Independent Anti-Slavery Commissioner

THE MODERN SLAVERY ACT 2015 STATUTORY DEFENCE: A call for evidence

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GLOSSARY

CCE	child criminal exploitation
CG	Conclusive Grounds
CPS	Crown Prosecution Service
HMICFRS	Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services
ICTG	Independent Child Trafficking Guardian
IOM	International Organization for Migration
MASH	multi-agency safeguarding hub
MSHT	modern slavery and human trafficking
NGO	non-governmental organisation
NRM	National Referral Mechanism
OCG	organised crime group
OIC	officer in case
PWITS	possession with intent to supply
RG	Reasonable Grounds
RPC	Regional Practice Coordinator
SCA	Single Competent Authority
STPO	Slavery and Trafficking Prevention Order

FOREWORD

Dame Sara Thornton – Independent Anti-Slavery Commissioner

The statutory defence under Section 45 of the Modern Slavery Act 2015 enshrined in law the principle of non-punishment of victims for their involvement in criminal activities which they have been compelled to do as a consequence of their trafficking. This principle of non-punishment had been established by the Council of Europe Convention on Action against Trafficking in Human Beings (2005) which was implemented in the UK in 2009.

In 2019 the Independent Review of the Modern Slavery Act examined concerns about the defence and concluded that there were sufficient checks and balances in the system to guard against abuse. Since the publication of the independent review concerns about the defence have intensified as it has been deployed much more frequently than was ever envisaged. I committed to examining what was happening on the ground in my strategic plan published in October 2019. No data is collected by agencies on the use of the defence and so I ran a call for evidence and received over 100 responses and 200 cases.

The evidence submitted to this review revealed the significant extent to which the statutory defence under the Modern Slavery Act is being used, predominantly in drug trafficking cases. Many of the cases were raised by contributors because they were seen as problematic and I have concluded that there is considerable concern. On the one hand, failure to consider the possibility of criminal exploitation at the start of an investigation is risking victims being wrongly prosecuted. On the other hand, over-reliance on the trafficking decisions made by the Home Office Single Competent Authority and failure to consider properly the legal components of the defence is risking prosecutions being discontinued when the matter could have been put before a jury. Furthermore when victims are correctly identified that identification is not triggering effective protection from the considerable harm posed by the traffickers. Non-prosecution alone will not protect a child or vulnerable adult; it must be supported by effective safeguarding. The operation of the statutory defence is neither adequately protecting victims of trafficking nor adequately protecting the public.

Having analysed the cases we interviewed experts and held two roundtable discussions. Four interconnected **issues** were identified:

- Police are not consistently considering from the outset of an investigation whether a suspect could be a victim of trafficking and whether the statutory defence may apply;
- Discontinuation of investigations and prosecutions as soon as the defence is raised;
- Over-reliance throughout the criminal justice system on the decision making of the Single Competent Authority (SCA);
- The statutory defence being raised late in the criminal justice process.

And these were leading to three **consequences**:

- Abuse of the statutory defence;
- Victims for whom the statutory defence was intended are not benefitting from it;
- Inadequate child protection interventions following National Referral Mechanism (NRM) referrals triggered by the statutory defence.

The identification of trafficking victims who may have initially been identified as a suspect in an investigation lies at the heart of improving the response. Better identification requires improved training, clearer guidance and professional curiosity from police officers, lawyers and the

judiciary. It has also been suggested that there may be a reluctance to identify victims because of the mistaken belief that identifying a suspect as a victim of trafficking makes them immune from prosecution. To take such an approach is to fail to pursue all reasonable lines of enquiry, including those which point away from a suspect, as required by the Criminal Procedures and Investigations Act 1996 and to misunderstand the statutory defence.

I am encouraged by investigations where officers have identified victims who have been criminally exploited and then taken the opportunity to investigate and to dismantle the organised criminal networks using Modern Slavery Act offences. However the number of such prosecutions under the Modern Slavery Act remains far too low. These investigations require expertise and resources and the failure to pursue them risks criminalising children and allows traffickers to offend with impunity.

The call for evidence revealed that in some instances cases are discontinued as soon as the defence is raised and in many others that identification of a victim of trafficking leads prosecutors to the conclusion that the evidential burden is therefore met and the defence is made out. It is essential that prosecutors properly test each limb of the defence. For adults, there would need to be evidence that the person was compelled to commit the criminal act, that this compulsion was attributable to slavery or exploitation and that a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act. It is a high burden for adults and each limb needs to be satisfied. For children the burden is lower; there needs to be evidence that the criminal act was as a direct consequence of the person being, or having been, a victim of slavery or exploitation, and a reasonable person in the same situation as the person, and having the person's relevant characteristics, would do that act.

In order to test each limb of the defence prosecutors need to be able to rely on a thorough police investigation and to scrutinise the trafficking decisions made by the SCA. I was concerned to read about some cases involving very serious violence which were apparently discontinued based on a brief SCA decision letter and no reference made to the analysing, testing and weighing of evidence required by Crown Prosecution Service (CPS) guidance nor to establishing the nexus between the trafficking and the offending.

Victims of modern slavery and human trafficking do not have immunity from prosecution. In my role as Independent Anti-Slavery Commissioner I am passionate about identifying victims and ensuring that they are protected but the law does not say that they should never be prosecuted, nor should that be the case. I have been part of many conversations where there is significant misunderstanding of this legal position. Ironically this belief that there is some kind of blanket immunity for victims of trafficking makes them attractive as drug couriers to the organised crime groups. The abuse of the defence is committed by traffickers who exploit both children and vulnerable adults, and exploit the statutory defence. Misunderstanding of the defence across the system is enabling this to happen.

The CPS suggested in a written submission that they are concerned that cases are being discontinued which should not be discontinued. The submission argued that since the Court of Appeal judgement in R v MK and R v Gega in 2018 the requirement to disprove the defence beyond reasonable doubt is difficult or impossible. The submission then proposed a reverse burden based on a balance of probabilities. I am extremely wary about supporting any recommendation to amend the law which would reduce the protection for victims of trafficking because I do not believe that the system is working as it should or could and addressing this needs to be the priority.

Many cases are discontinued following a positive identification of a victim of trafficking as part of the NRM. These decisions are made on the balance of probabilities by staff in the SCA and there is significant misunderstanding about the process. Many contributors have also observed that the trafficking decisions made by the SCA are being relied upon in a way that was never intended when the NRM was established in 2009 in order to identify and support victims. Many also voiced concern about the information available to decision makers and while that must be improved I remain concerned about the weight being put on the decision whether the outcome is positive or negative.

The response to the call for evidence produced a few cases where defendants were found to be falsely claiming that they were child victims but did not reveal defendants seeking referrals to the NRM by concocting false victim narrative. In many cases it was likely that defendants had been groomed and trafficked but had also committed serious crimes. A young person found in possession of crack cocaine, heroin and a large knife has probably been trafficked in the past and/or may be a victim of trafficking at the time of the offence but neither such status automatically means that they should not be prosecuted. I am persuaded that while an opportunistic defendant may attempt to abuse the defence, many cases involve victims of human trafficking who are committing serious offences.

Among the cases submitted there were some in which the statutory defence would appear to be appropriate but where it was not raised. Some of these cases concerned cannabis cultivation but we also received cases of children being charged with drug supply before the prosecutions were rightly discontinued by the CPS. In addition to inadequate initial investigation it was argued that this is happening because the onus is on the defendant not the CPS to raise the statutory defence. I would hope that in such cases the CPS would request the police to make further inquiries to establish whether a child has in fact been trafficked.

In many cases victims are not prosecuted – but neither are they protected and apparently nothing is done to halt escalating violence. There were many cases of repeat referrals among the cases submitted. I am extremely concerned about the lack of join-up between identification, referral and intervention particularly in respect of children but the issues could also apply to vulnerable adults. There needs to be a seamless process from the raising of the statutory defence, a referral to the NRM, a subsequent referral to social care and appropriate safeguarding activity.

In the case of children a referral to Children's Social Care should be triggering a multi-agency strategy meeting and an enquiry under the Children Act 1989. There is sometimes confusion among professionals about support offered by the Home Office contract as a consequence of an NRM referral – for children the safeguarding responsibility remains with the local authority. In these cases contextual safeguarding is essential and I am very supportive of innovative work led by Bedfordshire University. I am persuaded that the current legislation is adequate but policy and practice on extra-familial harm need to be strengthened and specifically the statutory guidance needs to cover criminal exploitation in more detail.

It has been suggested that because of the lack of effective interventions for young people trafficked to supply drugs it is better for them to be criminalised in the youth justice system when they will receive intensive support. This support is statutory whereas extra-familial safeguarding support is voluntary and less well resourced. This cannot be right. All the evidence suggests that the impact of criminalisation has the most profound negative impact on a child and must not be contemplated as a form of protection. This will require a cultural shift in the way we view child criminal exploitation (CCE).

I am not persuaded of the need to amend legislation on the statutory defence until the issues raised in this review are addressed. If they are addressed and the problems persist then the questions of who bears the burden, and to what standard, will need to be considered. We owe it to the victims of modern slavery and trafficking to use current legislation effectively before we start making it harder for those whose offending is a direct consequence of their trafficking.

This review makes ten practical recommendations which are aimed at making the current system work better.

Recommendations

1. The CPS legal guidance should clarify precisely what requirements there are on defendants and prosecutors when considering and deploying the statutory defence.
2. Training in the statutory defence needs to be prioritised by the police, CPS, defence lawyers, magistrates and judiciary.
3. The CPS should in all cases request the full trafficking consideration minute from the SCA in order to weigh and test the evidence in line with Home Office statutory guidance and CPS guidance.
4. The SCA should develop and implement information sharing protocols with a range of bodies.
5. The police, together with other criminal justice partners, should consider adopting Northumbria Police good practice of a national disclosure document to prompt consideration of the statutory defence.
6. Every child within the NRM should be referred to the relevant local authority Children's Social Care who should convene a Strategy Discussion under Section 47 of the Children Act 1989.
7. The Department for Education should review and update 'Working Together to safeguard Children' as recommended by the Child Safeguarding Practice Panel Review.
8. The Home Secretary should write to all local authorities to ensure that they understand what the NRM means in the context of children.
9. The SCA should provide clear guidance to First Responders about the circumstances in which a separate NRM referral should be submitted.
10. The SCA should improve the recording and monitoring of repeat referrals to the NRM to better understand the scale of continued trafficking and re-trafficking.

I am very grateful to those who have contributed their time and expertise to this review but the review would have been greatly assisted by data on the use of this defence. However there is none. It is essential that the police, CPS and courts collaborate to identify a way in which this area of significant public interest can be monitored both qualitatively and quantitatively and reviewed again in due course.

1. INTRODUCTION

1.1.1 In October 2020 I published my first Strategic Plan 2019-2021[1] setting out my commitment to work with criminal justice agencies to gain a better understanding of what is happening on the ground in respect of the use of the statutory defence provided by s.45 of the Modern Slavery Act 2015.[2]

1.1.2 On 17 January 2020 I launched a call for written evidence inviting anyone with practical experience and knowledge of cases involving use of the statutory defence.

1.1.3 The Modern Slavery Act introduced new measures to support and protect victims of modern slavery and human trafficking and give law enforcement the tools to ensure perpetrators are brought to justice. In particular, the Act introduced a statutory defence which can be raised by those who, in the case of adults, have been compelled to commit an offence as a direct result of their being a victim of modern slavery, or in the case of a child, have committed an offence as a direct result of their being the victim of modern slavery. This is a very important protection for victims of modern slavery and relies on the international principle of non-punishment.

1.1.4 No quantitative data exists with which to assess the scale and impact of the statutory defence. This was a matter raised in the Independent Review of the Modern Slavery Act published in March 2019[3] which recommended data was recorded on how the statutory defence is being used including the overall use of the defence, cases where the defence has been appropriately deployed, where it has been claimed and subsequently disproved, and instances where it, arguably, ought to have been deployed earlier on.

1.1.5 As outlined in my strategic plan:

> *"There are cases where victims have not used this defence and been imprisoned and there are cases where criminals have attempted to abuse this defence. There is little clarity about the use of this defence which makes it harder to know that victims are being protected and the system is being protected from those who seek to abuse the defence."*

1.1.6 Section 45 of the Act is silent in respect of the burden of proof required to establish the defence. The ruling in R v MK [2018][4] clarified that the burden of proof is on the prosecution to prove that an individual is not a victim of modern slavery once the defence is raised by that individual. Concerns have been raised about the ability of the prosecution to disprove accounts which often lack detail. Conversely, there are concerns that victims of modern slavery are failing to be identified and are incorrectly being prosecuted for crimes committed as a result of their exploitation.

The law

1.2.1 The defence does not apply to the most serious crimes, such as sexual offences or offences involving serious violence. These excluded offences are listed in full at Schedule 4 of the

[1] Independent Anti-Slavery Commissioner (2020), Independent Anti-Slavery Commissioner Strategic Plan 2019-2021.
[2] Section 45, Modern Slavery Act 2015.
[3] Frank Field MP, Maria Miller MP and Baroness Butler-Sloss (2019), 'Independent Review of the Modern Slavery Act 2015: Final Report'.
[4] R v MK [2018] EWCA Crim 667.

