

IHREC Submission to GRETA
in advance of its Second Evaluation Round of Ireland

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**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**

Irish Human Rights and Equality Commission

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Irish Human Rights and Equality Commission Submission to GRETA in advance of its Second Evaluation Round in Ireland

1. Introduction

The Irish Human Rights and Equality Commission (“the Commission” or “IHREC”) is the National Human Rights Institution (“NHRI”) for Ireland, established under the Irish Human Rights and Equality Commission Act 2014 (“2014 Act”). The Commission has a statutory remit to:

- protect and promote human rights and equality in Ireland;
- promote a culture of respect for human rights, equality and intercultural understanding;
- promote understanding and awareness of the importance of human rights and equality; and
- work towards the elimination of human rights abuses and discrimination.

In accordance with section 10(2)(h) of the 2014 Act, the Commission is mandated to consult with international bodies or agencies with a knowledge or expertise in human rights or equality.

The 2014 Act established a new Commission, merging the former Irish Human Rights Commission and the former Equality Authority into an enhanced body. The new Commission enjoys increased institutional accountability to the Houses of the Oireachtas (Parliament). Section 9(2) of the 2014 Act provides that ‘the Commission shall ... be independent in the performance of its functions’. The legislative framework establishing the Commission was drafted to ensure that it meets the requirements of the ‘Principles relating to the status and functioning of national institutions for the protection and promotion of human rights’ (the ‘**Paris Principles**’).

The Commission welcomes the upcoming Second Evaluation Round by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (‘**GRETA**’) and the opportunity to make a submission in advance of GRETA’s country visit.

The Commission notes the progress made by the Irish State since GRETA reported in its First Evaluation Round in September 2013. The Department of Justice and Equality consulted on and published a *Review of the National Action Plan to Prevent and Combat Trafficking in Human Beings 2009-2012*, which outlined the progress made by the State in its actions to address trafficking in human beings.

The Commission welcomes the publication in June 2015 of the Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland (‘**Draft Second National Action Plan**’). Particularly, the Commission notes the incorporation in the Draft Second National Action Plan of recommendations by international bodies, including those made by GRETA and by the Organization for Security and Co-operation in Europe (OSCE). The open consultation which followed publication of the Draft Second National Action Plan is also welcomed by the Commission as a means of engaging with important stakeholders.

The Commission is nevertheless concerned that a number of GRETA’s First Evaluation Round recommendations have not been actioned in full and that these gaps have exposed a deficit in the protection of and assistance provided to victims of trafficking in human beings.

It is an ongoing concern of the Commission that (at the time of writing) the Draft Second National Action Plan has not been adopted in its final form, despite GRETA reporting in 2013 that a new

National Action Plan for the period 2013-2016 was being drafted. Many of the essential action points identified in the Draft Second National Action Plan await urgent implementation.

The Commission welcomes that many points raised in the First Evaluation Round are reflected in the Draft Second National Action Plan. However, various commitments in the Draft Second National Action Plan continue to be framed in exploratory language, without firm commitments in terms of timelines or expected outcomes. It is regrettable that concrete recommendations to improve systems and outcomes for victims of trafficking in human beings are still being 'considered' by the State, as evidenced in the Draft Second National Action Plan.

Of immediate and pressing concern to the Commission is the process and procedure surrounding the initial identification of potential victims of human trafficking in Ireland and the priority to introduce improvements to the National Referral Mechanism through legislative reforms. Indeed, 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.

The Draft Second National Action Plan commits to carrying out a fundamental review of the identification process. However, this prospective commitment, in the absence of concrete timelines and outcomes, is not adequate, considering that more than one year has passed since the finding in the Irish High Court which showed there to be 'fundamental difficulties with the mechanism in place in this State' (*P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General*). The Court held that the current administrative scheme for the identification and protection of victims of human trafficking is inadequate in terms of transposing *EU 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*.

This submission raises these concerns, amongst others, in the State's response to trafficking in human beings in Ireland. The submission seeks to highlight areas where full compliance with the Council of Europe Convention on Action against Trafficking in Human Beings ('**the Convention**') is in question and where recommendations from GRETA's First Evaluation continue to require full implementation.

2. Summary of Recommendations

Legal and policy framework

The Commission recommends that the Government take the necessary legislative measures to place assistance and protection for victims of trafficking on a statutory basis.

The Commission recommends that in transposing the Victims' Rights Directive, special protection measures for victims of trafficking are incorporated.

Measures to prevent trafficking in human beings

The Commission recommends that proposed reforms under the *Criminal Law (Sexual Offences) Bill 2015* are accompanied by holistic and comprehensive support and awareness strategies, including a sufficiently-resourced exit strategy. The Commission recommends that any changes in the law should be monitored closely to measure their effectiveness, in terms of discouraging demand, the provision of protection and assistance to victims of trafficking and in relation to the effective prosecution of traffickers.

The Commission recommends that the State criminalise the use of services which are the object of labour exploitation.

The Commission recommends that labour inspections are properly resourced, frequent and targeted at sectors which show a high potential for human trafficking.

The Commission recommends that facilitating lawful migration, particularly in at-risk sectors, should form part of the strategy to prevent trafficking for the purpose of labour exploitation.

The Commission recommends that the State conduct a comprehensive human rights-led revision of the State's procurement practices.

Measures to address child trafficking

The Commission recommends the development of a specific identification mechanism which takes into account the special circumstances and needs of child victims of trafficking and which adopts best international practice in age assessment procedures.

The Commission recommends the introduction of a specialist legal support network to provide advice to victims of child trafficking.

The Commission recommends that the State ratify the Second Optional Protocol to the UN Convention on the Rights of the Child as a matter of priority.

Identification of victims of trafficking in human beings

The Commission recommends that the review of the formal identification process, signalled in the Draft Second National Action Plan, is subject to clear timelines to indicate when the new identification process will be in place, and that the State indicate any measures to be applied in the interim.

The Commission recommends that the State adopt legislation to ensure that effective, transparent and accessible measures give effect to the State's obligations under Articles 10 and 12 of the Convention. Statutory rights to assistance and protection should be available to all potential victims of trafficking, regardless of the potential victim's nationality or immigration status.

The Commission recommends that the relationship between asylum and trafficking in human beings is closely monitored and that key personnel receive adequate training in the identification of potential victims of trafficking in human beings.

The Commission recommends that the decision-making process at both the initial reasonable grounds stage and also at the conclusive decision stage is put on a statutory footing, setting out precisely the decision to be made, the low threshold that applies at the initial stage, and the inquisitorial nature of the process. The legislation should include a clear statement regarding the rights and entitlements that flow from a positive decision.

The Commission recommends that the mechanism established for the identification of victims of human trafficking affords fair procedures to the potential victim throughout the process. In the case of negative finding by An Garda Síochána, reasons should be provided to the applicant in writing.

The Commission recommends that the State formalise the role and input of specialised NGOs and other relevant actors in victim identification.

Non-punishment of victims of trafficking in human beings

The Commission recommends that the State ensure that victims of trafficking are not prosecuted for crimes that they were compelled to carry out as a result of being trafficked. Consideration should be given to putting the non-punishment principle on a statutory footing.

The Commission recommends the development of detailed, updated guidance from the Director of Public Prosecutions on how its discretion not to prosecute is exercised in cases of suspected trafficking in human beings.

The Commission recommends that the process of identifying a victim of human trafficking be appropriately separated from the investigation of any offence that the person is alleged to have committed, following the decision in the P. Case.

The Commission recommends that the State closely monitor and maintain comprehensive data on the emergence of different types of exploitation, including exploitation for criminal activity in certain high-risk areas of criminal activity.

Legal support for victims of trafficking in human beings

The Commission recommends that all potential victims of trafficking be proactively provided with adequate, early legal support in order to avoid prosecution as a result of being trafficked and in order to avail of an effective remedy and appropriate redress for any harm caused to them. Comprehensive information should be provided to enable victims of trafficking to navigate the immigration process.

The Commission recommends that the State consider expanding the remit of the Legal Aid Board in cases where a person is the victim of trafficking for labour exploitation and requires legal representation to obtain redress from a tribunal such as the Workplace Relations Commission.

Redress for Victims of Trafficking

The Commission recommends that victims of trafficking are provided with the necessary information and supports in order to secure any compensation to which they are entitled.

The Commission recommends that the State re-examine the possibility of establishing a dedicated compensation fund for victims of trafficking including a contribution from any proceeds confiscated in the course of criminal proceedings against perpetrators of human trafficking.

Recovery and Reflection and Temporary Residence

The Commission reiterates its concern that neither EEA nationality nor residency entitlements should operate, in practice, to deprive victims of trafficking of the protections envisaged by Article 12 of the Convention, including measures to assist victims in their physical, psychological and social recovery. The benefit of the Recovery and Reflection period should not be dependent on the provision of a witness statement to An Garda Síochána.

The Commission recommends that the State remove the conditionality of temporary residence for victims of trafficking which is currently based on co-operation with law enforcement agencies under the Administrative Immigration Arrangements.

Accommodation of victims of trafficking in Direct Provision Centres

The Commission reiterates that direct provision accommodation does not respect the rights of victims of trafficking in human beings and does not comply with the Convention. It recommends that victims of trafficking are accommodated in appropriate single gender facilities with access to the necessary support services, in keeping with the State's obligations of prevention and obligations to provide support services to victims under the Convention.

The Commission recommends that the State work with NGOs and civil society to provide appropriate accommodation to victims of trafficking.

The right to shelter and social care needs

The Commission recommends that the Habitual Residence Condition not be applied as an obstacle to victims of trafficking in accessing any supports including shelter or housing.

The right to seek employment

The Commission recommends that victims of trafficking, lawfully present in the State, be afforded access to the labour market in line with Article 12(4) of the Convention.

Measures concerning substantive criminal law, investigation, prosecution and procedural law

The Commission recommends that, in reporting prosecutions for trafficking, the State continues to clearly specify the crimes being prosecuted, particularly in relation to sexual exploitation cases against children, to ensure reporting transparency.

The State should address the obstacles to prosecuting perpetrators of trafficking, in particular those responsible for trafficking persons for labour exploitation and forced criminality.

Monitoring and Data Collection

The Commission recommends that an independent dedicated National Rapporteur be appointed to monitor developments in relation to trafficking as well as to ensure that the State complies with its obligations under domestic and international human rights standards.

The Commission recommends that future reviews of the State's National Action Plan are carried out by an independent body, such as an independent dedicated National Rapporteur.

The Commission recommends that the State continue to collect data from relevant actors and that all the necessary measures are taken to ensure respect for the rights of data subjects to personal data protection.

3. Legal and Policy Framework

The legislative framework on human trafficking in Ireland is set out in sections 1 to 4 of the *Criminal Law (Human Trafficking) Act 2008* (as amended by the *Criminal Law (Human Trafficking) (Amendment) Act 2013*).¹ The focus of the legislative approach is on criminalising offences of trafficking in human beings and on providing for dissuasive penalties. The identification of potential victims of trafficking in human beings and related issues regarding the assistance and supports provided upon identification are largely governed by administrative rules.

The decision of the Irish High Court in *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* (the '**P. case**'),² in which the Commission appeared as *amicus curiae*, demonstrates the desirability of placing the current administrative arrangements for identification of victims on a statutory basis as outlined in this submission.

Legislative reform is required to ensure that the prevention of trafficking and protection measures for victims or potential victims are adequate and fully comply with the State's human rights obligations. The Commission acknowledges the development of policy measures to assist potential victims of trafficking. However, the legislation which deals with trafficking focuses almost exclusively on the criminalisation dimension of trafficking and does not adequately address the need for protection and support of victims, or for effective prevention mechanisms. The Commission recalls and echoes GRETA's First Evaluation recommendation to '[...] enact statutory rights to assistance and protection for possible victims of trafficking [...]'.³

Since Ireland's First Evaluation by GRETA, the legislature has enacted the *International Protection Act 2015*, which seeks to streamline the process for granting international protection. While this legislation has been signed into law, the majority of its provisions are not yet operational, pending the establishment of the new systems required to give effect to the single application procedure.⁴

¹ Section 1 of the *Criminal Law (Human Trafficking) (Amendment) Act 2013* amended section 1 of the *Criminal Law (Human Trafficking) Act 2008*, by expanding the definition of labour exploitation to include forced begging. It also provided for the removal of organs and forced participation in criminal activity to be included as forms of exploitation.

² *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222. In this case, the applicant had spent almost three years in detention in the Dóchas Centre (a closed, medium-security prison for women), much of that time waiting for a decision on her application to be recognised as a victim of human trafficking. See Irish Human Rights and Equality Commission (2015) 'IHREC calls for immediate action to protect victims of human trafficking following High Court Judgment' [press release] 15 April 2015. <http://www.ihrec.ie/news/2015/04/15/ihrec-calls-for-immediate-action-to-protect-victim/>

³ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p.48, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

⁴ Where an Act of the Oireachtas contains a commencement provision, power is usually delegated to a Government Minister to issue an order (secondary legislation) prescribing the date upon which the Act, or parts thereof, will 'commence', or enter into force. It is often at the Minister's discretion as to when a piece of legislation will enter into force. At the time of writing (5 September 2016) sections 1-2, 78 and 80-81 have been commenced, but the remainder of the Act has not yet been commenced. The Irish Government seeks to commence the legislation by the end of 2016: Minister of State David Stanton TD, 'Private Members Immigration (Reform) (Regularisation of Residency Status) Bill 2016: Second Stage', *Parliamentary Debates: Seanad Éireann*, 29 June 2016, vol. 246, no. 2, p. 2.

The *International Protection Act 2015* explicitly recognises the vulnerable position of victims of trafficking in human beings, which must be taken into account in the application of Part 8 of the Act.⁵ Part 8 of the Act governs the content of international protection and the rights flowing from recognition of refugee status or the granting of subsidiary protection. In this way, the *International Protection Act 2015* recognises the vulnerable position of victims of trafficking, but this does not have any application prior to the granting of international protection, where a victim of trafficking is engaged in the refugee or subsidiary protection determination process.

In its Recommendations on the *General Scheme of the International Protection Bill 2015*, the Commission noted that separate legislation may be required in relation to the identification of potential victims of trafficking and the provision of supports, which would facilitate a move away from conflating issues of trafficking and protection more generally. However, in the interim, in order to ensure an adequate response on the part of the State to victims of trafficking, the Commission recommended the insertion of additional provisions in the *International Protection Act 2015* to bring Ireland's law into compliance with minimum international standards. The amendments recommended by the Commission related to healthcare, material assistance, access to the labour market, access to adequate information, free legal advice and child-specific provisions for child victims.⁶ However, the *International Protection Act 2015* did not address assistance and protection measures for victims of trafficking.

