

Advice on the General Scheme of the Criminal Law
(Trafficking in Persons and Sexual Offences) Bill 2006

May 2007



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1. Introduction

The General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill was referred to my Office by the Minister for Justice, Equality and Law Reform on 20 July 2006. Section 7 (4) of the Ombudsman for Children Act, 2002 provides that I shall, at the request of a Minister, give advice on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of any proposals for legislation.

In accordance with this statutory function, my advice on the Scheme is set out in this document. It is divided into three sections as follows:

1. general comments on the trafficking and child protection matters raised by the Scheme;
2. detailed comments on the Heads of the Scheme; and
3. advice regarding *lacunae* in our law and practice that are not addressed in the Scheme.

In preparing these observations, I have been guided by the UN Convention on the Rights of the Child (CRC) and by other international instruments and standards concerned with human trafficking and the sexual exploitation of children, including: the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the Council of Europe Convention on Action Against Trafficking in Human Beings; the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention on Transnational Organised Crime (hereafter the Palermo Protocol); the EU Council Framework Decision on Combating Human Trafficking; and the EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography.

As Ireland has already ratified the CRC, we are obliged to comply with its provisions. Ireland is also bound by the two EU Council Framework Decisions mentioned above, although it is left to national authorities to choose the form and methods of their implementation.

I welcome the Government's recent decision to sign the Council of Europe Convention on Action Against Trafficking in Human Beings and I trust that ratification of this and other relevant instruments will take place as soon as possible¹. While the United Nations and Council of Europe instruments listed above have not been incorporated into our domestic law, signature and ratification impose an obligation on the State to ensure that its law accords with the international standards to which it has bound itself.

¹ Ireland has also signed but not yet ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention on Transnational Organised Crime.

2. General comments on trafficking and child protection

According to a conservative estimate, between 600,000 and 800,000 people are victims of human trafficking across international borders every year. Of those, approximately half are children and the majority are trafficked into the commercial sex industry². While it is impossible to establish the precise extent of the phenomenon in Ireland due to its clandestine nature, the gravity of the human rights violation involved demands a comprehensive response.

The prohibition of slavery is one of the oldest and most widely recognised international human rights norms. The fact that this grave human rights violation is still so prevalent in spite of the international consensus on the issue is an indication of how difficult it is to combat.

Our response to trafficking must certainly be robust but we should bear in mind that it is much more than a criminal justice matter. It is a human rights matter. The distinction is important because thinking of trafficking as a human rights violation impels us to do more than criminalise trafficking – we must provide appropriate assistance and protection to the victims of trafficking, especially children, in addition to reflecting on how trafficking can be prevented in the first place³.

Although human rights concerns are paramount, there is also a compelling argument for having a strong protection and assistance regime from the point of view of efficacy in combating the problem. A system in which victims feel that they will receive adequate care and protection is one in which they are more likely to come forward and take part in criminal proceedings against traffickers⁴. This may increase the number of prosecutions and may also have a knock-on effect on demand as it may make human trafficking a higher-risk activity for the criminals involved. I would like to stress, however, that assistance and support given to victims of trafficking should not be made contingent on their involvement in proceedings against traffickers⁵.

² US Department of State, *Trafficking in Persons Report 2005*, p 6. The report is available at www.state.gov/g/tip

³ The need for adequate protection and support for victims of trafficking was highlighted in the Concluding Observations of the UN Committee on the Rights of the Child on Ireland's second periodic report (CRC/C/IRL/CO/2, p 15).

⁴ This point was acknowledged in section 7.1 of the *Report of the Department of Justice, Equality and Law Reform/Garda Síochána Working Group on Trafficking in Human Beings*, 2006. The report can be accessed on the website of the Department of Justice, Equality and Law Reform, www.justice.ie

⁵ This point is made in UNICEF's *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, p 26.

In relation to the prosecution of trafficking offences, I am satisfied that this Scheme largely meets the international human rights standards regarding children. However, I feel that there is not enough emphasis on the protection aspects of the trafficking issue. I appreciate that this Scheme must be read in conjunction with other legislation and policy in order to gain a proper understanding of the framework in place for dealing with the issue of trafficking. I am also aware that it was not the intention of the Minister for Justice, Equality and Law Reform to address the wider issue of protection in this particular Scheme. That being said, I have examined current practice in dealing with child victims of trafficking and reviewed other relevant legislation, including the Immigration, Residence and Protection Bill 2007, and have come to the conclusion that there are still significant gaps in our law and practice regarding trafficking. I have outlined my advice in this regard in section IV of this document.

It is not my intention to suggest that all the recommendations I make should be included in this particular Scheme, as there may be other more appropriate ways of addressing discrete lacunae in the anti-trafficking framework. However, I believe that the gaps that do exist must be filled if Ireland is to adhere to its obligations and to best international practice in this area.

This Scheme also introduces a number of innovations and changes into the law regarding sexual offences against children. While I have provided detailed comments on the relevant Heads below, I would like to emphasise the need to consolidate and modernise our legislation in this area. The recent reliance on emergency-type legislation to deal with pressing child protection issues has placed this need in stark relief. While I acknowledge that urgent action can sometimes be required to address significant protection gaps, rushing legislation through the Oireachtas without giving TDs, Senators and other relevant bodies, including this Office, sufficient time to consider the full implications of such legislation is not an ideal way to proceed. The need to afford the Oireachtas and others adequate time to properly consider matters of significant importance to the protection of human rights has also been raised by the Irish Human Rights Commission.⁶

⁶ Irish Human Rights Commission press release on its observations on the Criminal Justice Bill 2007, 29 March 2007.

