

VICTIM, NOT CRIMINAL

**TRAFFICKED
CHILDREN AND THE
NON-PUNISHMENT
PRINCIPLE IN
THE UK**

**FOR EVERY
CHILD IN
DANGER**

unicef 
UNITED KINGDOM

SUMMARY

“Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”¹

Article 26, Council of Europe Convention on Action Against Trafficking in Human Beings

Trafficked children who have been identified by the authorities usually come into contact with the criminal justice system as victims. However, some will come into contact with the system as perpetrators. The trafficking of children for criminality is an issue of growing concern in the UK; however, children who have been trafficked for other forms of exploitation may also find themselves in conflict with the law through, for example, immigration offences, minor civil or criminal offences, or serious criminal activity.

International obligations and standards require governments to ensure that trafficked children are not prosecuted, detained or punished for any crimes they have committed as a direct consequence of their trafficking.² In 2015, legislation was enacted in England, Wales, Northern Ireland and Scotland in an effort to better tackle human trafficking and other forms of modern slavery. Each of these three Acts to some extent and in different forms (through statutory defences and presumptions against prosecution) enshrine the international principle of non-punishment, and attempt to protect victims from secondary victimisation.³

This briefing paper assesses the early impact of the new ‘non-punishment’ provisions in respect of children, and considers whether the measures that have been put in place are sufficient to protect trafficked children from further harm. During the course of our research, we found a very mixed picture across the UK for children, with extreme variation in awareness of the new provisions and the way in which they can be used to ensure children who may have been trafficked are not criminalised. It was clear that the new provisions have begun to make a difference for children where there is a proactive approach to identifying children who may have been trafficked by police and prosecutors. However, we found serious shortcomings in the implementation of the non-punishment principle in the UK, including few safeguards against arrest or prosecution at the earliest stages of the criminal justice process;

very low levels of awareness among prosecutors, police, defence solicitors and frontline practitioners of the non-punishment protections for children that are in place; and little monitoring of the use of the presumption against prosecution or the statutory defence across the UK. Among other things, Unicef UK recommends that:

- The reasonable person test relating to the statutory defence in Section 45 of the Modern Slavery Act should no longer apply to children
- Mechanisms are put in place by the prosecuting agencies and government to properly monitor the implementation of the non-punishment principle across the UK
- Further training and awareness-raising is made available for police, prosecutors, judges, legal representatives and relevant practitioners on the protections from prosecution available for trafficked children.

METHODOLOGY

The research that informs this briefing was conducted through a mixed methods approach. An assessment of publicly available data and literature in relation to non-punishment was carried out, including national and international law. Semi-structured face-to-face and telephone interviews were conducted with experts and key stakeholders involved in the design and implementation of the non-punishment provisions: prosecutors, legal representatives,

police and officials from relevant government departments and enforcement agencies. A qualitative analysis was conducted of all guidance and training materials provided by stakeholders on non-punishment. A Freedom of Information request was submitted to 39 police forces in England to find out about their practice, procedures and training (35 responses were received), and a detailed interview was conducted with the Metropolitan Police and Police Scotland.

THE SCALE OF THE PROBLEM

Prosecution, the imposition of penalties and/or detention deny trafficked children many of the rights to which they are entitled, including access to justice and redress. And, importantly, where children fear or risk being arrested or detained they may refrain from seeking help.

The latest NCA Strategic Assessment shows that the most prevalent exploitation types for children believed to have been trafficked were sexual exploitation (217 children, 32 per cent) and criminal exploitation (142 children, 19 per cent).⁴ Of the 142 potential victims reported for criminal exploitation, 71 (50 per cent) were exploited specifically for benefits claims, and 29 (21 per cent) were trafficked

for cannabis cultivation. Twenty-five of these (86 per cent) were Vietnamese. Often, these children are at greater risk of being caught up in the criminal justice system as offenders due to the nature of their exploitation. However, there is also evidence of children trafficked for other forms of exploitation coming into conflict with the law for offences committed as a consequence of their exploitation. Yet very little data is collected or collated on the operation of the non-punishment principle for trafficked children. Furthermore, the data in the annual National Referral Mechanism (NRM) statistics is not fully disaggregated – for example, labour exploitation also includes criminal exploitation.

