



Northern Ireland  
Assembly

## Research and Information Service Research Paper

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3 September 2012

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# Issues raised in relation to the Department of Justice legislative proposals on Human Trafficking

NIAR 514-12

This research paper examines issues raised by respondents to the Department of Justice legislative proposals on human trafficking in order to comply with the EU Directive 2011/36/EU and considers if other EU Countries have dealt with these issues in legislation



## Key Points

The Department of Justice has introduced a Criminal Justice Bill which proposes two amendments to the legislation on trafficking to comply with an EU Directive.

Respondents during the consultation process and Lord Morrow in a Private Member's Bill consultation paper have highlighted areas where the Assembly could go further in implementing the Directive. The following key areas have been highlighted.

**Increased penalties.** While the proposals go further than is required by the Directive, some respondents have suggested strengthening the penalties and including aggravating factors in the legislation. Some EU countries stipulate minimum imprisonment terms in legislation, or specify aggravating circumstances or circumstances where a higher maximum penalty applies.

**Non-criminalisation/non-prosecution of victims.** Some respondents suggest the legislation should provide for non-prosecution of victims. Some EU countries are considering addressing this in legislation though the UK position is this can be dealt with in guidance.

**Treatment of victims in criminal proceedings.** Some respondents called for this to be spelled out in legislation. Some other EU countries provide for special protection for victims in legislation, or legal aid /counselling for victims. Portugal provides that prosecution is not dependent on reporting or accusation by the victim.

**Definition of trafficking.** Some respondents suggested the definition was inadequate drawing attention to forced begging and exploitation of crime. Some other EU states cover forced begging explicitly in their legislation or are considering proposals to do so.

**A guardian for trafficked children.** Some respondents suggested that such a guardian is required. Some other EU countries provide for representatives for child trafficking victims.

**National rapporteur.** Some respondents considered that current arrangements are inadequate. EU countries are at different stages on this. Some have established equivalent mechanisms, while others are still considering how to implement this. The Netherlands has established an independent body to discharge this functions. The Minister has noted that the Home Office is determined that the current inter-ministerial group is appropriate.

**Paying for sexual services.** Lord Morrow's Bill proposes to criminalise this arguing that the current requirement that coercion be shown is too onerous. EU countries approach this question differently: some prohibit prostitution, some regulate it while others permit but prohibit brothels or profiting from another's prostitution.

## Executive Summary

- In June 2012, the Justice Minister introduced a Criminal Justice Bill which included two clauses on human trafficking in order to comply with an EU Directive.
- Respondents raised a number of issues during the consultation process about the Department's legislative proposals in the Criminal Justice Bill regarding the implementation of the EU Directive on Human Trafficking.

### Increased Penalties

- Some respondents suggested that penalties should be strengthened (eg QUB School of Law Organised Crime Project suggested that penalties in other relevant legislation could be strengthened). Another suggestion was that there should be a mandatory prison sentence (NIEA). It was also suggested that there should be a list of aggravating factors specified in the legislation (CARE),
- It would appear that there are legislative provisions in Ireland to provide that persons convicted of trafficking should be sentenced to imprisonment, with the possibility of a fine in addition. In several countries there appears to be a minimum sentence stipulated for some trafficking offences (eg Germany, Hungary, Italy, Portugal, Slovakia, and Sweden).
- Some of the overviews suggest that penalties for trafficking are seen as similar to those for other serious crimes such as sexual assault (Estonia) or rape (Romania).
- In some countries, a life sentence is possible (Hungary, Ireland, Slovakia).
- Several systems provide for aggravating factors in legislation or provide that a higher maximum penalty is available in specified circumstances (eg Belgium, France, Germany, Hungary, Italy, Lithuania, and Portugal).
- The UK position is that the maximum penalty of 14 years goes beyond what is required in the Directive (10 years) and so no change is needed.
- The maximum penalty in the offences included in the Criminal Justice Bill is also 14 years.

### Non-criminalisation/Non-Prosecution of Victims

- Some respondents referred to the need for protection of victims, including protection from prosecution.
- Article 8 of the Directive deals with this.
- Poland is considering whether prosecutorial guidelines are sufficient to implement article 8 or is it required to amend the Penal Code. It also appears to be the case in Latvia that proposals to implement the Directive will address non-punishment of victims of trafficking. It appears that Bulgaria is considering

legislation (decrees) about dropping prosecution for illegal border crossing against trafficking victims where the offence was committed under duress.

- The UK position is that guidance for law enforcement and prosecutors adequately deals with this issue.

### **Treatment of Victims in Criminal Proceedings**

- Some respondents highlighted issues relating to the treatment of victims in criminal proceedings and made suggestions such as automatic eligibility to special measures, protection for victims acting as witnesses and proper access to legal counselling.
- These issues are dealt with in Articles 9, 11, 12, 15, 16 and 17 of the Directive.
- In the Netherlands, special procedural rules apply in the case of minors to avoid direct contact between the perpetrator and victim.
- Amendments have been made to the Criminal Code in Poland to improve the rights of victims in interviews.
- In Portugal, prosecution of the crime is not dependent on reporting or accusation by the victim.
- Attention was drawn in relation to provisions in England and Wales on access to legal aid for victims of labour trafficking. Some Member States provisions allow for legal counselling/legal aid for trafficking victims (Portugal and Ireland).
- One response highlighted difficulties in victims have faced in accessing compensation in England and Wales and that there should be clarity in NI Legislation as to what rights victims have to compensation schemes. A number of EU Member States provide compensation to trafficking victims (including Lithuania, Luxembourg, Portugal, Slovakia and the UK). Poland will be giving special focus to this issue in implementing the Directive. Lord Morrow proposes that his Bill would require the Department of Justice to set out how a trafficking victim could apply for compensation.

The UK government does not believe it appropriate for a victim to be given legal representation in criminal proceedings when the victim is not a party in such proceedings; most of the other matters (compensation, support for victims) are provided for as a matter of practice

### **Definition of Trafficking**

- Some respondents suggested that there was a lack of an adequate definition of trafficking. One respondent (CARE) suggested that the definition of trafficking should explicitly include 'forced begging' and 'exploitation of criminal activities'; Lord Morrow also drew attention to this in the second stage debate.
- Article 2 of the Directive mentions forced begging and exploitation of crime.

- In the Netherlands, it would appear that certain elements of the definition in the Directive such as forced begging may not be encompassed by the existing legislation and a bill has been introduced which addresses this. In Austria, it was considered the legislation covered forced labour or services but it was suggested Austria would like to include the offence "forced begging" in its revised criminal law provisions.
- Exploitation for begging is already covered in the French Penal Code definition; in Romania special protection for minors includes protection from forced begging or exploitation for begging.
- The UK Government position is that it is largely compliant although it acknowledges that current legislation is narrower in scope than the Directive's reference to 'exploitation of criminal activities'. However, the CPS is able to prosecute where criminal activities have led to a person receiving benefits or services.

