



Negative Impacts of the “Duty to Report” Related to the Crimes of Human Trafficking and Depriving of Personal Freedom pursuant to the New Criminal Code on Prevention Policies and Combating Human Trafficking¹

Act No. 40/2009 Coll., the Criminal Code, comes into force on 1 January 2010. This new important regulation introduces numerous changes concerning the field of human trafficking prevention activities.

The crimes of human trafficking and depriving of personal freedom (provisions of Section 168 and Section 170 of Act No. 40/2009 Coll., the Criminal Code) were newly included in the exhaustive listing of crimes to which the duty to report relates, or the duty to preclude a crime, following from the same legislation, provisions of Sections 367 and 368 (failure to preclude a crime, failure to report of a crime)².

La Strada Česká republika, o.p.s. and other specialized non-governmental organizations³ believe that the “duty to report” related to the crimes of *human trafficking and depriving of personal freedom* (a frequent element of human trafficking) may have an important negative impact on practical implementation of the prevention policy, particularly in the field of identifying trafficked persons. Precisely identification of a potentially trafficked person is an important pillar of strategies of combating this serious criminal activity. We also believe that the new adaptation is at variance with the possibilities of trafficked persons to enforce their rights following from national and international documents. The following arguments are discussed in the subsequent text:

The “duty to report” will:

- Prevent establishing contacts with trafficked persons
- Put employees of non-governmental organizations providing social services at risk in terms of safety or criminal prosecution
- Obstruct implementation of preventive activities focused on human trafficking or on health and social prevention in persons providing paid sexual services
- Cause revictimization of trafficked persons due to prosecution for the failure to report of the crime of human trafficking or depriving of personal freedom
- Reduce motivation to report of suspicions of human trafficking in persons not wanting to come in contact with the police for some reason (customers of sexual services, persons from the neighbourhood who are afraid of a revenge etc.)

We also believe that the “duty to report” is furthermore at variance with:

- Council Directive No. 2004/81/EC of 29 April 2004 concerning issuance of residential permits to third country citizens who have become victims of human trafficking or who have become objects of transferring and cooperate with relevant bodies.
- Council Framework Decision 2001/220/JHA of 15 March 2001 on the position of victims in criminal proceedings
- Overall concept of the Human Trafficking Victim Support and Protection Programme established and coordinated by the Ministry of the Interior of the Czech Republic

For the reasons above, we therefore propose to consider changing the present form of Act No. 40/2009 Coll., the Criminal Act. Excluding the crimes of human trafficking and depriving of personal freedom from the exhaustive list of qualified facts to which the “duty to report” relates is viewed as an optimum solution.

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² For the sake of simplification, the text dealing with duties pursuant to provisions of Sections 367 and 368 of the Criminal Code also mentions the “notification duty”.

³ The arguments stem predominantly from experience of La Strada ČR that has been engaged in prevention of human trafficking since 1995. Precious instigations were provided also by other specialized organizations (particularly Projekt Magdala SČKCH [Magdala Project of the Czech Catholic Charity Association], Rozkoš bez rizika [Bliss without Risk], Centrum Jana [Jana Centre], Diakonie ČCE [Evangelical Church of Czech Brethren Diacony] and others). The La Strada opinion is also supported by the Bohemian-Moravian Confederation of Trade Unions



- **“Duty to report” as an obstruction of establishing contact with trafficked persons**

Identification of trafficked persons is one of key pillars of all strategies of combating human trafficking. However, successful identification is prevented by many factors; besides high latency of this criminal activity, it is particularly the **fear and distrust of trafficked persons in respect of government bodies or their surroundings in general**. Trafficked persons also frequently suffer from a feeling of guilt and do not want to openly talk about their experience. They are afraid of revenge on part of organized crime groups that usually exhibit international scope of action and often dispose of information on where the family lives. Some persons find themselves in a contestable position in the Czech Republic due to trafficking and are afraid of being expelled or of other sanctions. The report of the European Commission Expert Group on human trafficking calls attention to the fact that it may take weeks or even months to overcome the posttraumatic stress and gain trust that enables the trafficked person to begin to talk (European Commission, 2005, p. 143 and subs.).