NRM STATISTICS 2016 – EXPLOITATION TYPES FOR CHILDREN

In 2016, the National Referral Mechanism received 3,805 referrals of potential victims of human trafficking, a 17 per cent increase from 2015. Children made up 34 per cent of these referrals (1,278 cases).

Type of exploitation	Number of children
Domestic servitude	103
Labour (including criminal activities)	468
Sexual exploitation	362
Unknown	345

The three most common countries of origin for minors in 2016 were the UK, Albania and Vietnam.

WHAT IS THE NON-PUNISHMENT PRINCIPLE?

The principle of the non-punishment of trafficking victims has evolved over the last 15 years. Its scope and application have been affirmed in international law and guidelines,⁵ including by the Office of the UN High Commissioner for Human Rights,⁶ the European Union, the Council of Europe, the International Labour Organization and the Association of Southeast Asian Nations. The trend towards recognising a non-punishment obligation in national law was strengthened in 2011 by the adoption of the EU Directive on preventing and combating trafficking in human beings and protecting its victims.⁷ The Directive provides, at Article 8, that:

“Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that the competent authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence ...”

Inherent in the non-punishment principle is the qualification that not all criminal activities are exempt and that there has to be a causal link, i.e. that the unlawful activities must be a ‘direct consequence’ of having been trafficked. Importantly, it is an accepted principle that this provision should apply regardless of the ability or willingness of victims to co-operate with the authorities.⁸

The operation of the non-punishment principle in the UK has recently been the subject of international scrutiny. In 2016, GRETA, the

Group of Experts on Action against Trafficking in Human Beings (responsible for monitoring State implementation of the Council of Europe Trafficking Convention), expressed concern about several cases in the UK “... where child victims had been convicted for drug-related offences in cannabis growing cases and incarcerated”. GRETA recommended that the UK Government:

- Ensure that the non-punishment provision is capable of being applied to all offences that victims were compelled to commit
- Strengthen efforts to ensure compliance, including by promoting the existing guidance, and developing guidance where there is none, among the police, legal professionals, prosecutors and judges
- Remove the requirement to apply the ‘reasonable person’ test to children within Section 45 of the Modern Slavery Act 2015.⁹

In the same year, the Committee on the Rights of the Child, in reflecting on the UK’s obligations to trafficked children under the United Nations Convention on the Rights of the Child, expressed its concern that children across the UK can still be prosecuted for crimes that they commit in the context of trafficking. It recommended that the UK Government establish “... a clear obligation of non-prosecution, and ensure that they are treated as victims rather than criminals by the law enforcement and judicial authorities.”¹⁰

THE RECITAL TO THE 2011 EU DIRECTIVE CLARIFIES THE SCOPE AND AIM OF THE NON-PUNISHMENT PROVISION:

“Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.”

THE NON-PUNISHMENT PRINCIPLE IN LAW

In 2015, new legislation was passed in England and Wales (the Modern Slavery Act), Northern Ireland (the Human Trafficking and Exploitation [Criminal Justice and Support for Victims] Act) and Scotland (the Human Trafficking and Exploitation Act) to address human trafficking and modern slavery.

During the passage of each Act, the issue of children being charged, detained, prosecuted and punished for offences that are committed as a direct result of their exploitation received a lot of attention. It was generally recognised by all concerned that prosecuting a trafficked child for such crimes violates the child's most basic rights; however, the exact form and extent of protection that trafficked children should be entitled to against such prosecution proved controversial. The UK Government, for example, asserted that trafficked children should have effective protection against inappropriate criminalisation while "avoiding giving [them] broad immunity from the criminal law".¹¹

Each law makes provision for the non-prosecution of trafficked persons who may have committed a criminal offence as a result of their exploitation, but there are substantial differences in the way each jurisdiction has approached this (see Annex 1).¹²

In England and Wales, Section 45 of the Modern Slavery Act introduces a statutory defence for victims of modern slavery. In relation to children, this provides that a child is not guilty of an offence if the child does that act as a direct consequence of having been a victim of slavery or relevant exploitation, and a reasonable person in the same situation as the child would act in the same way. Schedule 4 of the Act sets out a substantial list of offences to which the defence will not apply.