### **A Guardian for Trafficked Children**

- Some respondents suggested raised the issue of a Guardian for child victims is needed and that current arrangements are inadequate as a high proportion of rescued child victims in the UK are found to be re-trafficked.
- A Guardian or Representative is provided for in Article 14 of the Directive;
- In Finland, Poland and Portugal, the systems provide for guardians or representatives in relation to child trafficking victims.
- The UK Government has identified measures taken with regard to this issue and proposes no new measures.

### **National Rapporteur**

- Some of the respondents drew attention to the issue of a national rapporteur and noted that current arrangements are inadequate primarily as they are not independent from Government.
- Article 19 of the Directive deals with this.
- Some countries have not yet appointed a National Rapporteur (eg Austria, France). Others have an equivalent mechanism where the role is discharged by a Ministerial Delegate or an inter-ministerial committee (Poland, Spain).
- In the Netherlands, the National Rapporteur is an independent agency.
- The Justice Minister, speaking in the second stage debate, highlighted he was aware of the concerns around the current arrangements but that the Home Office are determined that the inter-ministerial group is appropriate to carry the national rapporteur arrangements.

### **Paying for Sexual Services**

- This is not covered in the Directive or the Department's proposals, but one respondent noted the Irish Minister for Justice is reviewing legislation and there is pressure for the introduction of measures to criminalise the purchase of sexual services;
- Across the EU some states prohibit prostitution, some regulate it, and some permit it but prohibit brothels or profiting from another's prostitution;
- Lord Morrow's Private Member's Bill consultation proposes making paying for sexual services illegal.
- A Private Member's Bill has been proposed in Scotland to criminalise the purchase of sex in Scotland.







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# 1 Introduction

The Justice Minister introduced a Criminal Justice Bill in the Northern Ireland Assembly in June 2012. The Bill includes two clauses on human trafficking which aim to achieve compliance with the EU Directive 2011/36/EU of the European Parliament and Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims. The EU Directive contains a number of provisions relating to:

- Offences concerning trafficking in human beings (Article 2);
- Penalties (Articles 4 and 7);
- Non-Prosecution and Application of penalties to the victim (Article 8);
- Investigation and Prosecution (Article 9);
- Jurisdiction (Article 10);
- Assistance and Support (Article 11);
- Protection (Article 12);
- Provisions on assistance, support and protection for child victims, including unaccompanied children (Articles 13-16);
- Compensation (Article 17);
- Prevention (Article 18);
- National Rapporteurs and Equivalent mechanisms (Article 19)

During the consultation stage of the policy proposals underpinning the Bill, consultees raised a number of concerns that the Department was taking a minimal approach in implementing the requirements of the Directive, highlighting areas where the legislation could be strengthened. These issues include increased penalties; non criminalisation/non prosecution of victims; the treatment of victims in criminal proceedings; the lack of an adequate definition of trafficking; the provision of a guardian or a representative for trafficked children and the creation of an independent national rapporteur. Lord Morrow MLA has published a consultation paper on plans to introduce a Private Member's Bill on human trafficking which aims to improve assistance and support to victims, provisions for addressing demand and investigations and prosecutions.<sup>1</sup> Lord Morrow argues that, if the provisions are not put on a statutory footing, there is no guarantee that resources will be put into reducing trafficking and caring for victims.

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<sup>1</sup> Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012, available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>

This research paper provides information on the ways other EU countries have dealt with the issues raised in response to the Department's consultation. This research paper draws heavily on reports from the European Commission and from the EU Tracker database as these compile this information from the Member States in English. These resources provide overviews and are therefore necessarily a summary of the position in the 27 Member States rather than detailed legal analysis of the legislative proposals. The Commission and EU Tracker overviews also provide information on the policies and legislation in the Member States apart from measures specifically to implement the Directive. It is not always clear from the material whether individual measures already in existing national legislation are deemed to satisfy the Directive or how precisely the law will be changed by any proposed implementing measures. Many states are still at an early stage in transposing the Directive and some appear not to have taken any concrete steps yet. As this research Paper is based on the overviews mentioned, and taking into account possible issues of translation, it should not be considered an authoritative statement of the legal position in other EU countries. It should be noted that some of the points below relate to existing legislative or policy provision in the Member States rather than specifically to any measure implementing the Directive.

## 2 Legislative Proposals Relating to Human Trafficking

The Justice Minister David Ford introduced the Criminal Justice Bill in the Northern Ireland Assembly on 25 June 2012 which includes two new human trafficking offences to comply with the EU Directive. Article 10 of the EU Directive requires Member States to take necessary measures to establish jurisdiction where the offences set out in the directive are committed wholly or partly within their territory or where the offender is one of their nationals. In order to comply with the Directive, Northern Ireland needs to create two offences:

- To amend section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 to create an offence where D trafficks another person (V) within the UK who was not already trafficked into the UK (for example from London to Belfast)
- To amend both the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants) Act 2004 to establish Extra-Territorial Jurisdiction and create an offence when a UK national (D), or a person who is habitually resident in the UK trafficks V anywhere outside the UK (for example, if the UK national trafficked someone from Mexico to Brazil.)

These new offences are set out in clauses 5 and 6 of the Criminal Justice Bill and a person guilty of these offences is liable on summary conviction to a maximum six

months term of imprisonment or a fine or both; and on conviction on indictment, a person found guilty of an offence is liable to a maximum term of imprisonment of 14 years.<sup>2</sup>

Northern Ireland is following the approach taken in England and Wales. The position of the UK Government is that it is technically compliant with most aspects of the EU Directive; however, there were two aspects where primary legislation was needed in order to achieve compliance. The first change required was to criminalise trafficking by a UK National which takes place anywhere in the world. The second change required amending the existing offence of trafficking for the purpose of labour and other exploitation provided for in the Asylum and Immigration (Treatment of Claimants) Act 2004 so that it applies where trafficking takes place wholly within the UK and the person has not been previously trafficked into the UK.<sup>3</sup> These offences are now contained in sections 109 and 110 of the Protection of Freedoms Act 2012 and they apply to England and Wales only. The Act was given Royal assent on 1<sup>st</sup> May 2012, however sections 109 and 110 of the Act have not yet commenced.

