rape Law, accessible online via this web-link: [LRC 122-2019 Knowledge or Belief Concerning Consent in Rape Law.pdf \(lawreform.ie\)](https://www.lawreform.ie/publications/LRC-122-2019-Knowledge-or-Belief-Concerning-Consent-in-Rape-Law.pdf)

⁶ Criminal Law (Rape) Act 1981: the full consolidated text may be accessed via this web-link: [Revised Acts \(lawreform.ie\)](https://www.lawreform.ie/publications/Revised-Acts)

Provide that:

Section 4A of the Act of 1981 is amended by the substitution of the following two subsections for subsection (6):

“(6) Where the judge has given leave in accordance with section 3 or 4 for any evidence to be adduced or question to be asked in cross-examination, the complainant shall be entitled to be heard in relation to the evidence and, for this purpose, to be legally represented in the proceedings for the duration of the evidence or, as the case may be, question concerned.

(7) This section applies to a sexual assault offence.”

RCNI Commentary on Head 5:

5. Now that Preliminary Trial Hearings (PTHs) are in force, alongside relevant Circuit Court and High Court rules^{7, 8} the recommendations in our own Position Paper⁹ that the Section 3 application for leave procedure should be tighter have been largely addressed.
6. However, RCNI's view is that any notice of intention to seek leave to adduce evidence as described in Section 4A CLRA 1981 should also as we recommend at page 8 of the Paper at (b) ".....indicate clearly the categories of questions to be asked, the reasons for asking them, and the parameters of the questions to be asked;..." and we would add, – "and/or the nature and rationale for seeking to adduce any other defence evidence about the complainant's other sexual experience";
7. The scope of legal advice and assistance for the complainant in Section 4A should be clear – from service of notice of intention till end of evidence at trial (ie not confined to PTH) whether through cross-examination of complainant or other defence evidence, not omitting examination of complainant in chief as implied here;
8. The opportunity should be taken to tighten the wording of Section 3 Criminal Law (Rape) Act 1981 so that the meaning of "other sexual experience" is clearer, as recommended at page 8 of our Paper at (k): [references to the complainant's other sexual experience should] "include references to pregnancy, miscarriage, abortion, contraception and other indicia of sexual activity".
9. The new Section 4A should be amended to the effect that the prosecutor has a duty to supply the legal representative for the complainant with a copy of that complainant's statement(s), where leave is sought to adduce defence evidence or put questions in cross-examination, under Section 3;
10. Head 5(7) is very welcome – as sexual assault is by far the highest volume sexual offence in this country.

Head 6 Amendment of section 6 of the Act of 1981

Provide that:

Section 6 of the of the Act of 1981 is amended –

(a) in subsection (1), by the substitution of “sexual assault offence or an offence under section 21 or 22 of the Criminal Law (Sexual Offences) Act 2017¹⁰” for “rape offence or the offence of aggravated sexual assault or attempted aggravated sexual assault or of aiding, abetting, counselling or procuring the offence of aggravated

⁷ S.I. No. 122/2022 - Rules of the Superior Courts (Criminal Procedure Act 2021) 2022, ([irishstatutebook.ie](https://www.irishstatutebook.ie)) – link to CCC rules

⁸ S.I. No. 453/2022 - Circuit Court Rules (Criminal Procedure Act 2021) 2022 ([irishstatutebook.ie](https://www.irishstatutebook.ie)) – link to CC rules (similar)

⁹ See list of recommendations at pp of this RCNI Position Paper on Previous Sexual History: <https://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>

¹⁰ Here is a link to the consolidated online text of the Criminal Law (Sexual Offences) Act 2017: [Revised Acts \(lawreform.ie\)](https://www.lawreform.ie/Revised-Acts)

sexual assault or attempted aggravated sexual assault or of incitement to the offence of aggravated sexual assault or conspiracy to commit any of the foregoing offences”, and

(b) by deleting subsection (4).

RCNI Commentary on Head 6:

RCNI broadly welcomes this provision.

11. On subsection (a): As already indicated, sexual assault is the most commonly charged sexual offence. At present, exclusion of the public is not automatic but at the discretion of the court. From survivors’ perspective, the stress of giving evidence in a sexual assault trial will be much less if it is known from the outset that the court will be held in private. Accordingly, this provision is very welcome.

12. On subsection (b), our view is that generally, it will be helpful to survivors to have both verdict and sentence delivered in courts which are closed to the public, **provided always** that there is no provision inserted either here or elsewhere to the effect that the anonymity of the accused should remain **after the accused has been found guilty or pleaded guilty**.

Head 7 Amendment of section 7 of the Act of 1981

Provide that:

Section 7 of the Act of 1981 is amended –

(a) by the insertion after “sexual assault offence” in each place where it occurs of “or an offence under section 21 or 22 of the Criminal Law (Sexual Offences) Act 2017”, and

(b) by the substitution of the following subsection for subsection (7) –

“(7) In this section –

‘broadcast’ means the transmission, relaying or distribution by electronic communications network of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

‘publication’ includes a film, sound track or any other record in permanent form (including a record that is not in a legible form but which is capable of being reproduced in a legible form) but does not include an indictment or other document prepared for use in particular legal proceedings.

‘published’ means published to any person, and includes published on the internet;

‘written publication’ includes a film, sound track or any other record in permanent form (including a record that is not in a legible form but which is capable of being reproduced in a legible form) but does not include an indictment or other document prepared for use in particular legal proceedings.”

RCNI Commentary on Head 7:

12. (a): This provision increasing the reach of complainant anonymity to “protected” and “relevant” persons is very welcome. In our view, it would be useful and appropriate for complainant anonymity to be extended further to include any child or young person named in offences under Sections 3, 4, 5, 6, 7 or 8 Criminal Law (Sexual Offences) Act 2017¹¹ (all child sexual exploitation offences), whether or not they are still a child when the matter comes to Court.

¹¹ Link to the consolidated 2017 Act may be found at footnote 10 above

13. (b): See the expression: “or any other record in permanent form” under the definition of both “publication” and “written publication” above: RCNI is concerned that this definition *might* exclude online written material which is impermanent, that is, designed not to remain online for very long before it disappears and becomes irretrievable. If we are correct in this, the provisions need to be amended so that they can include this kind of material.

Head 11 Repeals

Provide that:

The following are repealed –

- (a) section 2(2) of the Criminal Law (Incest Proceedings) Act 1995;
- (b) section 8(3) of the Criminal Justice (Female Genital Mutilation) Act 2012;
- (c) section 29(2) of the Criminal Law (Sexual Offences) Act 2017.

RCNI Commentary on Head 11:

14. On each one of these subsections, (a), (b), (c): As indicated in respect of Head 6 above, the RCNI view is that generally, it will be helpful to survivors to have both verdict and sentence delivered in courts which are closed to the public, **provided always** that there is no provision inserted either here or elsewhere to the effect that the anonymity of the accused should remain **after the accused has been found guilty or pleaded guilty**.

Head 12 Interpretation for Part 3 [single definition only]

Provide that: [.....]

“sexual exploitation” means, in relation to a person—¹²

- (a) the production of pornography depicting the person either alone or with others,
- (b) causing the person to engage in sexual activity for the purpose of the production of pornography,
- (c) the prostitution of the person,
- (d) the commission of an offence specified in the Schedule to the Act of 2001 against the person; causing another person to commit such an offence against the person; or causing the person to commit such an offence against another person, or
- (e) otherwise causing the person to engage or participate in any sexual, indecent or obscene act; [.....]

RCNI Commentary on Head 12 [extracted text only]:

15. In relation to (a) above, RCNI’s view is that it would be helpful to include an additional phrase so that “deep-faked” images are included in the definition of pornography. Section 1 (a) of the Harassment, Harmful Communications and Related Offences Act 2020¹³ could be used as a model for this purpose.

RCNI Recommendations

Head 3

¹² Apparently taken from Section 1 Criminal Law (Human Trafficking) Act 2008, available online at: <http://revisedacts.lawreform.ie/eli/2008/act/8/front/revised/en/html>

¹³ Accessible online via this web-link: <https://www.irishstatutebook.ie/eli/2020/act/32/section/1/enacted/en/html#sec1>

I Replace the proposed new text of Section 2 Criminal Law (Rape) Act 1981 with a text much closer to that proposed by the LRC in its draft Bill at the end of its Report¹⁴, omitting Section 2(3)(c) thereof:

“2. (1) A man commits rape if—

(a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and

(b) at that time he— (i) knows that she does not consent to the intercourse, or (ii) is reckless as to whether or not she consents to the intercourse, or (iii) does not reasonably believe that she consents to the intercourse [....].

(2) If at a trial for a rape offence, the jury has to consider whether the man reasonably believed that, at the time of the alleged commission of the offence, the woman was consenting, the jury shall have regard to—

(a) the circumstances referred to in subsection (3), and only those circumstances, and

(b) the steps referred to in subsection (4).

(3) The circumstances referred to in subsection (2)(a) are where the man, at the time the intercourse occurred, lacked the capacity to understand whether the woman was consenting or not by reason of—

(a) any physical, mental or intellectual disability the man had at that time, or

(b) any mental illness the man had at that time.

(4) The steps referred to in subsection (2)(b) are the steps, if any, taken by the man to ascertain whether the woman consented to the sexual intercourse.....”[LRC Section 5 is omitted as RCNI has no comment to make on that].

Head 5

II Amend Section 4A by adding this subsection:

“(2A): The notice of intention shall indicate the categories of questions to be asked, the reasons for asking them, and the parameters of the questions to be asked, or the nature of, and rationale for seeking to adduce, any other defence evidence about the complainant’s sexual experience other than that which is the subject of the charge or charges before the court”;

III Amend Section 4A by substituting this text for the text at subsection (6) set out above:

“Where notice of intention to make an application under Section 3 is given by or on behalf of an accused person who is for the time being charged with an offence to which this section applies, the complainant shall be entitled to be advised in respect of the notice and to be legally represented during the hearing of any application for leave to cross-examine on and/or adduce evidence of, the complainant’s other sexual experience. The complainant’s legal representative shall be entitled to be present in Court during the hearing of the complainant’s evidence and the hearing of all evidence adduced pursuant to Section 3 of the 1981 Act”;

IV Amend Section 4A by adding this subsection after subsection (3):

“(3A): The prosecution shall provide the complainant or his or her legal representative with a copy of his or her statement(s) as soon as practicable after notice of intention to adduce evidence or seek leave to cross-examine the complainant in relation to his or her sexual experience other than that to which the charge before the court relates, has been received”, and make any consequent amendments in the following subsections”:

V Amend Section 3 Criminal Law (Rape) Act 1981 as amended, by adding this subsection after S3(1)(c):

¹⁴ See web-link to full text of the Report at footnote 1 above (pages 99,100).

(1A): “References to any sexual experience (other than that to which the charge relates) of a complainant with any person shall include in this Section, in Section 4 and Section 4A shall include references to miscarriage, abortion, contraception and other indicators of sexual activity”.

Head 7

VI a): Amend Head 7 by the insertion after “sexual assault offence” in each place where it occurs of “or an offence under section 3,4, 5, 6, 7, 8, 21 or 22 of the Criminal Law (Sexual Offences) Act 2017”, and

VII (b): Consider carefully whether the following wording under the definition of both “publication” and “written publication” does include online written material designed not to be accessible or retrievable after a brief interval, and amend these definitions if the conclusion is that they may not, or do not: “or any other record in permanent form (including a record that is not in a legible form but which is capable of being reproduced in a legible form)”

Head 12

VIII Amend (a) so that it reads: “the production of pornography depicting the person, **or purporting to depict the person**, either alone or with others” (The additional text is emboldened).

Proposed Additional Heads to be added under Part 2:

IX Create a new **Digital Rape Offence**. At present, digital penetration without consent of a person’s anus, vagina or mouth in a sexual context is not defined as rape but as sexual assault in our law. If Ireland adopted the proposed EU Directive combating violence against women and domestic violence¹⁵, the current range of rape offences would have to extend to include digital rape, under the proposed Article 5. This Bill is an opportunity to make this change;

X Create at least one new **offence of voyeurism** which covers voyeuristic activities of which the victim is not aware at the time at which they are taking place, ie which go beyond the scope of Section 45 Criminal Law (Sexual Offences) Act 2017¹⁶. A precedent which could be adapted is at SS.67, 67A and 68 in UK Sexual Offences Act 2003¹⁷.

XI Devote at least one **Additional Head** to the following **Special Measures** to make it easier for complainants and other witnesses to give evidence:

- (a) Create a prohibition on defence cross-examination of the complainant on, or any defence evidence about, any aspect of her appearance at the time of the offence, which is led solely in order to advance the case that her appearance is evidence of consent and for no other reason;¹⁸
- (b) Amend Section 16 of the Criminal Evidence Act 1992 ¹⁹to allow for pre-recorded evidence of adult victims and witnesses with full capacity, including those who were victims of offences as children and whose evidence was recorded while they were still children – to stand as their evidence in chief at trial;
- (c) Amend Section 16 of the Criminal Evidence Act 1992 to allow for the pre-recording of cross-examination and re-examination of victims of and witnesses to, sexual offences and for such pre-recordings to stand as

¹⁵ See full English text of the proposed Directive via this web-link: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0105&from=EN>

¹⁶ See web-link to text of the Act at footnote 10 above

¹⁷ See this web-link to the full text of the Act as amended: [Sexual Offences Act 2003 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2003/62/section/1)

¹⁸ See further on this topic RCNI Report (2018) accessible via: [210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf \(rcni.ie\)](https://www.rcni.ie/2018/07/21/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf) and RCNI Submission on Criminal Justice System and Survivors of Sexual Violence (2021) accessible via: [RCNI-Criminal-Justice-System-and-Survivors-of-Sexual-Violence-3rd-National-Strategy-on-DSGBV-September-2021-LPD-Final-4.pdf](https://www.rcni.ie/2021/09/21/RCNI-Criminal-Justice-System-and-Survivors-of-Sexual-Violence-3rd-National-Strategy-on-DSGBV-September-2021-LPD-Final-4.pdf)

¹⁹ The full text of Part III of the consolidated version of the Criminal Evidence Act 1992 may be accessed here: [Revised Acts \(lawreform.ie\)](https://www.lawreform.ie/)

their evidence at trial. Section 28 UK Youth Justice & Criminal Evidence Act 1999²⁰ as amended may be a useful precedent in this regard (now both in force and operational across England & Wales);

- (d) Amend the special measures provisions of the Criminal Evidence Act 1992 as amended, the Criminal Justice (Victims of Crime) Act 2017²¹, the Criminal Law (Sexual Offences) Act 2017²² and the Domestic Violence Act 2018²³ to treat all victims and witnesses as if they were under 18, ie to create a presumption in favour of the grant of special measures to all victims of and witnesses to all sexual offences and all otherwise violent offences at least, whether or not any victim or witness is under or over 18;
- (e) Amend Section 14 of the Criminal Evidence Act 1992 on the use of intermediaries to provide for:
 - The use of intermediaries wherever a victim or witness over 18 has some form of physical disability affecting their ability to communicate their evidence in court but has no “mental disorder”; and
 - The extension of the use of intermediaries to the answers given by the witness being assisted as well as to the questions put to the witness.
- (f) Amend Criminal Justice (Victims of Crime) Act 2017 to provide for a generally worded provision akin to the inherent jurisdiction of the High Court, which would allow a judge at Circuit or District Court level to allow the use of any novel measure(s) in order to assist the witness to give evidence, at least in relation to any violent or sexual offence, provided that the use of any such measure was in the view of the court, not contrary to the interests of justice. An example of such a measure is the use of Court Dogs (e.g. USA).

In Conclusion

This Submission is a brief summary of several topics which are developed in much more detail in a number of RCNI policy papers, reports and submissions. The most relevant among them are listed under References at the end of this submission.

This is an important Bill from the point of view of survivors of sexual violence. RCNI would be happy to assist the Committee in any way it can as it gives this new legislation its detailed attention in pursuit of our common goal of ensuring that legislation in this area is as clear, robust and effective as it can be.

Ref: RCNI/LPD/Final

Date: 13th October 2022

Rape Crisis Network Ireland clg

Carmichael Centre

North Brunswick Street

Dublin D07 RAH8

Tel: 087 9635201

²⁰ Accessible via this web-link: [Youth Justice and Criminal Evidence Act 1999 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/1999/23/section/28)

²¹ Accessible via this web-link: [Revised Acts \(lawreform.ie\)](https://lawreform.ie/Revised-Acts)

²² Accessible via web-link at footnote 10 above

²³ Accessible via this web-link: [Revised Acts \(lawreform.ie\)](https://lawreform.ie/Revised-Acts)

Email: legal@rcni.ie

Website: www.rcni.ie

References – List of selected RCNI submissions with web-links (2012-2022)

1. RCNI Position Paper on Previous Sexual History and Separate Legal Representation, (2012), <https://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>
2. RCNI Submission to LRC on Knowledge or Belief Concerning Consent in Rape Law (2018) <https://www.rcni.ie/wp-content/uploads/RCNI-LRC-Knowledge-or-Belief-concerning-Consent-in-Rape-Law-Submission-October-2018.pdf>
3. RCNI Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings <https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf>
4. RCNI General Commentary on Tom O'Malley Review (2020): <https://www.rcni.ie/wp-content/uploads/RCNI-TOM-Review-Report-commentary-September-2020-LPD-7.pdf>
5. RCNI Submission on Victims' Testimony to Joint Oireachtas Committee on Justice (2021): <https://www.rcni.ie/wp-content/uploads/RCNI-Submission-on-Victims-Testimony-to-JOCJE-Final-February-2021-SI.pdf>
6. RCNI Submission on the proposed 3rd National Strategy on Domestic, Sexual and Gender-Based Violence: Sexual Violence in the Criminal Justice System (revised September 2021): <https://www.rcni.ie/wp-content/uploads/RCNI-Criminal-Justice-System-and-Survivors-of-Sexual-Violence-3rd-National-Strategy-on-DSGBV-September-2021-LPD-Final-4.pdf>

Strictly Private & Confidential

14th October 2022

Mr. Alan Guidon
Clerk to the Committee
Joint Committee on Justice
Leinster House
Dublin 2

By email to: justice@oireachtas.ie

Our Ref: JCJ/4/5/W/1

Dear Mr. Guidon,

Thank you for your correspondence on behalf of the Committee and the invitation to make submission on the General Scheme as set out.

I attach in word document format the initial submission of this Agency.

Should the Committee wish to have any clarification on the contents or hear further from me please contact Ms. Niamh Doody Business Manager in my office Niamh.Doody@tusla.ie

Yours Sincerely,



Bernard Gloster
Chief Executive

Child & Family Agency (Tusla)
Response to Joint Committee on Justice –
General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking Bill) 2022

Introduction:

Tusla welcomes the proposed legislation. In doing so the Agency has some unresolved concern as to inclusion of the Agency as a competent authority on the one hand and a potential conflict of interest which may exist on the other.

This conflict may arise in particular in relation to Tusla's role as corporate parent for children in care which requires Tusla to advocate for the child in their best interest and the role of competent authority as part of the Operational Committee which would require Tusla to determine a child's formal recognition as a victim of trafficking. A decision to refuse same could impact on the child's immigration status and access to support services.

Tusla has also highlighted the need for further detail about the identification mechanism for child victims which takes into account the special circumstances and needs of children, in particular specific identification guidelines for children.

That noted Tusla is happy to co-operate with the advancement of the legislation and will accept the final determination of the Oireachtas with a commitment to working through any potential conflict of role.

The following Heads are relevant.

- **Head 14** provides for Tusla, as a competent authority, to refer a matter to the Operational Committee where Tusla is of the view that the application is credible and based on reasonable grounds
- A potential issue with Head 14 is that it appears to be predicated on the person who believes that he or she has been, or is, or may be, a victim of human trafficking making the application to be recognised. In the case of a child, it may be unlikely that the child would self-identify as a victim of trafficking. Consideration should be given to giving Competent Authorities and Trusted Parties authority to refer to the Operational Committee in situations other than where the person has himself or herself sought to make the application.
- **Head 15(5)** provides for the Operational Committee to agree operational guidelines. Consider noting here the need for further detail about the identification mechanism for child victims which takes into account the special circumstances and needs of children, in particular specific identification guidelines for children. The description of the role and responsibilities of this Committee seem ambiguous. Also, volume of cases may come into issue given that being identified as a victim of trafficking will give a person access to a whole range of services as well as protection from deportation where they are a foreign national. International research has found that in some cases up to 21% of all victims of human trafficking are said to be children and a question arises as to whether it is envisaged that the NRM will require input from Tusla on all cases due for consideration. Whoever is on the committee will have to have very specialised knowledge and expertise.
- **Head 16** provides for all necessary cooperation between the members of the Competent Authorities and Trusted Partners, including the exchange of relevant information required to make a determination that a person is a victim of human trafficking. (b) the Competent Authorities or Trusted Partners, other than the Competent Authority or Trusted Partner that

made the referral, **may** share such information known to it about the person as is relevant for the purposes of making a determination, including but not limited to information set out in subhead 2. We are concerned about the use of language for information sharing e.g., ‘may’ and ‘consent’. We believe this part needs to be crystal clear on any obligation or choice to share information. Also there needs to be clarity on the use of the term ‘consent’.

16 (5) Information can only be shared with the **consent** of the person.

Head 16(6) sets out that “where the person is a child, the consent of the parent or guardian of the person shall be required. If the child does not have a parent or guardian, the Child and Family Agency shall represent the interests of the child.” There is a potential conflict of interest for Tusla here as, in certain situations, Tusla will have the dual role of, on the one hand, making a determination about whether the person is a victim of trafficking and, on the other hand, being tasked with representing the interests of the child.