Act. It is important to note that the defence does not apply to offences committed under the Modern Slavery Act, such as slavery or trafficking.

1.2.2 In respect of adults Section 45 states:

> *(1) A person is not guilty of an offence if—*
> *(a) the person is aged 18 or over when the person does the act which constitutes the offence,*
> *(b) the person does that act because **the person is compelled** to do it,*
> *(c) **the compulsion is attributable to slavery** or to relevant exploitation, and*
> *(d) **a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative** to doing that act.*

1.2.3 In respect of children Section 45 states:

> *(4) A person is not guilty of an offence if—*
> *(a) the person **is under the age of 18** when the person does the act which constitutes the offence,*
> *(b) 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*
> *(c) **a reasonable person in the same situation** as the person and having the person's **relevant characteristics** would do that act.*

1.2.4 There is no requirement in law for a child to be compelled to commit the act for the defence to be applicable; force, threats or coercion are not required. The 'act' must be as a direct consequence of the child being a victim of slavery or trafficking and a reasonable person in the same situation, of similar characteristics (such as age, sex, mental or physical disability) would have done the same. Children also do not have to show there was 'no realistic alternative' as adults must. The absence of compulsion and a lower threshold for meeting the reasonable person test is in recognition of the unique vulnerabilities of children.

1.2.5 However, case law[5] means compulsion will still be relevant when the CPS consider whether it is in the public interest to prosecute. It may still be in the public interest to prosecute, despite the person (adult or child) being a victim of trafficking. According to CPS guidance:

> *"In considering whether a trafficking/slavery victim has been compelled to commit a crime, Prosecutors should consider whether a suspect's criminality or culpability has been effectively extinguished or diminished to a point where it is not in the public interest to prosecute.*
>
> *A suspect's criminality or culpability should be considered in light of the seriousness of the offence. The more serious the offence, the greater the dominant force needed to reduce the criminality or culpability to the point where it is not in the public interest to prosecute."*[6]

1.2.6 An example of this is provided in R v EK [2018].[7] The ground of appeal was that the prosecution ought not to have proceeded with the case against the defendant as she was a victim of trafficking. The Crown (and the trial judge) accepted that she was a victim of trafficking, but it

[5] R v VSJ & others [2017] EWCA Crim 36, see also R v GS [2018] EWCA Crim 1824.
[6] Crown Prosecution Service (CPS) (2020), Human Trafficking, Smuggling and Slavery guidance.
[7] R v EK [2018] EWCA Crim 2961.

was submitted that the decision to prosecute remained justified because the offences were serious and the level of dominant force or compulsion needed to reduce her criminality to a level below which she should not have been prosecuted should be significant. There was an insufficient nexus between the trafficking and the offending to have reduced the defendant's culpability or criminality.

The statutory defence – what does it mean in practice?

1.3.1 Prior to conducting analysis on the use of the statutory defence, it is important to consider what constitutes an example of the statutory defence being used. Interpretation across law enforcement, criminal justice and partners of a 'Section 45 example' varies and no definition exists to agree a common understanding of what professionals are referring to in practical terms.

1.3.2 The below provides a number of scenarios that could be described as a relevant 'Section 45 example'.

- **Police encounter a person who has committed a crime, but before arrest, recognise they are a victim of trafficking;**
- **A person is recognised as a victim of slavery or trafficking *after arrest* but *before charge*;**
- **A person raises the statutory defence or is recognised as a victim *after charge* but *before trial*;**
- **A person utilises the statutory defence *at trial.***

Data limitations

1.4.1 To fully understand the use of the statutory defence, all of these scenarios are relevant. The police, the CPS and the Ministry of Justice are unable to record or search their records for each of these scenarios and therefore are unable to provide empirical data on which to conduct analysis. This is not isolated to the Section 45 defence, the same could be said for all other statutory defences, such as self-defence.[8]

1.4.2 Furthermore, slavery and trafficking in the UK is commonly categorised in line with the typologies produced by the Home Office in 2017.[9] The Home Office typologies are useful to understand how slavery and trafficking presents such as criminal exploitation, sexual exploitation, labour exploitation and domestic servitude.

1.4.3 However, the Modern Slavery Act 2015 and therefore the police National Crime Recording Standards[10] do not differentiate by these individual typologies. This means police crime records, CPS cases or Ministry of Justice outcomes are not recorded by the type of exploitation, making the identification of criminal exploitation cases where the statutory defence may feature even more challenging.

1.4.4 This is further complicated as cases where the statutory defence is likely to be applicable are not recorded as 'modern slavery' but under the criminal offence being investigated or prosecuted, such as cannabis cultivation, drug supply, fraud etc. This means it is not possible to search for examples of 'child criminal exploitation', where the defence is most likely to be found,

[8] Self-defence arises both under common law and the defences provided by Section 3(1) of the Criminal Law Act 1967. Section 76 of the Criminal Justice and Immigration Act 2008 provides clarification of the operation of the existing common law and statutory defences.
[9] Home Office (2017), A Typology of Modern Slavery Offences in the UK.
[10] Home Office (2020), Counting rules for recorded crime.

as cases are not recorded under that heading. Therefore, finding examples of the statutory defence through data held by the criminal justice system is like looking for a needle in multiple large haystacks. It is for this reason why the call for evidence adopted a qualitative approach; seeking views and case studies from those with experience and practical knowledge; not through quantitative data. It is essential that the police, CPS and courts collaborate and identify a way in which this area of significant public interest can be recorded, monitored and reviewed both qualitatively and quantitatively.

2. METHODOLOGY

Call for evidence

2.1.1 In order to gain a better understanding of the use of the statutory defence, experts, stakeholders and those with practical experience and knowledge of cases were invited to submit written evidence by 2 March 2020.

2.1.2 The call for evidence sought the broadest range of cases, including: cases where the statutory defence has been raised and addressed satisfactorily; cases where the defence has been raised and not been dealt with appropriately, and cases where, with the benefit of hindsight, the statutory defence should or could have been raised. The cases submitted reveal a number of important insights; however as a limited, qualitative exercise this evidence cannot be viewed as representative of the entire sample of cases involving the statutory defence.

2.1.3 These examples could arise from any stage of the criminal justice process, including all of the four scenarios defined above.

Response

2.2.1 107 responses were received, containing a total of 224 individual case studies. In addition to these case studies, 12 legal and non-governmental organisations (NGOs) sent responses providing observations on the statutory defence, the challenges posed by its use and supporting the need for this crucial piece of legislation to protect victims. Observations from three academics in the area of human trafficking and victim care were also received.

2.2.2 The NGOs who responded were: the Anti Trafficking Monitoring Group on behalf of a wide range of partners, Hestia, the Human Trafficking Foundation, SPACE, the International Organization for Migration, Prison Reform Trust and The Children's Society. Reponses received from legal chambers included: Temple Gardens and 12CP, as well as from Ben Douglas-Jones QC and Phillipa Southwell, who have extensive experience of the use of the Modern Slavery Act in trials and the Court of Appeal. The CPS provided a response with their observations; submitting a case study for inclusion in the call for evidence. The Magistrates Association surveyed over 300 of their members and provided a comprehensive response of their findings.

2.2.3 The majority of responses came from the police. The police examples accounted for 171 of the 224 case studies (76%). These were provided by 37 of the 43 Home Office police forces in England and Wales, and by the British Transport Police. Police Scotland also responded, despite alternative legislation being in place. Many were sent as a part of a single force-wide response, but there were also responses from individual frontline officers who had experienced the statutory defence in their day to day operational duties. The extent of this response illustrates the scale and significance of the challenges being faced at an operational level.

2.2.4 Twenty five police forces sent responses from their force lead or a senior detective with expertise in modern slavery, outlining their observations in the use of the defence. Of the case examples sent by the police, 88% related to drugs possession with intent to supply or cultivation of cannabis cases. This focus on drugs supply was also present in 85% of submissions from all contributing partners. The evidence has revealed this area of criminality is where the defence is being used most frequently, and where issues are arising.

2.2.5 Relevant case examples gathered through the call for evidence have been shared with the CPS. Additionally, two roundtable events took place this summer, bringing together subject

matter experts from the Home Office, policing, the criminal justice system, modern slavery support provision and NGOs to share and consider the emerging issues uncovered by the review.

3. FINDINGS

3.1.1 Following an in-depth review the evidence has been categorised into four reoccurring issues, leading to three overall consequences. Many are interdependent and enable, or exacerbate another issue. It is important to note that these issues are not weighted equally, with some having greater prevalence in the evidence or having a greater impact on the consequences than others.

3.1.2 The majority of submissions from the police related to examples where the person raised the statutory defence or was recognised as a victim after charge but before trial, or the defence was raised at trial. The evidence illustrates that in many cases police are not proactively anticipating the statutory defence at the beginning of an investigation or spotting victims of trafficking early enough. We did receive evidence where trafficking or the defence was proactively recognised early, investigated and dealt with appropriately. It was reassuring to see examples where the police encountered a person who has committed a crime, but before arrest or charge have recognised them as a victim of trafficking and investigations against those responsible for their exploitation have commenced. This ought to be happening more often.

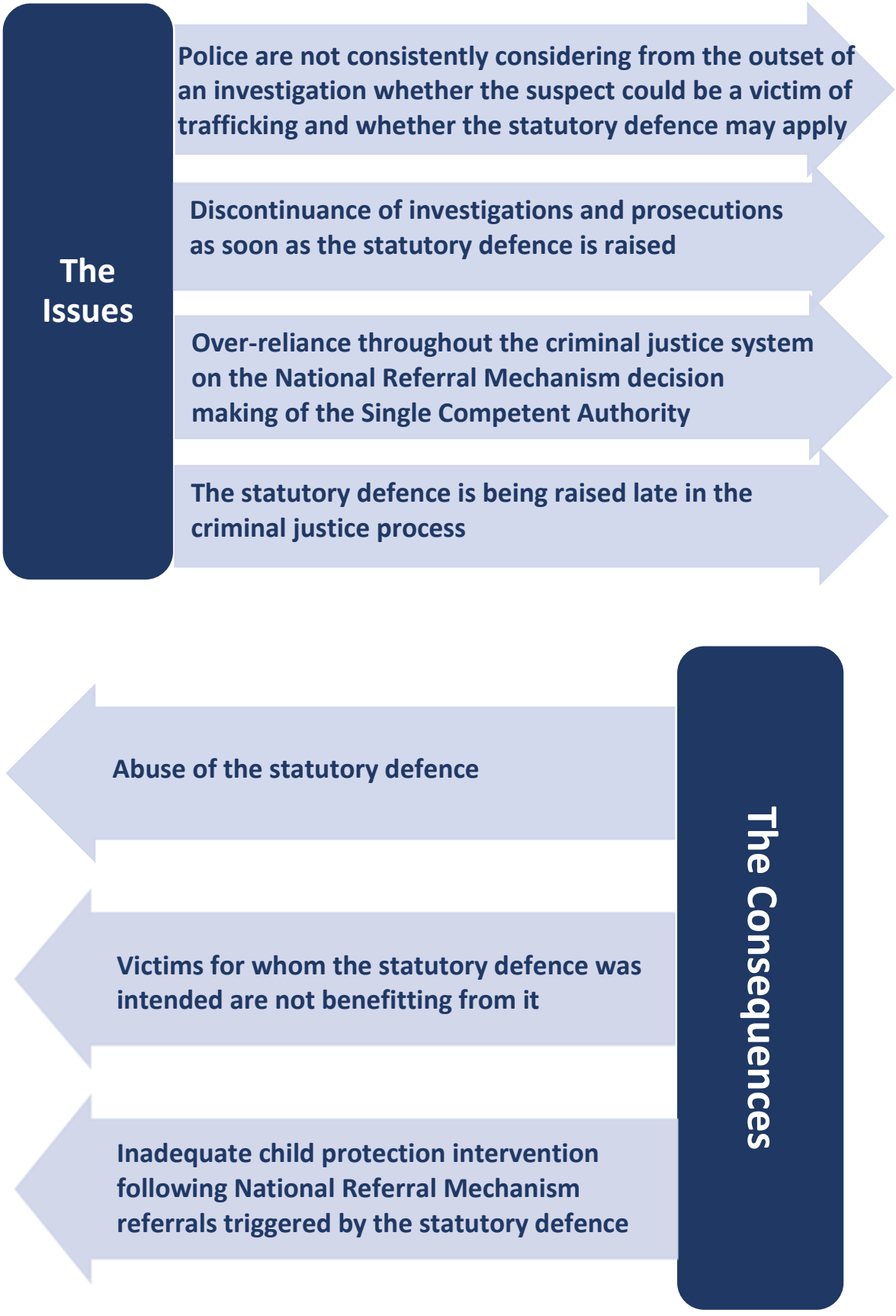
3.1.3 The evidence also revealed parts of the system are acting independently from one another; making referrals into the NRM in isolation from other agencies who hold relevant information. Confusion over the role of the NRM is apparent across the system and reliance on the decision making of the SCA is creating delays.

3.1.4 There was little evidence of cases where the statutory defence has been raised and the prosecution has continued. The CPS suggest in their submission that the requirement for the prosecution to disprove the defence beyond reasonable doubt is resulting in many cases being dropped. However, others have suggested that a careful examination to ensure that all the limbs of the defence under either Section 45(1) or 45(4) are satisfied would lead to more cases being prosecuted. In short, the identification of a defendant as a victim of trafficking is automatically leading to cases being dropped, rather than testing the evidence against the legislation.