The Minister for Justice, Equality and Law Reform has commented that the relevant law in this area is like a “patchwork quilt” and that it “is scattered across an archipelago of individual Acts”⁷. I agree with his assessment and welcome the Minister’s commitment to ask the Criminal Law Codification Advisory Committee to proceed with the consolidation of the law in this area as its first task⁸.

In relation to sexual offences carried out by children under this Scheme, I would like to restate the principle which I outlined in my comments on the Criminal Law (Sexual Offences) Act, 2006: the criminal law is generally not an appropriate tool for dealing with consensual sexual acts between children. In situations where such an act has taken place and that act technically attracts criminal liability, no proceedings should be brought against the child in question except with the consent of the Director of Public Prosecutions (DPP), who shall make his decision based on the best interests of all the children concerned. While I recognise that the DPP does not normally give reasons for his decisions, I consider that in such situations, he should do so in order to ensure that the best interests of the child are at the heart of decisions taken in this respect.

⁷ Dáil Debates, Vol. 633, No. 1, p 127.

⁸ Ibid., p 121. See also my submission to the Oireachtas Joint Committee on Child Protection (30 August 2006), in which I outline my views on this matter in detail. The submission can be accessed at www.oco.ie

3. Comments on the Heads of the Scheme

What follows is an analysis of the individual Heads of the Scheme. There are a number of Heads on which I have no comments to make because they do not give rise to any issues relating to the probable effect of the legislation on children.

Head 1:

This Head is a standard provision which sets out the Bill's short title and the time at which it will come into operation. I have no comment to make on this Head.

Head 2: Interpretation

This Head clarifies the meaning of a number of important terms used throughout the Scheme such as child, labour exploitation and sexual exploitation.

Compliance with international standards

I welcome the fact that in this Scheme, a child is generally understood to mean a person under the age of 18. This position accords with the UN Convention on the Rights of the Child and with other international instruments relating to trafficking and sexual exploitation⁹. This definition avoids the practice of defining a child in the context of sexual exploitation as being a person under the age of consent, which links two disparate concepts inappropriately and has the effect of diminishing the protection afforded to children under 18 but over the age of consent. Moreover, the Scheme includes other forms of exploitation within its scope with which the age of consent has no connection. There are, however, a number of issues raised by the discrepancy between the definition of a child in this Scheme and the current age of consent in Ireland which I will address in my comments on Head 7.

The forms of exploitation covered under this Head satisfy the minimum standards set out in the relevant international instruments. However, I would suggest that this Head could expand slightly on the definition of labour exploitation in line with Article 3 of the International Labour Organisation's Convention on the Worst Forms of Child Labour (No. 182), which Ireland has ratified¹⁰. The definition of labour exploitation used in the Scheme is drawn from Article 3 of the Palermo Protocol but the Protocol states explicitly

⁹ See Article 1 of the UN Convention on the Rights of the Child; Article 3 of the Palermo Protocol; Article 4 of the Council of Europe Convention on Action Against Trafficking in Human Beings; Article 1 of the EU Council Framework Decision on Combating Trafficking in Human Beings; and Article 1 of the EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography.

¹⁰ This wider definition was recommended in the *Report of the Expert Group on Trafficking in Human Beings*, European Commission, Directorate-General Justice, Freedom and Security, 2004, p 20.

that these should be regarded as minimum standards¹¹. While most forms of labour exploitation resulting from child trafficking would probably be encompassed by the terms of Head 2, it is conceivable that situations such as those envisioned by subsections (c) and (d) of Article 3 of the ILO Convention would not strictly speaking be covered¹².

Given that, under the definition of trafficking as outlined in Head 3, it is not necessary for force or coercion to be used to traffic a child, it is perhaps inconsistent to require that such force or coercion be present in the forms of labour exploitation contemplated by the Scheme.

As regards sexual exploitation, the term is understood in this Bill to encompass child pornography, prostitution and any sexual activity which is an offence under any enactment. This mirrors the terms of Article 34 of the CRC¹³. In relation to the last element of the definition used in the Scheme, it is clear that the consolidated legislation to which I referred above is urgently needed for the Scheme to give as high a level of protection as possible to children.

Recommendations

- The definition of the term labour exploitation in the context of trafficking could be expanded along the lines of the ILO Convention on the Worst Forms of Child Labour, as recommended in the Report of the Expert Group on Trafficking in Human Beings to the European Commission.
- The legislative framework regarding sexual offences against children is in need of modernisation and consolidation in order to address the lacunae and inconsistencies that currently exist. Until such a time as this takes place, the protection against sexual exploitation – the definition of which includes any sexual activity which is an offence under any enactment – will not be as strong as it should be.

11 The relevant part of Article 3 (a) of the Protocol reads as follows: "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".

12 Subsection (c) relates to the use of children for illicit activities such as drug trafficking and subsection (d) refers to work which is harmful to the health, safety or morals of children.

13 Article 34 of the Convention requires States Parties to protect children from sexual abuse and to prevent: a) the inducement or coercion of a child to engage in any unlawful sexual activity b) the exploitative use of children in prostitution and other unlawful sexual practices, and c) the exploitative use of children in pornographic performances and materials.

Head 3: Trafficking

This Head provides for a number of offences relating to human trafficking for the purposes of exploitation as defined under Head 2. Specifically, it provides that anyone who recruits, transports, transfers to another person, harbours or knowingly arranges or facilitates –

- a. the entry into, travel within or departure from the State of a person; or
- b. the provision of accommodation or employment in the State for that person

for the purpose of the trafficked person's exploitation, is guilty of an offence. In the case of adult victims, it will be necessary to show that use has been made of threats, force, coercion, deception, or fraud or that abuse has been made of a position of authority or of the victim's vulnerability. This requirement will not apply in the case of children.

