

THE WAY FORWARD?

**RECOMMENDATIONS TO PREVENT HUMAN
TRAFFICKING AND EXPLOITATION,
AND TO PROTECT AND IMPROVE THE STATUS
OF TRAFFICKED AND EXPLOITED PERSONS
AND PERSONS AT RISK OF TRAFFICKING AND
EXPLOITATION**



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AT RISK OF TRAFFICKING AND EXPLOITATION



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CONTENTS

1 INTRODUCTION	5
2 GENERAL RECOMMENDATIONS	6
2.1 Problems caused by the absence, and application of, legislation	6
2.2 The lack of effective supervision of labour law standards, especially in places where forced labour and human trafficking may occur	8
2.3 The gap between the supply and demand for cheap labour and the administrative regulations that prevent demand from being satisfied	10
2.4 The lack of reliable information on human trafficking	11
2.5 Insufficient awareness among foreigners of their rights and the legislative situation in the CR	13
2.6 Significant differences between citizens and foreigners from third countries in access to rights and in practical options for defending their rights	14
3 SPECIFIC RECOMMENDATIONS	18
3.1 The absence or inadequacy of measures to support and protect trafficked and exploited persons	18
3.2 Practices directly preventing the inclusion or worsening the exclusion of trafficked and exploited persons	25
4 BIBLIOGRAPHY	30

1 INTRODUCTION

The Way Forward – Recommendations to prevent human trafficking and exploitation, and to protect and improve the status of trafficked and exploited persons and persons at risk of trafficking and exploitation is one of the outputs of a project that La Strada Czech Republic (hereinafter “La Strada CR”) implemented in 2005-2007. The project focused on the social inclusion of trafficked and exploited persons. Its main objectives were to examine opportunities and limits for long-term cooperation with the target group, including the option of employment, and to collect information on the obstacles that can prevent the successful social inclusion of those persons.¹

The recommendations summarise the problems that in our opinion complicate effective solutions for the issue of human trafficking and exploitation, and impede or entirely obstruct the social inclusion of trafficked and exploited persons, and may worsen their social exclusion. They are divided into general recommendations, which concern options for prevention and intervention from a broader viewpoint, and specific recommendations, which describe the obstacles that arise from the current legislation and practice.

Although the text is primarily aimed at professionals who come into contact with human trafficking and exploitation, we have tried to make it as informative as possible in the hope that it will be read by people who are aware of the seriousness of the issue but have not yet directly encountered it. For that reason the text uses wherever possible names and terminology that are generally well known, and details or references to sources are provided in the footnotes. We have sought to provide justification for our recommendations, with additional information and practical examples, in order to facilitate an understanding of the purpose of the individual recommendations and the reasons behind their formulation.

We hope this text will inspire work to eliminate exploitation and ensure just and dignified working and living conditions for all.

1 Project number: CZ 04.1.03/2.1.15.2/0108

2 GENERAL RECOMMENDATIONS

2.1 Problems caused by the absence, and application of, legislation

- a) According to the definition presently used in the Czech Republic (hereinafter “CR”), anyone who coerces, engages, hires, lures, transports, conceals, detains or delivers another person to be used a) for sexual intercourse or other forms of sexual abuse or harassment, b) for slavery or serfdom, or c) for forced labour or other forms of exploitation, can be punished for human trafficking if the trafficked person is under 18 years of age. Trafficking adults is also a prosecutable offence if it involves the use or threat of violence, or deception, or the abuse of misunderstanding, duress or dependence of another person.²

The definition of human trafficking was extended in 2004 in line with the Palermo Protocol.³ The legislation in force until 2004 had only contained sanctions for human trafficking for the purposes of sexual exploitation; the new definition now includes trafficking for other purposes and in sectors other than the sex industry. The new legislation includes slavery, servitude, forced labour and other forms of exploitation in its definition of trafficking.

According to the information available the most common purpose of human trafficking is forced labour or other forms of exploitation in the sex industry or in other sectors. A significant problem, however, is that forced labour is not defined or described in more detail in the national legislation. It is only mentioned in the Charter of Fundamental Rights and Freedoms, where there is a provision on the prohibition of forced labour,⁴ and in the Criminal Code as one of the purposes of human trafficking.

The only positive definition of forced labour is found in the Forced Labour Convention,⁵ to which the CR is a signatory. The Convention is one of the International Labour Organization’s key documents and is aimed at preventing the most serious infringements of labour law standards. Forced labour also represents a violation of the human rights of persons who are subjected to it.

It is therefore desirable for the characteristics of forced labour and the prohibition thereof to be clearly articulated in the relevant national legislation so that an

2 Compare Section 232a of Act No. 140/1961 Coll., the Criminal Code, as amended

3 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the Convention against Transnational Organized Crime, UN, 2000

4 Compare the Resolution of the Cabinet of the Czech National Council 2/1993 Coll, declaring the Charter of Fundamental Rights and Freedoms to be part of the constitutional order of the Czech Republic, as amended, article 9

5 Forced Labour Convention, No. 29, 1930, given effect under No. 506/1990 Coll.

unambiguous and legally binding labour law standard is established. In the present circumstances it is a relatively complicated matter to sanction anyone for a breach of the prohibition of forced labour. The only basis for sanction in the national legislation is for forced labour as the purpose of human trafficking. In that case, however, in addition to the defining characteristics of forced labour also the characteristics of the crime of human trafficking would have to be present.

That is, however, in direct contradiction with the commitments under the aforementioned Forced Labour Convention, which obliges signatories to sanction forced labour and for sanctions to be effective and rigorously applied. However, we do not find forced labour listed as a crime in the Czech Criminal Code.

RECOMMENDATIONS

- ***Ensure that a clear definition of forced labour and articulation of its prohibition are incorporated into the Criminal Code and the relevant legal regulations on labour law standards and the supervision thereof.***
- ***Bring Czech legislation into line with the obligation under the Forced Labour Convention to sanction a breach of the prohibition on forced labour as a crime and ensure that the relevant sanctions are effective and are rigorously applied.***

b) On the basis of the Council Directive on short-term residence for trafficked persons,⁶ a new kind of residence permit has been introduced in the Foreigners Act.⁷ The awarding of the permit is conditional on cooperation with the law enforcement authorities. To allow trafficked persons to make an informed decision, after careful consideration of all the risks, on whether they will cooperate with the law enforcement authorities, the Act gives them a recovery and reflection period of thirty days. It follows from the directive, the Act and the very institution of the recovery and reflection period that trafficked persons are not obliged to cooperate with the law enforcement authorities within that time limit.

