

Evidence Review of Section 45 of the Modern Slavery Act: Background and Context

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Policy Objective

Section 45 (S45) of the Modern Slavery Act (MSA) offers a defence for those who are faced with criminal liability for a criminal act that they committed because of their modern slavery or human trafficking experience. It was developed to comply with the non-punishment principle of The Council of Europe Convention on Action Against Trafficking in Human Beings (2005) which purports that prosecutors must exercise discretion in deciding whether or not to pursue a criminal prosecution for offences committed as a result of a trafficking situation. The statutory defence was designed to reassure victims of modern slavery that they could give evidence without fear of being convicted for offences they had committed as part of their exploitation.

How This Provision Works in Practice

If the person is aged 18 or over, then they may use the defence if:

- They were *compelled* to commit the criminal act
- That compulsion is attributable to their exploitative situation; and
- A reasonable person in the same situation with relevant characteristics *would have no realistic alternative to committing the act*.

If the person is under 18 when they commit the act, they may use the defence if:

- The criminal act was a *direct consequence* of their exploitation
- A reasonable person in the same situation with relevant characteristics *would have also committed the act*.

The emphasis is added above in order to demonstrate the difference between adults and minors in the implementation of the defence: for adults there is a narrower remit for its use than for a child (under 18 years old) due to the general acceptance that children are inherently vulnerable.

It is important to note that S45 of the MSA is not a generic defence for anyone who has been a victim of modern slavery or human trafficking. Not only are the offences listed in Schedule 4 not subject to the defence ([discussed further below](#)), but for the defence to be used, it must be proven that there is a link between the defendant's experience of exploitation and the offence they committed. A more in-depth discussion relating to the relationship between the exploitation and the criminal act is discussed [below](#).

Where Does the Data on Section 45 Come From?

S45 is an area of law, policy and practice which continues to evolve over time in response to case law. There is very limited academic research into the use of S45, and no quantitative data on its use is collected, which makes it extremely difficult to assess how it is working in practice. The majority of evidence on the use of S45 comes from three specific reviews: two government-

commissioned reviews into the MSA in general, and another separate review undertaken by the office of the UK's Independent Anti-Slavery Commissioner (IASC) looking specifically at S45 of the MSA, which was published in 2020. More details on how these reviews were conducted and what they found are included [below](#).

This evidence review summarises some of the key pieces of case law relating to S45, provides an overview of the three reports mentioned above, and reviews the small amount of relevant academic literature on the topic.

Major Developments in Case Law

While S45 of the MSA is not a complex area of law, understandings of its application, particularly around acceptable evidence and what constitutes expertise, are still being contested and adapted. The following section summarises some of the major developments in the legal application of S45 since its introduction with the MSA in 2015. While this information is accurate at the time of writing, it must be noted that, as with any case law, it is likely that aspects around the application of the defence will continue to develop and change.

The Burden of Proof

The burden of proof is the requirement on a party within a dispute to sufficiently justify their position. In a court of law, the standard position for the burden of proof is that it lies with the prosecution, i.e. should the prosecution look to charge a defendant, the prosecution must prove the guilt of that defendant. However, the MSA does not state where the burden of proof lies in relation to S45. The Crown Prosecution Service (CPS) originally stated that the burden of proof was on the defendant; that is that the defendant must evidence that they were a victim of slavery or trafficking, and that to counter this, the prosecution must disprove that claim beyond reasonable doubt. If the prosecution failed to do this, then the burden of proof fell back to the defendant to prove not only that they were a victim, but that they were compelled to commit the offence because of their slavery or trafficking experience (or for a child that it was a direct consequence). This goes against the standard formulation for the burden of proof, which in any other criminal offence would lie with the prosecution rather than the defendant, and was challenged in the cases of *MK v R* and *Gega v R* (see Appendix 1).

In March 2018, the Court of Appeal found that in *MK's* case, the trial judge's interpretation of S45, which was the same as that suggested by the CPS above, was incorrect. It agreed that the burden on a defendant is evidential (i.e. that the defendant must provide *evidence* rather than *proof* of their claims that they were a victim of human trafficking or modern slavery and that they were compelled to commit the crime – or for children, that the crime was a direct result of their exploitation), but that it applied in a different way to that concluded by the trial judges. The Court of Appeal put forth that instead of the system advocated by the trial judges, in the use of S45, the defendant must *raise evidence* of each of the elements of the defence (i.e. that they were a victim of modern slavery or human trafficking, that they were compelled to commit the crime, and that the crime was a result of the slavery experience), and then the prosecution must disprove these claims. This meant that, unlike the trial judges' advocacy, the defendant is not required to *prove* their defence, but simply to provide an evidential basis for using the defence. This then shifts the burden of proof back to the prosecution, therefore being reflective of any other offence (where the prosecution must establish guilt beyond reasonable doubt).

Put simply, the outcome of these appeals ruled that S45 puts the *evidential* burden on the defendant and, if they are successful in doing this, that the burden of proof falls upon the prosecution to disprove the defence beyond reasonable doubt.

This formulation of the burden of proof serves to better recognise the experiences of victims of modern slavery by reducing the level of responsibility placed on them in proving their experiences and justifying the actions they took as a result of exploitation. This decision to change where the burden of proof lies brings the application of S45 in line with the standard legal position.

Determining Victimhood

Similar to the confusion over where the burden of proof should lie, the MSA provided no clear guidelines as to where the responsibility lay for deciding whether a defendant is, or is not, a victim of modern slavery or human trafficking. Standard practice was that The Court (i.e. the judge and the jury) was responsible for making this decision. However, this was brought into question in *R v DS* (2020). In this case, DS was a 17-year-old who claimed to be a victim of modern slavery in the form of county lines, and he feared violence. His evidence of being a victim of modern slavery was a National Referral Mechanism (NRM) positive conclusive grounds decision which indicated that the Single Competent Authority believed DS to be a victim of modern slavery (for more detail, see Appendix 2).