3.1.5 The evidence also revealed worrying examples where serious crime is going unchallenged and gang members who exploit young people are not being brought to justice. Additionally, the evidence revealed that despite being referred into the NRM young people are not being provided with meaningful support or intervention. I am concerned that the statutory defence and related referrals into the NRM are not making children, young people or our communities safer. In their thematic inspection on the response to vulnerable people in county lines drug offending, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) expressed that the availability of the statutory defence may in some circumstances increase the risk of exploitation. I concur with this view.

> *"When used appropriately, this defence can protect vulnerable people exploited by county lines criminals from being convicted.*
>
> *But, perversely, we found signs that the availability of this statutory defence may increase the risk of exploitation. We were told by a survivor of county lines exploitation that some offenders coach their recruits (vulnerable or otherwise) to say they have been trafficked if they are arrested. For some vulnerable people, this may give them a false sense of security."* [11]

[11] Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) (2020), 'Both Sides of the Coin: An inspection of how the police and National Crime Agency consider vulnerable people who are both victims and offenders in 'county lines' drug offending'.


The Issues
Police are not consistently considering from the outset of an investigation whether the suspect could be a victim of trafficking and whether the statutory defence may apply
Discontinuance of investigations and prosecutions as soon as the statutory defence is raised
Over-reliance throughout the criminal justice system on the National Referral Mechanism decision making of the Single Competent Authority
The statutory defence is being raised late in the criminal justice process
The Consequences
Abuse of the statutory defence
Victims for whom the statutory defence was intended are not benefitting from it
Inadequate child protection intervention following National Referral Mechanism referrals triggered by the statutory defence

ISSUES

1. Police are not consistently considering from the outset of an investigation whether the suspect could be a victim of trafficking and whether the statutory defence may apply

3.2.1 The evidence indicates police officers are not proactively considering the presence of trafficking for the purpose of exploitation when investigating other offences, such as young people concerned in the supply of drugs. They are not consistently looking for the indicators of exploitation, are not spotting the signs and subsequently are not investigating them. There appears to be a reluctance to identify suspects as victims of trafficking because of a mistaken belief that it automatically would prevent any prosecution.

3.2.2 A number of NGOs provided evidence via the Human Trafficking Foundation. Their submission, summarised here, supports this finding:

> *"When police approach a case involving a drug offence, the starting point is naturally with the person found in possession of drugs. There is no immediate incentive for police to look beyond the scope of the arrest and find the criminal at the top, or examine what exists behind the crime in terms of exploitation.*
>
> *Instead, within the pressurised environment under which the police operate - both owing to the nature of their work and the present resource challenges - there is an incentive for the 'quick win' of charging the child found with the drugs. The Foundation continues to hear of frequent cases in which trafficked children are being criminalised, while the traffickers avoid justice."*

3.2.3 The Criminal Procedure and Investigations Act provides that investigators must pursue all reasonable lines of enquiry, including those which point towards or away from the suspect. In cases of drug trafficking the circumstances need to be thoroughly investigated in order to establish whether the statutory defence applies. Each limb of the defence must be met: that the person was compelled, the compulsion is attributable to slavery or to relevant exploitation, and a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative. Or in the case of children: it is a direct consequence of slavery or exploitation, and a reasonable person in the same situation as the person and having the person's relevant characteristics would have done the same. It appears that investigators and prosecutors and maybe even magistrates and the judiciary are reaching a conclusion that the evidential burden for the statutory defence has been met, without each of these limbs being properly considered.

3.2.4 If the police have not investigated 'towards or away' from the suspect[12] as part of their initial investigation this leaves the prosecution unable to properly consider each of the limbs of s.45(1) and s.45(4). Without evidence to assess whether the evidential burden on the defendant had been reached, it is more likely the CPS will discontinue.

3.2.5 This allows the statutory defence to be raised late in the criminal justice process, often through the submission of an NRM referral when another professional identifies indicators of trafficking or the defence counsel identifies the availability of the statutory defence. This creates significant disruption that could have been avoided, if the possibility of trafficking and the applicability of the statutory defence had been proactively investigated at the very beginning.

[12] Ministry of Justice (2015), Criminal Procedure and Investigations Act 1996 (section 23(1)): Code of Practice.

3.2.6 Some evidence from the police colloquially referred to the statutory defence as the 'county lines defence'. Law enforcement frontline practitioners are not associating this phenomenon with modern slavery, but with drug dealing. The protection of trafficked and exploited victims at the very heart of the Modern Slavery Act is being undermined by the perception that criminals are using a defence many officers do not understand. Police officers are likely to be under performance pressures to deal proactively with county lines offending, they see a drug dealer in front of them and without additional understanding and expertise are unlikely to investigate trafficking.

3.2.7 The sharp increase of organised county lines criminal exploitation into sparsely resourced non metropolitan forces against a backdrop of a national shortage in detectives, limited capacity for digital investigation and a significant national drive for police enforcement activity relating to county lines, is having unintended consequences. The majority of drugs investigations are dealt with in a matter of hours as volume crime by the policing frontline, not specialist units or experienced detectives. The investigative approach for drugs offences is leaving the door open to misuse of the statutory defence and opportunities to act collectively to take out organised networks and protect victims of trafficking are being missed.

The police and CPS are still not identifying and addressing a possible s.45 defence within an investigation. As the s.45 defence is not being identified and addressed at an early stage, this is then resulting in cases being dropped at court and in some scenarios making some convictions unsafe … some officers and lawyers are not identifying the possible defence due to a lack of understanding and others are of the opinion that we shouldn't give them a defence if they don't raise it in interview and therefore not wanting to explore as a reasonable line of enquiry. As in any defence it can and will be sought to be abused by suspects to try and get away with their offending. As investigators it is therefore our job and responsibility to prove or negate (as best we can) this defence at the earliest opportunity. Officers sometimes view this as offenders using the defence as a get out of jail free card and this goes to reinforce the reluctance to explore this defence.

IASC/196/20

A 17 year old male from West Midlands was found in the South West with crack cocaine. There is no suggestion from the case papers that the police or CPS lawyer considered the possibility he could be a victim of criminal exploitation or the relevance of Section 45 [of the] Modern Slavery Act 2015.

Officers spoke to the male who initially refused to provide his name and details and was unable to account for his presence in the area. Police National Computer checks showed previous arrests for drug supply. When officers informed him that they were going to take him back to the police station for a strip search, he attempted to run away from officers whilst in handcuffs. A strip search was conducted in custody, class A drugs were located between buttocks. A mobile phone was also seized. He provided a no comment interview and did not answer any questions put to him. This male is 17 years old. Contact has been made with family members in the West Midlands area. They will not collect him and refused to allow him to return home. No prior convictions, but two prior arrests (possession with intent to supply).

Two months earlier he was stopped in Croydon, black plastic bag was found in his buttocks containing 12 suspected wraps of class A drugs. Arrested for possession with intent to supply and released under investigation. Six months prior to that found in Derbyshire in the same circumstances - in possession of a large amount of suspected class A drugs, cash and a mobile phone that was constantly ringing. Arrested for supply and money laundering, then released under investigation.

This was a police decision to charge due to late hour of night, later ratified by a CPS lawyer. Later in the criminal justice process a referral was made to the NRM (it is not yet known by whom or when) and the male received a conclusive grounds (CG) decision.

The prosecutor later discontinued the prosecution as there was no realistic prospect of a conviction; the Section 45 defence was made out. Medical evidence was subsequently received from the defence which lent weight and credibility to his defence of threats to stab him.

IASC/008/20

3.2.8 The statutory defence does not apply to offences committed under the Modern Slavery Act. As such the police officers and CPS lawyers who are most likely to encounter the defence are not those with modern slavery experience or expertise, or with the necessary capacity or support to conduct an investigation of the depth required to effectively investigate towards and away from the statutory defence.

3.2.9 Where modern slavery expertise exists and extensive investigation takes place, victims are much more likely to be identified. Knowledge is a powerful tool. A thorough modern slavery focused investigation from the outset not only proactively identifies victims, but also protects the system from those who might seek to abuse it. The following two cases from Lancashire Police and North Yorkshire Police illustrate this.

Operation Renard: *The covert operation began in East Lancashire in 2018 to investigate Vietnamese trafficking/organised immigration crime and potential abuse of the Section 45 defence. During the first three months of the operation over 25 cannabis farms were identified across the North West of England. Nail bar owners were detained in Liverpool and found to have over £50,000 secreted in a set of drawers. Hydroponic unit owners were arrested in Birmingham with £35,000 located hid within a rucksack. The head of the crime group was arrested on the M6 motorway after disposing of £70,000 from his vehicle on his way back from Scotland. His partner claimed to be fifteen years of age.*

At the first hearing she provided a birth certificate to the court proving she was in fact a child. An investigation into the birth certificate proved it was fake and it had been provided by the court interpreter who had represented her in the police station. The interpreter was subsequently convicted of conspiring to pervert the course of justice and given a custodial sentence in November 2019.

The investigation at this point was complex but was about to prove even more challenging as eight of the seventeen defendants claimed they had been trafficked. How do you prove or disprove a person has been trafficked?

Three of the defendants claimed to be fifteen years old. One detailed in her claim that she had been raped by her traffickers, she had been taken as her parents had died, her sister also part of the conspiracy claimed the same.

Prison calls were listened to and evidenced the females discussing their parents and telling others on the calls to be quiet and to remember they are dead. Facebook evidence showed a timeline of the girl's movement to the UK, they claimed to be being raped within a container in France and had seen others killed at the hands of traffickers. Facebook in fact corroborated that they were at pool parties and bars in Vietnam when they claimed they were in France.

The other female who claimed she was fifteen was initially placed into the NRM. She returned to Milton Keynes where she went missing after 24 hours, she was dealt with as aged fifteen, high risk and the fact that she was missing was a major police resource.

… A laptop recovered from the group identified her Facebook page and revealed she was in fact thirty years old and had children in Vietnam. She was traced five months later to a large cannabis farm in Blackpool.

The three females pleaded guilty during the trial and agreed they had made up the trafficking claims. Two males who also claimed they were trafficked had similar evidence rebutted by the police. The jury found them guilty of the offences and did not believe the Section 45 defence. During Operation Renard cannabis was seized to the value of £802,330, cash totalling £232,000 was recovered and 16 people were convicted and imprisoned for 35 years and 7 months.

Post-trial and conviction a further six NRM referrals have been made for Operation Renard subjects by UK Visas and Immigration whilst the subjects were awaiting deportation in immigration detention centres.

IASC/092/20

***Operation Coast:** Case in North Yorkshire in 2016 of cannabis cultivation where offender 'Z' provided a no comment interview.*

'Z' later claimed the Section 45 defence during an immigration interview and an NRM referral was made. Z was bailed by police and also treated as victim. A number of best evidence interviews provided lines of enquiry for police.

In 2018 following extensive investigation, evidence supported him as an offender and not a victim. NRM made a negative decision based on evidence from police that overturned the Section 45 defence. 'Z' was charged and later convicted.

IASC/026/20

3.2.10 There are some limited examples of this approach being applied in county lines drug supply investigations. These have been conducted by specialist teams with expertise and access to significant police resources. These examples are still the exception and not yet the rule. The challenge for the police is that county lines criminality, serious violence and the exploitation of young people is now a volume crime for most police forces. This is happening many times, every day, in communities across the country. Therefore, how far should the police realistically be

expected to go in the size and scope of their investigations given limited resources and scarce specialist capabilities?

3.2.11 Where specialist investigative expertise has been applied to county lines drug supply, the police have recognised that effective identification of CCE offers an opportunity to tackle otherwise hard to reach organised crime networks. These officers are maximising the opportunity when the statutory defence is raised, proactively using evidence of CCE to dismantle the criminal network by prosecuting those responsible for the exploitation using offences under the Modern Slavery Act, thus achieving sustained public protection, protecting future victims and communities from harm.

3.2.12 I encourage use of the Modern Slavery Act in this way. It also offers additional benefits: acting as a deterrent for offenders who do not wish to be classed as 'child traffickers'; making the use of children in drug supply a high-risk tactic and providing the state with control mechanisms post-conviction such as Slavery and Trafficking Prevention Orders (STPO).

3.2.13 In a recent county lines drug supply case[13] by Avon and Somerset Police one STPO lasting 30 years was imposed upon the offender who admitted offences under the Modern Slavery Act, coercive behaviour and being concerned in the supply of class A drugs. Upon sentencing in addition to the prison term, he was given a 30-year STPO by the court, which prevents him from entering Somerset, places restrictions on his use of electronic devices and bans him from organising travel or booking accommodation for anyone else.

Operation Piberia (Metropolitan Police): *In 2016, three adult defendants were convicted of conspiracy to supply cocaine and heroin after evidence gathered showed that they controlled extensive county lines between London and Portsmouth and the south coast.*

The three males were later charged with offences of trafficking contrary to section 4(1A) (b) Asylum and Immigration (Treatment of Claimants etc) Act 2004 in relation to children exploited by the defendants to supply class A drugs.

These three males co-ordinated and recruited young 'couriers' to transport their drugs and facilitated their travel from London to the south coast and sent them instructions once they arrived at their destination; five couriers were under the age of 18 and one was identified as an adult with a mental illness which made him vulnerable.

