



**Observations on the Scheme of the Criminal Justice
(Trafficking in Persons and Sexual Offences) Bill 2007**

21st May 2007

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Executive Summary

- The Human Rights Commission views the issue of trafficking as a complex and important human rights issue requiring a broad range of actions on the part of the State. In these observations, however, the Commission focuses on the human rights implications of the present legislative proposals. The Commission is mindful, of course, that the Scheme is a yet-to-be-completed text. With this in mind, the Commission hopes that these Observations will be considered in the further development of the Bill, and in preparing possible amendments to the Bill.
- While there remains some uncertainty as to the precise extent of the problem in Ireland, there is no doubt that trafficking as an international phenomenon is both serious and widespread.
- A number of international human rights instruments identify trafficking as a significant human rights violation and set out important obligations on states to take measures to prevent and to prosecute and instances of trafficking in persons for sexual or labour exploitation.
- As well as addressing important issues of protection of the rights of potential victims of trafficking, the Bill also engages with important issues of the rights of persons accused of offences and also persons potentially convicted of offences. Any bill of this type requires a careful balance between the primary human rights objective of protecting victims while ensuring respect for all persons who may be accused or convicted of crimes.

Recommendations in relation to the General Scheme

Head 2 - Definitions

- Certain terms in the Scheme are not defined or the definitions contained in the Scheme need to be clarified. These include the term “child pornography”, the phrase “indecent or obscene”; the term “sexual activity” and the concept of a “position of authority”.

Head 3 - Trafficking

- The Commission recommends that, to ensure full compliance with international law, the Scheme should make clear that consent is not a necessary element of an offence in circumstances where either a child is the victim of trafficking or, in the case of an adult victim, where any improper means of coercion are present.
- In the view of the Commission, given the seriousness of the offences of trafficking set out Head 3 and the obligations of the State to take measures to prevent such offences, imposition of a fine would not constitute an appropriate deterrent and punishment in cases involving offences of trafficking. While the imposition of a fine might be appropriate in the case of a corporate entity

convicted of trafficking, the Minister may wish to consider whether a fine constitutes an appropriate deterrent and punishment in cases involving offences by natural persons (including those acting on behalf of a corporate entity).

Head 4:

- Head 4 provides for new offences of sale of children. While these offences are welcome steps towards protecting children, the Commission queries whether the offences established by this Head should be restricted only to the sale of children. The sale or attempted sale of any person for the purpose of exploitation involves the commodification of that person, contrary to international measures on slavery and servitude. While children clearly require special protection, the Commission believes that practices involving the sale of adults for the purpose of exploitation should similarly be proscribed.

Head 6:

- Given the seriousness of the offences covered in Head 6 relating to the organisation of the sexual exploitation of children and the difficulty which may often be encountered in prosecuting offences where vulnerable children and the victims, the Commission would question whether it should not be open to a court to apply the same penalty for an attempt as for commission of an offence under this Head.

Heads 7

- Heads 7, 15, 17 and 23 effectively create a zone of protection in respect of 17 year old children. They create a category of sexually protected children who while legally free to engage in sexual activity may nonetheless be victims of certain sexual offences. Nevertheless, the potential exists for confusion and uncertainty as regards the application of the law to these children and some awareness-raising may be required, particularly in relation to members of the Garda Síochána and social services.
- The definition of a ‘sexual act’ in the General Scheme potentially excludes a number of acts involving sexual intimacy with a minor aged 15 or over, including 17 year olds, where the minor consents to such acts. The Commission recommends that more consideration be given to ensuring that all potential forms of sexual exploitation of minors are clearly prohibited by the Bill.
- The limited definition of “sexual act” in the General Scheme may also have a problematic gender equality dimension in that certain acts performed with male children of a certain age would constitute offences, whereas equivalent acts performed with female children would not.
- In the context of sexual offences relating to 17 year olds, the Commission recalls the recommendation of the Law Reform Commission in its 1990 *Report on Child Sexual Abuse*, recently endorsed by the Joint Committee on Child Protection in its 2006 report. The Law Reform Commission recommended the creation of an

offence of ‘child sexual abuse’ which would criminalise a range of conduct covering forms of sexual exploitation including acts that would not otherwise constitute a sexual offence.

- The maximum sentence for an offence under Head 7 is three years imprisonment, two years for an attempt. Given the serious nature of the activities involved – extracting sexual acts with a 17 year old through the payment of consideration or abuse of trust – the Minister may wish to consider whether the maximum penalties set constitute an appropriate deterrent and penalty to discharge the State’s obligation to effectively prevent the offences in question. The Minister may also wish to reconsider if an attempt under this Head should carry the same penalty as the commission of an offence.

Head 8:

- For the offences set out in Head 8 relating to exposing children to sexual activity some concern may arise that the definition of sexual activity is not sufficiently precise and certain, and thus may be susceptible to a variety of interpretations. It is unclear at what point an act becomes sexual in nature or purpose. Some clarification would be useful in this regard.
- The concept of “grooming” is novel in Irish criminal law and the Commission urges careful consideration of the proposals to create new offences in this area as they pass through the legislative process. The Commission would encourage wide consultation with practitioners and interested parties around this Head of the Scheme.
- While the targeting of activity that might act as a prelude to the commission of other serious sexual offences is welcome, the Commission believes that great caution will need to be displayed in basing criminal liability around an assessment as to whether an adult had the requisite intention to commit sexual offences with a child.

Head 9:

- While the proposals to protect the victims of trafficking from subsequent harassment are welcome, potential gaps arise in relation to the adult victims of trafficking and in relation to adults and children who may be the victims of labour exploitation. While the particularly vulnerable position of children is worthy of special attention, it is unclear why the Head is so confined. The Commission believes that the distinctions between child and adult victims and between victims of labour and sexual exploitation are, at least in this context, without foundation.
- The Scheme furthermore does not appear to require that the Garda Síochána be informed of a harassment order. By contrast, section 11(1)(d) and 11(2)(d) of the Domestic Violence Act 1996 require notification of safety, protection and barring orders to the member of the Garda Síochána. The Commission believes that such notification obligations would be of great practical assistance in making the

proposed harassment orders effective.

- A further concern arises in relation to the capacity of victims to access harassment orders, particularly in relation to legal aid. Given the fact that the victim may be a child, it is also unclear whether and to what extent the child may be represented by a *guardian ad litem*, and whether adequate resources exist for such representation.
- The Commission also notes with concern that Head 9(6) does not make any provision for the notification of a victim in cases where the offender applies for discharge of the harassment order.

Head 10:

- Given the potentially international nature of offences involving trafficking and the exploitation of children, the Commission regards the extension of the remit of the Scheme (and other Acts) to offences committed outside the Irish jurisdiction as prudent and most welcome.
- The Commission recommends that the application of this provision should be extended to protect children who, while not citizens of the State, nonetheless have been habitually resident herein in line with Article 2 of the Convention on the Rights of the Child. A potential gap in protection may arise, in particular, where a child who has been granted refugee status in the State, is the victim of a sexual offence committed outside the State (though the removal of the child from the State, in itself, would constitute ‘trafficking’ for the purpose of Head 3).
- The Commission welcomes the provision in Head 12 eliminating the possibility of double jeopardy in respect of offences prosecuted outside the State.

Head 13:

- In applying the provisions of Head 13(2), and in particular Head 13(2)(b), particular care should be taken to ensure that gardaí, where practicable, act with sensitivity towards any person who appears to be a victim of trafficking or of any offence under the Scheme.
- In applying the provisions of Head 13(4), consideration should be given to the inclusion of a clause requiring the Garda and the Court to have regard to certain matters relating to the circumstances of victims. The matters to be considered in this context could be set out in the Bill or in secondary legislation.

Head 14:

- The provisions in this Head relating to corporate liability may be further enhanced by the inclusion of the corporate sanctions suggested by Article 5 of the Framework Decision on Trafficking as well as Article 7 of the EU Framework Decision on Sexual Exploitation, (discussed above at 3.3.3).

Head 16:

- The protective measures proposed here seem appropriate to the trial of offences under the General Scheme, given the inherent vulnerability of victims of trafficking. However, these measures are not extended to the trial of the offences contained in Heads 5 and 7 of the General Scheme. This lacuna appears to qualify the protection offered to children who are aged 17. The Commission recommends that this exclusion should be removed.

Heads 18-20:

- The Commission believes that clarity is required in relation to the references to the “management” of risks posed by an offender, and what such management would involve. As presently drafted, it is arguably implicit that if the Responsible Persons decided that a risk was posed by an offender, they would be obliged to act, though it is unclear what this would entail.
- The reference in Section 14A(2) to the “investigation of sexual offences”, arguably creates a category of persons who are deemed by law automatically to be “suspect” in cases where sexual offences have been committed. Although the statistical evidence of recidivism amongst sexual offenders may be compelling, careful safeguards must be put in place in relation to the use of information about previous convictions within the criminal justice system. Moreover, particular attention may need to be paid to ensuring that information about a person’s previous offences does not lead to vigilanteism.
- The Commission is also concerned about proposals to allow the sharing of information with other States. Any such proposals would have the potential to seriously compromise the rights of individuals and would need to be tightly regulated. The Commission recalls here that it has made detailed submissions to the Minister on the human rights implications of international sharing of data in its observations on the Criminal Justice (International Co-operation) Bill.
- In general the standard by which any such restrictions on individual rights must be measured is whether the restrictions are “necessary in a democratic society”. In this regard the Commission recommends that the prohibition orders should provide that they apply only where there is a clear and genuine apprehension that the offender might commit future offences against children.
- That Commission believes that a point of clarification in relation to the application of these new sections in respect of offences committed before the Scheme comes into force. The prohibition order is explicitly referred to as a ‘sentence’, and must be regarded as a penalty for the purposes of the European Convention on Human Rights. Therefore the Commission presumes that orders under this Head will not be imposed in relation to offences committed before enactment of this legislation

Miscellaneous provisions in the General Scheme

- The Commission welcomes the inclusion of provisions seeking to guarantee the confidentiality of proceedings in respect of offences involving trafficking. These provisions comply with Article 6(1) of the Palermo Protocol requiring each State party, to the extent possible under its domestic law, to “protect the privacy and identity of victims of trafficking in persons, including, *inter alia* by making legal proceedings to such trafficking confidential.”

Omissions from the General Scheme:

- The Commission fully accepts that the protection of victims may more appropriately be addressed in civil legislation independent of the Scheme. It may indeed be more prudent to do so. The presence of explicit rights for victims in a prosecutorial statute may potentially be characterised as an inducement to give evidence, thus possibly undermining the case for the prosecution. Where certain rights and privileges are extended to victims *conditional on co-operation with a police investigation and/or prosecution*, a plausible defence may be mounted to the effect that the victim has been incentivised to give evidence. This may, in turn, diminish the impact of such evidence. These concerns strengthen the case for rights to be extended to persons identified as victims of trafficking without any condition of willingness to co-operate. That said, if the intention in implementing the Scheme is to facilitate adoption of or compliance with the international instruments discussed above, it is undeniable that the Scheme in itself is not sufficient for this purpose.
- In particular, the protective provisions outlined in Part II of the Palermo Protocol and Chapter III of the CoE Convention are largely absent from this Scheme:
 - (1) There is a notable absence of provisions designed to secure for the victim a period of recuperation and reflection.
 - (2) Provision is not made for the health care needs of victims. Where medical treatment is required, sensitive, appropriate facilities should be afforded, free of charge, to the victim. In cases where the victim has been subjected to sexual exploitation, sexual health services may also be required. Concrete resources are required to ensure effective access to these rights.
 - (3) There is no commitment to the resources (accommodation, material and psychological assistance, information and legal assistance) that would facilitate the victim’s escape from his or her exploiters.
 - (4) No provision is made for legal aid or compensation for victims, translation and interpretation services or support and information for victims in circumstances where a trial is initiated.
 - (5) No mention is made of the right of the victim to be informed of his or her options if he or she wishes to remain in the State. In particular, the possibility that the victim might escape the cycle of exploitation through the opportunity to access education or training or gain legitimate employment within the State is not addressed.
 - (6) Though dealt with in other legislation, there is no explicit mention in this Scheme of the principle of *non-refoulement*. The possibility of deportation

and subsequent re-victimisation is also not addressed.

(7) No mention is made of a variety of measures that would assist in the prevention of re-victimisation, including the right to access work, vocational training and further education and social welfare benefits where required.

- Were the proposed Immigration, Protection and Residency Bill to be enacted, the option of producing a ‘Policy Statement’ on the reflection, recovery and integration treatment of victims could become available. However, it is not possible to say at this moment when or whether that Bill will be enacted and in what form. Even if this were clear, the insertion of clauses or policy statements concerning victims would not conform to international standards on victim treatment. Such insertions would only apply to non-EU/EEA nationals. As such, the prospect arises that a policy statement offering full protection to all victims of trafficking may be *ultra vires* the proposed Immigration Bill.
- On a separate point, the objection may also be raised that it is undesirable to make changes to the general law on sexual offences in legislation in legislation dealing with trafficking. In particular many of the provisions set out in the General Scheme, particularly those relating to ‘grooming’ of children are novel in Irish law and may be better placed in discrete legislation where they can be the focus of parliamentary and public scrutiny.
- Although the Scheme weighs heavily in favour of measures criminalising the exploitation of children, no provision is made in the Scheme for the protection of such children, once identified as victims. The Optional Protocol to the UNCRC requires a raft of measures aimed at protecting victimised children and facilitating their psychological and physical recovery as well as preventing re-victimisation. Measures of this nature are entirely absent from the Scheme, as published. Appropriate and sensitive legislative safeguards are required to ensure the full protection of child victims, in particular where separated from their families.
- In line with Article 10(2) of the CoE Convention, until such time as a person reasonably suspected of being a victim is positively identified as such, or deemed, in the alternative, not to be a victim of trafficking, that person should not be removed from the jurisdiction. No mention is made, in the Scheme, of the rights of trafficked persons found in the State to seek to remain in the State, if appropriate.
- Where repatriation is proposed in relation to the victims of trafficking, such repatriation should preferably be made voluntarily, with the co-operation of the victim of trafficking. Such repatriation should be made only having taken careful account of the risks involved in such repatriation, in particular, the risk that victims will experience re-victimisation or retribution on their return. In no case should repatriation occur where such removal or return would undermine the rights, safety or dignity of the trafficked person. Explicit and appropriate legislative safeguards are needed to ensure that such rights are protected.

I. General Introduction and Context

1.1 Background to these Observations.

Pursuant to his powers under section 8(b) of the Human Rights Commission Act, 2000 the Minister for Justice, Equality and Law Reform has referred the Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006¹ to the Irish Human Rights Commission. The Human Rights Commission welcomes the opportunity afforded to submit its observations on this important piece of proposed legislation.

Section 8(b) of the 2000 Act requires the Commission, if requested by a Minister of the Government, to examine the relevant legislative proposal and to submit the Commission's views on any implications the proposals may have for human rights. The Commission recalls here that 'human rights' are defined in section 2 of the Human Rights Commission Act, 2000 as "rights, liberties and freedoms conferred on, or guaranteed to, persons" either by (a) the Constitution or (b) any agreement, treaty or convention to which the State is a party.

The Human Rights Commission views the issue of trafficking as a complex and important human rights issue requiring a broad range of actions on the part of the State. In these observations, however, the Commission focuses on the human rights implications of the present legislative proposals. The Commission is mindful, of course, that the Scheme is a yet-to-be-completed text. With this in mind, the Commission hopes that these Observations will be considered in the further development of the Bill, and in preparing possible amendments to the Bill.

These observations are based largely on research and analysis carried for the Commission by Dr. Fergus Ryan of Dublin Institute of Technology and Dr. Pauline Conroy of Ralaheen Ltd. The Commission is very grateful to Dr. Ryan and Dr. Conroy for their excellent work which has allowed the Commission to make these detailed observations on the Scheme of the Bill. However, the Commission emphasises that the analysis and recommendations set out in these Observations are those of the Commission.

1.2 Themes and issues to be considered

While the General Scheme does not contain a Long Title or Preamble, and while the range of concerns initially appears quite diverse, it is nonetheless possible to discern certain overriding themes in the proposed legislation. The primary focus of the Scheme is on conduct involving the exploitation, mainly (though not exclusively) sexual, of vulnerable persons and, in particular, of children. Overall, the Scheme is aimed at combating practices that serve to 'commodify' the person, that is, to treat human beings as commodities to be traded and exchanged for the purposes of sexual gratification and of profit through labour. In this regard, the Scheme reflects in large part a concern with

¹ First published 20 July 2006, the Scheme of the Bill is available for review online at: <http://www.justice.ie>.

ensuring the elimination of practices that constitute an affront to the ‘dignity and freedom of the individual’, a guiding principle set out in the Preamble to the Irish Constitution and a core value in international human rights law.

Trafficking must be recognised as “a complex phenomenon violating the trafficked person’s will and right of self-determination and affecting her or his human dignity”.² The human rights dimensions of trafficking and exploitation are highlighted by the US Office to Monitor and Combat Trafficking in Persons (hereinafter the ‘TIP report, 2006’):

“Fundamentally, trafficking in persons violates universal human rights to life, liberty, and freedom. Trafficking of children violates the inherent right of a child to grow up in a protective environment and the right to be free from all forms of abuse and exploitation”.³

The impact of trafficking on its victims is well illustrated by a number of studies⁴ which refer to common consequences such as:

- Rape (including multiple or ‘gang’ rape) and physical assault;
- Physical injuries, including broken bones;
- Harm to mental health and psychological wellbeing (including Post-traumatic Stress Disorder);
- Increased risks of suicidal depression;
- Increased risk of alcoholism and drug dependency;
- Significantly heightened exposure to and contraction of sexual transmitted infections, including HIV and syphilis;
- Unplanned pregnancies;
- Deterioration of physical health, including back pain, weight loss, stomach and gastrointestinal infections, vaginal discharges, increased risk of

² EU Experts’ Group on Trafficking in Human Beings, rec. 4, cited in European Network Against Trafficking in Women for sexual exploitation (ENATW) (2006) *European Union Plan for combating trafficking in Human Beings Guidelines*, (European Network Against Trafficking in Women for sexual exploitation) at p. 12.

³ US Department of State Office to Monitor and Combat Trafficking in Persons (2006), *Victims of Trafficking and Violence Protection Act 2000: Trafficking in Persons Report*, (US Department of State: Washington DC) downloaded at <http://www.state.gov>. The annual publication of the TIP report is one of a number of US State Department actions in relation to trafficking; this report confines its attention to the TIP reports alone. This human rights centred approach is also signalled in the Preamble to the Council of Europe Convention on Action against Trafficking in Human Beings and in the Preamble to the EU Framework Decision on Trafficking.

⁴ See London School of Hygiene and Tropical Medicine (2003), TIP report (2006), Bal Kumar KC, Subedi G, Gurung YB, Adhikari KP, (2001) *Nepal Trafficking in Girls With Special Reference to Prostitution: A Rapid Assessment* (International Labour Organization), E. Pearson (2003) *Study on Trafficking in Women in East Africa* (GTZ), European Commission (2006) pp. 140-141.

gynaecological conditions and cervical cancer.

While trafficking can clearly be seen to give rise to serious human rights concerns, there are a number of aspects of the phenomenon which require specific and complex considerations.

1.2.1 The meaning of ‘trafficking’ and its relationship with illegal immigration and smuggling in persons

Article 3(a) of the Palermo Protocol (discussed in detail in section 3.3.1 below) contains the most widely accepted definition of ‘trafficking’:

“ ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”

At the outset, it is particularly important firmly to decouple trafficking, as properly defined, from the phenomenon of illegal immigration. Some care is needed, in particular, to avoid the conflation of trafficking with immigration law, a tendency that unwittingly suggests that victims are always ‘foreign’ and associating migrant women, to the exclusion of other women, with sex or labour trafficking. The proposed Scheme embraces the possibility that trafficking may, indeed, involve victims of Irish and other EEA nationality, in respect of whom the norms of Irish immigration laws do not apply. Under the proposed Scheme, it is possible, for instance, for an offence to be committed where a child who is an Irish national is trafficked between two Irish towns for the purpose of the child’s sexual or labour exploitation, or, alternatively, where the child is trafficked out of the state for such purposes.

International law distinguishes between trafficking and smuggling. Both concern conduct that secures the entry (usually unlawful) of persons into a state. The distinction lies in the role and attitude of the person who is thus illegally transported, and the purpose for which they have been transported. While smuggling presupposes the cooperation and consent of the migrant, trafficking requires an additional element of non-consensual exploitation. Unless the victim of trafficking is a child, the definition of trafficking requires an absence of true consent on the part of trafficked person or, in the alternative, the extraction of that consent through deception, fraud, the exploitation of the victim’s vulnerability or through the abuse of a position of authority.

The purpose of such transportation is also different in each case. In the case of smuggling, the purpose of transportation ends when the person is delivered to the borders

of the state in question: no further purpose arises. The profit arises, in such cases, from the act of transportation. Trafficking, by contrast, presupposes that the transported person will be subject to further sexual or commercial exploitation on arrival at the destination chosen by the traffickers. That said, there may often be an overlap between activity that begins as smuggling and ultimately becomes trafficking. Furthermore, while trafficking and smuggling can be technically distinguished from each other, law enforcement officials on the ground regularly encounter substantial difficulties in assessing whether an act constitutes one or the other.

The year 2000 saw the adoption of the United Nations Convention against Transnational Crime. To this significant convention were attached two protocols: (i) Protocol against the Smuggling of Migrants by Land, Sea and Air⁵ (hereinafter the ‘Smuggling Protocol’); and (ii) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children⁶ (hereinafter the ‘Palermo Protocol’). The enactment of these two distinct measures underlines the distinction noted above.

Smuggling (under the UN protocol) is defined as:

“...the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.”⁷

A core element of the offence is the requirement of ‘illegal entry’, that is, an entry in breach of immigration norms set out by the laws of the state in question. As such it is appropriate to describe smuggling as an offence against the state concerned. By contrast, the offence of trafficking is viewed primarily as an offence against the person, and in particular a breach of that person’s rights. The European Network Against Trafficking in Women for Sexual Exploitation (‘ENATW’) describes trafficking as “one of the most demeaning forms of slavery entailing a breach of the fundamental rights of the person, such as the right to life, dignity, safety, health and equality”.⁸

It is particularly important to note, in this regard, that trafficking does not require, for its commission, an illegal entry into the State or a breach of immigration legislation. Although the trafficked person may have required permission to land in the State, the breach of such requirement is not integral to the offence. It is, in fact, perfectly feasible to encounter a trafficked person whose entry to the State is perfectly legal on account of

⁵ Adopted and opened for signature, ratification and accession by General Assembly Resolution 55/25 of 15 November 2000. Entry into force, 28 January 2004. Irish signature, 13th December 2000.

⁶ Agreed 12-15th December 2000. Adopted and opened for signature, ratification and accession by General Assembly Resolution 55/25 of 2 November 2000. Entry into force, 25 January 2003. Irish signature, 13th December 2000.

⁷ Smuggling Protocol, Article 3(a).

⁸ (ENATW, 2006, p.13)

their citizenship, for instance, of an EEA-member state. It is equally feasible that the trafficked person could be a citizen of Ireland and under the Scheme trafficking may occur domestically entirely within the State. It may equally involve the removal of a person *from* the state for the purpose of their exploitation abroad.