The Programme for the Support and Protection of Victims of Human Trafficking (hereinafter the “Programme”), based on the relevant methodological guidelines issued by the Minister of Interior,⁸ provides a similar option.

The recovery and reflection period is not, however, reflected in the relevant provisions of the Criminal Procedure Code⁹ concerning the option of refusing to testify, and the

6 Council Directive 2004/81/EC of 29 April 2004 on residence permits issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of activity to facilitate illegal immigration, who cooperate with the competent authorities

7 Act No. 326/1999 Sb. on the Residence of Foreigners in the Territory of the Czech Republic, as amended

8 Methodological Guideline of the 1st Deputy of the Minister of Interior of 26 October 2007 on the functioning of the Programme for the Support and Protection of Victims of Human Trafficking and its institutional arrangements

9 Act No. 141/1961 Coll., on the Criminal Procedure Code, as amended

criminal law legislation is therefore not in line with the aforementioned entitlement to a recovery and reflection period for trafficked persons.

RECOMMENDATION

Tobring the criminal law legislation into line with the Foreigners Act and identify ways of resolving the situation wherein the recovery and reflection period provided for in the Programme is not provided for in law.

- c) The Czech definition of the crime of human trafficking mentions “forced labour and other forms of exploitation” as one of the purposes of trafficking. The problems associated with the absence of national legislation on forced labour have already been mentioned. However, guidance can be found in the Forced Labour Convention and in the work of the International Labour Organization’s Committee of Experts.

It is difficult to find guidance for “other forms of exploitation”. There is no legally binding definition of exploitation in the relevant international legislation. In general it is presumed that exploitation should include cases that are serious and should be sanctioned, but for a variety of reasons do not satisfy the definition of forced labour or other terms describing the purpose of trafficking according to the definition of the crime of human trafficking. In that respect a discussion of experts at the national level, aimed at creating guidelines for situations to be included under the term “other forms of exploitation”, would be highly beneficial.

The outcome of the discussion should be a guideline document that would not only simplify the work of the law enforcement authorities and aid organisations, and facilitate cooperation between them, but could also significantly contribute to the more effective identification of trafficked persons.

RECOMMENDATION

On the basis of a discussion involving all actors concerned with the issue of human trafficking, elaborate guidelines on definitions of the terms “forced labour” and “other forms of exploitation” that will provide guidance to the actors, including the law enforcement authorities, on what actions and situations to include under these terms.

2.2 The lack of effective supervision of labour law standards, especially in places where forced labour and human trafficking may occur

According to the International Labour Organization (hereinafter “ILO”), the full implementation of its standards for workers’ rights, including immigrants, is crucial in the attempt to eliminate the conditions that allow human traffickers and unscrupulous

employers to exploit people on the basis of their nationality and residential status.¹⁰ In that respect it is very important that there is effective supervision of compliance with working conditions and standards.

The control mechanisms for labour and employment are reasonably well elaborated in the CR. Nevertheless, it is unclear who supervises the prohibition on forced labour, and on what legislative basis.

For effective supervision it is essential that the concept of forced labour be incorporated in an appropriate way into the relevant legislation on labour law standards, in order to provide an unambiguous legal basis for the work of the relevant supervision authorities. A clear legislative basis would simplify cooperation and the exchange of information between the individual institutions concerned, such as the labour inspectorates, employment offices, customs authorities, foreign police and law enforcement authorities.

The rigorous supervision of compliance with standards for working conditions, focusing on the low-income sectors where exploited persons are frequently employed, could help to reduce the incidence of exploitative working conditions. Eliminating the conditions that make it attractive for some employers to employ foreign workers without the relevant permits could help to prevent illegal employment. Another benefit would be the opportunity to gradually eliminate the unfair competition that such labour represents for local workers.

However, ensuring the supervision of working conditions in areas where the implementation of supervision is problematic, e.g. work in households or in sectors not ordinarily subject to supervision – e.g. the sex industry – where conditions can often be dire, will probably remain a major problem. Sweatshops will probably present a similar problem: while they would come under the scope of the supervisory authorities, their existence and location are kept secret due to the very poor prevailing conditions.

RECOMMENDATION

Adopt the necessary legislative and other measures to ensure the effective supervision of compliance with the prohibition on forced labour by the authorities charged with the supervision of labour law standards, and seek opportunities and ways to ensure such supervision is possible in sectors that are not ordinarily subject to it, or can only be accessed with difficulty.

10 INTERNATIONAL LABOUR OFFICE, Human Trafficking and Forced Labour Exploitation – Guidance for Legislation and Law Enforcement. Geneva: International Labour Office, 2005. p. 21

2.3 The gap between the supply and demand for cheap labour and the administrative regulations that prevent demand from being satisfied

The rate of growth of the world population of migrants more than doubled towards the end of the 20th century. According to ILO estimates there are now approximately 30 million migrant workers, immigrants and members of their families in Europe. There is every reason to believe that that is merely the beginning of a trend that will continue to accelerate in the 21st century. Between 1970 and 1990 the number of countries employing foreign labour rose from 42 to 90.¹¹

In developed countries there is great demand for semi-skilled and unskilled labour, due among other factors to negative demographic trends in those countries. The source countries, i.e. the countries from which migrants come, can offer a labour force for which no work is available in their home countries, or where owing to the poor economic or political situation it is essential or advantageous for those persons to seek work abroad. That migration trend is to a large extent a consequence of significant inequalities in the distribution of wealth around the world, a situation which is demonstrated by the fact that the difference in gross domestic product per capita between developed and less developed countries has quadrupled over the last twenty years.¹²

Supply of, and demand for, cheap labour, which usually represents migrants, also exists in the CR. However, as in other destination countries, this fact is not reflected in the relevant national policies. Restrictive employment and immigration policies, especially with regard to foreigners from third countries, are an obstacle to satisfying demand. The tension created logically leads the parties concerned to try to find ways to close the gap between supply and demand. If the legislation does not allow for that, the parties proceed in a manner outside the legal framework. This creates room for irregular migration and employment, often leading to the exploitation of migrant workers and the limiting of their options to protect themselves against exploitation. Moreover, if migrants, including irregular migrants, are not included as a matter of course in all relevant national policies (e.g. employment policy, social inclusion, etc.), and if they are not given access to their rights, ways of safeguarding them, and social resources, this may lead to their further marginalisation and social exclusion, with all the ensuing consequences.