In the practice of La Strada ČR, identification of trafficked and exploited persons is done by means of operations in the field, the INFO and SOS line or directly in the consulting room of a non-governmental organization. **Non-governmental organizations represent the key entity that identifies trafficked persons**. This is also confirmed by records of the Ministry of the Interior⁴.

Successful establishing of contact and trust is built on the fact that helping organizations offer a possibility of anonymous consultations and of keeping the provided information confidential to persons who can be assumed to have become victims of the crime of human trafficking. Most people who are in contact with La Strada ČR express the wish to remain anonymous at first, and many of them want to be assured that we do not work for the police.

The fact that the confidentiality principle should apply to information provided by any trafficked person is communicated as part of consulting or psychological help, and that this information should not be communicated further without the trafficked person's approval, is also pointed out in the publication of one of United Nations offices (UNODC, 2009 p. 56).

However, starting from the day the Criminal Code comes to force, in accordance with social work principles (particularly the informed consent and empowerment principle), helping organization workers will have to instruct every person that can be assumed to have been trafficked of the fact that if they describe their situation to the workers, the workers are obliged to report bodies active in criminal proceedings of such facts immediately. This will probably **make establishing a relationship of trust between the social worker and the client virtually impossible, and thus also de facto any provision of other social services away from the exploiting environment (for example, accommodation at an undisclosed address)**.

It is also likely that this fact will preclude any motivation of potentially trafficked persons right in the risky environment (for example, through field work within migrant communities or field social work among persons working in the sexual business). As Rozkoš bez rizika (Bliss without Risk) namely points out, “if a social worker wants to proceed to harsh compelling practices during the talks, he/she cannot stop the women as early as during initial mutual getting to know each other” (Comments of Rozkoš bez rizika, o.s. 2009).

⁴ Based on the National Combating Strategy of Human Trafficking (2008 – 2011), 62 persons total were incorporated in the Victim Support and Protection Programme in the course of almost five years of existence; out of this number, 23 persons were identified by a non-governmental entity (p. 32). The total number does not include Czech women for whom entrance in the Programme provided no benefit in the present situation. In practice, NGOs are the only entities except the police who identify trafficked persons.

In this respect, it should be mentioned that the offer of practically applicable services for human trafficking victims is one of fundamental human rights standards that should be adhered to by all membership countries of the European Union⁵.

- **Putting non-governmental organization workers at risk in terms of safety or criminal prosecution**

Any worker of a non-governmental organization who provides information of a crime acts as a regular citizen and thus provides his/her permanent address for the record. **Considering that the concealment of witnesses in accordance with possibilities offered by the Criminal Code is not always applied in practice to a satisfactory extent, not even the case of the trafficked persons themselves who act as witnesses / aggrieved parties in criminal proceedings, relying on this way of protection is impossible.** The "duty to report" may thus put at risk not only the worker of a specialized non-governmental organization, but also his/her whole family.

Workers of organizations providing health and social services to persons who offer paid sex will be exposed to risk also by the mere fact that upon their intervention, bodies active in criminal proceedings will visit clubs or areas where they have been active. Social workers are expected to exert "loyalty on part of managers and protective approach on part of clients. It is very difficult to find a way out of such a situation; it is accomplished by offering contacts, visits etc., but we are followed very sharply. However, an official denouncing would absolutely close the door to the field for us, not mentioning the possibility of personal threat", as emphasized by Rozkoš bez rizika in its statement (2009). The problem also consists in the fact that upon providing information, it will not be difficult for the criminal structures to associate any visit of the police with the work of the non-governmental organization. This will bring a risk not only for the workers but also for the clients who have been in contact with the non-governmental organization. Such an association will also de facto prevent any further activities in any given club or locality.

Considering the lack of clarity of the terms "other forms of exploitation" or "forced labour" that are included in the definition of the human trafficking crime, the workers are exposed to risk of criminal prosecution in cases where they assess the found facts differently from the body active in the criminal proceedings. This may happen if they believe that human trafficking was not concerned in any particular case. However, the workers cannot acquire clear orientation in practice in terms of what is considered "other forms of exploitation" by the criminal law in practice. Until now (as at October 2009), not a single positively and finally convicted cases of human trafficking for the purpose of other forms of exploitation (the term "other forms of exploitation" is used in the wording of the human trafficking crime pursuant to the new Criminal Code, similarly as in the provisions of Section 232a of Act No. 140/1961 Coll., the Criminal Act).