Compliance with international standards

Article 35 of the UN Convention on the Rights of the Child specifically calls on States to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form. The Convention also includes specific provisions relating to labour exploitation (Article 32), sexual exploitation (Article 34), other forms of exploitation (Article 36) and the rehabilitation of child victims (Article 39).

While these articles and the general principles¹⁴ of the UN Convention provide a strong basis for action against child trafficking, other instruments provide more detail as to what specific acts should be criminalised and what measures should be taken to support victims of trafficking. I have examined this Head in light of those standards¹⁵.

As regards the definition of trafficking and the substantive criminal offences flowing from it, the provisions in this Head largely accord with the principal international standards. In particular, the irrelevance of the means element (ie threats, fraud, deception) in relation to

14 The general principles of the Convention are: non-discrimination (Article 2); the best interests principle (Article 3); the right to life, survival and development (Article 6); and the right of the child to have his or her voice heard (Article 12). For a fuller discussion of these principles, see General Comment no. 5 of the UN Committee on the Rights of the Child on the general measures of implementation for the Convention on the Rights of the Child (CRC/GC/2003/5).

15 For definitions of trafficking, see Article 3 of the Palermo Protocol, Article 1 of the EU Council Framework Decision on Combating Trafficking in Human Beings and Article 4 of the Council of Europe Convention on Action Against Trafficking in Human Beings. Articles 18, 19 and 20 of the Council of Europe Convention also provide for trafficking-related offences that are not explicitly mentioned in the other instruments.

the trafficking of children is to be welcomed, as is the fact that offences carried out against children under this Head attract higher penalties.

While I appreciate the broad scope of Subhead 1 in relation to the definition of the trafficker, it might be useful to elaborate more clearly on the concept of knowingly facilitating the provision of employment to ensure that it complies fully with Article 19 of the Council of Europe Convention on Action Against Trafficking in Human Beings. I understand the wording used in Subhead 1 (b) of Head 3 to have the effect of criminalising the activities of those who knowingly employ trafficked persons, including children and young people, as well as individuals who facilitate such employment. However, I would query whether the term “employment” could be construed as being synonymous with the phrase “use of services” which is used in the Council of Europe Convention. As the latter is wider in scope, I would suggest that this element be included in Subhead 1 (b). This would ensure that someone who knowingly used the services of a victim of trafficking outside a clearly defined employee/employer relationship would also be criminally liable.

In line with Article 20 of the Council of Europe Convention, the theft, damage and destruction of a victim’s travel documents – a common coercive tactic employed by traffickers – should be an offence in and of itself attracting appropriate penalties. It is an act that is qualitatively different from the simple theft, damage or destruction of property and may have grave implications for the victim.

Issues of practice arising

Given the fact that children and adults are treated differently under this Head, the manner in which the age of a possible victim of trafficking is determined is of utmost importance. The Committee on the Rights of the Child has held that in ambiguous cases where it is unclear if an unaccompanied or separated child is less than 18 years old, the presumption should be that he/she is a child¹⁶. The Committee has also commented that age determination procedures should take into account psychological maturity as well as physical appearance; that it should be safe, child- and gender-sensitive; that it should respect the bodily integrity of the child; and that the process should be carried out with due respect to the child’s dignity¹⁷. Ideally, such an assessment should be carried out by a

¹⁶ General Comment No. 6 of the UN Committee on the Rights of the Child on the treatment of unaccompanied and separated children outside their country of origin (CRC/GC/2005/6), p 11.

¹⁷ Ibid.

multidisciplinary group of professionals with appropriate expertise and familiarity with the child's ethnic/cultural background¹⁸.

It is my understanding that, at present, there is no common age determination procedure shared by all the agencies that deal with victims of trafficking. A standardised approach, based on international best practice in the area, should be adopted.

Recommendations

- The act of knowingly using the services of a trafficked person should be an offence, in line with Article 19 of the Council of Europe Convention on Action Against Trafficking in Human Beings.
- The provisions in Article 20 of the Council of Europe Convention relating to, inter alia, the retention, damaging or destruction of another person's travel documents should be provided for in our criminal law.
- Age determination procedures should conform to international best practice and should be consistently applied by all agencies dealing with possible victims of trafficking.

Head 4: Sale of children for purposes of exploitation

This Head makes it an offence to sell, offer to sell, buy, take or deliver a child for the purposes of the child's exploitation.

Compliance with international standards

Ireland has yet to ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and was encouraged to do so by the Committee on the Rights of the Child during the examination of Ireland's second periodic report under the Convention¹⁹. I welcome this and the other provisions in this Scheme which, when enacted, should facilitate the ratification of the Optional Protocol.

This Head gives effect to Article 3(1)(a) of the Optional Protocol. The elements of offering, delivering and accepting children, as well as the three forms of exploitation mentioned in the Article, are all included under the terms of this Head.

¹⁸ Save the Children/United Nations High Commission for Refugees, *Separated Children in Europe Programme: Statement of Good Practice, 2004*, p 18.

¹⁹ Concluding Observations of the UN Committee on the Rights of the Child on the second periodic report of Ireland (CRC/C/IRL/CO/2), p 16.

Article 3 (1) (a) (ii) of the Optional Protocol requires that States Parties provide in their criminal law for improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption. I would query whether our criminal law currently satisfies this requirement.

