

The Criminal Law (Sexual Offences and Human Trafficking) Bill 2023

Irish Human Rights and Equality Commission
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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.

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Abbreviations

Bill	Criminal Law (Sexual Offences and Human Trafficking) Bill 2023
Commission	Irish Human Rights and Equality Commission
GRETA	Group of Experts on Action against Trafficking in Human Beings
HRC Habitual	Residency Condition
IRG	Defence Forces Independent Review Group IRG
NRM	National Referral Mechanism
O'Malley	Review Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences
UNCRPD	UN Convention on the Rights of Persons with Disabilities

Recommendations

Part 2 Sexual Offences

Section 6 Amendment of section 1 of Act of 1981 (Extending the protections to all sexual assault offences)

The Commission recommends that the Bill should include sexual exploitation offences in the list of ‘applicable offences’.

Section 7 – Amendment of section 2 of Act of 1981(Change in Mens Rea in Rape)

The Commission recommends that:

- careful consideration is given to the ‘all the circumstances’ provision and that greater specificity is included in the law in order to ensure it is not so broad that it effectively erodes the aim of the Bill; the introduction of an objective standard.
- the Bill is amended in order to ensure that the the rights of disabled people and children are fully protected.

Section 8 Amendment of section 4A of Act 1981 (Expansion of Separate Legal Representation)

The Commission reiterates its recommendation 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) is extended to victims of offences committed under section 4 of the Criminal Law (Human Trafficking) Act 2008.

The Commission recommends that:

- the Bill is amended to provide for the provision of early legal advice to all complainants/witnesses and, where applicable to their parent/guardians for child sexual exploitation offences, rape, sexual and sexual exploitation offences, in line with the recommendations of the O’Malley Review and that of the Commission.

- this legal advice should not be contingent on there being a prosecution, or on the person having been formally identified as victim of trafficking.

Sections 10, 11, 12 and 13 (Extended provisions for anonymity)

The Commission recommends that:

- sections 10, 11 and 12 of the Bill are amended to include the exclusion of the public from all sexual and sexual exploitation offence trials including the removal the obligation for the verdict and sentence (if any) to be announced in public.
- anonymity should be extended to complainant-witnesses and the accused at trials for all sexual and sexual exploitation offences.
- the Bill is amended to broaden section 13 further to also include sexual exploitation offences.

Part 3 National Referral Mechanism

The Commission reiterates its recommendation that the Bill is amended to include an expanded definition of 'exploitation' to include trafficking for the purposes of novel and emerging forms of exploitation such as forced/exploitative marriages, sale of children, illegal adoptions, and illegal surrogacy.

The Commission recommends that:

- the definition of 'child' is amended to include an explicit presumption in favour of minority where there is doubt as to the age of a person. The presumption of minority must apply unless and until an age estimation assessment finds otherwise.
- the Bill is amended to include the term 'age estimation assessment'.
- the responsibility for these assessments is assigned to the Child and Family Agency (Tusla) and that such assessments are supported by guidelines that are child-centred and adapted to the person's specific needs (cultural, gender, etc.). Such assessments must not be based on a medical test and must include a 'presumption of minority'.
- the Bill is amended to remove references to trafficking of a child for sexual exploitation in the 1998 Act and place this offences within the 2008 Act to ensure that all trafficking offences are included in the same Act.

- the 'means' element of the human trafficking definition is included in section 20 'Interpretation', with a clear exemption of this element in the case of minors and persons with 'mental impairments'.
- the Bill is amended to include a standalone offence of slavery, servitude or forced or compulsory labour.
- the term 'relevant body' is amended to include 'victim support organisation' from Directive 2011/36/EU, as this is broad enough to include NGOs, trade unions, monitoring groups and others.

Section 21 -Trusted Partners

The Commission recommends that:

- a mechanism of independent review of decisions relating to trusted partner status should be included.
- the Bill is amended to include immunity from suit for competent authorities or trusted partners, or provide indemnity if they are challenged.

Sections 22, 23 and 24 – Operational Committee

The Commission recommends that:

- the operational framework of the Operational 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.
- the Bill is amended to provide for the selection of 'relevant' members of the Competent Authorities, Trusted Partners and persons with expert knowledge of trafficking to form Operational Committee Panels to decide identification/reconsideration applications.
- the Bill should specify the timeframe between which the Operational Committee receives a request for reconsideration and when they are convened to make a decision.

Section 25 - Criteria for Identification as a Victim of Human Trafficking.

The Commission recommends that section 25 of the Bill (and all related sections) must be amended to include an exception of the ‘means’ requirement for children and applicants with a mental impairment.

Section 26 - Application for Identification as a Victim of Human Trafficking

The Commission recommends that the Bill is amended to include a presumption of minority where a Competent Authority or a Trusted Partner has cause to believe that a person is a child, and that person shall be presumed to be a child unless or until an age estimation assessment shows otherwise.

Section 27- The Referral or Refusal by a Competent Authority or a Trusted Partner of an Application

The Commission reiterates its recommendations that Sections 27(1)(a) and 28(2)(a) of the Bill should be amended to remove any reference to ‘credibility’.

The Commission recommends that:

- to align this Bill with national jurisprudence, EU and international law the basis for decisions should be ‘where there is a reasonable-grounds indication for believing that he or she might have been trafficked’.
- the Bill is amended to include a specific timeframe within which a Competent Authority or a Trusted Partner, whichever the case may be, must issue a decision after receiving a section 26 application.
- the Bill should clearly state that all section 27(4) and (5) decisions must be communicated to the applicant (including, where applicable, their guardian and/or legal representative) in writing.
- section 27 (and 28) of the Bill is amended to include an exception of the ‘means’ requirement for applicants with a ‘mental impairment’.

Section 28 - Reconsideration, Granting or Refusal of an Application by the Operational Committee

The Commission recommends that:

- the Bill is amended to include a specific timeframe within which the Operational Committee [panel] must issue a decision to the applicant.
- this is no more than 5-days after the Operational committee has been convened.
- the Bill should clearly state that all section 28 (4) and (5) decisions are swiftly communicated to the applicant (including where applicable their guardian and/or legal representative) in writing.
- section 27 of the Bill must be amended to include an exception of the 'means' requirement for applicants with a 'mental impairment'.

Section 29 - Sharing of information

The Commission recommends that:

- section 29 is amended to place an obligation on the Chair of the Operational Committee to gather comprehensive data on the NRM and share it with relevant bodies such as the National Rapportuer on Human Trafficking.
- the Bill is amended to include a 'Duty to Notify' on public bodies who are likely to come into contact with victims of trafficking. Where an adult person (suspected victim) chooses not to make a formal application to be recognised as a victim of trafficking, there must be a statutory requirement on public bodies to notify the Operational Committee, by sharing limited information that does not lead to personal identification.
- the Bill is amended to include a provision to amend the Children First Act to include all forms of trafficking against children. Where such a report has been made there must be a statutory duty to refer the child to the Operational Committee for identification.

Section 31 – Presumed victims of trafficking and identified victims of trafficking (Services for presumed and identified victims of trafficking)

The Commission recommends that the Bill must be amended to provide immigration permissions for presumed and identified victims of trafficking. This is a fundamental protection that is too important to be left to Operational Guidelines.

The Commission recommends that:

- the Bill is amended to provide a scheme of assistance and support entitlements for presumed and identified victims.
- the Bill is amended to explicitly state that both presumed and identified victims of trafficking are regarded as satisfying the Habitual Residency Condition and Reckonable Residence for the purposes of receiving social welfare and housing supports.
- this Bill should assign responsibility to the Domestic, Sexual and Gender-Based Agency for the administration of shelter accommodation for victims of trafficking who have been subjected to gender-based violence.

Section 32 - Appeal from Decision of Operational Committee

The Commission recommends that:

- the Bill is amended to include specific timeframes within which the appeals decisions will be made.
- 'credibility' test is removed from section 32(7)(a).
- section 27 (and 28) of the Bill must be amended to include an exception of the 'means' requirement for applicants with a 'mental impairment'.

Section 33 – Appeals officers

The Commission recommends that the Bill is amended to include a requirement that an appeals officer has demonstrable knowledge of human trafficking and undertakes required training.

Section 35 – Amendment of Criminal Law (Human Trafficking) Act 2008 (Non-prosecution of victims)

The Commission recommends that the Bill is amended to include a specific defence for victims of trafficking where they have committed crimes as a direct consequence of them being trafficked.

Part 4 Amendment of the Defence Act 1954

The Commission recommends that the removal of jurisdiction from the military courts for sexual offences is extended further to include sexual exploitation offences.

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 our founding legislation, we are 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 on any implications for human rights or equality.¹

In October 2020, we were 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. 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 our view that this has created an unhelpful imbalance in the overall human trafficking response, which the proposed legislation has the potential to address.

We welcome the introduction of a NRM in law but believe that there are some areas where protections must be strengthened. We believe that this Bill is the most significant opportunity to establish a NRM that applies to all victims of trafficking equally, 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 to victims.

