

# **Submission on Criminal Justice (Trafficking and Sexual Offences) Bill, 2006**

**STOP THE TRAFFIC CAMPAIGN, CORK**

## **INTRODUCTION**

We welcome the publication of Scheme of the Criminal Justice (Trafficking in Persons and Sexual Offences) Bill 2006. It is our position that comprehensive legislation is required to eliminate the problem of human trafficking in Ireland and to ensure that Ireland can contribute effectively to the global effort to eliminate human trafficking.

The Scheme for the Criminal Justice Bill addresses some of the law enforcement issues arising from the problem of trafficking. It is our submission, however, that the Bill fails to provide a comprehensive legal response to trafficking and, in particular, fails to address the protection needs of trafficked persons, including, in particular, women and children.

Further amendments are required to ensure compliance with best practice in international standards. In identifying the further amendments required, this submission draws on the:

- UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children;
- Council of Europe Convention on Action against Trafficking in Human Beings (CoE Convention);
- Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
- EU Framework Decision on Combating Trafficking in Human Beings (for the purpose of labour and sexual exploitation) and the;
- EU Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography;
- 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (article 6).

It is our submission that a comprehensive legal response to trafficking must:

- Define "trafficking in persons" in accordance with international standards;
- Provide effective tools for law enforcement bodies;
- Strengthen the response of the legal system;
- Establish effective protection and support measures for victims and witnesses of trafficking;
- Provide effective and appropriate protection measures for child victims of trafficking;
- Establish prevention policies.

We would like to draw attention to the recent Concluding Observations adopted by the UN Committee on the Elimination of All Forms of Discrimination Against Women (2005) on

Ireland's Combined Fourth and Fifth Periodic Reports under the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women:

*The Committee is concerned about trafficking in women and girls into Ireland, the lack of information on the extent of the problem and on specific legislation in this area, and the lack of a comprehensive strategy to combat it.*

*The Committee recommends the adoption and implementation of a comprehensive strategy to combat trafficking in women and girls, which should include preventive measures, the prosecution and punishment of offenders and the enactment of specific legislation in the area. The Committee also recommends that measures be put in place to provide for the physical, psychological and social recovery of women and girls who have been victims of trafficking, including the provision of shelter, counselling and medical care. It further recommends that border police and law enforcement officials be provided with the requisite skills to recognize and provide support for victims of trafficking.*

## **KEY RECOMMENDATIONS ON THE SCHEME FOR THE CRIMINAL JUSTICE (TRAFFICKING AND SEXUAL OFFENCES) BILL, 2006:**

1. In accordance with international standards, a clear statement is required setting out the **irrelevance of the victim's consent** where any of the improper means specified in the definition of trafficking are used. The irrelevance of consent in all cases involving children must also be clearly stated.
2. The Bill should provide for the establishment of a **specialised unit or task force** within An Garda Síochána, with responsibility for coordinating responses to trafficking and providing training to specialised personnel.
3. **'Effective, proportionate and dissuasive sanctions'** are required to eliminate the problem of trafficking. The Bill should be amended to provide for presumptive mandatory sentences, particularly in the context of **trafficking offences relating to children**. Provisions for monetary sanctions in the context of serious criminal offences are inappropriate and should be removed from the Bill.
4. The Trafficking Bill does not make any provision for the **protection of victims' rights**. In accordance with International and European standards, the Bill should be amended to provide a comprehensive legal response to the needs of victims of trafficking. This would provide for, at a minimum, the following:
  - Identification of victims;
  - Protection of private life of victims;
  - Appropriate medical assistance to victims;
  - Secure accommodation;
  - Recovery and reflection period (minimum 30 days);
  - Temporary Residence permit (minimum 6 months);
  - Translation and interpretation facilities where necessary;
  - Access to counselling and information services, in particular, as regards legal rights, in a language that can be understood;
  - Access to legal aid;
  - Right of access to education for children;
  - Right to access social welfare benefits as necessary.
  - Voluntary repatriation and return of victims;
  - Right of access to the asylum process.
5. Sensitive, well-resourced and effective **protection measures are required for child victims of trafficking**, in accordance with the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. In particular, **prevention measures** arising from the vulnerable position of **child asylum seekers**, whether as separated children, or in the context of family reunification, are urgently required.
6. To ensure full **recovery and reintegration of victims of trafficking** into society, the following should also be guaranteed:

- Right to work;
  - Right to access vocational training and education;
  - Compensation and legal redress against traffickers.
7. **Protection measures for witnesses and victims during legal proceedings** should be made, including specifically provision for: physical protection, relocation, identity change and assistance in obtaining employment.
  8. Provision should be made for protection of victims during **trial proceedings**, in a manner compatible with article 6 of the European Convention on Human Rights. Specific measures required include: protection of the victim's private life, and, where appropriate, identity; victims' safety and protection from intimidation.
  9. An offence of '**using the services of a victim of trafficking**', with knowledge that the person is a victim, should be included in the Bill.
  10. Provision should be made for **Proceeds of Crime legislation** to be used against Traffickers, with monies obtained being used to support social programmes for victims of trafficking.
  11. **A national coordinating body** is required to monitor and coordinate agency responses to trafficking. The publication of the Bill provides an opportunity to establish, on a statutory basis, a coordinating body.

