

# Independent Review of the Modern Slavery Act

Fourth interim report:  
Legal application of the Modern Slavery Act

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## Introduction to the Review

- i. In July 2018, the Home Secretary, at the request of the Prime Minister, announced a review of the Modern Slavery Act 2015 (the Act). The members of the Review are Frank Field MP (chairman), Maria Miller MP and the Baroness Butler-Sloss. The Review's terms of reference are set out at **Annex A**.
- ii. We have been provided with a secretariat seconded from the Home Office to support us, and we are very grateful to them for their hard work, efficient research, and for providing us with the relevant information we need to formulate and substantiate our conclusions and recommendations. We have also secured the services of a former House of Commons Clerk who has provided independent support and advice on the drafting of our report. Although we have been set up by the Home Office, we have made it very plain to Government that we are carrying out an entirely independent review of the working of the Act. As such, the conclusions and recommendations set out in this interim report and all other reports are entirely our own.
- iii. We have set up an independent website that can be found at <https://independentmsareview.co.uk>.
- iv. We were asked to focus on four areas of the Act and produce a final report for the Home Secretary with our recommendations by the end of March 2019. These four areas are:
  - The Independent Anti-Slavery Commissioner (sections 40 – 44)
  - Transparency in supply chains (section 54)
  - Independent Child Trafficking Advocates (section 48)
  - The legal application of the Act, comprising:
    - The definition of exploitation (section 3)
    - Reparation Orders (sections 8 -10)
    - The statutory defence (section 45)

This is our fourth and last interim report: our interim reports on the Independent Anti-Slavery Commissioner, transparency in supply chains and Independent Child Trafficking Advocates can be found on our websites. In accordance with our terms of reference, this report principally addresses the questions:

- how to ensure the Act can adequately respond to our evolving understanding of the nature of modern slavery offences, for example the recent and emerging issues of county lines and orphanage trafficking.

- how to ensure access to legal remedies and compensation for victims and whether a specific civil wrong would improve access to compensation for victims.
  - how to ensure an appropriate balance between the need to protect victims from criminal prosecution and preventing criminals from abusing this protection to avoid justice.
- v. In order to achieve the maximum information on the areas under review in a limited time, we invited nine Expert Advisers to gather and collate evidence for us from a range of sectors and interest groups. The Expert Advisers we appointed were:

- Vernon Coaker MP (Parliamentarians)
- Bishop Alastair Redfern (Faith Groups)
- Baroness Young and John Studzinski (Business)
- Anthony Steen (Civil Society)
- Christian Guy (Commonwealth and International)
- Professor Ravi Kohli (Child Trafficking)
- Peter Carter QC and Caroline Haughey QC (Criminal Justice System).

We are very grateful to the Expert Advisers, as well as all the individuals and organisations that provided evidence to them. We have drawn on their evidence and recommendations in this interim report on the legal application of the Modern Slavery Act.

- vi. The Home Affairs Select Committee (HASC), chaired by Yvette Cooper MP, is currently undertaking a wide-ranging inquiry into policy and implementation issues relating to modern slavery. It has conducted an open call for evidence, as well as holding a series of evidence sessions. We have analysed this evidence in full and have taken it into account where it is particularly relevant to the Review's terms of reference as part of our own evidence base. The work of the inquiry will complement the deep dive that our Review is conducting into specific provisions of our modern slavery legislation. The HASC inquiry is also dealing with a range of non-legislative issues that this Review will not specifically cover.
- vii. Our final report, which we will submit to the Home Secretary by the end of March 2019, will pull together the conclusions and recommendations of our four interim reports. It will also address certain other issues concerning the effectiveness of the Act which have been highlighted in the course of our review.

# Legal Application of the Modern Slavery Act

## (Sections 1-3, 8-10 and 45 of the Act)

### 1. Introduction

- 1.1 The Modern Slavery Act 2015 (“the Act”) is a ground-breaking piece of legislation. Four years after it received Royal Assent, and as other countries are following our lead and developing similar legislation, it is critical to consider the legal application of the Act. In particular, this Review has looked at the definition of exploitation under the Act and considered whether it is sufficiently flexible to allow for new and emerging forms of slavery and human trafficking to be captured. We have also looked in more detail at two provisions created by the Act: Slavery and Trafficking Reparation Orders and the statutory defence.
- 1.2 Section 3 of the Act (see **Annex B**) sets out the definition of exploitation. However, the construction of the legislation means it cannot be read in isolation and must be considered alongside section 1 on slavery, servitude and forced or compulsory labour and section 2 on human trafficking. Under the Act, a person is exploited if one or more of the following offences applies:
- Slavery, servitude and forced or compulsory labour (section 1 of the Act)
  - Sexual exploitation (defined in the Protection for Children Act 1978 and the Sexual Offences Act 2003)
  - Removal of organ(s) (defined in the Human Tissue Act 2004)
  - Securing services etc. by force, threats or deception
  - Securing services etc. from children and vulnerable persons.
- 1.3 Sections 8-10 of the Act (see **Annex C**) make provision for courts to make a Slavery and Trafficking Reparation Order (henceforth Reparation Order) against a person who is convicted of an offence

under sections 1, 2 or 4 of the Act.<sup>1</sup> There also needs to be a Confiscation Order in respect of that offence for the Reparation Order to be made. A Reparation Order requires the convicted individual to pay compensation to his or her victim(s).

- 1.4 Section 45 of the Act (see **Annex D**) provides a statutory defence for victims of modern slavery, for certain criminal offences which they were compelled to carry out as a result of their exploitation, such as being forced to produce or sell illegal drugs. It does not apply to the most serious crimes, such as sexual offences or offences involving serious violence. The statutory defence was designed to provide further encouragement to victims of slavery to come forward and give evidence without fear of being convicted for offences connected to their slavery or trafficking situation.
- 1.5 The Review gathered evidence on these three topics. We took evidence from law enforcement and the criminal justice system, as well as from a number of NGOs with legal expertise in human trafficking. We also received input from the Director of Public Prosecutions at the Crown Prosecution Service and the former Independent Anti-Slavery Commissioner. A full list of participants and their method of contribution to the Review is at **Annex F**. The reports from our Expert Advisers on the legal application of the Act will be made available on our website.

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<sup>1</sup> A person commits an offence under section 4 of the Act if the person commits any offence with the intent to commit an offence under section 2, including aiding, abetting, counselling or procuring an offence.

## 2. Sections 1-3: Definition of the offences

### 2.1 Meaning of exploitation (section 3) – new forms of modern slavery and trafficking

- 2.1.1 There was no consensus among stakeholders regarding the current scope of the Act's definition of exploitation, and specifically whether it was broad enough to capture new and emerging forms of modern slavery and trafficking.
- 2.1.2 Some stakeholders expressed strong views that the current definition should be amended to explicitly reflect new and emerging forms of exploitation, such as county lines and orphanage trafficking. There were concerns that individuals committing orphanage trafficking and county lines offences could escape prosecution as these offences are not explicitly referenced on the face of the Act.
- 2.1.3 However, the Crown Prosecution Service (CPS) has found the definition to be broad enough to prosecute a range of offences, including recently county lines offending, and does not suggest a new definition of exploitation. The Modern Slavery Act has been used to prosecute 285 defendants and convict 38 offenders between 2015 and 2017 (latest data available), with the number of prosecutions under the Act increasing year on year. Arrests and prosecutions commenced in a specific year may not result in convictions until subsequent years, due to the time it takes to investigate, gather evidence and prosecute at court.

