**Trafficking in Human Beings: an EU and UK legal challenge.**

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The parallel developments at both the EU and UK level addressing the issue of Trafficking in Human Beings are promising to rapidly change the legal landscape and practice environment when addressing the issue of human trafficking. Taking a legal perspective this paper will critically analyse the policy and legal developments at both levels of governance, in light of the Area of Freedom Security and Justice’s status as an area of shared competence, and subject to the principle of subsidiarity. The issue of whether the UK proposals meet the UK’s legal obligations under the EU legal framework will also be examined. The additional issue of the UK’s devolved legal jurisdiction and police framework in light of these developments will also be critically analysed.

1. **Introduction**

The issue of human trafficking (THB) is a multi-faceted problem which arises from a number of challenges facing the world today, and exacerbated by increasing globalisation and mobility. The issue of human trafficking law is almost as diverse. Issues arise in distinguishing human trafficking from human smuggling, and in addressing the various typologies of human trafficking, which can range from forced labour to forced prostitution, from child begging to the forced removal of human organs. In addition to the principal laws in the area, there are supplementary laws dealing with issues as varied as child sexual exploitation, gangmaster licencing, and criminal use of the internet. There are a number of drivers for human trafficking laws, ranging from the UN’s classification of human trafficking as a form of organised crime, being proscribed by the second protocol attached to the United Nations Convention against Transnational Organized Crime, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. At a continent of Europe level there is also the Council of Europe Convention on Action against Trafficking in Human Beings,[[1]](#footnote-1) which entered into force on the 1st February 2008. Case law has emanated from human rights courts, such as the European Court of Human Rights (ECtHR), domestic courts, and international criminal courts, in the context of human trafficking, with the latter addressing the use of human trafficking as a crime against humanity.[[2]](#footnote-2) This paper will be much more focused however, taking just one strand of this complex debate, and will focus on the UK’s legislative response to the EU’s recent 2011 Directive on preventing and combating trafficking in human beings and protecting its victims,[[3]](#footnote-3) and the measures that the UK has taken to implement this directive. The UK, unlike most of the other EU member states is not a unitary legal jurisdiction. While not strictly federal, as understood in the context of say the USA or Canada, independent legal jurisdictions continue to exist within the UK since its formation. In addition recent devolution of powers to sub-national parliaments or assemblies adds complexity to the UK’s regulatory and law enforcement picture. The legal jurisdictions of England and Wales have long been merged, however the Welsh Assembly has made its own mark in the area of human trafficking, to include the appointment of the Welsh Government’s anti-trafficking co-ordinator in 2011. Northern Ireland has been a separate legal and policing jurisdiction, operating as a unit since the departure of the Republic of Ireland, with the Northern Ireland assembly recently enacting its own laws in this area. Scotland is an even more distinct legal jurisdiction from that of England & Wales, coming from a pre-codified civilian jurisdictional background with many distinguishing features from the common law jurisdiction of England and Wales. Policing structures and accountability are also different, having more of a distinct flavour than might be anticipated. Chief Constables in both Scotland and Northern Ireland are answerable to the devolved parliaments in Stormont and Holyrood, rather than to Westminster. In addition, there continues to be a rebalancing of power amongst the “home countries” of the UK post the Scottish Independence Referendum, an issues which will continue to evolve over the next number of years.

1. **New EU directive in THB**

The UK has entered a new phase of legal relationship with the EU under the post-Lisbon Treaty legal framework in the context of the Area of Freedom Security and Justice (AFSJ). This arose from concern in the UK (and separately, Ireland and Denmark) about the erosion of national sovereignty in an area close to the core of national identity, and the increasing role of the now renamed Court of Justice of the European Union (CJEU). This needs to be understood in the context of the upgrade in legal status of the AFSJ post-Lisbon. AFAJ law is now classified as being of shared competence (between the individual member states and the EU), all be it with treaty based red lines in the areas of national security[[4]](#footnote-4) and internal security of individual member states,[[5]](#footnote-5) over which the EU, as a supranational entity, is not permitted to cross. In addition the EU’s Charter of Fundamental Rights, which has been developing a quasi-constitutional status within the EU’s legal framework, has moved from an area of soft law to hard law. The EU has also been given authority to accede in its own right to the European Convention on Human Rights (ECHR), a process which has recently received a set back by the CJEU’s ruling in *Opinion 2/13* of the 18th December 2014. These developments are felt at the UK legislative and executive level to shift the balance of power from the UK parliament, which is considered to be sovereign under UK law, to the court structures, whether that be the EU, and through it to the ECtHR, with even to the UK courts being accused of acting in collusion with the supranational and international courts. This is less of an issue in the Republic of Ireland where the Irish Constitution, as interpreted by the Supreme Court of Ireland, and regularly amended by the people by way of referenda, is supreme under the traditional tri-partite division of power.[[6]](#footnote-6)

The approach that the UK negotiated with the EU for the AFSJ post-Lisbon, and which is written into the post-Lisbon legal framework by way of protocols attached to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), is that the UK has a right to remain out of all post-Lisbon AFSJ measures unless it expressly opts back in again.[[7]](#footnote-7) (The same approach has been negotiated by the Republic of Ireland (same protocol) and Denmark.[[8]](#footnote-8)) Uniquely for the UK, the UK has also negotiated an opt out of all pre-Lisbon AFSJ measures, which had to be done in bloc, with a view to opting back in to a selection of measures, to be negotiated.[[9]](#footnote-9) The UK has now exercised this option, deciding to opt back into 35 pre-Lisbon AFSJ measures.[[10]](#footnote-10) The consequence of this change still has to be evaluated. Despite the concerns about national sovereignty, and the impact of EU AFSJ provisions on the internal balance of power in the UK, the reality of the perceived need to opt back into the 35 pre-Lisbon measures is interesting. Transnational crime and justice, and transnational counter-terrorism measures are difficult to ignore. Both the UK and the Republic of Ireland have (separately) been opting into most of the larger post-Lisbon measures, having to reconcile themselves to the consequential implications for national sovereignty. Demark is increasingly been left behind in this process. The UK government initially intended on remaining out of the provisions of Directive 2011/36/EU,[[11]](#footnote-11) the new Trafficking in Human Beings (THB) directive, and this is reflected in the text of the directive as passed. However under domestic political pressure it decided to opt back in again.[[12]](#footnote-12) The consequence of this is that while the original implementation deadline for the directive, April 2013, might not be strictly enforced against the UK, there is a requirement on the UK to implement its provisions, and to do so effectively.