## SPECIFIC AREAS OF CONCERN

### **Definition of trafficking**

The current definition does not make any reference to situations where the accused person raises the defence of consent on the part of the victim. An accused trafficker may, for example, argue that the victim consented to recruitment as a prostitute / sex worker. The UN Protocol and the CoE Convention allow for the possibility of consent to be raised as a defence. However, they include provisions clearly stating that if any of the improper means listed (abuse of a position of authority, coercion, deception etc) are used, any alleged consent to the subsequent exploitation is irrelevant. Without such provisions, there remains the possibility of confused and conflicting legal outcomes, such as was witnessed in the recent *Mr A* legal proceedings.

A clear statement must be included in the legislation setting out the irrelevance of the victim's consent where any of the improper means specified in the definition are used. The irrelevance of consent in all cases involving children must also be clearly stated.

Current international standards include clear provisions stating the irrelevance of consent where improper means are used. (See: article 3 UN Protocol; CoE Convention, article 4(b)). The Trafficking Bill, as currently drafted does not comply with international standards, with the likely result that prosecutions may fail because of difficulties in proving lack of consent.

## **Effective tools for legal bodies**

To ensure a coordinated and effective response to the problem of human trafficking, a specialised unit or task force within An Garda Síochána is required, with responsibility for coordinating Garda responses to trafficking. Such a specialised unit would have responsibility for training with particular focus on: methods used in preventing trafficking, prosecuting traffickers, protecting the rights of victims, including protecting victims from traffickers, and protecting witnesses and victims throughout the legal process and beyond. A specialised Garda unit would also have responsibility for developing strategic partnerships and working protocols with NGOs and other agencies with a view to ensuring coordinated responses to trafficking and establishing arrangements which address the reluctance of possible victims to cooperate with Garda investigations. (See: Recommendations of the Department of Justice, Equality and Law Reform and the Garda Síochána Working Group Report on Trafficking in Human Beings, 7.2.(8), p.22)

## **Substantive Criminal Law**

### **Criminalisation of the use of services of a victim**

To strengthen legal responses to the problem of trafficking, the COE Convention recommends that measures be taken to ensure the criminalisation of the use of services of a trafficked person, where there is knowledge that the person is a victim of trafficking. The current Bill does not provide for such an offence. It is submitted that an offence of using the services of a victim of trafficking, with knowledge that the person is a victim, should be included in the Bill.

### **Sanctions**

Compliance with international standards requires that ‘effective, proportionate and dissuasive sanctions’ are established for trafficking in persons and related offences (see: article 23 COE Convention). The current Bill provides for penalties involving deprivation of liberty and / or monetary sanctions. No minimum or presumptive mandatory sentences are included. It is submitted that monetary sanctions are inappropriate in the context of a serious criminal offence such as trafficking and should be removed. It is further submitted that provision should be made for presumptive mandatory sentences, particularly in the context of trafficking in children.

### **Ex parte and Ex officio applications**

Given the complex nature of trafficking investigations and prosecutions, it is essential that legislative provision is made to allow for *ex parte* and *ex officio* applications during criminal proceedings.

## **Law Enforcement**

In accordance with the Report of the Department of Justice, Equality and Law Reform and An Garda Síochána Working Group on Trafficking, provision should be made for Proceeds of Crime legislation to be used against Traffickers, with monies obtained being used to support social programmes for victims of trafficking.

## **Victim protection**

The current Bill does not include provision for the protection of victims of trafficking. It is our submission that this is a grave omission from the Bill and fails to comply with international and European standards on trafficking.

### **Identification of victims**

To ensure effective detection and prosecution of trafficking, and to ensure protection of victims, measures are required for prompt and sensitive identification of victims. Legal provision should be made to ensure that where reasonable grounds exist to believe that a person has been a victim of trafficking, that person should not be removed from the State until the identification process is complete. Full assistance should be granted to the possible victim during the identification process.

Doubts may exist as to the age of a victim, and, in particular, whether or not the victim is a 'child'. In such cases, legislative provision is required to ensure that a presumption in favour of recognition of the victim as a child can operate and special protection measures for children are granted.