<b>Prosecutions</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>Total</b>
Previous slavery and trafficking legislation	160	65	58	<b>283</b>
Modern Slavery Act 2015	26	80	179	<b>285</b>

<b>Convictions</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>Total</b>
Previous slavery and trafficking legislation	45	74	31	<b>150</b>
Modern Slavery Act 2015	-	1	37	<b>38</b>

Source: 2018 UK Annual Report on Modern Slavery

- 2.1.4 The CPS has reported that the definition of exploitation is flexible enough to enable them to bring prosecutions in a broad range of cases. It has warned against expanding the scope of the meaning of exploitation or defining exploitation so precisely that it would lack flexibility when applying the legislation to a changing profile of criminal conduct.
- 2.1.5 We agree. ***Section 3 on the meaning of exploitation should not be amended as it is sufficiently flexible to meet a range of circumstances, including new and emerging forms of modern slavery. While we are in no doubt about the seriousness of new types of exploitation that have come to light since the passing of the Act, such as county lines and orphanage trafficking, it is not practical to amend legislation every time a new form of exploitation is identified. Government instead should produce policy guidance to assist in the interpretation of the Act, building on the Home Office Typology of Modern Slavery research. This should be regularly updated to respond to new and emerging trends and should give examples of the types of exploitation that can potentially be prosecuted under the Act, including orphanage trafficking and county lines.***

## 2.2 Standalone offence of exploitation

- 2.2.1 Some stakeholders have suggested that there should be an additional category of offence in the Act for exploitation offences, where the exploitation does not meet the threshold for slavery, servitude and forced or compulsory labour. For example, law enforcement agencies reported they have sometimes found the definition of exploitation a challenge to use, particularly where the boundary between poor employment conditions and forced or compulsory labour is not clear.
- 2.2.2 This issue was considered by the Joint Select Committee on the Draft Modern Slavery Bill, in 2014. Government's view, expressed in its response to that Committee's report, was that adding a standalone offence for exploitation risked diluting the offences of slavery and human trafficking.<sup>2</sup> Allowing a much lower level of exploitation to be captured rather than relying on other existing offences would weaken the Act and divert attention from serious abuse.
- 2.2.3 We agree. Section 3 on the meaning of exploitation should not be amended to include a standalone offence of exploitation as it is

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<sup>2</sup> Government Response to the Joint Committee on the Draft Modern Slavery Bill Report, Session 2013-14 HL Paper 166 / HC 1019, Cm 8889, June 2014.

sufficiently flexible to meet a range of circumstances. Exploitation that does not meet the threshold for slavery, servitude and forced or compulsory labour can be addressed through the Gangmasters and Labour Abuse Authority and civil enforcement routes, including by employment tribunals.

## 2.3 Definition of human trafficking (section 2)

2.3.1 Stakeholders and expert advisers have noted that the definition of human trafficking in section 2(1) focuses heavily on the facilitation of travel of the victim:

*“A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.”*

2.3.2 This was raised as a concern by a number of stakeholders as there is no mention of ‘travel’ *per se* in the international definition of trafficking. Both the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol) and the EU Directive on Human Trafficking (Directive 2011/36/EU) define trafficking as a process that involves three stages<sup>3</sup>:

- The Act: *“recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons”;*
- The Means: *“by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”;*
- The Purpose: *“exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.*

2.3.3 Some stakeholders reported their concern that the emphasis on ‘travel’ in the Act could mean that offenders not directly involved in the transportation or transfer of the victim could escape prosecution. The notion of travel can also prove problematic when the victim arranges their own travel into and around the United Kingdom, and to the site of exploitation. This often occurs for victims from European Union countries who are currently free to enter the UK and travel around the

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<sup>3</sup> International law is clear that the ‘means’ element of the definition does not apply for children as children cannot consent to being exploited

country, and for victims who are deceived as to the conditions of work, or when those conditions deteriorate over time.

- 2.3.4 During the passage of the Bill, the Government's position was that the Palermo Protocol implicitly recognises movement in its definition of human trafficking and that it is explicitly referenced in section 2(3) of the Act<sup>4</sup>:

*“A person may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.”*

- 2.3.5 The CPS reported that it takes a broad interpretation of what is meant by 'travel', including movement over a very small space. This approach has not been challenged yet and the CPS does not feel that a change is needed as long as their interpretation continues to be accepted.

- 2.3.6 While the definition of human trafficking has not yet proved an issue, the magnitude of the debate surrounding it suggests it is not as clear as it could be, carrying the risk that a future challenge results in an overly narrow interpretation. Some of our expert advisers have recommended that section 2 should be amended now to clarify the position. We are concerned that the Act does not mirror the Palermo Protocol and the EU Directive in its structure, however, it is too early to determine if this is causing issues in securing prosecutions. ***We therefore recommend the Independent Anti-Slavery Commissioner should monitor and review the outcomes of prosecutions and appeals to ensure the Courts are not taking an overly narrow interpretation of what constitutes trafficking under section 2. The Commissioner should report her findings in her annual report, and Government should be prepared to bring forward amendments to the legislation if the Commissioner identifies an issue with the interpretation of section 2.***

## 2.4 How the offences relate to children

- 2.4.1 Both the Palermo Protocol and the EU Directive make it clear that the 'means' element of human trafficking does not apply for children as a child cannot consent to being exploited, even if he or she agrees to the 'act' element. Several expert advisers reported concerns from stakeholders that this is not clearly reflected in the Act. We have heard concerns about two subsections of the Act in particular.

- 2.4.2 Section 2(2) was highlighted as particularly problematic:

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<sup>4</sup> The Parliamentary Under-Secretary of State for the Home Department (Karen Bradley); Hansard, Modern Slavery Bill, Public Bill Committee, Thursday 4 September 2014 (Afternoon), Column 151

*“It is irrelevant whether V consents to the travel (whether V is an adult or a child).”*

This was reported as confusing as it is limited to consent to travel only, although international law makes it clear that a child is not able to consent at all.

Similar concerns were voiced for section 1(5):

*“The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.”*

This does not make it clear that a child is not able to consent to being held in slavery, servitude or forced or compulsory labour.

We agree with these concerns. **Section 1(5) and section 2(2) should be amended to reflect more clearly that a child is not able to consent to any element of their trafficking.**

### 3. Sections 8-10: Reparation Orders

#### 3.1 Use and awareness of Reparation Orders

- 3.1.1 Sections 8-10 of the Act make provision for courts to make Reparation Orders against a person who is convicted of an offence under sections 1, 2 or 4 of the Act. There also needs to be a Confiscation Order in respect of that offence for the Reparation Order to be made. The intention of this provision is to require convicted offenders to pay reparation to their victim(s) in respect of the exploitation and degradation they have suffered.
- 3.1.2 We were disappointed to note that between the coming into force of the Modern Slavery Act to December 2017 (latest available data) no Reparation Orders were made. Although we have been informed anecdotally of at least two cases in which a Reparation Order has been made, which we expect to be evidenced in future data releases, it is clear that this intention is not being realised. The lack of Reparation Orders also means it has not been possible for us to assess their effectiveness.
- 3.1.3 As set out in paragraph 1.3, there is a relatively narrow set of circumstances which allow a Reparation Order to be made. In cases where a conviction has been secured under other legislation, for example controlling prostitution, the Court can make use of Compensation Orders, which provide very similar powers to Reparation Orders, though unlike Reparation Orders, they are not contingent on a successful Confiscation Order. We heard from stakeholders that there is low awareness of Reparation Orders among participants in the criminal justice system, and confusion about the differences between Reparation Orders and Compensation Orders. ***Compensation for victims ought to be at the forefront of the Court's mind. The Sentencing Council should include in their forthcoming Modern Slavery Act sentencing guidelines a reminder for judges of their responsibility to consider Reparation Orders in every case where it is appropriate to do so.***
- 3.1.4 Police and the CPS are increasingly seeking to pursue "victimless" prosecutions, where victims are not called as witnesses (either because there is sufficient evidence without their testimony, or the victims are not identified). While this allows victims to move on with their lives without undergoing the trauma of recalling their experiences in court, it may make it more difficult to get compensation to victims, if there is no reason for the police to maintain contact with them. ***Compensation for victims ought to be made more easily available***

***to all known victims of a convicted perpetrator, regardless of whether they give evidence in Court. The police need sensitively to maintain contact with victims throughout the course of an investigation and trial, ensuring victims understand there is a possibility they could receive compensation in future and therefore the importance of providing the police with up-to-date means of contact.***

### **3.2 Identifying and securing assets and proceeds of crime**

- 3.2.1 There was consensus among the expert advisers that it is critical the criminal justice system removes from the perpetrators of serious and organised crime, the financial assets and monies gained through their criminal activities, alongside imposing prison sentences. By removing the financial gain, as well as the liberty of perpetrators, this type of crime becomes much less attractive.
- 3.2.2 In order for funds to be available to make Reparation Orders or Compensation Orders, the suspected perpetrators' assets and the proceeds of modern slavery offences need to be first identified and then seized at the earliest possible opportunity, before perpetrators have an opportunity to dissipate them. This requires robust financial investigation for every modern slavery case. However, we heard some reports that financial investigations are not happening consistently across the country. ***It is essential there is a swift and thorough financial investigation in every modern slavery investigation. Government needs to ensure the appropriate priority is placed on resourcing financial investigations.***
- 3.2.3 There should also be increased focus on making best use of the range of powers available to law enforcement agencies and courts to seize assets of alleged modern slavery perpetrators, such as Freezing Orders and Unexplained Wealth Orders. ***Law enforcement needs to make better use of the powers provided to it, in freezing suspects' assets early on in modern slavery investigations, including before arrest where that is appropriate. This will help to prevent perpetrators dissipating assets and ensure that there could be funds available post-conviction to make Reparation and Compensation Orders to victims. Freezing assets will also disrupt modern slavery and human trafficking networks, ensuring they are unable to operate while investigations and criminal proceedings are underway.***