Directive 2011/36/EU is not the first attempt of the EU to legislate to combat trafficking in human beings, and the UK was fully compliant in implementing its previous efforts to legislate in this area.[[13]](#footnote-13) The UK laws have also been strongly influenced by the Council of Europe’s convention in this area, with the UK often arguing that it takes human trafficking seriously and is doing more than is actually required in this crime area. Relevant lobby groups within the UK would disagree with this argument, arguing that problems arise with both the laws themselves, and their implementation. This paper will focus on the actual legal frameworks, as these are under considerable change at the EU, UK and sub-national level within the UK.[[14]](#footnote-14)

At the outset of the analysis of the UK provisions on THB, and its relationship in this area with the EU it is necessary to point out that the UK continues to maintain is Schengen-opt out position from the EU’s visas, asylum, immigration and free movement of third country nationals[[15]](#footnote-15) (the third UK opt out referred to in this paper),[[16]](#footnote-16) unless it has specifically opted back into a particular measure. The UK’s rights to opt back in to these measures are limited, under the *UK* v *Council* line of cases,[[17]](#footnote-17) to “Schengen-related” measures rather than “Schengen-integral measures”.[[18]](#footnote-18) Therefore many of those THB related measures adopted by the EU under its visas, asylum and immigration provisions do not, normally, apply to the UK. There is a very high level of complexity in the current (pre-directive) UK laws and policing structures dealing with trafficking in human beings, to include the complexity that is added to the picture due to the role of the sub-national legislatures, and their separate policing structures.[[19]](#footnote-19)

The EU’s legal framework in cross border law enforcement was originally designed by drug trafficking officers, with the drafting of the first two attempts to legislate for the enforcement of human trafficking law being based on the model used, and used successfully, for combatting drug trafficking. While human trafficking is also an organised crime, the drug trafficking approach when used for human trafficking did not work. The directive itself states that it takes “an integrated, holistic, and human rights approach”[[20]](#footnote-20) to THB, in contrast to earlier provisions of the EU. In addition to the definition sections (now broader), there is a law enforcement section, (to be expected, but now broader), and there is (novel to EU law) an extensive victim section, with all of these sections bringing a new perspective to the approach to tackling THB across the EU.

UK Modern Slavery Bill (due to become Act 2015) has a varied application, reflecting the differences in the legal jurisdictions across the UK, and the devolved nature of policing and police accountability. It treats England and Wales as one jurisdiction, but for the most part does not apply to Scotland or Northern Ireland. Provisions which do apply across the UK under this bill are Part 4 Provisions on the Independent Anti-Slavery Commissioner, Part 6 Transparency in Supply Chains, and the Final Provisions in Part 7, all subject to the provision of section 57, subsection (s.) 4 (that an “amendment or repeal made by this Act has the same extent as the provision amended or repealed” acknowledging the sub-national jurisdiction may have similar but not the same provisions, and subsection (ss.) 5, which limits the effect of the amendment and repeals in Schedule 4 to England and Wales. Therefore it is left to the sub-national legislatures to take their own positions on the repeals in their own jurisdictions. For their part, the Northern Ireland Assembly has just passed the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (NI bill), with Scotland following with the Human Trafficking and Exploitation (Scotland) Bill.

**Definition of the crime**

The EU definition of human trafficking used in the new directive is now broader than the one adopted under the earlier framework decision. It now expressly includes begging, and “the exploitation of criminal activities, or the removal or organs”.[[21]](#footnote-21) Forced labour “illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings”,[[22]](#footnote-22) and forced begging, are included within the ambit of this directive, with “no possible consent should be ever considered below the age of 18 years of age”.[[23]](#footnote-23) For all of its constituent acts the age of a child is defined as someone under the age of 18. The directive goes on to say that when dealing with a person of indeterminate age, it is to be presumed that they are a child, until the contrary is proven.[[24]](#footnote-24) There is no reference in the directive to the “age of sexual majority” which is often lower than the age of 18, and something which did feature in the directive.[[25]](#footnote-25) This is a significant change in focus, at least on this point, between the two EU documents. The directive, with twice as many articles as its predecessor, the framework decision, still does not encompass the allied crime areas of child sex tourism or on-line paedophilia activity. It does, however, have new provisions on the seizure and confiscation of assets[[26]](#footnote-26) although in practice earlier provisions on money laundering[[27]](#footnote-27) and the proceeds to crime[[28]](#footnote-28) continue to be relied on.

## The definition of human trafficking adopted by the UK government in the Modern Slavery Bill (UK MS bill)[[29]](#footnote-29) is separated out from the definition of slavery, servitude and forced or compulsory labour,[[30]](#footnote-30) with a further section setting out what is to be meant by exploitation under UK law.[[31]](#footnote-31) Section 14 of the UK bill states that “a slavery or human trafficking offence” means an offence listed in Schedule 1, with Schedule 1 referring to trafficking for prostitution, trafficking for sexual exploitation, trafficking for exploitation, slavery, servitude and forced or compulsory labour. Exploitation is also defined in section 3 to cover slavery, servitude and forced or compulsory labour, sexual exploitation, removal of organs, securing services etc. by force, threats or deception, and securing services etc. from children and vulnerable persons. There is no express reference to forced adoption or forced marriage in the UK MS bill, however laws on forced marriage are already on the statute books of all three UK jurisdictions,[[32]](#footnote-32) as are laws on adoption. Equally there is no reference to forced begging, however forced labour may well cover this, depending on how the UK provisions are interpreted in the courts. The NI Act definitions, in the main, appear to follow the drafting in the UK MS bill. There are some slight definition differences in how to determine whether someone is in a vulnerable situation, however this may turn out to be merely an issue with regard to the style of drafting once the relevant courts start to interpret the two acts.