However, this approach entirely ignores positive migration, which is viewed in United Nations and ILO documents in the broader context of development, economic growth and prosperity. The funds that migrants from around the world send home represent the second largest international financial flow after funds derived from the oil trade. At national level the benefits of migration are particularly marked in areas where there are labour shortages, whether these are due to an objective shortage of workers or because the local population is not interested in those particular kinds

11 INTERNATIONAL LABOUR OFFICE, About MIGRANT, [quoted 23 August 2007]. Access from: <http://www.ilo.org/public/english/protection/migrant/about/index.htm>

12 *ibid.*

of employment. For instance, it is well known that the construction industry in the CR essentially depends on foreign labour.

Labour migration can be advantageous for all parties concerned: the destination and source countries, individual workers and employers. However, it is not sustainable for destination countries, as the stronger side, to take only the advantages while almost all the risks, often endangering health, safety, life and basic human rights, are borne by the migrants as the more vulnerable side. The developed world should not merely benefit from the advantages of globalisation, such as the common relocation of production to sites with low manufacturing costs, often with serious consequences for the local population, the economy and the environment, but should face up to the consequences of globalisation, which may not always be entirely positive for developed countries.

RECOMMENDATIONS

- *Aim to create legal ways of satisfying the demand for labour from abroad with the aim of preventing exploitation, focusing on those groups of persons at the greatest risk of being exploited.*
- *Openly discuss the existence of supply of and demand for cheap labour, represented by regular and irregular migrants, and reflect it in measures and plans for employment, social policy, migration policy and other relevant fields.*
- *Analyse the economic and social advantages of migration and consider adopting measures so that those advantages are used to the benefit of the CR and migrant workers, as an alternative to attempts to prevent migration.*
- *Promote greater awareness of human trafficking and exploitation at work among the consumers of goods and services.*

2.4 The lack of reliable information on human trafficking

Human trafficking is in many respects a complicated phenomenon. It can be viewed from a range of perspectives:

- ⊗ It is a human rights issue, because violation of human rights is a cause and consequence of human trafficking.
- ⊗ It is related to gender equality: under certain circumstances inequalities can lead to human trafficking. Moreover, this crime is simultaneously a form of gender-based violence.
- ⊗ It is a problem concerning labour and labour law standards, whose breach in cases of human trafficking may amount to forced labour and slavery, or practices akin to slavery.
- ⊗ It concerns migration. Although it may also take place within national borders, a large number of cases are cross-border. It is a significant threat for migrant workers.

It is influenced by migration policy and displays similarities with migration, e.g. concerning migration flows and migrants' motivation to leave their countries of origin.

- ④ It is also an issue for criminal legislation as a crime in itself that is, in addition, often connected with other criminal offences and/or organised crime.

The purpose of human trafficking is the exploitation of persons, which can take place in very varied fields, which are subject to change in response to the contemporary situation, e.g. where demand for labour in a particular sector is concerned, or changes to the regulations on migration. Trafficking may occur in the construction industry or agriculture, but also in domestic labour and nursing, or even in begging or the removal of body organs, or – as is well known in this context – in the sex industry.

Owing to its nature, human trafficking is a highly latent crime. The responsibility cannot be placed on the trafficked persons themselves, who do not report human trafficking because they live under the threat of violence against themselves or their families, the loss of employment, or because they are in debt to or otherwise dependent on the traffickers - or it may be that they simply do not know the language and their rights in a foreign country, nor how to defend their rights.

These are all reasons why there is an acute lack of quantitative and qualitative information. However, that complexity is at the same time also the reason why it is absolutely essential to remedy that shortage.

Reliable information on the nature, mechanisms, trends and extent of human trafficking and exploitation and the factors that influence these categories are an essential precondition for the success of any measures aimed at prevention or intervention. It is equally necessary to focus on areas where a detailed investigation faces objective or methodological obstacles, such as the sex industry, domestic labour or criminal activities related to exploitative marriages. Ignoring those areas would mean ignoring the significant gender aspect of the issue.

RECOMMENDATIONS

- *Introduce a mechanism to collect and analyse gender sensitive and segregated information on the nature, mechanisms, trends and extent of human trafficking, and on the factors that influence those categories. The mechanism should have a mandate to allow it to collect that information from all the relevant sources, and should have an independent status to facilitate an impartial assessment of the effectiveness of the existing measures and the formulation of recommendations to improve them where necessary.*
- *Identify ways to improve knowledge of risk areas for human trafficking the investigation of which faces objective or methodological obstacles, such as the sex industry, domestic labour, exploitative marriages, irregular migrants' working and living conditions, etc.*

2.5 Insufficient awareness among foreigners of their rights and the legislative situation in the CR

In many cases the vulnerability that may result in exploitation and human trafficking is due to the lack of information held by the persons concerned, on their rights, on the opportunities to exercise those rights and apply them in practice, and on the legislative situation in the CR in general. For straightforward information in a language they understand, foreigners are in essence dependent on various intermediaries. In the early phases of their migration in particular, they see no reason to distrust those people, especially if they are “experts” in local circles who make their living by arranging work abroad.

For the intermediaries it is, however, an opportunity to begin creating a relationship of dependency merely by providing incomplete, incorrect or misleading information. Very often this concerns the misinformation that it is possible to change the purpose of their residence, or the type of visa or residence permit, within the CR, or that it is possible and legal to work with only a tourist visa. This incorrect information means that after they arrive foreigners may soon find themselves in the position of irregular immigrants, which increases their vulnerability and significantly complicates or completely obstructs any chance of defending their rights.

Insufficient information, as a factor that makes migrant workers more vulnerable, is reflected in the most important global instruments to protect the rights of migrant workers, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and ILO Convention No. 97 on Migration for Employment (Revised), 1949 (hereinafter “Migrant Workers Convention” and “Migration for Employment Convention”). Both conventions oblige signatories to inform migrant workers on various aspects of their employment and residence abroad. Those obligations apply to both source and destination countries.

Regardless of the legality of residence and employment, the Migrant Workers Convention grants those persons and their family members the right to information. This information should include their rights under the Convention, the conditions for entering the country, their rights and duties, and all the other information that enables migrant workers to meet the administrative requirements and other formalities in the country they are in. The countries concerned – source, transit and destination – are obliged to disseminate this information or ensure that it is disseminated. It should be provided free of charge and if possible in a language that the migrant workers understand.

