

A framework for tackling forced labour in Ireland

Paper prepared by Irish Congress of Trade Unions Labour Exploitation Group and Migrant Rights Centre Ireland

1. Introduction

This paper was developed by the Irish Congress of Trade Unions Labour Exploitation Group (ICTU) and the Migrant Rights Centre Ireland (MRCI) to contribute to the debate as to how an integrated approach to tackling forced labour can be developed in Ireland.

Forced labour is an extreme form of exploitation and is a growing problem in Ireland and at a European and international level. The economic recession is also creating the conditions for the growth of forced labour and exacerbates the problem of the identification of victims.¹

This paper is timely as the Irish government are considering the introduction of an offence of forced labour in to Irish law. The introduction of an offence in itself will be a significant development, however, it will not be sufficient on its own to tackle forced labour. 'Finding a solution to situations of forced labour is a huge challenge, as those who are in forced labour and the forms of coercion employed are constantly changing.'² Our learning from international experience, and the recommendation from the International Labour Organisation(ILO), is that 'action against forced labour, including trafficking, requires an integrated approach that blends rigorous law enforcement with prevention and victim assistance measures.'³ An integrated approach would contain the following elements:

- Criminalisation of Forced Labour
- Protections for victims of forced labour

1 Since 2006 the Migrant Rights Centre Ireland have dealt with approximately 150 cases of forced labour

2 (2009) Cost of Coercion. ILO.Geneva.

3 Skrivankova, Klara (2010) Between decent work and forced labour examining the continuum of exploitation. Joseph Rowntree Trust.

- Mandating key responsibility to state agencies to tackle forced labour

Without this type of integrated approach, attempts to address this problem will be insufficient.

2. Definition and identification of forced labour

Defining Forced Labour

The ILO's Convention No. 29 (1930) prohibits all forms of forced or compulsory labour, which is defined as, "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." The convention requires that the extraction of forced or compulsory labour be punishable as a criminal offence, and that ratifying states ensure that the relevant penalties imposed by law are adequate and strictly enforced.

Forced or compulsory labour runs completely counter to all the underlying principles of democracy, which is based on freedom and equality. It is the very antithesis of decent work, namely productive and *freely chosen* employment, as recognized in the Forced Labour Convention and further elaborated in the ILO's [Employment Policy Convention](#), 1964 (No. 122).

In forced labour cases workers can be subjected to:

- A climate of fear, psychological or physical coercion to perform work that they would otherwise not have accepted to perform.
- Deception or fraud, which can be used to gain the consent of workers. For example, accepting a job which they are told is legal and well paid, only to find out later that this is not the case.
- Punishment (menace of a penalty) which can be in the form of a threat of physical violence or non-physical threats, including denunciation to the police or immigration authorities in the case of people without legal residence or work status.

Forced labour must be 'understood through the lens of a continuum of exploitation,⁴ and as such, 'individual experience can begin as an acceptable work situation, where conditions subsequently deteriorate into forced labour.'⁵ In effect, poor labour standards and regulation of these create the conditions that allow forced labour to exist and which ultimately affect all workers.

Identification of Forced Labour

A key problem that is faced in the Irish jurisdiction, which is common to other jurisdictions, is the identification of forced labour. A common misconception is that those in forced labour situations are constrained in an overt manner. However, in practice, forced labour involves a complex set dynamics. It is unequal in nature, and coercion is used to extract consent in a range of explicit and subtle ways, such

4 Skrivankova, Klara (2010) *Between decent work and forced labour examining the continuum of exploitation*. Joseph Rowntree Trust.

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as, threatening harm to third persons or family members, and threatening dire consequences by means other than overt violence. For some, their position of vulnerability is such that they have no real alternative but to submit to the abuse involved. In some circumstances 'the person may have freely agreed to take up work and only once they started working discovered that they were deceived about the conditions or the nature of the work, and that they are not free to leave without repercussions.'⁶ Case law has established that when deception or fraud is present, the initial consent of a person to do the work is not considered valid or relevant. Other considerations such as the vulnerability of the person can also render their 'consent' irrelevant.

A non-exhaustive list of indicators was developed by the ILO to assist in the identification of forced labour, as set out below:

- Threats of or actual physical or sexual violence.
- Restriction of movement and confinement, to the workplace or to a limited area.
- Debt bondage: where a worker works to pay off debt or loan, and is not paid for his or her services.
- Withholding of wages, refusing to pay the worker at all or excessive wage reductions.
- Retention of passports and identity documents.
- Threat of denunciation to the authorities.

If any one of these factors is present then the case should be investigated. If two or more indicators present in a case, this is considered to be a strong indication of forced labour.⁷

Who does forced labour affect?

Forced labour can potentially affect all workers. Workplaces where poor standards go unchecked can degenerate into situations of forced labour. From MRCI's experience, workers in forced labour situations mainly work in non-unionised, unregulated sectors such as private homes, agricultural, restaurant, entertainment, seafaring, care and construction sectors. People in situations of forced labour are frequently from minority or marginalised groups and often face multiple forms of discrimination in their respective societies. Gender, ethnicity and class are often key determinants in situations of forced labour.