The defence then argued that the prosecution should not pursue a prosecution of DS, arguing abuse of process; the trial judge agreed and the trial was stopped and proceedings were stayed. The CPS appealed, noting that the evidential bar to be designated a victim of modern slavery under the NRM was much lower than the criminal legal burden of proof. Further, even if there was conclusive proof of the defendant's victim status, this does not evidence the link between the exploitative situation and the criminal act, which must exist for S45 to be successful.

The outcome of the case was that the appeal was allowed on the basis that the prosecution did not amount to an abuse of process. The effect of this is that a defendant would have to give evidence of their victimisation and therefore their reasons for raising the defence.

If the jury does not accept that the defendant is a victim, then the defence fails; if they accept that the defendant is a victim but do not believe they committed the offence due to the modern slavery experience and having no realistic alternative, then the defence will also fail. Thus, the responsibility for deciding whether a defendant is a victim who has the benefit of the S45 defence should be entirely down to the jury. Evidence that a person is a victim should not prevent prosecution from proceeding, as this does not evidence that their criminal actions were compelled by, or a direct consequence of, their exploitation. In lay terms, this means that while an NRM decision may indicate that a defendant is a victim, it is the jury's responsibility to decide whether a) they agree with that decision and b) that the defendant had no realistic alternative to committing the offence due to their circumstances as a victim of modern slavery.

At the point of *R v DS*, NRM conclusive grounds decisions could be used in S45 cases as evidence that the defendant is a victim of modern slavery or human trafficking. Later in 2020, the applicability of these NRM decisions was considered – an issue that had not been considered by the Court of Appeal or High Court before. *DPP v M* (2020), a case of child criminal exploitation, led to a ruling on the admissibility of NRM conclusive grounds decisions and expert evidence in relation to the S45 defence.

In a court case, the findings of the NRM decision makers are recorded and provided to the defence as a 'decision minute'. If a positive conclusive grounds decision is received, then the CPS will refer to their own policies to determine whether to continue with the proceedings (as defined in *R v DS*, having a positive conclusive grounds decision to indicate that a defendant was a victim of modern slavery does not automatically mean that any criminal offences are defensible under S45, either if the criminal act was not a direct consequence of the slavery or trafficking situation, or if the offence is one of those listed in Schedule 4). The case of *DPP v M* was brought to the High Court to consider two aspects:

- Whether the decision minute of the NRM is admissible in criminal proceedings
- What evidential weight that decision has

In this case, the prosecution argued that the decision minute (i.e. the NRM decision) was simply a non-expert opinion and this drew attention to the fact that there was no clear guidance around admissibility of these NRM decisions. The determination from this case was that the NRM decision is admissible by way of Section 10 admission ('Section 10 provides for proof by formal admission in criminal trials...an admission under Section 10 is conclusive evidence.' CPS, 1967), but that the weight of this decision was a matter for the court to decide.

The High Court in this case concluded that the NRM decision, when combined with other independent evidence, was enough to meet the evidential burden on the part of the defendant. As such, it was on the prosecution to prove beyond reasonable doubt that the offences M committed were not a direct consequence of his exploitation. This case is of particular importance regarding the implementation of S45, as it paved the way for NRM decisions to be considered as meeting the evidential burden on the defendant to evidence that they were a victim of modern slavery or human trafficking and that this can be used alongside other independent information as evidence of the link between that exploitation and the criminal actions.

However, the outcomes of this case have since been questioned, and the recent R v Breani (2021) case challenged the outcomes developed in DPP v M, highlighting how queries regarding evidence in S45 cases continue to be raised (see Appendix 2). In R v Breani, the Court of Appeal held the following:

1. A competent authority case worker's finding of conclusive grounds, is not admissible in evidence in a criminal trial and;

2. A case worker cannot give expert evidence of their findings [of conclusive grounds] as they are not experts.

The case held that a positive conclusive grounds decision is not admissible in evidence at a criminal court, because the decision is made by individuals who are not experts, and decisions may be made on partial evidence (as appeared to be the case with Breani where the prosecution gathered evidence that the NRM decision makers had not accessed). This is reflective of the comments made by the CPS in R v DS regarding the conclusive grounds decision, that 'the evidential bar to be designated as a victim of modern slavery, often made before any evidence is heard or tested, was a low one and can be untested, self-serving, and based on hearsay evidence' (CPS, 2020).

This case highlights some of the flaws in the NRM decision making process, and it should be questioned as to why the evidence held by the CPS had not been found by the Competent Authority and considered during the decision-making process; if they had this evidence, perhaps the outcome of the NRM decision would have been different and its value considered more significant.

As a result of R v Breani, NRM decisions are still acceptable as a method of indicating that a person may have been a victim of modern slavery or human trafficking, but they are not deemed robust enough to be relied upon as *proof* of modern slavery or trafficking.

There is a potential benefit from this case for defendants wishing to raise the S45 defence. Currently the NRM is overburdened with referrals, meaning that decisions are taking an inordinate amount of time, with a recent report showing waits as long as 500 days (Independent Anti-Slavery Commissioner, 2022). If the S45 defence does not rely on a positive conclusive grounds decision from the NRM, then perhaps less reliance will be placed on the system, thus reducing the numbers of decisions that need to be made and thereby shortening the length of time that the decisions take to make. While this may lead to less insightful data because not all potential victims will be referred into the NRM (for example where previously individuals who didn't require support but wanted to raise the S45 defence were referred in), a reduced waiting time will lead to a quicker decision turnaround, allowing them to make the next steps in their recovery journey.