We strongly welcome the Criminal Law (Sexual Offences and Human Trafficking) Bill 2023 as a wide-ranging piece of legislation with significant potential. In this review, we consider Part

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

3 - dedicated to the establishment of a National Referral Mechanism – in detail. We also provide observations on Part 2 insofar as it aligns to the human trafficking framework and to other relevant legislative provisions that seek to protect vulnerable populations and potential victims of sexual exploitation crimes, including unidentified victims of trafficking for sexual exploitation.

We note that this Bill also gives effect to recommendations by the Defence Forces Independent Review Group ('IRG') that the Defence Act 1954 is amended to ensure that persons subject to military law who commit sexual offences in this jurisdiction will be dealt with by An Garda Síochána and the civilian courts, rather than by court-martial.

The proposed observations and recommendations presented in this review are intended to bring attention to the most pressing issues arising in the Bill and offer possible solutions through suggested amendments.

The outline of this review follows the order of the Bill.

Part 2 Sexual Offences

The Criminal Law (Sexual Offences and Human Trafficking) Bill 2023 ('the Bill') is a wide-ranging piece of legislation that aims to strengthen the protections for victim-survivors of sexual offences and to implement a number of recommendations arising from the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences ('the O'Malley Review').²

Among the provisions of the Bill is an amendment to the law relating to rape – a belief held by the accused must be objectively reasonable rather than subjective. The Bill also amends the procedures applicable in proceedings for certain sexual offences, including in relation to the presenting of evidence, extends separate legal representation to victims of sexual assault where an application to question them on their previous sexual experience is granted.³ The exclusion of the public, the announcement of a verdict or decision and sentence and the anonymity of complainants and accused persons are also included in the Bill.

Part 2 defines 'applicable offences' for the purposes of providing victims of such crimes with specific protections. This definition does not sufficiently include sexual crimes arising in the high-risk environment for human trafficking crimes, where potential victims are often hidden and unidentified. From our perspective, as a National Rapporteur on Human Trafficking, we are concerned that potential victims of trafficking who are not positively identified, as provided for in Part 3 of this Bill, will be deprived of these protections. We are more broadly concerned that the crimes of sexual exploitation, a recognised form of exploitation in the international definition of human trafficking and a prevalent type of trafficking in reality, are separated from other crimes of a sexual nature, effectively denying protections offered to other categories of victims.

² Hereafter the O'Malley Review. O'Malley T (2020) [Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences](#).

³ If this application is granted, the barrister representing the victim will continue to represent the victim during the questioning

Section 6 Amendment of section 1 of Act of 1981 (Extending the protections to all sexual assault offences)

Part 2 section 6 of the Bill amends section 1(1) of the Act of 1981 by inserting three new definitions, and amending the definition of ‘rape offence’. According to the Bill, ‘applicable offence’ will now include sexual assault offence and sexual offences against children and protected persons under the 2017 Sexual Offences Act.⁴ We believe that this amendment does not sufficiently include sexual crimes arising in the high-risk environment for human trafficking crimes, where potential victims could be:

“hidden within hidden within mixed populations of independent, exploited and coerced prostitutes and in mixed migration flows.”⁵

As such, it should be extended further to include a number of other trafficking and sexual exploitation offences.

The Third National Strategy on Domestic Sexual and Gender-Based Violence identifies trafficking in human beings as a form of gender-based violence.⁶ The sex industry is recognised as being a high-risk environment for sexual exploitation and sex trafficking.⁷ This profound violence and sexual violence necessitates the inclusion of affected people in the protections provided to victims/witnesses of other sexual offences.⁸ In light of the recommendations of the O’Malley Review that are currently being implemented, this category of victims/witnesses must not be left behind in the expansion of protections.

There are a number of offences relating to sexual exploitation wherein a victims/witness may be called upon to act as a witness in a criminal trial. These offences relate to those who organise and benefit from the prostitution of others, a recognised form of human trafficking

⁴ For offences under s.3 Obtaining, providing etc. a child for purpose of sexual exploitation; s.4 Invitation etc. to sexual touching; s. 5 Sexual activity in presence of child; s.6 Causing child to watch sexual activity; s. 7 Meeting child for purpose of sexual exploitation; s.8 Use of information and communication technology to facilitate sexual exploitation of child; s.21 Sexual act with protected person; s. 22 Offence against relevant person by person in authority

⁵ European Commission (2016) Study on the Gender Dimension of Trafficking in Human Beings, p.8

⁶ Government of Ireland (2022) [Third National Strategy on Domestic, Sexual & Gender-Based Violence 2022-2026](#).

⁷ European Commission (2022) [Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the Progress made in the Fight against Trafficking in Human Beings \(Fourth Progress Report\)](#),

⁸ Including, at a minimum, access to legal advice/representation, exclusion if public at trial, and anonymity

exploitation.⁹ A number of offences under the Criminal Law (Sexual Offences) Act 1993 must be recognised as coming within the ambit of sexual exploitation offences, specifically:

- Section 7 – Soliciting or importuning for purposes of prostitution;
- Section 7A - making payment for sexual activity with a prostitute;
- Section 8 – loitering for the purposes of prostitution;
- Section 9- organising prostitution;
- Section 10 - living off the earnings of the prostitution of another; and
- Section 11 - brothel keeping.

When brothels are investigated or buyers are arrested, the victims/witnesses may, for a number of reasons, be reluctant to cooperate with An Garda Síochána. Failing to recognise the full ambit of offences that are, by their nature sexual exploitation offences, fails to protect and support these victim-witnesses of these offences, further compounding their vulnerability and harm.

If prosecutions of these sexual exploitation offences are to be successful then the victims-witnesses of these crimes – those who are disproportionately women and girls in prostitution - must be sufficiently protected and supported throughout the criminal justice process. Protection must include, at a minimum: access to legal advice and - where an application is made to question them on their previous sexual experience – legal representation,¹⁰ exclusion of the public from trials, and anonymity.

An effective response to combatting sexual exploitation requires a broader understanding of what constitutes a sexual exploitation offence. Consequently, this should broaden all the associated protections available to the victims/witnesses of all forms of sexual exploitation. While some protections for victims/witnesses can be drawn from the general provisions of Part 3 of the Victims of Crime Act 2017, which provides certain protections of victims during

⁹ Prostitution is a high-risk environment for sexual exploitation, the EU-wide report identifies prostitution, escort agencies, the pornography industry, massage parlours, bars and nightclubs as high-risk environments for sexual exploitation see European Commission (2022) [Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the Progress made in the Fight against Trafficking in Human Beings \(Fourth Progress Report\)](#), p. 6

¹⁰ All consequential amendments would be required in order to ensure that the complainant is entitled to legal aid if the application to question him or her under section 3 of the Criminal Law (Rape) Act 1981.

investigations and criminal proceedings, *inter alia*, there does not appear to be any proper rationale for excluding this category of victim-witnesses from the protections and supports afforded to victim/witnesses of other sexual offences.

To boost the effectiveness of this approach, this law must also be supported by increased funding for comprehensive, holistic exit pathways for victims of sexual exploitation¹¹, which would of course include potential victims of trafficking who may not wish to apply to be identified as such as, provided for in Part 3 of this Bill.

The Commission recommends that the Bill should include sexual exploitation offences in the list of ‘applicable offences’.

Section 7 – Amendment of section 2 of Act of 1981(Change in Mens Rea in Rape)

Section 7 introduces an objective test to the existing subjective test of consent, by replacing the ‘honest belief’ defence with ‘reasonable belief’ that the woman is consenting.¹²

Reasonable belief

The ‘reasonable belief’ test proposed by the Bill is a mixed test, with an objective starting point of ‘reasonableness’, with some subjective elements where the jury have to take into account the steps, if any, taken by the accused to obtain consent. Generally, subjective tests are preferred over objective tests in Irish criminal law. The preference for subjective tests may have constitutional underpinning as recognised in Irish case law.¹³ However, the Supreme Court has noted that a subjective approach to ‘belief’ does not adequately protect a victim’s constitutional rights.¹⁴ The ‘reasonable belief’ defence – over that of the ‘honest belief test -could be regarded as more effectively defending and vindicating a victim’s

¹¹ At a minimum, this must include: Legal, psychological and medical support; Access to exit programmes; Emergency and social housing; Financial assistance; Regularised immigration status with the right to work; Access to training and employment.

¹² Irish law currently provides for the defence of ‘honest belief’ to the crime of rape. This means that if an accused believes that a woman is consenting, even if this belief is mistaken, the accused will not be convicted of the crime of rape.¹² This legal test is subjective in nature. However, juries should have regard to the presence or absence of reasonable grounds for the accused’s belief.¹² This requires the jury to consider objective factors in determining the credibility of an accused.

¹³ Hardiman J in the Supreme Court: *CC v Ireland* [2006] 4 IR 1.

¹⁴ Charleton J in the Supreme Court, *The People (DPP) v C O’R* [2016] 3 IR 322 at 353–354.

constitutional rights. We note the Law Reform Commission's position that there is no constitutional obstacle to introducing a test of 'reasonable belief'.

Of particular concern is the removal from the Bill of the list of characteristics the jury must consider where the matter of the accused's reasonable belief arises in a trial. As the Bill is currently drafted it requires the jury to:

"have regard to all the circumstances, including the steps (if any) taken by the man to ascertain whether the woman was consenting to the intercourse."

By contrast, the General Scheme of the Bill contained a list of specified circumstances related to the accused's personal capacity that must be considered.