Forced labour can affect migrant workers disproportionately but Irish workers can also be at risk of forced labour, as situations where someone is coerced or forced to work without his or her valid consent, regardless of whether trafficking is involved, can fall within the scope of forced labour.⁸ Particular attention needs to be paid to immigration policy as it also intersects with forced labour. Ireland's migration system can exacerbate migrant workers' vulnerability to labour exploitation, including forced labour. For example, the work permit system, which binds a worker to a specific employer, and only in

6 Andrees Beate (2008) Forced labour and trafficking in Europe: how people are trapped in, live through and come out. International Labour Office, Geneva.

7 Anti-Slavery International, Trafficking for Forced Labour, 2006.

8 Committee of Experts Individual Observation concerning Convention No.29, (Mexico), 2007

exceptional circumstances, with prior approval of the Department of Jobs Enterprise and Innovation allows migrant workers to move jobs (and at the cost of €1,000). Migrant workers in this circumstance are in reality, compelled to continue in particular employment and are deprived of the right to free choice of employment. This can result in migrants ending up in informal employment situations or remaining in exploitative employment situations, and as a result their vulnerability to forced labour increases.

Being undocumented leaves a person more vulnerable to exploitation and recruitment into forced labour situations. Being an undocumented worker can also impact on a worker's right to seek redress for breaches of their employment rights. Furthermore, depending on a person's immigration status, they could be deemed an irregular migrant first and foremost and not primarily as the victim of a crime.

This is a critical issue that needs to be addressed in designing a strategy to address forced labour. Workers who have become undocumented due to situations of forced labour must not be penalised for irregular immigration status. Their protection must be central to the strategy, and regularisation of their immigration status must be prioritised within this strategy.

3. An Integrated framework for tackling forced labour

Criminalisation of Forced Labour: The National and International legal frameworks:

There is no law in place in the Irish jurisdiction that addresses the severity of the crime of forced labour. At present, employers and others who commit this crime are not subject to criminal penalties, therefore, the incentive for them to profit from their actions remains. People who find themselves in situations of forced labour have no specific remedy to address the crime committed against them.

Ireland's responsibilities under International and EU law require the enactment of a legislative prohibition of forced labour, punishable as a criminal offence that results in terms of imprisonment. The International Labour Office's Forced Labour Convention 1930 and the UN's Supplementary Convention on the Abolition of Slavery, (both ratified by Ireland) and the European Convention on Human Rights Act, 2003 require the criminalisation of forced labour. Failure to do otherwise is itself a violation of the ILO Convention and Article 4 the European Convention on Human Rights (ECHR). In *Siliadin v. France* (2005)⁹, the European Court of Human Rights, relying on the ILO definition of forced labour, ruled that Article 4 (ECHR), concerning slavery, servitude and forced labour, imposes positive obligations on states and specifically that, '...Governments have positive obligations...to adopt criminal-law provisions which penalise practices referred to in Article 4 and to apply them in practice' (para89).

⁹ *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005, available at: <http://www.unhcr.org/refworld/docid/4406f0df4.html> [accessed 25 May 2011]

However, more is required. Irish courts must be empowered to make orders for compensation for the victim for financial losses such as wages, or non-financial losses such as damages and/or pain and suffering.¹⁰

As stated above the Irish government is currently considering legislation that will bring Ireland in to compliance with international and EU obligations.

Protections for victims of forced labour

To ensure the law is meaningful, workers who have been subjected to forced labour need to be protected and their safety guaranteed. This is also essential to ensure that people come forward and report the crime and that it is prosecuted successfully. It is paramount that workers are facilitated to exit forced labour situations. In addition, the specific vulnerability of migrant workers who are victims of forced labour demands that Ireland put in place protections. For example, in some circumstances workers may become undocumented due to forced labour and in these cases it will be necessary to regularise their immigration status while they are assisting the state in investigating this crime. Also, an EU national subjected to forced labour may have been dependent on his/her employer for accommodation, therefore when they exit the situation, they will become homeless, and as such will require accommodation.

A scheme that can respond to the various needs of those affected by forced labour is required to ensure a range of supports can be accessed. To be effective this needs to include secure immigration status, appropriate secure accommodation, access to health care, psychological care, social welfare, quality legal advice and employment supports. Without these supports victims will not be identified or encouraged to come forward and report this crime and any laws in place will be rendered ineffective.

Restrictive migration policies contribute greatly to creating the conditions for forced labour. Greater flexibility in the work permit system is also required, in particular, allowing work permit holders to move freely between jobs in a defined sector. This will ensure that decent standards of employment are upheld and some of the conditions that allow forced labour to develop can be tackled.

10 Art. 41 ECHR provides an entitlement to ‘just satisfaction’ and allows damages to be granted by the European Court of Human Rights when, at the national level, the applicant was not awarded full compensation for the damage suffered. In the case referred to above, Siliadin had not claimed damages so the opportunity to establish a precedent award amount was lost, however she had claimed costs. She received €26,209.69 for her costs and expenses, and in addition before the French courts was then awarded €15,245 in compensation for psychological trauma as well as €31,238 in back wages.

