



THE BAR  
OF IRELAND

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BARRA NA hÉIREANN

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# SUBMISSION ON THE GENERAL SCHEME OF THE CRIMINAL JUSTICE (SEXUAL OFFENCES AND HUMAN TRAFFICKING) BILL 2022

October 2022

## About The Bar of Ireland

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.



## 1. INTRODUCTION

- 1.1. The General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022 (“**the 2022 Bill**”) is a welcome legislative initiative.
- 1.2. The Council of the Bar of Ireland (“the Council”) is of the view, however, that a number of elements of the General Scheme of the 2022 Bill require further consideration.
- 1.3. In general terms, the National Referral Mechanism is a particularly welcome legislative introduction. International bodies such as the US State Department and GRETA (Council of Europe Group of Experts on Action against Trafficking in Human Beings) have, over a number of years, highlighted issues with the identification, referral and supports offered to victims of human trafficking in Ireland. It is the Council’s view that a simple, speedy, effective procedure, with clear time limits, appeals processes and entitlements to supports on a needs basis must be adopted to meet the State’s international obligations.
- 1.4. This submission highlights the areas of concern the Council has identified. It makes suggestions as to the manner in which they might be addressed and highlights additional provisions which the Committee may wish to consider including.

## 2. OBSERVATIONS IN RESPECT OF PART 2 OF THE BILL

### 2.1. HEAD 3 – AMENDMENT OF SECTION 2 OF THE ACT OF 1981

- 2.1.1. The Law Reform Commission Report: *Knowledge or Belief Concerning Consent in Rape Law* sets out the current law in relation to consent. The decision of the Supreme Court in *The People (DPP) v CO’R* [2016] IESC 64, [2016] 3 IR 322 explains that the current test for recklessness as to the victim’s lack of consent is primarily subjective, but that the test does contain some objective elements. This allows a jury to apply their common sense to the facts of a given case when determining whether an accused person was reckless as to the issue of consent. In any criminal trial, a jury will be directed by the trial judge that they should bring their common sense to bear upon their assessment of the evidence.
- 2.1.2. The Law Reform Commission notes that s.48 of the Criminal Law (Sexual Offences) Act 2017 substituted a significantly expanded s.9 of the Criminal Law (Rape) (Amendment) Act 1990. The Law Reform Commission notes, and the Bar of Ireland agrees, that this codified the law as set out by the Supreme Court in *The People (DPP) v CO’R*. The Law Reform Commission also records that there was widespread consensus in the Oireachtas on this issue.
- 2.1.3. The 2017 Act also provided (for the first time) a statutory definition of consent. Section 9(1) of the 1990 Act, as inserted by s.48 of the 2017 Act, provides: “A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.” Section 9(2), as inserted by s.48 of the 2017 Act also sets out a non-exhaustive list of 8 specific circumstances in which a person does not consent:
- (a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,*
  - (b) he or she is asleep or unconscious,*
  - (c) he or she is incapable of consenting because of the effect of alcohol or some other drug,*
  - (d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,*
  - (e) he or she is mistaken as to the nature and purpose of the act,*

*(f) he or she is mistaken as to the identity of any other person involved in the act,  
(g) he or she is being unlawfully detained at the time at which the act takes place,  
(h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.”*

2.1.4. As the Law Reform Commission stated, the fault or mental element of the offence could also be proved by establishing beyond reasonable doubt that the accused was aware of, or reckless as to, the existence of one of the 8 situations set out above.

2.1.5. The extent to which the ‘reasonableness’ of the belief of consent features was explained by the Supreme Court in *CO’R* in the following terms:

*“Where, however, the accused claims to have mistakenly believed that a woman was consenting, then the jury should examine all of the facts which may support or which may undermine that claimed belief. They should consider all of the circumstances and focus on whether there are, or are not, any reasonable grounds for that belief. As s.2(2) of the Criminal Law (Rape) Act 1981 states: ‘the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.’ That means that where the accused believed genuinely, albeit unreasonably, that the woman was consenting, on this statutory definition he must, even though she did not consent, be acquitted. It needs also to be stated by trial judges, however, that no jury is under any obligation to believe an obviously false story. A jury is entitled to accept or reject any prosecution or defence evidence. In these cases, every jury is entrusted, using shrewdness and common sense, to judge what the accused claims as to his mistaken belief against their view of what an ordinary or reasonable man would have realised in the circumstances. This defence requires genuine belief.”*

2.1.6. Put simply, the more outlandish and unreasonable an accused’s asserted belief is, the less likely a jury is to accept it. That is true as a matter of law, but the Bar of Ireland submits that this is true in practice too. In cases where an accused asserts a mistaken belief as to the victim’s consent, inevitably the trial will focus on that issue. The prosecution can make submissions to the Jury why it feels the belief was

unreasonable. It can explain that the more unreasonable a belief is, the less likely it is to be true. This will also be explained by the trial Judge in directing the jury.