Serious concerns have been expressed regarding the formulation of the statutory defence.¹³ GRETA noted that section 45 of the Modern Slavery Act 2015 "... gives a rather narrow interpretation of the non-punishment principle,"¹⁴ and an independent review of the Modern Slavery Act, published in July 2016, questioned

whether the statutory defence is consistent with Article 8 of the EU Trafficking Directive.¹⁵

The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act in Northern Ireland also introduced a statutory defence in Section 22, but with no reasonableness test for children. This defence is limited in that it applies only to offences which attract a maximum sentence of less than five years, as well as a small number of additional specified offences which are particularly linked to trafficking and exploitation.

In Scotland, there is no statutory defence in place.¹⁶ Instead, Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015 places a duty on the Lord Advocate to issue and publish Instructions about the prosecution of a person who is, or appears to be, the victim of an offence of human trafficking. The Act stipulates that the Instructions must include factors to be taken into account or steps to be taken by the prosecutor when deciding whether to prosecute a child who does an act which constitutes an offence, and the act appears to be done as a consequence of the child being a victim of trafficking.

THE NON-PUNISHMENT PRINCIPLE IN POLICY

Following the passage of the three Acts, all three prosecuting agencies across the UK – the Crown Prosecution Service (CPS – England and Wales), the Crown Office and Procurator Fiscal Service (COPFS – Scotland) and the Public Prosecution Service for Northern Ireland (PPSNI) – have produced revised guidance on non-prosecution (Lord Advocate’s Instructions in Scotland).¹⁷

In England and Wales, the CPS 2016 guidance *Human Trafficking, Smuggling and Slavery* contains a new chapter covering Section 45 of the Modern Slavery Act.¹⁸ This states that, in cases where the suspect is arrested for a minor criminal offence and there is evidence to show that they may be a victim of trafficking, the police must refer them to the National Referral Mechanism (NRM) to confirm their trafficking status if they are a child. If, after investigation, there is clear evidence that a defence might apply, the custody officer may decide not to charge. In all other cases, the CPS will make the decision. In cases referred to the CPS for a charging decision and for which a defence under Section 45 could apply, a prosecutor will require proper information to inform a decision on charge and make an assessment on the availability of the defence. The guidance states that no charges should be brought if there is a conclusive grounds decision under the NRM that a suspect is a victim of trafficking or slavery; there is evidence that proves on a balance of probabilities that the other conditions in Section 45 are met, relevant to whether the suspect is an adult or child; and the offence is not an excluded offence under Schedule 4 of the Act. If the offence is excluded, the CPS would still have discretion not to prosecute.

The police follow the College of Policing’s Authorised Professional Practice (APP) on modern slavery in relation to non-prosecution. However, the APP document is limited in the information it provides. It only contains a very short paragraph on the statutory defence, registering the existence of Section 45 of the Modern Slavery Act but providing little guidance for the police on what to do if the defence is raised, or if they suspect a perpetrator may be a victim of trafficking.¹⁹

As mentioned above, there is no statutory defence in Scotland.²⁰ The Lord Advocate’s Instructions for prosecutors about the prosecution of suspected or confirmed victims of trafficking commenced on 31 May 2016. The Instructions state that “... if there is sufficient evidence that a child aged 17 or under has committed an offence and there is credible and reliable information to support the fact that the child: (a) is a victim of human trafficking or exploitation and (b) the offending took place in the course of or as a consequence of being the victim of human trafficking or exploitation, then there is a strong presumption against prosecution of that child for that offence.”

In Northern Ireland, the Public Prosecution Service has revised its Policy on Prosecuting Cases of Human Trafficking in light of the new legislation. However, the amended version of the guidance is not publicly available.

NEW LEGAL PROVISIONS IN PRACTICE

Unicef UK's research focused primarily on the situation in England, given that in 2015, as in previous years, the overwhelming majority of referrals for trafficking were for individuals first encountered in England, accounting for 90 per cent (2,934) of all referrals.²¹

Information obtained through interviews with defence lawyers and the police in England indicates some serious shortcomings in implementation of the non-punishment principle. Worryingly, in the majority of the cases where the defence lawyers we interviewed had raised the statutory defence, neither the custody sergeant nor CPS lawyers were aware of this new provision. In addition, evidence also shows that there are some defence lawyers who remain unaware of the statutory defence. GRETA highlighted this issue in its recent review of the UK:

*"It appears, for instance, that duty solicitors often advise children involved in cannabis cultivation to plead guilty as a way of getting less time in detention. Children are remanded in custody pending trial and by the time the trial has taken place and they are convicted, they have already served their time in detention."*²²

The situation appears particularly problematic at the magistrate court level due to workload and time pressures. We were informed of cases when the statutory defence was raised and the CPS alerted that a potential victim of trafficking was involved, but where the CPS did not review the case due to the absence of a positive conclusive grounds decision. There have also been a number of cases where the CPS has failed to make proactive enquires and left it to defence solicitors to request information from relevant agencies. This runs contrary to the new CPS guidance which is clear that prosecutors should be proactive in requesting information and determining if the accused is a victim of human trafficking. "If there is no positive conclusive grounds decision but other available evidence shows that on the balance of probabilities the suspect is a victim ... then this will satisfy the evidential stage of victim status." It seems that not all prosecutors are aware of the updated CPS guidance.

This reliance on conclusive grounds decisions before reviewing cases in light of non-punishment obligations can lead to prolonged uncertainty – delays in the NRM process mean that it often

takes more than the 45-day reflection and recovery period to deliver a final decision. Indeed, one defence lawyer reported a case that took well over a year to receive a final decision.

Unicef UK's research showed that the investigative stage is the most critical with regard to the appropriate use of the Section 45 statutory defence. It is at this stage when the police, CPS and defence lawyer should be working together to identify and safeguard children who may have been trafficked as quickly as possible. Guidance from both the police and the CPS emphasise close and early consultation between the two agencies in that regard. Freedom of Information responses show that it is standard practice for the police to seek advice in the first instance from the CPS when the statutory defence has been raised. Our interviews confirm that much has been done already to disseminate good practice, especially via training, but that many challenges still remain in achieving effective collaboration that protects children.

Once a child has been identified as a potential victim of trafficking, it is usual for the child to be treated as a suspect for interviewing purposes. This can have negative implications, most importantly for the child but also for the criminal justice process. As one expert told us:

*"Once the potential victim is interviewed as a suspect, in my experience it is very difficult – almost impossible – to get them to collaborate as a witness. We will continue to have low prosecutions of human trafficking because we are not dealing with children correctly from the onset and treating them as victims; we are criminalising them rather than saying 'we'll now take you to an ABE suite and we'll interview you as a witness'."*²³

In Scotland, there appeared to be much more scope for flexibility in the application of the Lord Advocate's Instructions in relation to the non-prosecution of trafficking victims. Important aspects of the policy and subsequent practice were that there was no reasonable person test to satisfy; that there was no need for a NRM decision before engaging the non-prosecution principle because prosecutors were proactively establishing whether there was a case of child trafficking; and the application of the Instructions to all stages of the criminal justice process, including post-conviction.

DATA ON INDIVIDUAL CASES

The statutory defence in the Modern Slavery Act entered into force in July 2015 and has not yet been tested in a court of law. It has been used at the investigation stage.

At present we do not know in how many cases the statutory defence has been raised by children (or adults) and what the subsequent outcome has been. This information is not routinely quantified and therefore is not held in an easily retrievable format. Records relating to the statutory defence are also not held centrally. The CPS has not been able to provide any

consistent information on the use of the statutory defence or the application of the broader non-punishment principle. This information is not recorded on the case management system before a case is charged. Those cases that might be discontinued on the basis of Section 45 can only be identified by individually reviewing every discontinued case to establish the reason for discontinuance.

In Scotland, the Lord Advocate's Instructions have been in effect since 31 May 2016 and there is a mechanism in place to monitor cases

SUMMARY OF FREEDOM OF INFORMATION RESPONSES

We contacted 39 police forces with a Freedom of Information request in August 2016. Of those contacted, 35 responded and eight of these declined to provide information. We received 27 substantive replies. Sixteen police forces confirmed that they had dedicated procedures in place to respond to cases where children (or their representatives) raised the statutory defence, but 11 did not; the majority of forces had organised training for officers on the Modern Slavery Act, including on the statutory defence. However, no police force was able to provide us with data on the number of children who had raised the statutory defence at the investigation stage, or whether cases has been discontinued or taken to trial.