It can also be argued that, even where a person does require permission to land under immigration law and has failed to obtain such permission, the trafficking of such a person need not be considered to entail the commission of an offence by the victim of such trafficking. The presence in the State of the victim of trafficking, as defined, is the result of the coercive conduct of persons other than the victim. As such, the prosecution of the victim may be neither warranted nor appropriate.

1.2.2 Exploitation as a crucial element in trafficking

As can be seen in the definition of trafficking set out in Article 3(a) of the Palermo Protocol quoted above, trafficking requires, first, that the migrant has not truly consented to being transported or has not consented to the particular purpose for which he or she has been transported. The European Commission⁹ identifies some of the common methods used to achieve subjugation of trafficked persons. These include:

- The withholding of passports and other means of identification and travel documents;
- Threats of violence against the victim or members of his or her family;
- Physical abuse and torture;
- Sexual assault, aggravated sexual assault and rape (including anal intercourse);
- Drugging of victims;
- Withholding earnings and possessions;
- Depriving victims of food, water and medical assistance;
- Keeping victims in poor sanitary conditions.

The definition of trafficking further requires, crucially, that the person has been transported for the purpose of exploiting that person, as defined. Exploitation in this context includes acts that amount to either labour exploitation or sexual exploitation. The person who has been trafficked is thus entitled to be treated as a person as a victim, and thus a person in need of protection

It is important to note that a person may be a trafficked person even if they have apparently consented to being transported, if they have been deceived as to the precise purpose of the trafficker. Carrington and Hearn (2003), for instance, argue that,

“There is nothing in the definition that limits deception [as] to the nature of the work. Thus a woman who consents to work in the sex industry but is deceived about the conditions is in fact trafficked for the purpose of sexual servitude.”

⁹ European Commission (2006), pp. 140-141.

Commentators with knowledge and experience of this field have acknowledged the difficulty involved in distinguishing between persons who have voluntarily migrated to Ireland and those who are trafficked.¹⁰ This difficulty reflects in part the subtlety of the measures employed to effect trafficking. International law on this point recognises and attempts to address these subtleties, by, for instance, acknowledging that apparent consent may be the product of deceit or fraud. In particular, it is acknowledged that a person may appear to consent to being trafficked in circumstances where that person has been misled as to the true purpose of the alleged trafficker. Nonetheless it is arguable that the process of identifying victims of trafficking is a difficult one which may require the expertise of specialist law enforcement officials specifically trained in the identification of trafficked persons. Research on this point indicates that, for a number of reasons, the State cannot necessarily rely on victims to self-identify as such.¹¹ The reasons for such reticence may include:

- Fear of prosecution (*e.g.* for prostitution or illegal immigration);
- Fear of deportation and re-victimisation;
- Fear or reprisal or retribution from the traffickers;
- A distrust of law enforcement officials;
- Inability to comprehend the process or motives of law enforcement officials.

It is understood, however, that some Garda training has begun with a view to enhancing the pro-active identification by Gardaí of trafficked persons.

1.2.3 Prosecutorial approaches to trafficking

A particular challenge arises, however, in the context of legislation designed to address trafficking and exploitation through prosecutorial means. The nature of such legislation demands a balance between the human rights of alleged victims and the fundamental rights to due process of persons accused of a crime. To this end, regard must be had to a number of provisions of the Constitution and of international human rights law requiring due process and the application of fair procedures in the lead up to and in the course of a criminal trial. Given the nature of the offences addressed by this Scheme, it is particularly important to ensure that the rights of accused should not be diminished by

¹⁰ See for instance Healy, Alison “Conference told of concerns over sex trafficking”, *Irish Times*, 5 December 2006 noting the experience of law enforcement officials that “...it was very difficult to distinguish between women who were forced into the sex industry and those who were doing it voluntarily”.

¹¹ See London School of Hygiene and Tropical Medicine et al. (2003) and Gilbert (2006). Mr. Phil Taylor, Regional Director (Northern Ireland and Scotland), Home Office Immigration and Nationality Department is quoted in Healy, Alison “Conference told of concerns over sex trafficking”, *Irish Times*, 5th December 2006 as follows: “He said it was ‘very difficult’ to get the evidence to prosecute the people trafficking women. ‘Often these women are extremely scared, not only for themselves but for their friends and families...’” though he added: “...but we can’t stop doing it just because it’s difficult.”

any popular revulsion, however genuinely and deeply felt, at a particular crime. It is also important that in any prosecutorial proceedings the rights of victims of trafficking be fully respected and the vulnerability of the innocent victims of trafficking be taken into account.

The focus of international law reflects as much a concern for the protection of victims as a desire to bring alleged perpetrators to justice. Although the Palermo Protocol, in particular, is motivated in large measure by a concern to combat transnational organised crime, the ultimate motivation of alleviating the plight of victims is evident throughout. As the MRCI/DCU (2007) report in *No Way Forward, No Going Back* states:

“A law enforcement approach by itself may endanger trafficked persons. The problem is not just one of punishing the traffickers; it is also a matter of protecting the victims”.¹²

In this regard, a recurring theme in international instruments is the need for a period of recuperation and reflection for the alleged victims of trafficking. In particular, a clear preference emerges for provisions that would facilitate victims in their recuperation by means of a temporary residence visa, allowing the victim a period of reflection and recovery before further action is taken (either to prosecute offenders or to repatriate victims). While it is arguable that such an approach may be prosecutorially valuable (in that it may assist in gaining the trust of the victim and generally improve the quality of evidence supplied), the primary purpose of victim-oriented protective measures (such as the period of recuperation and reflection and facilities for temporary residence) is to secure the human rights of the victims of crime.

International law further highlights the need for adequate resources to assist victims in their recovery and to prevent re-victimisation. In particular the report of the EU Experts’ Group contains a recommendation that trafficked persons should have access to assistance “regardless of their willingness or capacity to testify against their traffickers”.¹³ In other words, the rights secured to victims should not be made contingent on co-operation in the prosecution of exploiters.

Thus, to secure full compliance with international law, in addition to the criminalisation and prohibition of trafficking and related activities, legislative provision should also be made (whether in this Bill or elsewhere) to ensure protection for all victims of trafficking and sexual exploitation, specifically:

- Appropriate access to properly resourced health care services, and in particular, sexual health care services, where required;
- Appropriate and sensitive provision of psychological and mental health supports, including counselling, where required;
- A right to a period of reflection and recuperation, with appropriate safeguards

¹² MRCI/DCU (2007) at 6.21, p 29

¹³ Recommendation 89, cited in ENATW (2006) p. 15.

to ensure protection, during this period and thereafter, from re-victimisation or retribution by the alleged traffickers;

- With a view to achieving full recuperation prior to repatriation, the right to apply for a temporary residence permit to remain lawfully in the State;
- Secure and appropriate accommodation and financial assistance;
- Access to legal representation and advice, at the expense of the State, in relation to any criminal proceedings taken in respect of trafficking offences or offences involving the sexual exploitation of children committed against the victim;
- Access to information on, and support in relation to any legal proceedings conducted in respect of trafficking offences or offences involving the sexual exploitation of children of the victim, in a language which the victim can understand;
- Access to education, vocational training and work, such that the risk factors contributing to re-victimisation is minimised;
- Access to information on the right of the victim to apply for asylum or residence in the State, in a language which the victim can understand;
- The right to access compensation from convicted traffickers (or where this is not available from the State) in respect of injuries caused to the victim;
- Measures to ensure the effective protection of victims and witnesses from retribution in respect of evidence given against an accused person;
- Voluntary repatriation, where requested, where appropriate, having regard to the rights, safety and dignity of the victim.

1.2.4 Trafficking as a global phenomenon

The criminalisation of the activities noted in this Scheme must be viewed in the context of the experience of trafficking on a global scale. It is particularly pertinent to note that one of the primary sources of international law on the topic of trafficking is itself a protocol supplementing the UN Convention Against Transnational Organised Crime. The enactment of the protocol clearly implies that the phenomenon of trafficking is closely intertwined with transnational organised crime.

There is no doubt that trafficking as an international phenomenon is both serious and widespread. Greater uncertainty arises, nonetheless, regarding the precise extent of the problem. Although international estimates suggest that this is a worryingly common phenomenon, precise statistics are often elusive. Several studies suggest that the revenue from international trafficking is immense and increasing, with some commentators opining that in terms of significance, trafficking in human beings ranks only marginally behind illegal trafficking in arms and drugs as a source of revenue for international criminal organisations.¹⁴ UN reports suggest that trafficking for the purpose of the sex

¹⁴ Explanatory report on the Council of Europe Convention on Action against Trafficking in Human Beings (2005) CETS-197, at I.a.5, <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>,

industry alone may yield profits between US\$5 billion and US\$7 billion per annum.¹⁵ Increased trafficking and exploitation, moreover, frequently coincides with the arrival of war, armed conflict, or peace keeping missions of troops which disrupt normal rule of law.¹⁶

The US Department of State in its annual *Trafficking in Persons* (TIP) reports¹⁷ has also highlighted the extent of the problem. In its 2004 Report, it estimated (drawing on 2003 data) transnational trafficking in persons at a level between 600,000 and 800,000 persons per annum, (excluding person trafficked within a State).¹⁸ Half of these, the report estimated, were minors, while approximately 80 per cent were women and girls. Nevertheless, a measure of the uncertainty existing in this regard is evident in the contrasting figures presented by the UN, estimating between 700,000 and 4 million victims of trafficking each year, between 200,000 and 500,000 in Europe alone.¹⁹ UNICEF, citing an ILO report, suggests that 1.2 million children are trafficked each year.²⁰

Although most of such trafficking was for the purpose of commercial sexual exploitation, the TIP reports have highlighted an increasing phenomenon of labour exploitation, and the use of slave labour. A 2005 report of the International Labour Organisation endorses this view in estimating the number of persons in forced labour at 12.3 million, almost 2.5 million of these being suspected victims of trafficking.²¹ However, these figures must be viewed with some caution. The overwhelmingly clandestine nature of trafficking, the apparent unwillingness of victims to self-identify and the difficulties involved in distinguishing between persons smuggled into a state and those who have been 'trafficked' all suggest that the task of enumerating the precise extent of persons affected by trafficking may ultimately prove elusive.²² Nonetheless, while much of this evidence

¹⁵ See K. Carrington and J. Hearn (2003) "*Trafficking and the Sex Industry: from impunity to protection*", Current Issues Brief, Index No. 28, 2002-3, Parliament of Australia Parliamentary Library, www.aph.gov.au/library/pubs/CIB/2002-03/03cib28.htm#size

¹⁶ See for instance, Amnesty International (2004) *Lives Blown Apart: Crimes against women in times of conflict*, (Oxford: Amnesty International).

¹⁷ The annual publication of the TIP report is one of a number of US State Department actions in relation to trafficking; this report confines its attention to the TIP reports alone.

¹⁸ US Department of State Office to Monitor and Combat Trafficking in Persons (2004), *Victims of Trafficking and Violence Protection Act 2000: Trafficking in Persons Report*, (US Department of State: Washington DC).

¹⁹ See Carrington and Hearn *supra*.

²⁰ UNICEF Factsheet www.unicef.org/protection/files/trafficking.pdf citing International Labour Organization, (2002) *A Future without Child Labour*, (Geneva: ILO), p. 32.

²¹ International Labour Organisation (2005), *A Global Alliance Against Forced Labour*, (Geneva: ILO) p. 10.

²² Wylie identifies the several drawbacks involved in eliciting firm data on the problem of trafficking, see G. Wylie, (2006), "*Doing the Impossible: Collecting data on the Extent of Trafficking*" in van den Anker, Christien and Doornik, (eds.) *Trafficking and Women's*

is necessarily speculative, the overall picture presented is one suggesting the existence of a serious global phenomenon affecting potentially millions of people.

The profile of victims, while varied, also suggests a pattern of vulnerability to trafficking and exploitation. In particular, an EU-wide study suggests that experiences of poverty, lone parenthood, domestic violence and family dysfunction, though not necessarily causative, commonly feature amongst victims of trafficking.²³ The European Commission also identifies poverty, indebtedness, economic disparities between European states, high unemployment and increased opportunities for mobility as factors contributing to prostitution and trafficking.²⁴ Though such an approach is beyond the scope of this report, it is arguable that there is some merit in taking steps that, as part of a series of measures tackling trafficking, attempt to address risk factors at source.

Though again outside the scope of these observations, it is also important to consider whether factors exist that may make any particular state a destination of choice for traffickers or a source of trafficked persons. Legal lacunae and/or inadequate enforcement of existing laws may prove to be a factor in drawing trafficking to particular locations.

The effective combating of trafficking and instances of exploitation requires a multi-faceted approach embracing a wide range of tactics. The European Commission, for instance, has noted (in its Communication COM(2006) – 187) that legislative measures in themselves may not be sufficient to address the phenomenon of trafficking. Effective implementation by executive and judicial authorities is also required. The various international instruments on this point universally underline the added importance of international co-operation and in particular the willing exchange of information and expertise in the relevant fields.

Education, training and awareness-raising may play an important role in furthering the struggle against trafficking and other forms of exploitation. The identification and easing (and ultimately the elimination) of risk factors should also be highlighted as a priority. The prevalence of gender discrimination also plays a significant part in heightening the risk of exploitation, as ably evidenced by the predominantly female profile of adult victims of trafficking for the purpose of sexual exploitation. A consideration of risk factors must also necessarily tackle ‘pull’ as well as ‘push’ factors, and in particular the presence of a ‘demand’ for exploitable persons.

1.2.5 Trafficking and labour exploitation

International human rights standards in relation to labour have been fixed by the International Labour Organisation (ILO) and other international bodies and are discussed further below. However, in the context of trafficking we are concerned with certain

Rights, (Basingstoke: Palgrave MacMillan).

²³ See London School of Hygiene and Tropical Medicine (2003), Gilbert (2006).

²⁴ European Commission (2006) p. 138.

specific and serious violations of international labour standards. The definitions involved in trafficking for the purposes of labour exploitation require a precision that displaces the word ‘exploitation’ from its everyday meaning as a general description of low pay, poor working conditions or poverty. Labour exploitation is a relationship between worker and employer. The labour activity may be only marginally economic – such as a child coerced into begging - and yet be forced labour in fact.²⁵ An economic activity may be tough and hazardous such as coal mining or seafaring and yet not be labour exploitation by the employers of workers who carry out such jobs.

Labour exploitation concerns elements of forced labour, whereby the work or service is exacted under the menace of a penalty and/or the work or service is undertaken involuntarily. Therefore it implies an element of coercion or absence of consent. It is of note that coercion may not be apparent at the outset of a trafficking itinerary. The migrant destined for Europe may have been recruited in what the migrant believes was good faith, he or she typically signs forms or contracts and appears to consent to being recruited and transported to Europe. It is not until the migrant reaches the destination that he or she becomes aware that working conditions are appalling, wages are withheld, that deductions are being made from wages for services not received, the hours worked are beyond his or her limits and that without English it is not possible to complain or to escape.

Table 1
Identifying forced labour in practice²⁶

Lack of consent to labour relationship	Menace of a penalty if a person refuses to work
Deception/false promises about types and terms of work	Denunciation to police or immigration authorities and threats of deportation
Withholding or non-payment of wages	Threats of dismissal
Retention of identify documents or valuable personal possessions	Financial penalties
Induced indebtedness by falsification of accounts/value of good produced	Removal of rights or privileges

²⁵ Placing a child into begging is already an offence in Ireland under Section 247 of the Children Act, 2001. Begging includes placing a child to play a musical instrument or sell objects. Bringing a child in or out of the jurisdiction for the purposes of placing a child in begging would be a ‘new’ offence under this Scheme.

²⁶ International Labour Conference (2005) *A Global Alliance Against Forced Labour – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 93rd Session 2005, (Geneva: ILO) p.6.

The ILO provides guidance on the practices which constitute forced labour.²⁷ While a particular offence of ‘forced labour’ is infrequently found in Europe, some states have been addressing the practices associated with forced labour. In the UK, for instance, trafficking people for labour exploitation became an offence in 2004.²⁸ Similarly the Gangmasters (Licensing) Act 2004 in the UK sought to restrict the activities of labour intermediaries. In France the definition of exploitation extends to work undermining ‘dignity’ based on a new amendment to the French Penal Code.²⁹

In practice, it may be difficult to discern a precise distinction between (i) abusively or misleadingly organising or recruiting and/or charging fees to workers to come to Ireland to work in particular jobs or industries and (ii) the phenomenon of forced labour.³⁰ The characteristics of ‘lack of consent’ related to deception, and ‘inability to leave a job’ because documents or pay are withheld, may pitch a single worker against a single recruitment agent located overseas. In this context it may well be difficult to identify the nature of the forced labour. The fact that it is difficult, however, should not be an obstacle to recognising that grave breaches of the rights of workers to change employers, to move freely around the country and to behave in an autonomous fashion in relation to their private life, do occur. The Commission also acknowledges that migrant victims of labour trafficking who wish to escape their working and living conditions often find themselves quickly in an undocumented and precarious state. Without a legal employer, they ought not to be in the State, even though their wages may not have been fully paid. They have been victimised twice – first by labour recruiters and then by employers.

Many migrants who find themselves in this situation do not wish to return home because they have been indebted to labour recruiters prior to departure and these debts may be still outstanding. The labour recruiter typically organises transport, visas where necessary and provides the addresses of employers. While it is illegal for employment agencies in Ireland to charge fees to employees it is not illegal in many countries of origin. The debt to the original labour recruiter will still be outstanding if the migrant returns home early without paying it off. Some workers consenting to be brought into

²⁷ See ILO (2001) *Stopping Forced Labour, Global report on the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, (Geneva: ILO). R. Plant and C. O’Reilly (2003) “The ILO’s Special Action Programme to Combat Forced Labour,” *International Labour Review*, vol.142.No.1 pp 73-85.

²⁸ Asylum and Immigration (Treatment of Claimants) Act, 2004, Section 4.

²⁹ Act No. 2003-239 of 18 March 2003 amended section 225-4-1 of the Penal Code through the introduction of a provision prohibiting the trafficking of human beings for the purpose of placing that person at the disposal of a third party, even where the latter is not identified, with a view to aiding and abetting the crimes of procuring, aggression or sexual offences against such a person, the exploitation of begging, the imposition of working or living conditions undermining dignity, or compelling that person to commit any crime or offence.

³⁰ On the issue of labour exploitation in Ireland see Migrant Rights Centre Ireland in association with Dublin City University, (2007) *No Way Forward, No Going Back* (Dublin: MRCI/DCU).

Ireland from outside the European Union with organised jobs and work permits subsequently discover that they have been deceived.³¹ In these instances, it is arguable that the worker is providing his or her labour without full consent or full remuneration or under threat.

There already exists evidence that children are being brought into Ireland, through Ireland and out of Ireland for placement in employment, in begging or in domestic service.³² In the case of children it is not necessary to prove consent or deception in relation to trafficking for the purposes of labour exploitation.

The social partnership agreement of 2006 entitled *Towards 2016* pledges to create a strong and enforced culture of compliance in relation to employment rights, to substantially increase the labour inspectorate and to create a new directorate specialised in employment rights. To this end a National Employment Rights Agency has been established and a Director for the new Office of the Director of Employment Rights Compliance has been appointed. In 2006 it was made an offence for employers to retain workers' passports, identity papers, qualifications documents, driving licences or to make deductions from their wages to pay recruitment fees, employment fees or other fees related to obtaining a job in Ireland.³³ The enforcement of these important provisions will remove some of the vulnerability of migrant workers to labour exploitation.

1.3 Irish responses to trafficking

To a limited extent, existing Irish legislation already addresses some, though not all, aspects of trafficking in human persons, as well as the exploitation of persons. (A summary of relevant legislation currently in force is set out below in Appendix I.) Nonetheless certain deficiencies arise in legislation as it is currently formulated. Indeed, the Commission has previously observed the existence of "a clear legislative gap in relation to Irish Law combating various forms of trafficking in human beings."³⁴ Among

³¹ Examples include: where the work permit expires and the employer 'obliges' the worker to continue working illegally or be deported or claims (falsely) to have applied for renewal; where workers are recruited overseas and placed in 'trainee' positions in nursing homes and work for prolonged periods without full payment of wages believing that this is the norm in Ireland; where the work permit (for which the worker may have paid a fee to an intermediary) is found to be forged; and where workers do not receive regular wages or social insurance for an employer of the same ethnic group in the belief that a social or financial debt is owed by them or their family to the employer.

³² Cases of Ireland as a transit country for young people destined for domestic service in the UK have been identified by the Garda National Immigration Bureau (GNIB), Communication of Detective Superintendent John O'Driscoll, Garda National Immigration Bureau, Law Society, Women Lawyers' Seminar, Dublin. 25 November 2006.

³³ Employment Permits Act, 2006. s 23.

³⁴ IHRC (2006), *Irish Human Rights Commission Submission to the UN Committee on the Rights of the Child on Ireland's second periodic report under the UN Convention on*

the gaps in existing legislation are:

- Current legislation fails to distinguish between trafficking properly so called and the phenomenon of smuggling. In particular, the Illegal Immigrants (Trafficking) Act, 2000 makes no distinction between persons voluntarily transported to the State, with no intent to exploit those persons once arrived, and situations in which persons are trafficked involuntarily for the purpose of their exploitation.³⁵
- The 2000 Act applies only to persons delivered to the borders of the State in circumstances where their presence in the State is regulated by immigration law. It does not apply to Irish or EEA nationals. Nor does it cover trafficking within or out of the State.
- Current legislative provisions relating specifically to trafficking apply only to children (see section 3, Child Trafficking and Pornography Act, 1998). In relation to adults, there is no specific offence of trafficking in the sense in which that term is understood in international law

Partly as a result of the above, there would appear to be no reliable statistics on the incidence of trafficking into, within or out of the State. Ruhama notes in the Irish context:

“It is rather difficult to quantify the extent of trafficking. This is because the trade is essentially secretive with little incentive for either sexual exploiters or victims to reveal the nature of the problem.”³⁶

The latest TIP report (TIP Report, 2006) suggests specifically in relation to Ireland, that evidence does not *yet* suggest high levels of trafficking. While the report notes that the number of official investigations into trafficking is exceptionally low (‘numbering in single digits’), NGOs reported somewhat higher levels, somewhere between 14 and 200 victims since 2001, and 14 to 35 cases per year. Nonetheless, the report suggests that Ireland may be a destination and transit point for significant numbers of trafficked persons, mainly from Eastern Europe, Africa, Latin America and Asia. While commending the openness and leadership of the Irish authorities on this point, the report highlights shortcomings, including the lack of a specific offence of trafficking and the absence of dedicated anti-trafficking protection services.

the Rights of the Child, (Dublin: IHRC) p. 33.

³⁵ The most recent TIP Report (2006), while commending Ireland for its efforts, notes that: “...Current law, however, does not clearly define trafficking but rather merges it with smuggling, complicating efforts to count and verify the extent of trafficking in the country.” See also the comments of the Irish Refugee Council (2001) *Information Note on Smuggling and Trafficking*, (Dublin: Irish Refugee Council) p. 14, available at www.irishrefugeecouncil.ie.

³⁶ www.ruhama.ie accessed 2 March 2007.

Conroy (2003), in a study on trafficking into Ireland for the International Organisation for Migration, discerned substantial evidence of trafficking in minors, identifying 23 cases where investigations had been initiated or prosecutions commenced in relation to the trafficking of children for the purpose of sexual or labour exploitation (not including cases where suspicions had been entertained but not yet investigated). The study looked at cases between January 2002 and May 2003. 11 of the cases involved girls, 5 boys, while the gender of the alleged victims in the remaining 7 cases was unknown. Just under half of the alleged victims were under the age of 12, the remainder aged between 13 and 17.