International Standards

It is imperative that police, lawyers and the judiciary have a good understanding of S45 in order to implement it effectively so that it can be used with its initial intention: not to prosecute those who committed crimes because of their slavery experience. The importance of properly applying S45 can be illustrated by a recent ruling by the European Court of Human Rights (ECtHR) in V.C.L. and A.N. v the United Kingdom (ECHR, 2021), where a conviction of two children believed to be victims of trafficking led to the determination that the UK had failed to protect these child trafficking victims

and, in so doing, had breached their human rights (see Appendix 3).

V.C.L. and A.N. v. the United Kingdom is a case from 2009, well before the MSA or S45 were established. The case relates to two applicants, both Vietnamese children, who were found by police to be working in cannabis factories and charged with drug-related offences. One of the defendants received an NRM decision which determined that he was a victim of trafficking and the ECtHR deemed that there was credible suspicion to indicate that the other defendant had also been trafficked. The CPS disagreed with this information and pursued the prosecutions. Both defendants pled guilty, were convicted, and later unsuccessfully appealed.

This is the first case where the ECtHR has considered the relationship between Article 4 of the European Convention on Human Rights (freedom from slavery and forced labour) and the prosecution of trafficking victims. The Court deemed that this case constituted a violation of both Article 4 and Article 6 (right to a fair trial) of the European Convention on Human Rights in relation to failure to investigate the applicants' status as potential trafficking victims affecting overall fairness of criminal proceedings. It stated that by prosecuting despite credible suspicion that the defendants were victims of trafficking, the domestic authorities failed to take operational measures in line with international standards to protect minors, and the UK government was ordered to pay €25,000 euros to each applicant in damages.

The UK responded to this case in early 2022 (Council of Europe, 2022) citing the significant legislative and policy changes brought by the MSA as key methods through which mistakes like those in the case of V.C.L and A.N. will be prevented from occurring in the future. Within this response, early identification of victims of modern slavery, thorough investigation, and having a clear reason to prosecute if a defendant is determined to be a victim of modern slavery are issues that are highlighted. If the S45 defence is implemented properly, then this would help to address all these calls.

As is highlighted by this case, and by the OSCE (Organization for Security and Co-operation in Europe), 'The criminalisation of trafficked victims may be tantamount to persecution of victims by the State' (OSCE, 2013: para 4); an issue which, when used correctly, and with the use of adequate investigation, S45 helps to overcome.

Use of Section 45 in Practice

As mentioned above there is little evidence collated regarding the use and success of S45 of the MSA, with no quantitative data gathered. Other than case law, the main sources of information around S45 can be found in the two independent reviews of the MSA, and one report on S45 by the Independent Anti-Slavery Commissioner's Office. The following section provides an overview of the relevant findings of these reports.

2016 Review of the Modern Slavery Act

Twelve months after the MSA was implemented, an independent review was undertaken by Caroline Haughey to evaluate whether the Act was succeeding in its objectives (Haughey, 2016). In 2016, Caroline Haughey (now QC) was approached by Theresa May, Home Secretary at the time, to conduct an independent review of the Act which May had taken a lead in developing.

Methodology

This 2016 review was a government-commissioned independent review led by Haughey, a barrister with experience of both prosecuting and defending in cases of modern slavery and human trafficking. It focussed on reviewing the data held in the NRM, reviewing material provided by various police forces to questions asked of them in writing, and undertaking consultations with a wide range of stakeholders.

The purpose of this review was to 'ensure that the Modern Slavery Act, even in its infancy, is fulfilling the intentions of the legislature.' (Haughey, 2016:32) The aim was to evaluate this by considering: the level of awareness of the criminal justice measures contained within the Act, how well the measures in the Act were being implemented, whether there were any gaps in the Act, and how any such gaps might be rectified.

The review focused on a specific set of provisions incorporated within the Act: most of the provisions in Part 1 (Offences), Part 2 (Prevention Orders) and Part 5 (Protection of Victims). While it did not set out to explicitly review S45, some reference is made regarding its use. This review acknowledged that the Act was in its infancy when the report was undertaken, but that operational agencies were beginning to use the powers that the Act made available.

To grasp the potential for future reviewers to build on and connect their results and findings with those of previous studies, it is important to understand the methodology employed. While recognising Haughey's expertise in this field, the process through which she was recruited is unclear; nor is it evident whether anyone else was approached to undertake this review. Helpfully, in terms of analysing the review, Haughey includes an annexed terms of reference and methodology to summarise how the review was conducted. The methodology incorporates a list of actions that were undertaken. While this is useful for offering an overview of where information was gathered from, there is not enough detail to allow for such a review to be accurately replicated. This makes it difficult to evaluate the quality of the evidence base used in the review. For more details on the methodology, please see Appendix 4.

This evidence review is primarily concerned with the use of the S45 defence. While that is covered to some extent in the 2016 review of the MSA, it is merely one of a number of aspects covered and therefore it cannot be expected to go into great detail about the use of the defence. Further, considering this review was undertaken only a year after the MSA was introduced, it is unlikely that there would be significant information or insights to be able to review the use of S45; conclusions would be based on a limited and time-restricted overview.

What is noticeable from this review is an absence of engagement with academia. In relation to S45 specifically, this is hardly surprising; a simple search of academic journals highlights a significant lack of academic writing on this topic at the time the review was conducted. This could reflect the length of time it takes from proposing an academic article to seeing it in press, but it could also be indicative of the lack of access academics have to criminal justice and law enforcement data. However, there would have been scope to consult independent experts on related areas, such as the use of duress as a defence. While emphasising a lack of empirical academic work on the specific topic of S45 at the time, this concern provides further justification for inviting Haughey to undertake this review. Not only does she have significant experience of practising using the MSA, she participated in drafting the Act, and would also have strong working relationships with relevant organisations and practitioners, and therefore access to data that is out of reach for many academics.