The Commission notes that *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* (the '**EU Victims' Rights Directive**') applies to victims of crimes that have occurred within the territory of the European Union. It makes specific reference to victims of human trafficking under Article 22 and recognises that they may require an individual needs assessment 'to identify special protection needs' in order to ensure that appropriate measures are available to them during criminal proceedings. The Directive was required to be transposed by Member States by 16 November 2015 but this has not been realised in Ireland. While legislation to transpose the Directive is currently being drafted, the Directive's provisions have direct effect following the passing of the transposition deadline.⁷

The Draft Second National Action Plan aims to provide protection for trafficked persons during the criminal justice process in a number of ways which are reflective of the Victims' Rights Directive protections. The Commission recommends the Victims' Rights Directive be transposed without further delay and should incorporate special protection measures for victims of trafficking during criminal justice proceedings. The State should explore how the Victims' Rights Directive can enhance the identification and assistance of trafficked persons.⁸

The Commission recommends that the Government take the necessary legislative measures to place assistance and protection for victims of trafficking on a statutory basis.

⁵ Section 58 of the *International Protection Act 2015* (not commenced at the time of writing).

⁶ Irish Human Rights and Equality Commission (2015) *Recommendations on General Scheme of the International Protection Bill 2015*, Dublin: Irish Human Rights and Equality Commission pp.18-21. <http://www.ihrec.ie/news/2015/06/30/ihrec-recommendations-on-the-general-scheme-of-the/>

⁷ A 'General Scheme' for the *Criminal Justice (Victims of Crime) Bill* was published on 8 July 2015, and is available at [http://www.justice.ie/en/JELR/Pages/Criminal_Justice_\(Victims_of_Crime\)_Bill](http://www.justice.ie/en/JELR/Pages/Criminal_Justice_(Victims_of_Crime)_Bill). However, at the time of writing (5 September 2016) the Bill itself awaits publication.

⁸ See Department of Justice and Equality 'Report on the Roundtable on Identification of Victims of Human Trafficking' 15 December 2015, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/\\$File/Roundtable_report_Dec_2015_%20.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/$File/Roundtable_report_Dec_2015_%20.pdf)

The Commission recommends that in transposing the Victims' Rights Directive, special protection measures for victims of trafficking are incorporated.

4. Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Ireland ('the Convention')

4.1. Measures to prevent trafficking in human beings

Article 5 of the Convention requires a human rights-based approach to the positive duty to prevent trafficking in human beings. Article 6 of the Convention, on the measures which a State may take to discourage demand for trafficking in human beings, entails a holistic approach. This includes research on best practices, methods and strategies, awareness raising, targeted information campaigns and educational programmes.

Prevention of trafficking for sexual exploitation

The Commission notes the publication of the *Criminal Law (Sexual Offences) Bill 2015*⁹ and its stated purpose to discourage the demand which fosters the sexual exploitation of persons, by criminalising the purchase of sex.¹⁰ The proposed law provides for the separate offence of making a payment for the prostitution of a trafficked person.¹¹ The draft legislation proposes to increase the penalties for existing offences relating to organising prostitution, living on the earnings of prostitution and brothel-keeping.¹² The *Criminal Law (Sexual Offences) Bill 2015* also takes into account the potential cross-border implications of similar reforms in Northern Ireland.¹³

⁹ The *Criminal Law (Sexual Offences) Bill 2015* was published on 23 September 2015. The Bill was introduced in the Upper House of the Irish Parliament (Seanad Éireann) on 6 October 2015 by the Minister for Justice and Equality and, at the time of writing (5 September 2016) further debate in Lower House of Parliament (Dáil Éireann) is pending, prior to enactment.

¹⁰ Former Minister of State Aodhán Ó'Riordán stated in introducing the proposed laws to decriminalise the sale of sexual services: 'The effect of such a change will be that only those people who solicit the sexual services of others, that is, the buyers and pimps, will be prosecuted for the solicitation and loitering offences [...] The primary rationale for decriminalising the sale of sexual services is that those offering the services involved in prostitution are highly vulnerable, often from impoverished backgrounds and frequently with addiction and other issues. It is often the case that those involved in on-street prostitution are among the most vulnerable and marginalised within an already vulnerable group. Retaining criminalisation for solicitation is to penalise this high-risk group. Decriminalisation will also allow people to report violence experienced on the street without fear of prosecution and encourage them to seek appropriate support services. The decriminalisation of on-street prostitution will bring the Irish approach further into line with that of Northern Ireland and the Nordic approach generally'. Minister of State with responsibility for New Communities, Culture and Equality, Aodhán Ó'Riordán, TD, 'Criminal Law (Sexual Offences) Bill 2015: Committee Stage', *Parliamentary Debates: Seanad Éireann*, 11 December 2015, p. 2, available at: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2015121100002?>

¹¹ Section 26 of the *Criminal Law (Sexual Offences) Bill 2015*.

¹² Tánaiste and Minister for Justice and Equality Deputy Frances Fitzgerald, 'Criminal Law (Sexual Offences) Bill 2015: Report and Final Stages' *Parliamentary Debates: Seanad Éireann*, 21 January 2016, vol. 245, no. 5, p.2. A concern has been raised that maintaining the offence of brothel-keeping (where a brothel is defined in terms of a premises used by more than one person), and increasing the penalties for this offence, continues to criminalise a person who may be working together with another for safety reasons, and increases the penalties which a person in that situation may incur. See Catherine Martin TD, 'Written Answers: Criminal Law' (question no. 95) *Parliamentary Debates: Dáil Éireann*, 20 July 2016, vol. 919, no.1, p. 72.

¹³ The *Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act 2015* received royal assent on 13 January 2015 and the provisions dealing with the criminalisation of the purchase of sexual services came into force on 1 June 2015. The Act more widely addressed issues surrounding human trafficking,

The Commission observes that there is a dearth of conclusive evidence that any one legislative approach has the definitive effect of reducing trafficking in human beings for sexual exploitation. In this context, the Commission stresses the need for holistic and multi-agency strategies such as exit assistance for persons seeking to leave prostitution and to re-enter the labour market, together with mechanisms to reduce vulnerability to exploitation. Exit strategies and related supports must be properly resourced. The Commission notes that recent legislative reforms in Northern Ireland required relevant Government Departments to develop a Strategy that would introduce a programme of assistance and support for those seeking to leave prostitution, in recognition of the barriers faced by people who want to exit prostitution.¹⁴ The Northern Ireland Department of Health published an initial Programme of Assistance and Support to connect those wishing to leave prostitution with advice services and support they may require.¹⁵ The Commission calls for sufficiently-resourced exit strategies and supports to be put in place in Ireland.

An approach which incorporates administrative, educational, social and cultural measures would assist in achieving greater compliance with obligations under Article 6 of the Convention to discourage demand. The Commission welcomes initiatives undertaken by the Anti-Human Trafficking Unit (the 'AHTU') in partnership with Ruhama, to combat the trafficking of women and girls into prostitution, including the all-island REACH project.¹⁶ It recommends that the proposed reform under the *Criminal Law (Sexual Offences) Bill 2015* is accompanied by ongoing research on best practices, awareness-raising programmes, targeted information campaigns and educational programmes.

The proposed change in law should be kept under review to monitor and evaluate the extent to which effective dissuasion under Article 6 of the Convention is realised. As previously recommended by GRETA in relation to states which have criminalised the purchase of sexual services, the legislation must be kept under review to measure the impact on the provision of protection and assistance to victims of trafficking and the effective prosecution of traffickers. More broadly, the phenomenon of trafficking for the purposes of sexual exploitation should be continuously assessed.¹⁷

The Explanatory Report accompanying the Convention lists 'research' as an essential measure in discouraging demand.¹⁸ The media and civil society are identified as key agencies and in this context

slavery and other forms of exploitation, including measures to prevent and combat exploitation and to support victims, available at: <http://www.legislation.gov.uk/nia/2015/2/contents>.

¹⁴ Department of Health, Social Services and Public Safety (2015) 'Leaving Prostitution: a strategy for help and support', December 2015, available at: <https://www.health-ni.gov.uk/publications/leaving-prostitution-strategy-help-and-support>. The Strategy must be reviewed after three years.

¹⁵ Department of Health (2016) 'Leaving Prostitution: A Programme of Assistance and Support, July 2016, available here: <https://www.health-ni.gov.uk/publications/leaving-prostitution-strategy-help-and-support>

¹⁶ The REACH project ran from December 2013 until December 2015 and aimed to contribute to efforts to combat the trafficking of women and girls by: increasing access to supports and information; encouraging zero tolerance of violence against women and girls by raising awareness of the harms caused by the demand for sexual services amongst potential buyers of sex and by raising awareness of the indicators of human trafficking among relevant professionals and educating on the appropriate course of action, see: <http://www.reachproject.eu/>.

¹⁷ See for example: Council of Europe Group of Experts on Action against Trafficking in Human Beings (2014) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden*, p.31, available at: <http://www.coe.int/en/web/anti-human-trafficking/sweden>

¹⁸ Council of Europe (2005) *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, Council of Europe Treaty Series 197, pp. 19-20, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d38>

the Commission welcomes the State's proposal to support national media in raising awareness of trafficking in human beings under the Draft Second National Action Plan.

Prevention of trafficking for labour exploitation

GRETA highlights that: 'measures to discourage demand should target all forms of exploitation and not just the sex industry' and that the ineffective regulation of certain labour markets creates an environment in which the use of trafficked labour is possible and profitable.¹⁹ The Commission welcomes the commitments made in the Draft Second National Action Plan to work with civil society, trade unions and with business representatives to explore effective methodologies to reduce the demand together with the commitment to keep relevant legislation under review. The Commission further welcomes Ireland's ratification of *the ILO Convention concerning decent work for domestic workers* in August 2014.

The Commission recommends that increased consideration should be given to examining how the demand for trafficked persons for the purpose of labour exploitation can be addressed most effectively, in response to the recommendation by GRETA in its First Evaluation Round.²⁰ The State does not appear to be considering the possibility of establishing as a criminal offence the use of services which are the object of labour exploitation, where there is knowledge that the person is a victim of trafficking in human beings, as recommended in GRETA's First Evaluation Round.

Best practice prevention strategies in the context of labour exploitation include taking measures:

'to improve labour conditions in sectors vulnerable to the use of victims trafficked for labour exploitation, through strengthening and enforcing labour standards and regulations'.²¹

The Commission recommends that labour inspections are well-resourced,²² frequent and targeted and that inspectors receive regular training on identifying potential victims of trafficking in human beings. A perception that labour inspectors are more focussed on immigration status rather than employment rights has been reported by a sample of low-paid migrant workers who were interviewed by the Migrant Rights Centre of Ireland ('MRCI').²³

¹⁹ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Third General Report on GRETA's Activities*, Strasbourg: Council of Europe, p. 46, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

²⁰ GRETA recommended that 'Irish authorities should make more efforts to discourage demand for the services of trafficked persons for the purpose of labour exploitation, in partnership with the private sector and civil society' and invited the State 'to consider establishing as a criminal offence the use of services which are the object of labour exploitation, with the knowledge that the person is a victim of trafficking in human beings' Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, pp. 33-35, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

²¹ Mike Dottridge, (2016) *Emerging Good Practice by State Authorities, the Business Community and Civil Society in the Area of Reducing Demand for Human Trafficking for the Purpose of Labour Exploitation* Strasbourg: Council of Europe, p. 4, available at: <http://www.coe.int/en/web/anti-human-trafficking>.

²² In January 2016, the Workplace Relations Commission Inspector Services had a staff level of 70.2 full-time equivalents, of which 55.8 full-time equivalents were inspectors: Minister, Department of Jobs, Enterprise and Innovation, Richard Bruton TD, 'Written Answers: Workplace Relations Services Staff', (question no. 292) *Parliamentary Debates: Dáil Éireann*, 13 January 2016, vol. 902, no. 1, p. 81.

²³ The MRCI ran focus groups to examine trends and issues affecting migrants in low-paid precarious employment, as part of a preventative strategy to tackle exploitation. To address demand issues and to protect workers, it recommended introducing a scheme to enable undocumented workers to regularise their

Areas which are reported to involve a higher risk of labour exploitation include the domestic work sector, the maritime industry, the restaurant sector, certain agricultural industries, entertainment (including circuses) and car-washing services.²⁴ The Commission notes positive action in relation to the mechanism established to monitor the domestic staff of diplomatic personnel, following reports of exploitation of domestic workers in diplomatic households.²⁵

The Commission recommends that facilitating lawful migration, particularly in at-risk sectors, should form part of the strategy to prevent trafficking for the purpose of labour exploitation. For example, a demand for domestic workers (not included in the employment permit scheme) has been identified by the MRCI, which calls for a coherent labour policy responding to labour demands through legal channels.²⁶

Experience in the UK, in relation to the Gangmasters Licensing Authority shows that:

‘effectiveness requires combined labour inspection and enforcement powers, international information exchange, worker awareness of their rights, and practical support by the industry to ensure ethical standards by the companies they use.’²⁷

The Commission welcomes the agreement reached between the Workplace Relations Commission and the UK Gangmasters Licensing Authority to increase cross-border protection, to exchange information and to enable sharing of best practice between the two bodies.²⁸ The Commission highlights the need for clear lines of responsibility in cross-border cases. A focus on the agriculture, aquaculture and food processing sectors has been reported following the agreement between the bodies.²⁹

The State has reported increased co-operation between the Workplace Relations Commission (‘WRC’) and the Department of Transport concerning inspections in the fishing industry in 2015. The WRC also participates on the ‘North Atlantic Fisheries Project’ established to identify and support victims of trafficking within the marine sector.³⁰ A multi-agency taskforce established to examine the employment of non-EEA workers in the Irish fishing fleet recognised the maritime industry as a

immigration status; reviewing available migration channels at all skill levels and reviewing ineligible categories in the Employment Permit Scheme to address occupational shortages in the labour market. Migrant Rights Centre of Ireland (2015) ‘All Work and Low Pay: The Experience of Migrants Working in Ireland’, Dublin: Migrant Rights Centre of Ireland.

²⁴ Recent cases of potential trafficking are reported by Louise Kelly: ‘Up to 20 people found in house as part of investigation into suspected human trafficking’, *Irish Independent*, 19 August 2016, available at: <http://www.independent.ie/irish-news/news/up-to-20-people-found-in-house-as-part-of-investigation-into-suspected-human-trafficking-34978285.html>

²⁵ Department of Foreign Affairs and Trade (2014) ‘Guidelines Relating to the Employment of Private Domestic Employees by Accredited Members of the Mission’, Dublin: Department of Foreign Affairs and Trade.

²⁶ Migrant Rights Centre of Ireland (2015) ‘All Work and Low Pay: The Experience of Migrants Working in Ireland’, Dublin: Migrant Rights Centre of Ireland. In the context of domestic workers, the Commission recalls that the OSCE Special Representative on Trafficking identified the practice of tying visas to the employer as a factor which may contribute to trafficking in domestic servitude: OSCE (2011) ‘Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude’, Occasional Paper series no.4, available at: <http://www.osce.org/secretariat/75804>.

²⁷ GRETA (2013) *Third General Report on GRETA’s Activities*, Strasbourg: Council of Europe, p. 39, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

²⁸ Website of the Workplace Relations Commission (no date), available at: https://www.workplacerelations.ie/en/news-media/Workplace_Relations_Notices/WRC_Gangmasters.html

²⁹ Ciarán D’Arcy, ‘New cross-border agreement to stop labour exploitation’, *Irish Times*, 14 March 2016.