- **Head 17** provides for Tusla’s role, as a competent authority, as part of the Operational Committee to make a determination that the person is a victim of human trafficking. This determination is made on the balance of probabilities.
- **Head 19(2)** provides that, on a person being accepted into the National Referral Mechanism, it shall be the responsibility of Competent Authorities, acting individually, or collectively as part of the Mechanism, to ensure provision of an appropriate care package to such person, to include but not limited to access to such of the following services as may be appropriate and necessary in the opinion of the relevant Competent Authority, or other responsible public body, concerned: [...] (f) in the case of a child, access to child protection services of the Child and Family Agency”. This appears to suggest that a child will have to be identified as a victim of trafficking by the Operational Committee to be able to access a range of services including (f). For the avoidance of doubt, access to child protection services is not dependent on a formal determination that a child is a victim of trafficking. Services are

provided by Tusla in accordance with the provisions of the Child Care Act 1991, Child, and Family Act 2013, Children First: National Guidance for the Protection and Welfare of Children (2017), together with other relevant law, policy, procedures, and guidelines that govern social work practice.

ENDS

SOHT_08

October 2022

NWC Submission on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

Introduction

Founded in 1973, the National Women's Council (NWC) is the leading national women's membership organisation. We represent and derive our mandate from our membership, which includes over 190 groups and organisations from a diversity of backgrounds, sectors and locations across Ireland. Our mission is to lead and to be a catalyst for change in the achievement of equality for women. Our vision is of an Ireland and of a world where women can achieve their full potential and there is full equality for women.

NWC chairs the [National Observatory on Violence Against Women](#) an independent network of over 20 grassroots and national organisations that convene quarterly to monitor progress on violence against women in Ireland. NWC established and chairs the [National Advisory Committee](#) supporting the Dept. of Higher Education's Framework *Safe, Respectful, Supportive and Positive – Ending Sexual Violence and Harassment in Irish Higher Education Institutions*. NWC leads [Beyond Exploitation](#) the Irish civil society campaign defending the human right not to be bought or sold for sex with partner organisations Ruhama and the Immigrant Council of Ireland.

NWC welcomes changes on aspects of the Criminal Law (Rape) Act 1981 dealing with knowledge or belief of consent, the integration the O'Malley report recommendations and the amendments to the National Referral Mechanism for victims of Human Trafficking. We believe that these changes will improve legislation in relation to consent, enhance the operation of the National Referral Mechanism and that the system of identification of victims of human trafficking could significantly enhance the investigation, prosecution and prevention of human trafficking.

However, further recommendations in the O'Malley report need to be taken on board (such as the provision of free legal aid) and the General Scheme must take into account well-established best practice principles, in relation to the identification and support of victims of human trafficking.

Part 2

Sexual Offences, Amendments of section 2 of Act of 1981

The definition of consent, introduced by the Criminal Law (Sexual Offences) Act 2017 provides a positive definition of consent, where consent is freely and knowingly agreed to between the

parties, sending a clear message that consent to sexual acts must be negotiated and communicated between sexual partners¹. However, the honest belief defence as it stands on the Criminal Law (Rape) Act 1981 allows an unreasonable and unilaterally formed of belief that provides a defence for rape, it negates the need for negotiation and communication implicit in the definition of consent, as no evidence is required of the defendant to substantiate his belief in consent or his lack of knowledge that the act was not consensual, the defence is defined subjectively meaning that the belief does not need to be based on reasonable grounds.² This is especially problematic as evidence has repeatedly shown that stereotypical and prejudicial attitudes about rape and rape victims continue to influence juror deliberations in these cases.³ In addition, Women's Aid 2021 'Unheard and Uncounted' report gathered and analysed testimonies of victim-survivors' experiences of the criminal justice system which reported instances of negative responses from the Garda and members of the judiciary, with interviewees reporting feeling judged about how they behave in Court, reported a perception that they were not being believed, that the severity of their claim was dismissed or that the stakeholders sometimes lacked empathy⁴. Moreover, statutory services, including more particularly Court services and An Garda Síochána still struggle to understand the re-traumatising and re-victimising nature of the criminal legal system and, in some cases, replicate mechanisms of power when addressing DSGBV as highlighted by Women's Aid and Dublin Rape Crisis Centre who have reported on victim-survivors' negative experiences throughout their journey to justice.⁵ The development of objective frameworks are important to create a survivor centred culture throughout the justice system and its processes, not just in the actual court proceedings themselves. Therefore, the NWC welcomes that the Bill moves to an objective formulation of belief in consent, and that that a claim of belief must be based on reasonable grounds if it is to exculpate the accused.

¹ Women's Aid, Submission in response to the Law Reform Commission issue paper on knowledge or belief concerning consent in rape law (Women's Aid, October 2018).

² DRCC, Submission to the Law Reform Commission on Knowledge or Belief Concerning Consent in Rape Law (DRCC, November 2018).

³ Where criminal justice data are available for analysis, they have traditionally shown high 'attrition rates' for rape; in other words, conviction of rapists is low in comparison with the number of reported rapes. European Union Agency for Fundamental Rights, 2014, Violence Against Women: an EU-wide survey Main results.

⁴ Monica Mazzone and Women's Aid, Unheard and Uncounted, Women, Domestic Abuse and the Irish Criminal Justice System (Women's Aid, 2019).

⁵ Dublin Rape Crisis Centre, Submission to the Garda Síochána Inspectorate's inspection into the effectiveness and efficiency of the Garda Síochána's response to domestic abuse (DRCC, January 28th 2022),

Sexual Offences, Amendments of section 3, 4A, 6, 7, 8 of Act of 1981

The NWC welcomes the Amendments to the 1981 Act, such as the entitlement of victims to access legal aid when a relevant application for questioning on their sexual experience is been made at the preliminary trial, the extension of legal representation for victims in all sexual offence trials while the victim is being questioned on their sexual history, and the extension of privacy and anonymity in all sexual offence trials to further ensure the privacy and anonymity in all sexual offence trials. However, as the O'Malley review recommends, provision of free legal aid for all victims of sexual violence even when there is no prosecution⁶ should be included, as it acknowledges the gendered nature and gendered constraints that are experienced by victims of all gender-based violent crimes in accessing legal advice⁷.

Furthermore, NWC endorses the preliminary observations and areas of concern, as stated by the Dublin Rape Crisis Centre submission on Sections 3, 4 A, 6, 8 and 11 to the Department of Justice Consultation on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022.

NWC highlights from DRCC's submission the following observations and concerns on amendments to Sections of the Act of 1981:

- Section 3, it is welcomed the entitlement of victims to access legal aid when a relevant application for questioning on their sexual experience has been made at the preliminary trial as it is essential for a victim's understanding of proceedings. Legal representation should be available to the victim in relation to any application at preliminary hearing that might impact the victim.
- Section 4A, it is welcomed the extension of legal representation for victims in all sexual offence trials while the victim is being questioned on their sexual history. Currently, legal representation is not available to all sexual offences and in addition, the representation is only for the period during which the defence made the application to engage in such questioning of the victim's sexual history. The presence of legal representation to ensure the victim was fully and thoroughly prepared for a case, as well as to protect victims from re-traumatisation through the court process would greatly enhance the capacity of victims to give their best evidence and to recognise the rights of victims and the victims'

⁶ Tom O'Malley et al., Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (Irish Department of Justice, July 2020) para 5.23.

⁷ National Women's Council, NWC Submission on the Third National Strategy on Domestic, Sexual and Gender-Based Violence (June 2021) page 23. Available at: https://www.nwci.ie/images/uploads/NWC-3rd_National_Strategy_DSGBV_Submission_JUNE_2021.pdf

voices. The DRCC recommends that legal advice and legal representation be made throughout the entire trial process (during the investigation and trial process, the entire court trial or until such time as the prosecution case concludes), and not limited to the questioning of sexual history and certain other minor exceptions. In order to fulfil this, DRCC proposes that legal advice and legal aid will be provided through the Legal Aid Board and that the Board develops expertise and experience on criminal law matters in relation to sexual offences and the particular vulnerabilities of victims/survivors of sexual crimes, and provide a sufficiently trained and properly resourced unit within the Board in order to provide an adequate service to victims of sexual offences.

- Section 8, it should be amended to codify that waiving anonymity of both the convicted person and the victim be entirely at the behest of the victim without any necessary court approval.

Part 3

National Referral Mechanism for victims of Human Trafficking

The NWC welcomes the non-discriminatory and multi-agency approach that has been incorporated into the Bill, as it is in line with the provisions of the EU Anti-Trafficking Directive 2011/36/EU. The NRM and the system of identification of victims of human trafficking will enhance the investigation, prosecution and prevention of human trafficking. We specifically welcome that it appears that victims of human trafficking are not required to cooperate with criminal investigations in order to receive the full range of assistance and entitlements. If this is the case, this is a significant step forward from the current victim identification requirements.

However, there are significant gaps in the General Scheme and there are some issues that require clarification and need to be addressed. It is disappointing that the operational guidelines that will detail the functioning of the revised National Referral Mechanism (NRM) are not yet available.

Moreover, the NWC endorses the preliminary observations and areas of concern, as stated by the Irish Immigrant Council submission to the Department of Justice Consultation on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022.

The NWC highlights the following ICI's observations and concerns on the National Referral Mechanism for victims of Human Trafficking:

NWC Submission on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 **4**

- Head 12. The definitions of types of ‘exploitation’, including sexual exploitation, labour exploitation, removal of organs and forced criminality are in keeping with the provisions of existing legislation, namely the Criminal Justice (Human Trafficking) Act 2008. The legislative drafters should ensure that the definition also cover the 2013 Act. ICI recommends that the legislation also defines ‘exploitation’ in sufficiently broad a manner to allow for new or emerging forms of human trafficking including coercion and commercial exploitation;
- Head 14. The introduction of an additional “credibility” test as to whether a person is a victim of human trafficking is provided for in the General Scheme, and it is not clear why it appears that a more elaborate test than that currently applied by the Competent Authority (the AGS). It introduces a standard that is not compatible with the EU Anti-Trafficking Directive 2011/36/EU Directive, which mandates that Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any human trafficking offences;
- Head 15. It is important that further transparency is provided in the formulation and implementation of the operating guidelines, with clear timeframes to make further submissions and/or to submit an appeal;
- Head 16. The lack of a child specific provisions concerning the identification and application for recognition as a Victim of Trafficking do not consider the best interest of the child as per the Directive and Ireland’s obligations under the UN Convention on the Rights of the Child. ICI strongly recommends a child specific NRM, but if such a system is not legislated for, it must be the case that if a child victim of trafficking does not have a legal guardian that they are appointed with such a guardian;
- Head 18. Clarity needs to be provided on minimum qualifications and mandatory training required by the Competent Authority and Trusted Partners, as well as on the professional skills/competencies and selection process of those to ensure that all members (Operational Committee, Competent Authority and Trusted Partners) have relevant experience and knowledge of human trafficking and administrative decision making. Adequate funding and resourcing must be provided to ensure they can carry out their duties with appropriate care and professionalism;
- Head 19. Support and assistance to victims of trafficking should be provided on a consensual and informed basis. Victims should be informed of the NRM and the measures

involved and be supported to make their own decision about next steps that they want to take. Furthermore, Head 19 does not make any reference to access to any recovery and reflection period nor to providing access to residence permission for non-EEA nationals or provision of information relating to the possible granting of international protection. We are especially disappointed that the General Scheme refers to Direct Provision in the context of accommodation in a new Bill, which is not in compliance with the appropriate or safe accommodation or gender specific approach required by the Directive. It is also in direct contradiction to government policy to end the system and to the human rights and victim centred approach set out in the National Action Plan and the White Paper on Ending Direct Provision⁸. ICI recommends ensuring appropriate and safe accommodation for victims of trafficking within the new NRM as a matter of priority and that references to Direct provision are removed;

- Head 20 and 21. These Heads need to be drafted to ensure compliance with the requirements of Article 8 of the Directive, victims of human trafficking should be protected from prosecution or punishment for involvement in criminal activities, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.

For any queries and further information please contact:

Violence Against Women Coordinator Ivanna Youtchak ivannay@nwci.ie

Head of Policy, Jennifer McCarthy Flynn jennifermf@nwci.ie

⁸ Government of Ireland. A White Paper to End Direct Provision and to Establish a New International Protection Support Service (Department of Children, Equality, Disability, Integration and Youth, 2021). Available at file:///C:/Users/IvannaY/Downloads/124757_ef0c3059-b117-4bfa-a2df-8213bb6a63db.pdf

Submission on Part 3 of the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

Irish Human Rights and Equality Commission
October 2022



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

Published by the Irish Human Rights and Equality Commission.

Copyright © Irish Human Rights and Equality Commission 2022

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.

Contents

Introduction	1
List of recommendations	2
Background information	8
Summary	10
Part 2 Sexual Offences	12
Head 5 Amendment of section 4A of the Act of 1981	12
PART 3: National Referral Mechanism for Victims of Human Trafficking	13
Head 12 Interpretation	13
Head 13 Competent Authorities of the National Referral Mechanism	19
Head 14 Application for recognition as a victim of human trafficking	19
Head 15 National Referral Mechanism Operational Committee [Panel] for the identification of victims of human trafficking	23
Head 16 Sharing of information by Competent Authorities and Trusted Partners	26
Head 17 Identification of a victim of human trafficking by the National Referral Mechanism Operational Committee [Panel]	28
Head 18 Designation by Order of Trusted Partner	31
Head 19 Access to services by victims of human trafficking	32
Head 20 Prohibition on Deportation or Transfer of Victim of Trafficking	39
Head 21 Protection from prosecution for a human trafficking offence	39
Bibliography	45
Law	47
Case Law	49

Introduction

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

In October 2020, the Commission was designated as Ireland's Independent National Rapporteur on the Trafficking of Human Beings. This accords with the obligation set forth in Article 19 of the EU's Anti-Trafficking Directive that introduced a legally binding requirement for all EU Member States to establish National Rapporteurs or equivalent mechanisms. The development of a comprehensive National Referral Mechanism ('NRM') is at the core of an effective and functioning anti-trafficking response. This Bill is the most significant opportunity to establish a NRM that applies to all victims of trafficking, regardless of their nationality and immigration status, allowing for a structured and formal process of identification that concludes with a swift and clearly communicated decision. Importantly, it also provides an opportunity to establish clear provisions for assistance and support.

The Commission welcomes the opportunity to make a written submission to the Joint Oireachtas Committee on Justice on the General Scheme of the Criminal Justice (Sexual Offences And Human Trafficking) Bill 2022 ('the General Scheme') and remains available to the Committee to discuss or clarify any matters that may arise.

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

List of recommendations

Part 2 Sexual Offences

Head 5 Amendment of section 4A of the Act of 1981

The Commission recommends that the right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experiences) should be extended to victims of offences committed under section 4 of the Criminal Law (Human Trafficking) Act 2008.

PART 3: National Referral Mechanism for Victims of Human Trafficking

Head 12 Interpretation

The Commission recommends that the term ‘suspected victims of trafficking’ is retained and defined where there are reasonable grounds to believe a person has been a victim of an offence under section 2 or 4 of the Criminal Law (Human Trafficking) Act 2008 or section 3 of the Child Trafficking and Pornography Act 1998.

Victim’s consent

The Commission recommends that the Bill include express provisions for the identification victims who lack capacity such as children or adults with diminished capacity.

Absence of a child-specific identification process

The Commission recommends that the term ‘Children’s Legal Advisor’ be included and defined in the interpretations section in the Bill.

The Commission recommends that the Bill contain a child-specific identification process.

The Commission recommends that the findings of the First National Evaluation Report of the National Rapporteur on Human trafficking, GRETA 3rd evaluation report, the OSCE

country report of 2020 are all taken into account for the development of a child-specific identification process in the Bill.

The Commission further recommends that all ‘Competent Authorities’ and ‘Trusted Partners’ undertaking mandatory child trafficking training (IHREC, 2022) to be included in the Procedural Guidelines.

The Commission recommends, in relation to the definition of ‘child’, that the term ‘age assessment’ be included and defined in the Bill in regard to potential child victims of trafficking.

The Commission recommends that age assessments should be carried out by Tusla, or another competent body, supported by strict policy-guidelines that are child-centred and adapted to the person’s specific needs (cultural, gender, etc.) and should not be based on a medical test.

The Commission further recommends that the guidelines should explicitly adopt the principle of the ‘benefit of the doubt’ regarding age determination of young applicants.

The presumption of minority should be applied unless and until an age assessment test proves otherwise.

Inclusive categorisation of potential victim/ applicants

The Commission recommends the introduction of a separate standalone offences for holding a person in slavery, servitude or forced or compulsory labour fully aligns Irish law with Article 4 of the European Convention on Human Rights, which requires criminalisation of slavery, servitude and forced labour.

The Commission recommends the 2008 Act be amended to include the offence of trafficking of children for sexual exploitation, with all necessary consequential amendments to the 1998 Act.

The Commission recommends the drafting of the Bill include amendment of the term ‘exploitation’ with a view to incorporating trafficking for the purposes of novel and rare

forms of exploitation such as forced/exploitative marriages, sale of children and illegal adoptions, which have been reported elsewhere.

Head 13 Competent Authorities of the National Referral Mechanism

The Commission recommend the Bill clearly state that no Gardaí below the rank of superintendent will be part of an Operational Committee and that all members of the Operational Committee must be of sufficient seniority and appropriately trained on trafficking in human beings.

Head 14 Application for recognition as a victim of human trafficking

Multi-agency two-stage assessment

The Commission recommends that Head 14 place a duty upon Competent Authorities and/or Trusted Partners to refer anyone who they believe, or who believes themselves to be a victim of trafficking, to the Operational Committee.

Unnecessary duality in establishing both ‘credibility’ and ‘reasonable grounds’

The Commission recommends that the ‘credibility’ requirement be removed from both Heads 14 and 17 and not be included in the Bill.

The Commission recommends that Head 14 be drafted in such a way as to require the Competent Authority and/or Trusted Partner to refer the applicant to the Operational Committee, provided that consent of that applicant has been obtained.

To ensure accuracy, accountability and consistency the Commission recommends that internationally recognised indicators, such as the Delphi and Dignity indicators (or nationally agreed list of indicators), be specifically included or referenced in the Bill as the criteria which the Competent Authority or Trusted Partner may consider in making their referral. At the very least, the reasonable grounds criteria included in the Bill must fully align with the statutory definition of trafficking with the three elements.

Re-applications to Component Authorities and Trusted Partners

The Commission recommends that the process under Head 14 allows for the possibility of re-application to a Competent Authority or a Trusted Partner.

Head 15 National Referral Mechanism Operational Committee [Panel] for the identification of victims of human trafficking

Operational matters

The Commission recommends that the operational framework of the Committee is provided for in primary legislation and open to parliamentary scrutiny, due to its essential role in the functioning of an early mechanism for identification of victims of trafficking.

Membership and expertise

The Commission recommend that the Bill require the Department of Justice to draw up procedures that allow for the selection of ‘relevant’ members of the Competent Authorities, Trusted Partners and persons with expert knowledge of trafficking to form Operational Committee Panels that will then preside over exploitation-specific identification decisions under Head 17. This expert knowledge must cover at a minimum: the form of exploitation the applicant has claimed to be a victim of; gender-based violence; forced labour and employment-related matters, legal expertise and; child trafficking when considering an application under Head 17.

Head 16 Sharing of information by Competent Authorities and Trusted Partners

The Commission recommends that child applicants should be appointed a ‘Children’s Legal Advisor’ at the earliest stage of the referral and identification process.

To ensure consistency, the Commission is of the view that Head 16 should read ‘applicant’ instead of ‘person’.

Head 17 Identification of a victim of human trafficking by the National Referral Mechanism Operational Committee [Panel]

Indicators

The Commission recommends that the grounds upon which the Operational Committee [Panel] should base their decision, align with the definition of trafficking and should be based on indicators to that effect and a reasonable ground threshold.

Appeal and Reconsideration process

The Commission recommends the Bill include an appeal and a reconsideration process.

Head 18 Designation by Order of Trusted Partner

The Commission recommends that a mechanism of independent review of decisions relating to trusted partner status should be included.

Head 19 Access to services by victims of human trafficking

Assistance not conditional on cooperation with investigations

The Commission recommends that the Bill clearly set out assistance and support of suspected victims of trafficking. Most especially, the rights owed to third country national and EEA national victims, through express provisions for:

- **social welfare (free of any habitual residence condition tests, which must be irrelevant);**
- **housing assistance (that includes a specialised shelter and/or private arrangements);**
- **medical and psychological care; and**
- **immigration status, where necessary, to facilitate the entitlement to the above listed assistance, before, during and after the formal identification process subject of this scheme.**

The Commission recommends that the Bill clearly state that access to assistance and support and the necessary immigration status for third country national victims that underpins it are not conditional on cooperation with criminal investigation and proceedings.

In line with the most recent recommendations by GRETA, Head 19 should also include and expressly provide for the appointment of cultural mediators and/or trafficking experts to assist in the identification process, where necessary.

Head 20 Prohibition on Deportation or Transfer of Victim of Trafficking

The Commission recommends that the protections from deportations be extended to include transfers under the Dublin III Regulations.

Head 21 Protection from prosecution for a human trafficking offence

The Commission recommends that to adhere fully to the non-punishment principle, the Bill should amend the 2008 Anti-Trafficking Act, to include a specific statutory defence for victims of trafficking where they have committed crimes as a direct consequence of them being trafficked.

The Commission recommends that the legislative process of this Bill examine the feasibility of extending the expungement of criminal convictions to victims of other forms of human trafficking.

Background information

The existing NRM is predicated on the approaches set out in the Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking, which have been widely criticised. Both national and international expert bodies have expressed concerns and dissatisfaction with the fundamental assumptions underpinning the NRM that impact its application.

For instance, the assumption that victims of trafficking will necessarily be third country nationals was contradicted by the reality that a large proportion of victims are citizens of the European Economic Area and some victims are Irish (IHREC, 2022; Department of Justice 2022; European Commission, 2022).

The second assumption was that the victims of trafficking who are seeking international protection cannot simultaneously participate in the NRM as formally identified victims with a corresponding residence permit. This position has been unhelpful and interferes with the right to seek international protection. It has also been refuted by the State itself (see *Immigration, Residence and Protection Bill 2010*, section 139 (7) allowing residence permits for victims participating in the asylum process to run concurrently). Also of note, is the position taken by the State in allowing parents of Irish born children to hold a residence permit, while simultaneously retaining their applications for asylum.