- **The "duty to report" as an obstruction in implementation of preventive activities focused on human trafficking or on health and social prevention in persons providing paid sexual services**

One of the key elements supporting the concept of preventive measures along vulnerable groups is represented by the possibility to obtain information from these, often highly enclosed communities. Prevention by spreading information among migrant communities or in the field of sexual business is also built on building relationships of trust. Work in the field of prevention of sexually transmitted diseases and reducing health-related risks among women and men working in the sexual business is also based on relationships of trust.

⁵ The need of providing help to trafficked persons as an integral part of the policy of prevention and combating trafficking in persons is mentioned, for example, by the European Commission Expert Group Report on Trafficking in Persons (European Commission, 2005 p. 141 and subs.), a large publication of the UN, Toolkit to Combat Trafficking in Persons (UN, 2008 p. 349 and subs.); these and many other publications emphasize predominantly the need of taking into account the human rights framework of the issue.



The fear of any possible "denouncement" by the non-governmental organization may forbid or make considerably difficult both preventive work in the field and obtaining information from this environment that is necessary for the concept of further measures.

Experience and research also show that in certain phases of their lives, some trafficked persons are not interested in being "liberated by force" (Surtees, 2007 p. 95). Based on La Strada's experience, similar cases can be found in the Czech Republic particularly in persons trafficked in other areas than sexual business, thus especially into sectors such as agriculture, constructional industry, forestry, food industry etc. Long-term motivation to terminate the exploiting relationship is needed in this group, taking the form of field work and while applying risk reducing tools. The situation is similar in women who are in connection with persons who have trafficked them into the sexual industry. As mentioned also by Rozkoš bez rizika, "trafficking exhibits various nuances and degrees, particularly concerning present use of violence. Every party displays different susceptibility to the nuances and degrees. Aspects perceived by the social worker and by the law as trafficking represent a regular part of behaviour of women and girls in the prostitution scene" (Comments of Rozkoš bez rizika, o.s. 2009). These women, too, tend to consider cooperation for a long time. If they know that the non-governmental organization is obliged to report human trafficking, they may stop any contact and thus not use any other health and social services that are suitable for working in the sexual business.

- **Possible revictimization of trafficked persons by criminal prosecution for failure to report of the crime of human trafficking or depriving of personal freedom**

Trafficked persons were exposed to mental and physical violence, fear, humiliation and other cruel treatment due to the criminal activity, and they may face the consequences for a long time or for their whole lives. These persons were also exposed to significant violation of their human rights. For obvious reasons, many of them want to forget their experience upon escaping the environment of exploitation. Information providing on their part is also frequently prevented by their fear of their lives or the lives of their relatives.

These people, trafficked persons in the past, who are struggling to become reengaged in regular life, may no more face any objective threat to their lives or health. However, in case they did not provide information on their experience, they are exposed to the risk of criminal prosecution for the failure to fulfil the "duty to report" in respect of their awareness of the human trafficking crime.

- **The "duty to report" as an obstruction of information providing in persons who do not desire to enter in cooperation with the body active in criminal proceedings**

In some cases, non-governmental organizations are contacted by customers of sexual services or people who believe that human trafficking may be taking place in their surroundings, but who are afraid to intervene or want to provide their information anonymously. La Strada ČR workers operating in the field also depend in a certain extent on information about possible human exploitation or trafficking obtained from third persons. These are particularly people from vulnerable migrant communities.

Persons who inform any non-governmental organization of their suspicion usually want to remain anonymous. For example, customers of sexual services calling the INFO and SOS line often refuse to provide their first names or telephone numbers. Migrants and other persons who have information of possible trafficking are again afraid of risks and not without a reason.

The "duty to report" puts such groups in situations where they may be considering whether to let any non-governmental organization know that human trafficking is taking place

somewhere and thus attract attention to themselves (and thereby possibly exposing themselves to the risk of criminal prosecution for the failure to report or preclude) or whether they shall keep silent about this fact.