³⁰ Minister for Jobs and Innovation, Richard Bruton TD, ‘Written Answers: Human Trafficking’ (question no. 222), *Parliamentary Debates: Dáil Éireann*, 10 November 2015, vol. 895, no. 3, P.65.

potentially high-risk sector for human trafficking, due to the nature of the work and the employment structures in place. It made recommendations for structured and transparent employment, but did not address wider human trafficking issues.³¹

Emerging good practice in reducing demand for human trafficking for labour exploitation recognises that effective methods involve several actors working together. A best practice measure which Governments can take to reduce demand is a review of the procurement policies of government and state agencies.³² The Commission recommends that the State conduct a comprehensive human rights-lead revision of the State's procurement practices, in the wider context of the *UN Guiding Principles on Business and Human Rights* and the State's development of a National Action Plan on Business and Human Rights.³³

The Commission recommends that proposed reforms under the *Criminal Law (Sexual Offences) Bill 2015* are accompanied by holistic and comprehensive support and awareness strategies, including a sufficiently-resourced exit strategy. The Commission recommends that any changes in the law should be monitored closely to measure their effectiveness, in terms of discouraging demand, the provision of protection and assistance to victims of trafficking and in relation to the effective prosecution of traffickers.

The Commission recommends that the State criminalise the use of services which are the object of labour exploitation.

The Commission recommends that labour inspections are properly resourced, frequent and targeted at sectors which show a high potential for human trafficking.

The Commission recommends that facilitating lawful migration, particularly in at-risk sectors, should form part of the strategy to prevent trafficking for the purpose of labour exploitation.

The Commission recommends that the State conduct a comprehensive human rights-led revision of the State's procurement practices.

³¹ Department for Agriculture, Food and the Marine (2015) 'Report of the Government Task Force on Non-EEA Workers in the Irish Fishing Fleet, Dublin: Department for Agriculture, Food and the Marine. See also: Irish Human Rights and Equality Commission, 'Statement on human trafficking and exploitation of migrant workers in the fishing industry' [press release], 4 November 2015, available at: <http://www.ihrec.ie/news/2015/11/04/statement-on-human-trafficking-and-exploitation-of/>.

³² Mike Dottridge, (2016) *Emerging Good Practice by State Authorities, the Business Community and Civil Society in the Area of Reducing Demand for Human Trafficking for the Purpose of Labour Exploitation* Strasbourg: Council of Europe, p.10, available at: <http://www.coe.int/en/web/anti-human-trafficking>.

³³ The Department of Foreign Affairs and Trade published a *Working Outline of Ireland's National Plan on Business and Human Rights 2016-2019*, available at: <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/Working-Outline-of-Ireland's-National-Plan-on-Business-and-Human-Rights-2016---2019.pdf>

The Commission previously made this recommendation on this point in relation to Ireland's examination by the UN Committee on the Convention on the Rights of the Child Irish Human Rights and Equality Commission (2015) *Report by the Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland's Combined Third and Fourth Periodic Reports*, Dublin: Irish Human Rights and Equality Commission pp.11-13. <http://www.ihrec.ie/publications/list/ireland-and-the-united-nations-convention-on-the-r/>

4.2. Measures to protect and promote the rights of victims of trafficking in human beings

This part of the Commission's submission will address the State's approach to implementing measures of protection and promotion of the rights of victims of trafficking in human beings, under the following headings:

- Measures to address child trafficking
- Identification of victims of trafficking in human beings
- Non-punishment of victims of trafficking in human beings
- Legal support for victims of trafficking in human beings
- Redress for victims of trafficking in human beings
- Recovery and reflection and temporary residence
- Accommodation of victims of trafficking in Direct Provision centres
- The right to shelter and social care needs
- The right to seek employment

4.2.1. Measures to address child trafficking

The Commission welcomes the priority placed on identifying and protecting child trafficking victims in Ireland, as set out in the Draft Second National Action Plan, together with the recognition that this area requires a multi-agency response and close co-operation with civil society partners.³⁴ The Commission further welcomes GRETA's recognition of good practice in Ireland with respect to the placement of unaccompanied minors in small residential centres and foster care placements and the impact on preventing unaccompanied minors from going missing.³⁵ The Commission notes other best practice examples highlighted by GRETA such as operations in the Netherlands which include increased security measures with 24-hour supervision together with special guidance and support for children.³⁶

Reporting of child trafficking

For the year 2014, the Anti-Human Trafficking Unit (the 'AHTU') reported that as part of 79 human trafficking investigations, 46 alleged victims of trafficking were reported to or detected by An Garda Síochána, 12 of whom were children.³⁷ Of these children, nine were alleged victims of sexual exploitation, one was an alleged victim of forced criminality and there were two alleged victims of uncategorised exploitation and forced begging. Of the 44 persons referred to NGOs or International Organisations, one minor victim was reported.

³⁴ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland*, Dublin: Department of Justice and Equality, section 2.7, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/Second National Action Plan - June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/Second%20National%20Action%20Plan%20-%20June%202015.pdf)

³⁵ GRETA (2016) *Fifth General Report on GRETA's Activities*, Strasbourg: Council of Europe, p. 39, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

³⁶ GRETA (2016) *Fifth General Report on GRETA's Activities*, Strasbourg: Council of Europe, p. 39, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

³⁷ Anti-Human Trafficking Unit (2015) *Trafficking in Human Beings in Ireland 2014*, Dublin: Department of Justice and Equality, pp. 1-2, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-A6TFZC1155404-en/\\$File/2014 Annual Report.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-A6TFZC1155404-en/$File/2014%20Annual%20Report.pdf)

According to the AHTU, the majority of alleged minor victims of trafficking in Ireland are Irish and are victims of sexual exploitation, having suffered offences relating to child pornography, sexual assault and sexual indecency, which highlights that 'the criminal offence of human trafficking for the purpose of sexual exploitation covers a broad range of exploitative activities and practice.'³⁸

The United States Trafficking in Persons Report 2016 argues that prosecutions, for example in child molestation cases, are instances of 'non-trafficking crimes' being prosecuted as trafficking crimes, as the definition of sexual exploitation conflates broader exploitation offences, including the possession or creation of child pornography, with trafficking, 'making law enforcement statistics unreliable'.³⁹

Specific identification mechanism and age assessments

While GRETA's First Evaluation welcomed some improvements in dealing with child victims, it called on the State to establish a 'specific identification mechanism which takes into account the special circumstances and needs of child victims of trafficking'.⁴⁰ The commitment in the Draft Second National Action Plan to 'address the possibility of establishing' such a mechanism is a welcome development.⁴¹ However the Commission regards the prospective and exploratory language in the Draft Second National Action Plan to represent a weak commitment on the part of the Irish State, in response to the clear recommendation made by GRETA in 2013. As emphasised by GRETA:

'the identification of child victims requires specialised training to ensure that where a child is unable to explicitly articulate a concrete fear of persecution, including trafficking, such risks are recognised, and protection provided without delay. Identification of child victims is also essential to the prevention of re-trafficking.'⁴²

The Commission echoes the recommendation of GRETA that a specific identification and referral mechanism should be part of measures to improve the identification of child victims of trafficking. To mitigate against the possibility that child victims are treated as offenders or irregular migrants by law enforcement officials, it is imperative that regular training enables officials to look for the indicators of human trafficking and to mainstream prevention of trafficking as a policy measure.⁴³

³⁸ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland*, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/Second National Action Plan - June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/Second%20National%20Action%20Plan%20-%20June%202015.pdf)

³⁹ United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p. 192, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

⁴⁰ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 44, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

⁴¹ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland*, Dublin: Department of Justice and Equality, p.66, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/Second National Action Plan - June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/Second%20National%20Action%20Plan%20-%20June%202015.pdf)

⁴² GRETA (2016) *Fifth General Report on GRETA's Activities*, Strasbourg: Council of Europe, p. 36, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

⁴³ GRETA (2016) *Fifth General Report on GRETA's Activities*, Strasbourg: Council of Europe, p. 37, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

Arnold and Goncalves (2016)⁴⁴ note the absence of publicly available guidance on age assessments in Ireland and report that procedures are guided by the principles set out in *Moke v Refugee Applications Commissioner*.⁴⁵

The Commission welcomes the State's commitment in the Draft Second National Action Plan⁴⁶ to ensure best practice in age assessment procedures.⁴⁷ The Commission recalls its previous recommendation that any provisions in the *International Protection Bill 2015* which relate to medical examinations to determine the age of an applicant should comply with international best practice.⁴⁸

A person who appears to be a minor is referred to TUSLA (the Child and Family Agency responsible for improving wellbeing and outcomes for children). In this context, the Commission recalls the 2016 Concluding Observations of the UN Committee on the Rights of the Child that the State ensure that TUSLA is adequately resourced to respond to child protection referrals.⁴⁹

UNHCR Guidance provides that comprehensive age assessments must take account of 'both the physical appearance and the psychological maturity of the individual'.⁵⁰ In addition, General Comment No. 6 on the UN Convention of the Rights of the Child states that age assessments:

'must be conducted in a scientific, safe, child and gender-sensitive manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and in the event of remaining uncertainty, should accord the individual the benefit of the doubt

⁴⁴ Samantha Arnold and Diego Castillo Goncalves (2016) 'The International Protection Act 2015 and Age Assessments', *Irish Law Times*, 2016, 34(7), 94-98.

⁴⁵ *Moke v Refugee Applications Commissioner* [2005] IEHC 317.

⁴⁶ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland*, Dublin: Department of Justice and Equality, p.70, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/Second National Action Plan - June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/Second%20National%20Action%20Plan%20-%20June%202015.pdf)

⁴⁷ This has been identified as 'a critical step in the identification process', GRETA (2016) *Fifth General Report on GRETA's Activities*, Strasbourg: Council of Europe, p. 37, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

⁴⁸ The Commission noted that the term 'medical examination' was not defined in the draft legislation and is still not defined in the legislation as enacted. It further noted criticisms of procedures such as magnetic resonance tomography, bone and dental assessment, and radiological testing and recommended that age assessment measures should confine the use of medical and other exams to last-resort measures where there are grounds for serious doubt as to the age of the applicant and where other approaches have failed to establish the age of the person in question. See: Irish Human Rights and Equality Commission (2015) *Recommendations on the General Scheme of the International Protection Bill 2015*, Dublin: Irish Human Rights and Equality Commission, available at: <http://www.ihrec.ie/publications/list/ihrec-recommendations-on-the-general-scheme-of-the/>

⁴⁹ The UN Committee urged the State to: 'Ensure the allocation of adequate human, technical and financial resources to the Child and Family Agency to enable it to respond to child protection referrals and address the needs of children at risk in a timely manner, and implement long-term programmes to address the root causes of violence and abuse'. UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/CO/3-4, p. 8, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/039/97/PDF/G1603997.pdf>

⁵⁰ Office of the United Nations High Commissioner for Refugees (1997) *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Geneva: UNHCR, para. 5.11, available at: <http://www.unhcr.org/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html>

such that if there is a possibility that the individual is a child, s/he should be treated as such.⁵¹

In cases of uncertainty the benefit of the doubt should be applied, such that the person will be considered a child, given the heightened risks associated with mis-identification.⁵²

Specialised legal support network

The Special Rapporteur on Child Protection, Dr Geoffrey Shannon, in his Seventh Report published in 2014, noted the introduction of legislation in Northern Ireland to establish a 'specialist legal support network to provide advice to victims of child trafficking' and recommended the introduction of similar measures in this jurisdiction noting the cross-border vulnerability of children.⁵³ In his Eighth Report, published in 2015, Dr Shannon endorsed the recommendations of the United States Trafficking in Persons Report 2015, in particular regarding increased funding for victim services, enhanced training of social workers working with trafficked children and the establishment of a national rapporteur to enhance anti-trafficking efforts.⁵⁴

The OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Maria Grazia Giammarinaro, made a similar recommendation following her visit to Ireland in 2012, calling on the authorities to provide:

'... child victims of trafficking, when necessary, with a guardian and/or legal representative at all stages of assistance, (re)integration and/or return to ensure protection of their human rights and the child's best interests'.⁵⁵

To accompany the *First National Action Plan 2009-2012*, the AHTU published an information guide on services for child victims of trafficking.⁵⁶ The Commission recommends that the AHTU produce an updated guide upon publication of the Second National Action Plan. In this regard, the AHTU should take account of the best practice handbook developed by the European Commission and the EU Fundamental Rights Agency to reinforce guardianship systems to cater for the specific needs of child victims of trafficking under the *EU Strategy towards the Eradication of Trafficking in Human Beings*

⁵¹ Committee on the Rights of the Child (2005) *General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, p. 10, available at: <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

⁵² GRETA (2016) *Fifth General Report on GRETA's Activities*, Strasbourg: Council of Europe, p. 37, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

⁵³ Geoffrey Shannon (2014) *Seventh Report of Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas*, Dublin: Department of Children and Youth Affairs, p. 118, available at: <http://www.dcy.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf>

⁵⁴ Geoffrey Shannon (2015) *Eighth Report of Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas*, Dublin: Department of Children and Youth Affairs, p. 75, available at: <http://www.dcy.gov.ie/documents/publications/201512168thReportSpecialRapponChildProtection.pdf>

⁵⁵ Special Representative and Co-ordinator for Combating Trafficking in Human Beings (2013) *Report by Maria Grazia Giammarinaro, OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings, following her visit to Ireland from 30 January to 02 February 2012*, Vienna: Organisation for Security and Cooperation in Europe, p. 8. <http://www.osce.org/cthb/99775?download=true>

⁵⁶ Anti-Human Trafficking Unit (2012) *Services for Victims of Child Trafficking*, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/OACN-8XVHNX1421296-en/\\$File/Services for Victims of Child Trafficking.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/OACN-8XVHNX1421296-en/$File/Services%20for%20Victims%20of%20Child%20Trafficking.pdf)

2012–2016. One of the aims of the handbook is to achieve greater consistency in the development of guardianship systems for child victims of trafficking across the different EU Member States.⁵⁷

The Commission regrets that Ireland continues to be the only EU Member State which has not yet ratified or acceded to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.⁵⁸

The Commission recommends the development of a specific identification mechanism which takes into account the special circumstances and needs of child victims of trafficking and which adopts best international practice in age assessment procedures.

The Commission recommends the introduction of a specialist legal support network to provide advice to victims of child trafficking.

The Commission recommends that the State ratify the Second Optional Protocol to the UN Convention on the Rights of the Child as a matter of priority.