### 3 Issues Raised by Respondents in Relation to the Department's Legislative Proposals

A number of respondents suggested that the Department was following the approach taken in England and Wales and was taking a minimalist approach in implementing the EU Directive.<sup>4</sup> The Northern Ireland Commissioner for Children and Young People (NICCY) highlighted that the obligation to comply with the Directive does not preclude the UK from taking additional measures which would further progress the legislative and policy framework.<sup>5</sup>

Issues raised during the consultation are discussed in the following subsections and include: increased penalties; non criminalisation/non prosecution of victims; the treatment of victims in criminal proceedings; the lack of an adequate definition of trafficking, the provision of a guardian or a representative for trafficked children and the creation of an independent national rapporteur. It should be noted that the Department highlighted that it intended to compile the issues and refer them to the Organised

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<sup>2</sup> See clauses 5 and 6 of the Criminal Justice Bill and Explanatory Memorandum. Note that the penalty for Clause 6 is set out in section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2005 which must also be read in conjunction with section 5(13) of the 2004 Act

<sup>3</sup> Protection of Freedoms Bill Fact Sheet, part 7, Miscellaneous and General, available at <http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/fact-sheet-part7?view=Binary>

<sup>4</sup> See the Department of Justice Briefing paper to the Justice Committee on the Consultation Responses received in relation to proposals on legislative amendments required for Northern Ireland required for Northern Ireland to comply with the EU Directive, 12 June 2012

<sup>5</sup> Information obtained from submission made by NICCY to the Department of Justice Consultation on legislative amendments and Department of Justice engagement in relation to human trafficking, 31 May 2012

Crime Task Force Immigration and Human Trafficking sub group.<sup>6</sup> The Chairperson of the Justice Committee highlighted to departmental officials that concerns were raised that more could be done and asked if a minimal approach was being taken in complying with the EU Directive. Officials responded that the priority was to ensure compliance with the criminal aspects of the EU Directive but acknowledged that other suggestions were made during the consultation and in Lord Morrow's Bill.<sup>7</sup>

In the following sections, the relevant provisions in the Directive are introduced, followed by the issues raised in the consultation process and in Lord Morrow's Private Member's Bill consultation paper. Then the approach of other EU states is described. Each section concludes with the views of the NI or UK authorities.

### 3.1 Increased Penalties

Article 4 makes provision for penalties, requiring Member States to take necessary measures to ensure that an offence set out in article 2 is punishable by a maximum penalty of at least five years imprisonment. Article 4(2) also requires Member States to take necessary measures to ensure that an offence under article 2 is punishable by a maximum period of at least 10 years imprisonment in the following circumstances: where the offence:

- was committed against a person who was particularly vulnerable including child victims;
- was committed within the framework of a criminal organisation;
- deliberately or by gross negligence endangered the life of a victim; or
- was committed by use of serious violence or has caused particularly serious harm to the victim.

Article 4 (3) also requires Member States to ensure that that the fact an offence referred to in article 2 is committed by public officials in the performance of their duties is regarded as an aggravating circumstance.

In relation to the Department's legislative proposals to implement the Directive, the Queen's University of Belfast (QUB) School of Law Organised Crime Project welcomed the legislative amendments implementing extra-territorial jurisdiction however suggested that other amendments could be made to amend other relevant legislation to strengthen law and reduce demand. One suggestion was to increase sentences for offences contained in other relevant legislation relating to sexual and labour exploitation. QUB provided examples of existing legislation which could be

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<sup>6</sup> Department of Justice briefing paper to the Justice Committee, 12 June 2012.

<sup>7</sup> <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/June-2012/Criminal-Justice-Bill--DOJ-Briefing/>

strengthened. QUB pointed to the penalties in section 15 of the Police and Crime Act 2009 which deal with the paying of sexual services of a prostitute subject to force and questioned whether a fine not exceeding level 3 on the Standard Scale (£1000) serves as a strong deterrence and recommended an increase in the fine. It was suggested this should also apply to the offence of soliciting under the Sexual Offences (Northern Ireland) Order 2008 if a client purchases sexual services of a trafficked victim. QUB also recommended in cases where clients purchase sexual services with the full knowledge that providers are trafficked victims, the level of punishment should be increased, possibly with the imposition of a custodial sentence. QUB also suggested Sex Offender Registration could be considered for repeat offenders. The Northern Ireland Evangelical Alliance also suggested that those found guilty of using trafficked people for forced sex should face prison and be put on the sex offenders register.<sup>8</sup>

QUB also suggest that the penalty for acting as a gangmaster without a proper licence in the UK, including NI is 10 years imprisonment and that this could be further increased. The Organised Crime Project highlighted that the penalty on summary conviction for the same offence in NI attracts a maximum of six months imprisonment where it is 12 months in England and Wales. QUB suggest there is no justification for this anomaly between the two jurisdictions and that the Department should seek to make further amendments.<sup>9</sup>

The Northern Ireland Evangelical Alliance (NIEA) recommends there should be mandatory prison sentences for trafficking offences, stating that the principle of prison for convicted traffickers provides a consistent and firm policy framework for dealing with the supply and demand of the trafficking trade.<sup>10</sup> Urban Angels also called for increased penalties which they believe are not currently harsh enough to act as deterrents. They cited a recent case in which a perpetrator was sentenced to an 18 month jail term, which they suggested, is not commensurate with the crime.<sup>11</sup>

CARE suggested that the aggravating factors listed in Article 4 (2) of the Directive should be specified in legislation governing NI in order to comply with the Directive.<sup>12</sup> Lord Morrow has included aggravating factors amongst his suite of proposals to be included in a Private Member's Bill which is intended to improve assistance and

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<sup>8</sup> Northern Ireland Evangelical Alliance Briefing Note attached to Consultation Response to Amendments UK Legislation to comply with EU Directive 2011/36/EU.

<sup>9</sup> Information obtained from Submission by the QUB School of Law Organised Crime Project to the Department of Justice Consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004

<sup>10</sup> Information obtained from Submission made by the Northern Ireland Evangelical Alliance to the Department of Justice Consultation on Amendments to UK legislation to comply with the EU Directive 2011/36/EU

<sup>11</sup> Information obtained from submission made by Urban Angels to the Department of Justice Consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004, 2 May 2012.

<sup>12</sup> Information obtained from a submission made by CARE in Northern Ireland to the Department of Justice consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004 proposed amendments to comply with EU Directive 2011/36/EU, 31 May 2012

support to victims, addresses demand and investigations and prosecutions. Lord Morrow proposes that Clause 2 of the Draft Bill would include a list of aggravating factors reflecting those contained within Article 4 of the Directive ie: that the crime was committed by a public official when they were doing their duties; the victim was a child or vulnerable adult; the criminal was part of an organisation; the life of the person was endangered and there was use of serious violence or serious harm.<sup>13</sup>

The issue of sentencing and penalties differs across the EU member States. In some EU Member States, some of the penalties for trafficking are similar to those for other serious crimes. In Estonia, the Criminal Code does not include trafficking for human beings in the Penal Code; however, other articles in the Code are used to prosecute the crime. The penalties for trafficking range from five to 15 years imprisonment, which according to the EU Tracker, are aligned to penalties for other serious crimes such as sexual assault.<sup>14</sup> Similarly, in Romania, penalties for human trafficking are commensurate with penalties prescribed for serious crimes such as rape, with penalties ranging from three to fifteen years imprisonment.<sup>15</sup>

Some EU Member States stipulate minimum sentences in legislation. For example in Germany, the Criminal Code stipulates a penalty of imprisonment ranging between six months and 10 years.<sup>16</sup>