Namely:

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

It is notable that these have been excluded from the Bill.

The Law Reform Commission recommended that the jury ought not to have regard to 'all the circumstances of the case' but rather that where the issue of 'reasonable belief arises in a trial', the jury shall have regard to a specific set of circumstances. The issue with examining 'all the circumstances' is that it is an extremely vague requirement. Such a wide, undefined condition could result in a judge directing the jury on circumstances based on stereotypes or rape-myths. Finch and Munro found that jurors in England and Wales, often interpreted the phrase extremely broadly, importing imagery of the ideal victim and scrutinising the complainant's behaviour¹⁵. They warned that although jurors may not personally endorse socio-sexual myths and stereotypes, they may consider that the defendant harboured such prejudices and therefore import them into their analysis of the reasonableness of his belief.¹⁶ The Law Reform Commission acknowledged these flaws and argued that introducing a reference to 'all the circumstances' in an Irish context:

¹⁵ Emily Finch and Vanessa Munro, "Breaking boundaries? Sexual consent in the jury room" (2006) 26(3) Legal Studies 303 at 318.

¹⁶ Emily Finch and Vanessa Munro, "Breaking boundaries? Sexual consent in the jury room" (2006) 26(3) Legal Studies 303 at 318.

“could risk eroding the primarily objective standard being proposed by reintroducing a substantial subjective element.”¹⁷

The wording of this section raises two further issues, in relation to people with disabilities and the stage of maturity.

People with disabilities

The absence of explicit inclusion of an accused’s physical, mental or intellectual disability or any mental illness as factors the jury must consider, may not sufficiently protect accused persons with disabilities. The purpose of the UN Convention on the Rights of Persons with Disabilities (‘UNCRPD’) is to

“promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹⁸

Having regard to the provisions of the Convention, in particular Articles 3 and 4, the Bill must include a consideration of the accused’s personal capacity in order to comply with the principles and language of the Convention.

Age and maturity

We see the removal of the consideration for an accused’s ‘age and maturity’ (as was included in the General Scheme of the Bill 2022) as a regressive step. In particular, the Bill (as drafted) may not sufficiently protect the rights of children and young people. Including ‘maturity’ ensures that the jury shall not consider ‘age’ on its own. Maturity can be interpreted as physical, mental and or emotional maturity. There is a sound premise for the Law Reform Commission’s recommendation that the jury should consider the age and maturity of the accused where either of these could be interpreted as being that the

¹⁷ Law Reform Commission, ‘Report on Knowledge or Belief Concerning Consent in Rape Law’ (2019), at 68

¹⁸ Article 1 of UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

accused lacked the capacity to understand whether the woman was consenting. The Children Act 2001 uses the term ‘age and understanding’, whilst section 32 of the Children and Family Relationships Act 2015 and section 9 of the Adoption (Amendment) Act 2017 refer to the ‘age and maturity’ of children. This is an indicator that the Oireachtas has already acknowledged the need to assess maturity in conjunction with age. Our view aligns with the Law Reform Commission’s opinion that ‘maturity’ is a more objective and appropriate external standard against which a young person should be measured.¹⁹

The Commission recommends that careful consideration is given to the ‘all the circumstances’ provision and that greater specificity is included in the law in order to ensure it is not so broad that it effectively erodes the aim of the Bill; the introduction of an objective standard.

The Commission recommends that the Bill is amended in order to ensure that the the rights of disabled people and children are fully protected.

Section 8 Amendment of section 4A of Act 1981 (Expansion of Separate Legal Representation)

We welcome the expansion of legal representation to legal aid for complainants in all trials for sexual assault. Currently this is only provided to complainants in trials involving the offences of rape and aggravated sexual assault. This expansion is important, as the cross-examination of a complainant of their sexual history can be traumatic and invasive and, in some cases, more damaging to complainants in rural areas where trials are heard locally.

Legal representation

In our submission to the Joint Oireachtas Committee in December 2022, we called for separate legal representation 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) to be extended to victims of offences committed under section 4 of the Criminal Law (Human Trafficking) Act 2008. Given the nature and effect of the crime of

¹⁹ Law Reform Commission, ‘Report on Knowledge or Belief Concerning Consent in Rape Law’ (2019), at 80

sexual exploitation, victims of trafficking for the purposes of sexual exploitation must be afforded the same protections as victims of rape and other sexual assault offences in criminal trials.²⁰

The Commission reiterates its recommendation 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) is extended to victims of offences committed under section 4 of the Criminal Law (Human Trafficking) Act 2008.

Legal advice

At present, section 26(3A) of the Civil Legal Aid Act 1995, as inserted by the Civil Law (Miscellaneous Provisions) Act 2008, provides for the granting of legal advice to a complainant in a prosecution for a number of specified offences.²¹ Notably, this does not include sexual exploitation offences.

The O'Malley Review recommends that section 26(3A) of Civil Legal Aid Act 1995 be amended to provide that legal advice is available free of charge to a victim of any sexual crime and that such advice should not be contingent on there being a prosecution. Rather it should be available to any person complaining that a sexual crime has been committed against them²². We would urge that the Bill is amended to give effect to this O'Malley Review recommendation, ensuring that sexual exploitation offences are also included.

We reiterate the importance of the recommendations contained in the O'Malley Review related to the child sexual exploitation offences created by sections 3 to 7 of the Criminal

²⁰ 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.

²¹ (a) the offence of rape under the common law, (b) the offence of rape under section 2 of the Criminal Law (Rape) Act 1981, (c) the offence of aggravated sexual assault under section 3 of the Criminal Law (Rape) (Amendment) Act 1990, (d) the offence of rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990, (e) an offence under section 6 (substituted by section 2 of the Criminal Law (Sexual Offences) (Amendment) Act 2007) of the Criminal Law (Sexual Offences) Act 1993. (f) an offence under the Criminal Law (Sexual Offences) Act 2006, (g) an offence of incest under section 1 or 2 of the Punishment of Incest Act 1908."

²² Tom O'Malley et al., Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (Irish Department of Justice, July 2020), para 7.13

Law (Sexual Offences) Act 2017.²³ These include bringing new child sexual exploitation offences within the legal aid scheme, extending legal aid to parents/guardians of child victims, and ensuring that all victims received the same level of support irrespective of their location.²⁴

The Commission recommends that the Bill is amended to provide for the provision of early legal advice to all complainants/witnesses and, where applicable to their parent/guardians for child sexual exploitation offences, rape, sexual and sexual exploitation offences, in line with the recommendations of the O'Malley Review and that of the Commission.

The Commission recommends that this legal advice should not be contingent on there being a prosecution, or on the person having been formally identified as victim of trafficking.

Sections 10, 11, 12 and 13 (Extended provisions for anonymity)

As with the above, we believe that 'applicable offences' should also include sexual exploitation offences and that all relevant sections of the Bill should be amended to include such.

Namely:

- 'soliciting or importuning for purposes of prostitution';
- 'making payment for sexual activity with a prostitute';
- 'loitering for the purposes of prostitution';
- 'organising prostitution';
- 'brothel keeping'; and
- living on earnings of prostitution of another'.

²³ IHREC (2022) [Trafficking in Human Beings in Ireland. Evaluation of the Implementation of the EU Anti-Trafficking Directive](#), p. 137; O'Malley T. (2020) [Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences](#), p. 45

²⁴ O'Malley T. (2020) [Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences](#), pp. 91-118

It follows that in order to protect the anonymity of victim-witnesses this necessarily means that the accused will also be granted anonymity unless, or until they are convicted. On balance and by way of ensuring sufficient protection to these witnesses, anonymity must be extended to victims/witnesses of these offences also.

According to the Explanatory Memorandum, section 13 will amend section 9 of the Criminal Law (Rape) Act 1981 to allow the protections provided by this Act to apply at a trial by court-martial for an applicable offence (as defined in the Bill). We welcome the broadened category of applicable offences to which witness-victim protections will apply. These include all sexual offences – beyond those of rape, rape under section 4 of the 1990 Act and aggravated sexual assault. In line with reasoning and recommendations set out above we believe that this should be extended further to also include all sexual exploitation offences.

The Commission recommends that sections 10, 11 and 12 of the Bill are amended to include the exclusion of the public from all sexual and sexual exploitation offence trials including the removal the obligation for the verdict and sentence (if any) to be announced in public.

The Commission recommends that anonymity should be extended to complainant-witnesses and the accused at trials for all sexual and sexual exploitation offences.

The Commission recommends that the Bill is amended to broaden section 13 further to also include sexual exploitation offences.

Part 3 National Referral Mechanism

Part 3 is of particular interest to us as a National Rapporteur on Human Trafficking, as it establishes for the first time a formal legal mechanism for identification and assistance of victims of trafficking. We welcome the provisions of Part 3 and notes that the European Commission 4th Progress report to the European Parliament on the fight Against Trafficking in Human Beings identifies the inclusion of Independent entities in the State's mechanism proposal as a positive example²⁵. We further observe some notable improvements in the evolution of this Bill from the initial General Scheme, chief among them the introduction of an appeal process. There are, however, outstanding issues that must be improved to ensure that the mechanism is efficient, and that it assists all victims, including where immigration assistance is required. The Bill is an opportunity to outline assistance separately from the International Protection system, which is a distinct legal framework.

