

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

Irish Human Rights and Equality Commission
October 2022



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

Published by the Irish Human Rights and Equality Commission.

Copyright © Irish Human Rights and Equality Commission 2022

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

Contents

Contents.....	3
Introduction	1
List of recommendations	2
Background information	8
Summary	10
Part 2 Sexual Offences	12
Head 5 Amendment of section 4A of the Act of 1981.....	12
PART 3: National Referral Mechanism for Victims of Human Trafficking	13
Head 12 Interpretation	13
Head 13 Competent Authorities of the National Referral Mechanism.....	19
Head 14 Application for recognition as a victim of human trafficking.....	19
Head 15 National Referral Mechanism Operational Committee [Panel] for the identification of victims of human trafficking	23
Head 16 Sharing of information by Competent Authorities and Trusted Partners	26
Head 17 Identification of a victim of human trafficking by the National Referral Mechanism Operational Committee [Panel].....	28
Head 18 Designation by Order of Trusted Partner	30
Head 19 Access to services by victims of human trafficking	31
Head 20 Prohibition on Deportation of Victims of Trafficking	38
Head 21 Protection from prosecution for a human trafficking offence.....	38
Bibliography	44
Law	46
Case Law.....	47

Introduction

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

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

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

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

List of recommendations

Part 2 Sexual Offences

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

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

PART 3: National Referral Mechanism for Victims of Human Trafficking

Head 12 Interpretation

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

Victim’s consent

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

Absence of a child-specific identification process

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

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

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

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

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

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

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

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

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

[Inclusive categorisation of potential victim/ applicants](#)

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

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

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

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

Head 13 Competent Authorities of the National Referral Mechanism

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

Head 14 Application for recognition as a victim of human trafficking

Multi-agency two-stage assessment

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

Unnecessary duality in establishing both 'credibility' and 'reasonable grounds'

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

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

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

Re-applications to Competent Authorities and Trusted Partners

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

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

Operational matters

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

Membership and expertise

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

Head 16 Sharing of information by Competent Authorities and Trusted Partners

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

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

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

Indicators

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

Appeal and Reconsideration process

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

Head 18 Designation by Order of Trusted Partner

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

Head 19 Access to services by victims of human trafficking

Assistance not conditional on cooperation with investigations

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

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

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

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

Head 20 Prohibition on Deportation or Transfer of Victims of Trafficking

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

Head 21 Protection from prosecution for a human trafficking offence

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

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

Background information

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

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

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

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

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

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

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

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

Part 2 Sexual Offences

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

The Commission, as Rapporteur, has expressly called for victims of trafficking for the purposes of sexual exploitation to be afforded the same protections as victims of rape and other sexual assault offences in criminal trials.² Despite Head 5 extending the provisions for separate legal representation to complainants of other sexual assault offences, this does not extend to victims of trafficking for the purposes of sexual exploitation. The argument is two-fold. First, traffickers commonly use sexual violence as a tool to assert power and control over women, children, and men, regardless of the type of trafficking they are engaging in. Second, a trafficking offence is not, by definition, a sexual offence, although the sexual exploitation (without the element of trafficking) of a person, may constitute rape and/or sexual assault of the victim. The difficulty arises where the accused trafficker is not (exclusively, or possibly at all) the person who is actually perpetrating the sexual exploitation, but rather the person 'recruiting, harbouring, etc.' the victim for the purposes of sexual exploitation. Given the heinous nature of what a victim is subjected to when they have been sexually exploited, it is essential they are afforded the same protections as other victims of rape and sexual assault with regard to separate legal representation.

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

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

PART 3: National Referral Mechanism for Victims of Human Trafficking

Head 12 Interpretation

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

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

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

Victim's consent

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

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

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

Absence of a child –specific identification process

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

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

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

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

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

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

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

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

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

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

Therefore, it is especially important that the Bill develops concrete measures for child applicants, in line with the international recommendations and the Commission’s first

⁴ Heads 16 (6) and 19(2)(f)

National Evaluation Report that extensively explored child trafficking in Ireland (IHREC, 2022). Furthermore, greater clarity is need in relation to the provision that Tusla will act ‘in the best interests of the child’ where a child’s parent/guardian is potentially involved in the trafficking or where the child is unaccompanied. It may also be the case that a child trafficking victim may have a safe parent/guardian. The Bill must ensure that it is capable of capturing both scenarios and is sufficiently clear and detailed to ensure that child victims receive the necessary support and assistance.