In Hungary, §175/A of the Criminal Code, provides that a person who sold, purchased, passed for consideration, took over or changed somebody for another person and also who recruited, transferred, accommodated, hid somebody for that purpose or acquired somebody for somebody else was punishable by a maximum penalty of 3 years of imprisonment. The Code further stipulates longer penalties if the offence was committed against certain victims or for certain purposes or by certain methods. For example if the victim was under 18 years or the purpose of the trafficking was labour or prohibited use of human body, the act was punishable by an imprisonment of 1 to 5 years. The Code provides further penalties for terms of imprisonment between 2 and 8 years where the victim was in the care, supervision or medical treatment of the perpetrator. Certain cases were punished by 5 to 10 years of imprisonment and, there are higher penalties of 5 to 20 years imprisonment or life imprisonment for certain offences for example where a victim is younger than 12 years or where there is a use of threats or force. An attempt at committing human trafficking was punishable by 2 years of imprisonment.<sup>17</sup>

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<sup>13</sup> Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012, pg 9. Available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>, see also Clause 2 Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, available at <http://www.niassembly.gov.uk/Documents/Legislation/Bills/Private-Members-Bills/Session-2011-12/human-trafficking-bill/Human-Trafficking-and-Exploitation-Draft-Bill.pdf>

<sup>14</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Estonia#A4>

<sup>15</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Romania>

<sup>16</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=Germany>

<sup>17</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=Hungary>

In Italy, penalties in human trafficking cases range from eight years to 20 years imprisonment.<sup>18</sup> In Portugal, the Penal Code imposes sanctions ranging from 3 to 10 years imprisonment.<sup>19</sup> In Slovakia, the penalty for trafficking in human beings under the Criminal Code is four to 10 years and can attract penalties for other types of trafficking of prison terms ranging between seven and 12 years, for a term between 12 and 20 years and for a term between 20 and 25 years and a term of life.<sup>20</sup> In Sweden, the main legislative provisions on human trafficking can be found in the Criminal Code which prohibits all kinds of trafficking and provides penalties of imprisonment ranging between two and ten years.<sup>21</sup>

In some of the EU Member States, a life sentence is possible. In Ireland, the Child Trafficking and Pornography Act 1998 provides that a person guilty of organising or knowingly facilitating trafficking of a child for the purposes of sexual exploitation shall be liable on conviction on indictment to imprisonment for life.<sup>22</sup> The Criminal Law (Human Trafficking) Act 2008 which prohibits trafficking provides that a person guilty of an offences specified in the legislation is liable for a term of up to life imprisonment, and at the discretion of the court, to a fine.<sup>23</sup>

It would appear that several countries provide for aggravating factors in legislation. The Belgian System does not make a distinction between trafficking in human beings and trafficking in children, however if the victim is a child, this constitutes an aggravated circumstance and results in an increased penalty. The penalty amounts to a jail sentence from one to five years and a fine from 500 to 50,000 Euros.<sup>24</sup> In the Czech Republic, the Criminal Code includes increased penalties for a perpetrator who acts as a member of an organised group. The Criminal Code also provides that child trafficking for the purposes of removal or organs or sexual exploitation is punishable by a penalty of between two and ten years. The penalty also applies in cases of trafficking in other persons where there has been use of violence and abuse of dependence.<sup>25</sup> The French Penal Code provides for penalties of seven years imprisonment and a fine of 150,000 Euros however, increased penalties are possible pursuant to article 225-4-1. This provides that if human trafficking is committed against a minor or a person who is particularly vulnerable, then it is punishable by 10 years imprisonment and by a fine of 1,500,000.<sup>26</sup>

In the German Criminal Code, penalties for human trafficking range from six months to 10 years imprisonment (Article 232 (StGB)). However, in the case where the victim is a child or has been severely abused or endangered with death or the trafficking has been committed as part of organised crime the minimum sentence is raised to one year

<sup>18</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Italy>

<sup>19</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Portugal>

<sup>20</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Slovakia>

<sup>21</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Sweden>

<sup>22</sup> <http://www.irishstatutebook.ie/1998/en/act/pub/0022/sec0003.html#sec3>

<sup>23</sup> <http://www.irishstatutebook.ie/2008/en/act/pub/0008/sec0002.html#sec2>

<sup>24</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=Belgium>

<sup>25</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=Czech Republic>

<sup>26</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=France>

imprisonment.<sup>27</sup> The Hungarian Criminal Code provides longer penalties if the offence was committed against certain victims or for certain purposes or by certain methods. For example if the victim was under 18 years or the purpose of the trafficking was labour or prohibited use of the human body, the act was punishable by an imprisonment of 1 to 5 years. The Code provides for terms of imprisonment between 2 and 8 years where the victim was in the care, supervision or medical treatment of the perpetrator. Certain cases are punished by 5 to 10 years of imprisonment and, there are higher penalties of 5 to 20 years imprisonment or life imprisonment for certain offences for example where a victim is younger than 12 years or where there is a use of threats or force.<sup>28</sup> In Italy, penalties range from eight to 20 years imprisonment. For the offences of sexual exploitation or slavery, the penalties are increased by one third if the victim is under 18 years of age (Article 600 of the Penal Code).<sup>29</sup> In Lithuania, the criminal code sets out aggravating circumstances which include: two or more victims, offences committed by participating in an organised group or by seeking to acquire the victim's organ, tissue or cells (Article 147 and 157).<sup>30</sup> In Portugal, the law provides for penalties of three to ten years imprisonment which are aligned with other serious crimes, however the penalty is increased to a maximum of 12 years imprisonment if the crime is conducted as a professional act with intention to profit.<sup>31</sup>

The UK Government position on the implementation of Article 4 of the Directive on penalties is that no further implementation is required. The Government indicated that the current maximum penalty for a trafficking offence is 14 years and the Directive requires a maximum of 10 years. Therefore, there would be no legislative change or additional cost other than those related to extra-territorial jurisdiction beyond those related to extra-territorial jurisdiction.<sup>32</sup> The maximum penalties relating to the offences set out in the Criminal Justice Bill in Northern Ireland are also 14 years which would therefore arguably also go beyond what is required by the Directive.

### 3.2 Non Criminalisation/Non-Prosecution of Victims

Article 8 of the EU Directive makes provision for the non-prosecution or non - application of penalties to victims of human trafficking for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to acts set out in Article 2.

In response to the Department of Justice's legislative proposals, QUB Organised Crime Project raised the issue about the non-criminalisation of victims of trafficking and

<sup>27</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=Germany>

<sup>28</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=Hungary>

<sup>29</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Italy>

<sup>30</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action;jsessionid=K5GmQ18X2TpPK1NTy0dwjrH92KpwC342TyJR6hx7RyhyTTT2JpF6!1158633405?country=Lithuania>

<sup>31</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Portugal>

<sup>32</sup> [http://europeanmemorandum.cabinetoffice.gov.uk/memo\\_details.aspx?memoid=4174](http://europeanmemorandum.cabinetoffice.gov.uk/memo_details.aspx?memoid=4174)

emphasised strongly the importance that victims who are forced to commit criminal activities should not be prosecuted or punished. QUB Organised Crime Project suggested that the inclusion of a provision on non-criminalisation of trafficked victims can strengthen the protection of victims and would be more in line with Article 8 of the Directive. It was also highlighted that a number of other jurisdictions such as Austria, Finland, Malaysia, South Africa, Spain and the United States have statutory provisions and Northern Ireland and the United Kingdom should follow suit.<sup>33</sup> CARE suggests that the Directive does not require this to be enshrined in primary legislation, however provision must be made to ensure that there are robust guidelines in place concerning the non-prosecution of victims.<sup>34</sup>

Lord Morrow proposes to include clauses in his Private Member's Bill on protecting the victim from prosecution (Clause 5(3) of the draft Bill. This proposal would ensure that no prosecution or penalty would happen in certain circumstances as recommended in Article 8 of the Directive. This would include if the victim had been forced to commit a crime as a direct consequence of:<sup>35</sup>

- Threats, the use of force or other forms of coercion;
- Abduction;
- Fraud;
- Deception;
- Abuse of power or position of vulnerability;
- Giving/ receiving of payments or benefits to someone with control over the trafficked person to get their consent.