This was an evidence-led prosecution that did not rely on testimony from any of the exploited children. Police instead relied upon phone evidence, CCTV and information from partner agencies. Crucially, it involved treating the 'couriers' as victims of trafficking from the earliest available opportunity, rather than proceeding with drugs supply charges against them. This allowed police to prosecute those who were exploiting the vulnerable, rather than the vulnerable themselves.

Initially, the court deemed that there was no case to answer in regard to the trafficking charges, however the prosecution appealed, arguing that the victims were 'chosen' based upon their vulnerabilities and that whether or not the victims were 'willing volunteers' in the drug dealing was irrelevant.

IASC/222/20

[13] Avon and Somerset Police (2020), 'Man jailed after forcing a woman to transport drugs'.

Norfolk Constabulary arrested a number of individuals on suspicion of supplying controlled drugs in October 2018. Officers were concerned that two male youths from London were amongst the adults arrested. The youths' ages 16 and 17 years old. Although the two male youths made no comment in police interview, officer believed that the youths had been brought to Norfolk by the adult male "NH" to sell class A drugs. Norfolk Constabulary arrested the adult male "NH" for human trafficking offences and released the two male youths under investigation whilst they obtained more evidence.

The two male youths were entered into the NRM but refused to engage with the police who visited them at their home location. The adult male was charged and remanded with drug offences and further work was needed to prove the human trafficking. Both male youths received positive CG decision and officers returned to CPS for advice. CPS made the decision to take no further action against the two male youths for the drug offences due to the positive CG decision and evidence of human trafficking. CPS added a charge of human trafficking to the adult male "NH".

CPS decided to run this case as a victimless prosecution.

The adult male "NH" was convicted of the human trafficking x2 and sentenced to 10 years 3 months at Norwich Crown court.

IASC/045/20

2. Discontinuance of investigations and prosecutions as soon as the statutory defence is raised

3.3.1 The Court of Appeal in R v MK and Gega [2018][14] set out how the burden and standard of proof operates in relation to the statutory defence. The Court held that:

- The statutory defence places a mere evidential burden upon defendants: i.e. the defendant only has to adduce some evidence of each of the limbs of the defence to allow the defence to be considered by the jury
- If a defendant succeeds in discharging the evidential burden, then the legal burden falls upon the prosecution to disprove the defence beyond reasonable doubt
- Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction before proceeding, the reverse burden of proof generated by R v MK means that this is an evidential challenge that the prosecution frequently finds challenging to overcome

3.3.2 The Independent Review of the Modern Slavery Act[15] reviewed the burden of proof in 2020 and recommended that it should remain with the Crown, however the CPS have raised concerns about the impact this is having on their ability to prosecute:

[14] R v Gega [2018] EWCA Crim 667.
[15] Frank Field MP, Maria Miller MP and Baroness Butler-Sloss (2019), 'Independent Review of the Modern Slavery Act 2015: Final Report'.

"Defendants can raise the defence by doing no more than giving evidence on oath. The burden then falls on the prosecution to disprove the defence beyond reasonable doubt. This is frequently difficult or impossible for the prosecution to do because it involves attempting to prove a negative in circumstances where the pertinent facts are only known, or best known, to the defendant."

3.3.3 The submissions to this call for evidence overwhelmingly illustrate that once the statutory defence is raised, very little detail is given about the exploitation to the police or prosecution, merely stating it happened, making it almost impossible to investigate.

…when the (modern slavery) crime report has been generated post referral, defendants have stated that "they don't need to give statements as their solicitor told them" and they were only entering this route after discussion with their solicitor. I have written statements from the two police officers who spoke to the defendants who state they were not provided with any information in order to investigate the claim any further.

The defendants know they don't have to give police any evidence or cooperate with the process. Once they have written the referral (which doesn't have to contain facts - it could be a completely made up story) and social workers and key workers have stated on reports "they looked scared in court" etc. then that appears to be enough. Therefore, the Home Office minutes tend to rely on the untested words in the initial referral and other partnership input."

IASC/007/20

"X" was arrested for class A possession with intent to supply having been found in possession of crack cocaine and heroin. During interview he refused to answer any questions, he did not provide any explanation. He was asked whether he was a victim of modern slavery but would not engage with the interviewing officers. He would not provide PIN numbers for the phones he was in possession of at the time of his arrest. An NRM was submitted at this stage due to concerns around his age and criminal activity. A negative reasonable grounds (RG) decision was received based on the information provided. "X" initially pleaded guilty at court and the case was adjourned for pre-sentence Youth Offending Team report. He became aware he could potentially receive a custodial sentence, he then introduced the Section 45 defence to a social worker. The NRM was resubmitted by social services and a positive RG decision and CG decision were received. The case was subsequently discontinued as the CPS concluded that there was insufficient evidence to rebut the "Section 45" defence. "X" has not provided an account of his actions, admitted his involvement in the offences or provided any details of who or how he has been exploited.

IASC/129/20

3.3.4 The CPS report an increasing number of cases not being charged or being discontinued due to the difficulty as they see it, in overcoming the legal burden associated with the statutory defence.

"There are an increasing numbers of reports from CPS prosecutors of cases involving serious criminality which are not being charged or which are having to be dropped (often shortly before trial) due to the difficulty in overcoming the s.45 defence.

In many of these cases the investigators and prosecutors do not accept that the suspect is a genuine victim, but nevertheless have to advise no further action or drop the case due to their inability to rebut the s.45 defence beyond reasonable doubt."[16]

3.3.5 This is supported by the evidence from the police, indicating that in many cases the mere mention of the statutory defence and an NRM referral is enough to prevent or halt criminal proceedings. It is concerning that this is happening for serious offences.

3.3.6 We have seen evidence that the positive CG decision is being taken as the statutory defence without an obvious and proper examination of each of the limbs under s.45(1) for adults and s.45(4) for children. In this way the identification of a victim of trafficking leads prosecutors to the conclusion that the evidential burden is met and the defence is complete. This results in cases being dropped far too easily. This coupled with the police rarely conducting in-depth investigations looking towards and away from the suspect to provide enough evidence for the CPS to properly test each limb of the statutory defence, is inviting abuse.

3.3.7 Cases of serious criminality not being charged, or being discontinued, due to the perceived difficulty in overcoming the legal burden of the statutory defence are particularly worrying in the context of escalating youth violence associated with drug trafficking. It is accepted that the CPS must treat each case upon its own merits, however the following example from one police force provides a stark illustration of the serious violence escalating in communities, seemingly unimpeded by the criminal justice system. The risk this creates to the individuals themselves, other young people and to the community more widely is leading to significant harm. In the case below there was an opportunity for the prosecutor to ask the police for further investigation to take place, enabling the defence to be tested further before a decision to discontinue was taken.

… one of the subjects of the NRM failure has been in my opinion "A". He has very quickly become one of our serious offenders and is a mapped organised crime group (OCG) nominal and target nominal for the district. The NRM referral was made by the Youth Offending Team at court after he appeared in youth court being charged for drugs supply offences. Since his initial arrest and link to the gangs he then appeared to be linked to a large number of offences, see below. Overview of offences which he has been arrested for:

***Assault:** February 2019 he was allegedly involved in the assault of a student at college where the victim was stamped in the head whilst on the floor. Unfortunately the victim declined to support the prosecution and the offence has been filed after words of advice given. "A" was interviewed in relation to this and placed himself at the scene, but denied the assault.*

***Stabbing:** February 2019 "A" is named as the suspect for stabbing a 25 year old male.*

***Affray:** March 2019 a member of a rival gang is attacked in broad daylight in the middle of the town centre. He is stabbed multiple times by one of the aggressors and "A" is seen to stab on the victim's head whilst on the floor a number of times. From viewing footage "A" is clearly a leader of the group and is running towards the fight from the front of the group. He is not*

[16] CPS submission to the IASC call for evidence.

acting as though he is a follower of the aggressors. This matter is with CPS and he is likely to receive a charge after early discussions.

Robbery: *On the same date as the above affray "A" is named as involved in the robbery of a 20 year old's mobile phone near to college. It is believed that this incident is what has led to the disorder within the town centre.*

Injured in stabbing: *March 2019 "A" attends hospital with injuries consistent with being stabbed. He refuses to talk to officers and states that the injury was caused from climbing over a fence.*

Firearms discharge and affray: *April 2019 "A" is involved in a firearms discharge at a rival gang member. He and associates travel in a taxi to the known area of a rival OCG. The group then attack a male in the street and damage the vehicle he is in. They then continue to drive around the estate and there is believed to be two occasions where a firearm is fired at rival gang members' vehicles. The evidence against "A" at this stage for this offence is strong. It is a confirmed discharge and he can be placed in the offending taxi at the relevant times.*

CPS initially charged with a violent disorder. After an appeal from ourselves they have agreed to add further indictments for possess offensive weapons and firearms.

Possess bladed article: *In August he was arrested in a taxi along with other OCG nominals on suspicion of attempted murder. He has not been charged with this offence but was subsequently charged with possess bladed article after being found with a machete.*

Possess bladed article: *In September he was re-arrested on fresh evidence for the firearms discharge mentioned above and was found with a flick knife in his possession. He was subsequently charged with this offence.*

Section 18 grievous bodily harm (GBH) wounding: *In December he is named as part of a group of four males that are involved in the attack of an individual in his flat. After a number of attempts the victim will not come on board with the investigation. But did state that "A" was the main attacker striking him with the machete. He was reportedly heard to say "IS HE DEAD YET" whilst the victim was being struck on the floor.*

Other than the above stabbing injury incident that I have mentioned, we hold no information or intelligence at this stage that would indicate that he is a victim. The drugs line that he was caught supplying on is controlled and run by subjects all of a similar age to "A" and recorded as known associates on police systems. We hold no information to suggest that he was being forced to supply on this line or that anyone of a higher tier within any OCG was involved in the organisation of the drugs line.

The NRM referral was made in March 2019 and we had to wait until November 2019 where we received a positive CG NRM. The CPS lawyer then used this as a reason to drop all ongoing court work that he was dealing with. The same allocated lawyer dealing with a number of our cases then used this positive NRM to also drop the case against another subject of the same operation, "K", as he … felt that if "A" would be a positive CG then so would this separate unrelated suspect. When we eventually received the NRM result for "K" it came back positive. But the SCA decision maker made no attempt to contact the officer in charge of the investigation for information around the subject to help with their decision, even though they had been provided with our details.

Five months after his case was discontinued, "K" was charged and remanded after a 12 year old boy was shot in the face. If the drugs offences had not been dropped, then "K" would not have been at liberty to commit this offence.

The most frustrating thing around the whole process for me is not just the time that it is taking to receive the outcome. But also the fact that the final results have no explanation, grounds or justification around the decision made. The only paperwork provided just states that the individual is a positive in the process and the forms just contain generic contact details.

CPS are then clearly using the NRM decision to drop cases at court. This in turn is supporting an untouchable attitude in some of our young persons. But is also promoting the fact that higher tiers in the OCG should continue to target and use young individuals, as there are no apparent consequences for their actions. I appreciate that young persons need support. But this system is clearly failing and is being used by subjects for the wrong reasons.

IASC/040/20

3.3.8 The CPS invite consideration for the way the burden of proof operates in these cases, advocating for a change in the law. They submitted to this call for evidence that:

> *"A reverse burden based on the balance of probabilities rather than an evidential threshold would be preferable."*

3.3.9 HMICFRS in their recent report commented:

> *"In some cases, a defendant to a drug trafficking charge can produce evidence to show that the competent authority initially thought them to be a victim (i.e. at the reasonable grounds decision). Even if that decision is later overturned (i.e. at the conclusive grounds decision), the prosecution will be very unlikely to succeed because the burden of proof for the drug-related criminal charge is 'beyond a reasonable doubt'."*[17]

3.3.10 Other lawyers consulted have suggested that such a change would engage challenges under Article 6 of the European Convention on Human Rights and therefore have argued an amendment to a reverse burden would not be appropriate.

3.3.11 It has been suggested that there is often a failure to acknowledge the distinction between identification of victims of trafficking and their non-prosecution. If police and prosecutors were less fearful of identifying a suspect as a victim of trafficking, but instead made the identification and then proactively conducted a proper consideration of the evidential burden against each of the limbs of the defence as set out in s.45 (1) and s.45 (4); this would lead to a more robust and consistent approach.

3.3.12 Has the evidential burden been satisfied at every component of the defence? Was the person compelled to commit an offence as a direct result of their being a victim of slavery or exploitation? Or in the case of a child, did they commit an offence as a direct result of their being the victim of slavery or exploitation? And would a reasonable person in the same situation and having the person's relevant characteristics have done the same?

[17] HMICFRS (2020), 'Both Sides of the Coin: An inspection of how the police and National Crime Agency consider vulnerable people who are both victims and offenders in 'county lines' drug offending'.