4.2.2. Identification of victims of trafficking in human beings

In order for a victim of trafficking in human beings to be in a position to invoke his or her fundamental rights, it is crucial that the person is identified as a potential victim of trafficking, in the first instance. Efficient and effective identification processes are vital for combating trafficking and criminalising perpetrators. Early identification as a victim of trafficking also has ramifications for a potential victim's liability under the criminal law, where they have been compelled to participate in criminal acts.⁵⁹ While the Anti-Human Trafficking Unit (the 'AHTU') reports on the target of the Garda National Immigration Bureau (the 'GNIB') to identify potential victims of trafficking within a month,⁶⁰ NGOs have reported delays of over six months in waiting for an initial decision on identification.⁶¹

⁵⁷ European Commission & European Fundamental Rights Agency (2014) *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, Luxembourg: Publications Office of the European Union, p. 27, available at: <http://fra.europa.eu/en/publication/2015/guardianship-children-deprived-parental-care>.

⁵⁸ The *Criminal Law (Sexual Offences) Bill 2015* proposes measures to enable ratification by Ireland of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. This draft legislation is currently being debated in the Irish Parliament. Ireland received 11 recommendations in its Second Universal Periodic Review to ratify the Optional Protocol, see: UN Human Rights Council (2016) *Report of the Working Group on the Universal Periodic Review A/HRC/33/17*, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/IESession25.aspx>.

⁵⁹ The case of *DPP v Nguyen & Anor* [2014] IECA 55 concerned an appeal against the severity of a sentence imposed on two victims of trafficking who had been arrested in a raid on a cannabis grow-house.

⁶⁰ The GNIB, within An Garda Síochána, will 'endeavour to identify suspected victims of trafficking within a maximum period of 31 days', subject to the potential victim providing all necessary information to An Garda Síochána. Anti-Human Trafficking Unit (no date) *Statement of roles and responsibilities for State Organisations, Non-Governmental Organisations and International Organisations in Ireland engaged in cooperation regarding the prevention, protection of victims and prosecution of trafficking in human beings*, p.2, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/ACJN-8YSMSH1751575-en/\\$File/Statement of Roles and Responsibilities.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/ACJN-8YSMSH1751575-en/$File/Statement of Roles and Responsibilities.pdf)

⁶¹ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 43. More recently, NGOs reported delays to the United

Bearing in mind the particular vulnerability of victims of human trafficking and the positive obligation on the State to protect victims,⁶² the Commission emphasises the importance of identifying victims at an early stage, so that the victims can avail of assistance and support mechanisms, and so that the State may avoid further violating the human rights of an individual who has potentially already been subject to a gross violation of their rights.⁶³

As highlighted by GRETA, the State's approach to the identification of victims of human trafficking must be proactive.⁶⁴ Through adequate resourcing and trained personnel in key agencies who are proactive in recognising key trafficking indicators, potential victims of trafficking should be invited to come forward to be identified, to receive appropriate protection from the State and to trigger a criminal investigation. The Commission welcomes advances made by the Irish State in training key personnel, and in particular law enforcement officers, to recognise indicators of human trafficking.⁶⁵ It emphasises the need to continue this crucial training in roles such as labour inspectors, professionals responsible for the provision of assistance and protection measures to victims of trafficking and professionals involved in the international protection process, including the staff of Direct Provision centres.

The Commission also welcomes the State's commitment to carrying out a fundamental review of the formal identification mechanism, to put in place a process which 'meets best international practice'.⁶⁶ However, obstacles remain to securing an identification mechanism in Ireland which meets best international standards⁶⁷ and the Commission continues to be concerned at the delays seen in concluding this review and operationalising the changes required.

States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p. 193, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

⁶² The European Court of Human Rights recognised in *Rantsev v Cyprus and Russia* (App. No. 25965/04) 7 January 2010 that in cases of forced labour and human trafficking: 'States are not permitted to leave [...] a victim of an Article 4 violation unprotected or to return her to a situation of trafficking and exploitation' para. 271.

⁶³ Irish Human Rights and Equality Commission (2015) *Outline Submissions of the Amicus Curiae* in the case of: *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General*, Dublin: Irish Human Rights and Equality Commission, para. 54, available at: <http://www.ihrec.ie/publications/list/p-v-chief-superintendent-of-the-garda-national-im/>

⁶⁴ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, para. 164, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

⁶⁵ These advances have been highlighted by the European Migration Network (2014) *Identifying Victims of Trafficking in Human Beings in Asylum and Forced Return Procedures: Ireland* Dublin: ESRI, available at: http://emn.ie/files/p_20140501014005Ireland EMN Identification of Victims of Trafficking Report 2014 ONLINE FINAL.pdf

⁶⁶ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan*, para. 2.4.1. The Minister for Justice and Equality stated that: 'priority has been given to a review of the current victim identification process and work with state agencies and Civil Society on this important issue is already in train.' Tánaiste and Minister for Justice and Equality, Frances Fitzgerald TD, 'Written Answers: Human Trafficking' (question no. 164), *Parliamentary Debates: Dáil Éireann*, 17 May 2016, vol. 909, no. 1, p. 56.

⁶⁷ See, for example: Department of Justice and Equality 'Report on the Roundtable on Identification of Victims of Human Trafficking' 15 December 2015, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/\\$File/Roundtable_report_Dec_2015_%20.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/$File/Roundtable_report_Dec_2015_%20.pdf)

Irish legislation focusses on the criminalisation of trafficking in human beings,⁶⁸ and does not expressly define ‘victim of trafficking in human beings’. Administrative procedures published by the Department of Justice and Equality (the ‘**Administrative Immigration Arrangements**’)⁶⁹ together with a statement of the roles and responsibilities of key actors (the ‘**Statement of roles and responsibilities**’)⁷⁰ seek to discharge the State’s obligations to identify and protect victims of trafficking in human beings. The State has not expressly legislated for the identification of, or protection for, victims of trafficking.⁷¹ Furthermore, sole competence for the identification of potential victims of trafficking lies with the police, An Garda Síochána, which does not represent good practice.

In this part of the submission, the Commission highlights a number of shortcomings in the identification mechanism, particularly as regards the limited application of the Administrative Immigration Arrangements to ‘foreign nationals’ who would not otherwise have permission to be in the State. It outlines the flaws in the system as failing to ensure proactive identification based on a low-threshold, objective test, as exemplified in the Irish High Court decision: *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* (the ‘**P. Case**’), in which the Commission appeared as *amicus curiae*.⁷² It will also comment on procedural matters relating to transparency and the right to appeal a decision of the GNIB in respect of an initial determination of status as a potential victim of trafficking in human beings.

Limited Application of the Administrative Immigration Arrangements

The Administrative Immigration Arrangements are principally applied for immigration purposes, and are limited to a narrow category of persons who are in the State illegally. Thus, only a ‘foreign national’ who does not otherwise have a ‘valid immigration permission’ is eligible to be considered under the Administrative Immigration Arrangements and entitled to avail of the consequent benefits of identification as a potential victim of trafficking. In this way:

⁶⁸ The *Criminal Law (Human Trafficking) Act 2008* and the *Criminal Law (Human Trafficking) (Amendment) Act 2013* focus on penalising crimes related to trafficking in human beings and in setting out penalties.

⁶⁹ Irish Naturalisation and Immigration Service (2008) *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking*, as amended in 2011, Dublin: Department of Justice and Equality, available at: [http://www.inis.gov.ie/en/INIS/Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking - March 2011.pdf/Files/Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking - March 2011.pdf](http://www.inis.gov.ie/en/INIS/Administrative%20Immigration%20Arrangements%20for%20the%20Protection%20of%20Victims%20of%20Human%20Trafficking%20-%20March%202011.pdf/Files/Administrative%20Immigration%20Arrangements%20for%20the%20Protection%20of%20Victims%20of%20Human%20Trafficking%20-%20March%202011.pdf)

⁷⁰ The Statement of roles and responsibilities details the kinds of supports available upon a reasonable suspicion arising that a person is a victim of trafficking and lists the types of support available from NGOs and IOs. Anti-Human Trafficking Unit (no date) *Statement of roles and responsibilities for State Organisations, Non-Governmental Organisations and International Organisations in Ireland engaged in cooperation regarding the prevention, protection of victims and prosecution of trafficking in human beings*, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/ACJN-8YSMSH1751575-en/\\$File/Statement of Roles and Responsibilities.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/ACJN-8YSMSH1751575-en/$File/Statement%20of%20Roles%20and%20Responsibilities.pdf)

⁷¹ While the former Minister for Justice and Equality, Alan Shatter TD, stated in 2013 that the Administrative Immigration Arrangements would be put on a statutory footing under immigration reforms, the legislation ultimately enacted – the *International Protection Act 2015* – did not effect this reform. Minister for Justice and Equality, Alan Shatter TD, ‘Criminal Law (Human Trafficking) (Amendment) Bill 2013 [Seanad]: Second Stage’, *Parliamentary Debates: Dáil Éireann*, 28 June 2013, p. 3

⁷² *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222, p.18.

‘No stand-alone, formal identification procedure for *all* victims of trafficking irrespective of nationality and immigration status (ensuring access to protection and assistance measures), exists in Ireland’ (*emphasis added*).⁷³

The Commission recommends that the State implement GRETA’s previous recommendation ‘to 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 victim’s nationality or immigration status.’⁷⁴

The European Migration Network has highlighted a difference in treatment in the identification of victims of trafficking who are also in the asylum process or are subject to forced return procedures. It further reported on shortcomings in proactive identification within asylum and forced return procedures and a reliance on self-reporting in those contexts.⁷⁵ This echoes general concerns of GRETA in its Fifth General Report (and not specific to Ireland), which notes the:

‘[...] important gaps in the identification and protection of victims of trafficking among asylum seekers and irregular migrants. Law enforcement efforts to combat irregular migration are too often disconnected from the legal obligation to identify victims of trafficking in human beings, with negative consequences for the protection of such victims and the prosecution of traffickers.’⁷⁶

According to the AHTU’s Annual Report for 2014, of the 46 potential victims of trafficking detected by An Garda Síochána in 2014, 7 of those were seeking asylum. By exploitation type, these asylum seekers were reported to be victims of sexual exploitation (4); forced criminality (1); labour exploitation and sexual exploitation (1) and uncategorised exploitation (1).⁷⁷

In this context, the Commission notes with concern recent reports of an increase in refusals of leave to land which have gone from 1,935 in 2013 to 3,450 in 2015. In the first six months of 2016 a total of 2050 persons had already been refused leave to land in Ireland, with this figure expected to rise to 4,000 by the end of the year.⁷⁸ The Commission emphasises that points of entry must be adequately resourced with trained personnel, to ensure that victims of trafficking are protected and

⁷³ European Migration Network (2014) *Identifying Victims of Trafficking in Human Beings in Asylum and Forced Return Procedures: Ireland* Dublin: ESRI, p. 40, available at:

http://emn.ie/cat_publication_detail.jsp?clog=1&itemID=2598&item_name=&t=6

⁷⁴ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

⁷⁵ European Migration Network (2014) *Identifying Victims of Trafficking in Human Beings in Asylum and Forced Return Procedures: Ireland* Dublin: ESRI, available at:

http://emn.ie/cat_publication_detail.jsp?clog=1&itemID=2598&item_name=&t=6

⁷⁶ GRETA (2016) *Fifth General Report on GRETA’s Activities*, Strasbourg: Council of Europe, para. 99, available at: <http://www.coe.int/en/web/anti-human-trafficking/general-reports>

⁷⁷ Anti-Human Trafficking Unit (2015) *Trafficking in Human Beings in Ireland 2014*, Dublin: Department of Justice and Equality, pp. 16-17, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-A6TFZC1155404-en/\\$File/2014 Annual Report.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-A6TFZC1155404-en/$File/2014%20Annual%20Report.pdf)

⁷⁸ Tánaiste and Minister for Justice and Equality Deputy Frances Fitzgerald, ‘Written Answers: Deportation Orders Data’, (question no. 83) *Parliamentary Debates: Dáil Éireann*, 13 July 2016, vol. 918, no.1, p. 74.

identified as potential victims at the points of entry, and separately, that the principle of *non-refoulement* is fully respected at all times.⁷⁹

The Commission recommends that the relationship between asylum and trafficking in human beings is closely monitored.⁸⁰ Key personnel, including the staff of Direct Provision centres which accommodate asylum seekers, should receive adequate training in the identification of potential victims of trafficking in human beings.

The 'reasonable grounds' test

If there are 'reasonable grounds' for believing someone to be a victim of trafficking, they must then benefit from assistance measures under Articles 10 and 12 of the Convention. The 'reasonable grounds' test implies a low threshold to trigger the minimum preliminary assistance and supports which must be afforded to a potential victim of trafficking. A conclusive decision on identification as a victim of trafficking in Ireland requires a full investigation of the claim.

The Commission appeared as *amicus curiae* in the case of *P. v. The Chief Superintendent of the Garda National Immigration Bureau & Ors* (the '**P. case**'),⁸¹ wherein the Irish High Court found that the Administrative Immigration Arrangements are inadequate for the purpose of transposing *Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*.⁸² It found that a number of fundamental difficulties arise in relation to the mechanism in place in the State for early identification, in so far as it relates to persons suspected of involvement in criminal activity.⁸³

The P. Case highlighted the serious flaws in the present administrative system for identification of victims, not least a lack of clarity and transparency around decision-making. The following factors were relevant to the determination by the High Court that the current mechanism is inadequate:

1) The onus of proof falling on an applicant seeking to be recognised as a victim of trafficking

The Court noted that, while the respondents considered the veracity of the applicant crucial, and that an undue onus should not be placed on the respondents in this regard, the Directive did not

⁷⁹ See Irish Refugee Council (2016) 'Refusals of leave to land are alarming, says Irish Refugee Council', [press release], 21 January 2016, available at: <http://www.irishrefugeecouncil.ie/news/refusals-of-leave-to-land-are-alarming-says-irish-refugee-council/4606>.

⁸⁰ In this context, the Immigrant Council of Ireland has initiated a new programme called 'Tracks' to look at the nexus between asylum and trafficking in human beings, in particular in relation to the identification of victims of trafficking in the asylum procedure, to identify measures required to ensure appropriate protection to these persons. The project was devised in recognition of the fact that in most countries 'once victims of trafficking are identified in the asylum procedure there is no coordinated approach and [...] specific needs are generally poorly addressed'. The project will run until the end of 2017. More information is available at: <http://immigrantcouncil.ie/files/publications/7992f-tracks-project-info.pdf>.

⁸¹ Irish Human Rights and Equality Commission (2015) *Outline Submissions of the Amicus Curiae* in the case of: *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General*, Dublin: Irish Human Rights and Equality Commission, available at: <http://www.ihrec.ie/publications/list/p-v-chief-superintendent-of-the-garda-national-im/>

⁸² Article 11(4) of *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* requires Member States to '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.'