Furthermore, it is assumed that there is no need for a separate child trafficking identification mechanism, despite some prospective commitment in 2016, to the inclusion of such in the second National Action Plan on human Trafficking, and the repeated international and national recommendations in that regard (IHREC, 2022; OSCE, 2020, Abbit, 2021). The current interplay between three systems - international protection, human trafficking and general child protection – represent an elaborate approach to assistance that is not conducive to monitoring and accountability, and has ground the identification of child victims to a standstill in the last two years (IHREC, 2022; Department of Justice 2022; European Commission, 2022).

These assumptions, coupled with lack of provisions for assistance of victims in primary legislation, have resulted in a divergent approach to identification and support of victims, evoking questions regarding the equal of treatment of victims (GRETA, 2017; GRETA, 2022;

IHREC, 2021). This questionable but ongoing approach to identification and assistance of victims led to the downgrading of Ireland to 'Tier 2 Watch List' in the US Trafficking in Persons report, along with recurrent criticism about 'chronic deficiencies' in assistance to victims (US Department of State, 2018; US Department of State, 2019; US Department of State, 2020).

The operational arrangements put in place on the basis of these assumptions, which entrusted An Garda Síochána with the role of carrying out the identification process for all victims - as a single competent authority for the State - were similarly unhelpful. The inadequacies inherent in this approach are best reflected in the ruling of the High Court in *P v Garda National Immigration Bureau*.

The Commission has been very consistent in its observations regarding the NRM over the years (IHREC, 2016), and has provided detailed comments and recommendations on this particular aspect of the anti-trafficking response since its establishment as a National Rapporteur on Human Trafficking (IHREC, 2021; IHREC, 2022).

Summary

The Commission welcomes the publication of the General Scheme of the Criminal Justice (Sexual Offences And Human Trafficking) Bill 2022 following the announcement by the Minister of Justice to that effect in May 2021, and urges the swift completion and implementation of this crucial piece of legislation by the Government.

Unlike the criminalisation of human trafficking offences, victim identification and assistance has not been placed on a statutory footing to date (except some legal protections within criminal proceedings that were brought about through the Victims of Crime Act 2017). It is the view of the Commission that this has created an unhelpful imbalance in the overall human trafficking response, which the proposed legislation has the potential to address.

With reference to the key issues raised in the Commission's first National Evaluation Report as Rapporteur on Human Trafficking (published June 2022), this legislation represents a further step to ensure full compliance with the EU Anti Trafficking Directive. In particular, with Article 11.4, wherein States must:

“take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.”

The Commission's submission is based on the findings and evaluation of the first National Evaluation Report of the Rapporteur (IHREC, 2022).

The proposed observations outlined in the Submission are intended to bring attention to the most pressing issues arising in the General Scheme and offer possible solutions through suggested amendments of the relevant Heads. With the exception of one particular observation pertaining to separate legal representation to victims of human trafficking (under head 5 of Part 2 Sexual Offences), this Submission focuses exclusively on Part 3 'NRM'(Heads 12-21).

In this submission, the Commission welcomes the positive approaches outlined in the General Scheme with regards to conferring a role (a degree of agency) to victims in the process of identification, the inclusion of 'historic' and 'potential' victims of this crime, the

multi-agency cooperation and inclusion of independent stakeholders, protection against deportation and some steps with regards to non-prosecution.

Before moving to consider the General Scheme, in depth, the Commission would like to raise what it considers two of the most significant omissions from the General Scheme.

First, the almost complete absence of a child-specific identification process. The Commission has emphatically called for the inclusion of child-specific identification and assistance measures. Such calls are reiterated throughout the National Evaluation Report and owing to the significant reforms that are urgently required, these have been included in a dedicated chapter within the report (IHREC, 2022). Children are among the most vulnerable victims of trafficking. According to a recent EU Study, the social, economic and personal cost from the crime committed against children is exceptionally high (European Commission, 2020). Given their unique vulnerability, child victims of trafficking need child-specific processes and procedures within the NRM Bill.

Second, the complete absence of the sixty-days Recovery and Reflection period - a requirement of the Europe Convention on Action against Trafficking in Human Beings. Failing to provide for, in statute, immigration permissions seriously undermines the protections available to victims who are third country nationals, and in doing that, the principle of assistance to victims that is independent of cooperation with criminal investigation. The Bill must be sufficiently clear on the rights and entitlements suspected victims of trafficking can rely on before, during and after criminal investigation and proceedings, while also taking into account the implications of the habitual residence conditions especially in the cases of European Economic Area ('EEA') victims and third country nationals. The Commission has continuously highlighted the need to have an equal and fair process for all victims of trafficking, irrespective of their immigration status and nationality.

The following observations to relevant Heads of the Scheme have been compiled by the Commission to assist the Joint Oireachtas Committee on Justice in its deliberations, to assist the drafting of the Bill in general and to facilitate informed discussions on various aspects of victim identification and assistance along the way.

Part 2 Sexual Offences

Head 5 Amendment of section 4A of the Act of 1981

The Commission, as Rapporteur, has expressly called for victims of trafficking for the purposes of sexual exploitation to be afforded the same protections as victims of rape and other sexual assault offences in criminal trials.² Despite Head 5 extending the provisions for separate legal representation to complainants of other sexual assault offences, this does not extend to victims of trafficking for the purposes of sexual exploitation. The argument is two-fold. First, traffickers commonly use sexual violence as a tool to assert power and control over women, children, and men, regardless of the type of trafficking they are engaging in.

Second, a trafficking offence is not, by definition, a sexual offence, although the sexual exploitation (without the element of trafficking) of a person, may constitute rape and/or sexual assault of the victim. The difficulty arises where the accused trafficker is not (exclusively, or possibly at all) the person who is actually perpetrating the sexual exploitation, but rather the person 'recruiting, harbouring, etc.' the victim for the purposes of sexual exploitation. Given the heinous nature of what a victim is subjected to when they have been sexually exploited, it is essential they are afforded the same protections as other victims of rape and sexual assault with regard to separate legal representation.

The Commission recommends that the right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experiences) should be extended to victims of offences committed under section 4 of the Criminal Law (Human Trafficking) Act 2008.

² The Third National Strategy on Domestic Sexual and Gender identifies Trafficking in Human Beings as a form of gender-based violence, in line with Directive 2012/29/EU.

PART 3: National Referral Mechanism for Victims of Human Trafficking

Head 12 Interpretation

While the Commission acknowledges that the definitions may have been included under Head 12 in order to assist the drafters, it is unnecessary to repeat the definitions from *Criminal Law (Human Trafficking) Act 2008* ('2008 Act'). It is further observed that the definition of 'forced labour' outlined in the General Scheme does not take into account that the *Criminal Law (Human Trafficking)(Amendment) Act 2013* also includes 'begging'.

The Commission is concerned that the definition of 'victim of human trafficking' may potentially risk prejudicing prosecutions for offences under the 2008 Act. Further, given that Article 11 of the Anti-Trafficking Directive and Article 10 of the Warsaw Convention require, at most a 'reasonable grounds' identification for access to assistance and support, the term 'suspected victim of trafficking' could be retained.

The Commission recommends that the term 'suspected victims of trafficking' is retained and defined where there are reasonable grounds to believe a person has been a victim of an offence under section 2 or 4 of the Criminal Law (Human Trafficking) Act 2008 or section 3 of the Child Trafficking and Pornography Act 1998.

Victim's consent

Referring to victims of trafficking as 'applicants' within the proposed NRM process represents a positive move away from the passivity attributed to victims of trafficking under the existing administrative policy (Government of Ireland, 2011) and recognises their agency within the process of identification that is all too often taken from them when they have been subjected to the heinous crime of trafficking.

However, the Bill must recognise and provide for the individuals who do not have the capacity to be their own agent, for example, children or adults with diminished capacity to consent/apply (s.4(3) of the 2008 Act³).

The Commission recommends that the Bill include express provisions for the identification victims who lack capacity such as children or adults with diminished capacity.

Absence of a child –specific identification process

The Commission has emphatically called for the inclusion of child-specific identification and assistance measures. Such calls are reiterated throughout the National Evaluation Report, and owing to the significant reforms that are urgently required, these are included in a dedicated chapter within the report (IHREC, 2022). In the report, the Commission explicitly recommends that children should be appointed a Children’s Legal Advisor, (IHREC, 2022) and that all child trafficking offences should be included in the 2008 Act.

In principle, Section 26(3B) of the *Civil Legal Aid Act 1995* applies equally to children.

However, it is clear that provision is not sufficiently child-specific, to meet the needs of suspected child trafficking victims. Where a child is in the care of their (safe) parent/guardian and the child is sufficiently mature, they may instruct their solicitor but where a child does not have the requisite maturity, the child's parent or guardian will need to give instructions. At present, this is not possible under the *Civil Legal Aid Act 1995*.

Separately, where a child is in the care of the State, there is no requirement that Tusla seek legal aid on behalf of the child. A model for such a mechanism might be section 23D(5)(b) of the *Child Care Act 1991*. To recognise the significant benefit to child victims and to ensure that all children receive the legal support they require and are entitled to, the Commission would urge the Committee to consider providing each child with a ‘Children’s Legal Advisor’.

³ Mental impairment has the same meaning as in s. 5(5) of the Criminal Law (Sexual Offences) Act 1993: (5) In this section “mentally impaired” means suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation.

The Commission recommends that the term ‘Children’s Legal Advisor’ be included and defined in the interpretations section in the Bill.

As already stated in the first National Evaluation Report, the Commission is of the view that legal assistance has to be extended to parent/guardians of suspected child victims of trafficking. Similarly, a mechanism would be needed in cases where Tusla is acting *in loco parentis* with respect to a suspected child victim of trafficking. (IHREC, 2022, p.138)

Children are among the most vulnerable victims of trafficking. According to a recent EU Study, the social, economic and personal cost from the crime committed against children is exceptionally high (European Commission, 2020). Given their unique vulnerability, child victims of trafficking need child-specific processes and procedures within the NRM Bill. In addition to its commitment to carry out a fundamental review of the formal identification process for victims of trafficking in its 2016 Second National Action Plan to Prevent and Combat Human Trafficking in Ireland, the Government committed to ‘addressing the possibility’ of establishing a specific identification mechanism for child victims of trafficking, informed by a review of the data collection systems in place (Department of Justice and Equality, 2016). The Commission has criticised the use of such prospective and exploratory language, regarding it as a weak commitment on the part of the State to implement the Council of Europe Group of Experts on Action against Trafficking (‘GRETA’) recommendation (IHREC, 2016).

There were no child trafficking victims identified in Ireland in the last two years. Over the period 2013 to 2020, there were 34 child victims of trafficking identified in the State, which represents 9% of all victims. This proportion is significantly lower than the EU average of 22%. The markedly lower than EU levels of child trafficking in Ireland and the complete lack of identified cases in the last two years, exposes the challenges facing the State in the identification and categorisation of such victims in Ireland, and logically the appropriate assistance they require that flows from this.

While the General Scheme outlines some minimal child-specific measures,⁴ the Commission is of the view that these do not amount to a child-specific identification procedure.

⁴ Heads 16 (6) and 19(2)(f)

Therefore, it is especially important that the Bill develops concrete measures for child applicants, in line with the international recommendations and the Commission's first National Evaluation Report that extensively explored child trafficking in Ireland (IHREC, 2022). Furthermore, greater clarity is needed in relation to the provision that Tusla will act 'in the best interests of the child' where a child's parent/guardian is potentially involved in the trafficking or where the child is unaccompanied. It may also be the case that a child trafficking victim may have a safe parent/guardian. The Bill must ensure that it is capable of capturing both scenarios and is sufficiently clear and detailed to ensure that child victims receive the necessary support and assistance.

The Commission recommends that the Bill contain a child-specific identification process.

The Commission recommends that the findings of the First National Evaluation Report of the National Rapporteur on Human trafficking, GRETA 3rd evaluation report, the OSCE country report of 2020 are all taken into account for the development of a child-specific identification process in the Bill.

The Commission further recommends that all 'Competent Authorities' and 'Trusted Partners' undertaking mandatory child trafficking training (IHREC, 2022) to be included in the Procedural Guidelines.

The Commission recommends, in relation to the definition of 'child', that the term 'age assessment' be included and defined in the Bill in regard to potential child victims of trafficking.

The Commission recommends that age assessments should be carried out by Tusla, or another competent body, supported by strict policy-guidelines that are child-centred and adapted to the person's specific needs (cultural, gender, etc.) and should not be based on a medical test.

The Commission further recommends that the guidelines should explicitly adopt the principle of the 'benefit of the doubt' regarding age determination of young applicants.

It should be taken into account that the dangers inherent in treating a child as an adult are far greater than the danger of providing child-appropriate level of immediate care to an adult (OSCE/ODIHR, 2022).

The presumption of minority should be applied unless and until an age assessment test proves otherwise.

Inclusive categorisation of potential victim/ applicants

In line with the Commission's previous statements about the importance of recognising and supporting 'historic' victims of trafficking the Commission welcomes the inclusive categorisation of potential victims within the General Scheme.

The inclusive categorisation of potential victims (applicants) ends the lack of clarity about the particular point at which a person can be considered a suspected victim of trafficking by the State. The proposed approach reflects better the various 'stages' of human trafficking as it covers those who have previously been trafficked, those who are currently being trafficked, and potentially those who 'may' be being trafficked. Including persons who are at risk of trafficking (IHREC, 2022; GRETA, 2022) through the inclusion of those who 'may be trafficked' is a particularly useful preventative measure, which aligns to the definition of human trafficking as a crime of intent (Article 2(1) of the EU Anti-Trafficking Directive).⁵

The Commission, in its first National Evaluation Report, has previously called for a strengthened response to human trafficking and is of the view that the Bill provides an ample opportunity to address a range of legislative recommendations to achieve this..

The Commission recommends the introduction of a separate standalone offences for holding a person in slavery, servitude or forced or compulsory labour fully aligns Irish law

⁵ Article 2(1) of the EU Anti-Trafficking Directive establishes that 'Member States shall take the necessary measures to ensure that the following intentional acts are punishable: The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.

with Article 4 of the European Convention on Human Rights, which requires criminalisation of slavery, servitude and forced labour.⁶

The Commission recommends the 2008 Act be amended to include the offence of trafficking of children for sexual exploitation, with all necessary consequential amendments to the 1998 Act.

The Commission recommends the drafting of the Bill include amendment of the term ‘exploitation’ with a view to incorporating trafficking for the purposes of novel and rare forms of exploitation such as forced/exploitative marriages, sale of children and illegal adoptions, which have been reported elsewhere.

It is worth noting at this point that the Commission has taken the view that panels be drawn from the Operational Committee to ensure relevant expertise and to guard against the process become unwieldy and convoluted. As such, a distinction is made between the Operational Committee and the Operational Committee Panel, which is outlined in detail in Head 15.

⁶ See *CN v. United Kingdom*, no. 4239/08, ECHR 2012

Head 13 Competent Authorities of the National Referral Mechanism

The Commission is concerned that Head 13 does not specify the minimum level of seniority and expertise of Operational Committee [Panel] members. Expert knowledge and expertise in trafficking is essential to a functioning identification process.

Given that the Minister for Enterprise, Trade and Employment is responsible for employment permits, and that these are susceptible to abuse by traffickers, this Department could also be included. The Commission is also of the view that consideration could be given to designating the Minister for Transport as a competent authority too, taking into account the Marine Survey Office's responsibility regarding working time rules, under SI672 of 2019.

The Commission recommend the Bill clearly state that no Gardaí below the rank of superintendent will be part of an Operational Committee and that all members of the Operational Committee must be of sufficient seniority and appropriately trained on trafficking in human beings.

Head 14 Application for recognition as a victim of human trafficking

Multi-agency two-stage assessment

The Commission has continuously raised the problems associated with the current identification process, wherein An Garda Síochána are the sole authority of identification. In particular, the negative impact this has on victims, as they are compelled to cooperate with law enforcement in exchange, or fear, that they will not be granted residence permission. This often forces them back to the situation that lead to their trafficking in the first place, and/or places them in fear of retribution by their traffickers.

The two-stage procedure outlined in Heads 14 and 17 respectively mark an important move away from the current one-stage, single-agency identification process. The new approach should facilitate timely referral into the NRM in line with Article 11.2 of the EU Anti-Trafficking Directive. This will, in-turn, trigger access to initial basic assistance:

“as soon as there are reasonable-grounds indications for believing that a person might have been subjected to trafficking.”⁷

While the Commission has outlined particular issues regarding the details of each ‘identification’ stage currently contained in the General Scheme, the principle of adopting a multi-disciplinary and multi-agency two-stage assessment process is to be welcomed. Nonetheless, the Commission is of the view that the Bill should, from the outset, guard against the possibility of unnecessary Judicial Review of Head 14 decisions. This is especially relevant for non-statutory bodies but is equally relevant for Competent Authorities participating in this mechanism, taking into account the cost to the public, the burden on the courts and the toll this has on the vulnerable people at the centre of this process. This concern could be mitigated against by making it clear within the Bill that there is only one identification decision (Head 17), which is undertaken by the State.

The Commission recommends that Head 14 place a duty upon Competent Authorities and/or Trusted Partners to refer anyone who they believe, or who believes themselves to be a victim of trafficking, to the Operational Committee [Panel].

In the case of a person with diminished capacity, including children, any person who believes that the person may be a suspected victim of trafficking shall request a Competent Authority and/or Trusted Partner to make an application to the Operational Committee on behalf of that person for them to be recognised as a victim of human trafficking. Of relevance here is the recommendation made under Head 12 that the Bill include express provision for victims who lack capacity such as children or adults with diminished capacity.

Unnecessary duality in establishing both ‘credibility’ and ‘reasonable grounds’

The threshold of “a) the application is credible, and (b) is based on reasonable grounds” that the Competent Authority or Trusted Partner must satisfy before they refer to the Operational Committee should be removed and a lower threshold of “a positive finding from trafficking indicators” inserted. Every suspected victim must also be given the benefit

⁷ The recognised ‘test’ as per *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222 at para 189 states clearly states ‘The directive requires the State to provide assistance and support “as soon as there are reasonable-grounds indications for believing that a person might have been subjected to trafficking”.

of the doubt. This intentionally low threshold is in line with best practice (UNODC, 2009; GRETA, 2020; OSCE, 2011).

The added test of ‘credibility’ alongside the standard assessment of ‘reasonable grounds’ is to insert an unnecessary condition for identification of victims of trafficking, which is neither supported nor required by international law. In practice, this amounts to raising the identification threshold beyond that which is required.⁸ Explicitly establishing such dual criteria for identification of victims in Head 14 and Head 17 creates a hardened threshold for identification on the one hand, and creates an extra conditionality that could be problematic for implementation by both Competent Authorities and Trusted Partners alike, on the other. The meaning of ‘credibility’ for the individual partners and their capacity to establish ‘credibility’ may vastly differ, resulting in inconsistent application in decisions that may, inevitably, expose the process to litigation. Additionally, this would raise issues of a requirement for ‘evidence’ to establish credibility. Most importantly, the raised threshold will negatively impact potential victims of trafficking who are at the centre of the NRM by delaying the process and the entailing assistance.

The Commission’s proposes a change to the ‘test’ that should be applied when determining whether a person is a suspected victim of trafficking to refer to ‘reasonable grounds’ alone, an approach that fully aligns with the jurisprudence of the Irish courts, the EU Anti-Trafficking Directive, the Council of Europe Directive and the OSCE. All recommended amendments are in line with the internationally agreed ‘test’ to be applied in an NRM.⁹

⁸ The recognised ‘test’ as per *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222 at para 189 states clearly states ‘The directive requires the State to provide assistance and support “as soon as there are reasonable-grounds indications for believing that a person might have been subjected” to trafficking’.

⁹ EU Anti-Trafficking Directive: ‘A person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness.’ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Recital 18. Council of Europe Convention: Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Council of Europe Convention on Action against Trafficking in Human Beings 2005, Article 13.1. OSCE NRM Handbook: A presumed victim of trafficking shall mean a person for whom there are reasonable grounds to believe that he or she is likely to have been trafficked, but who has not (yet) been formally identified as such by the authorities, or who has declined to be formally identified as such. OSCE/ODIHR (2022) National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons. Warsaw: OSCE Office for the Democratic Institutions and Human Rights, p. 378

The referral process under Head 14 should have a reporting and referral process similar to the obligation under the Children First Act 2015, to report where a child has been harmed or is at risk of being harmed.

The Commission recommends that the ‘credibility’ requirement be removed from both Heads 14 and 17 and not be included in the Bill.

The Commission recommends that Head 14 be drafted in such a way as to require the Competent Authority and/or Trusted Partner to refer the applicant to the Operational Committee, provided that consent of that applicant has been obtained.

The Commission is unconvinced of the merits of a seemingly random list of criteria the Competent Authority or Trusted Partner must consider when deciding whether to refer a person to the Operational Committee under (the original) Head 14. There is also a danger that the four ‘reasonable grounds’ specified in 14(4) will be considered to be the **only** reasonable grounds that the Competent Authority or Trusted Partner may consider.

To ensure accuracy, accountability and consistency the Commission recommends that internationally recognised indicators, such as the Delphi and Dignity indicators (or nationally agreed list of indicators), be specifically included or referenced in the Bill as the criteria which the Competent Authority or Trusted Partner may consider in making their referral. At the very least, the reasonable grounds criteria included in the Bill must fully align with the statutory definition of trafficking with the three elements.

As currently drafted, the Heads are unclear on what supports and services a person is entitled to receive between the time the Competent Authority and/or Trusted Partner refers applicant to the Operational Committee, and the time when the Panel issues its decision. On this particular matter, see proposed amendments relating to Head 19 below.

Re-applications to Component Authorities and Trusted Partners

Currently, the Scheme does not consider what would happen if a person makes multiple applications to multiple Competent Authorities and Trusted Partners.

It is the view of the Commission that the applicant should be in a position to apply more than once to a Competent Authority or a Trusted Partner for the purposes of referral to the

Operational Committee. If an application does not result in a referral, the respective Competent Authority or the Trusted Partner must provide an explanation to the applicant within 5 working days. Where new evidence or information comes to light, the applicant should have the right to make a fresh application to a Competent Authority or a Trusted Partner of applicant's choice for the purposes of referral to the Operational Committee.

