

The 2011 EU Directive on Combating Human Trafficking: Does the United Kingdom Comply?

*Professor Rebecca M M Wallace**

*Fraser A W Janeczko***

Introduction

This article examines the obligations addressed to European Union (EU) member states¹ as set out in the ‘Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims’ (Directive).² The Directive, passed by the European Parliament and the Council of the EU on 5 April 2011, replaces an earlier ‘Framework Decision on Combating Human Trafficking’ (Framework Decision).³ On the EU’s agenda for almost a decade since the passing of the Framework Decision,⁴ the Directive is significant in that it was adopted in the wake of the Lisbon Treaty reforms.⁵ Initially the United Kingdom (UK) expressed its intention not to participate in the Directive on the basis that ‘[the UK has] put everything that is in the Directive in place’,⁶ although it did indicate that its position would be reviewed once the Directive

*MA, LLB, PhD. Immigration Judge, Director of the UHI Centre for Rural Childhood, Scotland, UK, and fee paid Judge of the First-tier Tribunal (Immigration). The views expressed do not reflect those of the Immigration and Asylum Tribunal.

**LLB (Hons), Dip LP, LLM.

¹With the exception of Denmark.

²Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

³Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L203/01.

⁴See generally, Schmidt and Morehouse ‘Europe’s fight against human trafficking’ (2010) October *Spotlight Europe* 2010/09 4-7.

⁵See the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C83/01 (EU Treaties).

⁶Prime Minister David Cameron speaking in the UK House of Commons (2010) 515 HC Debates 15 September col 873.

had been passed.⁷ On 14 December 2010, the European Parliament voted overwhelmingly in favour of the Directive by 643 votes to 10; the UK opted in shortly thereafter.⁸ EU member states now have two years in which to align their domestic laws with the Directive. This article analyses and evaluates the extent to which the obligations contained in the Directive are already assumed under existing international law and, in the case of the UK, in current domestic law.

The international context

As a prerequisite to an analysis of the Directive, it is necessary to paint – albeit with a broad brush – the wider international legal framework relating to human trafficking. The 2000 ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children’ (Trafficking Protocol)⁹ offered the ‘first global legally binding instrument with an agreed definition on trafficking in persons’.¹⁰ The Protocol was one of three documents adopted pursuant to the 2000 ‘United Nations Convention against Transnational Organized Crime’.¹¹ Article 3 of the Trafficking Protocol provides:

- (a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) ‘Child’ shall mean any person under eighteen years of age.

As is evident from the above definition, trafficking in human beings comprises three components: (i) the act of transferring a person; (ii) using coercion or

⁷The Prime Minister told the House of Commons that he was prepared to ‘look again’ at the issue, *ibid*.

⁸In accordance with Protocol 21 of the EU Treaties at C83/295.

⁹2237 UNTS 319.

¹⁰See United Nations Office on Drugs and Crime ‘United Nations Convention on Transnational Organized Crime and its Protocols’ available at <http://www.unodc.org/unodc/en/treaties/CTOC/index.html> accessed 16 July 2011.

¹¹2225 UNTS 209. The other Protocols adopted were the 2000 ‘Protocol against the Smuggling of Migrants by Land Sea or Air’ 2241 UNTS 507 and the 2001 ‘Protocol against the Illicit Manufacturing and Trafficking in Firearms, their Parts and Components and Ammunition’ 2326 UNTS 208.

deception; (iii) for the purpose of exploitation. In the case of children, however, no evidence of coercion or deception is required for them to be identified as victims of human trafficking as they are perceived to be vulnerable and unable to provide informed consent to being smuggled.¹²

At the time, the Trafficking Protocol represented the most comprehensive definition of trafficking in human beings. However, legal ambiguities remained, notably as a result of a lack of definition of terms, for example, ‘coercion’ and ‘forced labour’.¹³ Moreover, under article 4 of the Trafficking Protocol, trafficking must be international and must involve an organised criminal group. Essentially, the Trafficking Protocol focused upon human trafficking as a transnational crime rather than a human rights issue.

The EU context

The first EU measure on human trafficking pre-dates the 2000 Trafficking Protocol; in 1997, the EU adopted a ‘Joint Action on Trafficking in Human Beings’.¹⁴ This was replaced in 2002 by the aforementioned Framework Decision, which like the Trafficking Protocol, also emphasised the criminal components of human trafficking. This precipitated the criticism that ‘[p]rovision for protection for victims is minimal, particularly in relation to adult victims’.¹⁵ Indeed, the legal basis of EU action at that time has been cited as a constraint on the adoption of a human rights approach to human trafficking.¹⁶

The Court of Justice of the EU has declared that the legal basis of an EU legislative instrument must be its ‘centre of gravity’.¹⁷ Articles 29, 31(1)(e) and

¹²This highlights the difference between trafficking and smuggling in human beings. The definition of human smuggling in the Smuggling Protocol is largely dependent upon the notion of ‘consent’, whereby the smuggled migrant is accepted to have agreed to the illegal movement and entry into another country.

¹³However, guidelines have been produced through a joint project of the International Labour Organisation (ILO) and the EU detailing operational indicators of trafficking, respectively for adults and children in labour and sexual exploitation. These indicators can be used to assess the situation of a potential victim of trafficking with respect to each of the elements of the definition of human trafficking found in the Trafficking Protocol, see ILO and the European Commission ‘Operational indicators of trafficking in human beings’ (ILO Geneva 2009).

¹⁴Council Joint Action 97/154/JHA concerning ‘Action to Combat Trafficking in Human Beings and Sexual Exploitation of Children’ [1997] OJ L63/22. A Joint Action is a time limited project that requires coordinated action by EU member states whereby human and financial resources, know-how, equipment, and so on are mobilised to achieve specific objectives set by the EU Council. Joint Actions commit member states in the positions they adopt and in the conduct of their activities.

¹⁵Cullen ‘The EU and human trafficking: Framing a regional response to a global emergency’ in Antoniadis, Schütze and Spaventa (eds) *The European Union and global emergencies: A law and policy analysis* (2011), at 234.

¹⁶*Ibid.*

¹⁷The Court of Justice used this phrase in Case C-42/97 *Parliament v Council* [1999] ECR I-869 pars 43-57, in its discussion of the selection of the most appropriate among rival legal bases. The

34(2)(b) of the ‘Treaty on European Union’ (the TEU) form the legal bases of the Framework Decision, focusing on cooperation in police and criminal justice matters. Article 29 of the TEU identified one of the EU’s objectives as the provision to EU citizens of ‘a high level of safety within an area of freedom, security and justice ... [and that this] shall be achieved by preventing and combating ... trafficking in persons ...’. Article 31(1)(e) went on to state that ‘[c]ommon action on judicial cooperation in criminal matters shall include ... progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking’. Although not specifically referred to in article 31(1)(e), in line with the Trafficking Protocol, it is submitted that human trafficking falls under the rubric of ‘fields of organised crime’. Finally, article 34(2)(b) stated that the Council, acting unanimously, shall adopt framework decisions ‘for the purpose of approximating the laws and regulations of the Member States’. The 2002 Framework Decision was not directly effective in member states;¹⁸ however the Court of Justice held in the *Pupino* case that with regard to Framework Decisions, ‘[t]he national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision’.¹⁹

The Framework Decision defined a number of offences and penalties concerning trafficking in human beings for the purposes of labour or sexual exploitation.²⁰ It provided for the criminal liability of both legal and natural persons,²¹ and set out the circumstances in which member states were obliged as well as permitted to exercise jurisdiction and initiate a prosecution for any of the offences it described.²² Only one article of the Framework Decision addressed protection of, and assistance to, victims.²³ This article provided that investigations or prosecutions of trafficking offences were not to be dependent on the report or accusation of a victim; that children should be considered as particularly vulnerable victims; and that member states should take measures to ensure appropriate assistance for the child’s family. As will be seen from the analysis below, the Directive adopts a much more victim-centred, human rights approach than the Framework Directive. This is reflected in the increased emphasis placed on addressing the perceived needs of victims.