The Scottish bill is drafted slightly differently from the other two bills, with human trafficking being dealt with in section 1, and the separate crimes of slavery, servitude and forced or compulsory labour being dealt with in section 4. While the issue of consent is discounted under the section 1 human trafficking offence, at s.1.2, it appears to be missing for the section 4 offence. While adding and abetting etc. is not dealt with separately from the main offences, as is the case for the UK MS bill or the NI Act, aiding and abetting etc. for human trafficking do appear to be well covered in the Scottish laws.[[33]](#footnote-33) However the same cannot be said for the slavery, servitude and forced or compulsory labour provisions. Section 46 of the Criminal Justice and Licensing (Scotland) Act 2010 appears to survive the proposed Scottish bill, however this only proscribes the arrangement and facilitation of people trafficking. Another possibility is the Scottish doctrine of “art and part”. A Scottish law expert will have to examine this issue, and the Scottish legislature will have to assure themselves that aiding and abetting of all aspects of the new crimes are effectively covered in the Scottish jurisdiction.

While both the Northern Ireland (for THB offence only)[[34]](#footnote-34) and Scottish provisions[[35]](#footnote-35) deal with crimes committed by or on behalf of bodies corporate in the same way as crime committed by individuals, the UK MS bill supposes that bodies corporate will be either involved in the shipping business,[[36]](#footnote-36) or be involved in supply chains,[[37]](#footnote-37) which presupposes that bodies corporate are essentially operating in the legitimate business world, rather than companies which are wholly or predominantly operating in the criminal world, or involved in these activities outwith legitimate supply chains. In Scotland s.40 of the Criminal Justice and Licensing (Scotland) Act 2010 appears to survive the new Scottish bill. This has a focus on protecting children, providing for “certain sexual offences by non-natural persons”, such as bodies corporate. Equally section 99 of the Criminal Justice and Licencing (Scotland) Act 2010 appears to survive the new bill, which provides for the closure of premises associated with human exploitation etc. It refers to section 40A, which in its turn refers to section 47 of the same act, which is to be repealed. It will be necessary to ensure all of the provisions are aligned to cover the new, broader, definition of human trafficking in Scotland, and that there are effective measures to deal with non-natural persons, (i.e. companies) who are caught up in all forms of the new offences. Additionally, there would appear to be gaps in both the NI Act and UK MS bill in this area.

**Establishment of Jurisdiction**

Under the EU directive provisions on jurisdiction have been expanded, with reliance still being made on pre-existing EU provisions on conflicts of jurisdiction.[[38]](#footnote-38) The new provisions,[[39]](#footnote-39) in addition to redrafting much of the older provisions,[[40]](#footnote-40) requires that where a member state establishes jurisdiction on a basis other than the place where the offence was committed, that the “acts are a criminal offence at the place where they were performed”,[[41]](#footnote-41) in addition the “prosecution can be initiated only following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed”.[[42]](#footnote-42) It is worth noting however that under the directive jurisdiction, as standard, is to be established where “the offender is one of their nationals”.[[43]](#footnote-43) There is no caveat that the related offence is to occur within the EU.

The establishment of jurisdiction in both the UK and NI provisions may raise further questions. The UK bill refers to “a person” under section 1, the slavery, servitude and forced or compulsory labour provisions. However, under the section 2 human trafficking provisions, it speaks about UK nationals and non-UK nationals as criminals. It does not refer to the location or nationality of the victims, or criminality on the basis of where the crime is committed. With regard to trafficking, while “travel” in NI, Scotland and the UK law also includes travelling within any country, a UK national is liable regardless of “where the arranging or facilitating takes place” or “where the travel takes place”. However a non-UK national, even if within the UK when the offence takes place, is only liable if any part of the arranging or facilitating takes place in the United Kingdom, or “the travel consists of arrival in or entry into, departure from, or travel within the United Kingdom”. In contrast the NI Act and Scottish bill provide that the laws are to be applied where the criminal is a “UK national”, “a person who at the time of the offence was habitually resident in Northern Ireland,” or, as discussed above, “a body incorporated under the law of a part of the United Kingdom”. They do not refer to individuals who may be temporarily present in Northern Ireland or Scotland, and also engaged in trafficking. An examination of the existing legal frameworks is necessary to ensure that such situations are effectively covered, one way or another, in each of the three jurisdictions. There may well be conflict of laws issues between the UK, NI and/ or Scotland, but these can be resolved. More important though is that there should be no gaps in the legal framework.

**The penalties**

The minimum penalty provisions under the EU directive for THB have been made clearer for the standard offence, now to be “at least five years of imprisonment”[[44]](#footnote-44) whereas previously it was to be “effective, proportionate and dissuasive”, as was to be extraditable.[[45]](#footnote-45) The aggravated offence under the directive is now to be a maximum of 10 years imprisonment,[[46]](#footnote-46) up from its previous 8 years.[[47]](#footnote-47) As previously, the aggravated offence will occur where the victim is particularly vulnerable, or is a child, is committed within the context of an organised crime gang as defined by Council Framework Decision 2008/841/JHA,[[48]](#footnote-48) or either “deliberately or by gross negligence endangered the life of the victim”. It is also aggravated if it “was committed by use of serious violence or has caused particularly serious harm to the victim”.[[49]](#footnote-49) In establishing what is a particularly vulnerable person, which would lead to a more severe penalty, issues such as “gender, pregnancy, state of health and disability” need to be taken into account.[[50]](#footnote-50) Also relevant would be the use of “serious violence such as torture, forced drug/ medication use, rape or other serious forms of psychological, physical or sexual violence” on the victim.[[51]](#footnote-51) Added to this provision, the directive states that aggravation will also occur where the offence “was committed by public officials in the performance of their duties”.[[52]](#footnote-52) The indictment, aiding, abetting and attempt offences[[53]](#footnote-53) are now to also be subject to surrender[[54]](#footnote-54) under the European Arrest Warrant.[[55]](#footnote-55)