The Commission recommends that the process under Head 14 allows for the possibility of re-application to a Competent Authority or a Trusted Partner.

Head 15 National Referral Mechanism Operational Committee [Panel] for the identification of victims of human trafficking

Operational matters

The Commission is of the view that the processes of the Operational Committee are too important to be delegated to auxiliary guidelines and should be specified in statute. This has particular implications for the early identification, assistance and recovery of suspected victims, who are at the centre of the NRM in Part 3 (see head 19 for details).

The Bill must specify how often the Operational Committee should meet. The Commission is of the view that this should happen, at a minimum, every two months to align with the length of the current 60 day Recovery and Reflection period, to ensure that no victim (applicant) will wait an unreasonably long period of time for a decision to be made on their application to be identified as a victims of trafficking. Furthermore, while the Heads specify that the "Operational Committee shall make decisions collectively," the Commission would recommend that where consensus cannot be achieved then a simple majority decision should suffice and the decisions are 'owned' by one single State body.

In that regard, the Commission is concerned that the legal status of the Committee is uncertain, and as a result, its actions are those of its members. As set out in Head 15, all of the members could be sued, including the trusted partners, who would be jointly and severally liable. It would be far better if a single entity were responsible in law for the final decision, and this is why the Commission proposes that the Department of Justice assumes this function (See Head 17).

Unless there is a proper appeal mechanism, there is a risk that every negative identification decision will be subjected to judicial review. The costs implications of this for the State and for the vulnerable persons involved could be enormous.

The Commission recommends that the operational framework of the Committee is provided for in primary legislation and open to parliamentary scrutiny, due to its essential role in the functioning of an early mechanism for identification of victims of trafficking.

Independent bodies

The inclusion of independent non-statutory organisations being recognised as ‘Trusted Partners’ in the NRM is an essential, positive and long-awaited reform. This will ensure greater utilisation of unique specialist knowledge, a victim-centred, and practice-informed approach (IHREC, 2022). Moreover, it will introduce important checks and balances of victim identification decisions.

Despite this positive reform, the Commission is concerned that the current first-step of the identification process (outlined in Head 14) would divest powers to Trusted Partners, that should be exercised by the State, which could have serious implications for matters such as charitable status and insurance. Furthermore, this would potentially leave identifying Trusted Partners open to legal challenge through Judicial Review. The Commission makes further comments in this regard under Head 18 ‘Designation by Order of Trusted Partner’. Notwithstanding this, the Commission particularly welcomes the formalisation of the role of Trusted Partners in the Operational Committee undertaking formal identification decisions (Head 17, discussed below) but would, at the same time, recommend that Head 14 be amended to include only a duty upon Trusted Partners and Competent Authorities to refer an applicant to the Operational Committee on the basis of a reasonable ground indications for believing that a person might have been subjected to trafficking, and not, as currently envisioned in the General Scheme *a duty to complete a de facto* identification process.

Membership and expertise

As currently drafted, all Competent Authorities (and Trusted Partners) will form the Operational Committee and will act as the collective decision making body of the NRM. It is

the view of the Commission that this structure lacks the specificity of expertise necessary to examine applications involving different forms of exploitation. Head 15 (2) states that:

“Each Competent Authority shall be represented at meetings of the Operational Committee.”

The Commission is concerned that some Competent Authorities and Trusted Partners have only specific expertise of some forms of trafficking exploitation, yet they are tasked with deciding every application under Head 17. Given Heads 15(3) and (4), presumably this would mean that each would have equal decision-making power in deciding upon applications for recognition as a suspected victim of trafficking. For example, the WRC would be called upon to decide (per Head 17) whether an applicant is a suspected victim of trafficking for the purposes of sexual exploitation. Yet, it is highly unlikely that the WRC has the requisite knowledge of this form of trafficking. Equally, it is unlikely that Tusla would have sufficient knowledge of the particulars of labour-related exploitation.

To ensure the requisite knowledge and expertise of the decision-makers, ‘Operational Committee Panels’ from the Competent Authorities and Trusted Partners (and independent experts where needed) could be convened for the purpose of deciding Head 17 identifications arising from Head 14 referrals. The Department of Justice, in its role as National Coordinator could be responsible for convening such panels and would act as Chair of the Operational Committee [Panels].

The Commission recommend that the Bill require the Department of Justice to draw up procedures that allow for the selection of ‘relevant’ members of the Competent Authorities, Trusted Partners and persons with expert knowledge of trafficking to form Operational Committee [Panels] that will then preside over exploitation-specific identification decisions under Head 17. This expert knowledge must cover at a minimum: the form of exploitation the applicant has claimed to be a victim of; gender-based violence; forced labour and employment-related matters, legal expertise and; child trafficking when considering an application under Head 17.

This approach will further ensure that the Operational Committee does not become unwieldy and that each member of the Operational Committee [Panel] has the requisite knowledge and expertise of the complexity of vastly different and specific forms of

trafficking to be able to deliver competent and high-quality decisions. In addition, it is hoped that owing to the smaller and more specialised composition the Operational Committee [Panels] will be easier and more expedient to convene, leading, in turn, to fewer delays, quicker decisions and access to assistance and supports for victims (Articles 11.2¹⁰ and 11.4¹¹ of the EU Anti-Trafficking Directive).

Finally, in regards to Head 15 (ii) “Interim arrangements for applicants awaiting a determination on their application, including provision of support services”, the Commission is of the view that as currently drafted this is not sufficient. Instead, where a Competent Authority and/or Trusted Partner has referred a person under Head 14 to the Operational Committee [Panel] for identification, such applicants must be granted the 60 day Recovery and Reflection period in line with the recommendations relating to Head 19.

Head 16 Sharing of information by Competent Authorities and Trusted Partners

The Commission is encouraged to see that an applicant’s information can only be used for the purposes of identification. This is an important first step in ensuring that the identification process is separate and distinct from the criminal justice and immigration processes. This also aligns the proposed NRM with Article 11(3) of the EU Anti-Trafficking Directive, which requires that assistance, and support for a victim is not made conditional on the victim’s willingness to cooperate in the criminal investigation, prosecution or trial (IHREC, 2022).

The Commission is concerned with the inclusion in subhead 2 of:

“information relating to the person’s arrival in the State.”

¹⁰ Article 11.2 of the EU Anti-Trafficking Directive establishes that ‘Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3’.

¹¹ Article 11.4 of the EU Anti-Trafficking Directive establishes that ‘Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations’.

This suggests that the mechanism is only for third country nationals, which it is not. Head 16(2)(d) provides that all of Competent Authorities and Trusted Partners would receive details of a criminal investigation. Consideration should be given to the necessity for the dissemination of such information to everyone or to the deciding panel alone.

Whether a child has been taken into the care of the State, in which case Tusla are acting *in loco parentis* (and/ or as the child's legal guardian), or where the child is in the care of their parent/guardian they must have access to a Children's Legal Advisor. The Children's Legal Advisor would act as an advocate for the child to ensure the highest protection and support for the child, regardless of the form of trafficking the child has been subjected to, the family background, and/or the child's immigration status (OSCE/ODIHR, 2022).

The Commission recommends that child applicants should be appointed a 'Children's Legal Advisor' at the earliest stage of the referral and identification process¹².

To ensure consistency, the Commission is of the view that Head 16 should read 'applicant' instead of 'person'.

¹² IHREC (2022) [Trafficking in Human Beings in Ireland](#), p. 25

Head 17 Identification of a victim of human trafficking by the National Referral Mechanism Operational Committee [Panel]

The multi-agency identification process outlined in the Bill is a significant and positive reform of the current practice and is an approach that is internationally considered ‘best practice’ (OSCE/ODIHR, 2022). This approach combines multi-disciplinary professionals, agencies and services and ensures a wider range of skills and knowledge. Importantly, the approach outlined in the General Scheme includes agencies, such as the HSE and Tusla that focus on the health and wellbeing of people; and potential victims of trafficking by extension. This is conducive to the intended shift away from viewing trafficking through the criminal justice/immigration lens. This paradigm shift is *essential* for ensuring that the response to trafficking is grounded in human rights.¹³

Threshold

As outlined above, relating to Head 14, the Commission strongly believes that it is not necessary to include both Head 17(1)(a) (‘the balance of probability’) *and* (b) (‘reasonable grounds’) as the inclusion of both raises the threshold beyond that which is required by the jurisprudence of the Irish courts (*P Case*) or internationally recognised best practice (OSCE/ODIHR, 2022) where:

“it is recognised that ‘international consensus as reflected in the Directive is that a person should be identified as a “suspected victim” if there are reasonable-grounds indicators to that effect.”¹⁴

The inclusion of a legal burden of proof in a non-judicial setting is not only problematic but also wholly inappropriate.

¹³ According to the OSCE ‘Adopting a human-rights-based approach to victims of trafficking is a critical step in ending such abuses. A human-rights-based approach recognizes that human trafficking is not just a criminal activity but one that has profound human-rights implications both for victims and for the governments and non-governmental organizations that must deal with them. The creation of an effective National Referral Mechanism (NRM) can be a vital step in ensuring that the human rights of trafficked persons are protected.’ See OSCE/ODIHR (2022) [National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons](#). Warsaw: OSCE Office for the Democratic Institutions and Human Rights, p. 11

¹⁴ *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222, at para 183

Indicators

Head 14 considerations regarding the removal of a seemingly random sample of indicators applies to Head 17 as well, and an amendment in this regard is proposed.

The Commission recommends that the grounds upon which the Operational Committee [Panel] should base their decision, align with the definition of trafficking and should be based on indicators to that effect and a reasonable ground threshold.

Clear timelines

Appropriate and sufficiently short timelines for formal identification of a person as a ‘suspected victim of trafficking’ are at the core of:

“mechanisms aimed at the early identification of, assistance to and support for victims.”(EU Anti-Trafficking Directive Article 11.4)

It is the view of the Commission that Head 17(3) does not provide for a sufficiently clear timeframe within which the Operational Committee [Panel] must make their decision. The Commission is of the view that the absence of a specific timeframe is likely to have a seriously detrimental impact on victims. The Commission would recommend that the Head 17 identification decision should be issued within a timeframe of 60 days from the Head 14 referral and correspond to the end of recovery and reflection period (OSCE/ODIHR, 2022), and that such a decision is communicated (in writing) to the applicant and/or the applicants lawyer no later than 3 days after the decision is made. Applicants should be given reasons, in writing, if their application was unsuccessful.

Appeal and Reconsideration process

The Commission, in the first National Evaluation Report specially called for a NRM with, *inter alia*, an appeals process. The Commission is disappointed by the complete absence of a process for either appeal or reconsideration of the decisions under Head 17. Where new evidence or new information comes to light, the State must not refuse to re-consider the application, as there remains a positive duty to investigate further.¹⁵ This is especially

¹⁵ Brecknell v. United Kingdom (2008) 46 EHRR 42 at 70-71 and 75

important for victims who might suffer from Post-traumatic stress disorder, which can make recall a difficult and slow process. It must be remembered that there is a duty upon the State to identify victims in order to assist and protect them. As such, the State is obliged to act on information that may lead to identification. This duty does not stop with a decision under Head 17, if this decision turns out to be wrong. If it did, the State would be failing to perform the duty properly and the rights of victims to assistance and protection afforded to them under the Convention on Action against Trafficking in Human Beings, the Anti-Trafficking Directive and Article 4 ECHR would be denied to them.¹⁶ Accordingly, where relevant evidence casts doubt on the correctness of a negative identification decision, this must not be disregarded as to do so would:

“dilute the content of the duty and water down the protections afforded to victims.”¹⁷

Victims must enjoy the ‘benefit of doubt’, and this should be enshrined in the Bill.

A judicial remedy to challenge the decisions of the Operational Committee is available by way of Judicial Review, but it is the view of the Commission that this does not sufficiently meet the duties of the State to identify and protect victims. Furthermore, it is costly and arduous to both the State and the victim involved, in terms of public funds, court overuse and personal loss.

The Commission recommends the Bill include an appeal and a reconsideration process.¹⁸

Head 18 Designation by Order of Trusted Partner

The Heads as drafted do not confer any immunity from suit on competent authorities or trusted partners or provide any indemnity if they are challenged (see Head 15). The Commission is of the view that a provision like section 154 of the *Data Protection Act 1998*,

¹⁶ See *R (DS) v Secretary of State for the Home Department* [2019] EWHC (Admin)

¹⁷ *R (DS) v Secretary of State for the Home Department* [2019] EWHC (Admin) at 68

¹⁸ IHREC (2022) [Trafficking in Human Beings in Ireland](#), p. 82

which confers conditional immunity on the Data Protection Commission and Commissioner, could be considered as an additional precaution.

As currently drafted, a number of trafficking-specific bodies and organisations would not fall under Head 18 (1). These include, although are not limited to, Trade Unions and awareness and training organisations such as MECPATHS. This provision should be expanded to include Trade Unions and organisations/bodies with demonstrable expertise in human trafficking.

There is a risk that the ‘trusted partner’ mechanism will intentionally or unintentionally compromise the independence of NGOs or influence them to withhold legitimate criticism of anti-trafficking law and policy. There is also a risk that ‘trusted partner’ status will be withheld from NGOs which are considered to be critical or troublesome.

The Commission recommends that a mechanism of independent review of decisions relating to trusted partner status should be included.

Head 19 Access to services by victims of human trafficking

The Commission recalls the obligation of the State to provide assistance and support ‘prior, during and after’ any criminal proceedings (EU Directive, Article 11.1), and this assistance and support:

“shall include at least standards of living capable of ensuring victims’ subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.” (EU Directive, Article 11.5)

The Commission questions the feasibility of the idea to have all agencies and bodies on the Operational Committee working together to create a care package, and is of the view that a statutory entitlement should be considered comparable to the entitlement to an aftercare plan provided to children in the care of the Child and Family under section 45 of the Child Care Act 1991.

A procedure applicable to all victims and equal treatment

The Commission has continuously highlighted the need to have an equitable and fair process for all victims of trafficking, irrespective of their race, nationality or citizenship.

One of the most significant advancements envisaged in the General Scheme is that, *prime facie*, the NRM applies to all victims of trafficking, regardless of their nationality, immigration status or pending asylum claims (IHREC, 2022; GRETA, 2022). However, the decision not to place immigration-related measures - an integral part of assistance - in statute, undermines the equitable treatment of victims of trafficking of different backgrounds, origins and circumstances. Most particularly, this oversight will disproportionately affect third country nationals and EEA nationals, who represent the majority of victims of human trafficking (IHREC, 2022). Moreover, there is potentially an equality/discrimination issue arising, with some victims of trafficking being treated less favourably than others based on their nationality. Failing to recognise the need to place such protections on a statutory footing represents a serious missed opportunity to honour the object and purpose of EU¹⁹ and international law.²⁰

The Bill must include and clearly outline the rights and supports available to identified victims of human trafficking. Failing to provide, in Statute, for specific measures regarding social welfare assistance, housing assistance, immigration permissions for victims of trafficking, will perpetuate the present inconsistent approach and chronic deficiencies in assistance and support. In its first National Evaluation Report as a National Rapporteur, the Commission exposed the lack of synchronicity between State Agencies and Departments that led to divergent decisions with respect to identical cases, and made detailed recommendations regarding these matters. The Commission is of the view that the Scheme

¹⁹ Most especially, Council Decision 2007/125/ JHA “Prevention of and Fight against Crime” which in Article 3(2)(c) and (d) seeks to ‘*promote and develop best practices for the protection and support of witnesses and for the protection of crime victims*’; EU Directive 2004/81/EC regarding the issuing of residence permits to third-country nationals who are victims of trafficking, or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; EU Directive 2004/80/EC relating to compensation to crime victims; EU Directive 2012/29/ EU establishing minimum standards on the rights, support and protection of victims of crime. It is recognised that Ireland has opted-out of some of these Directives

²⁰ [Council of Europe Convention on Action against Trafficking in Human Beings 2005](#)

offers a unique (if not only) opportunity to coordinate once and for the assistance and support to victims of this crime.

Including all immigration provisions for victims of trafficking in the Operational Procedures or policy effectively waters down the protections available, leaving them liable to amendment and change at any time and without parliamentary scrutiny.

Victims seeking international protection

Importantly, the Bill must ensure that victims of trafficking who are simultaneously seeking International Protection are not treated in a manner different from other victims (IHREC, 2022). In particular, that the third country national immigration provisions for victims must apply to them as well. Currently, such victims are treated the same as the rest of the asylum seeking populations, in that they hold asylum permits precluding them from leaving Direct Provision and they have curtailed opportunities for reintegration (training/employment) compared to other victims of trafficking.

Recovery and Reflection Period for all victims

In line with Article 13 Council of Europe Convention on Action against Trafficking in Human Beings, the Commission would recommend the Recovery and Reflection period be granted to all applicants who receive a positive Head 14 referral and that this be expressly outlined in the Bill.

It must be remembered that the purpose of the 60 day day Recovery and Reflection period is to allow the suspected victim of trafficking time and support to begin to recover and, where they so choose, to make an informed decision as to whether they wish to report the crime(s) to the authorities. It also enables suspected victims time to decide whether they wish to be formally identified by the Operational Committee [Panel]. As such, the Bill must be sufficiently clear on the rights and entitlements suspected victims of trafficking can rely upon during and after the Recovery and Reflection period.

The Council of Europe Convention includes measures necessary to assist victims in their physical, psychological and social recovery.²¹ To ensure that all victims of trafficking benefit from these measures the national law has to contain explicit provisions.

Clearly outlined assistance from the moment of referral

The Commission would strongly recommend that entitlements to services (such as trafficking-specific healthcare, child-trafficking specific care, gender-specific accommodation, free legal aid, and access to education and psychological support) be enshrined in the Bill and aligned to the procedures outlined in Head 14 and Head 17, respectively.

Owing to the undeniable vulnerability of victims of trafficking, it is essential that recognised victims of trafficking be afforded the necessary supports they require in order to recover. Adequate provision of such would better safeguard the rights of victims and would, in all likelihood, increase the possibility of victims being able to assist An Garda Síochána with the investigation of trafficking offences where the victim is safe and supported. Accordingly, O'Malley J in the *P Case* emphasises this exact point:

‘Concentration on the veracity of an applicant may also lead the decision-makers to overlook the fact that what is at stake is not simply a matter of entitlement to a beneficial status, as in an application for refugee status, but a measure intended to facilitate the investigation of a serious crime. It does not necessarily lead to any permanent material gain for the applicant but is intended to assist the State in preventing the modern blight of human trafficking’²²

²¹Article 12 Assistance to Victims should include, at least: a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance b. access to emergency medical treatment; c. translation and interpretation services, when appropriate; d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand; e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; f. access to education for children.

2. Each Party shall take due account of the victim's safety and protection needs.

²² P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General [2015] IEHC 222, at para 183

Gender-specific and child victims-specific clarity in assistance

As outlined above, the Commission is disappointed there are no express provisions in the General Scheme to provide for gender-specific and child trafficking specific services to victims; a clear recommendation of the first National Evaluation Report.

Given the continued criticism of the Direct Provision System, it is troubling that Head 19 (1)(b) commits identified victims of trafficking to assistance within Directive Provision. Instead, the Commission would recommend that the Bill contain access to gender-specific accommodation for victims of trafficking, in addition to assistance from Local Authorities pursuant to their obligations under the Housing Acts 1966 to 2021.

Depending on the circumstances children may, or may not, require entry into the child protection system. In a situation where a child has a parent, relative or legal guardian who is not implicated in the trafficking of that child it will likely be in the child's best interest for the child to remain with their parent, relative or guardian. Equally, where a child is unaccompanied or has no safe legal parent, relative or guardian they must receive care tailored to meet their needs. The Bill must reflect these two possibilities and ensure that appropriate supports are provided for each situation. The Commission also recommends that the Bill include the immediate access to services for children suspected to be victims of trafficking once the Competent Authority or Trusted Partner has decided to refer the application to the Operational Committee. Presumed children victims of trafficking, including those undertaking an age assessment, should have access to the appropriate statutory support and assistance.

It is also recommended that the Bill include the requirement that a designated Competent Authority, with specific expertise in victim care and support (the HSE Anti Human-Trafficking Team (for adult victims) or Tusla for child victims) be required to undertake an individual risk and needs assessment and development of a care package for each person who has been identified as a victim of trafficking. This is a process that requires regular (at minimum quarterly) review and updating.²³

²³ 'Effective assessment should not be a single, one-off event but rather an ongoing process of *'assessment, review, and action'* that is tailored to the individual needs and risks of each individual person and conducted

Immigration permission as part of assistance

It is important that a longer-term residence permission be guaranteed to a third country national, determined by the Operational Committee [Panel] to be a suspected victim of trafficking. While this may of course be revoked if the person is later found not to be a *bona fide* victim, the Bill must clearly outline the residence permission available to identified victims of trafficking. It must be considered, that if upon the completion of the identification process, or at any time after the identification process, the applicant is found not to be a victim, those rights evaporate.²⁴ Thus, it is balanced, necessary and proportionate to ensure that victims' rights to assistance and support are enshrined in the Bill.

Where it is not possible for the Operational Committee [Panel] to meet to decide on an application within the specified timeframe (Head 17), or where the applicant, Competent Authority or Trusted Partner who is supporting the applicant so requests (based on reasonable grounds), the Bill should clearly state that the 60 Days Recovery and Reflection period is automatically renewed for a further 60 days and/or until the Operational Committee [Panel] meets to determine the Head 17 application. Where a positive Head 17 identification decision has been made, Head 19 should also include a prospective avenue to family reunification, especially with minor children.

with their informed consent', see NRM Handbook, OSCE (2022), pg. 310

²⁴ P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General [2015] IEHC 222, at para 166

Assistance not conditional on cooperation with investigations

Of particular relevance is Article 11.3 of the Directive that in criminal investigation and proceedings, requires:

“assistance and support for victims are not made conditional on the victims’ willingness to cooperate.”

In the absence of a clear and specified statutory provision on the immigration status of victims of trafficking triggered by a positive identification decision, third country national victims would have no other option but to cooperate in criminal investigations in exchange for possible legal residence; as is the present *status quo*.

