COUNTY LINES AND CHILD CRIMINAL EXPLOITATION: A CRITICAL EXAMINATION OF S 45(4) OF THE MODERN SLAVERY ACT 2015

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Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

I declare that the Word Count of this Thesis is 40,386

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Abstract: A plethora of academic commentary followed the enactment of s 45 of the Modern Slavery Act 2015 (MSA 2015). The existing analysis mainly focuses on the statutory defence as applicable to adults. Whilst reform options have been advanced for s 45(1), there has been limited consideration in respect of the statutory defence under s 45(4) as it applies to children whose offending is driven by their involvement in county lines.

This thesis will propose that s 45(4) is not fit for purpose. It will be argued that s 45(4) provision fails to afford child victims of county lines (as well as other forms of exploitation) a robust defence and is insufficiently nuanced to adapt to future developments in trafficking offences. This submission has originated from a critical examination of the interpretation and application of s 45(4) and trafficking legislation that has emerged in other jurisdictions. The overriding objective of this thesis is to contribute to the existing literature in this area by providing a critical review of s 45(4) and advancing original legislative and policy recommendations designed to address the gaps in legal protection for child victims of exploitation, strengthen recognition of the links between children's victimisation and criminalisation, and deter inappropriate prosecutions. Each chapter makes its own contribution for supporting the legislative and prosecutorial recommendations advanced.

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Thesis Introduction

The central aim of this thesis is to examine s 45 of the Modern Slavery Act 2015 which introduced a statutory defence for child victims of trafficking who commit criminal offences as a direct consequence of their exploitation and/or slavery in the context of 'county lines' offending. County lines drug dealing is an "increasingly prevalent",[1] and rapidly evolving, drug supply model which sees drug dealers travel from urban hubs to provincial locations to retail heroin, crack cocaine and other narcotics. The emergence of this market trend in the United Kingdom has been associated with "novel and evolving distribution practices",[2] yet arguably most problematic is its reliance on forms of exploitative labour undertaken by children and young people. As county lines centre upon the movement and exploitation of vulnerable people, the concern which this thesis intends to address is how despite increasing awareness and understanding of the fact that those involved in 'county lines' may be victims, children continue to be convicted of crimes as a result of their exploitation. This is the result of a variety of factors, including the very low age of criminal responsibility in England and Wales (E&W), the restrictive ambit in which common law duress and s 45 currently operates, and the general lack of awareness about the existence of the statutory defence among participants in the criminal justice system.[3]

Section 45 of the MSA 2015 introduced separate defences for victims of human trafficking over and under the age of 18 who are compelled to commit offences because of such exploitation. The defence is not retrospectively applicable and is subject to a long and somewhat arbitrary list of excluded offences contained in Schedule 4[4] which were deemed by the Government to be so serious that they should be excluded from the ambit of the new defences. For adults, the section operates where the person performs the criminal act

[1] *R. v Karemera (Michael)* [2018] EWCA Crim 1432; [2019] 1 W.L.R. 4761, 4763 (Hallet L.J)

[2] L. Moyle, 'Situating Vulnerability and Exploitation in Street-Level Drug Markets: Cuckooing, Commuting, and the "County Lines" Drug Supply Model' (2019) 49(4) *Journal of Drug Issues* 739, 740.

[3] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) para. 5.1.2. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 1 March 2022). See, generally, See, generally, HM Government, *UK Government Response to the Independent Review of the Modern Slavery Act 2015* (TSO, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815410/Government_Response_to_Independent_Review_of_MS_Act.pdf (accessed 1 March 2022).

[4] MSA 2015, s. 45(7).

because they were compelled to do so; the compulsion is attributable to slavery or relevant exploitation; and a reasonable person in the same situation as the person and sharing the person's relevant characteristics[5] would have no realistic alternative to doing the act.[6] Section 45(4) makes similar provision for persons under the age of 18, though the defence differs from the adult variation of the defence in that as it does not contain the element of compulsion, nor is there a need for the child to explore "realistic alternatives" to committing the offence.[7] This is because it is recognised that children under 18 can be particularly vulnerable to being influenced into committing criminal offences,[8] and since the element of compulsion is irrelevant to the assessment of whether a child has been trafficked, it would be "simply wrong to put such an onus on a victim who has been turned into a potential defendant by the situation".[9]

Section 45 only places an evidential burden upon the child. Therefore, in order to avail themselves of the defence, the child will only have to adduce sufficient evidence so as to allow the defence to be considered by the jury.[10] Thus, s 45 makes it relatively easy for a child to raise a defence which the prosecution has to disprove beyond a reasonable doubt.[11] Where the child puts age in issue, it is for the prosecution to prove beyond reasonable doubt that the child is over 18.[12]

At the time of writing, there has been extensive commentary on the s 45 defence as it applies to adults[13] where much of the discussion has centred upon the specific offences and defences

[5] "Relevant characteristics" include age, sex, and any physical or mental illness or disability (s. 45(5)).

[6] MSA 2015, s 45(1)(a)-(d)). For further commentary on the statutory defence as it applies to adults, see K. Laird, 'Evaluating the Relationship Between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?' [2016] Crim. L.R. 395.

[7] MSA 2015, s 45(1)

[8] As highlighted by Bird and Southwell, "a child should not have to prove compulsion to achieve protection because they are in a position of particular vulnerability and cannot consent to the exploitation': S Bird and P Southwell, "Does the New "Slavery" Defence Offer Victims of Trafficking any Greater Protection?' (2015) 9 Archbold Review 7, 8.

[9] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 2021, Jan, 145, 147; PBC Deb, 11 September 2014 (Modern Slavery Bill), col.379

[10] CPS, *Modern Slavery, Human Trafficking and Smuggling* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 17 February 2022)

[11] See *R v MK; R v. Gega* [2018] EWCA Crim 667.

[12] CPS, *Modern Slavery, Human Trafficking and Smuggling* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 17 February 2022)

[13] See generally, Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395-404; N. Wake, 'Human Trafficking and modern day slavery: when victims kill' (2017) 9 Crim. L.R. 658-667; S.M. Edwards, 'Coercion and compulsion - re-imagining crimes and defences' (2016) 12 Crim. L.R. 876.

which may arise because of their trafficking/slavery. Although there has been some substantive work devoted to reforming s 45 and the approaches to be adopted when the statutory defence does not apply,[14] there has been limited consideration in respect of the statutory defence as it applies to children[15] whose offending is driven by their involvement in county lines offending. Invaluable work has been advanced which has discussed the theoretical underpinnings of the s 45 defence generally and there has been some useful analysis of the disparate general defences that may arise when trafficked victims commit criminal offences as a result of their exploitation which are pertinent to the discussions raised in this thesis.[16] To the knowledge of the author there has been no comprehensive study to date which has focused its attention on the particular challenges that arise in the context of children's involvement in county lines, and critically examines the rationale for and the interpretation of s 45(4) of the MSA 2015, whilst offering an alternative legislative model and prosecutorial framework.

The key aim of this thesis is to address and answer the following questions: (i) In the absence of a general defence which recognises children's developmental immaturity, does s 45 of the MSA 2015 provide child victims who criminal commit offences as a result of their involvement in county lines with a robust defence? (ii) In light of the advantages found in both approaches, should E&W adopt a new integrated approach which involves an overlap of the s 45 defence and the Scottish Lord Advocate Instructions? (iii) Is it appropriate for an amended s 45 defence to apply to all children in explicit recognition of their innate and situational vulnerability?

This thesis will propose that s 45(4) is not fit for purpose. It will be argued that this provision fails to afford child victims of county lines (as well as other forms of child criminal exploitation) a robust defence and is insufficiently nuanced to adapt to future developments in trafficking-related offences. This view has originated from a critical examination of the interpretation and application of s 45(4) and trafficking legislation that has emerged in other jurisdictions. The overriding objective of this thesis is to contribute to the existing literature by providing a critical review of s 45(4); advance legislative and policy recommendations to address the gaps in legal protection for child victims of exploitation; and strengthen recognition of the links between children's victimisation and criminalisation. To address this issue, three recommendations are

[14] N. Wake, 'Human Trafficking and modern day slavery: when victims kill' (2017) 9 Crim. L.R. 658-667.

[15] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145-162.

[16] See, generally, K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395-404; N. Wake, 'Human Trafficking and modern day slavery: when victims kill' (2017) 9 Crim.L.R. 658-667; N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145-162.

advanced. The first proposes four potential legislative amendments to s 45(4). First, that the list of excluded offences contained within Schedule 4 needs to be revised to take account of the vast array of offences that are frequently committed in the context of county lines offending. Secondly, that s 45 explicitly sets out that once the defence is raised, it is for the prosecution to disprove one or more of the elements of the defence beyond a reasonable doubt. Thirdly, that the term "direct consequence" ought to be amended to reflect a causal requirement akin to that in diminished responsibility; and fourthly, that the reasonable person requirement adopts a more subjectivised approach. It will be contended that the legislative amendments advanced in this thesis provides "a more nuanced and humanising defence".[17] The second recommendation will support the proposal that a new integrated approach which involves a potential overlap of the s 45(4) defence and the Crown Office & Procurator Fiscal Service (COPFS) Lord Advocate instructions[18] could be adopted in E&W. It will be argued that adopting a hybrid model of the proposed s 45(4) amendments and revised Crown Prosecution Service (CPS) guidelines similar to the Lord Advocate's instructions offers a more "child-friendly" approach[19] and could remedy some of the problems that have been exposed since the enactment of the MSA 2015 by being amenable to future developments in trafficking offences committed by children as a result of their exploitation. The third recommendation will propose that the restrictive approach to the law of duress expounded by the House of Lords in *Hasan*[20] should be reappraised in light of the UK's ratification of the United Nations Convention on the Rights of the Child (UNCRC) to enable children to plead the defence in circumstances when they have a reasonable excuse for their involvement in county lines offending. In pursuit of this aim, the theoretical underpinnings and parameters of each defence shall be considered challenged with reference to the underlying rules and governing principles.

Research Questions

[17] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395, 404.

[18] COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015). Available at: http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf (accessed 17 February 2022)

[19] See Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice* (2010) Available at: https://rm.coe.int/16804b2cf3 (accessed 1 March 2022)

[20] [2005] UKHL 22; [2005] 2 A.C. 467.

The key aim of this thesis is to address and answer the following questions: (i) In the absence of a general defence which recognises children's developmental immaturity, does s 45 of the MSA 2015 provide child victims who criminal commit offences as a result of their involvement in county lines with a robust defence? (ii) In light of the advantages found in both approaches, should E&W adopt a new integrated approach which involves an overlap of the s 45 defence and the Scottish Lord Advocate Instructions? (iii) Is it appropriate for an amended s 45 defence to apply to all children in explicit recognition of their innate and situational vulnerability?

Thesis Structure

To address these key research questions, this thesis will be split into four chapters. Chapter One will examine county lines drug dealing which is an "increasingly prevalent",[21] and rapidly evolving, drug supply model which sees drug dealers travel from urban hubs to provincial locations to retail heroin, crack cocaine and other narcotics. This emergence of this market trend in the United Kingdom has been associated with "novel and evolving distribution practices",[22] yet arguably most problematic is its reliance on forms of exploitative labour undertaken by children and young people. As county lines centre upon the movement and exploitation of vulnerable people, this chapter will be split into three parts. The chapter will begin with an overview of the UK's anti-trafficking framework, which includes *inter alia* the MSA 2015. Drawing on the existing data and literature, the chapter will then critically examine children and young people's involvement in county lines, outlining how they are utilised by traffickers and organised gangs to enable this supply model. This will explore the harms associated with outreach street-level supply, outline the risk factors associated with participation and critically explore the policy responses designed to protect young people and children from county lines. As noted, s 45 of the MSA 2015 introduced a defence for child victims of trafficking and modern slavery who commit offences consequent on slavery and/or exploitation. Notwithstanding the statutory defence's explicit recognition of the innate and situational vulnerability of children and young people, the county lines model presents multidimensional complexities where young people, who are not deemed to be victims of slavery or trafficking, engage in offending behaviour. This issue can be attributed to various factors including, authorities not consistently considering from the outset of an investigation whether the suspect could be a victim of trafficking and whether the s 45 statutory defence may apply, and the very low minimum age of criminal responsibility in E&W. These issues are

[21] *R. v Karemera (Michael)* [2018] EWCA Crim 1432; [2019] 1 W.L.R. 4761, 4763 (Hallett L.J) italicise case names

[22] L. Moyle, Situating Vulnerability and Exploitation in Street-Level Drug Markets: Cuckooing, Commuting, and the "County Lines" Drug Supply Model' (2019) 49(4) *Journal of Drug Issues* 739, 740.

further complicated by the victim discourse which explicitly focuses on the language of 'innocence' and 'innocent' victims.[23] A stereotypical 'ideal victim'[24] narrative has been created which offers a very narrow definition of a 'trafficking victim' and a limited perception of the complexities of children and young people's involvement in county lines and other forms of forced criminality as a result of their exploitation. To counterbalance the dominant criminal justice approach to victims of trafficking, this chapter will argue that the victim discourse needs to be reframed to reflect what Wake *et al* have described as the "innate and situational vulnerability of children"[25] who commit offences as a result of their exploitation. At the time of writing, there has been a dearth of literature on this matter in the context of county lines offending. It is therefore submitted that this chapter will advance the wider literature in this area and inform the legislative and prosecutorial guidance recommendations advanced in Chapter 4.

Notwithstanding the increased awareness and understanding of the fact that those involved in 'county lines' may be victims, Chapter Two will examine how children and young people continue to be convicted of crimes because of their trafficking and exploitation. This is a result of variety of factors, including the very low age of criminal responsibility in E&W, the restrictive ambit in which common law duress currently operates, and the lack of awareness about the existence of the s 45 defence among participants in the criminal justice system. This chapter will argue that s 45(4) of the MSA 2015, while a laudable attempt to provide a robust defence for children who commit offences because of their exploitation, largely fails to achieve its intended purpose. In an attempt to demonstrate the inadequacy of the s 45 (4) defence, this chapter will be split into two parts. The first part shall consider the application of the current legislative and policy framework in E&W by examining an original hypothetical 'county lines' case scenario. By examining a case scenario in this way, this chapter aims to expose, in more detail, some of the wider issues that are likely to arise when children are involved in county lines offending. This analysis will include the types of offences that may arise and the range of potential defences, with a particular focus on s 45(4), while unpacking and illustrating their respective limitations. After examining the case scenario, the second part of the chapter argues that s 45(4) fails to achieve its intended purpose. It will be argued that by limiting its

[23] See J. Srikantiah,'Perfect victims and real survivors: The iconic victim in domestic human trafficking Law' (2007) 87 *Boston University Law Review*, 157-211; V. Munro, 'Of rights and rhetoric: Discourses of degradation and exploitation in the context of sex trafficking' (2008) 35 (2) *Journal of Law and Society* 240-264; C. Hoyle *et al*, 'Labelling the victims of sex trafficking: Exploring the borderland between rhetoric and reality' (2011) 20 (3) *Social and legal Studies*, 313-329.

[24] N. Christie, 'The Ideal Victim' in E.A. Fattah (ed), *From Crime Policy to Victim Policy* (Palgrave MacMillan 1986) 17-30.

[25] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) Jan P.L. 145.

scope to such an extent that child victims of county lines, as well as other forms of forced criminal exploitation, will continue to be at significant risk of conviction and that it is insufficiently nuanced to adapt to future developments in trafficking offences. This outcome, it is submitted, arises because of four fundamental flaws of the section. The first relates to the long and somewhat arbitrary list of excluded offences in Schedule 4 of the Act.[26] The second relates to the absence of an express provision specifying where the burden of proof lies. The third relates to Parliament's failure to define or clarify in the statutory notes what "direct consequence" requires.[27] The fourth concerns the inclusion of a reasonable person[28] test which has been criticised for being "too high for children".[29] The chapter will explore these issues in depth which will help inform the wider legislative and prosecutorial guideline recommendations advanced in Chapter 4.

In approaching law reform with respect to trafficking in persons, the Scottish government was concerned that an equivalent statutory defence akin to that available under the MSA 2015 would place an unnecessary burden on the accused. Chapter Three will examine the approach taken in respect of child victims of trafficking in Scotland, which was to advance specific instructions pertaining to prosecutorial discretion, rather than implement a defence.[30] The approach in Scotland has been cited with approval by numerous UK anti-trafficking groups and been regarded as an example of best practice.[31] This chapter will provide an analysis of the Scottish Lord Advocate guidelines by comparing the approach taken in E&W under the current CPS guidance[32] with a particular focus on county lines offending. This chapter will consider the advantages and disadvantages of the respective models which will inform the potential reform options advanced in chapter 4.

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[26] MSA 2015, s 45(7).

[27] MSA 2015, s 45(4)(b).

[28] MSA 2015, s 45(4)(c).

[29] Hansard, HL Vol.757, col.1652 (8 December 2014), Modern Slavery Bill (Baroness Kennedy of Cradley).

[30] Human Trafficking and Exploitation Act (Scotland) 2015, s. 8; COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015). Available at: http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf (accessed 21 February 2022).

[31] ATMG, '*Class Acts? Examining modern slavery legislation across the UK'* (October 2016) 67 Available at: http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg_class_acts_report_web_final.pdf (accessed 24 February 2022); GRETA, '*Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom'* (2016/21) para. 290 Available at: https://rm.coe.int/16806abcdc (accessed 27 February 2022).

[32] CPS, *Modern Slavery, Human Trafficking and Smuggling* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 17 February 2022)

Chapter Four will examine potential options for remedying the issues that have been identified with the operation of s 45(4) and the CPS guidelines in Chapters 2 & 3. The first recommendation proposes four potential legislative amendments to s 45(4). First, that the list of excluded offences contained within Schedule 4 needs to be revised in order to take account of the vast array of offences that are frequently committed in the context of county lines offending. Secondly, that s 45 explicitly sets out that once the defence is raised, it is for the prosecution to disprove one or more of the elements of the defence beyond a reasonable doubt. Thirdly, that the term "direct consequence" ought to be amended to reflect a causal requirement akin to that in diminished responsibility; and fourthly, that the reasonable person requirement adopts a more subjectivised approach. It will be contended that the legislative amendments advanced provide "a more nuanced and humanising defence".[33] The second recommendation will support the proposal advanced in Chapter 3 that a new integrated approach which involves a potential overlap of the s 45(4) defence and COPFS guidelines could be adopted in E&W. It will be argued that adopting a hybrid model of the proposed s 45(4) amendments and revised CPS guidelines similar to the Lord Advocate's instructions could remedy some of the problems that have been exposed since the enactment of the MSA 2015 by being amenable to future developments in trafficking offences committed by children as a result of their exploitation. It is submitted that this will have implications more broadly for the criminalisation of children in general as all/almost all young offenders are victims are victims of one form of exploitation or another. The third recommendation will propose that the restrictive approach to the law of duress expounded by the House of Lords in *Hasan*[34] should be reappraised in light of the UK's ratification of the United Nations Convention on the Rights of the Child (UNCRC) to enable children to plead the defence in circumstances when they have a reasonable excuse for their involvement in county lines offending. In pursuit of this aim, the theoretical underpinnings and parameters of each defence shall be considered challenged with reference to the underlying rules and governing principles.

Methodology

This thesis deploys a doctrinal 'black-letter' methodology to achieve the fundamental aims of the thesis, namely, to critically examine the rationale for and the interpretation of s 45 of the MSA 2015, whilst offering an alternative legislative model. This method was chosen because doctrinal analysis is used to systematise, rectify and clarify the area of the law on any particular

[33] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395, 404.

[34] [2005] UKHL 22; [2005] 2 A.C. 467.

topic by a distinctive mode of analysis of authoritative texts that consist of primary or secondary legal sources.[35]

In order to suggest legislative recommendations to s 45(4), my research has utilised the following primary sources: legislation and case-law from hard copy held in Northumbria Law School, and electronically via Westlaw, Lexis Nexis, Heinonline, BaiLII and online databases for other common law jurisdictions; and, secondary material drawn from library collections, inter-library loans, and the identified databases.[36] I will also refer to a number of submissions to Committee, Governmental and Law Commission consultations, and Hansard/Parliamentary debates that were not included in final reports. The original analysis of these responses provides a valuable insight into key stakeholder concerns, providing alternative views to the ones supported by the Commission and governmental bodies.

This inductive, qualitative methodology engages in 'ascertaining the precise state of the law on a particular point', and explores the 'implications of the state of the current law',[37] providing a 'more useful understanding of the present law and its operation'.[38] The doctrinal analysis is significant to illustrate how the law applies in combating human trafficking in E&W and Scotland which are rooted in similar cultural traditions and operating in similar socio-economic conditions.[39] Further, a doctrinal approach will provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment.[40]

Case Analysis

By following the doctrinal 'black-letter' methodology, there will be an emphasis on case analysis throughout this thesis. This approach was chosen because of the gradual emergence of case law since the implementation of the MSA 2015 which indicates that the law in this area

[35] Esin Örücü, 'Methodology of comparative law' in J. M. Smits, *Elgar Encyclopaedia of Comparative Law* (2nd Edn, Edward Elgar Publishing 2014) 449. See, also M. McConville and W. H. Chui (eds), *Research Methods for Law* (2nd Edn, Edinburgh University Press 2017) 4; D. Watkins and M. Burton (eds), *Research Methods in Law* (Routledge 2013) 9.

[36] For example, <http://www.parliament.uk>, <https://www.gov.uk>, http://www.scotlawcom.gov.uk>, http://lawcommission.justice.gov.uk.

[37] Glanville Williams, *Learning the Law* (Sweet and Maxwell 2002) 206-7.

[38] See D. Ezzy, Qualitative Analysis: Practice and Innovation (Allen and Unwin 2002) 5; H. E. Yntema, 'Comparative legal research: some remarks on "looking out of the cave"' (1956) 54 Mich L Rev 899, 901. See, also, the positivist legal theory advanced by H.L.A. Hart, *The Concept of Law* (Oxford University Press 2012) 185-212.

[39] W. Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 International and Comparative Law Quarterly 485, 511. See, also, Esin Örücü, 'Methodology of comparative law' in J. M. Smits, *Elgar Encyclopaedia of Comparative Law* (2nd Edn, Edward Elgar Publishing 2014) 447.

[40] I. Dobinson and F. John, Legal Research as Qualitative Research' in M. McConville and W. H. Chui (eds), *Research Methods for Law* (2nd Edn, Edinburgh University Press 2017) 22.

is in need of reform. Analysis of case law shows how the defence to child victims of trafficking has been interpreted and applied correctly, and whether the intended aims of the legislature have been met.

I will also rely on case commentaries. Commentaries published shortly after cases are decided are valuable in providing an important analysis of the law and related context; their currency means they can often be relied upon before articles are published, but they are limited in detail compared to articles because they are designed to provide an update.

Comparative Legal Research

In seeking to identify the correct balance, this thesis draws on the experiences of Scotland, which in turn has informed my suggested reformulation of s 45(4). Thus, this work adopts a doctrinal approach but one which is informed by comparative analysis which offers a theoretical and practical framework containing a range of comparative techniques.[41] The comparative element which supplements the doctrinal approach in this work will be most effective in addressing the research questions and identify potential models for reform.

By adopting a systematic approach by considering relevant political, cultural, socio-legal factors,[42] an in depth analysis of individual responses to consultations published through Parliamentary and Law Commission websites will be undertaken.[43] Furthermore, a comparative approach provides 'suggestions for future development',[44] 'warnings of possible difficulties',[45] and critical exposition of the national system.[46] Despite the difficulties attendant to policy transfer, the experience of other jurisdictions allows for advancement of reform

[41] K. Zwiegert and K. Hotz, An Introduction to Comparative Law (3rd Edn, Oxford University Press 2011). For further discussion, see, A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974) 6-7; W. Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 International and Comparative Law Quarterly 485, 486; C. J. Morrow, 'Comparative Law in Action' (1951) 3 L. Legal Ed. 403; M. Rheinstien, 'Comparative Law – Its Functions, Methods and Uses' (1968) 22(3) Ark L Review 415-425; P. De Cruz, *Comparative Law in a Changing World* (2nd Edn, Cavendish Publishing 1999) 213.

[42] C. Morris and C. Murphy, *Getting a PhD in Law* (Hart Publishing 2011) 35. See, also, D. Ezzy, *Qualitative Analysis: Practice and Innovation* (Routledge 2002) 5. See positive legal theory advanced by H. L. A Hart, *The Concept of Law* (3rd Edn, Oxford University Press 2012).

[43] M. Van Hoecke, *Legal Doctrine: Which Method(s) for What Kind Of Discipline* (Hart Publishing 2011).

[44] D. Tallon, 'Comparative Law: Expanding Horizons' (1969) 10 J.S.P.T.L. 265, 266.

[45] Thomas Weigend, 'Criminal Law and Criminal Procedure' in J. M. Smits, *Elgar Encyclopedia of Comparative Law* (2nd Edn, Edward Elgar Publishing 2014) 215; W. Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 International and Comparative Law Quarterly 485, 496.

[46] G. Wilson, 'Comparative Legal Scholarship' in M. McConville and W. H. Chui, *Research Methods for Law* (2nd Edn, Edinburgh University Press 2017) 163; R. Sacco, 'Legal Formats: A Dynamic Approach to Comparative Law' (1991) 39 American Journal of Comparative Law 1.

solutions based upon tried and tested methods.[47] The analysis of other jurisdictions has identified good practice when considering the various circumstances in which victims of trafficking require a robust defence to prosecution and has helped inform the proposed legislative and policy recommendations outlined in Chapter 4.

The research's predominant focus of comparative analysis is based on common-law rather than civil law systems (excepting the hybrid system in Scotland). The reason for this approach is two-fold: as the research has progressed, relevant Law Commissions have utilised these jurisdictions as comparators, providing critical observations on the law;[48] and, a common-law focus renders it possible to consider more jurisdictions. A comparison between civil and common-law requires a different approach to materials, methodologies, and organisational/procedural issues.[49] Civil law systems (including hybrid civil law systems like Scotland), rely on codes and legislation, which will require an assessment of treaties and commentaries in preference to case law.[50] Comparative analysis is not examined in one 'stand-alone' section, but is dealt with in context particularly in relation to the various models of statutory defences and non-statutory guidance adopted.

By considering divergent approaches to similar problems in Scotland, it is possible to assess the effectiveness of diverse legal frameworks in responding to victims of trafficking who commit serious offences. This would significantly assist the monitoring and augment understanding of criminal practices and greatly assist in building a clearer picture on the use of this defence in E&W while identifying avenues for future legislative reform.

It must be stated at the outset that 'common- law' for the purposes of this thesis will be taken to mean the legal tradition encompassing the legal systems of E&W and Scotland. With this in mind, the comparative analysis undertaken in this work focuses on the following jurisdictions: England and Scotland.

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[47] Kahn-Freund alluded to the Law Commissions Act 1965, s. 3(1) imposes upon the Law Commission and the Scottish Law Commission the obligation to "obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions" which is '[vital] to promote the exchange of legal ideas in the process of legislation': O. Kahn-Freund, 'On the uses and misuses of comparative law' (1974) 37 Modern Law Review 1, 2, 27. See, also, K. Zwiegert and K. Hotz, An Introduction to Comparative Law (3rd Edn, Oxford University Press 2011) 15; P. De Cruz, *Comparative Law in a Changing World* (2nd Edn, Cavendish Publishing 1999) 17.

[48] ibid. See, for example, the following Law Commission reports: *Murder, Manslaughter and Infanticide* (Law Com No 304); *Partial Defences to Murder* (Law Com No 290); *Report on Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004).

[49] J. Dainow, 'The Civil Law and the Common-law: Some Points of Comparison' (1966-7) The American Journal of Comparative Law 15 (3), 419-435.

[50] J. Dainow, 'The Civil Law and the Common-law: Some Points of Comparison' (1966-7) 15(3) *The American Journal of Comparative Law* 419, 430.

In approaching reform of the law with respect to trafficking in persons, the Scottish government was concerned that an equivalent statutory defence like that available under the MSA 2015 would place an unnecessary burden on the accused.[51] The position in Scotland, which was to advance specific instructions pertaining to prosecutorial discretion, rather than implement a defence,[52] has been cited with approval by numerous UK anti-trafficking groups and been regarded as an example of best practice. As mentioned, the analysis of the COPFS guidelines have proved invaluable in identifying a complementary to s 45 by having the advantage of being amenable to future developments in trafficking offences.

This research draws on a number of different sources and publications, which are referenced throughout. In order to provide a critical review of the s 45 defence as it applies to children and to make recommendations for improvement, this research will utilise the following primary sources: legislation and case-law from hard copy held in Northumbria Law School, and electronically via Westlaw, Lexis Nexis, Heinonline, BaiLII; and secondary material drawn from library collections, inter-library loans, and the identified databases. This work will also refer to official Government reports, parliamentary debates, and Law Commission reports across the key jurisdictions. This research also refers to a number of submissions to Committee, Governmental and Law Commission consultations, and Hansard/Parliamentary debates that were not included in final reports. The original analysis of these responses provides a valuable insight into key stakeholder concerns, providing alternative views to the ones supported by the Commission and governmental bodies. This preliminary research (outlined below) has provided a useful foundation in order to demonstrate how the law has developed in terms of judicial reasoning, while assiduously identifying the key issues which are inextricably linked to the restrictive application of the s 45 defence to propose recommendations.

[51] Human Trafficking and Exploitation Act (Scotland) 2015, s. 8; COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015). Available at: http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf (accessed 17 February 2022)

[52] ibid.

Chapter One

County Lines and Child Criminal Exploitation in the UK

I. Introduction

Prior to any detailed discussion regarding the position of children in the criminal law, it is necessary to address what county lines is and why it is particularly relevant in the case of children. County lines drug dealing is an "increasingly prevalent",[53] and rapidly evolving, drug supply model which sees drug dealers travel from urban hubs to provincial locations to retail heroin, crack cocaine and other narcotics. Emergence of this market trend in the United Kingdom has been associated with "novel and evolving distribution practices",[54] yet arguably most problematic is its reliance on forms of exploitative labour undertaken by children and young people. As county lines centre upon the movement and exploitation of vulnerable people, this chapter will be split into three parts. Drawing on the existing data and literature, the chapter will first critically examine children and young people's involvement in county lines, outlining how they are utilised by traffickers and organised gangs to enable this supply model. It will explore the harms associated with outreach street-level supply, outline the risk factors associated with participation and critically explore the policy responses designed to protect young people and children from county lines. Section 45 of the MSA 2015 introduced a defence for child victims of trafficking and modern slavery who commit offences consequent on slavery and/or exploitation. This chapter will then consider whether the 2015 Act provides a framework for ensuring that young people involved in county lines are not criminalised. Notwithstanding the statutory defence's explicit recognition of the innate and situational vulnerability of young people who have engaged in offending behaviour as a consequence of their experience of being trafficked, the county lines model presents multidimensional complexities where young people, who are not deemed to be victims of slavery or trafficking, engage in offending behaviour. This issue can be attributed to various factors including, authorities not consistently considering from the outset of an investigation whether the suspect could be a victim of trafficking and whether the s 45 statutory defence may apply, and the very low age of criminal responsibility in E&W. These issues are further complicated by the victim discourse which explicitly focuses on the language of 'innocence' and 'innocent' victims.[55] A

[53] *R. v Karemera (Michael)* [2018] EWCA Crim 1432; [2019] 1 W.L.R. 4761, 4763 (Hallet L.J)

[54] L. Moyle, Situating Vulnerability and Exploitation in Street-Level Drug Markets: Cuckooing, Commuting, and the "County Lines" Drug Supply Model (2019) 49(4) *Journal of Drug Issues* 739, 740.

[55] See J. Srikantiah,'Perfect victims and real survivors: The iconic victim in domestic human trafficking Law' (2007) 87 *Boston University Law Review*, 157-211; V. Munro, 'Of rights and rhetoric: Discourses of degradation and

stereotypical 'ideal victim'[56] narrative has been created which offers a very narrow definition of a 'trafficking victim' and a limited perception of the complexities of children and young people's involvement in county lines and other forms of forced criminality as a result of their exploitation. To counterbalance the dominant criminal justice approach to victims of trafficking, this chapter shall argue that the victim discourse needs to be reframed to reflect what Wake *et al* have described as the "innate and situational vulnerability of children"[57] who commit offences as a result of their exploitation. At the time of writing, there has been a dearth of literature on this matter in the context of county lines offending. It is submitted that this chapter will ultimately advance the literature in the area by and inform the wider legislative and prosecutorial guidance recommendations advanced in Chapter 4. The chapter will begin with an overview of the UK's anti-trafficking framework.

II. UK's anti-trafficking framework

The UK's legal response to trafficking is embedded within broader international and regional frameworks. In terms of international law, the UK is signatory to the Palermo Protocol[58] and the Council of Europe Convention on action against trafficking in human beings 2005 (the 'Trafficking Convention').[59] The UK Government also took the decision to opt-in to the 2011 EU Directive on preventing and combating trafficking in human beings and protecting its victims (the 'Trafficking Directive').[60] The Palermo Protocol[61] contains the well-established definition of 'trafficking' which both the Trafficking Convention and Directive use as a

exploitation in the context of sex trafficking' (2008) 35 (2) *Journal of Law and Society* 240-264; C. Hoyle *et al*, 'Labelling the victims of sex trafficking: Exploring the borderland between rhetoric and reality' (2011) 20(3) *Social and legal Studies* 313-329.

[56] N. Christie, 'The Ideal Victim' in E.A. Fattah (ed), *From Crime Policy to Victim Policy* (Palgrave MacMillan 1986) 17-30.

[57] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) Jan P.L. 145.

[58] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) Available at: https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx (accessed 18 February 2022)

[59] Council of Europe Convention on Action against Trafficking in Human Beings 2005, Warsaw, CETS No.197. Available at: https://rm.coe.int/168008371d (accessed 18 February 2022).

[60] 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 Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF (accessed 18 February 2022)

[61] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) art. 3 Available at: https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx (accessed 19 February 2022)

foundation. This tripartite definition focusses on the action, means and purpose of trafficking. The action translates as the "recruitment, transportation, transfer, harbouring, or receipt of persons"; the means includes "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"; and the purpose is for exploitation. That exploitation "shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".[62]

The definition of child trafficking differs from that of adults, which requires an additional element to be present – the 'means' of trafficking. Although the 'means' element is not required for the legal definition of child trafficking, it is often still a feature. The 'means' element refers to 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".[63]

The consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means set out (i.e., coercion, abduction, fraud, deception, abuse of power) have been used.[64]

The UK Government is obligated under a range of international conventions to uphold the rights of children and to take action to combat child trafficking and exploitation.[65] Children who are victims of trafficking have a right to specific assistance, support and protective measures in line with international standards.[66] To ensure the prevention of trafficking and the effective protection of child victims, the Palermo Protocol definition needs to be considered in light of other critically important international legal instruments. Foremost among these is the Convention on the Rights of the Child (CRC)[67] and its Optional Protocols. In the first place,

[62] ibid.

[63] ibid.

[64] When children are involved, it is sufficient that only the action and purpose elements are satisfied.

[65] Including: UN General Assembly. (1989). Convention on the Rights of the Child. United Nations, Treaty Series, vol. 1577, p. 3. Available at: http://www.refworld.org/docid/3ae6b38f0.html ; UN General Assembly. (2000). Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime; Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

[66] 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. Articles 13, 14, 15, 16

[67] https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

the CRC definition of a child ensures that our attention focus on all persons under 18 years. The CRC also informs the definition of child trafficking, through article 35. This provision indicates the need for States to ensure the prevention of child trafficking "for any purpose or in any form", thus widening the level of protection children are entitled to and covering such situations as the illicit inter country adoption, where fraudulent means are used to pursue a legal aim. In the UK, local authorities have a duty to provide protection and support to child victims of trafficking under the child protection framework.

While the international regime exemplified by Palermo, the Trafficking Convention and Directive utilises the concept and process of trafficking, in the UK the anti-trafficking position has been presented principally under the broader banner of 'modern slavery'.[68] This agenda was driven forward by former Prime Minister Theresa May in the form of the Modern Slavery Bill to overhaul the laws on human trafficking in an attempt to eradicate an "evil in our midst".[69] A Parliamentary Joint Select Committee was established, chaired by Frank Field MP, and held a series of public evidence-gathering sessions. One of the points of focus in the Committee's deliberations was the question whether, and to what extent, victims of trafficking should be protected from prosecution for crimes they were forced to commit while enslaved or under the control of their traffickers.[70] In June 2014 the Government introduced into Parliament the Bill that became the MSA 2015. The Act received the Royal Assent in March 2015, and its substantive provisions came into force on 31 July 2015. The MSA 2015 reformed and consolidated the previously piecemeal law on human trafficking and related offences of slavery, forced or compulsory labour and servitude contained in s. 71 of the Coroners and Justice Act 2009 and the trafficking offence in s. 59A of the Sexual Offences Act 2003, which are replaced by two new offence provisions, one dealing with slavery, servitude and forced compulsory labour[71] and the other with human trafficking.[72] In addition to providing detail on

[68] Currie notes that the UK is not the only jurisdiction within which trafficking and slavery are increasingly conflated: S. Currie, 'Compounding vulnerability and concealing unfairness: decision-making processes in the UK's anti-trafficking framework' (2019) P.L. 495. For further analysis of this in the ECHR case law, see R. Vijeyarasa and J. Villarino, "Modern Day Slavery: A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev" (2012) 8 *Journal of International Law and International Relations* 36. There are differing views on the appropriateness of the label "slavery" within trafficking discourse. See C. Hoyle, M. Bosworth and M. Dempsey, "Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality" (2011) 20 *Social and Legal Studies* 313.