2.1.7. The Law Reform Commission considered a number of arguments for and against a change in the current law. The Bar of Ireland broadly supports the arguments in favour of not changing the law. The Bar of Ireland shares the concerns expressed in the report (see Part 4 of the Law Reform Commission's report). In summary those arguments are:

- (a) That the concept of knowledge and recklessness is consistent with the criminal law generally.
- (b) That it is morally unfair to hold somebody liable for a serious crime when they could not foresee the risk of harm.
- (c) That criminalising inadvertence is not an effective deterrent.
- (d) That criminalising inadvertence is contrary to fair labelling principles.
- (e) That honest belief is rarely the central issue at trial.

2.1.8. In relation to the latter issue, the Bar of Ireland's position is that it is the experience of many barristers that honest belief is rarely the basis on which rape cases are defended. In some cases, the fact of sexual intercourse itself or the identity of the attacker may be at issue. In such cases while the issue of consent remains a formal proof, it is not realistically in dispute. In other cases, the fact of sexual intercourse is accepted but the defence case is that there was consent. In such cases the trial focusses on the credibility of the complainant's account and, if he gives evidence or has provided an account in interview, on the credibility of the accused's account. In either case the issue of honest belief is not at the core of the case.

2.1.9. The Law Reform Commission also considered arguments in favour of changing the law. Two such arguments are: (i) that an honest belief test allows an accused to rely on unreasonable beliefs and places a premium on ignorance; and (ii) a primarily subjective approach allows a man who gave no thought to consent to be acquitted. It is noted that some have opined that the law may encourage an accused to adhere to sexist stereotypes to defend himself, thereby entrenching sexist ideologies. The Bar of Ireland disagrees. In any jury trial, a jury will be directed by the trial judge that they should deploy their common sense in assessing the evidence that they have

heard. A jury is a diverse group of persons drawn at random from the community. It can safely be assumed that such a group is capable of distinguishing antiquated stereotypes from lived real-world experiences. Further, as outlined above, a jury will be directed to consider the reasonableness of a belief to consider whether it was honestly held. The concerns referred to by Law Reform Commission as possibly favouring a change in the law are not supported by the experience of barristers who prosecute and defend rape cases.

## **2.2. HEAD 5 AMENDMENT OF SECTION 4A OF THE ACT OF 1981**

2.2.1. The Bar of Ireland supports this proposed amendment. It is acknowledged that the experience of a victim as witness in a trial for sexual assault may be no less difficult or traumatic than in a trial for a rape or aggravated sexual assault offence.

## **2.3. HEAD 6 AMENDMENT OF SECTION 6 OF THE ACT OF 1981**

2.3.1. The Bar of Ireland supports this proposed amendment

## **2.4. HEAD 7 AMENDMENT OF SECTION 7 OF THE ACT OF 1981**

2.4.1. The Bar of Ireland supports this proposed amendment

## **2.5. HEAD 8 AMENDMENT OF SECTION 8 OF THE ACT OF 1981**

2.5.1. The Bar of Ireland supports this proposed amendment. Given the reputational injury which can arise following an *allegation* of a sexual offence of any nature, the Bar of Ireland feels it is appropriate that an Accused person be entitled to anonymity unless convicted.