3.3.13 The current published CPS legal guidance sets out a four stage approach to the prosecution decision but it does not explicitly set out the requirements for each of the limbs of the defence to be considered. I think it would be helpful if it were to do so. This could avoid the mistaken belief which I have repeatedly encountered that the identification of a suspect as a victim of trafficking automatically prevents a prosecution. [18]

> *"The fact that the CPS do, on occasion, discontinue charges when there is a positive conclusive grounds decision means that clients, their parents, and supporters, including the Youth Offending Services and Social Services, often expect charges to be summarily dropped when such a conclusive grounds decision is made.*
>
> *The CPS policy in such circumstances is set out in full on the website but its application appears to be uneven across different CPS areas and even different courts. Either a more open approach is required or a more specific policy to allow those affected to see and understand why any decision has been taken. The CPS should likewise publicise clearer guidance about what impact the NRM has upon its decision making, both pre- and post-charge."*
>
> **IASC/099/20**

RECOMMENDATION: The CPS legal guidance should clarify precisely what requirements there are on defendants and prosecutors when considering and deploying the statutory defence.

3.3.14 As part of the response to this call for evidence the Magistrates Association polled their members and 331 magistrates responded. Concern was voiced that neither the Ministry of Justice nor the CPS are currently capturing data on the use of the statutory defence.

3.3.15 Most magistrates had seen the statutory defence in the youth courts, particularly in relation to drugs, weapons and violence offences, but over 80% of respondents did not feel confident in how to respond to it when raised. There was confusion over the NRM and experience of significant court delays caused by it. Feedback suggests legal advisers in youth court are increasingly advising magistrates not to take a plea, but to set a trial date instead. The understanding given is this will put pressure on the SCA to make a decision more quickly, because a trial date has been set. Magistrates are asking for clearer guidance for courts on how such requests should be dealt with. They suggest that further training and guidance should be provided for the judiciary and other professionals at all levels within the criminal justice system on modern slavery, with specific reference to the statutory defence, the NRM, and how these interrelate.

3.3.16 Greater training for criminal justice professionals was a consistent theme in the evidence submitted to this call, from all sectors. The Anti-Trafficking Monitoring Group specifically noted that *"…judges, and officers of the court require enhanced training on modern slavery and human trafficking"*.

3.3.17 I have met with the head of training at the Judicial College who is responsible for the training of both magistrates and judges and raised this concern with him. He has assured me that

[18] There is clear and valuable material forthcoming, Ben Douglas-Jones, Michelle Brewer and Pam Bowen (2020) '*Criminal Defences available to victims of trafficking*', in 'Human Trafficking and Modern Slavery: Law and Practice', Philippa Southwell, Michelle Brewer and Ben Douglas-Jones, Bloomsbury Professional, 2nd ed. (unpublished).

there are plans to include material on modern slavery in both magistrates' and legal advisors' training and this will be complete by autumn 2020. Modern slavery is covered in the appropriate Magistrates Court Bench Book but this was last published in 2018 and needs to be updated.

RECOMMENDATION: Training in the statutory defence needs to be prioritised by the police, CPS, defence lawyers, magistrates and judiciary.

3. Over-reliance throughout the criminal justice system on the National Referral Mechanism decision making of the Single Competent Authority

3.4.1 Evidence obtained throughout this call has revealed the significant impact the decision of the SCA is having on prosecutions. There are many examples of cases being dropped at all stages as a result of SCA decisions. Many contributors pointed out that the decisions of the SCA are being used in a way which was never intended when it was originally established in 2009. The statutory defence is being raised in a wide range of cases at various stages of proceedings and at different levels and this puts strain on the SCA.

3.4.2 The following is an extract taken from a document created by the SCA to assist in the understanding of the NRM in criminal proceedings:

> *"The NRM is a civil process. It is designed to make it easier for the agencies involved in a modern slavery case, including the police, local authorities and NGOs to cooperate and share information about potential victims to enable their identification and facilitate access to advice, accommodation and support.*
>
> *All NRM decisions are made based on the information made available to the SCA at the time of making the decision. In many cases the SCA will not require additional information to make a positive decision but will seek further information prior to issuing a negative decision. This decision is assessed 'on the balance of probabilities'…"*

3.4.3 The modern slavery statutory guidance published by the Home Office[19] is clear that a positive decision does not automatically establish that the statutory defence is applicable. The other criteria provided by the Act must still be met. In many of the case examples provided to this call a positive CG decision appeared to automatically lead to a charge being refused or a case being dropped. This suggests there is not a proper consideration of each limb of the statutory defence under s.45(1) and s.45(4).

3.4.4 The CPS submitted evidence providing their view on the impact of the NRM decision on the prosecutions' ability to disprove the statutory defence:

> *"Defendants who wish to raise the s.45 defence are assisted if they have a reasonable or conclusive grounds National Referral Mechanism (NRM) decision in their favour. The NRM decision is not based upon the criminal standard of proof and is not binding on the prosecution or the criminal courts.*
>
> *However, positive NRM decisions make the task of disproving the defence even more difficult."*

3.4.5 The few examples of the decision being overcome were in complex matters where specialist police officers have conducted a significant amount of investigative activity at the very

[19] Home Office (2015), Modern Slavery Act 2015 – Statutory Guidance for England and Wales.

beginning. The vast majority of cases that attract the statutory defence would not warrant that level of investment.

3.4.6 The evidence suggests that there is a powerful perception among police and prosecutors that a decision by the SCA that an offender has also been identified as a victim of modern slavery completely undermines any future prosecution. This is particularly problematic when the decision was made some time in the past and the most recent offending has minimal nexus with the exploitation. Some appear to think that past exploitation provides immunity from prosecution. That is not the case and ironically could make the young person even more vulnerable to further exploitation as their exploiters view them as having a 'get out of jail free card.'

A 15 year old is frequently being arrested but is still dealing drugs on the street. He has openly told Police that they "can't touch him" since the NRM decision ended the prosecution against him. He sustained significant injuries after being attacked with a machete.

IASC/106/20

A 13 year old raised the s.45 defence in interview after being arrested on suspicion of dealing cannabis. An NRM was completed and a positive grounds decision was reached that the child was a victim of modern slavery. After discussions between the police, Youth Offending Teams and social services, the investigation into the drugs supply was discontinued by police.

Since then, the child has been arrested for wounding, robbery, public order offences and intelligence suggests he is carrying weapons and involved in drugs supply.

IASC/062/20

3.4.7 The examples below illustrate where young people previously in receipt of a positive CG decision have later built up their own drug trafficking network and in one case went on to exploit other vulnerable young people. The police in these cases were unable to stop this offending quickly, as the prior trafficking status of the suspects was acting as a barrier to criminal prosecution.

A frustration is that once a reasonable/conclusive grounds decision has been granted in favour of a person, then this is still used as a shield by them to evade any later consequences of their criminal actions as the then circumstances are somewhat different. This is certainly the case below where we have had to take a much longer road to achieve an outcome that meant a greater impact was felt by the community to this person's criminal activity.

A county lines nominal had been given a non-recent RG/CG decision but then continued to actively promote county lines and build his own line (causing significant community concerns). We had a long road to prove that this person was not a victim of MSHT but was in fact a

perpetrator of it to other vulnerable young people. This person has now been charged with supply offences and trafficking offences of a young person to deal his county line (successfully prosecuted for trafficking in February 2020). This case shows that the lack of detail and burden of proof on the prosecution allowed this activity to continue for much longer than it should have and placed young people in Hampshire in harm's way.

IASC/059/20

This is an individual who historically obtained a reasonable grounds decision from the SCA (aged 15 years) but has since continued to grow their local drug network to now becoming a suspected operator of their own county line. The issue here is that this non-recent NRM decision is still bought into play when they come to our attention today and this makes the securing of a criminal justice outcome difficult. This person (now 17 years) is now believed to no longer be in any duress.

The issue should be that each encounter with law enforcement is looked upon in the circumstances of that encounter and any past NRM, whilst considered, should hold less weight as the limited information can become redundant or can be challenged. This we believe is not being done in a consistent way and past NRMs are still used to counter current law enforcement activity when the circumstances are now fundamentally different.

IASC/058/20

3.4.8 The Modern Slavery Act 2015 is relatively recent legislation. Case law is now emerging to assist with the interdependence between the decision making of the SCA and the statutory defence. It is hoped confidence and clarity on this issue within the criminal justice system will grow.

3.4.9 R v VSJ & others [2017] [20] examines the effect of decisions by the Competent Authority (precursor to the SCA) in criminal cases. The court stated:

- *"… the decision of the Competent Authority as to whether a person had been trafficked for the purposes of exploitation is not binding on the court but, unless there was evidence to contradict it or significant evidence that had not been considered, it is likely that the criminal courts will abide by the decision.*
- *"It is important to appreciate a court will bear the Competent Authority's conclusion very much in mind but will examine the question of the cogency of the evidence on which the Competent Authority relied and subject the evidence to thorough forensic examination."*

3.4.10 This is reflected in CPS legal guidance[21] which emphasises the importance of the prosecutor considering t the cogency of the evidence on which the SCA relied in making their decision and recognition that the SCA decision is not binding on the court or the CPS.

[20] R v VSJ & others [2017] EWCA Crim 36

[21] CPS (2020), Human Trafficking, Smuggling and Slavery guidance.

3.4.11 In February 2020 the Court of Appeal handed down judgement following an appeal against a terminating ruling in the case of R v DS [2020].[22] Following a referral under the NRM, a positive CG decision was made on the defendant's status as a victim of trafficking, based on a statement from the defendant. The trial judge had upheld a defence submission to stay proceedings based on abuse of process, holding that the CPS and the court should abide by the NRM decision. The prosecution appealed the terminating ruling.

3.4.12 The Court of Appeal in this case considered the application of statutory defence and upheld the appeal determining:

> *"…the responsibility for deciding whether or not a person is in fact a victim of trafficking is unquestionably that of the jury."*

3.4.13 The CPS legal guidance[23] now states in respect of a CG decision by the SCA:

- *"The prosecutor must take a Conclusive Grounds decision into account in deciding whether a defendant is a victim of trafficking and whether the offending has a very close nexus with the exploitation.*
- *"The prosecutor is entitled to challenge that Conclusive Grounds decision before the jury in seeking to rebut the statutory defence and to invite the jury to come to a different decision …*
- *"Whether or not a defendant is in fact a victim of trafficking is a matter for the jury. This is an issue which they will have to consider on all properly admissible evidence, which may include the evidence of the defendant or, if he does not give evidence, may, if appropriate, include an adverse inference."*

3.4.14 It is hoped this greater clarity provided by R v DS will assist in reducing reliance on the decision of the SCA and help prevent cases being automatically discontinued on the basis of such decisions.

3.4.15 Significantly, in this appeal the court was asked to give a ruling on whether the decision of the SCA should be admissible at all before a jury. It was argued that the decision of the SCA is 'untested, self-serving and hearsay evidence'. The court declined to express a view in this case. However, it would be of great practical assistance if the court were to return to this matter in the future in an appropriate case.

3.4.16 The Home Office statutory guidance published in April 2020 echoed the expectation set out in the CPS guidance that prosecutors should be scrutinising the decision made by the SCA:

> *"The decision should be scrutinised by the prosecutor to see the evidence that was available to the SCA, to what extent the evidence has been analysed, weighed and tested by the SCA and to assess the quality of any expert evidence relied upon."*[24]

3.4.17 This level of scrutiny expected in the statutory guidance does not appear to be occurring. Although the guidance is clear that the SCA must update the police, CPS and the court hearing the case (if relevant) at the RG and CG stages as soon as a decision is made, there appears to be little practical evidence of the SCA sharing the level of detail necessary for the prosecutor to apply the scrutiny the guidance expects.

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[22] R v DS [2020] EWCA Crim 285.
[23] CPS (2020), Human Trafficking, Smuggling and Slavery guidance.
[24] Home Office (2015), Modern Slavery Act 2015 – Statutory Guidance for England and Wales.

3.4.18 In many cases it appears the decision letter issued by the SCA is the total extent of the information shared, or indeed requested by the police or CPS. This was illustrated by the previously referenced case example IASC/40/20 where the officer stated:

> *"The most frustrating thing around the whole process for me is not just the time that it is taking to receive the outcome. But also the fact that the final results have no explanation, grounds or justification around the decision made. The only paperwork provided just states that the individual is a positive in the process and the forms just contain generic contact details."*

RECOMMENDATION: The CPS should in all cases request the full trafficking consideration minute from the SCA in order to weigh and test the evidence in line with Home Office statutory guidance and CPS guidance.

3.4.19 Defence lawyers have also raised with us the incomplete nature of the information the SCA is basing its decision making upon. For example, they suggest that medical, Youth Offending Team and Children's Social Care records are rarely considered. Conversely we understand that requests from the SCA for further information frequently receive no response from a wide range of organisations. It has also been suggested that police officers, Youth Offending Teams and social workers do not understand their role in the process or what is expected of them when contacted by the SCA. In common with many information sharing processes reliance on generic email addresses is a real barrier to effective communication. We understand in Wales they have been auditing email address for points of contacts to ensure they are up to date and distributed to relevant partners, such as the SCA. This ensures that notification and requests are directed to and from the correct person.

3.4.20 Concerns have been raised by defence lawyers and police officers about the level of information provided by the SCA to help them carry out their respective roles. For example when officers are investigating cases of drug trafficking it is not easy for them to establish whether a person has previously been referred into the NRM. Furthermore if they establish a previous referral it is not clear whether there is a requirement to make a further referral.

RECOMMENDATION: The SCA should develop and implement information sharing protocols with a range of bodies.