The Migration for Employment Convention includes similar provisions. It stipulates that the signatories must ensure that appropriate services are available to migrant workers free of charge, including the provision of accurate and reliable information.

The Migrant Workers Convention guarantees the right of persons who live and work abroad, in accordance with the relevant legal regulations, to be fully informed of the conditions for entering the country where they will be employed, and especially of those conditions that relate to their residence and employment. They also have the

right to be informed as to which authority in the country where they are employed they should turn, in the event of any changes to the conditions of their residence.

Other provisions of the Migration for Employment Convention are also inspirational, even if they must be viewed in the context of the situation in the specific country and the need to ensure an essential degree of flexibility for employees and employers. It mentions a system for the supervision of employment contracts between employers and migrant workers, which should include the requirement for migrant workers to have access to their employment contracts before leaving their home countries, or at the latest on arrival in the country where they will be employed. An employment contract must include provisions on working conditions and on the remuneration for work. Moreover, those workers should be informed in writing about their general working and living conditions in the country where they will be employed. The system for supervising employment contracts includes a specification of the methods used to ensure that employers meet their contractual obligations, and sanctions for any breach of the aforementioned duties.

RECOMMENDATION

Identify and implement effective mechanisms that would make straightforward information readily available to foreigners, covering their rights and ways of asserting and exercising them in practice, and relevant information on the legislation covering foreigners and labour law. That information could be distributed for instance through diplomatic missions, the border police, employers, trade unions or appropriate NGOs.

2.6 Significant differences between citizens and foreigners From third countries in access to rights and in practical options for defending their rights

Foreigners to whom La Strada has provided services over the last two years have repeatedly described the following experiences:

- ⊙ Failure to pay wages, along with the threat that if the worker complains he or she will be dismissed (because the worker's work permit is tied to a specific employer, and if that employment is terminated the foreigner will not only forfeit his or her work permit, but also the residence permit, because that is tied to the work permit, and the foreigner may find him or herself with irregular status in the CR unless he or she leaves the country immediately).
- ⊙ Failure to pay wages, or retaining them until such time as a foreigner's tourist visa expires (because the foreigner will probably continue working, and as the purpose of residence cannot be changed within the CR the foreigner will have irregular status) and then payment is withheld with the threat that otherwise the foreigner will be reported to the foreign police.

- ⊙ Physical violence, threats on foreigners' lives, threats of expulsion, reporting a crime or the confiscation of a foreigner's passport if he or she requests the payment of wages owed.
- ⊙ Restricting a foreigner's freedom and preventing him or her from leaving his or her employment or transferring to another employer by threatening him or her with punishment, demands to pay unwarranted and exorbitant debts, reporting him or her to the authorities, or the withholding of wages or documents.
- ⊙ Threats of violence against the foreigner's family and relatives in his or her country of origin.
- ⊙ The dismissing of cases brought against an employer who has not paid wages owing to the inability to prove that the employment relationship in question really existed (many foreigners work without employment contracts and their co-workers often refuse to testify, fearing dismissal or a worsening in their working conditions).
- ⊙ Refusal to accommodate foreigners in temporary housing facilities owing to their nationality, and refusal to provide healthcare to foreigners even when they have health insurance or can pay for treatment.

The exploitation of foreigners is possible because they often do not know their rights or the legislative situation in the CR (see above), and above all because they have minimal options for defending their rights, a situation which is a consequence of their uncertain or irregular residential status. Their situation is moreover complicated by the fact that the competent authorities often place greater emphasis on punishing these people for breaching the regulations on foreign residents than on protecting their rights, which are often fundamental human rights.

Foreigners who live and work in the CR in accordance with the relevant laws but come from countries that are not as economically developed as the CR, and to which, in the majority of cases, significantly more restrictive migration regulations apply, are in a vulnerable position. Worse still is the situation of persons who find themselves – often unintentionally – in situations where their status is irregular. That was articulated by the former Secretary-General of the United Nations in his message to the High-Level Dialogue on International Migration and Development at the UN: “The benefits of international migration, not only for the migrants themselves but also for the destination countries, depend on the safeguarding of the rights of migrants. Labour law standards and rights are crucial in preventing exploitation, and should be thoroughly and consistently protected. Irregular migrants are more vulnerable still, especially with regard to employment. If they are afraid of being discovered it is unlikely that they will actively demand just treatment from their employers.”

According to ILO estimates, at least 15% of the present world population of migrants live and work under irregular status, i.e. contrary to the relevant regulations for foreigners and employment. According to the ILO that situation may be due in part to the increasing commercialisation of the recruitment of workers, and increasing tendencies in developed countries to apply restrictive immigration policies. All

categories of migrants regularly experience exploitative and discriminatory treatment in destination countries. Their options for exercising their human rights and their rights under labour law standards are often inadequate, especially where irregular migrants are concerned.¹³

In this context it would clearly be appropriate to reassess the broadly restrictive migration regulations in terms of their effectiveness, and to consider the benefits of an approach based on the acceptance and safeguarding of migrants' rights. Such an approach would be a significant positive contribution to the welfare of these people, and would help eliminate legal and illegal employment practices in exploitative and discriminatory conditions. If migrant workers need not fear reporting these practices and have the opportunity to receive compensation for lost earnings from exploitative employers, it is probable that the attractiveness of exploitative employment will be significantly reduced for such employers.

With regard to safeguarding the rights of migrant workers, inspiration can again be found in the Migration for Employment Convention and the Migrant Workers Convention. Both conventions include specific provisions that oblige signatories to ensure equal access to various rights for foreigners and citizens of the destination country.

Regardless of a foreigner's residential status, the Migrant Workers Convention stipulates the entitlement of migrant workers to the same treatment as that extended to citizens, including remuneration and other working conditions such as working hours, overtime, paid leave, the termination of employment, etc. A provision that regards as unlawful the option of derogating from the aforementioned principle of equal treatment in employment contracts is very important in the context of the potential exploitation of migrants at work. Signatories are obliged to ensure that migrant workers are not deprived of any of the rights ensuing from that principle owing to the irregularity of their residence or employment. Employers in particular cannot appeal to the irregularity of their employees' residence or employment as reasons for failing to fulfil entirely or in part their contractual obligations to migrants.