Mandating key responsibility to State Agencies to tackle forced labour

- **Department of Jobs Enterprise and Innovation (DJEI)**

DJEI should be mandated to coordinate and drive the strategies and actions designed to address the problem of forced labour. DJEI should establish a committee in cooperation with the Department of Justice and Equality and comprising membership from the relevant Departments, National Employment Rights Authority, National Bureau Criminal Investigations, statutory agencies, employers Trade Unions and NGOs. The role of this group would be to:

- Identify the extent of forced labour in Ireland and its location by industry and sector
- Devise strategies and actions to prevent, identify and support the prosecution of forced labour and the protection of victims
- Advise on integrated strategies that are required to prevent forced labour
- Support the development of awareness campaigns
- Monitor and evaluation progress

This group would a key driver in tackling forced labour in Ireland today.

- ***An Garda Siochana: The National Bureau for Criminal Investigations (NBCI)***

As forced labour can affect Irish workers, EU workers, Non-EEA workers and can be the result of organised crime and/or carried out by specific employers, it is important that NBCI is charged with the task of investigating the perpetrators of these crimes. The NBCI needs to work closely with the NERA in carrying out investigations and vigorously prosecuting the criminal breaches of these cases.

- **National Employment Rights Authority (NERA)**

The mandate and role of labour inspectors in detecting forced labour is set out in specific ILO Conventions to which Ireland is party.¹¹ Article 24 of the ILO Forced Labour Convention 1930¹² states the duties of any existing labour inspectorate should be extended to include inspection of forced labour. Article 12 of the ILO Labour Inspection Convention, 1947 states that labour inspectors shall enter freely without notice at any hour of the day or night any workplace liable to inspection, interrogate, alone or in the presence of witnesses, the employer or the staff of the undertaking on any matters concerning the application of the legal provisions. Both Conventions have been ratified by Ireland, 1931 and 1951 respectively. In a number of EU countries the labour inspectors' play a key role in tackling forced labour.

11 Labour Inspection Convention, No. 81 (1947) and Labour Inspection (Agriculture) Convention, No. 129 (1969)

12 Forced Labour Convention No. 29 (1930)

For example, in Belgium, specialised labour inspectors, carry out visits to workplaces where there are reasons to suspect forced labour.

NERA is Ireland's labour inspectorate. NERA inspectors derive their powers from a number of enacted employment statutes¹³. For the purposes of each Act an individual inspector is empowered to enter any premises at a reasonable time, to demand sight of records, to inspect records, to take copies of records and to interview and require information from any relevant person¹⁴

Currently, NERA's inspection service has no legal provision that will allow it to identify and address the specific offence of forced labour. While an inspection may uncover elements of forced labour, infringements may not attach a penalty, (for example the withholding of travel and identity documents, abuse of a person's immigration status or coercion of family members). Consequently, potential victims may be encountered but their situation may not be addressed, as NERA have no powers to act.

However, NERA, as the national employment inspectorate, is the appropriate body to inspect forced labour due to its existing powers and expertise in assessing breaches of employees' rights. Within an integrated framework, NERA will require the powers to identify, assess and inspect cases of forced labour. Following on from this, NERA would refer these cases to the NBCI for criminal investigation, to the employment courts for breaches of employment rights, regardless of the victim's immigration status, and assist victims in accessing protections as set out in the protection scheme outlined above.¹⁵

13 E.g.: Article 33 of the National Minimum Wage Act, 2000, Article 18 of the Employees (provision of information and consultation) act 2006

14 See; <http://www.employmentrights.ie/en/>

15 Currently, NERA will not recoup arrears of wages for a person whose immigration status is irregular due to their advice from the Attorney General. They maintain, as the victim has no permission to work in the state the contract between the employer and the employee is illegal, and therefore unenforceable through the Courts. However, they can prosecute the employer for employment breaches. This is an issue that needs to be addressed to strengthen NERA's role. The French labour code provides a model that could be used to address this problem.

4. Recommendations

- An offence of forced labour should be created within Irish law.
- The legislation should include specific powers for NERA to:
 - Identify, assess and inspect cases of forced labour,
 - Refer forced labour cases to the NBCI for criminal investigation,
 - Assist victims in accessing the victim protection scheme.
- The legislation should include a provision to protect the rights of undocumented workers to pursue compensation or arrears in the normal way.
- A specific protection scheme for victims should be established to ensure that victims are eligible for protection and assistance such as immigration status, the right to work, accommodation and counselling while they recover from their experiences.
- The DJEI should be mandated to be the key driver in coordinating the development and delivery of strategies and actions to tackle forced labour. DJEI should establish a committee made up of all stakeholders such as the Department of Justice and Equality, NERA, NBCI, government departments, employers, Trade Unions and NGOs to develop and implement the strategy.