The penalties adopted by the UKgovernment in the Modern Slavery Bill, are set out in section 5, and are split between the main offences of either THB or slavery, servitude and forced or compulsory labour, and offences undertaken with the intention of committing one of the main offences, such as “aiding, abetting, counselling or procuring” (section 4 of the UK MS bill). In the UK it is possible to be convicted either on indictment, or if the prosecutors decide to opt for the quicker, and cheaper route, on summary conviction. In some circumstances the accused will be given a choice as to where the trial is to take place. On indictment, the punishment is to be “imprisonment for life”.[[56]](#footnote-56) On summary conviction the punishment is “for a term not exceeding 12 months or a fine or both”,[[57]](#footnote-57) which is the usual approach to a conviction following the summary proceeding. For the predicate offences listed in section 4, aiding, abetting, etc. the penalty is “on conviction on indictment, to imprisonment for a term not exceeding 10 years,” with the summary conviction being again “imprisonment for a term not exceeding 12 months, or a fine or both”.[[58]](#footnote-58)

In contrast, in the NI Act the section 1 offence of slavery, servitude and forced or compulsory labour, or the section 2 human trafficking offence, can only lead to conviction on indictment, and imprisonment for life.[[59]](#footnote-59) The NI section 4 offences of “offence[s] to commit a section 1 or 2 offence,” such as aiding, abetting etc. do have the option of a summary conviction leading to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum, but it also has conviction on indictment leading to imprisonment leading to a team not exceeding 10 years. However if the offence is committed by kidnapping or forced imprisonment then the section 4 offence can lead to imprisonment for life. Scotland, for the section 1 human trafficking offence and the section 4 slavery, servitude and forced or compulsory labour offence has both the summary and indictment option for conviction, with a summary conviction leading to 12 months imprisonment or a fine not exceeding the statutory maximum, or both, with conviction for indictment leading to imprisonment for life, or a fine, or both.

There are no provisions on aggravated offences in the UK Modern Slavery bill. The NI Act does have a section devoted to aggravating factors, section 6, which is broader than, but covers all of the aggravating factors set out in the directive (Article 4), except that of membership of an organised criminal group. Under the Scottish provisions there is a section which deals with aggravation generally, section 5, but does not specify what the aggravated factors should be and a further section, section 6 which deals with aggravation when the crime is committed by a public official in the course of exercising his public position. On the issue of penalties then all UK jurisdictions are diverging from the provisions of the directive, and from each other.

**Other related offences**

The UK Modern Slavery Bill in addition to the main offences and the supplementary offences of aiding, abetting, etc. provides for the whole of the UK, including Scotland and Northern Ireland, transparency in supply chains, section 52. It also has, for the England and Wales jurisdiction, provisions on how the law is to work, which includes the introduction of slavery and trafficking prevention orders, which are covered in detail in sections 14 to 29, breach of which will lead to a further offence under section 30, leading to penalties under conviction under indictment of five years imprisonment, and under summary conviction to a term not exceeding six months, or a fine not exceeding £5,000, or both. The NI Act also legislates for an offence of paying for sexual services,[[60]](#footnote-60) at section 15, and the offence of forced marriage, section 16, (already legislated for in all three jurisdictions, as discussed above). Slavery and trafficking prevention orders are also provided for under the NI Act in section 11, the details of which are set out in Schedule 3 to the NI Act, breach of which would lead,[[61]](#footnote-61) to conviction on indictment to imprisonment for up to 5 years, and on summary conviction to up to six months imprisonment, a fine not exceeding the statutory maximum, or both. Trafficking and exploitation prevention orders are also dealt with at length in the Scotland bill,[[62]](#footnote-62) breach of which will lead,[[63]](#footnote-63) on conviction on indictment, to at least 5 year’s imprisonment, or if on summary conviction to imprisonment for up to 12 months, or a fine not exceeding the statutory minimum, or both.

**The law enforcement provisions**

Under the EU directive new provisions on investigation and prosecution[[64]](#footnote-64) provide that member states should ensure that THB law enforcement units have “effective investigation tools”, to include “those which are used in organised crime or other serious crime cases”.[[65]](#footnote-65) This would presumably include the whole range of EU tools such as cross border covert surveillance, joint investigation teams, controlled deliveries, etc.[[66]](#footnote-66) The bringing into the THB investigation of “serious and organised crime” policing is clearly provided for.[[67]](#footnote-67) In addition, in the case of child victims, the directive requires that domestic laws should ensure that it is possible to take a prosecution “for a sufficient period of time after the victim has reached the age of majority.”[[68]](#footnote-68) The need for special investigation and criminal procedures in the case of a child victim is also covered.[[69]](#footnote-69) The EU directive also provides for the avoidance of secondary victimisation due to the investigation or prosecution process.[[70]](#footnote-70) There are now new AFSJ provisions, replacing earlier PJCCM provisions on the standing of victims in criminal proceedings.[[71]](#footnote-71)

This issue is addressed by the UK MS bill, section 46, which amends the Youth Justice and Criminal Evidence Act 1999 (which for the most part, extends to England and Wales only), to include special measures for witnesses who are victims of either human trafficking, or the slavery, servitude and forced or compulsory labour offences under that act. Of particular relevance is section 16 of the Youth Justice and Criminal Evidence Act 1999, which deals with (under) age and incapacity, with section 17, dealing with “Witnesses eligible for assistance on grounds of fear or distress about testifying.” Similar provisions are made in the NI Act under section 24.3 which amends the Criminal Evidence (Northern Ireland) Order 1999 for slavery or human trafficking offences. In Northern Ireland the Justice Act (Northern Ireland) 2011 provides for special measures for child witnesses and for vulnerable witnesses in the case of sexual offences. There would appear to be a gap with regard to witnesses in non-sexual related THB cases in NI. Scotland has recently enacted the Vulnerable Witnesses (Scotland) Act 2014 which, while expressly referring to victims of trafficking for prostitution, and trafficking of people for exploitation under the Asylum and Immigration Act 2004, may well have left gaps through which other victims of trafficking might have fall. However there is also a “catch all” clause, [[72]](#footnote-72) to include in the category of vulnerable witnesses those “considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings.”