[69] A. Sparrow, "Modern slavery" bill to tighten laws on human trafficking' *The Guardian* (25 August 2013) Available at: https://www.theguardian.com/law/2013/aug/25/modern-slavery-bill-human-trafficking (accessed 20 February 2022)

[70] *Joint Committee on the Draft Modern Slavery Bill* (HL166/HC 1019, 2013-14) para.1. Available at: https://publications.parliament.uk/pa/jt201314/jtselect/jtslavery/166/166.pdf (accessed 20 February 2022)

[71] MSA 2015, s 1.

[72] MSA 2015, s 2

these offences, the MSA 2015 sets out maximum sentences for those convicted (with an increased term of life imprisonment).[73] Prior to the enactment of the MSA 2015, concerns were expressed that the possibility of a criminal prosecution could deter victims of slavery and trafficking from coming forward and reporting instances of these crimes.[74] It is for this reason the Government took the unique step of inserting a specific defence that can be pleaded only by those who are victims of slavery or trafficking.[75] The s 45 statutory defence shall be considered in further detail below.

III. Trafficking and Child Criminal Exploitation in the United Kingdom: An Overview

More than 5 years has passed since the enactment of the MSA 2015, and statistics provide some insight into its effect. Recent data shows the number of possible trafficked victims referred to UK's National Referral Mechanism (NRM) has grown considerably over the years: 3,804 in 2016, 5,141 in 2017, 6,986 in 2018, and 10,627 in 2019.[76] The 52 per cent increase in referrals between 2018 and 2019 is the largest year-on-year increase since the NRM inception in 2009. In the first quarter of 2020, there was a 14 per cent decrease in the number of referrals to the NRM from the previous quarter, and the second quarter of 2020 saw the second successive quarter-on-quarter decrease (-23 per cent), which could be attributed to the effects of the COVID-19 pandemic; however, in the third and fourth quarter of 2020, the number of referrals increased, their total number reaching 10,613 for the year 2020.[77] The CPS's Modern Slavery Report 2017–18[78] noted a 31 per cent increase in the numbers of modern slavery flagged cases referred to the CPS by law enforcement for early advice and prosecution, and the number of suspects for whom there was a positive charging decision

[73] MSA 2015 ss 5 and 6.

[74] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395, 396. Check spelling of Laird throughout

[75] MSA s.45 and Sch.4. This represents an attempt to comply with the non-punishment principle in art.26 of the Trafficking Convention which is discussed in further detail in Chapter 2.

[76] In the previous reporting period, the number of referrals was, respectively, 1,182 in 2012, 1,746 in 2013, 2,328 in 2014, and 3,262 in 2015. In August 2019, a digital referral form was introduced with a view to enabling better data collection and analysis. https://www.gov.uk/government/statistics/national- referral-mechanism-statistics-uk-end-of-year-summary-2019 (accessed 18 February 2022).

[77] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970995/modern -slavery- national-referral-mechanism-statistics-end-year-summary-2020-hosb0821.pdf (accessed 18 February 2022)

[78] CPS, *Modern Slavery Report 2017-18* (2018) Available at: https://www.cps.gov.uk/sites/default/files/documents/publications/Modern_slavery_report_201718.pdf (accessed 20 February 2022)

jumped from 188 to 239, a 27.1 per cent increase, while the conviction rate went from 61.4 to 65.1 per cent.

Quantifying how many children have been trafficked in the UK continues to pose a challenge to researchers and policymakers alike, due to the "complex" and "hidden nature" of abuse which exists across a "spectrum of exploitation".[79] The Government's 2011 estimate suggested that there was between 10,000 and 13,000 potential victims (of which 3,000 were children)[80] of trafficking and modern slavery nationally.[81] This figure, however, is long out of date and has been surpassed by the latest NRM statistics, which show the number of potential victims identified.[82] Other estimates have put the total number of UK trafficked victims at roughly 136,000.[83] Gallagher noted, however, that the methodology used to arrive at these figures must be critically evaluated given the immense complexity of qualitatively assessing this issue and the lack of reliable data.[84]

The latest NRM figures for 2020/21 provide an overview of potential victims identified by First Responders in the UK,[85] including children. In the last year, 10,685 individuals were referred in the NRM. Of those, 4,646 were children, accounting for 43.5 per cent of all referrals. Whilst this remains steady from the previous year at 4,700 or 42.7 per cent of referrals, the number of children identified rose substantially from 3,338 in 2018/19 and 2,418 in 2017/18.[86] NRM data is not recorded by age at time of exploitation but are categorised as adult, child or not specified/unknown.

[79] EPCAT UK, *Child trafficking in the UK 2021: A snapshot* (2021) Available at: https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=23b51868-f257-49bc-b779-a5059bd65a04 (accessed 20 February 2022)

[80] The phrase 'potential victims' is used in relation to National Referral Mechanism statistics as it designates that an individual has been identified and referred as a potential victim of modern slavery but does not indicate the outcome of a decision which may or may not confirm their victim status.

[81] ECPAT UK, *Child trafficking in the UK 2020: A snapshot* (2020) p. 7. Available at: https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=b92ea99a-6dd8-480c-9660-e6c0f0764acf (accessed 20 February 2022)

[82] Home Office, *National Referral Mechanism statistics* (2020) Available at: https://www.gov.uk/government/collections/nationalreferral-mechanism-statistics (accessed 20 February 2022)

[83] Walk Free Foundation, *Global Slavery Index* (2019) Available at: https://www.globalslaveryindex.org/2018/data/country-data/ united-kingdom/ (accessed 17 February 2022)

[84] A. Gallagher What's Wrong with the Global Slavery Index? (2017) 8 *Anti-Trafficking Review* 90—112.

[85] HM Government, *Guidance: Report modern slavery as a first responder* (2019) https://www.gov.uk/guidance/report-modern-slavery-as-a-first-responder (accessed 20 February 2022)

[86] ibid.

In 2019, there were 4,550 children referred into the NRM, the system for identifying victims of trafficking and modern slavery.[87] Over the past few years, children have comprised roughly half of all referrals into this system, partly because unlike adults, they do not need to consent to being referred. In 2019, referrals for children were up by 31 per cent on 2018. The numbers of children have increased significantly in the last few years, which likely reflects increased identification of victims rather than an increase in the trafficking of children. Of the children referred into the NRM in 2020/21, the most recorded country of origin was the UK at 2,817 children or 60.6 per cent of all child NRM referrals. This was followed by Vietnam (209), Sudan (142), Albania (118), Romania (116), Eritrea (98), Afghanistan (88), Iran (48), Iraq (47) and Nigeria (46). The vast majority of children referred into the NRM in 2020/21 were criminally exploited, accounting for 3,110 in total[88] or 66.9 per cent. Other exploitation types recorded are sexual exploitation (418), labour exploitation (362), domestic servitude (49) and organ harvesting (2). 510 children are recorded alongside an exploitation type 'not specified or unknown'.[89] The total number of referrals flagged for children as "county lines cases" in 2020/21 was 1,492. This presents a steady increase, from 383 in 2017/18, 796 in 2018/19 and 953 in 2019/20. In terms of NRM decision making, 4,588 children received a reasonable grounds decision in 2020/21, with 4,357 of those being a positive decision (95 per cent). 1,509 children received a conclusive grounds decision, with 1,448 of those being positive (96 percent).[90] It is suggested that the significant increase in child referrals may be due to continuities in perpetrator behaviour, adapted to maintain profitability during the lockdown, including the egregious criminal exploitation of children.[91] In their most recent report on the UK, GRETA noted that following the entry into force of the MSA 2015, the number of identified and assisted victims of modern slavery and human trafficking has continued to increase, and

[87] Home Office, *National Referral Mechanism statistics* (2020) Available at: https://www.gov.uk/government/collections/nationalreferral-mechanism-statistics (accessed 20 February 2022)

[88] This figure includes criminal exploitation as the primary exploitation type (at 2,482) and where criminal exploitation exists alongside other exploitation types (at 628 across different categories). Data provided by the Home Office (data cut 5 August 2021)

[89] EPCAT UK, *Child trafficking in the UK 2021: A snapshot* (2021) Available at: https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=23b51868-f257-49bc-b779-a5059bd65a04 (accessed 20 February 2022)

[90] ibid.

[91] ECPAT UK, *Child trafficking in the UK 2020: A snapshot* (2020) p. 7. Available at: https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=b92ea99a-6dd8-480c-9660-e6c0f0764acf; See also, Editorial, 'County lines: Teenage drug dealers posed as key workers during lockdown' (BBC 30 September 2020. Available at: https://www.bbc.co.uk/news/uk-england-london-54356383 (accessed 17 February 2022).

there is a growing sensitivity to detecting cases of new forms of exploitation and forced criminality, in particular the 'county lines' phenomenon.[92]

IV. The emergence of 'county lines' in the United Kingdom

County lines are an "emerging phenomena"[93] and consequently has only recently begun to receive research attention. The relatively small number of academic studies and published reports by state bodies, notably the annual National Crime Agency (NCA) intelligence reports, provide a useful source of information. Drawing on these available data sources, this section will begin by providing an overview of children and young people's involvement in county lines offending, outlining how they are utilised by criminal gangs to enable this supply model. The chapter will then explore the harms associated with this model of offending, consider the various risks associated with participation before examining the legislative and policy measures that exist to protect children and young people from victimisation.

County lines drug dealing has been described as an "increasingly prevalent",[94] and rapidly evolving, drug supply model which sees urban drug dealers cross police borders to exploit provincial drug markets.[95] The Serious Violence Strategy[96] sets out the UK Government definition of 'county lines', which is increasingly used to describe this type of exploitation where children are involved:

> County lines is a term used to describe gangs and organised criminal networks involved in exporting illegal drugs into one or more importing areas within the UK, using dedicated mobile phone lines or other form of "deal line". They are likely to exploit children and vulnerable adults to move and store the drugs and money and they will often use coercion, intimidation, violence (including sexual violence) and weapons.

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[92] GRETA, *Evaluation Report—United Kingdom: Access to justice and effective remedies for victims of trafficking in human beings (third evaluation round)—Part One* para. 6. Available at: https://rm.coe.int/greta-third-evalution-report-on-the-united-kingdom/1680a43b36 (accessed 17 February 2022).

[93] J. Windle, L. Moyle. R. Coomber, 'Vulnerable' Kids Going Country: Children and Young People's Involvement in County Lines Drug Dealing (2020) 20(1) *Youth Justice* 64-78.

[94] *R. v Karemera (Michael)* [2019] 1 W.L.R. 4761, 4763 (Hallett L.J).

[95] J. Windle, L. Moyle. R. Coomber, 'Vulnerable' Kids Going Country: Children and Young People's Involvement in County Lines Drug Dealing (2020) 20(1) *Youth Justice* 64-78

[96] *Serious Violence Strategy 2018* (2018) p.48 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698009/serious-violence-strategy.pdf (accessed 17 February 2022).

A common feature of 'county lines' is the exploitation of children and young people. The Strategy[97] also provides a definition of 'child criminal exploitation' as:

> **"**…where an individual or group takes advantage of an imbalance of power to coerce, control, manipulate or deceive a child or young person under the age of 18 into any criminal activity: (i) in exchange for something the victim needs or wants; (ii) for the financial or other advantage of the perpetrator or facilitator; and/or (iii) through violence or the threat of violence.

The Strategy notes that the victim may have been criminally exploited even if the activity appears consensual, and that child criminal exploitation can be facilitated through psychical and non-physical means (i.e., through the use of technology).[98]

Stone highlights that county lines offending "encompasses the initiatives of suppliers based in larger cities, usually operating as part of an organised crime collective, gang or network, to expand their trade into smaller provincial/coastal locations, to increase profitability and in hope of avoiding or reducing police attention in their own area".[99] He adds,

> "… they aim to establish fresh demand or, more commonly, seek to take control of the local market in the targeted area, by securing temporary premises in the new area… [by latching] onto a local dealer who is ill-placed to resist them and take over his network, and/or onto a local user, using his or her address as a base for their operations (a practice that has become known as 'cuckooing')".[100]

In achieving their ends, ambitious city-based dealers resort to "various manipulative means involving pressure, influence or reward, but underpinned by intimidation, threat or actual violence".[101] Pitt notes that criminal gangs will "forge links with local criminal business organisations and recruit local children as 'runners' who can market the drugs in their schools,

[97] ibid.

[98] ibid.

[99] N. Stone, 'Child Criminal Exploitation: 'County Lines', Trafficking and Cuckooing' (2018) 18(3) *Youth Justice* 285, 286.

[100] ibid.

[101] ibid.

colleges and neighbourhoods".[102] According to Andell and Pitts,[103] this proliferation of dealing networks has been facilitated in part by the concentration of gang-involved young people from different regions in the same prisons and Young Offender Institutions, and by schemes designed to relocate gang members at risk of death or serious injury at the hands of rival gangs, or their own, a long way from the source of the threat.

The NCA undertakes an assessment of county lines which provides a picture of the scale and scope of the threat. The assessments do not include the number of gangs, but they do include an estimate of the number of active 'deal lines' operating in E&W. The anonymous deal lines may be operated by individuals or groups. In 2017, the NCA conservatively estimated there were at least 720 lines across E&W;[104] however, given the scale and the evolving nature of the county lines business model,[105] it is difficult to determine accurately given its fluid nature, unclear intelligence, and inconsistent recording practices.[106]

Over the last decade, the county lines model has significantly evolved and has given criminal gangs far greater market reach.[107] Although the reasons for the formation of county lines is unclear, it has been suggested that this may have been caused by a myriad of factors, including the saturation of local drug markets;[108] the competition with other local gangs has

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[102] J. Pitts, *County Lines* (HM Inspectorate of Probation Academic Insights 2021) p.6 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577105/youth-justice-review-final-report-print.pdf (accessed 18 February 2022). See also, P. Andell, P & J. Pitts, 'The End of the Line: The Impact of County Lines Drug Distribution on Youth Crime in a Target Destination' (2018) Youth & Policy Available at: https://www.youthandpolicy.org/articles/the-end-of-the-line/ (accessed 18 February 2022); J. Jaensch & N. South, 'Drug Gang Activity and Policing Responses in an English Seaside Town: 'County Lines', 'Cuckooing' and Community Impacts' (2018) 69(4) *Journal of Criminal Investigation and Criminology* 269-278.

[103] P. Andell, P & J. Pitts, 'The End of the Line: The Impact of County Lines Drug Distribution on Youth Crime in a Target Destination' (2018) *Youth & Policy*. Available at: https://www.youthandpolicy.org/articles/the-end-of-the-line/ (accessed 18 February 2022);

[104] National Crime Agency (NCA), *County Lines Violence, Exploitation & Drug Supply* (2017) para. 3.2. Available at: https://www.nationalcrimeagency.gov.uk/who-we-are/publications/234-county-lines-violen-ce-exploitation-drug-supply-2017/file (accessed 18 February 2022).

[105] The National County Lines Coordination Centre's (NCLCC), *County Lines Strategic Assessment 2020/21* provides detail about the evolving nature of the county lines business model. Available at: https://cdn.prgloo.com/media/a814c42e66be436298757f5099bd3fd6.pdf (accessed 18 February 2022).

[106] National Crime Agency (NCA), *County Lines Violence, Exploitation & Drug Supply* (2017) para. 3.9 Available at: https://www.nationalcrimeagency.gov.uk/who-we-are/publications/234-county-lines-violen-ce-exploitation-drug-supply-2017/file (accessed 18 February 2022).

[107] J. Pitts, *County Lines* (HM Inspectorate of Probation Academic Insights 2021) p.6 Available at: https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2021/01/Academic-Insights-county-lines-.pdf (accessed 18 February 2022)

[108] G. Robinson, R. McLean, J. Densley, 'Working county lines: Child Criminal Exploitation and illicit drug dealing in Glasgow and Merseyside' (2019) 63(5) I*nternational Journal of Offender Therapy and Comparative Criminology* 694–711; J. Windle & D. Briggs, "It's like working away for two weeks": The harms associated with young drug dealers commuting from a saturated London drug market' (2015) 17(2) *Crime Prevention and Community Safety* 105.

become “too brisk and too dangerous”;[109] the dealers have become too well known to the local police; and because the gangs anticipate that they will meet with less resistance from the police and local dealers in new locations.[110] Although young people and vulnerable groups have long populated street-level supply roles in the drug market,[111] a distinctive aspect of the county lines model relates to the “systematic targeting and harnessing of vulnerable populations”[112] to transport drugs across regional borders and undertake the supply operation at street level in these host towns as drug ‘runners’ transporting substances across county borders and undertaking high risk street-level sales to end-users.[113] It has been suggested that one of the many reasons children and young people may be exploited because they represent a cheap, easily recruited workforce who can absorb the risks related to street-level sales and are considered disposable to dealers,[114] whose goal is commonly viewed by law enforcement as profit maximisation.[115] Moreover, recent research shows that criminal exploitation affects children of all backgrounds but particularly those with exacerbated vulnerabilities due to poverty, family breakdown, looked after status, frequent missing episodes and regular exclusions from school.[116] Data from the NCA reported that children are more likely targeted by traffickers as they provide the level of criminal capability[117] required by

[109] J. Pitts, ‘Critical Realism and Gang Violence’ in R. Matthews (ed.), *What is to be Done About Crime and Punishment: Towards a Public Criminology* (Palgrave/Macmillan 2016) 57-88.

[110] Drugwise, *Highways and Buyways: A Snapshot of UK Drug Scenes 2016* (2016) Available at: https://www.drugwise.org.uk/wp-content/uploads/Highwaysandbyways.pdf

[111] R. Lupton, A. Wilson, T. May, H. Warburton and P.J. Turnbull, *A Rock and a Hard Place: Drug Markets in Deprived Neighbourhoods* (Home Office 2002)

[112] J. Windle, L. Moyle. R. Coomber, ‘Vulnerable’ Kids Going Country: Children and Young People’s Involvement in County Lines Drug Dealing (2020) 20(1) Youth Justice 64-78; see also, L. Moyle, ‘Situating vulnerability and exploitation in street-level drug markets: Cuckooing, commuting, and the ‘county lines’ drug supply model’ (2019) 49 *Journal of Drug Issues* 739.

[113] J. Windle & D. Briggs, “It’s like working away for two weeks”: The harms associated with young drug dealers commuting from a saturated London drug market’ (2015) 17(2) *Crime Prevention and Community Safety* 105; J. Spicer, “That’s their brand, their business”: How police officers are interpreting county lines’ (2018) 29(8) *Policing and Society* 873.

[114] R. Coomber & L. Moyle, ‘The changing shape of street-level heroin and crack supply in England: commuting, holidaying and cuckooing drug dealers across “county lines” (2018) 58 *British Journal of Criminology* 1323, 1338.

[115] J. Spicer, “That’s their brand, their business”: How police officers are interpreting county lines’ (2018) 29(8) *Policing and Society* 873, 877.

[116] National Crime Agency, *County Lines Drug Supply, Vulnerability and Harm 2018* (January 2019) para. 18 <https://nationalcrimeagency.gov.uk/who-we-are/publications/257-county-lines-drug-supply-vulnerability-and-harm-2018/file> accessed 20 January 2020.

[117] In this regard ‘criminal capability’ refers to awareness, knowledge and physical capability required to effectively fulfil a criminal role within the offending model.

the offending model but are) easier to control, exploit and reward than adults.[118] Analysis of the data also highlights that children as young as 7- 11 years-old are targeted, with the majority of potential victim referrals aged between 15 – 17 years-old,[119] having been involved in various forms of forced labour and criminal exploitation including, but not limited to, county lines offending and child sexual exploitation.[120] A recent report from Just for Kids Law states that children who are outside of mainstream education are more vulnerable to becoming victims of child criminal exploitation.[121] The report also states that children who have experienced exploitation will be more vulnerable to exclusion and may be disproportionately impacted by exclusion.[122] Sturrock and Holmes note that these children are often known to Children's Services and Youth Offending Teams but because their absences from home and school are usually fairly brief, they may not be reported to Safeguarding professionals or the Police.[123] Youth Offending Team (YOT) staff report that whereas initially the runners were shipped in from the cities for a few days at a time and were usually known to children's services and the YOTs where they lived, increasingly they are local children with no previous links to welfare or criminal justice agencies.[124] This, according to Stone, is one of the many ways criminal gangs use young people and children as "remote-controlled commodities",[125] particularly

[118] National Crime Agency, *County Lines Drug Supply, Vulnerability and Harm 2018* (January 2019) para. 18 <https://nationalcrimeagency.gov.uk/who-we-are/publications/257-county-lines-drug-supply-vulnerability-and-harm-2018/file> accessed 20 January 2020.

[119] ibid.

[120] ibid. See also, National Referral Mechanism Statistics, *End of Year Summary 2018*, para. 34 Available at: https://www.nationalcrimeagency.gov.uk/who-we-are/publications/282-national-referral-mechanism-statistics-end-of-year-summary-2018/file#:~:text=6%2C993%20potential%20victims%20were%20submitted,2017%20total%20of%205%2C142%20referrals.&text=Reporting%20showed%20potential%20victims%20of%20trafficking%20from%20130%20different%20nationalities%20in%202018; *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) p. 8. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 21 November 2019).

[121] Just for Kids Law, *Excluded, exploited, forgotten: Childhood criminal exploitation and school exclusions* (2020) Available at: https://justforkidslaw.org/sites/default/files/fields/download/JfKL%20school%20exclusion%20and%20CCE_2.pdf (accessed 17 February 2022)

[122] ibid.

[123] R. Sturrock & L. Holmes, 'Running the Risks: The links between gang involvement and young people going missing' (London Catch 22 and Missing People, 2015) Accessed at: https://www.oscb.org.uk/wp-content/uploads/2019/04/Catch22-Running-The-Risks.pdf (accessed 18 February 2022)

[124] J. Pitts, County Lines (HM Inspectorate of Probation Academic Insights 2021) p.6 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577105/youth-justice-review-final-report-print.pdf (accessed 18 February 2022).

[125] N. Stone, 'Child Criminal Exploitation: 'County Lines', Trafficking and Cuckooing' (2018) 18(3) *Youth Justice* 285, 286.

because they are easier to control and, being young and having few, or no, previous convictions will be more likely to evade police notice.[126]

Children involved in county lines subsequently become exposed to a range of dangers, which Moyle has characterised as a "spectrum of harm".[127] Some young people and children who have acted as 'runners' have described experiences of physical violence, intimidation and emotional abuse by dealers.[128] In addition, young people and children visibly selling drugs face a heightened risk of arrest and violent robbery.[129] Drugs that have been confiscated by the police or stolen may have to be repaid by the young people, which can result in physical harm[130] and debt bondage which is recognised as an effective means of recruitment and control.[131]

It has been recognised that children and young people involved in county lines are groomed or trapped through the imposition of gifts, or accumulation of drug debts.[132] This control may be overt, through violence and threats of violence, or through more psychological coercion; for example, a child may be given relatively small amounts of money or gifts for doing this 'high risk' work.[133] Initially they may be told that they have been specially chosen to play an

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[126] ibid. See also, P. Andell, P & J. Pitts, 'The End of the Line: The Impact of County Lines Drug Distribution on Youth Crime in a Target Destination' (2018) *Youth & Policy* Available at: https://www.youthandpolicy.org/articles/the-end-of-the-line/ (accessed 18 February 2022).

[127] L. Moyle, 'Situating vulnerability and exploitation in street-level drug markets: Cuckooing, commuting, and the 'county lines' drug supply model' (2019) 49 *Journal of Drug Issues* 739, 751; R. Coomber & L. Moyle, 'The changing shape of street-level heroin and crack supply in England: commuting, holidaying and cuckooing drug dealers across "county lines" (2018) 58 *British Journal of Criminology* 1323.

[128] HM Government, *Ending gang violence and exploitation* (Home Office 2016) Available at: https://www.gov.uk/government/publications/ending-gang-violence-and-exploitation (accessed 18 February 2022); R. Sturrock & L. Holmes, 'Running the Risks: The links between gang involvement and young people going missing' (London Catch 22 and Missing People, 2015) Accessed at: https://www.oscb.org.uk/wp-content/uploads/2019/04/Catch22-Running-The-Risks.pdf (accessed 18 February 2022)

[129] J. Windle & D. Briggs, "It's like working away for two weeks": The harms associated with young drug dealers commuting from a saturated London drug market' (2015) 17(2) *Crime Prevention and Community Safety* 105; J. Densley, *How Gangs Work: An Enthograph of Youth Violence* (Palgrave Macmillan 2013).

[130] ibid. See also, V. Topalli, R. Wright & R. Fornango, Drug dealers, robbery and retaliation. Vulnerability, deterrence and the contagion of violence' (2002) 42(2) *British Journal of Criminology* 337–351.

[131] G. Robinson, R. McLean, J. Densley, 'Working county lines: Child Criminal Exploitation and illicit drug dealing in Glasgow and Merseyside' (2019) 63(5) *International Journal of Offender Therapy and Comparative Criminology* 694–711; NCA, *County Lines Drug Supply, Vulnerability and Harm 2018* (January 2019) para. 36 Available at: https://www.nationalcrimeagency.gov.uk/who-we-are/publications/257-county-lines-drug-supply-vulnerability-and-harm-2018/file (accessed 20 February 2022)

[132] G. Robinson, R. McLean, J. Densley, 'Working county lines: Child Criminal Exploitation and illicit drug dealing in Glasgow and Merseyside' (2019) 63(5) *International Journal of Offender Therapy and Comparative Criminology* 694–711

[133] P. Andell & J. Pitts, 'Preventing the violent and sexual victimisation of vulnerable gang-involved and gang-affected children and young people in Ipswich' (2017) Available at: https://www.uos.ac.uk/sites/default/files/Research%20Report%20by%20Paul%20Andell%20and%20John%20Pitts.pdf (accessed 18 February 2022).

"important role in the gang",[134] but they are then informed that they are in 'debt' and must repay the 'debt' by working for the gang.[135] A common tactic used by criminal gangs is to stage robberies against those holding or running drugs who are then held responsible for the loss.[136] If they protest, they are told that unless they keep working to pay off the debt both they and their families will be subject to violent retribution.[137] This often leaves children who deliver the drugs in the unenviable position of being at risk of being apprehended by the police, assaulted and robbed by their customers or by members of rival gangs.[138]

V. Vulnerability of Children

The concept of vulnerability within political and policy arenas in recent years has grown exponentially,[139] and its centrality in the context of children and young people being exploited is no exception to this trend. Despite its centrality in both legal scholarship and practice,[140] Fineman highlights that the concept is "in common use, but also grossly under-theorized, and thus ambiguous."[141] The United Nations has similarly recognised the "loose" use of vulnerability in policy contexts:

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[134] R. Sturrock & L. Holmes, 'Running the Risks: The links between gang involvement and young people going missing' (2015) Accessed at: https://www.oscb.org.uk/wp-content/uploads/2019/04/Catch22-Running-The-Risks.pdf (accessed 18 February 2022).

[135] P. Andell & J. Pitts, 'Preventing the violent and sexual victimisation of vulnerable gang-involved and gang-affected children and young people in Ipswich' (2017) Available at: https://www.uos.ac.uk/sites/default/files/Research%20Report%20by%20Paul%20Andell%20and%20John%20Pitts.pdf (accessed 18 February 2022).

[136] CPS, *County Lines Offending*. Available at: https://www.cps.gov.uk/legal-guidance/county-lines-offending (accessed 18 February 2022)

[137] P. Andell & J. Pitts, 'Preventing the violent and sexual victimisation of vulnerable gang-involved and gang-affected children and young people in Ipswich' (2017) Available at: https://www.uos.ac.uk/sites/default/files/Research%20Report%20by%20Paul%20Andell%20and%20John%20Pitts.pdf (accessed 18 February 2022).

[138] P. Andell & J. Pitts, 'The End of the Line: The Impact of County Lines Drug Distribution on Youth Crime in a Target Destination' (2018) *Youth & Policy* Available at: https://www.youthandpolicy.org/articles/the-end-of-the-line/ (accessed 18 February 2022); P. Andell, *Thinking Seriously About Gangs: Towards a Critical Realist Approach* (Palgrave Macmillan 2019).

[139] A. Morawa, 'Vulnerability as a Concept of International Human Rights Law' (2003) 6(2) *Journal of International Relations and Development,* 139-155, 139; United Nations, *Report on the World Social Situation*, 2003, Social Vulnerability: Sources and Challenges, (United Nations, 2003) p. 8. Available at: https://www.un.org/esa/socdev/rwss/docs/2003/fullreport.pdf (accessed 17 February 2022)

[140] M.A. Fineman, 'The vulnerable subject: Anchoring equality in the human condition' in M. A. Fineman (ed.), *Transcending the boundaries of law* (Routledge 2010) pp. 177-191.

[141] ibid.

> "Vulnerability stems from many sources and can be traced to multiple factors rooted in physical, environmental, socio-economic and political causes. In essence, vulnerability can be seen as a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences. It exists at all levels and dimensions of society and forms an integral part of the human condition, affecting both individuals and society as [a] whole."[142]

Currie[143] notes how this definition draws directly on Fineman's main thesis that vulnerability is the primal human condition,[144] but also details a number of particular factors which have the effect of enhancing vulnerability. Wake *et al*[145] placed vulnerability-enhancing factors in two distinct categories: (i) innate vulnerability, which includes intrinsic elements, such as, age, neurodevelopmental immaturity, gender; and (ii) situational vulnerability which may include experiences of chaotic, dysfunctional and traumatic backgrounds involving some combination of poor parenting, physical or sexual abuse, and/or substance abuse or mental health problems.

Notwithstanding the difficulties inherent in conceptualising vulnerability, the county lines model presents multidimensional complexities where young people involved in county lines continue to be criminalised rather than safeguarded, and their complex needs and risks may not be recognised.[146] According to Windle, this is partly a result of the UK Government's conservative and punitive youth justice approach,[147] which tends to ignore or downplay structural conditions facilitating youth offending while assuming rational choice as the main explanatory factor for offending, therefore, shifting the entire responsibility for these choices onto them.[148] It may also be because abstract concepts of vulnerability and exploitation can be difficult to identify

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[142] United Nations, *Report on the World Social Situation, 2003, Social Vulnerability: Sources and Challenges* (United Nations, 2003) p.8. Available at: https://www.un.org/esa/socdev/rwss/docs/2003/fullreport.pdf (accessed 17 February 2022)

[143] S. Currie, 'Compounding vulnerability and concealing unfairness: decision-making processes in the UK's anti-trafficking framework' (2019) P.L. 495, 498.

[144] M.A. Fineman, 'The vulnerable subject: anchoring equality in the human condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1, 19.

[145] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145.

[146] J. Windle, L. Moyle. R. Coomber, 'Vulnerable' Kids Going Country: Children and Young People's Involvement in County Lines Drug Dealing (2020) 20(1) *Youth Justice* 64, 72.

[147] See, generally, Home Office, *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales* (HMSO, 1997)

[148] J. Windle, L. Moyle. R. Coomber, 'Vulnerable' Kids Going Country: Children and Young People's Involvement in County Lines Drug Dealing (2020) 20(1) *Youth Justice* 64, 72.

in practice. It has been suggested that a variety of factors that contribute to this outcome including police and youth justice workers being under-resourced,[149] delays or failure to identify victims of trafficking and exploitation, failure to refer victims to the national referral mechanism, and significant delays by the competent authorities in making reasonable and conclusive grounds decisions regarding potential victim status.[150]

These issues are further complicated by the victim discourse which explicitly focuses on the language of 'innocence' and innocent' victims.[151] A stereotypical 'ideal victim'[152] has been created where labels 'victim' and 'exploited' are social constructs which may not be subjectively perceived or experienced as such, but also the perception of various actors, including the media, third sector and state agencies applying the label.[153] Christie argued that 'ideal victims' – those who 'most readily are given the complete and legitimate status of victim' – will be weak (often the very old or very young), blameless, carry out 'a respectable project' and victimised by a 'big and bad' offender who is unknown to the victim.[154] Based on this understanding, Windle asserts that children and young people working county lines will miss the mark on all but one (or at best two) of these criteria: (i) they are young, but seldom that young and innocence recedes with each passing year; (ii) they are involved in the sale of the most demonised of drugs (crack cocaine and heroin) and their drug sales do cause harm to others. As such, while policies may demand safeguarding, it can be difficult for some frontline practitioners to identify these young people as victims.[155]

VI. The Non-punishment Principle

[149] K. Haines K & S. Case, 'The future of youth justice' (2018) 18(2) *Youth Justice* 131–148.

[150] N. Wake *et al*, Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation (2021) Jan P.L. 145, 150.

[151] See J. Srikantiah,'Perfect victims and real survivors: The iconic victim in domestic human trafficking Law' (2007) 87 *Boston University Law Review*, 157-211; V. Munro, 'Of rights and rhetoric: Discourses of degradation and exploitation in the context of sex trafficking' (2008) 35 (2) *Journal of Law and Society* 240-264; C. Hoyle *et al*, 'Labelling the victims of sex trafficking: Exploring the borderland between rhetoric and reality' (2011) 20 (3) *Social and legal Studies*, 313-329.

[152] N. Christie, 'The Ideal Victim' in E.A. Fattah (ed), *From Crime Policy to Victim Policy* (Palgrave MacMillan 1986) 17-30.

[153] C. Hoyle, M. Bosworth, M. Dempsey, Labelling the victims of sex trafficking: Exploring the borderland between rhetoric and reality (2011) 20(3) *Social and Legal Studies* 313–329.

[154] N. Christie, 'The Ideal Victim' in E.A. Fattah (ed), *From Crime Policy to Victim Policy* (Palgrave MacMillan 1986) 18-19.

[155] J. Windle, L. Moyle. R. Coomber, 'Vulnerable' Kids Going Country: Children and Young People's Involvement in County Lines Drug Dealing (2020) 20(1) *Youth Justice* 64, 72.

Article 26 of the Trafficking Convention requires states to 'provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'. As human trafficking and county lines both involve the movement and exploitation, a child working in county lines would be deemed a victim of trafficking in the sense defined by the Trafficking Convention if he was recruited by the 'abuse of a position of vulnerability' for the purposes of exploitation. The 'minimum' definition of exploitation in Article 4 of the Trafficking Convention includes 'forced labour or services, slavery or practices similar to slavery, [or] servitude'; however, the statutory definition of trafficking under the MSA 2015 is significantly broader. Section 3(6) of the MSA 2015 includes any case where a person provides services for another, having been chosen for that purpose on the grounds that they are a child and that an adult would be likely to refuse to provide the same service. In *Karemera (Michael)*,[156] the Court of Appeal stressed that this provision was intended to protect people who are "prone to making poor choices";[157] however willing a person under 18 is to join a criminal enterprise, their recruiter will commit the offence of human trafficking if the youth of the recruit is "one of the reasons"[158] for choosing them (and if they 'arrange travel' for that person, as someone running a 'county lines' operation almost inevitably will).[159] Many young (under-18) members in county lines gangs and other criminal groups qualify as victims under this category, whether or not they are subject to forced labour which would bring them within the Trafficking Convention definition.

VII. Section 45 MSA 2015: the Statutory Defence

Section 45 of the MSA 2015 introduced separate defences for victims of human trafficking over and under the age of 18 who are compelled to commit offences as a result of such exploitation. The defence is not retrospectively applicable and is subject to a long and somewhat arbitrary list of exclusions in Schedule 4,[160] but it does apply to drug trafficking offences. For adults, the section operates where the person performs the criminal act because they were compelled to do so; the compulsion is attributable to slavery or relevant exploitation; and a reasonable person in the same situation as the person and sharing the person's relevant

[156] [2018] EWCA Crim 1432 at [23] (Hallett LJ)

[157] ibid.

[158] ibid [55] (Hallett LJ)

[159] S. Mennim & T. Ward, 'Abuse of process and the Modern Slavery Act 2015' (2020) 84(5) J. Crim. L. 502, 503.