The Migrant Workers Convention guarantees, for migrant workers who are in a signatory country in accordance with the relevant legal regulations, the same treatment to which citizens of that country are entitled, concerning protection against dismissal, unemployment benefits, access to programmes aimed at combating unemployment, and, under the stipulated conditions, access to alternative employment in the event of the loss of their previous employment. This provision has the potential to significantly reduce the vulnerability of migrants who are currently tied – through their work and residence permits – to a specific employer and have no entitlement to social security benefits should they lose their jobs.

In our experience violence and threats of violence are not isolated incidents in the exploitative employment of migrants. In that context there is an important provision in the Migrant Workers Convention that explicitly accepts their right to freedom and

¹³ *ibid.*

personal safety, and further states that they are entitled to effective protection by the state against violence, injury and threats, regardless of whether those come from public officials or private persons.

Concerning the confiscation of documents, the Convention states that it is unlawful for anyone other than authorised public officials to confiscate identity documents, documents authorising entry or residence in the country, or work permits. The 2005 Council of Europe Convention on Action against Trafficking in Human Beings includes a similar provision.

The European Union is built on the concept of human rights, and it is generally presumed that there are no significant shortcomings in member states in that respect. Member states frequently criticise regimes that trample human rights underfoot. The concept is, however, based on rights that pertain to every human being as such, and therefore the “developed world” too has certain shortcomings in the extent to which it rigorously insists that rights are assured for all persons, including regular and irregular migrants.

RECOMMENDATIONS

- ***Sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by UN General Assembly Resolution 45/158 of 18 December 1990***
- ***Evaluate the relevant measures, especially concerning migration and employment, in terms of their impact on groups faced with the threat of exploitation and human trafficking***
- ***Identify and apply measures leading to a stronger legal status for foreigners faced with the threat of exploitation and human trafficking, and to the elimination of factors that increase the risk thereof***

3 SPECIFIC RECOMMENDATIONS

3.1 The absence or inadequacy of measures to support and protect trafficked and exploited persons

- a) In 2004 the European Union adopted a [directive that allows trafficked persons to gain residence permits](#) on the condition that they cooperate with the competent authorities¹⁴ (see also part 2.1b). It is aimed at improving the detection of human trafficking crimes by providing an incentive – in the form of residence permits – for trafficked persons to cooperate with the authorities, and by paying attention to the safeguarding of the rights of trafficked persons.

The directive was transposed into Czech law in Section 42e of the Foreigners Act, concerning long-term residence for the purpose of protection. That amendment came into force in June 2006. Since then questions have arisen concerning the issue of transposing the directive into Czech law.

Transposition has been problematic because the wording of Section 42e is in many respects more limited than the wording of the directive itself. The directive does not, however, authorise member states to interpret it in that way. There is a great difference between the directive and Section 42e in the very definition of the persons to which the amendment, apparently implementing the directive, applies. According to the directive it applies to citizens of third countries who are or have been victims of crimes related to human trafficking, even if they have entered an EU member state in contravention of the relevant regulations on foreigners. In contrast the definition of a person to which Section 42e applies says that it concerns “a foreigner who is the probable victim of the crime of human trafficking... on condition that he or she cooperates with the law enforcement authorities in the prosecution of the person suspected of committing that crime, and does not cooperate with the suspect.” That is a marked difference. In addition to other discrepancies, the Czech version applies only to probable victims of human trafficking, and only if they are already cooperating with the law enforcement authorities, whereas the directive includes provisions that explicitly apply to persons before they decide to cooperate in any way. Moreover, in the Czech version the person must cooperate in prosecution, which is a specific stage of the criminal proceedings when there is sufficient reason to indicate that a crime has been committed by a specific person or persons. The directive, however, does not include any restrictions of that nature.

Another discrepancy concerns the definition of the “competent authorities” and the “relevant national proceedings”. The directive uses the term “competent authorities” in connection with the condition of cooperation, while the Czech transposition is

¹⁴ Council Directive 2004/81/EC of 29 April 2004 on the issuance of residence permits to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, and who cooperate with the competent authorities

restricted to the law enforcement authorities. However, it may happen that a probable trafficked person cooperates e.g. with a labour inspectorate which investigates compliance with the labour-law standards, and only if it concludes (with the assistance of the trafficked person) that standards have been breached to the extent that forced labour as the purpose of trafficking may be involved, will it transfer the case to the law enforcement authorities.

A provision on the purpose of the directive links the duration of residence permits to the length of the relevant national proceedings. As the Czech transposition restricts the “relevant national proceedings” to prosecution, it does not cover cooperation in the stages of criminal proceedings that precede and follow prosecution, and also fails to cover the residence of the trafficked person during any civil compensation proceedings. Under the wording of the directive, however, it would be possible to view such proceedings as part of the “relevant national proceedings”.

Finally, the ambiguous expression “cooperation with the law enforcement authorities” also causes great problems in practice. It is unclear whether that refers to all formalised acts in criminal proceedings, or only the situation in which the person cooperating has the status clearly defined in legislation, for example that of a witness in criminal proceedings.

It remains open to question whether the entire issue of residence permits in return for cooperation is not rather undignified. It might seem that it reduces trafficked persons to mere instruments serving the state’s interest in sanctioning that crime, and overlooks the fact that support and protection should be available to all trafficked persons merely on the basis that they are victims of a serious crime and an exceptionally severe violation of human rights. Moreover, that approach may frequently mean that the state’s protection is not extended to persons who are victims of the same crime, even its cruellest forms resulting in high safety risks for trafficked persons that constitute the very reason to keep them from cooperating.

RECOMMENDATIONS

- ***Bring the legislation transposing the directive into line with the purpose, objectives and wording of the directive. In this respect the interpretation of the provisions that transpose the directive and the relevant practice should be amended, and the information summarised in a written output that clarifies the concept of “cooperation with the competent authorities”. This output should be available to the public.***
- ***Introduce a system of protection and support for trafficked persons, in line with the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, that is not dependent on those persons cooperating in the detection and capture of suspects.***
- ***Sign and ratify the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.***

- b) A fundamental precondition for effective protection of and support for trafficked persons, and for the gathering of information on the phenomenon on human trafficking and ways of intervening to prevent it, is the consistent **identification of trafficked persons** by all actors that may come into contact with them, i.e. various units of the police, social workers, healthcare workers, authorities supervising compliance with the labour law regulations, and institutions and organisations working on the issue of migration and foreigners (e.g. the Refugee Facilities Administration or the Asylum and Immigration Policy Department at the Ministry of Interior).

