

MRCI Submission to the Committee on Justice on the Heads of Bill, General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

13 October 2022

Introduction

The Migrant Rights Centre Ireland (MRCI) welcomes the opportunity to make a submission to the Committee on Justice on this Heads of Bill to reform the National Referral Mechanism (NRM), as part of the Government's pre-legislative scrutiny process. MRCI is a national organisation working to promote the rights of migrant workers and their families in low paid employment who are at risk of poverty, exploitation, and social exclusion.

MRCI is a national assessment centre for trafficking for labour exploitation. To date, MRCI has assisted more than 280 vulnerable people where indicators of trafficking presented across different sectors, including agriculture, the private home, and restaurants

Internationally, the number of people estimated to be in situations of trafficking for labour exploitation has grown by 2.7 million to 28 million since 2016.ⁱ However, the number of people who have been identified as victims of human trafficking in Ireland has been declining since 2017.ⁱⁱ These low identification numbers underscore the state's lack of convictions for trafficking for labour exploitation.

Early victim identification is crucial in the fight against human trafficking. Currently, the identification of victims falls to An Garda Síochána alone. The involvement of police in both the identification and investigation of human trafficking is linked to the low number of identified victims for which Ireland has been widely criticised.ⁱⁱⁱ These experts have encouraged the adoption of a multi-agency approach to victim identification, and one that includes civil society. MRCI is pleased to see this approach included in the Heads of Bill.

MRCI's Key Recommendations

In this submission, MRCI comments on **Part 3 of the Heads of Bill** as it pertains to victims of trafficking for labour exploitation. There are three key recommendations/omissions that MRCI would like to mention before taking a head-by-head approach to the Heads of Bill. These are:

Identification Process based on Reasonable Grounds

MRCI strongly recommends a lower standard of identification than as outlined in the Heads of Bill, to bring as many victims as possible into the NRM. Only with robust victim identification will the

crime of human trafficking be tackled effectively. The criteria for identification (at both referral and determination stages) must be based on reasonable grounds as found in any recognised indicators of trafficking, e.g. The Delphi Indicators.^{iv}

Appeal

The right to appeal is fundamental in any process or system. The Heads of Bill contain no reference to an appeal, review, or reconsideration. In the interests of transparency and fairness, potential victims must be able to challenge a refusal to recognise them as victims of trafficking.

Rights and Entitlements, including Immigration Status

To encourage victims to present for identification it is essential that specific services and supports are set out in legislation. Supports *must* include the grant of immigration status. There is no reference in the Heads of Bill to immigration status for victims of trafficking who are undocumented or have precarious immigration status. The importance of this cannot be overstated: the immigration status of undocumented victims is exploited by traffickers to deter victims from fleeing or seeking help. The provision of a stable immigration status is vital in ensuring victims come forward for identification and a ‘firewall’ between Competent Authorities and immigration authorities will encourage undocumented victims to present.

Comments on Part 3, Head by Head

Before considering each Head, MRCI would like to note the absence of **operational guidelines**. As a stakeholder in the Dept of Justice’s stakeholder subgroup on the NRM within the Human Trafficking Stakeholders Forum, MRCI was assured by the Department that operational guidelines for the NRM would be provided to stakeholders ahead of the deadline for its submission (30 September 2022). To date, no such guidelines have been received. This makes comment in many areas of this Bill a challenging process, i.e., is a missing item to be regarded as an omission or will it be covered in the guidelines.

Head 12 – Interpretation for Part 3

- The definition of a victim should include a person awaiting appeal or reconsideration of an application/ referral. The right to appeal/ reconsideration must be in statute.
- The definition of the NRM as “*the framework through which the State fulfils its obligations to protect and promote the human rights of trafficking victims*” does not go far enough – the NRM encompasses access to services and supports for victims. Without a guarantee to these services, victims may not be willing to come forward.

Head 13 – Competent Authorities of the National Referral Mechanism

- Section (1): Amend to include Local Authorities as Competent Authorities. The Department of Housing, Local Government and Heritage, like listed Competent Authorities – e.g., health and social welfare – may encounter victims of trafficking through its operations.

- Recommend that a Competent Authority (and Trusted Partner) should record and report any refusal to refer a victim to the Operational Committee, in the interest of fairness and transparency.