Section 20 - Interpretation

We welcome the detailed list of terms included in section 20. However, there are a number of additional terms that should be included in section 20 and which are technically and substantively required to ensure this Bill robustly protects all victims of trafficking.

In line with [our recommendations](#) on the General Scheme of the Bill²⁶ we believe this section should be amended to better protect a greater number of victims - especially women and child victims - within the new NRM.

Expand the Definition of 'Exploitation'

This Bill is an opportunity to expand on the definition of what is considered 'exploitation' in Irish law in line with the proposals by the European Commission to expand the EU definition.²⁷ The Minister for Justice received Government approval to join the new EU

²⁵ European Commission (2022) Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the Progress made in the Fight against Trafficking in Human Beings (Fourth Progress Report), p. 15

²⁶ IHREC (2022) Submission on Part 3 of the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022, available at <https://www.ihrec.ie/documents/submission-on-part-3-of-the-general-scheme-of-the-criminal-justice-sexual-offences-and-human-trafficking-bill-2022/#:~:text=This%20Bill%20is%20the%20most,swift%20and%20clearly%20communicated%20decision.>

²⁷ The EU proposes a mandatory extension of the definition of human trafficking with 'forced marriage' and 'illegal adoption' that will be added to: "the exploitation of the prostitution of others or other forms of sexual

measures which will amend the anti-trafficking directive²⁸. It is recognised that many of the emerging forms of exploitation are forms of violence against women²⁹ affecting reproductive function, in some cases, which are undoubtedly gendered forms of exploitation. Among the less known forms of exploitation, cases of illegal adoption, forced and sham marriages, illegal surrogacy and forced pregnancy have been detected.³⁰ Forced and sham marriages mainly affect vulnerable migrant women, as well as ethnic minorities such as Roma. Such victims are often additionally trafficked for sexual exploitation, labour exploitation or forced begging.³¹ EUROJUST raises concerns that women from Roma communities in EU Member States are particularly vulnerable to being trafficked and exploited for sham marriages in order to facilitate movement of third-country nationals in the EU.³²

According to the European Institute for Gender Equality contribution to the EC 'Progress Report':

"women and girl victims of forced marriage are often hidden within private households and in the sector of prostitution, which makes their detection and identification more difficult."³³

Some countries in the EU report cases of trafficking for the purposes of illegal surrogacy and forced pregnancy, where:

exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs." [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](#), Article 2.3

²⁸ Irish Examiner, Paul Hosford (06.06.23), 'Ireland to apply to be part of EU measures combating human trafficking', available at <https://www.irishexaminer.com/news/arid-41110462.html>

²⁹ European Commission (2022) [Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the Progress made in the Fight against Trafficking in Human Beings \(Fourth Progress Report\)](#), p. 5

³⁰ European Commission (2022) [Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the Progress made in the Fight against Trafficking in Human Beings \(Fourth Progress Report\)](#), pp. 5-6

³¹ European Commission (2022) [Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the Progress made in the Fight against Trafficking in Human Beings \(Fourth Progress Report\)](#), p. 6

³² EUROJUST (2020) [Report on National Legislation and Eurojust Casework Analysis on Sham Marriages](#), p. 25

³³ European Commission (2022) [Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the Progress made in the Fight against Trafficking in Human Beings \(Fourth Progress Report\)](#), p. 6

“women are recruited to give away their newborns upon the promise of compensation or to participate in illegal surrogacy programmes.”³⁴

The Commission reiterates its recommendation that the Bill is amended to include an expanded definition of ‘exploitation’ to include trafficking for the purposes of novel and emerging forms of exploitation such as forced/exploitative marriages, sale of children, illegal adoptions, and illegal surrogacy.

Child Victims of Trafficking

We welcome recognition in the Bill of explicit provisions for child victims and adult victims who have diminished capacity, which we raised in our observations on the General Scheme³⁵. However, there are a number of omissions in the Bill that may severely limit the protection child victims receive. First is the absence of an age estimation assessment. It must be recognised 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 a young adult.³⁶ Second, is the absence of child-specific legal advice/representation. Third, a continued conflation and confusion between the two offences of the sexual exploitation of children, and child trafficking for the purposes of sexual exploitation. We have written extensively on each of these matters, most recently in our [submission on the General Scheme of this Bill](#). As such, we urge that the Bill is amended to correct these significant shortfalls in the law in line with our previous recommendations.

The Commission recommends that the definition of ‘child’ is amended to include an explicit presumption in favour of minority where there is doubt as to the age of a person. The presumption of minority must apply unless and until an age estimation assessment finds otherwise.

The Commission recommends that the Bill is amended to include the term ‘age estimation assessment’.

³⁴ Ibid, p. 6. Also see, Ekathimerine News (10.08.23), ‘Eight arrests as baby-trafficking ring dismantled on Crete’, available at <https://www.ekathimerini.com/news/1217434/eight-arrests-as-baby-trafficking-ring-dismantled-on-crete/>

³⁵ S.26(4), 27 (1)(b)(i), 28(2)(b)(i), 29(5)(a), 31(1)(e), 32(7)(a)

³⁶ OSCE/ODIHR, 2022

The Commission recommends that the responsibility for these assessments is assigned to the Child and Family Agency (Tusla) and that such assessments are supported by guidelines that are child-centred and adapted to the person's specific needs (cultural, gender, etc.). Such assessments must not be based on a medical test and must include a 'presumption of minority'.

The Commission recommends that the Bill is amended to remove references to trafficking of a child for sexual exploitation in the 1998 Act and place this offences within the 2008 Act to ensure that all trafficking offences are included in the same Act.

Clarity in the Definition

We observe that the definition of human trafficking in this Bill is split between section 20 and section 25. Specifically, the rationale to not include one element of the trafficking offence – the means³⁷ – in section 20 is unclear and may lead to unnecessary confusion. It may also have the unintended consequence of giving the impression that the 'means' by which someone is trafficked for exploitation is to be considered differently to the other two elements of trafficking, namely, the 'act'³⁸ and the 'purpose'³⁹. It is also important to note that this only applies to trafficking of persons other than children and persons with a mental impairment. Section 20 could be amended to include:

³⁷ As per 2s.4(1) 2008 Act '(a) coerced, threatened, abducted or otherwise used force against the trafficked person, (b) deceived or committed a fraud against the trafficked person, (c) abused his or her authority or took advantage of the vulnerability of the trafficked person to such extent as to cause the trafficked person to have had no real and acceptable alternative but to submit to being trafficked, (d) coerced, threatened or otherwise used force against any person in whose care or charge, or under whose control, the trafficked person was for the time being, in order to compel that person to permit the trafficker to traffick the trafficked person, or (e) made any payment to, or conferred any right, interest or other benefit on, any person in whose care or charge, or under whose control, the trafficked person was for the time being, in exchange for that person permitting the trafficker to traffick the trafficked person, " 2008 Act (amended).

³⁸ As per the 2008 Act, "'trafficks" means, in relation to a person (including a child)— (a) procures, recruits, transports or harbours the person, or (i) transfers the person to, (ii) places the person in the custody, care or charge, or under the control, of, or (iii) otherwise delivers the person to, another person'

³⁹ As per the 2008 Act as amended by Criminal Law (Human Trafficking) (Amendment) Act 2013 'exploitation' means—(a) labour exploitation, (b) sexual exploitation, (c) exploitation consisting of the removal of one or more of the organs of a person, or (d) exploitation consisting of forcing a person to engage in— (i) an activity that constitutes an offence and that is engaged in for financial gain or that by implication is engaged in for financial gain, or (ii) an activity in a place other than the State that—(I) constitutes an offence under the law of that place and would, if done in the State, constitute an offence, and (II) is engaged in for financial gain or that by implication is engaged in for financial gain'

“Means” in relation to a trafficked person (not applicable to children or persons with a mental impairment) means —

- (a) coerced, threatened, abducted or otherwise used force against the trafficked person,
- (b) deceived or committed a fraud against the trafficked person,
- (c) abused his or her authority or took advantage of the vulnerability of the trafficked person to such extent as to cause the trafficked person to have had no real and acceptable alternative but to submit to being trafficked,
- (d) coerced, threatened or otherwise used force against any person in whose care or charge, or under whose control, the trafficked person was for the time being, in order to compel that person to permit the trafficker to traffick the trafficked person, or
- (e) made any payment to, or conferred any right, interest or other benefit on, any person in whose care or charge, or under whose control, the trafficked person was for the time being, in exchange for that person permitting the trafficker to traffick the trafficked person.

The Commission recommends that the ‘means’ element of the human trafficking definition is included in section 20 ‘Interpretation’, with a clear exemption of this element in the case of minors and persons with ‘mental impairments’.

Slavery, Servitude and Forced Labour

There is currently no standalone criminal offence of slavery, servitude and forced labour offences or exploited labour in Irish law.⁴⁰ Instead, these exploitations are only criminalised when it forms part of a trafficking offence under the 2008 Trafficking Act. This Bill provides an opportunity to address that lacuna.

