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burning issues

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unprecedented levels of support from the taxpayer in recent years. What is worrying is the absence of sustained, and informed, debate. This suggests a deep reservoir of public apathy. The challenge for Irish society is to shake itself out of this state of complacency. More than individual action is required. Ultimately these are issues that require a political solution.

The Norwegian thinker Thomas Mathiesen has made a persuasive case for declaring a permanent international moratorium on prison building. Although particularly concerned with the situation in Scandinavian countries, Mathiesen's general arguments against penal expansionism apply with equal force to Ireland. His view is that:

Building is often seen as a technical question of architecture, construction, and short-term trends in inmate population. But the question is essentially political. Politics is a question of deciding priorities of values. Therefore, the issue of prison building is a question of deciding priorities of values. Is this the way we want to treat fellow human beings? Is this how we want to meet the crime problem?

It is sometimes said that a society has the kind of prison system that it deserves. It will be a difficult job to change social and political values so that the penal reform argument is taken seriously. What is required — and this task cannot be underestimated — is to translate the evident need for change into transformative policy and practice. To move things forward will require a vigorous and sustained debate. The first item on the agenda must be how to tackle the pernicious effects of inertia.

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**This article is based on an address to the
annual meeting of prison chaplains in May 2008.**

Child Trafficking and Ireland

Jyothi Kanics

What is child trafficking?

Governments first agreed on an international definition of trafficking in persons in 2000 with the adoption of the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*¹ (UN Trafficking Protocol), which supplements the *United Nations Convention against Transnational Organized Crime*.

The definition of **trafficking in persons** has three key elements:

Action: the recruitment, transportation, transfer, harbouring or receipt of persons.

Means: by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitative aim / exploitation: exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The consent of the victim is irrelevant when any of the means outlined above have been utilised. Furthermore, in the case of children, defined as anyone under 18 years of age, actions taken with the purpose of exploitation shall be considered trafficking even when the means have not been used.

Additionally, the *UN Convention on the Rights of the Child* obliges 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."² The Convention is supplemented by the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*.³

Trafficking in persons is distinct from smuggling. Smuggling is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."⁴ In short, smuggling equates to facilitating the illegal entry of a person into Ireland. Trafficking, on the other hand, may be national or international and the person being trafficked should be recognised as a victim of crime, who is deserving of protection and compensation. However, in practice a smuggled migrant may be vulnerable to exploitation and may become a victim of trafficking subsequent to being smuggled.

The Situation in Ireland

The International Labour Organization has estimated that 1.2 million children are trafficked for the purpose of labour or sexual exploitation each year.⁵ Ireland has been reported as both a transit and destination country for trafficking in human beings.⁶ However, there has been little data collection and research to examine the scale and nature of child trafficking to, from and within Ireland.

Research prepared for the International Organization for Migration (IOM) in 2003 reported that suspected child victims in Ireland ranged from age 3 to 17 years old and described a variety of case studies including: trafficking for forced labour, begging, domestic servitude, sexual exploitation and forced marriage.⁷ Another IOM publication from late 2005 noted that: "The Dublin unit of the Health Service Executive Service (HSE) for Separated Children Seeking Asylum estimate that approximately 20 children in their care in 2005 were trafficked, the majority of these for the purpose of sexual exploitation."⁸

With regards to protection for trafficked children, it has been reported in the Irish media that "a senior Garda source said that human trafficking

gangs are increasingly organising the trafficking of unaccompanied minors - teenagers aged under 18 - into Ireland who are taken into the care of the HSE on arrival in Ireland, from which they can easily escape."⁹

Irish journalists have also drawn attention to some disturbing cases such as when HSE "staff requested an extra childcare worker to mind a 15-year-old Somali girl, who had been rescued from a brothel after being trafficked into the country. The request was refused, according to social workers, and the girl disappeared a day later."¹⁰ Unfortunately, it seems that the situation has not improved, as demonstrated by a recent case where the suspected victim of trafficking, who was found in a brothel and later placed in HSE care, has also been reported missing.¹¹

Some more recent reports from the United Kingdom (UK) raise concerns that children are being trafficked within the Common Travel Area shared with the Republic of Ireland. For instance, last year the Welsh Assembly Government published draft guidance for professionals with responsibility for the care and protection of children, aimed at making them more aware of the increasing trade and helping to safeguard children who may have been trafficked. In doing so they noted that "often children are trafficked through several countries before arriving in the UK, and an increasing trend is for children to arrive via smaller airports or in Wales by ferry from Ireland."¹²

Furthermore, the UK's Child Exploitation and Online Protection Centre highlighted the Republic of Ireland as a transit country for trafficking of children to the UK in its report entitled *A Scoping Project on Child Trafficking in the UK*.¹³ Non-governmental organisations (NGOs) such as ECPAT UK have also highlighted cases of suspected trafficking from Ireland to the UK.