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

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

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

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

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

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

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

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

Inclusive categorisation of potential victim/ applicants

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

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

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

The Commission recommends the introduction of a separate standalone offences for holding a person in slavery, servitude or forced or compulsory labour fully aligns Irish law with Article 4 of the European Convention on Human Rights, which requires criminalisation of slavery, servitude and forced labour.⁶

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

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

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

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

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

Head 13 Competent Authorities of the National Referral Mechanism

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

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

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

Head 14 Application for recognition as a victim of human trafficking

Multi-agency two-stage assessment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Re-applications to Competent Authorities and Trusted Partners](#)

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

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

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

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

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

Operational matters

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

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

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

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

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

Independent bodies

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

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

Membership and expertise

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

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

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

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

To ensure the requisite knowledge and expertise of the decision-makers, ‘Operational Committee Panels’ from the Competent Authorities and Trusted Partners (and independent experts where needed) could be convened for the purpose of deciding Head 17 identifications arising from Head 14 referrals. The Department of Justice, in its role as National Coordinator could be responsible for convening such panels and would act as Chair of the Operational Committee [Panels].

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

This approach will further ensure that the Operational Committee does not become unwieldy and that each member of the Operational Committee [Panel] has the requisite knowledge and expertise of the complexity of vastly different and specific forms of

trafficking to be able to deliver competent and high-quality decisions. In addition, it is hoped that owing to the smaller and more specialised composition the Operational Committee [Panels] will be easier and more expedient to convene, leading, in turn, to fewer delays, quicker decisions and access to assistance and supports for victims (Articles 11.2¹⁰ and 11.4¹¹ of the EU Anti-Trafficking Directive).

Finally, in regards to Head 15 (ii) “Interim arrangements for applicants awaiting a determination on their application, including provision of support services”, the Commission is of the view that as currently drafted this is not sufficient. Instead, where a Competent Authority and/or Trusted Partner has referred a person under Head 14 to the Operational Committee [Panel] for identification, such applicants must be granted the 60 day Recovery and Reflection period in line with the recommendations relating to Head 19.

Head 16 Sharing of information by Competent Authorities and Trusted Partners

The Commission is encouraged to see that an applicant’s information can only be used for the purposes of identification. This is an important first step in ensuring that the identification process is separate and distinct from the criminal justice and immigration processes. This also aligns the proposed NRM with Article 11(3) of the EU Anti-Trafficking Directive, which requires that assistance, and support for a victim is not made conditional on the victim’s willingness to cooperate in the criminal investigation, prosecution or trial (IHREC, 2022).

The Commission is concerned with the inclusion in subhead 2 of:

“information relating to the person’s arrival in the State.”

This suggests that the mechanism is only for third country nationals, which it is not. Head 16(2)(d) provides that all of Competent Authorities and Trusted Partners would receive

¹⁰ Article 11.2 of the EU Anti-Trafficking Directive establishes that ‘Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3’.

¹¹ Article 11.4 of the EU Anti-Trafficking Directive establishes that ‘Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations’.

details of a criminal investigation. Consideration should be given to the necessity for the dissemination of such information to everyone or to the deciding panel alone.

Whether a child has been taken into the care of the State, in which case Tusla are acting *in loco parentis* (and/ or as the child's legal guardian), or where the child is in the care of their parent/guardian they must have access to a Children's Legal Advisor. The Children's Legal Advisor would act as an advocate for the child to ensure the highest protection and support for the child, regardless of the form of trafficking the child has been subjected to, the family background, and/or the child's immigration status (OSCE/ODIHR, 2022).

The Commission recommends that child applicants should be appointed a 'Children's Legal Advisor' at the earliest stage of the referral and identification process¹².

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

¹² IHREC (2022) [Trafficking in Human Beings in Ireland](#), p. 25

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

The multi-agency identification process outlined in the Bill is a significant and positive reform of the current practice and is an approach that is internationally considered ‘best practice’ (OSCE/ODIHR, 2022). This approach combines multi-disciplinary professionals, agencies and services and ensures a wider range of skills and knowledge. Importantly, the approach outlined in the General Scheme includes agencies, such as the HSE and Tusla that focus on the health and wellbeing of people; and potential victims of trafficking by extension. This is conducive to the intended shift away from viewing trafficking through the criminal justice/immigration lens. This paradigm shift is *essential* for ensuring that the response to trafficking is grounded in human rights.¹³