4. The statutory defence is being raised late in the criminal justice process

3.5.1 The Independent Review of the Modern Slavery Act specifically raised the importance of identifying victims of trafficking and of the statutory defence being raised early in the criminal justice process.

3.5.2 In R v O [2008][25] the Court of Appeal highlights the responsibility of both prosecution and defence to consider the status of the victim as a victim of slavery or trafficking. In particular defence lawyers will spend more time with the person and therefore have the best opportunity to encourage a disclosure by asking the right questions:

> *"Prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code.*

[25] R v O [2008] EWCA Crim 2835.

Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking, especially a young client."

3.5.3 Defence lawyers have expressed frustration at the existence of barriers to making such enquiries, telling us that the SCA require them to make a subject access data request in order to establish if their client is being considered within the NRM or has been in the past.

3.5.4 In R v D [2018][26] the Court of Appeal held that:

"It is important that wherever possible, those who may be victims of trafficking are identified before any plea is taken at court.

Should the matter be raised at the first hearing the judge will need to determine, as a matter of judgment on the facts of the individual case, whether a defendant is a potential credible victim of trafficking. If he so determines, the case should be adjourned for an NRM referral to be made. This should take 45 days but in practice may be considerably longer.

In such cases, the usual stage timetable for case progression under Better Case Management in the Crown Court and Transforming Summary Justice in the Magistrates' Court cannot apply and stage dates will need to be altered to accommodate the referral."

3.5.5 In July 2019 the CPS implemented a revised pre-trial hearing form for use by prosecutors, defence practitioners and judges with a specific section relating to suspects who may be potential victims of modern slavery.[27] The form now asks the defence to highlight whether it is alleged that a defendant is a victim of modern slavery so that consideration can be given to whether the prosecution should continue and/or whether the defendant is alleging a defence under s.45. This revision is intended to raise awareness of the defence and encourage earlier identification of the issues.

3.5.6 The evidence has revealed that despite the existence of case law and the steps taken by the CPS to identify issues earlier, the statutory defence is still frequently being raised in advanced stages of the criminal justice process. In some cases this is caused by a failure to investigate the possibility that an offender is in fact a victim of trafficking and to make an appropriate NRM referral at the outset. In other cases even when police officers have been proactive in considering the statutory defence in interview and in pre-interview briefings with legal representatives the defence is being raised late in the day causing significant disruption and delay.

3.5.7 In the following case the ultimate decision to discontinue was probably appropriate, but it took over a year and in the interim the child was charged with a serious criminal offence.

This was an investigation concerning young males running drugs through a county line between Hackney and Stevenage. As a result of this investigation five males were charged with conspiracy to supply class A drugs (heroin and crack). The males charged were aged 15, 17, 18, 20 and 32 years old.

[26] R v D [2018] EWCA Crim 2995.

[27] CPS (2020), Human Trafficking, Smuggling and Slavery guidance.

The 15 year old was interviewed twice by police in the presence of an appropriate adult and solicitor … and gave no comment interviews, he was subsequently charged. I have been updated by our modern day slavery detective sergeant that there were no trafficking charges as there was no evidence of anyone being trafficked based on all the evidence gathered during the investigation.

It took 13 months from the date of charge to the trial date. During the court proceedings the defence solicitor raised the Section 45 defence to the Judge. This had not been raised previously during any point of the investigation or in the lead up to the trial, and as a result of this the court proceedings were delayed until this issue was resolved. It is estimated that the solicitor took three to four months to submit a referral to the NRM through the NSPCC, this referral was made by the defence solicitor and he did not need to acquire consent as the defendant was under 18.

Police made contact with both the boy's mother and his defence solicitor following the receipt of the NRM, however, both refused to engage with the police, and also refused to support him being interviewed regarding the trafficking allegation that had been made. The information provided to police gave no indication of who was trafficking him, nor was any assistance given by him for us to identify and prosecute anyone for this offence. A case summary along with this was then sent to the SCA who gave a positive conclusive grounds decision. The police tried to appeal this but it was refused as the only person who can appeal is the person who made the referral, in this case the defendant's solicitor. Based on this the senior prosecutor took the decision to no further action the boy, who had now turned 16 years old.

IASC/037/20

I am confident (and our data shows), that our staff respond well to those cases when an NRM referral should be made as they believe the person in front of them is a genuine victim of MSHT. But this still leaves a major frustration that some defendants overtly and knowingly make a later NRM submission to the SCA that has such a lack of detail, and coupled with the lesser burden of proof on the decision making process, results in an overall and persistent perception that it is sometimes used as a 'get of out jail free card' for some county line dealers who run their own networks.

IASC/057/20

3.5.8 It is suggested the statutory defence is being raised late for a variety of reasons which cut across the criminal justice system. These include the failure to identify a victim of trafficking at the outset of a police investigation; a victim of trafficking not initially revealing or recognising their own victim status but after reflection or intervention later disclosing their exploitation; and as a tactic by the defence to provide the prosecution with a limited amount of time to properly test the statutory defence before trial.

3.5.9 The evidence also identified gaps in information sharing and of agencies operating in silo, and concerns that charities, Youth Offending Teams and other partners are unilaterally submitting NRMs very late in the criminal justice process (as late as during pre-sentence reports) without consultation with other agencies to share relevant information. Police forces in particular highlighted frustrations with referrals into the NRM at a late stage during a criminal prosecution,

causing delays within the criminal justice system. This especially related to children concerned in county lines offending, with referrals often being made without prior consultation with the other agencies who hold information on the child in question.

3.5.10 This unilateral approach is causing a problem; it demonstrates a fragmented approach to safeguarding and indicates that multi-agency discussions to safeguard children are not happening routinely. It also results in the SCA making decisions without all the relevant information. Recent guidance from the Ministry of Justice supports the importance of a coordinated approach, clearing advising:

> *"…that any (NRM) referral made should be after appropriate safeguarding steps have been taken and in light of multi-agency discussions."*[28]

3.5.11 The National Police Chiefs' Council produced guidance supporting this practice. It stipulates:

> *"For child victims of trafficking and slavery a multi-agency approach is essential to ensure the NRM referral contains a thorough and accurate representation of the information each agency holds on the child's circumstances. Best practice is to convene a multi-agency meeting asap prior to referral."*[29]

"SP" (child) was arrested on suspicion of possessing a controlled drug (class A) with intent to supply.

PCSOs observed "SP" to exchange an item with an unknown male, hence he was searched by police officers who found him to be in possession of wraps of crack cocaine and heroin, and cash.

"SP" answered no comment to all questions asked during interview (he was represented by a solicitor), and he was later charged following CPS advice.

Intelligence indicated that "SP" dealt drugs with, or on behalf of his friend, who was older than "SP", but still a child at the time of the offence.

A child referral was made to social care. Post charge, "SP" moved to Lancashire to live with father, where he was allocated a social worker. "SP" disclosed to his social worker that an unknown male approached him in the street, and told him to take a bag "around the back of the bookies or he would put a knife to his throat and stab him." He provided no further detail.

The social worker entered "SP" into the NRM, which was received by Lancashire Police, and a positive reasonable grounds decision was made.

The OIC (officer in case) was not notified about the NRM referral. CPS later requested the OIC contact the Home Office to check whether "SP" had ever been entered into the NRM, hence the referral came to light. Court proceedings were adjourned. South Yorkshire Police recorded a crime of modern slavery, however, this was eight months on from the date of the drugs

[28] Ministry of Justice (2019), County Lines Exploitation: Practice guidance for YOTs and frontline practitioners.

[29] The Modern Slavery Police Transformation Unit (now the Modern Slavery and Organised Immigration Crime Unit) produced guidance supporting this practice.

offence, whereby many of the investigative opportunities were lost. In addition, "SP" did not provide sufficient detail to social care to raise reasonable lines of enquiry or to identify a suspect. Due to tight court timetables, there was pressure on the OIC to fast track the Conclusive Grounds decision from the SCA.

"SP" received a positive conclusive grounds decision and CPS made the decision to discontinue the case.

IASC/079/20

There is no or limited consultation between statutory agencies, to assist in correctly identifying a potential victim of trafficking, especially prior to the submission of an NRM report. As a result following an NRM referral the SCA may not have all the necessary facts to make an accurate assessment of that individual's trafficking status. This can significantly impact on investigations and the use of a s.45 defence in a case. This issue can be made worse in that criminal proceedings are heavily dependent on the NRM decision made by the SCA to decide on the status of an individual and therefore for a possible s.45 defence to apply.

The issue is a regular occurrence, especially surrounding child criminal exploitation (CCE) and county lines (CL), where Children's Social Care submit an NRM referral. The basis of this appears to be a belief that a child involved in criminality is at risk of being exploited therefore an NRM needs to be submitted. Which is a valid rationale, however it is regularly seen to be a tick in the box exercise, as we are seeing many reports with just a cut and paste of the subject's care record with little or no detail to say why the First Responder suspects this to be exploitation.

This NRM is subsequently received by the police and this can be the first time they are aware of this information and a decision to suspect that individual as a victim of exploitation. However, the information held by the police can show additional information which can negate this and they are in fact not exploited and in all likelihood complicit in the offending.

Example; the potential victim (PV) is a 17 year old juvenile who is identified by social care as being a victim of forced criminality and is forced into various criminal actions linked to drug supply in the local area. The PV however is recorded on police systems for multiple violent offences including: robbery; s.18 assault; attempt murder; possession of bladed article; possess a firearm with intent to cause fear of violence, and violent disorder. The police view was therefore this individual was not being exploited.

Best practice; we would advise early consultation with relevant agencies in a Strat/MASH style meeting to discuss the individual concerned. All the evidence can be looked at then to make an informed decision in relation to any potential exploitation and the possibility of a s.45 defence. We are aware Cleveland run a good system like this which they try and implement a MASH meeting prior to any NRM referral.

IASC/195/20

CONSEQUENCES

1. Abuse of the statutory defence

3.6.1 Evidence gathered by my office, inspection activity by HMICFRS[30] and strategic assessment from the National Crime Agency[31] all reveal that criminals are enabled in their efforts to exploit others by the statutory defence and are coaching victims and associates alike to exploit the protections the trafficking defence offers. You have the perfect storm; motivated traffickers who know how to abuse vulnerable victims and how to exploit the statutory defence - and the systemic weaknesses enabling them to do so.

3.6.2 HMICFRS raised this as a concern in their recent thematic inspection:

> *"It was beyond the scope of our inspection to establish how many times charges had been refused or cases subsequently discontinued or dismissed, or to evaluate the quality of the police investigations and their evidence in each case. However, the strength and consistency of views we heard during interviews suggest that the section 45(1) defence may be too open to abuse."*

3.6.3 The failure to identify victims of trafficking at the beginning of an investigation and the discontinuance of criminal proceedings following SCA victim identification; exacerbated by the late consideration of the statutory defence; is creating the opportunity for abuse. This is widely known amongst criminal networks and therefore making young people vulnerable to exploitation because they are seen as immune to law enforcement.

From an NRM referral: "The PV (potential victim) is aware of his NRM positive status, and the PV is aware that if he is viewed as a victim he will be dealt with more leniently. The PV has also stated that the older people who exploit younger people do this for this very reason as children are likely to receive considerably lighter sentences then adults."

IASC/006/20

3.6.4 The Centre for Social Justice publication in July this year[32] reported:

> *"In every police force that we visited, misuse of the Statutory Defence under Section 45 was named as the main threat in the application of the Modern Slavery Act. We received a number of reports from police who explained to us that criminals abuse the Statutory Defence by claiming that they themselves are victims of modern slavery and therefore should not be prosecuted."*

3.6.5 Our analysis of the cases we have received in this call for evidence did not reveal that offenders were necessarily creating false claims or fabricating stories of trafficking. They are trafficked, but in some cases are also committing serious crimes. The traffickers are abusing the statutory defence because we are not dealing with the serious criminality. They are exploiting the

[30] HMICFRS (2020), 'Both Sides of the Coin: An inspection of how the police and National Crime Agency consider vulnerable people who are both victims and offenders in 'county lines' drug offending'.
[31] National Crime Agency (2020), 'National Strategic Assessment of Serious and Organised Crime 2020'.
[32] Centre for Social Justice (2020), 'IT STILL HAPPENS HERE: FIGHTING UK SLAVERY IN THE 2020s'.

failures in the system. I am persuaded that while opportunistic defendants may attempt to abuse the defence, at the heart of the problem are victims of human trafficking who are committing serious offences.

3.6.6 The example below illustrates the complexity of these cases and while this was submitted by the CPS as a potential abuse of the system, it is highly likely that this young person was indeed trafficked as identified by the positive CG decision, but he was also committing serious criminal offences for which it was right and proper to prosecute.

A youth was charged with possession of with intent to supply of cocaine and cannabis, as well as possession of a knuckle duster and bladed article. He pleaded not guilty and the case was listed for trial. Two weeks before the trial, after indicating that the prosecution case was accepted, the defence solicitor raised the s.45 defence, despite the fact that the youth had given no account to the police of this himself at any stage.

He received a Conclusive Grounds letter from the NCA which appeared to be largely based on intelligence and hearsay as he had not provided an account to anyone. The police did not agree that his offending was as a result of trafficking. He had had a Youth Offending Team intervention both before and after these offences for matters of violence and weapons. There was also intelligence that he had, since these offences were committed, been involved in recruiting and enforcing debts.