[160] MSA 2015, s. 45(7)

characteristics[161] would have no realistic alternative to doing the act.[162] Section 45(4) makes similar provision for persons under the age of 18, though the defence differs from the adult variation of the defence in that as it does not contain the element of compulsion, nor is there a need for the child to explore "realistic alternatives" to committing the offence.[163] This is because it is recognised that children under 18 can be particularly vulnerable to being influenced into committing criminal offences,[164] and since the element of compulsion is irrelevant to the assessment of whether a child has been trafficked, it would be "simply wrong to put such an onus on a victim who has been turned into a potential defendant by the situation".[165]

Section 45 only places an evidential burden upon the child. Therefore, in order to avail himself of the defence, the child will only have to adduce sufficient evidence so as to allow the defence to be considered by the jury.[166] Thus s 45 makes it relatively easy for a child to raise a defence which the prosecution has to disprove beyond a reasonable doubt.[167] In order to rebut the defence, the prosecution would have to prove that the child's youth was not a reason for recruiting them (though it is not obvious why this should affect the defendant's culpability), or that the offence was not one which a reasonable child of the same age and in the same situation would have committed. Although no evidence of coercion is required to establish that the defendant was a victim of trafficking, coercion may well be relevant to the reasonableness of the defendant's action.[168] Where the Defendant puts age in issue, it is for the prosecution to prove beyond reasonable doubt that the defendant is over 18.[169]

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[161] "Relevant characteristics" include age, sex, and any physical or mental illness or disability (s. 45(5)).

[162] MSA 2015, s 45(1)(a)-(d)). For further commentary on the statutory defence as it applies to adults, see: K. Laird, 'Evaluating the Relationship Between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?' [2016] Crim. L.R. 395; N. Wake, 'Human Trafficking and modern day slavery: when victims kill' (2017) 9 Crim. L.R. 658-667; S.M. Edwards, 'Coercion and compulsion - re-imagining crimes and defences' (2016) 12 Crim. L.R. 876.

[163] MSA 2015, s. 45(1)

[164] As highlighted by Bird and Southwell, "a child should not have to prove compulsion to achieve protection because they are in a position of particular vulnerability and cannot consent to the exploitation': S Bird and P Southwell, "Does the New "Slavery" Defence Offer Victims of Trafficking any Greater Protection?' (2015) 9 *Archbold Review* 7, 8.

[165] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 2021, Jan, 145, 147. See also, PBC Deb, 11 September 2014 (Modern Slavery Bill), col.379

[166] CPS, *Modern Slavery, Human Trafficking and Smuggling* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 17 February 2022)

[167] *R v MK; R v. Gega* [2018] EWCA Crim 667.

[168] S. Mennim & T. Ward, 'Abuse of process and the Modern Slavery Act 2015' (2020) 84(5) J. Crim. L. 502, 504.

[169] CPS, *Modern Slavery, Human Trafficking and Smuggling* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 17 February 2022)

Although there is legitimate criticism of the statutory defence, unlike the general approach to young people in the criminal justice system, Wake *et al*[170] highlighted that it represents a "significant development" in explicitly recognising children's "inability, or reduced capacity, to assess alternatives"[171] and takes account of children's "neurodevelopmental immaturity which means that children tend to be impulsive and engage in risky, sensation-seeking behaviour while lacking the capacity to consider longer term consequences of actions".[172] According to Wake *et al*, the "innate vulnerability of children is amplified by the trafficking situation where innate vulnerability and situational vulnerability coalesce".[173] This, they assert, aligns with "increasingly strong research showing that the impact of [adults] on a child's potentially criminal conduct continues well beyond the age of 10 when the current defence of being a minor disappears".[174]

The policy of the CPS since the enactment of the MSA 2015 sets out a four-stage test, which requires the prosecutor to consider: (i) whether there is reason to believe that the person is a victim of trafficking/slavery; (ii) whether there is clear evidence of a credible common-law defence; (iii) whether there is clear evidence of a s 45 defence; and (iv) where there is no such evidence, but the offence may have been committed as a result of compulsion arising from the trafficking, whether the public interest requires a prosecution.[175]

When addressing cases that fall outside the scope of the s 45 defence, the courts must continue to follow the safeguards against prosecuting victims of trafficking that already exist, alongside the domestic law regime that has been developed through common law. Lord Thomas C.J. in *Joseph (Verna)*[176] provided a detailed exposition of the law prior to the enactment of the MSA 2015 in relation to the non-punishment principle and confirmed that the UK's international obligations were adhered to by means of: (i) relevant CPS guidance, which indicated the circumstances in which a prosecutor could decline to proceed against an individual suspected of being a victim of trafficking; (ii) where available, the common law of

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[170] N. Wake et al, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 2021, Jan, 145, 150.

[171] ibid.

[172] ibid.

[173] ibid.

[174] ibid.

[175] CPS, *Modern Slavery, Human Trafficking and Smuggling* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 17 February 2022)

[176] [2017] EWCA Crim 36 at [4]

duress, and (iii) the court's abuse of process jurisdiction, whereby it could review the CPS's prosecutorial decision, and, in certain cases, refuse to entertain proceedings.[177] When delineating the scope of these obligations, his Lordship took care to emphasise that it merely provides for the *possibility* of not imposing penalties on victims, and this must not be construed as being tantamount to "blanket immunity from prosecution".[178]

Children are trafficked for a variety of forms of exploitation, some of which, but for the child's trafficked status, could render the child liable to criminal prosecution. When considering the range of potential offences that are likely to arise in the context of 'county lines' and forced criminal exploitation, it is instructive to consider the minimum age of criminal responsibility in E&W. This subject raises wider legislative and procedural issues which are outside the scope of this thesis. Nevertheless, it raises an important feature when considering what protections are available to child victims of trafficking and exploitation, which do not square well with principles established in this context.

VIII. Minimum Age of Criminal Responsibility

Until 1998 an additional protection - *doli incapax* - existed for children above the minimum age of criminal responsibility. This was a rebuttable presumption that operated between 10 and 14 and provided, in the words of Lord Lowry, a 'benevolent safeguard'[179] to protect children who were incapable of appreciating the criminal wrongfulness of their actions and thus not criminally responsible unless proven otherwise.[180] It is deeply unfortunate that although the presumption was entirely sound in relation to the underlying principles of the criminal law[181] by acknowledging young people's vulnerability and developing capacities,[182] it was declared that there was no case for retaining this presumption on the grounds that children under the aged between 10 - 14 years clearly did know the difference between right and wrong and,

[177] For further discussion, see *N(L)* [2012] EWCA Crim 189 at [21]; *M(L)* [2010] EWCA Crim 2327 at [7]-[12].

[178] [2017] EWCA Crim 36 at [20]

[179] [1995] 2 W.L.R. 383; [1995] 2 All E.R. 43 at [4] (Lord Lowry).

[180] In this regard 'wrongfulness' is taken to mean gravely wrong, seriously wrong, evil or morally wrong: *JM (A Minor) v Runeckles* (1984) 79 Cr.App.R. 255, 260 (Goff L.J). See also, *R v Gorrie* (1918) 83 J.P. 136; *B v R* (1958) 44 Cr. App. R. 1; *R v Smith (Sidney)* (1845) 1 Cox C.C. 260.

[181] The common law doctrine itself dates back to the legal writings of Hale and Blackstone: *The History of the Pleas of the Crown Vol. 1* (1736: reprint Professional Books 1971) 14-15; *Commentaries on the Laws of England*, Book IV (1st ed. 1769) 23–24.

[182] S. Bandelli, 'Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Young Children' (1998) 37 Howard J 114, 121; L. Gelsthorpe and A. Morris, "Much ado about nothing – a critical comment on key provisions relating to children on the Crime and Disorder Act 1998" (1999) 11 Child & Fam. L.Q. 210, 213.

therefore, did not need protection from criminal sanctions: the presumption was "archaic… illogical and… unfair" and "flew in the face of common sense".[183]

In *C (A Minor) v DPP*,[184] the House of Lords refused to countenance the abolition of the presumption through the exercise of judicial law-making and urged that the presumption be subject to 'parliamentary investigation, deliberation and legislation'.[185] With less deliberation than was warranted by the significance of the reform, the Crime and Disorder Act 1998 (CDA 1998) was passed. Section 34 of the 1998 Act reads: 'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished'. On a strict reading, this section was seen as merely abolishing the presumption only and that it was still open to a child aged between ten and fourteen to demonstrate that he did not understand that what they done was seriously wrong.[186] In *CPS v P*, Smith LJ expressed the opinion (obiter) that the defence remained in existence but also flagged under the issue for another court to consider fully.[187] The House of Lords subsequently considered this in *T.*[188] Whilst their Lordships acknowledged the ambiguity of the provision, it ruled that s 34 of the

[183] Home Office, *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales* (HMSO, 1997) p.6. Here the Government adopted the arguments posited by Glanville Williams ('The Criminal Responsibility of Children' [1954] Crim. L.R. 493, 495) and echoed the sentiments of Laws J in *C (A Minor) v DPP* [1994] 3 W.L.R. 888, 894-898, who described the presumption as 'perverse', contrary to common sense' and 'a serious disservice to the law' and who purported to abolish it. His Lordship also referred to the comments of Forbes J in *JBH and JH (minors) v O'Connell* [1981] C.L.Y. 373, [1981] Crim L.R. 632 (Forbes J) and Bingham LJ in *A v DPP* [1991] C.O.D. 442; [1992] Crim. L.R. 34 who looked at the doctrine with increasing unease. See also, Law Commission, *Codification of the Criminal Law* (Law Com No. 143 HSMO, 1972) 11.21-11.23.

[184] [1995] 2 W.L.R. 383; [1995] 2 All E.R. 43.

[185] ibid [403] (Lord Lowry).

[186] On this point, Keating noted that support for this interpretation could be found in the Solicitor-General's speech at the time of the legislation's passage through Parliament: H. Keating, 'The "responsibility" of children in the criminal law' (2007) 19 Child & Fam. L.Q. 183, 193. For further discussion on whether the 1998 Act merely abolished the presumption of *doli incapax* but left in place a common law defence of *doli incapax*, see N. Walker, 'The End of an Old Song' (1999) 149 *New Law Journal* 64; N. Wortley, 'Hello Doli… Or is it Goodbye?' [2007] *Journal of Medical Health Law* 234; T. Crofts, 'Taking the Age of Criminal Responsibility Seriously in England' (2009) 17 E*uropean Journal of Criminal of Crime, Criminal Law and Criminal Justice* 267.

[187] *CPS v P* [2007] EWHC 946 (Admin); [2008] 1 W.L.R. 1005; [2007] 4 WLUK 504 (DC) remains an important authority as to the process in which a judge adopt before deciding whether to continue a trial against a child in respect of whose capacity to understand the nature of the alleged wrongdoing there are doubts (Archbold Criminal Pleadings Evidence and Practice 2020 Ed. 1-158). For further discussion, see D. Ormerod, 'Young person: young person having low IQ - district judge determining young person having insufficient level of understanding to participate effectively in proceedings' Crim. L.R. 2008, 2, 165-171.

[188] [2009] UKHL 20.

CDA 1998 abolished both the presumption, and the defence, of *doli incapax* entirely, thus reducing the special protection for children aged 10 and over.[189]

The UN Committee on the Rights of the Child has expressed concern about the abolition of *doli incapax* and has repeatedly recommended that E&W consider raising the minimum age of criminal responsibility to an intentionally accepted level.[190] In the context of age of criminal responsibility, Article 40 of the UNCRC which highlights that "a child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection"[191] and requires each state to set a reasonable minimum age of criminal responsibility. The UNCRC promotes non-judicial measures for managing children in conflict with the law and requires State parties to establish a minimum age of criminal responsibility[192] bearing in mind issues of emotional and intellectual immaturity.[193] In 2007 the UN Committee declared that "a minimum age of criminal responsibility below the age of 12 years is considered…. not to be internationally acceptable" and encouraged member states to increase it to 12 years as an absolute minimum.[194]

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[189] ibid. For further discussion on this ruling, see F. A. R. Bennion 'Mens Rea and defendants below the age of discretion' [2009] Crim. L.R. 757, A. Ashworth, '*R v T*: Children and Young Persons – *doli incapax*- Crime and Disorder Act 1998 s. 34' [2009] Crim. L.R. 581-583. It has been held that the presumption continues to offences alleged to have been committed before its abolition: *R v H* [2010] EWCA Crim 312; *R v M* [2016] EWCA Crim 674.

[190] UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (UN Doc CRC/C/GBR/CO/5 2016) para. 78(a) <https://www.unicef.org.uk/babyfriendly/wp-content/uploads/sites/2/2016/08/UK-CRC-Concluding-observations-2016-2.pdf>; UN Committee on the Rights of the Child (CRC), Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : concluding observations : United Kingdom of Great Britain and Northern Ireland, 20 October 2008, UN Doc CRC/C/GBR/CO/4 2008) para(s) 77-78 https://www.refworld.org/docid/4906d1d72.html; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: State Party Report, United Kingdom of Great Britain and Northern Ireland (UN Doc CRC/C/83/Add.3, 2002) para(s) 36 and 59 <https://www.refworld.org/docid/3df59f5e4.html > (accessed 18 January 2020).

[191] UN Convention on the Rights of the Child Available at: https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?_ga=2.98228127.1617011622.1580733444-1255548651.1573913945 (accessed 25 January 2020)

[192] UN Convention on the Rights of the Child, art 40(3)

[193] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985) at [4.1]. An important consideration, as outlined in Rule 17, is whether a child, by virtue of their individual discernment and understanding, can be held responsible for their behaviour. Available at: https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf (25 January 2022)

[194] UN Committee on the Rights of the Child, *General comment No. 10: Children's rights in juvenile justice* (44th session UN Doc CRC/C/GC/10 2007) para. 32 < https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> (accessed 17 Jan 2020).

In response to "mounting pressure" to raise the minimum age of criminal responsibility,[195] the Age of Criminal Responsibility Bill (E&W) 2017-2019 proposed raising the conclusive presumption that 'no child under the age of ten years can be guilty of an offence' to 'twelve' in England and Wales.[196] This would have certainly addressed criticisms by the UN Committee, which have been highly critical of the abolition of the presumption of *doli incapax* and have repeatedly urged the UK to raise the age of criminal responsibility.

Despite the Bill receiving support from numerous peers, the Government's response was that the current age of criminal responsibility "is appropriate and accurately reflects what is required of our criminal justice system".[197] This continued political reluctance to increase the age of criminal responsibility is paradigmatic of the Government opting to maintain the status quo which tend to "minimise and overlook the dangers associated with punishing children at such a young age".[198] This becomes particularly problematic when considering those children who are placed in a situation where they are compelled to commit an offence related to their trafficking. As already noted, data from the NCA reported that children are more likely targeted by traffickers as they provide the level of criminal capability[199] required by the offending model but are easier to control, exploit and reward than adults.[200] Analysis of the data also highlights that children as young as 11 years-old are targeted, with the majority of potential victim referrals aged between 15 – 17 years-old,[201] having been involved in various forms of forced labour and criminal exploitation including, but not limited to, 'county lines' offending and child sexual exploitation.[202]

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[195] P. Brown, Reviewing the Age of Criminal Responsibility' (2018) 11 Crim. L.R. 904, 905.

[196] Cited in N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 2021, Jan, 145. See also, Home Office, *Report of the Committee on Children and Young Persons* (Ingleby Report), Cmnd 1191 (1960) p.30. This committee recommended abolition of the presumption of *doli incapax* as part of a proposal to raise the minimum age of criminal responsibility to 12 then eventually to 14.

[197] HL Deb, 8 Sept 2017, Vol 783, Col 2211 (Baroness Vere of Norbiton)(Con)

[198] T. Crofts, 'The common law influence over the age of criminal responsibility – Australia' (2016) 67(3) N.I.L.Q 283, 299.

[199] In this regard 'criminal capability' refers to awareness, knowledge and physical capability required to effectively fulfil a criminal role within the offending model.

[200] National Crime Agency, *County Lines Drug Supply, Vulnerability and Harm 2018* (January 2019) at [18] < https://nationalcrimeagency.gov.uk/who-we-are/publications/257-county-lines-drug-supply-vulnerability-and-harm-2018/file> accessed 20 January 2020.

[201] ibid.

[202] ibid. See also, National Referral Mechanism Statistics – *End of Year Summary 2018* at [34]; Independent Review of the Modern Slavery Act 2015: Final Report (TSO, 2019) 8. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 21 January 2022).

Although the Age of Criminal Responsibility Bill (E&W) 2017-2019 was passed by the House of Lords and represented an encouraging development by recognising children's developing capacities, as well as those wider international and domestic recommendations, the Bill failed to be enacted before the December 2019 general election it made no further progress.[203] There are now two issues that must be addressed. Now that Scotland has raised the age of criminal responsibility to 12,[204] there is a new level of inconsistency in approaches North and South of the border. Notwithstanding each jurisdictions divergent approaches to trafficked victims who commit offences, it surely cannot be right that a child aged 10 or 11 years-old who finds themselves on the wrong side of the border is left at a significant disadvantage for having been placed in a situation for which they are likely to have had little or no control. Crofts raises another pertinent issue. He noted that those other common law jurisdictions that have raised the minimum age of criminal responsibility to 12 after abolishing the higher conditional age where the presumption of *doli incapax* applied, thereby "[enhancing] the protection for 10- to 11-year-olds in making their protection absolute, rather than dependent on an assessment of their own individual capacities", such reforms have inadvertently removed the protections previously available for children aged 12 to 13'.[205]

IX. Conclusion

This chapter has examined the emergence of county lines offending in the UK and its problematic reliance on children and young people. Drawing on the available data and literature, this chapter has attempted to highlight the multidimensional complexities where young people, who are not deemed to be victims of slavery or trafficking, engage in this form of exploitation. This chapter also examined the discourse and attempted to challenge the notion of the 'ideal victim'[206] narrative which, it was argued, fails to take account of the innate and situational vulnerability of children involved in county lines.

The next chapter shall examine the E&W's anti-trafficking framework, with a particular focus on county lines offending. The chapter will begin by examining a hypothetical case scenario inspired by the themes explored in this chapter. It is submitted that by examining a case

[203] The Early Parliamentary General Election Act 2019.

[204] Age of Criminal Responsibility (Scotland) Act 2019, s 1.

[205] T. Crofts, 'Will Australia Raise the Minimum Age of Criminal Responsibility?' 43 (2019) Criminal Law Journal 26, 37; T. Crofts, 'The common law influence over the age of criminal responsibility' (2016) 67(3) N.I.L.Q 283, 297. See also the ruling in *R v Wilson* [2007] EWCA Crim 1251; [2007] 2 Cr. App. R. 31 at 421.

[206] N. Christie, 'The Ideal Victim' in E.A. Fattah (ed), *From Crime Policy to Victim Policy* (Palgrave MacMillan 1986) 17-30.

scenario in this way, the next chapter will attempt to expose some of the wider issues that are likely to arise when children are involved in county lines offending, including the types of offences that may arise and the range of potential defences, with a particular focus on s 45(4), while unpacking and illustrating their respective limitations. This will inform the legislative amendments to s 45(4) advanced in Chapter 4.

Chapter Two

Modern Slavery Act 2015, s. 45(4) and 'county lines': A Critical Analysis

I. Introduction

Notwithstanding the increased awareness and understanding of the fact that those involved in 'county lines' may be victims, children and young people continue to be convicted of crimes as a result of their trafficking and exploitation. This is a result of variety of factors, including the low age of criminal responsibility in E&W, the restrictive ambit in which common law duress operates, and the lack of awareness about the existence of the s 45 defence among participants in the criminal justice system. This chapter will argue that s 45(4) of the MSA 2015, while a laudable attempt to provide a robust defence for children who commit offences as a result of their exploitation, largely fails to achieve its intended purpose. In an attempt to demonstrate the inadequacy of the s 45(4) defence, this chapter will be split into two parts. The first part shall consider the application of the current legislative and policy framework in E&W by examining an original hypothetical 'county lines' case scenario. By examining a case scenario in this way, this chapter aims to expose, in more detail, some of the wider issues that are likely to arise when children are involved in county lines offending, including the types of offences that may arise and the range of potential defences, with a particular focus on s 45(4), while unpacking and illustrating their respective limitations. After examining the case scenario, the second part of the chapter argues that s 45(4) fails to achieve its intended purpose. It is submitted that by limiting its scope to such an extent, that child victims of county lines, as well as other forms of forced criminal exploitation, will continue to be at significant risk of conviction and that it is insufficiently nuanced to adapt to future developments in trafficking offences. This, it is submitted, arises because of four fundamental flaws of the section. The first relates to the absence of an express provision specifying where the burden of proof lies. The second relates to Parliament's failure to define or clarify in the statutory notes what "direct consequence" requires.[207] The third concerns the defence's inclusion of a "reasonable person"[208] test which has been criticised for being "too high for children"[209] and for introducing,

[207] MSA 2015, s 45(4)(b).

[208] MSA 2015, s 45(4)(c).

[209] HL Deb 8 December 2014, vol.757, col.1652 (Baroness Kennedy of Cradley).

in an indirect way, the need to prove an element of compulsion.[210] The fourth relates to the long and somewhat arbitrary list of excluded offences in Schedule 4 of the Act.[211] The chapter will conclude by attempting to advance amendments to s 45(4) defence which will inform the wider legislative and prosecutorial guideline recommendations advanced in Chapter 4.

II. Case Scenario: Trafficked Children and County Lines Offending

The following hypothetical scenario is used to highlight some of the typical issues that arise in cases involving children in county lines offending.

> Daniel (British National, aged 13) had a difficult relationship with his recently widowed father. One afternoon, Daniel was introduced to Vince (aged 25) by boys at his school. At first, he was approached and asked to take a package to a local house and offered £30 to do so. He did this a few times but was then given train tickets and packages to transport to a house in a town 100 miles away and promised much more money. It was only when he arrived at the house, Daniel found it was full of adults taking drugs, including injecting heroin, and he realised he was at risk and had become involved in something beyond his control. One of adults stole a package Daniel was carrying and because of this he became indebted to Vince. After being subjected to threats of violence against himself and his father if he did not repay the debt, Daniel stole the charity box from the counter at a local newsagent. When he attempted to escape, the proprietor blocked the door, and a struggle began. During the struggle, Daniel pushed the proprietor, causing him to fall back and hit his head on a shelf corner. The fall knocked the proprietor unconscious and caused bruising to the proprietor's face. Daniel was arrested two days later.

The following analysis illustrates the potential offences Daniel may be charged with before considering how the complex inter-relationship across Daniel's trafficked status and ostensible offending would be addressed under the current law.

(i) Possession with intent to supply

[210] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) para. 4.4.2 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 29 January 2022.

[211] MSA 2015, s 45(7).

Daniel may be potentially liable for an offence of possession with intent to supply a controlled drug (heroin), contrary to s 5(3) of the Misuse of Drugs Act 1971. In *Lambert*,[212] Lord Hope confirmed the that the elements of the offence had been correctly identified by Lord Lane C.J. in *McNamara*,[213] as being, first, that possession is established against the defendant once the prosecution have proved that he had in his control a package that in fact contained the drug alleged, that he knew that he had the package in his control and that he knew it contained something; and, secondly, that, once possession is established, a persuasive burden is cast upon the defendant to prove that he did not know or suspect or have reason to suspect that the package contained the substance which turned out to be a controlled drug or that he did not know or suspect or have reason to suspect that the substance or product was a controlled drug.[214]

When considering the manner and circumstances in which Daniel had received the packages, although he had been in physical control of the packages and their contents, there is nothing to suggest that he had the intention to possess, or the knowledge that he does possess, what was in fact a prohibited substance (heroin). On the facts, any potential charge is likely to fail on the prosecution establishing that Daniel had the requisite intent to supply the thing in which he was in possession.

(ii) Grievous Bodily Harm/Actual Bodily Harm

In order to establish a charge for inflicting grievous bodily harm, the prosecution must prove either that Daniel intended or that he had foresight of the risk that his act would cause serious harm.[215] In this regard, 'serious harm' may involve either unlawful wounding or the unlawful infliction of grievous bodily harm, which means no more and no less than really serious harm.[216] The CPS Guidance[217] lists examples of injuries which may be considered sufficiently

[212] [2001] UKHL 37; [2001] 2 Cr. App. R. 28 (at p. 580)

[213] (1988) 87 Cr. App. R. 246 (at p. 252).

[214] Misuse of Drugs Act 1971, ss 28(2) - (3)(b)(i), *Lambert* [2001] UKHL 37; [2001] 2 Cr. App. R. 28 (at p. 516) (Lord Hope); however, see *Malinina* [2007] EWCA Crim 3228, where it was said that, in the absence of agreement that there was sufficient evidence to raise a "defence" under s 28, the judge would have to instruct the jury as to the difference between the evidential burden on the defendant and the legal burden on the prosecution. It was also said that the judge would have to explain that the evidential burden could be discharged by proof on a balance of probabilities.

[215] Offences against the Person Act 1861, s 20.

[216] *DPP v Smith* [1961] AC 290 at 334 (Viscount Kilmur L.C.); Cunningham [1982] AC 566

[217] CPS, *Offences against the Person, incorporating the Charging Standard* (January 2020) <https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard > (accessed 5 August 2020).

serious to warrant a charge, but whether an injury is 'really serious' is ultimately a question for the jury "applying contemporary social standards",[218] subject to the judge's duty to withdraw the issue in the absence of evidence sufficient to support a conviction.

On the facts, it would appear obvious that Daniel's actions will have caused serious injury. While a number of individually minor injuries may collectively be considered grievous,[219] it is unlikely that the injuries sustained by the proprietor would meet the threshold of really serious harm; however, on a charge of an offence contrary to s 20 of the OAPA 1861, a verdict of assault occasioning actual bodily harm, or common assault, is an available alternative.[220] It appears that a charge for an offence of actual bodily harm is more likely to be successful in Daniel's case.[221]

An offence under the OAPA 1861, s 47, must involve an assault or battery and it must be established that the assault or battery occasioned (i.e., caused) the victim actual bodily harm. Actual bodily harm, in this context, must be shown to have caused "an injury which is calculated to interfere with the health or comfort of the [victim]";[222] such hurt or injury need not be permanent, but must be more than merely transient or trifling.[223] The pervading rationale is that a bruise, a graze and a cut would all be capable of being described as actual bodily harm; and in *R(T) v DPP*, it was held that a momentary loss of consciousness could be properly regarded as actual bodily harm even where there was no other discernible injury.[224] Therefore, Daniel pushing the proprietor causing him to fall back hit his head on a shelf corner causing temporary unconsciousness, and a bruise, the threshold has been duly met.

In order to bring a successful charge, the prosecution must also prove the *mens rea* necessary to establish assault or battery i.e. that the assault or battery was committed intentionally or recklessly.[225] Recklessness, in this context, means subjective or *Cunningham* recklessness.[226]

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[218] *R. v Golding (David)* [2014] EWCA Crim 889 at [64] (Treacy LJ); see also, *Bollom* [2003] EWCA Crim 2846, [2004] 2 Cr. App. R. 6 at [52] (p. 60) (Fulford J)

[219] *R. v Birmingham (David)* [2002] EWCA Crim 2608 at [11]; see also *Bollom* [2003] EWCA Crim 2846, [2004] 2 Cr. App. R. 6.

[220] *R. v Wilson; R. v Jenkins & Another* [1984] A.C. 242, (1983) 77 Cr. App. R. 319; see also, *Savage; DPP v Parmenter* [1992] 1 A.C. 699, (1992) 94 Cr. App. R. 193 p. 205 (Glidewell LJ)

[221] Offences Aginst the Person Act 1861, s 47.

[222] *R. v Miller* [1954] 2 QB 282 at p. 292 (Lynskey J)

[223] *R. v Donovan* [1934] 2 K.B. 498; (1936) 25 Cr. App. R. 1, CCA, cited with approval by Lords Templeman and Jauncey in *Brown (Anthony Joseph)* [1994] 1 A.C. 212 at pp. 230 and 242 respectively.

[224] [2003] EWHC 266 (Admin) at [6] (Maurice Kay J).
[225] *Savage; DPP v Parmenter* [1992] 1 A.C. 699, (1992) 94 Cr. App. R. 193 p. 207 (Glidewell LJ)

[226] *Cunningham* [1957] 2 All E.R. 412; (1957) 41 Cr. App. R. 155

It is likely that Daniel's subjective state of mind will be inferred from the circumstances or from video footage that the proprietor may have inside the newsagents, even if there is no other evidence to establish it.[227] As the proprietor has sustained injuries as a result of Daniel's actions, it need not be proved that he had foreseen the possibility that the injuries.[228]

(iii) Robbery/Theft

In order to succeed on a charge of robbery the prosecution must establish that Daniel stole the charity box, and that the stealing of it was accomplished by force.[229] Daniel will have one element of the offence of theft by stealing the charity box;[230] however, there are two important qualifications that must be satisfied in order to bring a successful charge of robbery. Firstly, the prosecution must prove that in order to steal the accused used force on any person or sought to put any person in fear of such force being then and there used on him;[231] and secondly, that the force or threat must be used immediately before or at the time of stealing. As Daniel had already stolen the charity box and had used unlawful force when leaving the newsagents, a charge of basic theft would be more appropriate.

The following text outlines a hypothetical ending to Daniel's case for the purposes of this chapter.

> Upon entering the newsagents Daniel was confronted by the proprietor who informs him that the shop is closed and asks him to leave. In fear of the threats made by Vince, Daniel panics and forcibly pushes past the proprietor, causing him to fall back and hit his head on a shelf corner. The fall knocked the proprietor unconscious. Daniel then removes the charity box from the counter and leaves the newsagents. The proprietor subsequently died as a result of the injuries he sustained.

(iv) Robbery/Manslaughter

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[227] *Afolabi v CPS* [2017] EWHC 2960 (Admin))

[228] *Savage; DPP v Parmenter* [1992] 1 A.C. 699, (1992) 94 Cr. App. R. 193 approving *Roberts* (1971) 56 Cr. App. R. 95

[229] In *R v Dawson* (1976) 64 Cr App R 170 the Court of Appeal held that 'force' is a word in ordinary use, which juries understand.

[230] Theft Act 1968, s 1.

[231] For further discussion, see *R v DPP* [2007] EWHC 739 (Admin)

Daniel could be charged with the offence of robbery. Unlike the previous scenario, Daniel used force immediately before the theft of the charity box. Further, as the proprietor has subsequently died as a result of his injuries, Daniel could also be charged with manslaughter. To be convicted of manslaughter, Daniel must act, from which death results, must be deemed to be dangerous.[232] On an objective assessment of the facts, it is evident that Daniel's conduct will be deemed to be dangerous.[233] Apart from the absence of the requisite intent, all other elements of the offence are the same as for murder. The manslaughter and robbery exclusion under Sch.4 means that the s 45 statutory defence would not assist Daniel.[234]

III. The Non-Punishment Principle: The Domestic Framework

The 'non-punishment principle', as set out in the Council of Europe Convention against Trafficking in Human Beings, art 26, requires "the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so"[235] does not provide absolute immunity from prosecution for trafficking victims, but it requires alternative options to imposing liability in some circumstances.[236] Daniel would be a victim of trafficking in the sense defined by the Trafficking Convention if he was recruited by the 'abuse of a position of vulnerability' for the purposes of exploitation. The 'minimum' definition of exploitation in Article 4 includes 'forced labour or services, slavery or practices similar to slavery, [or] servitude'; however, the statutory definition of trafficking under the MSA 2015 is significantly broader. Under s 3(6) it includes any case where a person provides services for another, having been chosen for that purpose on the grounds that they are a child and that an adult would be likely to refuse to provide the same service. In *Karemera (Michael)*,[237] the Court of Appeal stressed that this provision was intended to protect people who are "prone to making poor choices";[238] however willing a person under 18 is to join a

[232] *DPP v Newbury* [1977] A.C. 500, HL; *R v Larkin* [1943] KB 174.

[233] *R v Watson* (1989) 2 All ER 865, *R v Dawson* (1985) 81 Cr App R 150.

[234] For an excellent discussion on s 45 and whether a bespoke partial defence should be extended to trafficked victims who kill, see N. Wake, 'Human trafficking and modern day slavery: when victims kill' (2017) 9 Crim. L.R. 658-677 for an excellent discussion on s 45 and whether the defence should be extended.

[235] Council of Europe Convention on Action against Trafficking in Human Beings. See also, N [2012] EWCA Crim 189; [2013] Q.B. 379; [2012] 1 Cr. App. R. 35 (p.471).

[236] *N* [2012] EWCA Crim 189; [2013] Q.B. 379; [2012] 1 Cr. App. R. 35 (p.471) per Lord Judge CJ commenting on art.26 of the Council of Europe Convention on Action Against Trafficking in Human Beings (see also Directive 36/2011 [2011] OJ L101/1).

[237] [2018] EWCA Crim 1432 at [23] (Hallett LJ)

[238] ibid.

criminal enterprise, their recruiter will commit the offence of human trafficking if the youth of the recruit is "one of the reasons"[239] for choosing them (and if they 'arrange travel' for that person, as someone running a "county lines" operation almost inevitably will). Many young (under-18) members in "county lines" gangs and other criminal groups qualify as victims under this category, whether or not they are subject to forced labour which would bring them within the ECAT definition. The ECAT definition, however, is the one applied by the Competent Authority (now the 'Single Competent Authority'). The breadth of the definition of a victim under s 56(2) of the MSA 2015 is offset by restrictions contained in the statutory defence under s 45.

In *Joseph (Verna)*,[240] the Court of Appeal was invited to re-assess the approach taken by the courts to victims of trafficking in light of the creation of the s 45 defence. The case concerned a series of conjoined appeals and applications in which the appellants, who claimed to be victims of trafficking, were all convicted prior to the coming into force of the MSA 2015. Anti-Slavery International, as interveners, argued (i) that the court should develop the common law defence of duress in its application to victims of trafficking so that it matched s 45 for those unable to rely upon the statutory defence because it was not in force at the material time; and (ii) that where the evidence does not establish duress, it is no longer appropriate to rely on prosecutorial discretion and the abuse of process jurisdiction, rather it should be for the jury to decide whether the defendant was a victim, whether there was a nexus, and whether there was compulsion. Lord Thomas CJ provided a detailed exposition of the law prior to the enactment of the MSA 2015 in relation to the non-punishment principle and confirmed that E&W's international obligations were adhered to by means of: (i) relevant CPS guidance, which indicated the capacity of, and the circumstances in which, a prosecutor could decline to proceed against an individual suspected of being a victim of trafficking; (ii) where available, the common law of duress, and (iii) the court's abuse of process jurisdiction, whereby it could review the Crown Prosecution Service's (CPS) prosecutorial decision, and, in certain cases, refuse to entertain proceedings.[241] When delineating the scope of these obligations, his Lordship took care to emphasise that it merely provides for the possibility of not imposing penalties on victims, and that this must not be construed as being tantamount to "blanket immunity from prosecution".[242]

[239] ibid [55] (Hallett LJ)

[240] [2017] EWCA Crim 36 at [4].

[241] *N(L)* [2012] EWCA Crim 189 at [21]; *M(L)* [2010] EWCA Crim 2327 at [7]–[12].

[242] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [20.v]; M(L) [2010] EWCA Crim 2327 at [13]).

Although these existing mechanisms fulfil an important function, one of the many problems with such a prescriptive approach is that trafficked persons must, in many cases, rely on the CPS deciding that it is not in the public interest to prosecute them; and in the absence of sufficient evidence relating to their trafficking experience, the appeal mechanism is a limited panacea.[243]

The CPS guidance sets out that "prosecutors should have regard to the duty of the prosecutor to make proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking or slavery", and it is anticipated that this determination will be resolved after collaboration between the CPS and the Single Competent Authority (SCA).[244] The CPS guidance[245] requires the prosecutor to consider the potential application of s 45. The category of case under discussion is where Sch.4 excludes the offence from the purview of s 45, and where the offence would fall under s 45 but for the defence's lack of retrospective application, i.e., where the offence was committed pre- 2015 Act implementation.[246] In such cases, prosecution should not occur where there is clear and credible evidence of duress. In the absence of such evidence, but where there is evidence of compulsion through exploitation, the CPS must assess whether the public interest lies in prosecution. In some instances the nature of the offence charged will render it in the public interest to prosecute the trafficked person, subject to evidence, unless public interest factors tending against prosecution outweigh those in favour.[247] For Daniel, the CPS should discontinue the charge of theft, but the offence of assault occasioning actual bodily harm tends to favour charging as it is a serious offence which falls within the purview of Schedule 4 of the MSA 2015, and applications to stay prosecution as an abuse of process are granted only in exceptional circumstances.[248] The latter offence is even more important if the proprietor subsequently died; this would raise the offence to manslaughter. If, however, the proprietor lives, s 45 will be available as a defence. If a case involving more than one offence reaches trial, jurors may have the unenviable task of considering a combination of disparate defences, and the relevance of trafficking status will

[243] *R v Mullen* [2000] QB 520 at [540]; *R v Graham (H.K.)* [1997] 1 Cr App R 302 at [307]); see also, S.M. Edwards, "Coercion and Compulsion - Re-imagining Crimes and Defences' (2016) Crim LR 876, 893; B Hoshi, "The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked persons in International Law' (2013) 1(2) GroJIL 54, 69.