Under the UK MS bill actions of the National Crime Agency (NCA) is acknowledged in section 15.1.c stating that its Director may make an application to the courts for either slavery and trafficking protection orders or risk orders, in addition immigration officers, or any chief officer of police, referring, *inter alia*, to the territorial police. The NCA director must notify the relevant territorial chief of police of such a development. Guidance still has to be issued, under section 33 of the UK MS bill to the chief officers of police, the Director of the NCA and to immigration officers as to how they are to exercise their powers under Part 2 of the MS bill, which covers the prevention orders. However, despite the focus on THB units in the directive, and while it is clear that while UK territorial police THB units may well be leading on anti-trafficking/ slavery cases, with or without the support of the NCA, just as the NCA may also be leading, depending on how the crime presents itself, all front line police staff, immigration staff and UK Borders Agency staff will need to be prepared to tackle this crime in practice.[[73]](#footnote-73) There is a duty placed on public authorities in NI, under the NI Act, section 13, to notify the NCA of suspected victims of either their section 1 slavery, servitude and forced and compulsory labour offence, or their section 2 human trafficking offence. No further provisions are made in the NI Act as to how this crime is to be policed. The reference to the NCA in both the UK MS bill and the NI Act presupposes that the resources and tactics of the NCA can be deployed, where necessary to either slavery, servitude and forced or compulsory labour investigations, or human trafficking investigations, when necessary. This would be in line with the intentions in the EU directive that “effective investigation tools”, to include “those which are used in organised crime or other serious crime cases”[[74]](#footnote-74) would be available for (relevant) investigations in all parts of the UK.

There is now a unitary policing structure in Scotland, Police Scotland, which incorporates the former Scottish Crime and Drug Enforcement Agency (SCDEA), which used to operate in Scotland much as the former Serious and Organise Crime Agency (SOCA) operated in England and Wales, and Northern Ireland. It is therefore not surprising that the successor to SOCA, the NCA, is not referred to in the Scottish bill, as Police Scotland has its own serious and organised crime resources. Presumably if a slavery or human trafficking situation developed in Scotland into a trans-jurisdictional serious or organised crime case, liaison with the NCA either south of the Scottish/ English border or with the NCA in NI, would happen in the usual way. The NCA is also either the lead agency or the first point of contact for incoming or outgoing transnational law enforcement operations through its multi-national/ international office. The UK wide Crime (International Co-operation) Act 2003 sets out many of the relevant provisions for transnational crime and justice cooperation. The Scotland bill does provide for the enforcement of other UK orders.[[75]](#footnote-75) The NI Act[[76]](#footnote-76) also refers to relevant UK orders in the context of cross border enforcement, to include those of the England & Wales and Scotland. The UK MS bill[[77]](#footnote-77) also refers to cross-border law enforcement, allowing for “relevant UK orders” to include NI or Scottish orders. Each piece of legislation seems to be waiting for the legislation of the other jurisdiction to be passed, before the domestic law of the sub-national jurisdiction reacts to accommodate it.

**The victim provisions**

At the EU level there is a big change in the status of the victim, and consequent changes of the role of first responders, such as uniform police, when encountering a human trafficking situation. The directive also has new provisions on the non-prosecution or non-application of penalties to the victim “for their involvement in the criminal activities which they have been compelled to commit as a direct consequence” of the THB.[[78]](#footnote-78) This provision is echoed in section 45 of the UK MS bill, if the offence is a “direct consequence” of either of the two main UK MS offences, section 1, slavery, servitude, compulsory or forced labour, or section 2, human trafficking offence.

While the provision of assistance to victims was provided for in the earlier EU framework decision[[79]](#footnote-79) in one subsection of one article, it is now covered by six articles in the new directive, some of which are quite lengthy. Of these new provisions four articles are devoted to the protection of children and child victims.[[80]](#footnote-80) Under the directive when dealing with persons of indeterminate age, it is to be presumed that they are a child, until the contrary is proven.[[81]](#footnote-81) In addition the interests of the child are to “be a primary consideration” in any investigation involving children.[[82]](#footnote-82) Access to education is also provided for, as is the need to appoint a legal guardian or representative if “the holders of parental responsibility” are “precluded from ensuring the child’s best interests and/or from representing the child” due to a conflict of interests.[[83]](#footnote-83) The need for special investigation and criminal procedures in the case of a child victim is covered,[[84]](#footnote-84) although it is highly probable that these provisions are already in place in most, if not all, EU jurisdictions. The issue of unaccompanied child victims is also addressed, involving the need to appoint a legal guardian in these cases, if necessary.[[85]](#footnote-85) In the NI Act, section 22, provides a defence for slavery and trafficking victims if they were compelled to do something by virtue of either, the section 1, slavery, servitude and forced or compulsory labour offence, or the section 2, human trafficking offence. However this defence is not to apply if the “victim” is over the age of 21 and the offence is punishable on indictment with imprisonment for life or a term of at least 5 years. However some offences are covered by the “victim” defence, as listed in section 22.9, which may be amended later by the Department of Justice for NI. It is not clear to this author why this approach has been adopted in Northern Ireland. Section 7 of the Scottish Act (taking a similar approach to NI) relies on the Lord Advocate to publish guidelines, at some time in the future about the prosecution of victims of human trafficking or the slavery, servitude, forced and compulsory labour offences. This appears to be clearly contrary to the provisions of the directive. Both Northern Ireland and Scotland appear to diverge from the requirements of the directive on this point.

The UK MS bill section 50 provides that there is a presumption, in cases of doubt that a person is under the age of 18 years, until the contrary is proven. There are also provisions about special measures for witnesses in criminal proceedings;[[86]](#footnote-86) civil legal aid for victims of slavery;[[87]](#footnote-87) and child trafficking advocates.[[88]](#footnote-88) Still to be issued by the Secretary of State, under section 49, are guidance about identifying and supporting victims. This is a clear gap in the UK MS bill, on an issue required by the directive. The Minister will need to issue a Statutory Instrument on this matter once the MS Act is passed in order to rectify this issue. There is separately a duty to notify the Secretary of State about suspected victims of slavery or human trafficking under section 51 of the UK MS bill. Under the NI Act section 25 defines that a child is a person under the age of 18, also providing at subsection 3 that in cases of doubt a person is to be treated as if they were a child.