### 3.3 Risk Orders

- 3.3.1 The Act made provisions for Slavery and Trafficking Risk Orders (sections 23 - 29, henceforth: “Risk Orders”), to enable courts to place restrictions on individuals suspected of involvement in modern slavery offending. Between July 2015 and June 2018, 35 Risk Orders were issued.<sup>5</sup> Although we were not asked to consider Risk Orders as part of this review, we believe there are potential improvements that could be made to enhance the uptake and effectiveness of Risk Orders.
- 3.3.2 Police officers told us that Risk Orders could be a useful tool to disrupt offending networks and prevent further exploitation or trafficking. Currently, the Act sets out that Risk Orders need to be applied for in a magistrates’ court by police, NCA, Immigration Enforcement or GLAA, meaning the CPS cannot apply during or at the end of a criminal trial.
- 3.3.3 Many stakeholders reported it would be useful if the legislation was amended to enable Crown Court Judges to make Risk Orders following an application from the CPS, to restrict the activity of suspects while a criminal case is ongoing. In cases where a Crown Court Judge is already familiar with a case, having to go to a Magistrates’ Court and bring the Magistrates up to speed with the case is cumbersome and adds time to already long investigations. ***We recommend extending the provision of section 23 to allow Crown Court Judges to make Slavery and Trafficking Risk Orders.***

### 3.4 Other routes to compensation

- 3.4.1 In addition to Reparation, Confiscation and Compensation Orders, victims of modern slavery may also be able to access compensation via the following other routes:
- Recovery of unpaid or under-paid wages at Employment Tribunals or via HMRC’s National Minimum Wage enforcement team
  - Civil proceedings, including claims for intimidation, harassment, assault, unlawful imprisonment, negligence and breach of duty
  - The Government-funded Criminal Injuries Compensation Scheme. Compensation is available for victims of violent crime, although mental harm is taken into account. Some stakeholders suggested this scheme could be a good route for victims of modern slavery to secure compensation, but there needs to be greater flexibility for the scheme to take account of the particular circumstances of modern slavery victims. The Government recently announced a review of the

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<sup>5</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/749346/2018\\_UK\\_Annual\\_Report\\_on\\_Modern\\_Slavery.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/749346/2018_UK_Annual_Report_on_Modern_Slavery.pdf)

Scheme, with the intention to consult during summer 2019 and put a new scheme in place in 2020.

### **3.5 Proposal for a specific civil remedy**

- 3.5.1 There were mixed views from expert advisers and stakeholders about whether there should be a specific civil penalty for modern slavery. Some stakeholders argued it would improve access to compensation for victims by allowing victims to themselves bring civil claims in the County Court, to seek compensation directly from the alleged trafficker in cases where a criminal prosecution has not been possible.
- 3.5.2 A civil remedy was proposed at several points during the passage of the Modern Slavery Bill and rejected by the Government, who argued it was not necessary. The Government argued that civil remedies in tort already exist for victims of trafficking and slavery to claim damages from perpetrators through ordinary civil law and the Human Rights Act. Damages can, for example, be recovered for loss or damage caused to victims under the torts of intimidation, harassment, assault, unlawful imprisonment, negligence and breach of duty.<sup>6</sup>
- 3.5.3 We do not recommend that Government pursues the introduction of a modern slavery civil penalty at this juncture. However, Government should keep this under review, pending implementation of our other recommendations. Government should consider the introduction of a civil penalty again in future, should access to compensation for victims of modern slavery not improve.

### **3.6 Access to Legal Aid to pursue compensation claims**

- 3.6.1 Many respondents told us that victims faced challenges in accessing the legal aid they are entitled to in order to make civil compensation claims. Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), potential victims of modern slavery are able to access legal aid for compensation claims (although not for claims to the Criminal Injuries Compensation Scheme).
- 3.6.2 We welcome the steps that the Legal Aid Agency has taken action to improve access to legal aid for potential victims of modern slavery and human trafficking. We heard evidence that under the new civil legal aid contracts, there are almost 300 solicitors that could potentially provide legal help to victims of modern slavery and a significant increase in the volume of potential matter starts available compared to previous years, although current forecasts show only a fraction of these starts are

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<sup>6</sup> The Parliamentary Under Secretary of State, Home Office (Lord Bates), Modern Slavery Bill - Lords Report (1st Day) (Continued), 23 February 2015, Volume 759, Column 1464.

predicted to be taken up. ***The Government should keep under review the effect of the new Legal Aid contracts and how they are operating in practice in modern slavery cases. The Independent Anti-Slavery Commissioner should monitor the experience of victims of modern slavery in accessing legal aid and raise concerns or challenges with Government, as well as reporting them in her annual report.***

## **4. Section 45: The Statutory Defence**

### **4.1 Use of the statutory defence**

4.1.1 Section 45 of the Modern Slavery Act provides a statutory defence for victims of modern slavery who were compelled to carry out criminal offences as a result of their exploitation, for example, being forced to produce or sell illegal drugs. The defence does not apply to the most serious crimes, such as sexual offences or offences involving serious violence.

4.1.2 The statutory defence should help to ensure that victims of modern slavery who come forward to give evidence against their abusers can do so without fear of being convicted for offences connected to their slavery or trafficking.

4.1.3 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. Anecdotally, we heard that the use of the statutory defence has increased. However, it is not clear if the anecdotal increase in its use is as a result of a recent Court of Appeal judgment on the burden of proof which some might argue makes it easier to deploy (see paragraph 4.2.3 below), or whether it is simply due to the awareness of the defence increasing as the Modern Slavery Act becomes more widely understood.

4.1.4 Law enforcement participants reported concerns that the defence is being used as a 'loophole' for offenders identifying as victims. However, other stakeholders presented evidence that victims continue to be prosecuted for offences they were forced to commit.

### **4.2 Burden of proof**

4.2.1 The burden of proof is the duty of one party in a trial to produce evidence that will prove or disprove a disputed fact to a level meeting the requisite standard of proof. In a criminal court, the standard of proof is 'beyond reasonable doubt'.<sup>7</sup>

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<sup>7</sup> The judge will direct the jury they must be 'satisfied so that they are sure' of the defendant's guilt, which is the same standard as the traditional expression 'beyond reasonable doubt'.

- 4.2.2 The Act is silent on where the burden of proof should fall in respect of the statutory defence. The interpretation initially adopted by the CPS was that the defendant was required to provide sufficient evidence to demonstrate that he or she was a victim of slavery or trafficking.<sup>8</sup> If successful, the prosecution was required to disprove the claim, beyond reasonable doubt. If the prosecution was not able to do this, the legal burden of proof would then fall on the defendant to prove, on the balance of probabilities, that they were a victim *and* were compelled to commit the criminal offence as a result of their slavery or exploitation.<sup>9</sup>
- 4.2.3 In March 2018, this interpretation of the burden and standard of proof was challenged. In the conjoined appeals of *MK v R and Gega v R*<sup>10</sup>, the Court of Appeal ruled that section 45 places an evidential burden upon defendants (i.e. the defendant is required to adduce sufficient evidence to 'pass the judge' and allow the defence to be considered by a jury) and that if a defendant is successful in discharging the evidential burden, the legal burden of proof falls upon the prosecution to disprove the defence beyond reasonable doubt.
- 4.2.4 ***We agree that the burden of proof should remain with the Crown.*** We are aware that some members of law enforcement and prosecutors are concerned about the challenge of disproving the defence beyond reasonable doubt, particularly if the individual claiming the defence reveals little or no information about the circumstances of their exploitation. While we recognise the challenges faced by law enforcement and acknowledge that some individuals may try to misuse the statutory defence, this needs to be balanced against ensuring the defence is always accessible to genuine victims. The jury process is in place to test any concerns about a defendant's status, and a competent investigation will enable a court to determine where justice lies.
- 4.2.5 ***There is a natural tension which exists in any defence, between the potential for misuse and the need to protect victims. We believe a balance needs to be maintained, and the current legislation, case-law and the system of trial by jury achieves the right balance. Protecting vulnerable individuals is the purpose of the Act, and the recent Court of Appeal judgement helps ensure this protection.***
- 4.2.6 ***Law enforcement bodies and prosecutors should make provision to conduct thorough investigations and gather sufficient evidence to demonstrate whether an individual is a victim or not.***