[244] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [5] and [15].

[245] CPS, *Human Trafficking, Smuggling and Slavery (2015)* < https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery> (accessed 25 January 2022).

[246] See *R. v JXP* [2019] EWCA Crim 1280.

[247] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [6].

[248] *Attorney General's Reference (No.1 of 1990)* [1992] Q.B. 630; (1992) 95 Cr. App. R. 296, CA; *Attorney General's Reference (No.2 of 2001)* [2003] UKHL 68; [2004] 2 A.C. 72; [2004] 1 Cr. App. R. 25 (p.317), HL.

depend on the offence charged. Daniel's trafficked status will be relevant to the theft, but not on the potential charge of manslaughter.

IV. Children and General Defences in Criminal Law

(i) The extent of duress and trafficked victims

As Daniel will technically be deemed to be a victim of trafficking under the provisions of the MSA 2015, it is instructive to consider the question of whether a defence of duress will be available to him. Duress is a general defence to criminal liability in English law. In essence, the defence is available where a person acts under threats of death or serious harm to self or family, in circumstances in which a person of reasonable firmness would give way and to which the person had not contributed by joining a gang that used violence.[249] The test of the 'person of reasonable firmness' may be modified in response to certain conditions, two of which are youth and clinical mental disorder.[250] Thus it is integral to the law of duress, as it has developed in common law that less firmness and control is expected of a child than of an adult. This reflects the fact that children exhibit incontrovertible cognitive and developmental differences, as compared with adults.[251] Ashworth[252] identified three major resects in which children typically exhibit features that indicate reduced culpability. First, their cognitive abilities are under-developed:[253] there is ample evidence to show that children, as compared to adults, generally have limited understanding of facts, are impressionable and suggestable, and have limited powers of reasoning.[254] The "process of neurodevelopment" renders them "prone to impulsive, sensation-seeking behaviour, with an under-developed capacity to gauge the

[249] A. Ashworth & J. Horder, *Principles of Criminal Law* (7th Edn, OUP 2013) Cp. 6.3

[250] *R v Bowen* [1997] 1 W.L.R. 372; [1996] 4 All E.R. 837.

[251] For further discussion, see E.S. Scott and L. Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008) 37–38; see also D.P. Keating, 'Adolescent Thinking' in S. Feldman and G.R. Elliott (eds), *At the Threshold: The Developing Adolescent* (Harvard University Press 1990) 54–89, particularly on the shift between children's and adolescent thought; F. Zimring, 'Toward a jurisprudence of youth violence' in M. Tonry and M. Moore (eds), *Youth Violence: Crime and Justice, a review of research*, vol 24 (1998), 447–501.

[252] A. Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2015) 174

[253] Generally, only by mid-adolescence do the formal cognitive capacities resemble those of adults: E. Scott and L. Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008) 26; see also T. Grisso and R.B. Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University Chicago Press 2000)158–59 cited by the Law Commission, *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005), para 6.81. Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp177_Murder_Manslaughter_and_Infanticide_consultation_.pdf (accessed 25 February 2022).

[254] J. Viljoen, E. Penner and R. Roesch, 'Competence and Criminal Responsibility in Adolescent Defendants: The Roles of Mental Illness and Adolescent Development' in D. Bishop and B. Feld (eds), *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (OUP 2011).

consequence of actions".[255] Secondly, emotional controls tend to be under-developed: this means that "their responses to situations may be self-centred, and may tend to override any awareness of the vulnerabilities of others."[256] Thirdly, they are "more easily led than adults, being more likely to be swept along by the encouragement or 'daring' of others, particularly in a group situation".[257] There is an abundance of academic literature, supported by evidence from neuro-scientists, about these and other typical characteristics of children which are beyond the scope of this thesis. Nevertheless, this literature provides a valuable point of reference when understanding how these aforementioned characteristics and traits may vary according to "the chronological age of the child, the child's maturity, and the culture and socioeconomic circumstances in which the child has grown up" which may affect their decision making in a criminal law context.[258]

In *Joseph (Verna)*, the Court of Appeal was urged by Anti-Slavery International, as Interveners to the case, to re-assess the approach it had previously adopted in relation to trafficked victims who commit offences because of exploitation.[259] It was argued that the common law of duress should be developed, narrowly and within the confines of human trafficking, to accommodate trafficking victims who would be eligible to rely on s 45 "but for" its lack of retrospective application,[260] i.e. individuals who had committed offences not excluded under Sch.4. Although the offences committed by Daniel are not precluded from the common law defence, it would appear on the facts he would have failed to have met the high threshold outlined by Lord Bingham in *Hasan*.[261] His Lordship set the parameters of the defence as follows: (i) duress does not afford a defence to charges of murder, attempted murder[262] and, perhaps,

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[255] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145, 156; see also, T. Crofts, "Will Australia Raise the Minimum Age of Criminal Responsibility?" (2019) 43 Criminal Law Journal 26, 30–31; see also Centre for Social Justice, *Rule of Engagement: Changing the Heart of Youth Justice* (London: CSJ, 2012) 201.

[256] A. Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2015) 174; see also, Law Commission, *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005), para 6.82. Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp177_Murder_Manslaughter_and_Infanticide_consultation_.pdf (accessed 25 February 2022)

[257] A. Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2015) 174; see also, L. Steinberg & K. Monahan, 'Age differences in resistance to peer influence' (2007) 43(6) *Developmental Psychology* 1531–1543.

[258] A. Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2015) 174

[259] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [24].

[260] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [25].

[261] [2005] UKHL 22; [2005] 2 AC 467.

[262] *R v Howe* [1987] AC 417; R v Gotts [1992] 2 AC 412.

some forms of treason;[263] (ii) to found a plea of duress the threat relied upon must be to cause death or serious injury; (iii) the threat must be directed against D or his immediate family or someone close to him or, someone for whom D would reasonably regard himself as responsible; (iv) the relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions;[264] (v) the criminal conduct which the defence is sought to excuse must be directly caused by the threats which are relied upon; (vi) D may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have expected to take; and (viii) D may not rely on duress to which he has voluntarily laid himself open. Although all these factors are important when considering the ambit of the defence more broadly, this final factor will be of particular importance when examining the relationship between Daniel and Vince.

The question of whether duress should be extended or modified to accommodate a victim of trafficking threatened with false imprisonment was considered and refused by the court in *van Dao*,[265] where the court commented *obiter* that it was "strongly disinclined to accept that a threat of false imprisonment suffices … without an accompanying threat of death or serious injury." Widening the duress defence in this manner was deemed "ill-advised".[266] These sentiments were echoed by Lord Thomas C.J. in *Joseph (Verna)* who explained that:

> "The law of duress was clear. Its scope and limits were set out in cases of the highest authority. Parliament had enacted s 45 without providing for retrospective protection, and clear injustice was required to justify a court amending the law of duress as applicable to trafficking victims unable to take advantage of the Act".[267]

Gross LJ outlined four reasons for retaining the narrow approach in *van Dao*. The first three were practical concerns: difficulties in disproving the defence once raised; the potential for criminals to manufacture the defence; lack of sufficient safeguards to prevent misuse of a widened duress defence; and, a justification for maintaining the status quo, that justice can be

[263] *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [21]. This rule applies to a child of the age of criminal responsibility no matter how susceptible he might be to the duress, absent the question of diminished responsibility: *Wilson (Ashlea)* [2007] EWCA Crim 1251; [2007] 2 Cr. App. R. 31.

[264] However, see the dissenting judgment of Baroness Hale in *R. v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.342) at [67-68].

[265] [2012] EWCA Crim 1717 at [33], followed in *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [28].

[266] [2012] EWCA Crim 1717, followed in *R. v Brandford (Olivia)* [2016] EWCA Crim 1794 at [32].
[267] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.498) at [28].

achieved in sentencing, even where the defence fails.[268] In relation to the latter, there is significant degree of pedigree in this view if it is considered in the proper context of the sentencing policy for the importation of drugs which expressly allows the court to take into consideration as a mitigating factor any "involvement due to pressure, intimidation or coercion falling short of duress'.[269] This is particularly relevant in drug mule cases which by their very nature often involves the exploitation of vulnerable individuals by more sophisticated offenders keen to apply their business at any cost.[270] As numerous judicial authorities have demonstrated however, the express policy of the courts has been to turn its face against mitigation in those circumstances without considering wider factors relating to the trafficked victim's background which made it relatively easy to exploit them, such as, their gender, poverty or emotional vulnerability.[271]

Notwithstanding the domestic courts' circumspect approach to duress generally, it is submitted that its approach in the context of trafficked victims is contrary to the ruling of the Strasbourg court in *VCL and AN v United Kingdom* for two reasons. First, it is wrong in principle--this is clear from the ruling of the Strasbourg Court in *VCL and AN*, which highlights that the importance and primacy of protection of trafficked victims over prosecution.[272] Secondly, it denies the State the opportunity to rely upon trafficked victims (or victims in a more general sense) as witnesses or sources of information in respect of their exploiters. On this latter point, it is noteworthy that in *L(M)*[273] the applicants had their convictions quashed to be called as witnesses for the prosecution against the men who had trafficked and exploited them. This undoubtedly would not have been the case if they did not have their convictions quashed. Further, it is reasonable to argue that the whole process of prosecution in that case undermined the opportunity to, first, provide them with support to treat them as victims as opposed to criminals; and secondly, to be able to use the opportunity that was then presented to call them as witnesses in the subsequent prosecution of the traffickers. While the difficulties delineated by Gross LJ in *van Dao* should not be underestimated, the Court of Appeal in

[268] *van Dao* [2012] EWCA Crim 1717 at [45-48]); see also, D. Ormerod, "*R. v Dao*: duress - extent of duress" [2013] Crim. L.R. 234

[269] Sentencing Council, *Drug Offences Definitive Guideline* (2012) p. 7. Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-definitive-guideline-Web.pdf (accessed 21 February 2022)

[270] Z. Smith & J. Gowland, "Drug Sentencing: What's the Deal? The New Sentencing Regime for Drug Offences' (2012) J. Crim. L 389, 397

[271] For a recent example, see *R v S(G)* [2019] 1 Cr. App. R. 7.

[272] (2021) 73 E.H.R.R. 9 at [160]

[273] [2011] 1 Cr. App. R. 12

Joseph (Verna) has left open the possibility of revisiting the parameters of duress in a case post-dating the coming into force of the MSA 2015.[274]

(ii) Voluntary exposure to threats

It is instructive to first consider the nature of the relationship between Daniel and Vince. It is well established that an accused person cannot invoke the defence of duress where he has voluntarily exposed himself to the threat of which he now complains.[275] Indeed, in the course of her speech in *Hasan,* Baroness Hale said of this question that "[I]ogically, if it applies, it comes before all the other questions raised by the defence".[276] In *Hasan*, their Lordships made clear that the policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so.[277] Lord Bingham, delivering the leading judgment, held that the defence of duress is unavailable when as a result of the accused's voluntary association with others engaged in criminal activity he foresaw or ought reasonably[278] to have foreseen the risk of being subjected to any compulsion by threats of violence;[279] nothing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant's subservience; there need not be foresight of coercion to commit crimes, although it was not easy to envisage circumstances in which a party might be coerced to act lawfully; to the extent that *Baker and Ward,*[280] suggested that there must be foresight of coercion to commit crimes of the kind with which the defendant is charged, it misstated the law; and the test in relation to the defendant's foresight should be an objective one.[281]

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[274] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.498) at [28].

[275] *Fitzpatrick* [1977] N.I.L.R. 20; see also, *Sharp* [1987] Q.B. 853, (1987) 85 Cr. App. R. 207; *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, (1975) 61 Cr. App. R. 6.

[276] *R. v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467 at [74] (Baroness Hale).

[277] ibid [38] (Lord Bingham).

[278] The Supreme Court of Canada has held this is a purely subjective test and there negligently joining an organisation that might put a person under duress is not enough to exclude the defence; see *R. v. Ryan* [2013] 1 S.C.R. 14 at para. 79. It is submitted that subjective test has to be the right test.

[279] As a matter of fact, threats of violence will almost always be made by persons engaged in a criminal activity, but it is the risk of being subjected to compulsion by threats of violence that must be foreseen or foreseeable that is relevant, rather than the nature of the activity in which the threatener is engaged: *R v Ali* [2008] EWCA Crim 716, [2008] All ER (D) 56 (Mar).

[280] [1999] 2 Cr. App. R. 335, 344 (Roch L.J.)

[281] *R. v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467 at [38].

While it is understandable why Lord Bingham wished to “cast the net of voluntary association deliberately wide,”[282] Baroness Hale advocated for a more subjective approach which assessed whether the individual foresaw the risk of threats "of such severity, plausibility and immediacy that one might be compelled to do that which one would otherwise have chosen not to do",[283] and that there was a "reasonable excuse" for the voluntary exposure.[284] This approach would afford children in Daniel’s position a significant degree of flexibility and avoid the requirement of foresight of the nature of the offences that one might be compelled to commit.[285] Her Ladyship also stressed the importance of establishing that the accused had indeed set up "a voluntary association with others",[286] stating that she did not believe this limitation on the defence to be aimed at certain defendants, such as, battered wives or those in close personal and family relationships with their duressors.[287] She prefaced this by stating,

> “It is one thing to deny the defence to people who choose to become members of illegal organisations, join criminal gangs, or engage with others in drug-related criminality. It is another thing to deny it to someone who has a quite different reason for becoming associated with the duressor and then finds it difficult to escape.”[288]

As this extract would suggest, Daniel would fit snugly into this latter category. Norrie noted, however, that the normative contours of a defence tend to differ depending on who is pleading it.[289] It is easy to imagine very different cases - and not only Baroness Hale's battered woman[290] - where the application of the general rule formulated to deal with the gang member would lead to results both socially undesirable and morally unfair.[291] However, when faced

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[282] *R. v Brandford* [2016] EWCA Crim 1794 at [34].

[283] *R. v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467 at [77] (Baroness Hale).

[284] ibid.

[285] ibid [38] (Lord Bingham).

[286] ibid [77] (Baroness Hale).

[287] ibid [78] (Baroness Hale).

[288] ibid

[289] A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd Edn, Cambridge University Press 2014) 228-229 cited in K. Laird, ‘Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?’ (2016) 6 Crim. L.R. 395, 403-04.

[290] *R. v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467 at [77-78] (Baroness Hale).

[291] D. Ibbetson, ‘Duress Revisited’ (2005) 64(3) C.L.J. 530, 532.

with the choice between a defence that has the potential to operate as a "charter for terrorists"[292] and one that fails to recognise the defendant's "miserable and agonizing plight",[293] the Court in *Hasan* have opted for the latter.[294]

(iii) Lack of defence for children who murder

Despite Daniel's young age, preservation of the objective standard in duress is "indicative of the hard line being taken towards the defence"[295] and rebuts any concern that the criminal law would resort to "sell-out subjectivism".[296] The unfortunate stringency of the objective interpretation of duress was demonstrated in *Wilson*.[297] In that case, a 13 year-old boy helped his father kill his neighbour, by fetching an axe at the behest and by joining in the violence by striking the victim's head with a metal pole. The boy's evidence suggested that he was not provoked (he denied loss of control) and that he was not suffering from diminished responsibility (he said that he knew what he was doing and may even have encouraged his father to make the attack). Duress being unavailable, the essence of the defence was that the boy did not intend to cause death or really serious harm, since he was being "swept along by the tide of the moment, of uncontrolled aggression … and did not, or may not in those circumstances have been able to form the necessary intention".[298] Neither the trial judge nor the Court of Appeal found this denial of intent convincing, and the murder conviction was upheld. The court noted in their decision that "the reality is that, on our law as it stands, the appellant did not have a defence" and that "there may be grounds for criticising a principle of law that does not afford a 13-year-old boy any defence to a charge of murder on the ground that he was complying with his father's instructions, which he was too frightened to refuse to disobey".[299]

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[292] *Lynch v DPP for Northern Ireland* [1975] A.C. 653 at 688; (1975) 61 Cr. App. R. 6. This concern was endorsed by Lord Bingham in *R. v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [22].

[293] A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd Edn Cambridge University Press 2014) 228-229.

[294] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395, 403-04.

[295] R. Ryan, 'Resolving the duress dilemma: guidance from the House of Lords' (2005) 56(3) 421, 426.

[296] ibid. See also, J. Horder, "Occupying the Moral High Ground? The Law Commission on Duress" [1994] Crim LR 334, 340.

[297] *R. v Wilson* [2007] EWCA Crim 1251; [2007] 2 Cr. App. R. 31.

[298] ibid [11] (Lord Phillips of Worth Matravers C.J.)

[299] ibid.

The Law Commission[300] had previously highlighted the "potential injustice" of the inability of children to plead duress in murder cases:

> "Capacity to withstand duress is increased with maturity and it would be unjust to expect the same level of maturity from a twelve-year-old as from an adult. *Bowen*[301] also states that youth is a relevant characteristic for the purpose of whether or not the defendant could have been expected to resist the pressure of a threat in cases other than murder. A ten-year-old whose moral character is not fully formed should not be expected in all the circumstances to resist the temptation to kill in order to avert a threat to himself".

The Law Commission consulted on the idea of a special provision for duress affecting children juveniles and young persons.[302] These proposals, however, were met with little support.[303] A number of consultees did, however, go on to recommend that duress should become a defence to murder, and that youth should remain a relevant factor in deciding how a reasonable person would have responded to the threats.[304] Despite the Commission's proposed reversal of the burden of proof,[305] it is submitted that this would be an advance on the position in this case, where a child in the position of Daniel could not argue duress at all.

(iv) Alternative approaches to the reasonable person

Notwithstanding the preservation of the strict objective reasonable person standard in duress, Ryan noted that there has been "landmark shifts towards subjectivity in the criminal sphere" over recent years.[306] This was most clearly demonstrated in *R v G.*[307] By explicitly recognising the "special position of children on the criminal justice system",[308] the ruling may "have given

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[300] Law Commission, *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005), para 7.72. Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp177_Murder_Manslaughter_and_Infanticide_consultation_.pdf (accessed 25 February 2022)

[301] *R v Bowen* [1997] 1 W.L.R. 372; [1996] 2 Cr. App. R. 157, 166 (Stuart-Smith L.J)

[302] Law Commission, Murder, *Manslaughter and Infanticide* (Law Com No. 307, 2006) para 6.142 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228782/0030.pdf (accessed 26 February 2022)

[303] ibid.

[304] ibid.

[305] ibid. para 6.94

[306] R. Ryan, 'Resolving the duress dilemma: guidance from the House of Lords' (2005) 56(3) 421, 426.

[307] *R. v G* [2003] UKHL 50; [2004] 1 A.C. 1034.

[308] ibid. [1061] (Lord Steyn)

cause to the conjecture that in the context of duress a subjective approach would ultimately be favoured".[309] The facts are as follows: two boys aged 11 and 12, went camping without their parents' permission. During the night they entered the back yard of a shop where they found bundles of newspapers. After reading some of the papers they then set light to them. The boys threw the lit papers under a large plastic wheelie bin and left the yard. The fire spread to the wheelie bin and subsequently to the building itself, causing £1 million worth of damage. The boys claimed that they had expected the papers to burn themselves out on the concrete floor of the yard and had not appreciated that the fire could spread further. The boys were charged with arson contrary to s 1(1) and (3) of the Criminal Damage Act (CDA) 1971. At their trial, the judge ruled that he was bound to direct the jury in accordance with the House of Lords' decision in *Metropolitan Police Commissioner v Caldwell*,[310] directing the jury to consider whether it would have been obvious to the ordinary, reasonable bystander that there was a risk that the fire would spread from paper or papers, to bin or bins up to the building.[311] When clarifying the nature of the standard, the trial judge stated,

> "The ordinary, reasonable bystander is an adult. He does not have expert knowledge. He has got in his mind that stock of everyday information which one acquires in the process of growing up … When you answer this question as to whether it would have been obvious to an ordinary reasonable bystander watching that the fire would spread … the ages of these defendants are irrelevant. No allowance is made by the law for the youth of these boys or their lack of maturity or their own inability, if such you find it to be, to assess what was going on … "[312]

It is noteworthy that the jury were "perplexed"[313] by the harshness of the rule set out in *Caldwell* to children. Although it was not argued on appeal that the judge's direction was incorrect, the House of Lords took the opportunity to set the law back on the subjectivist track that Parliament

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[309] R. Ryan, 'Resolving the duress dilemma: guidance from the House of Lords' (2005) 56(3) 421, 426.

[310] [1982] A.C. 341; [1981] 2 W.L.R. 509.

[311] [2003] UKHL 50; [2003] 3 W.L.R. 1060 at [6]

[312] [2003] UKHL 50; [2003] 3 W.L.R. 1060 at [6]. See *Elliott v C* (1983)77 Cr App R 136 (where a mentally handicapped girl of 14 was convicted of criminal damage by fire, having failed to understand the flammable properties of white spirit).

[313] [2003] UKHL 50; [2003] 3 W.L.R. 1060 at [52]

can be taken to have intended[314] by approving cl.18(c) of the Criminal Code Bill.[315] This was based on the earlier decision in *Cunningham.*[316] In the future, if children claim not to have foreseen the risks involved in their actions and they are believed, they should not be convicted of offences requiring recklessness.[317]

(v) The abolition of doli incapax

Although it was not the main subject of the appeal, one of the more interesting aspects of the ruling in *G* were the observations expressed by Lord Steyn who asserted that the law expounded in *Caldwell* needed to be reappraised in light of the UK's ratification of the United Nations Convention on the Rights of the Child (UNCRC). Article 40.1, provides:

> "State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age …"[318]

As Lord Steyn stated:

> "This provision imposes both procedural and substantive obligations on state parties to protect the special position of children in the criminal justice system. For example, it would plainly be contrary to article 40.1 for a state to set the age of criminal responsibility at, say, five years."[319]

While it would be contrary to the spirit of the UNCRC to set the age of criminal responsibility at 5 years-old, it does not appear to be contrary to set it at 10 years-old. The UNCRC does not specify a minimum age. Article 6 of the European Convention on Human Rights (ECHR)

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[314] As Ashworth noted, the argument against *Caldwell* in terms of legislative intent was "always a strong one": 'Arson: Mens rea--Recklessness whether property destroyed or damaged' [2004] Crim. L.R. 369, 370.

[315] For commentary on the merits of the approach taken by the House of Lords, see, H. Keating, 'Reckless Children' (2007) Crim. L.R. 546; D. Kimel, "Inadvertent Recklessness in Criminal law" [2004] 120 L.Q.R. 548; M. Davies, "Lawmakers, Law Lords and Legal Fault: Two Tales from the (Thames) Riverbank" (2004) 68 J.C.L. 130; and D. Ibbetson, "Recklessness Restored" (2004) 63 C.L.J. 13.

[316] [1957] 2 Q.B. 396.

[317] Ashworth noted, however, that "this is a question of awareness of the risk, and not awareness of the social significance of the prohibited consequences": *Positive Obligations in Criminal Law* (Hart Publishing 2015) 174

[318] In addition, Art.4(1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) provides that: "In those legal systems recognising the concept of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts and emotional, mental and intellectual maturity." The Rules do not set a specific minimum age and are not binding.

[319] *R. v G* [2004] 1 A.C. 1034, 1061

which guarantees the right to a fair trial does not mention a minimum age. Despite this there was an attempt in *V and T v United Kingdom*[320] to argue that the cumulative effect of the minimum age of 10 and the trial process violated art.3 of the ECHR because it represented inhumane and degrading treatment.[321] This case concerned the trial of the two 10-year-old boys convicted of killing 2-year-old James Bulger. The majority of the European Court of Human Rights found that the fact that a child could be held criminally responsible at the age of ten did not in itself violate art 3. When acknowledging that there was no commonly accepted minimum age in Europe, setting it at the age of 10 is at the lower end of the spectrum, held that "it cannot be said to be so young as to differ disproportionately from the age limit followed by other European states".[322]

Given the importance of the boys' ages and Lord Steyn's explicit recognition of "the special position of children in the criminal justice system",[323] Keating[324] highlighted that not one of the Lordships in *R v G* commented on the fact that until 1998 the prosecution would have had to establish that the boys were *doli capax* as well as establishing *mens re*a. This consideration is equally applicable when examining the facts of Daniel's case.

Section 34 of the Crime and Disorder Act 1998 (CDA 1998) abolished the "rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence".[325] This had the effect of abolishing both the defence as well as the former presumption of *doli incapax*.[326] This was a rebuttable presumption that operated between 10 and 14 and provided, in the words of Lord Lowry, a "benevolent safeguard"[327] to protect children who were incapable of appreciating the criminal wrongfulness of their actions and

[320] [1999] ECHR 171, (2000) 30 E.H.R.R. 121.

[321] ibid. [63]

[322] ibid.

[323] *R. v G* [2004] 1 A.C. 1034, 1061

[324] K. Keating, 'Reckless children? (2007) Crim. L.R. 546, 549.

[325] The attribution of criminal responsibility to a child of 11 years does not by itself give rise to a breach of the European Convention on Human Rights provided the child is able effectively to participate in the proceedings: *S C v United Kingdom* (application no 60958/00) [2005] 1 FCR 286, [2005] Crim LR 130.

[326] In *R. v T* [2009] UKHL 20; [2009] 1 A.C. 1310, 1328 Lord Phillips of Worth Matrevers rejected Smith LJ's tentative and obiter suggestion in *DPP v P.* [2007] EWHC 946 (Admin); [2008] 1 W.L.R. 1005, DC, that only the presumption had been abolished. For further discussion on this ruling, see F. A. R. Bennion 'Mens Rea and defendants below the age of discretion' [2009] Crim. L.R. 757, A. Ashworth, '*R v T*: Children and Young Persons – *doli incapax*- Crime and Disorder Act 1998 s. 34' [2009] Crim. L.R. 581-583. Notwithstanding the ruling in *R v T*, it has been held that the presumption continues to offences alleged to have been committed before its abolition: *H* [2010] EWCA Crim 312; *M* [2016] EWCA Crim 674; *P.F.* [2017] EWCA Crim 983.

[327] *C (A Minor) v DPP* [1995] 2 W.L.R. 383; [1995] 2 All E.R. 43 at [4] (Lord Lowry).

thus not criminally responsible unless proven otherwise.[328] Put simply, had the presumption still been in place when Daniel committed the offences outlined in the case scenario, and it was deemed it in the public interest to prosecute, the prosecution would have to prove that he knew what he was doing was wrong, seriously wrong – not merely mischievous or naughty. It is acknowledged that on the facts if Daniel's case that it is highly unlikely that the presumption will have assisted Daniel as the prosecution will have little difficulty in rebutting the presumption given the serious nature of the offences.[329] This means that Daniel meets the threshold of being held criminally responsible for his actions.[330] It is however regrettable that had s 4 of the Children and Young Persons Act 1969 been implemented, the age of criminal responsibility would have been set at fourteen and there would have been no question of criminal proceedings against Daniel.[331] In the absence of any meaningful progress of the Age of Criminal Responsibility Bill (England and Wales) 2019–2021,[332] paired with little enthusiasm for raising the age of criminal responsibility generally,[333] it appears that children like Daniel will continue to have no defence.

V. s 45 Modern Slavery Act 2015: The Statutory Defence

Compared to the restrictive ambit of common law duress, s 45(4) is somewhat more flexible for a child in the position of Daniel, who has been recruited by a criminal gang at age 13 and says that he would suffer violence if he did not offend at the organisation's behest, to raise a defence which the prosecution must disprove. In order to rebut the defence, the prosecution would have to show either that Daniel's youth was not a reason for recruiting them (though it

[328] In this regard 'wrongfulness' is taken to mean gravely wrong, seriously wrong, evil or morally wrong: *JM (A Minor) v Runeckles* (1984) 79 Cr.App.R. 255, 260 (Goff L.J). See also, *R v Gorrie* (1918) 83 J.P. 136; *B v R* (1958) 44 Cr. App. R. 1; *R v Smith (Sidney)* (1845) 1 Cox C.C. 260.

[329] *L (A Minor) and Ors* [1996] 2 Cr. App. R. 510. The presumption could not be rebutted solely on the basis on the child's act alone, but the surrounding circumstances, any admission from the child, evidence from teachers, etc. could all be used to do so.

[330] The Age of Criminal Responsibility Bill 2016-17 (HC Bill 405) proposed raising the conclusive presumption that 'no child under the age of ten years can be guilty of an offence' to 'twelve' in England and Wales; however, the Bill was dropped in October 2019.

[331] Keating noted that this provision, passed just as the welfare approach to children's anti-social behaviour began to wane, was never implemented. It was repealed in 1991 by s.72 of the Criminal Justice Act 1991: K. Keating, 'Reckless children? (2007) Crim. L.R. 546

[332] The Age of Criminal Responsibility Bill [HL] 2019–21 had its first reading in the House of Lords on 15th June 2021. A date for the second reading has yet to be announced: https://bills.parliament.uk/bills/2613 (accessed 26 February 2022.

[333] HL Deb 8 September 2017 Vol.783, col.2211 (Baroness Vere of Norbiton (Con)).

is not obvious why this should affect the defendant's culpability), and that his involvement in the relevant offending was not a direct consequence of having been subject to trafficking. Although no evidence of coercion is required to establish that the defendant was a victim of trafficking, coercion may well be relevant to the reasonableness of the defendant's action. Presumably this envisages the "reasonable victim of slavery or relevant exploitation", which as Laird argues is a difficult standard to apply.[334] The task of applying this elusive standard, however, is pre-eminently one for the jury. It may be difficult for a vulnerable defendant to raise the s 45 defence in open court, and it may also be the case that the prosecutor may have failed to give sufficient consideration to this factor at the public interest stage.

Section 45 introduced separate defences for victims of human trafficking over and under the age of 18 who commit an offence because of exploitation. The defence is not retrospectively applicable and is subject to a long and somewhat arbitrary list of exclusions in Schedule 4. For adults, the section operates where the person performs the criminal act because they were compelled to do so; the compulsion is attributable to slavery or relevant exploitation; and a reasonable person in the same situation as the person and sharing the person's relevant characteristics would have no realistic alternative to doing the act.[335] 'Relevant exploitation' is exploitation within s 3, which is attributable to the defendant being a victim of human trafficking. As s 56(2) makes clear, any victim of the offence defined in s 2 is a victim of human trafficking for the purposes of the s 45 defence. The defence for under-18s is similar except there is no need to establish compulsion or the absence of a realistic alternative providing the criminal conduct was a direct consequence of being, or having been, a victim of slavery or relevant exploitation.[336] What does need to be established is that: "the person does that act as a *direct consequence* of the person being, or having been, a victim of slavery or a victim of relevant exploitation; and *a reasonable person in the same situation as the person and having the person's relevant characteristics* would do that act".[337] Despite s 45 being a laudable attempt to provide a robust defence for child victims of trafficking who commit offences as a result of their exploitation, it is argued that it largely fails to achieve its intended purpose. The next section shall examine each element of the defence in isolation to demonstrate the inadequacy of this provision.

[334] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395, 399.

[335] MSA 2015, s 45(1)(a)-(d))

[336] ibid. s 45(4)(b)

[337] ibid. s 45(4)(b)-(c)).

(i) Absence of an express burden of proof

The MSA 2015 is silent on where the burden of proof should fall in respect of the s 45 statutory defence. The interpretation initially adopted by the CPS was that the defendant was required to provide sufficient evidence to demonstrate that he or she was a victim of slavery or trafficking.[338] If successful, the prosecution was required to disprove the claim, beyond reasonable doubt. If the prosecution was not able to discharge the burden, the legal burden of proof would then fall on the defendant to prove every element of the defence on the balance of probabilities. This interpretation had also been included in a number of early academic commentaries on the defence.[339]

The conjoined appeals of *MK v R and Gega v R*[340] was the first to address the question of where the question of where the legal burden of proof lies when a defence is raised under s 45 of the MSA 2015. The Court of Appeal confirmed that the burden on a defendant relying on the s 45 defence is evidential, i.e., if the defendant raises evidence of each of the elements of the defence, it is for the prosecution to disprove one or more of them to the criminal standard the usual way. The appellants in that case were both Albanian nationals who claimed to have been victims of trafficking and sought to rely on the s 45(1) defence. Both had been convicted following trials. In each trial the judge had directed the jury that the defendant bore the evidential burden to raise the issue whether s/he was a victim of trafficking or slavery, and that having successfully done so, it was for the prosecution to prove beyond reasonable doubt that s/he was not, and if the prosecution succeeded the defence would not avail the defendant; however, if the prosecution failed, the legal or persuasive burden of proof in respect of the other elements of the defence would fall on the defendant, who must prove them on the balance of probabilities. The Court of Appeal held that there was nothing in the wording of s 45 that requires the defendant to bear the legal or persuasive burden of proof of any element of the defence.[341] To apply a reverse burden would undermine the protection that the Act is designed to afford to vulnerable people who are likely to be traumatised by their experiences and may well be at the mercy of those who exploited them.[342] Where the defendant's age is

[338] Also known as an evidential burden.

[339] See, for example, N. Wake, "Human Trafficking and Modern Day Slavery: When Victims Kill' (2017) Crim L.R. 658-77 and J. Haynes, "The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37(1) Statute Law Review 33.

[340] [2018] EWCA Crim 667; [2019] Q.B. 86.

[341] ibid [31].

[342] ibid [36].

in issue, it is for the prosecution to prove that the defendant is an adult to the usual criminal standard for the adult version of the defence to be considered.[343]

(ii) Sch. 4 - Exclusion of offences

While there is no exhaustive list of offences that may be committed by victims of trafficking in the course, or as a consequence, of being trafficked,[344] s 45(7) of the MSA 2015 states that the defences do not apply to an offence listed in Sch.4. Schedule 4 lists over 100 offences which are excluded from the parameters of both iterations of the defence, some of which "victims of modern slavery [may] become embroiled in".[345] In Daniels' case, he will have a defence to the potential charges of possession with intent to supply, assault and theft; however, on the alternate ending to Daniel's case, the charges robbery manslaughter and robbery are explicitly excluded under Sch.4 which means that the s 45 statutory defence would not be available to him.

In contrast, the position in Scottish law is preferable to the position in E&W.[346] Scotland does not have an equivalent defence for trafficked victims who are compelled to commit offences.[347] Instead, the Lord Advocate Instructions outline a strong presumption against prosecution of a child where there is credible and reliable information that the child is a victim of human trafficking and that the offending took place either in the course of, or as a consequence of, being a victim.[348] Most significantly, the Instructions have the advantage of being amenable to future developments in trafficking in that they do not exclude any offences, thereby recognising that the list of offences which victims of human trafficking or exploitation may commit is "constantly evolving".[349] This means that if the same offences were committed by Daniel in

[343] ibid [41]

[344] OSCE, *Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013), para 57 Available at: https://www.osce.org/files/f/documents/6/6/101002.pdf (accessed 1 February 2022)

[345] PBC Deb, 11 September 2014 (Modern Slavery Bill), col. 38 cited in N. Wake *et al*, Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation (2021) Jan P.L. 145, 149.

[346] The Scottish position regarding prosecution of child victims of trafficking will be examined in further detail in Chapter 3.

[347] Human Trafficking and Exploitation Act (Scotland) 2015, s. 8; COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015). Available at: https://www.copfs.gov.uk/publications/prosecution-policy-and-guidance?showall=&start=4 (accessed 21 February 2022).

[348] ibid.

[349] ibid.

Scotland, provided it was established that he was a trafficked victim, and that he committed the offences in the course, or as a consequence of his trafficking situation, there would be a presumption against his prosecution.

In a recent independent review of the MSA, stakeholders had expressed concerns that Sch. 4 is "too restrictive" and that it contains many offences that could be committed by victims of slavery or trafficking.[350] Others suggested that that it does not meet the UK's wider international obligations.[351] This latter argument was rejected in *R v A.*[352] In that case, the Court of Appeal held that Sch. 4 was not in conflict with the international obligations imposed by the Trafficking Convention and/or Trafficking Directive. Their Lordships stated that in cases where s 45 does not apply, the common law defence of duress/necessity and the four-stage approach to prosecution decisions set out in the CPS Guidance (that has express regard at stage four for the public interest) provide appropriate safeguards for trafficked victims. The Court of Appeal has consistently stated that the seriousness of the offence is a relevant consideration and that the more serious the offence the greater the degree of compulsion which must be shown. It is, however, difficult to see how this is relevant in the case of children, as s 45(4) makes clear that children do not have to show that they were compelled in order to rely on the defence, only that it was a direct consequence. As this, and many other cases, demonstrate the protection afforded by the anti-trafficking provisions in E&W provide an example of the tensions between the State's safe-guarding duties in respect of young people and the public interest in deterring serious crime.[353]As will become evidence from the discussion below, this is not the only aspect of the statutory defence as it applies to children that severely limits its scope and application.