Court of Justice may annul legislative measures where it considers the wrong legal base has been used, eg, in Case C-176/03 *Commission v Council* [2005] I-7879 the court annulled Council Framework Decision 2003/80/JHA of 23 January 2003 on the protection of the environment through criminal law [2003] OJ L29/55 as it had been adopted on the wrong legal basis.

¹⁸See text at n 30 below.

¹⁹Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR-I 5285.

²⁰The Framework Decision arts 1-3.

²¹*Id* arts 4-5.

²²*Id* art 6.

²³*Id* art 7.

The Council of Europe context²⁴

The Council of Europe has also addressed the issue of trafficking in human beings. The 2005 ‘Council of Europe Convention on Action against Trafficking in Human Beings’ (CoE Convention) built upon the foundations provided by the Trafficking Protocol, while at the same time instilling a more explicit ‘[human] rights based approach to combat trafficking in persons’.²⁵ In the lead up to the adoption of the CoE Convention, the Expert Group on Human Trafficking (Expert Group) established by the EU’s European Commission,²⁶ advocated the necessity of a human rights-based normative framework in the development of any policies on human trafficking.²⁷ In reaching this conclusion, the Expert Group relied upon the Principles and Guidelines on Human Rights and Human Trafficking produced by the UN Commissioner for Human Rights. The first principle of these Guidelines provides that ‘[t]he human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.’²⁸ The CoE Convention is distinct from the Trafficking Protocol in recognising internal trafficking within its definition, thus eliminating the need for an international border to be crossed before the necessary elements of the crime are satisfied.

The Directive: a new direction?

As of the entry into force of the Lisbon Treaty, all of Title V of the ‘Treaty on the Functioning of the European Union’ (TFEU) on freedom, security and justice became part of the general institutional framework of the TFEU. Accordingly, the system of decision making in this area was altered, providing new roles for the European Parliament and Commission, and the jurisdiction of the Court of Justice of the EU has been extended to provide judicial supervision. As a

²⁴It should be noted that the Council of Europe is a distinct international organisation from the EU. The 27 EU member states are also members of the Council of Europe and in the field of human rights, article 6(3) of the TEU reinforces that the provisions of the European Convention of Human Rights constitute part of the general principles of EU law.

²⁵United Nations Human Rights Council ‘Report submitted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children: Joy Ngozi Ezeilo’ 10th Session 20 February 2009 A/HRC/10/16 at 11.

²⁶European Commission Decision 2003/209/EC of 25 March 2003 to set up a consultative group to be known as the ‘Experts Group on Trafficking in Human Beings’ [2003] OJ L79/25. Note, this Decision was repealed by Commission Decision 2007/675/EC of 17 October 2007 setting up the Group of Experts on Trafficking in Human Beings [2007] OJ L277/29.

²⁷Opinion of the Group of Experts on Trafficking in Human Beings of the European Commission 18 October 2007, available at http://ec.europa.eu/home-affairs/doc_centre/crime/docs/opinion_expert_group_07_04_27_en.pdf accessed 1 April 2012.

²⁸Office of the High Commissioner for Human Rights ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (2002) E/2002/68/Add 1.

directive, the latest EU law is binding as to its effect, but leaves member states free to choose the form and methods for transposition into domestic law.²⁹ Contrary to the previous Framework Decision, the provisions of the Directive may have direct effect and may be relied upon by individuals before national courts.³⁰

The legal basis of the Directive is broader than the earlier Framework Decision. Article 82(2) of the TFEU allows the European Parliament and Council to adopt directives under the ordinary legislative procedure establishing minimum rules in relation to police and judicial cooperation in criminal matters with a cross-border dimension.³¹ The provision specifically states that such rules shall concern the rights of victims of crime. Article 83(1) provides that directives may be adopted in accordance with the ordinary legislative procedure establishing minimum rules concerning the definition of criminal offences and sanctions in respect of particularly serious crime with a cross-border dimension, including trafficking in human beings and the sexual exploitation of women and children.

This legal basis provides for a greater human rights-based approach to the issue of human trafficking. Indeed, article 1 of the Directive sets out the two objectives of the Directive: on the one hand it is to establish minimum rules for the definition of criminal offences and sanctions in the area of trafficking in human beings; and on the other hand it introduces common provisions to strengthen preventative measures as well as the protection of victims of trafficking. Arguably, by spelling out these dual objectives, the EU is giving greater cognisance to the rights of victims.

In addition, article 5(3) of the EU Charter of Fundamental Rights provides ‘[t]rafficking in human beings is prohibited’.³² Since the entry into force of the Lisbon Treaty, the Charter has enjoyed equal status with the EU Treaties themselves.³³ The Directive ‘can therefore be seen as giving effect to fundamental rights principles protected at the highest level of the EU legal order’.³⁴

²⁹ Article 288 of the TFEU.

³⁰ However, see Case C-105/03 *Criminal proceedings against Maria Pupino* n 18 above, in which the Court of Justice held that there is an obligation upon national courts to ensure that domestic law is interpreted as far as possible in line with a Framework Decision.

³¹ Article 294 of the TFEU outlines the ordinary legislative procedure.

³² Charter of Fundamental Rights of the EU [2010] OJ C83/389.

³³ Article 6(1) TEU.

³⁴ Chaudary ‘The fight against trafficking: The European Union and the UK opt out from the new Trafficking Directive’ (2010) 97/Nov *Women’s Asylum News* 2.

Analysis of the Directive

The definition of human trafficking

The lack of a comprehensive, global definition of human trafficking remains problematic. One notable feature of the Directive is that '[i]n order to tackle recent developments in the phenomenon of trafficking in human beings'³⁵ it defines trafficking in more detail than the Framework Decision. To this end, additional forms of exploitation are specifically included in the definition. In particular, the Preamble of the Directive provides that 'forced begging should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour'.³⁶ The Preamble goes on to provide that the expression 'exploitation of criminal activities', used in article 2(3) of the Directive 'should be understood as the exploitation of a person to commit, *inter alia*, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain'.³⁷ Article 2(3) also explicitly refers to trafficking in human beings for the purpose of removal of organs, and the Preamble unequivocally provides that 'other behaviour such as illegal adoption or forced marriage [is covered] in so far as they fulfil the constitutive elements of trafficking in human beings'.³⁸

The phrase 'a position of vulnerability' appeared in both the Trafficking Protocol and the CoE Convention but was not defined. Clarification is offered in the Directive with the term being interpreted as 'a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved'.³⁹ The value of this definition remains to be seen as now it simply shifts the test one step further to an analysis of when a person has no real or acceptable alternative but to submit to abuse. However, such a test cannot be determined by objective criteria, as each case will be determined by factors relevant to the victim on an individual basis. Obviously this is a subjective test and there is a danger that assumptions may be made in respect of a victim which are not grounded in the victim's experiences.