Question	Reply
In how many cases have children (or their legal representatives/appropriate adult) raised the statutory defence at the police station/investigation stage?	No information held
Do you have a procedure in place if the statutory defence is raised?	Yes: 16
How many of these cases have been discontinued?	Not known
How many of these have been referred to the CPS for trial?	Not known
How many children who may have been trafficked to commit criminal offences have been referred to the National Referral Mechanism?	5 (1 reply) Information not disclosed by others
Have you organised any training/awareness-raising on the Modern Slavery Act 2015, including on Section 45?	Yes: 23
Do you have a dedicated unit or officer dealing with child trafficking cases?	Yes: 11

in which the Lord Advocate's Instructions have been a consideration. This is because the Instructions require that all cases of this nature be reported to the National Lead Prosecutor for Human Trafficking and Exploitation for a final decision to be made. The Instructions have been considered in a number of cases to date, all involving adults. There have been no identified cases of trafficked children subject to prosecution since the Instructions came into effect.

In Northern Ireland, the statutory defence has been raised and considered in two cases, both involving an adult arrested in a cannabis farm. The Public Prosecution Service for Northern Ireland

(PPSNI) followed its procedure, stayed action and waited for the NRM outcome. Both NRM decisions were negative but PPSNI discontinued one case based on public interest grounds.

In 2008, the Court of Appeal held that it is the duty of both prosecution and defence lawyers to "make proper enquires" in criminal prosecutions involving individuals who may be victims of trafficking.²⁴ Unicef UK's research suggests that, while there has evidently been an improvement in practice, a proactive approach to determining whether a child may have indeed been trafficked still does not happen as a matter of routine.

AVAILABILITY AND QUALITY OF TRAINING

Unicef UK found that the availability and quality of training for police and prosecutors in relation to trafficked children and the non-punishment provisions varied widely, with differing practice across the UK. Almost all police forces organise training and have in place a procedure to deal with cases involving trafficking. However, most of them use the e-learning module developed by the College of Policing. This is not yet comprehensive, and is only an hour long. One interviewee described it as "inadequate". Several forces (including the Metropolitan Police and Greater Manchester Police) have developed their own more comprehensive training packages.

The revised CPS guidance is held centrally on the CPS intranet but there is no direct, proactive training for all CPS lawyers on the new guidance. Instead, it is left to prosecutors' own initiative to keep themselves updated. Out of 13 CPS regional offices, only four had received direct training on the new guidance.

There appeared to be significant training and awareness-raising activity taking place in Northern Ireland. The Law Society, the prison authorities and the police (human trafficking lead) all organise training on human trafficking for their members and staff, including on the statutory defence. Within the PPSNI there is now a human trafficking unit, established

in 2015, which organises training for prosecutors and supports them with advice.

Interviewees in Scotland reported that COPFS and Police Scotland had undertaken a lot of internal training and awareness-raising about the Lord Advocate's Instructions and did adhere to the principle of non-prosecution of victims of trafficking. It is not uncommon for Police Scotland to refer a person into the NRM as a potential victim of trafficking as there is improved awareness within the police force about indicators of trafficking and non-prosecution.

BEST PRACTICE: THE MET POLICE TRAINING PROGRAMME

In addition to the basic College of Policing e-module, the dedicated human trafficking unit of the Metropolitan Police set up an additional, more detailed face-to-face training course for all frontline staff in London. So far three London boroughs have been covered, with 13 sessions in each. The statutory defence is included in the training curriculum. There is also a 'train the trainers' programme under way. All frontline staff are included from every police station in a borough. The training pack is shared with other police forces.

CONCLUSIONS AND RECOMMENDATIONS

During the passage of the Modern Slavery Act, the then Modern Slavery Minister Karen Bradley MP stated in relation to non-punishment that “the defence will help ... but we cannot simply rely on legislation. The CPS has dealt with a number of cases in which the fact that the defendant was a victim was not known until they started serving their sentence. At no point did the defendant disclose that they were a victim of trafficking. That came out much later. We need to raise the awareness of the police, prosecutors and judges that the defendant may be a victim and that the defence of the public interest test not to prosecute is available, and should be applied.”²⁵