A legal analysis expresses an opinion on whether the "duty to report" is related to the victims themselves; this analysis points out that the "comment of Šámal / Púry / Rizman, the Criminal Act, Part II, 6th issue, 2004, p. 1022 to 1026 does not deal with the issue whether a crime victim, too, may be criminally liable, which may lead to the conclusion that **criminal prosecution of the victim** (provided that the victim is no more directly exposed to the hazard of death, bodily harm, other severe injury or criminal prosecution) **is imaginable.**" (Legal analysis of the adaptation of the crime of failure to report of a crime in the new Criminal Code in respect of its accordance with international treaties, 2009).

Considering that possible ways of protecting the identity and providing physical safety as offered in practice to endangered witnesses and aggrieved persons and their families are very limited, it is quite understandable that some trafficked persons decide not to speak of their experience⁶ in spite of the risk of prosecution⁶.

In an extreme case, the failure to meet the "duty to report" on part of the trafficked person may be used as a means of pressure of bodies active in criminal proceedings exerted so that the person testifies against the offenders in a certain extent. A situation may also occur where the trafficked person will be accused of this crime and will have to provide evidence of its innocence, for example, by bearing the burden of proving that he/she was under threat.

And, although it can be assumed that a human trafficking victim probably would not be convicted, the **risk itself of criminal prosecution of trafficked persons or their prosecution in this respect is believed to represent a threat of serious secondary victimization and retraumatization.** Considering that these are adult persons, their will to keep their experience for themselves should be respected.

- **Variance with the Council Directive No. 2004/81/EC of 29 April 2004 concerning issuance of residency permits to third country citizens who have become human trafficking victims or who have become objects of transferring and cooperate with relevant bodies⁷⁸**

As follows from the legal analysis "Article 6 of this Directive establishes the right of foreigners who are victims of human trafficking for utilizing a certain time to consider whether they shall cooperate with bodies active in criminal proceedings. As for those foreigners who decide to cooperate in prosecution of human trafficking offenders and who obtain a residency permit by this title, Article 12 defines the right to participate in programmes intended for human trafficking victims, while these programmes may also be provided by non-governmental organizations.

It can be inferred from the right of human trafficking victims for the time for consideration that such a victim may consider whether he/she shall cooperate with bodies active in criminal proceedings or not. This right thus also implies the right of victims not to cooperate, i.e. also not to provide information of committed crimes. Thus, if the crime victim was obliged to provide information of the crime commitment provided that the person has already escaped any direct hazard on part of the offender, it would represent a violation of

⁶ The Czech Republic is still in the process of only learning how to apply the so called "victim centred approach" in practice.

⁷ Unofficial translation of the Directive is available at:

[http://isap.vlada.cz/Kopie/revize.nsf/0b13bbb6e0c063d9c1256dc7002e1b5c/b9f2a1f20bffc0a9c12572760036174e/\\$FILE/32004L0081.pdf](http://isap.vlada.cz/Kopie/revize.nsf/0b13bbb6e0c063d9c1256dc7002e1b5c/b9f2a1f20bffc0a9c12572760036174e/$FILE/32004L0081.pdf)

⁸ The harmony or disharmony, respectively, between the "duty to report" and international documents is dealt with by a separate legal analysis of which only a part is quoted in this text. The full text of the legal analysis forms an appendix to this document.

this right." (Legal analysis of the adaptation of the crime of failure to report of a crime in the new Criminal Code in respect of its accordance with international treaties, 2009).

- **Variance with the Council Framework Decision 2001/220/JHA of 15 March 2001 on the position of victims in criminal proceedings⁹¹⁰**

It follows from the legal analysis that "it can be deduced from Article 13 of the Framework Decision that every membership country should support entities providing help to victims in their helping activities *"in accordance with their immediate needs"*, i.e. based on immediate needs of the victims. It can be deduced from the above that entities helping the victims should not be obliged serve only the purposes of criminal prosecution, and be bound with the duty to report for this purpose, but that they should be provided with certain autonomy for their work, enabling them to respond to immediate needs of their clients.

In this respect, the Framework Decision stems from the fact that a certain position of entities for providing help to the victims, and certain guarantees for their activities, form part of the rights of clients of such entities or other users of their services, thus often also a part of rights precisely of crime victims." (Legal analysis of the adaptation of the crime of failure to report of a crime in the new Criminal Code in respect of its accordance with international treaties, 2009).