Head 14 – Application for Recognition as a Victim of Trafficking

- This Head should include a clear statement that no department or agency will refer to immigration authorities anyone who is not referred to the Operational Committee as a victim of trafficking. It is not enough to prohibit sharing of information, per Head 16, as the consequences of this will be more than a breach of GDPR and could result in deportation proceedings against a victim.
 - Knowledge that they will not face referral to immigration authorities may assist victims in coming forward.
- Section (2): This section must provide in statute an appeal or reconsideration of a refusal to refer a victim to the NRM Operational Committee.
- Section (2): It appears that only a Competent Authority or Trusted Partner can receive an application for identification; this is too limiting for victims.
 - MRCI recommends a path for self-referral to the NRM Operational Committee. A situation may arise where no Trusted Partners are designated and where there is difficulty getting the application through a Competent Authority, or where the potential victim is unaware the Competent Authority holds this function.
- Section (3)(a): Amend to delete all references to ‘credibility’ and ‘balance of probabilities’. The Competent Authority / Trusted Partner is not being asked to investigate the victim’s account, only to refer for further consideration.
 - This section must provide for a referral based on reasonable grounds only, as per current Administrative Arrangements.^v
- Section (4)(a) – (c): This list must be replaced with a statement that reasonable grounds are based on ‘any and all indicators of trafficking’.
 - It is not clear why only the listed indicators were selected. Referring to ‘any and all indicators of trafficking’ is more helpful. The Competent Authority or Trusted Partner could be directed to a schedule of indicators (including Delphi indicators, at minimum).
 - If deception and coercion are emphasised, these must be defined. As it stands, only exploitation is defined in Head 12.

Head 15 – NRM Operational Committee

- The right to appeal or request reconsideration of a decision of the Operational Committee must be set out in statute. This appeal/ reconsideration should be capable of overturning the original decision in the interests of efficiency and fairness. The Operational Committee must comply with appeal procedures.
 - As written currently, only a Judicial Review can challenge a decision by the Operational Committee, and this does not have the same function as an appeal.

- The Operational Committee should be independently chaired/ administered, as part of general oversight, including oversight of Trusted Partner designation (covered at Head 19).
- Section (2): Insert a minimum grade of civil servant (e.g., not below Assistant Principal Officer/ Garda Superintendent) for each Competent Authority.
- Sections: (2) and (4): The legislation should ensure that Trusted Partners with expertise in this area are always given the opportunity to be part of Operational Committee. If no civil society organisation/ body etc. is designated as a Trusted Partner, there will be no non-governmental presence.
 - In Britain, NGOs have reported that there is no process to recruit/ appoint new NGOs into a similar role, leaving with victims few non-statutory organisations to approach.^{vi}
- Section (3): The wording in this section refers only to Competent Authorities. Trusted Partners are likely to constitute the expertise within the Operational Committee and should not be excluded from drafting procedures and process.
- Section (4): Amend to state that Trusted Partners shall also be involved in section (5) Operational Procedures.
- Section (5): Operational guidelines should not be left entirely to the Operational Committee to devise; as highlighted above in this Head, the right to appeal/ reconsideration, at minimum, must be listed in statute.
- Section (5)(i): There should be a minimum schedule for convening the Operational Committee, to reduce delays.
- Section 5(ii): The reference to interim arrangements must be more specific; the victim must be fully supported in the process (the two-stage process of identification), from the beginning.
- *Note:* The note should make clear that the Operational Committee's function goes beyond identification and includes administering the NRM as it applies to the support of victims, per Head 19, allowing them to access services (including those provided by the departments/ agencies of the Competent Authorities).

Head 16 - Sharing of Information by Competent Authorities and Trusted Partners

- MRCI agrees that information sharing should be limited to the purposes of making decision/ determination on a victim's case.
- This Head should include a clear statement that no department or agency will refer to immigration authorities anyone who is not referred to the Operational Committee as a victim of trafficking. It is not enough to prohibit sharing of information, per this Head, as the consequences of this will be more than a breach of GDPR and could result in deportation proceedings against a victim.

- Knowledge that they will not face referral to immigration authorities may assist victims in coming forward.
- Section (1): Information sharing purposes must cover appeals: for the purpose of an appeal or reconsideration of that decision/ determination.

Head 17 – Identification of a Victim of Human Trafficking by the NRM Operational Committee

- Provide in statute the right to appeal or for a reconsideration of decisions. This is fundamental to any fair process. Appeals/ reconsiderations must go before an independent body with the power to overturn the original decision in interests of efficiency and compassion.
 - As written currently, only a Judicial Review can challenge a decision by the Operational Committee, and this does not have the same function as an appeal.
- Section (1) (a): Credibility: amend to delete all references to ‘credibility’ and ‘balance of probabilities’. This section does not task the Operational Committee with investigating a victim’s account.
 - This section must provide for a decision based on reasonable grounds only, as per current Administrative Arrangements.^{vii}
- Section (1)(b): As with Head 14, replace with statement that reasonable grounds are based on ‘any and all indicators of trafficking’.
 - It is not clear why only the listed indicators were selected. Referring to ‘any and all indicators of trafficking’ is more helpful. The Competent Authority or Trusted Partner could be directed to a schedule of indicators (including Delphi indicators, at minimum).
- Section (3): Decision timeframe “*as soon as is practicable*” is too vague; it must be clear to victims when to expect a decision.
- Section (3): Amend to state that the reasons for any decision must be given to the applicant/ victim in writing, and in a language the victim understands.