The defence obtained reports to say that he was very suggestible, of a low IQ and extremely susceptible to exploitation. He would not agree to any assessment of him by experts instructed by the Crown. The defence reports did not comment on or explain his antecedent history which seemed at odds with the picture painted by them. The defence also submitted an abuse of process argument on the basis the CPS had failed to apply their own policy correctly given the NCA conclusion. They argued that the case should have been discontinued.

A conference was held with the police to consider the medical evidence, as well as all the other evidence, and it was agreed that the case should be discontinued on the basis there was insufficient evidence to prove that the defendant was not trafficked or that he did not commit the offences as a result of being trafficked.

CPS submission

3.6.7 While it is not possible to speculate categorically that the next example is an abuse of the statutory defence, it does illustrate how the perception of abuse taking place has been created.

Police are aware of a 16 year old, who is a frequent street dealer and whom they have concerns is not being safeguarded. He is linked to extensive intelligence and incidents of violent disorder and drug dealing and in 2017 was attacked with a machete. Following an arrest for drug dealing, he told police that he works with one other male and earns around £100 per day dealing drugs. The police did not submit an NRM referral as no exploitation was raised, however an NRM referral was submitted by the Youth Offending Service, he received a positive grounds decision and the charges were dropped.

When he was subsequently arrested for another offence, he openly told police that they "can't touch him" due to his previous NRM decision where the NRM decision ended the prosecution against him. If this child is a victim the system is failing him, he is not being safeguarded. He is frequently arrested and still on the street dealing drugs.

He has been linked to serious disorder, arrested for possession of weapons and told police that he is arming himself in response to "London boys" dealing drugs in the area. Police believe that "Ironically, if this child was under some form of supervision order as a result of a prosecution he may be better safeguarded" … "As it is, there is no compulsion for him to engage with any support".

IASC/105/20

2. Victims for whom the statutory defence was intended are not benefitting from it

3.7.1 There is evidence that victims of trafficking whose exploitation has a sufficiently close nexus to their offending for the Section 45 defence to reasonably apply, are not being protected by the legislation intended to support their non-punishment.

3.7.2 The International Organization for Migration (IOM) has identified multiple cases where:

> *"…defendants were explicitly described as a victim of human trafficking and modern slavery during their criminal trial for their involvement in the production of cannabis where Section 45 does not appear to have been applied."*

3.7.3 The IOM also referred to multiple news reports which provide indicators that the defendant was a potential victim of modern slavery in the circumstances leading to their criminality. They raise concern that in these news reports there is no reference to the defendants in these cases being recognised as potential victims. The concern that victims of trafficking are not using the defence when they could be is one supported by the submission from the Human Trafficking Foundation:

> *"Indeed, many NGOs and researchers generally report that the Section 45 defence is not being raised where it should be and victims are being falsely criminalised."*

3.7.4 The case examples submitted to this call mostly evidence this happening with adults concerned in cannabis cultivation.

A 38 year old was given a 10 month sentence following a trial for his involvement in the production of cannabis. In sentencing, the judge described the defendant's vulnerability: "You were unable to find work and there are in this country a number of gangs operating who recruit vulnerable newcomers from South East Asia, particularly Vietnam, to run their operations of cultivating cannabis". The judge continued, "You came here looking for a new life and you found yourself in something approaching modern slavery." The judge also acknowledged that the defendant had not personally profited from their involvement in the production of cannabis, "I doubt there is much you earned from the exercise at all."

IASC/197/20

A warrant was executed at an address where a substantial cannabis farm was discovered. Two Albanian men, "G" and "H", were arrested at the property.

During interview "G" stated he was trafficked in to the country and was debt bonded to his traffickers. He stated he had been threatened and made to work in the cannabis farm in order to pay his debt off. He agreed to enter the NRM.

"H" stated he had only been at the property overnight. He stated he owed a male £500 and was told he would pay this off if he stayed overnight at the property. He stated he was unaware it was a cannabis farm, he did not tend to the plants at all and did not know the other male present.

CPS authorised charges for both males who were charged and remanded in custody.

Once in custody "H" raised the s.45 defence and an NRM was submitted.

"H" was interviewed further and he stated he owed £500 to a male and although he had £300 in his possession at the time of arrest, this was to pay for prostitutes so could not be used to repay his debt. He stated he was unaware there were any cannabis plants at the address although the attending officers described the smell as being strong throughout the property.

Positive reasonable grounds decisions were received. "G" pleaded guilty at court and received 12 months' imprisonment and a fine of £140. The Conclusive Grounds decision has still not been received.

Although "H" provided no details to the investigating officers to enable them to conduct an investigation, the case against him was withdrawn by CPS as a positive Conclusive Grounds decision was anticipated.

IASC/130/20

3.7.5 Although there was less evidence of this happening with those concerned in criminal exploitation through county lines drug dealing, I do fear the profound impact this may have on the lives of children and young people when this does happen, with unjust criminalisation potentially affecting their future. In the call for evidence we were provided with no specific case examples of this happening, but this is not surprising given the majority of case studies were submitted by law enforcement. In the following two examples provided by the police there is however evidence of children being charged despite evidence of exploitation at the outset. All cases were later discontinued.

The victim of modern day slavery was a 15 year old school boy who had never been known to the police or social services previously.

The victim was initially arrested for possession with intent to supply (PWITS) after a warrant at his home address due to some intelligence received. Upon arrest the officers noted that the victim was living in dire living conditions and that he himself smelled and looked

undernourished. The victim was asleep on the sofa when officers entered the address and he had three drugs phones with him. He was arrested, sought legal advice, went no comment and subsequently charged and remanded. The next day he pleaded guilty at youth court.

As senior investigating officer (SIO) of the investigation I attended a strategy meeting recognising there was more to this investigation than initially met the eye. A joint investigation was implemented with social services. At the same time I was the SIO for a separate investigation relating to an OCG that turned out to be the offenders of modern slavery against the victim.

As a result of the victims arrest the OCG started to threaten the victim and family. This led to executive action by the police with threats to life (police process) being implemented and the victim and family being referred to the Protected Person Unit where they were moved out of area. During this turbulent time specialist officers interviewed the victim who disclosed he had been a victim of modern day slavery. The victim told police he was terrified and he was very upset because he had to drop out of school to do the drug dealing and he was really upset that he was letting the teachers down as he loved school.

I also went to CPS to see if we could withdraw the case of the initial PWITS as it was clear the victim was indeed a victim and had a clear defence for the drug dealing. The victim had been exploited and endured beatings … the victim should have never been charged so should definitely not get sentenced, reduced or not. Interestingly, the allocated lawyer agreed with me. It seemed to me that knowledge around the s.45 defence was limited.

Thankfully, the Youth Offending Service was on board and in partnership with them we submitted an NRM referral which was successful in identifying the victim as a trafficked child in terms of modern day slavery.

I made contact with CPS stating that the Modern Slavery defence was clearly available to the victim but they still didn't withdraw the case

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After 3 months from the initial charge and the initial conversation with CPS to withdraw the case, the case was finally withdrawn from Youth Court with the victim being recognised as a victim under the Modern Slavery Act.

A modern slavery investigation commenced … however the victim felt he wanted to move on with his new life and not support a police prosecution.

IASC/066/20

In November 2018, a 15 year old was taken into police protection and handed drugs over to police; he was arrested and gave an account in interview of being held to a drugs debt, including the names of his exploiters and locations.

CPS authorised him to be charged and remanded to court for drugs offences. The district judge remanded the young person as the Youth Offending Team could not find any suitable accommodation, whilst an NRM was submitted and another force was given the modern slavery crime to investigate. This force confirmed the vulnerability of the individual from intelligence and previous incidents of being beaten by [a] gang. He remained on remand until

7th January 2019 and CPS discontinued in February 2019. He still awaits a Conclusive Grounds decision.

IASC/046/20

3.7.6 The Crown Prosecution Service included this issue within their evidence, presenting the limitations upon their responsibility and submitting that the onus is upon the victim to raise the statutory defence:

> *"The issue of non-prosecution or availability of a defence remains entirely reliant upon the identification of the suspect as a trafficked victim. The introduction of the statutory defence has not changed this basic requirement. The identification of a suspect who might be a trafficked victim remains a challenge particularly where, regardless of the circumstances in which they are found, victims through fear or poor advice choose not to reveal details of their situation and plead guilty to an offence. Offenders who choose not to identify themselves as victims and who decide not to avail themselves of the s.45 defence will be subject to prosecution provided that the two stage test in the Code for Crown Prosecutors is passed*."

3.7.7 There is undoubtedly a tension between the desire for the state to protect victims of trafficking from criminalisation and the practical operation of the statutory defence. Suspects are often in such a fear of violence and intimidation that they do not instruct the defence to raise their trafficking and they are not providing enough, or any, information to point to it.

3.7.8 In some of these cases, such as cannabis cultivation, indicators are present to trigger a trafficking investigation without any disclosures from the defendant. Police interviews provide a good opportunity to gather evidence of trafficking, however, many are 'no comment' interviews. For the CPS to obtain evidence that the person is a victim of trafficking and evidence of a nexus between the exploitation and the crime, this more often than not must come from the police interview, representations by the defence or a defence case statement.

3.7.9 If the suspect and the defence are completely silent and no evidence exists of a nexus, this is challenging for the CPS. The statutory defence remains for those representing the suspect to raise. The CPS cannot do so on their behalf. They must however disclose any relevant material to the defence which would aide them. Equally, if the client is not giving an instruction to do so, the defence lawyer cannot put forward the defence either. This is why it is important for the CPS prosecutor to ask the police to conduct further lines of investigation if they consider that the suspect could potentially be a victim of trafficking.

3.7.10 This leads me to the conclusion that there are and will continue to be cases where victims of trafficking who ought to avail themselves of the statutory defence are not doing so and are being criminalised.

3.7.11 I have considered where the evidence points to improvements which could be made. I am convinced there are not enough probing questions from professionals on all sides. This point has already been made in relation to the initial police investigation. Many officers dealing with 'possession with intent to supply' cases are not detectives, nor specialists in modern slavery and therefore thorough questions which might reveal trafficking are not consistently being asked.

3.7.12 Defence lawyers must be more proactive and probing. It is important for investigators and defence lawyers to be asking the right questions to uncover the signs of trafficking. The

evidence suggests many legal representatives and defence lawyers are still not familiar with the statutory defence.

3.7.13 Good practice exists in Northumbria Police where officers dealing with offences where the statutory defence may apply include an explanation of the defence during disclosure with the legal representative before interview and this is documented. A document is provided outlining the defence and reminding them and their client that in order for the defence to have maximum validity, it should be raised at the earliest opportunity, the substantive offence for which the person has been arrested accepted and the police given sufficient opportunity to investigate the statutory defence properly. An adverse inference could then be drawn, based on a lack of co-operation if a refusal through silence or otherwise, is put forward. This assists in last minute defence statements and also allows time to properly assess the statutory defence as part of the initial, pre-charge investigation.

RECOMMENDATION: The police, together with other criminal justice partners, should consider adopting Northumbria Police good practice of a national disclosure document to prompt consideration of the statutory defence.

3. Inadequate child protection intervention following National Referral Mechanism referrals triggered by the statutory defence

3.8.1 In the context of children, the statutory defence was introduced to provide protection from prosecution for those who have committed offences as a direct consequence of their being a victim of modern slavery and that a reasonable person in the same situation, or similar characteristics would have done the same. Though important, protection from prosecution is not enough and should not be considered a safeguarding strategy. To prevent further exploitation, there needs to be substantive child protection activity. The call for evidence was intended to examine the use of the statutory defence and its impact on the criminal justice system. However, a number of the case examples highlighted disconnect between the statutory defence, the NRM and local child protection responses and demonstrated current failures within the system to effectively safeguard victims of CCE.

3.8.2 Where there are concerns about a child at risk of exploitation these should be referred to the relevant local authority Children's Social Care. In England and Wales, Section 17 of the Children Act 1989 [33] places a general duty on local authorities to safeguard and promote the welfare of 'children in need' in their area. On receipt of a referral, a social worker should lead a multi-agency assessment to gather information about a child. Where information gathered during this assessment indicates that a 'child is suffering or is likely to suffer significant harm', the local authority should convene a multi-agency strategy discussion under Section 47 of the Children Act.[34] This should include the local authority, police, health and any other involved agency, and should be used to share information, decide whether to initiate a full Section 47 enquiry and determine how this should be undertaken.

3.8.3 These multi-agency assessments and strategy discussions should take place at the earliest stage where potential child exploitation is identified and should inform the process of making a referral into the NRM. In cases where the assessments are not already in progress, they should be triggered by an NRM referral.

[33] Children Act 1989.
[34] HMG (2018), 'Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children'.

RECOMMENDATION: Every child within the NRM should be referred to the relevant local authority Children's Social Care who should convene a Strategy Discussion under Section 47 of the Children Act 1989.

3.8.4 Whilst there are legislative frameworks in place[35] and the most recent iteration of statutory guidance[36] confirms that Section 47 enquiries should be initiated where there are concerns about 'all forms of abuse and neglect' and 'extra familial threats including radicalisation and sexual or criminal exploitation', I understand that there are challenges in applying these frameworks in practice to extra-familial harm. The child protection system in England is largely framed around abuse from within the home and I am aware that in some areas, children are only placed on child protection plans where there are concerns about parenting in addition to extra-familial harm and in others, professionals predominantly use Child in Need plans where there are no concerns regarding parenting.[37] Consequently, the options for escalation where parents are not the source of harm can be limited and interventions will be voluntary.