The Commission has been informed that all immigration and related issues will form part of the ‘Operational Guidelines’ that will accompany the Bill. These are not equivalent to a statutory protection. It must be remembered that the core of the universal criticism levelled at the current NRM centres on the State’s pre-occupation with immigration issues (Administrative Immigration Arrangements); arguably to the detriment of fulfilling the broader obligation owed to victims (Government of Ireland, 2011; IHREC, 2022; GRETA, 2022). It is the view of the Commission that by excluding the immigration measures from the legislation and by placing them within the Operational Guidelines, the new NRM will perpetuate the differential treatment of victims depending on their nationality and immigration status and it will interfere with the principle of voluntary cooperation with the criminal justice system and unconditional assistance:

“before, during and after the conclusion of criminal proceedings.” (Article 11.1 of the EU Anti-trafficking Directive)

The Commission recommends that the Bill clearly set out assistance and support of suspected victims of trafficking. Most especially, the rights owed to third country national and EEA national victims, through express provisions for:

- **social welfare (free of any habitual residence condition tests, which must be irrelevant);**
- **housing assistance (that includes a specialised shelter and/or private arrangements);**

- **medical and psychological care; and**
- **immigration status, where necessary to facilitate the entitlement to the above listed assistance, before, during and after the formal identification process subject of this scheme.**

The Commission recommends that the Bill clearly state that access to assistance and support and the necessary immigration status for third country national victims that underpins it are not conditional on cooperation with criminal investigation and proceedings.

In line with the most recent recommendations by GRETA, Head 19 should also include and expressly provide for the appointment of cultural mediators and/or trafficking experts to assist in the identification process, where necessary.

Head 20 Prohibition on Deportation or Transfer of Victim of Trafficking

In addition to the expanding of the protections from deportation to include transfer under the Dublin III Regulations, the Commission, would also urge for the inclusion of a third subsection (c), a prohibition on deportation of victims of trafficking where the person has a pending application, including an appeal or reconsideration, before an Operational Committee [Panel].

The Commission recommends that the protections from deportations be extended to include transfers under the Dublin III Regulations.

Head 21 Protection from prosecution for a human trafficking offence

The Commission welcomes the inclusion of Head 21, but is deeply concerned by the limited nature of the provision, as currently drafted.

The Commission is of the view that Head 21 be expanded to include a statutory defence where a suspected victim of trafficking has been involved in unlawful activities where such involvement is a direct consequence of their situation as a trafficked person.

This would bring Ireland into compliance with international standards which, according to the United Nations High Commissioner for Human Rights, require that:

“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, *or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.*”²⁵[emphasis added]

Similarly, Guideline 4(5) provides that States should consider:

“Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.”

In 2005, for the first time, an explicit reference to these ideas was included in Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings provides that:

“Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”

The Commission is of the view that Head 21, even when read in conjunction with the DPP Prosecutors Guidelines²⁶ does not honour fully the non-prosecution requirement.

The non-prosecution principle aims to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators (where they so choose). The non-prosecution of victims principle does not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in (Directive 2011/36/EU). Article 8 of the EU Anti-Trafficking Directive does not confer an enforceable right on a suspected victim of trafficking not to be prosecuted.²⁷ But, importantly, when a victim is identified as a suspected victim of trafficking the prosecution is obliged to give due consideration to this status when making a

²⁵ Office of the High Commissioner for Human Rights, [Recommended Principles and Guidance on Human Rights and Human Trafficking](#), para 7

²⁶ “The prosecutor should consider whether the public interest is served by a prosecution of the suspect.” Director of Public Prosecutions (2019) [Guidelines for Prosecutors](#), pp. 12-13

²⁷ THP v. Chief Superintendent of Garda National Immigration Bureau and Others [2015] 2 ILRM 1, para. 200

decision whether to maintain its prosecution against them.²⁸ In order to ensure such a right is safeguarded, the Commission is of the view that the insertion of a statutory defence to crimes that are committed as a direct consequence of the person being trafficked is both necessary and proportionate.

The importance of the non-prosecution principle received considerable attention within the Commission's first National Evaluation Report wherein the report specifically outlined a number of cases where evidence would suggest that convicted persons were likely, or at least potentially, victims of trafficking. As such, the recommendations relating to non-prosecution fully align with the position of the Commission.

As currently drafted, the General Scheme provides that victims of trafficking will not be deported for immigration offences committed during the time they have been trafficked and/or for their role in their own trafficking; Heads 20 and 21, respectively. While the Commission takes no issue with Head 20 and indeed welcomes such a provision, Head 21 is considerably problematic.

GRETA called on the Irish authorities to ensure:

“the principle of non-punishment of victims of trafficking for their involvement in unlawful activities, to the extent that they were compelled to do so.” (GRETA, 2022)

There is no specific provision in Irish law on the non-punishment of victims of trafficking, and while the DPP “has issued guidelines for prosecutors,” GRETA recommends, *inter alia*, that:

“consideration should be given to adopting a specific legal provision.” (GRETA, 2022)

Evidence suggests that victims (or potential victims) of trafficking continue to be imprisoned and charged for criminal offences associated with trafficking (IHREC, 2022), beyond that of trafficking offences (IHREC, 2022). This suggests that the *principle of non-punishment* of victims for crimes they have committed as a direct consequence of them being trafficked is

²⁸ Court considers that the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, be at odds with the State's duty to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked.” See *VCL and AN v. United Kingdom*, no.77587/12 and 74603/12, para. 159, ECHR 2021

not being honoured fully and thus is in contravention of both Article 8 of the EU Anti-Trafficking Directive and Article 26 of the UN Convention Against Human Trafficking.

As stressed by GRETA in its 2017 report:

“the criminalisation of victims of human trafficking not only contravenes the State’s obligation to provide services and assistance to victims, but also discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State’s obligation to investigate and prosecute those responsible for human trafficking. GRETA considers that the absence of a specific provision on the non-punishment of victims of trafficking entails a risk of treating them differently depending on the prosecutor in charge of the case.”(GRETA, 2017)

Citing, *inter alia*, P. v. The Chief Superintendent of the Garda National Immigration Bureau & Ors. Greta recommended:

“adopting a specific legal provision on the non-punishment of victims of trafficking for their involvement in unlawful activities, to the extent that they were compelled to do so, and/or developing detailed, updated guidance for police officers and prosecutors on the aims and scope of the non-punishment provision.”²⁹

In line with this recommendation, and in light of the likely criminalisation of victims of trafficking by the Irish criminal justice system a statutory defence could potentially be useful in making the application of the non-prosecution principle (by the DPP) less dependent on the identification process (GRETA, 2022). Whether the defence arose on the evidence, and whether the prosecution could disprove it would be considered by the directing officer of the DPP as part of the general consideration of the strength of the evidence. Given the clandestine nature of trafficking it will always be the case that not all victims are formally identified and may only come to light once they have already entered the criminal justice system, such a defence would act as a safety net ensuring that victims of trafficking are not themselves criminalised.

²⁹ GRETA (2017) [*Report Concerning the Implementation of the Council of Europe Convention on Trafficking in Human Beings by Ireland. Second Evaluation Round*](#). Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties) Council of Europe, para. 207

The Commission acknowledges, and indeed welcomes, the State's innovative approach to decriminalisation of potential victims of trafficking for sexual exploitation, and sees either this Bill, or a standalone Bill as an opportunity for its full realisation. As part of that measure, in 2021, the Minister for Justice announced plans for legislation to retrospectively expunge over 600 convictions obtained for 'sale of sex' under the preceding 1993 legislation (Department of Justice, 2021). In her [statement](#) (Department of Justice, 2021), the Minister linked the measures explicitly with the plans to end the unnecessary criminalisation of potential victims of trafficking:

"Given what we know about the levels of exploitation and human trafficking in the sex trade, it is very likely that many of those convicted in the past fall into the exploited category for a number of reasons, including because they were victims of trafficking. These vulnerable victims should also benefit from the legislative change regarding the sale of sex and be able to move forward and rebuild their lives."³⁰

This novel approach has been welcomed by the Commission. However, there has been no similar initiative with regard to victims of other forms of human trafficking present in Ireland who have been convicted for crimes in which they may have been forced to participate.³¹

In recognition of the Commissions call for the wider application of retrospective expungement of criminal records of victims of trafficking the Commission would recommend that the Oirachtas Committee examine this important aspect as part of their deliberations.

The Commission recommends that to adhere fully to the non-punishment principle, the Bill should amend the 2008 Anti-Trafficking Act, to include a specific statutory defence for victims of trafficking where they have committed crimes as a direct consequence of them being trafficked.

³⁰ Department of Justice (2021) [Minister McEntee announces initiative to expunge previous convictions for 'sale of sex'](#) [press release] 25 April,

³¹ P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General [2015] IEHC 222; IHREC (2022) [Trafficking in Human Beings in Ireland](#), pp. 63-64

The Commission recommends that the legislative process of this Bill examine the feasibility of extending the expungement of criminal convictions to victims of other forms of human trafficking.

Bibliography

Abbit B. (2021) Hundreds of children referred to experts during pandemic over fears of criminal, sexual and labour exploitation. Manchester Evening News [online] 10th October

GRETA (2017) [Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: Second Evaluation Round](#). Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties);

GRETA (2020) [Guidance Note on the Entitlement of Victims of Trafficking, and Persons at Risk of Being Trafficked, to International Protection](#);

GRETA (2022) [Evaluation Report Ireland Third Evaluation Round](#). Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties) Council of Europe

GRETA (2022) [Evaluation Report Ireland Third Evaluation Round](#). Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties) Council of Europe

IHREC (2016) [IHREC Submission to GRETA in Advance of its Second Evaluation Round of Ireland](#). Dublin

IHREC (2021) [Ireland's Actions Against Trafficking in Human Beings: Submission by the Irish Human Rights and Equality Commission to the Council of Europe Group of Experts on Action against Trafficking in Human Beings \(GRETA\)](#). Dublin

IHREC (2022) [Trafficking in Human Beings in Ireland](#)

OSCE (2011) [Trafficking in Human Beings: Identification of Potential and Presumed Victims: A community policing approach](#). Vienna

OSCE (2020) Conclusions and Recommendations for Ireland following the Visit by OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Trafficking Beings, Valiant Richey

OSCE (2020), Conclusion and recommendations for Ireland following the visit by OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Valiant Richey

OSCE/ODIHR (2022) [National Referral Mechanisms Joining Efforts to Protect the Rights of Trafficked Persons](#), p. 72

UNODC (2009) [Model Law against Trafficking in Persons](#);

US Department of State (2018) [Trafficking in Persons Report](#)

US Department of State (2019) [Trafficking in Persons Report](#)

US Department of State (2020) [Trafficking in Persons Report](#)

Office of the High Commissioner for Human Rights, [Recommended Principles and Guidance on Human Rights and Human Trafficking](#),

Director of Public Prosecutions (2019) [Guidelines for Prosecutors](#)

Varenikova, M. (2020) ["Mothers, Babies Stranded in Ukraine Surrogacy Industry"](#), *The New York Times* [online] 15 August

Ekathimerini (2021) ["Probe launched following allegations of illegal adoptions"](#), *Newsroom* [online] 7 January

Law

Council Decision 2007/125/JHA of 12 February 2007 establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme Prevention of and Fight against Crime

Criminal Law (Human Trafficking) Act 2008

Criminal Law (Human Trafficking) (Amendment) Act 2013

Criminal Law (Sexual Offence) Act 2017

Criminal Justice (Victims of Crime) Act 2017

Child Trafficking and Pornography Act 1998

Criminal Law (Sexual Offences) Act 1993

International Protection Act 2015

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

EU Anti-Trafficking Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Recital 18.

EU Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

EU Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

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

[Immigration, Residence and Protection Bill 2010](#)

The Council of Europe Convention on Action against Trafficking in Human Beings (2005)

Case Law

Brecknell v. United Kingdom (2008) 46 EHRR 42 at 70-71 and 75

CN v. United Kingdom, no. 4239/08, ECHR 2012

[*P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General \[2015\] IEHC 222*](#)

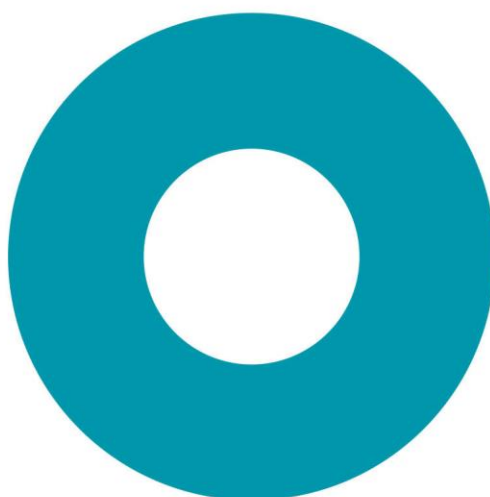
R (DS) v Secretary of State for the Home Department [2019] EWHC (Admin) at 68

See R (DS) v Secretary of State for the Home Department [2019] EWHC (Admin)

VCL and AN v. United Kingdom, no.77587/12 and 74603/12, para. 159, ECHR 2021



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



The Irish Human Rights and
Equality Commission
**16 – 22 Sráid na Faiche,
Baile Átha Cliath, D07 CR20**
16 – 22 Green Street,
Dublin, D07 CR20

Íosghlao/Lo-Call 1890 245 245
Guthán/Phone + 353 (0) 1 858 3000
Riomhphost/Email info@ihrec.ie
Idirlíon/Web www.ihrec.ie
🐦 @_ihrec
📷 /irishhumanrightsequality



International Transport Workers' Federation,
c/o Liberty Hall,
Dublin 1

Alan Guidan,
Principal Clerk,
Oireachtas Committee on Justice,
Leinster House,
Dublin 2

3rd October, 2022

Re: Submission on General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022.

Dear Mr Guidan,

I would be obliged if you circulate this submission to the Committee on Justice for consideration on the above matter. Should the Committee seek an appearance by myself on behalf of my organisation to elaborate on the submission I would be delighted to attend.

Firstly, by way of introduction and context, the International Transport Workers' Federation (ITF) is the global federation of trade unions that organise in the maritime, transport, civil aviation and logistics sectors.

The ITF has some 700 affiliated unions spanning 150 nations collectively organising 20 million workers. SIPTU, FORSA and UNITE are Ireland's affiliates to the ITF.

For well over a decade the ITF in Ireland has been campaigning to improve the conditions of non-European migrants working in the Irish flagged fishing fleet, both documented and undocumented.

Our efforts on behalf of this vulnerable sector of the workforce has included making numerous submissions to the Anti-Human Trafficking Unit of An Garda Síochána and the Modern Slavery Unit of the Police Service of Northern Ireland over the last five years on behalf of migrant fishers seeking their admission to the National Referral Mechanism (NRM) for suspect victims of human trafficking in both jurisdictions.

To date, on foot of submissions made by the ITF since 2017, An Garda Síochána have admitted 35 migrant fishers to the NRM, 24 of whom arrived documented into the Department of Justice administered Atypical Work Permit Scheme for Non-EEA fishers, and the remaining 11 of whom were employed on an undocumented basis, typically being brought into the date via the mis-use of a UK seafarer's transit visa. The PSNI have admitted four migrant fishers to their NRM on foot of ITF submissions.

Other submissions on behalf of migrant fishers made by the ITF to An Garda Síochána have resulted in the fisher not being admitted to the NRM and on one occasion not even being assessed face to face.

All files sent to the Director of Public Prosecutions arising from Garda investigations on foot of the above admissions to the NRM resulted in no prosecutions on the basis that the DPP concluding that there was 'insufficient evidence'. However, I note that there has, to date, not been a single conviction

in the state obtained for trafficking for the purposes of labour exploitation be that for fishers, agricultural workers, car washers, nail bar workers, domestic servants or refuse collectors and any other vulnerable sector.

The failure on the part of the State to prosecute and secure convictions for trafficking for labour exploitation has invited critical comment from various authoritative quarters including the United States State Department in their annual Trafficking in Persons (TIP) Report; the Council of Europe's Group of Experts on Action Against Trafficking (GRETA) and the Irish Human Rights and Equality Commission all of whom have cited fisheries as one of the sites of human trafficking for labour exploitation.

It is noteworthy, however, that the Department of Justice in their media and Parliamentary Question responses to the above critical commentary have the habit of particularly singling out the fisheries sector for rebuttal, erroneously claiming that all reports of trafficking of fishers have been 'fully investigated' and transpired to be 'without foundation'.

The conclusion drawn by the ITF to the defensive response of the Department lies in the fact that the Department itself currently administers the very permit scheme into which most of the fishers who were admitted to the NRM were enrolled.

The comments I shall make are to be confined to Part 3 of the Bill and with migrant fishers as cohort prone to trafficking particularly in mind.

Head 12

The definition of 'labour exploitation', 'forced labour' and 'trafficking' should cite the relevant International Labour Organisation conventions to which Ireland is a signatory

<https://www.ilo.org/global/topics/forced-labour/definition/lang-en/index.htm#:~:text=The%20Definition%20of%20forced%20labour,offered%20himself%20or%20her self%20voluntarily.%22>

Likewise reference to the Palermo Protocol, to which Ireland is a signatory and where the 'Delphi criteria' for identification of victims should be made under this heading.

https://www.ilo.org/global/topics/forced-labour/publications/WCMS_105023/lang-en/index.htm

Head 13

The list of competent authorities for the purpose of identifying victims should include :

- (h) the Naval Service
- (i) the Marine Survey Office
- (j) the Irish Coastguard

The above three agencies could well be the first to encounter a potentially trafficked fisher, seafarer or non-seafarer for that matter being smuggled into the state for the purposes for labour or sexual exploitation.

Head 14

Paragraph (1) should make clear that the either the person claiming they are a victim may make an application for admission to the NRM or, where they so authorise, an organisation or legal professional may also make an application on their behalf as is the current practice.

Under Paragraph (4) (c) if payment below the minimum wage is to be cited there is a strong case for referring to being forced to work grossly excessive hours or without sufficient breaks and periods of rest as defined in the Organisation of Working Time Act and specifically SI 672/2019 European Union (International Labour Organisation Work in Fishing Convention) (Working Hours) Regulations 2019 in the case of fishers as they are exempted from Part 2 of the Organisation of Working Time Act.

There is a case for a specific reference in this section to the statement provided by the applicant to An Garda Síochána or the invitation for the applicant to make a statement to An Garda Síochána. In the ITF's experience An Garda Síochána do not as a matter of course take a formal statement from applicants and in one instance declined to take a statement in favour of an informal interview albeit one where copious notes were taken and a professional interpreter was obtained.

Absent from this Head and elsewhere is any appeals mechanism should the operational committee decide not to admit an applicant to the NRM.

Head 17

As per comment on Head 14 in or after paragraph 2 (c) reference should be included to the Organisation of Working Time Act and specifically SI 672/2019 European Union (International Labour Organisation Work in Fishing Convention) (Working Hours) Regulations 2019.

Head 18

A representative of the official trade union movement should be eligible for inclusion on the operational committee as a trusted partner given the interest of the trade union movement in matters pertaining to Labour exploitation.

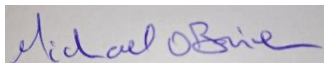
Finally, and I acknowledge that the ITF does not have a firm proposal as to under which heading, if any, this can be addressed in the draft Bill, I wish to draw the attention of the Committee to the problem of trafficked fishers working on foreign flagged vessels that operate out of Irish fishing ports.

As matters stand, the relevant authorities in Ireland have limited jurisdiction to consider abuses and exploitation of migrant fishers occurring on foreign flagged vessels which would be considered relevant for identification of trafficking victim purposes if they occurred on an Irish flagged vessel.

In one specific instance An Garda Síochána this year declined to admit a fisher who applied for admission to the NRM when he was recruited to work on a UK flagged vessel, albeit one owned by a citizen of this state, ostensibly working out of a Northern Ireland port. Instead, on arrival, he was brought into this state as the vessel, despite its UK flag, worked near exclusively from a Republic of Ireland port.

The PSNI are due to interview this fisher with a view to his possible admission to the NRM in Northern Ireland but the practical obstacles to this report of trafficking being investigated are obvious.

Yours sincerely



Michael O'Brien
Fisheries Campaign Lead, Ireland,
International Transport Workers' Federation
o'brien_michael@itf.org.uk
itfglobal.org



MRCI Submission to the Committee on Justice on the Heads of Bill, General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

13 October 2022

Introduction

The Migrant Rights Centre Ireland (MRCI) welcomes the opportunity to make a submission to the Committee on Justice on this Heads of Bill to reform the National Referral Mechanism (NRM), as part of the Government's pre-legislative scrutiny process. MRCI is a national organisation working to promote the rights of migrant workers and their families in low paid employment who are at risk of poverty, exploitation, and social exclusion.

MRCI is a national assessment centre for trafficking for labour exploitation. To date, MRCI has assisted more than 280 vulnerable people where indicators of trafficking presented across different sectors, including agriculture, the private home, and restaurants

Internationally, the number of people estimated to be in situations of trafficking for labour exploitation has grown by 2.7 million to 28 million since 2016.ⁱ However, the number of people who have been identified as victims of human trafficking in Ireland has been declining since 2017.ⁱⁱ These low identification numbers underscore the state's lack of convictions for trafficking for labour exploitation.

Early victim identification is crucial in the fight against human trafficking. Currently, the identification of victims falls to An Garda Síochána alone. The involvement of police in both the identification and investigation of human trafficking is linked to the low number of identified victims for which Ireland has been widely criticised.ⁱⁱⁱ These experts have encouraged the adoption of a multi-agency approach to victim identification, and one that includes civil society. MRCI is pleased to see this approach included in the Heads of Bill.

MRCI's Key Recommendations

In this submission, MRCI comments on **Part 3 of the Heads of Bill** as it pertains to victims of trafficking for labour exploitation. There are three key recommendations/omissions that MRCI would like to mention before taking a head-by-head approach to the Heads of Bill. These are:

Identification Process based on Reasonable Grounds

MRCI strongly recommends a lower standard of identification than as outlined in the Heads of Bill, to bring as many victims as possible into the NRM. Only with robust victim identification will the

crime of human trafficking be tackled effectively. The criteria for identification (at both referral and determination stages) must be based on reasonable grounds as found in any recognised indicators of trafficking, e.g. The Delphi Indicators.^{iv}

Appeal

The right to appeal is fundamental in any process or system. The Heads of Bill contain no reference to an appeal, review, or reconsideration. In the interests of transparency and fairness, potential victims must be able to challenge a refusal to recognise them as victims of trafficking.