## **2.6. HEAD 9 AMENDMENT OF SEXUAL OFFENCES (JURISDICTION) ACT 1996**

2.6.1. The Bar of Ireland supports this proposed amendment.

## **2.7. HEAD 10 AMENDMENT OF CRIMINAL JUSTICE (MUTUAL ASSISTANCE) ACT 2008**

2.7.1. The Bar of Ireland supports this proposed amendment.

## **2.8. REPEALS**

2.8.1. The Bar of Ireland supports this proposed amendment.



### 3. OBSERVATIONS IN RESPECT OF PART 3 OF THE BILL

#### 3.1. GENERAL OBSERVATIONS - PART 3

3.1.1. The Council welcomes the placement of the revised National Referral Mechanism on a statutory footing.

3.1.2. While Ireland has been removed from the Tier 2 ‘watch list’ by the US State Department, Ireland’s position on Tier 2 highlights the need for further improvements in the identification and protection of victims of trafficking. The US State Department Trafficking in Persons Report July 2022 states:

*“Systemic deficiencies in victim identification, referral, and assistance persisted, and services for victims remained inadequate. The government did not uniformly screen for trafficking in vulnerable populations, like sea fishers, before referring them to immigration authorities for deportation, even when victims self-identified. The government did not adopt an updated national anti-trafficking action plan (NAP), amend its national referral mechanism, or overhaul its accommodation framework for trafficking victims, which continued to leave victims with inadequate and unsuitable accommodations.”*

3.1.3. In terms of prioritised recommendations, the aforementioned report implores Ireland to:

- (a) Increase efforts to identify and protect all victims, especially Irish citizens, victims of labour trafficking and forced criminality, and vulnerable populations like children, sea fishers, and asylum-seekers.
- (b) Improve victim identification and referral by issuing a revised national referral mechanism in coordination with NGOs; providing victim identification training for all front-line officials, including for labour inspectors; and offering formal identification, a recovery and reflection period, and services to all victims.
- (c) Allow formal victim identification by entities other than the police, including civil society, labour inspectors, social workers, and health care professionals.

3.1.4. The submissions outlined by the Bar Council below highlight that there are some deviations in the General Scheme as against these recommendations.

3.1.5. On the 28th of September 2022 the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) published its Third evaluation on Access to justice and effective remedies for victims of trafficking in human beings in Ireland.

3.1.6. GRETA reports:

*“GRETA notes that the above figures of presumed victims do not reflect the real scale of the phenomenon of human trafficking in Ireland, due to persisting limitations of the National Referral Mechanism and the fact that An Garda Síochána remains the only stakeholder taking decisions on identifying victims of THB”.*

3.1.7. In light of these observations, the Bar Council believes that the priority should be to establish a mechanism which is capable of identifying victims of trafficking **quickly and fairly**, with a number of stakeholders involved rather than just the Gardai. Early identification is essential to ensure that suspected victims receive the assistance and support to which they are entitled as soon as possible and to avoid prosecution and punishment of victims for offences inherent in or consequent on their trafficking. There is little point in the NRM exercise if it takes months to deliver an identification decision. The victim may be re-trafficked, deported or prosecuted and imprisoned in the meantime.

## **3.2. HEAD 12 (INTERPRETATION FOR PART 3)**

3.2.1. The definitions for ‘trafficks’, ‘exploitation’, ‘sexual exploitation’, ‘forced labour’ and labour exploitation’ in Head 12 are taken from section 1 of the Criminal Justice Act 2008 (hereinafter the “2008 Act”). It is not necessary to repeat the definitions in this way. It is suggested that definitional parts should, where appropriate, simply refer directly to section 1 of the 2008 Act.

3.2.2. The current definition of ‘victim of human trafficking’ in Head 12, and the recognition of applicants as ‘victims of human trafficking’ by the National Referral

Mechanism (hereinafter the “NRM”) Operational Committee is unnecessarily determinative and risks prejudicing prosecutions for offences under the 2008 Act.

3.2.3. Given that the identification system only requires at most a reasonable grounds identification, the term ‘suspected victim of trafficking’ should be retained and defined in terms of a person in respect of whom ‘there are reasonable grounds to believe that he or she has been a victim of an offence under section 2, or 4 of the 2008 Act or section 3 of the Child Trafficking and Pornography Act 1998 (hereinafter the “1998 Act”) (i.e. the victim of trafficking)’. There can then be no confusion with the criminal standard in respect of the prosecution of the alleged trafficker or a claim that they are significantly prejudiced in their defence by reason of the identification.

3.2.4. In all of the circumstances, it is recommended that a person who has been recognised by the National Referral Mechanism (NRM) Operational Committee should be designated as a ‘suspected victim of trafficking’ rather than a ‘victim of trafficking’.