Furthermore, in relation to the applicable international legal instruments on adoption mentioned in the Optional Protocol, I note that Ireland has signed but not yet ratified the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. I would urge the Government to ratify this Convention to ensure that inter-country adoptions take place in the best interests of the children concerned and that the highest standards of procedure and practice are adhered to.

Head 5: Soliciting or paying for the purpose of sexually exploiting a child

This Head makes it an offence to carry out the following acts for the purposes of the sexual exploitation of a child:

- soliciting or importuning the child;
- paying, offering, promising or attempting to pay the child or another person; and
- providing, offering, promising or attempting to provide a child or another person with some other form of financial advantage.

It is also an offence under this Head to accept or agree to accept money or other form of financial advantage in any of the above situations.

Compliance with international standards

Article 3 of the Optional Protocol to the Convention on the Rights of the Child provides for, inter alia, offences relating to soliciting and child prostitution. In addition, Article 34 (a) of the CRC calls on States to prevent the inducement or coercion of a child to engage in any unlawful sexual activity. This Head largely complies with those provisions but I would query a number of points.

In relation to the terms soliciting and importuning, the clarification “whether or not for the purposes of prostitution” used in similar legislation is not used in this Scheme. It is clear that the intention in this Head is for these terms to refer not only to prostitution but also to acts other than prostitution. In the notes on the Head in the General Scheme, it is stated that “the concept of prostitution has been expanded so that the approach by the client could be for

the purposes of other forms of sexual exploitation, such as using a child for the production of child pornography, participating in a pornographic performance or for engaging in any sexual act²⁰. My concern would be that if the expanded notion is still predicated on a concept of prostitution, the idea of remuneration will still inhere in the offence, even if the categories of offence are broader than our traditional understanding of prostitution.

It should be noted that the issue of soliciting and importuning a child for the purposes of sexual exploitation was dealt with most recently in the Criminal Law (Sexual Offences) (Amendment) Act, 2007. That Act uses the phrase “whether or not for the purposes of prostitution” to clarify the meaning of the terms soliciting and importuning, echoing the amendment made to the Criminal Law (Sexual Offences) Act, 1993 by the Children Act, 2001. The purpose of this amendment was to make it clear that, while soliciting could take place in the context of prostitution, it could also take place in other contexts which did not involve prostitution (eg a neighbour could solicit a child for the purpose of the child’s sexual exploitation without offering or exchanging any money or other form of remuneration). This amendment was deemed necessary because soliciting and importuning tended to be conflated with prostitution²¹. It is arguable that in order to comply fully with Article 34 of the CRC, a clarification of the terms soliciting and importuning is required making the presence of financial advantage or remuneration irrelevant.

Although it remains to be seen how exactly the provisions in the 2007 Act and this Scheme are to be reconciled, it is important that the best elements of both be retained. In particular, a difference in relation to the scope of the offences covered in both should be addressed. The 2007 Act limits criminal liability to the commission of acts that would constitute an offence under certain sections of the Criminal Law (Sexual Offences) Act, 2006 and the Criminal Law (Rape) Act, 1990. However, Head 5 of this Bill provides for criminal liability in cases of sexual exploitation ie prostitution, pornography or any sexual activity with a person which is an offence under any enactment. The scope in this Scheme is thus wider and therefore preferable.

In relation to the defence of honest mistake concerning the age of the victim, I would note that we are considering this issue in a period of flux as the status of this defence vis-à-vis the

²⁰ General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006, Department of Justice, Equality and Law Reform, Head 5, note 2.

²¹ For an account of the legislative history of this term see Dáil Debates, Vol. 633, No. 1, pp. 81-86.

Constitution may change in future²². The issue was raised most recently in the discussions surrounding the proposed constitutional amendment on the rights of the child and will no doubt be the subject of further debate when the Dáil next considers the matter²³.

Recommendations

- The terms soliciting and importuning should be clarified to make the presence of financial advantage or remuneration irrelevant.
- The range of offences covered under this Head is broader than the corresponding section of Criminal Law (Sexual Offences)(Amendment) Act, 2007. Although it remains to be seen how the two will be reconciled, the expanded terms of this Head should be retained.

Head 6: Organisation of sexual exploitation of children

This Head provides for a number of offences relating to the organisation and facilitation of the sexual exploitation of children.

Compliance with international standards

This is a widely drawn provision which reflects the wide spectrum of agents involved in the sexual exploitation of children and it gives effect to Article 2 (a) and (b) and Article 4 of the EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography. I am satisfied with its scope and welcome its inclusion in the Scheme.

Head 7: Provisions relating to 17 year old children

This Head provides for a number of offences against 17 year olds where money, financial remuneration, or an abuse of a position of authority has taken place.

Compliance with international standards

The need for this Head arises from the definition of a child as a person under the age of 18 – the internationally recognised definition – and also from Ireland’s obligations under the EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography.

22 It is my understanding that at present, the defence of honest mistake can be used even when it is not explicitly provided for in legislation.

23 I outlined my views in detail on the defence of honest mistake in my submission regarding the Criminal Law (Sexual Offences) Act, 2006, my submission to the Joint Oireachtas Committee on Child Protection and my submission to the Oireachtas on the proposed constitutional amendment on the rights of the child. These submissions can be accessed at www.oco.ie

I welcome efforts to give greater protection to those who have attained the age of sexual majority but who are still under 18. While I would like to reiterate my opinion that it is generally inappropriate to link the definition of the child in cases of sexual exploitation with the age of consent, there are nuances that should be observed in relation to consensual sexual acts involving 17 year olds. In particular, given the restricted nature of the offences covered by this Head, I would query why other consensual sexual acts involving 17 year olds should not have the element of consent conditioned in the manner provided for in this Head.