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<sup>8</sup> Also known as an evidential burden

<sup>9</sup> For victims under 18 there is no requirement to demonstrate the element of compulsion

<sup>10</sup> *MK v R and Gega v R* [2018] EWCA Crim 667 a

### **4.3 Offences to which the statutory defence does not apply (Schedule 4)**

- 4.3.1 Schedule 4 of the Act sets out a list of offences excluded from the statutory defence. The defence does not apply to certain serious offences, mainly serious sexual or violent offences, to avoid creating a legal loophole for serious criminals to escape justice. Schedule 4, detailing the complete list of offences excluded from the statutory defence is at **Annex E**.
- 4.3.2 Some stakeholders expressed concerns that Schedule 4 is too restrictive, containing many offences that could be committed by victims of slavery or trafficking. Others suggested it does not meet international law obligations. We disagree with this point, international law requires provisions to be made for defences to protect victims of trafficking, but it does not require an absolute defence in all cases. In addition to section 45, prosecutors can exercise a discretion not to prosecute a case that is not in the public interest, which acts as a safety net for all offences.
- 4.3.3 ***We do not recommend any changes to Schedule 4. We agree that a balance needs to be achieved between preventing the perpetrators of serious criminal acts from evading justice and protecting genuine victims from prosecution. An absolute defence for all offences is not appropriate. The current safeguards of CPS discretion and consideration of the public interest test before bringing charges act as an appropriate safety net even if an offence falls within Schedule 4.***

### **4.4 The statutory defence in relation to children who may be victims of modern slavery**

- 4.4.1 To make use of the statutory defence, adult victims need to show that they were compelled to commit the offence; that compulsion is attributed to slavery or to relevant exploitation; and that a reasonable person in the same situation and having the accused person's characteristics would have no realistic alternative to doing the criminal act. In the case of children, it needs to be established that their action was a direct consequence of their exploitation and that a reasonable person in the same circumstances and with the same characteristics would do the criminal act. There is no requirement for compulsion to be demonstrated in the case of children.

- 4.4.2 We heard specific concerns about the ‘reasonable person test’ in section 45(1)(d). Some stakeholders argued that the reasonable person test introduces, in an indirect way, the need to prove an element of compulsion for a child victim of trafficking in order for a child to be protected by the statutory defence, which does not meet international obligations.
- 4.4.3 Our expert advisers did not agree that an element of compulsion is introduced in the reasonable person test. Characteristics of children vary vastly depending on their age, so it is difficult to have a one-size-fits-all test. It is also not advisable to have an automatic immunity for all victims under a defined age. We agree that the current provisions allow a jury to consider if the defence should apply, on a case-by-case basis, taking into account all of the circumstances.
- 4.4.4 We are nonetheless concerned to ensure the statutory defence is being appropriately applied in all cases where a child is a potential victim of modern slavery. ***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. The statutory defence should be considered by Judges and Magistrates at the pre-trial hearing in all cases relating to children.***

#### **4.5 Clarifying the relationship between the NRM and criminal justice process**

- 4.5.1 Several stakeholders raised concerns about the interaction between the criminal justice process and the National Referral Mechanism (NRM) in respect of decisions on whether people are victims of modern slavery.<sup>11</sup> We heard evidence suggesting that the interaction is commonly misunderstood, and this misunderstanding is creating complexities and challenges for police and prosecutors to work alongside.
- 4.5.2 The NRM process will provide a decision, on the balance of probabilities, advising whether an individual has been a victim of

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<sup>11</sup> The National Referral Mechanism (NRM) is a framework for identifying victims of human trafficking or modern slavery and ensuring they receive appropriate protection and support.

trafficking or modern slavery. The NRM decision has no official status in a criminal court, which makes decisions based on the criminal standard of proof 'beyond reasonable doubt'. Despite this, we heard examples of court cases being adjourned for an NRM referral and decision to be made, to determine if a defendant had victim status.

- 4.5.3 Our expert advisors considered that if the defence is first raised at trial it should be for the court to determine whether the prosecution and/or the defence be allowed time to investigate and provide further evidence. We agree. ***The relationship between the NRM process and criminal justice process needs to be clarified. A common set of guidance ought to be developed to ensure that all participants in the criminal justice system – the CPS, law enforcement, judiciary, defence and prosecution lawyers – understand the NRM decision-making process and the weight it should be given in criminal proceedings.***

## 5. Other issues

### 5.1 Training and awareness

- 5.1.1 All of our expert advisers have raised the issue of limited training and awareness of the Modern Slavery Act provisions among law enforcement agencies and other participants in the criminal justice system. They also noted that greater awareness of the Modern Slavery Act could result in the legislation being used successfully in conjunction with other legislation to secure significant sentences in more cases, for example making use of trafficking offences in addition to drugs offences in county lines cases. ***The recommendations made in Caroline Haughey's 2016 Review of the Modern Slavery Act relating to training and the need for specialist advocates in modern slavery cases should now be implemented. Government should work closely with relevant organisations (including the CPS, College of Policing, Criminal Bar Association, professional bodies representing solicitors and the Judicial College) to ensure there is mandatory training on recognising modern slavery for all participants in the criminal justice system. This is a priority for frontline officers and defence lawyers who may be among the first participants in the criminal justice system a victim encounters.***
- 5.1.2 The inclusion of the statutory defence in the Act has raised awareness and understanding of the fact that those involved in forced criminality may be victims. However, a lack of awareness of the statutory defence itself persists amongst participants in the criminal justice system. ***Government should work closely with relevant organisations (including the CPS, College of Policing, Criminal Bar Association, professional bodies representing solicitors and the Judicial College) to review the available training and guidance to ensure it includes clear and consistent information on the statutory defence. This should highlight the Court of Appeal ruling and where the burden of proof lies. Progress should be regularly monitored by a cross-government forum, such as the Prime Minister's Task Force.***
- 5.1.3 ***Finally, professional bodies need to reflect in their guidance to members that where there is evidence that someone might be a victim of trafficking, it is likely to be in their client's best interests to disclose this immediately, and the Crown must be given adequate time to conduct their enquiry.***

## 5.2 Data and monitoring

- 5.2.1 The use of the statutory defence in criminal cases is not currently recorded. We have heard anecdotally that the statutory defence is being raised by defendants more frequently, but in the absence of quantitative data, there is no clear evidence base to assess. It is therefore impossible to understand the extent to which the statutory defence is being used or misused. For this reason, ***the accurate collection of data on the use of the statutory defence is vital. As a priority, we recommend that the police, the CPS and HM Courts and Tribunals Service record data on how the statutory defence is being used by adults and children. The overall use of the defence needs to be captured, as well as 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.***
- 5.2.2 There is also no data available on the amount of compensation awarded to victims. ***The Crown Prosecution Service and HM Courts and Tribunals Service should collect data on compensation awards made to victims of modern slavery – whether through Reparation Orders or Compensation Orders. This data should be reviewed regularly in conjunction with the Home Office, to monitor progress in making compensation awards to victims. The findings should be reported annually in the UK annual report on modern slavery.***
- 5.2.3 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. ***The Ministry of Justice, Crown Prosecution Service and HM Courts and Tribunals Service should collect data on the type of exploitation involved in modern slavery prosecutions, and the age of the alleged victim(s).***

## **6. Summary of recommendations**

### **1. Definition of exploitation**

#### **a. Meaning of exploitation (section 3) – new forms of trafficking**

- Section 3 on the meaning of exploitation should not be amended as it is sufficiently flexible to meet a range of circumstances, including new and emerging forms of modern slavery.
- While we are in no doubt about the seriousness of new types of exploitation that have come to light since the passing of the Act, such as county lines and orphanage trafficking, it is not practical to amend legislation every time a new form of exploitation is identified. Government instead should produce policy guidance to assist in the interpretation of the Act, building on the Home Office Typology of Modern Slavery research. This should be regularly updated to respond to new and emerging trends and should give examples of the types of exploitation that can potentially be prosecuted under the Act, including orphanage trafficking and county lines.