Rights and Entitlements, including Immigration Status

To encourage victims to present for identification it is essential that specific services and supports are set out in legislation. Supports *must* include the grant of immigration status. There is no reference in the Heads of Bill to immigration status for victims of trafficking who are undocumented or have precarious immigration status. The importance of this cannot be overstated: the immigration status of undocumented victims is exploited by traffickers to deter victims from fleeing or seeking help. The provision of a stable immigration status is vital in ensuring victims come forward for identification and a ‘firewall’ between Competent Authorities and immigration authorities will encourage undocumented victims to present.

Comments on Part 3, Head by Head

Before considering each Head, MRCI would like to note the absence of **operational guidelines**. As a stakeholder in the Dept of Justice’s stakeholder subgroup on the NRM within the Human Trafficking Stakeholders Forum, MRCI was assured by the Department that operational guidelines for the NRM would be provided to stakeholders ahead of the deadline for its submission (30 September 2022). To date, no such guidelines have been received. This makes comment in many areas of this Bill a challenging process, i.e., is a missing item to be regarded as an omission or will it be covered in the guidelines.

Head 12 – Interpretation for Part 3

- The definition of a victim should include a person awaiting appeal or reconsideration of an application/ referral. The right to appeal/ reconsideration must be in statute.
- The definition of the NRM as *“the framework through which the State fulfils its obligations to protect and promote the human rights of trafficking victims”* does not go far enough – the NRM encompasses access to services and supports for victims. Without a guarantee to these services, victims may not be willing to come forward.

Head 13 – Competent Authorities of the National Referral Mechanism

- Section (1): Amend to include Local Authorities as Competent Authorities. The Department of Housing, Local Government and Heritage, like listed Competent Authorities – e.g., health and social welfare – may encounter victims of trafficking through its operations.

- Recommend that a Competent Authority (and Trusted Partner) should record and report any refusal to refer a victim to the Operational Committee, in the interest of fairness and transparency.

Head 14 – Application for Recognition as a Victim of Trafficking

- This Head should include a clear statement that no department or agency will refer to immigration authorities anyone who is not referred to the Operational Committee as a victim of trafficking. It is not enough to prohibit sharing of information, per Head 16, as the consequences of this will be more than a breach of GDPR and could result in deportation proceedings against a victim.
 - Knowledge that they will not face referral to immigration authorities may assist victims in coming forward.
- Section (2): This section must provide in statute an appeal or reconsideration of a refusal to refer a victim to the NRM Operational Committee.
- Section (2): It appears that only a Competent Authority or Trusted Partner can receive an application for identification; this is too limiting for victims.
 - MRCI recommends a path for self-referral to the NRM Operational Committee. A situation may arise where no Trusted Partners are designated and where there is difficulty getting the application through a Competent Authority, or where the potential victim is unaware the Competent Authority holds this function.
- Section (3)(a): Amend to delete all references to ‘credibility’ and ‘balance of probabilities’. The Competent Authority / Trusted Partner is not being asked to investigate the victim’s account, only to refer for further consideration.
 - This section must provide for a referral based on reasonable grounds only, as per current Administrative Arrangements.^v
- Section (4)(a) – (c): This list must be replaced with a statement that reasonable grounds are based on ‘any and all indicators of trafficking’.
 - It is not clear why only the listed indicators were selected. Referring to ‘any and all indicators of trafficking’ is more helpful. The Competent Authority or Trusted Partner could be directed to a schedule of indicators (including Delphi indicators, at minimum).
 - If deception and coercion are emphasised, these must be defined. As it stands, only exploitation is defined in Head 12.

Head 15 – NRM Operational Committee

- The right to appeal or request reconsideration of a decision of the Operational Committee must be set out in statute. This appeal/ reconsideration should be capable of overturning the original decision in the interests of efficiency and fairness. The Operational Committee must comply with appeal procedures.
 - As written currently, only a Judicial Review can challenge a decision by the Operational Committee, and this does not have the same function as an appeal.

- The Operational Committee should be independently chaired/ administered, as part of general oversight, including oversight of Trusted Partner designation (covered at Head 19).
- Section (2): Insert a minimum grade of civil servant (e.g., not below Assistant Principal Officer/ Garda Superintendent) for each Competent Authority.
- Sections: (2) and (4): The legislation should ensure that Trusted Partners with expertise in this area are always given the opportunity to be part of Operational Committee. If no civil society organisation/ body etc. is designated as a Trusted Partner, there will be no non-governmental presence.
 - In Britain, NGOs have reported that there is no process to recruit/ appoint new NGOs into a similar role, leaving with victims few non-statutory organisations to approach.^{vi}
- Section (3): The wording in this section refers only to Competent Authorities. Trusted Partners are likely to constitute the expertise within the Operational Committee and should not be excluded from drafting procedures and process.
- Section (4): Amend to state that Trusted Partners shall also be involved in section (5) Operational Procedures.
- Section (5): Operational guidelines should not be left entirely to the Operational Committee to devise; as highlighted above in this Head, the right to appeal/ reconsideration, at minimum, must be listed in statute.
- Section (5)(i): There should be a minimum schedule for convening the Operational Committee, to reduce delays.
- Section 5(ii): The reference to interim arrangements must be more specific; the victim must be fully supported in the process (the two-stage process of identification), from the beginning.
- *Note:* The note should make clear that the Operational Committee's function goes beyond identification and includes administering the NRM as it applies to the support of victims, per Head 19, allowing them to access services (including those provided by the departments/ agencies of the Competent Authorities).

Head 16 - Sharing of Information by Competent Authorities and Trusted Partners

- MRCI agrees that information sharing should be limited to the purposes of making decision/ determination on a victim's case.
- This Head should include a clear statement that no department or agency will refer to immigration authorities anyone who is not referred to the Operational Committee as a victim of trafficking. It is not enough to prohibit sharing of information, per this Head, as the consequences of this will be more than a breach of GDPR and could result in deportation proceedings against a victim.

- Knowledge that they will not face referral to immigration authorities may assist victims in coming forward.
- Section (1): Information sharing purposes must cover appeals: for the purpose of an appeal or reconsideration of that decision/ determination.

Head 17 – Identification of a Victim of Human Trafficking by the NRM Operational Committee

- Provide in statute the right to appeal or for a reconsideration of decisions. This is fundamental to any fair process. Appeals/ reconsiderations must go before an independent body with the power to overturn the original decision in interests of efficiency and compassion.
 - As written currently, only a Judicial Review can challenge a decision by the Operational Committee, and this does not have the same function as an appeal.
- Section (1) (a): Credibility: amend to delete all references to ‘credibility’ and ‘balance of probabilities’. This section does not task the Operational Committee with investigating a victim’s account.
 - This section must provide for a decision based on reasonable grounds only, as per current Administrative Arrangements.^{vii}
- Section (1)(b): As with Head 14, replace with statement that reasonable grounds are based on ‘any and all indicators of trafficking’.
 - It is not clear why only the listed indicators were selected. Referring to ‘any and all indicators of trafficking’ is more helpful. The Competent Authority or Trusted Partner could be directed to a schedule of indicators (including Delphi indicators, at minimum).
- Section (3): Decision timeframe “*as soon as is practicable*” is too vague; it must be clear to victims when to expect a decision.
- Section (3): Amend to state that the reasons for any decision must be given to the applicant/ victim in writing, and in a language the victim understands.

Head 18 – Designation by Order of Trusted Partner

While the idea of a Trusted Partner role for civil society is welcome, there is a lack of information, including the implications for organisations. Even the Note for this Head fails to explain the function of Trusted Partner fully: according to the other Heads, a Trusted Partner is tasked with deciding on applications from victims as part of NRM Operational Committee, not merely “*receiving and referring applications*”.

- Section (1): Eligibility: Trusted Partner status should be available to more than “*civil society organisations and bodies*”, but open to unions and other experts to serve as Trusted Partners.

- Additionally, Trusted Partners should be able to nominate experts to the Operational Committee.
- Section (3): Designation: MRCI recommends an independent process for the selection, designation, and administration of Trusted Partners. There should be no barrier in applying for designation as a Trusted Partner, where otherwise the Operational Committee would operate without Trusted Partners.
- Furthermore, the following must be clarified and considered:
 - The independent position of an organisation that takes up a Trusted Partner role;
 - Indemnity from legal action against Trusted Partners that decline to refer a victim to the Operational Committee;
 - The role of dissent if a Trusted Partner is not in agreement with NRM Operational Committee;
 - The funding and training that will be made available to Trusted Partners, and
 - A recusal policy for those who have referred a victim to the Operational Committee.

Head 19 – Access to Services by Victims of Trafficking

Overall comment on this Head:

The lack of commitment to the welfare of victims of trafficking, as set out in this Heads of Bill, is very disappointing. Victim supports and services should not be reduced to minimum standards or left to individual Departments/ agencies to decide. The EU Trafficking Directive prescribes the minimum standard, but legislation must go beyond this to encourage victims to present for identification.^{viii} Only with robust victim identification can the crime of human trafficking be tackled effectively.

The Note to Head 19 refers to the rationale as one “*not to create an entitlement to a specific service...or to duplicate the existing statutory basis on which specific services are provided...*” The NRM **must** create an entitlement to a specific service, to allow people to come forward with assurances that they will be provided for and protected. Victims will be reluctant to come forward unless they feel supported and secure. A clear statement of the supports and services available to support victims of trafficking is essential to the wellbeing of the victim, and to the integrity of the process.

It is crucial that immigration permissions are outlined in statute. This is a vital component of the NRM for undocumented victims of trafficking and those with irregular immigration status. Traffickers use a victim’s immigration status to keep their victims under control, and MRCI cautions that failure to provide a stable immigration status will result in fewer victims presenting for identification.

Head by Head comments (Head 19)

- The Head should clearly state that supports and immigration status for victims of trafficking will be provided independent of their cooperation with authorities, to reflect the EU Trafficking Directive.

- The Head should clearly state that an applicant for international protection who is seeking identification as a victim of trafficking should be able to assert the status that is most advantageous.
 - At present, applicants for international protection who are later identified as victims of trafficking are precluded from many of the more favourable rights and entitlements afforded to victims of trafficking.
- There is no mention of the Reflection and Recovery period afforded to victims by the EU Trafficking Directive. This should be a statutory entitlement for those victims who wish to cooperate with law enforcement. The Reflection and Recovery period may be waived if the victim wishes to cooperate with law enforcement sooner.
- Section (2): Immigration status should be included in this section, administered on a Stamp 4 permission basis.
 - Status should be for a minimum of 12 months initially. The current six-month duration of permission is inefficient and undermines the integration of victims into society (employers and landlords, for instance, are wary of issuing contracts of employment or leases to people with short expiry dates on their immigration permission).
 - Victims of trafficking should be entitled to family reunification, to allow for integration.
 - An ‘immigration firewall’ guaranteed throughout the NRM (as referenced in Head 14 and 16 also) to ensure no one will be referred to immigration authorities through interaction with any party to the NRM.
- Section (2): Strengthen language around the responsibility to provide an appropriate care package, to ensure all relevant Competent Authorities participate in the provision of services to victims of trafficking.
 - A designated caseworker would greatly improve victim outcomes, as is current practice under the Administrative Arrangements^{ix}, where each victim is assigned a HSE caseworker.
 - In MRCI’s opinion, HSE caseworkers are the greatest strength of the current system and should be retained.
- Section (2)(b): MRCI is concerned about the inclusion of Direct Provision and without any statement of a successor entity. The Direct Provision model is not appropriate for traumatised and vulnerable victims of trafficking.
 - House all victims of trafficking in victim-specific, supported accommodation. MRCI understands that a reform of accommodation for victims of trafficking is underway but has not received any updates from the Department of Justice.
- Section 2(d): Legal Aid: Early legal advice should be available to anyone who is considering coming forward as a victim of trafficking. This should be available as soon as there are reasonable grounds to believe that a person is a victim of trafficking, and not limited to post-identification.

Head 20 – Prohibition on Deportation for a Victim of Trafficking

- More clarity is required on the intersection of Section 3 process and status as a victim of trafficking; the binding principle of *non-refoulement* must be upheld.
- Strengthen assurances against deportation; merely deferring or suspending a deportation order is not sufficient: victims must be free from the threat of deportation entirely.
 - Traffickers often use the threat of deportation to keep a victim in a situation of trafficking. MRCI has observed this in many trafficking for labour exploitation cases (see also Delphi Indicators).^x

Head 21 – Protection from Prosecution for a Human Trafficking Offence

- The language in this Head is confusing; the Note is clearer than the language in Head 21.
 - It is unclear if the Department considers this Head to be a defence to prosecution of a victim of trafficking, or if it is intended as a guideline for prosecutors so that no prosecution is initiated.
- The principle of non-prosecution must extend beyond immigration offences. Instead, the Department should follow UK legislation in this area, and extend protections to other unlawful acts committed as a result of human trafficking. See section 45 of the Modern Slavery Act, in particular subsection (1).^{xi}
 - (1)A person is not guilty of an offence if—
 - (a) the person is aged 18 or over when the person does the act which constitutes the offence,
 - (b) the person does that act because the person is compelled to do it,
 - (c) the compulsion is attributable to slavery or to relevant exploitation, and
 - (d) a reasonable person in the same situation as the person and having the person’s relevant characteristics would have no realistic alternative to doing that act

Additional Comments on Part 3:

The following are not addressed in the Heads of Bill and cannot be covered in the Head-by-Head analysis.

1. Oversight

There should be independent oversight of the NRM to ensure it is fulfilling its obligations successfully and impartially.

2. Principles of this Legislation

MRCI recommends that the Heads of Bill contain a reference to the principles underpinning this legislation. It should be victim-centred legislation, with rights and entitlements set out in law and this should be stated clearly as part of the Bill.

3. Training of Competent Authorities and Trusted Partners

Training of Competent Authorities and Trusted Partners is essential to the success of the NRM, especially in trauma informed care, interviewing victims, anti-trafficking laws and related laws. There is no mention of this in the Heads of Bill.

4. Victims outside the Jurisdiction

A process should be in place for the Operational Committee to consider the cases of victims who were trafficked outside, whose trafficking does not take place in Ireland, or feature the relevant connections to Ireland, per the EU Trafficking Directive.^{xii}

5. Compensation

There is no trafficking-specific state compensation available to victims of trafficking. Currently, and in the absence of any prosecution or convictions (which may give access to criminal compensation), victims of trafficking labour exploitation must resort to other mechanisms e.g., personal injury law or employment law, to claim any money back from their traffickers.

6. Areas that are outside of MRCI's scope but are of concern include:

- A. Child Trafficking: this Heads of Bill lacks a child-specific approach to trafficking in human beings. Child victims of trafficking are extremely vulnerable and must be identified and supported through an appropriate, child-centred system. MRCI supports the National Rapporteur on Human Trafficking's call for an NRM that "explicitly address the special identification and referral needs of child victims of trafficking, including within the broader system of protection of separated and unaccompanied minors."^{xiii}
- B. Forced Marriage and other forms of trafficking: the definition of human trafficking (in Head 12 and where relevant) should be expanded to include forced marriage and allow scope for other 'novel' forms of trafficking that may emerge.

[ends]

For more information please contact:

Isabel Toolan
Senior Legal Advocacy Officer, MRCI
isabel@mrci.ie

ⁱ <https://www.walkfree.org/reports/global-estimates-of-modern-slavery-2022/>

ⁱⁱ 103 victims to 44 in 2021 <https://www.state.gov/reports/2022-trafficking-in-persons-report/ireland/>

ⁱⁱⁱ E.g., in <https://www.ihrec.ie/documents/trafficking-in-human-beings-in-ireland/> and <https://www.state.gov/reports/2022-trafficking-in-persons-report/ireland/> and <https://www.ihrec.ie/documents/trafficking-in-human-beings-in-ireland/>

^{iv} https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf

^v <https://www.blueblindfold.ie/wp-content/uploads/2020/09/Guide-to-Procedures-June-2015.pdf>

^{vi} Conversation with Anti-Slavery International, 2021

^{vii} See endnote v

^{viii} Directive 2011/36/EU <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0036>

^{ix} See endnote v

^x See endnote iv

^{xi} <https://www.legislation.gov.uk/ukpga/2015/30/section/45/enacted>

^{xii} See endnote viii

^{xiii} <https://www.ihrec.ie/documents/trafficking-in-human-beings-in-ireland/>



www.mecpaths.com

*Written Submission on the
General Scheme of the Criminal Justice
(Sexual Offences and Human Trafficking) Bill 2022*

October 2022

Introduction

MECPATHS is pleased to submit this Written Submission on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022. This submission outlines the child trafficking situation in Ireland, the work of MECPATHS, and offers some comments for consideration under two specific heads of this bill.

Child Trafficking

Child trafficking is regarded as a form of modern-day slavery and is simply defined as the “recruitment, transportation, transfer, harbouring or receipt” of a child for the purpose of exploitation¹. Children of all ages, genders and cultures can be victims of trafficking. Children do not need to be moved across borders to be trafficked and can be trafficked within their own country, city, or town. Children are trafficked for all types of exploitation, including forced labour, sexual exploitation, forced begging, organ harvesting, forced criminality, domestic servitude and forced marriage.



¹ United Nations Office on Drugs and Crime (UNODC) (2019) Monitoring Target 16.2 of the United Nations Sustainable Development Goals: multiple systems estimation of the numbers of presumed victims of trafficking in persons, Ireland. Available at: https://www.unodc.org/documents/data-and-analysis/glotip/MSE_Research_Brief_Ireland.pdf.

Child Trafficking in Ireland

The topic of Child Trafficking in Ireland has garnered little or no political or public attention, and that there is confusion about how the issue is understood. If there is any awareness of Child Trafficking, it is confined to sexual exploitation only. This means that other forms of Child Trafficking are not being screened for, such as forced criminality and forced begging. IHREC found that there has been limited research carried out around Child Trafficking and that it remains even more hidden and unknown than Trafficking in adults.²

As a result of its hidden nature, the extent of Child Trafficking in Ireland is very difficult to determine. From 2013-2021, the State formally identified 34 child victims of trafficking in Ireland, 26 girls and 8 boys, representing 9% of all victims.³ This percentage is significantly lower than the EU average of 22%⁴. The data that is available on child victims of trafficking is not disaggregated, therefore, there are no details available as to the type of exploitation that these children were trafficked for. The numbers are likely, however, to be much higher. The United Nations Office on Drugs and Crime (UNODC) published a research brief in 2019 that concluded that the overall level of trafficking in Ireland was approximately 50% higher than what is currently detected⁵.

For the last two years, Ireland has not formally identified any Child victims of trafficking even though The Global Trafficking in Persons Report 2022 found that ‘traffickers subject Irish children to sex trafficking within the country’⁶. This is in large part because frontline

² Trafficking in Human Beings in Ireland: Evaluation of the Implementation of the EU Anti-Trafficking Directive, INREC, June 2022

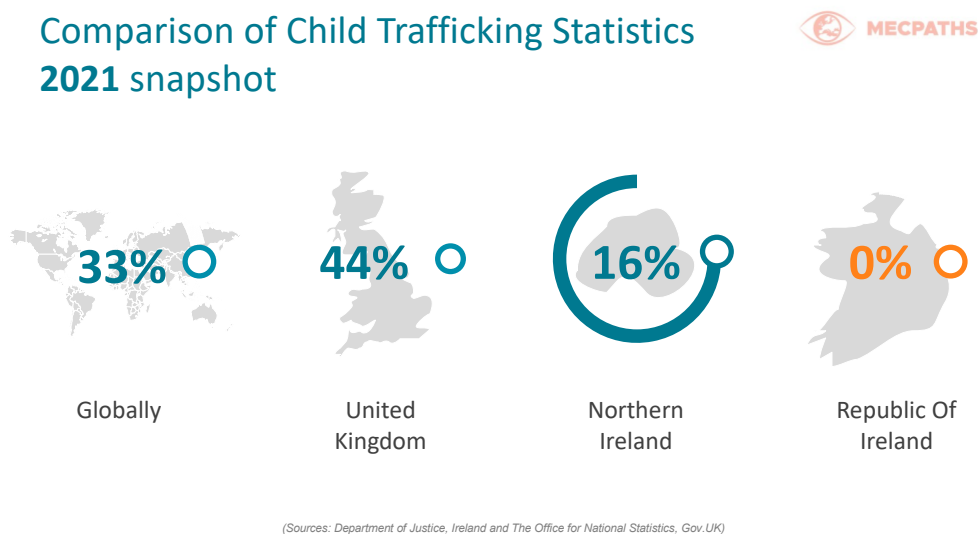
³ Ireland's Actions Against Trafficking in Human Beings: Submission by the Irish Human Rights and Equality Commission to the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA), October 2021

⁴ European Commission. Directorate General for Migration and Home Affairs. (2020) Data collection on trafficking in human beings in the EU. LU: Publications Office. Available at: <https://data.europa.eu/doi/10.2837/45442> (Accessed: 31 July 2022)

⁵ United Nations Office on Drugs and Crime (UNODC) (2019) Monitoring Target 16.2 of the United Nations Sustainable Development Goals: multiple systems estimation of the numbers of presumed victims of trafficking in persons, Ireland. Available at: https://www.unodc.org/documents/data-and-analysis/glotip/MSE_Research_Brief_Ireland.pdf.