- **Variance with the overall concept of the Human Trafficking Victim Support and Protection Programme established and coordinated by the Ministry of the Interior**

The Human Trafficking Victim Support and Protection Programme (hereinafter the "Programme") that forms an integral part of the national policy of prevention and strategy of combating human trafficking¹¹.

Pilot testing of the Programme was undertaken in the form of the Victim Support and Protection Model in 2003. It was established based on understanding the substance of operation of human trafficking criminal activity and particularly on understanding the needs of its victims.

At present, the Programme has three major aims: a) Provide trafficked persons with support and ensure protection of their human rights; b) Motivate human trafficking victims to provide testimonials that shall facilitate activities of bodies active in criminal proceedings; and c) Mediate returning of CR citizens who were trafficked outside of their home country back to the Czech Republic.

In the first phase of the Programme, a time for consideration is provided to persons that can be reasonably assumed to have been trafficked to consider whether they want to cooperate with bodies active in criminal proceedings, accompanied with any possible adaptation of their stay, for 60 days max. During this time, intended for critical interventions and psychosocial help, no rather profound contacts with bodies active in criminal proceedings should occur¹².

A variance occurs on both levels. **The duty to report is at variance with the aim to motivate victims for cooperation with bodies active in criminal proceedings, and with the option to utilize the right for a time for consideration.**

The time for consideration would be violated if bodies active in criminal proceedings had to be compulsorily and immediately informed of the crime commitment. It is namely likely that

⁹ Available online at http://www.bkb.cz/files/uploaded/UserFiles/File/A_Rovozhodnut5.3.2001_d.doc

¹⁰ The harmony or disharmony, respectively, between the "duty to report" and international documents is dealt with by a separate legal analysis of which only a part is quoted in this text. The full text of the legal analysis forms an appendix to this document.

¹¹ At present, the Human Trafficking Victim Support and Protection Programme is adapted by internal regulation acts, predominantly by the Guideline of the first deputy of the minister of the interior No. 5 of 26 October 2007 concerning operation of the Human Trafficking Victim Support and Protection Programme and its institutional provision.

¹² This is the situation in practice if the trafficked person is identified by an NGO.



this time will be shortened due to the duty to provide a testimony, to the detriment of the trafficked person. If the person refuses to provide the testimony, he/she shall be exposed to the threat of sanctions pursuant to the Rules of Criminal Procedure in the extreme case.

The time for consideration as constituted in the Programme but also in international human rights instruments and specialized literature incorporates also a motivation component besides the human law and humanitarian dimension. It should namely act as one of the elements that enhance the trust of the trafficked persons in the government and stimulate them for cooperation with relevant institutions (comp. e.g. European Commission, 2005; UN, 2008).

A similar problem as that of the Programme also appears in terms of the option to use the institute of long-term stay for the purpose of protection pursuant to provisions of Section 42e of Act No. 326/2006 Coll. on the stay of foreigners.

It should be mentioned here that neither La Strada ČR that has prepared this opinion nor other organizations that have provided their investigations intend to obstruct justice and the work of bodies active in criminal proceedings. It is beyond doubt that human trafficking is not only a serious type of criminality that must be fought efficiently, but also a problem of violation of human rights of persons, frequently found in highly vulnerable positions.

La Strada ČR is fully aware of the need of multidisciplinary approach to addressing the issue of human trafficking both on the national and international level. La Strada ČR sees a benefit of multidisciplinary cooperation not only in the contact with bodies active in criminal proceedings, but also with other institutions and organizations.

La Strada ČR is a contractual partnership organization of the Ministry of the Interior of the Czech Republic, operating in the Human Trafficking Victim Support and Protection Programme mentioned above and operated by the Ministry. In this respect, it should be emphasized that this cooperation also includes motivating trafficked persons for cooperation with bodies active in criminal proceedings and providing assistance to such persons during the whole proceedings. It should be mentioned that upon initiating using the services of our organizations, many clients decided to provide information to the police and contributed by providing their testimonies to criminal prosecution of the offenders¹³. As mentioned above, La Strada ČR identifies a significant number of persons trafficked in the Czech Republic and abroad every year.