Head 18 – Designation by Order of Trusted Partner

While the idea of a Trusted Partner role for civil society is welcome, there is a lack of information, including the implications for organisations. Even the Note for this Head fails to explain the function of Trusted Partner fully: according to the other Heads, a Trusted Partner is tasked with deciding on applications from victims as part of NRM Operational Committee, not merely “*receiving and referring applications*”.

- Section (1): Eligibility: Trusted Partner status should be available to more than “*civil society organisations and bodies*”, but open to unions and other experts to serve as Trusted Partners.

- Additionally, Trusted Partners should be able to nominate experts to the Operational Committee.
- Section (3): Designation: MRCI recommends an independent process for the selection, designation, and administration of Trusted Partners. There should be no barrier in applying for designation as a Trusted Partner, where otherwise the Operational Committee would operate without Trusted Partners.
- Furthermore, the following must be clarified and considered:
 - The independent position of an organisation that takes up a Trusted Partner role;
 - Indemnity from legal action against Trusted Partners that decline to refer a victim to the Operational Committee;
 - The role of dissent if a Trusted Partner is not in agreement with NRM Operational Committee;
 - The funding and training that will be made available to Trusted Partners, and
 - A recusal policy for those who have referred a victim to the Operational Committee.

Head 19 – Access to Services by Victims of Trafficking

Overall comment on this Head:

The lack of commitment to the welfare of victims of trafficking, as set out in this Heads of Bill, is very disappointing. Victim supports and services should not be reduced to minimum standards or left to individual Departments/ agencies to decide. The EU Trafficking Directive prescribes the minimum standard, but legislation must go beyond this to encourage victims to present for identification.^{viii} Only with robust victim identification can the crime of human trafficking be tackled effectively.

The Note to Head 19 refers to the rationale as one “*not to create an entitlement to a specific service...or to duplicate the existing statutory basis on which specific services are provided...*” The NRM *must* create an entitlement to a specific service, to allow people to come forward with assurances that they will be provided for and protected. Victims will be reluctant to come forward unless they feel supported and secure. A clear statement of the supports and services available to support victims of trafficking is essential to the wellbeing of the victim, and to the integrity of the process.

It is crucial that immigration permissions are outlined in statute. This is a vital component of the NRM for undocumented victims of trafficking and those with irregular immigration status. Traffickers use a victim’s immigration status to keep their victims under control, and MRCI cautions that failure to provide a stable immigration status will result in fewer victims presenting for identification.

Head by Head comments (Head 19)

- The Head should clearly state that supports and immigration status for victims of trafficking will be provided independent of their cooperation with authorities, to reflect the EU Trafficking Directive.

- The Head should clearly state that an applicant for international protection who is seeking identification as a victim of trafficking should be able to assert the status that is most advantageous.
 - At present, applicants for international protection who are later identified as victims of trafficking are precluded from many of the more favourable rights and entitlements afforded to victims of trafficking.
- There is no mention of the Reflection and Recovery period afforded to victims by the EU Trafficking Directive. This should be a statutory entitlement for those victims who wish to cooperate with law enforcement. The Reflection and Recovery period may be waived if the victim wishes to cooperate with law enforcement sooner.
- Section (2): Immigration status should be included in this section, administered on a Stamp 4 permission basis.
 - Status should be for a minimum of 12 months initially. The current six-month duration of permission is inefficient and undermines the integration of victims into society (employers and landlords, for instance, are wary of issuing contracts of employment or leases to people with short expiry dates on their immigration permission).
 - Victims of trafficking should be entitled to family reunification, to allow for integration.
 - An ‘immigration firewall’ guaranteed throughout the NRM (as referenced in Head 14 and 16 also) to ensure no one will be referred to immigration authorities through interaction with any party to the NRM.
- Section (2): Strengthen language around the responsibility to provide an appropriate care package, to ensure all relevant Competent Authorities participate in the provision of services to victims of trafficking.
 - A designated caseworker would greatly improve victim outcomes, as is current practice under the Administrative Arrangements^{ix}, where each victim is assigned a HSE caseworker.
 - In MRCI’s opinion, HSE caseworkers are the greatest strength of the current system and should be retained.
- Section (2)(b): MRCI is concerned about the inclusion of Direct Provision and without any statement of a successor entity. The Direct Provision model is not appropriate for traumatised and vulnerable victims of trafficking.
 - House all victims of trafficking in victim-specific, supported accommodation. MRCI understands that a reform of accommodation for victims of trafficking is underway but has not received any updates from the Department of Justice.
- Section 2(d): Legal Aid: Early legal advice should be available to anyone who is considering coming forward as a victim of trafficking. This should be available as soon as there are reasonable grounds to believe that a person is a victim of trafficking, and not limited to post-identification.