⁸³ See paras. 178–179 of the judgment in the *P. case*.

permit the State to impose a burden of proof of this sort on an applicant. It found that the 'reasonable grounds' test is an objective one which can be satisfied by a convincing account, but that an unconvincing account might also suffice.⁸⁴

2) The state of mind on the part of the decision-maker

The Court referred to the scheme envisaged under the Directive: that where requisite suspicion is held, certain steps follow, particularly in the form of assistance and support. However, the Court noted the confusion regarding what decision the respondent is required to arrive at before these steps are taken.⁸⁵

3) The appropriate procedure to be followed

The Court found that 'there is a necessity for rules or protocols, if not legislation, establishing what is to be done in circumstances where the person claiming to be a victim is also suspected of criminal activity'.⁸⁶

The Administrative Immigration Arrangements fail to elaborate on the nature of the process employed by An Garda Síochána, in determining whether there are 'reasonable grounds' for suspecting a person to be a victim of trafficking.⁸⁷ The Statement of roles and responsibilities does not clearly emphasise the low threshold which must pertain in any initial, filtering process. It provides that the Garda Superintendent must have 'sufficient information' to afford reasonable grounds for the belief that a person is a suspected victim of human trafficking. It goes on to say that reasonable grounds is 'a standard for what is fair and appropriate under usual and ordinary circumstances; that which is according to reason; the way a rational and just person would have acted'.⁸⁸

Evidence of the respondent in the P. Case appeared to expose 'certain discrepancies between the State's avowed practices and procedures [...] and the actual practice of victim identification'.⁸⁹ The Commission would welcome an unambiguous statement in law that the initial identification of potential victim of trafficking involves a low-threshold, objective test. The Commission also recommends that the State adopt legislation to ensure that effective, transparent and accessible measures give effect to the State's obligations under Articles 10 and 12 of the Convention.

A decision of the United Kingdom's High Court examined the application of the UK's guidance document in relation to the identification of victims of human trafficking. The decision is instructive

⁸⁴ See paras. 181 – 183 of the judgment in the P. Case.

⁸⁵ See paras 189-190 of the judgment in the P. Case.

⁸⁶ Para. 191 of the P. Case.

⁸⁷ Irish Human Rights and Equality Commission (2015) *Outline Submissions of the Amicus Curiae* in the case of: *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General*, Dublin: Irish Human Rights and Equality Commission, paras. 46-47, available at: <http://www.ihrec.ie/publications/list/p-v-chief-superintendent-of-the-garda-national-im/>

⁸⁸ Anti-Human Trafficking Unit (no date) *Statement of roles and responsibilities for State Organisations, Non-Governmental Organisations and International Organisations in Ireland engaged in cooperation regarding the prevention, protection of victims and prosecution of trafficking in human beings* p.2, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/ACJN-8YSMSH1751575-en/\\$File/Statement of Roles and Responsibilities.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/ACJN-8YSMSH1751575-en/$File/Statement%20of%20Roles%20and%20Responsibilities.pdf)

⁸⁹ Irish Human Rights and Equality Commission (2015) *Outline Submissions of the Amicus Curiae* in the case of: *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General*, Dublin: Irish Human Rights and Equality Commission, para. 49, available at: <http://www.ihrec.ie/publications/list/p-v-chief-superintendent-of-the-garda-national-im/>

in this jurisdiction in terms of the Court's interpretation of the requirements of Article 10 of the Convention.⁹⁰

The key question was whether the competent authority had 'reasonable grounds' to believe that the person in question was a victim of trafficking.⁹¹ The test to be applied is an objective one, applying a low threshold of suspicion, but not proof. The UK High Court confirmed that once there are reasonable grounds to believe that a person could be a victim of human trafficking, the fact that there are also reasonable grounds for suspecting that they might not be, is irrelevant.⁹² The Court noted that the initial decision is merely a filtering process, before coming to a fuller more conclusive decision as to whether the person is in fact a victim, rather than just a suspected victim.⁹³ The consequences of a negative reasonable-grounds decision are set out in the judgment to demonstrate what is at stake for the potential victim:

'The consequence of a negative reasonable grounds decision is very serious for a putative victim: it is akin to a decision by a judge at the permission stage of an application for judicial review that a claim is "totally without merit", in that it brings the process for testing the strength of a person's claim for rights protection to a halt on a summary basis.'⁹⁴

The judgment also considered the type of material that may be drawn on to inform a reasonable grounds decision, such as country reports and expert evidence. The competent authority has an inquisitorial task, whereby it should 'proactively seek out' information that could prove useful in establishing that there are reasonable grounds.⁹⁵

In the Netherlands, where there is the 'slightest indication' that a person is a possible victim of human trafficking, they must be offered the possibility of benefitting from a reflection period and specific assistance, reflective of the low threshold to be imposed.⁹⁶

Procedural protections

Throughout the identification and protection process, the rights of victims or potential victims of trafficking must be protected and respected including their right to fair procedures and natural justice. Potential victims of trafficking in human beings should have access to an effective remedy

⁹⁰ In the case of *The Queen (on the application of Hoang Anh Minh) v. The Secretary of State for the Home Department*, [2015] EWHC 1725 (Admin) (England and Wales High Court), flaws in the decision-maker's approach to the reasonable grounds decision were found to constitute a breach of the positive obligation of 'reasonable investigation' pursuant to Article 4 ECHR.

⁹¹ *The Queen (on the application of Hoang Anh Minh) v. The Secretary of State for the Home Department*, [2015] EWHC 1725 (Admin) (England and Wales High Court) para. 67.

⁹² *The Queen (on the application of Hoang Anh Minh) v. The Secretary of State for the Home Department*, [2015] EWHC 1725 (Admin) (England and Wales High Court) para 70.

⁹³ *The Queen (on the application of Hoang Anh Minh) v. The Secretary of State for the Home Department*, [2015] EWHC 1725 (Admin) (England and Wales High Court) para 74.

⁹⁴ *The Queen (on the application of Hoang Anh Minh) v. The Secretary of State for the Home Department*, [2015] EWHC 1725 (Admin) (England and Wales High Court) para 76.

⁹⁵ *The Queen (on the application of Hoang Anh Minh) v. The Secretary of State for the Home Department*, [2015] EWHC 1725 (Admin) (England and Wales High Court) para 126.

⁹⁶ OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO (2011) *Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, Brussels: OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, p. 43, available at: https://www.unodc.org/documents/human-trafficking/2011/UN_Commentary_EU_Trafficking_Directive_2011.pdf

protected under Article 13 of the European Convention on Human Rights (ECHR), when taken together with Article 4 which forbids slavery, servitude or forced or compulsory labour.⁹⁷

Currently no reasons are provided for a negative decision on 'reasonable grounds' and there is no right to appeal such a decision. In the P. Case, the High Court noted the statement in the *First National Action Plan 2009-2012* that there was no obligation on An Garda Síochána to explain a finding that the respondent did not have reasonable grounds for a positive identification finding.⁹⁸

Any decision on status should be made in writing with reasons provided to the person. Regarding the importance of the determination for a potential victim's rights and status, the Commission considers it necessary for An Garda Síochána to give reasons for its findings, so that an individual is in a position to respond meaningfully to any concerns which An Garda Síochána may have.⁹⁹ As raised by the Commission in its Outline Submissions to the P. Case, any adverse material should be disclosed to the potential victim of trafficking in a timely manner to ensure that the victim identification process is undertaken without delay and to give a potential victim the opportunity to respond to the material and to clarify any matters arising.¹⁰⁰

The Commission considers that putting the identification process on a statutory footing would serve to ensure that the relevant constitutional protections and the obligations that arise under section 3 of the *European Convention on Human Rights Act 2003* would be respected.¹⁰¹

Multi-agency involvement

GRETA's first evaluation report called on the State to formalise the role and input of specialised NGOs in victim identification,¹⁰² and these formalised and defined roles continue to be lacking.¹⁰³ The Roundtable on Identification of Victims of Human Trafficking hosted by the Department of Justice and Equality in December 2015 (the '**Roundtable on Identification of Victims**') heard calls to formalise cooperation between authorities and NGOs in the National Referral Mechanism and noted key features of the Dutch National Referral Mechanism which recognises the importance of multi-

⁹⁷ The European Court of Human Rights found a violation of Article 4 (prohibition of slavery and forced labour) Article 6 (right to a fair trial) and Article 13 (right to an effective remedy) of the ECHR in the case of *L.E. v Greece* (App. 71454/12), 21 January 2016, due to shortcomings in the investigation and judicial proceedings involving a nine-month wait for recognition as a victim of human trafficking. The length of proceedings was held to be excessive and not meeting the 'reasonable time' requirement.

⁹⁸ Para. 196 of the P. case.

⁹⁹ Irish Human Rights and Equality Commission (2015) *Outline Submissions of the Amicus Curiae* in the case of: *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General*, Dublin: Irish Human Rights and Equality Commission, para. 59, available at: <http://www.ihrec.ie/publications/list/p-v-chief-superintendent-of-the-garda-national-im/>

¹⁰⁰ Irish Human Rights and Equality Commission (2015) *Outline Submissions of the Amicus Curiae* in the case of: *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General*, Dublin: Irish Human Rights and Equality Commission, para. 61, available at: <http://www.ihrec.ie/publications/list/p-v-chief-superintendent-of-the-garda-national-im/>

¹⁰¹ Section 3 of the *European Convention on Human Rights Act 2003* requires that every organ of the State shall perform its functions in a manner compatible with the State's obligations under the ECHR.

¹⁰² Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 43, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁰³ This was most recently reported by the United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p.193, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

stakeholder identification ‘to ensure that victims did not fall out of the support system’.¹⁰⁴ In this regard, the Commission notes the pilot scheme operating in the United Kingdom whereby new multi-disciplinary panels headed by an independent chair make conclusive reasonable grounds decisions in certain pilot areas.¹⁰⁵

The Commission welcomes the commitments towards collective cooperation set out in the Draft Second National Action Plan and urges the State to take concrete measure to formalise the role of specialised NGOs and other key actors in the victim identification process.

The Commission recommends that the review of the formal identification process, signalled in the Draft Second National Action Plan, is subject to clear timelines to indicate when the new identification process will be in place, and that the State indicate any measures to be applied in the interim.

The Commission recommends that the State adopt legislation to ensure that effective, transparent and accessible measures give effect to the State’s obligations under Articles 10 and 12 of the Convention. Statutory rights to assistance and protection should be available to all potential victims of trafficking, regardless of the potential victim’s nationality or immigration status.

The Commission recommends that the relationship between asylum and trafficking in human beings is closely monitored and that key personnel receive adequate training in the identification of potential victims of trafficking in human beings.

The Commission recommends that the decision-making process at both the initial reasonable grounds stage and also at the conclusive decision stage is put on a statutory footing, setting out precisely the decision to be made, the low threshold that applies at the initial stage, and the inquisitorial nature of the process. The legislation should include a clear statement regarding the rights and entitlements that flow from a positive decision.

The Commission recommends that the mechanism established for the identification of victims of human trafficking affords fair procedures to the potential victim throughout the process. In the case of negative finding by An Garda Síochána, reasons should be provided to the applicant in writing.

The Commission recommends that the State formalise the role and input of specialised NGOs and other relevant actors in victim identification.

4.2.3. Non-punishment of victims of trafficking in human beings

The principle of non-punishment is linked directly to the obligation to identify potential victims of trafficking in human beings. To comply with the non-punishment requirement there must be an effective mechanism for early identification in the first instance.

¹⁰⁴ See Department of Justice and Equality ‘Report on the Roundtable on Identification of Victims of Human Trafficking’ 15 December 2015, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/\\$File/Roundtable_report_Dec_2015_%20.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/$File/Roundtable_report_Dec_2015_%20.pdf)

¹⁰⁵ National Crime Agency website: <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>

GRETA, in its First Evaluation Round, considered that Ireland should take ‘further steps’ to ensure compliance with the non-punishment principle set out in Article 26 of the Convention. GRETA proposed that this might be achieved through further guidelines for public prosecutors and investigators, who should be proactive in identifying potential victims of trafficking.¹⁰⁶ The Anti-Human Trafficking Unit (‘AHTU’) refers to guidelines for prosecutors in assessing whether to commence or continue with a prosecution, ‘including a consideration as to whether the public interest is served by the prosecution of a victim of human trafficking who has been compelled to commit offences (e.g. immigration or sexual offences) as a result of being trafficked.’¹⁰⁷

The Commission understands that guidelines for law enforcement officials are being developed, in direct response to the P. Case, where a potential victim of trafficking is also reported to be involved in criminality.¹⁰⁸ This development is welcome and these guidelines should be operationalised as soon as possible, considering that the P. Case was not an isolated incident.¹⁰⁹

As noted above, the High Court in the P. Case found that: ‘there is a necessity for rules or protocols, if not legislation, establishing what is to be done in circumstances where the person claiming to be a victim is also suspected of criminal activity’.¹¹⁰ Noting again the time which has elapsed since the P. Case decision, the Commission recommends that consideration be given to putting the non-punishment principle on a statutory footing, without further delay.

The High Court in the P. Case considered that issues in relation to the role of the Garda National Immigration Bureau (the ‘GNIB’) required clarification. The Court queried whether the officials investigating the case of human trafficking should be dependent for information on the officials investigating the criminal offence. The Court went on to highlight that such a process could be validly criticised as giving rise to a conflict or at least the appearance of a conflict.¹¹¹ The Court identified the need to clarify the requirements of disclosure between the respective investigations and queried whether the role of An Garda Síochána under the Administrative Immigration Arrangements is secondary to the criminal investigation, to the extent that the normal requirements of fair procedures are overridden by the requirements of that investigation.

¹⁰⁶ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, pp. 56-57, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁰⁷ Anti-Human Trafficking Unit website (no date)

<http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/irelandsresponse-criminaljusticerresponse-en>
Office of the Director of Public Prosecutions (DPP) (2010) *Guidelines for Prosecutors (Revised)*, Dublin: Office of the DPP, p. 16.

¹⁰⁸ Detective Superintendent Anne Marie Cagney, of the Garda National Protective Service Bureau, speaking at a conference hosted by the Immigrant Council of Ireland on Early Legal Intervention, 14 January 2016, stated that separate investigations for the investigation of the offence and the investigation of human trafficking are assigned to separate officers, with a senior officer monitoring the whole investigation. The Commission understands that the guidance under development will take the form of an internal directive for policing operations and has been progressed in conjunction with the AHTU in the Department of Justice and Equality.

¹⁰⁹ In 2014, An Garda Síochána commenced reviews of the cases of 13 individuals charged with drug-related offences for work in cannabis cultivation, to establish whether they were victims of trafficking. United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p. 192, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

¹¹⁰ Para. 191 of the P. case.

¹¹¹ Para. 194 of the P. case.

The Commission recommends that the process of identifying a victim of human trafficking be appropriately separated from the investigation of any offence that the person is alleged to have committed, following the decision in the P. Case.

