



**Irish Refugee Council Submission on Section 124 of the  
*Immigration, Residence and Protection Bill and other provisions*  
related to the protection for suspected victims of trafficking**

13 March 2008

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## Detailed comments on Section 124

### 1. Scope of the provision – ensure access and non-discrimination

Current provision: Section 124 outlines protection for suspected victims of trafficking who are neither Irish citizens nor EU/EEA nationals.

International obligations include: The implementation of the provisions of the *Council of Europe Convention on Action against Trafficking in Human Beings* (CoE) should respect the non-discrimination principle. In particular, this means that the enjoyment of measures to protect and promote the rights of victims should be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (CoE Art 3).

Proposed amendment: In this section 'foreign national' should mean any person who is not an Irish citizen in order to ensure equal access to services and protection as well as respect for the non-discrimination principle.

### 2. Identification process – preliminary identification

Current provision: Section 124 states that a member of the Garda Síochána not below the rank of Superintendent is responsible for identifying a suspected trafficked person.

International obligations include:

CoE Art 10 (1) - Identification of the victims: the State shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims.

CoE Art 35 – Co-operation with civil society

Proposed amendment: As identification is a process where a variety of actors may have the initial contact with a suspected victim, the Bill 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.

### 3. Identification process – self-identification and referral

Current provision: There is no explicit provision in the Bill for a trafficked person to apply to be recognised and granted a reflection and recovery period along with related protection.

International obligations include: CoE Art 10 - Identification of the victims

Proposed amendment: The Bill should allow for trafficked persons and others acting on their behalf to apply to be recognized and granted a reflection and recovery period.

#### 4. Reflection and recovery period – purpose

Current provision: The Bill states that this period is “to enable the suspected victim to recover from, and escape the influence of, the alleged perpetrators of the trafficking so that he or she can take an informed decision as to whether to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the alleged trafficking.”

International obligations include: CoE Art 13 – Recovery and reflection period

Proposed amendment: Arguably, the first part of this provision does not make sense as it implies that the victim should ‘recover from the alleged perpetrators.’ It should be clarified that suspected trafficked persons, as victims of crime, are entitled to protection, assistance and compensation. It is suggested to amend Section 124(3) to state that the purpose of the reflection and recovery period is to enable victims to remain legally in the State while they recover from their experience, to ensure access to necessary supports including legal aid and to provide information so that the victim can make an informed decision as to whether to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the alleged trafficking.

#### 5. Reflection and recovery period – length of time

Current provision: The Bill proposes a 'recovery and reflection period' of 45 days. While this meets minimum standards outlined in the *CoE Convention*, in practice this period has proven too short to allow victims to recover and to make decisions regarding their future options. A longer reflection and recovery period is necessary since many trafficked persons are recovering from significant trauma, while others fear retaliation. The Bill specifies that this period may be terminated on several grounds including if the foreign national has actively, voluntarily and on his or her own initiative renewed his or her relevant connections with the alleged perpetrators of the trafficking

International obligations include: CoE Article 13 - Recovery and reflection period - states that parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. It does **not** release the state from this commitment in circumstances when the suspected victim ‘has actively, voluntarily and on his or her own initiative renewed his or her relevant connections with the alleged perpetrators.’

Proposed amendments: We strongly advocate for a longer reflection and recovery period of 6 months - irrespective of whether a suspected victim is able and willing to co-operate with the authorities.

Furthermore, contact with alleged perpetrators should not result in termination of the reflection and recovery period. Section 124 (4) (b) (i) is not in line with the *CoE Convention*, is problematic in many respects and should be removed.

#### 6. Temporary residency

Current provision: The Bill proposes temporary residency of 6 months. Again, this measure is only meeting minimum standard since it is dependent on the victim's ability and willingness to co-operate with the investigation and prosecution efforts.

The permit is granted and renewed on the conditions that the suspected victim has severed all of his or her relevant connections with the alleged perpetrators of the trafficking and that it is necessary for the purposes of allowing the suspected victim to continue to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the trafficking.