More generally, this Head touches once again on the unsatisfactory legislative framework in the area of sexual offences against children to which I have already alluded²⁴. We will continue to encounter difficulties in addressing the question of sexual activity with and between children until the law in this area is modernised and consolidated in such a way as to remove the inconsistencies and lacunae that currently exist.

Recommendation

- Consideration should be given to conditioning the element of consent in situations where sexual acts not provided for under this Head have taken place.

Head 8: Grooming

This Head provides for three offences related to sexual grooming viz. engaging in a sexual activity in the presence of child; causing a child to watch or observe a sexual activity; and meeting or travelling to meet a child with the intention of committing a sexual offence, having communicated with the child on at least two previous occasions. It is my understanding that supplementary sections will be added at a later stage to deal with other grooming offences such as grooming over the internet and by telephone.

Compliance with international instruments

One of the requirements of Article 34 of the Convention on the Rights of the Child is to prevent the inducement or coercion of a child to engage in any unlawful sexual activity. In many instances, sexual grooming is an intrinsic part of the process of inducing a child to engage in sexual activity. Its purpose is to desensitise a child to such activity and break down the child's inhibitions with a view to committing a sexual act. While the process itself can be protracted, it nonetheless retains the quality of inducement.

²⁴ Supra, n.7. The definition of sexual activity under this Head excludes unnecessarily a wide range of activities.

Grooming for the purposes of sexual exploitation has been the subject of great public interest in recent times and certain elements of the Criminal Law (Sexual Offences) (Amendment) Act, 2007 were designed to tackle this issue.

At the time of the passage of the 2007 Act through Dáil Éireann, the Minister for Justice, Equality and Law Reform indicated that the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006 would deal more thoroughly with the issue of grooming. Indeed, the offences outlined in subheads 1 and 2 of Head 8 are not covered in the 2007 Act. I appreciate that there are legitimate concerns regarding the nature of the offences provided for under this Head and that we should be very careful not to criminalise the actions of those who intend no harm to children. However, I consider that the act of exposing a child to an activity for the purposes of sexual gratification with a view to desensitising the child to sexual activity must be adequately covered in our criminal law, notwithstanding the difficulties in establishing a just threshold for criminal liability in such situations.

In addition, I note that children themselves could potentially be criminalised under this Head. An explicit exclusion of that possibility such as that found in the UK's Sexual Offences Act, 2003 should be included²⁵.

There is also a disparity in the jurisdiction provisions of the two pieces of legislation, with those of this Scheme being wider in scope (see comment under Head 10 for a fuller discussion of jurisdiction). It is important that, however Head 8 and the grooming provisions of the 2007 Act are reconciled, these elements are not lost in the process.

Recommendations

- In the event of a reconciliation of the Criminal Law (Sexual Offences)(Amendment) Act, 2007 and the present Scheme, the offences outlined in subheads 1 and 2 – absent from the 2007 Act – should be retained. The jurisdiction provisions in this Scheme are also preferable to those found in the 2007 Act and should be retained.
- Given the child protection challenges posed by new media and the Internet in particular, supplementary sections relating to grooming online and by telephone should be included.

²⁵ See in particular section 15 of the Sexual Offences Act, 2003.

Head 9: Harassment Order

This Head gives the court power to prevent a person convicted of a sexual offence from contacting the victim or other person if it is satisfied that such contact would cause fear, distress, alarm or would amount to intimidation.

Compliance with international standards

I welcome the inclusion of a provision which affords victims of sexual offences protection from unwanted contact with the perpetrator of the offence. Such contact could cause significant distress and compound the suffering already experienced by the victim. This is especially important given the proliferation of media through which children and young people can be contacted, particularly the Internet.

Article 39 of the CRC calls on States to take all appropriate measures to promote the physical and psychological recovery and the social reintegration of a child victim of abuse and further requires that such recovery and reintegration take place in an environment which fosters the health, self-respect, and dignity of the child. Unwanted contact with the perpetrator of a sexual offence could clearly undermine such recovery and reintegration and the ability of a court to impose a harassment order should be regarded as an appropriate measure in the context of Article 39.

In relation to trafficking victims, the potential for re-trafficking upon further communication with a trafficker is a very real problem, particularly for children, and the harassment order envisaged under this Head would be a useful tool in affording victims greater protection²⁶. I would query, however, why the protection offered by this Head appears to be limited to victims of trafficking for the purposes of sexual exploitation and not for other forms of exploitation.

Recommendation

- The protection afforded by the harassment order to victims of sexual exploitation should also be afforded to victims of trafficking for the purposes of labour exploitation, particularly given that traffickers often attempt to make contact again with victims.

²⁶ For a discussion of the dangers of further communication with traffickers see UNICEF, *Reference Guide*, p. 67. Article 28 of the Council of Europe Convention is also of relevance here as it requires States to adopt such legislative or other measure as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation for victims and their family members.

Head 10: Jurisdiction

This Head sets out the jurisdiction provisions relevant to the offences outlined in the preceding Heads.

Compliance with international standards

The provisions included in this Head are broad and give wide scope for the exercise of extra-territorial jurisdiction. Of particular note is the fact that the Scheme goes beyond the minimum international standards and provides for offences carried out against citizens of Ireland abroad²⁷. I would, however, support the Irish Human Rights Commission's view that the terms of this Head could go further and provide for offences carried out against children who are habitually resident in the State but are not in the State at the time of the offence. If habitual residence is regarded as a sufficient connection to the State to allow for the prosecution of a perpetrator, then it should be sufficient for the protection of a child victim.