UK Crown Prosecution Guidance, as part of a three-stage test, requires that: ‘even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not’.¹¹² The UK Guidance lists offences where this commonly arises such that prosecutors might be attentive to additional risk in the context of these offences. In recent years, there have been a number of cases of human trafficking for the purpose of cannabis cultivation in Ireland,¹¹³ such that the relevant personnel should be vigilant to the threat of forced participation in certain types of criminal activity.¹¹⁴

The Commission welcomes the statement in the Draft Second National Action Plan that there is ‘increasing concern’ about the different types of exploitation for which people may be trafficked and the range of criminal activities they may be forced to undertake. These include ‘ATM theft, pick-pocketing, bag-snatching, counterfeit DVD selling, cannabis cultivation, metal theft, benefit fraud, as well as being forced to beg’.¹¹⁵ The 2014 Annual Report published by the AHTU reported that in 2014, three adults and one minor (all male) were reported as victims of human trafficking for the purposes of criminal activities and one female minor was reported as being a victim of trafficking for forced begging. However, there is a lack of comprehensive data in relation to the potential number of victims engaged in such activities and a recognition in the AHTU’s Annual Report 2014 that estimating their prevalence is ‘highly problematic’.¹¹⁶ The Commission recommends that the State continue its efforts to closely monitor the emergence of trafficking in human beings for the purpose of engagement in criminal activities. The Migrant Rights Centre of Ireland reported, drawing on an interview conducted in 2013, that the AHTU proposed to develop guidance material to reflect the complexities and subtleties of trafficking for criminal exploitation and the Commission would

¹¹² The Crown Prosecution Service (no date) *Human Trafficking, Smuggling and Slavery: Suspects in a criminal case who might be victims of trafficking and slavery*. In addition, there is a limited statutory defence under section 45 of the *Modern Slavery Act 2015* for persons who have committed criminal offences, where the offence is attributable to exploitation, see:

http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a19http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a19

¹¹³ *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222. See also Migrant Rights Centre of Ireland, ‘Suspected victims of trafficking acquitted and freed after a year in jail in Ireland’ [press release] 11 March 2015, in relation to case L00295/0112 (Legal Aid) *The DPP. v Hung Ba Tran and The DPP. v Hoang Hu Vo*, and *DPP v Nguyen & anor* [2014] IECA 55, available at: <http://www.mrci.ie/press-centre/suspected-victims-of-trafficking-acquitted-and-freed-after-a-year-in-jail-in-ireland/>

¹¹⁴ Migrant Rights Centre of Ireland (2013) *Trafficking for Forced Labour in Cannabis Production: The Case of Ireland*, Dublin: Migrant Rights Centre, available at: <http://www.mrci.ie/resources/publications/trafficking-for-forced-labour-in-cannabis-cultivation-the-case-of-ireland/>

¹¹⁵ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland*, Dublin: Department of Justice and Equality, p. 51, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/Second National Action Plan - June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/Second%20National%20Action%20Plan%20-%20June%202015.pdf)

¹¹⁶ Anti-Human Trafficking Unit (2015) *Trafficking in Human Beings in Ireland in 2014*, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/4E083F70F2EFCA8680257F4F0041859F/\\$file/2014%20Annual%20Report.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/4E083F70F2EFCA8680257F4F0041859F/$file/2014%20Annual%20Report.pdf)

The Commission notes that the criminalisation of trafficking in human beings for the purpose of criminal activity is a relatively recent offence under Irish law: *Criminal Law (Human Trafficking)(Amendment) Act 2013*.

welcome more information on the progress and outcome of this work,¹¹⁷ noting that a similar commitment is contained in the Draft Second National Action Plan.¹¹⁸

The Commission recommends that the State ensure that victims of trafficking are not prosecuted for crimes that they were compelled to carry out as a result of being trafficked. Consideration should be given to putting the non-punishment principle on a statutory footing.

The Commission recommends the development of detailed, updated guidance from the Director of Public Prosecutions on how its discretion not to prosecute is exercised in cases of suspected trafficking in human beings.

The Commission recommends that the process of identifying a victim of human trafficking be appropriately separated from the investigation of any offence that the person is alleged to have committed, following the decision in the P. Case.

The Commission recommends that the State closely monitor and maintain comprehensive data on the emergence of different types of exploitation, including exploitation for criminal activity in certain high-risk areas of criminal activity.

4.2.4. Legal support for victims of trafficking in human beings¹¹⁹

Legal assistance and representation is provided free of charge to a person who is an ‘alleged victim of a human trafficking offence’ by the Refugee Legal Service, a dedicated section of the Legal Aid Board. The service, delivered by personnel who have had specialist training in human trafficking issues,¹²⁰ includes information provision on how to obtain legal redress and provides support to victims of trafficking in their capacity as witnesses in any related criminal proceedings.¹²¹

The Commission welcomes that legal support for victims of trafficking was put on a statutory footing through an amendment in 2011 to the *Civil Legal Aid Act 1995*.¹²² In that legislation, the term

¹¹⁷ Migrant Rights Centre of Ireland (2013) *Trafficking for Forced Labour in Cannabis Production: The Case of Ireland*, Dublin: Migrant Rights Centre, available at: <http://www.mrci.ie/resources/publications/trafficking-for-forced-labour-in-cannabis-cultivation-the-case-of-ireland/>

¹¹⁸ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland*, Dublin: Department of Justice and Equality, p. 52, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/Second National Action Plan - June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/Second%20National%20Action%20Plan%20-%20June%202015.pdf)

¹¹⁹ The Commission has powers and functions conferred under the 2014 Act which can be used to support victims of trafficking in human beings, for example: section 10 (including the *amicus curiae* function), section 32 (equality reviews in particular sectors) section 35 (the power to conduct inquiries) and section 40 (legal and other assistance). The Commission was the body designated for the purposes of *Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement of workers* (section 10(2)(i) of the 2014 Act).

¹²⁰ Legal Aid Board (2015) *Annual Report*, Cahirciveen: Legal Aid Board, p. 25, available at: [http://www.legalaidboard.ie/lab/publishing.nsf/650f3eecd0fb990fca25692100069854/ab5e7dce1995ba3d80257eba004b33b4/\\$FILE/Annual Report 2014.pdf](http://www.legalaidboard.ie/lab/publishing.nsf/650f3eecd0fb990fca25692100069854/ab5e7dce1995ba3d80257eba004b33b4/$FILE/Annual%20Report%202014.pdf)

¹²¹ Legal Aid Board (2012) *Information Leaflet for Potential Victims of Trafficking*, Dublin: Human Trafficking Unit, Legal Aid Board, p. 4. http://www.legalaidboard.ie/lab/publishing.nsf/Content/Information_Learnets

¹²² Section 3 of the *Civil Law (Miscellaneous Provisions) Act 2011* amended section 26 of the *Civil Legal Aid Act 1995* legislating for the provision of legal advice to a person who is an ‘alleged victim’ of a human trafficking offence, on:

‘alleged victim of a human trafficking offence’ is defined by reference to the offence of trafficking in human beings.¹²³ The Commission reiterates the position, noted above, that Irish law lacks an explicit definition of a ‘victim of trafficking in human beings’. As demonstrated in the P. case, it may take some time before a person is officially identified as a potential victim of trafficking, which augments the danger that unidentified victims could be prosecuted as a result of being trafficked.¹²⁴ The Commission submits that definitional clarity, and consistency in terminology, would assist in ensuring that all potential victims of trafficking are supported at the earliest stage possible and would improve transparency in the identification process.

The UN Human Rights Committee, in its 2014 Concluding Observations in relation to Ireland’s obligations under the International Covenant on Civil and Political Rights expressed concern at the ‘inadequacies in the legal support provided to victims of trafficking’.¹²⁵ This followed submissions to the *Interim Review of the National Action Plan to Prevent and Combat Human Trafficking* which raised ‘[t]he inadequacy of the legal support provided to victims of trafficking’ as one of the primary concerns, and highlighted the following issues concerning the quality of the legal assistance:

‘– [...] early legal representation is not available, only once-off information is provided, legal advice not enough to navigate the immigration system, and [there is a] lack of representation throughout the criminal investigation and prosecution process.’¹²⁶

In the period between 2009 and the end of 2014, a total of 105 potential victims of trafficking had been referred to the Legal Aid Board, the majority of whom were potential victims of sexual exploitation.¹²⁷ However, the Commission has concerns that the number of potential victims availing of assistance from the Legal Aid Board does not correlate with the overall number of potential victims of trafficking identified over the same period as the Draft Second National Action Plan

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- (a) ‘any matter connected with the commission of the human trafficking offence (whether or not a prosecution for that offence has been instituted),
 - (b) any matter connected with the commission of any other offence of which the person is alleged to be a victim, being an offence (whether or not a human trafficking offence) that is alleged to have been committed in the course of, or otherwise in connection with, the commission of the human trafficking offence, or
 - (c) without prejudice to the generality of paragraph (a) or (b), the prosecution of the human trafficking offence or of the other offence referred to in paragraph (b).’

¹²³ The term ‘alleged victim’ is used in the *Civil Law (Miscellaneous Provisions) Act 2011* whereas the Administrative Immigration Arrangements refer to a ‘suspected victim’.

¹²⁴ GRETA noted the concerns of NGO’s in this regard in its First Evaluation, Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 57, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹²⁵ UN Human Rights Committee (2014) *Concluding Observations on Ireland’s Fourth Periodic Report*, CCPR/C/IRL/CO/4, para. 20, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en

¹²⁶ Department of Justice and Equality (2012) *Review of the National Action Plan to Prevent and Combat Trafficking in Human Beings*, Dublin: Department of Justice and Equality, p. 56, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-95REJP1041313-en/\\$File/Review of the National Action Plan Final.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-95REJP1041313-en/$File/Review%20of%20the%20National%20Action%20Plan%20Final.pdf)

Concerns regarding early legal representation were more recently reflected in the United States Trafficking in Persons Report 2016: United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p. 193, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

¹²⁷ Legal Aid Board (2015) *Annual Report 2014*, Cahirciveen: Legal Aid Board, p. 26, available at: [http://www.legalaidboard.ie/lab/publishing.nsf/650f3eecd0dfb990fca25692100069854/ab5e7dce1995ba3d80257eba004b33b4/\\$FILE/Annual Report 2014.pdf](http://www.legalaidboard.ie/lab/publishing.nsf/650f3eecd0dfb990fca25692100069854/ab5e7dce1995ba3d80257eba004b33b4/$FILE/Annual%20Report%202014.pdf)

indicates that by the end of 2013, almost 300 potential victims of trafficking had come to the attention of the authorities. In 2014, An Garda Síochána commenced 79 human trafficking investigations involving 46 alleged victims.¹²⁸

As there is no obligation for a victim of trafficking to avail of the free services of the Legal Aid Board and the Board will not cover the expenses of private lawyers, it is unclear how many potential victims may have engaged private legal representation at their own expense; whether they are no longer counted in the trafficking statistics as they have entered the asylum process; or whether they have foregone legal representation altogether.

In relation to cases of potential victims of trafficking for labour exploitation, the Legal Aid Board can appear before the Refugee Appeals Tribunal, but is prevented from providing full legal representation before the various Labour Relations appellate bodies, including the Workplace Relations Commission.¹²⁹ In 2011, the UN Independent Expert on Extreme Poverty and Human Rights called for the remit of the Legal Aid Board to be extended to include representation before quasi-judicial tribunals.¹³⁰ In June 2015, the UN Committee on Economic, Social and Cultural Rights also expressed concern at the lack of legal aid services for ‘especially disadvantaged and marginalised individuals and groups’ and recommended that the Board’s remit be expanded.¹³¹

The Commission recommends that all potential victims of trafficking be proactively provided with adequate, early legal support in order to avoid prosecution as a result of being trafficked and in order to avail of an effective remedy and appropriate redress for any harm caused to them. Comprehensive information should be provided to enable victims of trafficking to navigate the immigration process.

The Commission recommends that the State consider expanding the remit of the Legal Aid Board in cases where a person is the victim of trafficking for labour exploitation and requires legal representation to obtain redress from a tribunal such as the Workplace Relations Commission.

4.2.5. Redress for victims of trafficking

Currently a victim of human trafficking is entitled to seek civil and criminal compensation from the perpetrators of the trafficking¹³² and criminal compensation through the Courts, the Personal

¹²⁸ Anti-Human Trafficking Unit, (2015) *Trafficking in Human Beings in Ireland 2014*, Dublin: Department of Justice and Equality p. 9, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-A6TFZC1155404-en/\\$File/2014 Annual Report.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-A6TFZC1155404-en/$File/2014%20Annual%20Report.pdf)

¹²⁹ Section 28(9)(a) of the *Civil Legal Aid Act 1995* explicitly excludes a number of areas from the scope of the legislation. This point was also highlighted in the Department of Justice and Equality (2012) *Review of the National Action Plan to Prevent and Combat Trafficking in Human Beings*, Dublin: Department of Justice and Equality, p. 56, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-95REJP1041313-en/\\$File/Review of the National Action Plan Final.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-95REJP1041313-en/$File/Review%20of%20the%20National%20Action%20Plan%20Final.pdf)

¹³⁰ UN Office of the High Commissioner for Human Rights (2011) *Report of the UN Independent Expert on Extreme Poverty and Human rights, Magdalena Sepúlveda Carmona: Mission to Ireland*, A/HRC/17/34/Add.2, p. 4, available at: <http://www.ohchr.org/EN/Issues/Poverty/Pages/AnnualReports.aspx>

¹³¹ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland*, E/C.12/IRL/CO/3 (Advance unedited version), para. 8, available at: [http://tbinternet.ohchr.org/Treaties/CESCR/Shared Documents/IRL/INT_CESCR_COC_IRL_20930_E.docx](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/IRL/INT_CESCR_COC_IRL_20930_E.docx)

¹³² The difficulties in enforcing compensation claims against perpetrators were noted at a conference held in Dublin hosted by the Immigrant Council of Ireland in January 2016: John McDaid (2016) *The importance of*

Injuries Board or from the Criminal Injuries Compensation Tribunal.¹³³ Difficulties have been identified in recouping awards which have been issued by workplace relations bodies.¹³⁴

In relation to the Criminal Injuries Compensation Tribunal, the victim will require a report from An Garda Síochána to progress his or her claim for compensation.¹³⁵ While the victim can claim for loss of earnings or for out-of-pocket expenses including for medical treatment in the case of physical injury which is the direct result of a violent crime, he or she cannot claim compensation for the pain and suffering he or she experienced at the hands of the traffickers.¹³⁶ Compensation is not available where the victim and the perpetrator were living together as part of the same household, which may be common in many instances of human trafficking, as the perpetrator exercises control over the victim.¹³⁷

The Commission is concerned that the limited scope of potential compensation for victims of human trafficking undermines the availability of financial redress for victims. There is currently no dedicated compensation fund for victims of human trafficking despite a reference in the preamble to the EU Directive on human trafficking, to encourage Member States to use 'seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims' assistance and protection, including compensation of victims'.¹³⁸

The State notes in its Review of the National Action Plan 2009 to 2012, that the establishment of a specific compensation fund, as suggested under Article 15(4) of the Convention as a means of securing victim compensation, 'would be inappropriate given that no such fund exists for other victims of crime' and would consequently be 'difficult to justify' in the absence of a compensation fund for victims of other crimes, such as rape.¹³⁹

The Commission notes practice in the United Kingdom, under the *Modern Slavery Act 2015*, under which a court must give reasons for not ordering compensation (by way of a 'slavery and trafficking reparation order') in cases of convictions for modern slavery.¹⁴⁰

legal aid for victims of crime – the situation in Ireland, presentation delivered at Early Legal Intervention Conference, Dublin 2016.