Threshold

As outlined above, relating to Head 14, the Commission strongly believes that it is not necessary to include both Head 17(1)(a) (‘the balance of probability’) *and* (b) (‘reasonable grounds’) as the inclusion of both raises the threshold beyond that which is required by the jurisprudence of the Irish courts (*P Case*) or internationally recognised best practice (OSCE/ODIHR, 2022) where:

“it is recognised that ‘international consensus as reflected in the Directive is that a person should be identified as a “suspected victim” if there are reasonable-grounds indicators to that effect.”¹⁴

The inclusion of a legal burden of proof in a non-judicial setting is not only problematic but also wholly inappropriate.

¹³ According to the OSCE ‘Adopting a human-rights-based approach to victims of trafficking is a critical step in ending such abuses. A human-rights-based approach recognizes that human trafficking is not just a criminal activity but one that has profound human-rights implications both for victims and for the governments and non-governmental organizations that must deal with them. The creation of an effective National Referral Mechanism (NRM) can be a vital step in ensuring that the human rights of trafficked persons are protected.’ See OSCE/ODIHR (2022) [National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons](#). Warsaw: OSCE Office for the Democratic Institutions and Human Rights, p. 11

¹⁴ *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222, at para 183

Indicators

Head 14 considerations regarding the removal of a seemingly random sample of indicators applies to Head 17 as well, and an amendment in this regard is proposed.

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

Clear timelines

Appropriate and sufficiently short timelines for formal identification of a person as a ‘suspected victim of trafficking’ are at the core of:

“mechanisms aimed at the early identification of, assistance to and support for victims.”(EU Anti-Trafficking Directive Article 11.4)

It is the view of the Commission that Head 17(3) does not provide for a sufficiently clear timeframe within which the Operational Committee [Panel] must make their decision. The Commission is of the view that the absence of a specific timeframe is likely to have a seriously detrimental impact on victims. The Commission would recommend that the Head 17 identification decision should be issued within a timeframe of 60 days from the Head 14 referral and correspond to the end of recovery and reflection period (OSCE/ODIHR, 2022), and that such a decision is communicated (in writing) to the applicant and/or the applicants lawyer no later than 3 days after the decision is made. Applicants should be given reasons, in writing, if their application was unsuccessful.

Appeal and Reconsideration process

The Commission, in the first National Evaluation Report specially called for a NRM with, *inter alia*, an appeals process. The Commission is disappointed by the complete absence of a process for either appeal or reconsideration of the decisions under Head 17. Where new evidence or new information comes to light, the State must not refuse to re-consider the application, as there remains a positive duty to investigate further.¹⁵ This is especially important for victims who might suffer from Post-traumatic stress disorder, which can

¹⁵ Brecknell v. United Kingdom (2008) 46 EHRR 42 at 70-71 and 75

make recall a difficult and slow process. It must be remembered that there is a duty upon the State to identify victims in order to assist and protect them. As such, the State is obliged to act on information that may lead to identification. This duty does not stop with a decision under Head 17, if this decision turns out to be wrong. If it did, the State would be failing to perform the duty properly and the rights of victims to assistance and protection afforded to them under the Convention on Action against Trafficking in Human Beings, the Anti-Trafficking Directive and Article 4 ECHR would be denied to them.¹⁶ Accordingly, where relevant evidence casts doubt on the correctness of a negative identification decision, this must not be disregarded as to do so would:

“dilute the content of the duty and water down the protections afforded to victims.”¹⁷

Victims must enjoy the ‘benefit of doubt’, and this should be enshrined in the Bill.

A judicial remedy to challenge the decisions of the Operational Committee is available by way of Judicial Review, but it is the view of the Commission that this does not sufficiently meet the duties of the State to identify and protect victims. Furthermore, it is costly and arduous to both the State and the victim involved, in terms of public funds, court overuse and personal loss.

The Commission recommends the Bill include an appeal and a reconsideration process.¹⁸

Head 18 Designation by Order of Trusted Partner

The Heads as drafted do not confer any immunity from suit on competent authorities or trusted partners or provide any indemnity if they are challenged (see Head 15). The Commission is of the view that a provision like section 154 of the *Data Protection Act 1998*, which confers conditional immunity on the Data Protection Commission and Commissioner, could be considered as an additional precaution.