I have already alluded to the fact that there are some anomalies in relation to the jurisdiction provisions of this Scheme. In particular, the Scheme appears to provide for two different jurisdiction regimes – one provided by Head 10 of the Bill, the other provided by the amendment to the Sexual Offences (Jurisdiction) Act, 1996. The 1996 Act requires that when a relevant act is carried out in another jurisdiction, it must be an offence under the law of that State as well as in this jurisdiction for the perpetrator to be criminally liable. In addition, the offences carried out in the other jurisdiction must be committed by a citizen of Ireland or by an individual habitually resident in the State. Head 10 of this Scheme, on the other hand, does not require that an act be an offence in another jurisdiction and provides for criminal liability in situations where the perpetrator is neither a citizen of Ireland nor habitually resident here.

It is proposed to amend the Schedule of the 1996 Act in Head 17 of this Scheme to include the offences outlined in Head 3 of this Scheme, only in so far as it relates to sexual offences. I would query why this is necessary, since it is proposed to include the offences under Head 3 within the scope of the jurisdiction provisions of Head 10. The latter are stronger than the provisions contained in the 1996 Act both in terms of the agents and the nature of the offences covered.

²⁷ See Article 31 of the Council of Europe Convention; Article 4 of the Optional Protocol to the Convention on the Rights of the Child; Article 8 of the EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography; and Article 6 of the EU Council Framework Decision on Combating Trafficking in Human Beings. The jurisdiction provisions vary from one instrument to the other but the formula used in Head 10 represents a good synthesis of them.

Recommendations

- The Head should provide for offences carried out against persons who are habitually resident in the State but are not in the State at the time of the offence.
- The anomalies in the relationship between the jurisdiction provisions in Head 10 and the Sexual Offences (Jurisdiction) Act, 1996 should be resolved.

Head 11: Proceedings related to offences committed outside the State

I have no comment to make on this Head.

Head 12: Double jeopardy

I have no comment to make on this Head.

Head 13: Entry, search and seizure

I have no comment to make on this Head.

Head 14: Liability of offences by corporate bodies

This Head provides for liability when a corporate body commits an offence and the offence is carried out with the connivance or consent of an officer of that body, or as a result of his/her neglect.

Compliance with international standards

This provision is consistent with the current trend towards recognising corporate liability and I welcome its inclusion. It gives effect to Article 22 of the Council of Europe Convention on Action Against Trafficking in Human Beings, Article 4 of the EU Council Framework Decision on Combating Trafficking in Human Beings and Article 6 of the EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography.

Head 15: Amendments of the Child Trafficking and Pornography Act, 1998

This Head changes the definition of a child under the 1998 Act from a person under the age of 17 to a person under the age of 18. It also introduces an offence of attempting to produce, distribute, disseminate or transmit child pornography.

Compliance with international standards

The change to the definition of the child is consistent with the terms of the CRC, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography.

Head 16: Amendment of the Criminal Evidence Act, 1992

This Head adds certain offences outlined in the Scheme to the Schedule of the Criminal Evidence Act, 1992. The 1992 Act allows for vulnerable witnesses to give evidence through a video-link or intermediary and also allows video-recorded information to be admitted in certain circumstances.

Compliance with international standards

Article 8(1) (a) of the Optional Protocol to the Convention on the Rights of the Child obliges States to adopt appropriate measures to protect the rights and interests of child victims by recognising their vulnerability and adapting procedures to recognise their special needs, including their special needs as witnesses. Article 8 of the EU Council Framework Decision on the Standing of Victims in Criminal Proceedings (which applies to both the Framework Decision on trafficking and the Framework Decision on sexual exploitation) requires, inter alia, that the privacy of victims be protected and that they be able to testify in a manner that will shield them from the negative effects of giving evidence in open court. Article 30 of the Council of Europe Convention also highlights the special needs of child victims in this regard.

I welcome the amendment to the Criminal Evidence Act, 1992 which aims to bring certain parts of this Scheme within its scope, though I would query why Heads 5 and 7 are excluded. When considering the protection afforded to child victims of trafficking in court proceedings, one must also bear in mind the provisions of Head 23 relating to the Criminal Law (Rape) Act, 1990 and certain sections of the Children Act, 2001²⁸. Taken together, they represent a sound body of legislation. However, there are deficiencies in the implementation of certain protection measures, such as those relating to providing evidence via video link and the presence of intermediaries. In the absence of full practical implementation, victims seeking to testify will not receive the level of protection to which they are entitled. Such protection is particularly important when one considers

²⁸ See in particular sections 251, 252 and 255 of the Children Act, 2001.

the vulnerability of child victims, the danger posed by traffickers and the potential for reprisal or re-trafficking.

In addition, our legislation could go further. Section 16 of the Criminal Evidence Act, 1992 limits the ability to submit video-recorded statements as evidence to children under the age of 14. This provision should apply to all children. Protection measures for child witnesses beyond those currently provided for in Irish law have been introduced in other common law jurisdictions including Northern Ireland, Scotland, England, Wales, Canada and South Africa. These measures include the following: the admission of video-recorded evidence by a child as evidence in chief; the prohibition of cross-examination by the accused; establishing who carries the principal duty of care to children in the court room; pre-trial preparation; and training for those in the criminal justice system working with children²⁹.

Recommendations

- Victims of offences under Heads 5 and 7 should also be afforded protection under the Criminal Evidence Act, 1992.
- The implementation of existing measures to protect child victims in criminal proceedings should be expedited.
- Consideration should be given to the adoption of further child protection measures such as those used in other jurisdictions.