Several reports provide some illuminating comparative evidence on the phenomenon in the UK³⁷ which, while not definitive in regard to the incidence of trafficking involving Ireland, highlights the potential for significant levels of trafficking in this state. In particular, the UK experience suggests that the phenomenon is not confined to large metropolitan areas but is encountered throughout the length and breadth of the UK. The work of Operation Pentameter is worthy of note in this regard.³⁸ Operation Pentameter involved the co-ordination of 55 police forces across the United Kingdom as well as the Serious and Organised Crime Agency (SOCA), the UK Immigration Service and the Crown Prosecution Service in the UK, directed at combating the phenomenon of trafficking and providing protection to persons identified as victims. As a result of this strategy, it is reported that police rescued 84 trafficked women and arrested 232 people. Of the victims identified, 12 were aged 14 or older but under the age of 17.

As discussed above, an incident involving the illegal transport of persons into the State may feasibly present as ambiguous in terms of whether trafficking is involved; in such cases, it may not be immediately evident whether the case is one of smuggling or of trafficking. As a result, a great amount of what may in fact be trafficking may be presented or may be treated (through lack of evidence of an intent to exploit) as people smuggling, and dealt with as a standard case of illegal immigration. A further problem lies in the apparent unwillingness or incapacity of victims to self-identify as such. This may be for various reasons, including possible fear of prosecution, a lack of awareness of the availability of protective measures, (or an absence thereof), a concern that they will be deported, and re-victimised, and a fear of retribution at the hands of the traffickers.

At several junctures, international instruments stress the importance of having appropriately trained officers skilled in the identification of victims of trafficking, and in assisting such victims in a sensitive and professional manner. Particular emphasis is placed on pro-active screening as standard coupled with specific training for law-enforcement officials. Pearson (2002) also raises the need for improved awareness of trafficking at both an official level and more broadly within the community.³⁹ She particularly emphasises the need for appropriate training of relevant officials. Such training, she adds, requires more than simply supplying information on tackling vice but

³⁷ See for instance the reports cited in Gilbert (2006).

³⁸ See www.ukhtc.org, www.pentameter.police.uk. See also Gilbert (2006).

³⁹ Pearson (2002), p. 36

should include:

“...training and awareness-raising in the broader community so that everyone who potentially comes into contact with trafficked persons (including those who buy their services or the products of their labour), is aware of the human rights aspect of the problem and is able to act or refer a trafficked person to a place where they may receive assistance.”⁴⁰

The Commission welcomes the undoubted commitment of the State, and in particular of An Garda Síochána, to the promotion of effective measures to combat trafficking and exploitation. The considerable expertise of the Garda in addressing these issues cannot be discounted. Nonetheless, while An Garda Síochána has received some temporary funding to highlight issues of trafficking amongst trainee Gardaí, core funding is required to embed training in the identification of trafficked persons into the basic curriculum at the Garda College, Templemore. The Stop Sex Trafficking Campaign,⁴¹ furthermore, recommends the creation of “...a specialised unit or task force within An Garda Síochána...with responsibility for coordinating Garda responses to trafficking”. Such a unit would spearhead training initiatives focussing on the prevention and prosecution of trafficking offences and the identification and protection of victims.

⁴⁰ *Ibid.*

⁴¹ Submission on Criminal Justice (Trafficking and Sexual Offences) Bill, 2006 (Cork: Stop the Traffic Campaign)

II. Relevant Constitutional Human Rights Law Standards

Some provisions of the Irish Constitution are relevant to a discussion of the provisions of this Scheme. It is important in this context to note that, while often framed as rights of the ‘citizen’, many of the rights secured by the Constitution have been recognised as universal in nature and thus applicable to all persons regardless of their nationality. In particular, the Courts have concluded that rights such as the right to personal liberty (Article 40.4), inviolability of the dwelling place (Article 40.5) to seek *habeas corpus* (Article 40.4.2) and the right to fair procedures in criminal trials (Article 38.1) may be invoked by non-Irish nationals.⁴² The right to privacy has also been acknowledged as applying to non-Irish nationals.⁴³

2.1 The rights of accused persons and offenders

Given the prosecutorial nature of this Scheme, the requirements of Article 38.1 of the Constitution are of particular relevance. Article 38.1 states that “[n]o person shall be tried on any criminal charge save in due course of law”, a formula that has been interpreted as securing to an accused person a variety of unenumerated rights.⁴⁴ This confers on the accused an entitlement to a trial conducted in accordance with “basic principles of justice which are inherent in the proper course of the exercise of the judicial function”.⁴⁵ It encompasses a variety of rights pertaining not only to the trial of a person but also to periods of detention prior to trial and to the arrest of a person for the purpose of charging him or her with a crime.

A number of specific rights are of particular relevance in this context. Given the diverse content of this Scheme, it is preferable to deal with specific constitutional issues as they arise in relation to particular Heads of the Scheme. Nonetheless, three points of general concern arise in this context and should be addressed at this point.

Nullum crimen sine lege – no crime without a law

Precision and clarity in the definition of a criminal offence is a constitutional requirement of considerable importance. It is of integral importance that the offences defined in the Scheme are set out with a precision sufficient to avoid uncertainty regarding the scope of its provisions. Given that the commission of an offence under this Scheme may result in

⁴² See for instance *Northants Co. Co. v. ABF* [1982] I.L.R.M. 164, *State (McFadden) v. Governor of Mountjoy Prison* [1981] I.L.R.M. 113, *State (Kugan) v. O’Rourke*, [1985] I.R. 658, *State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550, *In re Article 26 and sections 5 and 10 of the Illegal Immigrants Trafficking Bill 1999* [2000] 2 I.R. 360.

⁴³ *Kennedy and Arnold v. Ireland* [1987] I.R. 587.

⁴⁴ On which see Hogan and Whyte (2003) Chapter 6.5, Casey (2000), *Constitutional Law in Ireland*, 3rd ed. (Dublin: Thomson Round Hall) pp. 516-542, Ryan (2001), *Constitutional Law*, (Dublin: Round Hall) Chapter 20.

⁴⁵ Per Gannon J. *State (Healy) v. Donoghue* [1976] I.R. 325

significant penalties, the requirement of precision and clarity is of particular importance in this context. It is equally essential, in seeking to ensure adequate protection of victims, that definitional vagueness be avoided. This point is further addressed below at several points, particularly in relation to some of the definitional subsections of the Scheme, which may require further elaboration.

Defence of genuine mistake as regards age

As many of the offences in this Scheme relate specifically to conduct involving children, the decision of the Supreme Court in *C.C. v. Ireland*⁴⁶ is of particular relevance. That case establishes that there must be a mental or intentional dimension to any offence relating to the age of a child. In other words, where the age of the victim is integral to the commission of an offence, an accused person cannot be convicted of that offence where he or she genuinely believed that the victim was of or above the age below which criminality attached to the act in question. Insofar as the Scheme creates offences involving children, following from the decision of the Court in this case, it is clear this defence of genuine mistake will be open to the accused person.

2.2 The constitutional rights of victims

The concept of victims' rights is not well developed as a matter of constitutional jurisprudence.⁴⁷ Rather it appears that the Irish courts have indicated a resistance to any judicial approach aiming to balance the rights of the accused with those of the victim.⁴⁸ Given the potential serious consequences of a criminal conviction (especially where the liberty of the accused is at stake), constitutional jurisprudence tends to focus largely on the rights of the accused.

However, a number of aspects of constitutional jurisprudence may be of relevance to victims of trafficking and exploitation. The unenumerated rights protected by Article 40.3 are of concrete support to the rights of victims. These include the right to bodily integrity, an entitlement of great relevance in the context of sexual and labour exploitation.⁴⁹ The right to privacy is also safeguarded: given the very intimate and

⁴⁶ [2006] IESC 33.

⁴⁷ The decision in *AD v. Ireland* [1994] I.R. 369 suggests that the scope for arguing in favour of general constitutional protection for victims is quite limited. In *AD v. Ireland*, Carroll J. rejected the plaintiff's proposition that victims had, as part of their right to bodily integrity, a right to be compensated by the State in respect of criminal injuries. Essentially, the Court considered that the matter of compensation was one for the Oireachtas and the Government alone to determine.

⁴⁸ See decision of Costello P in *Donnelly v. Ireland* [1998] 1 I.R. 325 where a proportionality approach to balancing the rights of accused and victim is rejected.

⁴⁹ First identified in *Ryan v. Attorney General* [1965] I.R. 294, and elaborated upon in *McGee v. Attorney General* [1974] I.R. 284, *State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 282 and *In re a Ward of Court (withdrawal of Medical Treatment)* [1996] 2 I.R. 79. Although the corollary duty to respect the bodily integrity of individuals weighs primarily on the State, private individuals have also been identified

invasive nature of the offences with which the Scheme is concerned, the privacy rights of victims will be of particular concern. One may appropriately draw analogies with the privacy rights secured to children in the legal system and to victims of alleged rape and sexual assault. Although the Constitution in Article 34.1 leans in favour of justice being administered in public,⁵⁰ it nonetheless acknowledges that “special and limited cases” may arise where *in camera* proceedings are required. Given the delicate and intimate nature of the offences outlined herein, it is appropriate that the privacy of victims be respected in the legal process.

Of less direct support to the rights of victims are the Preamble to the Constitution and the Directive Principles of Social Policy. The Preamble includes amongst its objectives “that the dignity and freedom of the individual may be assured,” a formula that arguably suggests (albeit in very general terms) a sympathetic and supportive approach to the victims of trafficking. Although the Directive Principles of Social Policy are non-justiciable, they may nonetheless inform the interpretation of other rights and give direction to the Oireachtas in how it should exercise the legislative function.

In several respects, the Directive Principles strengthen the case for the prevention of trafficking and exploitation. Article 45.4.1, in particular, guides the State to “safeguard with especial care the economic interests of the weaker sections of the community...”, an approach suggestive of a protective role for the State in the face of human exploitation. Article 45.4.2, moreover, has particular relevance in the context of labour exploitation, the State being guided to “...endeavour to ensure that the strength and health of workers, men and women, and the tender age of children, shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.”

In relation to female victims of sexual crime, a number of delicate points of constitutional relevance must be considered. Although the fact of pregnancy in itself is not sufficient to prevent deportation,⁵¹ the implications of any removal from the State upon the bodily integrity of the woman and the right to life of an unborn child are relevant in determining whether removal should occur. In cases where the victim of a sexual crime wishes to terminate a pregnancy, the constitutional freedom to travel for this purpose is of note.⁵²

as owing a duty to respect this right: *In People (Director of Public Prosecutions) v. Tiernan* [1988] I.R. 250 the commission of a sexual assault was deemed to constitute a breach of this right.

⁵⁰ See *In re R. Ltd.* [1989] I.R. 126, *Irish Times v. Ireland*, [1998] 1 I.R. 359.

⁵¹ *Baby O. and I.A.O. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169

⁵² Article 40.3.3 as amended by the 13th Amendment to the Constitution Act, 1992. For a recent examination of the right to travel in the context of a pregnancy, see the High Court decision in the case of a young woman in the care of the Health Services Executive, known as “Miss D.” who asserted her right to travel to the United Kingdom, reported in the *Irish Times*. May 10th 2007.

2.3 Restrictions on the rights of convicted persons

In addition to the rights set out above, the Scheme also raised the possibility of interfering with the rights of persons convicted of offences over and above the ordinary punishment of crime. The right to earn a livelihood has been recognised as an unenumerated right under Article 40.3 of the Constitution.⁵³ The right to earn a livelihood may be subject to restrictions where justified by the common good.⁵⁴ In particular, the decision in *Landers v. Attorney General*⁵⁵ confirms that restrictions introduced with a view to protecting children (in that case preventing a child from singing for gain in licensed premises) did not infringe the constitutional right of the child in question. *A fortiori*, provisions preventing persons convicted of sex offences from working with children, if there is a risk of real harm to such children, are also consonant with the Constitution.

In determining whether a prohibition on convicted persons accessing employment (such as those set out in Head 20 of this Scheme) should be imposed, regard should be had to the principles set out in *Cox v. Ireland*.⁵⁶ In *Cox* the Supreme Court struck down statutory provisions⁵⁷ prohibiting persons convicted of a scheduled offence in the Special Criminal Court from holding any employment paid for out of public monies. In that case, given the “impermissibly wide and indiscriminate” nature of the prohibition in question, the Court ruled that the prohibition unjustifiably infringed the prosecutor’s right to earn a livelihood. The proportionality requirement was endorsed by *The People (Director of Public Prosecutions) v. WC*⁵⁸ in which Flood J observed that the courts were obliged, by virtue of the requirement of proportionality, to “impose a sentence which is appropriate to the degree of guilt, taking into account all relevant circumstances as they arise in that case”.

⁵³ *Murtagh Properties v. Cleary* [1972] I.R. 330, *Murphy v. Stewart* [1973] I.R. 97, *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321.

⁵⁴ *Hand v. Dublin Corporation* [1991] 1 I.R. 409, *Shanley v. Galway Corporation* [1995] 1 I.R. 396

⁵⁵ (1975) 109 I.L.T.R. 1

⁵⁶ [1992] 2 I.R. 503.

⁵⁷ Namely, s. 34 of the Offences Against the State Act 1939

⁵⁸ [1994] 1 I.L.R.M. 321.

III. Relevant International Human Rights Law Standards

In this section we first look at the preliminary issues relating to the status of international human rights treaties in Irish law. We then turn to the treaties and human rights standards relevant to the issues raised in the present Scheme. Given the diverse nature of the offences covered by this Scheme, the relevant international instruments are addressed in distinct sections dealing separately with:

- General human rights treaties of relevance to trafficking in persons;
- International instruments relating specifically to trafficking in persons;
- International instruments specifically addressing women's rights;
- International instruments relating specifically to the exploitation of children;
- International treaties relating to labour exploitation; and
- The rights to freedom from refoulement in international law.

In the interest of completion, in this section the Commission sets out both those treaties which Ireland is a party and those treaties to which Ireland is not yet a party, including those that it has signed. Those treaties which Ireland has not ratified are not binding on the State, but they may be viewed as persuasive statements of international law in the area and may become binding on Ireland in due course.

3.1 The status of international instruments in Irish law

Article 29.6 of the Irish Constitution limits the application of international instruments within the State. International agreements to which the State is a party, once ratified by the State, are binding as a matter of international law. Nonetheless, as Ireland is a dualist state, international law is regarded as juridically distinct from domestic law and, absent 'incorporation' by the Oireachtas, international agreements are not binding as a matter of national law.⁵⁹ This means that such agreements cannot be relied upon (otherwise than as being persuasive) in national courts of law.⁶⁰ Although there have been some instances in which the courts have regarded international laws as persuasive in the interpretation of national measures,⁶¹ on a number of occasions the courts have stressed that, absent incorporation, international measures are not binding within the State.⁶² This

⁵⁹ Incorporation ordinarily occurs by means of an Act of the Oireachtas rendering the agreement part of national law. Examples of international instruments incorporated by the Oireachtas into Irish law include European Convention on Human Rights (European Convention on Human Rights Act, 2003) and the Geneva Convention on the Status of Refugees 1951 (Refugee Act 1996). The extent to which the European Convention has been effectively given legal effect in Irish law was the subject of detailed submissions by the Commission during the debate around the European Convention on Human Rights Act 2003.

⁶⁰ This point is made also in the Irish Human Rights Commission's 2006 *Submission to the UN Committee on the Rights of the Child on Ireland's second periodic report under the UN Convention on the Rights of the Child*, (Dublin: IHRC) at 1.2, pp. 7-8.

⁶¹ *Ó Domhnaill v. Merrick* [1985] I.R. 151, *Desmond v. Glackin (No. 1)* [1993] 3 I.R. 1

⁶² For an example of the application of the dualist principle in relation to a human rights

consideration underlines the importance of incorporating the relevant international instruments into Irish law at the earliest possible opportunity. The Commission has noted the advantages of giving direct legal effect to human rights instruments in domestic law.⁶³

In the context of trafficking and child exploitation, it is worth noting that, while Ireland has signed both the 2000 Palermo Protocol on Trafficking and the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, neither has (at the time of publication) been ratified by the State. Given the serious nature of the offences dealt with in these protocols, and the grave human rights abuses addressed thereby, it is a point of concern to the Commission that these measures await ratification. The Commission however, warmly welcomes the fact that Council of Europe Convention on Action against Trafficking, has recently been signed by Ireland. The Commission also understands that the enactment of the present legislation is intended to place Ireland in a position to ratify both instruments.⁶⁴

3.2 General human rights treaties of relevance to trafficking in persons

The Universal Declaration of Human Rights (UDHR), while not expressly referring to trafficking, affirms in Article 1 that all human beings are born free and equal in dignity and rights. Article 4 confirms, in a similar vein, that “no person shall be held in slavery or servitude; slavery and the slave trade shall be prohibited *in all their forms*” (emphasis added).

The wording of Article 4 of the UDHR clearly does not confine its remit to traditional manifestations of the slave trade, a point emphasised by a number of international conventions on slavery, and in particular a 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery. This treaty, building on earlier definitions of slavery,⁶⁵ requires States Parties to take all practicable measures to abolish a diversity of practices akin to slavery, including debt bondage, serfdom and practices whereby women are sold into marriage, without their consent. Particular reference is made to practices whereby children may be delivered to another person for the purpose of exploitation of the child or of his labour.

The International Covenant on Civil and Political Rights in Article 8 reaffirms the ban on slavery and servitude. Article 8(3) specifically proscribes “forced or compulsory labour”. The International Covenant on Economic Social and Cultural Rights in Article 6 recognises the right to work of each person, but specifically requires that this is “work

treaty, see *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97.

⁶³ See Irish Human Rights Commission’s 2006 *Submission to the UN Committee on the Rights of the Child* at pp. 7-8.

⁶⁴ In general Ireland does not ratify international agreements until the Government is of the view that the law of the State is in general compliance with the agreement in question.

⁶⁵ Slavery Convention 1926, as amended by Protocol, 1953, defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised (Article 1(1)).

which he freely chooses and accepts”, thus implicitly confirming the ban on forced labour.

Notably Article 4 of the European Convention on Human Rights and Fundamental Freedoms prohibits slavery and servitude as well as forced or compulsory labour. Given that the Convention has been given legal effect in Irish law, this requirement is binding not only as a matter of international law binding on the State but also as a matter of domestic law as it may be directly invoked by litigants before the Irish courts.

The European Union Charter of Fundamental Rights⁶⁶ also clearly endorses the view that slavery, forced labour and trafficking are an affront to the human dignity of the individual. Article 5 (contained in Part I – Dignity) expressly prohibits slavery, servitude, forced or compulsory labour. In Article 5(3), moreover, it explicitly states that “trafficking in human beings is prohibited”.

As the phenomenon of trafficking is predominantly carried out by non-state actors, particular consideration arise in relation to the nature of states’ obligations to tackle the associated human rights violations. The human rights contained in international human rights treaties are traditionally regarded as rights which individuals hold vis-à-vis states. However, the evolution of the system of international protection of human rights has seen a growing appreciation of the concept of positive obligations of states, whereby states assume duties to uphold the rights of individuals vis-à-vis violations by third parties. The nature of state responsibility for preventing human rights violations has been explored in detail by the various treaty, monitoring and adjudicatory bodies.⁶⁷ This concept of positive obligations in the context of human trafficking relates to the duty of states parties to various human rights treaties to protect individuals from the actions of traffickers through the various means available to them.

⁶⁶ Though not yet in force, the courts of the European Union nonetheless draw from the Charter as a source of inspiration on the content of rights protected by EU law. On this point, see the discussion in Walsh and Ryan (2006), *The Rights of De Facto Couples*, (Dublin: IHRC) at 2.3.4, p.27.

⁶⁷ In relation to the ICCPR, see General Comment No.31 of the Human Rights Committee *The Nature of the General Legal Obligations of State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), at para. 8. For ECHR case law on this point, *Z. and Others v. United Kingdom, Judgement of 10 May 2001, Application No 29392/95*; *M.C. v. Bulgaria, Judgement of 4 Dec. 2003, Application No. 39272/98*.

3.3 Treaties dealing specifically with trafficking persons

The specific phenomenon of trafficking, though arguably of some vintage, has only very recently been addressed directly in any comprehensive sense by international instruments.

3.3.1 The Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('the Palermo Protocol')⁶⁸

The most significant relevant provisions of international law specific to trafficking are contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,⁶⁹ (2000) (hereinafter referred to as 'the Palermo Protocol'). Along with 116 other states, Ireland has signed the Convention, but the State is amongst only 6 of those signatory jurisdictions that have not followed up with ratification. While the treaty is not binding on Ireland it can be considered persuasive in Irish law.

The Palermo Protocol is a supplement to the UN Convention on Transnational Organised Crime. It thus understandably reflects, in part at least, a prosecutorial focus, the aim being to combat a particular aspect of organised crime transcending national boundaries.⁷⁰ Despite these origins the Protocol may nonetheless fairly be described as having a significant human rights dimension. The preamble to the Protocol and Article 2 identifies three key objectives thereof:

- (a) the prevention and combating of trafficking in human persons
- (b) the protection and assistance of victims of such trafficking
- (c) the promotion of inter-state co-operation in the achievement of these objectives

The Preamble, notably, makes particular reference to the need to protect the

⁶⁸ This particular Protocol is not the first of its kind. It builds on impressive array of conventions on the topic going back to 1921. An earlier convention was instigated in 1950 in Lake Success, New York, entitled "Convention for the Suppression of Trafficking in Persons and of the Exploitation of Prostitution of Others." That Convention in turn cites earlier agreements on trafficking dating back to the International Convention for the Suppression of the Traffic in Women of Full Age 1933 and the International Convention for the Suppression of the Traffic in Women and Children 1921.

⁶⁹ Agreed December 12-15, 2000. Palermo, Italy. Adopted and opened for signature, ratification and accession by General Assembly Resolution 55/25 of 2 November 2000, the Protocol came into form on 25 December 2003.

⁷⁰ The MRCI/DCU (2007) in *No Way Forward, No Going Back*, (at 4.13) note some criticisms levelled against the Palermo Protocol for addressing "trafficking within the context of organised crime, rather than within the framework of migrants' rights". Jordan for instance, suggests that the protocol's "...drafters created a strong law enforcement tool with comparatively weak language on human rights protections and victims." Jordan, (2002), *The Annotated Guide to the Complete UN Trafficking Protocol*, (Washington: International Human Rights Law Group).

internationally recognised human rights of victims. Highlighting the absence of a comprehensive instrument tackling trafficking, the Protocol states the concern of States Parties that “in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected.” In this regard, the Protocol may be characterised as protective in nature.

The Protocol contains three parts, the first of which sets out an agreed definition of trafficking. Article 4 delimits the scope of the Protocol, in particular, in confining its remit to the prevention, investigation and prosecution of offences that are “transnational in nature” and involving an organised crime group. Article 5 effectively mandates the criminalisation of trafficking, when committed intentionally. It further mandates the creation of criminal offences involving an attempt to traffic a person or persons, participating as an accomplice in such activity and organising or directing other persons to commit an offence involving trafficking.