⁴⁰ For a detailed discussion on the absence of slavery, servitude and forced labour offences where there has been no trafficking see in IHREC’s First National Report – IMPROVE Ref by page number and link

It is important to note that particularly exploitative working conditions may be the result of trafficking, but not all exploitation occurs in the context of human trafficking.⁴¹ In *CN v United Kingdom*⁴² the European Court of Human Rights distinguished domestic servitude from trafficking and exploitation, noting that:

“domestic servitude is a specific offence, distinct from trafficking and exploitation and which involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance.”⁴³

Doyle et al note that:

“unlike the approach taken in the United Kingdom in the Modern Slavery Act 2015, there are no separate specific offences of servitude and forced labour in Irish law, independent of the anti-trafficking regime, meaning that labour exploitation scenarios that do not satisfy the stringent three-part trafficking test of action–means–exploitation will not ground a prosecution.”⁴⁴

This is problematic insofar as Coghlan and Wylie note that:

“few cases ‘tick all the boxes’ of a rigid definition of trafficking, yet the exploitation of migrant workers is rife.”⁴⁵

Some stakeholders working in the field, particularly those supporting victims of trafficking, have commented that there is considerable confusion about the scope of the offence in Ireland and the requirement for coercion as one of the elements required.

The Commission recommends that the Bill is amended to include a standalone offence of slavery, servitude or forced or compulsory labour.

⁴¹ European Union Agency for Fundamental Rights (2021) [Protecting Migrants in an Irregular Situation from Labour Exploitation: Role of the Employers Sanction Directive](#). Luxembourg: Publications Office of the European Union, p. 34

⁴² [2012] ECHR 1911.

⁴³ European Court of Human Rights (2022) [Guide on Article 4 of the European Convention of Human Rights: Prohibition on Slavery and Forced Labour](#), p. 9

⁴⁴ Doyle, M. D., Murphy C., Murphy M., Rojas Coppari P., and J. Wechsler R. (2019) [‘I felt like she owns me’: Exploitation and uncertainty in the lives of labour trafficking victims in Ireland](#), pp. 231-251

⁴⁵ Coghlan D. and Wylie G. (2011) [Defining Trafficking/Denying Justice? Forced Labour in Ireland and the Consequences of Trafficking Discourse](#)

Exclusion of Support Organisations and Experts

Expert knowledge and expertise in trafficking is essential to a functioning identification process. As currently drafted, there are number of organisations and experts who would not qualify as a 'relevant body' for the purposes of applying to be a 'Trusted Partner'. There are experts in trafficking and/or organisations that provide direct support to potential and identified victims. For example, MECPATHS - a registered charity - would not qualify as a 'relevant body' under the Bill as they do not work directly with victims, yet they are the only NGO that specialises in child trafficking in Ireland. Conversely, the International Transport Workers' Federation – a Trade Union - directly supports victims but would not qualify as a 'relevant' body as they are not a charity.

The Commission recommends that the term 'relevant body' is amended to include 'victim support organisation' from Directive 2011/36/EU, as this is broad enough to include NGOs, trade unions, monitoring groups and others.

Section 21 -Trusted Partners

We welcome the inclusion of independent non-statutory organisations being recognised as 'Trusted Partners' in the NRM. This is an essential, positive and long-awaited reform. This will ensure greater utilisation of the unique specialist knowledge, a victim-centred, and practice-informed approach⁴⁶. However, it is important to recognise that they should not be treated as though they are organs of the State. It is not in the interests of victims or NGOs themselves that they be legally responsible for victim identification decisions. The Bill as drafted does not confer any immunity from suit for competent authorities or trusted partners or provide any indemnity if they are challenged. A provision like section 154 of the Data Protection Act 1998, which confers conditional immunity on the Data Protection Commission and Commissioner, might be considered.

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. To avoid

⁴⁶ IHREC (2022) [Trafficking in Human Beings in Ireland](#), p. 89

unnecessary litigation, we believe that a mechanism of independent review of decisions relating to trusted partner status should be included.

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

The Commission recommends that the Bill is amended to include immunity from suit for competent authorities or trusted partners, or provide indemnity if they are challenged.

Sections 22, 23 and 24 – Operational Committee

We welcome the provisions for the Operational Committee to allow for an officer of the Minister to act as Chairperson, a Secretariat and at least one representative from each of the Competent Authorities and Trusted Partners to form the Operational Committee.

However, it remains the case that significant and important aspects of the operations and functions of the Operational Committee are being left to ‘Operational Guidelines’. The processes of the Operational Committee are too important not to be included in the Bill.

It is important that the Bill outlines the fundamental structure and principles that will underpin the workings of the Operational Committee. It remains our view that this provision lacks essential clarity, in particular s.22(2) which states that the Operational Committee shall consist of:

‘(b) at least one representative of each of—

- (i) the competent authorities, and
- (ii) the trusted partners (if any) for the time being designated under section 21(3) (a)’.

The current wording of the Bill suggests that at least one representative of each of the Competent Authorities and Trusted Partners will form the Operational Committee. This could result in the Operational Committee becoming unworkable and lacking in expertise as it has the dual functions of drafting policies and procedures (Operational Guidelines), and identifications under section 28.

We are concerned that not all Competent Authorities and Trusted Partners have the requisite knowledge of all forms of trafficking exploitation, yet they are charged with

making determinations under 28(2)(a). Moreover, the language of ‘(if any)’ regarding Trusted Partners implies potential exclusion from the Operational Committee identification/reconsideration decisions, which we also find concerning.

To ensure the requisite knowledge and expertise of the decision-makers, Operational Committee Panels should be drawn from the wider Operational Committee for the purposes of making identification/reconsideration decisions. The panels, which are made up of Competent Authorities and Trusted Partners (and independent experts where needed) should be convened for the purpose of identification/reconsiderations. Having smaller panels would allow decisions to be made more quickly and by those with specific expertise.

We are of the view that Section 24 of the Bill is simply too limited and vague in regards to the operational procedures that are to govern the Operational Committee . The Bill must include a provision that specifies the maximum time between which the Operational Committee receives an application of identification/reconsideration and the Operational Committee convenes. For example, ‘The Operational Committee [or, as we have already suggested⁴⁷, an Operational Committee Panel] will meet as soon as possible and no later than five days after receiving an application under s. 27(4) , or s.27(8)’.

The Commission recommends that the operational framework of the Operational 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.

The Commission recommends that the Bill is amended to provide for the selection of ‘relevant’ members of the Competent Authorities, Trusted Partners and persons with expert knowledge of trafficking to form Operational Committee Panels to decide identification/reconsideration applications.

The Commissions recommends that the Bill should specify the timeframe between which the Operational Committee receives a request for reconsideration and when they are convened to make a decision.

⁴⁷ IHREC (2022) [Submission on Part 3 of the General Scheme of the Criminal Justice \(Sexual Offences and Human Trafficking\) Bill 2022](#), p 22

Section 25 - Criteria for Identification as a Victim of Human Trafficking.

We welcome the inclusion of Section 25, which outlines the criteria for identification of victims, in a manner that is aligned with the definition of the crime. The section specifies ‘means’ through which a person must have been trafficked which must be considered. Although sections 27(1)(b) and 28(2)(b) remove this requirement for child applicants, there is no such exception for persons with a ‘mental impairment’⁴⁸.

Importantly, the Bill must recognise that trafficking a 'mentally impaired' person is a separate offence under section 4(3) the 2008 Act. For clarity, section 25 of the Bill should clearly state that in the case of children and persons who are mentally impaired the ‘means’ element is not applicable, this would avoid any unnecessary confusion⁴⁹.

The Commission recommends that section 25 of the Bill (and all related sections) must be amended to include an exception of the ‘means’ requirement for children and applicants with a mental impairment.

Section 26 - Application for Identification as a Victim of Human Trafficking

This section outlines the procedure through which an application is made by a person to the Competent Authority or a Trusted Partner. It also includes a provision for an ‘appeal’ to be made on behalf of a child or a person with a ‘mental impairment’ to be identified by the Operational Committee Operational Committee as a victim of trafficking.

We welcome this provision but would call for this section to also include greater child-specific protections. As noted above, there is concern that the NRM is not sufficiently child-

⁴⁸ Mental impairment has the same meaning as in s. 5(5) of the Criminal Law (Sexual Offences) Act 1993: In this section “mentally impaired” means suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation. The Commission uses this term only because this is the language used in statute. We do not support the use of this term.

⁴⁹ Mental impairment has the same meaning as in s. 5(5) of the Criminal Law (Sexual Offences) Act 1993: In this section “mentally impaired” means suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation. The Commission uses this term only because this is the language used in statute. We do not support the use of this term.

centred⁵⁰. Currently, there is no statutory mechanism for determining whether a person is a child, or not. Article 13.2 of the EU Anti-Trafficking Directive is clear:

“Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection...”

As such, where there are reasons to believe that a person is a child, there must be a presumption of minority until this is proven otherwise. To meet this obligation we recommend that section 26 is amended to transpose fully this obligation.

The Commission recommends that the Bill is amended to include a presumption of minority where a Competent Authority or a Trusted Partner has cause to believe that a person is a child, and that person shall be presumed to be a child unless or until an age estimation assessment shows otherwise.