While the real scale of the problem is unknown, there are indications that we have only seen the tip of the iceberg. It is certainly alarming that some children have been identified as trafficked to Ireland and have subsequently gone missing from care. The Minister for Justice, Equality and Law Reform reported that 2,536 separated migrant children¹⁴ were placed in HSE care between 2000 and 2007. Of those placed in care during that period, 441 children went missing and only 53 were later found.¹⁵

While not all of those placed in care had been trafficked to Ireland, once they have gone missing, it is likely that they will be at-risk of trafficking, because they lack legal status and protection.

Addressing the Problem

Recently the Irish Government has taken significant steps, which should lead to better protections for trafficked persons as well as punishment for traffickers.

New legislation

From a criminal law perspective, legislation is in place in Ireland to prevent and punish traffickers. Most recently, the *Criminal Law (Human Trafficking) Act 2008* came into force with effect from 7th June 2008. The Act creates separate offences of trafficking in children for the purpose of labour exploitation or the removal of organs, as well as trafficking in children for the purpose of sexual exploitation. It also makes it an offence to sell or offer for sale or to purchase or offer to purchase any person, adult or child, for any purpose.¹⁶

The *Criminal Law (Human Trafficking) Act 2008* complements existing legislation such as the *Child Trafficking and Pornography Act, 1998* and the *Child Trafficking and Pornography (Amendment) Act, 2004*. Yet, as the Special Rapporteur on Child Protection noted in his first report to the Oireachtas: "while children are protected under this legislation by the prohibition of activity and punishment of offenders, the 1998 Act and the 2004 Act do not provide for the creation of a protective environment for victims of child trafficking and pornography."¹⁷

As the Acts noted above do not address protection measures, it was suggested that the *Immigration, Residence and Protection Bill 2008 (IRP Bill)* should include such provisions. Indeed a new article 124 was added to the *IRP Bill*, which provides for a reflection and recovery period for those suspected trafficked persons as well as for temporary residency for those who co-operate with the authorities on the investigation and prosecution. This article has been heavily criticised¹⁸ for falling short of the standards outlined in the Council of Europe's *Convention on Action against Trafficking in Human Beings (CoE Convention)*. In particular, the *IRP Bill* should include a framework outlining the entitlements and protections guaranteed

to suspected victims of trafficking such as accommodation, medical care and legal aid. Furthermore, the *IRP Bill* does not address protection for EU/EEA nationals nor does it specify necessary protections for child victims of trafficking.

In contrast, the *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking*, which came into operation with the enactment of the *Criminal Law (Human Trafficking) Act 2008* and may be applied in cases occurring since June 2008, clarify that:

a person from the European Economic Area who has been identified as a suspected victim of human trafficking will, for the purpose of these arrangements, be treated no less favourably than a person from outside that area.

Additionally, the *Administrative Immigration Arrangements* specify that: "Where the person is under the age of 18 years regard will be had to the best interests of the child in the granting and revocation of a temporary residence permission." This safeguard is crucial to protect the most vulnerable children and should also be made clear in amendments to the *IRP Bill*.

New structures

Many organisations welcomed the creation of a new Anti-Human Trafficking Unit (AHTU) within the Department of Justice, Equality and Law Reform at the end of 2007. The AHTU is exclusively dedicated to co-ordinating and facilitating the implementation of a new national strategy to address human trafficking.¹⁹

Additionally, a High Level Group on Combating Trafficking in Human Beings has been created. This Group is tasked with presenting to the Minister the most appropriate and effective response to dealing with trafficking in human beings and a priority for its current work is the development of a National Action Plan to Combat Trafficking in Human Beings (NAP).²⁰ While the High Level Group is made up strictly of relevant statutory agencies, members of the High Level Group meet on a quarterly basis with representatives from non-governmental and international organisations in a National Roundtable.

Feeding into the work of the Roundtable, five thematic Working Groups have been established to address:

1. Awareness raising and training
2. Establishment and functioning of a National Referral Mechanism ²¹
3. Trafficking for sexual exploitation
4. Trafficking for labour exploitation
5. Child trafficking

These Working Groups are examining practical issues relating to co-operation in the fight against trafficking. As a result, strategic partnerships among statutory, international and NGOs should be strengthened and proposals to address current gaps should be debated and further elaborated.