¹³³ Legal Aid Board (2012) *Information Leaflet for Potential Victims of Trafficking*, Dublin: Human Trafficking Unit, Legal Aid Board, p. 5. http://www.legalaidboard.ie/lab/publishing.nsf/Content/Information_Leaflets

¹³⁴ The MRCI has called for the introduction of penalties for the non-payment of these awards: Migrant Rights Centre of Ireland (2015) *All Work and Low Pay: The Experience of Migrants Working in Ireland*, Dublin: Migrant Rights Centre of Ireland.

¹³⁵ The Scheme imposes a requirement that the victim has reported the crime 'without delay', though there is some discretion to dispense with that strict requirement. Department of Justice and Equality (2011) *Scheme Of Compensation for Personal Injuries Criminally Inflicted*, Dublin: Department of Justice and Equality, p. 5, available at: <http://www.justice.ie/en/JELR/Scheme 11.pdf/Files/Scheme 11.pdf>

¹³⁶ Department of Justice and Equality (2011) *Scheme Of Compensation for Personal Injuries Criminally Inflicted*, Dublin: Department of Justice and Equality, p. 3. <http://www.justice.ie/en/JELR/Scheme 11.pdf/Files/Scheme 11.pdf>

¹³⁷ The Scheme provides that: 'No compensation will be payable where the offender and the victim were living together as members of the same household at the time the injuries were inflicted'. Department of Justice and Equality (no date) *Scheme of Compensation for Personal Injuries Criminally Inflicted*, Dublin: Department of Justice and Equality, p. 3. <http://www.justice.ie/en/JELR/Scheme 11.pdf/Files/Scheme 11.pdf>

¹³⁸ EU 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, p. 8.

¹³⁹ Department of Justice and Equality (2014) *Review of the National Action Plan to Prevent and Combat Trafficking in Human Beings 2009-2012*, Dublin: Department of Justice and Equality, p. 10. [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-95REJP1041313-en/\\$File/Review of the National Action Plan Final.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-95REJP1041313-en/$File/Review of the National Action Plan Final.pdf)

¹⁴⁰ Section 8(7)(b) of the *Modern Slavery Act 2015*.

The Commission recommends that victims of trafficking are provided with the necessary information and supports in order to secure any compensation to which they are entitled.

The Commission recommends that the State re-examine the possibility of establishing a dedicated compensation fund for victims of trafficking including a contribution from any proceeds confiscated in the course of criminal proceedings against perpetrators of human trafficking.

4.2.6. Recovery and reflection and temporary residence

Recovery and Reflection

The Recovery and Reflection period required under Article 13 of the Convention must be sufficient to allow a person to recover and escape the influence of traffickers, and to take an informed decision on cooperating with the competent authorities. No expulsion order may be enforced during this time. The Recovery and Reflection period must be granted where there are 'reasonable grounds' for suspecting a person to be a victim of trafficking and the discussion in section 4.2.2 (on the identification of victims) is also relevant in this context.

A Recovery and Reflection period of 60 days is granted to potential victims of trafficking under the Administrative Immigration Arrangements, with more flexible arrangements available for child victims of trafficking. This exceeds the 30-day minimum period required under the Convention. However, application of the Recovery and Reflection period in Ireland continues to be limited as it is applied under the Administrative Immigration Arrangements, to regularise the immigration status of people who do not have permission to remain in the State.¹⁴¹

As noted above in relation to identification of victims of trafficking, the Administrative Immigration Arrangements are applicable only where a person's immigration status falls to be considered. It is not clear the extent to which persons who otherwise have permission to be in the State, including EEA nationals or asylum seekers, can claim equivalent rights under the mechanism.¹⁴² The Recovery and Reflection period is enjoyed by a very limited category of persons and 'applied very rarely', as highlighted in GRETA's First Evaluation Report for Ireland.¹⁴³ This situation appears not to have changed since the First Evaluation Round as it is reported that only two victims received reflection periods in 2014.¹⁴⁴

¹⁴¹ This includes persons from outside the European Economic Area (EEA) who do not have a right of residence in Ireland or persons who are not in the asylum process and do not therefore have temporary permission to remain in the State until a decision is made on their application for protection.

¹⁴² The Administrative Immigration Arrangements recognise that a person from the EEA may be identified as a suspected victim of trafficking and 'will be treated no less favourably than a person from outside that area', Irish Naturalisation and Immigration Service(2011) *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking*, Dublin: Department of Justice and Equality, para. 4, available at: <http://www.inis.gov.ie/en/INIS/Pages/PB08000021>

¹⁴³ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p.49, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁴⁴ United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p. 193, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

In this way, 'rather than being an entitlement as provided for under Convention' the Recovery and Reflection period 'is used as a form of regularising a person's stay in the country'.¹⁴⁵ The Commission reiterates its concern that neither EEA nationality nor residency entitlements should operate, in practice, to deprive victims of trafficking of the protections envisaged by Article 12 of the Convention. These include measures to assist victims in their physical, psychological and social recovery and to ensure that their safety and protection needs are met.¹⁴⁶ Such considerations must be to the fore in any re-examination 'of the process for the allocation of Recovery and Reflection to victims of human trafficking' as signalled under the Draft Second National Action Plan.¹⁴⁷

Furthermore, organisations working with victims of trafficking have raised concerns in relation to the fact that a potential victim must be identified by An Garda Síochána in order to avail of the Recovery and Reflection period. As reported by GRETA in its First Evaluation Round, many cases, in practice, required a witness statement prior to the granting of a period of Recovery and Reflection, though the Irish authorities submitted that the granting of this period is not dependent on the provision of a witness statement.¹⁴⁸

In their joint commentary on the EU Directive, a number of UN agencies cite the Recovery and Reflection period provided to victims of trafficking in the Netherlands as an example of good practice. In the Netherlands, if there is the 'slightest indication' that a person is the victim of trafficking then he or she is granted a reflection period with temporary residence permit and access to a number of supports and services including access to both the labour market and social welfare supports.¹⁴⁹

Temporary Residence

Following a period of Recovery and Reflection, temporary, renewable residence permits may be allocated to potential victims of trafficking, required under Article 14 of the Convention. Under the Administrative Immigration Arrangements, these permits are explicitly contingent upon residence being necessary for the purpose of the potential victim assisting law enforcement authorities.

Article 14 is clear in requiring provision of a residence permit where necessary, *either* 'owing to their personal situation' *or* 'for the purpose of their cooperation with the competent authorities in

¹⁴⁵ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p.49, available at:

<http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁴⁶ Irish Human Rights and Equality Commission Designate (2014) *Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Review under the International Covenant on Civil and Political Rights*, Dublin: Irish Human Rights and Equality Commission Designate, para. 120, available at: <http://www.ihrec.ie/download/pdf/20140616113130.pdf>

¹⁴⁷ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland*, Dublin: Department of Justice and Equality, pp. 54 and 77, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/Second National Action Plan - June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/Second%20National%20Action%20Plan%20-%20June%202015.pdf)

¹⁴⁸ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 50, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁴⁹ OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO (2011) *Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, Brussels: OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, p. 43, available at: https://www.unodc.org/documents/human-trafficking/2011/UN_Commentary_EU_Trafficking_Directive_2011.pdf

investigation or criminal proceedings'. However, the Administrative Immigration Arrangements continue to refer to the cumulative requirements that the person has severed all contact with the alleged perpetrators *and* that temporary residence is necessary to assist An Garda Síochána, without reference to the potential victim's personal circumstances.

The Commission recalls GRETA's First Evaluation recommendation to ensure that victims can fully benefit from the right to obtain a renewable residence permit and that this right is not contingent upon cooperation with law enforcement.

The Commission reiterates its concern that neither EEA nationality nor residency entitlements should operate, in practice, to deprive victims of trafficking of the protections envisaged by Article 12 of the Convention, including measures to assist victims in their physical, psychological and social recovery. The benefit of the Recovery and Reflection period should not be dependent on the provision of a witness statement to An Garda Síochána.

The Commission recommends that the State remove the conditionality of temporary residence for victims of trafficking which is currently based on co-operation with law enforcement agencies under the Administrative Immigration Arrangements.

4.2.7. Accommodation of victims of trafficking in direct provision centres

In its *Policy Statement on Direct Provision*,¹⁵⁰ the Commission echoed concerns of the UN Human Rights Committee, amongst others, that victims of trafficking are inappropriately accommodated within the Direct Provision system.¹⁵¹

The Commission recommends that victims of trafficking be accommodated in appropriate, single-gender facilities with access to a range of necessary support services, in keeping with the State's obligations of prevention and obligations to provide support services to victims.¹⁵² In its observations on the General Scheme of the *International Protection Bill 2015*, the Commission reiterated its ongoing concern at the lack of appropriate protection for vulnerable persons within the system of Direct Provision.¹⁵³

¹⁵⁰ Irish Human Rights and Equality Commission (2014) *Policy Statement on the System of Direct Provision in Ireland*, Dublin: Irish Human Rights and Equality Commission, recommendation no.5, available at:

http://www.ihrec.ie/download/pdf/ihrec_policy_statement_on_direct_provision_10dec14.pdf

¹⁵¹ UN Human Rights Committee (2014) *Concluding Observations on the Fourth Periodic Report of Ireland*, CCPR/C/IRL/CO/4, para. 20, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en

The United States Trafficking in Persons Report 2016 noted issues relating to the lack of privacy, inadequate security, remotely located centres and mixed-gender accommodation not being suitable for victims of sex trafficking: United States Department of State (2016) Trafficking in Persons (TIP) Report 2016, p.192, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

¹⁵² Irish Human Rights and Equality Commission (2014) *Policy Statement on the System of Direct Provision in Ireland*, Dublin: Irish Human Rights and Equality Commission, recommendation no.5, available at:

http://www.ihrec.ie/download/pdf/ihrec_policy_statement_on_direct_provision_10dec14.pdf

¹⁵³ Irish Human Rights and Equality Commission (2015) *Recommendations on the General Scheme of the International Protection Bill 2015*, Dublin: Irish Human Rights and Equality Commission, available at:

<http://www.ihrec.ie/publications/list/ihrec-recommendations-on-the-general-scheme-of-the/>

The Commission notes that the Reception and Integration Agency ('RIA') has established a female-only accommodation centre in Killarney, Co. Kerry. At the end of January 2015, 65 individuals who had been identified as potential victims of trafficking were residing in Direct Provision accommodation.¹⁵⁴ In 2015, the Working Group on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, consulted with Direct Provision residents. During the period of consultation it met with a number of individuals who had been trafficked and heard that people experiencing trauma, including victims of trafficking, found the requirement to share a bedroom with other people particularly challenging as it could exacerbate mental health difficulties.¹⁵⁵

As reported by the McMahon Working Group:

'Male and female clients all required medical or psychological assistance, for either physical or emotional injuries, as a result of their trafficking experience. Mental health was poor among all. In particular, anxiety, sleeplessness and feelings of anger, shame, and desperation were common. Sexual and reproductive health issues continue to present as issues due to the long-term effects of exploitation. Both victims of labour exploitation had serious health problems. One ended up in hospital (as a result of an accident in his workplace) and was left with a huge medical bill which he was not able to pay, which caused additional stress.'¹⁵⁶

Female victims of trafficking reported sexual advances or inappropriate behaviour/ comments from other residents, which increased pressure, discomfort, caused victims to relive the trauma of exploitation and to isolate themselves from other residents.¹⁵⁷

Victims of trafficking should not be accommodated in Direct Provision facilities. The OSCE Action Plan to Combat Trafficking in Human Beings has recommended that 'shelters, run by governmental

¹⁵⁴ Dr B. McMahon (2015) *Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers*, Dublin: Department of Justice and Equality, p. 195, available at: [http://www.justice.ie/en/JELR/Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers.pdf/Files/Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers.pdf](http://www.justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf)

¹⁵⁵ Dr B. McMahon (2015) *Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers*, Dublin: Department of Justice and Equality, p. 171, available at: [http://www.justice.ie/en/JELR/Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers.pdf/Files/Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers.pdf](http://www.justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf)

¹⁵⁶ Dr B. McMahon (2015) *Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers*, Dublin: Department of Justice and Equality, p. 345, available at: [http://www.justice.ie/en/JELR/Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers.pdf/Files/Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers.pdf](http://www.justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf)

¹⁵⁷ Dr B. McMahon (2015) *Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers*, Dublin: Department of Justice and Equality, p. 346, available at: [http://www.justice.ie/en/JELR/Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers.pdf/Files/Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers.pdf](http://www.justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf)

In addition, in 2014 the Rape Crisis Network Ireland reported on 'domestic violence, sexual harassment and sexual assault in Direct Provision centres, recruitment for prostitution, and trafficking, particularly of young asylum seekers for the purposes of sexual exploitation', see: Rape Crisis Network Ireland (2014) *Asylum seekers and refugees surviving on hold*, Dublin: Rape Crisis Network Ireland, p.18, available at: <http://www.rcni.ie/wp-content/uploads/RCNI-Asylum-Seekers-and-Refugees-Surviving-on-Hold.pdf>

bodies, NGOs, or other institutions of civil society should meet the needs of trafficked persons'.¹⁵⁸ GRETA's First Evaluation Round also urged the State to explore the involvement of NGOs as support providers, with a view to ensuring the provision of appropriate accommodation to victims of trafficking.¹⁵⁹ As noted at the Roundtable on Identification of Victims:

'The option of referral to care centres established and equipped to shelter and support crime victims – and by enabling access to existing women's shelters and supported housing run by charities already in existence or by supporting the establishment of new shelters - should be explored in any new system of identification.'¹⁶⁰

In 2013, GRETA specifically stated that it did not consider Baleskin Reception Centre as an 'appropriate environment for such victims' due to a lack of privacy for residents as well as being a mixed-gender hostel which it stated could 'expose vulnerable women to further grooming and exploitation'.¹⁶¹ The Commission is concerned that, despite this issue being raised as part of the Review of the First National Action Plan 2009-2012 and by expert international bodies, the State did not intend to change its practice in its response to such concerns, as reported in that review.¹⁶²

The Commission reiterates that direct provision accommodation does not respect the rights of victims of trafficking in human beings and does not comply with the Convention. It recommends that victims of trafficking are accommodated in appropriate single gender facilities with access to the necessary support services, in keeping with the State's obligations of prevention and obligations to provide support services to victims under the Convention.

The Commission recommends that the State work with NGOs and civil society to provide appropriate accommodation to victims of trafficking.