#### **b. Definition of human trafficking (section 2)**

- The Independent Anti-Slavery Commissioner should monitor and review the outcomes of prosecutions and appeals to ensure the Courts are not taking an overly narrow interpretation of what constitutes trafficking under section 2. The Commissioner should report her findings in her annual report, and Government should be prepared to bring forward amendments to the legislation if the Commissioner identifies an issue with the interpretation of section 2.

#### **c. How the offences relate to children**

- Section 1(5) and section 2(2) should be amended to reflect more clearly that a child is not able to consent to any element of their trafficking.

### **2. Reparation orders**

#### **a. Use and awareness of Reparation Orders**

- Compensation for victims ought to be at the forefront of the Court's mind. The Sentencing Council should include in their forthcoming Modern Slavery Act sentencing guidelines a reminder for judges of their responsibility to consider Reparation Orders in every case where it is appropriate to do so.
- Compensation for victims ought to be made more easily available to all known victims of a convicted perpetrator, regardless of whether they

give evidence in Court. The police need sensitively to maintain contact with victims throughout the course of an investigation and trial, ensuring victims understand there is a possibility they could receive compensation in future and therefore the importance of providing the police with up-to-date means of contact.

**b. Identifying and securing assets and proceeds of crime**

- It is essential there is a swift and thorough financial investigation in every modern slavery investigation. Government needs to ensure the appropriate priority is placed on resourcing financial investigations.
- Law enforcement needs to make better use of the powers provided to it, in freezing suspects' assets early on in modern slavery investigations, including before arrest where that is appropriate. This will help to prevent perpetrators dissipating assets and ensure that there could be funds available post-conviction to make Reparation and Compensation Orders to victims. Freezing assets will also disrupt modern slavery and human trafficking networks, ensuring they are unable to operate while investigations and criminal proceedings are underway.

**c. Risk Orders**

- We recommend extending the provision of Section 23 to allow Crown Court Judges to make Slavery and Trafficking Risk Orders.

**d. Access to Legal Aid to pursue compensation claims**

- The Government should keep under review the effect of the new Legal Aid contracts and how they are operating in practice. The Independent Anti-Slavery Commissioner should monitor the experience of victims of modern slavery in accessing legal aid and raise concerns or challenges with Government, as well as reporting them in her annual report.

**3. The statutory defence**

**a. Burden of proof**

- The burden of proof should remain with the Crown.
- There is a natural tension which exists in any defence, between the potential for misuse and the need to protect victims. We believe a balance needs to be maintained, and the current legislation, case-law and the system of trial by jury achieves the right balance. Protecting vulnerable individuals is the purpose of the Act, and the recent Court of Appeal judgement ensures this protection.

- Law enforcement bodies and prosecutors should make provision to conduct thorough investigations and gather sufficient evidence to demonstrate whether an individual is a victim or not.
- b. Offences to which the statutory defence does not apply (Schedule 4)**
- We do not recommend any changes to Schedule 4. A balance needs to be achieved between preventing the perpetrators of serious criminal acts from evading justice and protecting genuine victims from prosecution. An absolute defence for all offences is not appropriate. The current safeguards of CPS discretion and consideration of the public interest test before bringing charges act as an appropriate safety net even if an offence falls within Schedule 4.
- c. The statutory defence in relation to children who are potential victims of modern slavery**
- For all potential 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. The statutory defence should be considered by Judges and Magistrates at the pre-trial hearing in all cases relating to children.
- d. Clarifying the relationship between the NRM and criminal justice process**
- The relationship between the NRM process and criminal justice process needs to be clarified. A common set of guidance ought to be developed to ensure that all participants in the criminal justice system – the CPS, law enforcement, judiciary, defence and prosecution lawyers – understand the NRM decision-making process and the weight it should be given in criminal proceedings.

#### **4. Other cross-cutting issues**

##### **a. Training and awareness**

- The recommendations made in Caroline Haughey's 2016 Review of the Modern Slavery Act relating to training and the need for specialist advocates in modern slavery cases should now be implemented.

- Government should work closely with relevant organisations (including the CPS, College of Policing, Criminal Bar Association, professional bodies representing solicitors and the Judicial College) to ensure there is mandatory training on recognising modern slavery for all participants in the criminal justice system. This is a priority for frontline officers and defence lawyers who may be among the first participants in the criminal justice system a victim encounters.
- Government should work closely with relevant organisations (including the CPS, College of Policing, Criminal Bar Association, professional bodies representing solicitors and the Judicial College) to review the available training and guidance to ensure it includes clear and consistent information on the statutory defence. This should highlight the Court of Appeal ruling and where the burden of proof lies. Progress should be regularly monitored by a cross-government forum, such as the Prime Minister's Task Force.
- Finally, professional bodies need to reflect in their guidance to members that where there is evidence that someone might be a victim of trafficking, it is likely to be in their client's best interests to disclose this immediately, and the Crown must be given adequate time to conduct their enquiry.

#### **b. Data and monitoring**

- The accurate collection of data on the use of the statutory defence is vital. As a priority, we recommend that the police, the CPS and HM Courts and Tribunals Service record data on how the statutory defence is being used by adults and children. The overall use of the defence needs to be captured; as well as 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.
- The Crown Prosecution Service and HM Courts and Tribunals Service should collect data on compensation awards made to victims of modern slavery – whether through Reparation Orders or Compensation Orders. This data should be reviewed regularly in conjunction with the Home Office, to monitor progress in making compensation awards to victims. The findings should be reported annually in the UK annual report on modern slavery.
- The Ministry of Justice, Crown Prosecution Service and HM Courts and Tribunals Service should collect data on the type of exploitation

involved in modern slavery prosecutions, and the age of the alleged victim(s).

## **7. Annexes**

### **Annex A: Terms of reference for the Independent Review of the Modern Slavery Act**

#### **1. Background**

The introduction of the Modern Slavery Act 2015, the first legislation of its kind in the world, has helped to transform the UK's response to modern slavery. More victims are being identified and supported; more offenders are being prosecuted; and thousands of companies have published statements setting out the steps they have taken to tackle modern slavery in their supply chains.

The UK is determined to lead global efforts to tackle this barbaric crime and as the methods used by criminals to exploit vulnerable people evolve, and our understanding of this crime evolves, it is important to consider our legislative approach.

#### **2. Aim of the review**

The aim of the review is to report on the operation and effectiveness of, and potential improvements to, provisions in the Modern Slavery Act 2015, which provides the legal framework for tackling modern slavery.

#### **3. Structure of the review**

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.

The review will be independent; the findings and recommendations of the review will represent the views of the reviewers. The reviewers will be supported by a secretariat which will be seconded from the Home Office, and sponsored by the Director for Tackling Slavery and Exploitation.

The review will aim to report to the Home Secretary before the end of March 2019. On completion, the review is to be compiled into a report, including recommendations, to be presented to the Home Secretary for approval.

Following approval, the Home Secretary will lay the report in Parliament.

#### **4. Scope of the review**

This review aims to understand how the 2015 act is operating in practice, how effective it is, and whether the legal framework for tackling modern slavery is fit for purpose now and in the future. In doing so, the review will need to take into account any significant political, economic, social and technological changes since the 2015 act was passed.

The following provisions of the act must be considered in the review:

- section 3 on the meaning of exploitation
- sections 8-10 on reparation orders
- sections 40 to 44 on the Independent Anti-Slavery Commissioner
- section 45 on the statutory defence
- section 48 on Independent Child Trafficking Advocates
- section 54 on transparency in supply chains

In particular, the review should consider the following questions which have been brought to the attention of the government by the sector and others as issues requiring consideration:

- in relation to section 3, how to ensure the act is ‘future-proof’ given our evolving understanding of the nature of modern slavery offences, for example the recent and emerging issues of county lines and orphanage trafficking
- in relation to sections 8 to 10, how to ensure access to legal remedies and compensation for victims and would a specific civil wrong improve access to compensation for victims
- in relation to sections 40 to 44, how to ensure the independence of the Anti-Slavery Commissioner
- in relation to section 45, how to ensure an appropriate balance between the need to protect victims from criminal prosecution and preventing criminals from abusing this protection to avoid justice
- in relation to section 48, how to ensure the right support for child victims given the changing profile of child victims
- in relation to section 54, how to ensure compliance and drive up the quality of statements produced by eligible companies

The review should take into account the following principles:

- recommendations should only relate to the legal framework provided by the act and its implementation
- recommendations must be sustainable and take into account the financial and practical impact of implementation

- the review may consider other matters in relation to modern slavery subject to the agreement of the Home Secretary
- purdah guidelines should be adhered to where appropriate

## **Annex B: Sections 1 – 3 of the Modern Slavery Act 2015**

### **1 Slavery, servitude and forced or compulsory labour**

(1) A person commits an offence if—

(a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or

(b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.