¹⁶ See R (DS) v Secretary of State for the Home Department [2019] EWHC (Admin)

¹⁷ R (DS) v Secretary of State for the Home Department [2019] EWHC (Admin) at 68

¹⁸ IHREC (2022) [Trafficking in Human Beings in Ireland](#), p. 82

As currently drafted, a number of trafficking-specific bodies and organisations would not fall under Head 18 (1). These include, although are not limited to, Trade Unions and awareness and training organisations such as MECPATHS. This provision should be expanded to include Trade Unions and organisations/bodies with demonstrable expertise in human trafficking.

There is a risk that the ‘trusted partner’ mechanism will intentionally or unintentionally compromise the independence of NGOs or influence them to withhold legitimate criticism of anti-trafficking law and policy. There is also a risk that ‘trusted partner’ status will be withheld from NGOs which are considered to be critical or troublesome.

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

Head 19 Access to services by victims of human trafficking

The Commission recalls the obligation of the State to provide assistance and support ‘prior, during and after’ any criminal proceedings (EU Directive, Article 11.1), and this assistance and support:

“shall include at least standards of living capable of ensuring victims’ subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.” (EU Directive, Article 11.5)

The Commission questions the feasibility of the idea to have all agencies and bodies on the Operational Committee working together to create a care package, and is of the view that a statutory entitlement should be considered comparable to the entitlement to an aftercare plan provided to children in the care of the Child and Family under section 45 of the Child Care Act 1991.

A procedure applicable to all victims and equal treatment

The Commission has continuously highlighted the need to have an equitable and fair process for all victims of trafficking, irrespective of their race, nationality or citizenship.

One of the most significant advancements envisaged in the General Scheme is that, *prime facie*, the NRM applies to all victims of trafficking, regardless of their nationality, immigration status or pending asylum claims (IHREC, 2022; GRETA, 2022). However, the decision not to place immigration-related measures - an integral part of assistance - in statute, undermines the equitable treatment of victims of trafficking of different backgrounds, origins and circumstances. Most particularly, this oversight will disproportionately affect third country nationals and EEA nationals, who represent the majority of victims of human trafficking (IHREC, 2022). Moreover, there is potentially an equality/discrimination issue arising, with some victims of trafficking being treated less favourably than others based on their nationality. Failing to recognise the need to place such protections on a statutory footing represents a serious missed opportunity to honour the object and purpose of EU¹⁹ and international law.²⁰

The Bill must include and clearly outline the rights and supports available to identified victims of human trafficking. Failing to provide, in statute, for specific measures regarding social welfare assistance, housing assistance, immigration permissions for victims of trafficking, will perpetuate the present inconsistent approach and chronic deficiencies in assistance and support. In its first National Evaluation Report as a National Rapporteur, the Commission exposed the lack of synchronicity between State Agencies and Departments that led to divergent decisions with respect to identical cases, and made detailed recommendations regarding these matters. The Commission is of the view that the Scheme

¹⁹ Most especially, Council Decision 2007/125/ JHA “Prevention of and Fight against Crime” which in Article 3(2)(c) and (d) seeks to ‘*promote and develop best practices for the protection and support of witnesses and for the protection of crime victims*’; EU Directive 2004/81/EC regarding the issuing of residence permits to third-country nationals who are victims of trafficking, or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; EU Directive 2004/80/EC relating to compensation to crime victims; EU Directive 2012/29/ EU establishing minimum standards on the rights, support and protection of victims of crime. It is recognised that Ireland has opted-out of some of these Directives

²⁰ [Council of Europe Convention on Action against Trafficking in Human Beings 2005](#)

offers a unique (if not only) opportunity to coordinate once and for all the assistance and support to victims of this crime.

Including all immigration provisions for victims of trafficking in the Operational Procedures or policy effectively waters down the protections available, leaving them liable to amendment and change at any time and without parliamentary scrutiny.

Victims seeking international protection

Importantly, the Bill must ensure that victims of trafficking who are simultaneously seeking International Protection are not treated in a manner different from other victims (IHREC, 2022). In particular, that the third country national immigration provisions for victims must apply to them as well. Currently, such victims are treated the same as the rest of the asylum seeking populations, in that they hold asylum permits precluding them from leaving Direct Provision and they have curtailed opportunities for reintegration (training/employment) compared to other victims of trafficking.

Recovery and Reflection Period for all victims

In line with Article 13 Council of Europe Convention on Action against Trafficking in Human Beings, the Commission would recommend the Recovery and Reflection period be granted to all applicants who receive a positive Head 14 referral and that this be expressly outlined in the Bill.