¹⁵⁸ This was emphasised by the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings (2013) *Report by Maria Grazia Giammarinaro, OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings, following her visit to Ireland from 30 January to 02 February 2012*, Vienna: Organisation for Security and Cooperation in Europe, p. 5, available at:

<http://www.osce.org/cthb/99775?download=true>

¹⁵⁹ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 23, available at:

<http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁶⁰ See Department of Justice and Equality 'Report on the Roundtable on Identification of Victims of Human Trafficking' 15 December 2015, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/\\$File/Roundtable_report_Dec_2015_%20.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/$File/Roundtable_report_Dec_2015_%20.pdf)

¹⁶¹ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 45, available at:

<http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁶² Department of Justice and Equality (2014) *Review of the National Action Plan to Prevent and Combat Trafficking in Human Beings 2009-2012*, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-95REJP1041313-en/\\$File/Review of the National Action Plan Final.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-95REJP1041313-en/$File/Review of the National Action Plan Final.pdf)

4.2.8. The right to shelter and social care needs

As raised by GRETA in its First Evaluation Round, many potential victims of trafficking from the EEA face difficulties in accessing social protection or welfare supports due to the operation of the Habitual Residence Condition (HRC)¹⁶³ as many of them are not deemed to satisfy that test and therefore cannot access women's shelters or other relevant supports.¹⁶⁴

The European Commission against Racism and Intolerance (ECRI)¹⁶⁵ and the former UN Independent Expert on Human Rights and Extreme Poverty¹⁶⁶ have, following country visits, raised the point that, in practice, the HRC can operate as a barrier to many vulnerable groups seeking to access a social security payment.

This issue was also raised at the Roundtable on Identification of Victims in December 2015. Participants expressed the view that the HRC could act as a barrier for victims of human trafficking, including returning nationals/EU citizens and third country nationals, and that this possible obstacle to effective access to shelter and social care needs requires further attention. One solution offered was the possibility of issuing waivers.¹⁶⁷

The Commission recommends that the Habitual Residence Condition not be applied as an obstacle to victims of trafficking in accessing any supports including shelter or housing.

4.2.9. The right to seek employment

Victims of trafficking who are not in the asylum process, and have a temporary residence permission, have the right to access work and training opportunities.¹⁶⁸

¹⁶³ As noted above, the Administrative Immigration Arrangements provide that a person from the EEA may be identified as a suspected victim of trafficking and 'will be treated no less favourably than a person from outside that area', Irish Naturalisation and Immigration Service (2011) *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking*, Dublin: Department of Justice and Equality, para. 4, available at: <http://www.inis.gov.ie/en/INIS/Pages/PB08000021>.

The HRC is an extra qualifying condition for means-tested social welfare payments which stipulates that a person satisfy a number of factors to demonstrate a connection to Ireland. These factors include, the length of time spent in Ireland or another country, the person's employment pattern, his or her intentions to remain in the State, and where his or her 'centre of interest' is deemed to be, taking into consideration family ties, the person's home and other relevant circumstances.

¹⁶⁴ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 46, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁶⁵ European Commission against Racism and Intolerance (2013) *ECRI Report on Ireland* (fourth monitoring cycle), Strasbourg: Council of Europe, para. 130.

¹⁶⁶ UN Office of the High Commissioner for Human Rights (OHCHR) (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona: Mission to Ireland*, Geneva: OHCHR, p. 12.

¹⁶⁷ Department of Justice and Equality (2015) 'Roundtable on Identification of Victims of Human Trafficking' 15 December 2015, Dublin: Department of Justice and Equality, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/\\$File/Roundtable_report_Dec_2015_%20.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/0/C8946B6E562E812080257F650054E6E3/$File/Roundtable_report_Dec_2015_%20.pdf).

¹⁶⁸ Anti-Human Trafficking Unit (2015) *Guide to Procedures for Victims of Human Trafficking in Ireland* Dublin: Department of Justice and Equality, p. 10, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9X7FBT1221175-en/\\$File/Guide to Procedures June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9X7FBT1221175-en/$File/Guide%20to%20Procedures%20June%202015.pdf)

The right to seek employment and training is also enjoyed by individuals who have been recognised as refugees or as being eligible for subsidiary protection.¹⁶⁹ However, as demonstrated by a recent study, the transition from Direct Provision to active participation in community life involves many financial and other hurdles, including difficulties in accessing employment and accommodation.¹⁷⁰

The Commission notes that the *International Protection Act 2015* continues to preclude applicants for international protection from seeking employment¹⁷¹ and has previously commented on the adverse impacts of this prohibition in the context of egregiously excessive delays in the application process.¹⁷²

Potential victims of trafficking, who in parallel are seeking international protection, are also excluded from the labour market, under the current law and the proposed change of law under the *International Protection Act 2015*.

The Commission recommends that the law be amended to allow asylum seekers who are also potential victims of trafficking to obtain work permits.¹⁷³

The Commission recommends that victims of trafficking, lawfully present in the State, be afforded access to the labour market in line with Article 12(4) of the Convention.

¹⁶⁹ Section 53 of the *International Protection Act 2015* (not yet commenced) continues the practice of allowing only those with recognised status to seek employment, as currently provided for under section 3 of the *Refugee Act 1996*.

¹⁷⁰ Muireann Ní Raghallaigh *et al* (2016) *Transition from Direct Provision to Life in the Community*, Dublin: Irish Research Council, the Irish Refugee Council, University College Dublin and Trinity College Dublin. The obstacles to gaining employment following long periods in the asylum process are detailed at pages 53 to 56.

¹⁷¹ Section 16(3)(b) of the *International Protection Act 2015* (not yet commenced) continues the prohibition on applicants for international protection seeking employment as currently provided for under section 9(4)(b) of the *Refugee Act 1996*.

¹⁷² Irish Human Rights and Equality Commission (2014) *Policy Statement on the System of Direct Provision in Ireland*, Dublin: Irish Human Rights and Equality Commission, p. 19, available at: http://www.ihrec.ie/download/pdf/ihrec_policy_statement_on_direct_provision_10dec14.pdf

¹⁷³ This echoes the recommendation made in the *Trafficking in Persons (TIP) Report 2016* United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016*, p.192, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

4.3. Measures concerning substantive criminal law, investigations and prosecutions

The Garda National Protective Services Bureau was established in 2015 with a remit including human trafficking, organised prostitution, missing persons, the management of sex offenders and victim support.

The Commission welcomes the nomination by the Director of Public Prosecutions (the ‘DPP’) of particular personnel to deal with cases of human trafficking and the specific guidelines (noted above):

‘to guide prosecutors in examining which factors are to be considered in assessing whether to commence or continue with a prosecution including a consideration as to whether the public interest is served by the prosecution of a victim of human trafficking who has been compelled to commit offences (e.g. immigration or sexual offences) as a result of being trafficked.’¹⁷⁴

The Anti-Human Trafficking Unit in the Department of Justice and Equality reported that in 2014 An Garda Síochána commenced 79 human trafficking investigations involving 46 alleged victims.¹⁷⁵ In the same year, 14 prosecutions in respect of 13 defendants were initiated. In 13 cases, the DPP directed that charges be brought under offences relating to the sexual exploitation of children (the cases involved exploitation including child pornography, sexual assault and sexual indecency).¹⁷⁶ One defendant was charged in relation to the prostitution of minors. All of the victims and defendants in those cases were Irish.

While the State is reported to have ‘sustained efforts to investigate trafficking offences’, it did not convict any labour or sex traffickers in the period from 1 April 2015 until 31 March 2016.¹⁷⁷

From the information available (to end 2014), it appears that no prosecutions have been initiated in relation to trafficking for the purpose of labour exploitation,¹⁷⁸ despite the change in law in 2013 to amend the definition of ‘forced labour’. This is in the context of the identification of eight potential victims of trafficking for labour exploitation being reported in 2014,¹⁷⁹ together with a reported

¹⁷⁴ Website of the Anti-Human Trafficking Unit:

<http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/irelandsresponse-criminaljusticerresponse-en>

¹⁷⁵ Anti-Human Trafficking Unit (2015) *Trafficking in Human Beings in Ireland 2014*, Dublin: Department of Justice and Equality. This is an increase from 56 in 2013. See:

[http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-A6TFZC1155404-en/\\$File/2014 Annual Report.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-A6TFZC1155404-en/$File/2014%20Annual%20Report.pdf)

¹⁷⁶ As noted above in section 4.2.1 (measures to address child trafficking), the United States Trafficking in Persons Report 2016 argues that prosecutions, for example in child molestation cases, are instances of ‘non-trafficking crimes’ being prosecuted as trafficking crimes: United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p. 192, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

¹⁷⁷ The US Department of State *Trafficking in Persons Report* refers to the reporting period April 2015 to March 2016, United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p. 192, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

¹⁷⁸ Government of Ireland (2015) *CESCR: Reply of Ireland to the List of Issues in relation to its third periodic report*, Dublin: Department of Foreign Affairs, para. 40. <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/int-priorities/humanrights/Response-of-Ireland-to-CESCR.pdf>

¹⁷⁹ Anti-Human Trafficking Unit (2015) *Human Trafficking in 2013 and 2014 – A cross-border analysis*, Dublin: Department of Justice and Equality, available at:

‘increase in suspected victims of forced labour, forced criminal activity, and forced begging from Eastern Europe, particularly Romania’.¹⁸⁰

While the Commission recognises that the legislation has been strengthened to take account of trafficking for forced labour, it notes that more needs to be done to ensure the effective prosecution of traffickers in order to fulfil the State’s obligations under international law and to ‘ensure that human trafficking offences are investigated and prosecuted effectively, leading to proportionate and dissuasive sanctions’ as recommended by GRETA’s First Evaluation.

The Draft Second National Action Plan notes that investigations are complicated by the clandestine nature of the criminality, the frequent need to rely on evidence collected abroad and the potential for victims and witnesses to be either traumatised or intimidated. The Commission welcomes the commitment in the Draft Second National Action Plan to ‘meet these challenges and ensure a robust enforcement response’.¹⁸¹ In this context, the Commission recalls GRETA’s First Evaluation Round recommendation to ‘make full use of all measures available to protect victims/witnesses of [trafficking in human beings] to prevent intimidation during the investigation and during and after the court proceedings’.¹⁸²

The Commission recommends that, in reporting prosecutions for trafficking, the State continues to clearly specify the crimes being prosecuted, particularly in relation to sexual exploitation cases against children, to ensure reporting transparency.

The State should address the obstacles to prosecuting perpetrators of trafficking, in particular those responsible for trafficking persons for labour exploitation and forced criminality.

4.4. Monitoring and data collection

The Commission recalls GRETA’s First Evaluation recommendation to introduce an independent evaluation of the implementation of the National Action Plan and to consider the establishment of an independent National Rapporteur or other mechanism for monitoring the anti-trafficking activities of State institutions.

The Commission welcomes the review of the National Action Plan 2009-2012, which involved in-depth discussions with a range of state and non-state actors. However, the review was ultimately published by the Department of Justice and Equality and carried out under the direction of the Interdepartmental High Level Group (comprising representatives from key Government

[http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9X5D37102553-en/\\$File/Human trafficking in 2013 and 2014 A cross-border analysis.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9X5D37102553-en/$File/Human%20trafficking%20in%202013%20and%202014%20A%20cross-border%20analysis.pdf)

¹⁸⁰ Victims of forced labour have been identified in domestic service, the restaurant industry, and car washing services, as reported by: United States Department of State (2016) *Trafficking in Persons (TIP) Report 2016* p. 192, available at: <http://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>

¹⁸¹ Anti-Human Trafficking Unit (2015) *Draft Second National Action Plan to Prevent and Combat Human Trafficking in Ireland*, Dublin: Department of Justice and Equality, p.56, available at: [http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/Second National Action Plan - June 2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/Second%20National%20Action%20Plan%20-%20June%202015.pdf)

¹⁸² Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p. 60, available at: <http://www.coe.int/en/web/anti-human-trafficking/ireland>

Departments and agencies). As the evaluation was conducted by the same High Level Group which largely has responsibility for producing the National Action Plan, it might be argued that the Review lacked the independence necessary to achieve a truly objective and critical analysis. The Commission nonetheless notes that submissions to the Review were appended thereto.

GRETA has identified the importance of collating ‘comprehensive statistical information on both trends in human trafficking and the performance of the main actors in the fight against trafficking’ from a human rights perspective.¹⁸³

The Draft Second National Action Plan highlights the difficulty of obtaining accurate data in relation to victims of trafficking given the clandestine nature of trafficking in human beings. Inadequate information and expertise has serious implications for the identification of potential victims of trafficking.¹⁸⁴ The Commission previously raised concerns with the UN Human Rights Committee that the State had invoked data protection restrictions ‘to excuse inaction in relation to the taking of concrete measures to identify and protect vulnerable persons at risk of exploitation’.¹⁸⁵

The Commission also notes that the UN Committee on Economic, Social and Cultural Rights called on the Irish State to collate ‘statistical data disaggregated by year, sex, disability, ethnicity and other relevant criteria’¹⁸⁶ to provide the Committee with updated and sufficient data so it can assess the progressive realisation of economic social and cultural rights in the State.

The Commission welcomes the statement in the Draft Second National Action Plan that ‘the question of the appointment of a National Rapporteur and other monitoring mechanisms in respect of reviewing the implementation of this Plan will be specifically considered’, as required under the EU Directive on Human Trafficking.¹⁸⁷ The Commission urges the State to action this commitment without further delay.

The Commission recommends that an independent dedicated National Rapporteur be appointed to monitor developments in relation to trafficking as well as to ensure that the

¹⁸³ Council of Europe Group of Experts on Action against Trafficking in Human Beings (2013) *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round*, GRETA(2013)15, p.27.

<http://www.coe.int/en/web/anti-human-trafficking/ireland>

¹⁸⁴ According to MRCI: ‘There is need for an independent rapporteur who could identify trends and lead out in addressing these issues in a coordinated and strategic way [...] New forms of trafficking are constantly emerging and it is necessary to have a key role in place to monitor, design responses and address the gaps in identification and prosecution.’ Migrant Rights Centre of Ireland (2013) *Trafficking for Forced Labour in Cannabis Production: The Case of Ireland*, Dublin: Migrant Rights Centre p.5.

<http://www.mrci.ie/resources/publications/trafficking-for-forced-labour-in-cannabis-cultivation-the-case-of-ireland/>

¹⁸⁵ Irish Human Rights and Equality Commission Designate (2014) *Submission to the UN Human Rights Committee on the Examination of Ireland’s Fourth Periodic Review under the International Covenant on Civil and Political Rights*, Dublin: Irish Human Rights and Equality Commission Designate, para. 119.

<http://www.ihrec.ie/download/pdf/20140616113130.pdf>

¹⁸⁶ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding observations on the third periodic report of Ireland*, E/C.12/IRL/CO/3, para. 6. http://tbinternet.ohchr.org/Treaties/CESCR/SharedDocuments/IRL/INT_CESCR_COC_IRL_20930_E.docx

¹⁸⁷ Department of Justice and Equality (2015) *National Action Plan to Prevent and Combat Human Trafficking 2015 (Draft)*, Dublin: Department of justice and Equality, p. 74.

[http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/\\$File/SecondNationalActionPlan-June2015.pdf](http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/RADN-9Y2H3C135052-en/$File/SecondNationalActionPlan-June2015.pdf)

State complies with its obligations under domestic and international human rights standards.

The Commission recommends that future reviews of the State's National Action Plan are carried out by an independent body, such as an independent dedicated National Rapporteur.

The Commission recommends that the State continue to collect data from relevant actors and that all the necessary measures are taken to ensure respect for the rights of data subjects to personal data protection.