Furthermore, the grounds for revocation include:

- (a) the suspected victim has actively, voluntarily and on his or her own initiative renewed his or her relevant connections with the alleged perpetrators of the trafficking,
- (b) the suspected victim no longer wishes to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the trafficking of the suspected victim,
- (c) the allegation that the foreign national is a victim of trafficking is fraudulent or unfounded,
- (d) any investigation or prosecution arising in relation to the trafficking has been finalised or terminated, or
- (e) the Minister is satisfied that it is in the interests of public security, public policy or public order (“*ordre public*”) to do so.

Under Section 124 (11) once there is a decision to revoke that status, the individual will have 15 days to make a representation to stay on humanitarian grounds as outlined under Section 45 and humanitarian consideration will be considered by the Minister.

International obligations include:

CoE Art 14 – Residence permit

CoE Art 12 Assistance to victims – Art 12 (6) Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

UN Trafficking Protocol Art 6 (6) implies temporary residency and provision of legal aid

UN Trafficking Protocol Art 7 states that when implementing provisions related to temporary residency, States “shall give appropriate consideration to humanitarian and compassionate factors.”

EU Council Framework Decision on Combating Trafficking in Human Beings 2002/629/JHA.1. Art 7 states that Member States shall establish that investigations into or prosecution of offences covered by this Framework Decision shall not be dependent on the report or accusation made by a person subjected to the offence, at least in cases where the offence is committed in whole or in part within its territory.

Proposed amendments:

The Bill should allow for the government to issue a 6-month renewable residence permit to a trafficked person in both of the following situations:

- a the Minister considers that their stay is necessary owing to their personal situation on humanitarian grounds
- b the Minister considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

Additionally, the revocation grounds should be limited to points (c) and (e) as above. For many reasons, it may be difficult for a victim to sever all connections with the alleged traffickers and it will also prove difficult in some cases to determine whether such renewed contact is voluntary on the part of the victim – particularly when the victim is a child and the alleged trafficker is a family member.

Furthermore, 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 stands, it simply instrumentalises the victim as a tool for the investigation and prosecution, disregarding their rights and protection needs. In this context, Section 124 (11) is welcomed as providing a possibility for victims, who are able and willing to co-operate, to apply to stay on humanitarian grounds.

## 7. Possibility for long-term residency on humanitarian grounds for all victims

Current provision: If a suspected trafficked person is able and willing to co-operate with the investigation, they are granted temporary residency. As noted above, under Section 124 (11), once there is a decision to revoke that status, the individual will have 15 days to make a representation to stay based on humanitarian considerations as outlined under Section 45 and in making a decision the Minister will have regard for humanitarian considerations.

However, for trafficked persons who are unable or unwilling to co-operate, currently there is no clear provision in the Bill that allows them to apply to stay in Ireland on humanitarian grounds. Theoretically, a trafficked person could submit an application for protection, but they may not be able to meet the strict standards to be granted refugee status or subsidiary protection.

As currently outlined in the Bill, protection applicants who are not entitled to protection in the State may be granted residence permission as per Sections 79 (2) (c) and 83. However, in those sections, humanitarian considerations are not listed and it is unclear who would meet the 'compelling reasons' criterion and whether or not residence criteria (at Section 31) will also be applied. It appears that vulnerable persons who are now granted leave to remain status as well as those who cannot be *refouled* may be denied residence permission and any related entitlements under the terms of the Bill, particularly if the residence criteria are applied.

International obligations include: The *UN Trafficking Protocol* Art 7 states that when implementing provisions related to temporary residency, States "shall give appropriate consideration to humanitarian and compassionate factors."

Proposed amendment: Section 124 should include a provision that would allow all suspected trafficked persons to apply for long-term residency on humanitarian grounds.

## 8. Temporary residency – recognition of time spent in State

Current provision: As per Section 124 (9) the granting of a temporary residence permission shall not of itself entitle the suspected victim to any right to remain in the State upon the expiration of that permission.