The issue of penalties for those found guilty of trafficking offences is given greater coverage in the 2011 Directive. The Preamble to the Directive states

³⁵The Directive, Preamble par 11.

³⁶*Ibid.*

³⁷*Ibid.*

³⁸*Ibid.* The expanded definition has been welcomed by, *inter alia*, the Organisation for Security and Cooperation in Europe (the OSCE) Representative and Coordinator for Combating Trafficking in Human Beings: European Council on Refugees and Exiles, Interview with Maria Grazia Giammarinaro, OSCE Representative and Coordinator for Combating Trafficking in Human Beings, March 2011 available at <http://www.ungift.org/knowledgehub/en/stories/april2011/interview-with-maria-grazia-giammarinaro.html> accessed 16 July 2011.

³⁹The Directive art 2(2).

that '[t]he level of penalties in this Directive reflect the growing concern among Member States regarding the development of the phenomenon of trafficking in human beings'.⁴⁰ Article 4(1) of the Directive provides that a trafficking offence referred to in article 2 shall be punishable 'by a maximum penalty of at least five years of imprisonment'. This differs significantly from the 2002 Framework Decision which provided that such offences should be punishable 'by effective, proportionate and dissuasive criminal penalties ...'.⁴¹ Furthermore, building on the Framework Decision, the Directive includes a more detailed list of aggravating circumstances, the presence of which should lead to a maximum penalty of at least ten years imprisonment.⁴² It also provides that where a trafficking offence is committed by public officials in the performance of their duties, this is to be regarded as an aggravating circumstance.⁴³

An additional feature is article 8, which provides that victims of trafficking shall not be prosecuted nor have penalties imposed upon them for their 'involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2'. The Preamble to the Directive states that '[t]he aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators'.⁴⁴ The UK Anti-Trafficking Monitoring Group has highlighted a number of concerns in this regard, including that victims are still being criminalised and are not being afforded sufficient protection when acting as witnesses.⁴⁵

Extraterritorial jurisdiction

A state's jurisdiction refers to its authority to govern persons and property by its criminal and civil law. The preferred basis of criminal jurisdiction in international law is the territoriality principle whereby a state prosecutes criminal acts committed within its own borders.⁴⁶ However, the Permanent

⁴⁰*Id* Preamble par 12.

⁴¹Note, this remains the position in relation to incitement, aiding and abetting, and attempt to commit the offences in article 2 of the Directive see *id* art 4(4).

⁴²*Id* art 4(2).

⁴³*Id* art 4(3).

⁴⁴*Id* Preamble par 14. Note, this paragraph concludes with the caveat that '[t]his safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in'.

⁴⁵Anti-Slavery International for the Anti-Trafficking Monitoring Group 'Wrong kind of victim? One year on: An analysis of UK measures to protect victims of trafficking' (Anti-Slavery International 2010) 10-11 and 90-91.

⁴⁶Mann 'The doctrine of jurisdiction in international law' (1964) 111 *Hague Recueil* 1 at 9-13; 'Jurisdiction with respect to crime' (1935) 29 *AJIL Supp* 435.

Court of International Justice stated in the *Lotus case* that '[t]he territoriality of criminal law ... is not an absolute principle of international law and by no means coincides with territorial sovereignty'.⁴⁷

Under international law, criminal jurisdiction may be founded on a number of other principles, namely the nationality principle, the protective principle, the passive personality principle and the universality principle. The basic territoriality principle has been modified and can now characterised as having both a subjective and an objective aspect. The former provides that a state can exercise jurisdiction over an individual in the territory where a crime is commenced; the latter provides that the state in which the crime is completed and has effect (ie the forum of injury) may exercise jurisdiction.⁴⁸ The latter principle is more controversial than the former.⁴⁹

Article 10 of the Directive deals with the issue of jurisdiction and changes the previous position. EU member states are to take measures to establish jurisdiction in relation to human trafficking offences where either 'the offence is committed in whole or in part within their territory' or 'the offender is one of their nationals'.⁵⁰ This differs from the Framework Decision which included a third ground, where 'the offence is committed for the benefit of a legal person established in the territory of that Member State'.⁵¹ This ground has now been made discretionary by article 10(2)(b) of the Directive as a result of the European Parliament's scrutiny of the Directive. In addition, member states are granted discretion to extend their jurisdiction further to include cases where trafficking offences are committed outside their territories and either 'the offence is committed against one of its nationals or a person who is habitually resident in its territory' or 'the offender is habitually resident in its territory'.⁵²

⁴⁷*SS Lotus (France v Turkey)* PCIJ Rep ser A No 10 (1927) at 30.

⁴⁸The objective territoriality principle is sometimes also referred to as 'effects' or 'impact' jurisdiction.

⁴⁹The response of states to the problem of the 'child sex industry' highlights a reluctance to extend jurisdiction extraterritorially. See, eg, Perrin 'Taking a vacation from the law: Extraterritorial criminal jurisdiction and section 7(4.1) of the Criminal Code' (2009) 13 *Canadian Criminal LR* 175 which discusses the legal uncertainty and practical difficulties of enforcing Canada's extraterritorial child sex offence laws. However, see the US Court of Appeal (Eleventh Circuit) judgment of 15 March 2010 in the case of *United States v Frank* where the court upheld the extraterritorial jurisdiction provided in statute 18 USC § 2251A (Sexual exploitation of children). The court held that Congress plainly intended that the statute apply extraterritorially. However, it is acknowledged that the offending individual in this instance held US citizenship.

⁵⁰The Directive art 10(1)(a) and (b).

⁵¹*Id* art 6(1)(c).

⁵²*Id* art 10(2)(a) and (c).

Accordingly, the Directive relies primarily on the territoriality and nationality principles and, as such, is not particularly controversial. However, there are clear practical difficulties with providing extraterritorial jurisdiction over trafficking offences. For example, if the offender is a non-EU national, resident overseas, who facilitates the arrival into an EU member state of an individual for the purpose of exploitation, there may be significant barriers to prosecution, namely securing the presence of the alleged offender in the EU. In most instances this would probably require an extradition request and thus would be reliant on the existence of an extradition treaty between the relevant States.

Assistance and support for victims

The majority of the new provisions in the Directive address the issues of assistance and support for victims of human trafficking. There are now six relatively detailed articles (arts 11-16) dealing with issues of assistance, support and protection for victims of human trafficking. As discussed above, the lack of such provisions in the previous Framework Decision may be explained by reference to its earlier legal basis. The Directive highlights the need for the victim's perspective to be at the heart of any measures designed to tackle human trafficking. Article 11 of the Directive builds upon article 28 of the CoE Convention which provides for the protection of victims during and after any investigation and prosecution of human trafficking offences. However, the Directive's provisions only extend to the victims, whereas article 28 of the CoE Convention requires protection to be given to those who report trafficking offences, witnesses who give testimony and, where appropriate, family members of victims and witnesses. This of course underscores the fear often held by those in a position to divulge information against traffickers that they may be at risk of recrimination, stigmatisation and may not be afforded adequate state protection.⁵³

Article 11(1) of the Directive provides:

Member States shall take the necessary measures to ensure that assistance and support are provided to victims *before, during and for an appropriate period of time after the conclusion of criminal proceedings* in order for them to exercise the rights set out in Framework Decision 2001/220/JHA, and this Directive.