⁶ United Nations (2000) ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.’ Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/united_nations_protocol_on_thb_en_4.pdf (Accessed: 30 June 2020).

professionals most likely to encounter a child victim of trafficking are not trained to identify them as such. As Valiant Richey from the Organisation for Security and Co-Operation in Europe (OSCE) said on his visit to Ireland in February 2020: ‘If you’re not looking for or screening for them it’s going to be hard to find them’⁷. A comparison of child victims of trafficking statistics in 2021 clearly illustrates this fact⁸. The 0% statistic in Ireland is not cause for congratulations, rather it is a very poor reflection of how seriously the State is failing the most vulnerable children in society:

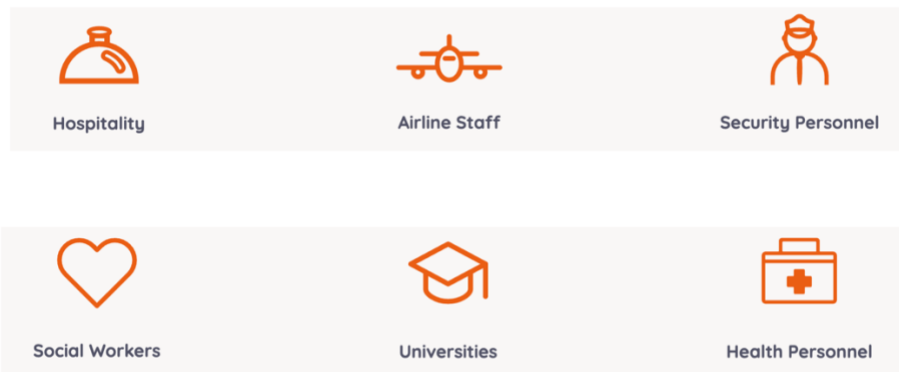


MECPATHS

MECPATHS was founded in 2013 in response to Child Trafficking as a growing human rights and social justice issue, in Ireland. It is the only non-profit organisation in Ireland with dedicated anti-Child Trafficking expertise. It works to raise awareness on Child Trafficking and educates frontline and emerging professionals on how to recognise indicators and report their concerns to the authorities. MECPATHS has been a member of the Children’s Rights Alliance since 2018 and partners with the following sectors to provide training and support:

⁷ Hennessy, M. (2020) “‘You’re not screening for them’: Concern that trafficked Irish children are falling through the cracks.’, The Journal, 23 February. Available at: <https://www.thejournal.ie/child-trafficking-ireland-5016343-Feb2020/> (Accessed: 20 June 2020).

⁸ MECPATHS (2022) ‘Human Trafficking Overview’ www.mecpaths.com



MECPATHS collaborates closely with the Department of Justice and An Garda Siochana to provide education to the Hospitality and Services Sectors, including: The Private Security Authority (Ireland), Tusla, Dalata Hotel Group, PREM Hotel Group, Mercy University Hospital Cork, The Health Service Executive, The ISPCC, Inner-City Organisations Network (ICON), United States Border Control at Dublin Airport, Maynooth University, University College Cork, Trinity College Dublin, The University of Limerick, Munster Technological University, The Technological University of Dublin, and Shannon College of Hotel Management.

The following are issues with the general scheme that we would like to raise with the Justice Oireachtas Committee for consideration.

CRIMINAL JUSTICE (SEXUAL OFFENCES AND HUMAN TRAFFICKING)

BILL 2022 GENERAL SCHEME

PART 3 National Referral Mechanism for Victims of Human Trafficking

Head 17 Identification of a victim of human trafficking

by the National Referral Mechanism Operational Committee

- The Department of Justice reclassified the data on child victims of trafficking in 2017. There is a real concern that the reclassification of data has obscured or under-counted the true extent of child trafficking in the State, which impedes the identification process and reflects the 0% statistic for the last two consecutive years. Clarity should be provided around how cases of Child Trafficking for sexual exploitation and the sexual exploitation of children “simpliciter” (without the element of trafficking) are distinguished. There is currently confusion around this as trafficking of children for sexual exploitation is addressed in section 3 of the 1998 Child Trafficking and Child Pornography Act while trafficking of children for all other forms of exploitation is covered by section 2 of the Criminal Justice (Human Trafficking) 2008 Act.
- Identification of child victims of trafficking will be hampered by the lack of a cohesive understanding of the issue. If there is any awareness of Child Trafficking, it is confined to sexual exploitation only and within the context of immigration. One misconception is that an individual needs to be moved across a border to fulfil the trafficking element. This means that other forms of Child Trafficking are not being screened for, such as forced criminality, domestic servitude and forced begging. Two recent significant reports clearly demonstrated how criminal networks exploit children in Ireland to engage in criminal behaviour within the illegal drugs trade (Robinson and Doherty,

2018⁹; Naughton and Redmond, 2020¹⁰). The research found that ‘the average age of a drug runner was 13 and the youngest reported was eight; the average age of a drug dealer was 14 and the youngest reported was 10’. Even though under Irish law the grooming of children for criminal exploitation is clearly understood as Child Trafficking, the adults involved are not being prosecuted and more importantly, the children are not being recognised as victims of exploitation¹¹.

Head 19 Access to services by victims of human trafficking

- Include in services ongoing counselling services should be made available to all victims of trafficking, especially children.
- All child trafficking victims (on account of their specific vulnerabilities) be included in the ‘Barnahus model’ already operating in the State.

⁹ Robinson, J. and Doherty, J. (2018) Blanchardstown Local Drug and Alcohol Task Force: Drug and Alcohol Trends Monitoring System (DATMS) 2018: YEAR 3. Available at: <http://www.drugs.ie/images/uploads/BLDATFYear3DATMSReport.pdf>.

¹⁰ Naughton, C. and Redmond, S. (2020) National Prevalence Study: Do the findings from the Greentown study of children’s involvement in a criminal network (2015) extend beyond Greentown? Available at: <https://ulir.ul.ie/bitstream/handle/10344/8644/UL-NationalPrevalenceStudy-070520.pdf?sequence=2>.

¹¹ IHREC (2022) Trafficking in Human Beings in Ireland: Evaluation of the Implementation of the EU Anti-Trafficking Directive.

Submission on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

AKIDWA

OCTOBER 2022



Table of Contents

Introduction.....	2
I. Head 13 - The Oddity in Competent Authorities	4
II. Head 17 – The Credibility Test.....	5
III. Head 18 - Designating Trusted Partners	6
IV. Head 19 - Migrant-Specific Victim Support.....	7
V. Head 20 – Migration Specific Provisions	7
VI. Summary Recommendations	8

Introduction

Akina Dada Wa Africa-AkiDwA (Swahili for sisterhood), also known as AkiDwA is a registered charity organisation that is a national network of African women living in Ireland. Since 2001, the organisation has worked earnestly to promote equality and justice for migrant women to realise its vision for a fair and just Ireland with equal access to resources in all aspects of society: social, cultural, economic, civic and political. AkiDwA supports the integration of migrant women into Ireland and advocates that these women live a life free of gender and racial discrimination and through the lens of gender equality and international human rights.

Trafficking in persons is an internationally condemned violation of human rights and trafficking for the purpose of sexual exploitation is in breach of the right to the dignity of persons and bodily integrity as well as other rights.¹ Sex trafficking is the most common type of trafficking in Europe and majority of trafficking victims are migrants who are non-EU citizens.² The situation in Ireland mirrors that of Europe as 25 of the 44 victims of human trafficking were trafficked for the purpose of sexual exploitation.³ Migrant women also form majority of the victims of sex trafficking.⁴ Many of the women trafficked to Ireland are from Africa.⁵ AkiDwA has supported women trafficked to Ireland with information and referral for legal support over the years.

From 2008-2010 AkiDwA worked with Global Alliance against Traffic in Women (GAATW) based in Thailand in a project that explored trafficking of women in general. In 2009, AkiDwA joined the Immigrant Council of Ireland campaign called *Turn Off the Red Light* (TORL) and,

¹ United Nations Human Rights Office of the High Commissioner, 'Human Rights and Human Trafficking' Fact Sheet No. 36, 2014, Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/FS36_en.pdf Accessed on: 09.10.2022

² European Commission, "Data Collection on Trafficking In Human Beings In The EU" (2018), Migration and Homes Affairs, Available at: https://home-affairs.ec.europa.eu/system/files/2020-09/20181204_data-collection-study.pdf Accessed : 25.09.2022

³ Department of Justice, ' Trafficking in Human Beings in Ireland Annual Report 2021' 2021, p 9 Available at: [Trafficking in Human Beings in Ireland \(blueblindfold.ie\)](https://www.blueblindfold.ie) Accessed: 10.10.2022

⁴ ibid

⁵ ibid

together with over 70 organisations, advocated for the introduction of new legislation to address prostitution and human trafficking. A 2009 study conducted by AkiDwA revealed a range of gender specific vulnerabilities migrant women are exposed to.⁶ It was found that migrant women often encounter several forms of sexual and gender-based violence including, domestic violence, sexual harassment assault and rape.⁷ In 2020, AkiDwA published a base-line study on trafficking of migrant women in Ireland which highlighted the push and pull factors that entangle migrant women in the web of human trafficking made recommendations including calls for legislative and policy reform on trafficking in persons.⁸

AkiDwA welcomes the Criminal Justice (Sexual Offences and Human Trafficking) Bill⁹, hereafter referred to as “the Criminal Justice Bill” or “the Bill”, as a necessary opportunity to address the rights of victims of sexual violence, who are often women. This Submission centres its commentary and recommendations on Part 3 of the Criminal Justice bill which focuses human trafficking. Firstly, the new national referral mechanisms for victims of trafficking (VOT) set out in Head 13 particularly the inclusion of the Gardai in the operational committee by virtue of being a competent authority in victim identification will be critically discussed. Secondly, the statutorily provided method of identifying victims of trafficking will be analysed with emphasis on the “credibility test” by the operation committee required under Head 17. Thirdly, the problem of legal regarding the role and operation of trusted partners provided in Head 18 will be highlighted. Thereafter, the suitability of the migrant specific supports and migration protection provisions available victims of trafficking in Ireland provided respectively under Head 19 and Head 20 will be critiqued. Summarily, the recommendations provided herein will be set out.

⁶ AkiDwA, “Submission to United Nations Committee on the Elimination of all forms of Racial Discrimination on the examination of Ireland on its combined 5th to 9th reports (2019) Available at: <https://akidwa.ie/wp-content/uploads/2019/11/20191104-AkiDwA-Ireland-CERD-Alternative-Report.pdf> last accessed: 09.10.2020

⁷ ibid

⁸ AkiDwA, ‘Mobile Bondage: Human Trafficking of Migrant Women’,(2020) Available at: <https://akidwa.ie/wp-content/uploads/2021/02/Human-Trafficking-of-African-Woman.pdf> Accessed: 09.10.2022

⁹ General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

I. Head 13 - The Oddity in Competent Authorities

1. The expansion of competent authorities to identify victims of trafficking under Head 13 to include state organisations such as the Child and Family Agency, the HSE, Minister for Children, Equality, Disability, Integration and Youth, the Minister for Justice, Minister for Social protection and Workplace Relations Commission is very much welcome.¹⁰ Head 13(1)(a) lists the An Garda Síochána as a competent authority for the purpose of identifying victims of human trafficking within the proposed framework of National Referral Mechanism.¹¹ At present, the the Gardai is the sole identifiers of trafficking victims. However, it is the case that that there has been delays in victim identification by Gardai.¹² The identification of a person who might have had entered Ireland irregularly but also suffered human trafficking as an official victims of trafficking removes them from the position of an offender, whom the police should prosecute to a victim, whom the police should support.¹³ Given that the Gardai have the obligation to investigate and facilitate the prosecution the offence of illegal migration and smuggling, their ability to effectively identify victims of trafficking is called into question due to conflicting priorities.¹⁴ However, the Gardai could be retained as a trusted partner who can make an application for a suspected victim of trafficking to be identified as a VOT by the operational committee. It is important to note that Head 15(4) provides that a Trusted Partner that has been so designated can form part of an operational committee.¹⁵ It is therefore imperative that the An Garda Síochána is not designated as part of the operational committee.

2. Recommendation

- 2.1 Given that the bodies designated as competent authorities form part of the operational committee that decides whether a person is a victim of trafficking, it is recommended that the Gardai not be regarded as a competent authority due to their conflict of interest.

¹⁰ n 9, The Criminal Justice Bill, Head 13

¹¹ Ibid

¹² Group of Experts on Action Against Trafficking in Human Beings (GRETA), ' Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: Second Evaluation Round' 20 September 2017 para 114 Available at: <https://rm.coe.int/greta-2017-28-fgr-irl-en/168074b426> Accessed on 10.10.2022

¹³ n 8, AkiDwA 2020, p32

¹⁴ n12

¹⁵ n 9, The Criminal Justice Bill, Head 15 (4)

II. Head 17 – The Credibility Test

3. The introduction of a credibility test in the Criminal Justice Bill under Head 17 is rather problematic in light of variables present in situations of sex trafficking.¹⁶ Given the length of time that may have passed between recruitment, transit, several intermediate countries, if any, and then final destination (Ireland), it is not always possible for these women to give a detailed account of their experience. The reliance on victims of trafficking as the primary, and often only witness, is rather problematic to victims as it often means experiencing re-traumatisation in the process of telling their stories which is not a strong victim-sensitive approach to tackling human trafficking.¹⁷ In relation to migrant women incoherence in their testimonies and case facts presented might occur as a result of issues relating to language barrier, fear of authorities, familial or communal ties with traffickers, juju oaths, ignorance of the law.¹⁸ Civil Society Organisations who are trusted partners as well as competent authorities who apply for victim identification are in a better position than the operational committee to assess victim credibility given that such bodies would most likely have a relationship with the victim. Given that trusted partners and competent authorities already have to consider the credibility of potential victims of trafficking when deciding to refer them,¹⁹ the credibility test of the operational committee would be a superfluous hinderance to victim identification and subsequently, access to justice.

4. Recommendation

- 4.1. It is therefore recommended that the credibility test be removed from the requirement at the operational committee stage of identification. Indeed, the international law on trafficking does not require witness credibility to satisfy the offence of human trafficking as established in Article 3 of the Palermo Protocol.²⁰

¹⁶ n 9, The Criminal Justice Bill, Head 17

¹⁷ n 8, AkiDwA 2020, p32

¹⁸ ibid p32 to 34

¹⁹ n 9, The Criminal Justice Bill, Head 14

²⁰ UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, Article 3

III. Head 18 - Designating Trusted Partners

5. Head 18 provides that

“A civil society organisation or body that works with or provides services to victims or potential victims of human trafficking may apply to the Minister, in accordance with this section, to be designated as a Trusted Partner for the purposes of Head 14.”²¹

6. Thus, non-governmental organisations who are often most conversant with the case and character of the VOT is now in a position to apply for identification on behalf of potential victims and also make decisions on identification by way of sitting on the operational committee. This is a very welcome development and line with the recommended European approach to identification.²² Given AkiDWA’s involvement with assisting victims of trafficking, it welcomes the introduction of Trusted Partners in the VOT identification procedure for its decentralisation of the existing method of identification. However, further clarification of on the legal liability of trusted partners. Can trusted partners be sued for how it conducts the application on behalf of a potential victim? Is there a forum to review the decisions of trusted partners? In addition, do trusted partners have to deliver written reasons when it applies and more especially, refuses to apply to the operational committee for the status of VOT for its service users. Indeed, whether or not a trusted partner can refuse to refer a victim of trafficking into the National Referral Mechanism is not specified. It would be most useful if the Bill specified whether becoming a trusted partner implies that such organisations have a duty to refer a possible victim of trafficking into the national referral mechanism.

7. Recommendation

7.1. In order for the position of trusted partners to be accessible to civil society organisations, it is crucial that the legislation clearly clarify its position regarding the aforementioned questions.

²¹ n 9, The Criminal Justice Bill, Head 18

²² n 12, GRETA 2017, para 126

IV. Head 19 - Migrant-Specific Victim Support

8. Entrusting the operational committee with a duty to provide a care package to identified VOT in Head 19 is a commended innovation that would better provide tracks for accountability and secure victim assistance.²³ However, the retention of Direct Provision as the accommodation facility for victims of trafficking is rather insufficient.²⁴ The state has noted the plethora of criticism against the Direct Provision System and committed to abolishing it in.²⁵ Indeed GRETA has recommended that human trafficking be tackled separately to asylum seeking procedures, hence housing victims of trafficking in centres designed for asylum seekers is not in line with European anti-trafficking recommendations.²⁶ While, the bill provides an opportunity to take a concrete step towards providing alternative support for migrant victims of trafficking, the present draft fails to take advantage of this opportunity,

9. Recommendation

- 9.1. It is recommended that migrant victims of trafficking, particularly for the purpose of sexual exploitation are accommodated in the shelter facilities available to other women who have suffered gender based violence rather than direct provisions.

V. Head 20 – Migration Specific Provisions

10. The prohibition of deportation of a person applying to become a VOT under Head 20 is a just provision which would facilitate the right to a fair trial.²⁷ However, other Administrative Immigration Arrangements and cross-border centred victim protection provisions specific to migrant victims have not been provided for statutorily by way of this bill. The immigration arrangements such as the provision for a renewable 6 months temporary residence permit to be granted to a potential migrant VOT who wishes to

²³ n 9, The Criminal Justice Bill, Head 19

²⁴ *ibid*

²⁵ Department of Children, Equality, Disability, Integration and Youth, 'A White Paper to End Direct Provision and to Establish a New International Protection Support Service' 2021, Available at: [file:///C:/Users/Sharon%20Etokhana/Downloads/124757_ef0c3059-b117-4bfa-a2df-8213bb6a63db%20\(1\).pdf](file:///C:/Users/Sharon%20Etokhana/Downloads/124757_ef0c3059-b117-4bfa-a2df-8213bb6a63db%20(1).pdf) Accessed on 09.10.2022

²⁶ n 12, GRETA 2017, para 130

²⁷ n 9, The Criminal Justice Bill, Head 20

assist An Garda Síochána which is renewable as well as the opportunity to apply for a work permit (stamp 4) or even citizenship (stamp 6) are commendable.²⁸ However, there have been several calls to place these provisions in law rather than as Administrative Arrangements which will be available on a case by case basis thereby introducing uncertainty around such provisions.²⁹ The Criminal Justice Bill is an opportunity for the Irish state to take this step in entrenching migration related support and protections in law.

II. Recommendation

II.1. It is recommended that these assistance measures for migrant victims be included in the legislative framework alongside the facilities available for other victims in line with the international human right principle of non-discrimination and equality.

VI. Summary Recommendations

12. Head 13 - Given that the bodies designated as competent authorities form part of the operational committee that decides whether a person is a victim of trafficking, it is recommended that the Gardai not be regarded as a competent authority due to their conflict of interest.

13. Head 17 - It is therefore recommended that the credibility test be removed from the requirement at the operational committee stage of identification. Indeed, the international law on trafficking does not require witness credibility to satisfy the offence of human trafficking as established in Article 3 of the Palermo Protocol.

14. Head 18 - In order for the position of trusted partners to be accessible to civil society organisations, it is crucial that the legislation clearly clarify its position regarding the aforementioned questions.

²⁸ Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking 2011

²⁹ n 12 GRETA 2017, PARA 172

15. Head 19 - It is recommended that migrant victims of trafficking, particularly for the purpose of sexual exploitation are accommodated in the shelter facilities available to other women who have suffered gender based violence rather than direct provisions.
16. Head 20 - It is recommended that these assistance measures for migrant victims be included in the legislative framework alongside the facilities available for other victims in line with the international human right principle of non-discrimination and equality.



THE BAR
OF IRELAND

The Law Library

BARRA NA hÉIREANN

An Leabharlann Dlí

SOHTU_05

SUBMISSION ON THE GENERAL SCHEME OF THE CRIMINAL JUSTICE (SEXUAL OFFENCES AND HUMAN TRAFFICKING) BILL 2022

October 2022

About The Bar of Ireland

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.



1. INTRODUCTION

- 1.1. The General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 (**“the 2022 Bill”**) is a welcome legislative initiative.
- 1.2. The Council of the Bar of Ireland (**“the Council”**) is of the view, however, that a number of elements of the General Scheme of the 2022 Bill require further consideration.
- 1.3. In general terms, the National Referral Mechanism is a particularly welcome legislative introduction. International bodies such as the US State Department and GRETA (Council of Europe Group of Experts on Action against Trafficking in Human Beings) have, over a number of years, highlighted issues with the identification, referral and supports offered to victims of human trafficking in Ireland. It is the Council’s view that a simple, speedy, effective procedure, with clear time limits, appeals processes and entitlements to supports on a needs basis must be adopted to meet the State’s international obligations.
- 1.4. This submission highlights the areas of concern the Council has identified. It makes suggestions as to the manner in which they might be addressed and highlights additional provisions which the Committee may wish to consider including.

2. OBSERVATIONS IN RESPECT OF PART 2 OF THE BILL

2.1. HEAD 3 – AMENDMENT OF SECTION 2 OF THE ACT OF 1981

- 2.1.1. The Law Reform Commission Report: *Knowledge or Belief Concerning Consent in Rape Law* sets out the current law in relation to consent. The decision of the Supreme Court in *The People (DPP) v CO’R* [2016] IESC 64, [2016] 3 IR 322 explains that the current test for recklessness as to the victim’s lack of consent is primarily subjective, but that the test does contain some objective elements. This allows a jury to apply their common sense to the facts of a given case when determining whether an accused person was reckless as to the issue of consent. In any criminal trial, a jury will be directed by the trial judge that they should bring their common sense to bear upon their assessment of the evidence.
- 2.1.2. The Law Reform Commission notes that s.48 of the Criminal Law (Sexual Offences) Act 2017 substituted a significantly expanded s.9 of the Criminal Law (Rape) (Amendment) Act 1990. The Law Reform Commission notes, and the Bar of Ireland agrees, that this codified the law as set out by the Supreme Court in *The People (DPP) v CO’R*. The Law Reform Commission also records that there was widespread consensus in the Oireachtas on this issue.
- 2.1.3. The 2017 Act also provided (for the first time) a statutory definition of consent. Section 9(1) of the 1990 Act, as inserted by s.48 of the 2017 Act, provides: “A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.” Section 9(2), as inserted by s.48 of the 2017 Act also sets out a non-exhaustive list of 8 specific circumstances in which a person does not consent:
- “(a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,
 - (b) he or she is asleep or unconscious,
 - (c) he or she is incapable of consenting because of the effect of alcohol or some other drug,
 - (d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,
 - (e) he or she is mistaken as to the nature and purpose of the act,

*(f) he or she is mistaken as to the identity of any other person involved in the act,
(g) he or she is being unlawfully detained at the time at which the act takes place,
(h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.”*

2.1.4. As the Law Reform Commission stated, the fault or mental element of the offence could also be proved by establishing beyond reasonable doubt that the accused was aware of, or reckless as to, the existence of one of the 8 situations set out above.