International obligations and practice include:

While Ireland is not a party to *EU Council Directive 2004/81/EC* the provisions of Section 124 appear to be in line with this Directive. While the Directive states that the reflection period shall not create any entitlement to residence under this Directive, it does not make the same exclusion with regards to the temporary residence permit.

Furthermore, CoE Art 14 (4) states that if a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit as provided for in Section 124 of the Bill.

Arguably, the non-discrimination principle also applies here.

Proposed amendment: Recognising that Section 124 (9) may remain as it is, it should be complemented by an addition clause. This amendment should specify that the period that the individual has been granted temporary residency should be reckonable and should be taken into account when the individual applies for another kind of residence permit as provided for under Section 45. There should be a pathway open to these individuals to qualify for long-term residency.

## 9. Best interests of the child – child protection measures

Current provision: There is currently no mention of specific protection measures for suspected child victims of trafficking in the Bill.

International obligations include:

CoE Convention as cited below / Convention on the Rights of the Child

Proposed amendment: Provisions should be added to facilitate the ratification of the *CoE Convention* including the following:

### *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 Art 10).

### *Reflection and Recovery Period – Temporary Residency*

Furthermore, 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 Art 14). As above, a minimum reflection and recovery period of 6 months is recommended.

### *Protective environment*

Each Party shall take specific measures to reduce children's vulnerability to trafficking, notably by creating a protective environment for them (CoE Art 5(5)).

With regards to assistance of victims, each Party shall 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 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 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. In addition to the points below, please see separate submissions relating to the protection of separated children made by the Irish Refugee Council.

### *Guardianship, Identification and Family Tracing*

As soon as a separated or unaccompanied child is identified as a victim (CoE 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 Art 16).

## 10. Entitlements – access to services and realisation of rights

Current provision: Section 124 does not outline any entitlements for suspected trafficked persons. As some of these entitlements are granted to other categories of persons (protection applicants, those unlawfully present, long-term residents, etc) throughout the Bill, it appears that the Bill is excluding this category from enjoying these and other entitlements.

International obligations include:

CoE Art 12, Art 13 and Art 14

UN Trafficking Protocol Art 6

EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)

Proposed amendment: Provision should be made regarding the entitlements and equitable treatment of those who are granted a reflection and recovery period or temporary residency. Such entitlements should include:

- standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
- access to emergency medical treatment;
- translation and interpretation services, when appropriate;
- counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
- assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
- access to education for children

Additionally, provisions should be made for those granted temporary residency to have:

- necessary medical and other assistance to those who do not have adequate resources and need such help
- access to the labour market, to vocational training and higher education
- the right to family reunification

## 11. Free legal aid – access to compensation – access to the asylum process

Current provision: The Bill does not provide for free legal aid for suspected trafficked persons.

International obligations include:

CoE Art 14 (5) states that each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

CoE Art 15 - Compensation and legal redress

UN Trafficking Protocol Art 6

EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)

Proposed amendment: Suspected trafficked persons should have access to free legal aid in order to receive support in seeking compensation as well as support in considering and submitting a protection application or application for residency when appropriate.

## 12. Right to information and advice in a language that is understood

Current provision: There is currently no provision in Section 124 regarding the obligation to make sure that the suspected trafficked victim understands their rights and entitlements as well as the procedures, which affect them. There is no provision in Section 124 for translation and interpretation services.

International obligations include:

CoE Art 15 (1) states that each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.

CoE Art 12 (1) obliges States to provide:

(c) translation and interpretation services, when appropriate;  
(d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;

Additionally, CoE Art12 (7) states that each Party shall ensure that services are provided on a consensual and informed basis.

Proposed amendment: Amendments should be made in line with the *CoE Convention* as noted above. This means that the suspected trafficked person should be informed about their status – the reflection and recovery period, temporary residency – and renewal of status in a language that the victim understands. Information about accessing legal aid and other services as well as the asylum process should also be provided in a language that the victim understands.