Part II of the Protocol is predominantly directed at the victims of trafficking and requires *inter alia*:

- That states secure the privacy and identity of victims, in particular by making legal proceedings relating to trafficking confidential (Article 6(1));
- That provision is made for the supply of information on court and administrative proceedings to victims of trafficking;
- That states facilitate victims in the presentation of their views and concerns in criminal proceedings, without prejudice to the rights of the defendant;
- That states consider adopting measures to provide for the physical, psychological and social recovery of victims, in particular through the provision of housing, counselling and information, medical, psychological and material assistance and employment, education and training opportunities;
- That states endeavour to secure the physical safety of trafficked persons in their territory;
- That states facilitate victims in providing for the possibility of compensation for damage suffered.

In considering the position of trafficked persons, moreover, states are required to have regard to the age, gender and special needs of victims, in particular those of children. Additionally the Protocol suggests that states consider adopting measures with a view to permitting victims a right to remain in the relevant state, either temporarily or permanently, having special regard to humanitarian and compassionate factors, though notably, it does not mandate such measures. Nonetheless, Article 8 allows for the repatriation of victims. In particular, the state of which the victim is a national (or in which they have a right permanent residence) is required to facilitate the return of the person where proposed by the host state. In all cases, however, both the receiving state and the state to which the person is returned must act with due regard for the safety of the person. If possible, such repatriation should be voluntary. It is thus clear that repatriation should not occur where there is any doubt as to the safety of the trafficked person or the risk of re-victimisation. Where a trafficked person lacks appropriate documentation facilitating re-entry, the state of which that person is a national or permanent residence

has a duty to supply appropriate travel documents.

The third part of the Convention broadly requires states to co-operate in the prevention and prosecution of offences. It provides, in particular, for the instigation of a range of measures designed to prevent trafficking both at source and through discouraging the demand that fosters exploitation. Article 10 allows for the exchange of information between police forces of different states. Article 10(2) emphasises the importance of training for law enforcement officials in preventing and combating trafficking in a manner that effectively protects the rights of victims. Articles 12 and 13 of the protocol concern the security and control of official documents, an important consideration given the possibility that trafficking may be effected through the use of false documentation. The Protocol requires that measures be taken to secure against fraudulent production of travel and identity documents and correspondingly to ensure the integrity of officially sanctioned documentation.

3.3.2 Council of Europe Convention on Action against Trafficking in Human Beings (CoE Convention)

The Council of Europe has also developed a keen interest in suppressing the trafficking of human persons, in particular those emanating from Central and Eastern European and in the new States which have joined the Council in the last ten years. The CoE Convention sets as “paramount objectives” the protection of the human rights of victims of trafficking, calling on States Parties to take action to prevent trafficking and to provide appropriate protection to the victims thereof. This Convention has recently been signed by the State, a step which the Commission warmly welcomes. Again this means that, while the treaty is not binding on Ireland, the State has expressed an intention to be bound by the treaty and it may be persuasive in Irish law.

In contrast with the Palermo Protocol, the CoE Convention emphasises protective measures from the outset. It encourages in particular the adoption of a human rights-based approach to trafficking, requiring, further, that gender-mainstreaming and a child-sensitive approach feature prominently in the development, implementation and assessment of state policies against trafficking. Of particular note are the provisions of Chapter III of the Convention. Article 10 addresses the effective identification of victims, focussing on the need to ensure appropriate training of persons to prevent and combat trafficking and to identify and help the victims thereof. Article 10(2) requires that no person suspected of being a victim of trafficking shall be removed from the state in which they are found until the identification process as a victim of an offence has been completed.

Article 12 mandates the provision of assistance to victims in their physical, psychological and social recovery. A number of measures are addressed in this context including:

- Securing standards of living capable of ensuring adequate subsistence for victims of trafficking, including appropriate and secure accommodation, psychological and material assistance,
- Access to emergency medical treatment for victims, where required;

- Translation and interpretation services, if relevant;
- Access to counselling and information regarding (*inter alia*) victims' legal rights and services available to them, in a language that they can understand;
- Assistance to enable victims' rights and interests to be presented and considered during appropriate stages of the criminal trial process;
- Access to education for children.

States Parties are required to have regard, in this context, to the vulnerable position of victims and in particular to their need for safety and protection. Importantly, such measures are deemed not to be conditional on the willingness of the victim to act as a witness in a prosecution. Article 13 of the Convention posits that each State shall provide a recovery and reflection period where persons are reasonably believed to be the victims of trafficking. The minimum duration of such a period of reflection is set at 30 days. The purpose of such a period is to facilitate the victim in recovering from his or her ordeal and escaping the influence of traffickers. The period of reflection may also facilitate the victim in making an informed decision to co-operate with law enforcement authorities.

The Convention also requires that provision be made for the granting to victims, in specific cases, of renewable residence permits. This should occur where the competent authority considers that the personal situation of the victim necessitates their remaining in the state or where the competent authority considers that their stay is necessary for the purpose of their co-operation in the investigation of an offence or instigation of criminal proceedings.

Nonetheless, Article 16 seems to suggest that repatriation should ultimately be possible in appropriate cases, though preferably with the co-operation of the victim. The State party of which the victim is a national or a legal permanent resident is required to accept and facilitate the victim's return. In all cases, however, the decision to repatriate should only be made with due regard to the rights, safety and dignity of the victim. In particular, Article 16(5) requires that repatriation schemes should seek to avoid re-victimisation. States are required to address risk factors leading to victimisation preferably through the reintegration of the trafficked person into society, and the provision of education and labour training for such persons. This Article suggests, in particular, that such measures may help to eliminate the prospect of re-victimisation by addressing at root the risk factors, such as poverty and unemployment, that fuel trafficking in persons. Article 15 provides that victims should have access to compensation and legal redress in respect of their ordeal, and should, moreover, have access to legal assistance and free legal aid for the purpose of pursuing such a remedy. In particular, a fund for victim reparation is suggested.

Chapter IV addresses the criminalisation of trafficking, Article 18 requiring that trafficking, as defined, be made an offence. Article 19, notably, requires parties to make it an offence to use the services of a victim, where the offender is aware that the person is

a victim of trafficking.⁷¹ Article 22 makes provision for the imposition of corporate liability in cases of trafficking, including cases where a leading person in an organisation has facilitated the commission of an offence through a lack of supervision or control. Article 23 requires that such sanctions be “effective, proportionate and dissuasive”. Article 23(4) notably requires the temporary or permanent closure of any establishment used in the trafficking of human beings. Article 26 again addresses the position of victims, noting that Parties should not impose penalties on victims in respect of their involvement in illegal activities, where compulsion has been a factor in their commission.

Chapter V emphasises the importance of effective investigation and prosecution and, in particular, provides for the possibility of *ex parte* and *ex officio* applications. Article 28 is designed to facilitate victims in making a complaint to the authorities in their state of residence. It also seeks to facilitate various non-governmental organisations to assist and/or support the victim during criminal proceedings. Article 28 aims to combat retaliation or intimidation of victims and other witnesses, while Article 30 requires the protection of victims’ privacy and identity and the prevention of intimidation. Notably, Article 29 requires the establishment of specialised authorities and co-ordinating bodies focussing on trafficking and the protection of victims thereof.

Chapter VI sets out a number of measures requiring co-operation and the sharing of information, on both the domestic and international level. It stresses, in particular, the involvement of civil society and NGO organisations in the fight against trafficking. Chapter VII establishes an international group of experts, GRETA, to share information on, and monitor, action against trafficking.

3.3.3 EU instruments on trafficking

The European Union has consistently exhibited its opposition to trafficking in human persons. Article 5 of the European Union Charter on Fundamental Rights specifically states that trafficking in human beings is prohibited. It further proscribes slavery and servitude, as well as forced and compulsory labour. In placing these proscriptions under Part I of the Charter, (entitled ‘Dignity’) the European Union is clearly characterising these phenomena as human rights violations constituting an affront to the dignity of the human individual.

In addition to a large and diverse range of political declarations and executive ‘action plans’;⁷² two specific legislative measures are relevant in this context. Although the

⁷¹ Article 21 requires that various inchoate offences, such as attempts, aiding or abetting the commission of an offence should also, in their own right, be punishable by law.

⁷² Council Joint Action 96/700/JHA of 29 November 1996 establishing an incentive and exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children (STOP); Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children; European Parliament, Resolution of 19 May 2000 on the communication from the Commission “for further actions in the fight against trafficking in women”; the

measures in question purport to comply with and respect fundamental rights, the legal basis for such measures generally falls under the Justice and Home Affairs pillar.

The Council Framework Decision on combating trafficking in human beings⁷³

The 2002 Framework Decision seeks to instigate a comprehensive approach from all Member States to the phenomenon of trafficking, however its focus is on criminalising rather than protective measures. In particular, the Decision sought to forge a definition of trafficking comprising constituent elements that are common to all Member States. It aims also to ensure in all Member States the presence and enforcement of “effective, proportionate and dissuasive sanctions” in response to the phenomenon. Member States were required to take implementing action by 1 August 2004 at the latest. A 2006 report of the Commission on the implementation of this Action⁷⁴ observed (without elaboration) that “...by the end of 2005, the Commission had received no or only preliminary information regarding the implementation of the Framework Decision from four Member States: Portugal, Luxembourg, Ireland and Lithuania.”⁷⁵

Article 1 of the Decision requires Member States to take the necessary measures to ensure that trafficking is a punishable offence in each state. Prosecution policy should be proactive in response, and should not, in particular, be dependent on reporting by or an accusation made by a victim.⁷⁶ Member States are also required, by Article 2, to penalise the instigation of trafficking offences, as well as conduct that amounts to aiding or abetting the commission of an offence or an attempt to commit an offence referred to in Article 1.

For these purposes, the definition of trafficking largely replicates that contained in the Palermo Protocol, though the Council Decision contains some interesting supplementary elements. For the purpose of the Decision, trafficking comprises:

- “...the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:
- (a) use is made of coercion, force or threat, including abduction, or
 - (b) use is made of deceit or fraud, or
 - (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to

Brussels Declaration on preventing and combatting trafficking in human beings, 2002; Commission Communication COM (2005) 514 on fighting against trafficking in human beings; EU plan on best practices, standards and procedures for combatting and preventing trafficking in human beings (2005/C311/01); Commission COM (2006) 92 Roadmap for Equality between Women and Men;

⁷³ 19 July 2002 (2002/629/JHA).

⁷⁴ Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings COM(2006)187 final{SEC(2006) 525}.

⁷⁵ *Ibid.* p. 3

⁷⁶ Article 7(3)

- the abuse involved, or
- (d) payments or benefits are given or received to achieve the consent of a person having control over another person

for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.”

The penalties for such offences should be “effective proportionate and dissuasive”. Alleged offenders, moreover, should be eligible, in appropriate cases, for extradition. In certain specified cases the maximum penalty should not be less than eight years: these cases include where the offender has deliberately or by gross negligence endangered the life of the victim, where the offender has used serious violence or caused serious harm to the victim or where the offence was committed within the framework of a criminal organisation.⁷⁷ This requirement also applies where the victim was “particularly vulnerable”, a phrase that is deemed to include where the victim was under the age of sexual majority and where the offence has been committed for the purpose of the prostitution or other forms of sexual exploitation.

Article 4 requires Member States to take steps to ensure that legal persons⁷⁸ (such as companies) can be held liable for offences involving trafficking where committed for their benefit by any person who holds a leading position within the organisation.⁷⁹ The latter person may act either individually or as part of an organ of the legal person. Legal persons should also be deemed liable where lack of supervision or control has rendered possible the commission of an offence for the benefit of that legal person by a person under its authority. Such measures are without prejudice to provisions that penalise natural persons who perpetrate, instigate or are accessories to such offences.

Article 5 requires that the penalties for legal persons involved in trafficking should be “effective, proportionate and dissuasive”.⁸⁰ Article 6 requires Member States to act

⁷⁷ As defined in Joint Action 98/733/JHA (apart from the penalty level referred to therein).

⁷⁸ Under Article 5(4) a legal person is defined as “...any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.”

⁷⁹ Based on “(a) a power of representation of the legal person, or (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control within the legal person.”

⁸⁰ Sanctions may include criminal and non-criminal fines and other sanctions, such as: (a) exclusion from entitlement to public benefits or aid, or (b) temporary or permanent disqualification from the practice of commercial activities, or (c) placing under judicial supervision, or (d) a judicial winding-up order, or (e) temporary or permanent closure of establishments which have been used for committing the offence.

where the offence is committed in whole or in part within its territory, for the benefit of a legal person established within its territory or where the offender is a national of the Member State, though some exceptions apply. Article 7 sets out some relatively minimal requirements relating to the provision of protection of and assistance to victims, particularly child victims, involved in the criminal process.

Council Directive 2004/81/EC on the residence permit issued to third country nationals who are victims of trafficking in human persons or who have been the subject of an action to facilitate illegal immigration, who co-operate with the competent authorities

Ireland and the United Kingdom have opted out of this directive and it is not binding on the State.⁸¹ Broadly, the Directive allows for the provision of a temporary residence permit to, and a period of reflection for, the victims of trafficking. Such provision, however, is made conditional on the victim's co-operation in the trial of the alleged offenders. In particular, the duration of the proposed residence permit is linked directly to the "length of the relevant proceedings"⁸² and applies only to third-country nationals who "cooperate in the fight against trafficking in human beings or action to facilitate illegal immigration". In other words, the rights set out in this Directive are prosecutorially directed. In this respect, the Directive differs from the CoE Convention, the protective measures of which are not made contingent on such co-operation.

Article 6 sets out a requirement of a reflection period for victims, allowing them to "recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities". During such recuperation, victims are entitled, under Article 7, to a variety of rights analogous to those set out in Article 12 of the CoE Convention.

Article 8 establishes the conditions for the issue of the residence permit. On expiry of the reflection period, Member States may grant a residence permit but, in deciding whether to do so, may consider:

- The opportunity presented for the investigation of trafficking or the instigation of judicial proceedings;
- Whether the victim has shown a clear intention to cooperate; and
- Whether the victim has severed all relations with those suspected of trafficking.

It is clear from Articles 13 and 14 that the permit may be withdrawn or not renewed if the victim ceases to cooperate, or actively, voluntarily and in his or her own initiative renews his or her connection with the suspected persons. Again stressing the contingent nature of the residence permit, the permit will (regardless of the extent of the victim's co-operation) terminate on the discontinuance of proceedings.

From a human rights perspective, this approach raises a number of points of concern. The standing of the 'foreign' victim of trafficking, and his or her right to remain in a particular Member State, appears, under this Directive, to be related to the 'utility' of his

⁸¹ See Council Directive 2004/81/EC, Clause 21 of the Preamble.

⁸² Article 1

or her evidence in proceedings. The vindication of rights is thus predicated on the priority given to certain prosecutorial strategies. First, this tendency may favour victims of large crime bodies over the victims of small scale criminals, a result that would be inequitable as between victims. Second, this apparently ‘utilitarian’ approach jars with the human rights focus of the Palermo Protocol as well as that of the CoE Convention in that it sets conditions to the vindication of rights set out in those measures. Indeed the European Union’s own Experts’ Group on Trafficking in Human Beings has explicitly recommended that:

“in order to effectively address trafficking and to prevent re-trafficking, as well as meeting the State’s obligation under international human rights law Member States should ensure that trafficked persons have access to adequate remedies, including assistance, protection and compensation, *regardless of their willingness or capacity to testify against their traffickers*”.⁸³

A further difficulty – of particular concern in the effective prosecution of alleged offenders – is the possible effect of the linkage between, on the one hand, co-operation in the investigation and prosecution of offences and, on the other, the granting of the proposed permit. Such direct linkage may have the effect of incentivising the giving of evidence against the accused and thus possibly contaminating or tainting such evidence. In the *DPP v. Gilligan*⁸⁴ the Supreme Court had to consider whether evidence given by persons in the analogous position of being on a witness protection programme could be admitted in court. The defendant in question had alleged that witnesses, who had themselves been convicted of certain drugs offences, were now being financially supported by the State, and thus had an incentive to tailor their evidence with a view to pleasing the State. While the Court ruled that such evidence was admissible, a note of caution was nonetheless entered in relation to evidence from such persons corroboration. It is also open to a court to determine that in all the circumstances of the case it would be appropriate to have corroborating or circumstantial evidence to support such evidence. Such an approach is cautious but it reflects concern for due process, for the presumption of innocence, and for a fair trial. In the present context, at the very least, these concerns strengthen the view that it would be prudent for the State not to predicate the right of residence on a willingness to testify.

3.4 Human rights instruments specific to women

Although trafficking and sexual exploitation may equally affect men and women, and children of both genders, it is clear from our study that, in this specific context, a particular concern for female victims is appropriate. Virtually all of the relevant international agreements coming within the scope of this study, whilst asserting the importance of gender equality, also acknowledge the fact that, at least insofar as adults

⁸³ Emphasis added. Recommendation 89, report of the Experts’ Group on Trafficking in Human Beings, cited in ENATW (2006), p. 15.

⁸⁴ [2005] IESC 78

are concerned, trafficking tends more frequently to involve female victims than male. This is particularly the case in relation to trafficking for the purpose of sexual exploitation.⁸⁵ As ENATW (2006) observe "...[w]omen are at greater risk of falling victim to trafficking owing to gender discrimination, poverty and lack of employment opportunities in their country of origin".⁸⁶

Indeed, the phenomenon of trafficking for the purpose of sexual exploitation must be viewed in the context of gender discrimination generally, and the experience of women in society. The European Commission in Com (2005) 514 recognises that gender specific prevention strategies are "...a key element to combat trafficking in women and girls. This includes implementing gender equality principles and eliminating the demand for all forms of exploitation, including sexual exploitation and domestic labour exploitation". In a similar spirit the UNHCR Gender Guidelines 2002 cite trafficking as a potential form of gender-based persecution:

"18.....The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm."

It is notable that the Declaration on Elimination of Discrimination against Women, 1967, in Article 8 requires that "[a]ll appropriate measures, including legislation, shall be taken to combat all forms of traffic in women and exploitation of prostitution of women.". In a like manner, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) provides a backdrop to the affirming of women's human rights in this context, including the rights to autonomy of body and person. In particular, the latter Convention commits States Parties, in Article 6, to pursue "all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

⁸⁵ See for instance M. O'Connor and G. Healy (2006), *The Links between Prostitution and Sex Trafficking: a Briefing Handbook* (Prepared for the Coalition against Trafficking in Women and the European Women's Lobby), available at: <http://www.aretusa.net>.

⁸⁶ ENATW (2006) p. 9.

3.5 Human rights instruments specific to children

Given the particularly vulnerable condition of children, a number of international instruments make specific reference to the exploitation of children. The UN Declaration on Human Rights clearly establishes that “childhood is entitled to special care and assistance”. The International Covenant on Economic Social and Cultural Rights asserts in Article 10(3) the necessity for special measures of protection and assistance for all children and young persons. It concludes, in particular, that “[c]hildren and young persons should be protected from economic and social exploitation.” Article 24(1) of the Covenant on Civil and Political Rights, in a similar vein, affirms the particular right of children, without discrimination, to such measures of protection as necessitated by his status as a minor.

3.5.1 UN Convention on the Rights of the Child (CRC)⁸⁷

A detailed exposition of the rights of children is set out in the United Nations Convention on the Rights of the Child (CRC), some of the provisions of which are particularly pertinent in this context. An initial point concerns definition of a child, which, for the purposes of the Convention, is a person below the age of 18 years. This is addressed below in the context of the Scheme, which makes some provision for the protection of children who are of the age of consent for sexual activity but not yet 18.

In pursuance of the principle that all decisions affecting children should be informed by the best interests of the child, set out in Article 3, the Convention requires states parties to

“...undertake to ensure the child such protection and care as is necessary for his or her well-being,⁸⁸ taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, [States Parties] shall take all appropriate legislative and administrative measures.”

Article 9 leans heavily against the separation of the child from his parents, a point of relevance in the context of the trafficking and sale of children.

Article 19 generally requires states to take a variety of measures to combat all forms of abuse of children, including physical and mental violence, injury, abuse, neglect, or negligent treatment. The Convention suggests a multi-faceted response to preventing abuse, and addressing actual instances of abuse, including legislative, administrative, social and educational measures. Specific reference is made in this context to the exploitation of children, including sexual abuse. Although the Article is predominantly

⁸⁷ Ratified by Ireland, 21 September 1992. On the implementation of the Convention in Ireland, see the Irish Human Rights Commission, (2006), *Submission to the UN Committee on the Rights of the Child on Ireland's second periodic report under the UNCRC*, (Dublin: IHRC)

⁸⁸ Article 23 emphasises the particular importance of this provision in cases where the child is a person with a disability.

directed at children in the care of their parents and legal guardians, the Article would appear to extend to any person who has the care of the child. Article 19 also requires states to provide support and treatment, as necessary, through social programmes to children who have been victimized or exploited and to those with care of the child. It mandates the adoption of effective procedures to identify child victims, and requires, moreover, effective means for the investigation of cases involving alleged abuse.

Specifically in relation to trafficking, Article 11 places an express obligation on states to adopt measures “to combat the illicit transfer and non-return of children abroad.” With this in mind, the Convention anticipates that states shall promote the conclusion of agreements (bilateral and multilateral) or accede to existing agreements on this topic.

Article 20 further emphasises the uniquely vulnerable position of the child temporarily or permanently deprived of his or her family environment, guaranteeing to such children the “special protection and assistance” of the state. In cases of separation, the Convention requires the provision of alternative care for children, which may include foster placement or adoption. In addressing the child’s situation, regard should be had to the “desirability of continuity in a child’s upbringing” a point that may militate strongly in favour of speedy family reunification in cases of trafficking, where appropriate. The child’s ethnic, religious, cultural and linguistic background is also to be respected in this context. Specific reference is also made to the right of the child to seek refugee status,⁸⁹ though the Convention leans in favour of family reunification, where appropriate. In particular, the Convention requires measures facilitating the tracing of the child’s parents and other family member of any refugee child, the object being to restore family unity, if possible and appropriate in light of the specific circumstances.

Article 32 and 34 of the Convention are particularly relevant in the context of the exploitation of children. Article 32 aims, through the adoption of a variety of measures, to protect the child from economic exploitation and work that would be hazardous to the child. The Convention also targets work that would interfere with a child’s education or which otherwise would be harmful to the child’s health or development.⁹⁰

Article 34 specifically addresses sexual exploitation and abuse of children, requiring States Parties to undertake to protect the child from such conduct. A variety of measures (national, international and multi-national) are encouraged with a view to preventing:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;

⁸⁹ Although the Geneva Convention on the Status of Refugees is not age-specific, Article 22 of the CRC reaffirms the right of the child to seek refugee status, where legally entitled to asylum. The Convention on the Rights of the Child requires that children seeking asylum, whether accompanied or not, “...receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the [Convention on the Rights of the Child] and in other international human rights or humanitarian instruments to which the said States are Parties.”

⁹⁰ Defined as including the “physical, mental, spiritual, moral or social development” of the child.

- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35 requires states to take measures with a view to preventing the abduction of, sale of or trafficking in children, regardless of the purpose thereof, while Article 36 addresses other forms of exploitation prejudicial to any aspect of the child's welfare.

In cases where children have been subjected (*inter alia*) to exploitation or abuse, Article 39 of the Convention requires the establishment of appropriate measures to secure the recovery (physical and psychological) and reintegration of the victim. An emphasis is placed on the venue of recovery, the environment of which must "foster the health self-respect and dignity of the child."

