**RESPONSE FROM THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO THE SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, CONCERNING A CALL FOR INPUT ON THE TOPIC OF THE IMPLEMENTATION OF THE NON-PUNISHMENT PRINCIPLE IN THE CONTEXT OF TRAFFICKING IN PERSONS**

**Information on laws and policies on the non-punishment principle (NPP)**

Note: Under Acts of the UK Parliament, legislative and executive powers have been conferred on devolved institutions in Scotland, Wales and Northern Ireland. While the UK Government is responsible for international relations and concluding international agreements, the devolved institutions have competence for observing and implementing international obligations that relate to devolved matters.

**England and Wales**

There are three ways in which the non-punishment provision (NPP) can apply for someone identified as a victim of trafficking:

* Common law defence of duress: in circumstances where there is evidence of threats of death or grievous bodily harm which was of such gravity as to cause a reasonable person to act in the same way as the defendant has acted.
* Section 45 of the Modern Slavery Act 2015 (MSA 2015): created a statutory defence for victims who commit certain offences when they are compelled to do so and the compulsion is attributable to slavery or to relevant exploitation (in the case of adults) or when they commit them as a direct consequence of being a victim of slavery/exploitation (in the case of children). Both adults and children are subject to the ‘reasonable person test’; that is “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”.
* An adult may be considered as being compelled to do something by another person or by the person's circumstances through all the means of trafficking defined by the United Nations Protocol on Trafficking 2000 supplemented by the Protocol. The prosecutor would take into account the seriousness of the offence committed; the more serious the offence (grave crime) the greater the dominant force needed to extinguish the criminality[[1]](#footnote-1).

The statutory defence does not apply to the most serious crimes, such as sexual offences or offences involving serious violence or terrorism. Schedule 4 of the MSA 2015 lists the excluded offences. However, it is possible for non-punishment to apply to these offences under the CPS policy on non-prosecution *(below)*.

The Crown Prosecution Service (CPS) policy on suspects and defendants who may be victims of human trafficking / modern slavery (HT/MS): where there is no clear evidence of duress and no clear evidence of a section 45 defence or the offence committed is an excluded offence where section 45 does not apply, prosecutors should go on to consider the public interest in prosecuting (i.e. prosecutorial discretion). Prosecutors should consider all the circumstances of the case, including the seriousness of the offence and any direct or indirect compulsion, and apply prosecutorial discretion in whether it remains in the public interest to prosecute.

At which stage of the investigation / prosecution can the NPP be applied?

The statutory defence can be considered before charging a suspect – where the police have sufficient evidence that a suspect is a victim of HT/MS, they can decide not to refer the case to the CPS. In cases referred to the CPS for charging, where there is evidence that the suspect may be a victim of HT/MS and the other elements of the defence are evidenced, the CPS can decide not to charge. Prosecutors must keep each case under review and take account of any new information or evidence that comes to light; therefore, where the defence is raised at a later stage of criminal proceedings, it must still be considered.

The National Referral Mechanism (NRM)

The NRM is the process by which the UK identifies and supports potential victims of modern slavery by connecting them with appropriate support, which may be delivered through the specialist Modern Slavery Victim Care Contract (MSVCC), local authorities and asylum services. Adults identified in the NRM can receive accommodation, financial support, assistance in accessing mental and physical health care including counselling, and access to legal support.  The Government recognises the particular vulnerabilities of child victims of modern slavery, including trafficking. This vulnerable group of children is entitled to support and assistance, and require tailored support which addresses their specific needs and vulnerabilities. Our ambitious NRM Transformation programme will seek to deliver a series of changes to ensure victims have their cases settled promptly and receive support tailored to their recovery needs from the outset.

Vulnerable individuals are only ever detained in circumstances where the immigration factors outweigh the risk of harm to the individual. Any person encountered whose experiences may indicate that they may be a victim of modern slavery will be considered for referral to the NRM. Individuals who are recognised as a potential victim of modern slavery through the NRM get access to tailored support for a recovery period of at least 45 days while their case is considered and may access further support if they receive a positive conclusive grounds decision. While an individual is in the recovery period, they are protected from removal from the UK, unless grounds of public order apply. Decisions on detention, returns, and whether an individual is a victim of modern slavery are made on an individual basis. Published guidance which applies to Home Office staff working in the detention system provides information on how to identity potential victims of trafficking and slavery. The guidance makes clear that if a first responder thinks a person is a potential victim of trafficking or slavery, they must consider a referral into the NRM so a trained specialist can investigate further.

Gender dimensions of implementation of the non-punishment principle

The UK is cognisant of the reality that women and girls are disproportionately affected by MSHT. In England, the Crown Prosecution Service (CPS) Violence Against Women & Girls (VAWG) Strategy[[2]](#footnote-2) groups together offences that are committed primarily, but not exclusively, by men against women, with female victims being disproportionally represented. This includes Trafficking in Human Beings. The strategy provides a framework outlining the approach taken to these crimes in line with our Public Sector Equality Duty, international treaties and conventions and the Government’s strategy. Common themes of VAWG include exploitation, coercion, control, and abuse. However, it is recognised that these offences can be targeted at all victims, regardless of gender.