The reference to the Framework Decision makes clear that the rights in the Directive are intended to build upon the rights set out in the earlier legislative measure. Such assistance and support should begin as soon as there is a

⁵³ See, eg, *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 pars 80-111.

‘reasonable-grounds indication’ that the person is a victim of human trafficking.⁵⁴ The Directive gives some indication of what is meant by ‘assistance and support’ when it says that this shall allow for a standard of living whereby the victim can subsist, and includes for example, the provision of appropriate and safe accommodation as well as medical treatment.⁵⁵ This provision is similar to article 12(1) of the CoE Convention which sets out the areas in which states should adopt legislative and other measures to assist victims in their physical, psychological and social recovery. Specific attention is given to victims with special needs, as a consequence of their being ‘pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered’.⁵⁶

Article 12 of the Directive provides rights additional to those set out in the earlier Framework Decision.⁵⁷ This article guarantees legal counselling and representation for victims of human trafficking which is to be free of charge where the victim does not have sufficient financial resources to pay for such representation.⁵⁸ Article 12 further requires every victim of human trafficking to undergo an individual risk assessment to determine what protection is required, such as access to witness protection programmes.⁵⁹ Finally, the article requires member states to prevent ‘secondary victimisation [otherwise known as post crime victimisation]’.⁶⁰ This is victimisation which follows as a consequence of the initial offence committed against the victim and can include such acts as bullying, name calling or isolation from the victim’s community.

Articles 13-16 of the 2011 Directive specifically relate to child victims of human trafficking. This is a significant development from the Framework Decision which dealt with children in only one article.⁶¹ It also resonates with the emphasis in the CoE Convention that states should adopt a child sensitive approach when dealing with child trafficking victims and seek to reduce children’s vulnerability to trafficking notably by creating a protective environment for them.⁶² The Preamble of the Directive notes that ‘[i]n the application of this Directive, the child’s best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the 1989 United Nations

⁵⁴*Id* art 11(2).

⁵⁵*Id* art 11(5).

⁵⁶*Id* art 11(7).

⁵⁷*Id* art 12(1).

⁵⁸*Id* art 12(2).

⁵⁹*Id* art 12(3).

⁶⁰*Id* art 12(4).

⁶¹The Framework Decision art 7.

⁶²The CoE Convention art 5(3) and (5).

Convention on the Rights of the Child'.⁶³ The Directive provides that where the age of a victim of human trafficking is uncertain and there are reasons to believe the person is a child, 'that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with [the articles of the Directive which relate specifically to assistance, support and protection for child victims]'.⁶⁴

Article 14 deals with assistance and support for child victims in general, and article 15 specifically deals with the protection of child victims in the course of criminal investigations and proceedings. Article 14 provides for an individual assessment to be made of the special circumstances of each particular child and following this for specific actions to assist and support child victims in the short and long term, in their physical and psycho-social recovery.⁶⁵ Member states are also required to provide child victims the children of victims of human trafficking access to education within a reasonable time, in accordance with national law.⁶⁶ The article also states that 'Member States shall take measures, where appropriate and possible, to provide assistance and support to the family of a child victim ...'.⁶⁷

The right to legal representation as provided for in article 12 is reiterated specifically in the case of child victims of human trafficking.⁶⁸ Article 15 calls for the appointment of a 'special representative for a child victim of trafficking in human beings where ... the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim'.⁶⁹ The article then sets out detailed provisions designed to protect child victims during criminal investigations and proceedings, including the conduct of interviews and court proceedings.⁷⁰ Article 16 highlights the additional assistance, support and protection that should be afforded to unaccompanied child victims of trafficking.⁷¹

Compensation schemes

The Directive introduces a provision relating to compensation for victims, however it is not as innovative as might first appear. Member states are only obliged to 'ensure that victims of trafficking in human beings have access to

⁶³The Directive Preamble par 8, see also Preamble pars 23 and 24.

⁶⁴*Id* article 13(2).

⁶⁵*Id* art 14(1).

⁶⁶*Id* art 14(1).

⁶⁷*Id* art 14(3).

⁶⁸*Id* art 15(2).

⁶⁹*Id* art 15(1).

⁷⁰*Id* art 15(3), (4) and (5).

⁷¹*Id* art 16.

existing schemes of compensation to victims of violent crimes of intent'.⁷² This is less far reaching than article 15 of the CoE Convention which requires state parties to provide victims with the right to compensation from perpetrators as well as, for example, through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims.

Prevention

The Directive provisions relating to prevention represent an advance upon the earlier Framework Decision. Article 18(1) contains the general obligation whereby member states 'shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings'. Article 18(2) then goes on to oblige member states to:

... take appropriate action, including through the Internet, such as information and awareness raising campaigns, research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of trafficking in human beings.

This is noteworthy for its emphasis on cooperation with civil society and the taking of action via the internet. However, in reality it arguably goes no further than articles 5 and 6 of the CoE Convention, which similarly call in general terms for states to adopt measures that will prevent and discourage human trafficking.

Pursuant to article 18(3) of the Directive, member states shall '*promote* regular training for officials likely to come into contact with victims or potential victims of trafficking in human beings ... aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings'.⁷³ This language does not, however, require member states to provide training and therefore is less far reaching than article 5(2) of the CoE Convention which requires states to establish and or strengthen training programmes, in particular for professionals concerned with trafficking in human beings

Finally, article 18(4) provides that '[i]n order to make the preventing and combating of trafficking in human beings more effective by discouraging demand, member states shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation ... with the knowledge that the person is a victim of a [trafficking] offence...'. Cullen argues that inclusion of this discrete offence is anomalous and out of

⁷²*Id* art 17.

⁷³Emphasis added.

lace, as it arguably fits more comfortably alongside the other criminal offences found at articles 2 and 3 of the Directive.⁷⁴

National Rapporteurs and the EU's Anti-Trafficking Coordinator

Article 19 of the Directive is novel in calling for the establishment of national rapporteurs or equivalent mechanisms. Such bodies are to be tasked with assessing trends in human trafficking, measuring results of anti-trafficking actions – including the gathering of statistics in close cooperation with relevant civil society organisations – and reporting thereon. This goes further than the CoE Convention which only requires state parties to ‘consider appointing National Rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements’.⁷⁵ In addition, article 20 of the Directive provides for the appointment of an Anti-Trafficking Coordinator (the ATC) at the EU level.⁷⁶ The *raison d’être* of this position is to ‘contribute to a coordinated and consolidated Union strategy against trafficking in human beings ... In particular Member States shall transmit to the ATC the information referred to in Article 19 [relating to the work of national rapporteurs], on the basis of which the ATC shall contribute to reporting carried out by the Commission every two years on the progress made in the fight against trafficking in human beings.’⁷⁷ Cullen has suggested that ‘[t]his network of rapporteurs could be important in linking the EU’s system with that of the CoE Convention, which establishes an expert committee to monitor implementation, as well as with the United Nations, which has a Special Rapporteur on trafficking in persons, especially women and children’.⁷⁸ At the time of writing, relatively few EU member states have dedicated National Rapporteurs:⁷⁹ however, in many member states there are mechanisms in place for the identification of suspected victims of trafficking, which may be described as equivalent.