(iii) s 45(4)(b) - Compulsion/problems with direct consequence ambiguity

To qualify for the statutory defence under s 45(4), Daniel's involvement in the criminal activity must be 'a direct consequence' of having been subject to trafficking.[354] The following analysis

[350] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) para.4.3.2 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 29 January 2022)

[351] ibid.

[352] [2020] EWCA Crim 1408, [2021] 4 WLR 16 at [65].

[353] Court of Appeal judgment – prosecuting victims of trafficking, abuse of process and Schedule 4 offences (*Youth Justice Legal Centre* 10 November 2020) Available at: https://yjlc.uk/resources/legal-updates/court-appeal-judgment-prosecuting-victims-trafficking-abuse-process-and (accessed 22 February 2022).

[354] Compulsion is irrelevant insofar as a child's status as is a victim of trafficking is concerned; however, compulsion will be a relevant consideration when considering whether the public interest in prosecuting a child is

reviews the relevant principles established by the courts when assessing whether there was sufficient nexus between victims' trafficked status and their crimes to invoke s 45(4) of the MSA 2015. It is argued that the failure to define "direct consequence" potentially imports a compulsion requirement into the under 18 version of the defence. As noted, unlike the adult iteration, the statutory defence, as applicable to those under 18 years, omits the requirement that the compulsion be attributable to slavery or relevant exploitation. The term "direct consequence" ought to be explicitly defined. It is submitted herein that a causal requirement akin to that in diminished responsibility would have provided more clarity and prevented confusion regarding whether compulsion forms an implicit aspect of the "direct consequence" mandate. [355]

There are no statutory or jurisprudential authorities clarifying how the term "direct consequence" should be interpreted.[356] As Haughey noted this lack of definition "is likely to lead to difficulty in the future".[357] In *L(C),* the Court of Appeal offered numerous glosses to the term including, *inter alia*, that the alleged crime must be "consequent on or integral to the exploitation of which he was the victim"[358]. In the absence of a statutory definition of "direct consequence', the courts appear to have subsequently adopted the *L(C)* interpretation when seeking to establish whether there was a nexus between the commission of an offence and the defendant's trafficked status. This was reaffirmed by the Court of Appeal in *Joseph (Verna)*.[359] When summarising the UK's international obligations towards victims of trafficking who commit offences, Lord Thomas of Cwmgiedd emphasised that a "careful analysis of the facts is required including close examination of the individual's account and proper focus on the evidence'[360] but made clear that, "if there is no reasonable nexus of connection between the offence and the trafficking, generally a prosecution should proceed'.[361]

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satisfied: see CPS Guidance, *Human Trafficking, Smuggling and Slavery* available at <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery> accessed 17 June 2020.

[355] Homicide Act 1957, s. 2(1B), as inserted by Coroners and Justice Act 2009, s. 52.

[356] Laird noted his confusion, stating that "[it] was unclear why the term "direct consequence" was used and whether this is intended to be interpreted differently from the term "attributable": Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed? (2016) 6 Crim. L.R. 395, 397.

[357] Caroline Haughey, The Modern Slavery Act Review (2016) p.27. Available at < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf> accessed 18 June 2020.

[358] [2013] EWCA Crim 991; [2014] 1 All E.R. 113 at [20], [33]; (2014) Crim. L.R, 2, 150, 156.

[359] [2017] EWCA Crim 36 at [20(vi)].

[360] ibid [40].

[361] ibid [20 (v)].

In the majority of cases, the link between a child's trafficked status and the commission of an offence will be clear; however, there are inevitably going to be cases where establishing the connection will prove more difficult. Piotrowicz and Sorrentino noted that "a trafficked person may be involved in prohibited conduct that is not a direct consequence of coercion exerted by traffickers but is, nevertheless, linked to the trafficking experience".[362] For example, a child attempting to escape the influence of their trafficker, in which case recourse to offending may be a result of the perceived absence of meaningful alternatives to escape exploitation. Although this may be viewed *prima facie* as conduct that is not a direct consequence of the actions of traffickers it is likely that the trafficking experience caused or was a significant contributory factor in causing the victim's conduct. By the legislature and the courts failing to provide a definition of "direct consequence', this element of the defence remains open to conjecture.

As originally drafted, the defence as it applied to children did require an element of "compulsion".[363] According to Bradley, the compulsion element provided an "appropriate safeguard, so that the defence does not provide a loophole in the law for serious criminals".[364] As parliamentary debates on the Bill indicate, the Government's rationale was subject to intense criticism. Ministers considered the inclusion of compulsion in the defence for children as being "incredibly torturous"[365] and "extremely vague",[366] adding that it would be "simply wrong to put such an onus on a victim who has been turned into a potential defendant by the situation".[367] This criticism, however, underappreciates the concerns raised by Finch. In a comment that presaged the subsequent removal of the requirement, Finch noted that there was an "internal inconsistency" which was evidenced by the Bill not requiring compulsion to be demonstrated in order to prosecute an individual for trafficking a child, but that an element compulsion would have to be established in order for the child to show that they were entitled to a defence.[368] This approach, she argued, could be exploited by traffickers to "evade

[362] R. Piotrowicz and L. Sorrentino, Human Trafficking and the Emergence of the Non-Punishment Principle (2016) 16(4) *Human Rights Law Review* 669, 679.

[363] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.382

[364] ibid col. 368 (Karen Bradley)

[365] ibid col. 368 (Sarah Teather)

[366] ibid col. 369 (Sarah Teather)

[367] ibid c379.

[368] PBC Debate, 21 July 2014 (Modern Slavery Bill), col. 36 (Nadine Finch)

prosecution and used to make a mockery of the child's defence".[369] As a result of the concerns enumerated by the Committees, the Bill was amended to remove the "compulsion" requirement,[370] replacing it with the requirement that the child does the act as a "direct consequence" of being, or having been, a victim of slavery or relevant exploitation.[371]

Despite the removal of "compulsion" from the s 45 statutory defence for children and revised prosecutorial guidelines,[372] it is arguable that the "direct consequence" requirement inadvertently retains the need to establish compulsion for children to avail themselves of the defence. This is particularly pertinent as it is not immediately obvious whether "direct consequence" encompasses criminality committed by the trafficked person when under the control of the trafficker, when attempting to flee the control of the trafficker or when "otherwise acting to try to protect or assist him or herself on account of their trafficked status".[373]

It is not possible to establish a comprehensive list of offences that victims may commit in the course, or as "a direct consequence", of being trafficked. People are trafficked for many reasons and the offences in which they are involved are usually linked; there are, however, certain offences which are frequently committed in the context of human trafficking.[374] The most common types of offences which victims commit in the *course* of trafficking or exploitation include immigration offences and possession of false identity documents.[375] The offences which victims commonly commit as a *consequence* of the trafficking or exploitation include the production or being concerned in the sale and supply of controlled drugs, shoplifting, theft by housebreaking, benefit fraud and offences linked to commercial sexual exploitation.[376]

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[369] PBC Debate, 21 July 2014 (Modern Slavery Bill Debate, col. 36 (Nadine Finch).

[370] K. Laird, Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed? (2016) 6 Crim. L.R. 395, 397.

[371] MSA 2015, s 45(4)(b)

[372] CPS, *Human Trafficking, Smuggling and Slavery* (2015) available at < https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery> accessed 17 June 2020.

[373] P. Carter and P. Chandran, 'Protecting against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System' in P. Chandran (ed.), *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 425.

[374] Organization for Security and Co-operation in Europe (OSCE), *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013) para. 51 Available at < https://www.osce.org/files/f/documents/6/6/101002.pdf> accessed 28 June 2020.

[375] As was the case in *R v O* [2008] EWCA Crim 2835.

[376] Organization for Security and Co-operation in Europe (OSCE), Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking (2013) p. 9 Available at < https://www.osce.org/files/f/documents/6/6/101002.pdf> accessed 28 June 2020.

Schloenhardt and Markey-Towler outlined another category of offences ("liberation offences") which a trafficked victim may feel compelled to commit in an attempt to free themselves from the trafficking situation or to somehow improve that situation.[377] This may arise when a child is attempting to flee the control of their trafficker or when otherwise acting to try to protect or assist themselves on account of their trafficked status.[378] Such offences are not strictly "a direct consequence of control exerted by trafficker, but [are], still linked to the trafficking experience".[379] Significantly, Sch. 4 of the MSA 2015 arbitrarily excludes so many criminal offences (including, but not limited to, blackmail, theft, forced begging) and potentially so many victims of slavery and trafficking from its ambit that it "has the potential to undermine the effectiveness of the s 45 defence",[380] meaning that victims may have no choice but revert to using the common law in E&W.

(iv) s 45(4)(c) – The 'Reasonable Person' dilemma

The requirement in s 45(4)(c) of the MSA 2015 is reflective of an external standard of liability equated to the amorphous test of the reasonable person in common law duress in *Graham*.[381] Unlike the statutory defence for adults under s 45(1), the lack of the test of compulsion, and the no reasonable alternative requirement for meeting the reasonable person test is in recognition of the unique vulnerabilities of children.[382] Nevertheless, this element is to be interpreted strictly, and so every child, notwithstanding their lack of capacity, will be assessed by asking whether 'a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act'.[383] The following analysis will briefly examine the relevant principles established by the courts before examining the objective

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[377] A. Schloenhardt and R. Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons' (2016) 4(1) *Groningen Journal of International Law* 10, 13.

[378] P. Carter and P. Chandran, 'Protecting against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System' in P. Chandran (ed.), *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 425.

[379] Organization for Security and Co-operation in Europe (OSCE), *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013) para. 53 Available at < https://www.osce.org/files/f/documents/6/6/101002.pdf> accessed 21 January 2022.

[380] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' [2016] Crim. L.R. 395, 396.

[381] [1982] 1 W.L.R. 294; (1982) 74 Cr. App. R. 235; see also, R. v. Howe [1987] A.C. 417, 426; (1987) 85 Cr. App. R. 32, 37.

[382] Explanatory Notes para. 222

[383] MSA 2015, s. 45(4)(c). As originally drafted, the reasonable person test as it applied to children required they have "no reasonable alternative" to doing the culpable act; however, following an amendment by Lord Bates and Baroness Kennedy this element was removed <https://publications.parliament.uk/pa/bills/lbill/2014-2015/0069/amend/ml069-I.htm > (accessed 17 January 2022).

reasonable person standard under s 45(4)(c). It is argued that the inclusion of a reasonable person standard in s 45(4) places an additional barrier in the way of children successfully pleading the defence, and carries an overwhelming potential for injustice by introducing, in an indirect way, the need for a child to establish an element of compulsion.[384]

The reasonableness requirement within common law duress was justified by the Law Commission so as to not "create too wide a defence".[385] Parallel to this was the justification for its inclusion in s 45 as "an important safeguard against [the] defence being abused".[386] Although the term "reasonable person" has a precise and technical component in various areas of the law,[387] Smith noted that, in the context of duress, the extant law does not recognise the defence for the weak or timorous accused who fails to meet the anthropomorphic 'reasonable steadfastness' standardisation.[388] According to Smith, by setting too high a standard for an excusatory defence and generating "problems of unintelligibility and impracticality, [operating] on morally questionable foundations".[389] This criticism, it would seem, is equally applicable to the objective requirement applicable to children in s 45(4)(c).

The Government rejected the notion of adopting a subjective test on grounds that it would allow the statutory defence to be raised in "tenuous circumstances", which would enable defendants to argue that "they felt compelled by circumstances that any normal person could conclude were not enough to justify committing the offence."[390]

Although the Government's concern that the statutory defence could be subject to abuse is certainly a valid one, Laird, in his incisive review of the adult s 45 statutory defence, argued that requiring victims of slavery and trafficking to show the same level of fortitude as the

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[384] Independent Review of the Modern Slavery Act 2015 (May 2019) para. 4.4.2. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 21 January 2022).

[385] Law Commission, *Criminal Law Report on Defences of General Application* (Law Com 83, 1977) para 2.28.

[386] PBC Deb, 11 September 2014 (Modern Slavery Bill), col. 368

[387] For example, the test for negligence in tort law requires consideration of what the reasonable person (in the defendant's profession) would do; however, in those cases there really is a standard: whether it be for instance the standard of the reasonable qualified competent driver (*Nettleship v Weston* [1971] 3 WLR 370) or the standard of a responsible body of medical opinion (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582).

[388] KJM Smith, 'Duress and Steadfastness: In Pursuit of the Unintelligible' [1999] Crim LR 363, 372-373.

[389] KJM Smith, "Must Heroes Behave Heroically' [1989] Crim LR 622, 627.

[390] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.369

ordinary citizen is "deeply problematic given the extreme nature of their circumstances".[391] Similar sentiments were also expressed by Edwards who argued that the very concept of objective reasonableness is "[a construct] imagined in a social world …by those whose behaviour is often outside the world of the person whose behaviour is under scrutiny".[392] While these criticisms are directed towards the s 45 defence as it applies to adults, they are equally applicable to the statutory defence for children. This criticism also demonstrates the problem with invoking the reasonable person test in these circumstances; either this makes the enquiry essentially subjective, which surely cannot have been intended given what the Minister said about the purpose of the test,[393] or it requires a victim of slavery or relevant exploitation to be evaluated against a standard they could not possibly have been expected to achieve.[394] This criticism, however, underappreciates the point made by Baroness Kennedy of Cradley. Kennedy remarked that, in her view, "it is very hard – if not impossible – for a person to place themselves in the mind of an enslaved or trafficked child…" adding that "a person would need to understand the cultural, supernatural and psychological impact a trafficker can have on a child as well as the fear they feel."[395]

Notwithstanding the removal of the element of compulsion from s 45(4)(c), it is arguable that the "reasonable person" test inadvertently retains the need to establish compulsion in their actions in order to access the protection of the statutory defence, which does not meet international obligations.[396] Expert advisors to the Independent Review of the MSA, however, did not agree that the "reasonable person' requirement introduces an element of compulsion in this context.[397] This appears to reflect the earlier position of the Court of Appeal in *L(M)*

[391] K. Laird, Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed? (2016) 6 Crim. L.R. 395, 399.

[392] S. Edwards, "Coercion and compulsion - re-imagining crimes and defences" (2016) 12 Crim. L.R. 876, 895.

[393] See PBC Deb, 11 September 2014 (Modern Slavery Bill), col. 369. For further discussion in relation to the similar problems that arose under the former law of provocation, see A. Norrie, 'From criminal law to legal theory: the mysterious case of the reasonable glue sniffer' (2002) 65 M.L.R. 538 cited in Laird, 399.

[394] K. Laird, Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed? (2016) 6 Crim. L.R. 395, 399.

[395] HL Deb 8 December 2014 col, 1652; see also, ILPA Briefing for Modern Slavery Bill, House of Commons, Second Reading (8 July 2014) p.3; ATMG, *Class Acts? Examining Modern Slavery Legislation in the UK* (2016) p.68.

[396] ATMG, *Class Acts? Examining Modern Slavery Legislation in the UK* (2016) 67; GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, Second Evaluation Round* (2016) para. 288.

[397] Independent Review of the Modern Slavery Act 2015 *Final report* (TSO, 2019) para 4.24. Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> (accessed 10 August 2020)

which have held that 'compulsion' is intended in "a general sense…and is not limited to circumstances in which the English common law defences would be established".[398] The threshold for establishing "compulsion" is, therefore, ostensibly lower than that required to establish the common law defence of duress.[399]

An overt public policy constraint has been interposed to confine the number of 'relevant characteristics' under s 45(5). This element mirrors the common law.[400] Beyond age and sex of the individual defendant, precedential authorities have only accorded relevance to character traits that constitute severe mental illness or psychiatric disorder.[401]

During the Public Bill Committee stages, Bequiraj argued that this circumspect list of 'relevant characteristics' "limit[s] the scope of the defence provision in an unjustified manner", and "severely restricts the effective and accurate evaluation of the actual circumstances under which the commission of an offence may be compelled".[402] She further points out "the [fiction] in assuming that persons of the same age, sex and health status are compelled in the same way to commit an offence in the context of trafficking".[403] Although it is not possible to establish an exhaustive list of characteristics that may be tailored specifically to victims of trafficking and slavery,[404] Laird has remarked that by relying upon the common law, s 45(5) "incorporates a number of the common law's deficiencies".[405]

It is recognised that there is a myriad of physical and psychological methods of coercion employed by traffickers to compel child victims of trafficking and slavery to commit criminal offences. One of the most prevalent forms is where traffickers establish conditions that lead

[398] *LM and Ors* [2010] EWCA Crim 2327 at [11] (Hughes L.J)

[399] N. Wake *et al*, Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation (2021) Jan P.L. 145.

[400] *R v Graham (H.K)* [1982] 1 W.L.R. 294; (1982) 74 Cr. App. R. 235.

[401] See A. Buchanan and G. Virgo, 'Duress and Mental Abnormality' [1999] Crim LR 517; and see *Bowen* [1996] 4 All ER 837, 844, categorising availability to individuals suffering from 'some mental illness, mental impairment, or a recognised psychiatric condition, provided persons generally suffering from such a condition may be more susceptible to pressure and threats'.

[402] Written evidence submitted by Dr Julinda Beqiraj (MS 36) para. 15. Available at <https://publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/memo/ms36.htm > (accessed 01 August 2020).

[403] ibid.

[404] *Independent Review of the Modern Slavery Act 2015: Final report* (TSO, 2019) para 4.24: "Characteristics of children vary vastly depending on their age, so it is difficult to have a one-size-fits-all test"

[405] K. Laird, Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed? (2016) 6 Crim. L.R. 395, 400.

to so-called 'learned helplessness', impeding victims' attempts to resist or escape.[406] Hallett LJ in *GAC*[407] defined learned helplessness as:

> "…the reaction of a victim to chronic and repeated abuse, whereby they feel that whatever they do nothing will change. They have no way of physically or emotionally breaking free from their abuser and the abuse. They cannot extricate themselves from the violent situation no matter how many cries for help they may make. They become increasingly passive."[408]

Although there is earlier case law which acknowledges that 'learned helplessness' can be a relevant characteristic of the reasonable person,[409] her Ladyship in *GAC* made clear that "an accused would need to be suffering from [learned helplessness] in a severe form to claim that their will was overborne",[410] to the extent that they had "lost [their] free will".[411] This would appear to reflect the restrictive approach taken in in *Hurst*[412] and *Bowen*[413] as to which characteristics are deemed to be relevant under duress.[414] Further, given that the House of Lords in *Hasan*[415] stressed the importance of both confining duress within narrow bounds and not diluting its overwhelmingly objective nature,[416] it is unlikely that 'learned helplessness' is intended to be a 'relevant characteristic' for the purposes of the statutory defence for children. The Minister stated that expanding the list of relevant characteristics would "make the defence more akin to a subjective test, which creates a loophole for serious criminals to exploit as a

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[406] E. Hopper and J. Hidalgo, 'Invisible Chains: Psychological Coercion of Human Trafficking Victims' (2006) 1 Intercultural Hum. Rts. L. Rev. 185, 205; see also, E. N. Anyaegbunam, D. Udechukwu and B. E. Nwani, 'Psychological coercion of trafficking in human persons: Antecedents and Psychosocial consequences for the victims and society' (2015) 20(3) *Journal of Humanities And Social Science* 21.

[407] *R. v GAC* [2013] EWCA Crim 1472.

[408] ibid [26]. For extensive analysis of the case, see J. Loveless, "R v GAC: Battered Women 'Syndromization'" [2014] Crim. L.R. 655.

[409] See, *R. v Emery (Sally Lorraine)* (1993) 14 Cr. App. R. (S.) 394; see also, *Antar* [2004] All E.R. (D) 412 (p.844)

[410] *R. v GAC* [2013] EWCA Crim 1472 at [51].

[411] ibid.

[412] *R v Hurst* [1995] 1 Cr. App. R. 82 at 90. Beldam LJ stated that, "we find it hard to see how the person of reasonable firmness can be invested with the characteristics of a personality that lacks reasonable firmness" cited in Laird at 400.

[413] *R v Bowen* [1997] 1 W.L.R. 372; [1996] 2 Cr. App. R. 157.

[414] K. Laird, Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed? (2016) 6 Crim. L.R. 395, 400.

[415] *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [18].

[416] K. Laird, Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed? (2016) 6 Crim. L.R. 395, 400.

defence to serious charges";[417] however, in seeking to minimise this possibility, there is the substantial risk that the defence will continue to exclude "real victims" from its protective ambit.[418]

VI. Conclusion

In an attempt to answer the first research question, set out in the introduction of this thesis, this chapter has examined the application of the s 45 statutory defence as it applies to children in a hypothetical scenario inspired by the themes explored in Chapter One. As this study has demonstrated, in the absence of a general defence which recognises their developmental immaturity, children remain at significant risk of prosecution as a result of their exploitation. Notwithstanding s 45's explicit recognition of the "innate and situational vulnerability"[419] of children who commit criminal offences as a result of their exploitation, the significant limits placed upon it makes it application in circumstances of forced criminality otiose; this means that undue reliance will continue to be placed on the common law defence of duress and prosecutorial discretion to ensure that children are not victimised by the state. As this chapter has demonstrated, children who become enmeshed in county lines offending after being recruited into a criminal gang may be able to plead the s 45 defence but will often have no recourse under the common law defence of duress. In the absence of any meaningful progress of the Age of Criminal Responsibility Bill (England and Wales) 2019–2021,[420] paired with little enthusiasm for raising the age of criminal responsibility generally, s 45 remains, as Liard put it, "a missed opportunity to craft a nuanced and ultimately more humanising defence".[421] This missed opportunity will shape the debate in Chapter Three which shall examine the current CPS guidelines and compare them to the approach taken in respect of child victims of trafficking in Scotland, which was to advance specific instructions pertaining to prosecutorial discretion, rather than implement a defence, which has been cited as potential model for

[417] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.374 (Karen Bradley).

[418] K. Laird, Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed? (2016) 6 Crim. L.R. 395, 400

[419] N. Wake et al, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L.145

[420] The Age of Criminal Responsibility Bill [HL] 2019–21 had its first reading in the House of Lords on 4 February 2020. A date for the second reading has yet to be announced: https://bills.parliament.uk/bills/2613 (accessed 26 February 2022).

[421] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 2016, 6, 395, 404

reform in jurisdictions further afield with approval in jurisdictions further afield.[422] It is submitted that the examination of both approaches will help inform the potential model for reform advanced in Chapter 4.

[422] Parliament of the Commonwealth of Australia, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (2017) para(s) 6.101-6.102. Available at: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf (accessed 28 February 2022)

Chapter Three

Prosecutorial discretion and child victims of exploitation: Does England & Wales require prosecutorial guidelines equivalent to Scotland?

I. Introduction

The Human Trafficking and Exploitation Act (Scotland) 2015 (the “Scotland Act 2015”) and s 45 of the MSA 2015 were introduced in response to the "increased recognition of the problem of trafficking”.[423] This author has considered how both Acts provide different responses to trafficked victims compelled to commit criminal offences.[424] Section 45 of the MSA 2015, which introduced a statutory defence for adult and child victims who commit offences as a result of their trafficking/exploitation, has been heralded an "important milestone in protecting trafficked victims”.[425] In approaching reform of the law with respect to trafficking, the Scottish government considered and rejected the notion of a statutory defence.[426] It argued that a defence would "create a requirement that prosecutorial instructions take account of the different landscape that would exist if a defence were on the statute book”.[427] The position in Scotland, which was to advance specific instructions pertaining to prosecutorial discretion,

[423] [2018] HCJAC 7; 2018 J.C. 195 at [38]; see also, Independent Anti-Slavery Commissioner, *Combating modern slavery experienced by Vietnamese nationals en route to, and within, the UK* (2017) para. 4.2.2 Available at: https://www.antislaverycommissioner.co.uk/media/1160/combating-modern-slavery-experienced-by-vietnamese-nationals-en-route-to-and-within-the-uk.pdf (accessed 22 January 2022).

[424] S. Mennim and N. Wake, ‘Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)?’ (2018) 82(5) J. Crim. L. 373, 376.

[425] Caroline Haughey, *The Modern Slavery Act Review: One year on* (Home Office, 2016) 2. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf (accessed 29 January 2022).

[426] Mennim and Wake, ‘Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)?’ (2018) 82(5) J. Crim. L. 373, 376.

[427] S. Mennim and N. Wake, ‘Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)?’ (2018) 82(5) J. Crim. L. 373, 373; Scottish Committee, *Stage 2 Report on the Human Trafficking and Exploitation (Scotland) Bill, SP Paper 710 21st Meeting, Session 4* (2015) p. 43

rather than implement a defence,[428] has been cited with approval by numerous UK anti-trafficking groups and been regarded as an example of best practice.[429]

This purpose of this chapter is to provide detailed consideration of Scotland's Lord Advocate's Instructions to Prosecutors and compare them with the approach taken by current CPS guidance[430] with a particular focus on county lines offending. The chapter will be split into three sections. The first section will begin by outlining the CPS guidelines in E&W which will demonstrate the inadequacy of the current guidelines and the issues that arise when guidelines are not articulated. This will be illustrated by examining notable appellate authorities and existing literature on the subject. The second section will consider the alternative approach taken in Scotland by under the Lord Advocate Instructions, and the potential availability of the common law defence of coercion. The third and final section of the chapter will then support the author's earlier contention that a new integrated approach should be adopted in E&W which would involve a potential overlap of the s 45 statutory defence and the Lord Advocate Instructions.[431] It will be argued that this approach would remedy some of the problems that have been exposed since the enactment of the MSA 2015 by being amenable to future developments in trafficking offences committed by children. This will support the wider legislative recommendations advanced in Chapter 4.

II. CPS Guidelines on Prosecuting Victims of Trafficking

It was clear following the ruling of the Court of Appeal in *R. v N and Le*[432] that the content and application of the CPS guidelines to prosecutors would be key to the UK's ability to comply

[428] Human Trafficking and Exploitation Act (Scotland) 2015, s. 8; COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015). Available at: http://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf

[429] S. Mennim and N. Wake, 'Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)?' (2018) 82(5) J. Crim. L. 373, 374; ATMG, '*Class Acts? Examining modern slavery legislation across the UK*' (October 2016) 67 Available at: http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg_class_acts_report_web_final.pdf (accessed 24 October 2020); GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom' (2016/21) para 290 < https://rm.coe.int/16806abcdc> (accessed 07 March 2022).

[430] CPS, *Modern Slavery, Human Trafficking and Smuggling* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 5 March 2022)

[431] S. Mennim and N. Wake, 'Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)?' (2018) 82(5) J. Crim. L. 373.

[432] *R. v N and Le* [2012] EWCA Crim 189.

with art 26 of the Trafficking Convention. The point is forcefully made in the following passage from the judgment:

> "[I]n future the only publication likely to be relevant to an inquiry into an alleged abuse of process in the context of Convention obligations is the CPS Guidance in force at the time when the relevant decisions were made. It should normally be assumed that the contemporaneous CPS Guidance will have taken account of all the relevant material to be found in all the guidance offered by different authorities with responsibilities in this area, and indeed that it will be updated in the light of any new information. Unless it is to be argued that the CPS Guidance itself is inadequate and open to question because it has failed to keep itself regularly updated in the light of developing knowledge, for the purposes of the court considering an abuse of process for which the prosecutorial authority is responsible, it is the CPS Guidance which should be the starting point, and in the overwhelming majority of cases, the finishing point for any argument of alleged non-compliance with Article 26." [433]

The CPS guidelines has developed in response to developments in the law, and a number of significant changes have been made to it since the enactment of the MSA 2015.[434] The enactment of the s 45 defence does not supersede the CPS guidelines, nor does it remove the requirement for the proper exercise of prosecutorial discretion before proceedings are brought against a possible victim of human trafficking or slavery. Such discretion is all the more important given the limitations on the scope of the defence, and close adherence to the guidelines is vital to avoid any risk of prosecutors paying less regard to the UK's positive obligations under the Trafficking Convention on the basis that the statutory defence is now available at trial.

The guidelines make clear that there is no definitive definition of a trafficked victim and highlights the need for prosecutors to be alert to the indicators of trafficking. It requires a structured approach to be taken to the decision as to whether prosecution is in the public interest, setting out a four-stage test; this requires prosecutors to consider: (i) whether there is reason to believe that the person is a victim of trafficking/slavery; (ii) whether there is clear evidence of a credible common-law defence; (iii) whether there is clear evidence of a s 45 defence; and (iv) where there is no such evidence, but the offence may have been committed as a result of compulsion arising from the trafficking, whether the public interest requires a

[433] ibid [86(b)].

[434] CPS, *Legal guidance: Human trafficking, smuggling and slavery* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 5 March 2022)

prosecution.[435] Where there is evidence of either a common law defence of duress or the s 45 defence, the case should not be charged or should be discontinued on evidential grounds. If there is not, the guidelines nonetheless require the prosecutor to go on to decide whether it is in the public interest to prosecute. Thus, the guidelines apply even where the statutory defence is not available.[436]

(a) Is there reason to believe that the person is a victim of trafficking/slavery?

(i) Assessing Age

When making a determination of whether there is reason to believe that a child is a victim of trafficking or slavery, and the extent to which their ability to resist involvement in criminal activity is usually fact specific and will typically be determined at the moment of arrest. When a young person is arrested, police are required to determine their age which in most cases will be easily determined by a simple superficial observation. There are, however, some instances when this may not be so obvious and require more than a superficial observation.[437] Difficulties may arise when a young person has entered the UK illegally and has no identification documents to confirm their age.[438] Further, Hoyano also highlighted that children mature at different ages, and that their early life experiences may give them a "misleading appearance"; for example, children from other ethnic groups may appear older and more mature than those which the authorities and the court is familiar and has more experience dealing with.[439]

Where age is in issue in relation to anyone brought before a criminal court, the court is obliged to make "due inquiry" as to the age, and to "take such evidence as may be forthcoming at the hearing of the case" in accordance with s 99 of the Children and Young Persons Act 1933. Similar provisions require the court addressing the defendant's age to take account of "any available evidence".[440] In practical terms the "due inquiry" in any criminal proceedings very often will be to commission a *Merton* compliant age assessment carried out in accordance

[435] S. Mennim and T. Ward, 'Abuse of process and the Modern Slavery Act 2015' (2020) 84(5) J. Crim. L 502, 504.

[436] *R. v D* [2018] EWCA Crim 2995 at [21]; CPS, *Legal guidance: Human trafficking, smuggling and slavery* (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 5 March 2022)

[437] L. Hoyano, '*R. v L*: people trafficking – guidance' (2014) 2 Crim. L.R. 150, 151.

[438] ibid.

[439] ibid.

[440] Section 150 of the Magistrates Courts Act 1980, s1(6) of the Criminal Justice Act 1982 and s 305(2) of the Criminal Justice Act 2003.

with the guidance set out in *B v Merton Borough Council.*[441] Such an assessment will be carried out by two social workers who "should be properly trained and experienced".[442] A *Merton* compliant age assessment involves the social workers considering a variety of material including hearsay evidence and circumstantial evidence before they reach a conclusion as to the person's age. Although the age assessment is not determinative the judge will admit the evidence of a *Merton* compliant age assessment[443] when the court is determining the proper venue for the proceedings according to the age of the defendant.[444] If at the end of a 'due inquiry' D's age remains in doubt, then the defendant must be treated as a child.[445] Section 51 of the MSA 2015 puts this on a statutory footing.

In instances where the court determines for the purposes of procedure that a reputed child defendant is an adult, this will not prevent the defendant from raising evidence that they are under the age of 18 in the context of an s 45 defence.[446] In *Brecani* the Court of Appeal noted that age dispute could be raised under s 45,[447] but said nothing about the evidential status of age assessments. Ultimately, the prosecution has more resources available to investigate age than the defence, and accordingly, it will then be for the prosecution to prove that the defendant is an adult to the usual criminal standard for the adult version of the defence to be considered.[448]

(ii) Reasonable Ground Decisions

When making a determination of whether there is reason to believe that a child is a victim of trafficking or slavery, prosecutors are often assisted by obtaining a decision of the Competent Authority (now "Single Competent Authority'). The Competent Authority was established under the National Referral Mechanism ("NRM") to consider cases where someone is referred to the

[441] [2003] 4 All ER 480.

[442] Home Office, *Assessing Age* (2022) Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1045849/Assessing_age.pdf (accessed 22 February 2022).

[443] *DPP v M* [2020] EWHC 3422 (Admin) at [48]

[444] *M v Hammersmith Youth Court* [2017] EWHC 1359 (Admin)

[445] MSA 2015, s 51; Article 10(3) of the Trafficking Convention; *L* [2013] EWCA Crim 991, [2013] 2 Cr App R 23 (247) at [25]

[446] *R v Brecani* [2021] EWCA Crim 731 at [60].

[447] ibid.

[448] [2018] EWCA Crim 667; [2019] Q.B. 86 at [41]

NRM as a possible victim of trafficking. Through the NRM, children suspected of being victims of trafficking are referred to the Competent Authority, a unit within the Serious and Organised Crime Division of the Home Office. Their case will then be examined by an official within the relevant unit who would make a "reasonable grounds" decision, the threshold for which is that they "suspect but cannot prove' that the person concerned is a victim of modern slavery. After gathering more evidence, the caseworker makes a Conclusive Grounds decision on the balance of probabilities.

While a decision of the SCA that a young person is a victim of trafficking does not confer blanket immunity from prosecution, there is a positive obligation on the State to consider whether prosecution is consistent with its duty to protect the victim "where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked".[449] Therefore, where the Competent Authority has determined that a person is a victim of trafficking, it is open to the prosecution to show that the authority was mistaken or that there was no 'nexus' between the trafficking and the offence charged; but it must do so in terms consistent with art 26 of the Trafficking Convention which requires "the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so" rather than with domestic legislation alone.[450] This author noted that this latter point presents two pertinent issues.[451] First, the divergence between the Palermo Protocol and the Trafficking Convention definition of 'trafficking' and the definition of "relevant exploitation' in the MSA 2015. It is arguable that this definitional divergence will lead to inconsistencies in how prosecutorial decisions are reached in relation to a young person's trafficked status and potentially have significant implications as to the fairness of their trial.[452] Secondly, do decisions to prosecute based on failure to meet the 'reasonable person' test, or committing a Sch. 4 offence, contained in the s 45 statutory defence potentially fall foul of the ECHR, art. 4 requirements? Criticisms have already expressed their concerns regarding the inclusion of an objective 'reasonable person' test as being "too high for children",[453] and that Sch. 4 lists over 100 offences which child victims of exploitation may become "embroiled in".[454]

[449] *VCL v United Kingdom* (77587/12) (2021) 73 E.H.R.R. 9 at [158-159]

[450] ibid [162]. See also, S. Mennim and T. Ward, 'Expert Evidence, hearsay and victims of trafficking' (2021) 85(6) J.Crim.L 471.

[451] S. Mennim, 'The non-punishment principle and the obligations of the state under article 4 of the European Convention on Human Rights' (2021) J. Crim. L. 311, 318.

[452] ibid.

[453] HL Deb 8 December 2014, vol.757, col.1652.

[454] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.387 cited in N. Wake et al, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) Jan P.L. 145, 149.

Surely the position should be that if a child victim commits an offence because of their trafficked status then they should have protection. Their vulnerability does not cease based upon the nature of the offence charged. The significant limitations placed on the application of the s 45 defence means that children will either have to rely on the common law duress, which is deemed to be "insufficiently nuanced" to deal with trafficked victims, or simply having to rely on prosecutorial discretion.[455] It is arguable that this is antithetical to the E&W's international obligations.[456] During an independent review of the defence, the government rejected these assertions on the basis that when exercising prosecutorial discretion consideration is also given to the public interest test irrespective of whether the defence falls within Sch. 4, and that the respective elements of the defence allows the jury to consider if the defence should apply, on a case-by-case basis, taking into account all of the circumstances.[457]

When a child is suspected to be a victim of trafficking there is still great deal of reliance placed on lawyers and the courts to advise the child of the existence of the defence and for them to disclose at the earliest possible instance that they are a victim.[458] However, this fails to recognise that there will be circumstances where a young person will be unable or unwilling to disclose or give evidence pertaining to their trafficked status. This may be the result of their victimisation, including trauma (mental, psychological, or emotional) they have experienced; their inability to express themselves clearly and articulacy; mistrust of authorities; and/or fear of reprisals.[459] This issue becomes more complicated when considering whether a child can have a fair trial if an official determination by the Competent Authority that they are a trafficked victim is not permitted to be used in court.[460] In *VCL and AN v United Kingdom* the European Court of Rights made clear that "evidence concerning an accused's status as a victim of trafficking is … a *fundamental aspect* of the defence which he or she should be able to secure

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[455] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) Crim.L.R. 395, 397.