New commitments

The Department of Justice, Equality and Law reform has stated that the NAP will be drafted under four main headings:

1. Prevention of Trafficking and Awareness Raising;
2. Prosecution of the Trafficker;
3. Protection of the Victim;
4. Response to Child Trafficking.

It has, furthermore, emphasised that a key goal of the NAP will be to ensure that Ireland has the appropriate legislative and administrative structures in place to allow for ratification of all relevant international instruments including the *UN Trafficking Protocol* and the *CoE Convention*.

The Irish Government signed the *CoE Convention* in April 2007. ²² The AHTU has stated that the Government plans to be in a position to ratify the Convention in 2009. This will require concerted efforts to improve measures to prevent child trafficking as well as to identify and protect suspected victims of child trafficking.

Creating a National Referral Mechanism (NRM) would be one important step in the right direction. An NRM is a co-operative framework through which State actors fulfil their obligations to protect and promote

the human rights of trafficked persons, co-ordinating their efforts in a strategic partnership with civil society. ²³ Different stakeholders should clarify their mandates and co-operation. For example, this might be done through the development of formal protocols or memoranda of understanding, addressing issues such as preliminary identification, data protection and referrals of suspected victims to safe shelter and necessary services.

In this regard, one point of intervention where procedures should be clarified is at ports of entry. It will be important to specify what measures should be taken at ports of entry when an individual appears to be a separated child or when an individual claims to be a victim of trafficking. Currently, some "unaccompanied minors" have been denied leave to land and there are concerns that their protection needs and best interests have not been properly assessed before removal. ²⁴ There should be no doubt that a suspected separated child should be referred to the HSE and that the *Child Care Act 1991* should apply in such cases. This should also be the case when the individual concerned claims to be 18 or over, because trafficked children are sometimes compelled to use false documents or to tell the authorities that they are an adult. More specific policies and measures still need to be put in place to protect trafficked children in Ireland. The development of the NAP is therefore a timely opportunity.

Developing a National Action Plan

As noted above, the High Level Group has been tasked with adopting a National Action Plan to Combat Trafficking in Human Beings (NAP). NGOs lobbying the Irish Government have strongly encouraged it to adopt a human rights approach, which will address all forms of trafficking and draw upon the many existing guidelines and models in this area. While these guidelines and good practice documents provide a solid framework for elaborating a NAP, experience from other countries has shown that the process for developing and implementing a NAP is often as important as the outputs.

Bearing this in mind, the Irish Refugee Council and others have called upon the Irish government to set up an NRM following a comprehensive assessment as defined in the practical handbook entitled *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked*

*Persons.*²⁵ For example, the UK government has collaborated with the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe to undertake an NPM assessment as part of its on-going work in this field.

Additionally, the UK government set clear criteria for the consultation process regarding the development of its Action Plan and provided written proposals with sufficient time for response. It is hoped that the Irish government will move forward with a similar thorough and transparent consultation process.

Protecting children in the National Action Plan

Prevention and Awareness Raising

In order to raise awareness, it is important to have more information about the trafficking phenomenon in Ireland. Therefore, the AHTU has prioritised putting in place a data collection strategy in order to co-ordinate information about reported cases from the Garda National Immigration Bureau (GNIB), HSE and Office of the Refugee Applications Commissioner as well as select service providers. The data collected will be used to provide statistics and to monitor trends and developments in the future.

Various initiatives to raise public awareness and to begin training of relevant agencies have also been carried out recently including the recently launched blue blindfold campaign.²⁶ A continuous professional development training course on trafficking issues has been designed by An Garda Síochána, assisted by the International Organisation for Migration, with participation from NGOs and the UK Human Trafficking Centre.²⁷

Under the future NAP, prevention efforts will hopefully prioritise work with vulnerable groups and provision of equal treatment and care for separated children. The HSE's *Intercultural Health Strategy 2007-2012* highlights a particular at-risk group:

Serious concerns are emerging around the situation of aged out minors who leave residential accommodation at the age of 18 and, without adequate follow up and support, are at risk of a range of social ills; a number of anecdotal accounts of members of this cohort engaged in

*prostitution have been received. Child trafficking and related exploitation and abuse of children is emerging as an additional issue in this area.*²⁸

It is therefore urgent that the Irish Government provide equitable treatment and care to separated children and improve leaving care and after care supports for "aged-out minors"²⁹ regardless of their immigration status.