Some steps to eliminate this shortcoming have already been taken. Information materials have been produced (e.g. for the police, healthcare workers and social workers), and a number of training courses have been held for various target groups. Nevertheless, many shortcomings remain in that field. We find cases in which persons forced into prostitution are fined for breaching local decrees on prostitution without being identified as possible victims of crime. Neither La Strada Czech Republic nor any other organisations providing services for trafficked and exploited persons have recorded a single case in which those persons have been assigned to their care by e.g. the foreign police, which probably often comes into contact with the target groups in which trafficked and exploited persons are found.

Among organisations who carry out such identification on a relatively frequent basis, especially the criminal police and its organised crime unit, there are relatively frequent discrepancies between who those units consider to be trafficked persons and who aid organisations consider to be trafficked persons.

A single document providing guidance in the identification of trafficked persons and unifying the concept of a “trafficked person” would definitely help to clarify the situation and increase the number of such persons identified. It is also important to continue regular training for specialists who may come into contact with those persons.

RECOMMENDATIONS

- *In collaboration with all the relevant organisations, elaborate a single document to identify trafficked persons and ensure it is used by all units that may come into contact with such persons. The document should include specific indicators and a definition of the procedure to establish a minimal standard of who can be considered a trafficked person.*
- *Regular training on the issue of human trafficking for specialists who may come into contact with trafficked persons, with the emphasis on the identification and treatment of trafficked persons to avoid their re-victimisation.*

- c) One of the defining characteristics of human trafficking is coercion, whether in the form of physical violence, threats, extortion or other forms of pressure. Another characteristic is exploitation, which can often amount to forced labour, or practices verging on slavery, either in the sex industry or in other fields.

It is in the nature of the crime that victims are often subjected to highly traumatic experiences. A recent study of the physical and psychological consequences of human trafficking¹⁵ states that trafficked persons experience symptoms indicative of post-traumatic stress disorder at a level comparable to victims of torture.

It is understandable, therefore, that after such experiences trafficked persons often fear for their health and lives after managing to get out of the exploitative situation, especially if they decide to cooperate with the law enforcement authorities. For such cases the Criminal Procedure Code¹⁶ includes the **option of concealing the identity of a witness**. In practice, however, that option is used rather rarely. It is the exception for a witness to be protected, although the circumstances of such cases give good grounds for that practice to be the norm, especially when according to the legislation protection can be removed at any time.

For the protection and safety of trafficked persons it would be highly advisable to ensure that they can testify from another room as standard practice and do not need to meet the accused, thereby avoiding secondary victimisation. Moreover, it would be in the interests of the law enforcement authorities to allow a social worker to be present at hearings if requested by trafficked persons. If required that social worker could provide them with psychological support and intervene in order to reassure a trafficked person and thereby reduce the risk that he or she will be unable to testify.

RECOMMENDATIONS

- *Find a way to ensure in practice that trafficked persons appearing as witnesses in criminal proceedings have the option of appearing as witnesses with concealed identity as a standard practice.*
- *Ensure that all trafficked persons have the option of testifying from another room so that they do not need to meet the accused, ensure that repeated hearings are kept to a minimum, and allow trafficked persons the option of being accompanied to hearings by a social worker who can intervene if the trafficked person faces psychological problems in consequence of the hearing.*

d) Trafficked persons are victims of a crime that is often referred to as a “modern form of slavery” and represents one of the most serious violations of human rights and human dignity. As the defining characteristic of this crime is exploitation, trafficked persons are deprived of a substantial part or all of the earnings that would otherwise belong to them. They should therefore be entitled to financial compensation for material and non-material injury, as well as lost earnings.

15 ZIMMERMANN, C., HOSSAIN, M., YUN, K., ROCHE, B., MORISON, L., WATTS, C. *Stolen Smiles – The physical and psychological consequences of women and adolescents trafficked in Europe*. London: The London School of Hygiene and Tropical Medicine, 2006. p. 78

16 Compare Section 55 paragraph 2 of Act No. 141/1961 Coll., on the Criminal Procedure Code, as amended

In practice, however, **compensation** for the victims of crime in general and trafficked persons in particular presents substantial problems. Trafficked persons are often foreigners, in many cases with irregular status, which significantly affects their chances of receiving compensation. For foreign nationals the very making of a claim is problematic, and even if such a person succeeds in making a claim he or she faces problems remaining in this country during compensation proceedings, especially if the claimant is referred to civil proceedings. It is equally difficult to hold such proceedings when the trafficked person is not present in this country.

Another major complication is the impossibility of calculating lost earnings in cases of human trafficking for the purpose of exploitation in prostitution, as that is neither employment nor a licensed trade.

In connection with attempts to exact compensation for trafficked persons, problems arise in practice concerning the payment of court fees. If trafficked persons who make claims are referred to civil proceedings there is a relatively small but significant risk that in the event that they lose in court they will have to pay the costs of court proceedings. However, in consequence of their exploitation they do not have those funds, and will probably prefer to waive their claim. In those cases it would be appropriate to make a statement on compensation a standard part of the judgement in criminal proceedings.

In this context, it is a very significant complication if a witness with concealed identity appears as an injured party claiming compensation. As the statement on compensation must specify the person to whom compensation is to be awarded (in criminal, civil or execution proceedings), the identification of that person would nullify the purpose of the witness protection institution.. If such a person is not allowed to make a claim without revealing his or her identity he or she will probably be unable to claim any compensation whatsoever.

In addition to achieving justice for the injured party, the opportunity to win compensation for the injury suffered in cases of human trafficking, and in cases of exploitation in general, can have a significant deterrent effect. This approach could be particularly interesting as an instrument to combat illegal employment.¹⁷ If employers were obliged to cover these expenses for all workers subjected to forced labour or other exploitative practices, including workers who they have employed in contravention of the legislation, that would probably significantly increase the risks for employers involved in such employment or practices.