[456] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) para(s) 4.3.2, 4.4.2. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 29 January 2022)

[457] ibid.

[458] ibid.

[459] Home Office, *Victims of modern slavery – Competent Authority guidance* (2016) Available at: https://www.antislaverycommissioner.co.uk/media/1059/victims_of_modern_slavery_-_competent_authority_guidance_v3_0.pdf (accessed 7 March 2022)

[460] *R v Brecani* [2021] EWCA Crim 731; [2021] 1 W.L.R. 5851 (overruling *DPP v M* [2020] EWHC 3422 (Admin); [2021] 1 W.L.R. 1669); however, see the inconsistent approach in *R. v AAJ* [2021] EWCA Crim 1278.

without restriction'.[461] By a 'status' the Court seems to mean the status of having been determined to be a victim of trafficking by the competent authority. The passage is concerned with what must be available to the defence rather than what should be admitted in court, but there is little point in providing the defence with evidence that cannot be used. In a case where a young person is unable or unwilling to give evidence that they are a victim of trafficking, and their unwillingness may itself be a result of their victimisation, it is submitted that this makes it impossible for the State either to provide a fair trial or to comply with its obligations under art. 4 if it prevents the court from taking account of the competent authority's determination. Arguably, the status of having been recognised as a trafficked victim is one which the court must consider to comply with ECHR art 4.[462]

(b) Is there clear evidence of duress and/or s 45 defence?

The same considerations in relation to duress outlined in Chapter 2 apply to the CPS guidelines.[463] In a similar vein to the s 45 defence, the CPS guidelines do not attempt to elaborate or provide any clarification as to how the term "direct consequence" should be defined or interpreted. The seriousness of the offence(s) will be a significant consideration when determining what the reasonable person would have done. Although the seriousness of the offence is not irrelevant where the defendant is a child, it is noteworthy that the guidelines make no reference to the ruling in *DPP v M*.[464] In that case, the court held that when considering the situation and relevant characteristics of the defendant for the purposes of s 45(4)(c), the seriousness of the offence will be of less significance than it would in respect of the defence under s 45(1), as "a child is more likely than an adult to behave without proper understanding of the nature and consequences of his actions".[465] This lack of clarity as to how the terms of each element of the defence should be defined is particularly problematic given that prosecutors are required to make a determination based on the facts, including the individuals account and proper focus on the evidence (i.e. positive or negative Conclusive

[461] *VCL & AN v United Kingdom* (77587/12) (2021) 73 E.H.R.R. 9 at [161] (author emphasis added). For further commentary on this case, see S. Mennim, 'The non-punishment principle and the obligations of the state under article 4 of the European Convention on Human Rights' (2021) J. Crim. L. 311.

[462] S. Mennim and T. Ward, 'Expert evidence, hearsay and victims of trafficking' (2021) 85(6) J. Crim. L 471.

[463] CPS, Modern Slavery, Human Trafficking and Smuggling (2015) Available at: https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery (accessed 5 March 2022)

[464] *DPP v M* [2020] EWHC 3422 (Admin)

[465] ibid [62].

Grounds decisions) satisfies each limb of the defence.[466] As the next section demonstrates, mistaken interpretation of where the burden of proof lies in establishing the defence has already been subject to consideration by the appellate courts.

(i) s 45 and the burden of proof

As noted in the critical analysis of the statutory defence in Chapter Two, the MSA 2015 is silent on where the burden of proof should fall in respect of the s 45 statutory defence. The interpretation initially adopted by the CPS was that the defendant was required to provide sufficient evidence to demonstrate that they were a victim of slavery or trafficking.[467] If successful, the prosecution was required to disprove the claim, beyond reasonable doubt. If the prosecution was not able to discharge the burden, the legal burden of proof would then fall on the defendant to prove every element of the defence on the balance of probabilities. This interpretation had also been included in a number of early academic commentaries on the defence.[468]

The conjoined appeals of *MK v R and Gega v R*[469] was the first to address the question of where the legal burden of proof lies when a defence is raised under s 45 of the MSA 2015. The Court of Appeal confirmed that the burden on a defendant relying on the s 45 defence is evidential, i.e., if the defendant raises evidence of each of the elements of the defence, it is for the prosecution to disprove one or more of them to the criminal standard the usual way. The appellants in that case were both Albanian nationals who claimed to have been victims of trafficking and sought to rely on the s 45(1) defence. Both had been convicted following trials. In each trial the judge had directed the jury that the defendant bore the evidential burden to raise the issue whether s/he was a victim of trafficking or slavery, and that having successfully done so, it was for the prosecution to prove beyond reasonable doubt that s/he was not, and if the prosecution succeeded the defence would not avail the defendant; however, if the prosecution failed, the legal or persuasive burden of proof in respect of the other elements of the defence would fall on the defendant, who must prove them on the balance of probabilities. The Court of Appeal held that there was nothing in the wording of s 45 that requires the

[466] S. Mennim and N. Wake, 'Burden of proof in trafficking and modern slavery cases: *R. v MK; R v Gega*' (2018) 82(4) J. Crim. L 282,

[467] Also known as an evidential burden.

[468] See, for example, N. Wake, "Human Trafficking and Modern Day Slavery: When Victims Kill' (2017) Crim L.R. 658-77 and J. Haynes, "The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37(1) Statute Law Review 33.

[469] [2018] EWCA Crim 667; [2019] Q.B. 86.

defendant to bear the legal or persuasive burden of proof of any element of the defence.[470] To apply a reverse burden would undermine the protection that the Act is designed to afford to vulnerable people who are likely to be traumatised by their experiences and may well be at the mercy of those who exploited them.[471] Where the defendant's age is in issue, it is for the prosecution to prove that the defendant is an adult to the usual criminal standard for the adult version of the defence to be considered.[472] The conviction in the case of MK was quashed, but in the case of Gega it was upheld, the evidence there having been so overwhelming that the court found it "fanciful to suppose in her case that the niceties of the legal burden of proof could have made any difference".[473]

The Court of Appeal held that there was nothing in the wording of s 45 that requires the defendant to bear the legal or persuasive burden of proof of any element of the defence.[474] To apply a reverse burden would undermine the protection that the Act is designed to afford to vulnerable people who are likely to be traumatised by their experiences and may well be at the mercy of those who exploited them.[475] Where the defendant's age is in issue, it is for the prosecution to prove that the defendant is an adult to the usual criminal standard for the adult version of the defence to be considered.[476]

Lord Burnett C.J. noted, it was "not difficult to see why the CPS guidance was drafted to replicate the approach under the 1999 Act" (Immigration and Asylum Act 1999, s 31(7)), which engages a reverse burden (beyond disproving refugee status) with respect to the defence therein.[477] According to the Court of Appeal, a fundamental difference applied across s 31 of the 1999 Act, which includes an express provision (namely, "the defendant must show") placing the burden of proof on a defendant, and s 45 of the MSA 2015, which remains silent on the issue. His Lordship explained that there is no 'true analogy' across s 31 of the 1999 Act and the s 45 defence, before pointing out the similarities between duress and s 45 of the MSA

[470] ibid [31].

[471] ibid [36].

[472] ibid [41]

[473] ibid [56]

[474] ibid [31].

[475] ibid [36].

[476] ibid [41]

[477] ibid [31]

2015.[478] The Court of Appeal, however, acknowledged significant differences between s 45 and duress, for example, the broader ambit of s 45.[479]

The Independent Review of the Modern Slavery Act[480] reviewed the burden of proof and recommended that it should remain with the Crown; however, the CPS have continued to raise concerns about the impact this is having on their ability to prosecute, submitting that a reverse burden of proof on the balance of probabilities rather than an evidential burden would be preferable.[481]

The Court of Appeal in *MK v R and Gega v R* accepted that in some instances the prosecution may have "real difficulty in disproving to the criminal standard the defendant's account",[482] but suggested that it is unlikely to significantly differ from the task faced in duress cases.[483] Section 45 is not established solely on the grounds of what the defendant did and why; an objective test applies requiring the prosecution to disprove that a reasonable person in the same situation as the young person and having the young person's relevant characteristics would do that act. This objective requirement was designed to operate against the "twin dangers" that a young person might easily concoct a false claim and that this may operate to encourage traffickers to continue with their exploitation.[484]

This author noted that where the burden of proof should lie in the context of coercion-based defences is far from straightforward and has been the subject of considerable debate. The Law Commission previously recommended the introduction of a reverse burden should duress be introduced as a full defence to first degree, second and attempted murder.[485] Reasons for departing from the common law approach included inter alia difficulty in disproving the

[478] ibid [31] and [38]

[479] ibid at [38]

[480] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) para. 4.2.4 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 29 January 2022)

[481] ibid paras 3.3.2 -3.3.8

[482] [2018] EWCA Crim 667; [2019] Q.B. 86 at [37] and [38].

[483] ibid [38].

[484] ibid [39].

[485] S. Mennim and N. Wake, 'Burden of proof in trafficking and modern slavery cases: *R. v MK; R v Gega'* (2018) 82(4) J. Crim. L 282, 284; Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. No. 304, (2006) at [6.101] Available at: https://www.lawcom.gov.uk/app/uploads/2015/03/lc304_Murder_Manslaughter_and_Infanticide_Report.pdf (accessed 1 March 2022)

defence, the potential for serious prosecutors to concoct false claims and the serious nature of the offences under consideration.[486]

All judicial respondents were of the view that a reverse burden in such a context would not offend against European Convention on Human Rights, art 6(2).[487] As one consultee observed,

> "If… a statute were enacted which placed a burden of proof on the defendant to establish on the balance of probabilities that he acted under duress, I would not expect the courts to hold that such a provision was incompatible with article 6(2) of the ECHR. It could not be described as an intrinsic part of the offence (as is indeed exemplified by the fact that it does not currently constitute a defence at all) and it is a matter on which the defendant is well placed to provide evidence."[488]

The Commission also noted the burden of proof may be placed on the defendant in duress cases in the United States Supreme Court, citing the case of *Dixon v US*.[489] They also noted that in French law the burden of proving any general defence, including duress, is traditionally regarded as falling on the defendant.[490]

Notwithstanding differing views regarding the ambit and framing of coercion-based defences, the Court of Appeal acknowledged that a reverse burden would potentially frustrate Parliament's objective to protect trafficking victims from double victimisation through criminalisation and suggested that it undermines the protection s 45 is designed to provide those who are likely to remain traumatised by their experiences.[491] Significantly, the Court of Appeal explained that in such contexts, a reverse burden could have the effect of imposing "on a child defendant the more onerous elements of the s 45 defence that Parliament intended should only apply to adults".[492] This is evidenced by the lower threshold which takes explicit recognition of children's situational vulnerability (trafficked children) and innate vulnerability

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[486] ibid at [6.101]-[6.111]. See also, S. Mennim and N. Wake, 'Burden of proof in trafficking and modern slavery cases: *R. v MK; R v Gega*' (2018) 82(4) J. Crim. L 282, 284.

[487] ibid. at [6.136].

[488] ibid.

[489] (2005) 413F 3rd 520.

[490] Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles*, Law Com. No. 218, (1993) at [6.139] Available at: https://www.lawcom.gov.uk/app/uploads/2015/06/lc218.pdf (accessed 1 March 2022)

[491] [2018] EWCA Crim 667; [2019] Q.B. 86 at [36].

[492] ibid [41] as cited in N. Wake *et al*, Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation (2021) Jan P.L. 145, 148.

(e.g. (in)ability to decide between alternatives, resist compulsion, etc.).[493] Further, the suggestion that a child ought to establish his/her age on the balance of probabilities is counterintuitive to the protections afforded under art 13(2) of the Trafficking Directive,[494] and at odds with the lower threshold defence applicable to under 18s, specifically designed in "recognition of the unique vulnerabilities of children".[495] Ultimately, the prosecution have more resources available than a young defendant, and accordingly, only in exceptional circumstances, and principally based upon statutory exception should a reverse burden apply.[496] Even with a statutory clause, the court may still be required to discern whether Parliament intended that the burden should be legal or evidential.[497]

The Court of Appeal acknowledged that "at first sight", the defence under s 45 may appear to fall within the third "exemption" or "excuse" category, outlined *in R v DPP ex parte Kebilene*,[498] thereby justifying a reverse burden, and sympathised with the CPS decision to model its initial guidelines on the 1999 Act, considered above. That case involved judicial review of a decision by the Director of Public Prosecutions to prosecute the accused under s 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989, as inserted by the Criminal Justice and Public Order Act 1994.[499] The accused sought judicial review, arguing that the provision was incompatible with art 6(2) of the European Convention of Human Rights. Lord Hope held that the first stage in any inquiry as to whether such a provision is vulnerable to challenge under art 6(2) is to identify the nature of the provision which is said to transfer a burden of proof. His Lordship referred to three kinds of statutory presumptions which transfer the legal burden to the accused.[500] The first two relate to elements of the offence itself. The third category comprises provisions which relate to an exemption or proviso which the accused must establish if he wishes to avoid conviction, but which is not an essential element of the

[493] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation', P.L. 2021, Jan, 145, 147.

[494] [2018] EWCA Crim 667; [2019] Q.B. 86 at [42].

[495] ibid [44].

[496] ibid [15]. See also *Woolmington v DPP* [1935] AC 462 at [481] (although cf. insanity and reverse burdens by statutory implication; *R v Hunt (Richard)* [1987] AC 352.

[497] ibid [13]; see, for example, *Lambert* [2001] UKHL 37, [2002] 2 AC 545.

[498] [1999] 3 W.L.R. 972; [2000] 2 AC 326.

[499] Since *Kebilene*, the offence has been substantially re-enacted as s.57 of the Terrorism Act 2000, with a crucial difference: by virtue of ss. 118(2)-(4), the onus on the defendant to "prove" innocent possession etc. is merely evidential.

[500] [1999] 3 W.L.R. 972; [2000] 2 AC 326, 379.

offence.[501] In relation to the latter, his Lordship referred to *R v Edwards*[502] in which a provision of this last kind was held to impose a burden of proof on the defendant to establish on the balance of probabilities that he had a licence for the sale of intoxicating liquor. In that case, Lawton LJ observed[503] of that case that this exception to the fundamental rule that the prosecution must prove every element of the offence charged was limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances, or by persons of specified classes or with special qualifications, or with the licence or permission of specified authorities.

The Court in *MK v R and Gega v R* rejected the Crown's notion that s 45 was a provision of the type described by Lord Hope in *Kebilene*, or that it was analogous to such a provision.[504]

It is difficult to avoid the conclusion that the circumstances that led to the appeal in M*K v R and Gega v R* might have been avoided with a carefully drafted express legislative provision specifying that the prosecution bear the burden of proof. During Parliamentary debate, Minister Diana Johnson advanced such a proposal,[505] but the amendment was withdrawn as unnecessary.[506] Perhaps it should have been superfluous, given the well-established golden thread principle; namely, that it is the duty of the prosecution to establish guilt beyond reasonable doubt, save in the context of insanity and any statutory exception.[507] It ought to have been unnecessary on the basis that s 45 explicitly states that a "person is not guilty" where the defence applies. Accordingly, a reverse burden would be equivalent to requiring a defendant to prove their innocence.[508]

The Court of Appeal also explained the "unusual" nature of s 45 in applying to all criminal offences except those excluded under Sch. 4.[509] For that reason, Minister Diana Johnson's proposal, replicated below, might have provided a welcome addition to the defence:

> (9) Once the defence set out in subsection (1) is raised by the accused or on his or her behalf, or the court of its own volition or on hearing submissions from any party decides

[501] ibid 379F-H

[502] [1975] Q.B. 27

[503] ibid pp.39-40

[504] [2018] EWCA Crim 667, [2019] Q.B. 86 at [25]

[505] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.382

[506] ibid col. 384-5

[507] *Woolmington v DPP* [1935] A.C. 462, 481–482.

[508] [2018] EWCA Crim 667; [2019] Q.B. 86 at [25].

[509] ibid [23]

that such a defence should be considered by the court, the burden of proving that the offence was not committed as a direct and immediate response of him or her being a victim as set out in subsection (1) shall lie upon the prosecution.[510]

Since the ruling was delivered in *MK*, the CPS have revised their guidelines to reflect the clarification made in that case,[511] but it still does not explicitly set out the requirements for each of the limbs of the defence to be considered. This is outlined as follows:

> **Burden and Standard of Proof - Evidential burden on the defendant**
>
> Section 45 only places an evidential burden upon the Defendant. Therefore, in order to avail himself of the defence, the Defendant will only have to adduce sufficient evidence so as to allow the defence to be considered by the jury.
>
> Prosecutors should be mindful that each case depends on its own facts and the weight to be afforded to the SCA decision will depend on the particular circumstances of each case and will need to be considered with the surrounding evidence. The seriousness of the offences will be a significant consideration when determining what a reasonable person would have done where the defendant is an adult
>
> **Burden and Standard of Proof - Legal Burden on the Prosecution**
>
> If a Defendant succeeds in discharging the evidential burden, then the legal burden falls upon the prosecution to disprove the defence beyond reasonable doubt. Where the Defendant puts age in issue, it is for the prosecution to prove beyond reasonable doubt that the defendant is over 18.
>
> The safeguard against "unscrupulous" use of the defence lies within the application of the objective tests set out in section 45(1)(d) (for persons over 18) and section 45(4)(c) (for persons under 18); see below *R v MK and Gega* [2018] EWCA Crim 667. The Court of Appeal [at paragraph 39] observed that "the prosecution is likely to have less difficulty in establishing to the criminal standard that an adult offender in the defendant's position had a realistic alternative to committing the offence, than the defendant would have in establishing on the balance of probabilities that a reasonable person in his or her position would have had no realistic alternative but to do what was done."

[510] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.382

[511] CPS, *Legal guidance: Human trafficking, smuggling and slavery* (2015) Available at: https://www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling (accessed 1 March 2022)

When deciding whether to bring or continue a prosecution, careful consideration should be given to the availability of the Section 45 defence and whether there is sufficient evidence to disprove the defence beyond reasonable doubt. No charges should be brought if there is sufficient evidence that suggests that:

The suspect is a genuine victim of trafficking or slavery; and that

The other conditions in Section 45 are met (relevant to whether the suspect is an adult or child); and

The offence is not an excluded offence under Schedule 4 to the Act.[512]

Alternative wording to the CPS guidelines has already been suggested in relation to the s 45 defence as it applies to adults.[513] It is submitted that the following wording could provide a more robust and consistent approach when considering the statutory defence as it applies to children:

Burden and standard of proof

It is for the child defendant to raise evidence of each element of the defence under section 45 of the Modern Slavery Act 2015.

The burden of proof remains with the prosecution when the defence is raised. Once raised, it is for the prosecution to disprove one or more elements of the defence beyond reasonable doubt. If the prosecution discharge this burden, the defence will fail (see the judgment in *MK v R* [2018] EWCA Crim 667 [45]).

In the case of children, the prosecution must adduce sufficient evidence to satisfy a jury beyond reasonable doubt that a reasonable person in the same situation and with the same characteristics of the child defendant, would not have done that act, and that the child defendant was either:

- not a victim of slavery or exploitation
- the offence was not committed as a direct consequence of the child defendant's slavery or exploitation; or, if they was so acting,

[512] CPS, *Legal guidance: Human trafficking, smuggling and slavery* (2015) Available at: https://www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling (accessed 1 March 2022)

[513] S. Mennim and N. Wake, 'Burden of proof in trafficking and modern slavery cases: R. *v MK; R v Gega*' (2018) 82(4) 282.

• that a reasonable person with the same characteristics of the child defendant and in the same position would have committed the offence.

Where any issue as to the age of the defendant arises, the prosecution must adduce sufficient evidence to prove beyond reasonable doubt that the defendant was an adult (18 years-old) at the time the offence was committed. If the prosecution are unable to discharge this burden, then the defendant must be treated as a child for the purposes of section 45 of the Modern Slavery Act 2015 (see the judgment in *MK v R* [2018] EWCA Crim 667 [44]).

Notwithstanding those concerns raised by the CPS in relation to their ability to prosecute,[514] it is submitted that the insertion of an explicit legislative provision, reminiscent on that proposed by Diana Johnson during the MSA's passage through Parliament,[515] would provide a welcome addition to the revised s 45(4) defence. Under subsection (4)(a) of the revised s 45 defence,

> "once the defence is raised by the accused or on his or her behalf, or the court of its own volition or on hearing submissions from any party decides that such a defence should be considered by the court, the burden of proving that the offence was not committed as a result of the person being, or having been, a victim of slavery or a victim of relevant exploitation shall lie upon the prosecution".

(c) Is it in the Public Interest to Prosecute?

In all cases, irrespective of whether the defence(s) are likely to apply, the CPS are required to assess whether prosecution is in the public interest. A prosecution will usually take place, subject to sufficient evidence, unless public interest factors tending against prosecution outweigh those in favour.[516] In some instances, however, the nature of the offence charged might render it in the public interest to prosecute, despite the person (adult or child) being a victim of trafficking.[517]

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[514] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) paras 3.3.2 -3.3.8 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 29 January 2022)

[515] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.382.

[516] CPS, *Legal guidance: Human trafficking, smuggling and slavery* (2015) Available at: https://www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling (accessed 26 January 2022).

[517] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [6]; see also *R v S(G)* [2018] EWCA Crim 1824.

This was demonstrated in *EK*. In that case, the appellant, a victim of human trafficking, pleaded guilty in 2011 to various offences including conspiracy to control prostitution and possessing false identity documents. In 2018 she appealed her conviction, arguing that the prosecution ought not to have proceeded or should have been stayed as an abuse of process on the basis that she was a victim of trafficking. The Court, having admitted the Conclusive Grounds decision as fresh evidence, accepted that the appellant had been a victim of trafficking at all material times, but held that the decision to prosecute was not flawed and that the conviction was safe. The offences were serious, and the appellant's culpability was significant. It followed that "a very high level of compulsion would be necessary to extinguish the appellant's culpability or diminish it to a point where it would not have been in the public interest to proceed with the prosecution".[518] Gross LJ, giving the judgment of the Court, went on to say:

> "It is, unfortunately, not infrequent that those convicted of criminal offences have been subjected to a malign, sometimes controlling influence. Ordinarily, that does not absolve them from criminal responsibility, a decision not lightly taken, though it may well be reflected in a reduction of the sentence passed. In the [victim of trafficking] context it is important that the law is not devoid of sympathy or understanding - the evils of human trafficking are now well understood; but it is also necessary in the public interest that there neither is, nor ought to be, any blanket immunity. Unfortunately for the appellant, she fell and falls on the wrong side of that line."[519]

The CPS guidelines also states that, "prosecutors should also be alive to the fact that, if a person, by joining an illegal organisation or a similar group of people with criminal objectives and coercive methods, voluntarily exposes and submits himself to illegal compulsion, he cannot rely on the duress to which he has voluntarily exposed himself as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress which he calls in aid".[520] For the reason already outlined in Chapter 2, Daniel would not be able to rely on duress.

(i) Abuse of process: has the jurisdiction survived the enactment of the MSA 2015?

[518] *R. v EK* [2018] EWCA Crim 2961 at [51]. For further discussion on this ruling, see S. Mennim, 'The wrong side of the line? Trafficking victims compelled to commit offences and prosecutorial discretion' (2019) 83(2) J. Crim. L 111.

[519] ibid [56].

[520] *R v Fitzpatrick* [1977] N.I.L.R. 20

The CPS guidelines make clear that in cases where the common law defence of duress or the statutory defence under s 45 of the MSA 2015 are unavailable (i.e., the vast majority of situations), the UK's international obligations are met via prosecutorial discretion, and the Court's power to stay a prosecution as an abuse of the process.[521]

In *R. v DS*[522] the Court made clear the limited scope for abuse of process to operate in cases where the s 45 defence is available. In that case, the defendant ("DS') then aged 17 was charged with possession of class A drugs with intent to supply. Following a referral to the National Referral Mechanism, the Single Competent Authority (SCA) determined by a conclusive grounds decision that DS was a victim of trafficking. Accordingly, DS served a defence statement in which he admitted guilt subject to the defence in s 45(4) MSA 2015, contending that he had done the acts constituting the offences with which he was charged as a direct consequence of his being a victim of human trafficking. On the first day of the trial, DS applied to stay the proceedings as an abuse of process, relying on the conclusive grounds decision. The trial judge found that the conclusive grounds decision was sound and stayed the proceedings as an abuse of process.[523]

The Court held that as a result of the enactment of the MSA 2015 and the s 45 statutory defence it was no longer necessary for the courts to fill any perceived lacunas by expanding the notion of abuse of process. The question whether the s 45 defence is made out, or more accurately whether the prosecution have proved that it is not made out (since the burden of proof rests on the prosecution)[524] is a question of fact for the jury to decide.[525] The Court held that the trial judge should not have entertained DS's submission that the indictment should have been stayed as an abuse of process, and clarified that as a result of the enactment of the MSA 2015 and the s 45 statutory defence, it was no longer necessary for the courts to fill any perceived lacunas by expanding the notion of abuse of process.[526] The Court had not identified any clear gap between the provisions of the MSA 2015 and the UK's international obligations, and in its judgment the CPS Guidance means that the CPS is "entitled" not to

[521] See *R v L(M)* [2011] 1 Cr App R 12 at [7]; *R v Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [4]; *R v S(G)* [2018] EWCA Crim 1824 at [76]

[522] *R v DS* [2020] EWCA Crim 285; see also, A [2020] EWCA Crim 1408.

[523] S. Mennim, 'The non-punishment principle and the obligations of the state under article 4 of the European Convention on Human Rights' (2021) J. Crim. L. 311, 117.

[524] *R. v MK* [2018] EWCA Crim at [45]; S. Mennim and T. Ward, 'Abuse of process and the Modern Slavery Act 2015' (2020) 84(5) J. Crim. L. 502, 503.

[525] *R. v DS* [2020] EWCA Crim 285 at [40]; S. Mennim, 'The non-punishment principle and the obligations of the state under article 4 of the European Convention on Human Rights' (2021) J. Crim. L. 311, 117.

[526] ibid [40].

prosecute for the purposes of art 8 of the Trafficking Directive.[527] The state's positive obligation to protect victims of trafficking (under art 4 ECHR and the Palermo Protocol) is not expressed in terms of non-prosecution, but "requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking …".[528] The Court opined that there was no basis for deriving a positive obligation not to prosecute victims of forced or compulsory labour from art. 4 of the ECHR, and made clear that if any obligation did exist, it would be "heavily qualified"[529] and that there remains a need for prosecutors to carefully consider whether the s 45 statutory defence is rebutted on the evidence.[530]

The decision in *DS* must now, however, be read in light of the recent decision in the conjoined cases of *R v AAD*.[531] In that case the court substantively reviewed the both the pre-2015 authorities on abuse of process[532] which were subsequently upheld in *Joseph (Verna)*.[533] When addressing the question as to whether the abuse of process jurisdiction survived the enactment of the MSA 2015, the court held that "…absent authority to the contrary, it is difficult to see why it should not".[534] Departing from the ruling in *DS*, Lord Justice Fulford VP (presiding), stated that:

> "…there was nothing in the language of the 2015 Act [that] gives any indication that the previously established availability of an abuse of process jurisdiction in this context was designed to be removed or significantly curtailed by the 2015 Act… that jurisdiction remains an available additional safeguard, given appropriately exceptional facts... cases of abuse of process will be (as they always should have been) very rare in this context and can arise in only very limited circumstances."[535]

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[527] ibid [39.ii].

[528] ibid [39.iii].

[529] ibid [39].

[530] S. Mennim and T. Ward, 'Abuse of process and the Modern Slavery Act 2015' (2020) 84(5) J. Crim. L. 502, 503.

[531] *R v AAD* [2022] EWCA Crim 106

[532] See *N(L)* [2012] EWCA Crim 189; [2013] QB 379 at [21] (Lord Judge), L(C) & Ors [2013] EWCA 991; [2013] 2 Cr App R 23 at [16-17].

[533] *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr App R 33 and *R v S(G)* [2018] EWCA Crim 1824; [2019] 1 Cr App R 7 .

[534] [2022] EWCA Crim 106 at [116]

[535] ibid [143]

Clearly the *raison d'être* of the MSA 2015 was to improve the position of trafficked victims (or those claiming trafficked status) to raise a substantive defence which, if raised on sufficient evidential basis, it would then be for the prosecution to disprove to the usual criminal standard.[536] The court was of the view that the abuse jurisdiction both complemented and supplemented the s 45 defence,[537] adding that retaining the availability of the jurisdiction would "seem better to preserve the obligations in the [Trafficking] Convention and Directive, which extend not only to [trafficked victims] not being punished but also, in appropriate cases, to not being prosecuted."[538] When addressing the Crown's assertion that there was no "special category" of abuse of process jurisdiction since the enactment of the MSA 2015,[539] his Lordship noted that it has only been described as "special" or "unusual" when evoked in a case involving a victim of trafficking, emphasising that it can only be because abuse of process applications must take into account the relevant context, which here includes a framework of international obligations.[540] The Court reiterated the abuse jurisdiction "does not give alleged trafficked victims carte blanche to circumvent a prosecution", emphasising that "a decision to prosecute is for the CPS, not for the courts" and that "where the facts are in dispute then it is for a jury to determine those facts".[541] Thus, where the where the CPS has taken into account the relevant prosecutorial guidance and has taken into account any conclusive grounds decision (and has a rational basis for departing from a conclusive grounds decision if it has been favourable to the prospective defendant) there is simply no basis for an abuse of process challenge at all: since mere asserted disagreement with a decision to prosecute will never of itself suffice. Indeed, it has long been established that a judge may not order a stay of a prosecution simply because the judge personally would not have prosecuted.[542] The Court did, however, go to address the corollary of that position where (in what will be likely to be a most exceptional case) there has been a failure to have due regard to CPS guidance or if there has been a lack of rational basis for departure by the prosecution from a conclusive grounds decision then a stay application may be available. It will then be assessed by the court, by way of review on grounds corresponding to public law grounds.[543]

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[536] ibid [116]

[537] ibid [118]

[538] ibid [116]

[539] ibid [133]

[540] ibid [117]

[541] ibid [118]

[542] ibid [119]; see also, *Connelly v DPP* [1964] A.C. 1254

[543] ibid [120]

The Court accepted that *DS* had been superseded by the landmark ruling of the European Court of Human Rights in *VCL & AN v United Kingdom.*[544] In that case, the ECtHR was of the view that there was still a role for the domestic criminal courts to supervise prosecutorial decision-making to ensure that Article 4 is not breached. Although the Court confirmed that in line with the relevant international instruments, there is no general prohibition on the prosecution of victims,[545] the Strasbourg court stated that the prosecution of trafficking victims "may be at odds with the state's duty to take operational measures to protect them"[546] and that the Palermo Protocol and the Anti-Trafficking Convention still place an obligation on the State to consider whether prosecution is consistent with its duty to protect the victim "where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked".[547] As such, a prosecutor must have "clear reasons" which are consistent with the definition of trafficking contained within the Palermo Protocol and the Anti-Trafficking Convention" to depart from an official decision that the person is a victim of trafficking.[548] Therefore, where the SCA has determined that a defendant is a victim of trafficking, it is open to the prosecution to show that the authority was mistaken or that there was no "nexus' between the trafficking and the offence charged. While prosecutors will not be bound by the determination of the SCA, they will need to present "clear reasons" in terms consistent with the provisions of the Trafficking Convention and the Palermo Protocol, rather than with domestic legislation alone.[549] As this author has noted,[550] this latter point presents two pertinent issues. First, there is a divergence between the Palermo Protocol and the Trafficking Convention definition of trafficking and the definition of "relevant exploitation' in the MSA 2015. This definitional divergence may continue to lead to inconsistencies in how prosecutorial decisions are reached in relation to a child's trafficked status and potentially have significant implications as to the fairness of their trial. Secondly, do decisions to prosecute based on failure to meet the 'reasonable person' test, or committing a Sch. 4 offence, contained in the s 45 statutory defence potentially fall foul of Article 4 requirements? Concerns have already been expressed regarding those elements of the statutory defence being

[544] (2021) 73 E.H.R.R. 9

[545] ibid [158]

[546] ibid [159]

[547] ibid [158-159]

[548] ibid [162]

[549] ibid [162]

[550] S. Mennim, 'The non-punishment principle and the obligations of the state under article 4 of the European Convention on Human Rights' (2021) 85(4) J. Crim.L 311, 318.

antithetical to the UK's international obligations generally.[551] The Government, however, rejected these assertions. The Government was firmly of the view that current safeguards of prosecutorial discretion and consideration of the public interest test before bringing charges act as an appropriate safety net even when the offence falls within the ambit of Schedule 4 and that the reasonableness test allowed for a jury to consider if the defence should apply, on a case-by-case basis, taking into account all of the circumstances.[552]

It is noteworthy that at the time of writing, the CPS guidance still make no reference to the Court of Appeal ruling in *R v AAD*.

III. The Lord Advocate's Instructions (Scotland): an alternative approach?

The Scottish position regarding prosecution of child victims of trafficking further supports the argument that a more "child appropriate" approach should be taken in relation to young people in the criminal justice system.[553] The Scottish approach has been cited with approval by numerous UK anti-trafficking groups[554] and been regarded as "an example of best practice as a model for potential reform in jurisdictions further afield".[555]

There is no statutory defence provision, but the non-punishment principle is embedded within s 8 of the Human Trafficking and Exploitation (Scotland) Act 2015 (hereinafter, the "Scotland Act") requires the Lord Advocate to publish Instructions to prosecutors regarding the non-prosecution of victims of human trafficking and exploitation. The Lord Advocate's Instructions outline "a strong presumption against prosecution"[556] of a child where there is "credible and

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[551] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) para(s) 4.3.2, 4.4.2. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf (accessed 1 March 2022)

[552] ibid.

[553] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) Jan P.L. 145, 148.

[554] ATMG, *Class Acts? Examining modern slavery legislation across the UK* (October 2016) 67 Available at: http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg_class_acts_report_web_final.pdf (accessed 24 October 2020); GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom* (2016/21) para 290 < https://rm.coe.int/16806abcdc>.

[555] S. Mennim and N. Wake, Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)? (2018) 82(5) J. Crim.L. 373, 377. See also, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (2017) para. 6.101-102. Available at: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf (accessed 29 January 2022).

[556] COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015)

reliable"[557] information that the child is a victim of human trafficking" and that there is "sufficient evidence that… the offending took place in the course of or as a consequence of being the victim of human trafficking or exploitation".[558] The Lord Advocate Instructions adopt an approach that appears to be compatible with the MSA 2015 in that it similarly omits the element of compulsion and does not require that the act be directly attributable, but rather a consequence of the child's victimhood.[559] Unlike the MSA 2015, which is silent on where the burden of proof should fall in respect of the s 45 statutory defence, the Lord Advocate Instructions explicitly stipulate that, for both children and adults, the prosecutor must be persuaded that, on the balance of probabilities, the accused was a victim of human trafficking or exploitation.[560] The Lord Advocate instructions arguably impose a further burden on the prosecutor to undertake a "proper investigation … of the circumstances surrounding the accused"[561] even if the accused does not raise the issue of being a victim of human trafficking.[562]

Significantly, the Lord Advocate Instructions have the advantage of being amenable to future developments in trafficking. The Instructions are framed in broad terms, which do not exclude any offences, thereby recognising that the list of offences which victims of human trafficking or exploitation may commit is "constantly evolving".[563]

Moreover, unlike the statutory defence in E&W which mandates a child's criminal activity be a direct consequence of their trafficking or exploitation,[564] the Lord Advocate Instructions make clear distinction between offences which take place *during the course* of trafficking or exploitation and those which are *a consequence* of trafficking and exploitation. In relation to the former, this may include, immigration offences, in particular being in possession of false documents or entering a country illegally, in order for the trafficking or exploitation to take place.[565] The offences which victims commonly commit as a *consequence* of the trafficking or

[557] ibid.

[558] ibid.

[559] ibid.

[560] ibid.

[561] ibid

[562] Cited in N. Wake *et al*, Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation (2021) Jan P.L. 145, 151.

[563] S. Mennim and N. Wake, 'Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)?' (2018) 82(5) J. Crim.L. 373, 376.