In Latvia, plans have been submitted to the Government for approval on amending criminal law and criminal procedural law in order to implement the EU Directive, These plans appear to include the non-punishment of victims of trafficking.<sup>36</sup> In Poland, indications are that attention will be given to Article 8 and a group of experts will be responsible for deciding if existing prosecutors' guidelines are sufficient to ensure the best interests of the victim or whether there will need to be amendments to the Penal Code.<sup>37</sup> In Bulgaria, consideration is being given to criminal law decrees related to human trafficking, also including an option of providing those relating to the protection of victims of trafficking, in the new Penal Code about dropping of the prosecution

<sup>33</sup> Information obtained from Submission by the QUB School of Law Organised Crime Project to the Department of Justice Consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004

<sup>34</sup> Information obtained from a submission made by CARE in Northern Ireland to the Department of Justice consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004 proposed amendments to comply with EU Directive 2011/36/EU, 31 May 2012

<sup>35</sup> Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012, pg 14. Available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>, see also Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, available at <http://www.niassembly.gov.uk/Documents/Legislation/Bills/Private-Members-Bills/Session-2011-12/human-trafficking-bill/Human-Trafficking-and-Exploitation-Draft-Bill.pdf>

<sup>36</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Latvia#A4>

<sup>37</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Poland>

against victims of human trafficking in art. 279, par. 5 of the Penal Code (illegal crossing of the border), where the offence was committed under duress, during the commission of the crime "human trafficking".<sup>38</sup>

The UK Government position on the implementation of Article 8 of the Directive is that the law, policy and operational guidance for law enforcement and prosecutors permit non-prosecution of victims who have been compelled or coerced to commit criminal offences as a result of their trafficked situation. Therefore, no operational changes are needed.<sup>39</sup>

### 3.3 Treatment of Victims in Criminal Proceedings

A number of articles in the EU Directive relate to the treatment of victims in criminal proceedings. Article 9 of the Directive requires Member States to ensure the investigation and prosecution of offences set out in the directive and that such measures should not be dependent on the reporting by the victim. Furthermore, this article of the Directive requires Member States to ensure that investigation and prosecutions continue in cases where the victim has withdrawn their statement.

Article 11 of the Directive requires Member State to take 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. Assistance and support measures shall be provided on an informed and consensual basis and shall include standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, translation and interpretation services where appropriate. Article 12 requires Member States to ensure the protection of victims of trafficking in criminal proceedings including ensuring legal counselling and representation (including for the purpose of claiming compensation). Legal counselling and representation shall be free of charge where the victim does not have sufficient financial resources.

Article 15 requires Member States to ensure the protection of child victims in criminal proceedings. Article 15 (1) requires Member States to appoint a representative for a child trafficking victim where holders of parental responsibility are precluded from representing the child due to a conflict of interest. Article 15 (2) requires Member States to ensure that child victims have access without delay to free legal counselling and legal representation including for the purpose of claiming compensation, unless they have sufficient financial resources. Article 15(3) deals with interviews with child victims. Article 15 (4) allows interviews to be video-recorded and to allow such

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<sup>38</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Bulgaria#A4>

<sup>39</sup> [http://europeanmemorandum.cabinetoffice.gov.uk/memo\\_details.aspx?memoID=4174](http://europeanmemorandum.cabinetoffice.gov.uk/memo_details.aspx?memoID=4174)

interviews to be used in criminal proceedings. Article 15 (5) provides for special measures including the hearing may take place without the presence of the public and that the child can be heard in the courtroom without being present through the use of appropriate technology.

Article 16 requires Member States to take necessary measures to ensure that the specific actions to assist and support child victims, take account of the personal and special circumstances of child victims. Article 17 requires Member States to ensure that victims of human trafficking have access to existing schemes of compensation to victims of violent crimes of intent.

In response to the Department of Justice's legislative proposals, South Tyrone Empowerment Programme (STEP) suggested that consideration be given to Article 12 (4) of the Directive to ensure that victims of trafficking are automatically eligible for special measures during court proceedings. They also suggest consideration be given to Article 15 in relation to the protection of child victims of trafficking in human beings in criminal investigations and proceedings and recommended the need for Young Witness Preparation and Support Services to be enshrined in legislation.<sup>40</sup> Clause 12 of Lord Morrow's Bill proposes to extend special measures for human trafficking victims acting as witnesses. Lord Morrow notes that there is already provision of special measures for victims for trafficking for sexual exploitation and his Bill proposes to extend these to other types of exploitation.<sup>41</sup>

In the Netherlands, special procedural rules apply in the case of minors including optional close door interrogations and avoiding direct contact between the victim and suspect.<sup>42</sup> In Poland, amendments have been made to the Criminal Code aimed at improving the rights of victims, particularly interviews with victims.<sup>43</sup>

Two respondents highlighted, in relation to the treatment of victims in criminal proceedings, that the Directive states that proceedings should be able to continue if the victim withdraws their statement; however the respondents noted that in the UK criminal proceedings are heavily dependent on the testimony of the victim and the level of trauma experienced or fear can make them poor witnesses, leading to low levels of convictions. The respondents suggested that victims should expect to be protected if they act as a witness but there is no current provision for this.<sup>44</sup>

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<sup>40</sup> Submission by STEP to the Department of Justice's Consultation on Amendments to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants' etc) Act 2004, 25 May 2012,

<sup>41</sup> Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012, pg 17-18. Available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>, see also Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

<sup>42</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Netherlands>

<sup>43</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Poland>

<sup>44</sup> Information obtained from submission made by a respondent to the Department of Justice Consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004. 30 May 2012

It should be noted that in Portugal the crime is not dependent on the reporting or accusation by the victim – this is described as a measure showing Portugal is in the frontline concerning the Directive.<sup>45</sup>

CARE highlighted the issue of access to legal advice and how it is unclear whether current support is offering this to an adequate level. CARE points to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which includes provisions ensuring victims of labour trafficking have proper access to free counselling. CARE recommended that legislation enshrines adequate protection for victims of trafficking during the investigation and prosecution of an offence, including amendments to existing legislation to ensure special measures for trafficking victims acting as witnesses.<sup>46</sup>

In relation to the issue of legal aid and legal counselling, the framework in Portugal provides for legal counselling. In Ireland, Part 2 of the Civil Law (Miscellaneous Provisions) Act 2011 amends section 26 of the Civil Legal Aid Act 1995. The provisions specify that the Legal Aid Board shall grant legal advice to a person who is an alleged victim of human trafficking offence in relation to:

- Any matter in connection with the commission of the human trafficking offence (whether or not a prosecution for that offence has been instituted)
- any matter connected with the commission of any other offence of which the person is alleged to be a victim, being an offence (whether or not a human trafficking offence) that is alleged to have been committed in the course of, or otherwise in connection with, the commission of the human trafficking offence, or
- without prejudice to the generality of paragraph (a) or (b), the prosecution of the human trafficking offence or of the other offence referred to in paragraph (b).”