## 13. Non-punishment

Current provision: The Bill does not exempt trafficked persons from punishment for immigration related offences and other actions related to their having been trafficked.

International obligations include: CoE Convention Art 26 – Non-punishment provision

Proposed amendment: A victim of trafficking should not be criminalised. 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 (see below).

## Additional comments on other sections of the IRP Bill related to the protection of suspected trafficked persons

### 14. Section 109 – Section 54 – Section 4 – Documents check – Unlawful stay – Removal

Current provisions:

Section 109 states that a foreign national present in the State shall, unless he or she gives a satisfactory explanation of the circumstances which prevent him or her from so doing, produce on demand—

(a) a valid travel document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality, or

(b) where he or she is the holder of a permit under this Act, that permit.

A foreign national who contravenes this section shall be guilty of an offence.

Section 4 states that the presence in the State of a foreign national is lawful if, and only if, it is in accordance with permission given or deemed to be given to him or her, in accordance with this Act, to be present in the State. All other foreign nationals are unlawfully in the State.

Section 54 states that where it appears to an immigration officer or a member of the Garda Síochána that a foreign national is unlawfully present in the State or at a frontier of the State, the officer or member may remove the foreign national from the State.

International obligations: Council of Europe Convention – particularly Art 10 and Art 26

Proposed amendment: Amendments should be made to ensure that a trafficked person who lacks documentation and is unlawfully in the State is not detained and summarily removed. This will require training of relevant authorities as well as exemption from related offences. This should be specified as relevant throughout the Bill.

### **15. Section 24(1) Identification process – separated child accompanied by an adult**

Current provision: Section 24 (1) of the Bill states that when a child under 18 years of age arrives accompanied by an adult taking responsibility for the child, the officer may require that person to verify that he or she is taking responsibility.

International obligations include:

*Convention on the Rights of the Child (CRC) Articles 19, 32, 34 and 36* – regarding protection from exploitation and measures to ensure the identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment.

CoE Art 5 (5) - Each Party shall take specific measures to reduce children's vulnerability to trafficking, notably by creating a protective environment for them.

Proposed amendment: Section 24 (1) should be amended to instruct immigration officers to require verification that accompanying adults are authorised to take responsibility for the child concerned.

### **16. Section 19 Entry into State to be by way of approved ports**

Current provision: Section 19 states that a person (other than an Irish citizen) coming from outside the State by air or sea shall not, without the consent of the Minister, enter or attempt to enter the State elsewhere than at an approved port. A person who does so will be guilty of an offence and will be regarded as having been refused permission to enter and be present in the State.

International obligations include: CoE Convention Art 26 – Non-punishment provision (see above)

Proposed amendment: Suggest to add an additional provision at Section 19 (4) (d) as follows:  
(4) *Subsection (1)* shall not apply to—  
(d) individuals who have been identified as victims of trafficking

### **17. Section 22 Requirement for a travel document**

Current provision: A person (other than an Irish citizen) shall be in possession of a travel document and furnish necessary information to an immigration officer. A person who contravenes this section will be guilty of an offence.

International obligations include: CoE Convention Art 26 – Non-punishment provision (see above)

Proposed amendment: Due to the nature of trafficking, a trafficked person may not be in possession of their documents through no fault of their own. Suggest to add a provision stating that this section shall not apply to individuals who have been identified as victims of trafficking.

### **18. Section 23                      Arrival of foreign national; presentation and examination**

Current provision: Section 23 (1) (a) (iii) states that a person (other than an Irish citizen) coming from outside the State shall as soon as practicable present him or herself to an immigration officer at the immigration area office for the immigration area in which he or she will have his or her dwelling place while present in the State. A person who contravenes this section will be guilty of an offence.

International obligations include: CoE Convention Art 26 – Non-punishment provision (see above)

Proposed amendment: Due to the nature of trafficking, a trafficked person may not be able to present to an immigration officer. Suggest to add a provision stating that this section shall not apply to individuals who have been identified as victims of trafficking.