It must be remembered that the purpose of the 60 day day Recovery and Reflection period is to allow the suspected victim of trafficking time and support to begin to recover and, where they so choose, to make an informed decision as to whether they wish to report the crime(s) to the authorities. It also enables suspected victims time to decide whether they wish to be formally identified by the Operational Committee [Panel]. As such, the Bill must be sufficiently clear on the rights and entitlements suspected victims of trafficking can rely upon during and after the Recovery and Reflection period.

The Council of Europe Convention includes measures necessary to assist victims in their physical, psychological and social recovery.²¹ To ensure that all victims of trafficking benefit from these measures the national law has to contain explicit provisions.

Clearly outlined assistance from the moment of referral

The Commission would strongly recommend that entitlements to services (such as trafficking-specific healthcare, child-trafficking specific care, gender-specific accommodation, free legal aid, and access to education and psychological support) be enshrined in the Bill and aligned to the procedures outlined in Head 14 and Head 17, respectively.

Owing to the undeniable vulnerability of victims of trafficking, it is essential that recognised victims of trafficking be afforded the necessary supports they require in order to recover. Adequate provision of such would better safeguard the rights of victims and would, in all likelihood, increase the possibility of victims being able to assist An Garda Síochana with the investigation of trafficking offences where the victim is safe and supported. Accordingly, O'Malley J in the *P Case* emphasises this exact point:

‘Concentration on the veracity of an applicant may also lead the decision-makers to overlook the fact that what is at stake is not simply a matter of entitlement to a beneficial status, as in an application for refugee status, but a measure intended to facilitate the investigation of a serious crime. It does not necessarily lead to any permanent material gain for the applicant but is intended to assist the State in preventing the modern blight of human trafficking’²²

Gender-specific and child victims-specific clarity in assistance

²¹Article 12 Assistance to Victims should include, at least: a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance b. access to emergency medical treatment; c. translation and interpretation services, when appropriate; d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand; e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; f. access to education for children.

2. Each Party shall take due account of the victim’s safety and protection needs.

²² *P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General* [2015] IEHC 222, at para 183

As outlined above, the Commission is disappointed there are no express provisions in the General Scheme to provide for gender-specific and child trafficking specific services to victims; a clear recommendation of the first National Evaluation Report.

Given the continued criticism of the Direct Provision System, it is troubling that Head 19 (1)(b) commits identified victims of trafficking to assistance within Directive Provision. Instead, the Commission would recommend that the Bill contain access to gender-specific accommodation for victims of trafficking, in addition to assistance from Local Authorities pursuant to their obligations under the Housing Acts 1966 to 2021.

Depending on the circumstances children may, or may not, require entry into the child protection system. In a situation where a child has a parent, relative or legal guardian who is not implicated in the trafficking of that child it will likely be in the child's best interest for the child to remain with their parent, relative or guardian. Equally, where a child is unaccompanied or has no safe legal parent, relative of guardian they must receive care tailored to meet their needs. The Bill must reflect these two possibilities and ensure that appropriate supports are provided for each situation. The Commission also recommends that the Bill include the immediate access to services for children suspected to be victims of trafficking once the Competent Authority or Trusted Partner has decided to refer the application to the Operational Committee. Presumed children victims of trafficking, including those undertaking an age assessment, should have access to the appropriate statutory support and assistance.

It is also recommended that the Bill include the requirement that a designated Competent Authority, with specific expertise in victim care and support (the HSE Anti Human-Trafficking Team (for adult victims) or Tusla for child victims) be required to undertake an individual risk and needs assessment and development of a care package for each person who has been identified as a victim of trafficking. This is a process that requires regular (at minimum quarterly) review and updating.²³

Immigration permission as part of assistance

²³ 'Effective assessment should not be a single, one-off event but rather an ongoing process of *'assessment, review, and action'* that is tailored to the individual needs and risks of each individual person and conducted with their informed consent', see NRM Handbook, OSCE (2022), pg. 310

It is important that a longer-term residence permission be guaranteed to a third country national, determined by the Operational Committee [Panel] to be a suspected victim of trafficking. While this may of course be revoked if the person is later found not to be a *bona fide* victim, the Bill must clearly outline the residence permission available to identified victims of trafficking. It must be considered, that if upon the completion of the identification process, or at any time after the identification process, the applicant is found not to be a victim, those rights evaporate.²⁴ Thus, it is balanced, necessary and proportionate to ensure that victims' rights to assistance and support are enshrined in the Bill.