Under the directive assistance to a THB victim is to include “the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.”[[89]](#footnote-89) Victims with special needs also need to be provided for, for example, those who are pregnant, have health issues, “a disability, a mental or psychological disorder […] or a serious form of psychological, physical or sexual violence [which] they have suffered.”[[90]](#footnote-90) As the UK has stated, this makes “mandatory some measures which are currently good practice”.[[91]](#footnote-91) While these provisions still have to be enumerated by the Secretary of State under the MSB (section 49), the protection of victims is provided for in sections 18 to 21 of the NI Act. Section 18 of the NI Act lists the type of assistance and support anticipated pending determination by competent authority, to include safe accommodation, material assistance, health care services, information, translation and interpretation services, legal advice and assistance with repatriation. Section 19 of the NI Act also provides assistance and support for exiting prostitution. Guidance as to compensation for victims is provided for in section 20 of the NI Act, with section 21 providing for an independent guardian for child victims. In the Scottish bill there is a definition of an adult as someone over the age of 18. There does not however appear to be any provisions presuming and individual is a child until the contrary can be proved. The Scotland bill provides for support and assistance for adult victims of human trafficking in section 8, referring expressly to accommodation, day to day living, medical advice and treatment, language translation and interpretation, counselling, legal advice, information and repatriation. Strangely it does not provide similar protection for either child victims of human trafficking or child or adult victims of slavery, servitude, forced or compulsory labour.

The EU directive also provides that legal support, to include witness protection programmes, designed on the basis of “individual risk assessment” is separately provided for.[[92]](#footnote-92) The NI Act is less explicit on this point, but does refer in s.18 to “assistance and support pending determination by a competent authority”. This protection is to be given where the victim is 18 or over, or of indeterminate age, in the context of human trafficking. The NI Act does not provide protection for anyone under the age of 18. Provisions on independent guardians for children are provided for in the NI Act, under section 21, but no express reference is made to the physical security of the child who has been a human trafficking victim along the line of a witness protection programme. Hopefully these two issues are covered elsewhere in the Northern Irish legal framework. Witness protection or similar provisions do not appear to have been provided for in either the UK MS Bill or the Scotland Bill. However, pre-existing law on this topic is still on the statute books for all three jurisdictions under section 82 of the Serious Organised Crime and Police Act 2005, which provides for the usual witness protection schemes in the UK. It is to be presumed that this provision will also apply, where appropriate, to cases involving the human trafficking or slavery, servitude, and forced or compulsory labour crimes.

The EU directive provides that if there are existing schemes for the compensation of “victims of violent crimes of intent” then THB victims should have access to such schemes.[[93]](#footnote-93) In addition to the usual anti-money laundering and proceeds of crime provisions, the UK MSB provides for slavery and trafficking reparation orders,[[94]](#footnote-94) whereby assets of the criminal will be used to pay compensation to the victim of either of the two main offences or the supplementary offences under the act. The NI Act has similar provisions in its section 10, referring to its Schedule 2. There do not appear to be any reference to victim compensation or reparation orders in the Scottish bill. Earlier general provisions on criminal compensation are the Criminal Injuries Compensation Act 1995, which covers England & Wales, and Scotland, with NI operating on the basis of the Criminal Damage Compensation Northern Ireland Order 1977. It is not clear, however, that these provisions now extend to victims of human trafficking, as required by the EU directive, or victims of slavery, servitude and forced and compulsory labour.

**The UK MS Bill provisions for the whole of the UK**

The EU directive also addresses the issue of prevention, with member states required to “take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation” related to THB.[[95]](#footnote-95) This should include, *inter alia*, internet campaigns, and the raising of awareness, “in cooperation with relevant civil society organisations and other stakeholders”. In addition the relevant professionals need to be trained, to include “front-line police officers”,[[96]](#footnote-96) which would be a much broader group than specialists in THB units. The UK wide appointment of the Independent Anti-Slavery Commissioner (Part 4 of the UK MSB, building on earlier provisions in Wales) should address these issues. The Anti-Slavery Commissioner is, *inter alia*, tasked with marking official reports to any of the three relevant governmental bodies, “making recommendation to any public body,” which presumably would include the police services, and “providing information, education and training.”

The UK MSB, together with the two sub-national bills, shows some other examples of some innovative thinking, on behalf of all of the UK, with provisions which were not in the EU directive. All three jurisdictions developing prevention orders (slavery and trafficking prevention orders) in detail, something which seems to be in line with UK thinking in other areas of criminal and counter-terrorism law. In addition, for the whole of the UK, the MSB have provisions in Part 6, Transparency in Supply Chains, and Maritime Enforcement, which is separately covered in section 35 to 39. How well the section 52 provisions on transparency in global supply chains work will be interesting to see in practice. A prior example of this can be seen in the US state of California’s Transparency in Supply Chains Act 2010, which was also enacted with a view to combatting human trafficking. The Maritime enforcement provisions is provided for in different sections for all three UK jurisdictions in the MSB, along with provisions on hot pursuit of ships in UK territorial waters, with all transport issues and the use of defence assets being reserved to the UK government.[[97]](#footnote-97)

**Conclusion**

At the time of writing only the Northern Ireland proposals have become law. While the UK Modern Slavery bill is at a late stage of drafting, the Scottish bill is still being considered, and may well have new provisions added before being enacted. While the EU directive did require the UK to enact its provisions, it is clear that the challenge of addressing the issue of human trafficking has been fully taken on board by all three legislatures in the UK. Clearly the dominant thinking in the UK is that there is a need to address not just human trafficking, but also slavery, servitude and forced or compulsory labour. Some of the directives requirements do not appear, at least on first reading of the texts of the three bills/acts, and may possibly be found, by specialists in the relevant fields, in other pieces of legislation already on the statute books, or in supporting case law. However, the fact that the provisions do not appear, or to be signposted in the new human trafficking legislation, is itself an issue. This law is becoming increasingly challenging, and the need for law enforcement and support services to adjust to the change in emphasis, originally in the directive, and now in all three of the UK jurisdictions acts/ bills, will be great. One of the issues when examining law is how well the relevant law drafted. Then there is a need to examine how it is interpreted and implemented by the relevant courts, and thirdly, how well do these provisions actually work in practice. These latter two issues will have to be left to some future piece of research.