Section 27- The Referral or Refusal by a Competent Authority or a Trusted Partner of an Application

We are deeply concerned by the threshold test for determination of applications proposed by the Bill. A reasonable grounds assessment is what is required by international law and this ought to be sufficient. Sections 27(1)(a) and 28(2)(a) require the Competent Authority/Trusted Partner and the Operational Committee , respectively, to:

“decide whether— (a) there are reasonable grounds for believing that the application is credible.”

Requiring ‘credibility’ in addition to an assessment of ‘reasonable grounds’ contravenes the jurisprudence of the Irish courts, the EU Anti-Trafficking Directive, the Council of Europe Directive and the OSCE. ⁵¹ Adopting this additional criteria for deciding applications creates

⁵⁰ IHREC (2022) [Submission on Part 3 of the General Scheme of the Criminal Justice \(Sexual Offences and Human Trafficking\) Bill 2022](#), pp. 2-4

⁵¹ 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’. 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

a hardened threshold for identification and creates an extra conditionality that is overly subjective and problematic. The meaning of ‘credibility’ for the individual partners and their capacity to establish ‘credibility’ may vastly differ, leading to inconsistent decisions and, of most concern, will mean that victims will be unable to meet this raised threshold.

There will be situations in which a person’s account does not appear credible and yet there will be other evidence to ground a reasonable grounds decision that the person has been the victim of trafficking. Further, statutory credibility tests have in the past led to large amounts of litigation. For example, there were hundreds of judicial reviews relating to the application of section 11B of the Refugee Act 1996, which dealt with assessments of credibility in refugee status determination. As a result, this section was not included in the International Protection Act 2015.

We note that the concluding recommendations the Joint Oireachtas Committee on the General Scheme for such Bill stated that:

(9) The Committee recommends that the ‘credibility test’ proposed under Heads 14 and 17, to determine whether an individual is a victim of human trafficking, should be removed and the current threshold for identification centring on reasonable grounds of belief should be maintained⁵².

We are of the view that, like the negative decision, the positive decision by the Competent Authority or Trusted Partner must be communicated clearly and swiftly, to the applicant and

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 (2020) National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons. Warsaw: OSCE Office for the Democratic Institutions and Human Rights, p. 378

⁵² Committee on Justice, Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 (Published 8 Mar 2023.), available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2023/2023-03-08_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-criminal-justice-sexual-offences-and-human-trafficking-bill-2022_en.pdf

any relevant representatives, including legal representatives, in addition to the referral to the Operational Committee.

The Bill, as currently drafted states that where a Competent Authority or Trusted Partner is making a referral to the Operational Committee , or is refusing an application:

“shall, as soon as practicable after an application in accordance with section 26 is made to the competent authority or trusted partner, as the case may be...”⁵³

The requirement that the decision be made ‘as soon as practicable’ is overly vague . If the system is to have any value, referral or refusal decisions should be made in a matter of days, with the possibility of a short extension on exceptional circumstances. We note that in this Bill only the applicants are bound by time limits with no similar limits imposed on Competent Authority or Trusted Partner or the Operational Committee. It is also of note that an applicant may, according to section 27(8):

“not later than 30 days after the date of the notification referred to in subsection (6), make a request (in accordance with the operational guidelines) to have his or her application reconsidered by the operational committee under section 28.”

The Commission reiterates its recommendations that Sections 27(1)(a) and 28(2)(a) of the Bill should be amended to remove any reference to ‘credibility’.

The Commission recommends that to align this Bill with national jurisprudence, EU and international law the basis for decisions should be ‘where there is a reasonable-grounds indication for believing that he or she might have been trafficked’.

The Commissions recommends that the Bill is amended to include a specific timeframe within which a Competent Authority or a Trusted Partner, whichever the case may be, must issue a decision after receiving a section 26 application.

The Commission recommends that the Bill should clearly state that all section 27(4) and (5) decisions must be communicated to the applicant (including, where applicable, their guardian and/or legal representative) in writing.

⁵³ Section 27(1) Criminal Law (Sexual Offences and Human Trafficking) Bill 2023

The Commission recommends that section 27 (and 28) of the Bill is amended to include an exception of the ‘means’ requirement for applicants with a ‘mental impairment’.

Section 28 - Reconsideration, Granting or Refusal of an Application by the Operational Committee

As with above, the Bill must be amended to remove the ‘credibility’ requirement (see above section and recommendation in section 27).

Moreover, there should be an express requirement in section 28 that a decision⁵⁴ of the Operational Committee must be made within a specified period of time. We recommend that this is no more than five working days after the Operational Committee panel has been convened. Thus, an applicant will receive a decision from the Operational Committee no more than ten working days after they submit their application for identification or reconsideration, as the case may be. This is reasonable and balanced as it will ensure that applicants are not left in limbo waiting for an indefinite period of time for a decision, which in itself may be traumatic.

Similarly to the section above, we reiterate that both positive and negative decisions must be communicated clearly and swiftly to the applicant and, where relevant, their representative and/or their guardian. This is necessary in order to give immediate effect to access to NRM services, especially in cases where the provision of such services has not commenced.

Many NRM’s are plagued by excessively long waiting times. For example, in the UK in 2022 the average wait times for decisions on official victim status exceeded 600 days.⁵⁵ To guard against this, it is essential that the Bill includes clear timeframes within which decisions must be made. It also must be born in mind that the Operational Committee’s decision follows the initial assessment of a Competent Authority or Trusted Partner. Given the professionalism and expertise of Trusted Partner and Competent Authority, the function of the Operational Committee panel is - in essence – a process to formalise the initial decision. Only where there is clear and conclusive evidence that Competent Authority or Trusted

⁵⁴ reconsideration, granting or a refusal of an application

⁵⁵ United States, State Department, Trafficking in Persons Report: United Kingdom (2023)

Partner have erred in their decision should the Operational Committee decision differ from that of the initial assessment. This is a fundamental victim-centred approach which must be reflected in the Bill and in all subsequent operational guidelines.

The Commission recommends that the Bill is amended to include a specific timeframe within which the Operational Committee [panel] must issue a decision to the applicant.

The Commission recommends that this is no more than 5-days after the Operational committee has been convened.

The Commission recommends that the Bill should clearly state that all section 28 (4) and (5) decisions are swiftly communicated to the applicant (including where applicable their guardian and/or legal representative) in writing.

The Commission recommends that section 27 of the Bill must be amended to include an exception of the ‘means’ requirement for applicants with a ‘mental impairment’.

Section 29 - Sharing of information

Given the dearth of quality data available, we recommend that section 29 is amended to include a positive duty on the Chair of the Operational Committee to collect and publish anonymised statistical data that is disaggregated by, at a minimum: age, gender, nationality, form of exploitation and whether the person has a mental impairment⁵⁶.

To better ensure the collection of accurate data we would urge that the Bill includes a statutory obligation on public bodies to report to the Operational Committee /Department of Justice where they suspect they have encountered a person who may have been trafficked, often known as a ‘Duty to Notify’. Section 52 of the UK’s Modern Slavery Act 2015 is a good example of such a duty.⁵⁷ This is particularly important for certain public bodies such as the HSE, as research shows that as many as 88% of victims of human

⁵⁶ The data collected may include: the number applications made to TP or CA (s.26), specifying which CA or TP such applications were made; the number of positive referral decisions (s.27(4)), the number (including reasons) for a negative referral decision (s.27(5)); the number of reconsideration applications (s.27(8)); the number of positive identification decisions (s.28(4)); the number (including reasons) for a negative identification decision (s.28(5)); number of appeals made (s.32(1)); the number of applications granted (including reasons)(s.32(10)); the number of applications refused (including reasons) (s.32(11)).

⁵⁷ Available at <https://www.legislation.gov.uk/ukpga/2015/30/section/52/enacted>

trafficking may attend a health facility in their first year of being trafficked. However, less than 1% are identified according to studies in the US, UK and Canada.⁵⁸ Such a duty, along with clear recording structures would greatly support the implementation of this Bill and the overall anti-trafficking response. There will be instances where a person who is a victim of trafficking does not wish to enter the NRM. Where that person is over 18 years there should be no mandatory referral into the NRM. To do so undermines the agency and consent of the individual. Instead, a Duty to Notify will include information that is limited to ensure the individual cannot be identified.

A Duty to Notify will further improve identification of victims by creating a statutory duty for specified public authorities to notify the Operational Committee where they have reasonable grounds to believe that a person may be a victim of human trafficking. This will help raise awareness of trafficking among practitioners in these agencies and build a more comprehensive picture of the nature and scale of trafficking, to inform the policy development and law enforcement responses⁵⁹.

A Duty to Notify is similar, yet distinct from Mandatory Reporting under the Children First Act 2015. As per the 2015 Act, a mandated person is required to report any knowledge, belief or reasonable suspicion that a child has been harmed, is being harmed, or is at risk of being harmed. Only child trafficking for the purposes of sexual exploitation is included in the schedule of offences to which Children's First applies.⁶⁰ There is a significant lacuna in the law relating to trafficking of children for other forms of non-sexual exploitation in trafficking that must be addressed.⁶¹

⁵⁸ Egyud A, Stephens K, Swanson-Bierman B, DiCuccio M, Whiteman K. Implementation of Human Trafficking Education and Treatment Algorithm in the Emergency Department. *J Emerg Nurs*. 2017 Nov;43(6):526-531. doi: 10.1016/j.jen.2017.01.008. Epub 2017 Apr 18. PMID: 28427727.