3.5.2 Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography

The Optional Protocol had been signed by Ireland on 7 September 2000 and shortly afterwards Ireland signalled its intention to ratify as soon as the necessary legislation was in place.⁹¹ This deficiency arguably will be partly addressed in the provisions of the Scheme combating the practices involving child exploitation. The Child Trafficking and Pornography Act, 1998, has already established a comprehensive regime for the prosecution of offences involving (*inter alia*) the production, dissemination and possession of child pornography. The ratification of the Optional Protocol by Ireland was recommended by the UN Committee on the Rights of the Child in 2005 and the Government's intention to ratify the Protocol was confirmed by the Minister of State for Children in an exchange with the Committee.⁹²

The Protocol is broadly aimed at eliminating a number of practices that entail the exploitation of children, mainly, though not exclusively, for sexual ends. The Protocol favours a holistic multifaceted approach to these phenomena involving a number of different steps including, but not limited to, criminal sanctions. In particular, Article 3 of the Protocol requires States Parties, at a minimum, to criminalise a number of acts and activities including:

⁹¹ DJELR (2001) *Draft National Plan for Women (2001-2005)* Dublin, August, par 12.4, p. 36. DJELR (2002) *Ireland - Report to the United Nations on the National Plan for Women 2002 on the Implementation of the Beijing Platform for Action*, Dublin, September, par. 12.4, p.52. The Protocol builds in part on the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and the Declaration and Agenda for Action adopted at the World Congress against Commercial Sexual Exploitation of Children, Stockholm, 27 to 31 August 1996.

⁹² UN (2005) *Convention on the Rights of the Child, Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Second Periodic Report, Ireland*, 11 August 2005, par, 82, page 18.

- The sale of children, defined as the transfer of a child for remuneration or consideration. In particular, the Protocol requires the criminalisation of acts in which a person offers, delivers or accepts a child for the purpose of sexual exploitation of the child, the transplant of a child's organs for profit or the engagement of the child in forced labour;
- Improperly inducing consent to the adoption of a child;
- Offering, obtaining, procuring or providing a child for the purposes of child prostitution (defined as “the use of a child in sexual activities for remuneration or other consideration”); and
- The production, distribution, dissemination, import or export, offering, sale or possession of child pornography.⁹³

Such measures should apply regardless of whether the act is transnational or domestic in scope, whether organised or isolated. The identified offences, moreover, are deemed to be extraditable offences. Article 6 requires states parties to co-operate and assist each other in the investigation and prosecution of the relevant offences, while Article 7 mandates a number of steps designed to frustrate offenders, including confiscation of goods, materials, assets and proceeds connected with such offences, as well as the closing of premises used to commit such offences.

Emphasising the best interests of the child, Article 8 commits requires states to take a variety of measures protective of child victims. In particular, it requires that states parties recognise the vulnerability of child victims by adapting procedures to address the special needs of child witnesses. The Protocol requires that child victims be kept informed of the progress of trials in which they are concerned, and made aware, in particular, of the rights and the role of child victims in such cases, as well as the scope, timing and disposition of their cases. The protocol mandates, moreover, the making of arrangements for the presentation and consideration of the views, needs and concerns of the child, consistent with national rules regarding criminal law proceedings, and for appropriate support services to be provided to child victims throughout the legal process. Citing the possibility of intimidation and retaliation, the Protocol also emphasizes the importance of securing the safety of child victims and their families, as well as witnesses for the prosecution. Unnecessary delays are to be avoided in the disposition of cases.

The Protocol further emphasizes the need for measures to secure appropriate assistance for the victims of offences with a view to aiding their recovery, physical and psychological. Article 8(4) in particular requires adequate training for persons working with victims. The Protocol also highlights the importance of inter-state co-operation and assistance in the investigation of offences, as well as the exchange of appropriate information.

⁹³ Defined by the Protocol as “...any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”

3.5.3 EU Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography

Building on a long line of political actions aimed at protecting children from sexual exploitation,⁹⁴ the Council Framework Decision 2004/68/JHA of 22 December 2003 mandates a range of criminal sanctions against the sexual exploitation of children and child pornography. Although the focus of the Decision is primarily prosecutorial, the Preamble acknowledges (in clause 4) important human rights dimensions:

“Sexual exploitation of children and child pornography constitute serious violations of human rights and of the fundamental right of a child to a harmonious upbringing and development.”

The purpose of the Decision is to forge a consistent and effective EU response to such conduct, with a view to ensuring a comprehensive and common approach to such offences throughout the Union. In particular, the Decision seeks to ensure that effective, proportionate and dissuasive sanctions apply across EU Member States. The Decision requires transposition into national law by 20 January 2006 at the latest.⁹⁵ For the purpose of the Decision a child is defined as a person aged below the age of 18 years.

Article 2 of the Decision requires Members States to criminalise and punish intentional conduct involving

“(a) coercing a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;

⁹⁴ See Joint Action 96/700/JHA of 29 November 1996 establishing an incentive and exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children; Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children; Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multi-annual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks; Decision No 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women; Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet, Resolution of the European Parliament of 11 April 2000 - call for legislative action against sexual exploitation of children and child pornography, including common definitions, charges and penalties; Resolution of the European Parliament 30 March 2000 on the Commission Communication on the implementation of measures to combat child sex tourism.

⁹⁵ Member States are required, by 20 January 2006 at the latest, to supply to the Council and the Commission the text of transposing provisions. On foot of such communications, and on the basis of a report of the Commission, the Council shall, by 20 January 2008, assess compliance with the Decision.

- (b) recruiting a child into prostitution or into participating in pornographic performances;
- (c) engaging in sexual activities with a child, where
 - (i) use is made of coercion, force or threats;
 - (ii) money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities; or
 - (iii) abuse is made of a recognised position of trust, authority or influence over the child.”

Article 3 requires Member States to take action against intentional conduct resulting in the production, distribution, dissemination, transmission or supply of child pornography, or any other action by which child pornography is made available (whether by computer or otherwise), though some limited exceptions apply.⁹⁶ Member States are also required to sanction the acquisition or possession of child pornography. For this purpose, child pornography is defined as including pornographic material that visually depicts or represents:

- (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or
- (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or
- (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i).

In this regard, the Commission notes that the Child Trafficking and Pornography Act, 1998, which establishes a series of offences involving the production, dissemination and possession of child pornography, substantially gives effect to this provision. Member States are further required to take effective steps against conduct involving persons instigating such an offence or aiding or abetting in the commission of any of the above offences as well as attempts to commit offences under the Decision.

The Decision favours penalties of a maximum of at least between one and three years of imprisonment, though higher penalties are required (a maximum of at least between five and ten years of imprisonment) in certain specified cases.⁹⁷ The Decision also requires

⁹⁶ Member States are permitted to exempt conduct where the person depicted is in fact aged 18 or over at the time of depiction or where the person was of the sexual age of consent at the time of depiction, the images having been produced with the depicted person’s consent and solely for their own private use. In determining whether the depicted person has consented, the Member States may have regard to whether “superior age, maturity, position, status, experience or the victim’s dependency on the perpetrator has been abused in achieving the consent”. Member States may also exempt realistic images of a non-existent child produced and possessed by the producer solely for his own private use, provided that the images are not based on images of real persons and there is no risk of dissemination to other persons.

⁹⁷ These higher penalties are mandated where the offence involves: coercing a child into prostitution or into participating in pornographic performances; engaging in sexual

States to provide for the possibility that offenders who are natural person may, temporarily or permanently, be prevented from engaging in work involving the supervision of children (a point addressed by Head 20 of the proposed Scheme).

Articles 6 and 7 require Member States to take effective steps to ensure that legal persons, such as companies, may be held liable for and punished in respect of offences committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person. Legal persons should also be capable of being held liable for a lack of supervision or control by a person referred to above resulting in the commission of an offence for the benefit of that legal person by a person under its authority. These measures are without prejudice to the prosecution of natural persons in respect of the same offences.

In respect of legal persons found guilty of offences, Article 7 requires the imposition of “effective, proportionate and dissuasive sanctions”, including:

- exclusion from entitlement to public benefits or aid;
- temporary or permanent disqualification from the practice of commercial activities;
- placing under judicial supervision;
- a judicial winding-up order; or
- temporary or permanent closure of establishments which have been used for committing the offence.

Article 8 requires that each Member State take the necessary measures to establish its jurisdiction over the offences where committed:

- in whole or in part within its territory;
- by one of its nationals or
- for the benefit of a legal person established within its jurisdiction.⁹⁸

Where a Member State does not extradite its own nationals, it is required to take steps to establish its jurisdiction over and to prosecute where an offence is committed by one of its own nationals outside its territory. Member States are specifically required to ensure that they have jurisdiction in cases where child pornography is accessed from its territory, whether or not the computer system from which the pornography is sourced is situated within its jurisdiction.

Article 9 indicates that investigations and prosecutions may be initiated otherwise than on the report or accusation of an alleged victim. Victims of an offence referred to in Article 2, moreover, are deemed to be particularly vulnerable victims for the purpose of Council framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in

activities with a child, where use is made of coercion, force or threats; profiting from or otherwise exploiting a child for the purpose of prostitution, and recruiting a child into prostitution.

⁹⁸ Though where the offence is committed outside its territory, member states have a discretion not to apply their jurisdiction rules.

criminal proceedings. The Decision also mandates appropriate assistance for members of the victim's family. The preamble indicates that child victims should be questioned according to their age and stage of development.

3.6 Standards particular to labour exploitation

Ireland has ratified a number of ILO conventions on the issue of labour exploitation, including:

- ILO Convention 29 Forced Labour Convention, 1930 (ratified 2 March 1931)
- ILO Convention 96 Fee-Charging Employment Agencies Convention (Revised), 1949 (ratified 13 June 1972)
- ILO Convention 105 Abolition of Forced Labour Convention, 1951 (ratified 11 June 1958)
- ILO Convention 182 Worst Forms of Child Labour Convention, 1999 (ratified 22 December 1999)

The Palermo Protocol indicates that exploitation includes forced labour or services, slavery or practices similar to slavery or servitude. Servitude in this context appears to mean a form of physical or mental subjection of one human by another/others.

3.7 The right to freedom from refoulement

Finally, the Commission believes it is important to bear in mind that many victims of trafficking may also be fleeing or have been subject to persecution and may be in danger of being exposed to persecution if returned to their countries of origin. Ireland has a number of obligations under international human rights law in this regard, both under the 1951 UN Convention relating to the Status of Refugees and the ECHR. Of particular note in the present context is the decision of the European Court of Human Rights in the case of *H.L.R. v. France*,⁹⁹ where the Court recognised that violations of Article 3 of the ECHR can be carried out by private, non-state perpetrators and that States have positive obligations to protect against such violations.

⁹⁹ (1997) 26 EHRR 29. *HLR* was a deportation case where the source of the alleged risk to the applicant in Colombia was not the public authorities but rather drug traffickers allegedly threatening reprisals. Almost identical language was used by the Court in *Ammani v Sweden* Application No 60959/00 (unreported) 22 October 2002 where the alleged risk of ill-treatment was “not only by the Algerian authorities but also by the Islamic armed organisation GIA.” Although *HLR* was put simply (26 EHRR 29, 50, para 40) in terms of the court “not rul[ing] out the possibility” of the principle of the State having extra-jurisdictional responsibilities applying in non-state agent cases, the court just three days later applied that rule in its well-known judgment in the case of *D v United Kingdom* (1997) 24 EHRR 423, 447, at para 49.

IV. Comments on particular aspects of the Scheme raising human rights standards

4.1 An Overview of the Scheme

As already indicated, the focus of the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006 addresses a number of issues pertinent to the realisation of human rights standards is overwhelmingly prosecutorial. The Scheme proposes the introduction of a series of new offences with a view to criminalising a variety of acts. The introduction of these offences will doubtless enhance the protection offered to many vulnerable persons, and particularly to children.

Many of the acts targeted by the Scheme serve as a prelude to and/or are committed with a view to facilitating other acts that are currently proscribed by law. For instance, the proposed offence of trafficking is clearly aimed at combating activities that may be carried out with a view to facilitating serious incidents of labour exploitation and sexual offences (including but not limited to those involving minors¹⁰⁰), as well as prostitution.¹⁰¹ The criminalisation of the sexual grooming of minors in Head 8(5) may also serve to address activities that facilitate the commission of sexual acts with minors, which in themselves currently attract criminal penalties.¹⁰² In this sense, the enactment of the measures contained in the Scheme should be viewed as a supplement to existing laws, designed to strengthen the protection offered to vulnerable persons. To some extent, the Scheme may be said to have a quasi-preventative focus, criminalising practices that may lead to other crimes being committed against vulnerable persons.

In substantive terms, the Scheme may usefully be characterised as addressing three broad phenomena:

- Trafficking in human persons, including adults and children
- The sale and exploitation of children
- The control of 'sex offenders', in particular, in relation to the employment of sex offenders in a context where there would be unsupervised access to children or people with a mental disability

The Scheme seeks to address conduct involving trafficking in persons for the purpose of exploitation (Head 3), a phenomenon which has been the subject of a number of significant international agreements. Heads 4-9 propose the establishment of a series of offences involving the sexual exploitation of children. Notably, Head 4 aims to

¹⁰⁰ On which see the Criminal Law (Sexual Offences Act) 1993, the Criminal Law (Sexual Offences) Act 2006 and the Criminal Law (Sexual Offences) Act 2007.

¹⁰¹ The close connection between prostitution and trafficking is addressed in M. O'Connor and G. Healy, (2006) *The Links between Prostitution and Sex Trafficking: a Briefing Handbook* (Prepared for Coalition against Trafficking in Women and the European Women's Lobby), downloaded at: <http://www.aretusa.net>

¹⁰² See for instance the Criminal Law Amendment Act, 1935, Criminal Law (Sexual Offences) Act 1993, Criminal Law (Sexual Offences) Act 2006.

criminalise the sale of children for the purpose of sexual exploitation, while Head 5 makes it an offence to solicit or pay for the purpose of sexually exploiting a child. Head 6 makes it an offence to engage in behaviour that amounts to the ‘organisation of sexual exploitation’. Head 8, moreover, seeks to create a specific offence of sexual grooming in relation to children. It also seeks to criminalise a variety of acts that involve exposing children to sexual stimuli, such as causing children to view a sexual act or an image of a sexual act. Heads 7, 15, 17 and 23 collectively address the sexual exploitation of children who are aged 17, a category currently outside the protective remit of the age of consent laws, but nonetheless considered vulnerable to sexual exploitation. Head 9 introduces a new harassment order which may be made with a view to restricting the harassment or intimidation of victims of certain sexual offences by persons convicted in respect of such offences.

While the first part of the Scheme creates certain new offences, Heads 10-14 seek to address the effective enforcement and prosecution of such crimes. Notably, insofar as it relates to the new offences proposed, the Scheme is intended to be extra-territorial in its application. With this in mind, Head 10 of the Scheme proposes that the Scheme will apply to offences committed outside the State where they are either allegedly committed by persons with a relevant connection to the State and/or are allegedly committed against Irish citizens. The Scheme also addresses the liability of bodies corporate in respect of the conduct of officers of such bodies and other persons directing the activities of legal persons. Head 13 aims to confer on An Garda Síochána certain powers of arrest, search and seizure where there is reason to believe that an offence has been committed under the Scheme. Head 16 seeks to apply the provisions of the Criminal Evidence Act, 1992 to the trial of offences under this Scheme, thus offering some protection to the alleged victims in the course of a trial of offences.

The Scheme also proposes a number of important substantive amendments to existing legislation aimed primarily at the minimising the risks, in particular to children and people with a mental disability, potentially posed by convicted sex offenders. In particular, Heads 19 seeks to require the assessment and management of the potential risks posed by an offender to whom Part 2 of the Sex Offenders Act 2001 applies. Head 20 proposes the introduction of a new Part 7 in the 2001 Act aimed at prohibiting a ‘sex offender’ as defined by Part 5 of the 2001 Act from working with children and persons who are mentally impaired. Heads 21-25 make certain consequential amendments to a number of Acts including the Criminal Law (Incest Proceedings) Act 1995, the Bail Act 1997, the Children Act 2001 and the Criminal Law (Rape) Act 1981.

4.2 Head 2 - Definitions

Child

Head 2 contains a number of definitions that inform the interpretation of the Scheme. The first definition of note concerns the words “child” which is deemed, for the purpose of the Scheme, to mean a person under the age of 18 years (unless otherwise indicated). The choice of this age is fully consistent with the provisions of the UNCRC. In

particular, it extends a range of important protective measures to a particularly category of child – those aged 17, who, though legally free to engage in consensual sexual acts, still attract the protective provisions of the 1989 Convention.

Exploitation

The term ‘exploitation’ is carefully delimited by the Act. It refers to labour or sexual exploitation, as defined, or to the removal of a person’s organ for the purpose of transplanting into another person. Each of these matters is worthy of separate note:

Sexual Exploitation and related terms

The definition of sexual exploitation is of particular note in relation to Heads 3 to 9 of the Scheme. The definition contains reference to “... the production of child pornography” as well as “the participation of a child in child pornography or in something that is indecent or obscene”. The Commission is mindful of the requirement of certainty in the definition of criminal offences. In the case of *King v. Attorney General*, it was held that criminal offences must be expressed with “precision and clarity” and should not be susceptible to ambiguity.¹⁰³ In this regard, the Commission recommends that, for the sake of clarity, the phrase “child pornography” as it is used in Head 2 should be defined. It is likely that an appropriate cross-reference to the definition of the same term in the Child Trafficking and Pornography Act 1998, section 2, would readily serve this purpose.

The phrase “indecent or obscene” poses a somewhat greater challenge. These terms, though regularly encountered in a legal context, arguably demand a restrictive interpretation in the context of a process in which persons are liable to be convicted of an offence attracting a maximum sentence of life in prison. In particular, it is arguable that the terms “indecent or obscene” require to be read as connoting activity of a particularly serious nature. In this regard, the Commission is mindful of the decision of the European Court of Human Rights in *Muller v. Switzerland*¹⁰⁴, which suggests that, in the criminal context, the terms ‘indecent or obscene’ should be confined to conduct or material that is “...liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity”.

The definition of sexual exploitation also includes “any sexual activity with a person which is an offence under any enactment”. Some potential difficulties may arise owing to the fact that certain consensual sexual activities with persons aged 15-17 are not offences under the Criminal Law (Sexual Offences) Act 2006, a point discussed further below in section 4.4.

“Labour exploitation” and related terms

Labour exploitation has been defined in the Scheme as covering (a) forced labour or services; (b) slavery or practices similar to slavery; or (c) servitude. The definition read as a whole suggests that the term ‘exploitation’ has a very particular meaning that confines the remit of the Scheme to particularly blatant and egregious abuses of workers’

¹⁰³ [1981] I.R. 223 at 263.

¹⁰⁴ (1991) 13 E.H.R.R. 212.

rights going beyond those contained in current legislation on the point. The reference to 'slavery' reinforces this view. In this sense the definition can be read as only referring to practices that involve a person being systematically forced to work in circumstances where the defining characteristic is that *they have no feasible opportunity to leave that place of employment.*

Provisions relating to the removal of organs

The Scheme seeks also to make it an offence to traffic a person (Head 3) or to sell a child (Head 4) with a view to the removal of an organ for the purpose of transplanting it into another person. Head 2 defines an 'organ' as:

“...any part of a human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be replicated by the body and in Head 4 'organ' refers only to such a part of a human child's body.”¹⁰⁵

This definition does not appear to cover the trafficking of persons for the purpose of the extraction and use of material for the purpose of human reproduction, for instance, female eggs or male sperm. In the field of human reproduction and reproductive health, a global and commercial market has emerged in relation to assisted reproduction and fertility. The Scheme appears, nonetheless, to leave open the possibility that a person may be unwillingly trafficked for such purposes.¹⁰⁶

The Heads of Bill do not, moreover, cover trafficking in organs *per se*, independently of the trafficking of *persons* for the purpose of transplantation. In other words, while the Scheme would ban the trafficking of persons and the sale of children the purpose of which was the transplantation of organs, it does not cover a situation in which removed organs are transported into, within or out of the State, having been removed without lawful consent. The Commission understands that the complex area of organ transportation and sale falls within the general competence of the Minister for Health and Children. In the context of this General Scheme, the Commission wishes to simply note that the issue of organs transfer raises wider important human rights concerns, which are addressed in the Council of Europe's Convention for the Protection of Human Rights and Dignity of the Person with regard to the Application of Biology and Medicine: Convention on Human Rights and Medicine, 1997 (known as the Oviedo Convention), a treaty which Ireland has not ratified this Convention.

Recommendations:

- **For the sake of clarity, Head 2 should make clear that the definition of the term “child pornography” contained in the Child Trafficking and Pornography Act 1998, section 2, will apply to the present Bill.**
- **The interpretation of the phrase “indecent or obscene” must be confined and precise in the context of a process in which persons are liable to be convicted**

¹⁰⁵ This definition differs from that used in S.I. 158 of 2006.

¹⁰⁶ See R.G Lee and D. Morgan, (2001) *Human Fertilisation and Embryology: Regulating the Reproductive Revolution*, (Blackstone Press) and B Dickens, "Reproductive Technology and the 'New' Family" in Sutherland, E. and A. McCall Smith, *Family Rights: Family Law and Medical Advance* (Edinburgh: Edinburgh University Press).

of an offence attracting a maximum sentence of life in prison. The Commission recalls here that the European Court of Human Rights has suggested that the terms ‘indecent or obscene’ should be confined to conduct or material that is “...liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity”.

- The Commission notes that the definition of sexual exploitation in the Scheme includes “any sexual activity with a person which is an offence under any enactment”. In the view of the Commission, some potential difficulties may arise owing to the fact that certain consensual sexual activities with persons aged 15-17 are not offences under the Criminal Law (Sexual Offences) Act 2006, a point discussed further below at 4.4. As such, the definition may not capture certain types of sexual activity with minors.

4.3 Head 3 - Trafficking

In defining ‘trafficking’, the Scheme mirrors closely the requirements of the Palermo Protocol. Head 3 honours the distinction made in international law between trafficking and smuggling, the key distinguishing elements being, in the case of adult persons, the absence of individual consent in respect of the activity in question and the purpose for which the person has been transported. In particular, the mere delivery of a person to the borders of the State is not sufficient to constitute trafficking under this Scheme. The Scheme requires an additional element, namely that the purpose of facilitating such delivery must be “the exploitation” (as defined) of the trafficked person.

The Scheme recognises that the trafficking chain may encompass a variety of actors with miscellaneous roles. The definition of a ‘trafficker’ includes the person responsible for the transport of persons for the purpose of exploitation, though other parties may also be the subject of criminal proceedings. These include:

- Those involved in the recruitment of trafficked persons. This may occur outside the confines of the State and may include a variety of persons responsible for the identification and selection of trafficked persons at source;
- Those who harbour a trafficked person, possibly though not exclusively while *en route* to or from the State;
- Those who knowingly arrange or facilitate trafficking;
- Those who provide accommodation to trafficked persons;
- Those who employ trafficked persons.

The presence of *mens rea* is not explicitly addressed in respect of persons other than those charged with arranging or facilitating trafficking (which must be carried out ‘knowingly’). Nonetheless, it is clear that the persons involved must be acting “for the purpose of the trafficked person’s exploitation”, a formula that strongly suggests that the accused person must have acted knowing of the intended outcome, namely that the trafficked person will be the subject of exploitation.

It is important to note that although the Scheme draws from instruments aimed primarily

at tackling trafficking as a transnational phenomenon, it applies equally to “the entry into, travel within or departure from the State” and may thus embrace a chain of events that takes place wholly or partly within the State. It is noteworthy that analogous UK legislation contains three separate offences in respect of each of inward, outward and internal trafficking.¹⁰⁷ By contrast, the Irish scheme has favoured a formula that applies equally regardless of the source of the alleged victim.