(3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances.

(4) For example, regard may be had—

(a) to any of the person's personal circumstances (such as the person being a child, the person's family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons;

(b) to any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6).

(5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.

## **2 Human trafficking**

(1) A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.

(2) It is irrelevant whether V consents to the travel (whether V is an adult or a child).

(3) A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.

(4) A person arranges or facilitates V’s travel with a view to V being exploited only if—

(a) the person intends to exploit V (in any part of the world) during or after the travel, or

(b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.

(5) “Travel” means—

(a) arriving in, or entering, any country,

(b) departing from any country,

(c) travelling within any country.

(6) A person who is a UK national commits an offence under this section regardless of—

(a) where the arranging or facilitating takes place, or

(b) where the travel takes place.

(7) A person who is not a UK national commits an offence under this section if—

(a) any part of the arranging or facilitating takes place in the United Kingdom, or

(b) the travel consists of arrival in or entry into, departure from, or travel within, the United Kingdom.

### **3 Meaning of exploitation**

(1) For the purposes of section 2 a person is exploited only if one or more of the following subsections apply in relation to the person.

#### *Slavery, servitude and forced or compulsory labour*

(2) The person is the victim of behaviour—

- (a) which involves the commission of an offence under section 1, or
- (b) which would involve the commission of an offence under that section if it took place in England and Wales.

#### *Sexual exploitation*

(3) Something is done to or in respect of the person—

- (a) which involves the commission of an offence under—
  - (i) section 1(1)(a) of the Protection of Children Act 1978 (indecent photographs of children), or
  - (ii) Part 1 of the Sexual Offences Act 2003 (sexual offences), as it has effect in England and Wales, or
- (b) which would involve the commission of such an offence if it were done in England and Wales.

#### *Removal of organs etc*

(4) The person is encouraged, required or expected to do anything—

- (a) which involves the commission, by him or her or another person, of an offence under section 32 or 33 of the Human Tissue Act 2004 (prohibition of commercial dealings in organs and restrictions on use of live donors) as it has effect in England and Wales, or
- (b) which would involve the commission of such an offence, by him or her or another person, if it were done in England and Wales.

#### *Securing services etc by force, threats or deception*

(5) The person is subjected to force, threats or deception designed to induce him or her—

- (a) to provide services of any kind,
- (b) to provide another person with benefits of any kind, or
- (c) to enable another person to acquire benefits of any kind.

#### *Securing services etc from children and vulnerable persons*

(6) Another person uses or attempts to use the person for a purpose within paragraph (a), (b) or (c) of subsection (5), having chosen him or her for that purpose on the grounds that—

(a) he or she is a child, is mentally or physically ill or disabled, or has a family relationship with a particular person, and

(b) an adult, or a person without the illness, disability, or family relationship, would be likely to refuse to be used for that purpose.

## **Annex C: Sections 8 – 10 of the Modern Slavery Act 2015**

### **8 Power to make slavery and trafficking reparation orders**

(1) The court may make a slavery and trafficking reparation order against a person if—

(a) the person has been convicted of an offence under section 1, 2 or 4, and

(b) a confiscation order is made against the person in respect of the offence.

(2) The court may also make a slavery and trafficking reparation order against a person if—

(a) by virtue of section 28 of the Proceeds of Crime Act 2002 (defendants who abscond during proceedings) a confiscation order has been made against a person in respect of an offence under section 1, 2 or 4, and

(b) the person is later convicted of the offence.

(3) The court may make a slavery and trafficking reparation order against the person in addition to dealing with the person in any other way (subject to section 10(1)).

(4) In a case within subsection (1) the court may make a slavery and trafficking reparation order against the person even if the person has been sentenced for the offence before the confiscation order is made.

(5) In determining whether to make a slavery and trafficking reparation order against the person the court must have regard to the person's means.

(6) If the court considers that—

(a) it would be appropriate both to impose a fine and to make a slavery and trafficking reparation order, but

(b) the person has insufficient means to pay both an appropriate fine and appropriate compensation under such an order,

the court must give preference to compensation (although it may impose a fine as well).

(7) In any case in which the court has power to make a slavery and trafficking reparation order it must—

- (a) consider whether to make such an order (whether or not an application for such an order is made), and
- (b) if it does not make an order, give reasons.

(8) In this section—

- (a) “the court” means—
  - (i) the Crown Court, or
  - (ii) any magistrates’ court that has power to make a confiscation order by virtue of an order under section 97 of the Serious Organised Crime and Police Act 2005 (confiscation orders by magistrates’ courts);
- (b) “confiscation order” means a confiscation order under section 6 of the Proceeds of Crime Act 2002;
- (c) a confiscation order is made in respect of an offence if the offence is the offence (or one of the offences) concerned for the purposes of Part 2 of that Act.

## **9 Effect of slavery and trafficking reparation orders**

(1) A slavery and trafficking reparation order is an order requiring the person against whom it is made to pay compensation to the victim of a relevant offence for any harm resulting from that offence.

(2) “Relevant offence” means—

- (a) the offence under section 1, 2 or 4 of which the person is convicted;
- (b) any other offence under section 1, 2 or 4 which is taken into consideration in determining the person’s sentence.

(3) The amount of the compensation is to be such amount as the court considers appropriate having regard to any evidence and to any representations made by or on behalf of the person or the prosecutor, but subject to subsection (4).

(4) The amount of the compensation payable under the slavery and trafficking reparation order (or if more than one order is made in the same proceedings, the total amount of the compensation payable under those orders) must not exceed the amount the person is required to pay under the confiscation order.

(5) In determining the amount to be paid by the person under a slavery and trafficking reparation order the court must have regard to the person’s means.

(6) In subsection (4) “the confiscation order” means the confiscation order within section 8(1)(b) or (2)(a) (as the case may be).

## **10 Slavery and trafficking reparation orders: supplementary provision**

(1) A slavery and trafficking reparation order and a compensation order under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 may not both be made in respect of the same offence.

(2) Where the court makes a slavery and trafficking reparation order as mentioned in section 8(4), for the purposes of the following provisions the person's sentence is to be regarded as imposed or made on the day on which the order is made—

(a) section 18(2) of the Criminal Appeal Act 1968 (time limit for notice of appeal or application for leave to appeal);

(b) paragraph 1 of Schedule 3 to the Criminal Justice Act 1988 (time limit for notice of application for leave to refer a case under section 36 of that Act).

(3) Sections 132 to 134 of the Powers of Criminal Courts (Sentencing) Act 2000 (appeals, review etc of compensation orders) apply to slavery and trafficking reparation orders as if—

(a) references to a compensation order were references to a slavery and trafficking reparation order;

(b) references to the court of trial were references to the court (within the meaning of section 8 above);

(c) references to injury, loss or damage were references to harm;

(d) the reference in section 133(3)(c)(iii) to a slavery and trafficking reparation order under section 8 above were to a compensation order under section 130 of that Act;

(e) in section 134 the references to service compensation orders were omitted.

(4) If under section 21 or 22 of the Proceeds of Crime Act 2002 the court varies a confiscation order so as to increase the amount required to be paid under that order, it may also vary any slavery and trafficking reparation order made by virtue of the confiscation order so as to increase the amount required to be paid under the slavery and trafficking reparation order.

(5) If under section 23 or 29 of that Act the court varies a confiscation order so as to reduce the amount required to be paid under that order, it may also—

(a) vary any relevant slavery and trafficking reparation order so as to reduce the amount which remains to be paid under that order;

(b) discharge any relevant slavery and trafficking reparation order.

(6) If under section 24 of that Act the court discharges a confiscation order, it may also discharge any relevant slavery and trafficking reparation order.

(7) For the purposes of subsections (5) and (6) a slavery and trafficking reparation order is relevant if it is made by virtue of the confiscation order and some or all of the amount required to be paid under it has not been paid.