⁵⁹ UK Home Office Circular 025/2015: duty to notify the Home Office of suspected victims of modern slavery Published 2 November 2015, available at <https://www.gov.uk/government/publications/circular-025-2015-duty-to-notify-the-home-office-of-suspected-victims-of-modern-slavery/circular-025-2015-duty-to-notify-the-home-office-of-suspected-victims-of-modern-slavery>

⁶⁰ Children First Act 2015 (amended), Schedule 3, s.10. An offence under either of the following provisions of the Child Trafficking and Pornography Act 1998: (a) section 3 (child trafficking and taking, etc., child for sexual exploitation); (b) section 4 (allowing child to be used for child pornography); (c) section 4A (organising etc. child prostitution or production of child pornography); (d) section 5A (participation of child in pornographic performance). S.11. An offence under section 5 of the Criminal Law (Human Trafficking) Act 2008 in so far as it relates to a child who has been trafficked for the purpose of his or her exploitation.

⁶¹ The 2015 Children's First Act defines harm as assault, ill-treatment, neglect or sexual abuse, and covers single and multiple instances. There is no reference that this should include offences under section 2 of the 2008 Act (amended). Therefore, trafficking a child for the purposes of all other forms of trafficking (labour,

A functioning NRM must include child-specific pathways for child victims of trafficking. As such, where a 'mandated person' makes a report under Children First (as amended in line with the above recommendation) that a child may be a victim of trafficking, it is essential that there is an obligation upon State bodies/agencies to refer that child to the Operational Committee for identification. It is only in exceptional circumstances that this would not be in the best interests of the child.

Whilst the clarity regarding the sharing of information is positive overall, we are concerned about section 29(8)(c) as it relates to:

“information relating to the arrival of the applicant in the State.”

We consider that this section could denote negative repercussions or even possible criminalisation of presumed victims of trafficking who apply to be recognised as a victim when their entry into the State was made in an irregular manner.

The Commission recommends that section 29 is amended to place an obligation on the Chair of the Operational Committee to gather comprehensive data on the NRM and share it with relevant bodies such as the National Rapportuer on Human Trafficking.

The Commission recommends that the Bill is amended to include a 'Duty to Notify' on public bodies who are likely to come into contact with victims of trafficking. Where an adult person (suspected victim) chooses not to make a formal application to be recognised as a victim of trafficking, there must be a statutory requirement on public bodies to notify the Operational Committee, by sharing limited information that does not lead to personal identification.

The Commission recommends that the Bill is amended to include a provision to amend the Children First Act to include all forms of trafficking against children. Where such a report has been made there must be a statutory duty to refer the child to the Operational Committee for identification.

organ removal, begging, forced criminality or any other novel forms of exploitation such as illegal adoption etc.) are not covered by the Children First Act.

Section 30 – Effect of referrals, grants and refusals and entry to National Referral Mechanism

We greatly welcome the clarity in section 30 that provides for the basis upon which a person enters the NRM, as well as the clarity offered by the terms ‘presumed’ and ‘identified’ victims.

A person enters the NRM when a positive referral by a Competent Authority or Trusted Partner has been made under section 27(4). As a ‘presumed victim of trafficking’ the applicant will be entitled to receive services outlined in section 31. A person will cease to be a ‘presumed victim’ in one of three ways. First, where a person receives a positive identification decision under section 28(4), in which case they will become an ‘identified victim’. Second, where a person receives a negative identification decision under s.28(5) and 30 days has passed within which time they have not lodged an appeal under section 32, at that time they will cease to be a ‘presumed victim’. Third, where a person receives a negative identification decision under section 28(5) and an appeals decision under section 32(10) or (11), at which point the person will cease to be a ‘presumed victim’ and will be recognised as either an ‘identified victim’, or not.

There may be a situation where an applicant is at no time a ‘presumed victim of trafficking’. This would occur where a Competent Authority or Trusted Partner does not refer an application (section 27(5)) and where the reconsideration of that decision, applied for within 30 days (section 27(8)), has been negative. If the Operational Committee then makes a negative identification against the applicant (section 28(5)) and a negative appeals decision (section 32(11)), then the individual concerned does not enter the NRM.

Section 31 – Presumed victims of trafficking and identified victims of trafficking (Services for presumed and identified victims of trafficking)

A welcome reform contained in the Bill is that it removes the requirement of victims to cooperate with an investigation and prosecution in order to access services. However, we are strongly of the view that for this section to be meaningful and effective and in compliance with the legal requirements of EU law then considerably more clarity is required

to ensure presumed and identified victims have access to the assistance and support they are entitled. Importantly, the UN Special Rapporteur on Trafficking in Persons, especially Women and Children has urged the Ireland to:

“provide dedicated, safe accommodation for victims of trafficking, and to implement a statutory framework for assistance measures, including medical assistance, psycho-social support, and legal aid, in partnership with civil society organisations [emphasis added].”⁶²

Immigration permission for presumed and identified victims

A fundamental principle of an NRM is that it must apply equally to all victims, regardless of their nationality, immigration status or pending asylum claims.⁶³ However, the decision not to place immigration-related measures - an integral part of assistance - in statute, completely undermines the equal treatment of victims of trafficking based on their backgrounds, origins and circumstances. Most concerning, this oversight will disproportionately affect third country nationals, who represent the majority of victims of human trafficking.⁶⁴ The Bill, as currently drafted, offers different protections to victims, with some victims being treated less favourably than others based on their nationality. Failing to recognise the need to place such protections in statute is a serious omission and undermines the object and purpose of EU⁶⁵ and international law,⁶⁶ leaving victims unprotected and extremely vulnerable to being re-trafficked.

⁶² UN Office of the High Commissioner, Press release (11.09.23) ‘UN experts urge Ireland to strengthen access to housing and assistance for trafficking victims’.

⁶³ IHREC (2022) [Trafficking in Human Beings in Ireland](#), pp. 15, 23, 26, and 81; 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, para. 201

⁶⁴ See factsheets 1 and 2 of IHREC (2022) [Trafficking in Human Beings in Ireland Evaluation of the Implementation of the EU Anti-Trafficking Directive](#), pp. 178-181

⁶⁵ 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

⁶⁶ [Council of Europe Convention on Action against Trafficking in Human Beings 2005](#)

The conditions of the permission for presumed and identified victims must be included in the Bill, and it must be clear what happens when these permissions expire. The system of the Administrative Immigration Arrangements, whereby the permission given is a rolling Temporary Residence Permit might be considered as a model. For all the faults of the Administrative Immigration Arrangements, that aspect has worked reasonably well. Clear immigration permissions must be included in this. It is simply too important a protection measure to be left to Operational Guidelines. Moreover, immigration permission (lawful residence) is a prerequisite to accessing other assistance and supports such as housing, and social assistance.

The Commission recommends that the Bill must be amended to provide immigration permissions for presumed and identified victims of trafficking. This is a fundamental protection that is too important to be left to Operational Guidelines.

Importantly, the Bill must ensure that victims of trafficking who are simultaneously seeking international protection are not treated differently from other victims of trafficking.

International protection and the NRM identification process must not be mutually exclusive.

A person must be able to be both an international protection applicant and a victim of trafficking. Currently, such victims must decide between international protection or being recognised as a victim of trafficking. This is unacceptable.

Clear provision for safe and appropriate accommodation

This section of the Bill must provide for safe and appropriate accommodation for victims of trafficking; an issue that has continuously received criticism from international monitoring bodies.

We are disappointed to see the explicit reference in the Bill to the services scheme administered by the International Protection Accommodation Services. This is a service that is designed for applicants for international protection and not for victims of trafficking. We are of the view that the chronic weaknesses of the State's response is predicated on the erroneous conflation of two distinct frameworks – International Protection and Human Trafficking. This Bill must not perpetuate this error, but must instead provide for trafficking-specific assistance and supports, separate from the International Protection framework.

In particular, the use of Direct Provision accommodation for victims of trafficking has been roundly criticised by us, the Group of Experts on Action against Trafficking in Human Beings ('GRETA'), civil society organisations, as well as in reports by the OSCE and the US State Department. Despite this, providing accommodation for victims – both emergency shelter and longer-term housing - remains acutely problematic⁶⁷ with victims being housed in Direct Provision, often for years on end. We are especially concerned for female victims in Direct Provision where they have reported being subjected to violence and harassment from managers, staff and other residents.⁶⁸

Victims have a right to assistance and support measures under EU law⁶⁹ and this must be reflected in national law. To ensure that the rights are real and effective it will be necessary to include specific provisions in the Bill to amend existing legislative schemes to ensure access for victims through an unambiguous scheme of entitlements.

The Commission recommends that the Bill is amended to provide a scheme of assistance and support entitlements for presumed and identified victims.

A number of legislative schemes must be amended to ensure that presumed and identified victims qualify to receive essential assistance and support. Notably, this must include a waiver, in statute, for presumed and identified victims from the Habitual Residency Condition ('HRC') and Reckonable Residence Condition.