**Northern Ireland**

The non-punishment provision that can apply for someone identified as a victim of trafficking is as follows:

* Common law defence of duress: in circumstances where there is evidence of threats of death or grievous bodily harm which was of such gravity as to cause a reasonable person to act in the same way as the defendant has acted.
* Section 22 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015created a statutory defence for victims who commit certain offences when they are compelled to do so and the compulsion is attributable to slavery or to relevant exploitation (in the case of adults) or when they commit them as a direct consequence of being a victim of slavery/exploitation (in the case of children). Both adults and children are subject to the ‘reasonable person test’; that is “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”.

The statutory defence does not apply to the most serious crimes, such as sexual offences or offences involving serious violence or terrorism. Section 22(9) lists the excluded offences.

The Public Prosecution Service (PPS) draft policy[[3]](#footnote-3) on Prosecuting Cases of Modern Slavery and Human Trafficking contains a whole chapter on this issue. A three-stage approach is taken in respect of the decision to prosecute:

* Is there a reason to believe that the person has been trafficked?;
* If so, if there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds;
* However, even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.

Prosecutors must keep each case under review and take account of any new information or evidence that comes to light; therefore, where the defence is raised at a later stage of criminal proceedings, it must still be considered.

**Scotland**

Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015:

In Scotland, there is not a specific statutory defence akin to that which exists in other countries, e.g. section 45 of the Modern Slavery Act 2015 in England and Wales. Instead, section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015 placed an obligation on the Lord Advocate, the head of the system of prosecution of crime in Scotland, to issue instructions to prosecutors including the factors to be taken into account or steps to be taken by prosecutors when deciding whether to prosecute a person alleged to have committed a criminal offence but who appears to be a victim of trafficking or exploitation.

[The Lord Advocate’s instructions](https://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf) are published on the Crown Office and Procurator Fiscal Service (COPFS) website and include a test to be applied to adults aged 18 and older and a distinct test to be applied to children aged 17 and younger:

“If there is sufficient evidence that a person aged 18 or over has committed an offence and there is credible and reliable information to support the fact that the person; (a) is a victim of human trafficking or exploitation (b) has been compelled to carry out the offence and (c) the compulsion is directly attributable to being the victim of human trafficking or exploitation, then there is a strong presumption against prosecution of that person for that offence.”

“If there is sufficient evidence that a child aged 17 or under has committed an offence and there is credible and reliable information to support the fact that the child; (a) is a victim of human trafficking or exploitation and (b) the offending took place in the course of or as a consequence of being the victim of human trafficking or exploitation, then there is a strong presumption against prosecution of that child for that offence.”

The Lord Advocate’s Instructions are applied regardless of the criminal offence which the accused person is alleged to have committed, and can be applied at any time during the prosecution process or even after a conviction has been recorded. Information from any source can be taken into account in determining whether the test is satisfied.

All cases in which the Lord Advocate’s Instructions are engaged must be reported to the National Lead Prosecutor for Human Trafficking & Exploitation who is responsible for making final decisions on whether the relevant test is satisfied and thus whether the person should or should not be prosecuted. This process ensures expertise and consistency in decision-making.

An accused person may challenge a decision to prosecute him or her by lodging a plea in bar of trial on the grounds of oppression and the Court will assess the merits of his or her plea.

* Common law defence of Coercion: in *Quyen van Phan v HM Advocate [2018] HCJAC 7* the Appeal Court confirmed that the common law defence of Coercion may be available to a victim of human trafficking in certain circumstances. While it is normally the case that there requires to be an immediate danger of violence, the Court said that if an accused person, who is being required to tend a Cannabis farm, is confined to the place where the Cannabis is being grown, and he believes that if he does not do so then he will be seriously injured on arrival of those controlling the operation, then the defence may well be made out.
* Mitigation and discretion of the sentencing Judge: an accused person may plead guilty or be found guilty but in mitigation may set out his or her position that he or she is a victim of human trafficking or exploitation. The sentencing Judge has wide discretion to reduce what would have otherwise been the appropriate sentence, including the option to impose an Absolute Discharge in terms of section 246 of the Criminal Procedure (Scotland) Act 1995, which in effect means that there is no conviction save for specific limited purposes.

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1. (R v [VSJ Ors [2017] EWCA Crim 36](https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad832f200000166c52dc4987453ce41&docguid=I929BED40EF8511E6999FABFF970AC93B&hitguid=I929BED40EF8511E6999FABFF970AC93B&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=5&resolvein=true)). [↑](#footnote-ref-1)
2. <https://www.cps.gov.uk/sites/default/files/documents/publications/VAWG-Strategy-2017-2020-R01.pdf> [↑](#footnote-ref-2)
3. Updated policy (Public Prosecution Service Northern Ireland Policy for Prosecuting Cases of Modern Slavery and Human Trafficking) launching for public consultation on 28th January 2021. [↑](#footnote-ref-3)