¹⁷ Inspiration can be found e.g. in the Iranian labour code from 1990, which as a sanction for breaching the prohibition on forced labour stipulates imprisonment, a fine, and the obligation to pay lost earnings and compensation for any other injury (International Labour Office, Human Trafficking and Forced Labour Exploitation – Guidance for Legislation and Law Enforcement. Geneva: International Labour Office, 2005. p. 16)

RECOMMENDATIONS

- *Ensure all victims of human trafficking have a realistic opportunity to claim financial compensation for non-material injury and compensation for lost earnings, taking into account the specific features of this crime and the problems identified in practice. Such a measure should include an in-depth analysis of other potential obstacles to the raising and exacting of claims for compensation.*
- *Consider introducing an obligation for employers to pay exploited and trafficked persons all the remuneration due for work performed and the appropriate tax and deductions, as an instrument with a significant deterrent effect. In this context it would also be appropriate to consider introducing an effective complaint mechanism that would enable exploited and trafficked persons to provide information on exploitative practices, either directly or through third parties.*

- e) A significant security risk for trafficked persons is that social security and employment services and benefits are tied to offices in the recipient's place of permanent residence. If that is also the place where the person was exploited, e.g. forced into prostitution, there is the danger that the person will meet the perpetrators there, or that the perpetrators may determine the person's current place of residence. Moreover, children who are removed and placed in institutional care are usually located in the vicinity of their parents or guardians' permanent residence.

While the authorities may [transfer a trafficked person's file](#) to another locality, the decision rests with the specific authority. In our experience even when they are willing to transfer the file, at least one personal visit in the place of permanent residence is required by employment offices.

RECOMMENDATION

For security reasons in particular, it should be possible for persons who have probably been trafficked or exploited in the place of their permanent residence to have their files transferred from the local social services department or employment office to another locality. In view of the security risk, which may endanger life, that decision should not be left to administrative discretion.

- f) In the professional discourse on human trafficking relatively little attention has been paid to [health issues](#). One of the sources of information on that subject is a recent study by the London School of Hygiene and Tropical Medicine on the impact of human trafficking on health.¹⁸

According to the study nearly all the trafficked persons interviewed had been subjected to violence during trafficking, and half of them had suffered physical injuries.

18 ZIMMERMANN, C., HOSSAIN, M., YUN, K., ROCHE, B., MORISON, L., WATTS, C. Stolen Smiles – The physical and psychological consequences of women and adolescents trafficked in Europe. London: The London School of Hygiene and Tropical Medicine, 2006.

After being released, the majority of them displayed a high incidence of symptoms indicating physical health problems, which declined significantly approximately one month after they had been taken into the care of an aid organisation. The majority of them suffered from memory loss. There was a very high incidence of mental health problems such as depression, anxiety and hostility, comparable with the figure of 10% of women in the general population suffering from the most severe symptoms.¹⁹ A significant reduction in mental health symptoms was recorded approximately three months after they had entered the care of an aid organisation. As many as 56% of the persons interviewed had, at the time of entering care, symptoms indicative of post-traumatic stress disorder, a level that is comparable with persons who have experienced torture or the traumatic experience of warfare.²⁰

It is evident from that brief summary that human trafficking results in significant health problems for trafficked persons, and due attention should be paid to health issues. Moreover, it is more than likely that persons who are no longer suffering acute health problems, pain and fear for their health will provide more detailed and reliable information on the circumstances of their trafficking. It is one of those areas where the interests of the trafficked person coincide with the interests of the state in combating this serious crime.

RECOMMENDATIONS

- *Arrange and implement a “recovery and reflection period” for trafficked persons of at least 90 days to allow their health and cognitive functions to return to a level that enables them to make a considered and informed decision on their future, and to provide more reliable information on the circumstances of their specific experiences of human trafficking.*
- *Take measures to prevent delays in legalising the residence of trafficked persons, which gives them access to healthcare.*
- *Ensure that organisations that may be the first to come into contact with persons who are probably victims of trafficking (e.g. the police, immigration authorities, aid organisations) actively question those persons about any health problems or pain they may have during the initial contact. It is important that these questions are asked in private, and in a language and manner that the person in question understands.*
- *Ensure that the relevant authorities respond to acute and serious health problems by providing professional medical attention before they interview the person in question or request information from him or her.*
- *In connection with problems such as sexually-transmitted diseases, ensure that testing and treatment proceed as far as possible on the basis of the free consent of the person in question.²¹*

¹⁹ *ibid.* p. 85

²⁰ *ibid.* p. 78

²¹ *ibid.* p. 113 - 116

3.2 Practices directly preventing the inclusion or worsening the exclusion of trafficked and exploited persons

- a) A factor that greatly complicates or even entirely obstructs the inclusion of trafficked persons is their **prosecution and conviction for crimes that occurred in connection with their trafficking**, which they were either forced to commit, or were unable to influence. A provision on immunity from prosecution in the most recent international instrument to combat human trafficking, the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, reveals the importance attached to not prosecuting the victims of the crime of human trafficking.

The consequence of prosecuting a victim of crime may be far-reaching, as illustrated by the following case, which, while hypothetical, is based on actual practice and legislation.

Many trafficked persons are brought into the destination country using false travel documents. In the experience of La Strada CR, however, trafficked persons are prosecuted and convicted for using them. This may have very serious consequences for their future lives. If a convicted trafficked person – a foreigner – were to cooperate with the law enforcement authorities, he or she could be awarded legal residence in the CR for the duration of the criminal proceedings, and could find work, make social contacts and successfully integrate into society. Moreover, if that person's testimony significantly contributed to capturing the perpetrators, he or she would have the opportunity of gaining permanent residence in the CR for humanitarian reasons. However, due to his or her criminal record the trafficked person would be ineligible for permanent residence. In this case, the only way of legalising his or her residence would be to apply for international protection. However, those applying for international protection cannot work for a full year after filing their application. The process of integration would be interrupted, with the risk of losing the necessary skills and work habits during the year in which they are excluded from the labour market. Moreover, there would be further difficulties if such a person happened to be involved in, for example, divorce proceedings in his or her country of origin as, when applying for international protection, he or she cannot be in contact with his or her country of origin's embassy in the CR, which plays a key role in completing the divorce process. If this person had children in his or her country of origin, he or she could not visit them, because a person applying for international protection cannot return to his or her country of origin.

That example illustrates the potentially far-reaching consequences of punishing trafficked persons, in addition to the fact that the victim of a crime is punished, a situation contradicting the principles and purposes of criminal proceedings.

RECOMMENDATION

Adopt measures in line with the 2005 Council of Europe Convention on Action against Trafficking in Human Beings so that trafficked persons are not punished for crimes associated with their trafficking, which they were either forced to commit, or were unable to influence.