[Head 17: Amendment of the Sexual Offences \(Jurisdiction\) Act, 1996](#)

See comments under Head 10.

[Head 18: Amendment of the Sex Offenders Act, 2001](#)

This Head provides for the inclusion in the Schedule to the Sex Offenders Act, 2001 of certain offences provided for in this Scheme and I welcome the amendment.

[Head 19: Insertion into Part 2 of the Sex Offenders Act, 2001](#)

This Head will facilitate the sharing of information regarding convicted sex offenders between An Garda Síochána and the Probation and Welfare Service, as well as providing for the exchange of information with the relevant authorities in other jurisdictions.

I welcome this addition to the Sex Offenders Act.

²⁹ Of particular note are the provisions in Scotland's Vulnerable Witness Act, 2004. I outlined my views on these and other measures in detail during the course of my submission to the Joint Oireachtas Committee on Child Protection (30 August 2006). The submission can be accessed at www.oco.ie

Head 20: New Part in Sex Offenders Act, 2001

This Head provides for a prohibition from working with children for those convicted of a relevant sexual offence. This is a welcome amendment and constitutes an important part of the protection regime established by the Sex Offenders Act.

Compliance with international standards

Such a prohibition is required under Article 5(3) of the EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography. Under this Article, Member States are obliged to ensure that, where an individual is convicted of one of the offences outlined in the Framework Decision, that person may be “temporarily or permanently prevented from exercising professional activities related to the supervision of children”.

Head 21: Amendment of the Criminal Law (Incest Proceedings) Act, 1995

I have no comments to make on this Head.

Head 22: Amendment of the Bail Act, 1997

This Head adds certain offences under this Scheme to the Schedule to the Bail Act, 1997 and I welcome this amendment, given the serious nature of the offences involved. I would, however, query the exclusion of offences under Head 7 from the Schedule to the 1997 Act.

Recommendation

- Offences under Head 7 of the Scheme should also be included in the Schedule to the Bail Act, 1997.

Head 23: Amendment of the Children Act, 2001

This Head changes the definition of a child from a person under the age of 17 to a person under the age of 18 for the purposes of section 249 of the Children Act, 2001, which makes it an offence for a person who has custody, charge or care of a child to cause or encourage unlawful sexual intercourse or buggery with the child or to cause or encourage the seduction or prostitution of the child.

Compliance with international standards

As I have noted before, international standards in this area require a child to be defined as a person under the age of 18 and I welcome this amendment.

Head 24: Amendment of the Criminal Law (Rape) Act, 1981

This Head provides for the protection of the privacy and identity of trafficking victims during legal proceedings.

Compliance with international standards

Article 8(e) of the Optional Protocol to the Convention on the Rights of the Child, Article 30 of the Council of Europe Convention and Article 6 (1) of the Palermo Protocol all require the protection of victims' privacy and their identity. I welcome the extension of the anonymity provisions of the Criminal Law (Rape) Act, 1981 to include victims of offences under Head 3 of this Scheme which gives effect to our international obligations in this regard.

Head 25: Repeal of Section 3(1) of the Child Trafficking and Pornography Act, 1998

I have no comment to make on this Head.

4. Lacunae in law and practice

As I indicated above, there are a number of important gaps in the proposed anti-trafficking framework in Ireland that have not been addressed either in legislation or in practice. Broadly speaking, these gaps fall into the areas of protection and support for victims of trafficking.

Article 20.1 of the UN Convention on the Rights of the Child requires that a child temporarily or permanently deprived of his or her family environment be given special protection and assistance by the State. Article 39 of the Convention further obliges States Parties to take all appropriate measures to promote the physical and psychological recovery and the social integration of child victims of abuse. Other international instruments relating to trafficking and sexual offences also contain provisions concerning victim protection which touch on a number of different issues, including: immigration status, accommodation, medical needs (physical and psychological), support in criminal proceedings, providing information to victims, ensuring a durable solution that is in the victim's best interests; and training for those providing assistance³⁰.

I have made some recommendations below aimed at addressing the current lacunae based on the standards mentioned above³¹.

Immigration status

Although it is the practice that all suspected victims of child trafficking are referred to the Health Service Executive (HSE) and that such children are not generally deported, the fact remains that, unless an application for asylum, subsidiary protection or humanitarian leave to remain is made, these children have no defined immigration or protection status in this country. The HSE is responsible for making protection applications on behalf of unaccompanied children in care. However, being a victim of trafficking would not in itself constitute a ground for being granted either refugee status or subsidiary protection as defined in the Immigration, Residence and Protection Bill, 2007 and no specific provision is made in that Bill for victims of trafficking. In the absence of any separate legal framework for child victims of trafficking, the only option available may be to make a protection application when it is not entirely appropriate to do so. The UN Committee on

³⁰ Parts III and V of the Council of Europe Convention on Action Against Trafficking in Human Beings contain the most comprehensive protection provisions of the international legal instruments which I have reviewed. Protection measures are also provided for in Article 8 of the Optional Protocol to the UN Convention on the Rights of the Child; Articles 6, 7 and 8 of the Palermo Protocol; Article 7 of the EU Council Framework Decision on combating trafficking in human beings; and Article 9 of the EU Council Framework Decision on combating the sexual exploitation of children and child pornography.

³¹ Practice in other jurisdictions has also been useful in giving guidance on protection and support to victims of trafficking. See in particular the United States' Trafficking Victims Protection Act, 2000 and Italy's Legislative Decree 286 of 25 July 1998.

the Rights of the Child has specifically commented on this sort of situation by indicating that States "should refrain from referring unaccompanied and separated children into asylum procedures if their presence in the territory does not raise the question of refugee protection status"³².