The issue of consent is central to the definition of trafficking, though in this respect, an important distinction is made between child and adult victims. In the case of adult victims it must be established that any act constituting trafficking has been carried out in circumstances where the victim’s consent has been impaired in a manner defined in the Scheme. In particular, the Scheme posits as an element of the offence of trafficking, proof that use has been made by the trafficker of coercion, force, threats or abduction. The Scheme, however, also addresses the possibility that more subtle mechanisms may be used to create the impression of consent in circumstances where it is in fact the product of deception or fraud. A further scenario arises where the trafficker is shown to have abused a position of authority or the vulnerability of the trafficked person. This may include giving payments to a person who has care, charge or control of the trafficked person.

A number of observations may be made on this point. First, as with all criminal offences, the overall burden of proof lies, wholly appropriately, on the prosecution. Where there is any reasonable doubt as to the existence of an element essential to the commission of an offence, that doubt clearly must be resolved in favour of the accused person.

Second, the Head makes reference to the use *by the trafficker* of coercive, deceptive or fraudulent conduct. It is thus unclear whether this effectively addresses the position of a person who, while not employing coercive methods, is nonetheless aware that other persons have coerced the alleged victim. On one interpretation it is arguable that the accused person is guilty if he or she has sought to rely upon the coercive activity of another person with a view to effecting the alleged victim’s trafficking, even if he himself was not directly responsible for such activity.

Third, the Scheme does not appear explicitly to make it an offence to use the services of a trafficked person, outside the context of employment. It is arguable that the effective combating of trafficking requires a response not only to the fact of trafficking but also to factors that drive demand. In particular, Article 19 of the Council of Europe Convention on Action Against Trafficking in Human Beings recommends that Parties consider criminalising the use of services which are the object of exploitation where the perpetrator acts with the knowledge that the person is a victim of trafficking in human beings.¹⁰⁸

¹⁰⁷ Contained respectively in sections 57, 58 and 59 of the Sexual Offences Act 2003 (UK).

¹⁰⁸ For a consideration of similar issues relating criminal liability for knowingly having sexual activity with a child, see Law Reform Commission report on Child Sexual Abuse,

Fourth, a number of potentially vague words and phrases remain undefined in the definition. In particular, the exact confines of a “position of authority” are not delimited, a point that may lead to uncertainty in the application of this Head. Similarly, the term “vulnerability” is susceptible to a variety of interpretations, including poverty, unemployment and family dysfunction that may engender a level of uncertainty in the application of this Head. Some care is also required in relation to the concept of “abuse...made of a position of authority”. In this regard, the Commission notes that in the United Kingdom, it was decided to provide an exhaustive list of positions of authority on the context of child abuse more generally, through sections 21 and 22 of the UK Sexual Offences Act 2003.

The onus of proving a lack of consent is cast, in this instance, on the State, an approach that is consistent with constitutional requirements regarding the overall burden of proof in criminal trials. It is arguable, that to ensure full compliance with international law,¹⁰⁹ the Scheme should expressly indicate the irrelevance of consent in circumstances where either a child is the victim of trafficking or, in the case of an adult victim, any of the improper means mentioned in the Head 3 are present.

Head 3 makes provision for serious penalties including a sentence of up to 14 years in prison in respect of the trafficking of adults and up to life imprisonment in respect of child trafficking. Provision is also made for the levying of a fine. While the imposition of a fine may be appropriate in the case of a corporate entity convicted of trafficking, the Minister may wish to consider whether a fine constitutes an appropriate deterrent and punishment in cases involving offences by natural persons (including those acting on behalf of a corporate entity). Notably, Head 25 of the Scheme would remove section 3(1) of the 1998 Act, the effect being to generalise the protection granted to adults and children alike. It is nonetheless clear that the maximum sentence for trafficking would remain the same in respect of child trafficking – life imprisonment as compared with 14 years for adult trafficking.

Recommendations:

- **The Commission notes that the Scheme does not define what constitutes a position of authority on the part of a persons accused of a trafficking offence. The Commission suggests that the Minister might consider of such a definition is necessary or appropriate.**
- **To ensure full compliance with international law, the Scheme should make clear that consent is not a necessary element of an offence in circumstances where either a child is the victim of trafficking or, in the case of an adult victim, where any improper means of coercion are present.**

September 1990. The Commission also notes the provisions introduced in the Criminal Law (sexual Offences) Act 1993 which extended criminal liability in relation to prostitution to the clients of prostitutes.

¹⁰⁹ In particular, Article 3 of the Palermo Protocol and Article 4 of the CoE Convention.

- **In the view of the Commission, given the seriousness of offences set out in this Head and the obligations of the State to take measures to prevent such offences, imposition of a fine would not generally constitute an appropriate deterrent and punishment in cases involving offences of trafficking. While the imposition of a fine might be appropriate in the case of a corporate entity convicted of trafficking, the Minister may wish to consider whether a fine constitutes an appropriate deterrent and punishment in cases involving offences by natural persons (including those acting on behalf of a corporate entity).**

4.4 Sexual exploitation of children

4.4.1 Heads 4 – Sale of children for purpose of exploitation

The provisions of Head 4 are substantially consonant with the relevant requirements of the Optional Protocol on the sale of children. Head 4(1) makes reference to a person who “sells or offers to sell to another person or accepts or buys from another person” a child, for the exploitation of the child.¹¹⁰ A potential technical difficulty may arise in connection with the use of the phrase “offers to sell”.¹¹¹ It is likely that any ambiguity in this regard could be remedied by the inclusion of words that define the term ‘offers for sale’ as used in this Act as including conduct that knowingly ‘invites offers for the purchase or sale of’ or “solicits a person to buy or sell...”

More significantly, the offences established by this Head are restricted only to the sale of children. In the view of the Commission, the sale or attempted sale of any person for the purpose of exploitation involves the commodification of that person, contrary, in particular, to international measures on slavery and servitude cited. While children clearly require special protection, the Commission believes that practices involving the sale of adults of the purpose of exploitation should similarly be proscribed. This would clearly address any lacunae arising from *CC v. Ireland*.

¹¹⁰ In this context, some separate attention may need to be directed to practices relating to adoption. Although the Adoption Acts 1952-1998 (specifically, section 42 of the Adoption Act, 1952 and section 1 of the Adoption Act, 1991) ban the payment of consideration in return for the adoption of a child, the possibility arises that exorbitant administrative fees and other indirect fees, far exceeding the true cost of administration, may be charged with a view effectively to making a profit from the sale of a child for the purpose of adoption. Although this practice would not fall within the remit of this Head (unless an intention existed to sexually exploit the child) it is suggested that this matter may need to be revisited in another context.

¹¹¹ See the well known case of *Fisher v. Bell* [1961] 1 QB 394. See also *Minister for Industry and Commerce v. Pim*, [1966] I.R. 154. See also *Pharmaceutical Society of Great Britain v. Boots Chemists* [1953] 1 All E.R. 482. See generally. Robert Clark, *Contract Law in Ireland*, 5th ed., (Dublin: Thomson Round Hall, 2004) pp. 7-10

Recommendations:

- **The Commission queries whether the offences established by this Head should be restricted only to the sale of children. The sale or attempted sale of any person for the purpose of exploitation involves the commodification of that person, contrary to international measures on slavery and servitude. While children clearly require special protection, the Commission believes that practices involving the sale of adults of the purpose of exploitation should similarly be proscribed.**

4.4.2 Head 5 – Soliciting and paying to sexually exploit a child

Head 5 criminalises certain actions connected to the sexual exploitation of children. In particular, this Head makes it an offence to solicit or importune a child, or to pay, offer or promise to pay or attempt to pay a child or another person for the purpose of the sexual exploitation by that person or any person of a child. A person who accepts or agrees to accept such consideration is also guilty of an offence.

The offence of soliciting or importuning a child under this Head does not require that it be done as a prelude with the prostitution of a child. Although the Head makes it an offence to pay, offer or promise to pay, or provide other consideration for the sexual exploitation of the child, Head 5(1)(a) clearly makes it an offence to solicit or importune whether or not it is intended that consideration will issue in respect of the act of sexual exploitation. In other words, an offence may arise whether or not the person soliciting or importuning the child offers or intends to offer any financial advantage

The fact that the victim is a child is integral to the offence in question. In line with the decision in *CC v. Ireland*¹¹² (concerning the defence of honest mistake in relation to the age of a child), it is a defence to proceedings to prove that the accused honestly believed that the victim was aged 18 or over. The Commission notes here that the offence of solicitation of children for sexual purposes, introduced by the Criminal Law (Sexual Offences) (Amendment) Act, 2007 covers much of the same ground.

4.4.3 Head 6 – Organisation of sexual exploitation of children

Head 6 concerns a variety of acts involving the exploitation of children for sexual purposes. These include:

- Controlling or directing the activities of a child for the purpose of that child's sexual exploitation;
- Organising the sexual exploitation of children by controlling or directing the activities of more than one child for that purpose;
- Compelling, coercing or recruiting a child for that purpose;
- Arranging or facilitating such exploitation or making gains therefrom;
- Causing or inciting a child to become involved in sexually exploitative activity.

¹¹² [2006] IESC 33.

These new offences could potentially be very significant, particularly in the absence of a specific offence of child prostitution in Irish law.

An attempt to do any of the above is also an offence. However, given the seriousness of the offences involved and the difficulty which may often be encountered in prosecuting offences where vulnerable children and the victims, the Commission would question whether it should not be open to a court to apply the same penalty for an attempt as for commission of an offence under this Head.

Recommendations:

- **Given the seriousness of the offences covered in Head 6 relating to the organisation of the sexual exploitation of children and the difficulty which may often be encountered in prosecuting offences where vulnerable children and the victims, the Commission would question whether it should not be open to a court to apply the same penalty for an attempt as for commission of an offence under this Head.**

4.5 Protection of 17 year old children

Heads 7, 15, 17 and 23 address a unique category of children, those aged 17. Such children are not subject to the Criminal Law (Sexual Offences Act) 2006, 17 being the age of consent for sexual acts, as defined by the 2006 Act. Head 7 attempts to criminalise sexual acts involving those aged 17 in circumstances where either money or some other form of remuneration or consideration is given by a person or on behalf of that person in exchange for the child engaging in a sexual act, or where the person abuses a recognised position or trust authority or influence over the child.

This Head addresses a particular vulnerability linked to the fact that though these are minors, they are nonetheless competent to engage in sexual activity and may thus be rendered more ‘attractive’ to persons wishing to exploit them and wishing to minimise possible legal liability in doing so. In extending protection from these particular types of sexual exploitation to 17 year old children, these measures are broadly consonant with the requirements of the UN Convention on the Rights of the Child, and in particular Article 32 and 34 thereof.

Nonetheless, a number of considerations arise. First, Head 7 may benefit from a more thorough and precise definition of the phrase “recognised position of trust, authority or influence over the child” a formula that may be susceptible to varying interpretations.

A more serious concern arises in relation to the definition of a “sexual act” for these purposes. The Criminal Law (Sexual Offences) Act 2006 defines a sexual act, for the purposes of sections 2 and 3 of that Act, as

- “(a) an act consisting of
 - (i) sexual intercourse, or
 - (ii) buggerybetween persons who are not married to each, other, or

(b) an act described in section 3(1) or 4(1) of the Act of 1990”.

Section 3(1) of the ‘Act of 1990’ – namely the Criminal Law (Rape) Act 1990 - concerns the offence of “aggravated sexual assault”, that is, “a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted.” Section 4(1) concerns acts involving “the penetration (however slight) of the anus or mouth by the penis or the penetration (however slight) of the vagina by any object held or manipulated by another person.”

The definition of a ‘sexual act’ thus potentially excludes a number of acts involving sexual intimacy with a minor aged 15 or over, including 17 year olds, where the minor consents to such acts. Although such conduct may constitute a sexual assault, consent is a defence to a charge of assault where the alleged victim is aged 15 or over and consents to the acts in question. The definition of a sexual act for the purposes of the 2006 Act excludes, in particular, consensual acts of manual genital contact (masturbation and mutual masturbation) and oral penetration of the vagina, where the minor is aged 15 or over. The 2006 Act also criminalises an act whereby oral sex is performed on a 15 year old male in circumstances where a similar act performed on a similarly aged female would not be an offence, in breach of the requirements of gender equality.¹¹³ The definition of sexual act would appear, moreover, to exclude most forms of same-sex sexual activity involving females, a conclusion compounding the view that these provisions may be in breach of gender equality requirements.

Additionally, in defining a ‘sexual act’ for the purpose of the 2006 Act, the Oireachtas decriminalised several sexual acts between males aged 15 and over falling short of penetrative sexual activity, which previously applied under section 4 of the Criminal Law (Sexual Offences) Act, 1993. This point was raised in the Dáil during the debates on the 2006 Act,¹¹⁴ and has also been addressed in the Oireachtas Joint Committee on Child Protection’s Report on Child Protection (2006).¹¹⁵ It is of course, important to note that Section 4 of the 1993 Act applied only to acts between males, and thus was clearly contrary to international jurisprudence banning discrimination on the basis of sexual orientation.¹¹⁶ Nonetheless, the general point may be made that significant legal lacunae

¹¹³ The 1990 Act defines rape for the purpose of section 4 of that Act as including (*inter alia*) penetration of the vagina by any object held or manipulated by the person, apparently excluding penetration by animate parts of the body.

¹¹⁴ Deputy Brendan Howlin T.D. in the course of the Dáil debates preceding the enactment of the Criminal Law (Sexual Offences) Act 2006, 621 Dáil Debates 32 (2 June, 2006), observed that if enacted, the 2006 Act would decriminalise acts previously banned under section 4 of the Criminal Law (Sexual Offences) Act, 1993, involving gross indecency between two males, one of whom was under the age of 17 but aged 15 or over.

¹¹⁵ Joint Committee on Child Protection (2006) at 4.6.7-4.6.12

¹¹⁶ See for instance the judgments of the European Court of Human Rights in *Sutherland v. UK* App. 25186/94, Judgment of 27 March 2001, *Da Silva Mouta v. Portugal* (1999)

exist in relation to certain sexual acts with children aged 15 or over, at least where consent is present. While such acts may currently constitute sexual assault under section 2 of the Criminal Law (Rape) (Amendment) Act, 1990 and the defence of consent to sexual assault is excluded in cases where the minor is aged under 15,¹¹⁷ consent negates the offence of sexual assault where the party involved is aged 15 or over.

In this regard, the recommendation of the Law Reform Commission, recently endorsed by the Joint Committee on Child Protection in its 2006 report, is worthy of note. The Commission in its 1990 *Report on Child Sexual Abuse*¹¹⁸ recommended the creation of an offence of 'child sexual abuse' which would criminalise conduct including intentional touching of a child for the purpose of sexual arousal or sexual gratification, intentional masturbation in the presence of the child, intentional exposure of sexual organs or exposure to a sexual act, and other forms of sexual exploitation. The Law Reform Commission in proposing a general offence 'child sexual abuse' argued that one of the main benefits of such an offence was that it would capture instances of an adult maintaining an abusive relationship with a child over a period of time without the evidential and other difficulties associated with trying to balance the right of the complainant to give their evidence in full, and the due process rights of the accused to be faced with a reasonable number of counts only and to limit the evidence to matters specified in the Indictment. In the present context, the Commission believes that the Law Reform Commission proposals may still have much merit.

The maximum sentence for an offence under Head 7 is three years imprisonment, two years for an attempt. Given the serious nature of the activities involved – extracting sexual acts with a 17 year old through the payment of consideration or abuse of trust – it may be appropriate considering whether the maximum penalties set constitute an appropriate deterrent and penalty. Again, it may also be questioned whether an attempt should carry the same penalty as commission of an offence in this context.

In this context, it is also worth noting the terms of Heads 15 and 17 of the Scheme. Both increase the upper end of the zone of protection for children from under 17 to under 18 years of age. Head 15 amends the Child Trafficking and Pornography Act, 1998, changing the definition of a child from a person under the age of 17 years to a person under the age of 18 years. This effectively extends the protection provided by that Act in cases where the children involved are of the age of consent but still minors.¹¹⁹ Head 17 amends the definition of a child for the purpose of the Sexual Offence (Jurisdiction) Act,

31 E.H.R.R. 47 and *Karner v. Austria* Application No. 40016/98, 24 July 2003. See also the communication of the Human Rights Committee to the International Convention on Civil and Political rights in *Young v. Australia* Communication No. 941/2000, 6 August 2003.

¹¹⁷ Criminal Law (Amendment) Act 1935, section 14.

¹¹⁸ LRC 32-1990, at p 40.

¹¹⁹ It also closes up a potential loophole in the Act of 1998 in criminalising an attempt to commit a variety of offences involving the production and dissemination of child pornography.

1996, increasing the age limit upwards from under 17 to under 18 years of age. It also amends section 8 of the Act of 1996, an unusual provision that permits a court, in determining whether a person is or was aged under 17 years for the purpose of the Act, to have regard to “a person’s physical appearance or attributes.” While section 8 of the 1996 Act is beyond the scope of the current review, the Commission is concerned that that a conviction in respect of an offence against a child should be based on more objective, concrete – preferably documentary - proof of the child’s age. While the Commission acknowledges that there may often be practical difficulty in ascertaining a person’s age in the context of trafficking, it is arguable that a conviction based on the victim’s appearance, which may not be a reliable guide to the victim’s age, would be unsafe.

Head 23 is also relevant in this context. The effect of this proposed amendment is to raise the upper limit of protection for children under Section 249 of the Children Act 2001 from the age of 16 (under 17 years of age) to the age of 17 (under 18 years of age). Section 249 of the Children Act 2001 provides that a person is guilty of an offence if, having the custody, charge or care of a child, he or she causes or encourages unlawful sexual intercourse or buggery with the child or causes or encourages the seduction or prostitution of, or a sexual assault on, the child. The maximum penalty on conviction is a fine of £25,000 [€31,750] or a term of imprisonment of up to 10 years or both. A person may be deemed to have caused or encouraged activity in breach of this section where they have “knowingly allowed the child to consort with, or to enter or continue in the employment of, any prostitute or keeper of a brothel”. While the provisions of section 249 endeavour to promote this aim, the exclusion of 17 year old children creates a lacuna that Head 23 ably addresses. Nonetheless, for the sake of completeness, it may be that the Schedule to the Children Act, 2001 will also need to be amended to include the 2006 Act.

Heads 7, 15, 17 and 23 effectively create a zone of protection in respect of 17 year old children. They create an interesting category of sexually protected children who while legally free to engage in sexual activity may nonetheless be victims of certain sexual offences. In this context, the potential exists for confusion and uncertainty as regards the application of the law; as such, some awareness-raising may be required.

Recommendations:

- **Heads 7, 15, 17 and 23 effectively create a zone of protection in respect of 17 year old children. They create a category of sexually protected children who, while legally free to engage in sexual activity, may nonetheless be victims of certain sexual offences. In this context, the potential exists for confusion and uncertainty as regards the application of the law and some awareness-raising may be required, particularly in relation to members of the Garda Síochána and social services.**
- **Head 7 may benefit from a more thorough and precise definition of the phrase “recognised position of trust, authority or influence over the child” a formula that may be susceptible to varying interpretations.**

- **The definition of a ‘sexual act’ potentially excludes a number of acts involving sexual intimacy with a minor aged 15 or over, including 17 year olds, where the minor consents to such acts. The Commission recommends that more consideration be given to ensuring that all potential forms of sexual exploitation of minors is clearly prohibited by the Bill.**
- **The limited definition of sexual act may also have a problematic gender equality dimension in that certain acts performed with male children of a certain age would constitute offences, whereas equivalent acts performed with female children would not.**
- **In the context of this category of sexual offences, the Human Rights Commission recalls the recommendation of the Law Reform Commission in its 1990 *Report on Child Sexual Abuse*, recently endorsed by the Joint Committee on Child Protection in its 2006 report. In that report the Law Reform Commission recommended the creation of an offence of ‘child sexual abuse’ which would criminalise a range of conduct covering forms of sexual exploitation including acts that would not otherwise constitute a sexual offence.**
- **The maximum sentence for an offence under Head 7 is three years imprisonment, two years for an attempt. Given the serious nature of the activities involved – extracting sexual acts with a 17 year old through the payment of consideration or abuse of trust – the Minister may wish to consider whether the maximum penalties set constitute an appropriate deterrent and penalty to discharge the State’s obligation to effectively prevent the offences in question. The Minister may also wish to reconsider if an attempt under this Head should carry the same penalty as the commission of an offence.**

4.6 Exposure to sexual acts and images and child ‘grooming’

Head 8 creates a number of sexual offences relating to children, not involving direct sexual contact with the child but serving as a prelude to intended sexual exploitation. Overall, this Head targets various phenomena involving child ‘sexual grooming’. ‘Grooming’ refers to a variety of practices by which a person seeks to gain the trust of and befriend a child as an intentional prelude to, or with a view to facilitating, sexual activity with the child. The purpose of such grooming may be to lower the child’s inhibitions or gain the child’s trust so as to facilitate unrestricted access to the child, and to make it easier discreetly to engage in illegal sexual activity with the child. Notably, a child for the specific purposes of this Head is defined as a person under the age of 17 years, rather than 18.

The Commission notes again here that some of these provisions overlap in part with aspects of the proposed offence of ‘child sexual abuse’ recommended by the Law Reform

Commission in its *Report on Child Sexual Abuse*¹²⁰ and believes that aspects of the Law Reform Commission's recommendations in relation to abuse of a position of authority over a child may be of relevance in this context also.

Head 8(1) makes it an offence for a person, for the purposes of obtaining sexual gratification, to intentionally engage in sexual activity when a child is present or where the child is in a place from which the child can observe the sexual activity. An important element of this offence is that the person engaging in the activity in question must know or believe that the child is aware, or intend that the child should be aware, of such sexual activity. In other words, it is not sufficient that the child be cognisant of the activity: for an offence to arise, the accused must know that a child is watching or intend that a child be watching. Head 8(2) makes similar provision for situations in which a person intentionally causes a child to watch another person engaging in sexual activity, or to look at an image of persons engaged in sexual activity.

Some concern may arise relating to the definition of 'sexual activity' for this purpose.¹²¹ It is arguable that the definition is not sufficiently precise and certain, and thus may be susceptible to a variety of interpretations. Such activity may, by definition, be legal in itself. For example, it is unclear at what point an act becomes sexual in nature or purpose. It may be that the qualifying clauses in relation to intent on the part of the accused and the linking of the definition to the circumstances of the activity, that the application of the Head in practice may be appropriately confined. However, some clarification would be useful in this regard.

Head 8(5) seeks to target persons who meet or travel with the intention of meeting with a child for the purpose of that child's sexual exploitation. The offence in question contains three limbs, all of which must be satisfied to constitute an offence:

- First, the person must intentionally meet with a child, or travel with the intention of doing so on foot of prior communication with the child. The person in question must have communicated with the child on at least two previous occasions. Communication may be by any means, and presumably would include e-mail, instant messaging, or via social networking websites.
- At the time of meeting or travelling to meet a child, the person must intend to do something that would constitute a sexual offence under any enactment.
- The person must not reasonably believe that the person he has communicated with is aged 17 or over.

A number of points should be addressed in this context. Although the state of mind of the accused person is relevant, a clear act is required in this context: that of meeting with,

¹²⁰ LRC-32-1990 at p 44.