[564] MSA 2015, s 45(4)(b)

[565] As was the case in *R v O* [2008] EWCA Crim 2835.

exploitation include those which victims commit for the benefit of those trafficking or exploiting them; for example, the production or being concerned in the sale and supply of controlled drugs, theft by housebreaking/shoplifting, and offences linked to commercial sexual exploitation.[566] Most significantly, the instructions also take account of offences committed *as a consequence* of the trafficking or exploitation which are not for the benefit of those trafficking or exploiting but are the result of the perception of the victim that there are no other alternatives to escape the trafficking or exploitation.[567] Schloenhardt and Markey-Towler referred to these as "liberation offences" which a trafficked victim may feel compelled to commit in an attempt to free themselves from the trafficking situation or to somehow improve that situation.[568] This may, for example, include offences of violence or dishonesty committed when a child is attempting to flee the control of their trafficker or when otherwise acting to try to protect or assist themselves on account of their trafficked status.[569] This sits in stark contrast to both iterations of the s 45 defence which does not have broad enough application to excuse all the possible offences a victim may commit to escape, endure or survive the trafficking situation.[570]

The Lord Advocate Instructions sensibly recognise that a young person will not always identify themselves as a victim and may not provide information relevant to this or to those they come into contact with. There are a number of reasons for this, including (but not restricted to): cultural differences, fear of authority, threats or trauma or other psychological factors. This is particularly true of children.[571] The prosecutor is required to make his or her own decision as to whether the person is a victim, taking into account the list of Indicators of Human Trafficking which has been produced by the United Nations Office on Drugs and Crime.[572] That is a very detailed list that includes indicators of psychological control and compulsion. The prosecutor

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[566] Organization for Security and Co-operation in Europe (OSCE), *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013) p. 9 Available at < https://www.osce.org/files/f/documents/6/6/101002.pdf> (accessed 26 January 2022).

[567] COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015).

[568] A. Schloenhardt and R. Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons' (2016) 4(1) *Groningen Journal of International Law* 10, 13.

[569] P. Carter and P. Chandran, 'Protecting against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System' in P. Chandran (ed.), *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 425.

[570] A. Schloenhardt and R. Markey-Towler, "Non-Criminalisation of Victims of Trafficking in Persons--Principles, Promises, and Perspectives' (2016) 4(1) Groningen Journal of International Law 10, 21.

[571] COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015).

[572] ibid; United Nations Office on Drugs and Crime, *Human Trafficking Indicators* Available at: https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf (accessed 26 January 2022).

must instruct the police to investigate the United Nations indicators and must obtain information from NGOs working with the accused.[573]

The decision as to whether to prosecute a victim has been centralised. The guidelines require that in all cases where a child has been identified as a victim of human trafficking and exploitation, they must be reported to the National Lead Prosecutor for Human Trafficking and Exploitation for a final decision to be made.[574] This system of centralising the final decision "ensures expertise and consistency" as all final decisions are made by one person who has expertise in dealing with trafficking victims.[575] According to a UNICEF, there appears to be significant scope for flexibility in the application of the Lord Advocate's Instructions in cases concerning trafficked children. Important aspects of the policy and subsequent practice are that there is no "reasonable person test" to satisfy; there is no exhaustive list of excluded offences; there is no need for an NRM decision before engaging the non-prosecution principle because prosecutors are proactively establishing whether there is a case of child trafficking; and the Instructions apply to all stages of the criminal justice process, including post-conviction.[576]

Notwithstanding the benefits afforded by this more flexible model, the lack of a statutory defence has been challenged. In *Van Phan (Quyen) v HM Advocate*,[577] a Vietnamese man (M) was discovered in a flat which was being used for cannabis cultivation. The Lord Advocate reviewed the facts and determined, applying the instructions, that there was no reasonable basis for finding that M was a trafficking victim and that the necessary element of compulsion to commit the offence was not present. M was indicted on charges of, *inter alia*, producing cannabis and being concerned in the supply of cannabis contrary to ss 4(2)(a) and 4(3)(b) Misuse of Drugs Act 1971.

A compatibility minute (notification of intention to raise a compatibility issue), submitted on behalf of M, stated the continued prosecution of M was incompatible with Directive 2011/36/EU (art 8), which ratified the Council of Europe Convention against trafficking in Human Beings 2005, art 26. The minute sought a declaration that the Scotland Act 2015 was incompatible

[573] A. Schloenhardt and R. Markey-Towler, "Non-Criminalisation of Victims of Trafficking in Persons--Principles, Promises, and Perspectives' (2016) 4(1) *Groningen Journal of International Law* 10, 33.

[574] S. Mennim and N. Wake, Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)? (2018) 82(5) J. Crim.L. 373, 377.

[575] GRETA, *Evaluation Report United Kingdom, Third Evaluation Round* (2021) para. 175 Available at:https://rm.coe.int/greta-third-evalution-report-on-the-united-kingdom/1680a43b36 (accessed 26 January 2022).

[576] Unicef, *Victim, Not Criminal: Trafficked Children and the Non-punishment Principle in the UK* (2017) p.7 <https://www.unicef.org.uk/wp-content/uploads/2017/05/Unicef-UK-Briefing_Victim-Not-Criminal_2017.pdf> accessed 26 January 2022.

[577] [2018] HCJAC 7; 2018 J.C. 195.

with EU law (namely, art 26), due to the absence of a statutory defence for trafficked victims compelled to commit criminal offences and that proceedings should be deserted on grounds of oppression. The minute also sought directive compatible jury directions to be issued or for a reference to be made to the High Court.

The sheriff referred the issue to the High Court, posing the following questions:

> "(1) Is the … (Scotland) Act 2015 incompatible with Directive 2011/36/EU in the absence of a statutory defence to the effect that [M] had been compelled to act as he did as a direct consequence of being subject to human trafficking?
>
> (2) In the absence of a statutory defence … is the continued prosecution of M incompatible with Directive 2011/36/EU, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the European Convention on Human Rights?
>
> (3) If the … Act and the … continuation of the … proceedings are compatible with Directive 2011/36/EU, and if at trial the evidence broadly follows [certain] lines … would the court require to give additional directions over and beyond the standard directions so as to give effect to the Directive, and, if so, what additional directions should be given?'[578]

To each of these questions the court answered in the negative. The High Court noted that the Lord Advocate instructions created a strong presumption against the prosecution of persons who appear to be the victims of human trafficking. It found that the existence of the discretion not to prosecute met the requirement of Art 8 of the Trafficking Directive that national authorities are to be 'entitled not to prosecute'.[579]

The High Court explained that pre-reform, the position across the jurisdictions was "not materially different" to that set out in *R v Joseph (Verna),* considered in *Van Phan (Quyen) v HM Advocate*.[580] This was based on three factors. First, there is vested in the respondent a general discretion not to prosecute. This is transmitted to prosecutors along with a specific instruction which provides a strong presumption against prosecution where a person has been compelled to carry out the offence as a direct effect of trafficking. Decisions to prosecute are reviewable where the accused submits a plea in bar of trial; a plea might succeed where

[578] S. Mennim and N. Wake, Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)? (2018) 82(5) J. Crim.L. 373.

[579] [2018] HCJAC 7; 2018 J.C. 195 at [44].

[580] ibid [39].

insufficient regard is given to the Lord Advocate's instructions and/or where "any prospective trial would be unfair".[581] As in E&W, there is no blanket immunity from prosecution for victims of trafficking. Various factors require to be taken into account when deciding whether to prosecute, including the gravity of the offence.[582] Secondly, the Scottish common law defence of coercion would be available, and thirdly, the Court highlighted that circumstances which fall short of coercion could be taken into account in sentencing and could provide powerful mitigation and result in a significant reduction of sentence, even an absolute discharge.[583] The Scottish Law Commission[584] recently considered the defence of coercion in relation to homicide. It is instructive to examine the defence in more detail and contrast it with common law duress in E&W when considering the circumstances in which it may arise in the context of children committing criminal offences as a result of their exploitation.

(i) The extent of coercion in Scottish law

Although the defence of coercion was addressed centuries ago by Hume,[585] the defence was not formally recognised in Scotland until the case of *Thomson v HM Advocate*[586] which provided the first confirmation of the existence of coercion. In that case, the accused was convicted of the armed robbery of a Post Office sorting office (and several other offences) for having a getaway van. He claimed that he was forced to participate, since he was threatened with a gun and indeed injured on the hand. The trial judge (Lord Hunter) left the issue of coercion to be considered by the jury, directing them in accordance with Hume's criteria: (i) an immediate danger of death or great bodily harm; (ii) an inability to resist the violence; (iii) a backward or inferior part in the perpetration; and (iv) a disclosure of fact, as well as restitution of profit, on the first safe and convenient occasion. Delivering the judgment of the Court, L.J.-C. Wheatley stated,

[581] ibid [40]. See also, *Butt v Scottish Ministers* [2013] JC 274, LJC (Carloway) at [16].

[582] ibid [41].

[583] ibid [45].

[584] Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper no. 172, 2021) Available at: https://www.scotlawcom.gov.uk/files/9716/2254/8710/Discussion_Paper_on_the_Mental_Element_in_Homicide_-_DP_No_172.pdf (accessed 9 March 2022).

[585] D. Hume, *Commentaries on the Law of Scotland, Respecting Trial for Crimes* (1797) 53

[586] *Thomson (Oliver) v HM Advocate*, 1983 J.C. 69.

> "The first two are conditions to be satisfied before the defence gets off the ground. It is only if it does get off the ground that the other two tests come into play as measures of the accused's credibility and reliability on the issue of the defence."[587]

It can, therefore, be seen that the court regarded only the first two elements (as propounded by Hume) as being substantive elements of the defence, with the latter two elements being factors relevant only to the credibility and reliability of the accused.

In addition to the leading case of *Thomson*, the appeal court also gave the defence of coercion a detailed consideration in the case of *Cochrane v HM Advocate*.[588] Although *Cochrane* was mainly concerned with the relevance of personal characteristics of the accused's response to threats was reasonable, the appeal court starts its discussion by setting out Hume's four elements.

There is relatively little case law in Scotland on coercion. The few authorities that do exist, such as *Thomson* and *Cochrane*, suggest that (like duress in E&W) its availability as a defence is tightly controlled, and that it is successful only if there was (i) an immediate danger of death or great bodily harm; and (ii) an inability to resist the violence, with the extent of the accused's part in the perpetration and their disclosure to the relevant authorities being a relevant factors in determining guilt.[589] The courts apply the defence in very limited situations, no doubt mindful of the potential for a coercion defence to be open to abuse without these strict requirements which will be considered in further detail below.

Immediate danger of death or great bodily harm

Hume restricted the availability of the defence to situations involving "an immediate danger of death or great bodily harm".[590] That was approved by the appeal court in *Thomson*, stating that:

> "What [Hume] was saying was that it is only where, following threats, there is an immediate danger of violence, in whatever form it takes, that the defence of coercion can be entertained, and even then only if there is an inability to resist or avoid that immediate danger. If there is time and opportunity to seek and obtain the shield of

[587] ibid [78].

[588] 2001 S.C.C.R. 655.

[589] Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper no. 172, 2021) Available at: https://www.scotlawcom.gov.uk/files/9716/2254/8710/Discussion_Paper_on_the_Mental_Element_in_Homicide_-_DP_No_172.pdf (accessed 9 March 2022)

[590] D. Hume, *Commentaries on the Law of Scotland, Respecting Trial for Crimes* (1797) 53

> the law in a well-regulated society, then recourse should be made to it, and if it is not then the defence of coercion is not open. It is the danger which has to be "immediate" not just the threat."[591]

In requiring the danger of death or great bodily harm to be "immediate", Scottish law has traditionally taken a stricter approach than in E&W. The ruling of the Court of Appeal in *R v Hudson and Taylor*[592] is widely recognised as having embraced a "generous view of the ambit of the duress defence".[593] The appellants were two teenage girls who had committed perjury at an earlier trial by failing to identify the defendant. In the course of their trial for perjury they pleaded duress on the basis that they had been warned by a group, including a man with a reputation for violence, that if they identified the defendant they would be killed. The trial judge ruled that the threats lacked sufficient immediacy to sustain the defence of duress: the girls could have sought the protection of the police, thereby "neutralising" the threat. This decision was reversed by the Court of Appeal, since although the threats could not be executed in the courtroom, they could be carried out in the street that very same night.[594] Widgery L.J stated,

> "It is essential to the defence of duress that the threat shall be effective at the moment when the crime is committed. The threat must be a "present" threat in the sense that it is effective to neutralise the will of the accused at that time... threats sufficient to destroy his will ought to provide him with a defence even though the threatened injury may not follow instantly, but after an interval." [595]

Notwithstanding the court's rational approach when interpreting the immediacy requirement in the context of duress, there has been disapproving judicial comment of the ruling in *Hudson and Taylor* being "an indulgent decision".[596] Lord Bingham in *Hasan*[597] expressed his dissatisfaction with the ruling in very clear terms:

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[591] *Thomson (Oliver) v HM Advocate*, 1983 J.C. 69, 77. See also *Trotter v HM Advocate* 2000 S.C.C.R 968 which re-affirmed the requirement of immediate danger.

[592] [1971] 2 QB 202.

[593] R. Ryan, 'Resolving the Duress Dilemma: Guidance From the House of Lords' (2005) 56(3) N.I.L.Q 421, 426.

[594] *R. v Hudson (Linda)* [1971] 2 QB 202, 206; R. Ryan, 'Resolving the Duress Dilemma: Guidance From the House of Lords' (2005) 56(3) N.I.L.Q 421, 426.

[595] ibid [206-207].

[596] In *Hasan* [2005] UKHL 22 at [27] (Lord Bingham) citing G. Williams, *Textbook on Criminal Law* (2nd Edn. Stevens & Sons Ltd. 1983) p.636, Lord Bingham notes Glanville Williams's description of *Hudson and Taylor* as "an indulgent decision".

[597] ibid

> "I can understand that the Court of Appeal… had sympathy with the predicament of the young appellants but I cannot, consistently with principle, accept that a witness testifying in the Crown Court at Manchester has no opportunity to avoid complying with a threat incapable of execution then and there."

His Lordship further described the decision as having "had the unfortunate effect of weakening the requirement that execution of a threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress".[598] Although not expressly overruled in *Hasan*, *Hudson and Taylor* was the subject of such disapproving comment with some academics going as far to suggest that the ruling was "no more than a historical anomaly".[599] Chalmers and Leverick noted, however, that the approach of the court in *Hudson and Taylor* has been adopted in other jurisdictions.[600]

Inability to resist the threat

Hume's second requirement was that the accused must be unable "to resist the threat of violence", although he does not elaborate on this requirement in any further detail.[601] The requirement was referred to in *Thomson*, when the appeal court quoted from the directions of the trial judge, Lord Hunter (which were later approved by the court).[602] The requirement is discussed further in *Cochrane* when Lord Justice General Rodger explained:

> "if when threatened with death or great bodily harm the accused is in a position to resist any attack—perhaps because he is stronger or more skilful in combat than the third party—then the defence of coercion cannot apply, since the accused should resist rather than commit the crime."[603]

Chalmers and Leverick note that the "inability to resist the violence" requirement:

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[598] ibid

[599] R. Ryan, Resolving the Duress Dilemma: Guidance From the House of Lords (2005) 56(3) N.I.L.Q 421, 426.

[600] J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para. 5. 17 (Referring to *United Sates and Riffe* 28 F. 3d 565 (1994); *R v Ruzic* [2001] 1 S.C.R. 687 where the Supreme Court of Canada went as far as declaring the requirement, contained within s. 17 of the Canadian Criminal Code, that threats must be of immediate death of bodily harm as unconstitutional).

[601] D. Hume, *Commentaries on the Law of Scotland, Respecting Trial for Crimes* (1797) 53

[602] 1983 S.C.C.R. 368, 378 (L.J.-C. Wheatley); Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper no. 172, 2021)

[603] *Cochrane v HM Advocate* 2001 S.C.C.R. 655, 661

> "appears only to play similar role to the retreat rule in self-defence and means that the defence of coercion will be denied to the accused who fails to pursue a course of action other than compliance"[604]

A backward and inferior part in the perpetration and disclosure of the fact

Hume's third and fourth elements for the defence was that the accused must play "a backward and inferior part in the perpetration" of the offence, and that the accused must make "disclosure of the fact as well as the restitution of the spoil on the first safe and convenient occasion".[605] As the court in *Thomson* held, if the first two of Hume's elements are met, then Hume's third and fourth elements "come into play as measures of the accused's credibility and reliability on the issue of the defence".[606]

Ashworth[607] noted that in relation to coercion, there seems to be little doubt that the standards of the "ordinary sober person of reasonable firmness" is to be modified for child accused. When discussing this view, Ashworth highlighted a passage from the works of Gordon[608] which refers to threats "of such a nature as to overcome the resolution of an ordinarily constituted person of the same age and sex of the accused", noting however that he made no comment on the reference to age and sex. This standard was later clarified in *Cochrane*.

Cochrane, deals with the issue of the standard against which the accused should be judged in coercion cases. *Cochrane* arose from relatively nonspecific (and probably future) threats[609] made against a 17-year-old who was, on a formal psychological assessment, "highly compliant"[610] and, therefore, much more likely than members of the general population to be persuaded – and terrified – by such intimidation. The appeal court held, faced with these facts, that the test for coercion was primarily objective, stating it to be: "whether an ordinary sober

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[604] J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para. 5. 17.

[605] D. Hume, *Commentaries on the Law of Scotland, Respecting Trial for Crimes* (1797) 53

[606] *Thomson (Oliver) v HM Advocate*, 1983 J.C. 69, 78; Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper no. 172, 2021)

[607] A. Ashworth*, Positive Obligations in Criminal Law* (Bloomsbury Publishing 2015) 183.

[608] GH Gordon, *The Criminal Law of Scotland* (2nd Edn, 1978), para 13.25 citing AM Anderson, *The Criminal Law of Scotland* (2nd Edn 1904), 16; A. Ashworth, *Positive Obligations in Criminal Law* (Bloomsbury Publishing 2015) 183.

[609] In the accused's own words, the alleged coercer had said "If you don't [carry out the robbery], I'll hammer you and blow your house up" 2001 S.C.C.R. 655 at [6]

[610] 2001 S.C.C.R. 655 at [7] (L.J-G Rodger)

person of reasonable firmness, sharing the characteristics of the accused, would have responded as the accused did."[611] It elucidated the matter further as follows:

> "Therefore, in a case where the accused lacks reasonable firmness, the jury must disregard that particular characteristic but have regard to his other characteristics. At the same time, I bear firmly in mind that the judge is entitled to have regard to all the accused's characteristics in determining what punishment, if any, is appropriate in the particular circumstances".[612]

In terms of deciding what characteristics are relevant the court held that "[t]he test does not… apply a single standard to all cases" before concluding that "a child cannot be expect to react like an adult", highlighting that characteristics such as age, gender and any physical (as opposed to mental) handicap are relevant in deciding what may reasonably be required of ordinary people.[613]

By definition, objective tests focus attention away from the effect of exculpatory factors on the accused him or herself. The concern is, primarily, on hypothesising as to how such factors would have affected an individual regarded as representative of the general population – an "average" person or, in coercion, an "ordinary" one who is "sober" and "of reasonable firmness".[614] In other words: "[h]eroic qualities are not required by the law in this context, nor is allowance made for excessive cowardice or timidity."[615] The jury's task is complicated by the fact that the relevant ordinary person also shares the characteristics of the accused. Since it is logically impossible for an individual to be, simultaneously "of reasonable firmness" and "highly compliant", individual characteristics relating specifically to levels of bravery are to be disregarded for the purpose of coercion.[616]

(ii) Does coercion operate as a defence for trafficked victims in Scotland?

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[611] ibid [29] (L.J-G Rodger)

[612] ibid [30] (L.J-G Rodger)

[613] ibid [21] (L.J-G Rodger)

[614] C. McDiarmid, 'How do they do that? Automatism, coercion, necessity and mens rea in Scots Law' in A. Reed, M. Bohlander, N. Wake, & E. Smith (Eds.), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) 159-169

[615] *Thomson (Oliver) v HM Advocate*, 1983 J.C. 69, 72 (Referring to trial judge report)

[616] C. McDiarmid, 'How do they do that? Automatism, coercion, necessity and mens rea in Scots Law' in A. Reed, M. Bohlander, N. Wake, & E. Smith (Eds.), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) pp. 159-169

Like the common law defence of duress in E&W, the Scottish courts have stated that coercion should be approached with caution, as it can be an easy allegation to make. For instance, the trial judge in the case of *Thomson* stated that, in his view, "the door of the defence of coercion should not be opened too wide" before quoting Lord Morris of Borth-ye-Gest in *DPP for Northern Ireland v Lynch*.[617] Lord Morris had cautioned that the defence of duress "must never be allowed to be the easy answer of those who can devise no other explanation of their conduct nor of those who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant".[618] Similar public policy concerns that a defence of coercion could operate as a so-called "charter for terrorists"– by allowing terrorist organisations to confer immunity on their members to commit acts of atrocity simply by issuing threats of death to them – have also been articulated in a number of cases.[619] This concern was shared in *Howe*, where Lord Lane C.J. stressed that this would be a particularly dangerous relaxation in the law since duress is easy to raise and difficult to disprove beyond reasonable doubt.[620]

In relation to the latter argument, this assumes that the defence has merely to be raised for an acquittal to follow. The cases in which duress or coercion are accepted remain, unlike what Lord Lane C.J. held, very exceptional.[621] In relation to the former arguments, these concerns can be addressed relatively easily by ruling out the defence for murder or attempted murder,[622] and those who voluntarily joined such an organisation or who placed themselves in a situation where it was foreseeable that they would be subjected to coercion.[623] As highlighted in Chapter 2, it is well established principle in E&W that an accused person cannot invoke the defence of duress is unavailable in a murder case murder[624] or where an individual has voluntarily exposed themselves to the threat of which they now complain.[625] It is noteworthy that Scottish law has not at the time of writing considered whether it would admit the defence of coercion

[617] [1975] A.C. 653

[618] ibid [670]

[619] ibid [688] (Lord Simon); see also *R v Howe* [1987] A.C. 417 at [443-444] (Lord Griffiths) and [434] (Lord Halisham).

[620] [1986] Q.B. 626, 641.

[621] *Abbott v The Queen* [1976] 3 All ER 140, 152 (Lord Wilberforce)

[622] *R v Howe* [1987] AC 417; *R v Gotts* [1992] 2 AC 412.

[623] See *Sharp* [1987] Q.B. 853, (1987) 85 Cr. App. R. 207; *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, (1975) 61 Cr. App. R. 6; *R. v Hasan* [2005] UKHL 22; [2005] 2 A.C. 46.

[624] *R v Howe* [1987] AC 417; *R v Gotts* [1992] 2 AC 412.

[625] R. v Hasan [2005] UKHL 22; [2005] 2 A.C. 467 at [38] (Lord Bingham); Sharp [1987] Q.B. 853, (1987) 85 Cr. App. R. 207; Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653, (1975) 61 Cr. App. R. 6.

in either of these circumstances. Although this leaves the point without authority, it can be safely assumed that when confronted with such cases the Scottish courts approach would be congruent with the traditionally strict interpretation of the defence.[626] As in the context of common law duress in E&W, it is submitted that this strict interpretation of coercion will inevitably lead to results which are socially undesirable and morally unfair.[627]

As discussed in Chapter 2, the question of whether duress should be extended or modified to accommodate a victim of trafficking threatened with false imprisonment was considered and refused by the Court of Appeal in *van Dao*.[628] The Scottish courts have recently considered the question of whether the defence of coercion would be available to an accused if they had been coerced into cultivating cannabis under threat of violence in *Van Phan (Quyen) v HM Advocate*.[629] When discussing the extent of coercion in this context, the court also took the opportunity to address the immediacy requirement by emphasising that it was not essential for there to be immediate danger of death or serious bodily harm. The court in *Van Phan (Quyen)* stated,

> "It is important to observe that the *locus classicus* (*Thomson v HM Advocate*) was concerned with the robbery of a Post Office sorting-office using firearms. It was rather different from the more placid, but time-consuming crime of cultivating cannabis".[630]

It would be a matter of facts and circumstances whether a person was truly coerced to commit crime by virtue of genuinely anticipated and unavoidable violence;[631] for example, the defence could apply where a farmer is confined to a flat in which cannabis is grown and has reasonable grounds for believing that if he does not tend to the crop he will be seriously injured on the arrival of those controlling the operation.[632] It is submitted that the revised interpretation to coercion in *Van Phan (Quyen)* demonstrates a promising development towards making the defence available to all victims of trafficking.

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[626] *Thomson (Oliver) v HM Advocate*, 1983 S.C.C.R. 368, 373-374 (Lord Hunter). See also, the *Draft Criminal Code for Scotland* s. 29(2)(b) Available at: https://www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf (accessed 13 February 2022).

[627] D. Ibbetson, 'Duress Revisited' (2005) 64(3) C.L.J. 530, 532.

[628] [2012] EWCA Crim 1717 at [33], followed in Joseph (Verna) [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.486) at [28].

[629] [2018] HCJAC 7; 2018 J.C. 195.

[630] ibid [42]

[631] ibid.

[632] ibid [43]

It is instructive to consider whether the discretionary approach may be too little to signal to victims that they can exit their trafficking situation and freely cooperate with law enforcement agencies without fear. Many victims may feel that they will not be believed and/or that they would face consequences for offences they were compelled to commit should they confide in the authorities.[633] As the applicant in *Van Phan (Quyen)* argued, in contrast to the position in England, "there is "no "robust tradition" of independent judicial review of [the Lord Advocate's] decisions", and "no case in which the Lord Advocate's discretion in the context of a criminal prosecution had been subject to a successful review".[634] It was similarly submitted that a trafficking victim's status being used in mitigation is not an effective remedy, where a case does proceed to trial, and a plea in bar of trial or the coercion defence is unsuccessful. The prospect of an absolute or conditional discharge is unlikely to remove (or even mitigate) the powerful deterrent of possible prosecution operating against trafficking victims contacting the authorities. According to Hoyano, the threat of prosecution "gives the trafficker one more weapon in his arsenal to entrap his victim into silent compliance'.[635] In addition to a more "robust tradition' of judicial review, the availability of a statutory defence, albeit improved on s 45 MSA 2015, could provide an additional layer of protection for trafficking victims compelled to commit criminal offences in Scotland. It would also send out a vital message that protection is available to trafficked individuals who have been compelled to commit criminal offences.[636]

III. Conclusion

The chapter has critically examined the disparate approaches to victims of trafficking compelled to commit offences in Scotland and England. The starting point for the analysis in this chapter was how the current CPS guidelines are convoluted and lack sufficient clarity when prosecutors are required to determine whether a child is a victim of trafficking/slavery. The courts have struggled, or perhaps more accurately been reluctant, to determine the weight and admissibility of Competent Authority decisions which has led to a cavalcade of appellate authorities on the issue. Similar issues have arisen in the context of the court's jurisdiction to

[633] A. Schloenhardt and R. Markey-Towler, "Non-Criminalisation of Victims of Trafficking in Persons--Principles, Promises, and Perspectives' (2016) 4(1) *Groningen Journal of International Law* 10, 33; S. Mennim and N. Wake, Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)? (2018) 82(5) J. Crim.L. 373, 377.

[634] S. Mennim and N. Wake, Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)? (2018) 82(5) J. Crim.L. 373, 377.

[635] L. Hoyano, "*R. v N*: Abuse of Process--Prosecution--Decision to Prosecute' (2012) Crim LR 958, 963; S. Mennim and N. Wake, Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)? (2018) 82(5) J. Crim.L. 373, 377.

[636] S. Mennim and N, Wake, Appeal Court, High Court of Justiciary: does Scotland require a defence equivalent to s.45 Modern Slavery Act 2015 (England and Wales)? (2018) 82(5) J. Crim. L. 373, 377.

stay a prosecution as an abuse of process since the enactment of the MSA 2015. The approach taken in Scotland, which was to advance specific instructions pertaining to prosecutorial discretion. Although the Lord Advocate instructions have the advantage of being amenable to future developments in trafficking by making explicit recognition that the list of offences which a child victim of trafficking may commit is “constantly evolving”, it was argued that the discretionary approach may be too little to signal to victims that they can exit their trafficking situation and freely cooperate with law enforcement agencies without fear. Further, unlike the position E&W, there is no robust tradition of independent judicial review of the Lord Advocate's decisions. It was similarly submitted that a child’s victim status being used in mitigation is not an effective remedy, where a case does proceed to trial, and a plea in bar of trial or the coercion defence is unsuccessful. The prospect of an absolute or conditional discharge is unlikely to remove (or even mitigate) the powerful deterrent of possible prosecution operating against trafficking victims contacting the authorities. It is submitted E&W should adopt a hybrid model of the proposed s 45(4) amendments and revised CPS guidelines similar to the Lord Advocate’s instructions which could remedy some of the problems that were examined in Chapter Two and provide a strong argument in reducing the list of excluded offences in Schedule 4. This shall be explored in more detail in Chapter 4.

Chapter Four

Modern Slavery Act 2015, s 45(4): Proposals for reform

I. Introduction

This chapter will examine a range of potential options for remedying the issues that have been identified with the operation of s 45(4) and the CPS guidelines in Chapters 2 & 3. The first recommendation will support the proposal that common law duress should be extended to cover circumstances where children commit criminal offences as a result of their exploitation but have a "*reasonable excuse*" for their voluntary exposure in a criminal gang.[637] The second recommendation proposes four potential legislative amendments to s 45(4). The first will advance the argument for a new integrated approach of the s 45 defence and Lord Advocate instructions provide a remedy for the restrictive nature of Sch. 4. The argument will be made for s 45 to apply to all offences except murder. It will be argued that in cases where a child commits murder that a partial defence of 'developmental immaturity' should be available. Second, that s 45 should contain an express provision clearly stating where the burden of proof lies. Third, that the term "direct consequence" be amended to reflect a causal requirement akin to that in diminished responsibility. Finally, that the 'reasonable person' requirement adopts a more subjectivised approach which will allow a more effective and accurate evaluation of the child's circumstances/characteristics, taking into account any wider physical and psychological methods of coercion employed by traffickers to compel child victims of exploitation to commit criminal offences. It will be contended that the legislative amendments advanced proffer "a more nuanced and humanising defence". [638]

II. Refining duress: voluntary association and child victims of exploitation

In essence, the defence of duress is available where a person acts under threats of death or serious harm to self or family, in circumstances in which a person of reasonable firmness would give way and to which the person had not contributed by joining a gang that used violence.[639] In *Hasan*, Lord Bingham enumerated no less than seven limitations on the ambit

[637] *R v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467 at [77] (author emphasis added)

[638] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395, 404.

[639] J. Gardner, 'The gist of excuses' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) 170.

of the defence, one of which when as a result of an accused's voluntary association with others engaged in criminal activity they foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.[640] The inherent unfairness of the restrictive approach taken in *Hasan* was later illustrated in *van Dao*,[641] where the court opined that widening the defence to accommodate trafficked victims was "ill-advised".[642]

Maintaining this restrictive approach to duress means that there will be no need for the court to deny the defence where a child who, as a result of their exploitation by a criminal gang, commits a criminal offence. Thus, any potential defence of duress will be filtered out of consideration on the basis that the defence does not extend to trafficked victims[643] or to those children who have voluntarily exposed themselves to the threats of which they complain.[644] Moreover, the defence is also restricted by the other limb of the defence requiring a child's actions to be assessed to the objective "reasonable person" standard.[645]

Notwithstanding the "public policy"[646] arguments and confusion regarding the excusatory nature of duress, the absence of a defence if duress for a child who commit offences as a result of their exploitation is "simply indefensible, and the logic that that a defence should be available is "irresistible".[647] As noted, the court in *Joseph (Verna)* left open the possibility of revisiting the parameters of the defence. [648] While broader considerations of how the defence could be reformed are beyond the scope of this thesis, it is submitted that the subjectivised stance taken by Baroness Hale in *Hasan* provides a more nuanced approach.[649] In advancing proposals as to how the defence could be refined to grant a special exception for children who commit offences as a result of their exploitation reference shall be made to the recommendations advanced by the Law Commission and existing academic commentary.[650]

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[640] [2005] UKHL 22 at [38] (Lord Bingham).

[641] [2012] EWCA Crim 1717

[642] ibid [33] (Gross L.J.)

[643] ibid

[644] *R v Hasan* [2005] UKHL 22, [74] (Baroness Hale)

[645] *R v Bowen* [1996] 2 Cr App R 157.

[646] *R v Graham (H.K)* [1982] 1 All E.R. 801, 806.

[647] *R v Hasan* [2005] UKHL 22, [21] (Lord Bingham)

[648] [2017] EWCA Crim 36; [2017] 1 Cr. App. R. 33 (p.498) at [28].

[649] R*. v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467 at [77] (Baroness Hale).

[650] N. Wake, 'Human trafficking and modern day slavery: when victims kill' (2017) 9 Crim. L.R. 658-677

Wake[651] highlighted that s 45 does not apply a voluntary association exclusion as it is "presumed that a trafficked victim's status will have been established through the Competent Authority";[652] however, any such decision regarding a child's trafficked status is not binding on the court[653] and is not admissible at trial.[654] Further, it could also be that a victim of trafficking may have "exposed them to the risk of committing a criminal offence".[655] It is submitted that duress should adopt a more subjectivised approach as advocated by Baroness Hale in *Hasan*.[656] Under the revised approach, the jury would assess whether the child foresaw the risk of threats "of such severity, plausibility and immediacy that one might be compelled to do that which one would otherwise have chosen not to do", and that there was a "*reasonable excuse*" for the voluntary exposure.[657] This refined defence will still apply the objective "reasonable person" standard for duress.[658] In order to address the concerns outlined by Lord Bingham,[659] the voluntary association exclusion will still apply to "filter out unmeritorious claims";[660] however, under this revised approach, the jury will be able to conduct a careful balancing exercise to assess whether they would have reasonably perceived the risk, and in the absence of a reasonable excuse, they are unlikely to believe that the child did not foresee the risk.[661]

III. A revised defence for child victims of exploitation

(i) Schedule 4: A revised approach

Section 45 has been the subject of much criticism for its complexity and restrictiveness, and for requiring more of the trafficked defendant than the Trafficking Convention and Trafficking

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[651] ibid 675

[652] ibid

[653] *R v AAD* [2022] EWCA Crim 106 at [83]; see also Joseph [2017] EWCA Crim 36 at [20] and [38].

[654] ibid [85-86] upholding the ruling in *Brecan*i [2021] EWCA Crim 731 at [54].

[655] N. Wake, 'Human trafficking and modern day slavery: when victims kill' (2017) 9 Crim. L.R. 658, 675.

[656] *R v Hasan* [2005] UKHL 22; [2005] 2 A.C. 467 at [77] (Baroness Hale).

[657] ibid (author emphasis added)

[658] In accordance with *R v Bowen* [1996] 2 Cr App R 157, 166

[659] *R v Hasan* [2005] UKHL 22, [74] (Baroness Hale)

[660] N. Wake, 'Human trafficking and modern day slavery: when victims kill' (2017) 9 Crim. L.R. 658, 675.

[661] ibid

Directive.[662] Although there is no exhaustive list of offences that may be committed by victims of trafficking in the course, or as a consequence, of being trafficked,[663] s 45(7) of the MSA 2015 states that the defences do not apply to an offence listed in Sch.4.[664] Schedule 4 lists over 100 offences which are excluded from the parameters of both iterations of the defence, some of which child victims of exploitation may become embroiled in.[665]

Parliament sought to cover a wide range of offences[666] and placed significant reliance upon Sch.15 of the Criminal Justice Act 2003, which lists those "certain serious offences"[667] that can attract extended sentences;[668] for example, arson, kidnapping and murder. Some of the excluded offences, however, are not found in Sch.15 of the Criminal Justice Act 2003. Sch. 4 lists numerous offences which are likely to arise in child trafficking cases, for example, shoplifting, pick-pocketing, cannabis cultivation.[669] Although Sch.4 does exclude many serious offences, it was noted by Lord Burnett C.J in *MK*[670] that it does not exclude "other serious offences which may result in the imposition of long sentences of imprisonment on a convicted defendant, such as, the supply of, or conspiracy to supply, Class A drugs, or their importation". Moreover, it was questioned whether the exclusion of assault with intent to resist arrest was appropriate, since "[w]e know that children especially… are suspicious of authority, because traffickers have made them that way; they are scared and [may] not understand the

[662] S. Bird and P. Southwell, "Does the new "slavery" defence offer victims of trafficking any greater protection?" (2015) 9 Archbold Review 7–9.

[663] OSCE, *Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013) para 57

[664] This significant restriction of the scope of the defence also extends to the ancillary offences of attempt, conspiracy, aiding and abetting, counselling or procuring, and offences under Pt 2 of the Serious Crime Act 2007 (encouraging or assisting (2015 Act s 45(7) and Sch.4, paras 1–37).

[665] PBC Deb 11 September 2014, col.387 cited in N. Wake et al, Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation (2021) Jan P.L. 145, 149.

[666] Modern Slavery Bill, Presentation and First Reading (Standing Order No.57) (10 June 2014), col.421. Available at:http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140610/debtext/140610-0001.htm (accessed 1 February 2022).

[667] Explanatory Notes to the Modern Slavery Act 2015, para. 218. Available at: http://www.legislation.gov.uk/ukpga/2015/30/notes/division/5 (accessed 1 February 2022).

[668] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) 6 Crim. L.R. 395, 396.