Where it is not possible for the Operational Committee [Panel] to meet to decide on an application within the specified timeframe (Head 17), or where the applicant, Competent Authority or Trusted Partner who is supporting the applicant so requests (based on reasonable grounds), the Bill should clearly state that the 60 Days Recovery and Reflection period is automatically renewed for a further 60 days and/or until the Operational Committee [Panel] meets to determine the Head 17 application. Where a positive Head 17 identification decision has been made, Head 19 should also include a prospective avenue to family reunification, especially with minor children.

²⁴ P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General [2015] IEHC 222, at para 166

Assistance not conditional on cooperation with investigations

Of particular relevance is Article 11.3 of the Directive that in criminal investigation and proceedings, requires:

“assistance and support for victims are not made conditional on the victims’ willingness to cooperate.”

In the absence of a clear and specified statutory provision on the immigration status of victims of trafficking triggered by a positive identification decision, third country national victims would have no other option but to cooperate in criminal investigations in exchange for possible legal residence; as is the present *status quo*.

The Commission has been informed that all immigration and related issues will form part of the ‘Operational Guidelines’ that will accompany the Bill. These are not equivalent to a statutory protection. It must be remembered that the core of the universal criticism levelled at the current NRM centres on the State’s pre-occupation with immigration issues (Administrative Immigration Arrangements); arguably to the detriment of fulfilling the broader obligation owed to victims (Government of Ireland, 2011; IHREC, 2022; GRETA, 2022). It is the view of the Commission that by excluding the immigration measures from the legislation and by placing them within the Operational Guidelines, the new NRM will perpetuate the differential treatment of victims depending on their nationality and immigration status and it will interfere with the principle of voluntary cooperation with the criminal justice system and unconditional assistance:

“before, during and after the conclusion of criminal proceedings.” (Article 11.1 of the EU Anti-trafficking Directive)

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

- **social welfare (free of any habitual residence condition tests, which must be irrelevant);**
- **housing assistance (that includes a specialised shelter and/or private arrangements);**

- **medical and psychological care; and**
- **immigration status, where necessary to facilitate the entitlement to the above listed assistance, before, during and after the formal identification process subject of this scheme.**

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

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

Head 20 Prohibition on Deportation of Victims of Trafficking

In addition to the expanding of the protections from deportation to include transfer under the Dublin III Regulations, the Commission, would also urge for the inclusion of a third subsection (c), a prohibition on deportation of victims of trafficking where the person has a pending application, including an appeal or reconsideration, before an Operational Committee [Panel].

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

Head 21 Protection from prosecution for a human trafficking offence

The Commission welcomes the inclusion of Head 21, but is deeply concerned by the limited nature of the provision, as currently drafted.

The Commission is of the view that Head 21 be expanded to include a statutory defence where a suspected victim of trafficking has been involved in unlawful activities where such involvement is a direct consequence of their situation as a trafficked person.

This would bring Ireland into compliance with international standards which, according to the United Nations High Commissioner for Human Rights, require that:

“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, *or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.*”²⁵[emphasis added]

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

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

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

“Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”

The Commission is of the view that Head 21, even when read in conjunction with the DPP Prosecutors Guidelines²⁶ does not honour fully the non-prosecution requirement.

The non-prosecution principle aims to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators (where they so choose). The non-prosecution of victims principle does not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in (Directive 2011/36/EU). Article 8 of the EU Anti-Trafficking Directive does not confer an enforceable right on a suspected victim of trafficking not to be prosecuted.²⁷ But, importantly, when a victim is identified as a suspected victim of trafficking the prosecution is obliged to give due consideration to this status when making a

²⁵ Office of the High Commissioner for Human Rights, [Recommended Principles and Guidance on Human Rights and Human Trafficking](#), para 7

²⁶ “The prosecutor should consider whether the public interest is served by a prosecution of the suspect.” Director of Public Prosecutions (2019) [Guidelines for Prosecutors](#), pp. 12-13

²⁷ THP v. Chief Superintendent of Garda National Immigration Bureau and Others [2015] 2 ILRM 1, para. 200

decision whether to maintain its prosecution against them.²⁸ In order to ensure such a right is safeguarded, the Commission is of the view that the insertion of a statutory defence to crimes that are committed as a direct consequence of the person being trafficked is both necessary and proportionate.