### **19. Section 28                      Duties of carriers**

Current provision: Section 28 outlines the duties of carriers and related offences.

International obligations include: CoE Convention Art 26 – Non-punishment provision (see above)

Proposed amendment: Victims of trafficking should be exempt from prosecution and carriers should be exempt in cases of trafficking. It is important to stress in this context that carrier liability sanctions could potentially drive would-be protection applicants into the hands of traffickers.

### **20. Section 34                      Residence permits**

Current provision: Section 34 (3) (g) states that a residence permit issued under this section shall contain a statement of the class of residence permit to which it belongs.

International obligations include:

CoE Art 11 – Protection of private life

CoE Article 28 – Protection of victims, witnesses and collaborators with the judicial authorities

Convention for the Protection of Human Rights and Fundamental Freedoms

Proposed amendment: This section could imply that trafficked persons would receive a specific class of residence permit. This would potentially violate their right to private life and could endanger them. Resident permits issued to trafficked persons should not indicate that they have been trafficked. There should not be a specific class of residence permits 'labelling' trafficked persons.

## 21. Section 36 Long-term residence permission

Current provision: Section 36 (5) includes the following:

(5) A period of residence in the State shall not be reckonable for the purposes of *subsection (4)(a)* if—

(f) it consists of a period where the foreign national's residence permission was non-renewable or otherwise formally limited,

(h) it consists of a period during which the foreign national was unlawfully in the State.

International obligations include: While Ireland is not a party to *EU Council Directive 2004/81/EC* the provisions of Section 124 appear to be in line with this Directive. While the Directive states that the reflection period shall not create any entitlement to residence under this Directive, it does not make the same exclusion for the temporary residence permit. Furthermore, CoE Art 14 (4) states that if a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit as provided for in Section 124 of the Bill.

Proposed amendment: The time a trafficked person spends in the country on a temporary residence permit should be reckonable. Arguably, time spent unlawfully in the country – such as time spent waiting for a decision under Section 45 – should also be reckonable. Please see above - point 7 regarding the possibility for long-term residency on humanitarian grounds for all victims and point 8 regarding recognition of time spent in State.

## 22. Section 54 Removal from State of foreign national unlawfully present

Current provision: Where it appears to an immigration officer or a member of the Garda Síochána that a foreign national is unlawfully present in the State or at a frontier of the State, the officer or member may remove the foreign national from the State.

International obligation: CoE Art 16 (2) When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.

Proposed amendment: The Bill should be amended to ensure that trafficked persons, who are not granted temporary residency, are removed with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.

## Further analysis of relevant Irish legislation and policy

Please also review additional submissions on the Bill made by the Irish Refugee Council.

### Irish Human Rights Commission

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

*Bill 2007 – June 2007*

<http://www.ihrc.ie/documents/article.asp?NID=210&NCID=6&T=N&Print=>

### Ombudsman for Children

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

*Bill 2006 – May 2007*

[http://www.oco.ie/policyResearch/statistics\\_.aspx](http://www.oco.ie/policyResearch/statistics_.aspx)

**Special Rapporteur for Child Protection**

*Report submitted to the Oireachtas – November 2007*

[http://www.omc.gov.ie/documents/child\\_welfare\\_protection/Report\\_of\\_Special\\_Rapporteur\\_on\\_Child\\_Protection\\_Geoffrey\\_Shannon.PDF](http://www.omc.gov.ie/documents/child_welfare_protection/Report_of_Special_Rapporteur_on_Child_Protection_Geoffrey_Shannon.PDF)

**Immigrant Council of Ireland**

*Analysis of the current level of transposition of the Council of Europe Convention on Action against Trafficking in Human Beings in the Irish Legislation – February 2008*

*Analysis of the Immigration, Residence and Protection Bill, 2008 – March 2008*

**Migrant Rights Centre of Ireland**

*Submission/proposed amendments to the Immigration, Residence and Protection Bill, 2008*