• Conclusion

Based on the above, it can be argued that incorporation of the crime of human trafficking and depriving of personal freedom in the exhaustive listing of acts to which the duty to report or preclude (Section 367 and Section 368) relates pursuant to the new Criminal Code will have a significant *negative* impact on the possibility of identifying trafficked persons, providing social services to such persons or prevention of this phenomenon.

The "duty to report" will prevent factual gaining of trust that is necessary in order to establish contact with the majority of potentially trafficked persons. The fear of "denouncement" by non-governmental organizations may also represent a significant obstruction of working in the field of health and social prevention in persons providing paid sexual services, also among groups endangered by human trafficking. The existence of the "duty to report" will introduce potential risks for the workers of non-governmental organizations. Not only those entering the field, thus the risky environment will be endangered, but also those providing the information. The notifying person acts under its

¹³ In 2008, out of the total of 27 persons using the so called complex of La Strada ČR services, 22 persons cooperated with bodies active in criminal proceedings; in 2009 (January – September), 14 out of 16 persons cooperated with these bodies.



own name and address; particularly in situations where groups of organized crime are concerned, this may lead to exposure to a risk, in spite of possibilities provided by the Rules of Criminal Procedure for witness protection, as follows from practical experience. Workers of non-governmental organizations are also endangered by criminal prosecution in case they evaluate a situation where they have been present differently from bodies active in criminal proceedings – this may happen easily as concerning the term “other forms of exploitation”, the expert community and the criminal justice still lack a direction taking the form of a final positive sentence in which considerations of the content of the term should develop. Many people who can provide information of human trafficking, including customers of sexual services, often hesitate whether to provide the information. In their contacts with non-governmental organizations, they wish to remain anonymous for various reasons. The duty to report and thus also the fear of the necessary disclosure of identity or the need of cooperation with the bodies active in criminal proceedings may be the motive why they decide not to contact any non-governmental organization, either.

Negative impacts will be displayed particularly in the lives of the trafficked persons, thus those whose interests suffered most due to these criminal activities, and who are in need of social services for their rehabilitation.

We believe that the **recommendation to exclude the crimes of human trafficking pursuant to provisions of Section 168 and depriving of personal freedom pursuant to provisions of Section 170 from the exhaustive listing provided in provisions of Section 367 and Section 368 of the Criminal Code is in accordance with the aims of the legislator who by doing so, endeavoured to enhance the instruments that shall help in combating these serious criminal activities and in revealing more of such delicts, respectively.** (This intention can be deduced from the Explanatory Note concerning the provisions mentioned above and also from the long-term efforts of the Czech Republic to increase the number of prosecuted and convicted human trafficking crimes.)

Human trafficking is a very specific type of criminality and as a phenomenon, it requires measures of a specific policy both on the national level (comp. National Combating Strategy of Human Trafficking 2008 - 2011¹⁴) and on the European level (comp. e.g. European Commission, 2005). Considering these specifics, such measures should be therefore chosen that respect the substance not only of the criminal activities themselves but also the characteristics of the victims and their conduct.

We believe that exclusion of the crimes of human trafficking and depriving of personal freedom from provisions that define the duty to report or preclude such crimes is in the interest not only of the criminal policy but predominantly in terms of the human rights law.

¹⁴ Approved by the Resolution of the Government of the Czech Republic No. 62 of 23 January 2008



Resources:

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- Ministry of the Interior of the Czech Republic. National Combating Strategy of Human Trafficking (for the period of 2008 – 2011). [Online] [Quotation: 15 Dec 2008.] http://aplikace.mvcr.cz/archiv2008/rs_atlantic/data/files/strategie_08-114072.pdf.
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- Council Directive No. 2004/81/EC of 29 April 2004 concerning issuance of residence permits to third country citizens who have become victims of human trafficking or who have become objects of transferring and cooperate with relevant bodies
- Surtees, Rebecca. 2007. Listening to Victims. Vienna: ICMPD, 2007. ISBN 3-900411-093.
- Journal of the Ministry of the Interior, Vol. 2007, Chapter 99 of 6 November 2007
- Act No. 40/2009 Coll., the Criminal Code