Findings

The 2016 review notes how, since the implementation of the Act, there has been growing awareness of modern slavery and human trafficking amongst practitioners and members of the public alike, but that there was a lack of consistency in how law enforcement and criminal justice agencies were dealing with it. The review identified four key issues:

- *Training for police officers, investigators and prosecutors is patchy and sometimes absent*
 - *Insufficient quality and quantity of intelligence about the nature and scale of modern slavery at national, regional and international level, which hampers the operational response*
 - *Lack of a structured approach in operational agencies to identifying, investigating, prosecuting and preventing slavery, including learning from what works and what does not*
 - *Some complainants not being afforded the vulnerable witness protections*

available to them during and after the Court process
(Haughey, 2016:3)

The MSA states that to use the S45 defence, the defendant must have been compelled to commit the offence because of their trafficking or slavery situation (for an adult), or that the offence committed must have been as a direct consequence of the trafficking or slavery situation (for a child). However, a point of contention raised in this review is that the MSA does not define 'direct consequence'. Without this clarity, the review highlights criticisms over the extent of the defence: some claim there should be restrictions on the defence. Others argue that it should be used as a blanket defence to any offence committed by a trafficked person, regardless of its proximity to their trafficking experience, as is the case in the Trinidad and Tobago Trafficking in Persons Act. The 2016 review recommends that 'consideration should be given to clarifying and/ or enhancing the term "direct consequence", and to clarifying the process by which s45 is raised and applied.' (Haughey, 2016:27-28) This indicates how at the time of this report there were still no conclusively agreed parameters to the use of the defence and confusion over how and when it should be used.

This low level of awareness of the S45 defence was emphasised again a year after this review by Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services:

Lack of awareness of the statutory section 45 defence means that officers attending incidents or crime scenes may not consider or gather sufficient evidence to help determine whether individuals are offenders or potentially victims forced to commit offences.

(HMICFRS, 2017:43)

As has been discussed above in relation to case law, six years on from this report, there is still much variation in understandings of S45, with ongoing contestation over how the legal process should work.

2019 Review of the Modern Slavery Act

Two years after Haughey's review in 2018, the Home Secretary, at the request of the Prime Minister, commissioned Frank Field MP, Maria Miller MP and Baroness Butler-Sloss to undertake another independent review of the MSA. The review was submitted to the Home Secretary in March 2019 (referred to as the 2019 review throughout this document) and laid in Parliament in May of the same year.

This review focused on four key aspects of the Act: the role of the Independent Anti-Slavery Commissioner, transparency in supply chains, Independent Child Trafficking Advocates and the legal application of the MSA. Under the section on the legal application, S45 was named as one of the areas that this review would focus on.

Methodology

The purpose of this review was 'to look into the operations and effectiveness of the Act and to suggest potential improvements' (Field et al., 2019:7). An Annex is also provided in the 2019 review, summarising the terms of reference and structure of the review, stating that 'The review will gather evidence and seek views from relevant stakeholders. This process could include a call for written submissions, evidence sessions on particular aspects of the legislation, and interviews with representatives from civil society, business, law enforcement and other interested bodies.' (Field et al., 2019:78) While this offers a little indication of the types of data collected, the use of 'could' suggests this was written before the data was gathered and there is no further information regarding the final methods used, how experts were approached or how consultations were undertaken. For more information on the methodology, please see Appendix 5.

While the review provides helpful insights into the methodology such as listing the named experts involved in the research and the organisations that took part in the consultation processes, it provides no information on how the consultation process was undertaken, such as the questions or format. Like the 2016 review, this makes it difficult to review the quality of the evidence base used

in the review or for another research team to recreate the same research process.

Findings

The review raises a number of issues it uncovered with the Act and offers a list of 80 recommendations. The authors urge 'the Government to consider and act quickly and effectively upon the recommendations we set out in this report in a manner commensurate to the significance of the issues they address. Some of these recommendations require legislation, which should be brought in as soon as practicable, while those that do not should be implemented without delay.' (Field et al, 2019:8)

The review acknowledges a significant flaw regarding S45: the lack of quantitative data making it impossible to accurately assess the scale or impact of its use. As a result, assessments of its effectiveness must be based on qualitative case studies, which is what this review relied upon.

There is no quantitative data available with which to assess the scale and impact of the statutory defence. It is therefore difficult to understand how the statutory defence has been used or potentially misused, other than considering qualitative case studies. In addition to the cases that are charged, it is of course possible that in some cases charges were never brought because of the existence of the defence; by their nature these cases will not be recorded.

(Field et al., 2019: 68)

The review indicates that at the time it was undertaken there had been an increase in the use of S45, but the authors note that this is purely anecdotal and there is no way of knowing the reason behind this rise.

The 2019 review highlighted that there is a concern raised by law enforcement that criminals have identified S45 of the MSA as a 'loophole' to their convictions, where they claim that they have been exploited in order to use the defence to escape conviction. On the other hand, the review notes that other stakeholders have stated that the reverse is also true, that victims of modern slavery who employ the defence continue to be convicted of offences they committed due to coercion as part of their slavery experiences. Again, the lack of quantitative data collected on S45 makes it difficult to assess the evidence behind these claims, although the conviction of those believed to be trafficked has been well documented by Burland (2019). This concern over S45 being used as a loophole was not raised in the 2016 review, and the 2019 review concluded that the current system achieves the right balance. It also noted that by listing more serious crimes that S45 cannot be raised against, Schedule 4 of the MSA helps to prevent creating a legal loophole for serious offenders to escape justice.