Under this legislation, human trafficking means an offence which is an offence under certain section of the Criminal Law (Human Trafficking) Act 2008 and section 3 of the Child Trafficking and Pornography Act 1998. The legislation came into force in August 2011.

CARE also highlighted the difficulty victims of trafficking in England and Wales have had in accessing compensation and there should be clarity in the Northern Ireland legislation about exactly what rights victims have to the different compensation schemes available such as criminal injuries compensation, employment tribunal, etc.<sup>47</sup>

A number of EU Member states provide for compensation to victims or are in the process of making amendments to legislation to provide for compensation. In Lithuania, the national laws allow a victim to claim compensation if they are held to be a victim of

<sup>45</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Portugal>

<sup>46</sup> Information obtained from a submission made by CARE in Northern Ireland to the Department of Justice consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004 proposed amendments to comply with EU Directive 2011/36/EU, 31 May 2012

<sup>47</sup> Ibid,

trafficking.<sup>48</sup> In Luxembourg, legislation makes provision for compensation for victims.<sup>49</sup> In Poland, it appears that, in implementing the EU Directive on human trafficking, special focus will be given to compensation for victims of trafficking to ensure access to existing compensation schemes as victims of crime of violent intent.<sup>50</sup> The framework in Portugal provides for compensation to victims, appearing to be as victims of violent crimes.<sup>51</sup> In Slovakia, the issue of compensation to victims was included in the National Programme for Combating Human Trafficking 2008-2010.<sup>52</sup>

Lord Morrow's proposals on his Private Member's Bill relate to a number of areas on the treatment of victims in criminal proceedings. It is proposed that clauses 8-12 of the Bill would deal with supporting and assisting the victim into recovery. Lord Morrow proposes that the Department must ensure as soon as there are reasonable grounds to believe that an individual is a victim and there has not been a conclusive determination that the victim is not such a victim, they must be provided with and continue to be provided with assistance and support until three months after criminal proceedings have been completed.<sup>53</sup> Clauses 8 and 9 would cover Articles 11-16 of the EU Directive and deal with General and Legal Support, including:<sup>54</sup>

- Appropriate and safe accommodation;
- Material assistance;
- Medical treatment;
- Counselling;
- Information including on reflection and recovery period, the possibility of granting international protection and refugee status;
- Translation and interpretation services;
- Access to education for child victims and children of victims;
- legal counselling either through legal aid or other means, legal representation and assistance in applying for compensation.

Lord Morrow proposes in clause 9 of his Bill that civil legal aid would be available to trafficking victims in three circumstances which reflect changes in the law on England and Wales:

- for an application for leave to enter or remain in the UK;
- a claim under employment law; and
- a claim for damages.

<sup>48</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Lithuania>

<sup>49</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Luxembourg>

<sup>50</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Poland>

<sup>51</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Portugal#A2>

<sup>52</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Slovakia>

<sup>53</sup> Clause 8(1) of the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

<sup>54</sup> Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012, pg 17-18. Available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>, see also Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

Lord Morrow also proposes that clause 10 of his Bill would require the Department of Justice to set out how a trafficking victim could apply for compensation for instance through compensation orders, an application to the Compensation Agency, civil litigation or before an employment tribunal. The UK Government stated its position on the implementation of the Directive articles in relation to victims in criminal proceedings in its Explanatory Memorandum on the Directive.<sup>55</sup> In relation to Article 11, the UK Government indicates that it would not add requirements beyond what is already provided but could extend the length of time they are required to provide it. The Government's new prime contracting funding model for support for victims of trafficking would enable the prime contractor to assess support needs on a case by case basis. In implementing Article 12, the UK Government suggested that most trafficking victims will be witnesses who are covered by existing arrangements. Victims already receive protection from police, social workers and from volunteers. Support would be provided on an individual needs based on a comprehensive assessment. It was suggested that although the UK was compliant in practice, legislation may need minor amendment. Further detail was not provided on this point. The Government stated that it was made clear during negotiations that they did not think it was appropriate for a victim to have legal representation in a system where they are not party to proceedings. In relation to Article 15, the Government highlighted that the provision of a supporter (representative) for child witnesses is good practice but not enshrined in legislation and legislative change would be required for parts 1-3. However, there would be no operational change because this is covered by practice guidance. Finally, in relation to Article 17, the UK Government indicated that trafficking victims already have access to schemes on compensation.<sup>56</sup>

### 3.4 Definition of Trafficking

Article 2 of the Directive requires Member States to take measures to ensure the following acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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

In relation to the lack of an adequate definition which is required under Article 2 (1) of the Directive, one respondent suggests that this is reflected in the discrepancies in

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<sup>55</sup> [http://europeanmemorandum.cabinetoffice.gov.uk/memo\\_details.aspx?memoID=4174](http://europeanmemorandum.cabinetoffice.gov.uk/memo_details.aspx?memoID=4174)

<sup>56</sup> [http://europeanmemorandum.cabinetoffice.gov.uk/memo\\_details.aspx?memoID=4174](http://europeanmemorandum.cabinetoffice.gov.uk/memo_details.aspx?memoID=4174)

terms used in the wider counter-trafficking movement which needs to be addressed.<sup>57</sup> CARE also argue that the requirements of Article 2 (1) and 2 (3) mean that the Asylum and Immigration Act 2004 should be amended so that trafficking definitions should specifically include forced begging and the exploitation of criminal activities.<sup>58</sup>

Lord Morrow proposes to expand the definition of exploitation in the Asylum and Immigration (Treatment of Claimants etc) Act 2004 in clause 3 of his draft Bill to meet the requirements of the Directive. His proposed definition would include:<sup>59</sup>

- force and threats to cover coercion, abduction and fraud and for offences abuse of power to include an abuse of trust relationship;
- defining services that a person might be forced to provide to include forced begging and criminal activities; and
- Defining exploitation to include a third person being given or receiving payments or benefits to achieve the consent of the victim of trafficking.