1. CETS no. 97. [↑](#footnote-ref-1)
2. Rome Statute, Article 7.1.c as defined by Article 7.2.c. [↑](#footnote-ref-2)
3. Directive 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, OJ L 101/1. [↑](#footnote-ref-3)
4. Article 73 TFEU. [↑](#footnote-ref-4)
5. Article 72 TFEU. [↑](#footnote-ref-5)
6. Under the English legal tradition sovereignty rested with the King/ Queen, and has been devolved to Parliament. In contrast under the Scottish legal tradition, sovereignty rests with the people of Scotland. There is less clarity on this point in Northern Ireland, as Ireland, and Northern Ireland in particular, (and unlike Scotland) underwent massive structural and social change at the time of the creation of the UK. [↑](#footnote-ref-6)
7. Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom Security and Justice. [↑](#footnote-ref-7)
8. Protocol (No 22) on the position of Denmark. [↑](#footnote-ref-8)
9. Protocol (No 36) on Transitional Provisions, Article 10. [↑](#footnote-ref-9)
10. See House of Commons on-line library, In brief: the 2014 bloc opt-out and selective opt-back-ins, Standard note: SN/IA/6684, available at www.parliament.uk/**brief**ing-papers/SN06684.pdf‎. [↑](#footnote-ref-10)
11. Directive 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, OJ L 101/1. [↑](#footnote-ref-11)
12. Action – Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings – first implementation report/ update of information on Member States’ external action, Brussels, 4 July 2011, 12401/11, at page 2, second paragraph. [↑](#footnote-ref-12)
13. Specifically Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203 of 1.8.2002, which itself replaced Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, OJ L 63 of 04.03.1997. [↑](#footnote-ref-13)
14. An initial examination of the EU legal provisions on human trafficking mapped against the earlier UK provisions was made in O’Neill, M.; The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective, Journal of Contemporary European Research, Vol. 7. Issue 4, pp. 452-467 (available on-line). [↑](#footnote-ref-14)
15. Chapter 2 TFEU. [↑](#footnote-ref-15)
16. Protocol (No 19) on the Schengen Acquis integrated into the Framework of the European Union, Article 5 – re UK and Ire opt back in again. [↑](#footnote-ref-16)
17. Case C-77/05 *United Kingdom* v. *Council*, [2007] ECR page I-11459. [↑](#footnote-ref-17)
18. AG Trstejak, paragraph 84 of opinion in Case C-77/05 *United Kingdom* v. *Council,* [2007] ECR page I-11459. [↑](#footnote-ref-18)
19. For a full analysis of this situation, see further O’Neill, M. The EU Legal Framework on Trafficking in Human Beings: where to from here – the UK perspective, JCER Volume 7, Issue 4, pp. 453-457. (available online). [↑](#footnote-ref-19)
20. Directive 2011/36/EU, at paragraph 7 of the preamble. [↑](#footnote-ref-20)
21. Directive 2011/36/EU, at Article 2.3. [↑](#footnote-ref-21)
22. Paragraph 11 of the Preamble to Directive 2011/36/EU. [↑](#footnote-ref-22)
23. Article 2.6 of Directive 2011/36/EU [↑](#footnote-ref-23)
24. Directive 2011/36/EU, Article 13.2. [↑](#footnote-ref-24)
25. Article 3.2.b Council Framework Decision 2002/629/JHA. [↑](#footnote-ref-25)
26. Directive 2011/36/EU, Article 7. [↑](#footnote-ref-26)
27. Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing freezing, seizing and confiscation of instrumentalities and the proceeds of crime, O JL 182, 1. [↑](#footnote-ref-27)
28. Council Framework Decision 2005/212/JHA of24th February 2005 on Confiscation of Crime- Related Proceeds, Instrumentalities and Property, OJ L 68, 49. [↑](#footnote-ref-28)
29. Section 2 of the (UK) Modern Slavery Bill. [↑](#footnote-ref-29)
30. Section 1 of the (UK) Modern Slavery Bill. [↑](#footnote-ref-30)
31. Section 3 of the (UK) Modern Slavery Bill. [↑](#footnote-ref-31)
32. Scotland has legislated for civil remedies in the context of a forced marriage, and has made breach of a force marriage protection order a criminal offence under the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011. A similar approach has been taken in England & Wales and Northern Ireland under the Force Marriage (Civil Protection) Act 2007, England & Wales, and Northern Ireland. [↑](#footnote-ref-32)
33. Scotland s.3.4. and s.12.1.k. [↑](#footnote-ref-33)
34. NI Act, S.2.8.c re Human trafficking, only, with no reference to bodies corporate involved in slavery, servitude and forced or compulsory labour. [↑](#footnote-ref-34)
35. Scotland bill, s.2.2.c re Human Trafficking, with a catch all provision re bodies corporate or other commercial entities in s.35 of the Scotland Bill. [↑](#footnote-ref-35)
36. S.39.2.c of UK Modern Slavery Bill. [↑](#footnote-ref-36)
37. S.52 of the UK Modern Slavery Bill. [↑](#footnote-ref-37)
38. Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflict of jurisdiction in criminal proceedings, OJ L 328, p. 42. [↑](#footnote-ref-38)
39. Article 10 of Directive 2011/36/EU. [↑](#footnote-ref-39)