¹²¹ Defined in Head 8(7) as "...activity which by its nature may be sexual and because of its circumstances or the purpose of a person in relation to it or both it is sexual."

or travelling with a view to meeting the child. This, coupled with the intention to commit a sexual offence, constitutes the offence in question. In this regard, the offence in question is not dissimilar to an offence involving an attempt to commit a crime.

The protective nature of the measure is not in doubt: it is clearly designed to prevent and combat practices that may lead to serious exploitation of children. Nonetheless, some care will be required in establishing the requisite intent to the standard required in criminal trial. A successful conviction will thus require clear and convincing evidence of intent to commit a sexual offence.¹²² In this regard, it is worth noting the terms of the Child Protection Guidelines of the Department of Health and Children and of the Department of Education and Science both warn against acting on ‘suspicions’ that are not supported by evidence. In particular, the fact that a meeting has been arranged, in itself, should not be sufficient on its own to establish intent to commit an offence.

Nonetheless, the concept of “grooming” is novel in Irish criminal law and the Commission urges careful consideration of these proposals as they pass through the legislative process. The Commission would encourage wide consultation with practitioner and interested parties around this Head of the Scheme.

Recommendations:

- **For the offences set out in Head 8 relating to exposing children to sexual activity some concern may arise that the definition of sexual activity is not sufficiently precise and certain, and thus may be susceptible to a variety of interpretations. It is unclear at what point an act becomes sexual in nature or purpose. Some clarification would be useful in this regard.**
- **The concept of “grooming” is novel in Irish criminal law and the Commission urges careful consideration of these proposals as they pass through the legislative process. The Commission would encourage wide consultation with practitioners and interested parties around this Head of the Scheme.**
- **While the targeting of activity that might act as a prelude to the commission of other serious sexual offences is welcome, the Commission believes that great caution will need to be displayed in basing criminal liability around an assessment as to whether an adult had the requisite intention to commit sexual offences with a child.**

¹²² Such evidence may include the possession of pornography or child pornography or the display of such to the child, the secretive context of the meeting and/or the content and tenor of communications prior to the meeting, though none of these factors *per se* may be conclusive of guilt.

4.7 Head 9 - Harassment Orders

Head 9 of the Scheme allows for the imposition of a harassment order, providing some measure of protection to victims of sexual offences including some (though not all) of the offences created by this Scheme. Such orders may be granted where a court is satisfied that there is a reasonable expectation that the convicted offender may harass the victim or any other person or that the victim or any other person has a genuine fear of being contacted or intimidated in any way by the offender such as would cause the victim or another person fear, distress or alarm. If imposed, the order may prevent the offender from doing anything, or going anywhere (as specified in the order) which the court is satisfied would cause the protected party fear, distress or alarm, or which would otherwise constitute intimidation.

Head 9 is restricted to situations in which a person has been found guilty of a sexual offence as defined by section 3 of the Sex Offenders Act 2001. Section 3 embraces a wide range of sexual offences, including rape, sexual assault and defilement of a child. By virtue of Head 18(5) of this Scheme, the definition of sexual offence is further extended to include conduct amounting to an offence under Heads, 4,5, 6 and 8 of the Scheme. The definition is also deemed to include an offence under Head 3 but only “insofar as it relates to sexual exploitation of children.”

Two observations may be made. First, the Scheme does not appear to offer any protection to the victims of trafficking for the purposes of labour exploitation. A potential gap arises in relation to certain persons who may be the adult victims of trafficking. The Head is confined to instances where the offence in question is sexual in character.

Second, the Scheme extends protection only to child victims of trafficking and not to adults. While the particularly vulnerable position of children is worthy of special attention, it is unclear why the Head is so confined. In so restricting the application of Head 9, the Scheme arguably fails to make provision for the possibility that the victims of trafficking generally may, as a result of a successful prosecution, be the subject of harassment.

While acknowledging that the general provisions of section 10 of the Non-Fatal Offences Against the Person Act 1997 may offer some protection, it is arguable that the distinction between victims of labour exploitation and sexual exploitation on the one hand, and the distinction between child and adult victims is, at least in this context, without foundation. This is particularly the case given that, while separated children have a statutory right to protection under the Child Care Act 1991, adult victims have no such statutory right to protection by or of the State. Arguably, this gap conflicts with Article 28 of the CoE Convention, which requires States Party to adopt measures to protect victims from “potential retaliation and intimidation”.

The Scheme furthermore does not appear to require that the Garda Síochána be informed of any such order. Head 9(7) of the Scheme stipulates that in cases of variation or discharge of an order the Garda Síochána must be notified of such variation or discharge.

While a person convicted of an offence attracting the provisions of Head 9 would be subject independently of this head to the provisions of the Sex Offenders Act 2001, there is nothing in the Scheme or the latter Act requiring that the Gardaí be notified of the existence of the initial Order, notwithstanding the obvious implications for law enforcement. By contrast, section 11(1)(d) and 11(2)(d) of the Domestic Violence Act, 1996 require notification of safety, protection and barring orders to the member of the Garda Síochána in charge of the Garda station responsible for the area in which the object of protection resides or for the place in relation to which the relevant order was made.

A further concern arises in respect of the Head 9(2) and (6). Although the Commission welcomes the facility afforded to victims to apply for such an order, the Scheme does not address the capacity of victims to raise such concerns. In particular, it is unclear whether, for the purpose of invoking this right, the victim is entitled to access legal aid. Given the fact that the victim may be a child, it is similarly unclear whether and to what extent the child may be represented by a *guardian ad litem*, and whether adequate resources exist for such representation. Head 9(6) moreover does not make any provision for the notification of a victim in cases where the offender applies for discharge of the harassment order.

Recommendations

- **While the proposals to protect the victims of trafficking from subsequent harassment are welcome, potential gaps arise in relation to certain persons who may be the adult victims of trafficking and in relation to adults and children who may be the victims of labour exploitation. While the particularly vulnerable position of children is worthy of special attention, it is unclear why the Head is so confined. The Commission believes that the distinctions between child and adult victims and between victims of labour and sexual exploitation are, at least in this context, without foundation.**
- **The Scheme furthermore does not appear to require that the Garda Síochána be informed of any such order. By contrast, section 11(1)(d) and 11(2)(d) of the Domestic Violence Act 1996 require notification of safety, protection and barring orders to the member of the Garda Síochána. The Commission believes that such notification obligations would be of great practical assistance in making such orders effective.**
- **A further concern arises in relation to the capacity of victims to access the remedies set out under this Head. In particular, it is unclear whether a victim will be entitled to access legal aid. Given the fact that the victim may be a child, it is similarly unclear whether and to what extent the child may be represented by a *guardian ad litem*, and whether adequate resources exist for such representation.**
- **The Commission also notes with concern that Head 9(6) does not make any provision for the notification of a victim in cases where the offender applies for discharge of the harassment order.**

4.8 Head 10 - Jurisdictional matters

Given the potentially international nature of offences involving trafficking and the exploitation of children, the extension of the remit of the Scheme (and other Acts) to offences committed outside the Irish jurisdiction is prudent and welcome.¹²³ In particular, these measures are consistent with the principles contained in Article 4 of the Optional Protocol on the Sale of Children, which require extra-territorial application where either the offender or the victim is a national of the relevant state, or where the offender is habitually resident therein.¹²⁴

Head 10 identifies a number of situations in which the extra-territorial application of Heads 3-9 (*inter alia*) will be permitted.¹²⁵ These provisions broadly embrace acts occurring outside the State. The Scheme applies, for instance, where the act is committed for the benefit of a legal person established within the State, or where it is committed by a citizen of Ireland or a person habitually resident in the State. The Scheme also extends to situations in which the victim is an Irish citizen. Additionally it covers acts occurring on board a ship¹²⁶ or aircraft registered in the State.

The Minister may wish to consider the extension of this provision to protect children who, while not citizens of the State, nonetheless have been habitually resident herein. Article 2 of the Convention on the Rights of the Child pledges that “States Parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction...*”, (emphasis added) a formulation that clearly embraces all children regardless of citizenship. A potential gap in protection may arise, in particular, where a child who has been granted refugee status in the State, is the victim of a sexual offence committed outside the State (though the removal of the child from the State, in itself, would constitute ‘trafficking’ for the purpose of Head 3).

The Commission welcomes the provision in Head 12 eliminating the possibility of double jeopardy in respect of offences prosecuted outside the State. This provides a safeguard

¹²³ The State’s capacity to enact legislation having extra-territorial effects is not in doubt. Article 29.8 of the Constitution (and to a more limited extent Article 3.2) provide for the possibility of extra-territorial application of Irish laws. See also *Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975* [1977] I.R. 129. Several pieces of legislation currently permit the prosecution of offences committed outside the State including the Sexual Offences (Jurisdiction) Act, 1996 and the Criminal Justice (UN Convention Against Torture) Act, 2000.

¹²⁴ Article 4(2). “Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases: (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory; (b) When the victim is a national of that State.”

¹²⁵ This Head also extends extra-territorial application to offences committed under sections 5 and 6 of the Child Trafficking and Pornography Act, 1998, and to a rape offence and sexual assault offence as defined in section 1 of the Criminal Law (Rape) Act, 1981.

¹²⁶ Including any vessel used in navigation – see Head 10(2)

against the prospect of multiple trials of an accused person and is thus consonant with the established principle that no person should be punished twice in respect of the same offence, or re-tried having been already acquitted.

Recommendations

- **Given the potentially international nature of offences involving trafficking and the exploitation of children, the Commission regards the extension of the remit of the Scheme (and other Acts) to offences committed outside the Irish jurisdiction as prudent and most welcome.**
- **The Commission recommends that the application of this provision should be extended to protect children who, while not citizens of the State, nonetheless have been habitually resident herein in line with Article 2 of the Convention on the Rights of the Child. A potential gap in protection may arise, in particular, where a child who has been granted refugee status in the State, is the victim of a sexual offence committed outside the State (though the removal of the child from the State, in itself, would constitute ‘trafficking’ for the purpose of Head 3).**
- **The Commission welcomes the provision in Head 12 eliminating the possibility of double jeopardy in respect of offences prosecuted outside the State.**

4.9 Entry, Search and Seizure

Head 13 provides for the granting of certain powers to the Garda Síochána deemed necessary for the investigation of a crime under the Scheme.¹²⁷ In particular, this Head provides that on the sworn information of a member of the Garda not below the rank of Sergeant, a District Court judge may issue a warrant to search a particular place and any persons found at that place. This may be done only where the District Court judge in question is satisfied that there are reasonable grounds for suspecting that evidence of or relating to an offence under Head 3 to 6, 8 or 9 of the Scheme is to be found at that place.

The Commission has previously observed in its observations on the Criminal Justice Bill 2004 that, as a general point of principle in relation to criminal justice legislation:

“...all legislative proposals to increase the powers of the Garda Síochána should be subject to careful scrutiny in order to ensure that the correct balance is struck between, on the one hand, the rights of everyone in society to have a police service capable of effectively detecting and prosecuting crime and, on the other hand, the rights of the individual to the enjoyment of the full range of his or her human rights and freedoms. A central pillar of human rights law is that any interference with individual rights must be justified by demonstrating that the

¹²⁷ These provisions are similar in many respects to those contained in section 7 of the Child Trafficking and Pornography Act, 1998.

interference is in pursuit of a legitimate aim, and that the interference is proportionate to the achievement of that aim. Furthermore, adequate and effective safeguards should be in place to ensure that the rights of the individual are not interfered with arbitrarily or unjustifiably.”¹²⁸

Given the serious nature of the offences covered by the Scheme, the presence of effective mechanisms for such investigation is undoubtedly important and necessary for the detection and the effective prosecution of crime. Nonetheless, in examining the scope of such measures, regard must be had to the human rights of all persons affected by such investigations, in particular the right inviolability of the dwelling place (guaranteed by Article 40.5 of the Constitution) and the personal right to privacy (secured by Article 40.3 of the Constitution) as well as the provisions of Article 8 of the European Convention on Human Rights. Given the importance of these rights, the Commission welcomes the inclusion in the Scheme of a clear requirement of prior judicial scrutiny as a prerequisite to the issuing of a warrant.¹²⁹ While facilitating the Garda in the investigation of a crime, the requirement of judicial approval provides an important safeguard for the rights of individuals whose person and property may be the subject of such searches.

Such freedoms and rights are, of course, subject to limitations. In particular Article 40(5) of the Constitution as well as Article 8(2) of the ECHR permits interference with such rights but only where this is done “in accordance with the law”. The State must, furthermore, demonstrate that, under Article 8 of the ECHR, such intrusion is “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Nonetheless, the possibility arises that possible victims and suspected traffickers for labour or sexual exploitation may be living in the same dwelling or adjacent to a private home on private property. Thus in applying the provisions of Head 13(2) and in particular Head 13(2)(b) particular care should be taken to ensure that Gardaí, where practicable, act with sensitivity towards any person who appears to be a victim of trafficking or of any offence under the Scheme. Given the vulnerable situation of such victims, and in particular the possibility that such persons may be the victims of sexual exploitation, it is arguable that the power to search such persons may need to be pursued with some delicacy. In particular, it is arguable that individuals who may have been the

¹²⁸ Irish Human Rights Commission, (2004) *Observations on the Criminal Justice Bill 2004* (Dublin: IHRC) 3 November 2004 at p. 1. See also Préfontaine, Daniel, (2001) “Implementing International Standards in Search and Seizure: Striking the Balance between Enforcing the Law and Respecting the Rights of the Individual” (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy).

¹²⁹ In its *Observations on the Criminal Justice Bill, 2004* (3 November 2004) the Commission underlined the importance of judicial oversight in the granting of search warrants, Irish Human Rights Commission, (2004) *Observations on the Criminal Justice Bill 2004*, (Dublin: IHRC) at p. 2.

victims of sexual exploitation may be further traumatised by an intrusive search. Given the nuances associated with the concept of trafficking, it may not be immediately obvious on an initial search of a place that a person is a victim of trafficking. Additionally, it may not be clear whether persons found in a place are children for the purposes of the Act. As such, some discretion may need to be left to An Garda Síochána.

In applying the provisions of Head 13(4), consideration should be given to the inclusion of a clause requiring the Garda and the Court to have regard to certain matters. Such matters might include:

- The possibility that some of those found in or in the vicinity of the place specified in the information may be the victims of trafficking and/or of any other offence committed under the proposed Scheme;
- The possibility that some of those found in or in the vicinity of the place may be children;
- The possibility that such persons may have poor or no English;
- The possibility that such persons may not recognise the persons conducting the search to be police officers (if the raid is plain clothes);
- The possibility that the persons may be concerned that they will be accused of a crime themselves (*e.g.* prostitution or illegal immigration);
- The possibility that the persons may be concerned that they will be persecuted or otherwise victimised if returned to their place of origin.

Recommendations:

- **In applying the provisions of Head 13(2), and in particular Head 13(2)(b), particular care should be taken to ensure that gardaí, where practicable, act with sensitivity towards any person who appears to be a victim of trafficking or of any offence under the Scheme.**
- **In applying the provisions of Head 13(4), consideration should be given to the inclusion of a clause requiring the Garda and the Court to have regard to certain matters. The matters to be considered in this context could be set out in the Bill or in secondary legislation.**

4.10 Head 14 - Corporate liability

Head 14 appears to address the concerns raised in Articles 4 and 5 of the EU Framework Decision on Trafficking. Head 14(1) suggests first that a body corporate may be accused of an offence under the Scheme. It seeks further to pierce the corporate veil by rendering criminally liable any person who was a director, manager, secretary or other officer of the company (or who had purported to act in such capacity) where those persons were involved in the commission of the offence. In particular, a director or other officer may be liable to prosecution where the offence was committed with that person's consent or the connivance of any person, or where the act is attributable to any neglect on the part of that person. A prosecution may be taken against such a natural person regardless of whether proceedings have been taken against a company.

Recommendations:

- **This measure may be further enhanced by the inclusion of the corporate sanctions suggested by Article 5 of the Framework Decision on Trafficking as well as Article 7 of the EU Framework Decision on Sexual Exploitation, (discussed above at 3.3.3).**

4.11 Head 16 - Protection for witnesses

Head 16 extends the provisions of Part III of the Criminal Evidence Act 1992 to cover offences committed under Heads 3, 4, 6, 8 and 9 of this Scheme (though not sections 5 or 7.) Section 13 of the 1992 Act allows evidence to be given by a person other than the accused through a live video link, thus relieving potentially vulnerable witnesses from the requirement to give evidence in open court. This may be done in all cases where the victim is aged 17 or under, unless the court sees good reason to the contrary, and, with the leave of the court, where the victim is aged 17 or over. Section 14 permits persons under the age of 17 to give evidence through an intermediary. Section 16 of the Act, moreover, allows video-recorded evidence to be admitted in appropriate cases.

In light of the requirements contained in the international instruments noted above, these protective measures seem prudent. Nonetheless, in assessing these measures, the Commission must have regard to the right of the accused person to prepare and mount an effective defence. In particular, an essential aspect of fair procedures in criminal trials requires that the accused person be allowed to test the evidence presented by any witness. In *Donnelly v. Ireland*,¹³⁰ however, this right was deemed not to have been unfairly qualified by the specific terms of the Criminal Evidence Act 1992. It appears that, provided the accused is still afforded an opportunity to challenge evidence presented by an alleged victim, the presence of mediating factors such as a video link does not infringe the accused persons' right to a fair trial.

A potential gap arises in relation to evidence given in proceedings under Head 5 or Head 7 of the Scheme, the protective scope of the 1992 Act not extending to the trial of the offences contained in those Heads. It is unclear why this should be so. Arguably, this lacuna may lead to differential treatment of children in substantially similar circumstances. In particular, it appears to qualify the protection offered to children who are aged 17. It is unclear why this should be the case.

Recommendations:

- **The protective measures proposed here seem appropriate to the trial of offences under the General Scheme, given the inherent vulnerability of victims of trafficking. However, these measures are not extended to the trial of the offences contained in Heads 5 and 7 of the General Scheme. This lacuna appears to qualify the protection offered to children who are aged 17. The Commission recommends that this exclusion should be removed.**

¹³⁰ [1998] 1 I.R. 325.

4.12 Amendment of the Sex Offenders Act 2001

Heads 18-20 of the Scheme propose certain amendments to the Sex Offenders Act 2001.

4.12.1 Changes to scope of Sex Offenders Act 2001

Head 18 makes miscellaneous amendments to the 2001 Act. Head 18(1) proposes that offences to which section 3(2) of the 2001 Act applies¹³¹ will not become a sexual offence for the purpose of the Act unless and until a sentence involving the deprivation of liberty has been handed down in respect of the offence. This would appear to limit the application of the Act of 2001 in cases where a non-custodial sentence only is handed down.

Head 18(2) extends the remit of the Sex Offenders Act 2001 to include the offence of sexual or indecent assault of a person aged 17 or over who is mentally impaired, as defined by section 5(5) of the Criminal Law (Sexual Offences) Act, 1993.¹³² Head 18(3) increases the penalties applicable for breach of the notification requirements of the Act,¹³³ and in particular introduces the prospect of trial on indictment for breach.

Head 18(5) extends the definition of a ‘sexual offence’ in the 2001 Act to include offences under Heads 4, 5, 6 and 8 of the Scheme and Head 3 thereof, though only to the extent that the offence of trafficking is for the purpose of the sexual exploitation of children. The effect of Head 18(5) is thus to make persons who are convicted of such offences subject to the requirement of notification under the Act.

4.12.2 Assessment of risk posed by sex offenders

Head 19 proposes to insert a new provision, section 14A, into the Sex Offenders Act 2001. The purpose of this provision is to provide a statutory basis for the management of risks posed by sex offenders registered under the Act. It requires the Commissioner of An Garda Síochána and the Director of the Probation and Welfare Service (defined when acting together as the “Responsible Persons”) to establish arrangements to assess and manage the risks posed by any offender to whom the Act applies. The purpose of such

¹³¹ Namely, sexual assault, indecent assault, incest by males, incest by females of or over the age of 17, an attempt to commit any of these offences, an offence involving aiding, abetting, counseling, procuring or inciting the commission of any of these offences or an offence involving conspiracy to commit any of these offences.

¹³² Section 5(5) of the Act of 1993 defines “mentally impaired” as “...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.”

¹³³ From a fine of £1,500 (€1,950) and/or a maximum of 12 months imprisonment on summary conviction to €3,000 a maximum of 12 months imprisonment or both on summary conviction, and, additionally, on indictment, a fine not exceeding €10,000 or a term of imprisonment not exceeding 5 years (though the Scheme appears to exclude the possibility of both a fine and a term of imprisonment on indictment).

arrangements is to “protect the public from such offenders” and “for the investigation, where appropriate, of sexual offences”. The Responsible Persons are required to share with each other any relevant information with a view to facilitating the assessment and management of offenders. There are certain restrictions on the sharing of information with other persons and bodies in circumstances outside the scope of this section, though section 14A(5) allows for the exchange and sharing of information with the authorities of a jurisdiction to which the offender travels or intends to travel.

While these measures appear prudent in many respects, the terms of the proposed section 14A pose a number of potential difficulties. It is unclear, first, whether the Responsible Persons are afforded any discretion in choosing which offenders to select for assessment, and, if so, how such a determination would be made. Nor is it clear, once an assessment has been made, what consequences will issue for a particular offender. In particular, clarity is required in relation to the references to the “management” of risks posed by an offender, and what such management would involve. It is arguably implicit that if the Responsible Persons decided that a risk was posed by an offender, they would be obliged to act, though it is unclear what this would entail.

The reference in Section 14A(2) to the “investigation of sexual offences” also poses concerns. Arguably this provision creates a category of persons who are deemed by law automatically to be “suspect” in cases where sexual offences have been committed. Although the statistical evidence of recidivism amongst sexual offenders may be compelling and it may be prudent to take steps to monitor the whereabouts of sex offenders, this may not in itself justify an automatic categorisation of a sex offender as “suspect”.¹³⁴ On the one hand convicted persons can justifiably be exposed to some restrictions over and beyond any punishment of crimes committed. As McKechnie J. noted in *Gilligan v. Governor of Portlaoise Prison*,¹³⁵ “...a convicted person differs from a person untouched by the legal system”. Indeed, the decision in *Enright v. Ireland*¹³⁶ suggests that, like the notification requirements of the 2001 Act, these measures are not intended as punitive but rather are regulatory in nature, and as such are open to the State to impose on offenders.

Nonetheless, any management of offender risk must be carried out in a proportionate manner. The Constitution generally leans against measures of preventative justice. In taking steps under this Head, the Responsible Persons should be mindful of the principle that, in respect of any further offence, a person is presumed innocent until proven guilty of such further offence.¹³⁷ In this regard, caution is required in the investigation of

¹³⁴ *Cf. King v. Attorney General* [1981] I.R. 233.

¹³⁵ Unreported, High Court, April 12, 2001

¹³⁶ [2003] 2 I.R. 321.