A statutory defence is not a full embodiment of the non-punishment principle as developed in international human rights law. It is much narrower in scope than the principle anticipated in international treaties and directives, and has severe limitations for children (specifically, in relation to exempted offences and, in England and Wales, the requirement of the reasonable person test).²⁶ The international principle states that children should not be detained, charged or punished for offences committed as a direct consequence of being trafficked – in other words, no punitive action of any kind should be imposed on the child. By its very nature, a statutory defence comes at a later stage of the process, when a negative chain of actions is already triggered and, as such, **can only function as a safety net in fairly limited circumstances.**

Prosecution agencies have pointed out that the public interest test can be a more flexible tool than the statutory defence (as there is no reasonable person test required), and that this test does not depend on a positive conclusive grounds decision from the NRM. Offences excluded from the statutory defence in England, Wales and Northern Ireland can also still be dealt with under the public interest test.

Yet, despite its limitations, the statutory defence constitutes a step forward and, together with the public interest test applied by prosecutors, can go a long way towards ensuring trafficked children are not punished for offences that are a direct result of their exploitation. Early qualitative evidence from Northern Ireland and Scotland indicates that the existence of a

monitoring system, the flexible application of the non-punishment principle and a proactive approach by prosecutors to identify potential victims of trafficking have been essential in tackling inappropriate prosecutions. Indeed, one prosecuting agency reported that the decision not to prosecute as it is not in the public interest has been applied more frequently since the Modern Slavery Act came into force in 2015.

However, the emerging evidence from this research shows that while there has certainly been some progress in implementing the non-punishment provisions that now exist across the UK, **there is still much to be done before a child protection response takes precedence over a criminal justice response in cases where trafficked children find themselves in conflict with the law.** One of the most significant barriers to achieving such a child-focused response lies in the lack of information being collected about the use and impact of the statutory defence and presumption against prosecution.²⁷

Unicef UK recommends that:

- The reasonable person test relating to the statutory defence in Section 45 of the Modern Slavery Act should no longer apply to children.²⁸
- Mechanisms are put in place by the prosecuting agencies and government to properly monitor the implementation of the non-punishment principle across the UK, including by centrally recording data from individual cases such as the use of prosecutorial discretion in relevant cases, the raising of a statutory defence, and outcomes for a child where the statutory defence has been raised.²⁹
- Further training and awareness-raising on the protections from prosecution available for trafficked children is made available for police, prosecutors, judges, defence solicitors/lawyers and relevant practitioners.

In England and Wales:

- The Home Office should ensure NRM decisions are made within 45 days to enable faster case resolution for trafficked children in conflict with the law.
- The CPS should organise direct training for all prosecutors, and place a dedicated human trafficking lead in every branch.
- The CPS should ensure cases where a presumption against prosecution has been applied or a statutory defence has been raised are recorded on their case monitoring system. Police custody records should also note where children may have been trafficked and/or where the statutory defence has been raised.
- If a child (or his or her representative) raises the statutory defence during a police interview (with the child as suspect), the interview should cease and a later ABE (Achieving Best Evidence) interview scheduled, if the child wishes to co-operate.
- The police custody sergeant must ensure the welfare of the child is the primary concern in all decision-making.
- Section 45 should be explicitly included in training for the police.
- Section 45 should be included in training organised by the Judicial College for judges, tribunal members and magistrates. Further awareness-raising work must be undertaken among defence solicitors.

In Scotland:

- The Law Society should organise regular training for solicitors, and publish guidance on human trafficking with links to the Lord Advocate's Instructions.
- The Lord Advocate's Instructions and the non-punishment principle should be incorporated into judicial training and training for defence solicitors.
- Scottish Government and COPFS should act to raise awareness among professionals about the presumption against prosecution for trafficked children.

In Northern Ireland:

- PPSNI should make its revised guidance on non-prosecution and the statutory defence publicly available.
- The PPSNI should ensure cases where a presumption against prosecution has been applied or a statutory defence has been raised are recorded on their case monitoring system.
- The Judicial Studies Board should organise training for judges on the statutory defence and non-punishment principle.

ANNEX 1

England and Wales

The Modern Slavery Act 2015 introduces a defence for slavery or trafficking victims who commit an offence. With regard to children, Section 45 states the following:

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.*

Northern Ireland

Section 22 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 contains a defence for slavery and trafficking victims in relation to certain offences. In relation to children the provisions read as follows:

Subject to subsection (9), a person is not guilty of an offence if—

- (a) the person is a child at the time the act which constitutes the offence is done; and*
- (b) that act was done as a direct consequence of the person being, or having been, a victim of an offence under section 1 or a relevant exploitation."*

Subsection (9) sets out that the defence under section 22 (whether for adults or children) only applies to offences which attract a maximum sentence of less than five years, as well as to a small number of additional specified offences which are particularly linked with trafficking and exploitation.