The UK position – does the UK comply?

In 2010, the UK Home Office (the Home Office) conducted an analysis of the UK’s compliance with the then draft Directive.⁸⁰ Although not based on the

⁷⁴Cullen n 15 above at 241.

⁷⁵CoE Convention art 29(4) (emphasis added).

⁷⁶The official website of the ATC can be found at <http://ec.europa.eu/anti-trafficking/> accessed 1 April 2012. On 14 December 2010, the European Commission appointed Myria Vassiliadou to this position

⁷⁷The Directive art 20.

⁷⁸Cullen n 15 above at 242.

⁷⁹Only the Czech Republic, the Netherlands and Portugal have an institution known as a National Rapporteur.

⁸⁰Home Office ‘Explanatory Memorandum on European Community Document, COM (2010) 95’ 25 May 2010 available at <http://www.statewatch.org/news/2010/sep/eu-uk-trafficking->

final text, this provides guidance as to the UK government's understanding of the compliance of UK laws with the final version of the Directive. The Home Office expressed the opinion that UK legislation was essentially compatible with the provisions of the Directive.⁸¹ This conclusion was based on the fact that many of the provisions of the draft Directive mirror the earlier Framework Decision or include provisions found in the CoE Convention, a convention to which the UK is a state party.⁸² It was noted, however, that in relation to certain provisions, 'some legislation would be required to give effect to the Directive'.⁸³

Definition and penalties

As already seen, the definition of human trafficking in the Directive builds upon that contained in the Trafficking Protocol. In the UK, there is no overarching anti-trafficking legislation, instead there has been a piecemeal approach, with amendments being made as and when necessary. This approach is further complicated by the system of devolved government in the UK as some issues which arise in the context of human trafficking fall within the competence of the devolved governments of Scotland and Northern Ireland, while others are reserved to the UK government.⁸⁴

There are two types of human trafficking crime in the UK. The first deals with trafficking for sexual exploitation and the second covers trafficking for purposes other than sexual exploitation. Trafficking for sexual exploitation is criminalised in England, Wales and Northern Ireland in accordance with sections 57-59 of the Sexual Offences Act 2003 and in Scotland in accordance with section 22 of the Criminal Justice (Scotland) Act 2003. The Sexual Offences Act 2003 provides that a person commits an offence if he or she intentionally arranges or facilitates the arrival in, or the entry into, travel within or the departure from the United Kingdom of another person (B) and either: (a) he or she intends to do anything to or in respect of B which if done will involve the commission of one of the offences set out in the Act; or (b) he or she believes that another person is likely to do something to or in respect of B which if done will involve the commission of a such an offence.⁸⁵

Trafficking for purposes other than sexual exploitation is criminalised across the UK by sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Amendments to these sections have been made by

em.pdf accessed 16 July 2011.

⁸¹*Id* at par 27.

⁸²*Id* at pars 14 and 15.

⁸³*Id* at par 16.

⁸⁴For example, issues such as housing are devolved while immigration is reserved.

⁸⁵See ss 57, 58 and 59 of the Sexual Offences Act 2003.

the UK Borders Act 2007 and the Borders, Citizenship and Immigration Act 2009. These amendments apply to England, Wales and Northern Ireland. The Criminal Justice and Licensing (Scotland) Act 2010 has extended some of these amendments to Scotland. Section 31 of the UK Borders Act 2007 extends the offences in the Asylum and Immigration (Treatment of Claimants) Act 2004. Furthermore, section 54 of the Borders, Citizenship and Immigration Act 2009 expands the definition of ‘exploitation’ in the offence of trafficking in section 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004. The amendments made by the UK Borders Act 2007 have been extended to Scotland by virtue of the Criminal Justice and Licensing (Scotland) Act 2010. For England, Wales and Northern Ireland section 4 of the 2004 Act provides that someone is guilty of the offence of trafficking if he or she arranges or facilitates the entry into, or travel within, the United Kingdom of an individual with the intention to exploit, or in the belief that another person will exploit, that individual in the UK or elsewhere. Furthermore, the offence of trafficking is committed by arranging or facilitating the departure from the UK of an individual with the intention to, or the belief that someone else will, exploit the individual.

Section 4 continues by defining ‘exploitation’ with reference to Article 4 of the European Convention of Human Rights (slavery and forced labour), as well as the means employed, ie force, threats or deception. This section of the Act concludes by detailing the penalties available following conviction for the offence of human trafficking, namely imprisonment for a term not exceeding fourteen years, a fine, or both following conviction on indictment, or on summary conviction, to imprisonment for a term not exceeding twelve months, a fine not exceeding the statutory maximum or both.

The UK definition of human trafficking is based upon that found in the Trafficking Protocol; this is also the basis of the definition in the Directive. The UK includes forced labour, as defined in article 4 of the European Convention on Human Rights, and organ removal within the definition of human trafficking. Although begging is not specifically mentioned in the UK legislation, it almost certainly falls within the UK definition.⁸⁶ That

⁸⁶Home Office ‘Explanatory Memorandum’ n 81 above par 31. See s 4(5) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004; ss 57(2), 58(2) and 59(2) of the Sexual Offences Act 2003; and s 22(3) of the Criminal Justice (Scotland) Act 2003. The Crown Prosecution Service in its ‘Legal Guidance on Human Trafficking and Smuggling’ refers to a number of cases which ‘provide guidelines on sentencing and reflect the degree of coercion, force and violence used in the exploitation of their victims’, these include: *R v Plakici* 2005 1 Cr App R (S) 19; Attorney General’s Reference (No 6 of 2004); *R v Maka* 2006 2 Cr App R (S) 14; *R v Roci and Ismailaj* 2006 2 Cr App R (S) 15; *R v Makai (Atilla)* 2008 1 Cr App R (S) 73; and *R v Khan, Khan and Khan* 2010 EWCA Crim 2880 available at www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling accessed 16 July 2011.

notwithstanding, CARE International submits that the inclusion of ‘forced begging’ and a definition of vulnerability ‘would make cases involving cannabis cultivation and forced begging [especially by Roma children] more readily identifiable as trafficking cases by authorities’.⁸⁷ Accordingly, the UK definition is compliant with the definition prescribed by the Directive and the current maximum fourteen year sentence for trafficking ensures that the UK is compliant with the penalty provisions of the Directive.

Despite this extensive patchwork of legislation, encompassing a number of legislative acts, there are a number of difficulties in securing a successful prosecution, namely evidential issues and the unwillingness of victims to act as witnesses.⁸⁸

It is clear that UK human trafficking laws are broadly compliant with the definition of trafficking in the Directive, however, it may be preferable if the law were to be consolidated into a single Act (or more likely, two Acts- one for Scotland and one for the rest of the UK) in order to make it clearer and more comprehensive. In March 2012, the Equality and Human Rights Commission called for a separate human trafficking law in Scotland, a move backed by Jim Laird, Scottish trafficking services team leader with the support group Migrant Help. Mr Laird, appearing before the Scottish Parliament’s Equal Opportunities Committee stated ‘[w]e need a separate piece of Scottish legislation that brings it all together and makes it easier for everyone – including the Crown Office [the Public Prosecutor in Scotland] – to understand, so that we can get more prosecutions’.⁸⁹ If Scotland favoured this approach, it would be following that of the Republic of Ireland. In 2008 Ireland passed the Criminal Law (Human Trafficking) Act. This Act lays out a list of trafficking offences, namely trafficking in children for the purpose of labour exploitation or the removal of their organs; trafficking in children for the purpose of sexual exploitation; and trafficking in adults for the purposes

⁸⁷CARE International ‘EU Directive on Human Trafficking: Why the UK Government should opt-in’ (Care International UK, London, 2010), available at <http://www.care.org.uk/wp-content/uploads/2011/02/EU-Directive-on-Human-Trafficking-Why-the-UK-should-opt-in-7-Feb-2011.pdf> accessed 16 July 2011.