¹³⁷ *O’Leary v. Attorney General* [1993] 1 I.R. 102, *Hardy v. Ireland* [1994] 2 I.R. 550. Generally, where a person is accused of a crime, evidence as to the accused’s criminal record is not admissible prior to conviction, though it may be considered in sentencing: see *King v. Attorney General* [1981] I.R. 233, and *Director of Public Prosecutions v. Keogh* [1998] 4 I.R. 416. This is the case even where such evidence is introduced solely

further offences where the identity of the offender is unclear. One also needs to be mindful of the existence of genuine community sensitivities around the subject of sex offences, especially against children. In particular the Responsible Persons should take steps to avoid prompting ‘vigilantism’ against persons who have complied with the requirements of the Sex Offenders Act. Any steps to manage the offender would also need to have regard to the right to privacy rights of family members of sex offenders as highlighted in a recent decision of the High Court.¹³⁸

The Commission is also concerned about proposals to allow the sharing of information with other States. Any such proposals would have the potential to seriously compromise the rights of individuals and would need to be tightly regulated. The Commission recalls here that it has made detailed submissions to the Minister on the human rights implications of international sharing of data in its observations on the Criminal Justice (International Co-operation) Bill.

Recommendations:

- **The Commission believes that clarity is required in relation to the references to the “management” of risks posed by an offender, and what such management would involve. As presently drafted, it is arguably implicit that if the Responsible Persons decided that a risk was posed by an offender, they would be obliged to act, though it is unclear what this would entail.**
- **The reference in Section 14A(2) to the “investigation of sexual offences”, arguably creates a category of persons who are deemed by law automatically to be “suspect” in cases where sexual offences have been committed. Although the statistical evidence of recidivism amongst sexual offenders may be compelling, careful safeguards must be put in place in relation to the use of information about previous convictions within the criminal justice system. Moreover, particular attention may need to be paid to ensuring that information about a person’s previous offences does not lead to vigilanteism.**
- **The Commission is also concerned about proposals to allow the sharing of information with other States. Any such proposals would have the potential to seriously compromise the rights of individuals and would need to be tightly regulated. The Commission recalls here that it has made detailed submissions to the Minister on the human rights implications of international sharing of data in its observations on the Criminal Justice (International Co-operation) Bill.**

for the purpose of providing reasonable grounds for arrest as opposed to establishing the commission of further offences. *Keogh*, however, did not rule out the possibility that, in appropriate cases, the legislature might modify this rule by allowing evidence to be adduced, though Kelly J. expressly reserved judgment on whether statutory intervention of this nature would be constitutional.

¹³⁸ High Court, unreported, Quirke J., January 17, 2007. See “€70,000 for family in ruling against Garda” *Irish Times*, January 18, 2007.

4.12.3 Prohibition Orders

Head 20 of the Bill proposes certain additional provisions for inclusion in the Sex Offenders Act 2001, providing for a prohibition on working with children and mentally impaired persons. The Head may be applied to any person convicted of an offence to which the Act of 2001 applies. The Head provides that a number of new sections would be added to the 2001 Act.

A proposed new section 39 of the 2001 Act would require the courts, in determining the sentence to be imposed on a sex offender in respect of a sexual offence, to consider whether a condition should be added prohibiting the offender from engaging in particular types of work. The hallmark of such work is that “a necessary or regular part” of the role consists mainly of “the offender having unsupervised access to or, contact with a child or children or a mentally impaired person or persons.”

The proposed new section 40 of the 2001 Act would allow the Court, if it considers it is in the best interests of children or mentally impaired persons to do so, to impose such a condition for a specified duration.¹³⁹ In making its decision, the court should have regard to “the need to protect children and mentally impaired persons from serious harm from the offender, and the need to prevent the commission by the offender of further sexual offences.” The specified duration of the order is at the discretion of the judge, though the period of imprisonment and the period of the prohibition should not, in aggregate, exceed the maximum term of imprisonment that may be imposed in respect of the particular offence. Section 41 requires that the court explain to the offender the effects of the condition and the possible consequences of failure to comply therewith (set out in section 43).¹⁴⁰

The net effect of these provisions would be to allow a judge to prevent a person from working in the defined field for a period post-release. The sections proposed by Head 20 are discretionary rather than mandatory in nature and thus differ from those considered in *Cox v. Ireland* (see section 2.3 above). Under the proposals, judges retain the right to determine whether the precise circumstances of the case require such a prohibition. In making a decision, judges are entitled to receive and hear evidence or submissions from any person concerned, including, presumably, the offender and his or her victim(s).

A question arises regarding the application of these new sections in respect of offences committed before the Scheme comes into force. Article 7 of the European Convention on Human Rights prohibits the imposition of a penalty heavier than that applicable at the time the criminal offence was committed. The question thus arises whether the

¹³⁹ There is an apparent drafting error in this section. It makes reference to a prohibition order contained in subhead 1 of section 21 of the Act. Section 21, however, makes reference to the standard of proof – no prohibition is mentioned. This reference possibly should be to section 39(1), though the point remains unclear.

¹⁴⁰ A breach of this condition is a criminal offence attracting penalties, on summary conviction, of up to a €3,000 fine or imprisonment for a maximum of 12 months or both, or on indictment, a penalty of up to €15,000 or up to five years imprisonment or both.

prohibition introduced in these sections constitutes a ‘penalty’ within the meaning of Article 7 of the Convention. In *Welch v. UK*¹⁴¹ the European Court of Human Rights set out a number of considerations pertinent to the determination of whether a course of action constitutes a penalty:

- Whether the measure is imposed following conviction for a criminal offence;
- The nature and purpose of the measure in question;
- The procedures involved;
- The severity of the sanction.

The prohibition order is explicitly referred to as a ‘sentence’, a factor that leans heavily in favour of the conclusion that this order is indeed intended as a penalty. The fact that the penalty may be described more appropriately as a secondary rather than primary punishment should not detract from this conclusion. Therefore the Commission presumes that orders under this Head will not be imposed in relation to offences committed before enactment of this legislation. The Commission recommends that provision be included in the Bill to this effect.

Recommendations

- **In general the standard by which any such restrictions on individual rights must be measured is whether the restrictions are “necessary in a democratic society”. In this regard the Commission recommends that the proposals for prohibition orders should provide that they apply only where there is a clear and genuine apprehension that the offender might commit future offences against children.**
- **The Commission believes that a point of clarification is needed in relation to the application of these new sections in respect of offences committed before the Scheme comes into force. The prohibition order is explicitly referred to as a ‘sentence’, and must be regarded as a penalty for the purposes of the European Convention on Human Rights. Therefore the Commission presumes that orders under this Head will not be imposed in relation to offences committed before enactment of this legislation**

4.13 Other miscellaneous provisions

Head 21 supplements the terms of the Criminal Law (Incest Proceedings) Act 1995. Section 3 of the Act prohibits the publication or broadcast of information identifying a person accused of an offence under the Punishment of Incest Act 1908, or to identify any other person in respect of whom an offence is alleged to have been committed. The proposed Section 3A relates to situations where a person is charged with both an offence under the 1908 Act and a sexual assault offence (as defined by section 1(1) of the Criminal Law (Rape) Act 1981). In cases where the incest charge is not proceeded with,

¹⁴¹ Judgment of 9 February 1993, Series A, No. 307-A.

or the accused found not guilty of incest, section 3A permits the anonymity requirements of the 1981 Act to apply regardless. Nonetheless, the Court is entitled in such circumstances to lift the anonymity requirements in respect of the accused person if (a) the anonymity requirements relating to the complainant have been lifted; or (b) the accused person is found guilty of a sexual assault offence.

Head 24 provides for the privacy of proceedings and the protection of the identity of complainants in respect of the trafficking provisions of the Scheme. It does so by extending the provisions of sections 6 and 7 of the Criminal Law (Rape) Act 1981 (as amended) to include the offence of trafficking.¹⁴² The Commission welcomes the inclusion of provisions seeking to guarantee the confidentiality of proceedings in respect of offences involving trafficking. These provisions comply with Article 6(1) of the Palermo Protocol requiring each State party, to the extent possible under its domestic law, to “protect the privacy and identity of victims of trafficking in persons, including, *inter alia* by making legal proceedings to such trafficking confidential.” Although the scope of Head 24 is confined to offences of trafficking under the Scheme, it is worth noting that the provisions of the Children Act 2001 offer similar protection to child victims, including victims of an offence under Heads 4,5,6 and 8 of the Scheme.¹⁴³ This is in line with Article 8(e) of the Optional Protocol on the Sale of Children¹⁴⁴

Recommendations

- **The Commission welcomes the inclusion of provisions seeking to guarantee the confidentiality of proceedings in respect of offences involving trafficking. These provisions comply with Article 6(1) of the Palermo Protocol requiring each State party, to the extent possible under its domestic law, to “protect the privacy and identity of victims of trafficking in persons, including, *inter alia* by making legal proceedings to such trafficking confidential.”**

¹⁴² Though in doing so, a potential drafting problem arises: the terms of the Scheme require the amendment of the phrase “sexual assault offences” (plural) where it appears in section 7(1), (2), (3), (4), (5), (8)(a) and (10) of the 1981 Act (as amended). Each of those subsections employs the phrase in the singular - “sexual assault offence”. See section 17(2) of the Criminal Law (Rape) (Amendment) Act, 1990.

¹⁴³ Section 252 of Children Act 2001 requires that the anonymity of children be protected in proceedings for an offence against a child or in which a child is a witness. Section 257 allows the judge discretion to clear the court of all persons save officers of the court and persons directly involved in the proceedings.

¹⁴⁴ Article 8 (e) of the Optional Protocol requires States to protect “as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;”.

4.14 Omissions from the Scheme

The Scheme as a whole is undoubtedly directed at preventing and imposing sanction in relation to conduct prejudicial to the human rights of victims and potential victims of exploitation. In particular, the criminalisation of trafficking and a variety of activities exploitative of children address to a significant extent the need, highlighted consistently by international law, for the effective prosecution of crimes of this nature. In this regard, the Scheme is broadly to be commended for taking strong action against acts that can only be regarded as a serious affront to the dignity of the human individual. In doing so, the Scheme addresses the criminalisation requirements laid down in several instruments, and in particular in the EU Framework Decision on Trafficking.

Protection of victims

Some measures of the Scheme clearly address the vulnerable position of the victims of exploitation. In this regard, the provisions of Head 9 facilitating the imposition of a harassment order, and the application of the Criminal Evidence Act 1992 to victims of offences under this Scheme are particularly welcome. Similarly, the commitment to secure the privacy and identity of victims is to be commended. Nonetheless, the Scheme as a whole overwhelmingly reflects a prosecutorial focus at the possible expense of a perspective stressing the human rights of victims.

The Commission fully accepts that the protection of victims may more appropriately be addressed in civil legislation independent of the Scheme. It may indeed be more prudent to do so. The presence of explicit rights for victims in a prosecutorial statute may potentially be characterised as an inducement to give evidence, thus possibly undermining the case for the prosecution. Where certain rights and privileges are extended to victims *conditional on co-operation with a police investigation and/or prosecution*, a plausible defence may be mounted to the effect that the victim has been incentivised to give evidence. This may, in turn, diminish the impact of such evidence. These concerns strengthen the case for rights to be extended to persons identified as victims of trafficking without any condition of willingness to co-operate. Pearson (2002), in particular, has observed that viewing the trafficked person merely as a “witness, and as a tool of law enforcement”, which, she suggests, is common, may indeed (ironically) prove counterproductive to prosecutorial aims¹⁴⁵

That said, if the intention in implementing the Scheme is to facilitate adoption of or compliance with the international instruments discussed above, it is undeniable that the Scheme in itself is not sufficient for this purpose. In particular, the protective provisions outlined in Part II of the Palermo Protocol and Chapter III of the CoE Convention are largely absent from this Scheme:

- There is a notable absence of provisions designed to secure for the victim a period of recuperation and reflection. No provision is made to permit victim who are non-EEA nationals to remain temporarily in the State for the purpose of recuperation and reflection. Given the integral importance of such a facility for the recovery of the victim, the absence of firm legislative provision for such a

¹⁴⁵ Pearson (2002). p. 35

- facility clearly undermines the rights of victims.
- Provision is not made for the health care needs of victims. Where medical treatment is required, sensitive, appropriate facilities should be afforded, free of charge, to the victim. In cases where the victim has been subjected to sexual exploitation, sexual health services may also be required. Concrete resources are required to ensure effective access to these rights.
 - There is no commitment to the resources (accommodation, material and psychological assistance, information and legal assistance) that would facilitate the victim's escape from his or her exploiters. While the Child Care Act 1991 (as amended) requires protective action in the case of separated children, similar legal provisions do not apply in the case of adult victims of trafficking.
 - No provision is made for legal aid or compensation for victims, translation and interpretation services (where required) or support and information for victims in circumstances where a trial is initiated.
 - No mention is made of the right of the victim to be informed of his or her options if he or she wishes to remain in the State. In particular, the possibility that the victim might escape the cycle of exploitation through the opportunity to access education or training or gain legitimate employment within the State is not addressed.
 - Though dealt with in other legislation,¹⁴⁶ there is no explicit mention in this Scheme of the principle of *non-refoulement*, that is, the principle that no person should be returned to the borders of a state where the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group (which would include a group the defining characteristic of which is based on gender or sexual orientation) or political opinion. The possibility of deportation and subsequent re-victimisation is not addressed.
 - No mention is made of a variety of measures that would assist in the prevention of re-victimisation, including the right to access work, vocational training and further education and social welfare benefits where required.

Were the proposed Immigration, Protection and Residency Bill to be enacted, the option of producing a 'Policy Statement' on the reflection, recovery and integration treatment of victims could become available.¹⁴⁷ However, it is not possible to say at this moment when or whether that Bill will be enacted and in what form. Even if this were clear, the insertion of clauses or policy statements concerning victims would not conform to international standards on victim treatment. Such insertions would only apply to non-EU/EEA nationals. They would not address the circumstances of victims who already benefit from free movement of labour, or free movement and rights within the Common Travel Area of the UK and Ireland. Such inclusion would thus exclude from the purview of protection persons who are nationals of EEA Member States as well as Irish citizens

¹⁴⁶ See Section 5, Refugee Act, 1996. See also Immigration, Residence and Protection Bill, 2006, Heads 38 and 39.

¹⁴⁷ Scheme for an Immigration, Residence and Protection Bill, 2006, Head 5

who are victims of trafficking.

Victims of trafficking as defined in international instruments also originate in Member States of the EU and within Ireland itself. Confining victim status to legal instruments addressing immigration has the additional unfortunate consequence of unintentionally suggesting that victims are always 'foreign' and associating migrant women, to the exclusion of other women, with the phenomena of sex or labour trafficking.

The protection of victims, moreover, requires more than simply the granting of immigrant status – in fact in many cases it may not require such status at all. It is clear from the discussion above that the protection of victims requires a multiplicity of steps, both legal and practical in their effects. A holistic response to the needs of victims arguably, thus, goes well beyond the scope of immigration legislation, however well-intentioned. Adequately protective measures may indeed lie outside the scope of the proposed Head 5 of the Scheme of the Immigration and Residence Bill, in that such legislation is designed only to address the situation of non-EU nationals, and only to the extent that their presence in the State is concerned. As such, the prospect arises that a policy statement offering full protection to all victims of trafficking may be *ultra vires* the proposed Immigration Bill.

On a separate point, the objection may also be raised that it is undesirable to make changes to the general law on sexual offences in legislation in legislation dealing with trafficking. In particular many of the provisions set out in the General Scheme, particularly those relating to 'grooming' of children are novel in Irish law and may be better placed in discrete legislation where they can be the focus of parliamentary and public scrutiny.

The protection of child victims of trafficking

Although the Scheme weighs heavily in favour of measures criminalising the exploitation of children, no provision is made in the Scheme for the protection of such children, once identified as victims. The Optional Protocol to the UNCRC requires a raft of measures aimed at protecting victimised children and facilitating their psychological and physical recovery as well as preventing revictimisation. Measures of this nature are entirely absent from the Scheme, as published.¹⁴⁸ Appropriate and sensitive legislative safeguards are required to ensure the full protection of child victims, in particular where separated from their families.¹⁴⁹ Where appropriate, the State should endeavour to seek without delay the reunification of the victim with his or her family, with due regard always to the safety and dignity of the child.

¹⁴⁸ The Child Care Act, 1991 (as amended) nonetheless places an obligation on the Health Service Executive to identify at risk children, and, in appropriate cases, to provide alternative accommodation and care to such children. Though see also Browne, Emma *The Village*, 12 January 2006 and O'Brien, Carl, *The Irish Times*, 27 March 2006 who report, citing internal HSE reports, that out of 3000 unaccompanied minors in the care of the State, some 250 have disappeared from care.

¹⁴⁹ See also Conroy (2003).

Deportation, repatriation and the *non-refoulement* (see section 3.7 above)

In line with Article 10(2) of the CoE Convention, until such time as a person reasonably suspected of being a victim is positively identified as such, or deemed, in the alternative, not to be a victim of trafficking, that person should not be removed from the jurisdiction. No mention is made, in the Scheme, of the rights of trafficked persons found in the State to seek to remain in the State, if appropriate.

In the case of persons identified as trafficked persons, who are not otherwise entitled to immigrant status within the State, explicit regard should be had to the principle of *non-refoulement*. This principle requires that no person who is found in the State should be returned or removed to the borders of another state in circumstances where such return or removal would likely threaten the life or freedom of that person on account of his or her race, religion, nationality, membership of a particular social group or political opinion.¹⁵⁰ Under the provisions of the EU Qualification Directive,¹⁵¹ victims of trafficking may be entitled to either refugee status or subsidiary protection.. In particular, no person should be returned to the place from which they have been trafficked in circumstances where it is likely that the person will be re-victimised and/or punished for their co-operation with law enforcement officials.

Persons who have been trafficked should be informed, in a language which they understand, of their right to seek refugee status or subsidiary protection in the State, as well as any other legal avenues by which they may seek lawfully to remain in the jurisdiction. Due consideration should be taken of the vulnerability of victims of trafficking and appropriate assistance should be provided to facilitate the submission and assessment of their protection claims. That said, given that trafficked persons who are adults generally have been transported without their consent, repatriation may, in appropriate circumstances, be a feasible option. The case for repatriation is arguably stronger in the case of children, for whom family reunification will, in most cases, be a priority.

Where repatriation is proposed, such repatriation should preferably be made voluntarily, with the co-operation of the victim of trafficking. Such repatriation should be made only having taken careful account of the risks involved in such repatriation, in particular, the risk that victims will experience re-victimisation or retribution on their return. Some care will be required to ensure that the victim is not returned in circumstances where conditions that led to such victimisation (such as debt bondage, poverty, lack of education or training) remain unaddressed. In no case should repatriation occur where such removal or return would undermine the rights, safety or dignity of the trafficked person. Explicit and appropriate legislative safeguards are needed to ensure that such rights are protected.

¹⁵⁰ Cf. section 5, Refugee Act, 1996.

¹⁵¹ (Council Directive 8043/04/EC of 27 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or persons who otherwise need international protection and content of the protection granted, OJ 2004 L 304/12

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APPENDIX I
A SUMMARY OF RELEVANT LEGISLATION CURRENTLY IN FORCE

1. Non-Fatal Offences Against the Person Act 1997

The Non-Fatal Offences Against the Person Act sets out a variety of offences, some of which are relevant in this context. Section 9 of the Act makes it an offence to engage in certain conduct with a view to compelling a person to abstain from doing or to do any act which that person has a lawful right to do or to abstain from doing. The conduct covered by the Act includes wrongfully and without lawful authority using violence or intimidating that person or a member of their family, persistently following that person and watching or besetting a premises in which that person resides, works or conducts a business. Section 15 of the Act makes it an offence intentionally or recklessly to detain a person, to cause them to be detained or otherwise to deprive a person of their personal liberty without the consent of that person. This offence, termed ‘false imprisonment’, replaces the common law offence of the same name.

It is, likewise, an offence intentionally to take or detain a child under the age of 16 years (or cause such a child to be taken or detained) with a view to remove or keeping that child out of the lawful control of its parent or lawful guardian. These measures may be useful in addressing the experience of a person who has been detained for the purpose of trafficking. It is important to note, however, that save for the application of the Criminal Law (Jurisdiction) Act 1977 to the offence of false imprisonment, the Act only applies to offences committed within the State. It would, thus, not encompass coercion or abduction occurring outside the jurisdiction. Insofar as false imprisonment is concerned, the Act has extra-territorial effect but only in application to offences allegedly committed in Northern Ireland and not elsewhere.

2. Child Trafficking and Pornography Acts, 1998-2004

The Child Trafficking and Pornography Acts, 1998-2004 address, *inter alia*, the phenomenon of trafficking in children. A child for this purpose is currently defined as a person under the age of 17 years.¹⁵²

Section 3 of the Act makes it an offence “to organise or knowingly facilitate” –

- (a) the entry into, transit through or exit from the State of a child for the purpose of his or her sexual exploitation, or
- (b) the provision of accommodation for a child for such a purpose while in the State.

On conviction, offenders are liable to imprisonment for life.

¹⁵² Child Trafficking and Pornography Act 1998, Section 2(1)

Notably, Head 25 of the Scheme would remove section 3(1) of the 1998 Act, the effect being to generalise the protection granted to adults and children alike, although the sentences involved would differ depending on the age of the victim.

Section 3(2) of the 1998 Act, moreover, makes it an offence for any person to take, detain or restrict the personal liberty of a child for the purpose of sexual exploitation or to use a child for such a purpose. The subsection also penalises any person who “organised or knowingly facilitates such taking, detaining, restricting or use”. The maximum penalty on conviction is imprisonment for a term not exceeding 14 years.

For this purpose, sexual exploitation is defined as follows:

- (a) “inducing or coercing a child to engage in prostitution or the production of child pornography
- (b) using the child for prostitution or the production of child pornography
- (c) inducing or coercing the child to participate in any sexual activity which is an offence under any enactment
- (d) the commission of any such an offence against the child”.

The Act is confined, however, to trafficking for the purposes of sexual exploitation. It does not, in particular, address the potential for labour exploitation in relation to children.

3. Illegal Immigrants (Trafficking) Act 2000

The Illegal Immigrants (Trafficking) Act 2000, despite its title, may more accurately be described as a measure addressing the consequences of people smuggling generally rather than trafficking *per se*. Specifically, the Act does not make any distinction between those who facilitate persons who wish to enter the State willingly and those who traffic unwilling or coerced persons with a view to their exploitation.

Section 2(1) of the Act makes it an offence for any person to organise or knowingly facilitate the entry into the State of a person whom he or she has reasonable cause to believe to be an illegal immigrant or a person who intends to seek asylum. This section has extra-territorial effect. The Act empowers the State to seek the forfeiture of ships, aircrafts and other vehicles used for the purpose of smuggling. It further creates certain powers of arrest, search and seizure, as well as the power to detain certain vehicles suspected of having been used for the purpose of smuggling.

Although the Act addresses some aspects of trafficking, it essentially appears to be aimed at curbing illegal immigration. Although the Act may indirectly address the exploitation of potential immigrants, this would not appear to be a central purpose of the Act. In particular, the Act concerns only the act of smuggling *into* the State; it does not address the situation of persons once in the State. Nor does it address the phenomenon or trafficking within the State, or the departure of trafficked persons from the State. The Act, moreover, is confined in its application to non-EEA nationals, and thus does not address the situation of EEA nationals who are the alleged victims of trafficking.

4. Immigration Act 2003

Similar concerns arise in respect of the provisions of the Immigration Act 2003. Section 2 of the Act addresses carriers of persons arriving in the State from a place other than Great Britain, Northern Ireland, the Channel Islands or the Isle of Man. Such carriers are required to ensure that all passengers alighting in the State are presented to an immigration officer on arrival in the State. The carrier is obliged, moreover, to ensure that all such passengers possess a valid passport or other equivalent document confirming the identity and nationality of each passenger. In particular, if required by law, each passenger must hold a valid Irish visa for the purpose of travelling to or through the State.