The independent review recognised this discord between the risk of criminals using S45 as a loophole, and the need to provide legitimate victims with a form of defence against criminal actions that they had no choice but to commit. The review acknowledged that there was a risk of the defence being misused, but deemed this not to be detrimental enough to warrant removing the defence, when doing so would prevent genuine victims from being able to avoid conviction. It emphasised that 'Protecting vulnerable individuals is the purpose of the Act' (Field et al., 2019:69)

Reflecting the issues raised in the 2016 review, the 2019 review highlights that there is a potential lack of knowledge amongst the judiciary about the use of the defence.

For all individuals who may be victims of modern slavery, it is essential that defence lawyers are aware of the statutory defence and advise their clients to disclose at the earliest possible stage if they are a victim of trafficking or modern slavery. This is even more important in the cases of children. Where it has not already been raised by the defence and there are indicators that modern slavery might be a factor, training and guidance from the Judicial College ought to prompt Judges and Magistrates to question at the pre-trial hearing whether the statutory defence is applicable

(Field et al., 2019:70-71).

The 2019 review raised the fact that adequate training had still not been provided, and stated that 'The recommendations made in Caroline Haughey's 2016 Review of the MSA relating to training and the need for specialist advocates in modern slavery cases should now be implemented.' (2019:72) These concerns around training were raised yet again in 2020 by the Independent Anti-Slavery Commissioner's Office ([see below](#)), indicating that even five years after the implementation of the Act, there was still not a good working knowledge of S45.

After the report covered the four key areas it set out to investigate, there is then a fifth section entitled 'Other Issues' (pages 71-73) which highlights findings that came to light during the research process but which do not fit into any of the four main research categories. Importantly, half of these six 'other issues' related to the lack of data regarding the implementation of the MSA.

The use of the statutory defence in criminal cases is not currently recorded

There is also no data available on the amount of compensation awarded to victims

It is not possible to disaggregate the data collected on prosecutions and convictions under the Act to look at the type of exploitation, or the age of the alleged victim(s).

This makes it challenging to monitor the nature of modern slavery cases being prosecuted and whether there have been prosecutions for new and emerging types of exploitation

(Field et al., 2019:72-73)

These comments are significant as they emphasise how a lack of quantitative data appears to be an issue not only in relation to the use of S45, but a common theme regarding the difficulty of accurately assessing the efficacy of the MSA overall. The lack of quantitative data also meant that this independent review rested entirely on insights from qualitative research. Improved data collection was recommended in response to all three of the data-related issues quoted above. Should these recommendations be taken on board, then there is the possibility that future reviews may be able to consider quantitative data alongside qualitative and provide more accurate insights into the use and effectiveness of the MSA.

Independent Anti-Slavery Commissioner's Call for Evidence Report

Dame Sara Thornton, the UK's Independent Anti-Slavery Commissioner (IASC), ran a call for evidence on S45 which led to the publication of a report in October 2020. The report uses evidence collected from over 100 responses relating to over 200 cases of the use of S45 of the MSA.

Unlike the other reviews, this was not an overall evaluation of the MSA, nor was it government commissioned. Rather, the purpose of this review was to look specifically into the use of S45, which was a commitment the IASC had written into her strategic plan in 2019. The highlighting of S45 in this strategic plan was a response to concerns being raised after it was becoming clear that it had been used significantly more than was envisaged when the MSA was established.

Methodology

The authors of the report, Bristow and Lomas, provide a brief methodology which summarises how the review was undertaken. The authors make note of the fact that no data is collected by agencies around the use of the S45 defence, so in order to be able to conduct their own review, the IASC ran a call for evidence where 'experts, stakeholders and those with practical experience and knowledge of cases were invited to submit written evidence' (Bristow & Lomas, 2020:15). The initial call for evidence can be found [here](#). A summary of the methodology is provided in Appendix 6. This call for evidence led to 107 responses; additionally, 12 legal and non-governmental organisations, and three academics provided their observations on the use of S45. Comparing this to the experts involved in the 2016 and 2019 independent reviews of the MSA, there is an indicative pattern of increasingly including academic insight in reviews on such legislation and its implementation, from no academics mentioned in the 2016 review (Haughey), one mentioned in the 2019 review (Field et al.) and three participating in the 2020 review (Bristow & Lomas). However, it must be acknowledged that the 2020 review is specifically focused on the S45 defence as opposed to the 2016 and 2019 reviews which had a broader remit of reviewing more aspects of

the MSA and therefore there was likely to be a smaller pool of experts upon whom to call for evidence and insights. It is interesting to note that none of these reports seem to have approached survivors – those with experience of being a defendant using S45 – to gather their experiences.

While the responses collected related to all experiences of the use of the defence – successful, unsuccessful and situations in which the defence was not used but, upon reflection, it should have been – the authors highlight that because of a complete lack of quantitative data on the use of the defence, ‘as a limited, qualitative exercise this evidence cannot be viewed as representative of the entire sample of cases involving the statutory defence’ (Bristow & Lomas, 2020:15). This reemphasises the points made in the 2019 review of the MSA that it is necessary for data collection to be undertaken on the use of the S45 defence in order to be able to generate an accurate understanding of its use, misuse, successes and failures. Because of this lack of data collection, this report was based entirely on findings generated through the call for evidence.