⁸⁸One jurisdiction which has been particularly criticised is Scotland, where to date there has been only one conviction (September 2011) for the crime of human trafficking, despite a number of investigations and cases being initiated. In relation to the difficulty of trafficking victims being willing to give evidence in prosecutions, see, eg, Equality and Human Rights Commission Scotland ‘Inquiry into Human Trafficking in Scotland: Report of the Equality and Human Rights Commission’ November 2011 69-71, available at http://www.equalityhumanrights.com/uploaded_files/Scotland/Human_Trafficking_in_Scotland/inquiry_into_human_trafficking_in_scotland-full-report_pdf.pdf accessed 1 April 2012.

⁸⁹MacNab ‘Scotland needs own human trafficking laws, MSPs told’ *The Scotsman* 21 March 2012 available at <http://www.scotsman.com/the-scotsman/scotland/scotland-needs-own-human-trafficking-laws-msps-told-1-2185193> accessed 1 April 2012.

of sexual or labour exploitation or the removal of their organs. Furthermore, it explicitly states that these offences can be committed by corporate bodies and that a natural person (eg the company Director) whose actions are the basis for the corporate liability may concurrently be individually liable for a trafficking offence.

Liability of legal persons

In terms of liability of legal persons, the Home Office's view is that the UK is compliant with these provisions of the Directive.⁹⁰ The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and the Sexual Offences Act 2003 state that the offences therein must be committed by 'a person'. However, with regard to England, Wales and Northern Ireland, the Acts in their current manifestation do not define 'a person'; it is thus not entirely clear that both legal and natural persons, can be held liable for committing the offences. In contrast, in Scotland, sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and section 22 of the Criminal Justice (Scotland) Act 2003, explicitly provide that some of the crimes in sections 4 and 22 respectively can be committed by 'a body incorporated under the law of a part of the United Kingdom'.⁹¹ These are the only explicit references in UK legislation to the potential liability of legal persons for human trafficking. The wording of the Scottish legislation clearly indicates that legal persons as well as natural persons can be held liable for certain human trafficking offences. The English, Welsh and Northern Ireland counterpart legislation previously contained the wording currently in the Scottish version, but this was subsequently deleted from that legislation. The UK government maintains, however, that the existing UK legislation is fully compliant with article 5 of the Directive.⁹²

To date, there have been no prosecutions in the UK of legal persons for the offences defined in section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. However, this in itself does not necessarily mean that current legislation precludes the possibility of bringing a prosecution against a legal person. The present law is silent in relation to England, Wales and Northern Ireland and in relation to Scotland it only provides for legal liability of companies incorporated in the UK. It would therefore be beneficial if the liability of legal persons were more clearly defined.

⁹⁰Home Office 'Explanatory Memorandum' n 81 above at par 32.

⁹¹Emphasis added. The offences concerned are those contained in s 4(3A) of the 2004 Act and ss 22(1A) and (6) of the Criminal Justice (Scotland) Act 2003, see also discussion of extraterritorial jurisdiction relating to Scotland below.

⁹²Home Office 'Explanatory Memorandum' n 81 above at par 32.

Extraterritorial jurisdiction

Section 4(1) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 refers to facilitating the ‘arrival in or entry into the United Kingdom of an individual... travel within the United Kingdom by an individual ... [or] the departure from the United Kingdom of an individual ...’. Sections 57-59 of the Sexual Offences Act 2003 refer to the arrival in, or the entry into, travel within or the departure from the UK, and the equivalent Scottish legislation uses similar terms. Therefore, the UK legislation clearly extends the geographical ambit of the UK law on trafficking beyond UK borders. Section 5(1) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 provides that the offences of facilitating the arrival in, travel within, or departure from the UK ‘apply to anything done whether inside or outside the United Kingdom’. Therefore, it is submitted that the UK is compliant with article 10(1)(a) of the Directive.

In Scotland, the Criminal Justice and Licensing (Scotland) Act 2010 introduced a new section 4(3A) into the Asylum and Immigration (Treatment of Claimants) Act 2004 which now provides that *inter alia*, British citizens, habitual residents of Scotland, and UK incorporated companies, commit an offence in relation to an individual where they arrange or facilitate the arrival in, travel within or departure from a country other than the UK and they either intend to exploit the passenger, or they believe that another person is likely to exploit the passenger. The Criminal Justice and Licensing (Scotland) Act 2010 similarly introduced a new section 22(1A) into the Criminal Justice (Scotland) Act 2003 which mirrors the provisions in the 2004 Act in relation to trafficking for sexual exploitation. The Scottish legislation is therefore compliant with regards article 10(1)(b) which requires jurisdiction to be exercised where the offender is one of its nationals. The legislation is also partly compliant with article 10(2), which gives member states the discretion to establish further jurisdiction over trafficking offences committed wholly outside the UK, to the extent that the Scottish legislation covers situations where the offender is an habitual resident of Scotland.

However, the legislation in force in England, Wales and Northern Ireland does not include these Scottish provisions. Therefore, the UK is not compliant as regards article 10(1)(b). This would require the English, Welsh and Northern Ireland legislation to extend jurisdiction over UK nationals for trafficking acts which take place wholly outside of the UK. The UK Minister for Immigration acknowledged in the House of Commons on 9 May 2011 that UK laws would need to be amended to provide for this

We have said from the outset that opting in to the directive will require us to make some legislative changes to ensure full compliance, and we are ready to do that. This will include widening extra-territorial jurisdiction. The directive

requires us to establish extra-territorial jurisdiction when the offender is a UK national. It also gives us discretion about whether to establish jurisdiction over cases in which the offender is an habitual resident.⁹³

In terms of article 10(2) of the Directive, the UK may still choose to exercise its discretion to widen its jurisdictional competence to include jurisdiction over trafficking offences committed wholly outside the UK, where the offender is an habitual resident, the victim is a national or an habitual resident, or the offence is committed for the benefit of a legal person established in the UK. As it stands, Scotland already complies with this provision in part, having established jurisdiction to the extent that the offender is an habitual resident of Scotland.