3.8.5 Those on a Child in Need plan will be visited every six weeks and the support that they receive around this on a voluntary basis will vary. However, it does not match the 25 hours a week of statutory intervention that results from some youth criminal justice outcomes. There is a wealth of evidence that demonstrates the profound negative impact of criminalisation on a child, however practitioners must be able to offer alternative safeguarding interventions that are effective.

3.8.6 In order to suitably equip practitioners and address the current gaps in safeguarding responses to extra-familial harm, further detail must be provided within statutory guidance.[38] In the absence of clear practice guidance, responses to extra-familial harm will continue to be inconsistent. This lack of guidance was also raised as a concern in the recent Child Safeguarding Practice Review Panel[39] on child criminal exploitation which found that:

> *'Even when local areas and practitioners know the children at risk of being drawn into criminal exploitation, many are not confident about what they can do to help them.'*

3.8.7 The review identified that there are currently a number of different approaches to respond to CCE being taken across the country, but there is little reliable evidence of what works and no central point where evidence is evaluated and disseminated. It therefore recommended a review of statutory guidance[40] to reflect the specific circumstances of this group of children who are at risk of criminal exploitation.

RECOMMENDATION: The Department for Education should review and update 'Working Together to safeguard Children' as recommended by the Child Safeguarding Practice Panel Review.

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[35] Section 47 of the Children Act 1989.
[36] HMG (2018), 'Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children'.
[37] Carlene Firmin and Jenny Lloyd (2020) 'Contextual Safeguarding: A 2020 update on the operational, strategic and conceptual framework'.
[38] HMG (2018), 'Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children'.
[39] The Child Safeguarding Review Panel (2020), 'It was hard to escape: Safeguarding children at risk from criminal exploitation'.
[40] HMG (2018), 'Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children'.

3.8.8 Within the case examples submitted to the call for evidence, there was evidence of misunderstanding of the role of the NRM and a lack of awareness among frontline professionals about what it means for children. Whilst the NRM acts as a framework to identify and support adult victims of modern slavery, for children, whilst Section 48 of the Modern Slavery Act does make provision for Independent Child Trafficking Guardians (ICTGs), the duty to safeguard those referred into the NRM remains with the local authority and other local safeguarding partners. It is evident that this is not well understood across all agencies and there are misconceptions about the support that is provided for children through the NRM process. This is demonstrated by the case study from the police below.

I have spoken with the social workers who submitted these referrals and some believed that the NRM process would offer more support and funding for children already involved with local children's services.

IASC/076/20

RECOMMENDATION: The Home Secretary should write to all local authorities to ensure that they understand what the NRM means in the context of children.

3.8.9 If statutory agencies are getting their response to CCE right, we should not be seeing repeat referrals being made into the NRM, yet the call for evidence has demonstrated multiple examples where this is happening. Since starting my role as Independent Anti-Slavery Commissioner, I have repeatedly reinforced to the Home Office that there is a need for cases of re-trafficking to be recorded and monitored. Disappointingly despite the recent shift to a new digital referral and case management system this is still not in place. I understand that where an NRM referral is made for someone already in the system that the referrals may be merged, but this does not address the wider systemic issues of re-trafficking and the lack of an adequate child protection response.

3.8.10 The following examples illustrate cases where young people have been referred into the NRM on multiple separate occasions.

"B" was arrested/located four times within the force area between August 2019 and September 2019 and finally charged and remanded for drug related offences. He was bailed by the courts to secure accommodation, however whilst en route assaulted a security officer and escaped from a motor vehicle, only to be located a week later in London. "B" has had several NRMs submitted across the UK.

CPS decided to NFA (no further action) him for the drug offences based on previous NRMs.

IASC/103/20

In December 2018 the police arrested a young male and he was charged some months later with supply and possession of a knife. He had also been arrested in October 2018 by another force for similar offences and was still under investigation for those when arrested. In his interview he chose to offer no comment to any of the questions and he was offered every opportunity to provide an account as well as a trafficking defence which he chose not to do. His mobile phone was examined and there was no evidence suggesting any connections to trafficking. In their request/advice for a charging decision the police reported to CPS concerns that the defendant had been reported missing on several occasions and been involved in serious cases which may have been county lines. However, CPS still authorised that he should be charged with four offences. The lawyer stated:

> *"I am (reluctantly) authorising charges in this case, I say reluctantly because there are four previous referrals relating to him being trafficked/county lines. However, at this stage, he has not raised this defence and we cannot make any presumptions at this time… It is in the public interest to prosecute for the reasons detailed below. Public interest factors in favour of prosecution outweigh those against. Para 4.12 a-g of the Code are:*
>
> *a) Seriousness of offence*
>
> *e) Impact on the community"*

At court in May the defendant said that he now wished to tell the police everything and he would have pleaded not guilty and his counsel argued duress. However, we did not get as far as taking a plea and the judge allowed an adjournment.

In September the [SCA] determined a positive Reasonable Grounds decision that the defendant had been trafficked. This raises the first concern as the SCA base this finding solely on the details of the NRM form, which in these circumstances was not raised by the police, and the SCA are not obliged to engage with the defendant. Despite the provision of all relevant documents to the SCA, they returned a positive decision despite there being no evidence to support this, other than the claims made by the defendant … in this case and from the correspondence from the prosecutor, it would appear that they have taken the Competent Authority's finding as evidence when he states that:

> *"My reason for discontinuance is a prosecution is not needed in the public interest. This is following the positive NRM referral that has been received that has stated that this young man is a victim of modern slavery/human trafficking."*

Just because the Competent Authority has expressed a positive NRM referral does not preclude prosecution as can be seen from the judgements above, and this should rightly go before a jury. This affirms my concerns and those of many law enforcement agencies that the positive Reasonable Grounds decision is based on a very low threshold and CPS are then using this to discontinue drug trafficking cases based solely on the claims made by the defendant, despite the plethora of case law which indicates that such cases should go before a jury. I opine there is a real danger that this important defence is being misused/abused by unscrupulous suspects and legal representatives, which may dilute police and CPS sympathy to genuine victims of modern slavery and exploitation, and that the onus of proof should be far higher, and conceivably placed upon the defence to prove.

IASC/063/20

RECOMMENDATION: The SCA should improve the recording and monitoring of repeat referrals to the NRM to better understand the scale of re-trafficking.

3.8.11 Further, I am still unclear about what the expectation is on practitioners who are involved in the case of someone who has already been referred into the NRM but has been subject to further exploitation. If the circumstances surrounding the exploitation are clearly very different then a separate referral seems to be an obvious approach, but if it is a child who has been criminally exploited and has been identified a month later in different circumstances that indicate exploitation by another perpetrator there is a need for clarity on whether a separate NRM referral should be submitted, or if this further detail should be submitted to the SCA to inform the original referral.

RECOMMENDATION: The SCA should provide clear guidance to First Responders about the circumstances in which a separate NRM referral should be submitted.

3.8.12 Given the cross-border nature of CCE, communication and information sharing between local safeguarding partners also needs to take place across borders although I am not convinced that this always happens in practice. I am aware that there are cases where children are placed out of area with very limited information shared with the host local authority to enable them to effectively safeguard the child and when missing children are found out of area, all relevant information is not always shared between agencies.[41] Initiatives such as the Rescue and Response Programme[42] for young people from London who are at risk of county lines exploitation and are identified out of area and the establishment of the National County Lines Co-ordination Centre to encourage a more co-ordinated national response are positive steps to improve cross-border communication. Further work is needed however to ensure that this approach is embedded in practice at a national level.

3.8.13 I am aware that there are many examples of good practice across the UK to safeguard children who have been criminally exploited and referred into the NRM. In Wales, the All Wales Safeguarding Procedures contain a practice guide 'Safeguarding children from Child Criminal Exploitation'[43] which have been developed to encourage a consistent response to CCE. In addition, multiple areas have developed exploitation screening tools to gather the information needed to assess the risk to an exploited child at the earliest stage. I have been pleased to see the multi-agency forums such as Multi-Agency Child Exploitation meetings or in the context of the West Midlands, the Panel for the Protection of Trafficked Children established to discuss cases, encourage intelligence sharing between agencies on emerging risks and linked cases as well as to provide strategic oversight. I am encouraged by the work of the Tackling Exploitation Programme[44] in providing support to areas in improving their strategic responses to extra-familial harm and I hope that the development of the online portal as part of this work will make a positive contribution to embedding learning and good practice.

3.8.14 Section 48 of the Modern Slavery Act makes a provision for ICTGs. Disappointingly, the service is yet to be rolled out nationally however I understand that the Home Office is now looking to implement the next phase of national rollout to target the areas of highest need. The ICTG service currently covers one third of all local authority areas across six early adopter sites with a two-tier system of support. This includes direct workers, who provide direct support to

[41] Waltham Forest Safeguarding Children Board (2020), 'Serious Case Review: Child C'.
[42] Mayor's Office for Policing and Crime (2019), 'Rescue and Response County Lines Project: Supporting young Londoners affected by county lines exploitation'.
[43] Welsh Government (2019) 'All Wales Safeguarding Procedures: Practice guide on safeguarding children from Child Criminal Exploitation'.
[44] The Children's Society (2020), 'Supporting local areas to develop and embed a strategic response to child exploitation'.

trafficked children who are unaccompanied in the UK, and Regional Practice Co-ordinators (RPCs) who provide more strategic level support in cases involving children who have been trafficked but have a figure of parental responsibility in the UK. The recent evaluation of the RPC role highlights the work of RPCs to raise awareness of the NRM and the statutory defence among practitioners at a local level and also their role in encouraging multi-agency responses to trafficked children. Whilst their role in increasing awareness is positive, I am concerned about a reliance on RPCs to upskill statutory agencies given that they are a limited resource.

3.8.15 It is vital that any strategies to respond to CCE incorporate a whole-system approach including early intervention, prevention, community awareness and disruption activity to tackle perpetrators and dismantle criminal networks. I welcome the development of a contextual safeguarding[45] approach in recognising the need for Children's Social Care practitioners, child protection systems and wider safeguarding partnerships to develop partnerships and engage with individuals and sectors who have influence over/within extra-familial contexts, and that the assessment of, and intervention with, these spaces are a critical part of child protection interventions.

3.8.16 The following case study provided by a local authority Children's Social Care department provides an example of a case where a contextual safeguarding approach was used effectively to work with a child and family affected by CCE.

The case relates to a 15 year old male arrested for PWITS of class A and class B.

In using a contextual safeguarding approach, on receipt of the MASH screening tool the social worker was able to think about the assessment triangle in a different manner and look at the push and pull factors for the young person. This analysis identified three significant areas of risk for the young person: the community where he visited regularly and 'hung out' (not where he lived), his peers and association with older males, as well as his home life which involved substance misuse and domestic abuse. This identified that not only was the 15 year old being exploited, but also his mother therefore the social worker was able to pull together adults and children's services as part of the response. The social worker used the Signs of Safety model when screening in MASH to identify his likes and interests and found that he did some work with his uncle in a garage.

This approach has ensured that the Child in Need plan developed is achievable, measurable and is focused on the young person, but that it also encourages information sharing with relevant agencies for a more strategic approach to tackling exploitation.

IASC/224/20

3.8.17 The Home Office is currently considering piloting devolved NRM decision making. I believe that this could make a positive contribution to ensuring a more joined up approach between the NRM and local safeguarding responses. It is recognised that in relation to child trafficking there are statutory duties for safeguarding partners under the Children Act 1989, 2004 and the Children and Social Work Act 2017, as well as obligations under Article 10 of ECAT to determine whether someone meets the definition of trafficking. How these two systems interact

[45] Carlene Firmin (2017), 'Contextual Safeguarding: An overview of the operational, strategic and conceptual framework'.

in practice at a local level will require further exploration, but it is essential that any devolved NRM decision making model for children is intrinsically linked to local safeguarding structures to address the disconnect between decision making and safeguarding that currently exists.[46]

3.8.18 I strongly support the calls to strengthen policy and practice guidance in relation to extra-familiar harm and encourage the efforts to embed contextual safeguarding approaches into local safeguarding activity to continue. However, it is also clear that there is also a need for a wider cultural shift. Whilst the recognition that victims of Child Sexual Exploitation (CSE) require a child protection response is now largely embedded in practice, the same cannot be said for CCE where there are still complex nuances between who is considered a victim and who is a perpetrator. In 2018, the Joint Targeted Area Inspections on child exploitation stated that agencies need to 'apply the lessons they have learned from the response to child sexual exploitation'.[47] Despite some progress, there is still work to be done.

[46] Independent Anti-Slavery Commissioner and ECPAT UK (2020), 'A review of what works in multi-agency decision making and the implications for child victims of trafficking'.

[47] Ofsted, Care Quality Commission, HM Inspectorate of Probation, HM Inspectorate of Constabulary and Fire & Rescue Services and HM Inspectorate of Constabulary (2020), Protecting children from criminal exploitation, human trafficking and modern slavery: an addendum.

APPENDIX: LIST OF CASE STUDIES