Findings

The report identifies four specific issues relating to the use of S45:

- *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.*
- (Bristow & Lomas, 2020:7)

Further to these issues, the report highlights a lack of knowledge on S45 amongst those practitioners working directly with it: police, lawyers and the judiciary. The evidence used for the report indicated that some cases are being discontinued as soon as the defence is raised and that in other cases, the identification of a victim of trafficking was seemingly enough for prosecutors to consider that the evidential burden is met and therefore that the defence will be successful. These cases illustrate a misunderstanding on the part of those who are responsible for raising or objecting to the defence; it is not the case that someone being identified as a victim of modern slavery or human trafficking is enough to guarantee the defence, nor is it enough that raising the defence should mean that prosecutions are automatically dropped. This 2020 report therefore reiterates the concerns raised in the 2016 and the 2019 independent reviews of the MSA that understandings of the use and implementation of S45 are inadequate. As an issue repeated in each of these reports, it is therefore imperative that training of police officers, lawyers and judges around S45 should be prioritised in order to ensure firstly that relevant cases are brought to trial in the first instance, and secondly that the use of the defence is robust, to support those victims that the defence was designed to support while simultaneously protecting against abuse from criminals looking to circumvent conviction.

However, perhaps more problematic is the safeguarding issue that has been identified through the Independent Anti-Slavery Commissioner’s Office report. The report recognises that the identification of victims is not leading to effective protection from the harm posed by the traffickers, highlighting that non-prosecution alone is not enough to protect a child or vulnerable adult, but that 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.’ (Bristow & Lomas, 2020:7)

The call for evidence indicated that S45 was being used predominantly in cases relating to drug trafficking. The overall conclusion relating to the evidence put forward for the review was that while the legislation is not perfect in its current state, it should not be changed until the issues raised in the report are addressed. The report emphasises as a bottom line that ‘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.’

Issues Identified by Wider Evidence

The above sections outline the findings of the key, currently-available, reports that include reviews of S45, emphasising that there has been little explicit research undertaken regarding this part of the MSA. The lack of evidence regarding S45 extends into academia. There is little academic literature which focuses explicitly on the use of the S45 defence in the UK, and the literature that does exist predominantly discusses the application of the defence, in terms of both linking the criminal act to the exploitation and in questioning the validity of the crimes exempt from the defence listed in Schedule 4.

Schedule 4 of the MSA lists over 100 offences against which the defence cannot be used; these relate to more serious crimes such as murder, manslaughter and firearms offences. While there are logical reasons as to why the defence cannot be used for these crimes – similar to the limitations around crimes which can use the defence of duress, which the S45 defence closely resembles – there are criticisms of Schedule 4. These relate particularly to how several of the offences it excludes from the defence are offences that victims of modern slavery are vulnerable to committing (such as recruiting other victims into modern slavery, an issue which is exemplified later in this section) and, further, just because the crime is a serious one does not mean that the victim was not compelled to commit it (Jovanovic, 2017; Wake, 2017).

S45 of the MSA includes the points that, if the person is aged 18 or over, they may use the defence if ‘A reasonable person in the same situation with relevant characteristics would have no realistic alternative to committing the act.’ Or, if they are under 18 they may use the defence if ‘A reasonable person in the same situation with relevant characteristics would have also committed the act.’ Schedule 4 destabilises these aspects of applying S45, because it suggests that the reasonable-person-in-the-same-situation caveat cannot apply to certain crimes, which rather calls into question the purpose of having this caveat at all. Reflective of this, the Trinidad and Tobago Trafficking in Persons Act offers an absolute defence for trafficking victims who commit offences due to being trafficked. Similarly, OSCE recommends that the non-punishment principle should apply to *any* offence where the link to trafficking can be established:

As there is no exhaustive list of offences that might be committed by victims of trafficking in the course of, or as a consequence of, being trafficked, and since new forms of exploitation may, and do, emerge, States should consider adopting an open-ended list of offences typically related to trafficking in human beings, with regard to the commission of which victims of trafficking shall be immune from punishment. It should be clearly stated that the list is not exclusive, and that the duty of non-punishment applies to any offence so long as the necessary link with trafficking is established. Such a list should be widely disseminated amongst prosecutorial, judicial and law enforcement services, including those not dealing directly with trafficking cases.

(OSCE, 2013:23)

Another academic debate regarding the applicability of S45 relates to the requirement of compulsion to commit the crime for adults to be able to raise the defence. Muraszkievicz (2019) comments that there is a flaw in the requirement of compulsion in order to be able to use the defence, as it suggests that those who have been trafficked but not yet exploited are presumably not entitled to the defence. This is an issue also picked up by Jovanovic (2017):

compulsion has to result from either the conduct that constitutes an offence of slavery, servitude or forced labour, or the conduct that constitutes “relevant exploitation”, resulting from an act of human trafficking. In both cases, it is clear that

the MSA requires that a person has already been subject to exploitation, either in the form of slavery, servitude or force labour, or in other forms of “relevant exploitation” listed in section 3. This is a serious oversight of the MSA because, on its face, it prevents the application of the defence to victims who have been trafficked but not yet exploited. (Jovanovic, 2017:59)

By means of an illustrative example, if a person were to be trafficked across an international border and the intention was that they were to be used in a situation of labour exploitation, but they were identified or escaped before the exploitation occurred, then they may have committed an immigration offence within the transportation part of their trafficking experience, and yet the element of exploitation has not occurred. There is potential here for confusion in the application of the defence by denying such victims the right to use S45, however it is important to remember that Section 4 of the MSA states that ‘A person commits an offence under this section if the person commits any offence *with the intention* of committing an offence under section 2 [human trafficking]’ (emphasis added). Thus, in situations of human trafficking, the defence should be applicable regardless of whether or not the exploitation actually took place, as long as there is evidence of intent.