The importance of the non-prosecution principle received considerable attention within the Commission's first National Evaluation Report wherein the report specifically outlined a number of cases where evidence would suggest that convicted persons were likely, or at least potentially, victims of trafficking. As such, the recommendations relating to non-prosecution fully align with the position of the Commission.

As currently drafted, the General Scheme provides that victims of trafficking will not be deported for immigration offences committed during the time they have been trafficked and/or for their role in their own trafficking; Heads 20 and 21, respectively. While the Commission takes no issue with Head 20 and indeed welcomes such a provision, Head 21 is considerably problematic.

GRETA called on the Irish authorities to ensure:

“the principle of non-punishment of victims of trafficking for their involvement in unlawful activities, to the extent that they were compelled to do so.” (GRETA, 2022)

There is no specific provision in Irish law on the non-punishment of victims of trafficking, and while the DPP “has issued guidelines for prosecutors,” GRETA recommends, *inter alia*, that:

“consideration should be given to adopting a specific legal provision.” (GRETA, 2022)

Evidence suggests that victims (or potential victims) of trafficking continue to be imprisoned and charged for criminal offences associated with trafficking (IHREC, 2022), beyond that of trafficking offences (IHREC, 2022). This suggests that the *principle of non-punishment of victims for crimes they have committed as a direct consequence of them being trafficked* is

²⁸ Court considers that the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, be at odds with the State's duty to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked.” See *VCL and AN v. United Kingdom*, no.77587/12 and 74603/12, para. 159, ECHR 2021

not being honoured fully and thus is in contravention of both Article 8 of the EU Anti-Trafficking Directive and Article 26 of the UN Convention Against Human Trafficking.

As stressed by GRETA in its 2017 report:

“the criminalisation of victims of human trafficking not only contravenes the State’s obligation to provide services and assistance to victims, but also discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State’s obligation to investigate and prosecute those responsible for human trafficking. GRETA considers that the absence of a specific provision on the non-punishment of victims of trafficking entails a risk of treating them differently depending on the prosecutor in charge of the case.”(GRETA, 2017)

Citing, *inter alia*, P. v. The Chief Superintendent of the Garda National Immigration Bureau & Ors. Greta recommended:

“adopting a specific legal provision on the non-punishment of victims of trafficking for their involvement in unlawful activities, to the extent that they were compelled to do so, and/or developing detailed, updated guidance for police officers and prosecutors on the aims and scope of the non-punishment provision.”²⁹

In line with this recommendation, and in light of the likely criminalisation of victims of trafficking by the Irish criminal justice system a statutory defence could potentially be useful in making the application of the non-prosecution principle (by the DPP) less dependent on the identification process (GRETA, 2022). Whether the defence arose on the evidence, and whether the prosecution could disprove it would be considered by the directing officer of the DPP as part of the general consideration of the strength of the evidence. Given the clandestine nature of trafficking it will always be the case that not all victims are formally identified and may only come to light once they have already entered the criminal justice system, such a defence would act as a safety net ensuring that victims of trafficking are not themselves criminalised.

²⁹ GRETA (2017) [Report Concerning the Implementation of the Council of Europe Convention on Trafficking in Human Beings by Ireland. Second Evaluation Round](#). Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties) Council of Europe, para. 207

The Commission acknowledges, and indeed welcomes, the State’s innovative approach to decriminalisation of potential victims of trafficking for sexual exploitation, and sees either this Bill, or a standalone Bill as an opportunity for its full realisation. As part of that measure, in 2021, the Minister for Justice announced plans for legislation to retrospectively expunge over 600 convictions obtained for ‘sale of sex’ under the preceding 1993 legislation (Department of Justice, 2021). In her [statement](#) (Department of Justice, 2021), the Minister linked the measures explicitly with the plans to end the unnecessary criminalisation of potential victims of trafficking:

“Given what we know about the levels of exploitation and human trafficking in the sex trade, it is very likely that many of those convicted in the past fall into the exploited category for a number of reasons, including because they were victims of trafficking. These vulnerable victims should also benefit from the legislative change regarding the sale of sex and be able to move forward and rebuild their lives.”³⁰

This novel approach has been welcomed by the Commission. However, there has been no similar initiative with regard to victims of other forms of human trafficking present in Ireland who have been convicted for crimes in which they may have been forced to participate.³¹

In recognition of the Commissions call for the wider application of retrospective expungement of criminal records of victims of trafficking the Commission would recommend that the Oireachtas Committee examine this important aspect as part of their deliberations.