In other countries, there are discussions about including some of these activities in the definition of trafficking; in some countries, they are already covered. In the Netherlands the provisions in the Criminal Code that specifies that human trafficking is an offence is in line with the internationally agreed description. However, the Directive contains several additional elements including a widening of the definition of exploitation to include forced begging and criminal activities.<sup>60</sup> It would appear that this element of the definition may not be included in existing legislation and a Bill has been introduced including provisions on the definition of trafficking in human beings and extraterritorial jurisdiction.<sup>61</sup> In the Austrian Criminal law provisions, labour exploitation covers forced labour or services. In practice, forced begging is seen as a form of labour exploitation. However, Austria would also like to include the offence "forced begging" in the revised criminal law provisions. Article 2(3) of the Directive specifies that "exploitation" should include "begging".<sup>62</sup>

In France, the Penal Code covers exploitation for begging. According to art. 225-4-1 of the French Penal Code, human trafficking is the recruitment, transport, transfer, accommodation, or reception of a person in exchange for remuneration or any other benefit or for the promise of remuneration or any other benefit, in order to put him at the disposal of a third party, whether identified or not, so as to permit the commission against that person of offences of procuring, sexual assault or attack, exploitation for

<sup>57</sup> Information obtained from a submission ,made by a Respondent, to the Department of Justice Consultation on legislative amendments

<sup>58</sup> Information obtained from a submission made by CARE in Northern Ireland to the Department of Justice consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004 proposed amendments to comply with EU Directive 2011/36/EU, 31 May 2012

<sup>59</sup> Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012,pg 10-11. Available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>, see also Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

<sup>60</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Netherlands>

<sup>61</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Netherlands#A4>

<sup>62</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Austria#A4>

begging, or the imposition of living or working conditions inconsistent with human dignity, or to force this person to commit any felony or misdemeanour.<sup>63</sup> In Romania, activity harmful to minors is punished as a crime and this includes forced begging or exploitation for begging.<sup>64</sup>

The UK Government has indicated that the UK is largely compliant with this aspect of the Directive as there are already trafficking offences in legislation. The UK Government acknowledged that it did not have a trafficking offence which applies to all forms of exploitation of criminal activities but does not propose to widen the existing legislation as the CPS is able to prosecute where activities have led to a person receiving benefits or services.<sup>65</sup>

### 3.5 A Guardian for Child Victims

Article 14 of the Directive requires Member States to appoint a Guardian or a representative for child victims of trafficking where the holders of parental responsibility are, due to conflict of interest between them and the child victim, precluded from ensuring the child's best interest and from representing the child.

It was suggested in a response to the Department's proposals, that a Guardian for child victims is needed and that current arrangements are inadequate as a high proportion of rescued child victims in the UK are found to be re-trafficked.<sup>66</sup> CARE argued that a system of advocates/guardians for trafficked children would ensure at very little cost that the expertise is available to support these vulnerable children through the care system.<sup>67</sup> Lord Morrow proposes to include legal advocates for children - generally referred to in international instruments as a 'guardian' - in clause 11 of his Private Member's Bill.<sup>68</sup> The legal advocate would have the following responsibilities:

- advocate that all decisions are taken in the child's best interests;
- advocate for the child to receive appropriate care, accommodation, medical treatment, including psychological assistance, education, translation and interpretation services;
- advocate for the child's access to legal and other representation where necessary;
- consult with, advise and keep the child informed of legal rights;

<sup>63</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=France>

<sup>64</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Romania>

<sup>65</sup> <http://europeanmemorandum.cabinetoffice.gov.uk/files/Miscellaneous%20EMs%2010/PE%20CONS%2069-10.pdf>

<sup>66</sup> Information obtained from a submission ,made by a Respondent, to the Department of Justice Consultation on legislative amendments

<sup>67</sup> Information obtained from a submission made by CARE in Northern Ireland to the Department of Justice consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004 proposed amendments to comply with EU Directive 2011/36/EU, 31 May 2012

<sup>68</sup> Proposed Changes in the Law to Tackle Human Trafficking: Consultation Paper, August 2012, pg 19. Available at <http://www.mydup.com/articles.asp?ArticleNewsID=471>, see also Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

- contribute to identification of a plan to safeguard and promote the long term welfare of the child based on an individual assessment of that child's best interests;
- Keep the child informed of all relevant immigration, criminal or compensation proceedings;
- Provide a link between the child and various organisations who may provide services to the child;
- Assist in establishing contact with the child's family, where the child wishes and it is in the child's best interests;
- Attend all police interviews with the child;
- Accompany the child when the child moves to new accommodation.

A number of EU Member States provide for 'Guardians' in their systems. If a child who is a victim of trafficking is in Finland without a guardian or other legal representative, the child will always be appointed a representative immediately. The representative exercises a guardian's right to be heard in matters pertaining to the child's person and assets, decides on the child's living arrangements and manages the child's assets.<sup>69</sup> In Portugal, it has been suggested that the country is on the frontline in implementing the measures in the Directive as the system provides for special measures for children such as a guardian or representative.<sup>70</sup> The Slovakian system has specific legislation on Social and Legal Protection of Children and on Social Guardianship.<sup>71</sup>

The UK Government has outlined the measures it takes in complying with Article 14. A trafficked child is likely to be a child in need under the Children Act 1989. Under this legislation, an unaccompanied child identified as trafficked will be assessed by the local authority they are referred to as in need of support. Where the child becomes looked after, local authorities must allocate the child a social worker to assess their needs and draw up a care plan. An Independent Reviewing officer must also be appointed with responsibility for chairing reviews of their care plans and ensuring the child understands the plan of their care. A child is also entitled to an advocate who will have a duty to represent the child on any aspect of their care. No measures for further implementation of Article 14 have been suggested by the UK Government.<sup>72</sup>

### 3.6 A National Rapporteur

Article 19 requires states to provide for a National Rapporteur or equivalent mechanism. The tasks set out in the Directive of this mechanism include: carrying out the assessments of trends of trafficking in human beings; measuring the results of anti-trafficking actions, including the gathering of statistics in close co-operation with relevant civil society organisations active in this field and reporting.

<sup>69</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Finland>

<sup>70</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Portugal>

<sup>71</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Slovakia>

<sup>72</sup> <http://europeanmemorandum.cabinetoffice.gov.uk/files/Miscellaneous%20EMs%2010/PE%20CONS%2069-10.pdf>

In relation to the issue of a National Rapporteur, one respondent to the Department of Justice consultation on legislative amendments suggested that the current arrangement, an inter-departmental ministerial group, is inadequate primarily because it is not independent of government, has not the resources to conduct serious research and does not regularly report. In contrast, the respondent points to the Netherlands which has created an independent office and is successful in the quality of information provided to government.<sup>73</sup> Amnesty International suggested that a Commissioner which is a role with a precedent in Northern Ireland could fulfil the functions of a Rapporteur.<sup>74</sup>

Some countries such as Austria, France, Italy and Ireland have not yet appointed a National Rapporteur.<sup>75</sup> France however is aware of the importance of such a mechanism and planning is underway by an inter-ministerial group. In Ireland, the implementation of the provision concerning the appointment of a National Rapporteur or equivalent mechanism is under consideration.<sup>76</sup>

Other countries have an equivalent mechanism. In Poland, the inter-ministerial Committee for Combating and Preventing Trafficking in Human Beings acts as an equivalent mechanism.<sup>77</sup> In Spain, the delegate of the Minister of Health, Social Services and Equality, Blanca Hernández Oliver, exercises the role of a National Rapporteur or equivalent mechanism.<sup>78</sup>