(8) If on an appeal under section 31 of the Proceeds of Crime Act 2002 the Court of Appeal—

(a) quashes a confiscation order, it must also quash any slavery and trafficking reparation order made by virtue of the confiscation order;

(b) varies a confiscation order, it may also vary any slavery and trafficking reparation order made by virtue of the confiscation order;

(c) makes a confiscation order, it may make any slavery and trafficking reparation order that could have been made under section 8 above by virtue of the confiscation order.

(9) If on an appeal under section 33 of that Act the Supreme Court—

(a) quashes a confiscation order, it must also quash any slavery and trafficking reparation order made by virtue of the confiscation order;

(b) varies a confiscation order, it may also vary any slavery and trafficking reparation order made by virtue of the confiscation order.

(10) For the purposes of this section—

(a) a slavery and trafficking reparation order made under section 8(1) is made by virtue of the confiscation order within section 8(1)(b);

(b) a slavery and trafficking reparation order made under section 8(2) is made by virtue of the confiscation order within section 8(2)(a).

## **Annex D: Section 45 of the Modern Slavery Act 2015**

### **45 Defence for slavery or trafficking victims who commit an offence**

- (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.
- (2) A person may be compelled to do something by another person or by the person's circumstances.
- (3) Compulsion is attributable to slavery or to relevant exploitation only if—
  - (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
  - (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.
- (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.
- (5) For the purposes of this section—

“relevant characteristics” means age, sex and any physical or mental illness or disability;

“relevant exploitation” is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.
- (6) In this section references to an act include an omission.
- (7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.
- (8) The Secretary of State may by regulations amend Schedule 4.

## **Annex E: Schedule 4 of the Modern Slavery Act 2015**

### **Section 45 Offences to which defence does not apply**

#### Common law offences

- 1 False imprisonment.
- 2 Kidnapping.
- 3 Manslaughter.
- 4 Murder.
- 5 Perverting the course of justice.
- 6 Piracy.

#### *Offences against the Person Act 1861 (c.100)*

- 7 An offence under any of the following provisions of the Offences Against the Person Act 1861—
  - section 4 (soliciting murder)
  - section 16 (threats to kill)
  - section 18 (wounding with intent to cause grievous bodily harm) section 20 (malicious wounding)
  - section 21 (attempting to choke, suffocate or strangle in order to commit or assist in committing an indictable offence)
  - section 22 (using drugs etc to commit or assist in the committing of an indictable offence)
  - section 23 (maliciously administering poison etc so as to endanger life or inflict grievous bodily harm)
  - section 27 (abandoning children)
  - section 28 (causing bodily injury by explosives)
  - section 29 (using explosives with intent to do grievous bodily harm)
  - section 30 (placing explosives with intent to do bodily injury)
  - section 31 (setting spring guns etc with intent to do grievous bodily harm)
  - section 32 (endangering safety of railway passengers)
  - section 35 (injuring persons by furious driving)
  - section 37 (assaulting officer preserving wreck) section 38 (assault with intent to resist arrest).

#### *Explosive Substances Act 1883 (c.3)*

- 8 An offence under any of the following provisions of the Explosive Substances Act 1883—
  - section 2 (causing explosion likely to endanger life or property)
  - section 3 (attempt to cause explosion, or making or keeping explosive with intent to endanger life or property)

section 4 (making or possession of explosives under suspicious circumstances).

*Infant Life (Preservation) Act 1929 (c.34)*

9 An offence under section 1 of the Infant Life (Preservation) Act 1929 (child destruction).

*Children and Young Persons Act 1933 (c.12)*

10 An offence under section 1 of the Children and Young Persons Act 1933 (cruelty to children).

*Public Order Act 1936 (1Edw.8& 1Geo.6c.6)*

11 An offence under section 2 of the Public Order Act 1936 (control etc of quasimilitary organisation).

*Infanticide Act 1938 (c.36)*

12 An offence under section 1 of the Infanticide Act 1938 (infanticide).

*Firearms Act 1968 (c.27)*

13 An offence under any of the following provisions of the Firearms Act 1968—  
section 5 (possession of prohibited firearms)  
section 16 (possession of firearm with intent to endanger life)  
section 16A (possession of firearm with intent to cause fear of violence)  
section 17(1) (use of firearm to resist arrest) section 17(2) (possession of firearm at time of committing or being arrested for specified offence)  
section 18 (carrying firearm with criminal intent).

*Theft Act 1968 (c.60)*

14 An offence under any of the following provisions of the Theft Act 1968—  
section 8 (robbery or assault with intent to rob)  
section 9 (burglary), where the offence is committed with intent to inflict grievous bodily harm on a person, or to do unlawful damage to a building or anything in it  
section 10 (aggravated burglary)  
section 12A (aggravated vehicle-taking), where the offence involves an accident which causes the death of any person  
section 21 (blackmail).

*Criminal Damage Act 1971 (c.48)*

15 The following offences under the Criminal Damage Act 1971—  
an offence of arson under section 1

an offence under section 1(2) (destroying or damaging property) other than an offence of arson.

*Immigration Act 1971 (c.77)*

16 An offence under section 25 of the Immigration Act 1971 (assisting unlawful immigration to member state).

*Customs and Excise Management Act 1979 (c.2)*

17 An offence under section 170 of the Customs and Excise Management Act 1979 (penalty for fraudulent evasion of duty etc) in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (indecent or obscene articles).

*Taking of Hostages Act 1982 (c.28)*

18 An offence under section 1 of the Taking of Hostages Act 1982 (hostage taking).

*Aviation Security Act 1982 (c.36)*

19 An offence under any of the following provisions of the Aviation Security Act 1982—  
section 1 (hijacking)  
section 2 (destroying, damaging or endangering safety of aircraft)  
section 3 (other acts endangering or likely to endanger safety of aircraft)  
section 4 (offences in relation to certain dangerous articles).

*Mental Health Act 1983 (c.20)*

20 An offence under section 127 of the Mental Health Act 1983 (ill-treatment of patients).

*Child Abduction Act 1984 (c.37)*

21 An offence under any of the following provisions of the Child Abduction Act 1984—  
section 1 (abduction of child by parent etc)  
section 2 (abduction of child by other persons).

*Public Order Act 1986 (c.64)*

22 An offence under any of the following provisions of the Public Order Act 1986—  
section 1 (riot)  
section 2 (violent disorder).

*Criminal Justice Act 1988 (c.33)*

23 An offence under section 134 of the Criminal Justice Act 1988 (torture).

*Road Traffic Act 1988 (c.52)*

- 24 An offence under any of the following provisions of the Road Traffic Act 1988—  
section 1 (causing death by dangerous driving)  
section 3A (causing death by careless driving when under the influence of drink or drugs).

*Aviation and Maritime Security Act 1990 (c.31)*

- 25 An offence under any of the following provisions of the Aviation and Maritime Security Act 1990—  
section 1 (endangering safety at aerodromes)  
section 9 (hijacking of ships)  
section 10 (seizing or exercising control of fixed platforms)  
section 11 (destroying fixed platforms or endangering their safety)  
section 12 (other acts endangering or likely to endanger safe navigation)  
section 13 (offences involving threats).

*Channel Tunnel (Security) Order 1994 (S.I. 1994/570)*

- 26 An offence under Part 2 of the Channel Tunnel (Security) Order 1994 (SI 1994/570) (offences relating to Channel Tunnel trains and the tunnel system).

*Protection from Harassment Act 1997 (c.40)*

- 27 An offence under any of the following provisions of the Protection from Harassment Act 1997—  
section 4 (putting people in fear of violence)  
section 4A (stalking involving fear of violence or serious alarm or distress).

*Crime and Disorder Act 1998 (c.37)*

- 28 An offence under any of the following provisions of the Crime and Disorder Act 1998 —  
section 29 (racially or religiously aggravated assaults) section 31(1)(a) or (b) (racially or religiously aggravated offences under section 4 or 4A of the Public Order Act 1986).

*Terrorism Act 2000 (c.11)*

- 29 An offence under any of the following provisions of the Terrorism Act 2000—  
section 54 (weapons training)  
section 56 (directing terrorist organisation)  
section 57 (possession of article for terrorist purposes)  
section 59 (inciting terrorism overseas).

*International Criminal Court Act 2001 (c.17)*

- 30 An offence under any of the following provisions of the International Criminal Court Act 2001—  
section 51 (genocide, crimes against humanity and war crimes)  
section 52 (ancillary conduct).