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

³⁰ Department of Justice (2021) [Minister McEntee announces initiative to expunge previous convictions for ‘sale of sex’](#) [press release] 25 April,

³¹ P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General [2015] IEHC 222; IHREC (2022) [Trafficking in Human Beings in Ireland](#), pp. 63-64

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

Bibliography

Abbit B. (2021) Hundreds of children referred to experts during pandemic over fears of criminal, sexual and labour exploitation. Manchester Evening News [online] 10th October

GRETA (2017) [Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: Second Evaluation Round](#). Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties);

GRETA (2020) [Guidance Note on the Entitlement of Victims of Trafficking, and Persons at Risk of Being Trafficked, to International Protection](#);

GRETA (2022) [Evaluation Report Ireland Third Evaluation Round](#). Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties) Council of Europe

GRETA (2022) [Evaluation Report Ireland Third Evaluation Round](#). Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties) Council of Europe

IHREC (2016) [IHREC Submission to GRETA in Advance of its Second Evaluation Round of Ireland](#). Dublin

IHREC (2021) [Ireland's Actions Against Trafficking in Human Beings: Submission by the Irish Human Rights and Equality Commission to the Council of Europe Group of Experts on Action against Trafficking in Human Beings \(GRETA\)](#). Dublin

IHREC (2022) [Trafficking in Human Beings in Ireland](#)

OSCE (2011) [Trafficking in Human Beings: Identification of Potential and Presumed Victims: A community policing approach](#). Vienna

OSCE (2020) Conclusions and Recommendations for Ireland following the Visit by OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Trafficking Beings, Valiant Richey

OSCE/ODIHR (2022) [National Referral Mechanisms Joining Efforts to Protect the Rights of Trafficked Persons](#), p. 72

UNODC (2009) [Model Law against Trafficking in Persons](#);

US Department of State (2018) [Trafficking in Persons Report](#)

US Department of State (2019) [Trafficking in Persons Report](#)

US Department of State (2020) [Trafficking in Persons Report](#)

Office of the High Commissioner for Human Rights, [Recommended Principles and Guidance on Human Rights and Human Trafficking](#),

Director of Public Prosecutions (2019) [Guidelines for Prosecutors](#)

Varenikova, M. (2020) ["Mothers, Babies Stranded in Ukraine Surrogacy Industry"](#), *The New York Times* [online] 15 August

Ekathimerini (2021) ["Probe launched following allegations of illegal adoptions"](#), *Newsroom* [online] 7 January

Law

Council Decision 2007/125/JHA of 12 February 2007 establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme Prevention of and Fight against Crime

Criminal Law (Human Trafficking) Act 2008

Criminal Law (Human Trafficking) (Amendment) Act 2013

Criminal Law (Sexual Offence) Act 2017

Criminal Justice (Victims of Crime) Act 2017

Child Trafficking and Pornography Act 1998

Criminal Law (Sexual Offences) Act 1993

International Protection Act 2015

EU Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

EU Anti-Trafficking Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Recital 18.

EU Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

EU Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

EU Directive 2012/29/ EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

[Immigration, Residence and Protection Bill 2010](#)

The Council of Europe Convention on Action against Trafficking in Human Beings (2005)

Case Law

Brecknell v. United Kingdom (2008) 46 EHRR 42 at 70-71 and 75

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

[*P. v The Chief Superintendent of the Garda National Immigration Bureau, the DPP, Ireland and the Attorney General \[2015\] IEHC 222*](#)

R (DS) v Secretary of State for the Home Department [2019] EWHC (Admin) at 68

See R (DS) v Secretary of State for the Home Department [2019] EWHC (Admin)

VCL and AN v. United Kingdom, no.77587/12 and 74603/12, para. 159, ECHR 2021



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



The Irish Human Rights and
Equality Commission
16 – 22 Sráid na Faiche,
Baile Átha Cliath, D07 CR20
16 – 22 Green Street,
Dublin, D07 CR20

Íosghlao/Lo-Call 1890 245 245
Guthán/Phone + 353 (0) 1 858 3000
Ríomhphost/Email info@ihrec.ie
Idirlíon/Web www.ihrec.ie
🐦 @_ihrec
📍 /irishhumanrightsequality