In the Netherlands, a National Rapporteur was appointed in 2000 and one of the main functions is to analyse trends in the field of human trafficking and to examine Dutch efforts to address the issues. The National Rapporteur is exercised by an independent agency (a National Rapporteur with a team of six people). The National Rapporteur provides the government with an annual report. A report with recommendations is also submitted every other year to the Government and is made publicly available. The Government responds to the recommendations of the National Rapporteur to Parliament.<sup>79</sup>

In the United Kingdom, there is an equivalent mechanism in place in the form of the UKHTC as the central repository for data and the Inter-Ministerial Group for oversight.<sup>80</sup> The UK Government stated it hopes to implement this article of the Directive without recourse to legislation but this would require more work to confirm. The reason given

<sup>73</sup> Information obtained from submission made by respondents to the Department of Justice Consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004. 30 May 2012, similar issues highlighted submission made by CARE in Northern Ireland to the Department of Justice consultation on Amendment to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004 proposed amendments to comply with EU Directive 2011/36/EU, 31 May 2012

<sup>74</sup> Amnesty International Response to Department of Justice Consultation on Amendments to the Sexual Offences Act 2003 and the Asylum and Immigration Act 2004, May 2012.

<sup>75</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Austria>,

<sup>76</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Ireland#A4>

<sup>77</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Poland>

<sup>78</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Spain>

<sup>79</sup> <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Netherlands#A2>

<sup>80</sup> <http://europeanmemorandum.cabinetoffice.gov.uk/files/Miscellaneous%20EMs%2010/PE%20CONS%2069-10.pdf>

is that this Article is outside the usual provision of a Directive which usually confers rights on individuals.<sup>81</sup>

The Justice Minister highlighted in the second stage debate of the Criminal Justice Bill that he was aware of the concerns around the current arrangements but that the Home Office are determined that the inter-ministerial group is appropriate to carry the national rapporteur arrangements.<sup>82</sup>

### 3.7 Making it an offence to Pay for Sexual Services

The issue of paying for sexual services is not dealt with in the EU Directive nor in the Department for Justice's clauses in the Criminal Justice Bill. However, one response to the Department's proposals for legislative amendments noted that as Minister for Justice in the Republic of Ireland is preparing to review legislation in the area, there is considerable pressure for the introduction of measures to criminalise the purchase of sexual services. It was suggested that there is a need to maintain dialogue on human trafficking on an all island basis.<sup>83</sup> QUB Organised Crime Project indicated in its response to the Department's legislative proposals that it is neutral to the legal status of voluntary prostitution itself in Northern Ireland and the United Kingdom.<sup>84</sup>

Lord Morrow has included proposals for clauses in his Private Member's Bill to make paying for sexual services illegal in Northern Ireland (Clause 4 of his Bill). Lord Morrow notes that under the Sexual Offences (Northern Ireland) Order it is illegal to buy sex from someone in Northern Ireland if they are coerced. However according to Lord Morrow, this presents real challenges as it requires proof of coercion which is difficult to obtain. Lord Morrow draws attention to the Swedish model which makes the purchase of sex an offence.<sup>85</sup>

A study for the European Parliament in 2005 indicated that EU states had different policies on prostitution: some prohibited it entirely, some permitted it but prohibited brothels or profiting from someone else's prostitution, while others regulated prostitution.<sup>86</sup>

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<sup>81</sup> <http://europeanmemorandum.cabinetoffice.gov.uk/files/Miscellaneous%20EMs%2010/PE%20CONS%2069-10.pdf>

<sup>82</sup> Official Report of the Northern Ireland Assembly, Second Stage Debate of the Criminal Justice Bill, 3 July 2012

<sup>83</sup> Consultation on legislative amendment and Department of Justice engagement in relation to Human Trafficking: Response from the Northern Ireland Catholic Council on Social Affairs, June 2012,

<sup>84</sup> QUB School of Law Organised Crime Project Submission to the Amendment to The Sexual Offences Act 2003 and the Asylum and Immigration Act 2004, May 2012, see footnote 12 of submission.

<sup>85</sup> Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012, available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>, see also Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

<sup>86</sup> Study on National Legislation on Prostitution and the Trafficking of women and Children, A Report by Transcrime for the European Parliament, available at <http://ec.europa.eu/anti-trafficking/entity.action?id=0f8bafc9-bfc0-441b-b33e-dbe7996da145>.

Sweden has enacted legislation to prohibit the offering of sexual services in order to reduce demand for sexual services and prevent trafficking for sexual exploitation and includes penalties of a fine or six months term of imprisonment (Chapter 6, ss 9 and 11 of the Criminal Code).<sup>87</sup> In France on 6 December 2011, the National Assembly adopted a resolution reaffirming the abolitionist position of France with regards to prostitution and directly referring to Directive 2011/36. According to this resolution, the National Assembly considers the fight against human trafficking as a priority, the prostituted persons being in their large majority victims of sexual exploitation.<sup>88</sup> According to a study for the European Parliament in 2005, a country falls under the Abolitionism model if outdoor and indoor prostitution are not prohibited. The State decides to tolerate prostitution. Prostitution by adults is not subject to punishment, but profiting from another person's prostitution is criminalised. The New Abolitionism Model develops this further – indoor and outdoor prostitution are not prohibited however with reference to indoor prostitution, the State intervenes to prohibit the existence of brothels.<sup>89</sup>

A Private Member's Bill has been proposed in Scotland by Rhoda Grant MSP to criminalise the purchase of sex in Scotland.<sup>90</sup> It is intended that the proposal would make the purchase of sex illegal in Scotland with the aim of reducing demand for prostitution. In addition to strengthening the existing legislative framework against purchasers, Scotland would become an unattractive market for prostitution and other associated criminal activities such as trafficking for sexual exploitation.<sup>91</sup>

In the Netherlands, the Government introduced a new Act in 2010 on legalised prostitution which requires every sex business in be licensed and every prostitute to be registered.<sup>92</sup>

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<sup>87</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Sweden>

<sup>88</sup> <http://www.lexisnexis.com/EUTRACKER/greymatter.aspx?celex=32011L0036&country=France>

<sup>89</sup> Study on National Legislation on Prostitution and the Trafficking of women and Children, A Report by Transcrime for the European Parliament, available at <http://ec.europa.eu/anti-trafficking/entity.action?id=0f8bafc9-bfc0-441b-b33e-dbe7996da145>, p 15.

<sup>90</sup> This proposal was lodged on 23 May 2012, see <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/51148.aspx>

<sup>91</sup> See Rhoda Grant, MSP, Statement of Reasons why consultation is unnecessary, 23 May 2012, available at [http://www.scottish.parliament.uk/S4\\_MembersBills/20120523\\_SofReasons\\_Criminalisation\\_of\\_Purchase\\_of\\_Sex.pdf](http://www.scottish.parliament.uk/S4_MembersBills/20120523_SofReasons_Criminalisation_of_Purchase_of_Sex.pdf)

<sup>92</sup> <http://www.lexisnexis.com/eutracker/greymatter.aspx?celex=32011L0036&country=Netherlands>