It is submitted that there are practical difficulties with the extraterritorial effect of human trafficking offences. As stated above, this is primarily due to the possible difficulty in securing the physical presence of alleged traffickers in the UK in order to proceed with a prosecution.⁹⁴

Assistance and support for victims

In relation to the draft Directive, Chaudary stated that '[m]ost of the provisions ... which deal with victim protection correspond to a grey area in UK law: UK guidance recommends that the authorities should comply with those provisions, but the authorities have discretion as to whether to do so'.⁹⁵ Indeed, despite being obliged by virtue of the CoE Convention to protect and promote the rights of victims of human trafficking, there are no UK anti-trafficking laws which explicitly provide for this. In relation to assistance and support provisions in the Directive, the UK government has responded that the UK is broadly compliant in practice, through guidelines and policies, however, legislation may be required to fully transpose the Directive into domestic law.⁹⁶

Article 11(2) of the Directive speaks of assistance and support being provided 'as soon as the competent authorities have a reasonable-grounds indication for believing that the person [may be a victim of human trafficking]' and article 11(4) states that member states shall establish mechanisms for the 'early identification of, assistance to and support for victims'. The UK has in place a National Referral Mechanism (NRM), which is a single framework designed to identify victims of human trafficking.⁹⁷ There are calls for the NRM to be

⁹³(2011) HC Debates 9 May 2011 col 977.

⁹⁴See above section on extraterritorial jurisdiction.

⁹⁵Chaudary n 34 above at 3..

⁹⁶Home Office 'Explanatory Memorandum' n 81 above at pars 37-41.

⁹⁷See further, Scottish Commissioner for Children and Young People and the Centre for Rural Childhood, Perth College UHI 'Scotland: A safe place for child traffickers?' (Scottish

reviewed due to perceived flaws in its operation, however it is sufficient here to note that such a mechanism exists and that individuals who are supported through it are, if there are reasonable grounds to believe that person has been trafficked, granted forty-five days temporary leave to remain in the UK.

Similarly, there are no legal provisions in UK legislation providing for the protection of victims of human trafficking as required by article 12 of the Directive. The UK government recognises this, stating that ‘legal counselling and some criminal procedure measures are in current guidance but not in legislation’.⁹⁸ As far as guidance to Public Prosecutors in England and Wales is concerned, the ‘Crown Prosecution Service Policy for Prosecuting Cases of Human Trafficking’ (CPS Policy) recognises ‘a duty to provide victims and witnesses with appropriate protection and support to ensure their safety and to improve their ability to give their best evidence ... The welfare of the victim should always be paramount; it is for this reason that that specialist support will be needed from support providers.’⁹⁹ This CPS Policy also recognises the barriers which may deter victims of human trafficking from coming forward and giving evidence.¹⁰⁰ It states that ‘Prosecutors should also recognise the diversity of victims. As experiences of trafficking are undoubtedly different and are affected by the victim’s ethnicity, age, immigration status, religion and culture, the safety and needs of each victim must be assessed on an individual basis.’¹⁰¹ The CPS Policy also refers to the ‘CPS Code of Practice for Victims of Crime’ (CPS Code of Practice),¹⁰² which grants all victims of crime the right to receive certain levels of service from police forces, the CPS, and other criminal justice agencies.¹⁰³

Articles 13 to 16 of the Directive turn the focus of attention to care, assistance and support for child victims of human trafficking. It has been stated that ‘[a] strong and mature framework exists in the UK to safeguard children...’.¹⁰⁴ As with human trafficking legislation, the UK’s child law is contained in a patchwork of legislative measures, namely the Children Acts 1989 and 2004, the Children (Scotland) Act 1995, and the Children (Northern Ireland) Order 1995.¹⁰⁵ The legislative provisions extend to all children in the UK and thus

Commissioner for Children and Young People, Edinburgh, 2011).

⁹⁸Home Office ‘Explanatory Memorandum’ n 81 above at par 38.

⁹⁹The CPS Policy 15.

¹⁰⁰*Id* at 16.

¹⁰¹*Ibid.*

¹⁰²The CPS Code of Practice is mandatory guidance which has been produced pursuant to s 32 of the Domestic Violence, Crime and Victims Act 2004.

¹⁰³*Id* at 18.

¹⁰⁴Anti-Slavery International n 45 above at 11.

¹⁰⁵It should be noted that the UK is a state party to the 1989 UN Convention on the Rights of the Child 1577 UNTS 3, and has accordingly assumed a number of international obligations.

would be applicable to child victims of human trafficking. In addition, child law issues are contained in other legislative instruments such as the Borders, Citizenship and Immigration Act 2009, section 55 of which places a duty on the government to ensure that its functions in the areas of, *inter alia*, immigration and asylum are discharged having regard to the need to safeguard and promote the welfare of children in the UK. The UK therefore has in place measures which have as their purpose the realisation of children's rights. However, none of these provisions specifically addresses the situation of child victims of human trafficking.

As far as the protection of child victims in criminal investigations and proceedings is concerned, the CPS Policy has a specific section which provides guidance on how to handle cases where victims of trafficking are children.¹⁰⁶ Notably, the UK is not compliant with the obligations in articles 14(2) and 15(1) of the Directive which require the appointment of a guardian or representative for a child victim of human trafficking in certain circumstances. A similar obligation exists under the CoE Convention.¹⁰⁷ One promising practice on the Scottish scene, is the Guardianship Project currently being piloted by the Scottish Refugee Council and the Aberlour Child Trust, a leading children's charity which provides a range of services, support and advice for vulnerable children, young people and families in Scotland. At the time of writing, irrespective of any evaluation of that project, the UK government does not appear to be in favour of extending similar programs to other parts of the UK.

Compensation

Article 17 of the Directive requires member states to ensure that victims of human trafficking 'have access to existing schemes of compensation [which are available] to victims of violent crimes of intent'. The UK complies with this article through the operation of the state funded Criminal Injuries Compensation Scheme. This scheme is administered in England, Scotland and Wales by the Criminal Injuries Compensation Authority (CICA), which is a branch of the UK Ministry of Justice and provides services in Scotland on behalf of the Scottish government.¹⁰⁸ Northern Ireland has its own Criminal Injuries Compensation Scheme, which following devolution of policing and

¹⁰⁶The CPS Policy 21-24.

¹⁰⁷CoE Convention art 10(4)(a).

¹⁰⁸The UK Ministry of Justice website, CICA, available at <http://www.justice.gov.uk/about/criminal-injuries-compensation-authority/index.htm> accessed 16 July 2011. The official website of the CICA, which administers the scheme, is found at www.cica.gov.uk. The current scheme was introduced in 2008 and streamlines administrative procedures, clarifies scheme rules in areas of doubt and updates the tariff of injuries to reflect current views on the relative seriousness of certain injuries.

justice matters to Northern Ireland in 2010, became an Agency within the Northern Ireland Department of Justice.¹⁰⁹

The CICA provides a free service to victims of violent crime by giving them financial support to assist them in moving forward with their lives after being subjected to violent crime.¹¹⁰ CICA provides two types of compensation: personal injury awards to victims of crime; and fatal injury awards to immediate family members of victims who have died as a result of a violent crime.¹¹¹ A claim demands ‘a victim must have sustained physical or mental injuries as a result of a violent crime. A victim claiming mental injury without physical injury must demonstrate they were put in considerable fear of immediate physical harm.’¹¹²

The first human trafficking victims to be awarded compensation awards were two Romanian women who had been trafficked to the UK for sexual exploitation.¹¹³ Subsequently there have been a handful of other successful claims.¹¹⁴ Anti-Slavery International and the Eaves Poppy Project have stated that these awards ‘herald increasing recognition and sensitivity to the injuries sustained by trafficked persons. The Authority’s acceptance of the applicants’ false imprisonment and forced prostitution as a basis of compensable injury solidifies the ability of trafficked persons to claim under the scheme.’¹¹⁵ However, they do highlight two cases which appear to demonstrate that an offender’s conviction for human trafficking offences is not sufficient to guarantee the success of an application.¹¹⁶ Questions of effectiveness notwithstanding, the above demonstrates that the UK does comply with the obligation in article 17 of the Directive.