However, this discussion also brings to light other issues regarding the applicability of the S45 defence, notably in relation to the criminal act being directly attributable to the modern slavery experience. Piotrowicz and Sorrentino (2016) identify two different types of crimes that may be committed as a result of a slavery situation: those committed in the process of a person being trafficked, and those a person may commit as part of their exploitation. They define these as causation-based and duress-based offences respectively, and could be illustrated by immigration offences committed in the process of being trafficked across a border (causation-based), and being compelled to produce illegal drugs (duress-based). However, Piotrowicz and Sorrentino also suggest that the non-punishment principle should go further and cover offences committed by victims of trafficking linked to their exploitation, even when the offence is not so clearly a direct consequence of the coercion they experienced by their traffickers, for example when a victim escapes but offends in the process or as a result. While this could be illustrated by a victim escaping their exploiter, finding themselves without money and, as a result, stealing food in order to eat, the authors accept that this is a blurred line and question the acceptability of applying the non-punishment principle here. Despite the blurred line, this line of enquiry raises a valid consideration as to how closely related to the slavery situation a crime must be in order for the S45 defence to be justified. It should also trigger consideration of whether charging and prosecuting the victim of such a crime would be in the public interest.

Jovanovic (2017) expands on Piotrowicz and Sorrentino’s discussion (2016), claiming that there are three different types of offences that may be committed by victims: status offences, purpose offences, and secondary offences. Status offences correspond to Piotrowicz and Sorrentino’s causation-based offences, e.g. relating to violations of immigration law to facilitate trafficking. Purpose offences reflect Piotrowicz and Sorrentino’s duress-based offences, e.g. those offences relating to the reason the person was trafficked, such as drug production or theft. Secondary offences are those which don’t appear to be related to the trafficking situation but are still (perhaps more tenuously) related. These could be crimes committed as the victim escapes their exploitation, or in an attempt to survive after escaping. These secondary offences would also include cycle of abuse issues, where the victim exploits others in order to ameliorate their own situation. Jovanovic claims that there should be different rules around applying the defence to each of these groups of offences ‘since the compulsion and causal relationship between a victim’s criminal behaviour and her trafficking experience or exploitation are inherently different.’ (2017:65-66) This is reflective of the recommendations of the 2016 review of the MSA which advises that ‘consideration should be given to clarifying and/ or enhancing the term ‘direct consequence’, and to clarifying the process by which s45 is raised and applied’ (Haughey, 2016: 9).

Cycle of abuse offences are harder to judge in relation to the applicability of S45, for example, a case where a victim is compelled to control other victims as part of their own exploitation. It is currently unclear as to whether this would be defensible under the non-punishment principle (though acknowledging that clear-cut modern slavery offences are covered in Schedule 4 and therefore do not qualify for the defence). An illustrative case study of such a situation is discussed by Mennim (2019). Mennim highlights two similar cases: R v O and R v N. In both cases, the

defendants had been identified as victims of human trafficking, but both had committed crimes: N was a Vietnamese national, and was arrested for an offence of producing class B drugs. He made it clear from the outset that he had been trafficked, but subsequently pleaded guilty and was sentenced to 16 months' imprisonment. O was convicted and sentenced for conspiracy to control prostitution for gain. However, she did not raise her trafficking status until serving her custodial sentence of 5 years' imprisonment. 'N sought permission to appeal against conviction and O sought leave to appeal against conviction and sentence on the grounds that they had been victims of trafficking (VoTs) and that the prosecution ought to have been discontinued or stayed as an abuse of process.' (Mennim, 2019:410)

The question for the Court in both appeals concerned the safety of the conviction, considering: (i) whether there was credible evidence that the applicants fell within the definition of trafficking in the Palermo Protocol and the Trafficking Directive; (ii) whether there was a nexus between the crime committed and the trafficking; and, (iii) whether it was in the public interest to prosecute either N or O. (Mennim, 2019:410)

The outcome of the case was that both defendants were accepted as having been victims of human trafficking, and N won his appeal but O was considered culpable for her offences of controlling prostitution for gain. 'It was submitted that O's VoT [Victim of Trafficking] status had introduced an 'inevitable grey line' in determining whether sufficient nexus could be established between a VoT who had removed themselves from trafficking to become a perpetrator'. (Mennim, 2019:413). As Gadd and Broad state, 'the politics of modern slavery render it difficult for many to imagine offenders as anything other than the 'evil' nemesis of 'innocent' victims' (2018:1440), which leads to blurred lines when considering victims who have gone on to exploit others in order to ameliorate their own situation. While more information on O's situation shows that she had been subjected to a juju ritual and believed that she had no option but to be compliant for fear of the repercussions, her crimes were considered to outweigh the protection of the status of being a victim of trafficking. Not only does this example illustrate the lack of clarity regarding the use of S45 in cases of cyclical abuse of one victim by another victim, but it brings to light Christie's notion of the ideal victim (1986), where a person is more likely to be recognised and treated as a victim if they are weak, passive and blameless. While O comfortably met the criteria of being a victim of human trafficking, she was treated as though there was a caveat to that definition – that to truly be a victim she should have had also been entirely blameless in any actions she undertook.

Muraszkiewicz expands on this: 'Committing minor crimes may be tolerable but those listed in Schedule 4 [the list of crimes exempt from the S45 defence] interfere with our ability to accept someone as a victim.' (Muraszkiewicz, 2019:403). Committing serious crimes, such as those listed in Schedule 4, tarnishes our ability to consider someone a victim, playing to Christie's theory of the ideal victim. Having the capacity to undertake a serious offence like murder or rape questions the possibility that the victim is truly weak and passive, therefore undermining the likelihood that they might be deemed as a victim, and more likely to be understood as a perpetrator.