2.1.5. The extent to which the ‘reasonableness’ of the belief of consent features was explained by the Supreme Court in *CO’R* in the following terms:

“Where, however, the accused claims to have mistakenly believed that a woman was consenting, then the jury should examine all of the facts which may support or which may undermine that claimed belief. They should consider all of the circumstances and focus on whether there are, or are not, any reasonable grounds for that belief. As s.2(2) of the Criminal Law (Rape) Act 1981 states: ‘the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.’ That means that where the accused believed genuinely, albeit unreasonably, that the woman was consenting, on this statutory definition he must, even though she did not consent, be acquitted. It needs also to be stated by trial judges, however, that no jury is under any obligation to believe an obviously false story. A jury is entitled to accept or reject any prosecution or defence evidence. In these cases, every jury is entrusted, using shrewdness and common sense, to judge what the accused claims as to his mistaken belief against their view of what an ordinary or reasonable man would have realised in the circumstances. This defence requires genuine belief.”

2.1.6. Put simply, the more outlandish and unreasonable an accused’s asserted belief is, the less likely a jury is to accept it. That is true as a matter of law, but the Bar of Ireland submits that this is true in practice too. In cases where an accused asserts a mistaken belief as to the victim’s consent, inevitably the trial will focus on that issue. The prosecution can make submissions to the Jury why it feels the belief was

unreasonable. It can explain that the more unreasonable a belief is, the less likely it is to be true. This will also be explained by the trial Judge in directing the jury.

2.1.7. The Law Reform Commission considered a number of arguments for and against a change in the current law. The Bar of Ireland broadly supports the arguments in favour of not changing the law. The Bar of Ireland shares the concerns expressed in the report (see Part 4 of the Law Reform Commission's report). In summary those arguments are:

- (a) That the concept of knowledge and recklessness is consistent with the criminal law generally.
- (b) That it is morally unfair to hold somebody liable for a serious crime when they could not foresee the risk of harm.
- (c) That criminalising inadvertence is not an effective deterrent.
- (d) That criminalising inadvertence is contrary to fair labelling principles.
- (e) That honest belief is rarely the central issue at trial.

2.1.8. In relation to the latter issue, the Bar of Ireland's position is that it is the experience of many barristers that honest belief is rarely the basis on which rape cases are defended. In some cases, the fact of sexual intercourse itself or the identity of the attacker may be at issue. In such cases while the issue of consent remains a formal proof, it is not realistically in dispute. In other cases, the fact of sexual intercourse is accepted but the defence case is that there was consent. In such cases the trial focusses on the credibility of the complainant's account and, if he gives evidence or has provided an account in interview, on the credibility of the accused's account. In either case the issue of honest belief is not at the core of the case.

2.1.9. The Law Reform Commission also considered arguments in favour of changing the law. Two such arguments are: (i) that an honest belief test allows an accused to rely on unreasonable beliefs and places a premium on ignorance; and (ii) a primarily subjective approach allows a man who gave no thought to consent to be acquitted. It is noted that some have opined that the law may encourage an accused to adhere to sexist stereotypes to defend himself, thereby entrenching sexist ideologies. The Bar of Ireland disagrees. In any jury trial, a jury will be directed by the trial judge that they should deploy their common sense in assessing the evidence that they have

heard. A jury is a diverse group of persons drawn at random from the community. It can safely be assumed that such a group is capable of distinguishing antiquated stereotypes from lived real-world experiences. Further, as outlined above, a jury will be directed to consider the reasonableness of a belief to consider whether it was honestly held. The concerns referred to by Law Reform Commission as possibly favouring a change in the law are not supported by the experience of barristers who prosecute and defend rape cases.

2.2. HEAD 5 AMENDMENT OF SECTION 4A OF THE ACT OF 1981

2.2.1. The Bar of Ireland supports this proposed amendment. It is acknowledged that the experience of a victim as witness in a trial for sexual assault may be no less difficult or traumatic than in a trial for a rape or aggravated sexual assault offence.

2.3. HEAD 6 AMENDMENT OF SECTION 6 OF THE ACT OF 1981

2.3.1. The Bar of Ireland supports this proposed amendment

2.4. HEAD 7 AMENDMENT OF SECTION 7 OF THE ACT OF 1981

2.4.1. The Bar of Ireland supports this proposed amendment

2.5. HEAD 8 AMENDMENT OF SECTION 8 OF THE ACT OF 1981

2.5.1. The Bar of Ireland supports this proposed amendment. Given the reputational injury which can arise following an *allegation* of a sexual offence of any nature, the Bar of Ireland feels it is appropriate that an Accused person be entitled to anonymity unless convicted.

2.6. HEAD 9 AMENDMENT OF SEXUAL OFFENCES (JURISDICTION) ACT 1996

2.6.1. The Bar of Ireland supports this proposed amendment.

2.7. HEAD 10 AMENDMENT OF CRIMINAL JUSTICE (MUTUAL ASSISTANCE) ACT 2008

2.7.1. The Bar of Ireland supports this proposed amendment.

2.8. REPEALS

2.8.1. The Bar of Ireland supports this proposed amendment.

3. OBSERVATIONS IN RESPECT OF PART 3 OF THE BILL

3.1. GENERAL OBSERVATIONS - PART 3

3.1.1. The Council welcomes the placement of the revised National Referral Mechanism on a statutory footing.

3.1.2. While Ireland has been removed from the Tier 2 ‘watch list’ by the US State Department, Ireland’s position on Tier 2 highlights the need for further improvements in the identification and protection of victims of trafficking. The US State Department Trafficking in Persons Report July 2022 states:

“Systemic deficiencies in victim identification, referral, and assistance persisted, and services for victims remained inadequate. The government did not uniformly screen for trafficking in vulnerable populations, like sea fishers, before referring them to immigration authorities for deportation, even when victims self-identified. The government did not adopt an updated national anti-trafficking action plan (NAP), amend its national referral mechanism, or overhaul its accommodation framework for trafficking victims, which continued to leave victims with inadequate and unsuitable accommodations.”

3.1.3. In terms of prioritised recommendations, the aforementioned report implores Ireland to:

- (a) Increase efforts to identify and protect all victims, especially Irish citizens, victims of labour trafficking and forced criminality, and vulnerable populations like children, sea fishers, and asylum-seekers.
- (b) Improve victim identification and referral by issuing a revised national referral mechanism in coordination with NGOs; providing victim identification training for all front-line officials, including for labour inspectors; and offering formal identification, a recovery and reflection period, and services to all victims.
- (c) Allow formal victim identification by entities other than the police, including civil society, labour inspectors, social workers, and health care professionals.

3.1.4. The submissions outlined by the Bar Council below highlight that there are some deviations in the General Scheme as against these recommendations.

3.1.5. On the 28th of September 2022 the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) published its Third evaluation on Access to justice and effective remedies for victims of trafficking in human beings in Ireland.

3.1.6. GRETA reports:

“GRETA notes that the above figures of presumed victims do not reflect the real scale of the phenomenon of human trafficking in Ireland, due to persisting limitations of the National Referral Mechanism and the fact that An Garda Síochána remains the only stakeholder taking decisions on identifying victims of THB”.

3.1.7. In light of these observations, the Bar Council believes that the priority should be to establish a mechanism which is capable of identifying victims of trafficking **quickly and fairly**, with a number of stakeholders involved rather than just the Gardai. Early identification is essential to ensure that suspected victims receive the assistance and support to which they are entitled as soon as possible and to avoid prosecution and punishment of victims for offences inherent in or consequent on their trafficking. There is little point in the NRM exercise if it takes months to deliver an identification decision. The victim may be re-trafficked, deported or prosecuted and imprisoned in the meantime.

3.2. HEAD 12 (INTERPRETATION FOR PART 3)

3.2.1. The definitions for ‘trafficks’, ‘exploitation’, ‘sexual exploitation’, ‘forced labour’ and labour exploitation’ in Head 12 are taken from section 1 of the Criminal Justice Act 2008 (hereinafter the “2008 Act”). It is not necessary to repeat the definitions in this way. It is suggested that definitional parts should, where appropriate, simply refer directly to section 1 of the 2008 Act.

3.2.2. The current definition of ‘victim of human trafficking’ in Head 12, and the recognition of applicants as ‘victims of human trafficking’ by the National Referral

Mechanism (hereinafter the “NRM”) Operational Committee is unnecessarily determinative and risks prejudicing prosecutions for offences under the 2008 Act.

3.2.3. Given that the identification system only requires at most a reasonable grounds identification, the term ‘suspected victim of trafficking’ should be retained and defined in terms of a person in respect of whom ‘there are reasonable grounds to believe that he or she has been a victim of an offence under section 2, or 4 of the 2008 Act or section 3 of the Child Trafficking and Pornography Act 1998 (hereinafter the “1998 Act”) (i.e. the victim of trafficking)’. There can then be no confusion with the criminal standard in respect of the prosecution of the alleged trafficker or a claim that they are significantly prejudiced in their defence by reason of the identification.

3.2.4. In all of the circumstances, it is recommended that a person who has been recognised by the National Referral Mechanism (NRM) Operational Committee should be designated as a ‘suspected victim of trafficking’ rather than a ‘victim of trafficking’.

3.2.5. A person who has made an application for recognition which has been referred to the NRM Operational Committee should separately be designated as a ‘NRM potential victim of trafficking’ as this person has only passed through an initial preliminary analysis process with the NRM Competent Authorities or trusted partners who have made a referral. It is the NRM Operational Committee which identifies or recognises the applicant as a (suspected) victim of trafficking.

3.2.6. An ‘applicant’ should be defined as a person who has applied for identification/recognition to a referral body or has been designated as a ‘NRM potential victim of trafficking’ (i.e. a referral has been made to NRM Operational Committee in respect of their application). Interim supports should be available either to all applicants or at least to ‘NRM potential victims of trafficking’.

3.3. HEAD 13 (COMPETENT AUTHORITIES OF THE NATIONAL REFERRAL MECHANISM)

3.3.1. It is important that all bodies that may have contact with victims should be integrated into the national referral mechanism.

- 3.3.2. The Marine Survey Office of the Department of Transport has responsibility for implementation of working time rules at sea under the European Union (International Labour Organisation Work in Fishing Convention) (Working Hours) Regulations 2019 SI 672 of 2019. Consideration could be given to designating the Minister for Transport as a competent authority.
- 3.3.3. Given that the Minister for Enterprise is responsible for employment permits, and that these are susceptible to abuse by traffickers, this Minister might also be included.
- 3.3.4. It is not clear, however, that there is any operational reality to the designation of the Minister for Social Protection as a Competent Authority unless it is apparent that her officials are encountering victims who may require identification.
- 3.3.5. It is also suggested that the wording of this Head be changed to reflect the fact that it is the NRM Operational Committee which will identify/recognise (suspected) victims of trafficking on foot of a referral from one of the referral bodies.
- 3.3.6. It is confusing to say that the referral bodies recognise or identify victims when this is also a description of the role of the NRM Operational Committee. The referral bodies carry out a preliminary investigation of the application for recognition and decide whether or not to refer the application. They do not 'identify' applicants as such.
- 3.3.7. The General Scheme of the Bill seems to outline a scheme whereby applicants will identify themselves to the referral bodies and make an application for recognition. The referral bodies then analyse and investigate that application on a preliminary basis and, if they are satisfied that there are reasonable grounds to believe that the person has been the victim of an offence under section 2, or 4 of the 2008 Act or section 3 of the 1998 Act (i.e. that they have been trafficked), they make the referral, which will include a recommendation, to the NRM Operational Committee in respect of the application. The NRM Operational Committee engages in a more detailed and intensive investigation of the application and makes a decision either to reject or accept the recommendation, grant the application and recognise the applicant as the (suspected) victim of trafficking.

- 3.3.8. This NRM process should more clearly explained in the General Scheme of the Bill. It is important that the legislation is as prescriptive as possible. The process must be easy to understand and to follow.

3.4. HEAD 14 (APPLICATION FOR RECOGNITION AS A VICTIM OF HUMAN TRAFFICKING)

- 3.4.1. As discussed above, Head 14(1) requires that the individual makes an application to be recognised as a ‘victim of human trafficking’.
- 3.4.2. Consideration ought to be given to a mechanism whereby the referral process can be initiated by the referral bodies without the need for a formal application in certain circumstances (for example where the applicant is incapacitated). There is an obligation on the State to identify victims of human trafficking, whether or not those victims apply to be recognised as such.
- 3.4.3. Head 14(3)(a) provides that a Competent Authority or Trusted Partner shall refer the application for determination where it is ‘credible’. It is not necessary to include a credibility assessment as part of the test. There will be situations in which a person’s account or parts of the account is not credible and yet there will be other evidence to support a reasonable grounds decision that the person has been the victim of a trafficking offence. Statutory credibility tests have in the past led to large amounts of litigation. It should be enough that the referral body is satisfied that the application is “based upon reasonable grounds” meaning that there are reasonable grounds to believe that the applicant has been the victim of an offence under section 2, or 4 of the 2008 Act or section 3 of the 1998 Act (i.e., that they have been trafficked)
- 3.4.4. The inclusion of a list of factors or specific reasonable grounds in Head 14(4) is unnecessary as these are elements of the underlying offence of trafficking. It is unclear why it needs to be broken down in this way. It is suggested that the four ‘reasonable grounds’ specified in 14(4) could usefully be replaced by reference to a schedule including a list of [internationally-developed indicators of human trafficking such as those developed by the United Nations Office for Drugs and Crime \(UNODC\)](#). This would have the effect of making the system simpler and quicker.

3.5. HEAD 15 (NATIONAL REFERRAL MECHANISM OPERATIONAL COMMITTEE FOR THE IDENTIFICATION OF VICTIMS OF HUMAN TRAFFICKING)

3.5.1. It is respectfully suggested that there are too many members of the NRM Operational Committee and that its decision-making processes will be unwieldy and unworkable as a result. No more than three people from the NRM Operational Committee should be involved in individual identification/recognition decisions which must be dealt with expeditiously.

3.5.2. If trusted partners are to have a position on the NRM Operational Committee, it is important the Committee has its own legal personality. The legal status of the Committee as described in the Scheme is uncertain. If and when it makes mistakes or suffers from delays in decision-making, its decisions, or its failure to make decisions, will be challenged by judicial review. As set out in Head 15, all of the members would be sued, including the trusted partners. A single entity should be responsible at law for the final decision. A mechanism of recommendation by a troika appointed from a panel consisting of Operational Committee members and other professionals and approval of the decision by a minister might be considered as a solution.

3.5.3. The deciding body – the troika - should have the capacity to investigate applications (or cause them to be investigated by Gardaí) and commission reports which might not have been available to the referring body. The examination of the application should be more intense than the initial preliminary examination for the referral although the standard of proof should be same i.e., ‘reasonable grounds to believe’.

3.5.4. It is also suggested that the deciding body should include an independent person with legal expertise.

3.6. HEAD 16 (SHARING OF INFORMATION BY COMPETENT AUTHORITIES AND TRUSTED PARTNERS)

3.6.1. Information sharing is important, but it should be possible to make identification decisions quickly based on relatively small amounts of information. The preparation

of voluminous files will necessarily slow the decision-making process down, to the detriment of victims of human trafficking.

3.6.2. Head 16(2)(d) provides that the long list of Competent Authorities and Trusted Partners would receive potentially operationally sensitive details of a criminal investigations. Consideration should be given to the necessity and desirability of the dissemination of such information to such a broad forum. Perhaps only the troika deciding upon the particular application needs all of the information.

3.6.3. Head 16(5) requires the consent of the person to information sharing. In order to consent the person must know what information will be shared about them. Consideration should be given as to whether it will be possible to obtain fully informed consent. Further, consideration should be given to a situation in which there is overwhelming evidence of human trafficking, but the victim does not consent to the sharing of information.

3.6.4. In subhead 6, the Child and Family Agency should be able to represent the interests of the child only where it is in loco parentis under the Child Care Act 1991 or some other legal mechanism.

3.7. HEAD 17 (IDENTIFICATION OF A VICTIM OF HUMAN TRAFFICKING BY THE NATIONAL REFERRAL MECHANISM OPERATIONAL COMMITTEE)

3.7.1. Again, the inclusion of a credibility requirement is not desirable. This requirement makes identification contingent on victim cooperation, which is contrary to international law. A reasonable grounds assessment is what is required by international law and this ought to be sufficient.

3.7.2. The person identified should be identified as a suspected victim of trafficking only. There is no necessity for a conclusive decision.

3.7.3. The requirement that the decision be made as soon as practicable is legally meaningless. Referral decisions should be made in a matter of days, with the possibility of extension on exceptional circumstances, and recognition decisions

within a similar timeframe. The entire process should not take longer than 10 working days.

- 3.7.4. An effective mechanism of independent review of decisions should be included so as to avoid a situation where negative decisions are immediately subjected to judicial review. This function might be conferred on an existing body such as the International Protection Appeals Tribunal.

3.8. HEAD 18 (DESIGNATION BY ORDER OF TRUSTED PARTNER)

- 3.8.1. While the inclusion of a number of Non-Governmental Organisations (NGOs) who work in the area as referral bodies is a welcome development, there is a risk that the Trusted Partner mechanism will intentionally or unintentionally compromise the independence of NGOs or influence them to withhold legitimate criticism of anti-trafficking law and policy.

- 3.8.2. A mechanism of independent review of decisions relating to trusted partner status should therefore be included. For example, a Trusted Partner Appeal Panel operated by the Charities Regulator, akin to the Approved Housing Body Appeals process.

3.9. HEAD 19 (ACCESS TO SERVICES BY VICTIMS OF HUMAN TRAFFICKING)

- 3.9.1. Ideally, the identification system should be as simple and as quick as possible so as to ensure early identification of victims. Clear, short timeframes should be included for the making of referral decisions by Competent Authorities and Trusted Partners and of identification decisions by the Operational Committee. It should be possible to make these decisions in a matter of days given the low evidential threshold of 'reasonable grounds to believe.' If decisions are made quickly, there is no requirement for interim measures.

- 3.9.2. However, if the decision-making process is drawn out, it will be necessary to provide for assistance and support of applicants while their applications are considered. This will mean, in effect, ensuring that upon application, and certainly upon referral, an applicant will be entitled to a recovery and reflection period

(including, where necessary, an immigration permission) as well as material assistance in the form of money and accommodation. This is likely to create difficulties because it will mean delegation of the power to confer these benefits to Competent Authorities and Trusted Partners. There is merit therefore in including clear timeframes for decisions so that applicants receive a decision on entitlement to services from the Operational Committee within a matter of days.

3.9.3. More detail is required in relation to the entitlement of beneficiaries of identification to receive public services. A statutory entitlement to a care plan should be created comparable to the aftercare plan provided to children in the care of the Child and Family Agency under section 45 of the Child Care Act 1991. This ought to be on a needs basis and the outcome of the NN and LP case ought to be noted¹.

3.9.4. Under Directive 2011/36/EU, the assistance and support measures to which adult victims are entitled 'shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.'

3.9.5. Victims have a right to these assistance and support measures under EU law and this should be reflected in national law. In order to ensure that the rights are real and effective, it will be necessary either to make amendments to the Social Welfare Consolidation Act 2005, the Housing Acts and the Health Acts or to create a separate regime of entitlements comparable to the EU (Reception Conditions) Regulations 2018.

3.10. HEAD 20 (PROHIBITION ON DEPORTATION OF VICTIM OF TRAFFICKING)

3.10.1. It would be preferable here simply to provide for the grant of an immigration permission to a victim who does not have one. Temporary protection from

¹[https://www.duncanlewis.co.uk/news/Home_Office_concedes_that_their_45_day_policy_for_providing_support_for_victims_of_trafficking_is_unsatisfactory__\(28_June_2019\).html](https://www.duncanlewis.co.uk/news/Home_Office_concedes_that_their_45_day_policy_for_providing_support_for_victims_of_trafficking_is_unsatisfactory__(28_June_2019).html)

deportation is not the same as a valid immigration permission with an associated right to work.

3.10.2. If the provision is to remain as drafted, the Operational Committee must be required to expressly determine the period the person was a victim of human trafficking for. The risk is then that a person may not be protected against all of his/her immigration offences and be deported despite having protection.

3.11. HEAD 21 (PROTECTION FROM PROSECUTION FOR A HUMAN TRAFFICKING OFFENCE)

3.11.1. It is not sufficient to provide that a person cannot be prosecuted for their role in their own trafficking. This is not what is required, it is submitted that the requirement is broader. Article 26 of the Anti-Trafficking Convention contains the following “non-punishment provision”:

3.11.2. *“Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”*

3.11.3. Further, Article 8 of the Anti-Trafficking Directive provides for the non-prosecution or non-application of penalties to the victim in the following terms:

3.11.4. *“Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.”*

3.11.5. It would be better to create a specific defence of having been trafficked on the model of section 45 of the Modern Slavery Act 2015 in England and Wales. This would cover what is covered by Head 21 while ensuring that evidence of trafficking was considered by the DPP at charging stage at the evidential level as well as as part of the public interest analysis. It would also give defence lawyers a larger role in victim identification in the criminal justice system.

4. CONCLUSIONS

A simple, speedy, effective procedure, with clear time limits, appeals processes and entitlements to supports on a needs basis is necessary to achieve the aim of “*early identification of, assistance to and support for victims*”. At present, the Council cautions that the proposed measures risk the creation of a mechanism that creates lengthy delays and bureaucracy thus impeding the legitimate stated aim of the mechanism.

For further information & queries contact:

Nuala Byrne

Secretary, Human Rights Committee of The Bar of Ireland

E: nbyrne@lawlibrary.ie

Houses of the Oireachtas

Leinster House

Kildare Street

Dublin 2

D02 XR20

www.oireachtas.ie

Tel: +353 (0)1 6183000 or 076 1001700

Twitter: @OireachtasNews

Connect with us



Download our App