3.2.5. A person who has made an application for recognition which has been referred to the NRM Operational Committee should separately be designated as a ‘NRM potential victim of trafficking’ as this person has only passed through an initial preliminary analysis process with the NRM Competent Authorities or trusted partners who have made a referral. It is the NRM Operational Committee which identifies or recognises the applicant as a (suspected) victim of trafficking.

3.2.6. An ‘applicant’ should be defined as a person who has applied for identification/recognition to a referral body or has been designated as a ‘NRM potential victim of trafficking’ (i.e. a referral has been made to NRM Operational Committee in respect of their application). Interim supports should be available either to all applicants or at least to ‘NRM potential victims of trafficking’.

### **3.3. HEAD 13 (COMPETENT AUTHORITIES OF THE NATIONAL REFERRAL MECHANISM)**

3.3.1. It is important that all bodies that may have contact with victims should be integrated into the national referral mechanism.

- 3.3.2. The Marine Survey Office of the Department of Transport has responsibility for implementation of working time rules at sea under the European Union (International Labour Organisation Work in Fishing Convention) (Working Hours) Regulations 2019 SI 672 of 2019. Consideration could be given to designating the Minister for Transport as a competent authority.
- 3.3.3. Given that the Minister for Enterprise is responsible for employment permits, and that these are susceptible to abuse by traffickers, this Minister might also be included.
- 3.3.4. It is not clear, however, that there is any operational reality to the designation of the Minister for Social Protection as a Competent Authority unless it is apparent that her officials are encountering victims who may require identification.
- 3.3.5. It is also suggested that the wording of this Head be changed to reflect the fact that it is the NRM Operational Committee which will identify/recognise (suspected) victims of trafficking on foot of a referral from one of the referral bodies.
- 3.3.6. It is confusing to say that the referral bodies recognise or identify victims when this is also a description of the role of the NRM Operational Committee. The referral bodies carry out a preliminary investigation of the application for recognition and decide whether or not to refer the application. They do not 'identify' applicants as such.
- 3.3.7. The General Scheme of the Bill seems to outline a scheme whereby applicants will identify themselves to the referral bodies and make an application for recognition. The referral bodies then analyse and investigate that application on a preliminary basis and, if they are satisfied that there are reasonable grounds to believe that the person has been the victim of an offence under section 2, or 4 of the 2008 Act or section 3 of the 1998 Act (i.e. that they have been trafficked), they make the referral, which will include a recommendation, to the NRM Operational Committee in respect of the application. The NRM Operational Committee engages in a more detailed and intensive investigation of the application and makes a decision either to reject or accept the recommendation, grant the application and recognise the applicant as the (suspected) victim of trafficking.

3.3.8. This NRM process should more clearly explained in the General Scheme of the Bill. It is important that the legislation is as prescriptive as possible. The process must be easy to understand and to follow.

### **3.4. HEAD 14 (APPLICATION FOR RECOGNITION AS A VICTIM OF HUMAN TRAFFICKING)**

3.4.1. As discussed above, Head 14(1) requires that the individual makes an application to be recognised as a ‘victim of human trafficking’.

3.4.2. Consideration ought to be given to a mechanism whereby the referral process can be initiated by the referral bodies without the need for a formal application in certain circumstances (for example where the applicant is incapacitated). There is an obligation on the State to identify victims of human trafficking, whether or not those victims apply to be recognised as such.

3.4.3. Head 14(3)(a) provides that a Competent Authority or Trusted Partner shall refer the application for determination where it is ‘credible’. It is not necessary to include a credibility assessment as part of the test. There will be situations in which a person’s account or parts of the account is not credible and yet there will be other evidence to support a reasonable grounds decision that the person has been the victim of a trafficking offence. Statutory credibility tests have in the past led to large amounts of litigation. It should be enough that the referral body is satisfied that the application is “based upon reasonable grounds” meaning that there are reasonable grounds to believe that the applicant has been the victim of an offence under section 2, or 4 of the 2008 Act or section 3 of the 1998 Act (i.e., that they have been trafficked)

3.4.4. The inclusion of a list of factors or specific reasonable grounds in Head 14(4) is unnecessary as these are elements of the underlying offence of trafficking. It is unclear why it needs to be broken down in this way. It is suggested that the four ‘reasonable grounds’ specified in 14(4) could usefully be replaced by reference to a schedule including a list of [internationally-developed indicators of human trafficking such as those developed by the United Nations Office for Drugs and Crime \(UNODC\)](#). This would have the effect of making the system simpler and quicker.