[669] https://yjlc.uk/resources/legal-updates/statutory-defence-child-victims-trafficking-and-slavery-section-45-modern (accessed 05 March 2022)

[670] *R v MK; R v. Gega* [2018] EWCA Crim 667 at [9].

language".[671] It remains questionable whether the exclusions are necessary, and, unsurprisingly the schedule has been described as "a recipe for disaster and confusion".[672]

During Parliamentary debate on the 2015 Act, Mark Durkan, then MP (SDLP), argued that s 45 should extend to all offences.[673] This recommendation was not adopted on the basis that allowing the defence to extend to those crimes deemed too serious would potentially lead to unintended consequences; for example, the increase in the use of victims for the commission of serious offences,[674] and that the defence would be pleaded not by victims of slavery and trafficking but by "serious criminals" attempting to obviate or frustrate prosecution.[675] In relation to the latter, Laird asserted that this is "a false dichotomy".[676] He clarified that:

> … an individual may genuinely be a victim of slavery or trafficking and be compelled to commit a serious criminal offence, and that it is wrong to assume from the fact someone has done the acts that fulfil the definition of a serious criminal offence that he is necessarily a serious criminal.[677]

The long and arbitrary list of excluded offences contained in Sch. 4 is incredibly damaging to the applicability of the s 45 defence to children. Despite this, the recent Independent Review of the MSA advocated that no change be made.[678] As highlighted in the previous chapter, the Lord Advocate instructions in Scotland are framed in broad terms, which do not exclude any offences, explicitly recognising that the list of offences victims of trafficking and exploitation commit is "constantly evolving".[679] It is submitted that this broader approach is more desirable

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[671] HL Deb, Modern Slavery Bill 8 Dec 2014, 1658 cited in N. Wake et al, Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation (2021) Jan P.L. 145.

[672] PBC Deb, 21 July 2014 (Modern Slavery Bill), col.36 (Peter Carter).

[673] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.386. This would have aligned s. 45 to the equivalent Trinidad and Tobago's Trafficking in Persons Act that provides an absolute defence for victims of trafficking who commit offences because of being trafficked cited in N. Wake, 'Human trafficking and modern day slavery: when victims kill' (2017) 9 Crim. L.R. 658, 671.

[674] Joint Committee, Draft Modern Slavery Bill Report (2013–2014), HL Paper No.166, HC Paper No.1019, p. 57.

[675] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.365. Joint Committee, Draft Modern Slavery Bill Report (2013–2014), HL Paper No.166, HC Paper No.1019, p. 57.

[676] K. Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' 2016) 6 Crim. L.R. 395, 397

[677] ibid.

[678] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) para(s) 4.3.2.-4.3.3.

[679] COPFS, 'Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (COPFS 2015).

than the restrictive ambit in which the defence currently operates by not excluding those offences which children typically commit as a result of their exploitation. By adopting a similar approach to that of the Lord Advocate instructions, this will allow the amended s 45 defence to be adaptive to the evolving trends in offences that children may commit as a result of their exploitation. It is, however, important to address valid concerns of the defence being abused by traffickers/criminal gangs to using children in the commission of serious offences.[680] This requires a balanced and nuanced approach to be adopted. Under the revised s 45 defence, children will be able to raise the defence to all offences except murder. When dealing with children who have committed the offence of murder, it is submitted that children should be able to plead a partial defence of developmental immaturity.

(ii) Developmental immaturity: A partial defence to children who kill

The Law Commission, initially in its report on *Murder, Manslaughter and Infanticide*[681] and latterly, more generally, in its discussion paper on *Criminal Liability: Insanity and Automatism*,[682] argued for a separate limb of diminished responsibility, recognising the developmental immaturity of children below the age of 18. The Law Commission's proposals would have included "an abnormality of mental functioning arising from a recognised medical condition, developmental immaturity in a defendant under the age of eighteen, or a combination of both".[683] The Law Commission acknowledged "that the recommendation [for a new defence for the young in relation to diminished responsibility] was potentially controversial",[684] because some of its consultees took the view that mitigating murder on the grounds of developmental immaturity was "too generous to those who had killed with the fault element for first degree murder".[685] Thus, the contemporary defence of diminished responsibility contained in s 2 of the Homicide Act 1957,[686] requires that the defendant prove, on the balance of probabilities, that they suffered from a recognised medical condition which substantially impaired their ability to understand the nature of their conduct, form a rational judgment, and exercise self-control.

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[680] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.365; Joint Committee, Draft Modern Slavery Bill Report (2013–2014), HL Paper No.166, HC Paper No.1019, p. 57.

[681] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No. 307, 2006) para(s) 5.125-5.137

[682] Law Commission, *Criminal Liability: Insanity and Automatism* (2013) para(s) 9.3-9.21

[683] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para. 9.20

[684] Law Commission, *Criminal Liability: Insanity and Automatism* (2013) para 9.7

[685] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No. 307, 2006) para(s) 5.129

[686] HA 1957 (as amended by s 52 of the Coroners and Justice Act 2009)

The insertion of the phrase 'recognised medical condition' represented a "tightening"[687] as well as "clarification"[688] of the law; however, by excluding the developmental immaturity requirement in the case of a younger defendant, the defence is "ill-equipped to adequately address the circumstances of young offenders".[689] Wake highlighted that by requiring a child to establish on the balance of probabilities that they suffered from a recognised medical condition, diminished responsibility is "not designed to be utilised in cases involving 'normal' development".[690] This point was acknowledged by the Law Commission who explained that "there is an important difference between a recognised medical condition and developmental immaturity: youth is not a pathological condition equivalent to a medical condition."[691] The lack of a developmental immaturity defence will continue to risk punishing children who, by reason of biological factors, or to environmental or social factors, lack sufficient capacity.[692] Lord Dholakia acknowledged the abundance of research and data that recognises that:

> "[C]hildren who go through the criminal process at a young age are often young people from chaotic, dysfunctional and traumatic backgrounds involving some combination of poor parenting, physical or sexual abuse, conflict with families, substance abuse or mental health problems."[693]

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[687] Lord Justice Toulson, 'Can the courts provide a more holistic response to developmentally immature young defendants without comprising justice?' (28 April 2009) Available at: http://www.michaelsieff-foundation.org.uk/content/Report%208%20-%20LJ%20Toulson%20Speech.pdf (accessed 5 March 2022)

[688] T. Crofts and N. Wake, 'Diminished responsibility determinations in England and Wales and New South Wales: whose role is it anyway?' (2021) 72(2) N.I.L.Q 324. For further discussion, see R. Mackay and Barry Mitchell, 'The new diminished responsibility plea in operation: some initial findings' [2017] 1 Crim. L.R. 18–35; R. Mackay, 'The new diminished responsibility plea: more than mere modernisation' in A Reed and M Bohlander (eds*), Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) 9.

[689] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145, 160;

[690] ibid. See also, T. Crofts, "The common law influence over the age of criminal responsibility—Australia" (2016) 67(3) N.I.L.Q 283, 298; C. McDiarmid, "After the age of criminal responsibility: a defence for children who offend" (2016) 67(3) N.I.L.Q 327, 336. See also, C. McDiarmid, *Childhood and Crime* (Dundee: Dundee University Press 2007), Ch.3.

[691] ibid. See also, Law Commission, *Criminal Liability: Insanity and Automatism* (2013) para(s) 9.20. As noted by Howard, "developmental immaturity is not a recognised medical condition under DSM 5 or ICD 10. Thus if a link to a "recognised medical condition" were to be required, then the developmentally immature 10-year-old could fail to satisfy the test, unless that immaturity can be linked, for example, to conditions on the autism spectrum or due to mild mental retardation": H. Howard, Lack of capacity: reforming the law on unfitness to plead (2016) 80(6) J. Crim. L. 428, 434.

[692] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No. 307, 2006) para(s) 5.132.

[693] Lord Dholakia, "Age of Criminal Responsibility" in N. Wake, R. Arthur and T. Crofts (eds), 'The Age of Criminal Responsibility' (2016) 67(3) N.I.L.Q 263–264, 263 cited in N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 2021, Jan, 145, 156.

Despite considerable support amongst academics for the introduction of a developmental immaturity defence,[694] the Government was not persuaded that it would be appropriate to extend the partial defence, taking the view that there is a risk that this would make the defence too easy to run if it was unrelated to a recognised medical condition.[695] This, however, presents an interesting anomaly. In a response to the Government's refusal to accept the proposal, it was highlighted:

> "An adult of 40 years with the emotional maturity of a 10-year-old can claim diminished responsibility as they may be diagnosed as having a "recognised medical condition", yet a 'normal' 10 year old cannot succeed with the plea as their development has not been arrested. In this way, more is expected of children than adults. The fact that children develop consequential reasoning as they grow older is disregarded (unless they have a "recognised medical condition")."[696]

In the absence of the presumption of *doli incapax*, any conditional age protection or capacity-based defence for children in E&W, it is submitted that the introduction of a developmental immaturity defence, provides two notable advantages. First, by explicitly acknowledging the differences in capacity, capabilities, and culpability of children,[697] the defence would reduce what is murder to manslaughter. Secondly, by reducing the offence to manslaughter, this would provide the judge a greater degree of discretion when determining sentence.[698] This allows a nuanced approach to be taken by making adjustments in recognition of the welfare

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[694] See, C. McDiarmid, 'After the Age of Criminal Responsibility' (2016) 67(3) N.I.L.Q. 327-341; K. Fitz-Gibbon, Protections for children before the law: An empirical analysis of the age of criminal responsibility, the abolition of *doli incapax* and the merits of a developmental immaturity defence in England and Wales (2016) 16(4) *Criminology & Criminal Justice* 391-409; N. Wake, R. Arthur, T. Crofts, and S. Lambert, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145; T. Crofts and N. Wake, 'Diminished responsibility determinations in England and Wales and New South Wales: whose role is it anyway?' (2021) 72(2) N.I.L.Q 324.

[695] Ministry of Justice, *Murder, manslaughter and infanticide: Proposals for reform of the law Summary of responses and Government position* (2010), para.97. Available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20100512140907/http://www.justice.gov.uk/consultations/docs/murder-review-response.pdf (accessed 26 February 2022)

[696] Ministry of Justice, *Murder, manslaughter and infanticide: Proposals for reform of the law Summary of responses and Government position* (2010), para.98. Available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20100512140907/http://www.justice.gov.uk/consultations/docs/murder-review-response.pdf (accessed 26 February 2022)

[697] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145, 161.

[698] Sentencing Council, *Manslaughter by reason of diminished responsibility (2018)* *https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/*

principle[699] which acknowledges the child's lack of maturity.[700] Taken together, it is submitted that the introduction of a developmental immaturity defence, in conjunction with raising the age of criminal responsibility in E&W, provides a more child-friendly approach to juvenile justice by recognising the special needs of children and promoting their rehabilitation.[701]

(iii) s 45(4)(a) - Burden of Proof

Notwithstanding those concerns raised by the CPS in relation to their ability to prosecute,[702] it is submitted that the insertion of an explicit legislative provision, reminiscent of that proposed by Diana Johnson during the MSA's passage through Parliament,[703] would provide a welcome addition to the amended s 45(4) defence: Under s 45(4)(a) of the defence:

> "once the defence is raised by the accused or on his or her behalf, or the court of its own volition or on hearing submissions from any party decides that such a defence should be considered by the court, the burden of proving that the offence was not committed as a result of the person being, or having been, a victim of slavery or a victim of relevant exploitation shall lie upon the prosecution".[704]

(iv) s 45(4)(b) - Direct Consequence: towards a causal requirement: Lessons from diminished responsibility

The "direct consequence" requirement is problematic for its lack of clarity, and it ought to be explicitly defined. An alternative approach might be a "causal requirement" akin to that in diminished responsibility. The partial defence of diminished responsibility contained in s 2 of the Homicide Act 1957, as amended by s 52 of the Coroners and Justice Act 2009, requires that the defendant prove, on the balance of probabilities, that an abnormality of mental

[699] Children and Young Persons Act 1933 s.44.

[700] Sentencing Council, *Manslaughter by reason of diminished responsibility (2018)* Available at: *https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/ (accessed 06 March 2022)*; G. Brown, 'The imposition of punishment parts on young offenders' (2021) 169 Crim.L.B. 2-5.

[701] N. Wake *et al*, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145, 161; G. Brown, 'The imposition of punishment parts on young offenders' (2021) 169 Crim.L.B. 2-5;

[702] *Independent Review of the Modern Slavery Act 2015: Final Report* (TSO, 2019) paras 3.3.2 -3.3.8

[703] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.382

[704] ibid

functioning provides “an explanation” for doing or being a party to the killing.[705] An explanation will be provided if "it causes, or is a significant contributory factor in causing the person to carry out that conduct'.[706] Notwithstanding the significant distinction in the extent and application of diminished responsibility, it is submitted that the insertion of an explicit causation requirement in s 45 could provide a suitable model for legislative reform.

Instead of requiring the commission of an offence to be a “direct consequence” of the child’s victim status, it would require that: “the person being, or having been, a victim of slavery or a victim of relevant exploitation provides an explanation for the act constituting the offence.” An explanation will be provided where their relevant status “caused, or was a significant contributory factor in causing, the person to carry out that act”. This goes further than the Court of Appeal in *Joseph (Verna)* by formally adopting the phrase, “an explanation”. The posited approach offers a nuanced solution to concerns regarding the interpretation and ambit of the term “direct consequence”. In providing that the child’s status offers “an explanation” (as opposed to “the” or the “sole” explanation) for their offending, even in circumstances where the offence does not appear to be integral or a direct consequence of the exploitation, the “explanation” requisite would not automatically deprive them of a defence.[707] Thus, if it established that a child’s relevant exploitation “caused, or was a significant contributing factor in causing, them to carry out the offence”, the defence will be available to them providing the remaining elements of the defence are established.

In the majority of cases, the causal connection between the child’s status or exploitation and the commission of an offence will be self-evident; there will, however, be cases which give rise to some difficulties when measuring and proving the degree of causation. This latter point was one of the reasons Mackay advised against the introduction of a strict causation requirement in s 2 of the HA 1957.[708] Loughnan who predicted that such a requirement would “limit the

[705] This phrase originates with the Law Commission, *Murder, Manslaughter, and Infanticide* (Law Com No 304, 2006) para 5.124; see also Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) para 5.95). According to the Commission, this would ensure an ‘appropriate connection’ between the abnormality and the killing, but leaves open the possibility that other factors (such as provocation) may also have been operative at the time the killing occurred (Murder, Manslaughter, and Infanticide para 5.124).The government, however, was insistent that there must be an explicit causal requirement: see, *Murder, manslaughter and infanticide: proposals for reform of the law* CP 19/08, para. 51; Hansard 3 March 2009, col. 410 (Maria Eagle MP).

[706] Homicide Act 1957, s 2(1B), as inserted by Coroners and Justice Act 2009, s 52.

[707] By contrast way of contrast with the defence of diminished responsibility, this element of the proposed defence is consistent with the ruling of the House of Lords in *R v Dietschmann* [2003] 1 AC 1209). In *Dietschmann*, the House of Lords rejected the idea that a defendant's ‘abnormality of mind’ must be the sole cause of the killing, interpreting the defence of diminished responsibility to require that it must be one although not the sole cause for the defendant's conduct (at 1217).

[708] Law Commission, *Murder, Manslaughter, and Infanticide* (Law Com No 304, 2006) para 5.123.

scope of diminished responsibility".[709] According to Mackay, having to establish a causal connection between the defendant's 'abnormality of mental functioning' and their homicidal act would potentially render diminished responsibility harder to satisfy than insanity, which has no such limitation.[710] Similar sentiments were expressed by Miles, who claimed that for psychiatrists to reach the conclusion that the abnormality of mental functioning was the cause or a significant contributory factor in causing a defendant to carry out the killing was, "extremely difficult, if not impossible to do in practice".[711]

Viewed in the light of the subsequent development and interpretation of the diminished responsibility defence,[712] the concerns regarding the inclusion of a causation requirement appear to have been somewhat "overstated".[713] Fortson, in his incisive evaluation of the partial defence, noted that there were two specific reasons for this position. Firstly, although psychiatric opinion evidence will be relevant to the determination of the matters specified in s 2(1) of the 1957 Act, it will be for the jury to decide whether those matters are proved.[714] As reflected in the Court of Appeal decision in *Walton v The Queen*,[715] Lord Keith of Kinkel, who delivered the leading judgment, stated that "upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case."[716]

By way of contrast, under the proposed amendment, it is instructive to consider the forms of evidence the jury will have to consider which may provide "…objective evidence of the [child's] account of [their] trafficking experiences".[717]

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[709] A. Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press 2012) 244; see also, R.D. Mackay, The New Diminished Responsibility Plea: More than Mere Modernisation? in A. Reed & M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2008) 18-19.

[710] R.D. Mackay, The Coroners and Justice Act 2009 - partial defences to murder (2) The new diminished responsibility plea (2010) 4 Crim. L.R. 290, 300.

[711] J. Miles, 'The Coroners and Justice Act 2009: A "dog's breakfast" of homicide reform' (2009) 10 Arch. News 6, 8; see also, Baroness Murphy, June 30, 2009, HL Deb col.177 and 180.

[712] See, for example, *R v Golds* [2016] UKSC 61.

[713] R. Fortson, 'The Modern Partial Defence of Diminished Responsibility' in A. Reed & M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2008) 36.

[714] ibid

[715] [1977] 3 W.L.R. 902; [1978] A.C. 788

[716] [1977] 3 W.L.R. 902; [1978] A.C. 788, 793.

[717] *R v JXP* [2019] EWCA Crim 1280 at [59] (Davies LJ)

Secondly, Fortson argued that the causation requirement did no more than give legislative effect to an earlier House of Lords' decision in *Dietschmann.*[718] The House of Lords rejected the idea that a defendant's 'abnormality of mind' must be the sole cause of the killing,[719] interpreting the defence of diminished responsibility to require that it must be one although not the sole cause for the defendant's conduct.[720] This means, therefore, that each case will turn on its own facts.

This reasoning exposes the other side of the dialectic in which the expansive jurisprudence of diminished responsibility has been developed and refined by the courts. Although legislative reforms to the partial defence may have been prompted, at least initially, by the need to ensure an "appropriate connection",[721] case law continues to demonstrate the courts' notable confidence in fact finders' ability to evaluate expert and non-expert evidence when determining whether the defendant's "abnormality of mental functioning" offers "an explanation" for the killing. By corollary, this supports the rationale for a similar causation-based approach to be extrapolated for the purposes of the reformulated s 45 defence in three ways. Firstly, the reformulated s 45(4) defence is markedly distinctive in modelling itself on a causation-based model which is significantly broader than the international interpretation of the non-punishment principle under the Trafficking Directive and the Trafficking Convention. Secondly, the reference to "an explanation" rather than "direct consequence" will ensure that the defence is broad enough to allow the possibility that other causes or explanations may have operated but is narrow enough to be applied on a case-by-case basis. Thirdly, the causation-based model in diminished responsibility has already been subject to a vast amount of appellate case law. Although this means the courts would avoid the rather thorny issue of having to define or interpret "an explanation", this would be assessed in the context of the s 45 defence.

(v) s 45(4)(c) – the reasonable person test: An evaluative approach

The inclusion of a reasonable person test akin to duress in s 45 was justified as "an important safeguard against [the] defence being abused".[722] Moreover, an overt public policy constraint was interposed to confine the number of 'relevant characteristics' under s 45(5). Beyond age

[718] R. Fortson, 'The Modern Partial Defence of Diminished Responsibility' in A. Reed & M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2008) 36.

[719] As was the case in *R v Egan* [1992] 4 All ER 470, 479.

[720] [2003] UKHL 10; [2003] 1 A.C. 1209, 1217 (Lord Hutton)

[721] Law Commission, *Murder, Manslaughter, and Infanticide* (Law Com No 304, 2006) para 5.124

[722] PBC Deb, 11 September 2014 (Modern Slavery Bill), col.368

and sex of the individual defendant, precedential authorities have only accorded relevance to character traits that constitute severe mental illness or psychiatric disorder.[723] Although it is not possible to establish an exhaustive list of characteristics that may be tailored specifically to child victims of exploitation,[724] it is arguable that limiting the relevant characteristics in this way fails to appreciate the incontrovertible cognitive and developmental differences children possess, as compared with adults.[725] As noted during the Public Bill Committee stages, the circumspect list of 'relevant characteristics' contained within s 45(5) severely "limit[s] the scope of the defence provision in an unjustified manner", and "restricts the effective and accurate evaluation of the actual circumstances under which the commission of an offence may be compelled".[726]

(i) 'Relevant behaviours' associated with coercion or control

The Serious Crime Act 2015 (SCA 2015) created a new offence which closes a gap in the law around patterns of controlling or coercive behaviour in an ongoing relationship between intimate partners or family members.[727] In order to establish the statutory offence under s 76, the prosecution has to establish that the defendant used behaviour that was "controlling or coercive".[728] This requires an understanding of what amounts to controlling and coercive behaviour, which is not explained within the legislation. The *mens rea* requirement for the offence is an objective one and it is for the prosecution to prove that the defendant "knows or ought to know that the behaviour was coercive or controlling.[729]

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[723] See A. Buchanan and G. Virgo, 'Duress and Mental Abnormality' [1999] Crim LR 517; and see Bowen [1996] 4 All ER 837, 844, categorising availability to individuals suffering from 'some mental illness, mental impairment, or a recognised psychiatric condition, provided persons generally suffering from such a condition may be more susceptible to pressure and threats'.

[724] *Independent Review of the Modern Slavery Act 2015 Final report* (TSO, 2019) para 4.24: "Characteristics of children vary vastly depending on their age, so it is difficult to have a one-size-fits-all test"

[725] For further discussion, see E.S. Scott and L. Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008) 37–38; see also D.P. Keating, 'Adolescent Thinking' in S. Feldman and G.R. Elliott (eds), *At the Threshold: The Developing Adolescent* (Harvard University Press 1990) 54–89, particularly on the shift between children's and adolescent thought; F. Zimring, 'Toward a jurisprudence of youth violence' in M. Tonry and M. Moore (eds), *Youth Violence: Crime and Justice, a review of research*, vol 24 (1998), 447–501.

[726] Written evidence submitted by Dr Julinda Beqiraj (MS 36) para. 15. Available at <https://publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/memo/ms36.htm > (accessed 01 August 2020).

[727] For further commentary, see S.M. Edwards, 'Coercion and compulsion - re-imagining crimes and defences' (2016) 12 Crim. L.R. 876-899; V. Bettinson, Criminalising coercive control in domestic violence cases: should Scotland follow the path of England and Wales? (2016) 3 Crim. L.R. 165-180.

[728] SCA 2015, s 76(1)(a)

[729] ibid s 76(1)(c)-(d)

CPS guidelines[730] advises prosecutors that, in many cases, what amounts to controlling or coercive behaviour is not strictly limited to psychological, physical, sexual, financial, and emotional conduct,[731] and that "consideration of the cumulative impact of controlling or coercive behaviour and the pattern of behaviour within the context of the relationship is crucial". The CPS guidelines make explicit cross reference to the statutory guidance published by the Home Office pursuant to s 77(1) of the SCA 2015 which a person investigating offences in relation to controlling or coercive behaviour must have regard.[732] Building on the non-exhaustive examples in the statutory guidance, the CPS guidelines cite some of the relevant behaviours that may be taken into account associated with coercion or control which may include, *inter alia*: preventing a person from being able to attend school, college or University; limiting access to family, friends and finances; depriving them of access to support services, such as specialist support or medical services; monitoring a person via online communication tools or using spyware*; forcing the victim to take part in criminal activity such as shoplifting*; taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep; financial abuse including control of finances; threats to hurt or kill; assault…"[733] It is noteworthy that while the coercer may be prosecuted for coercing a partner or family member into committing criminal offences, Edwards highlighted that evidence of this type of coercion would not be sufficient to establish a defence under the common law of duress and such criminal offences as are noted above are specifically excluded from the s 45 defence.[734]

(ii) Towards a subjective evaluation of child's circumstances/characteristics

An evaluation of the circumstances/characteristics under which the commission of an offence may be compelled are listed in the *Victims of Modern Slavery Competent Authority Guidance*[735] which explicitly acknowledges that "[d]ue to their age and dependent status,

[730] CPS Guidelines, *Controlling or Coercive Behaviour in an Intimate or Family Relationship* (2015) Available at: https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship (accessed 27 February 2022)

[731] Home Office, *Statutory Guidance Framework Controlling or Coercive Behaviour in an Intimate or Family Relationship* (December 2015) Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf (accessed 27 February 2022)

[732] ibid

[733] CPS Guidelines, *Controlling or Coercive Behaviour in an Intimate or Family Relationship* (2015) Available at: https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship (accessed 27 February 2022)

[734] S.M. Edwards, 'Coercion and compulsion - re-imagining crimes and defences' (2016) 12 Crim. L.R. 876, 884.

[735] *Victims of modern slavery – Competent Authority guidance* (Home Office, 2016) Available at:

children are especially vulnerable to physical and psychological coercion".[736] Examples of physical coercion refers to the threat of the use of force or the actual use of force against the victim of trafficking or their family members, as well as more subtle measures of control; for example withholding travel or immigration documents. Examples of psychological coercion include blackmail; ritual oaths -there is evidence to suggest witchcraft or ritual oaths can also be used to make children fearful and compliant; and grooming - where vulnerable individuals are enticed over time to take part in activity in which they may not be entirely willing participants. The *Modern Slavery: Statutory Guidance for England and Wales*[737] published by the Home Office pursuant to s 49 of the MSA 2015 provides further clarity by providing a comprehensive list of physical and psychological indictors, highlighting that victims who are subjected to the various forms of physical and psychological control may be conditioned by their exploiters to the extent that they are unable to envisage escape.[738] The guidance also makes clear that as a result of the abuse and neglect that victims have experienced, they may develop poor physical or mental health, adding that individuals with existing mental or physical health conditions may also make them more likely to become a victim of modern slavery in the future.[739] Crucially, the guidance also acknowledges that the physical injuries and psychological trauma experienced by trafficked victims may not be obvious or visible in many cases and may not be easily disclosed by victims, emphasising that "those who have been both physically and psychologically abused over prolonged periods the physical and psychological complaints are deeply entwined".[740] Under the revised defence, when considering the objective test under s 45(4), the CPS guidelines should make specific reference to statutory and non-statutory guidance. It is submitted that this will allow more effective and accurate evaluation of the child's circumstances/characteristics when considering the reasonable person test by taking into account any wider physical and psychological methods of coercion employed by traffickers to compel child victims of exploitation to commit criminal offences. It is expected that magistrates and judges will require

https://www.antislaverycommissioner.co.uk/media/1059/victims_of_modern_slavery_-_competent_authority_guidance_v3_0.pdf (accessed 5 March 2022)

[736] Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland* (February 2022) Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055834/Modern_Slavery_Statutory_Guidance__EW__Non-Statutory_Guidance__SNI__v2.7.pdf (accessed 27 February 2022)

[737] ibid

[738] ibid. para 3.12

[739] Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland* (February 2022) para 3.13

[740] ibid para. 3.14

training, and that the jury will have directions from the judge when considering this element of the defence.

IV. Conclusion

To summarise, under the proposed amendments s 45(4) defence would apply to all offences except murder. When a child commits murder, it is submitted that a partial defence of developmental immaturity should be available within the defence of diminished responsibility.[741] In order to remedy the confusion caused in *MK*,[742] it is submitted that there should be an express legislative provision relating to where the legal burden of proof lies when the amended s 45(4) defence is raised. Subsection (4)(a) will explicitly set out that once the defence is raised, it is for the prosecution to disprove one or more elements of the defence beyond reasonable doubt. If the prosecution discharges this burden, the defence will fail.[743] A distinction may be drawn with the rebuttable presumption of *doli incapax* which applied to children to children aged between 10 and 14 years and was abolished by s 34 of the Crime and Disorder Act 1998.[744] In *J.M. (A Minor) v Runeckles*,[745] decided before the change in law, Mann J said that he had no doubt that the standard to which the prosecution must satisfy the court is the criminal standard, that is, beyond reasonable doubt. If, on the other hand, the defence challenge the presumption, the burden is not so heavy. The burden in the case of the defence is the evidential burden. It is asserted that the effect of the revised s 45 defence making it clear upon which party the burden of proof on the issue lies, together for the explicitly acknowledges the innate and situational vulnerability of children in their trafficking situation, and in the youth criminal justice system generally. Rather than requiring the commission of an offence to be a "direct consequence" of the child's victim status,[746] subsection (4)(b) would require that the child's status provides "an explanation for the act constituting the offence". If the child can establish, on the balance of probabilities, that their relevant exploitation "caused, or was a significant contributing factor in causing, them to carry out the offence", the defence

[741] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No. 307, 2006) para(s) 5.125–5.137.

[742] *R v MK; R v Gega* [2018] EWCA Crim 667 at [45].

[743] ibid [44].

[744] See *T* [2009] 1 A.C. 1310 in which the House of Lords confirmed that the presumption that a child aged between 10 and 14 years is *doli incapax*, i.e. incapable of forming a criminal intent, was abolished both as a defence and rebuttable presumption by the Crime and Disorder Act 1998 s 34. Schedule 9 to the Act provides that the section does not apply to anything done before the commencement of the section. The decision in *T* has received criticism, see article by F. Bennion, 'Mens rea and defendants below the age of discretion' [2009] Crim.L.R. 757.

[745] *J.M (A Minor) v Runeckles* (1984) 79 Cr.App.R. 255.

[746] MSA 2015, s 45(4)(a)

will be available to them. The term exploitation includes slavery, servitude, and forced or compulsory labour; human trafficking; sexual exploitation; removal of organs; securing services by force, fraud or deception; and, securing services by children or vulnerable individuals. This approach is justified on the basis that the defence could arguably extend to all young people who engage in offending behaviour as exploitation and abuse are frequently as associated with youth offending.[747] Under subsection (4)(c) the jury must be satisfied that a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act. This aspect of the defence aligns with the current s 45(4) defence, except for the broader reasonable person test which takes account of non-statutory guidance when having regard to the relevant circumstances/characteristics of the child.[748] It is submitted that this will allow more effective and accurate evaluation of the child's characteristics/circumstances by taking into account any wider physical and psychological methods of coercion employed by traffickers to compel child victims of exploitation to commit criminal offences. The voluntary association exclusion will apply to the revised defence, without reasonable excuse, to the risk of exploitation where the defendant ought reasonably to have foreseen the risk of compulsion to do that which one would otherwise have chosen not to do.[749] It is submitted that this subjectivised approach avoid the requirement of foresight of the nature of the offences that one might be compelled to commit. Moreover, this approach would afford children involved in county lines a significant degree of protection by mandating that account is taken of their circumstances and situational vulnerabilities, whilst also acknowledging that their exploiters may have selected them due to their innate vulnerabilities.

[747] See generally, N. Wake, R. Arthur, T. Crofts, and S. Lambert, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) P.L. 145

[748] See, for example, Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland* (v2.7 February 2022); Home Office, *Criminal Exploitation of children and vulnerable adults: County Lines guidance* (September 2018)

[749] *Hasan* [2005] UKHL 22; [2005] 2 A.C. 467; [2005] 2 Cr. App. R. 22 (p.314) at [77] (Baroness Hale).

Thesis Conclusion

The overarching aim of this thesis, as outlined in the introduction, was to provide a contribution to the existing literature by providing a critical review of s 45(4) of the MSA 2015. The scope and theoretical underpinnings of the statutory defence were criticised with reference to the abundance of existing literature, whilst examining the multidimensional complexities the county lines model presents. It was suggested that, though a laudable attempt to provide a robust defence for children who commit offences as a result of their exploitation, s 45 largely fails to achieve its intended purpose. It was highlighted that, in the absence of any enthusiasm for raising the minimum age of criminal responsibility or a general defence which explicitly recognises their developmental immaturity, children who commit criminal offences will continue to have no defence at all. In an attempt to address these issues, legislative and policy recommendations were advanced in order to address the gaps in legal protection for child victims of exploitation, strengthen recognition of the links between children's victimisation and criminalisation and deter inappropriate prosecutions. This final section will provide a synopsis of the findings in each chapter and concludes with some final remarks.

It was established at the outset of this thesis how the emergence of county lines offending disproportionately impacts children. Drawing on the available data and literature, chapter one attempted to engage with the existing literature on children's involvement in county lines offending, while providing an overview of the UK's anti-trafficking framework. This analysis attempted to highlight the multidimensional complexities where children and young people, who are not deemed to be victims of slavery or trafficking, engage in this form of exploitation. This chapter also challenged the notion of the 'ideal victim' which, it was argued, fails to take account of the innate and situational vulnerability of children and young people involved in county lines and other forms of child criminal exploitation. These themes were explored in more detail in Chapter Two where consideration was given to a hypothetical case scenario. As the study in that chapter demonstrated, in the absence of a general defence which recognises their developmental immaturity, children remain at significant risk of prosecution as a result of their exploitation. This, it was argued, was based on four fundamental flaws contained within s 45 defence. The first relates to the long and somewhat arbitrary list of excluded offences in Schedule 4 of the Act. The second relates to the absence of an express provision specifying where the burden of proof lies. The third relates to Parliament's failure to define or clarify in the statutory notes what "direct consequence" requires. The fourth concerns the defence's inclusion of a "reasonable person" test which has been criticised for being "too high for children". Notwithstanding s 45's explicit recognition of the innate and situational

vulnerability of children who commit criminal offences as a result of their exploitation, it was submitted that the significant limits placed upon it makes it application in circumstances of forced criminality otiose; this means that undue reliance will continue to be placed on the common law defence of duress. As this chapter highlighted, however, even when children who become enmeshed in county lines are able to plead the s 45 defence in some circumstances, they will often have no recourse under the common law defence of duress in relation to the offences excluded by Sch. 4 if they are deemed to have voluntarily exposed themselves to threats by a criminal entity. Moreover, in the absence of a defence of developmental immaturity, paired with little enthusiasm for raising the age of criminal responsibility in E&W, children and young people who commit criminal offences as a result of their exploitation have no other choice but to rely on the CPS deciding that it is not in the public interest to prosecute them and the court's power to stay the prosecution as an abuse of process.

The disparate approaches to victims of trafficking compelled to commit offences in Scotland and England was considered in Chapter 3. The approach taken in Scotland, which was to advance specific instructions pertaining to prosecutorial discretion, rather than implement a defence, has been cited with approval by numerous UK anti-trafficking groups and been regarded as an example of best practice. Although the Lord Advocate instructions have the advantage of being amenable to future developments in trafficking by making explicit recognition that the list of offences which a child victim of trafficking may commit is "constantly evolving", it was argued that the discretionary approach may be too little to signal to victims that they can exit their trafficking situation and freely cooperate with law enforcement agencies without fear. Further, unlike the position E&W, there is no robust tradition of independent judicial review of the Lord Advocate's decisions. It was similarly submitted that a child's victim status being used in mitigation is not an effective remedy, where a case does proceed to trial, and a plea in bar of trial or the coercion defence is unsuccessful. The prospect of an absolute or conditional discharge is unlikely to remove (or even mitigate) the powerful deterrent of possible prosecution operating against trafficking victims contacting the authorities. It was submitted E&W should adopt a hybrid model of the proposed s 45(4) amendments and revised CPS guidelines similar to the Lord Advocate's instructions which could remedy some of the problems that were examined in Chapter Two.

A range of potential options for remedying the issues identified with the existing legislative and policy framework in E&W was considered in Chapter 4. In addition to the existing protections to challenge the decision to prosecute and the court's jurisdiction to stay, four further legislative amendments to the s 45 defence were advanced. First, that a new integrated approach of the s 45 defence and Lord Advocate instructions provide a remedy for the restrictive nature of Sch. 4. The argument was made that s 45 should apply to all offences except murder. In

circumstances where a child commits murder, it was suggested that a partial defence of 'developmental immaturity' should be available. Second, the insertion of an explicit legislative provision indicating that the burden of disproving the defence is in the prosecution to reflect the decision in *MK*. Third, instead of requiring the commission of an offence to be a "direct consequence" of the child's victim status, it would require that: "the person being, or having been, a victim of slavery or a victim of relevant exploitation provides an explanation for the act constituting the offence." An explanation will be provided where their relevant status "caused, or was a significant contributory factor in causing, the person to carry out that act". Fourth, when considering the 'reasonable person' test under s 45, judicial and CPS guidelines should make specific reference to the statutory and non-statutory guidance which will allow more effective and accurate evaluation of a child's circumstances/characteristics by taking into account any wider physical and psychological methods of coercion. The exclusion of duress in county lines cases was criticised as being too restrictive and that a more subjective approach was required in the case of children under the age of 18. It was proposed that duress should be extended to children who voluntary expose themselves to threats providing that there was a "reasonable excuse" for the voluntary exposure. Although some characteristics of the child may be considered when evaluating the reasonableness of their actions, the child will still be held to an objective standard which will prevent unmeritorious claims.

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