- b) Another obstacle to successful social inclusion affects not only trafficked persons, but also various groups of people who are emotionally or financially dependent on another person, or coerced by violence. In such cases the dependent person borrows money or buys goods on the instructions of the dominant person, who is usually the user of the goods purchased or the money borrowed.

In our experience the money is borrowed on the basis of false confirmations of employment or false sworn affidavits. Trafficked persons are moreover often controlled to such an extent that they are not given access to their earnings, and/or their freedom of movement is restricted. In addition to the aforementioned **debts**, additional debts accumulate for health insurance or fines for using public transport without tickets. Another source of debt for these persons are fines for breaching decrees on prostitution, a consequence of – among other factors – the inability of the relevant authorities to identify them as persons who have been forced into prostitution, and in all probability victims of the crime of human trafficking too.

Usually the consequences of these debts and the need to repay them are felt by trafficked or exploited persons after they have managed to escape from the exploitative situation resulting from their trafficking. They have no money but are determined to start a new life. If they manage to find work, it is usually with relatively low wages, which are reduced further by deductions to repay debts. This significantly complicates their inclusion and forces them onto the margins of society, and may motivate them to undertake illegal activities that may lead to higher earnings and the more rapid repayment of debts, or to avoid employment altogether so that no deductions can be made from their wages.

Moreover, if a trafficked person has given or has been forced to give false data for a loan application, this is classified as the crime of credit fraud, regardless of the amount of the loan. The person may be prosecuted even for small amounts, which is another example of the aforementioned problem of punishing trafficked persons for crimes associated with their trafficking, that they were unable to influence or were forced to commit. If they are convicted their criminal records in general and their conviction for credit fraud in particular are another significant barrier to successful inclusion in the labour market, in addition to all the aforementioned problems they already face.

RECOMMENDATIONS

- *Identify a way of reducing the possibility of persons in relationships of dependency being abused when borrowing money or buying goods on instalment, e.g. by means of stricter regulations for extending credit and loans.*
- *Consider the option of releasing trafficked persons from debts accumulated during their trafficking or exploitation, or reducing their liability for them, in view of the fact that they were not acting on their own free will, as coercion is one of the defining characteristics of all cases of human trafficking. It is moreover appropriate to consider the question of how a lack of free will could be demonstrated in cases where for various reasons criminal proceedings have not been commenced.*

- c) One of the fundamental preconditions for the social inclusion of trafficked persons is their ability to ensure a source of income. If, however, that income is derived from business activities on the basis of a [trade licence](#), a substantial problem arises. A trade licence must list a registered office, but a trafficked person, especially a foreigner, will often be unable to meet that condition. For trafficked persons who cannot find employment, or prefer to go into business, that can represent a great obstacle to successful social inclusion.

RECOMMENDATION

Find a solution to ensure that the requirement to enter an address in the trade licence as a registered office – a requirement that is difficult for trafficked persons to satisfy – does not prevent them from receiving a trade licence.

- d) Trafficked persons are a very specific group that differs substantially from the general profile of victims of crime. Human trafficking is a very serious crime, often referred to as “modern slavery”, and is the outcome of a combination of crimes that may often be sanctioned individually. It frequently has a cross-border aspect and in many cases it is linked with organised crime. It yields large profits with a relatively low risk of detection. Trafficked persons are exposed over a long period of time to exploitation, which may take different forms, and to traumatic experiences and abuse on account of duress or dependence.

These are all reasons why programmes have been created in many countries, including the CR, providing a range of services to trafficked persons to help counter the consequences of trafficking and allow them to regain control over their lives. That progress has been very important, especially in view of safeguarding the rights and interests of trafficked persons, and in view of the state’s interest in complying with international human rights standards and detecting the crime of human trafficking.

However, as trafficked persons are a specific group to which specific services are provided, and only a relatively small number of specialised organisations and institutions has the necessary information, qualifications and capacity, it is important to ensure that this exclusivity does not have a negative impact, and in particular that trafficked persons [do not become increasingly dependent on the services provided](#), rather than enhancing and extending their own abilities, knowledge and skills, and that they do not become [stigmatised](#).

An example of this kind of stigmatisation is the classification of long-term residence for the purpose of protection, which despite all the shortcomings mentioned remains a very important instrument in safeguarding the rights and interests of trafficked persons. The documents of a person to whom such permission has been awarded reveal what kind of residence permit is involved. This residence permit is intended for trafficked persons as one of two categories of entitled persons, on condition that they cooperate with the law enforcement authorities. This is relatively sensitive information, which can be deduced from the type of residence permit. Everyone

who has access to such a person's identity documents can see that the person is probably a victim of trafficking, which violates that person's right to privacy and may be a cause of stigmatisation. In addition it is also clear from the documents that the person has cooperated with the law enforcement authorities, which may jeopardise his or her safety.

RECOMMENDATION

Regularly evaluate the influence of measures adopted to combat human trafficking, in terms of their impact on the rights and interests of trafficked persons, and any other groups that may be affected by such measures.

- e) The issue of the stigmatisation of trafficked persons is closely associated with deep-rooted and widespread **prejudices concerning prostitution**, and for many people the terms “human trafficking” and “prostitution” are synonymous. Prejudices about prostitution, which in general undermine the human, moral and social value of sex workers, greatly complicate and sometimes entirely rule out social inclusion and the provision of services to those persons. Moreover, as a rule people – including people who should be familiar with the issue (e.g. social workers, public prosecutors, judges, the police) – do not distinguish between persons who choose freely to work in the sex industry and persons who are coerced into such work, which results in the stigmatisation and penalising of persons who are victims of crime.

It therefore happens, for instance, that an authority concerned with the social and legal protection of children will not recommend that those persons be trusted to care for their children. The reliability of their testimonies in court is constantly questioned; they are fined for breaching decrees on prostitution, and the violation of their rights, e.g. in connection with the seeming dilemma over whether a “prostitute” can be a rape victim, is relativised. A statement by a woman working as a prostitute in a country where prostitution is sanctioned illustrates such attitudes: “They arrest men for paying us, but not for raping us.”²²

RECOMMENDATION

Seek ways that can help to remove prejudices concerning prostitution, and educate and inform the relevant professionals, emphasising the need to distinguish between prostitution and human trafficking for the purpose of exploitation in prostitution.

The text reflects legislation as of 30 the September 2007

22 PHETERSON, G. *The Prostitution Prism*. Amsterdam: Amsterdam University Press, 1996. p. 44

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