However, Burland (2017) also picks up on this issue of the ideal victim in relation to victims of modern slavery being compelled to commit crimes, and how this may be impacting the use of S45, even in relation to the precise crimes for which the defence was intended. Burland argues that 'the successful identification of people trafficked for cannabis cultivation is undermined by a dominant victim discourse that has created a narrow stereotype of the "ideal" and "innocent" victim of human trafficking' (Burland, 2017:2). One Judge, upon sentencing two Vietnamese men convicted of producing cannabis to 12 month prison sentences, even stated that their cases were 'an example of modern slavery' (Burland, 2017:11). The irony of this statement indicates a real lack of comprehension of the S45 defence amongst those who are responsible for implementing it, thereby reiterating the concerns of the 2016 and 2019 reviews of the MSA, and the Independent Anti-Slavery Commissioner's Office 2020 report on S45, that knowledge of S45 amongst relevant practitioners is not of an adequate standard. The worrying truth, as Burland states, is that 'More trafficked persons are being punished than traffickers' (2017:14). This is a perturbing claim, but one which reiterates the concerns of the independent reviews of the MSA which suggest that practitioner knowledge on the use of S45 still needs significant improvement.

Conclusion

To date there has been limited data collected on the use of S45 of the MSA which makes it difficult to gather an accurate understanding of its use, its strengths and any barriers to success. While no quantitative data has been collected on S45, there have been two independent reviews of the MSA and a report from the Independent Anti-Slavery Commissioner's Office. However, particularly regarding the 2016 and 2019 reviews of the MSA there is little clarity on the level of independence, rigor or inclusiveness regarding the methodologies of these reports. There is also a dearth of information regarding the commissioning processes and the data collected, with the 2019 review expressing that it was reliant on anecdotal evidence.

The reviews of the MSA highlight this lack of data collection as a problem and also call for training for police, lawyers and the judiciary regarding when and how the defence should be applied, and the risk of the defence being used as a loophole for criminals looking to avoid conviction. The Independent Anti-Slavery Commissioner's Office report on S45, published in 2020 reiterates some of these issues, such as the need for better training and data collection regarding the use of S45. Thus, after multiple reviews incorporating its legal application, there continue to be the same problems highlighted with the MSA which need to be prioritised as a matter of urgency if the legislation is to improve in efficiency and to achieve the purposes for which it was developed.

It is positive to see an increase in independent academic insight being included with the reports on the MSA over time, however, there is an evident flaw in all of these reviews that survivors of modern slavery – those with lived experience of raising S45 – were not consulted as part of the research for any of these reports.

This evidence review provides a summary of recent, relevant legal cases to provide clarity on the current understandings and operational processes relating to how the use of S45 occurs in practice. This summary includes details on appeals processes that have led to changes in understandings regarding where the burden of proof should lie, the evidential weight of NRM decisions and how prosecutions that don't adequately consider the possibility that the defendant was a victim of modern slavery could risk violating the defendant's human rights. These cases highlight that precedents continue to be set as new cases provide new nuances of the defence. It is clear that S45 is still not fully understood and understandings of its use will continue to morph as more cases are heard in court.

This review then offers a summary of the extant academic literature regarding the use of the non-punishment principle and S45 of the MSA. This summarises the difficulties associated with imposing the defence when there is a lack of clarity around how closely the criminal act should be associated with the modern slavery situation for the defence to be applicable. It questions Schedule 4 of the MSA for the list of offences excluded from the defence, and considers whether there should be a blanket defence for all crimes, or whether there should be differences in the use of the defence depending on whether the offence was committed in the lead up to the slavery situation, as part of the exploitation during the slavery situation, or as a result of leaving the slavery situation. It also addresses the current lack of clarity relating to the use of S45 in cycle of abuse offences, where a victim exploits others in order to ameliorate their own situation.

Overall, it is clear that issues regarding expertise and evidence relating to the S45 defence have still not been fully negotiated, and recent case law implies that it is likely that this will continue to be developed and challenged as more cases are brought to court. There is a lack of data collected on the use of S45, meaning there is no robust insight into what crimes it is predominantly used for (though the report from the Independent Anti-Slavery Commissioner's Office indicates S45 is being used predominantly in cases relating to drug trafficking), when it is successful or how it might be vulnerable to abuse. Reviews regarding the defence rely on anecdotal data with limited academic input and no survivor input, and the recommendations they put forward are still yet to be effectively implemented, despite the first of these reviews being six years old.

It is not that S45 is a complicated piece of legislation, but that putting it into practice has not been straightforward. This can be linked to problems with implementation, but also with the complexity of modern slavery as a crime. As such, it is imperative that police investigators, defence lawyers,

prosecutors and judges are all adequately trained not only in the application of the S45 defence, but in the nuances of modern slavery and how such experiences can affect victims and, in turn, affect the criminal justice process. It is only once these practitioners have this in-depth knowledge that the defence can be successful in its intention of not prosecuting individuals who had no choice in committing the crime of which they are accused.

From this evidence review, there are a number of key recommendations that could improve both the use of, and the understanding of, S45 of the MSA.

- Collection of quantitative data on the use and outcomes of the S45 defence should be a priority in order to understand the types of cases in which it is used, barriers to success, and how it might be vulnerable to misuse.
- Adequate training for police, lawyers and the judiciary is fundamental if S45 is to be used in the way it was intended: to serve the best interests of victims of modern slavery. This should include insights into potential bias based on notions of the ideal victim.
- Reviews of any legislation should offer clarity regarding the commissioning process and methodologies used.
- Reviews into the practical use of the MSA should involve insights from academics working in relevant fields, and should always seek the input of survivors who have lived experience.

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