### **3.5. HEAD 15 (NATIONAL REFERRAL MECHANISM OPERATIONAL COMMITTEE FOR THE IDENTIFICATION OF VICTIMS OF HUMAN TRAFFICKING)**

3.5.1. It is respectfully suggested that there are too many members of the NRM Operational Committee and that its decision-making processes will be unwieldy and unworkable as a result. No more than three people from the NRM Operational Committee should be involved in individual identification/recognition decisions which must be dealt with expeditiously.

3.5.2. If trusted partners are to have a position on the NRM Operational Committee, it is important the Committee has its own legal personality. The legal status of the Committee as described in the Scheme is uncertain. If and when it makes mistakes or suffers from delays in decision-making, its decisions, or its failure to make decisions, will be challenged by judicial review. As set out in Head 15, all of the members would be sued, including the trusted partners. A single entity should be responsible at law for the final decision. A mechanism of recommendation by a troika appointed from a panel consisting of Operational Committee members and other professionals and approval of the decision by a minister might be considered as a solution.

3.5.3. The deciding body – the troika - should have the capacity to investigate applications (or cause them to be investigated by Gardaí) and commission reports which might not have been available to the referring body. The examination of the application should be more intense than the initial preliminary examination for the referral although the standard of proof should be same i.e., ‘reasonable grounds to believe’.

3.5.4. It is also suggested that the deciding body should include an independent person with legal expertise.

### **3.6. HEAD 16 (SHARING OF INFORMATION BY COMPETENT AUTHORITIES AND TRUSTED PARTNERS)**

3.6.1. Information sharing is important, but it should be possible to make identification decisions quickly based on relatively small amounts of information. The preparation

of voluminous files will necessarily slow the decision-making process down, to the detriment of victims of human trafficking.

3.6.2. Head 16(2)(d) provides that the long list of Competent Authorities and Trusted Partners would receive potentially operationally sensitive details of a criminal investigations. Consideration should be given to the necessity and desirability of the dissemination of such information to such a broad forum. Perhaps only the troika deciding upon the particular application needs all of the information.

3.6.3. Head 16(5) requires the consent of the person to information sharing. In order to consent the person must know what information will be shared about them. Consideration should be given as to whether it will be possible to obtain fully informed consent. Further, consideration should be given to a situation in which there is overwhelming evidence of human trafficking, but the victim does not consent to the sharing of information.

3.6.4. In subhead 6, the Child and Family Agency should be able to represent the interests of the child only where it is in loco parentis under the Child Care Act 1991 or some other legal mechanism.

### **3.7. HEAD 17 (IDENTIFICATION OF A VICTIM OF HUMAN TRAFFICKING BY THE NATIONAL REFERRAL MECHANISM OPERATIONAL COMMITTEE)**

3.7.1. Again, the inclusion of a credibility requirement is not desirable. This requirement makes identification contingent on victim cooperation, which is contrary to international law. A reasonable grounds assessment is what is required by international law and this ought to be sufficient.

3.7.2. The person identified should be identified as a suspected victim of trafficking only. There is no necessity for a conclusive decision.

3.7.3. The requirement that the decision be made as soon as practicable is legally meaningless. Referral decisions should be made in a matter of days, with the possibility of extension on exceptional circumstances, and recognition decisions

within a similar timeframe. The entire process should not take longer than 10 working days.

3.7.4. An effective mechanism of independent review of decisions should be included so as to avoid a situation where negative decisions are immediately subjected to judicial review. This function might be conferred on an existing body such as the International Protection Appeals Tribunal.

### **3.8. HEAD 18 (DESIGNATION BY ORDER OF TRUSTED PARTNER)**

3.8.1. While the inclusion of a number of Non-Governmental Organisations (NGOs) who work in the area as referral bodies is a welcome development, there is a risk that the Trusted Partner mechanism will intentionally or unintentionally compromise the independence of NGOs or influence them to withhold legitimate criticism of anti-trafficking law and policy.

3.8.2. A mechanism of independent review of decisions relating to trusted partner status should therefore be included. For example, a Trusted Partner Appeal Panel operated by the Charities Regulator, akin to the Approved Housing Body Appeals process.