Under the present system, the Operational Guidelines: For Deciding Officers and Designated Persons on the determination of Habitual Residence⁷⁰ provides for a waiving of the HRC for

⁶⁷ The US State Department's 2020 Trafficking in Persons report noted a lack of specialised services in the centres for all victims, but especially for female victims who had been traumatized due to psychological, physical, or sexual violence. It also noted that victims who were in the asylum process remained in direct provision accommodation while a determination was being made in relation to their claim for international protection, which could continue for years. It noted that while the government, including a parliamentary committee, acknowledged the lack of adequate accommodation and planned to develop alternative government-funded accommodation, officials took no concrete steps during the reporting period. See US State Department (2020) Trafficking in Persons Report, p. 271.

⁶⁸ IHREC consultation, 2023.

⁶⁹ Under Directive 2011/36/EU, the assistance and support measures to which adult victims are entitled 'shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.'

⁷⁰ Operational Guidelines: For Deciding Officers and Designated Persons on the determination of Habitual Residence, From Department of Social Protection, Published on 18 March 2020, available at

identified victim of trafficking regarding access to social welfare. This must be amended to include the two new statuses created by this Bill, namely presumed and identified victims – and put into statute to ensure its full effect.

To avoid any ambiguity in the provision of social housing and social welfare support, we are of the view that this Bill must clearly state that once a person is a presumed or identified victim of trafficking then they are deemed to have satisfied the HRC and reckonable residency requirements for the purposes of receiving social housing and welfare supports.

The General Scheme of the Housing (Miscellaneous Provisions) Bill 2023 proposes to make eligibility for social housing support contingent on both lawful residence in the State and compliance with a habitual residence condition ('HRC') in line with that applied for most social welfare payments under section 246 of the Social Welfare Consolidation Act 2005. Presumed and identified victims must be included in the list of categories of persons who are deemed to be habitually resident under Head 6, subparagraph 8 of the General Scheme of the Housing (Miscellaneous Provisions) Bill 2023.

The Commission recommends that the Bill is amended to explicitly state that both presumed and identified victims of trafficking are regarded as satisfying the Habitual Residency Condition and Reckonable Residence for the purposes of receiving social welfare and housing supports.

For some victims appropriate and safe accommodation will mean sheltered accommodation comparable to that which is available to victims of domestic violence. Given the recognised intersection between trafficking and gender-based violence and the central role of the Department of Justice as the National Anti-Trafficking Coordinator, we believe that the Domestic, Sexual and Gender-Based Agency should be responsible for the overseeing of the specialist shelter for victims of trafficking.

The Commission recommends that this Bill should assign responsibility to the Domestic, Sexual and Gender-Based Agency for the administration of shelter accommodation for victims of trafficking who have been subjected to gender-based violence.

<https://www.gov.ie/en/publication/fc9c5e-operational-guidelines-for-deciding-officers-on-the-determination-of/>

Section 32 - Appeal from Decision of Operational Committee

We welcome the introduction of an appeals mechanism in section 32, where an applicant can, within 30 days of a negative identification decision of the 'Operational Committee', appeal that decision.

While there is a maximum time within which the applicant can request an appeal, there is no such requirements on either the Operational Committee to arrange for the appeal or time within which a decision of the appeals officer must be made.

As with the above recommendations relating to section 27 and 28 the 'credibility' test within section 32(7)(a) must be removed and the 'means', once defined in section 20, to specifically not apply to minors and persons with a 'mental impairment'.

The Commission recommends that the Bill is amended to include specific timeframes within which the appeals decisions will be made.

The Commission recommends that 'credibility' test is removed from section 32(7)(a).

The Commission recommends that section 27 (and 28) of the Bill must be amended to include an exception of the 'means' requirement for applicants with a 'mental impairment'.

Section 33 – Appeals officers

We welcome the introduction of Section 33 establishing the appointment of suitable persons to be appointed as appeals officers, specifically the requirement to be experienced barristers or practising solicitors of not less than five years' experience and independent in performing their functions (sections 33(3) and (4)). We welcome this provision as it ensures a high level of competency of appeals officers. However, we are concerned that there is no requirement that such person has knowledge of trafficking nor is required to undertake any specific training.

The Commission recommends that the Bill is amended to include a requirement that an appeals officer has demonstrable knowledge of human trafficking and undertakes required training.

Section 34 - Prohibition on deportation of certain persons

We welcome the provisions guarding against deportation but reiterate that temporary protection from deportation is not the same as a valid immigration permission. Detailed under section 31, and in our submission to the General Scheme, we raised the importance of clear immigration permissions for presumed and identified victims of trafficking.

Section 35 – Amendment of Criminal Law (Human Trafficking) Act 2008 (Non-prosecution of victims)

Section 35 amends the Criminal Law (Human Trafficking) Act 2008 to provide protection to certain persons from prosecution for certain offences, including for their role in their own trafficking.

We are disappointed that the recommendations of the Joint Committee have not been reflected in the Bill. Namely, recommendation 23:

“The Committee recommends that, to adhere fully to the non-punishment principle, the Bill should amend the Criminal Law (Human Trafficking) Act 2008, to include a specific statutory defence for victims of trafficking where they have committed crimes as a direct consequence of them being trafficked. The legislative process of this Bill should also examine the feasibility of extending the expungement of criminal convictions to victims of other forms of human trafficking”⁷¹.

We are deeply concerned by the limited nature of the section. 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”⁷².

⁷¹ Committee on Justice, Report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 (Published 8 Mar 2023.), available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2023/2023-03-08_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-criminal-justice-sexual-offences-and-human-trafficking-bill-2022_en.pdf, P.12

⁷² 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, para. 117

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”.⁷³

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 persons⁷⁴[emphasis added]

Evidence suggests that victims of trafficking continue to be imprisoned and charged for criminal offences associated with trafficking,⁷⁵ beyond that of trafficking offences⁷⁶. This suggests that the principle of non-punishment of victims for crimes they have committed as a direct consequence of them being trafficked is 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

⁷³ 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, para. 125

⁷⁴ Office of the High Commissioner for Human Rights, [Recommended Principles and Guidance on Human Rights and Human Trafficking](#), para 7

⁷⁵ IHREC (2022) [Trafficking in Human Beings in Ireland](#), pp. 62-63

⁷⁶ IHREC (2022) [Trafficking in Human Beings in Ireland](#), p. 60-64

the non-punishment of victims of trafficking entails a risk of treating them differently depending on the prosecutor in charge of the case”⁷⁷.

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”⁷⁸

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.⁷⁹ 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.

The Commission recommends that the Bill is amended to include a specific defence for victims of trafficking where they have committed crimes as a direct consequence of them being trafficked.

⁷⁷ 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. 205

⁷⁸ 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

⁷⁹ 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, para. 125

Part 4 Amendment of the Defence Act 1954

Sections 37 and 38 - provide that persons subject to military law who commit rape, rape under section 4, sexual assault or aggravated sexual assault are liable to be tried by courts-martial only where these offences were committed outside the State. Where such offences occur within the State, they will be dealt with by An Garda Síochána and the civilian courts and that a general court-martial does not have jurisdiction

According to the Defence Forces Independent Review Group ('IRG') report:

“it is not clear ... why this jurisdiction should be retained at all by the court martial system, given the greater experience of An Garda Síochána, the prosecution authorities and the civil courts in dealing with these offences [rape, rape under section 4, aggravated sexual assault].”⁸⁰

While the IRG report refers only to the most serious of sexual offences, the Bill extends this to all 'applicable offences' (as defined in this Bill). This broadened approach is to be welcomed. In line with the recommendations set out above we would argue that this should be extended further to include all sexual exploitation offences also.

The seriousness of sexual offences (including sexual exploitation offences) coupled with the the damning findings of the IRG review⁸¹ necessitates the separation from the chain of command of the Defence Forces when dealing with crimes of a sexual nature.

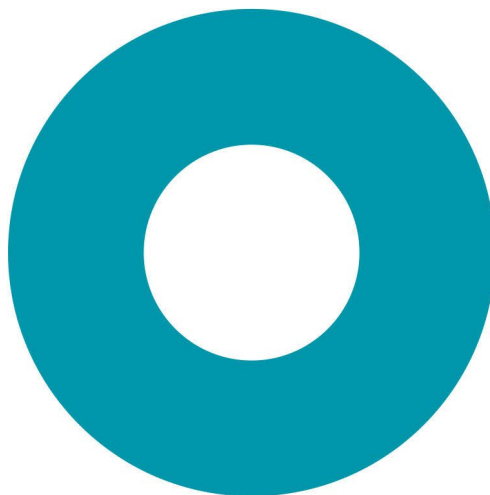
The Commission recommends that the removal of jurisdiction from the military courts for sexual offences is extended further to include sexual exploitation offences.

⁸⁰ Report of the Independent Review Group (IRG), (2023). Available at <https://www.gov.ie/en/publication/4eb09-report-of-the-independent-review-group-on-dignity-and-equality-issues-in-the-defence-forces/>, p.59

⁸¹ Report of the Independent Review Group (IRG), 28 March 2023. Available at <https://www.gov.ie/en/publication/4eb09-report-of-the-independent-review-group-on-dignity-and-equality-issues-in-the-defence-forces/>



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
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