Head 20 – Prohibition on Deportation for a Victim of Trafficking

- More clarity is required on the intersection of Section 3 process and status as a victim of trafficking; the binding principle of *non-refoulement* must be upheld.
- Strengthen assurances against deportation; merely deferring or suspending a deportation order is not sufficient: victims must be free from the threat of deportation entirely.
 - Traffickers often use the threat of deportation to keep a victim in a situation of trafficking. MRCI has observed this in many trafficking for labour exploitation cases (see also Delphi Indicators).^x

Head 21 – Protection from Prosecution for a Human Trafficking Offence

- The language in this Head is confusing; the Note is clearer than the language in Head 21.
 - It is unclear if the Department considers this Head to be a defence to prosecution of a victim of trafficking, or if it is intended as a guideline for prosecutors so that no prosecution is initiated.
- The principle of non-prosecution must extend beyond immigration offences. Instead, the Department should follow UK legislation in this area, and extend protections to other unlawful acts committed as a result of human trafficking. See section 45 of the Modern Slavery Act, in particular subsection (1).^{xi}
 - (1)A person is not guilty of an offence if—
 - (a) the person is aged 18 or over when the person does the act which constitutes the offence,
 - (b) the person does that act because the person is compelled to do it,
 - (c) the compulsion is attributable to slavery or to relevant exploitation, and
 - (d) a reasonable person in the same situation as the person and having the person’s relevant characteristics would have no realistic alternative to doing that act

Additional Comments on Part 3:

The following are not addressed in the Heads of Bill and cannot be covered in the Head-by-Head analysis.

1. Oversight

There should be independent oversight of the NRM to ensure it is fulfilling its obligations successfully and impartially.

2. Principles of this Legislation

MRCI recommends that the Heads of Bill contain a reference to the principles underpinning this legislation. It should be victim-centred legislation, with rights and entitlements set out in law and this should be stated clearly as part of the Bill.

3. Training of Competent Authorities and Trusted Partners

Training of Competent Authorities and Trusted Partners is essential to the success of the NRM, especially in trauma informed care, interviewing victims, anti-trafficking laws and related laws. There is no mention of this in the Heads of Bill.

4. Victims outside the Jurisdiction

A process should be in place for the Operational Committee to consider the cases of victims who were trafficked outside, whose trafficking does not take place in Ireland, or feature the relevant connections to Ireland, per the EU Trafficking Directive.^{xii}

5. Compensation

There is no trafficking-specific state compensation available to victims of trafficking. Currently, and in the absence of any prosecution or convictions (which may give access to criminal compensation), victims of trafficking labour exploitation must resort to other mechanisms e.g., personal injury law or employment law, to claim any money back from their traffickers.

6. Areas that are outside of MRCI's scope but are of concern include:

- A. Child Trafficking: this Heads of Bill lacks a child-specific approach to trafficking in human beings. Child victims of trafficking are extremely vulnerable and must be identified and supported through an appropriate, child-centred system. MRCI supports the National Rapporteur on Human Trafficking's call for an NRM that "explicitly address the special identification and referral needs of child victims of trafficking, including within the broader system of protection of separated and unaccompanied minors."^{xiii}
- B. Forced Marriage and other forms of trafficking: the definition of human trafficking (in Head 12 and where relevant) should be expanded to include forced marriage and allow scope for other 'novel' forms of trafficking that may emerge.

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ⁱ <https://www.walkfree.org/reports/global-estimates-of-modern-slavery-2022/>

ⁱⁱ 103 victims to 44 in 2021 <https://www.state.gov/reports/2022-trafficking-in-persons-report/ireland/>

ⁱⁱⁱ E.g., in <https://www.ihrec.ie/documents/trafficking-in-human-beings-in-ireland/> and <https://www.state.gov/reports/2022-trafficking-in-persons-report/ireland/> and <https://www.ihrec.ie/documents/trafficking-in-human-beings-in-ireland/>

^{iv} https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_105023.pdf

^v <https://www.blueblindfold.ie/wp-content/uploads/2020/09/Guide-to-Procedures-June-2015.pdf>

^{vi} Conversation with Anti-Slavery International, 2021

^{vii} See endnote v

^{viii} Directive 2011/36/EU <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0036>

^{ix} See endnote v

^x See endnote iv

^{xi} <https://www.legislation.gov.uk/ukpga/2015/30/section/45/enacted>

^{xii} See endnote viii

^{xiii} <https://www.ihrec.ie/documents/trafficking-in-human-beings-in-ireland/>