Prevention

The obligation to prevent human trafficking contained in article 18 of the Directive focuses upon the importance of education, training, information and awareness-raising campaigns, research and education programmes. The UK

¹⁰⁹See the Department of Justice of Northern Ireland website Compensation Agency available at <http://www.dojni.gov.uk/compensation-agency/> accessed 16 July 2011.

¹¹⁰The UK Ministry of Justice website, About the CICA, available at <http://www.justice.gov.uk/about/criminal-injuries-compensation-authority/index.htm> accessed 16 July 2011.

¹¹¹See Anti-Slavery International and Eaves Poppy Project *Rights and recourse: A guide to legal remedies for trafficked persons in the UK*, (April 2010) 95 *et seq.*

¹¹²See the CPS Policy. For a further discussion on eligibility and levels of compensation see Anti-Slavery International and Eaves Poppy Project n 114 above at 96-101.

¹¹³*Ibid* at 100.

¹¹⁴*Ibid.*

¹¹⁵*Ibid.*

¹¹⁶*Ibid.*

Action Plan on Tackling Human Trafficking 2007,¹¹⁷ handed responsibility for conducting research, developing improved training packages, promoting good practice and improving knowledge and understanding of the way criminal enterprises associated with human trafficking operate to the UK Human Trafficking Centre (UKHTC).¹¹⁸ The UKHTC is a multi-agency unit of the UK Serious Organised Crime Agency, which is itself an agency of the Home Office. The UKHTC provides a focal point for the development of expertise and cooperation in the fight against human trafficking. It works with stakeholders from ‘the governmental, non-governmental and inter-governmental sectors in the UK and abroad, including all UK police forces, the UK Border Agency, and charitable organisations’.¹¹⁹ The UKHTC ‘has prioritised key areas of work to raise awareness of these issues and make the UK a lead nation in good practice and policy implementation’.¹²⁰

One of the key focus areas of the UKHTC is the prevention of human trafficking. The three key areas of preventive work identified within the UK Action Plan on Human Trafficking are: ‘increasing our knowledge and understanding of the problem, working to identify and address the issues that impact on the supply and demand sides of human trafficking, and finally maximising the collective preventative effort’.¹²¹ The UKHTC contributes to work in the three areas through its multi-agency work groups; it uses targeted campaigns to raise awareness of trafficking among victims, the public, law enforcement and other professions; it also acts as the focal point for the collation of data, information and intelligence on all forms of trafficking.¹²² The aim is then to incorporate this knowledge and understanding in the UK’s response to human trafficking. Of course, preventing human trafficking demands that the root causes of human trafficking be addressed. International cooperation is necessary to dismantle the structural inequalities existing in countries of origin which often render certain individuals and groups of individuals more vulnerable to human trafficking.¹²³

¹¹⁷UK Home Office and Scottish Government ‘UK Action Plan on Tackling Human Trafficking’ (UK Home Office London, Scottish Government Edinburgh 2007).

¹¹⁸Serious Organised Crime Agency website, About the UKHTC, available at <http://www.soca.gov.uk/about-soca/about-the-ukhtc> accessed 16 July 2011.

¹¹⁹*Ibid.*

¹²⁰*Ibid.*

¹²¹*Ibid.*

¹²²*Ibid.*

¹²³See, eg, the Group of Experts on Action against Trafficking in Human Beings (GRETA) reports on Georgia and Moldova from February 2012, available at http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2011_24_FGR_GEO_en.pdf and http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2011_25_FGR_MD_A_en.pdf, respectively, accessed 1 April 2012. In the case of Georgia, eg, GRETA notes the ‘vulnerability to trafficking of many Georgian citizens is increased by the country’s socioeconomic situation, with disadvantaged rural areas, a high unemployment rate and an

Moreover, in terms of the offence set out in article 18(4) of the Directive, the UK is compliant. In England, Wales and Northern Ireland, sections 14 and 15 of the Policing and Crime Act 2009 introduced the offence of using the sexual services of a prostitute subjected to force.¹²⁴ Similarly, in Scotland, section 1 of the Prostitution (Public Places) (Scotland) Act 2007 created the offence of soliciting in a relevant place for the purpose of obtaining the services of someone engaged in prostitution.

National Rapporteur

The Directive now obliges the UK to establish an independent National Rapporteur or equivalent mechanism, whereas the CoE Convention obliges the UK to ‘consider’ appointing a National Rapporteur. The anticipated role of this institution is to carry out assessments of trends in trafficking in human beings, measure the results of anti-trafficking actions, and report thereon.¹²⁵ The UK government maintains that the Inter-Departmental Ministerial Group on Trafficking fulfils this role, supported by the UNHTC, UKBA and a Non-Governmental Organisation Stakeholder Group.¹²⁶ The Inter-Departmental Ministerial Group ‘provides a strategic oversight and monitoring function’.¹²⁷ However, as CARE International points out, this group is ‘by definition, part of the Government and so cannot constitute the conventional meaning of a rapporteur which is supposed to be independent’.

Conclusion

The Directive is to be welcomed for a number of reasons. It has a wide geographical scope covering all EU member states – excluding Denmark. It further extends and clarifies the definition of human trafficking and incorporates more comprehensively a human rights approach at the EU level. Of course the UK’s decision to opt in must be regarded as a positive step. As can be seen, the UK is to a large extent already compliant with the provisions of the Directive; however, there is no room for complacency in ensuring that

estimated number of 250 000 internally-displaced persons (IDPs) from the regions of Abkhazia and Tskhinvali (South Ossetia)’, at 9.

¹²⁴See now, in relation to England and Wales, s 53A of the Sexual Offences Act 2003 and in relation to Northern Ireland, 64A of the Sexual Offences (Northern Ireland) Order 2008.

¹²⁵The Directive art 19.

¹²⁶Lord De Mauley is quoted by CARE International as saying that the UK is compliant with the requirement in article 19 of the Directive because of the ‘Inter-Departmental Ministerial Group on Trafficking which the Government believe fulfils the function of a rapporteur and that scrutiny by this group satisfies the requirements as set out in the directive. In terms of data gathering, the UK Human Trafficking Centre acts as a central repository for intelligence and data on human trafficking.’

¹²⁷Ministry of the Interior of the Czech Republic website, National Rapporteurs: UK available at www.mvcr.cz/mvcren/article/united-kingdom.aspx?q=cHJuPTE%3d accessed 16 July 2011.

the Directive is fully transposed into UK law. Following the April 2013 transposition deadline, compliance shall be monitored through a Commission report scheduled to be submitted to the European Parliament and the Council by April 2015, assessing the extent to which member states have taken the necessary measures to comply with the Directive. The impact of anti-trafficking legislation will then be subject to a further assessment, culminating in a report by the Commission to be submitted the following year. The obligation upon the UK to transpose the Directive by April 2013 therefore provides an opportunity for at least a review and evaluation of current legislation. Such an exercise may result in increased calls for a more comprehensive, holistic approach to anti-trafficking legislation, as has already been advocated in Scotland. At this juncture, what must be emphasised is that the Directive sets out minimum standards to be achieved by EU member states and does not preclude the adoption of more robust measures.