The Minister for Justice, Equality and Law Reform has stated that he intends to deal with the issue of trafficking in the new immigration policy framework by means of a clear policy statement³³. Indeed, a statement issued by the Department of Justice, Equality and Law Reform upon signature of the Council of Europe Convention on Action Against Trafficking in Human Beings explicitly mentioned that provision would be made for a reflection period of at least 30 days and a temporary residence permit for victims of trafficking³⁴. Although such a policy statement would be welcome, it would be preferable to remove discretion and ambiguity from this issue and make explicit provision for reflection periods and temporary residence permits in primary legislation.

Such provisions should be regarded as an essential element of a sound child protection regime³⁵. It is important to note, however, that affording such assistance to victims of trafficking should never be made contingent on their participation in criminal proceedings³⁶.

Accommodation

Secure and suitable accommodation is vital for child victims of trafficking, especially in the initial period of seeking to escape the influence of traffickers. The accommodation currently available to such victims falls short of this requirement and additional resources should be made available to the HSE as a matter of urgency in order to rectify the situation.

While some victims of child trafficking are placed in foster care, most of them are housed in hostels that are not directly run by the HSE and which are not subject to inspection by the Social Services Inspectorate. The absence of sufficient care staff and of appropriate security at these facilities is a serious deficiency in the current regime. Victims of trafficking, and indeed unaccompanied minors generally, receive a lower level of protection and assistance than Irish children in care³⁷.

³² General Comment No. 6 of the UN Committee on the Rights of the Child, p 12.

³³ Dáil Debates, Vol. 633, No. 4, pp 1366-1367.

³⁴ Department of Justice, Equality and Law Reform press release, 13 April 2007.

³⁵ See Articles 13 and 14 of the Council of Europe Convention and Article 7 of the Palermo Protocol.

³⁶ This conditionality is one of the main problems with EU Council Directive 2004/81/EC on the residence permit issued to third country nationals who are victims of trafficking, although Ireland opted out of the Directive. It is also limited in the sense that it excludes EU/EEA citizens, despite the fact that many individuals trafficked to EU countries hail from other EU countries.

³⁷ For a fuller discussion of this point, see my submission to the UN Committee on the Rights of the Child of April 2006, made in advance of its examination of Ireland's second periodic report under the CRC. The submission can be accessed at www.oco.ie

Victim support

As recommended by the UN Committee on the Rights of the Child in its Concluding Observations on Ireland's most recent periodic report, vital social services should be available round the clock³⁸. This would prevent the situation arising in which victims of child trafficking are placed in the care of agencies other than the HSE who are not in a position to give the child in question the support and assistance he or she requires.

As part of the initial process of establishing the protection needs of a child victim of trafficking, an assessment should be made of particular vulnerabilities, including health, physical, psychosocial, material and other protection needs, including those deriving from domestic violence or other trauma³⁹.

I welcome the establishment of the Commission for the Support for the Victims of Crime, and particularly the fact that organisations working directly with victims of trafficking have been granted funding by the Commission.

As suggested in the Council of Europe Convention on Action Against Trafficking in Human Beings, consideration might be given to the establishment of a victim support fund. The fund could be supported by the sale or use of criminal assets seized from traffickers⁴⁰.

Lack of information

Many of the difficulties which victims of trafficking face when they initially escape the influence of traffickers stems from a lack of information regarding entitlements, support services, protection applications, legal options, and avenues of redress. Children in particular face difficulties in accessing such information. Consideration should be given to the appointment of an independent guardian for child victims of trafficking who would keep the child informed and support him/her throughout the process until a durable solution in the best interests of the child is found⁴¹.

38 Concluding Observations of the UN Committee on the Rights of the Child on Ireland's second periodic report, p 7.

39 See section V of General Comment No. 6 of the UN Committee on the Rights of the Child on the treatment of unaccompanied and separated children outside their country of origin.

40 See Article 15 (4) of the Council of Europe Convention on Action Against Trafficking in Human Beings.

41 Chapter 5 of the UNICEF's *Reference Guide* examines the guardian issue in considerable detail. It should be noted that such a guardian is not the same as a guardian ad litem in legal proceedings.

There is also a dearth of accurate and disaggregated data regarding suspected victims of trafficking in Ireland. Information gathered at ports of entry, by the Office of the Refugee Applications Commissioner (ORAC) and by centres accommodating victims of trafficking needs to be more consistent and complete.

Non-punishment provision

It should be made explicit that victims of trafficking will not be punished for engaging in illegal activities as a result of them being trafficked⁴². Notwithstanding the fact that it is unlikely a child victim of trafficking would be proceeded against in such a fashion, I consider that a clear statement on this matter is necessary.

Training

All professionals who may have contact with child victims of trafficking or abuse should be adequately trained. This should include, inter alia, members of An Garda Síochána, labour inspectors, customs officials, the judiciary and members of the HSE⁴³.

I welcome the increased emphasis in recent times on professional training for members of An Garda Síochána in dealing with victims of trafficking. However, in addition to being trained in dealing appropriately with cases of trafficking, it would be useful for such officials to also be trained to deal with child victims. This is especially important in situations where gardaí might, for example, raid premises in which such victims are housed or working.

⁴² While not an obligation under the Council of Europe Convention, Article 26 of the Convention requires States Parties to provide for the possibility of not imposing penalties on victims in these circumstances.

⁴³ The need for a wide range of professionals to receive such training is highlighted in UNICEF's *Reference Guide*, p 45.