Scotland

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

(1) The Lord Advocate must issue and publish instructions about the prosecution of a person who is, or appears to be, the victim of an offence—

(a) of human trafficking,

...

(2) The Instructions must in particular include factors to be taken into account or steps to be taken by the prosecutor when deciding whether to prosecute a person in the circumstances mentioned in subsections (3) and (4).

...

(4) The circumstances are where—

(a) a child does an act which constitutes an offence, and

(b) the act appears to be done as a consequence of the child being a victim of an offence mentioned in subsection (1).

REFERENCES

1. Council of Europe Convention on Action against Trafficking in Human Beings
www.gov.uk/government/uploads/system/uploads/attachment_data/file/236093/8414.pdf
2. Piotrowicz, Ryszard Wilson, and Sorrentino, Liliana, 'Human Trafficking and the Emergence of the Non-Punishment Principle' in *Human Rights Law Review*, 2016, 16, 669-699
3. See Annex 1
4. NCA Strategic Assessment, The Nature and Scale of Human Trafficking in 2014
www.nationalcrimeagency.gov.uk/publications/656-nca-strategic-assessment-the-nature-and-scale-of-human-trafficking-in-2014/file
5. See Council of Europe Convention on Action Against Trafficking in Human Beings (into force in 2008); EU Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims; ILO Protocol to Convention 29 (The Forced Labour Convention 1930); ASEAN Convention Against Trafficking in Persons, Especially Women and Children
www.asean.org/storage/2015/12/ACTIP.pdf; OSCE (2013), The Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking
6. UN Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/ Add.1 (2002)
7. EU Directive 2011/36
8. *Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, November 2011
9. GRETA (2016) 21
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806abdc>
10. UN Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/5, 12 July 2016
11. See Parliamentary debate and evidence given by Karen Bradley, Parliamentary Under-Secretary of State for the Home Department
www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/140911/pm/140911s01.htm
12. For a more detailed analysis see: Anti-Trafficking Monitoring Group, "Class Acts?", October 2016
13. See, for instance, Bird, Steven and Southwell, Philippa, "Does the new 'Slavery' Defence Offer Victims of Trafficking any Greater Protection?", *Archbold Review*, Issue 9, November 19, 2015
14. *Supra* note 5, paragraph 287
15. Haughey, Caroline, "The Modern Slavery Act Review", July 2016
16. See www.parliament.scot/parliamentarybusiness/report.aspx?r=10123&mode=html#iob_93459
17. England: www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a20
Scotland: www.crownoffice.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf
Northern Ireland: not publicly available
18. www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/
19. College of Policing, *APP on Modern Slavery*, last accessed 21 October 2016
www.app.college.police.uk/modern-slavery-index/
20. For a critique of this decision, see The Law Society of Scotland paper at
www.lawscot.org.uk/media/598124/stage-3-briefing-note-human-trafficking-and-exploitation-scotland-bill-october-2015.pdf
21. HM Government, *Report of the Inter-Departmental Ministerial Group on Modern Slavery*, October 2016
22. *Supra* note 5
23. Interview with a defence lawyer
24. R v O (2008) EWCA Crim 283
25. Modern Slavery Bill, Public Committee Bill, debate, last accessed at:
www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/140911/pm/140911s01.htm
26. *Supra* 6
27. HHJ Edmunds QC, "What to do if the Defendant Might be a Victim of Human Trafficking – A Cautionary Tale", *Archbold Review*, Issue 3 April 17, 2015
28. Also recommended by GRETA, *supra* note 6
29. *Supra* note 20,
www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/140911/pm/140911s01.htm

Right now, children are in danger. We'll do whatever it takes, until every child is safe.

Unicef ensures more of the world's children are vaccinated, educated and protected than any other organisation. We have done more to influence laws and policies to help protect children than anyone else. We get things done. And we're not going to stop until the world is a safe place for all our children.

Unicef UK is a member of the Anti-Trafficking Monitoring Group.

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