Prosecution

Since the adoption of the new *Criminal Law (Human Trafficking) Act 2008*, efforts to investigate and prosecute trafficking cases will be strengthened. Due to the nature of trafficking and the fact that many victims may be in Ireland unlawfully, it will be important to ensure that children are treated first and foremost as children, rather than as irregular migrants. As emphasised by the UN Committee on the Rights of the Child,³⁰ Save the Children³¹ and others, trafficked children should not be detained, prosecuted and punished for offences related to their having been trafficked.

The Ombudsman for Children highlighted this as a particular concern in her *Advice on the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006*: "It should be made explicit that victims of trafficking will not be punished for engaging in illegal activities as a result of them being trafficked. 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."

Bearing this guidance in mind, the Irish Government should provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so. In particular, this would include non-punishment for immigration-related offences such as lack of an identity document.

As a practical measure, the Director of Public Prosecutions could consider developing guidance for prosecutors on discontinuing cases against suspected trafficked persons such as those issued in 2007 by the UK Government.³² In the UK prosecutors have been urged to be alert to the possibility that in some specific circumstances, a young offender may actually be a victim of trafficking and have committed the offences under coercion. In such cases, "where there is clear evidence that the youth has

a credible defence of duress, it is recommended that the case should be discontinued on evidential grounds. Where the information concerning coercion is less certain, further details should be sought from the police and youth offender teams, so that the public interest in continuing a prosecution can be considered carefully.”

Protection and Responding to Child Trafficking

In line with the *UN Convention on the Rights of the Child* the best interests of the child should be the primary consideration in all matters and decisions affecting the child. This general principle should be incorporated as an overarching principle in legislation such as the *Immigration, Residence and Protection Bill 2008*.

Furthermore, in order to be in a position to ratify the *CoE Convention*, it is recommended we address the following issues:

Identification

As identification is a process where a variety of actors may have the initial contact with a suspected victim, the Irish Government policy should ensure collaboration with relevant support organizations such as key non-governmental service providers involved in the identification process and acknowledge that such support organizations may be authorized to make a preliminary identification to ensure immediate access to necessary services and protection.

Age assessment – benefit of the doubt

When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she should be presumed to be a child and should be accorded special protection measures pending verification of his/her age (*CoE Convention Art 10*).

Reflection and Recovery Period – Temporary Residency

In the case of trafficked children, the reflection and recovery period as well as temporary residency should always be granted and renewed in accordance with their best interests (*CoE Convention Art 14*).

As currently proposed in the *JRP Bill*, linking the granting of temporary residency to cooperation with a criminal investigation improperly incentivises such cooperation, potentially leading to complaints as to the

reliability of the evidence provided by the trafficked person. As the provision currently stands, it simply instrumentalises the victim, as a tool for the investigation and prosecution, disregarding their rights and protection needs.

Irish legislation should allow for the government to issue a 6-month renewable residence permit to a trafficked person in both of the following situations: when the Minister considers that their stay is necessary owing to their personal situation on humanitarian grounds as well as when the Minister considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

In this context, Section 124 (11) of the *JRP Bill* is welcomed as providing a possibility for victims, who are able and willing to co-operate, to apply to stay on humanitarian grounds. As noted above, the best interests of the child should be always be a primary consideration when deciding upon such matters.

Protective environment

The Irish Government should take specific measures to reduce children’s vulnerability to trafficking, notably by creating a protective environment for them (*CoE Convention Art 5(5)*). In Ireland, it will be necessary to explore the options for safe and secure accommodation to be provided in certain cases.

With regards to assistance of victims, the Irish Government should ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care (*CoE Convention 12(7)*).

Protection of victims, witnesses and collaborators with the judicial authorities

A child victim shall be afforded special protection measures taking into account the best interests of the child (*CoE Convention Art 28 (3)*).

Separated Children

Suspected child victims of trafficking may be with their family in Ireland or may be separated children. Special protection should be granted when the child is separated from his/her family.

Guardianship, Identification and Family Tracing

As soon as a separated child is identified as a suspected victim of trafficking (CoE Convention Art 10), the Irish Government should:

- provide for representation of the child by a legal guardian, organisation or authority, which shall act in the best interests of that child;
- take the necessary steps to establish his/her identity and nationality;
- make every effort to locate his/her family when this is in the best interests of the child.

Best interests and return

Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child (CoE Convention Art 16).

Conclusion

The issues highlighted above are already on the agenda for the Child Trafficking Working Group convened by the AHTU and should be addressed in the forthcoming National Action Plan.

In comparison to other European countries, Ireland has been late to acknowledge and to address the issue of trafficking in human beings. But this also means that we now have an opportunity to learn from the experiences of other countries and to adapt good practice models to ensure the protection to which victims of child trafficking are entitled.

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