



Submission by MRCI, to Joint Committee on Justice on General Scheme of the Smuggling of Persons Bill 2020

Introduction

The Migrant Rights Centre Ireland (MRCI) is a national organisation working to promote the rights of migrant workers and their families living in situations of vulnerability throughout Ireland. In 2020 MRCI provided information and support on 2898 cases to people from 125 different countries. 27% of people were undocumented; 56% related to residency, citizenship and immigration status, 20% to social welfare - PUP payments and sick pay and 14% related to employment rights and work permits. The most common sectoral queries were from workers in meat factories, homecare and domestic work.

Scope of Commentary

We welcome the opportunity to make this submission, to Joint Committee on Justice on General Scheme of the Smuggling of Persons Bill 2020, however MRCI is commenting on this bill **as an anti-trafficking measure only**. This submission is therefore limited to **Section 5: Facilitation of unlawful entry and presence**.

Background:

MRCI is the lead organisation in Ireland dealing with people trafficked for labour exploitation (TLE) and is the National Assessment Centre for TLE. MRCI has identified TLE in non-unionised, unregulated sectors such as agriculture, restaurants, entertainment, fishing, domestic work, car washes and in cannabis production. Since 2001, MRCI has dealt with almost 300 instances of TLE with people from 30 different countries, predating anti-trafficking legislation. In the last three years (2018, 2019, 2020) MRCI has assisted with 37 new cases of suspected TLE.

MRCI believes that trafficking is increasing, as indicated by international trends. The Irish government has also acknowledged the problem of forced labour is growing¹. However, the

¹ 2020 Trafficking In Persons Report - <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>

numbers of identified victims of trafficking in Ireland remain low due to underinvestment in outreach and awareness of human trafficking and a robust identification system and process.

From our case work, research and outreach MRCI knows that exploitation of migrant workers in unregulated sectors is prevalent across Ireland and, as such, that the conditions are present for TLE to persist. Furthermore, new trends are consistently emerging that need new responses, e.g. exploitation of workers by agents and third parties. This is likely to be exacerbated by restrictive immigration policies and the impact of Covid 19.

The effect of Covid 19 on vulnerable workers is yet to be fully realised. The Pandemic has exposed workers in precarious employment and presented persistent concerns in particular in the agri-food and horticulture sectors. MRCI is concerned about condition seasonal workers who are vulnerable to exploitation, even before the advent of the Pandemic, which warrants further attention.

In 2020, MRCI screened more people for suspected cases of TLE than in 2018 - 2019, but simultaneously observed a decrease in engagement from potential victims after initial consultations. When the process of identification, referral and supports are explained to people, MRCI finds that it acts as a disincentive to further engagement. This was compounded by Covid 19 where people needed to focus on basic survival.

The lack of identification of victims leads to a lack of prosecutions and therefore a lack of convictions. Ireland has had no conviction since the enactment of the Criminal Law (Human Trafficking) (Amendment) Act in 2013 and it is in this light² that MRCI considers the 2020 Smuggling of Persons Bill.

Section 5: Facilitation of unlawful entry and presence

This section of the Smuggling of Persons Bill (the 'Bill') gives effect to three legal instruments – Council Directive 2002/90/EC (the 'Directive'), Framework Decision 2002/946/JHA (the 'Decision') and the UN Protocol against the smuggling of migrants by land, sea and air, supplementing the UN Convention against Transnational Organized Crime, adopted in November 2000 (the 'UN Protocol').

Section 5(1) and (2)

The offence

As required by the Directive and the UN Protocol, Section 5(1) and 5(2) of the Bill specifies as offences, the knowing facilitation or organising of entry, transit and presence in the State,

² MRCI is also recognized as an expert organization for human trafficking within the Criminal Legal Aid Scheme for trafficking for criminal exploitation cases, in particular in cannabis production. Through this scheme it assesses cases of human trafficking within the criminal justice system and provides detailed reports of the assessment and evidence in court on these cases.

or another designated state, going beyond the 2000 Illegal immigrants Trafficking Act s. 2(1) which criminalised the organisation of and knowing facilitation of entry alone.

As anti-trafficking tool, MRCI welcomes the Bill's approach in criminalising those who seek to traffick others both into, through and within the State, who knowingly facilitate and organise these people to remain in the State, in a situation of severe exploitation.

[No comments on Section 5(3)]

Section 5(4)

Humanitarian Assistance and lack of gain as defences; treatment of organisations assisting with individuals seeking protection

MRCI appreciates the inclusion of humanitarian assistance as a defence in 4(b), per Article 1(2) of the Directive. It is hopeful that placing the burden on the accused to prove a lack of financial gain ("otherwise than for gain") and the presence of humanitarian motivation in the accused's actions will result in more arrests and prosecutions for human trafficking.

Though a reversal of the burden away from the state is often onerous for the defendant, and the decision to make a defence out of what was previously an exclusion, MRCI notes the drafter's statement on the prosecution's past difficulty in proving financial gain in trafficking cases. Again, it is hoped that this reversal of the burden will lead to more prosecutions and convictions for human trafficking.

However, a note of caution – although outside of the scope of MRCI's response – that the provisions may be employed against people who are attempting family reunification, who are not involved in human trafficking, but who cannot show that the assistance offered was for humanitarian purposes. This was the case in Mallah v France where the European Court of Human Rights ruled against the French government concerning a man convicted of facilitating the unauthorised residence of his son-in-law, under French legislation deriving from the Directive³. The court deemed the conviction to be a violation of the right to private life under the European Convention of Human Rights.

The Protocol's *travaux préparatoires* show that it "was not intended to criminalize humanitarian support given to migrants, in particular by non-governmental organizations or churches or support given on the basis of close family ties".⁴ The Mallah judgment explains that France provided immunity to families under this law per Article 1.2 of the Directive (in the case, the son in law was not deemed to be close enough to be deemed family). This

³ See Mallah v France, 2011 - <file:///C:/Users/ISABEL~1.TOO/AppData/Local/Temp/Chambre%20judgment%20Mallah%20v.%20France%2010.11.11.pdf>

⁴ Travaux Préparatoires - https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf

might be a step that the State could consider, though there have been instances of trafficking among family groups. Perhaps it might operate as a defence or an immunity.

MRCI again hopes that Section 5(5) will contribute to an increase in prosecutions for human trafficking and not lead to a rash of prosecutions for actions that are not human trafficking. Innocent organisations and individuals may fall foul of the provisions because they cannot show humanitarian motives or a lack of financial gain, though the gain may not be from any exploitation.

MRCI is mindful of any unintended consequences that might result and make it more difficult for undocumented migrants to seek a resolution of their legal status, e.g. the 'hostile environment' that pervades in the U.K. Such climates drive people underground and enable trafficking to flourish, as people without options turn to exploitative employment out of the need to survive, and organisations fearing criminal prosecution are unable to assist.

However, while there may be concerns of overreach with regard to some of the provisions, this must be balanced with the need to step up the fight against human trafficking. Ireland has had no successful convictions in trafficking cases, and a scant number of prosecutions.

Section 5(5)

Aggravating factors in sentencing

MRCI welcomes the aggravating factors contained in 5(5)(a) and 5(5)(b) and giving effect to the UN Protocol where a victim has been harmed or subjected to inhuman or degrading treatment.

Section 5(6)

Sentencing

The sentence for the indictable offence appears in line with the EU Framework Decision 2002/946/JHA and the UN Protocol. Again, MRCI supports the imposition of severe sentences for anyone found to have trafficked another human being.

ENDs

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