40. Article 6 of Council Framework Decision 2002/629/JHA. [↑](#footnote-ref-40)
41. Article 10.3.a of Directive 2011/36/EU. [↑](#footnote-ref-41)
42. Article 10.3.B of Directive 2011/36/EU. [↑](#footnote-ref-42)
43. Article 10.1.b of Directive 2011/36/EU. [↑](#footnote-ref-43)
44. Article 4.1 of the Directive 32011/36/EU. [↑](#footnote-ref-44)
45. Article 3 of Council Framework Decision 2002/629/JHA. [↑](#footnote-ref-45)
46. Article 4.2 of Directive 2011/36/EU. [↑](#footnote-ref-46)
47. Article 3.1 of Council Framework Decision 2002/629/JHA. [↑](#footnote-ref-47)
48. Council Framework Decision 2008/841/JHA of 24 October 208 on the fight against organised crime, OJ L 300, p. 42. [↑](#footnote-ref-48)
49. Article 4 of Directive 2011/36/EU. [↑](#footnote-ref-49)
50. Paragraph 12 of Directive 2011/36/EU. [↑](#footnote-ref-50)
51. Paragraph 12 of Directive 2011/36/EU. [↑](#footnote-ref-51)
52. Article 4.3 of Directive 2011/36/EU. [↑](#footnote-ref-52)
53. Article 3 of Directive 2011/36/EU. [↑](#footnote-ref-53)
54. Article 4.4 of Directive 2011/36/EU. [↑](#footnote-ref-54)
55. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, p.1. [↑](#footnote-ref-55)
56. Section 2.1.a of the Modern Slavery bill. [↑](#footnote-ref-56)
57. Section 5.1.b. of the Modern Slavery bill. [↑](#footnote-ref-57)
58. Section 5.2 of the Modern Slavery bill. [↑](#footnote-ref-58)
59. S.1.6 and s.2.6 of the NI Act. [↑](#footnote-ref-59)
60. These provisions are legislated for elsewhere for Scotland and for England and Wales. [↑](#footnote-ref-60)
61. Under section 16 of Schedule 3 of the NI Act. [↑](#footnote-ref-61)
62. Sections 12 to 27 of the Scotland Bill. [↑](#footnote-ref-62)
63. Section 28 of the Scotland Bill. [↑](#footnote-ref-63)
64. Article 9 of Directive 2011/36/EU. [↑](#footnote-ref-64)
65. Article 9.4 of Directive 2011/36/EU. [↑](#footnote-ref-65)
66. A detailed analysis of these provisions at an EU level is provided in O’Neill, M.; EU Cross-Border Policing Provisions, the View from One of the Schengen Opt-out States, *European Journal of Crime, Criminal Law and Criminal Justice 18 (2010) 73–89,* and more recently inO’Neill, M.:“A Europe that protects: moving to the next stage of cross border law enforcement cooperation”, *Police Journal*, Volume 84 Number 2 2011. [↑](#footnote-ref-66)
67. paragraph 15 of the Preamble to Directive 2011/36/EU. [↑](#footnote-ref-67)
68. Article 9.2 of Directive 2011/36/EU. [↑](#footnote-ref-68)
69. Directive 2011/36/EU, Article 15. [↑](#footnote-ref-69)
70. Article 12.4 of Directive 2011/36/EU. [↑](#footnote-ref-70)
71. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57. (UK, Ire in. Den out). [↑](#footnote-ref-71)
72. Section 10.a, inserting a new subsection 1.d to the section 271 of the Criminal Procedure (Scotland) Act 1995. [↑](#footnote-ref-72)
73. An analysis of the impact of Directive 2011/36/EU on frontline policing staff is made in O’Neill M.; Trafficking in Human Beings, An ongoing problem for the EU’s law enforcement community, SIAK- journal, International Edition 2013, pages 51-62. [↑](#footnote-ref-73)
74. Article 9.4 of Directive 2011/36/EU. [↑](#footnote-ref-74)
75. Section 29 of the Scotland bill. [↑](#footnote-ref-75)
76. Schedule 3, section 17 of the NI Act. [↑](#footnote-ref-76)
77. Sectio n31 of the UK MS bill. [↑](#footnote-ref-77)
78. Article 8 of the Directive 2011/36/EU. [↑](#footnote-ref-78)
79. Article 7.1 of Council Framework Decision 2002/629/JHA. [↑](#footnote-ref-79)
80. Article 13 to 16 of Directive 2011/36/EU. [↑](#footnote-ref-80)
81. Article 13.2 of Directive 2011/36/EU. [↑](#footnote-ref-81)
82. Article 13.1 of Directive 2011/36/EU. [↑](#footnote-ref-82)
83. Article 14.2 of Directive 2011/36/EU. [↑](#footnote-ref-83)
84. Article 15 of Directive 2011/36/EU. [↑](#footnote-ref-84)
85. Article 16 of Directive 2011/36/EU. [↑](#footnote-ref-85)
86. Section 46 of the Modern Slavery Bill. [↑](#footnote-ref-86)
87. Section 47 of the Modern Slavery Bill. [↑](#footnote-ref-87)
88. Section 48 of the Modern Slavery Bill. [↑](#footnote-ref-88)
89. Article 11.5 of Directive 2011/36/EU. [↑](#footnote-ref-89)
90. Article 11.7 of Directive 2011/36/EU. [↑](#footnote-ref-90)
91. Action Oriented paper on strengthening the EU external dimension on action against trafficking in human beings – first implementation report/ update of information on Member States’ external action, Brussels 4 July 2011, 12401/11, p.112. [↑](#footnote-ref-91)
92. Article 12 of Directive 2011/36/EU. [↑](#footnote-ref-92)
93. Article 17 of Directive 2011/36/EU. [↑](#footnote-ref-93)
94. Sections 8, 9 and 10 of the UK Modern Slavery Bill. [↑](#footnote-ref-94)
95. Article 18 of Directive 2011/36/EU. [↑](#footnote-ref-95)
96. Article 18.3 of Directive 2011/36/EU. [↑](#footnote-ref-96)
97. Scotland Act 1998, Schedule 5 Reserved Matters, Part I General Reservations, para 9, defence, and Part II Specific Reservations, Head E – Transport. [↑](#footnote-ref-97)