### **Protection of private life**

Legislation should ensure that the private and family life of victims is protected. Legislation should ensure that personal data regarding victims of trafficking is safeguarded. Safeguards must be established to ensure that the identity, or details allowing the identification of victims of trafficking, should not be made publicly known, except in order to facilitate the tracing of family members or otherwise secure the protection and well-being of victims.

### **Assistance to victims**

Effective legal measures are required to ensure that victims are assisted in their physical, psychological and social recovery. Such assistance is also necessary to ensure successful investigation and prosecution of traffickers. The assistance outlined below draws on the Victim Assistance provisions of the COE Convention.

It is our submission that the Criminal Justice (Trafficking and Sexual Offences) 2006 Bill should be amended to ensure:

- Access to legal aid and full legal representation at all stages of criminal proceedings relating to trafficking;
- Access to legal aid and full legal representation in all matters concerning immigration and residence rights;
- Translation and interpretation services where necessary;
- Access to counselling and information services, in particular, as regards their legal rights, in a language that they can understand;
- Right to work;
- Right to access vocational training and education;
- Right of access to education for children;
- Right to access emergency medical treatment and appropriate health care;
- Right to secure accommodation;
- Right to access social welfare benefits as necessary.

### **Recovery and reflection period**

To ensure that a person has time to recover and escape the influence of traffickers, and make an informed decision on cooperating with the competent authorities, a legally protected recovery and reflection period is essential. Victims of trafficking are extremely vulnerable and frequently suffer from severe trauma. Time is needed to recover and reflect in a secure environment. A legally protected recovery period is necessary where a person is illegally within the State, to avoid removal from the territory.

It is submitted that provision should be made for a recovery period of at least 30 days. During that time, no expulsion or deportation order may be made against a trafficked person. Full assistance should be given to the trafficked person, in accordance with the protection measures for victims outlined above.

### **Temporary Residence permit**

Provision for residence permits meets both the needs of victims and law enforcement bodies involved in investigation prosecution. Immediate return to a victim's country of origin is unsatisfactory for both the victims and law enforcement bodies attempting to combat trafficking.

Immediate return does little to prevent trafficking in source countries or prevent re-victimisation. The medical and other needs of the trafficked person are not addressed and there is little or no opportunity for the trafficked person to cooperate with law enforcement bodies. The greater victims' confidence that their rights and interests are protected, the better the information they will give.

A temporary residence permit of at least 6 months should be made available to trafficked persons. The permit should be granted where it is necessary due to a victim's personal situation or where it is necessary to facilitate cooperation with competent authorities. Issuing of a residence permit should not in any circumstances be conditional on cooperation with criminal proceedings. Provision should be made for a renewal of residence permits beyond a six month period in the interests of the victim and / or law enforcement bodies.

## **Right of access to asylum**

Trafficked persons should be guaranteed access to the asylum process. Trafficking should be recognised as a human rights violation and, where appropriate, as gender-based persecution in accordance with UNHCR Gender Guidelines (2002).

## **Compensation and legal redress**

Measures are required to ensure that trafficked persons may obtain compensation for material and non-material injuries suffered. Access to legal aid should be guaranteed to assist trafficked persons in pursuing their claims against their traffickers.

## **Repatriation and return of victims**

It is submitted that the legislative provision is required to ensure that repatriation of a trafficked person to their country of origin is voluntary and takes place with due regard to the rights, safety and dignity of a trafficked person. A voluntary repatriation programme, with proper legislative safeguards, should be established.

Child victims of trafficking should not be returned to their country of origin where this is not in the child's best interests. (see article 16(7) of the CoE Convention).

## **Gender equality**

Anti-trafficking measures should at all times respect the principle of gender equality. A clear statement to this effect in the legislation would ensure that the right to freedom of movement and the human rights of women and children are fully respected by anti-trafficking measures.

## **Protection of witnesses, victims and other collaborators with legal authorities**

The Bill, as currently drafted, does not provide protection measures for victims, witnesses and others cooperating with criminal proceedings. Provision should be made for such measures as are necessary including: physical protection, relocation, identity change and assistance in obtaining employment.

During trial proceedings, provision should be made to ensure:

- Protection of the victim's private life, and, where appropriate, identity;
- Victims' safety and protection from intimidation.



### **Child victims of trafficking**

Sensitive, well-resourced and effective protection measures are required for child victims of trafficking, in accordance with the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. No provision is made for protection or prevention measures in the current Bill. Detailed amendments are required to ensure an appropriate and effective legislative framework to respond to the problem of child trafficking. In particular, prevention measures arising from the vulnerable position of child asylum seekers, whether as separated children, or in the context of family reunification, are urgently required.

In accordance with international standards, the involvement of children in trafficking offences should be recognised as an aggravating factor for the purposes of sentencing.