### **3.9. HEAD 19 (ACCESS TO SERVICES BY VICTIMS OF HUMAN TRAFFICKING)**

3.9.1. Ideally, the identification system should be as simple and as quick as possible so as to ensure early identification of victims. Clear, short timeframes should be included for the making of referral decisions by Competent Authorities and Trusted Partners and of identification decisions by the Operational Committee. It should be possible to make these decisions in a matter of days given the low evidential threshold of 'reasonable grounds to believe.' If decisions are made quickly, there is no requirement for interim measures.

3.9.2. However, if the decision-making process is drawn out, it will be necessary to provide for assistance and support of applicants while their applications are considered. This will mean, in effect, ensuring that upon application, and certainly upon referral, an applicant will be entitled to a recovery and reflection period



(including, where necessary, an immigration permission) as well as material assistance in the form of money and accommodation. This is likely to create difficulties because it will mean delegation of the power to confer these benefits to Competent Authorities and Trusted Partners. There is merit therefore in including clear timeframes for decisions so that applicants receive a decision on entitlement to services from the Operational Committee within a matter of days.

3.9.3. More detail is required in relation to the entitlement of beneficiaries of identification to receive public services. A statutory entitlement to a care plan should be created comparable to the aftercare plan provided to children in the care of the Child and Family Agency under section 45 of the Child Care Act 1991. This ought to be on a needs basis and the outcome of the NN and LP case ought to be noted<sup>1</sup>.

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

3.9.5. Victims have a right to these assistance and support measures under EU law and this should be reflected in national law. In order to ensure that the rights are real and effective, it will be necessary either to make amendments to the Social Welfare Consolidation Act 2005, the Housing Acts and the Health Acts or to create a separate regime of entitlements comparable to the EU (Reception Conditions) Regulations 2018.

### **3.10. HEAD 20 (PROHIBITION ON DEPORTATION OF VICTIM OF TRAFFICKING)**

3.10.1. It would be preferable here simply to provide for the grant of an immigration permission to a victim who does not have one. Temporary protection from

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<sup>1</sup>[https://www.duncanlewis.co.uk/news/Home\\_Office\\_concedes\\_that\\_their\\_45\\_day\\_policy\\_for\\_providing\\_support\\_for\\_victims\\_of\\_trafficking\\_is\\_unsatisfactory\\_\\_\(28\\_June\\_2019\).html](https://www.duncanlewis.co.uk/news/Home_Office_concedes_that_their_45_day_policy_for_providing_support_for_victims_of_trafficking_is_unsatisfactory__(28_June_2019).html)

deportation is not the same as a valid immigration permission with an associated right to work.

3.10.2. If the provision is to remain as drafted, the Operational Committee must be required to expressly determine the period the person was a victim of human trafficking for. The risk is then that a person may not be protected against all of his/her immigration offences and be deported despite having protection.

### **3.11. HEAD 21 (PROTECTION FROM PROSECUTION FOR A HUMAN TRAFFICKING OFFENCE)**

3.11.1. It is not sufficient to provide that a person cannot be prosecuted for their role in their own trafficking. This is not what is required, it is submitted that the requirement is broader. Article 26 of the Anti-Trafficking Convention contains the following “non-punishment provision”:

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

3.11.3. Further, Article 8 of the Anti-Trafficking Directive provides for the non-prosecution or non-application of penalties to the victim in the following terms:

3.11.4. *“Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.”*

3.11.5. It would be better to create a specific defence of having been trafficked on the model of section 45 of the Modern Slavery Act 2015 in England and Wales. This would cover what is covered by Head 21 while ensuring that evidence of trafficking was considered by the DPP at charging stage at the evidential level as well as as part of the public interest analysis. It would also give defence lawyers a larger role in victim identification in the criminal justice system.

#### 4. CONCLUSIONS

A simple, speedy, effective procedure, with clear time limits, appeals processes and entitlements to supports on a needs basis is necessary to achieve the aim of “*early identification of, assistance to and support for victims*”. At present, the Council cautions that the proposed measures risk the creation of a mechanism that creates lengthy delays and bureaucracy thus impeding the legitimate stated aim of the mechanism.

**For further information & queries contact:**

Nuala Byrne

Secretary, Human Rights Committee of The Bar of Ireland

E: [nbyrne@lawlibrary.ie](mailto:nbyrne@lawlibrary.ie)