*Anti-terrorism, Crime and Security Act 2001 (c.24)*

- 31 An offence under any of the following provisions of the Anti-terrorism, Crime and Security Act 2001—  
section 47 (use of nuclear weapons)  
section 50 (assisting or inducing certain weapons-related acts overseas)  
section 113 (use of noxious substance or thing to cause harm or intimidate).

*Female Genital Mutilation Act 2003 (c.31)*

- 32 An offence under any of the following provisions of the Female Genital Mutilation Act 2003—  
section 1 (female genital mutilation)  
section 2 (assisting a girl to mutilate her own genitalia)  
section 3 (assisting a non-UK person to mutilate overseas a girl's genitalia).

*Sexual Offences Act 2003 (c.42)*

- 33 An offence under any of the following provisions of the Sexual Offences Act 2003—  
section 1 (rape)  
section 2 (assault by penetration)  
section 3 (sexual assault)  
section 4 (causing person to engage in sexual activity without consent)  
section 5 (rape of child under 13)  
section 6 (assault of child under 13 by penetration)  
section 7 (sexual assault of child under 13)  
section 8 (causing or inciting child under 13 to engage in sexual activity)  
section 9 (sexual activity with a child)  
section 10 (causing or inciting a child to engage in sexual activity)  
section 13 (child sex offences committed by children or young persons)  
section 14 (arranging or facilitating commission of child sex offence)  
section 15 (meeting a child following sexual grooming)

- section 16 (abuse of position of trust: sexual activity with a child)
- section 17 (abuse of position of trust: causing or inciting a child to engage in sexual activity)
- section 18 (abuse of position of trust: sexual activity in presence of child)
- section 19 (abuse of position of trust: causing a child to watch a sexual act)
- section 25 (sexual activity with a child family member)
- section 26 (inciting a child family member to engage in sexual activity)
- section 30 (sexual activity with a person with a mental disorder impeding choice)
- section 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity)
- section 32 (engaging in sexual activity in the presence of a person with a mental disorder impeding choice)
- section 33 (causing a person with a mental disorder impeding choice to watch a sexual act)
- section 34 (inducement, threat or deception to procure sexual activity with a person with a mental disorder)
- section 35 (causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception)
- section 36 (engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder)
- section 37 (causing a person with a mental disorder to watch a sexual act by inducement, threat or deception)
- section 38 (care workers: sexual activity with a person with a mental disorder)
- section 39 (care workers: causing or inciting sexual activity)
- section 40 (care workers: sexual activity in the presence of a person with a mental disorder)
- section 41 (care workers: causing a person with a mental disorder to watch a sexual act)
- section 47 (paying for sexual services of a child)
- section 48 (causing or inciting child prostitution or pornography)
- section 49 (controlling a child prostitute or a child involved in pornography)
- section 50 (arranging or facilitating child prostitution or pornography)
- section 61 (administering a substance with intent)

section 62 (committing offence with intent to commit sexual offence)  
section 63 (trespass with intent to commit sexual offence)  
section 64 (sex with an adult relative: penetration)  
section 65 (sex with an adult relative: consenting to penetration)  
section 66 (exposure)  
section 67 (voyeurism)  
section 70 (sexual penetration of a corpse).

*Domestic Violence, Crime and Victims Act 2004 (c.28)*

34 An offence under section 5 of the Domestic Violence, Crime and Victims Act 2004 (causing or allowing a child or vulnerable adult to die or suffer serious physical harm).

*Terrorism Act 2006 (c.11)*

35 An offence under any of the following provisions of the Terrorism Act 2006—  
section 5 (preparation of terrorist acts) section 6 (training for terrorism)  
section 9 (making or possession of radioactive device or material)  
section 10 (use of radioactive device or material for terrorist purposes)  
section 11 (terrorist threats relating to radioactive devices etc).

*Modern Slavery Act 2015 (c. 30)*

36 An offence under any of the following provisions of the Modern Slavery Act 2015—  
section 1 (slavery, servitude and forced or compulsory labour)  
section 2 (human trafficking).

*Ancillary offences*

37 (1) An offence of attempting or conspiring to commit an offence listed in this Schedule. (  
2) An offence committed by aiding, abetting, counselling or procuring an offence listed in this Schedule.  
(3) An offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting) where the offence (or one of the offences) which the person in question intends or believes would be committed is an offence listed in this Schedule.

**Annex F: Full list of Contributors**

<b>Contributors</b>	<b>Interest Group</b>
Amnesty International UK	Civil Society
Anti-Trafficking and Labour Exploitation Unit (ATLEU)	Civil Society
Anti-Trafficking Monitoring Group (ATMG)	Civil Society
Barnardo's	Civil Society
Better Care Network	Civil Society
Christian Action Research and Education (CARE)	Civil Society
Chartered Institute of Building	Civil Society
Equality Now	Civil Society
Every Child Protected Against Trafficking (ECPAT) UK	Civil Society
Focus on Labour Exploitation (FLEX)	Civil Society
Home For Good	Civil Society
Hope and Homes for Children	Civil Society
Human Trafficking Foundation	Civil Society
Dr Patricia Hynes, University of Bedfordshire	Civil Society
Justice and Care	Civil Society
Love146	Civil Society
Lumos Foundation	Civil Society
Migrant Help UK	Civil Society
Nordic Model Now	Civil Society
Save the Children	Civil Society
St Mary's University	Civil Society

Dr Patrick Burland	Civil Society
Nogah Ofer, University College London	Civil Society
The Children's Society	Civil Society
Unicef UK	Civil Society
Unseen	Civil Society
NHS (Camden)	Civil Society
Senator Linda Reynolds (Australia)	Commonwealth and International
Griffith Law School (Australia)	Commonwealth and International
Lady Justice of Appeal Dame Anne Judith Rafferty	Criminal Justice System
HHJ Martin Edmunds	Criminal Justice System
HHJ Sarah Mallett	Criminal Justice System
HHJ Timothy Spencer QC	Criminal Justice System
Retired Judge - HHJ Michael Topolski	Criminal Justice System
Crown Prosecution Service, including the Director of Public Prosecutions and individual Prosecutors	Criminal Justice System
National Policing Lead for Modern Slavery – Chief Constable Shaun Sawyer	Criminal Justice System
The Modern Slavery Police Transformation Unit	Criminal Justice System
The Metropolitan Police Modern Slavery & Kidnap Unit	Criminal Justice System

National Crime Agency	Criminal Justice System
The Magistrates Association	Criminal Justice System
Police officers from regional forces, including Gwent, Yorkshire and Humber, West Yorkshire, Lincolnshire, East Midlands, West Midlands, Staffordshire and Lancashire	Criminal Justice System
Police Service of Northern Ireland (PSNI) via Department of Justice, Northern Ireland	Criminal Justice System
Ben Douglas-Jones QC, Michelle Brewer and Philippa Southwell (Co-Editors and Authors of Human Trafficking and Modern Slavery: Law and Practice)	Criminal Justice System
Eran Cutliffe - Prosecutor, Crown Prosecution Service	Criminal Justice System
Ogheneruona Iguyovwe - Prosecutor, Crown Prosecution Service	Criminal Justice System
Hope for Justice	Criminal Justice System
Office of the Police Crime Commissioner for Lancashire	Criminal Justice System
Office of the Police Crime Commissioner for Gwent & Gwent Police	Criminal Justice System
Kevin Hyland, Independent Anti-Slavery Commissioner (2014 - 2018)	Cross-cutting
Arise Foundation	Faith Groups
Clewer Initiative	Faith Groups
Jesuit Refugee Service UK	Faith Groups
Medaille Trust	Faith Groups
Santa Marta Group	Faith Groups

STN Trust	Faith Groups
The Passage	Faith Groups
University of Derby	Faith Groups
South Yorkshire Police	Faith Groups
Women@thewell	Faith Groups
UK Feminista	Faith Groups
Hestia Housing	Faith Groups
St Giles Trust	Faith Groups
Rahab Adoratrices	Faith Groups
The Salvation Army	Faith Groups
Gangmasters and Labour Abuse Authority	Government/public authority
Northern Ireland Executive	Government/public authority
Scottish Government	Government/public authority
Welsh Government	Government/public authority
Croydon Council	Government/public authority
Legal Aid Agency	Government/public authority
Upper Tribunal Judge Nadine Finch	Judiciary
Baroness Hamwee	Parliamentarians
Ann Coffey MP	Parliamentarians
Lord McColl of Dulwich	Parliamentarians